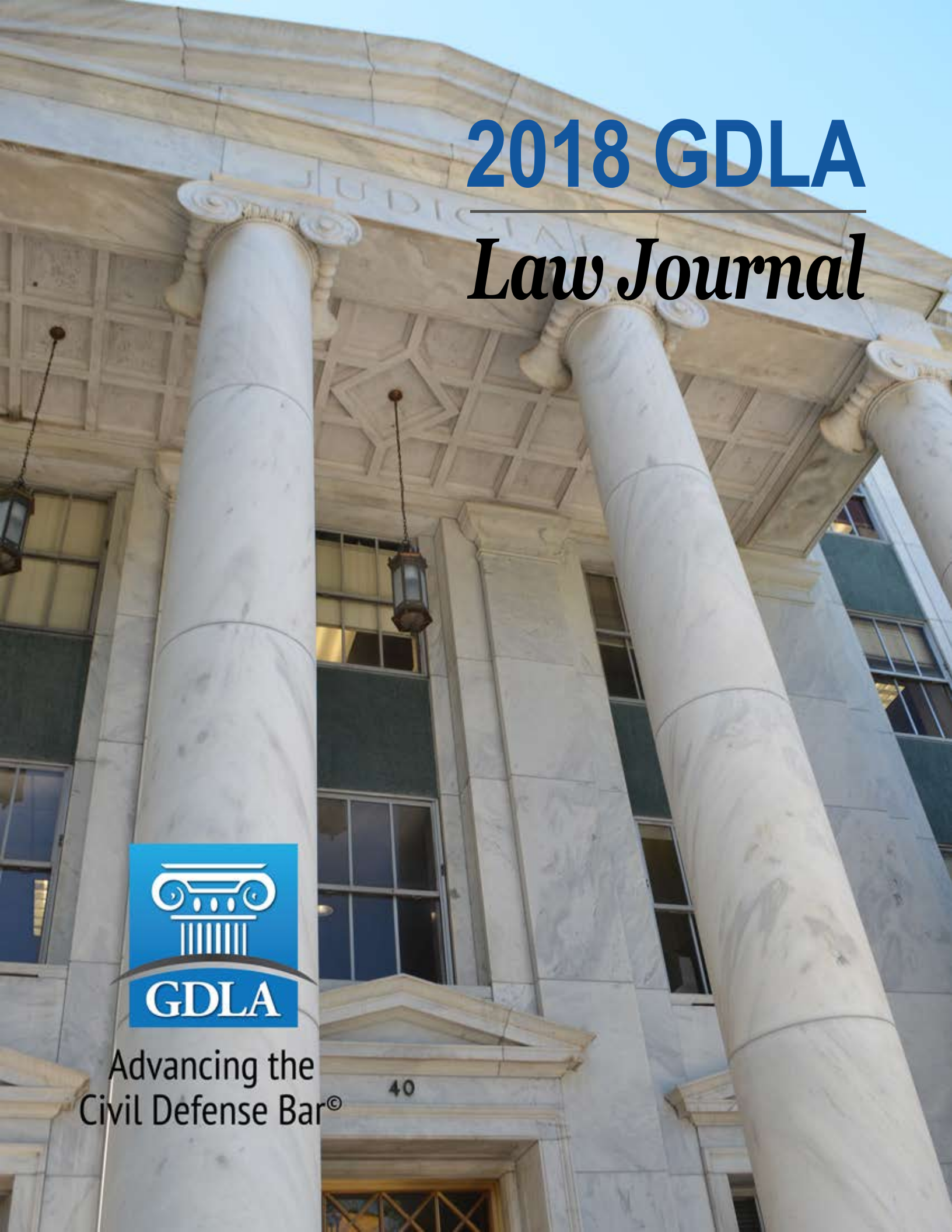

2018 GDLA

Law Journal

GDLA

Advancing the
Civil Defense Bar©

Georgia Defense Lawyers Association
Advancing the Civil Defense Bar©

2018 Law Journal

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PRESIDENT'S MESSAGE

Sarah B. "Sally" Akins is a partner at Ellis, Painter, Ratterree & Adams LLP in Savannah. She has handled cases involving premises liability, automobile and truck accidents, professional negligence (medical, legal and pharmaceutical) litigation involving counties and municipalities including civil rights cases and zoning cases, insurance coverage litigation and products liability. Ms. Akins is also a registered mediator and arbitrator.

It has been an honor, a pleasure and a privilege to serve as the Association's President during 2017-2018. It was especially meaningful for me, as we lost my law partner and mentor, Paul Painter, who served as GDLA President from 1986-1987, in May 2017. In addition, the year was incredibly memorable as 2017 marked the 50th Anniversary of the Association's founding.

GDLA celebrated its Golden Anniversary in style, holding the 50th Annual Meeting at The Breakers in West Palm Beach, Florida. We had a record turnout of attendees and all enjoyed the legendary oceanfront resort. There we presented the inaugural GDLA Distinguished Service Award to Past President Salty Forbes, Forbes Foster & Pool, Savannah, who truly was the most fitting first recipient. President Peter Muller, Goodman McGuffey, Savannah, also presented President's Awards to our hard-working Amicus Committee leaders: Chair Marty Levinson, Hawkins Parnell Thackston & Young, Atlanta, and Vice-Chair Garret Meader, Drew Eckl & Farnham, Brunswick. Fulton State Court Judge Susan Edlein was on-hand to swear-in the new officers. In commemoration of our 50th anniversary, Salty Forbes penned an historical overview chronicling important events since our founding. Together with that history, each living past president contributed personal memories from their years of involvement. The compilation was bound into a magazine that attendees received in a gift bag with a frame and rocks glass, each bearing our 50th anniversary logo.

The Trial and Mediation Academy was scheduled for January at Callaway Gardens, but unfortunately, a snow storm got in the way and it will now take place in August. The Academy is chaired by Carrie Christie, Rutherford & Christie, Atlanta and co-chaired by Brad Marsh, Swift Currie McGhee & Hiers, Atlanta. The talented and very dedicated faculty is Jerry Buchanan, The Buchanan Law Firm, Columbus; Bill Casey, Swift Currie McGhee & Hiers, Atlanta; Anne Gower, Gower Wooten & Daneille, Atlanta; Philippa Ellis, Owen, Gleaton, Egan, Jones & Sweeney, Atlanta; Billy Harrison, Mozley Finlayson & Loggins, Atlanta; Matt Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; Jeff Ward, Drew Eckl & Farnham, Brunswick; and Dick Willis, Bowman and Brooke, Columbia, SC. These lawyers devote untold hours of time and their rich experience to the Academy. We should all send our young associates to the Academy early in their careers.

The 14th Annual Judicial Reception was held in early February 2018 at State Bar Headquarters. This event is hugely popular with the bench and the membership and draws a larger crowd each year. It is a great time for GDLA members and judges to enjoy some relaxed fellowship outside of the courtroom.

Immediately before the Judicial Reception this year, we held the first of what we expect to be an ongoing educational series, Expert Deposition Skills Workshop. The inaugural session focused on deposing an orthopedic surgeon, and was organized and moderated by Wayne Melnick, Freeman Mathis & Gary, Atlanta. The program attracted the largest turnout for any seminar to date. Panelists were: Will Ellis, Hawkins Parnell Thackston & Young, Atlanta; Zach Matthews, McMickle Kurey & Branch, Alpharetta; Dave Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; and Matt Stone, Stone Kalfus, Atlanta. Each offered exceedingly helpful and insightful practice pointers to the rapt audience that included a range of experience levels.

On the day following the Judicial Reception, we held the Third Annual Past Presidents Luncheon at the Capital City Club downtown. This event, during which the Association pays tribute to and thanks all the Past Presidents for their contributions and dedication to the Association, was the brainchild of Past President Matt Moffett when he was at the helm.

GDLA initiated a Women's Caucus and it had its first event in March in conjunction with GTLA's Women's Caucus. The fun evening combined wine tasting, a spirited tapas cooking competition, and networking for trial lawyers on both sides of the "v." We plan to continue holding these women's events.

Our Amicus Committee has been very busy, having filed 11 briefs since June 2017. At press time, there were two additional requests for amicus briefs under consideration. Our thanks and appreciation go to Chair Marty Levinson and Vice-Chair Garret Meader on their continued efforts in heading this vitally important committee.

GDLA continues to build on its relationship with GTLA, an effort that was started by Matt Moffett. In addition to the joint Women's Caucus event previously mentioned, we have worked together to establish the GDLA-GTLA Professional Civility Award. In May, we will gather together for a reception at Capital City downtown, during which a member of both GDLA and GTLA will receive an award, the recipient of which will have been selected by the other organization. The Supreme Court and Court of Appeals will be invited to celebrate with us that evening.

GDLA's connection to the national defense bar, DRI, was strengthened this year when Past President Ted Freeman, Freeman Mathis & Gary, Atlanta, was installed as DRI Southeast Regional Director. Also, Douglas Burrell, Drew Eckl & Farnham, Atlanta, was elected DRI Secretary. Both he and Ted serve on the DRI Board of Directors, providing GDLA with a valuable connection to the national defense bar.

GDLA continues to enhance its visibility at the state level, as well. In June 2017, we collected our sixth Best Newsletter Award from the State Bar of Georgia; the first five had been consecutively presented.

GDLA continues to grow and now has more than 900 members from across the state. Sadly, we lost an important member in February 2018 with the passing of one of our founders; Gould Hagler, Fulcher Hagler, Augusta, served as President from 1975-1976. Gould would be proud to know GDLA has truly become an impressive collection of lawyers, rivaling any other

group in this state not only in professional and intellectual acumen, but also the ability to have fun.

I have thoroughly enjoyed serving as a director and an officer of GDLA. I extend my thanks to the Board of Directors, Executive Committee and Officers for their hard work, guidance and counsel this year.

A very large thank you goes out to Dart Meadows, Balch & Bingham, Atlanta, for his efforts in putting together an outstanding *Law Journal*. Having served as *Law Journal* editor myself, I can tell you it is an incredibly time-consuming process. I know you will find this edition is filled with timely, interesting and useful articles on a wide variety of subjects.

Last, but most definitely not least, is thanks to Jennifer Davis, our incredibly talented and hard-working Executive Director. Without Jennifer, the Association would not be thriving as it is today.

For the Defense,

Sarah B. "Sally" Akins
GDLA President
Ellis, Painter, Ratterree & Adams LLP, Savannah

EDITOR'S ACKNOWLEDGEMENT

James D. "Dart" Meadows is the founding partner of the Atlanta office of Balch & Bingham LLP. He has over 35 years of experience successfully resolving a wide variety of complex disputes. Dart has defended litigation claims and suits in 40 different states. His focus is on business litigation, product liability, healthcare, and real estate litigation.

I am pleased to present the 2018 GDLA *Law Journal*. Included are articles from most of the GDLA's thirteen substantive law sections, covering cutting-edge topics and cases. This year's authors practice with large and small firms from throughout the state. I hope you will take a few minutes to peruse the table of contents, skim through the entire Journal and read those articles of interest to you.

I am extremely appreciative of the many hours of hard work by the authors of this publication including L. Taylor Bittick, Susanna Bramlett, Amanda Proctor, Jennifer B. Flannery, Christopher B. Freeman, Richard E. Glaze, Jr., Robert B. Gilbreath, Michael J. Goldman, Chuck Hoey, W. Melvin Haas, Jennifer Kennedy-Coggins, Madison Kitchens, Tracie Macke, William J. Martin, Alycen A. Moss, Alyssa K. Peters, Dawn Pettigrew, Rachel E. Reed, Katherine Dale Sheriff and Patricia-Anne Upson. Please thank the authors for their important contribution when you see them, or drop them a note or email.

I also want to recognize and thank Tyler Bishop, Jonathan DeLuca, Austin Alexander and Meghan Pieler, four fine lawyers in our firm, who dusted off their Law Review hats and spent many hours helping with this project. This is a worthwhile project I hope you will support in future editions.

For the Defense,

Dart Meadows
GDLA Vice-President
Balch & Bingham LLP

BURDETTE REVERSED: CLARIFYING THE SCOPE OF THE WILLFUL MISCONDUCT DEFENSE UNDER THE GEORGIA WORKERS' COMPENSATION ACT

By: L. Taylor Bittick

L. Taylor Bittick is an associate with Chambless, Higdon, Richardson, Katz & Griggs, LLP, in Macon. Her practice is focused on insurance defense, including governmental liability defense and workers' compensation.

I. INTRODUCTION[1]

The Georgia Worker's Compensation Act (hereinafter, "the Act"), codified at O.C.G.A. § 34-9-1 *et seq.*, is a no-fault statute; that is, if an employee is accidentally injured or killed on the job for an employer subject to the Act, the injury is generally compensable regardless of whether the injury was the employee's own fault. Nevertheless, the Act provides employers and insurers with several affirmative defenses that may bar a claimant's recovery.[2] One such defense is the "willful misconduct" defense provided by O.C.G.A. § 34-9-17(a), which bars recovery if the injury or death is caused by the claimant's own willful misconduct.

The Honorable Judge MacIntyre once declared that "[t]he meaning of the word 'willful,'… includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. Such is a general and popular signification of the term. 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.'"[3]

Perhaps today we no longer attach such strong meaning to the term "willful," but the defense of willful misconduct remains narrow and difficult for employers to invoke. Indeed, because willful misconduct is an affirmative defense,[4] the employer must prove by a preponderance of the evidence that (A) the injured claimant engaged in willful misconduct, and (B) the willful misconduct proximately caused the claimant's injuries.[5]

The defense of willful misconduct has never been narrower in application than in the years following the Georgia Court of Appeals decision in *Burdette v. Chandler Telecom, LLC*, 335 Ga. App. 190 (2015). In *Burdette*, the Court of Appeals restricted the willful misconduct defense to situations wherein the employee had committed acts of a criminal or "quasi criminal" nature, significantly limiting the application of the willful misconduct defense in Georgia workers' compensation cases.

Last year, however, in a highly anticipated decision, *Chandler Telecom, LLC v. Burdette*, 300 Ga. 626 (2017), Georgia's highest court reversed the Court of Appeals' decision in *Burdette*.

The Supreme Court's opinion in *Chandler* contained two important elements. First, the opinion clarified the definition and scope of the willful misconduct defense in the context of an employee's failure to follow his employer's rules and his supervisor's direct orders. In reversing the decision by the Court of Appeals, the Supreme Court held that willful misconduct is not limited to "criminal or quasi-criminal" *actions*. Instead, "quasi criminal" describes the requisite *mens rea* of the claimant.[6]

Second, the Georgia Supreme Court reaffirmed that findings of fact by the State Workers' Compensation Board are due great deference by courts. As such, *Chandler* reversed the Court of Appeals' findings of fact as outside of its authority to make, and remanded to the Board to make findings of fact consistent with the Supreme Court's opinion.[7]

This article provides a brief overview of the willful misconduct defense after *Chandler*'s overturning of *Burdette* and its present application to employee conduct that defies an employer's clear rules and instructions.

II. DEFINING WILLFUL MISCONDUCT UNDER O.C.G.A. § 34-9-17(A)

O.C.G.A. 34-9-17 does not explicitly define "willful misconduct" beyond an illustrative, but not exhaustive, list of four examples: intentionally self-inflicting an injury, attempting to injure another, failing or refusing to use a safety device,[8] or violating of a duty imposed by statute.[9] Specifically, the willful misconduct defense is codified as follows:

> No compensation shall be allowed for an injury or death due to the employee's willful misconduct, including intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute.[10]

Georgia courts, however, have helpfully defined willful misconduct in terms of what it is not. For example, the Georgia Court of Appeals has held that proving willful misconduct under the Act requires more than an act of negligence, or even gross negligence.[11] Further, mere horseplay—*e.g.*, popping wheelies on a bicycle while riding through a warehouse—does not constitute willful misconduct.[12] Nor does a night watchman's use of a loaded pistol as a hammer on one of his car engine parts constitute willful misconduct sufficient to bar recovery for his death under the Act.[13]

Rather, in the seminal case of *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333 (1929), the Georgia Supreme Court held that willful misconduct sufficient to bar recovery under the Act involves conduct of a "criminal or quasi-criminal nature," such that the employee acts with the knowledge that his conduct is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.[14] For example, suicide—a criminal act—generally constitutes willful misconduct because it is a "self-inflicted injury" under O.C.G.A. § 34-9-17(a), unless the employee's judgment was so impaired such that his suicide was not intentional.[15] Further, where an

employee is injured while trying to hurt someone else on purpose—*e.g.*, as an aggressor in a fight or otherwise—workers' compensation benefits are not recoverable.[16]

The far-reaching effect of the *Carroll* "quasi-criminal" standard for elevating employee behavior to the level of willful misconduct reached a pinnacle in the Court of Appeals' decision in *Burdette*. Generally, whether an employee was guilty of willful misconduct is a question of fact solely reserved for the State Board of Workers' Compensation.[17] As such the state appellate courts have tended to defer to the Board as a fact-finding body regarding whether an employee's behavior constitutes willful misconduct, either in violation of an employer's rules or a statute.[18] But the Georgia Court of Appeals in *Burdette* departed from the old custom of deference in order to narrow the scope of the willful misconduct defense. The Supreme Court, in reversing the Court of Appeals, safeguarded the tradition of deference by clarifying its "quasi criminal" standard in *Carroll* and rejecting the Court of Appeals' attempt to further restrict an already-limited defense.

III. *BURDETTE* AND *CHANDLER*: DEFINING "QUASI CRIMINAL" AND DEFERRING TO THE BOARD AS FACT-FINDER

On the morning of November 5, 2012, cell tower technician Adrian Burdette "ascended to the top of a cell phone tower to install radios and other equipment as part of a T-Mobile antenna system upgrade."[19] After Burdette completed his task, his supervisor instructed him to climb down the tower. Burdette refused and insisted on rappelling down. His supervisor repeatedly requested that Burdette climb down, and even warned him that his job might be at risk if he refused. Nevertheless, Burdette attempted to rappel – unsuccessfully. Something went wrong, and rather than making a "controlled descent," he fell down the tower and hit the icy ground below.

Although Burdette survived, he badly injured his leg and sought worker's compensation. Brian Prejean, the supervisor who had instructed Burdette not to rappel down the tower, testified that Burdette had lacked the proper equipment for a "controlled descent."[20]

Burdette's employer, Chandler Telecom, LLC, denied that the injury was compensable. An ALJ agreed and found that Burdette was barred from recovery because he engaged in "willful misconduct" within the meaning of O.C.G.A. § 34-9-17(a) by defying his supervisor's instruction to climb down the tower instead of using controlled descent.[21] The Board affirmed and adopted the ALJ's findings.[22] After Burdette appealed to Superior Court, the Board's decision was affirmed by operation of law 60 days after docketing, since no hearing had been scheduled and no ruling issued. Burdette then applied for discretionary appeal with the Georgia Court of Appeals.[23]

In *Burdette v. Chandler Telecom*, LLC, 335 Ga. App. 190 (2015) (rev'd by *Chandler Telecom, LLC v. Burdette*), the Court of Appeals held that Burdette's injury was compensable. The court explained that Burdette's "conduct was not of a 'quasi criminal nature,' involving 'the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.'"[24] The Court of Appeals then went on to explain why it believed that employer Chandler Telecom had "not met its burden of showing that Burdette's use of controlled descent was willful misconduct."[25]

The Court of Appeals made two errors. First, it misinterpreted *Carroll* to impose a "quasi criminal" *actus reus* requirement rather than a "quasi criminal" *mens rea* requirement.[26] Second, it failed to abide by the rule that the Board's findings of fact must be upheld if supported by *any*

evidence, even if the Court of Appeals strongly disagrees with the findings.[27]

Arguably, much of the Supreme Court's analysis in *Chandler* exaggerated the degree to which the Court of Appeals erred in *Burdette*. Indeed, the Court of Appeals very nearly stated the correct standard for willful misconduct articulated in *Carroll*: the misconduct must be "quasi criminal" and it must be done intentionally "either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences."[28] The *Burdette* court strayed, however, from the proper application of *Carroll* by relying on *Wilbro v. Mossman*, 207 Ga. App. 387 (1993) for the proposition that the misconduct must be "quasi-criminal in nature" rather than applying the correct standard: "of a quasi-criminal nature."[29]

In *Wilbro*, a store clerk climbed onto a lower shelf so that she could reach a higher shelf in order to restock it. The clerk had been specifically warned by her supervisor not to climb on the shelves to restock them. The Court of Appeals found that the injury was nonetheless compensatory. The court held that the clerk's conduct "[could not] constitute willful misconduct as a matter of law since the conduct was at most a violation of instructions and/or the doing of a hazardous act in which the danger was obvious, but was not conduct that was criminal or quasi-criminal in nature."[30]

One potential interpration of this language is that a mere "violation of instructions" *is never* "quasi-criminal" and therefore is *never* willful misconduct. The *Wilbro* court may very have understood the correct standard. But as the *Chandler* court clarified: "*Wilbro* offered no further reasoning to explain its conclusion; it may well have misunderstood the phrase 'criminal or quasi-criminal' to refer to

violations of penal statutes or similar acts."[31]

Neither party in *Chandler* argued on appeal that quasi-criminality was anything other than a *mens rea* requirement. Even Burdette admitted in his brief to the Supreme Court that "'quasi-criminal' as used in *Carroll* is essentially a term of art for an especially high degree of recklessness."[32] Ironically—and unfortunately for employers and insurers—Chandler Telecom, who "prevailed" before the Supreme Court, failed to achieve its goal of having *Carroll* itself overturned as unduly restrictive.

The Georgia Supreme Court thus rejected the primary argument of employer Chandler Telecom and accepted the interpretation of the claimant Burdette. Nevertheless, the court ruled in favor of the employer, because it worried that the Court of Appeals had adopted a definition of "quasi criminal" that further narrowed the correct definition provided by the claimant.

Ultimately, the Court of Appeals heavy reliance on its prior decision in *Wilbro* seems to have prompted the Supreme Court to reverse *Burdette*. Indeed, by reversing *Burdette*, *Chandler* extinguished the risk that courts would rely on *Burdette* and *Wilbro* to foreclose the "willful misconduct" defense whenever a claimant's conduct did not resemble criminal activity. The Supreme Court therefore held that the Court of Appeals had overly-limited employers' statutory defense to worker's compensation claims resulting from an employee injuries caused by an intentional violations of their employers' rules or instructions.[33]

Specifically, the Supreme Court's opinion in *Chandler* found that the *Burdette* court (like the *Wilbro* court before it) had misunderstood the definition of "willful misconduct" provided nearly a century ago in *Carroll*.[34] Rather, the requirement that

willful misconduct must be "criminal or quasi-criminal" is not about the nature of the claimant's act, but instead refers to the claimant's state of mind – i.e. their degree of culpability.[35]

To be sure, under *Chandler*, an intentional violation of employer safety rules *can* in fact constitute willful misconduct sufficient bar to compensation under the Act, where the employee committed the violation with either the knowledge it was likely to result in injury, or with wanton and reckless disregard of its probable injurious consequences – i.e., what the *Carroll* court called "quasi criminal" conduct.

Notably, the Court of Appeals also relied on the Georgia Supreme Court's opinion in *Roy v. Norman*[36] for the proposition that "mere violations of instructions, orders, rules, ordinances, and statutes, and the doing of hazardous acts where the danger is obvious, do not, without more, as a matter of law, constitute wilful misconduct."[37] The Supreme Court declined to discuss the *Burdette* court's reliance on *Roy*, but had it chosen to do so, it could easily have distinguished the case.

In *Roy,* an employee made a small fire with gasoline in a cup to ward off mosquitoes. When he stirred the cup with a stick to rekindle the flames, they flared up and burned him.[38] The employee allegedly violated statutory criminal law by putting gasoline into a container not approved by the State Fire Marshall for such use.[39] The employer argued that the injury was not compensable because the claimant had engaged in criminal willful misconduct. The ALJ found instead that "[t]hough Claimant violated the statute, he did not willfully set himself on fire. The result was involuntary, unintentional and negligent; not conscious or intentional." This finding was adopted by the State Board of Worker's Compensation.[40]

Notwithstanding the ALJ's finding of fact, it made no difference under the law that the claimant did not intend to set himself on fire. The willful misconduct defense is not limited to instances in which an employee intends harm as a result of their actions. But it is equally established that mere negligence does not constitute "willful misconduct." Furthermore, "inadvertent, unconscious, or involuntary violations" of a statute are not willful misconduct.

The *Burdette* court also failed to acknowledge that the Supreme Court's decision in *Roy* was about preserving the discretion of fact finding bodies: indeed, "whether there is wilful misconduct under O.C.G.A. § 34-9-17 due to the violation of a criminal or penal statute, is a determination for the finder of fact…"[41] Such a finding can only be overturned if unsupported by *any* evidence.[42] Because the finding was supported by at least *some* evidence in the record that the claimant was merely negligent and was unaware that he was violating a statute, the Supreme Court refused to overturn the finding of the Board and the ALJ below.[43]

Chandler is fully consistent with *Roy* – in both cases, the findings of the ALJs were upheld. But whereas, in *Roy*, the Supreme Court avoided expanding upon the legal principles at issue (instead quoting *Carroll* verbatim), in *Chandler* the Court took the opportunity to clear away confusion as to the scope of the willful misconduct defense.

Further, unlike the claimant in *Roy*, claimant Burdette was fully aware that he was acting in contravention of his supervisor's repeated orders. Thus, the Court of Appeals suggestion that Burdette's action *could not* have been "willful misconduct," because rappelling down a cell-tower is not a "quasi criminal" act, was improper.[44] The *Burdette* court also

improperly made a finding of fact reserved for the Board of Review: i.e., that "Burdette did not act with the requisite knowledge or recklessness" for willful misconduct.[45]

However, just as the Board found that the claimant in *Roy* was merely negligent, and therefore did not engage in "willful misconduct", Burdette may be found to have been merely negligent when he rappelled down the cell-tower. If so, the employer's "willful misconduct" defense will remain defeated. Indeed, it is important to recognize that *Chandler* does not stand for the proposition that the willful misconduct defense always prevents compensation when an employee fails to comply with his or her employer's orders or instructions.[46] Rather, the court's holding in *Chandler* is limited to *intentional* violations of rules or instructions where the claimant either had *knowledge* that injury was a probable consequence, or wantonly and recklessly disregarded that risk. If an employee is injured as the result of such disobedient act, they cannot obtain compensation under O.C.G.A. § 34-9-17(a).[47]

IV. THE FUTURE OF THE AFFIRMATIVE DEFENSE OF WILLFUL MISCONDUCT

Chandler's reversal of *Burdette* has clarified, for employers, insurers, and claimants alike, that an employee will be barred from compensation under the Act where he or she intentionally violates the employer's rules or instructions with "either the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences."[48] But the court's deference to the Board as a fact-finder preserves uncertainty surrounding the affirmative defense of willful misconduct; indeed, successfully asserting a "willful misconduct" defense continues to require employers to bear a difficult burden of proof.

Nevertheless, while not every injury

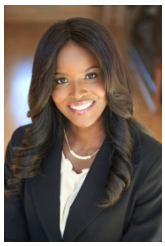
resulting from a violation of an employer's rules will not necessarily bar compensation, employers and insurers have peace of mind that injuries resulting from intentionally reckless and dangerous conduct are not compensable, regardless of whether the conduct was criminal or resembled criminal activity. Rather, what ultimately matters is whether the employee acted with "knowledge" or with "wanton and reckless disregard" of the danger posed by their conduct.

[1] Many thanks to Jacob Bradshaw (University of Virginia School of Law, class of 2019), our outstanding law clerk, for his assistance with this article.
[2] O.C.G.A. § 34-9-17.
[3] Pullman Co. v. Carter, 61 Ga. App. 543 (1939).
[4] Cornell-Young v. Minter, 168 Ga. App. 325, 327 (1983).
[5] Commc'ns, Inc. v. Cannon, 174 Ga. App. 820, 820 (1985); Borden Co. v. Dollar, 96 Ga. App. 489, 490-91 (1957).
[6] *Chandler*, 300 Ga. at 630 ("*Carroll* thus established the requisite mental state that an employee must have for his or her actions to constitute willful misconduct: an intentional and deliberate action done either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences, including as relevant here "conscious or intentional violations of definite law or rules of conduct, obedience to which is not discretionary.").
[7] *Chandler*, 300 Ga. at 630.
[8] The claimant in *Burdette*, a cell-tower technician, refused to descend from a cell-tower using the tower's ladder, but instead rappelled down the tower and injured himself in the process. This would seem to constitute a refusal or failure to use a safety device (a ladder), but the Supreme Court did not address that issue.
[9] O.C.G.A. § 34-9-17(a).
[10] *Id.*
[11] Travelers Ins. Co. v. Gaither, 148 Ga. App. 251 (1981).
[12] *See* Lumbermens Mut. Cas. Co. v. Amerine, 139 Ga. App. 702 (1976).
[13] *See* City of Atlanta v. Madaris, 130 Ga. App. 783 (1974).
[14] *Id.* at 342.
[15] *See, e.g.*, Bayer Corp. v. Lassiter, 282 Ga. App. 346 (2006) (holding that where an employee would not have committed suicide "but for" a prior compensable injury, death benefits are recoverable under the act.).
[16] Scott v. Travelers Ins. Co., 49, Ga. App. 157 (1934).
[17] Herman v. Aetna Case. & Sur. Co., 71 Ga. App. 464 (1944).
[18] *See, e.g.*, Steed v. Liberty Mut. Ins. Co., 157 Ga. App. 273 (1981); Lumbermans Mut. Casualty Co. v. Amerine, 139 Ga. App. 702 (1976); *Roy v. Norman*, 261 Ga. 303 (1991); Wilbro v. Mossman, 207 Ga. App. 387 (1993); Atlanta v. Madaris, 130 Ga. App. 783 (1974).
[19] Brief for Respondent at 4, Chandler Telecom, LLC v. Burdette, 300 Ga. 626 (2017), No. S16G0595, 2016 WL 7364964.
[20] *Id.*
[21] 300 Ga. at 626.
[22] *Id.*
[23] *Id.* at 627.
[24] *Burdette*, 335 Ga. App. at 195 (internal citations omitted).
[25] *Id.* at 196.
[26] *Chandler*, 300 Ga. at 631.
[27] *Id.* at 631.
[28] *See Burdette*, 335 Ga. App. at 195; *Chandler*, 300 Ga. at 631.
[29] *See Burdette*, 335 Ga. App. at 195 (citing *Wilbro*, 207 Ga. App. at 387-88, 390).
[30] 207 Ga. App. at 390.
[31] *Chandler*, 300 Ga. at 630.

[32] Brief for Respondent at 21, Chandler Telecom, LLC v. Burdette, 300 Ga. 626 (2017), No. S16G0595, 2016 WL 7364964.
[33] 300 Ga. at 630.
[34] *Id.*
[35] *Id.* at 631.
[36] 261 Ga. 303 (1991).
[37] *Burdette*, 335 Ga. App. at 195 (citing Roy v. Norman, 261 Ga. 303, 304 (1991)).
[38] *Roy*, 261 at 303.
[39] *Id*.
[40] *Id*. at 304.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *See Burdette*, 335 Ga. App. at 195-96.
[45] *Id.*
[46] *Chandler*, 300 Ga. at 631.
[47] *Id.* at 632.
[48] *Id.*

CHASING THE MOVING TARGET OF PROVING THE EXERCISE OF ORDINARY CARE IN GEORGIA PREMISE LIABILITY LAW

By: Dawn Pettigrew and Rachel Reed



Dawn Pettigrew is a senior associate at Mabry & McClelland, LLP, in Atlanta. Her practice focuses on the defense of general liability claims and construction litigation.

Rachel Reed is an associate at Mabry & McClelland, LLP. Her practice includes civil litigation with a concentration in defending premises liability and personal injury actions.

The American Tort Reform Foundation listed Georgia's high court on its watch list of "judicial hellholes" in its 2017 publication and assessment of venues where courts apply laws and court procedures in a purportedly unbalanced manner.[1] The U.S. Chamber Institute for Legal Reform ranked Georgia 40th out of the 50 states from best to worst in perceived legal climates in a 2017 national survey of 1,321 in-house general counsel, senior litigators, or attorneys.[2] The same 2017 survey ranked the impartiality of Georgia trial judges 40 out of the 50 states. Several Georgia cases have made national headlines, but has the Georgia judiciary truly expanded the duty of care owed by property owners in premise liability matters to a notorious level? Likely not, but even the Georgia Supreme Court has noted the pendulum-like nature of appellate rulings handed down over the years in "slip and fall" premises liability cases.[3] An examination of recent appellate decisions provides some guidance regarding the most current expectation for a property owner to satisfy its duty to keep its premises and approaches safe under Georgia law.

The Heightened Importance of a Routine Inspection Procedure:

As a general rule, a property owner's liability exists when its

knowledge of the injury-causing condition is greater than that of the plaintiff. Foregoing an analysis of a defendant property owner's liability defenses in cases involving actual knowledge, the current trend in Georgia's construction of "constructive knowledge" provides the greatest demonstration of the divergence in Georgia law from its surrounding jurisdictions regarding the duty owed by a Georgia proprietor.

Even before the landmark premise liability decision of *Robinson v. Kroger*, Georgia law recognized that a proprietor's constructive knowledge of a hazardous condition on its premises could be established by showing the presence of an employee in the area of the condition with the means to discover and remove it.[4] Constructive knowledge can also be imputed to a property owner through evidence that the alleged hazard was present for such a length of time that it would have been discovered had the proprietor exercised *reasonable* care in inspecting its premises.[5] The *Robinson* decision identified and attempted to correct the arguable extra burden placed on an injured plaintiff in a premise liability claim (i.e. the requirement that a plaintiff establish both the defendant's knowledge of the condition and the plaintiff's lack of knowledge of the same).[6] *Robinson* affirmed the evidentiary burdens of the parties and clarified the order of priority of the respective burdens of proof. In its holding, *Robinson* made it clear that the defendant property owner must first establish the absence of its knowledge of the hazardous condition before the plaintiff has the burden of producing rebuttal evidence of her inability to discover the existence of the same.[7] After *Robinson* attempted to balance the

scales in the allocation of the applicable burdens of proof, subsequent appellate decisions that interpreted *Robinson* added the weight of their assessments to the duty of care owed by the respective parties to the playing field already leveled by *Robinson*. A review of recent Georgia decisions may support an argument that it is once again time to add some counterweight—this time on behalf of the defendant property owner.

Generally, a plaintiff's equal knowledge of the injury causing conditions will bar his recovery when the proprietor's knowledge cannot be shown to be superior to that of the plaintiff. Yet, a request for summary judgment premised on the plaintiff's equal knowledge of a defect as shown through evidence that the plaintiff had previously traversed the injury causing condition has become more difficult. The tipping point for the success or failure of an equal knowledge defense is established by the weight of evidence of a patron's constructive knowledge of potential hazards that could or could not be found on the property compared to specific knowledge of the condition at issue.[8] Summary judgment may not be deemed proper if the presented facts show that the plaintiff previously traversed the fall area, such as a mat partially covering cords only to later fall on the same cords, if it cannot be shown that the plaintiff had specific knowledge of the existence of the hazardous condition of the *cords*.[9] The equal knowledge rule will not support the grant of summary judgment under such a fact pattern even where the plaintiff patron was given a warning to "be careful" when walking in the area due to an ongoing renovation.[10]

When a plaintiff's knowledge of the specific condition cannot be shown,

questions of the plaintiff's exercise of due care commensurate with the knowledge he did possess cannot be decided as a matter of law but instead become an issue to be decided by a jury.[11] The Georgia Court of Appeals recently reversed the grant of summary judgment to a grocery store proprietor holding that an issue of fact remained regarding the defendant's constructive knowledge of the condition where the plaintiff had traversed the area of her fall twice before slipping on the substance during her third crossing.[12] Despite a patron's possible equal knowledge of a condition, Georgia law now holds that in some instances, such knowledge will not shield a proprietor from liability if it cannot demonstrate the execution of a routine inspection procedure to disprove constructive knowledge.

Presently under Georgia law, an owner/occupier is on constructive notice of what a reasonable inspection would reveal.[13] In seeking summary judgment, defendant property owners are now charged with the burden of demonstrating the reasonableness of their current inspection procedures or the inability of a reasonable procedure to detect the injury causing condition. As Hamlet recognized, "ay, there's the rub."[14] While not yet rising to the level of a Shakespearean tragedy, satisfaction of this prerequisite element to summary judgment adjudication simultaneously serves as a road block to summary judgment adjudication. Fact-riddled evidentiary submissions that attempt to outline and demonstrate the sufficiency, frequency, and thoroughness of an inspection procedure may provide fodder for an argument that there are issues of material fact to be decided by a jury to support the denial of summary judgment. It has been the rule in this jurisdiction

for some time that how closely a particular proprietor monitors its premises and approaches; what a proprietor knows about its property's condition at any given time; and the extent to which customers should be held responsible for looking or not looking are all questions that, in general, must be answered by juries as a matter of fact rather than by judges as a matter of law.[15]

Despite fears of a turning tide towards adjudication of premise liability cases by juries rather than as a matter of law when an inspection procedure falls short, the hope for a dismissal through the grant of summary judgment is not lost. It is still the law in Georgia that no inference arises that a defendant's failure to discover a defect was the result of any alleged failure to inspect if no evidence exists that the defendant could have discovered the condition during a reasonable inspection.[16] As established by the *Blake v. Kroger* decision, the correct rule in the applicability of a routine inspection procedure to create an issue of fact is that no inference can arise that a proprietor's failure to discover a condition is the result of its failure to inspect in the absence of evidence that a reasonable inspection would have discovered the foreign substance.[17] For cases involving faulty equipment, a defendant may obtain summary judgment if there is an absence of evidence of a malfunction.[18]

The reasonableness of an inspection procedure may be a harder to establish for certain proprietors. Georgia courts require more confirmation of the inspection steps taken for supermarkets, as post *Robinson* appellate decisions hold that grocery stores and food service establishments create conditions which cause slip and falls to occur with some

frequency, thus imputing a duty for such premises owners to inspect with greater frequency.[19] For such proprietors, fifteen (15) minute inspection intervals may not be enough to demonstrate a reasonable routine inspection procedure if there is evidence that the proprietor had knowledge of a recurring condition that demanded more frequent inspection.[20] Further, a fine-tuned store inspection policy may pack a weak punch if a proprietor cannot demonstrate that it actually executed the inspection.[21]

A store proprietor's journey to summary judgment has a longer path as fine details such as the color of the foreign substance (clear liquid vs. colored chicken drippings) may be determinative of whether the alleged injury causing condition was discernible and discoverable through the execution of a more frequent inspection procedure.[22] Also, a proprietor's knowledge of the occurrence of the condition can be presumed by steps taken to guard against its occurrence. For example, a grocery's stores preventative measure of placing plastic bags near raw poultry packages known to leak or directives in employee manuals for employees to be cognizant of stray security sensor pins arguably heightens the likelihood of a finding of constructive knowledge.[23] When presented with such factual scenarios, a defendant proprietor must put forth more verifiable evidence of the frequency and proof of the execution of a routine inspection procedure to obtain summary judgment.

The Duty to Protect from Dangers Both Near and Far

Negligent security claims provide another source of premise liability claims for which the duty owed to an invitee may be expanding in this

jurisdiction. The *Martin v. Six Flags Over Georgia II, L.P.*[24] Georgia Supreme Court decision and its impact may be perceived by some as the *Robinson v. Kroger* of negligent security cases. The *Martin* decision that assessed a proprietor's liability for third-party criminal action, which occurred off premises, may have tipped the scales in favor of plaintiffs or evened the odds in the adjudication of negligent security lawsuits. Despite the resonating impact of *Martin*, Georgia law has previously recognized that a proprietor has a duty to exercise ordinary care to guard against injury from dangerous characters if the proprietor has reason to anticipate a criminal act, "whether directly in front of his building or not."[25] The *Martin* decision did affirmatively set forth and clarified a "common sense" standard that a property owner does not escape liability for an attack that begins on its premises simply because the attack is completed off of its property limits.[26] The attack in *Wilks v. Piggly Wiggly S., Inc.*, occurred twenty (20) to twenty-five (25) yards beyond the subject grocery store and immediately upon the customer's exit from premises. The attack in *Martin* occurred 200 or so feet (or over 66 yards) from the Six Flags property line at a bus stop that was not contiguous with, adjacent to, or touching Six Flags' property in any way.[27] In limiting the expansion of a property owner's duty to keep safe its invitees on public roads extended by the Court of Appeals' ruling, the Georgia Supreme Court clarified that the property owner's liability did not extend to nonadjacent public property.[28] However, based on the fact pattern before the Court, the *Martin* decision did not narrow the scope or clarify the extent of a proprietor's duty to protect against harm occurring

outside of its property limits to the extent that such third-party criminal acts are "foreseeable."

The arguable expansion of Georgia property owners' duty to protect invitees from third-party criminal acts and hazardous conditions makes the grass look somewhat greener across the jurisdictional fence. Case law from surrounding jurisdictions reflect a less flexible approach in the assessment of "reasonableness" and "foreseeability" that may offer guidance to Georgia proprietors striving to meet their statutory duty of ordinary care.

Tennessee

Tennessee applies the following standard to premises liability matters: a plaintiff must show that "the premises owner or [its] employees created the dangerous condition that lead to the plaintiff's injury or if a third-party created the dangerous condition, the premises owner had actual or constructive notice that the dangerous condition exists before the plaintiff was injured."[29] Similar to Georgia, a plaintiff may establish constructive notice by proving the length of time a condition existed or proving that the dangerous condition arose from a pattern of conduct.[30] Tennessee Courts have also recognized the "method of operation theory," where a plaintiff must show "that the proprietor's chosen method of operation created a hazardous condition which was foreseeably harmful to others, that the proprietor failed to use reasonable and ordinary care to protect [its] customers from the hazardous condition created by his method of operation and that the hazardous condition directly and proximately caused the plaintiff's injury." [31]

In one case, the Court of Appeals upheld the grant of summary judgment

to a defendant even though the plaintiff showed that, while attending a concert, thirty-three (33) spills occurred prior to plaintiff's fall. The evidence showed that only two (2) spills had occurred in the immediate area of plaintiff, and the Court held that the spills did not occur "with such regularity that the dangerous condition was reasonably foreseeable to defendants." [32]

Turning to third-party criminal acts, Tennessee abrogated a rather strict approach to create a balancing test, which states such as South Carolina later adopted. In a landmark case, the Supreme Court held, "a duty to take reasonable steps to protect customers arises if the business knows, or has reason to know, either from what has been or should have been observed or from past experience, that criminal acts against its customers on its premises are reasonably foreseeable, either generally or at some particular time. In determining the duty that exists, the foreseeability of harm and the gravity of harm must be balanced against the commensurate burden imposed on the business to protect against that harm."[33] In *McClung*, a customer was abducted in a parking lot and ultimately murdered. The Supreme Court held that the landowner should have taken reasonable steps to protect customers when in the course of a year and a half, the following occurred: several crimes were reported; there was a bomb threat, and there were fourteen burglaries, two reports of malicious mischief, ten robberies, thirty-six auto-thefts, ninety larcenies, and one attempted kidnapping immediately adjacent to defendants' property.[34] The Court held that given the prior criminal acts, summary judgment should have been denied, and remanded the matter to the Trial Court.[35] Only after a criminal

attack rose to this level of severity did Tennessee change its standard.

Alabama

Alabama states its law more pointedly: "a premises owner […] owes no duty to protect invitees from all conceivable dangers they might face while on the premises because the owner of the premises is not an insurer of the safety of his invitees." [36] Alabama has applied a more conservative approach to premises liability cases holding that "the entire basis of an inviter's liability rests upon his superior knowledge of the danger which causes the invitee's injuries. Therefore, if that superior knowledge is lacking as when the danger is obvious, the inviter cannot be held liable."[37] In addition to showing either length of time a hazard was present to show constructive notice or that the defendant had actual notice, a plaintiff may show that the defendant had a delinquent inspection policy. In Hale, the Court upheld summary judgment in a slip-and-fall case at a grocery store when the store demonstrated that employees inspected the store every hour, that the store had no actual knowledge, that the plaintiff did not know how long the spill had been present, and that there were no store employees nearby who could have easily discovered the spill.[38] With respect to delinquent inspection, the defendant submitted an affidavit averring that the store employees adhered to the hourly inspection procedure, and the Court looked no further.[39] Courts have granted countless number of cases upon the reasoning that the condition was open-and-obvious. In one of the seminal cases, *Dolgencorp, Inc. v. Taylor,*[40] the Court defined open-and-obvious as "the danger should have been observed not whether in fact it was consciously appreciated […]." In that

case, Dollar General had Christmas decorations displayed and there were unopened boxes of merchandise, around which plaintiff maneuvered and one of which caused the plaintiff's fall.[41] The Court reversed the trial court's denial of summary judgment and remanded it.

In third-party criminal cases, Alabama has the following standard, "It is the general rule […]that absent a special relationship or circumstances, a person has no duty to protect another from criminal acts of a third person."[42] In *New Addition Club, Inc. v. Vaughn,*[43] Mary Vaughn and her friends went to a club to celebrate. Upon arrival, patrons began fighting in the club, which spilled over into the parking lot.[44] There, Ms. Vaughn attempted to break up the altercation when she was shot and killed by one of the patrons.[45] The trial court denied summary judgment, and the jury awarded $240,000.[46] The Club appealed. The facts in evidence showed that there had been numerous previous fights at the club, one prior shooting had occurred, Ms. Vaughn's shooter had been previously banned from the club for brandishing a weapon at another patron, and the Club knew that the shooter had previously assaulted other patrons while on the premises.[47] The Court ruled in favor of the Club, holding that it owed Ms. Vaughn no duty and advising that the "particular criminal activity, not just any criminal activity must be foreseeable."[48] Further, Alabama Courts have "rejected the idea that a difference of opinion on the adequacy of lighting, the presence of security guards, or the number of security guards present at a particular location constitutes a legal basis for a denial of summary judgment or directed verdict."[49]

South Carolina

In South Carolina, "in order to recover for injuries sustained in a fall caused by a foreign substance on the storekeeper's floor, a customer must prove either that the foreign substance was placed on the floor by the storekeeper or that the storekeeper had actual or constructive notice of the foreign substance on the floor and failed to remove it."[50] Demonstrating the established nature of *Wintersteen*, few cases have developed since that time. In *Browning v. Bi-Lo, Inc.*[51], the Court held that insofar as the plaintiff could not show actual or constructive knowledge on the defendant's part, summary judgment was appropriate particularly when the plaintiff testified that she was not looking at the floor and had no idea who put the substance on the floor.[52] In 2006, the Court of Appeals affirmed the lower court's ruling on summary judgment where the plaintiff could not show that the restaurant caused a particular hazard to be present and reified the notion that the presence of hazard does not mean a landowner is liable.[53]

With respect to third-party criminal acts, South Carolina has adopted Tennessee's approach. South Carolina has a "balancing approach to determining foreseeability in the context of whether a business owner has a duty to protect its invitees from criminal acts of third parties."[54] Using this framework, "the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk."[55] In *Easterling v. Burger King*, a customer was rear-ended twice and then

assaulted by another customer in the drive-thru lane.[56] The Court held that while there had been numerous calls to the police within a short span such as to create a pattern of behavior and numerous incidents of "road rage" while in the drive-thru, there had only been one armed robbery at the premises.[57] This activity was not sufficient to place Burger King on notice that this particular type of criminal behavior was reasonably foreseeable.[58] Further, the Court held that even if the incident were "foreseeable, plaintiff failed to prove that Burger King's security measures were unreasonable."[59] The Court cited *Gopal*, where "the hiring of security personnel is no small burden."[60]

So, What Does This All Mean?

So, with the perception that Interstate 85 to Georgia is a highway to judicial hell, what steps can a proactive property owner take to meet the applicable standard of care? First, premise owners should develop and implement a system for the inspection of their premises that is feasible and easily adhered to by their employees. It is easy to cast a critical eye on an implemented inspection procedure after the occurrence of an incident. Georgia law, no matter how changeable, does not require an owner to make its property injury proof. Business operations should not be prioritized over customer safety, but neither should a business be wary of moving forward with conducting its normal course of business if it has taken steps to satisfy its legal obligation to protect against foreseeable risks of harm.

Often times a premises owner will have good policies; however, the individual employees may not be familiar with those policies. A thorough inspection and maintenance program is always a bonus, but the selected program

should be simple enough to be known from the corporate level to the troops on the ground who are the first line of defense in demonstrating the proprietor's fulfillment of its statutory duty. It is also essential that employees know the policies as well as know the importance of adhering to them. If there is documentation generated for the inspection program, a parallel document retention policy to preserve the inspection program's execution should also be in place. It should come as no surprise that it is sometimes worse to having missing paperwork than no paperwork.

The protection against third-party crime also requires steps taken to show due diligence. If all criminal acts were predictable, there would be no need for law enforcement agencies tasked with the responsibility of deterring third-party criminal acts; however, the failure to have any security measures in place will make a finding of a breach of the owed duty of care a near certainty. Notification of criminal acts should prompt an assessment of the strength of the implemented security procedures. A court will likely examine whether a property owner has taken any reasonable steps to prevent crimes from occurring on the premises. The type of establishment and the nature of its business operations will govern the type and scope of the selected security program. Demonstrable evidence supporting the vetting and ultimate selection of a maintenance program will provide more support for a proprietor to stand its ground against a hindsight attack on the reasonableness of its implemented security measures.

[1] Jonathan Ringel and Amanda Bronstad, *Judicial Hellholes' Report Jabs Georgia Courts*, FULTON COUNTY DAILY REPORT, https://www.law.com/dailyreportonline/sites/dail

yreportonline/2017/12/05/florida-ranked-no-1-in-judicial-hellholes-report/?slreturn=20180219155737.

[2] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM. 2017 LAWSUIT CLIMATE SURVEY RANKING THE STATES: A SURVEY OF THE FAIRNESS AND REASONABLENESS OF STATE LIABILITY SYSTEMS (Sept. 2017).

[3] Robinson v. Kroger Co., 268 Ga. 735, 735 (1997).

[4] Johnson v. All Am. Quality Foods, Inc., 340 Ga. App. 664, 666 (2017).

[5] *Id.*

[6] *Robinson*, 268 Ga. at 736.

[7] *Id.* at 748.

[8] Teston v. SouthCore Constr., Inc., 336 Ga. App. 733, 735 (2016), cert. denied (Oct. 17, 2016).

[9] *Id.* at 733–35.

[10] *Id.*

[11] *Id.* at 736 (reversing grant of summary judgment on equal knowledge rule although plaintiff previously traversed area of her fall because she was not looking down at floor as she walked and did not initially see wires and cords on which she later tripped).

[12] *Johnson*, 340 Ga. App. at 665.

[13] Riggs v. Highland Hills Apartments, LLC, 334 Ga. App. 247, 251 (2015).

[14] WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

[15] Am. Multi-Cinema, Inc. v. Brown, 285 Ga. 442, 445 (2009).

[16] Keisha v. Dundon, No. A17A1534, 2018 WL 494659, at *1, *3 (Ga. Ct. App. Jan. 22, 2018).

[17] Blake v. Kroger Co., 224 Ga. App. 140, 144 (1996).

[18] *Keisha*, 2018 WL 494659, at *3.

[19] Walmart Stores E. L. P. v. Benson, 343 Ga. App. 74, 78 (2017).

[20] Burnett v. Ingles Markets, Inc., 236 Ga. App. 865, 867 (1999) (store had knowledge of children throwing grapes in store and testimony of plaintiff's husband that inspection did not occur in timeframe alleged by proprietor supported denial of summary judgment).

[21] *Id.*

[22] *Benson*, 343 Ga. App. at 79.

[23] *Burnett*, 236 Ga. App. at 867; Donastorg v. Rainbow USA, Inc., 342 Ga. App. 215, 219 (2017).

[24] *See generally* Martin v. Six Flags Over Ga. II, L.P., 301 Ga. 323 (2017).

[25] Wilks v. Piggly Wiggly S., Inc., 207 Ga. App. 842, 843 (1993) (citing Elmore of Embry Hills, Inc. v. Porcher, 124 Ga. App. 418, 420 (1971)).

[26] *Martin*, 301 Ga. at 329.

[27] *Id.* at 334.

[28] *Id.* at 335.

[29] Parker v. Holiday Hosp. Franchising Inc., 446 S.W.3d 341, 352 (Tenn. 2014).

[30] Blair v. W. Town Mall, 130 S.W.3d 761, 764 (Tenn. 2004).

[31] Martin v. Washmaster Auto Ctr., U.S.A., 946 S.W. 2d 314, 320 (Tenn. 1996).

[32] Katz v. Sports Auth. of the Metro. Gov't of Nashville & Davidson Cnty. TN, No. M2016-01874-COA-R3-CV, 2017 WL 3741346, at *1, *5 (2017).

[33] McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 903–04 (Tenn. 1996).

[34] *Id.*

[35] *Id.* at 905.

[36] Hale v. Kroger Ltd. P'ship I, 28 So. 3d 772, 778 (Ala. 2009).

[37] Jones Food Co. v. Shipman, 981 So. 2d 355, 363 (Ala. 2006).

[38] *Hale*, 28 So. 3d at 783.

[39] *Id.*

[40] Dolgencorp, Inc. v. Taylor, 28 So.3d 737, 742 (Ala. 2009).

[41] *Id.* at 739.

[42] Moye v. A.G. Gaston Motels, Inc.. 499 So. 2d 1368, 1379 (Ala. 1986).

[43] New Addition Club, Inc. v. Vaughn, 903 So. 2d 68, 69 (Ala. 2004).

[44] *Id.* at 70.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 75.

[48] *Id.* at 76.

[49] *Id.*

[50] Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35 (2001).

[51] Browning v. Bi-Lo, Inc., No. 2004-UP-504, 2004 WL 6334931, at *1 (S.C. Ct. App. Oct. 8, 2004)

[52] *Id.*

[53] Carrigg v. Cusch, Inc., No. 2006-UP-067, 2006 WL 7285709, at *1 (S.C. Ct. App. Feb. 1, 2006).

[54] Bass v. Gopal, Inc., 395 S.C. 129, 142 (2011).

[55] *Id.* at 138.

[56] Easterling v. Burger King Corp., 416 S.C. 437, 442-43 (2016).
[57] *Id.* at 443.
[58] *Id.* at 450.
[59] *Id.*
[60] *Id.* at 451.

DEVELOPMENTS IN SPOLIATION LAW AND EDISCOVERY SINCE *PHILLIPS VS HARMON*

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Charles G. "Chuck" Hoey has litigated workers' compensation, general liability, coverage, subrogation and other insurance claims for nearly 30 years. Chuck is now of counsel at Drew Eckl & Farnham where he continues to defend workers’ compensation and general liability claims. He is also a frequent speaker and author on a variety of insurance defense topics.

In 2018, it is difficult to imagine a lawsuit or workers compensation claim which does not involve electronically stored or transmitted information. This information must be preserved and searched. Every trial attorney must have a working knowledge of EDiscovery, spoliation, and technology issues.

Although the issue of spoliation can arise outside the context of EDiscovery, these issues are related. Most claims materials, including photographs, recorded statements, police reports, medical records, videos, and claims notes will be stored and transmitted electronically. This article will summarize recent Georgia cases about spoliation, and then turn to recent cases, from around the country, regarding some EDiscovery topics.

RECENT GEORGIA CASES REGARDING SPOLIATION

In 2015, the Georgia Supreme Court overruled longstanding precedent that a defendant’s duty to preserve evidence arises only when a plaintiff provides actual or express notice that the plaintiff is contemplating litigation. In *Phillips v Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015)[1], the Georgia Supreme Court ruled that notice can be actual or **constructive** (emphasis supplied).[2] Defendants were given the duty to preserve evidence if

litigation was reasonably foreseeable, based upon circumstances such as the severity of an injury, history of conduct between the parties, financial exposure, whether the defendant conducted more than a routine investigation after the event, and whether the defendant was obviously at fault.[3] The *Phillips* case, and constructive notice, were discussed in the 2016 *GDLA Law Journal* in "Spoliation: Is Foresight The New Trigger To Preserve Evidence?" by Sandra Vinueza Foster.[4]

The Georgia Supreme Court issued their opinion in *Cooper Tire and Rubber Company v. Koch,* S17G0654 on March 15, 2018.[5] This opinion establishes that plaintiffs have the same obligations to preserve evidence and when that duty arises.[6] Ruling that both the trial court and Court of Appeals properly followed the guidelines set forth in *Phillips v Harmon,* the Supreme Court affirmed the finding of both courts that the plaintiff did not spoliate evidence.[7] Although plaintiffs have a duty to preserve evidence when litigation is actually contemplated, or reasonably foreseeable, the facts of *Cooper Tire* supported the trial court's decision that no spoliation occurred.[8]

The *Cooper Tire* case arose from a one vehicle rollover accident involving Mr. Gerald Koch on April 24, 2012.[9] While driving on I-16, Mr. Koch's 2000 Ford Explorer swerved out of control when some tread on his left rear tire detached.[10] The vehicle crashed into a guardrail, continued traveling and overturned several times before coming to an "uncontrolled" rest in the eastbound ditch.[11] Mr. Koch was hospitalized in the ICU at the Medical Center of Central Georgia.[12] Unfortunately, he died on June 3, 2012 as a result of the injuries. Mr. Koch never left the ICU.[13]

During the hospitalization, Mr. Koch was sometimes able to discuss the accident with his wife. He described the accident by saying that the tire "blew," and his vehicle

flipped several times. The Ford Explorer was towed from the scene by a wrecker service and placed in the wrecker service's storage yard. Before Mr. Koch's death, the wrecker service informed Mrs. Koch that there would be storage fees for the Ford Explorer. Alternatively, if title to the vehicle was signed over to the wrecker service, no storage fees would be charged. The wrecker service would sell the vehicle for scrap.

Mrs. Koch discussed this issue with her husband. He said to save the blown tire and may have asked that all the tires be saved. There is some dispute whether Mr. Koch said to save all the tires or just the left rear tire which had blown. When that discussion occurred, Mr. Koch was still in the ICU. No attorney had been hired or consulted. Mr. and Mrs. Koch were focused on his injuries and treatment as well as storage fees which Mr. and Mrs. Koch could not afford. They decided to transfer title to the vehicle to the wrecker service.

Only the portion of the left rear tire was saved by the wrecker service. The detached portion of the tread at the scene was never retrieved. The Explorer was crushed for scrap. The Supreme Court noted that the decision to sign over title to the vehicle was based upon financial concerns which arose when Mr. and Ms. Koch were focused on his injuries and recovery rather than litigation. They had not spoken to or hired an attorney. There was no nefarious intent or expectation of litigation when the decision was made. Another point emphasized by the Supreme Court was that destroying the Explorer and the other three tires, might hurt the plaintiff's case more than the defendant.[14] Without the vehicle or other tires, plaintiff could not do testing to exclude other possible causes of the accident. Even without an adverse spoliation instruction, the jury would learn that the vehicle and other tires were destroyed.

After her husband's death, Ms. Koch hired counsel.[15] Plaintiff's counsel retrieved the preserved tire on September 26, 2012;[16] suit was filed in 2014.[17] Cooper Tire eventually moved for a dismissal of the case, or some other spoliation sanction, arguing that its defense had been irretrievably prejudiced by the spoliation of the remaining tires and the vehicle.[18] The trial court denied this motion.[19] At the time the Ford Explorer was destroyed, Mr. and Mrs. Koch were not actually contemplating litigation, nor was litigation "reasonably foreseeable" to them. No lawyer or expert witness had been consulted or hired.

The *Cooper Tire* opinion establishes that plaintiffs have a duty to preserve evidence once litigation is actually contemplated, or when litigation was reasonably foreseeable, to that plaintiff. The court wrote:

> "The duty is defined the same for plaintiffs and defendants, and regardless of whether the party is an individual, corporation, government, or other entity. However, the practical application of that duty in particular cases may depend on whether the party is the plaintiff or the defendant as well as the circumstances of the party and the case." [20]

With the same set of facts, litigation may be reasonably foreseeable to a corporation when litigation is **not** reasonably foreseeable to a potential plaintiff who has not yet consulted with or hired an attorney or expert. "[T]he duty often will not arise at the same moment for the plaintiff and the defendant, because of their differing circumstances."[21] The opinion continues by noting, however, that "there will be … cases with clear proof that the plaintiff *actually* contemplated litigation at the pertinent time – because, for example, she consulted an attorney and authorized the litigation."[22] At that point, litigation is, obviously, both contemplated and foreseeable. The potential defendant will not

necessarily have constructive notice of pending litigation when the plaintiff knows that litigation is contemplated. Plaintiff's counsel may wait months, or over a year, before putting a potential defendant on actual notice of litigation.

> "During that intervening time, the plaintiff would have a duty to preserve relevant evidence, while the defendant's duty might not yet have been triggered if other circumstances did not put the defendant on constructive notice of litigation….a plaintiff also must act reasonably in anticipating whether litigation arising from her injury will occur….Neither party may manipulate the civil justice system by destroying relevant evidence and then asserting (and hoping a judge will ultimately credit) a failure to have actually contemplated litigation at that time, when a reasonable person in the party's situation would have anticipated a lawsuit." [23]

Spoliation will be a double-edged sword. When plaintiff's attorneys argue and investigate whether the defendant had constructive notice of pending litigation, defense counsel should be investigating whether plaintiff met his duty to preserve evidence when plaintiff had hired counsel and **knew** that litigation was pending.

Spoliation cases will always be fact intensive. Actual contemplation of litigation can be inferred from comments or the actions of a party. When either party has consulted with counsel, or a potential expert witness, it appears that the duty to preserve evidence will always be triggered by those actions. A routine or cursory investigation by a party, without more, will likely not prove that litigation was contemplated at the time. As noted in *Cooper Tire* and citing *Phillips v Harmon*, the duty to preserve "does not arise *merely* because the [party] investigated the incident, because there may be many reasons to investigate incidents causing injuries." [24] In the *Cooper Tire* case, the mere act of saving the blown-out tire, without more, was not enough to prove contemplation of litigation. Defendants can

raise a similar argument where there are no other circumstances to create an expectation of litigation.

When determining whether litigation was reasonably foreseeable to any party, the identity, knowledge and experiences of the person, corporation, business, or governmental entity will be important. An individual with no history of prior significant injuries or litigation, and who has not consulted with an attorney, will not necessarily foresee litigation against a tire manufacturer after an accident involving a tread separation of a tire. When that tire manufacturer learns of an accident involving a tread separation of one of their tires, however, that manufacturer probably will have an immediate duty to preserve evidence. A corporate tire manufacturer, which may have litigated tire tread separation cases in the past, will be presumed to know that litigation is foreseeable as soon as the tire manufacturer learns an accident which is allegedly due to a tire defect.

Attorneys will be left to argue what the party knew, and what the party should reasonably have foreseen. Once a court determines that litigation was contemplated, or reasonably foreseeable, then that party has a duty to preserve evidence regardless of who (or what) the party is.

Trial judges will have broad discretion to determine whether spoliation occurred, whether a duty to preserve evidence existed, and in crafting remedies for any violations. Unless there is a showing that the trial judge applied the wrong standards, appellate courts will likely determine that any findings about spoliation were "within the discretion of the trial judge" and affirm.

The remaining Georgia spoliation cases can be summarized more quickly. In *Delphi Communications, Inc v Advanced Computing Technologies,*[25] the Court of

Appeals affirmed the trial court's decision to strike Defendant's answers due to spoliation of evidence.[26] This lawsuit was filed by Advanced Computing Technologies ("ACT") against two former employees who left ACT and formed a company called Delphi Communications.[27] ACT claimed that the former employees were improperly soliciting and taking former ACT clients, and that Defendants copied ACT software products without permission or consent.[28] When the suit was filed, ACT sought **and received** a temporary restraining order precluding defendants from "destroying, deleting or removing from any computers any data or software before the hard drives of each computer are imaged for inspection and analysis by a special master[.]"[29] The information on defendant's hard drives, at the time the lawsuit was filed, was central to the lawsuit.

Defendants did not preserve their hard drives or allow the creation of "mirror images" of their hard drives as required by the TRO.[30] In effect, after being sued for stealing clients and software from ACT, defendants failed to preserve evidence which would demonstrate whether client information and proprietary software was stolen. Not surprisingly, defendant's answer was stricken.[31] The case proceeded to trial on the issue of damages including assessed attorney's fees pursuant to O.C.G.A. 13-6-11.[32] The jury awarded nominal damages and assessed attorney's fees.[33] The trial court limited attorney's fees to only those fees performed for work on the computer theft/computer trespass claim.[34] Despite that fact, plaintiff's counsel presented attorney's fees for all the work performed except for appellate work and work on the summary judgment claim.[35] Because the plaintiff failed to prove attorney's fees only for the computer theft/computer trespass claim, the award of assessed attorney's fees was reversed.[36]

Despite Defendant's egregious destruction of evidence, which resulted in their answer being stricken, the Plaintiff still had to prove damages. Most of the damages were attorney's fees necessitated by the spoliation; without the spoliation, Defendant might have won the case.

In *Bath v. International Paper*,[37] the Court of Appeals reversed the grant of summary judgment to Defendants because Defendants lost evidence which was crucial to the case. Plaintiff was electrocuted while working at Defendant International Paper's plant as an electrician for White Electrical.[38] While replacing a broken wire, Plaintiff cut into a live wire which he believed was turned off.[39] International Paper allegedly warned the employees of White Electrical that their plans showing the wiring, and location of the circuit boxes, were inaccurate.[40] White Electrical employees denied hearing this warning.[41] Plaintiff was using a tic tracer on the date of his accident to determine whether a wire was live before cutting into it. [42]

After the electrocution, International Paper took control of the scene immediately.[43] They saved the wire and light in question in a box – but lost the box.[44] The tic tracer being used by plaintiff was also lost.[45] The trial court granted summary judgment despite the failure to preserve the wire, light, and tic tracer.[46] The trial court determined that this evidence was not crucial to Plaintiff's claim, and Plaintiff had an incontrovertible duty to use his tic tracer before cutting the wire. Plaintiff insisted that he had used the tic tracer. Without that equipment being provided, he could not test whether the tic tracer had malfunctioned. Since that lost evidence was crucial to the question of liability, summary judgment was not proper.

In *Sheats v. Kroger Company*,[47] the Court of Appeals reversed and remanded a case to the trial court which had issued its

ruling before *Phillips v Harmon* was issued, and, therefore, applied the wrong legal standard.[48] Ms. Sheats was lifting a case of ginger ale into her cart when the bottom of the case broke.[49] The ginger ale fell from the box.[50] At least one bottle hit her foot.[51] It was undisputed that Kroger was aware of the collapse of the box which broke but failed to keep the broken box**.** Ms. Sheats sued both Kroger and the product manufacturer.[52] The trial court granted summary judgment against the plaintiff but used the incorrect standard in denying a spoliation sanction.[53] The case was remanded to the trial court for evaluation of the duty to preserve issue in light of the standards set forth in the *Philips v Harmon* opinion.[54]

Sheats further sought the reversals of summary judgment for her claims against Kroger for product liability, *res ipsa loquitor,* and ordinary negligence.[55] The Court of Appeals held that Kroger had a duty to supply goods packed by reliable manufacturers and without defects which could be discovered by the exercise of appropriate care.[56] Without the box, Ms. Sheats could not prove that Kroger had overlooked a reasonably observable defect; Kroger could not show that it had not.[57] Kroger had, therefore, destroyed evidence and prejudiced Ms. Sheats' claim.

The Court of Appeals affirmed the award of summary judgment against the product manufacturer.[58] Without the box, Ms. Sheats could not prove that the product was defective. There was no evidence that the manufacturer had control of the product at the time of the accident, that the manufacturer requested the destruction of the box, or that the manufacturer even knew of the claim before the box was destroyed.[59]

This case includes a blistering dissent from Judge Andrews in which he described the *Philips v. Harmon* opinion as "alarmingly" expanding situations where a

defendant is on notice of a potential claim.[60] Judge Andrews argued that defendants are now "damned if you do, damned if you don't" when conducting an inquiry about an accident.[61] None of the other six judges who decided *Sheats* joined in the dissent.[62] In light of the recent *Cooper Tire* opinion, it appears that constructive notice is here to stay.

In *Phillips et al v. Owners Insurance Company,*[63] the Court of Appeals ruled that no independent cause of action exists for spoliation in Georgia.[64] The court held adequate remedies exist for preserving evidence, and seeking damages when spoliation occurs.[65]

In Demere Marsh Assocs., LLC v. Boatright Roofing & Gen. Contracting, Inc.,[66] the trial judge had decided to allow the jury to make findings of fact regarding whether spoliation occurred.[67] The Court of Appeals reversed that portion of the trial court's decision.[68] The trial judge must make the necessary findings of fact to determine whether spoliation occurred.[69] Those findings of fact are **not** for the jury.[70] The jury may only hear about spoliation if the trial judge has already determined that spoliation occurred.[71] At that point, the appropriate sanction could include mentioning the spoliation to the jury.[72] If there is spoliation, the judge must craft a remedy appropriate to the harm or prejudice done.[73] It is not for a jury to decide whether spoliation occurred.

CASES REGARDING

EDISCOVERY AND SPOLIATION

The US Supreme Court case of *Goodyear Tire & Rubber Co. v. Haeger*[74] examines the powers of a Federal court to sanction a party for bad faith behavior.[75] The Haegers settled a case with Goodyear after years of contentious discovery.[76] After the settlement, an attorney for the Haegers learned that Goodyear had deliberately withheld testing data which should have

been provided. Goodyear eventually conceded that the data was withheld.[77] The trial court awarded $2,700,000.00 in assessed attorney's fees and costs.[78] This amount was the entire amount expended by the Haeger's attorneys subsequent to the discovery response which deliberately withheld significant test results.[79]

The Supreme Court ruled that the $2,700,000.00 award was improper. The lower courts had not used the "but for" test.[80] Although sympathetic to the lower courts' desire to sanction Goodyear for egregious conduct, Justice Kagan noted that in a civil case, damages must be compensatory rather than punitive.[81] To be compensatory, the attorney's fees and court costs must be awarded pursuant to the "but for" test.[82] What fees and costs would have been avoided "but for" the dishonest response? The award was vacated because the incorrect standard was used.[83] Justice Kagan also noted that the courts do not, and should not, have to be accountants who run down every penny spent.[84] "Rough justice" is sufficient.[85] As long as a judge applies the correct legal standard to compute damages resulting from spoliation, reversals are unlikely.

O'Berry v. Turner, Civil Action Nos. 7:15-CV-00064-HL, 2016 WL 1700403, at *1 (M.D. Ga. Apr. 27, 2016),[86] contains an excellent discussion of spoliation law. This case involved a motor vehicle accident.[87] The defendants were a trucking company the driver of the truck.[88] The trucking company failed to preserve the driver's relevant driver logs, failed to have adequate procedures to preserve driver logs, and other pertinent information, and were dilatory in their efforts to gather this important information.[89] Judge Lawson held that there was an intentional spoliation of evidence.[90] The evidence was not deliberately destroyed; the defendant had negligently failed, however, to meet its obligations of

taking reasonable measures to preserve and gather pertinent records. Judge Lawson decided to instruct the jury that the lost information was damaging to the trucking company.

In *Ronnie Van Zant, Inc. v. Pyle,*[91] the United States District Court for the Southern District of New York sanctioned the Defendants because of the destruction of evidence by an independent contractor who was not party.[92] The court held that Defendants had control over the evidence because of the close contractual relationship Defendants had with the non-party.[93] That individual had a personal interest in the outcome of the litigation.[94]

These facts go back to the 1977 plane crash which killed Ronnie Van Zant, the lead singer for Lynyrd Skynyrd, and other members of the band including Stephen Gaines.[95] Cleopatra Records, through their subsidiary, Cleopatra Films, decided to make a film purportedly about the crash and surrounding events.[96] Cleopatra hired Jared Cohn to direct and former Lynyrd Skynyrd drummer, Artimus Pyle, as a consultant.[97] Cleopatra claimed that the film was a biography about Artimus Pyle, and told through Artimus Pyle's eyes, but about the 1977 crash.[98]

The dispute arose because Pyle is subject to an agreement he, other surviving band members, and the estates of Ronnie Van Zant and Stephen Gaines, signed in 1988.[99] This agreement placed significant restrictions on performing under the name "Lynyrd Skynyrd," or otherwise profiting from that name.[100] There were also restrictions on profiting from the names or likenesses of Ronnie Van Zant and Stephen Gaines.[101] Individual band members could sell their personal biographies, and mention Lynyrd Skynyrd, as long as the primary purpose of the movie, book, or feature was an individual biography rather than a history of the band.[102] This agreement was enforced

and, at times, litigated.[103] Artimus Pyle collected the royalties to which he was entitled pursuant to the agreement.[104]

In 2016, Cleopatra hired Jared Cohn to direct the film which was purportedly a biography of Artimus Pyle, but primarily about the 1977 plane crash.[105] Although Cohn was not an employee of Cleopatra, he ultimately answered to Cleopatra and had a direct financial interest in the movie.[106] Artimus Pyle was to receive 5 percent of the net receipts in return for being a consultant.[107] Apparently, Pyle told Cleopatra about the history of litigation but not the Consent Order, and its limitations on profiting from the Lynyrd Skynyrd name.[108]

The movie was to be titled "Freebird."[109] Cleopatra Films alleged that the movie title "Freebird" had nothing to do with the Lynyrd Skynyrd song of that same name.[110] The name for the film was changed to "Street Survivor" which – coincidentally or not – is the name of Lynyrd Skynyrd's last album.[111]

When Ronnie Van Zant's widow learned of the project, she had hired counsel who immediately sent a cease and desist letter notifying Cleopatra Films of the original agreement, the consent order, and demanding that production cease immediately.[112] Litigation followed with expedited discovery.[113]

The day after the lawsuit was filed, film director Jared Cohn, purchased a new cell phone.[114] He saved all his photos from the old phone but deleted all of the texts.[115] These texts included texts between Jared Cohn, Artimus Pyle, and other individuals about the movie.[116] Although Jared Cohn was not a defendant, he was an independent contractor hired by Cleopatra Films and director. Additionally, Pyle and Cleopatra Films had access to these texts.[117] They were deemed to have "control" over

them.[118] Pyle never hired an attorney or made any effort to defend the lawsuit.

The judge sanctioned Pyle and Cleopatra Films by striking their defenses and pleadings, and entering judgment in favor of the Plaintiffs.[119] Cleopatra and Pyle were permanently barred from making the film.[120] Given the importance of Jared Cohn to the project, his texts were deemed to be within the control of Cleopatra and Pyle.[121]

It is an understatement to say that any duty to preserve evidence in the immediate control of a nonparty, who was also not an employee, is a source of potential concern. Fortunately, this case is not a Georgia or Eleventh Circuit case. There are also some unique facts such as Jared Cohn being the director of the movie, his deletion of all tweets the day after the suit was filed, and Artimus Pyle's refusal to hire a lawyer or mount a defense. Defendant's behavior in this case is a checklist of bad faith actions. Distinguishing this case factually should not be difficult if it is cited in support of an argument that parties must preserve evidence in the control of a nonparty.

CLAW-BACK AGREEMENTS

Given that thousands of documents routinely have to be stored and searched during EDiscovery in large cases, there is always the risk of inadvertently turning over confidential or privileged information. Claw-back agreements are one of the steps counsel should take to preserve privilege and protect confidentiality. Although Georgia law does not have any statutory provisions regarding EDiscovery, claw-back agreements are specifically described in FED. R. EVID. 502(b) and (d). Unless and until Georgia passes EDiscovery statutory provisions, FED. R. EVID. (b) and (d), along with federal case law, are probably the best guidelines to follow in all Georgia when using claw-back agreements in a pre-trial EDiscovery order.

Typically, claw-back agreements allow parties to recover inadvertently disclosed information which is confidential or privileged. The privilege is not waived by the inadvertent disclosure. FED. R. EVID. 502(b) requires that the disclosure be inadvertent; that the disclosing party show that reasonable steps were taken to prevent the disclosure, and that reasonable steps were taken to correct the error. These agreements are not a substitute for old fashioned review of documents and attention to detail.

In *Irth Solutions, LLC vs Windstream Communications, LLC* No. 2:16-CV-219 (S.D. Ohio August 2, 2017)[122] a disclosure was not deemed to be subject to the terms of a claw-back agreement or protected by federal law.[123] In that case, one of the firms, Baker & Hostetler, released 43 documents, amongst a total of 2,200 documents, which Baker & Hostetler later claimed were privileged.[124] The attorneys for the receiving party insisted that the disclosure was either not inadvertent, or not covered by the claw-back agreement.[125] Baker & Hostetler filed a motion to enforce the claw-back agreement and to require the return of the documents.[126] While that motion was pending, Baker & Hostetler released the same 43 allegedly privileged documents as part of a supplemental response.[127]

The court declined to enforce the claw-back agreement holding that the disclosure was "reckless" rather than inadvertent.[128] In addition to releasing the 43 allegedly privileged documents again, while the motion was pending, the court was persuaded by the failure of the Baker & Hostetler to double check what documents were being provided after the package of documents was created by the IT support staff.[129]

CONCLUSION

All of the cases discussed are worth reading for the full discussion of the spoliation and EDiscovery issues presented.

Counsel should always encourage clients to err on the side of saving as much information as possible and insure that steps are taken to avoid the accidental deletion of important data. Defense attorneys should also investigate whether plaintiffs have destroyed evidence and seek appropriate sanctions. With respect to EDiscovery, remember that ignorance of EDiscovery laws and procedures will neither be excused nor forgiven by the courts or clients. Some states now require lawyers to have training or CLE hours for technology and EDiscovery issues. Although Georgia does not have those requirements, trial attorneys should consider self-imposed requirements for EDiscovery and spoliation training.

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[1] Phillips v Harmon, 297 Ga. 386 (2015).
[2] *Id*. at 396-97.
[3] *Id*. at 397.
[4] Sandra Vinueza Foster, *Spoliation: Is Foresight The New Trigger To Preserve Evidence?*, GA. DEF. LAWYERS ASS'N L.J. 15 (2016)
[5] Cooper Tire & Rubber Co. v. Koch, S17G0654, 2018 WL 1323994, at *1 (Mar. 15, 2018).
[6] As of the deadline for publication, the *Cooper Tire* opinion was still subject to motions for reconsideration and not yet final.
[7] *Cooper Tire*, 2018 WL 1323994 at *6.
[8] *Id*. at *6-7.
[9] *Id*. at *1.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*. at *7.
[15] *Id*. at *2.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*. at *3.
[21] *Id*.
[22] *Id*. at *4 (emphasis in original).
[23] *Id*.
[24] *Id*. at *6 (quoting *Phillips* at 297 Ga. 386, 397 n.9).
[25] Delphi Communications, Inc. v. Advanced Computing Technologies, 336 Ga. App. 435 (2016).
[26] *Id*. at 440, 441.
[27] *Id*. at 435.
[28] *Id*.
[29] *Id*. at 437 (alteration in original).
[30] *Id*. at 437-48.
[31] *See id*. at 440.
[32] *Id*. at 435, 440.
[33] *Id*. at 435.
[34] *Id*. at 440.
[35] *Id*. at 441.
[36] *Id*.
[37] Bath v. International Paper, 343 Ga. App. 324 (2017).
[38] *Id*. at 324-35.
[39] *Id*. at 327.
[40] *Id*. at 326-27.
[41] *Id*. at 326.
[42] *Id*.
[43] *Id*. at 327.
[44] *Id*.
[45] *Id*.

[46] *Id*. at 328.
[47] Sheats v. Kroger Company, 336 Ga. App. 307 (2016).
[48] *Id*. at 311.
[49] *Id*. at 308.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 309.
[53] *Id*. at 310, 311.
[54] *Id*. at 311.
[55] *See id*. at 312-13.
[56] *Id*. at 313.
[57] Sheats v. Kroger Company, 336 Ga. App. 307 (2016).
[58] *Id*. at 307.
[59] *Id*. at 311.
[60] *See id*. at 314-15 (Andrews, J. dissenting).
[61] *Id*. at 315.
[62] *See id*. at 314.
[63] Phillips v. Owners Insurance Company, 342 Ga. App. 202 (2017).
[64] *Id*. at 204-07.
[65] *See id*. at 205.
[66] Demere Marsh Assocs., LLC v. Boatright Roofing & Gen. Contracting, Inc., 343 Ga. App. 235 (2017).
[67] *Id*. at 248.
[68] *Id*. at 249.
[69] *Id*. at 248.
[70] *Id*.
[71] *See id*.
[72] *Id*.
[73] *Id*.
[74] Goodyear Tire & Rubber Co. v. Haeger, ___ U.S. ___, 137 S. Ct. 1178 (2017).
[75] *Haegar*, 137 S. Ct. at 1183-84.
[76] *Id*. at 1184.
[77] *Id*.
[78] *Id*. at 1185.
[79] *Id*.
[80] *Id*. at 1186-87.
[81] *Id*. at 1185, 1186.
[82] *Id*. at 1186.
[83] *Id*. at 1190.
[84] *Id*. at 1187.
[85] *Id*.
[86] O'Berry v. Turner, No. 7:15-CV-00064-HL, 2016 WL 1700403, at *1 (M.D. Ga. Apr. 27, 2016).
[87] *Id*. at *1.
[88] *Id*.
[89] *Id*.
[90] *Id*. at *4.
[91] Ronnie Van Zant, Inc. v. Pyle, 270 F. Supp. 3d 656 (S.D.N.Y. 2017).
[92] *Id*. at 683.
[93] *Id*. at 669-71.
[94] *Id*. at 669.
[95] *Id*. at 660.
[96] *Id*. at 663-64.
[97] *Id*. at 664.
[98] *Id*.
[99] *Id*. at 661-62, 665.
[100] *Id*. at 661-62.
[101] *Id*. at 661.
[102] *Id*. at 662.
[103] *Id*. at 662-63.
[104] *Id*. at 663.
[105] *Id*. at 664.
[106] *See id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] That assertion may have been the most ridiculous claim in the history of litigation.
[111] *Id*. at 660-61, 667 & n.13.
[112] *Id*. at 661, 664-65.
[113] *Id*. at 668.
[114] *See id*. at 667.
[115] *Id*.
[116] *Id*.
[117] *Id*. at 670.
[118] *Id*.
[119] *See id*. at 683.
[120] *Id*.
[121] *Id*. at 670.
[122] Irth Solutions, LLC vs Windstream Communications, LLC, No. 2:16-CV-219, 2017 WL 3276021, at *1 (S.D. Ohio August 2, 2017).

[123] *Id*. at *15.
[124] *Id*. at *3, *14.
[125] *Id*. at *2-3.
[126] *Id*. at *1.
[127] *See id*.
[128] *Id*. at *13-14.
[129] *Id*. at *4-5.

THE IMPACT OF RECENT U.S. SUPREME COURT PERSONAL JURISDICTION OPINIONS ON PRODUCT LIABILITY LAWSUITS IN GEORGIA

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I. INTRODUCTION

The doctrine of personal jurisdiction concerns the bounds of a court's power over the parties to a lawsuit. Among other things, the doctrine examines the relationship between the forum, the parties, and the claims at issue to determine whether the court can, consistent with state law and due process, adjudicate the claims of a plaintiff and render a valid judgment against a defendant. This article will examine two recent U.S. Supreme Court decisions on personal jurisdiction, and their potential implications for product liability suits in Georgia.

II. BRIEF OVERVIEW OF THE PERSONAL JURISDICTION LANDSCAPE BEFORE 2014

A plaintiff has the burden of demonstrating that the court has at least one of two categories of personal jurisdiction: general jurisdiction or specific jurisdiction. General jurisdiction allows a court to hear "any and all claims" against a defendant.[1] It is sometimes referred to as "all-purpose" jurisdiction. By contrast, specific jurisdiction "depends on an affiliation between the forum and the underlying controversy"—principally, "an activity or an occurrence that takes place in the forum State and is therefore subject to

the State's regulation."[2] It is sometimes referred to as "case-linked" jurisdiction.

Initially, the doctrine of personal jurisdiction was rooted in notions of sovereignty. In the seminal case of *Pennoyer v. Neff*, the U.S. Supreme Court held that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."[3] In other words, a court's jurisdictional power over litigants reached only so far as the geographic bounds of the forum.[4]

This cramped version of personal jurisdiction ultimately gave way to the realities of interstate commerce and technological advances in transportation and communication. In its place, the Supreme Court held in *International Shoe Co. v. Washington* that a state may authorize courts within its borders to exercise personal jurisdiction over a nonresident defendant so long as the defendant has "certain minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[5] Under *International Shoe*'s "minimum contacts" test and its progeny, a defendant's contacts should be such that it "should reasonably anticipate being haled" into the forum.[6] Thus, over time, the Court recognized that the doctrine of personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[7]

III. THE SUPREME COURT'S GENERAL JURISDICTION OPINION IN *DAIMLER AG V. BAUMAN*

Prior to 2014, it was commonly assumed that, under the doctrine of general personal jurisdiction, any large product manufacturer could be sued in virtually any state in which it sold a

substantial volume of its products, regardless of whether the plaintiff's claim arose from the defendant's forum contacts. After the Supreme Court's opinion in *Daimler AG v. Bauman*,[8] however, that assumption is no longer valid. While the opinion largely purported to be a simple application of the Court's prior general jurisdiction precedents, it has spawned a resurgence of personal jurisdiction challenges across the nation and set the stage for the Court's groundbreaking specific jurisdiction ruling last year in *Bristol-Myers Squibb v. Superior Court of California*, discussed below.

The sweeping nature of the plaintiffs' personal jurisdiction theory in *Daimler AG* suggests the extent to which general jurisdiction had become unmoored from virtually any limiting principle. The Court succinctly summarized the issue in the majority opinion's first sentence, stating that the case concerned "the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States."[9] Specifically, twenty-two Argentinian residents filed suit in California federal court alleging that the Argentine subsidiary (Mercedes-Benz Argentina) of a German Company (Daimler AG) collaborated with government security forces to kidnap, torture, and kill Mercedes-Benz Argentina employees.[10] The plaintiffs sought to hold Daimler AG vicariously liable for the acts of its Argentine subsidiary, and sued for alleged violations of the laws of California, the United States, and Argentina.[11] The plaintiffs never argued that the California federal court had specific jurisdiction over their claims, nor did

they challenge the district court's prior holding that Daimler AG's contacts with California were too sporadic to confer general jurisdiction.[12] Instead, the plaintiffs relied on an agency theory—ultimately endorsed by the Ninth Circuit—in which the California contacts of Daimler AG's American subsidiary, Mercedes-Benz USA, LLC, were imputed to Daimler AG.[13]

In rejecting this agency theory, the Supreme Court clarified the contours of general jurisdiction and, in so doing, significantly narrowed the number of fora in which defendants can be sued on "any and all" claims. The Court first recognized that a corporate defendant's state of incorporation and principle place of business remained the paradigmatic bases for general jurisdiction, as such state affiliations were unique, easily ascertainable, and afforded plaintiffs at least one (and often two) jurisdictions in which to sue on an all-purpose basis.[14] In a footnote, the Court left open the possibility that, "in an exceptional case," a defendant's operations in a different forum "may be so substantial and of such a nature as to render the corporation at home in that State."[15] While the Court gave no guidance as to what type and degree of forum-related activities would rise to the level of "an exceptional case"—an issue that has since flummoxed lower courts and litigants alike—the Court plainly rejected a "stream-of-commerce" theory of general jurisdiction.[16] The Court also warned against the conflation of general jurisdiction and specific jurisdiction, characterizing as "unacceptably grasping" plaintiffs' theory that general jurisdiction exists wherever a corporation engages in a "substantial, continuous, and systematic course of business" in the forum.[17] According to

the Court, "[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[18]

As courts have recognized, *Daimler AG* has made it **"**incredibly difficult to establish general jurisdiction [over a corporation] in a forum other than the place of incorporation or principal place of business.**"**[19] Justice Sotomayor has even gone so far as to contend that, under the Supreme Court's recent personal jurisdiction decisions (in which she ordinarily is the lone dissenter), "it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation."[20]

Emboldened by *Daimler AG*, product manufacturers have been increasingly successful in moving to dismiss the claims of plaintiffs who elected, for strategic reasons, to file their claims in states with no connection to their claims.

IV. THE SUPREME COURT'S SPECIFIC JURISDICTION OPINION IN *BRISTOL-MYERS SQUIBB V. SUPERIOR COURT OF CALIFORNIA*

Meanwhile, the U.S. Supreme Court's watershed opinion on *specific* personal jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court of California*,[21] is widely regarded as the most impactful product liability case decided last year. In tandem with the Court's general jurisdiction opinion in *Daimler AG*, the decision will have significant implications for where product manufacturers and other corporations can be sued and the extent

to which plaintiffs residing in a forum state can join their claims with other plaintiffs who do not.

In *Bristol-Myers Squibb Co.*, 86 California plaintiffs and 592 nonresident plaintiffs from 33 other states brought consolidated suits in California state court, alleging injuries caused by the drug Plavix (a medication used to inhibit blood clotting).[22] BMS moved to quash service of summons for the nonresident plaintiffs, claiming that the California Superior Court lacked general jurisdiction to hear the case because BMS is neither incorporated nor headquartered in California. Additionally, BMS argued that the court lacked specific jurisdiction over BMS because the complaint did not allege that the nonresidents' injuries had occurred or been treated in California, nor did they allege that they obtained Plavix through California physicians or from any other California source.[23] In August 2016, California's Supreme Court held that, although there was no general jurisdiction,[24] BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's Plavix-related contacts in California such that the exercise of specific jurisdiction would not be unreasonable.[25]

In June 2017, the U.S. Supreme Court reversed in an 8–1 opinion, concluding that the California courts' exercise of jurisdiction over the nonresident plaintiffs' claims violated due process. In so holding, the Court rejected the California Supreme Court's "sliding scale" approach to specific jurisdiction, which posited that BMS's extensive contacts with California permitted the exercise of specific jurisdiction based on a less direct

connection between the company's forum-related activities and plaintiffs' claims than ordinarily would be required.[26] In support of its ruling, the Supreme Court noted that "BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California."[27] Thus, the mere fact that the nonresidents' claims were *similar* to the claims of the California plaintiffs—over whom the court indisputably did have personal jurisdiction—could not cure the fatal jurisdictional defect: that all of the conduct giving rise to the nonresidents' claims occurred in other states.[28] Nor was the Court persuaded by the plaintiffs' argument that personal jurisdiction over BMS could be established through its contract with a California-based company to distribute the product. According to the Court, a defendant's relationship with a third party, without more, cannot confer personal jurisdiction because the "minimum contacts" requirement must be met as to each defendant.[29]

While Justice Alito's majority opinion sought to downplay the "parade of horribles" theorized by the plaintiffs if personal jurisdiction were denied, Justice Sotomayor's dissent addressed potential implications of the Court's decision. According to Justice Sotomayor, "the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action."[30] Moreover, she predicted that "[t]he effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a

defendant is 'essentially at home,'" which will "hand one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions."[31]

The *Bristol-Myers Squibb* decision has already spawned a flurry of personal jurisdiction challenges in both state and federal courts. Although some courts have given the Supreme Court's holdings a more far-reaching application than others, it is clear that the plaintiffs' bar will need to take *Bristol-Myers Squibb* into account when determining where to sue product manufacturers on behalf of multi-state claimants; otherwise, they may face an early dismissal of their claims.

V. PRODUCT LIABILITY SUITS IN GEORGIA IN THE AFTERMATH OF THE SUPREME COURT'S LATEST PERSONAL JURISDICTION DECISIONS

The Supreme Court's opinions in *Daimler AG* and *Bristol-Myers Squibb* will undoubtedly have a significant impact on where product manufacturers are sued, issues of forum shopping, and the extent to which a court will be able to hear out-of-state claims. Yet, it remains to be seen how these developments will play out in Georgia. The following section will examine these issues in brief and proffer a few considerations that could dictate whether or not Georgia will see more product liability suits in the near-term.

A. Reasons Product Liability Suits in Georgia May Increase in the Wake of *Daimler AG* and *Bristol-Myers Squibb*

Given that lower courts are only beginning to grapple with the *Daimler*

AG and *Bristol-Myers Squibb* decisions, any predictions concerning their effects on product liability suits in Georgia should be appropriately caveated. That said, several factors suggest that Georgia may experience a surge in product liability suits in the coming years.

First, it stands to reason that *most* states may see an uptick in product liability suits filed in their jurisdiction simply because the Supreme Court's personal jurisdiction precedents now render it substantially more difficult to aggregate out-of-state claims in a single state forum.[32]

Second, and more importantly, a large number of company headquarters are based in Georgia, including 17 "*Fortune* 500" companies and 30 "*Fortune* 1000" companies.[33] Given that the Supreme Court's recent decisions render nationwide class actions and multi-state mass torts increasingly suspect, we can anticipate that cases involving out-of-state claims will need to be brought in a product manufacturer's "home" forum to stave off a personal jurisdiction challenge.[34]

Third, by some (admittedly non-scientific) indicators, Georgia is becoming an increasingly inhospitable jurisdiction for corporate defendants. For instance, Georgia was added to the American Tort Reform Foundation's "Judicial Hellholes" Watch List for 2017–2018.[35] This marks the second year in a row that Georgia has laid claim to this dubious distinction—after not being named in any of the previous editions since the report's inception in 2002. According to the latest report, "Georgia's Supreme Court in recent years issued decisions that significantly expanded civil liability, and that troubling trend continued in 2017. Making matters worse, trial courts in the

Peach State are understandably following the high court's lead as a growing list of outrageous verdicts has begun to worry many business leaders there."[36] Whether or not Georgia's reputation as an increasingly plaintiff-friendly jurisdiction is deserved, perception may matter more than reality as litigants assess where to sue in an uncertain post-*BMS* landscape.

B. Reasons There May Not Be a Significant Spike in Georgia-Based Mass Torts or Class Actions.

While the factors raised above may suggest that Georgia will experience a burgeoning number of product liability suits in the wake of *Daimler AG* and *Bristol-Myers Squibb*, it is likely premature to expect the Supreme Court's decisions to open the floodgates of litigation in Georgia.

First, simple factors of geography and demographics will likely continue to play the most significant role in determining where product manufacturers are sued. In fact, forum size could become an even more decisive factor now that nationwide class actions are harder to certify and mass torts involving out-of-state plaintiffs are increasingly prone to dismissal on personal jurisdiction grounds. Typically, the larger the forum size, the greater the potential exposure to the defendant—and thus, the more likely that an enterprising plaintiffs' lawyer will sue there. All other things being equal, a state like California—with forty million consumers—can generate a much larger pool of potential plaintiffs than a state like Georgia, with only ten million consumers.

Second, Georgia law remains favorable to product manufacturers in many respects. To give an obvious example, Georgia law requires that

"[a]ctions for injuries to the person shall be brought within two years after the right of action accrues[.]"[37] By contrast, personal injury claims brought in Florida or Missouri—both top-three Judicial Hellholes—will be subject to four-year or five-year statutes of limitations, respectively.[38] Moreover, because personal injury class actions are difficult to certify, plaintiffs often bring class claims predicated upon alleged violations of state consumer protection statutes.[39] Yet, Georgia's primary state consumer protection statute—the Georgia Fair Business Practices Act (GFBPA)—expressly prohibits plaintiffs from bringing claims on a classwide basis.[40] Thus, assuming that courts continue to uphold the General Assembly's prohibition on GFBPA class actions,[41] plaintiffs seeking to bring nationwide or multi-state class claims against a product manufacturer for violations of state consumer protection laws may continue to think twice before suing in Georgia.

Third, as of this writing, over 260 court opinions have cited *Bristol-Myers Squibb* since it was decided last summer; remarkably, however, the case has never been cited in Georgia state court and has been addressed only once by a Georgia federal court. Thus, there is substantial uncertainty concerning whether Georgia courts will narrowly construe the holdings of *Bristol-Myers Squibb* and confine the case to its facts, or whether the opinion will receive a more sweeping application. The last section will examine the one Georgia case that has addressed *Bristol-Myers Squibb*, as that case touches upon many of the questions left open by the Supreme Court's opinion and perhaps presages the battles to be waged by Georgia product liability litigants in the years ahead.

C. The Northern District of Georgia's Ruling in *Sanchez v. Launch Technical Workforce Solutions, LLC*

In February 2018, the U.S. District Court for the Northern District of Georgia denied a defendant's personal jurisdiction challenge to a putative nationwide class in *Sanchez v. Launch Technical Workforce Solutions, LLC*,[42] holding that *Bristol-Myers Squibb* was distinguishable because it involved a mass tort action—rather than a class action—and was animated by federalism principles that were not equally applicable in federal court. The named plaintiff in *Sanchez* sought to bring claims on behalf of a nationwide class for alleged violations of the Fair Credit Reporting Act. The defendant moved to dismiss all claims except those asserted by Georgia class members, arguing that the court lacked both general jurisdiction (because the defendant was a Delaware limited liability company with a principle place of business in Illinois) and specific jurisdiction over the out-of-state claims. The court agreed that it lacked general jurisdiction, but rejected the defendant's specific jurisdiction argument. Although the court acknowledged the "logical appeal" of the defendant's *Bristol-Myers Squibb* analogy—and expressed some misgivings over "allowing the unnamed nonresident plaintiff class members to ride the coattails of the named plaintiff's assertion of specific jurisdiction"—the court held that there were material differences between mass actions and class actions that warranted separate treatment for purposes of personal jurisdiction.[43]

In reaching this conclusion, the court relied heavily on the U.S. Supreme Court's 1985 decision in *Phillips Petroleum Co. v. Shutts*, which held,

among other things, that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant."[44] The court further commented that the requirements of Rule 23 of the Federal Rules of Civil Procedure—such as the commonality, typicality, predominance, and superiority requirements—provided ample due-process protections to class action defendants that are not afforded in mass actions. The court reasoned that "in contrast to a mass action like *Bristol-Myers*, which may—and likely would—present significant variations in the plaintiffs' claims, the requirements of Rule 23 class certification ensure that the defendant is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense."[45] Thus, the court "perceived no unfairness in hauling the defendant into court to answer to it in a forum that has specific jurisdiction over the defendant based on the representative's claim."[46] Lastly, the court commented that the federalism concerns underpinning *Bristol-Myers Squibb* were "not at issue here in federal court" because, among other things, "'a nationwide class action in federal court is not about a state's overreaching, but rather relates to the judicial system's handling of mass claims involving numerous … parties.'"[47]

While it is unclear whether other Georgia courts will be persuaded by the court's reasoning in *Sanchez*, product manufacturers facing out-of-state claims in Georgia should be prepared to argue that the court misapplied *Bristol-Myers Squibb* or, alternatively, that its holding should be cabined to the particular facts of the case.

As an initial matter, despite *Sanchez*'s suggestion that the class action defendant's ability to respond "with a unitary, coherent defense" cures any due process infirmities, the Supreme Court made clear in *Bristol-Myers Squibb* that "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."[48] Because the doctrine of personal jurisdiction requires a plaintiff-by-plaintiff and claim-by-claim analysis, it was immaterial that "third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents."[49] In short, *Bristol-Myers Squibb* provides no support for the argument that Rule 23's requirements to ensure that a named plaintiff's claims cohere with those of absent class members—such as commonality or typicality—in any way relax the separate jurisdictional requirement that there be "a connection between the forum and *the specific claims at issue*."[50]

Moreover, *Sanchez* involved unique facts that do not apply to most nationwide class actions: namely, jurisdiction predicated upon a federal question in which the law applicable to each class members' claims (*i.e.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681) was identical, regardless of where each class member's cause of action arose. This is significant in two respects.

First, it obviated the need for the court to perform a choice-of-law analysis concerning what law applied to the out-of-state class members' claims. By contrast, in most nationwide class actions, the named plaintiff will seek to

apply the laws of the forum state *extraterritorially* to the claims of nonresident absent class members, which requires the court to assess whether that application of law would offend constitutional principles of due process. As the Supreme Court has held, "[f]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[51] Ironically, in *Shutts*—the case heavily relied upon by the *Sanchez* court—the Supreme Court held that, while the Kansas trial court properly asserted personal jurisdiction over the absent out-of-state class members (even though their claims had no connection to Kansas), the Kansas Supreme Court erred by deciding that Kansas law could be constitutionally applied to all claims. The Court noted that "[t]he issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposed to adjudicate and which have little connection with the forum."[52]

In other words, even if the *Sanchez* court is correct that individual class members, aside from the name plaintiff, need not satisfy the "minimum contacts" test in order for a forum court to exercise personal jurisdiction over them, a defendant should still be able to argue that the out-of-state claims fail. For instance, if the suit is brought in federal court, the plaintiff will need to

show that he possesses Article III standing not only with respect to his own claims, but also with respect to the claims brought on behalf of out-of-state class members.[53] Thus, a hypothetical plaintiff who files suit in Georgia for injuries sustained in Georgia may have standing to pursue claims under Georgia law, but he likely will lack standing to pursue similar relief on behalf of Illinois class members *under Illinois law*.[54] Moreover, even if a court determines that it has personal jurisdiction over the claims of out-of-state class members and that the named plaintiffs have standing to bring those claims, product manufacturers facing nationwide or multi-state claims can still argue that the classes should not be certified because the myriad choice-of-law issues would overwhelm any common questions and render the class unmanageable.[55] As the Eleventh Circuit has previously stated, "[i]t goes without saying that class certification is impossible where the fifty states truly establish a large number of different legal standards governing a particular claim."[56]

Second, and relatedly, because the *Sanchez* court's jurisdiction was founded upon a federal question, no state sovereignty and federalism concerns arose in that case. By contrast, under the *Erie* doctrine, federal courts sitting in diversity must apply state substantive law. This raises the possibility that a plaintiff will seek to apply the forum state's law to all class claims, notwithstanding (i) the forum state's lack of legitimate state interests in adjudicating the claims of out-of-state class members, and (ii) the potential conflicts between the forum state's law and the laws of the other states. Thus, diversity cases—in sharp contrast to federal-question cases—invoke the same

clash-of-sovereigns and forum-shopping concerns that *Bristol-Myers Squibb* sought to root out in state courts. Accordingly, and perhaps counterintuitively, a court's subject-matter jurisdiction may impact the personal jurisdiction inquiry.

VI. CONCLUSION

Although it remains to be seen how other Georgia courts will apply *Bristol-Myers Squibb* going forward, product manufacturers should seriously consider asserting a personal jurisdiction challenge whenever a case is brought outside the company's "home" jurisdiction and the relevant conduct or injuries did not occur in the forum state. Indeed, a Georgia-based plaintiff seeking to sue a nonresident defendant in Georgia on behalf of a multi-state or nationwide class may be left with one of two options: (1) satisfy the court that Georgia law can be constitutionally applied to all of the out-of-state class claims (*i.e.*, by showing Georgia has sufficient contacts with the claims such that application of Georgia law would not be arbitrary or unfair); or (2) demonstrate that, even though other states' laws apply to the out-of-state claims, those laws are similar enough so as not to pose an insuperable obstacle to class certification. This is no small task. Accordingly, product-manufacturer defendants should be ever mindful of the ways in which the Supreme Court's recent personal jurisdiction cases—and, in some instances, Article III and Rule 23—can be added to their arsenal to combat forum-shopping and defeat multi-state claims.

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1 Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

2 *Id.*

3 95 U.S. 714, 720 (1878).

4 *See* Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (stating that, under *Pennoyer*, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent

limits of the State's power").

5 326 U.S. 310, 316 (1945).

6 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

7 Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 (1982).

8 134 S. Ct. 746 (2014).

9 *See id.* at 750.

10 *Id.* at 751.

11 *Id.* at 751–52.

12 *Id.* at 758.

13 *Id.* at 759–60.

14 *Id.* at 760.

15 *Id.* at 761 n.19.

16 *See id.* at 757 ("Although the placement of a product into the stream of commerce 'may bolster an affiliation germane to specific jurisdiction,' … such contacts 'do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.'").

17 *Id.* at 761.

18 *Id.* at 761–62 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

19 Monkton Ins. Services, Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014).

20 BNSF Ry. v. Tyrrell, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part).

21 137 S. Ct. 1773 (2017).

22 *Id.* at 1778.

23 *Id.*

24 The Superior Court had earlier denied BMS's motion to quash on general jurisdiction grounds, concluding that its activities in California were sufficiently extensive to subject it to the jurisdiction of California courts. California's Court of Appeal then summarily denied BMS's petition for a writ of mandamus on the same day as the Supreme Court's decision in *Daimler AG*. After the California Supreme Court transferred the matter back to the appellate court to reexamine the issue in light of *Daimler AG*, the Court of Appeal again denied the writ—this time on specific jurisdiction grounds.

25 *Id.* at 1778–79.

26 *Id.* at 1779.

27 *Id.* at 1778.

28 *Id.* at 1782.

29 *Id.* at 1783.

30 *Id.* at 1789 (Sotomayor, J., dissenting).

31 *Id.*

32 *Cf. Bristol-Myers Squibb*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting) ("[T]he Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action.").

33 *See* FORTUNE 500, http://fortune.com/fortune500/list/. In fact, Georgia boasts more "*Fortune* 500" companies than all but ten states—New York (54), California (53), Texas (50), Illinois (36), Ohio (25), Virginia (23), New Jersey (21), Pennsylvania (21), Connecticut (18), and Minnesota (18).

34 *Cf. Bristol-Myers Squibb*, 137 S. Ct. at 1783 (noting that "[o]ur decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS").

35 *See* ATRF, JUDICIAL HELLHOLES: 2017–2018, Dec. 5, 2017, *available at* http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf.

36 *Id.* at 3.

37 O.C.G.A. § 9-3-33.

38 *See* Fla. Stat. § 95.11(3); Mo. Rev. Stat. § 516.120.

39 Some of the most prominent state consumer protection statutes utilized by class action plaintiffs include California's Unfair Competition Law (UCL), False Advertising Law (FAL) and Consumer Legal Remedies Act (CLRA); Illinois's Uniform Deceptive Trade Practices Act (UDPTA) and Consumer Fraud and Deceptive Business Practices Act (ICFA); New York's General Business Law (GBL); Florida's Deceptive and Unfair Trade Practices Act (FDUPTA); and Texas's Deceptive Trade Practices-Consumer Protection Act (DTPA).

40 *See* O.C.G.A. § 10-1-399(a) (stating that a claimant "may bring an action individually, but not in a representative capacity"); *see also* Cappuccitti v. DirecTV, Inc., 623 F.3d

1118, 1126 n.19 (11th Cir. 2010) ("O.C.G.A. § 10-1-399(a) authorizes private actions under the FBPA but specifically precludes a private plaintiff from bringing such a claim 'in a representative capacity.'"); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 1289 (N.D. Ga. 2008) ("[B]y its very terms, the GFBPA prohibits consumer class actions.").

41 Some plaintiffs have attempted to challenge statutory class action prohibitions in light of the Supreme Court's opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 (2010), which held that when a plaintiff sues in federal court, Rule 23 of the Federal Rules of Civil Procedure may displace a state's consumer protection law to the extent the state statute barring private class actions constitutes a procedural rule rather than a substantive right. *See also* Lisk v. Lumber One Wood Preserving, LLC, 792 F.3d 1331, 1333 (11th Cir. 2015) (holding that Alabama Deceptive Trade Practices Act's provision restricting class actions does not apply in federal court). *But see* Helpling v. Rheem Mfg. Co., No. 1:15-cv-2247-WSD, 2016 WL 1222264, at *13 (N.D. Ga. Mar. 23, 2016) (distinguishing *Lisk* and holding that the notice requirement of Ohio's Consumer Sales Practices Act was not preempted by Rule 23).

42 __ F. Supp. 3d __, No. 1:17-CV-01904-ELR, 2018 WL 942963, at *1 (N.D. Ga. Feb. 14, 2018).

43 *Id.* at *1.

44 472 U.S. 797, 811 (1985); *see also* Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co. (In re Ford Motor Co.), 471 F.3d 1233, 1245 (11th Cir. 2006) ("The granting of class certification under Rule 23 authorizes a district court to exercise personal jurisdiction over unnamed class members who otherwise might be immune to the court's power."). Indeed, as the leading class action treatise bluntly declares: "Put simply, *there is no requirement that the class action court have personal jurisdiction over absent plaintiffs*." 2 NEWBERG ON CLASS ACTIONS § 6:25 (5th ed.) (emphasis in original).

45 *Sanchez*, 2018 WL 942963, at *1.

46 *Id.*

47 *Id.* (quoting In re Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 09-2047, 2017 WL 5971622, at *20 (E.D. La. Nov. 30, 2017)).

48 137 S. Ct. at 1781.

49 *Id.*

50 *Id.* (emphasis added).

51 Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981).

52 *Shutts*, 472 U.S. at 821.

53 *See* Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017) (stating that "standing is not dispensed in gross" and noting that "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint"); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

54 As the Eleventh Circuit has recognized, "a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000). To the contrary, "[w]here … a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal." In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009); In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., No. 9 CV 3690, 2015 WL 3988488, at *25 (N.D. Ill. June 29, 2015) (same).

55 *See, e.g.*, Shepherd v. Vintage Pharm., LLC, 310 F.R.D. 691, 699–700 (N.D. Ga. 2015) (variations in state laws governing negligence and strict liability required individualized factual determinations, which precluded a finding of predominance under Rule 23(b)(3)).

56 Klay v. Humana, Inc., 382 F.3d 1241, 1261 (11th Cir. 2004).

THE LAST HURRAH FOR LAST CLEAR CHANCE?

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Georgia law recognizes a doctrine designed to prevent a jury from assigning *any* fault, or contributory negligence, to a plaintiff. It is the last-clear-chance doctrine.[1] This doctrine originated in jurisdictions applying the harsh, common-law rule under which a plaintiff's recovery was barred if the plaintiff was found to be guilty of even 1 percent contributory negligence.

Because its purpose is to prevent the assignment of *any* negligence to the plaintiff, the doctrine is a potent weapon for a plaintiff. When it is submitted incorrectly, the harm to the defendant is palpable and undeniable. As one court put it: "The last-clear-chance doctrine is a very just and a salutary rule to be applied in a proper case, but its misapplication is fraught with great danger and often leads to unjust results, because it always invites a jury to disregard or excuse contributory negligence. . . ."[2] Indeed, the cases, including Georgia cases, in which improper submission of a last-clear-chance instruction was held to require a new trial are *legion*.[3]

I. Georgia should abandon the last-clear-chance doctrine.

Now that Georgia has adopted apportionment of fault, a strong case can

be made that jurors should no longer be instructed on the last-clear-chance doctrine. Courts elsewhere have abolished last-clear-chance instructions after adopting comparative negligence.[4] As one commentator explained in the Harvard Law Review nearly 75 years ago, "The whole last-clear-chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted apportionment statutes."[5] More recent commentary explains that the doctrine of last clear chance has crumbled under legislative acts and judicial decisions adopting comparative negligence.[6]

Georgia adopted comparative fault in 2005, and it should follow the example of other jurisdictions by eliminating the last-clear-chance doctrine. The doctrine no longer serves a legitimate purpose, and "a doctrine that has caused as much confusion among the legal profession as this one has is certain to be potentially misleading and confusing to a lay jury. . . ."[7] The best that can be said for the last clear chance doctrine is that it has "generated massive amounts of litigation and require[s] complicated logical analysis few juries [are] capable of performing."[8]

II. If Georgia does not abandon the last-clear-chance doctrine, the suggested pattern jury instruction should be revised.

If Georgia does not abandon last clear chance, Georgia Suggested Pattern Jury Instruction 60.210 should be revised. The suggested instruction states:

> People are under an obligation to use ordinary care to avoid injuring others after finding them in a dangerous place,

> regardless of how they got there, and are liable for the failure to do so. This rule is known as the Last clear chance doctrine. The Last clear chance doctrine only applies when it is proved by a preponderance of the evidence that the plaintiff(s) placed himself/herself/themselves in danger because of his/her/their own negligence, the defendant actually knew of the plaintiff's (plaintiffs') danger, and the defendant had opportunity to take action to avoid the injury to the plaintiff(s) by the use of ordinary care under the conditions and circumstances that existed at that time but failed to do so. If you find such to be proved, then the failure of the defendant to use ordinary care under such circumstances to avoid the injury to the plaintiff(s) would be considered the proximate cause of the plaintiff's (plaintiffs') injuries.[9]

Georgia's suggested pattern jury instructions have, on occasion, been found to state the law incorrectly.[10] The pattern instruction on last clear chance does not correctly state the law because Georgia cases, including the cases cited as the source for the pattern instruction, make clear the last-clear-chance doctrine does not apply unless the plaintiff is in a state of peril from which the plaintiff is unable to extricate herself.[11] In Georgia, as elsewhere, the plaintiff *must* show that

by his own negligence, he put himself in a perilous position "from which he could not extricate himself."[12] This is an essential element.[13] The inescapable-peril element is omitted from the pattern jury instruction, and it therefore misstates the law. There is some authority for the notion the last-clear-chance doctrine also applies when the plaintiff's peril is escapable, but the plaintiff is oblivious to the peril.[14] The suggested pattern jury instruction, however, does not instruct on that alternative either, and it thus misstates the law as well.[15]

III. Until the last-clear-chance doctrine is abolished, practitioners should keep these points in mind about its application.

The last-clear-chance doctrine applies only when the defendant actually knew of the plaintiff's peril.[16] It does not apply when a defendant merely should have known of the danger.[17] The Georgia Court of Appeals has emphasized this point: "The doctrine simply has no application unless the defendant knew of the plaintiff's perilous situation and had opportunity to take proper evasive action to avoid injuring him. It does not apply to a 'should know' or 'should have known' situation."[18] There must be evidence that the defendant had "an opportunity to take evasive action after he became aware of the impending collision."[19]

In one case, for example, the Georgia Court of Appeals reversed the trial court's judgment and remanded for a new trial when a last-clear-chance instruction was improperly given in the absence of evidence to support the conclusion the defendant saw and knew of plaintiff's perilous position.[20] The defendant's vehicle struck the plaintiff while he was leaving a liquor store after the owner refused to sell him wine in

view of his apparent state of inebriation. Witnesses testified it was dark outside. The court held that giving a last-clear-chance instruction was reversible error because there was no evidence "that the defendant saw and knew of the plaintiff's perilous position and that he realized or had reason to realize his helpless condition."[21]

If a plaintiff invokes the "oblivious to the peril" basis for submitting a last-clear-chance instruction, the defendant should be aware of authority supporting an argument this "oblivious to the peril" theory is not available when the danger to which the plaintiff claims obliviousness is one which an ordinary person can be charged with knowledge of, such as the dangers associated with a railroad track.[22] By logical extension, this authority would also apply to charge a plaintiff with knowledge of the dangers of, for example, changing the tire on a car at night when the vehicle is partially on the roadway. Further, there must be evidence that it was possible for the defendant to discover the plaintiff's obliviousness.[23]

Also, the last-clear-chance doctrine does not apply unless the plaintiff placed himself in the position of peril as a result of his own negligence.[24] Again, the whole purpose of giving a last-clear-chance instruction is to prevent the assignment of *any* negligence to the plaintiff.[25] This is precisely why plaintiffs often seek a last-clear-chance instruction—to prevent the jury from assigning any contributory negligence to the plaintiff and to avoid the resulting reduction in the amount of recoverable damages under Georgia's comparative negligence statute.[26]

When a plaintiff seeks a last-clear-chance instruction and argues for the jury to apply the doctrine, the plaintiff is in

effect admitting his own contributory negligence. This is important because if the jury assigns no negligence to the plaintiff, and a reviewing court concludes a last-clear-chance instruction should not have been submitted, it is likely to conclude that submitting the instruction was harmful error. The analysis goes like this:

1. There was evidence plaintiff was contributorily negligent, as necessarily conceded by the plaintiff's request for a last-clear-chance instruction.
2. The jury assigned no contributory negligence to the plaintiff.
3. The last-clear-chance instruction told the jury it did not have to assign any contributory negligence to the plaintiff if the defendant had the last clear chance to avoid the accident.
4. It is possible that the instruction caused the jury to find no contributory negligence on the plaintiff's part.
5. Thus, the court is "unable to say" the instruction "could not have misled the jury."[27]
6. This means that if giving the Last-clear-chance instruction was error, the case must be retried.[28]
7. Giving a last-clear-chance instruction will be error when (i) the instruction misstates the law (as with the suggested pattern instruction), or (ii) the evidence does not support the giving of the instruction.[29] The evidence will not support submission of a last-clear-chance instruction unless there is some evidence of each of the following elements:
   - The plaintiff placed himself in danger

because of his own negligence;

- He was in a position of inescapable peril or was oblivious to his peril;
- The defendant actually knew of the plaintiff's peril or obliviousness; and
- The defendant had the opportunity to take action to avoid the injury to the plaintiff by the use of ordinary care and failed to do so.[30]

IV. Conclusion

Georgia should abolish the last-clear-chance doctrine. The doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar. It serves no useful purpose in jurisdictions, such as Georgia, which have enacted apportionment statutes.[31] Furthermore, the doctrine is confusing for jurors, the bench, and the bar. Until the doctrine is abolished, the suggested pattern jury instruction should be revised to include the essential element of the plaintiff's inability to escape the peril. And courts should be sure not to give a last-clear-chance instruction unless there is evidence both that the plaintiff's peril truly was inescapable and that the defendant had actual knowledge of the plaintiff's peril at a point when a reasonable person could act on that knowledge and, through the exercise of ordinary care, avoid injuring the plaintiff.

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[1] *See* O.C.G.A. § 51-11-7 ("If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases, the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.").

[2] Zettler v. City of Seattle, 279 P. 570, 572 (Wash. 1929).

[3] *See, e.g.*, Fouts v. Builders Transport, Inc., 222 Ga. App. 568, 474 S.E.2d 746 (1996); Ellis v. Dalton, 194 Ga. App. 114, 116, 389 S.E.2d 797, 799 (1989); Conner v. Magnum, 132 Ga. App. 100, 105, 207 S.E.2d 604, 609 (1974); Smith v. Mobley, 185 Ga. App. 462, 364 S.E.2d 597 (1987); Cent. of Ga. R. Co. v. Little, 126 Ga. App. 502, 191 S.E.2d 105 (1972); John J. Woodside Storage Co. v. Reese, 105 Ga. App. 602, 125 S.E.2d 556 (1962); Bayne v. Turner, 236 N.E.2d 503 (Ind. Ct. App. 1968); Brandelius v. City & County of San Francisco, 306 P.2d 432 (Cal. 1957); Graybill v. Clancy, 291 P. 87 (Okla. 1930); Vaughn v. Oates, 37 S.E.2d 479 (W. Va. 1946); Wilson v. Chesapeake & Ohio R. Co., 324 N.W.2d 552 (Mich. Ct. App. 1982); Simmers v. DePoy, 184 S.E.2d 776 (Va. 1971); Wilson v. Sereno, 461 P.2d 514 (Ariz. Ct. App. 1970); Stallings v. Dick, 210 N.E.2d 82 (Ind. Ct. App. 1965); Miller v. Atchison, T. & S.F. Ry. Co., 332 P.2d 756 (Cal. Ct. App. 1958); Nichols v. Spokane Sand & Gravel Co., 379 P.2d 1000 (Wash. 1963); Miles & Sons Trucking Serv. v. McMurtrey, 341 F.2d 9 (10th Cir. 1965); Brock v. Marlatt, 191 N.E. 703 (Ohio 1934); Hickambottom v. Cooper Transp. Co., 329 P.2d 609 (Cal. Ct. App. 1958); Thomas v. Boklage, 170 S.W.2d 348 (Ky. Ct. App. 1943); Cotterll v. Gehle, 114 N.E.2d 482 (Ohio Ct. App. 1951); Ratlief v. Yokum, 280 S.E.2d 584, 588 (W. Va. 1981); Schwandt v. Bates, 397 P.2d 244 (Idaho 1964); J.D. Ball Ford, Inc. v. Roitman, 206 So.2d 661 (Fla. Ct. App. 1968); Drinnon v. Smith, 503 S.W.2d 197 (Tenn. Ct. App. 1973); Rollman v. Morgan, 240 P.2d 1196 (Ariz. 1952); Cavitt v. Ferris, 269 F.2d 440 (5th Cir. 1959); Grossman v. Hudson Transit Corp., 96 N.Y.S.2d 674 (N.Y. App. Div. 1950); Kentucky & W. Va. Power Co. v. Lawson, 240 S.W.2d 843 (Ky. Ct. App. 1951); Graham v. Milsap, 290 P.2d 744 (Idaho 1955); Gordon v. Cozart, 110 So.2d 75 (Fla. Ct. App. 1959); Sherman v. William M. Ryan & Sons, 13 A.2d 134 (Conn. 1940); Cinncinati St. Ry. Co. v. Keehan, 186 N.E. 812 (Ohio Ct. App. 1932); Illinois Cent. R. Co. v. Pigott, 181 So.2d 144 (Miss. 1965); Capital Transit Co. v. Grimes, 164 F.2d 718 (D.C. Cir. 1947); Walker v. City of New York, 450 N.Y.S.2d 814 (1982); Box v. S. Ga. Ry. Co., 433 F.2d 89 (5th Cir. 1970).

[4] *See, e.g.*, French v. Grigsby, 571 S.W.2d 867, 867 (Tex. 1978); Hull v. Taylor, 644 N.E.2d 622, 624-25 (Ind. Ct. App. 1994); Bookhoven v. Klinker, 474 N.W.2d 553, 555-57 (Iowa 1991); Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Wendland v. Ridgefield Const. Servs., Inc., 462 A.2d 1043 (Conn. 1983); Callesen v. Grand Trunk W. R. Co., 437 N.W.2d 372, 377 (Mich. Ct. App. 1989); *see also* Spahn v. Town of Port Royal, 499 S.E.2d 205 (S.C. 1998) (holding doctrine has been subsumed by adoption of comparative negligence but jury may still be instructed on its elements) *but see* Vlach v. Wyman, 104 N.W.2d 817, 819 (S.D. 1960) ("Considered as a rule of proximate cause the common law doctrine of last clear chance is not incompatible or in conflict without our statutory rule of comparative negligence."); Jernigan v. Tart, 758 S.E.2d 481 (N.C. Ct. App. 2014) (holding that trial court erred in refusing to instruct jury on last-clear-chance doctrine).

[5] Malcom M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1251 (1940).

[6] HENRY WOODS & BETH DEERE, COMPARATIVE FAULT § 8.2 at 172 (3d ed. 1996).

[7] Gordon v. Cozart, 110 So.2d 75 (Fla. Ct. App. 1959).

[8] Matthew J. Moore, *Missouri, State of Confusion for Comparative Fault in Strict Liability Contexts*, 64 UMKC L. REV. 759, 764 (1996).

[9] Georgia Suggested Pattern Jury Instructions – Civil 60.210.

[10] *See, e.g.*, Clark v. Rush, 312 Ga. App. 333, 718 S.E.2d 555, 557 (2011) ("Today, we conclude that the pattern instruction on comparative negligence [§ 60.141] no longer is an accurate statement of the law."); Smith v. Finch, 285 Ga. 709, 710, 681 S.E.2d 147, 150-51 (2009) (holding that pattern instruction 62.311 was not a correct statement of Georgia law).

[11] *See, e.g.*, Smith v. Mobley, 185 Ga. App. 462, 463, 364 S.E.2d 597, 598 (1987); Townsend v. Wright, 220 Ga. App. 324, 469 S.E.2d 281 (1996*);* Nelson v. Hirsh, 1986 U.S. Dist. LEXIS 25990, at *1, *5 (S.D. Ga. 1986); *see also* Stallings v. Dick, 210 N.E.2d 82, 95 (Ind. Ct. App. 1965) (last-clear-chance instruction *must* include element of plaintiff's duty to extricate herself from position of peril); Haber v. Pac. Elec. Ry. Co., 248 P. 741 (Cal. Ct. App. 1926) ("The requested instruction omits entirely the ability of the plaintiffs to extricate themselves from the impending peril. . . ." * * * "[I]t will be readily

perceived that the requested instruction is deficient.").

[12] *Townsend*, 220 Ga. App. at 325, 469 S.E.2d at 282.

[13] Stallings v. Cuttino, 205 Ga. App. 581, 583, 422 S.E.2d 921, 923 (1992); Shuman v. Mashburn, 137 Ga. App. 231, 235-36, 223 S.E.2d 268, 271-72 (1976).

[14] *See* Lovett v. Sandersville R. Co., 72 Ga. App. 692, 696, 34 S.E.2d 664, 666 (1945).

[15] *Cf.* Stewart v. Capital Transit Co., 108 F.2d 1 (D.C. Cir. 1939) (Last-clear-chance instruction was defective because did not require that plaintiff's peril be either inescapable or that plaintiff was oblivious to danger).

[16] Palmer v. Stevens, 115 Ga. App. 398, 400, 154 S.E.2d 803, 807 (1967).

[17] Fouts v. Builders Transport, Inc., 222 Ga. App. 568, 571, 474 S.E.2d 746, 752-53 (1996).

[18] *Stallings*, 205 Ga. App. at 583, 422 S.E. 2d at 923-24; *see also* Shilliday v. Dunaway, 220 Ga. App. 406, 409, 469 S.E.2d 485, 488 (1996); Whitley v. Gwinnett County, 221 Ga. App. 18, 23-24, 470 S.E.2d 724, 730 (1996); Hickambottom v. Cooper Transp. Co., 329 P.2d 609, 613 (Cal. Ct. App. 1958).

[19] Rios v. Norsworthy, 266 Ga. App. 469, 472, 597 S.E.2d 421, 426 (2004); Grayson v. Yarbrough, 103 Ga. App. 243, 119 S.E.2d 41 (1961).

[20] *See* Conner v. Magnum, 132 Ga. App. 100, 105, 207 S.E.2d 604, 609 (1974); *see also* Nichols v. Spokane Sand & Gravel Co., 379 P.2d 1000, 1001-02 (Wash. 1963) (same); Schwandt v. Bates, 397 P.2d 244, 247 (Idaho 1964) (same); Rios v. Norsworthy, 266 Ga. App. 469, 472, 597 S.E.2d 421, 426 (2004) (last-clear-chance doctrine did not apply because there was no evidence that defendant had any opportunity to take evasive action after he became of aware of the impending collision); Bethel Apostolic Temple v. Wiggen, 200 So.2d 797, 798 (Fla. 1967) ("Instruction on the last clear chance should not be given unless the evidence clearly demonstrates its applicability."); Kuhn v. Dell, 404 P.2d 357, 362 (Idaho 1965) ("It is reversible error to instruct the jury on the doctrine of last clear chance where there is no substantial evidence to support the doctrine."); De Vore v. Faris, 199 P.2d 391, 396 (Cal. Ct. App. 1948) ("The giving of an instruction submitting an issue on the last-clear-chance doctrine, where there is not sufficient evidence to justify the submission, is reversible error.").

[21] *Conner*, 132 Ga. App. at 105, 207 S.E.2d at 609.

[22] *See* Alsup v. Henwood, 137 S.W.2d 586, 590 (Mo. Ct. App. 1940) (no evidence of obliviousness because "a pedestrian knows that a railroad track is of itself a warning of danger").

[23] *See* State ex rel. Thompson v. Shain, 159 S.W.2d 582, 586 (Mo. 1941).

[24] *See* Walker Hauling Co. v. Johnson, 110 Ga. App. 620, 625, 139 S.E.2d 496, 500 (1964) (last-clear-chance doctrine "does not apply against non-negligent plaintiffs."); Mealey v. Slaton Mach. Sales, Inc., 508 F.2d 87, 90 (5th Cir. 1975).

[25] *See generally* Malcom M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940) (last clear chance was designed to prevent assignment of any negligence to plaintiff); *see also* Johnson v. Brewer, 105 P.2d 365, 367 (Cal. Ct. App. 1940) (same); Ratlief v. Yokum, 280 S.E.2d 584, 588 (W. Va. 1981) (same).

[26] O.C.G.A. § 51-12-33.

[27] Dept. of Transp. v. Davison Inv. Co., 267 Ga. 568, 570, 481 S.E.2d 522, 525 (1997).

[28] *Davison, Inv. Co.*, 267 Ga. at 570, 481 S.E.2d at 525.

[29] Jury instructions must be "adjusted to the evidence, apt, and a correct statement of applicable law." Royalston v. Middlebrooks, 303 Ga. App. 887, 892, 696 S.E.2d 66, 71 (2010). If they are not, the error requires a new trial. *See* Boston Men's Health Ctr., Inc. v. Howard, 311 Ga. App. 217, 221, 715 S.E.2d 704, 707 (2011); *see also* Rather v. City & County of San Francisco, 184 P.2d 727, 730 (Cal. Ct. App. 1947) ("The giving of a last-clear-chance instruction in a case where there is not sufficient evidence to justify the submission of such issue is fatally prejudicial error.").

[30] *See generally* Jay M. Zitter, *Sufficiency of the evidence to raise last clear chance doctrine in*

cases of automobile collision with pedestrian or bicyclist—modern cases, 9 A.L.R.5th 826 (1993).

[31] Comment, *Contributory Negligence—Doctrine of Last Clear Chance Retained by Comparative Negligence Statute*, 52 HARV. L. REV. 1187, 1188 (1939).

THE "LEAVES" THEY ARE A CHANGIN'

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Currently, Federal law does not require employers to provide paid leave to their employers; it only directs employers to offer unpaid leave in certain circumstances as outlined in the Family and Medical Leave Act of 1993 (FMLA). In light of the discretion available to employers, it is estimated that only 13 percent offer paid family and medical leave to their employees.[1] Not only is FMLA leave unpaid, but it is limited in scope; covering only specific itemized reasons for leave. Thus, leaving both employees and employers in a bind in determining how to best handle this gap left by the FMLA.

With the ever-increasing demographic of millennials in the work-force, employers and politicians are seeing a quickly evolving transition to "work-life balance" and a demand for more realistic leave requirements. On the other side of the table, employers are demanding a cease fire on overly-regulated employment laws and arguments for new leave requirements that could put an already stretched business into financial crisis. The trend however, is leaning towards the millennials. State and local governments around the country, including Georgia, have begun enacting laws to bridge this gap left by the FMLA. In

addition, President Trump has presented Congress with a paid leave proposal and Congressional Democrats have introduced a bill to implement paid leave nationwide.

I. The Family and Medical Leave Act

The FMLA entitles eligible employees of covered employers up to twelve work weeks of unpaid, job protected leave for specified reasons related to family, medical, and military caregiver provisions.[2] The purpose of this leave, according to the United States Department of Labor, is to allow employees "to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons."[3]

Leave under the FMLA is only available to employees who work for employers with more than 50 employees, and employees who have been with the company for more than 12 months and amassed over 1,250 hours in the 12 months prior to the leave.[4] FMLA leave may be taken, among other reasons, when an employee needs to attend to the serious health condition for themselves, a parent, spouse, child, or injured service member in the family, or for pregnancy or care of a newborn.[5]

While leave under the FMLA provides an employee with job-protection for certain health conditions that they or their family members might face, it is limited to situations where there is an overnight stay in the hospital, more than three consecutive days of medical treatment, chronic conditions, or pregnancy.[6] This leaves employees without job protection for absences related to minor illnesses or conditions that require the use of more than 12 weeks of leave.

Typically, there are few ways that someone on FMLA leave can generate income. Most employers require that any available paid leave (PTO) run concurrently

with FMLA leave. So, if an employee has paid leave available, it will be compensated for that time, but the available PTO will not usually cover the duration of FMLA leave. Employees may also have short-term disability (STD) insurance available to use for at least partial income replacement during FMLA leave. However, STD typically does not cover an employee's full salary and may not cover the entire 12 weeks of FMLA leave (and obviously it is only available if the leave is for the employee's own health condition—not a family member's). However, if these options are not available to an employee or if these options are not sustainable for the employee, it is less likely that the employee would take advantage of the benefits available under FMLA.

II. The White House and Congress' Position on Family Leave

One of President Donald Trump's campaign promises in the 2016 Presidential election was to bring paid maternity leave to all mothers in the United States.[7] President Trump's daughter, Ivanka Trump, has been a strong influencer for these policy changes since his election.[8]

When President Trump submitted his first budget proposal to Congress in May of 2017, it included funding of a new program that would provide all mothers and fathers with six weeks of paid time off after the birth or adoption of a child. [9] This proposal was broader than the one promised during his campaign since it also included leave for fathers and adoptive parents. [10]

Trump suggested that the funding should be provided through state unemployment insurance. [11] However, he left the specifics of administration of the program in the hands of the states. [12] When determining the 2018 budget, Congress did

not incorporate Trump's paid leave proposal into it.

President and Ivanka Trump have not given up on the ideal of a federal mandate for paid leave. Ivanka Trump has teamed up with Republican Senator, Marco Rubio to put together a plan for paid family leave.[13] This plan would involve families pulling from their Social Security retirement benefits and delaying their benefits once they retire. [14] Concerns with this type of program include the already underfunded Social Security program would be drained at a faster rate. [15] On the other hand, it would allow employees to take advantage of paid leave with money already earned through the Social Security System without costing the taxpayers any additional money. [16]

In addition to changes through the budget, Democratic Representatives and Senators have introduced the Family and Medical Insurance Leave Act (the "FAMILY" Act). [17] This Act would allow employees to create a fund with a portion of their wages to use in a way that is similar to FMLA Leave, with the exception that eligibility requirements are different. [18] This proposed system is built to mirror the programs already in place in California, New Jersey, and Rhode Island. [19] It is unlikely that this Act will make much progress through the Republican controlled Congress.

III. The States Step In

In light of the limitations posed by the FMLA and the lack of action by the Federal government on this issue, many state legislators have introduced new laws to assist employees by mandating that employers offer sick leave – either paid or unpaid.

States like Hawaii,[20] Maine,[21] and Minnesota[22] have enacted laws that are similar to the FMLA but either offer employees more leave, different coverage requirements (number of employees), or

allow for different reasons for leave. Maine's family and medical leave law, for example, covers employers with 15 or more employees and provides employees with ten weeks of unpaid family leave over the course of two years for their own or a family member's serious health conditions, birth or adoption of a child, organ donation, or death of a family member while on active duty in the armed forces.[23] Oregon's law extends the covered reasons for leave to caring for a child who is suffering from an illness, injury, or condition that is not a serious health condition, but requires home care.[24]

Massachusetts, on the other hand, takes a different approach with its "Small Necessities Leave Act," which allows employees to take up to 24 hours per year to participate in children's educational activities or accompany a child, spouse, or elderly relative to medical appointments.[25] Other states like California,[26] Illinois,[27] Louisiana,[28] Minnesota,[29] Nevada,[30] North Carolina,[31] Rhode Island,[32] Vermont,[33] and the District of Columbia[34] require similar paid leave for school-related parental leave.

Back in 2011, Connecticut started this trend when it became the first state to require private employers to provide sick leave to its employees.[35] Shortly thereafter, many states began passing laws that required employers to provide sick or family leave to their employees. California,[36] Rhode Island,[37] New Jersey,[38] and recently added New York[39] have taken similar approaches to funding and administering their paid family leave programs. The paid leave programs are administered under the state disability programs and funded by employee-paid payroll taxes.[40]

As for paid sick leave, nine states– Arizona,[41] California,[42] Connecticut,[43] Maryland,[44] Massachusetts,[45] Rhode Island,[46] Vermont,[47] and Washington[48] – and the District of Columbia[49] now have some form of paid sick leave. Like the

family leave laws, these laws differ significantly in both coverage and reasons for leave. For instance, Arizona's paid sick leave law applies to all private employers and requires that employers provide employees with sick leave to use for themselves or for family members to seek medical treatment, preventative medical care, or when they or their family member's communicable disease may jeopardize the community's health.[50] Likewise in Maryland, all employees must provide sick leave to their employees, but if the employer has over fifteen employees, the leave must be paid.[51] Most, if not all, of these laws contain a retaliation provision that prevents employers from taking any adverse action against an employee for utilizing this paid leave.

Lastly, some states, including Georgia, have mandated that employers who provide employees with sick leave (paid or unpaid), must allow those employees to use those benefits for a family member's illness, injury, or medical appointment. [52]

IV. What About the Cities and Municipalities?

Municipalities have also begun to pass laws requiring employers to provide paid leave to their employees.

Most recently, Austin, Texas, which is one of the fastest growing cities in America, passed a sick leave ordinance.[53] This ordinance requires all employers to provide their employees with at least one hour of sick time for every 30 hours worked, with a cap of either 48 or 64 hours depending on the number of employees with the company.[54] Currently, Austin is the only city in this predominantly "red" state to pass a local ordinance concerning leave.

Portland, Oregon, very much a "blue state," expanded on Oregon's paid leave law to include employers not covered by Oregon's state law. That is, coverage for employers who have between six and ten

employees since the state law covers all employers with more than ten.[55] Other cities across the country have done the same, including multiple cities in California,[56] Illinois,[57] Minnesota,[58] New Jersey,[59] Pennsylvania,[60] and Washington.[61]

The shift of local governments becoming involved in the policy making for employers is important and has strong implications. In the past, employers have not had to worry about differing laws if they were only operating in one state, but with local ordinances in place, employers must be acutely aware of each of their locations and the differing standards that must be applied in each. As such, States have taken a strong stance against cities creating their own policies that differ from the states and could make it more difficult or less appealing for businesses to locate there. States have done this by passing laws that prohibit cities from enacting laws that are more stringent than the state or federal law on the subject. Georgia's mandate specifically states that a local government may not establish an employee benefit requirement for private employers.[62] Likewise, employers will find similar laws concerning the restrictions on local governments in Alabama,[63] Arkansas,[64] Florida,[65] Indiana,[66] Iowa,[67] Kansas,[68] Kentucky,[69] Louisiana,[70] Michigan,[71] Mississippi,[72] Missouri,[73] North Carolina,[74] Oklahoma,[75] Rhode Island,[76] South Carolina,[77] Tennessee,[78] and Wisconsin.[79]

V. Georgia's Attempt At A Sick Leave Law

Last year, Georgia joined the trend when state legislators passed SB 201, which requires employers to provide sick leave to employees.[80] However, the Georgia law comes with a number of significant limitations. Most importantly, the law appears to provide no means of enforcement against an employer who violates it. [81]

Georgia's SB 201 requires certain employers to allow employees to use sick leave to care for immediate family members (defined as an employee's child, spouse, grandchild, grandparent, parent, or any dependents as shown on the employee's most recent tax return). [82] This law went into effect on July 1, 2017.[83] The law applies to employers (1) with 25 or more employees, (2) who do not provide an "employee stock ownership plan," and (3) who already offer or have paid sick leave policies.[84] Employees must work at least 30 hours a week to be eligible for leave under SB 201. [85] The law does not apply to short-term disability or long-term disability benefits.[86] The maximum sick leave that employers must allow employees to use for immediate family members is five days per calendar year. [87]

The law specifically provides that "nothing in this code section shall be construed to create a new cause of action against an employer." [88] In other words, not only does it appear that employees do not have the right to file lawsuits against employers who violate the law, but there is also no apparent provision for administrative enforcement.

So, what does SB 201 really mean for employers with operations in Georgia? Nothing, if they do not provide paid sick leave at all. However, if employers have separate paid leave banks (as opposed to "PTO"), then a minimum of five days (per calendar year) of the "sick leave" bank must be extended to include paid leave for the care of immediate family members (i.e., do away with your personal doctor's note requirement for returning from sick leave—at least five days a year). If employers have a general "PTO" policy, then the reason for leave generally doesn't come into play anyway.

Despite the fact that the law provides no apparent means for enforcement, covered

employers should attempt to comply with it. It is not entirely clear that administrative enforcement will be impossible, or that the plaintiffs' bar will not find some creative way around the express lack of a private right of action.

VI. Conclusion

As the youngest millennials enter the workforce and the oldest take management roles, employers will need to reevaluate some of their practices and procedures in the workplace. Millennials' priorities and expectations from their employer differ from those of past generations. Work-life balance is very important to millennials, which may mean that employers need to increase their workplace flexibility (schedule and location) and alter their leave policies.

If employers are reevaluating and changing policies with the evolving workplace, this would be an ideal time to conduct a legal review of all policies. This is to ensure that all of the employment policies are in line with the new legal requirements and also to stay current with the trends.

This is especially important with leave policies with all of the changes discussed above and the fact that leave is such an important benefit available to employees. Employers should provide a detailed leave policy that allows for consistent administration for all employees. However, the policy should not be too detailed as to create a contractual obligation for leave.

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[1] Drew Desilver, *Access to Paid Family Leave Varies Widely in U.S.*, PEW RESEARCH CENTER (March 23, 2017), http://www.pewresearch.org/fact-tank/2017/03/23/access-to-paid-family-leave-varies-widely-across-employers-industries/.
[2] 29 U.S.C. §§ 2611-12
[3] 29 C.F.R. § 825.101(a).
[4] 29 C.F.R. § 825.110
[5] 29 C.F.R. § 825.112
[6] *Id.*
[7] Seth McLaughlin, *Trump Reaches Out To Women, Suburbanites With Promises Of Child Care, Paid Family Leave*, THE WASHINGTON TIMES (September 13, 2016), https://www.washingtontimes.com/news/2016/sep/13/trump-plans-push-six-weeks-paid-parental-leave/.
[8] *Id.*
[9] Lorie Konish, Trump's Budget Calls For Six Weeks' Paid Family Leave, CNBC (February 12, 2018), https://www.cnn.com/2017/05/22/politics/trump-paid-leave-ivanka/index.html.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Seung Min Kim, *Ivanka, Rubio Find A New Project: Paid Family Leave*, POLITICO (February 4, 2018), https://www.politico.com/story/2018/02/04/rubio-ivanka-trump-family-leave-385050
[14] *Id.*

[15] *Id.*
[16] *Id.*
[17] S. 337, 115th Congress (2017).
[18] *The Family And Medical Insurance Leave (FAMILY) Act Fact Sheet*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES (September 2017) http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf.
[19] Id.
[20] *See* Haw. Rev. Stat. §§ 398-1 – 398-29 (2017).
[21] *See* Me. Rev. Stat. Ann. tit. 26, §§ 843 – 849 (2017).
[22] *See* Minn. Stat. §§ 181.940 - 181.944 (2017).
[23] Me. Rev. Stat. Ann. tit. 26, §§ 843 – 849 (2017).
[24] Or. Rev. Stat. §§ 659A.150 – 156 (2017).
[25] M.G.L.A. 149 § 52D
[26] Cal. Educ. Code §§ 48900 – 48900.1.
[27] 820 Ill. Comp. Stat. 147/1 - 147/49 (2017).
[28] La. Rev. Stat. Ann. §§ 23:1015.2 (2017).
[29] Minn. Stat. §§ 181.9412 (2017).
[30] Nev. Rev. Stat. §§ 392.920 (2017).
[31] N.C. Gen. Stat. § 95-29.3 (2017).
[32] R.I. Gen. Laws § 28-48-12 (2017) (*effective July 1, 2018).*
[33] Vt. Stat. Ann. tit. 21 §§ 472a to 474 (2017).
[34] D.C. Code Ann. § 32-1202 (2017).
[35] Conn. Gen. Stat. § 31-57r (2017).
[36] Cal Gov't Code § 12945.2 (2017).
[37] R.I. Gen. Laws §§ 28-57-1 – 15 (2017).
[38] N.J. Stat. Ann. § 34:11B-3 (2017).
[39] N.Y. Workers' Comp. Law §§ 204 (2017).
[40] *See supra* notes 36-39.
[41] Ariz. Rev. Stat. § 23-373 (2017).
[42] Cal. Lab. Code §§ 19, 20, 21, 59, 79, 245 to 249, 2810.5 (2017).
[43] Conn. Gen. Stat. § 31-57r (2017).
[44] Md. Code. Ann., Lab. & Empl. §§ 3-1301, 3-802 (2017).
[45] Mass. Gen Laws ch. 149 § 148C (2017).
[46] R.I. Gen Laws §§ 28-57-1 – 15 (2017).
[47] 21 V.S.A. §§ 481 – 487 (2017).
[48] Wash. Rev. Code § 49.46.210 (2017).
[49] D.C. Code Ann. § 32-131.02 (2017).
[50] Ariz. Rev. Stat § 23-373 (2017)
[51] Md. Code Ann., Lab. & Empl. §§3-1301, 3-802 (2017).
[52] This includes Hawaii (Haw. Rev. Stat. §§ 398-1, 398-4), Illinois (820 Ill. Comp. Stat. 191/5 to 191/25), Maine (Me. Rev. Stat. Ann tit. 26 §636), Georgia (O.C.G.A. §34-1-10), and Minnesota (Minn. Stat. §181.940).
[53] Austin, Tex., Ordinance No. 20180215-049 (2017).
[54] *Id.*
[55] Portland, Or., Code of the City of Portland §9.01.020 (2017).
[56] Cities include Berkeley, Cupertino, El Cerrito, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica.
[57] Including Chicago and Cook County.
[58] Including Minneapolis and St. Paul.
[59] Including Bloomfield, East Orange, Elizabeth, Irvington, Jersey City, Montclair, Morristown, New Brunswick. Newark, Passaic, Paterson, Plainfield, and Trenton.
[60] Including Philadelphia and Pittsburgh.
[61] Including SeaTac, Seattle, and Tacoma.
[62] O.C.G.A § 34-4-3.1 (2017).
[63]Ala. Code § 25-7-45 (2017).
[64] Ark. Code Ann. § 11-4-221 (2017).
[65] Fla. Stat. § 218.077 (2017).
[66] Ind. Code § 22-2-16-3 (2017).
[67] Iowa Code § 331.301 (2017).
[68] Kan. Stat Ann. §§ 12-16, 130 (2017).
[69] 2017 Ky. Acts H.B. 3.
[70] La. Rev. Stat. §23:642 (2017).
[71] Mich. Comp. Laws §123.1388 (2017).
[72] Miss. Code. Ann. §17-1-51 (2017).
[73] Mo. Rev. Stat. §290.528 (2017).
[74] N.C. Gen. Stat. §143-760 (2017).
[75] Okla. Stat. tit. 40 §160 (2017).
[76] R.I. Gen. Laws § 28-57-8 (2017).
[77] S.C. Code Ann. § 41-1-25 (2017).
[78] Tenn. Code Ann. §7-51-1802 (2017).
[79] Wis. Stat. §§ 103.10 to 103.11 (2017).
[80] O.C.G.A. §34-1-10 (2017).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

MULTI-PERIL REAL PROPERTY LOSSES, CAUSATION DOCTRINES, & ANTI-CONCURRENT CAUSE PROVISIONS: WHICH WAY WILL THE WIND BLOW IN GEORGIA, THE GULF STATES AND CALIFORNIA?

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I. INTRODUCTION

Last year, the United States experienced a historic year for weather and climate events with the majority of the catastrophic events occurring in the Gulf States and California. Hurricanes Harvey, Irma, and Maria, and the Western Wildfires accounted for just a few of the 219 separate disasters that occurred in 2017, causing damage costing, in aggregate, over $1.5 trillion.[1] In addition to exorbitant costs, catastrophic storms often lead to complex insurance coverage issues. One of the frequent legal questions at the center of claims arising out of a catastrophic weather event is how coverage is impacted when a loss is caused by multiple perils, and the relevant insurance policy may cover one (or more) of the causes of the loss, but exclude another. For example, an issue may arise when a hurricane destroys a home, and the total loss was caused by wind, rain, hail, and flooding, i.e., multiple perils. If the homeowner's insurance policy covers wind, rain, and hail, but excludes flood waters, is the loss covered?

Courts across the country disagree about property insurers' liability for losses attributable to both covered and excluded risks. The majority of jurisdictions, including Georgia, have adopted the Efficient Proximate Cause Doctrine to resolve multi-peril causation questions.[2] The Efficient Cause Doctrine holds that the efficient cause that sets other causes in motion is the cause to which the loss is attributable.[3] If the efficient cause is covered by the insurance policy, then coverage exists, even if excluded causes contributed to the total loss.[4]

Some states, including Florida and Texas where a high number of real property losses occur, follow the Concurrent Cause Doctrine. A minority of states take this policyholder-friendly position, which allows coverage if at least one of the multiple causes of a loss is covered by the policy, even if another concurrent cause is excluded.[5]

Insurance companies have attempted to contract around the confusion that arises out of multi-cause losses by including an "anti-concurrent cause" (ACC) provision. The variation in common law doctrines between jurisdictions has resulted in contradictory interpretations of identical contractual provisions related to the concurrent cause issue. While some states have declined to interfere with contractual decisions made by carriers and their insureds (by adding an ACC provision), others have gone as far as banning ACCs by statute. With the incidence of natural disasters on the rise,[6] we can expect to see ACC clauses appear more frequently in property insurance policies.

II. THE EFFICIENT PROXIMATE CAUSE DOCTRINE

The Efficient Proximate Cause Doctrine is derived from common law negligence.[7] It holds that, when multiple intervening causes culminate in damage, the

"efficient" cause for the purpose of assigning liability is "the one that necessarily sets the other causes into operation."[8] When examining an insurance loss after-the-fact, it may be difficult to tell the exact sequence of events or degree of damage each cause contributed. Nonetheless, whether a covered or excluded cause is the efficient proximate cause is a question for the finder of fact, usually the jury, to determine.[9]

A. Georgia

In Georgia, the concept of the "efficient cause" as the measure of proximate cause where there are multiple concurrent causes can be traced back to the beginning of the 20th century.[10] A 2003 Northern District of Georgia case demonstrates how the Efficient Proximate Cause Doctrine functions today in the context of coverage disputes.[11] In *Burgess v. Allstate Insurance Co.*, [12] the plaintiff was insured under a homeowner's insurance policy which specifically excluded mold coverage. The insured property suffered water damage from various sources, including a leak from her roof, the repair for which she decided to pay out of pocket. She called her insurance company a few months later when she became concerned about the possibility of mold formation. The adjuster concluded that, while the water damage resulting from the leak from the roof was a covered loss, the water damage from other sources and the mold were explicitly excluded from the policy. Based on the adjuster's assessment of the damage, the insurance company denied coverage for her claim.

The homeowner sued the insurance company, claiming that it owed coverage since the evidence suggested that the covered risk contributed to the overall loss. Upon review of the insurer's motion for summary judgment based on the policy exclusions, the court confirmed that Georgia

employed the Efficient Proximate Cause Doctrine, which is applicable where "a risk specifically insured against sets other causes in motion in an unbroken sequence between the insured risk and the ultimate loss."[13] The court suggested that, because the adjuster terminated her investigation of the property after identifying the presence of mold, she left questions about the extent of the covered water damage, and whether the water damage could have exacerbated or contributed to the development of the mold, resulting in more damage.[14] The Court determined that the plaintiff homeowner produced enough evidence for a jury to consider whether the covered water damage was "the efficient proximate cause of the Plaintiff's loss even though the mold, an excluded event, contributed to the loss as well."[15]

In a recent federal district case construing Georgia law, a manufacturer of batteries allowed sulfuric acid mist to circulate around the warehouse it leased, causing structural damage to the building.[16] The manufacturer's insurer argued that the "direct" causes of the property damage were excluded risks - general wear-and-tear, gradual deterioration, and corrosion.[17] The court, however, held that, where damage could be linked to a covered risk, i.e. pollution, the damage would still be covered even if the loss could also fall under excluded categories of wear-and-tear, corrosion, or gradual deterioration. The fact that the loss may have also been attributable to excluded risks did not affect the fact that the sulfuric acid, covered as pollution, was the efficient proximate cause.[18]

B. Alabama

Alabama common law began with a very literal adoption of the Efficient Proximate Cause Doctrine. In Alabama's seminal case *West Assurance Company v. Hann*,[19] the wall of a warehouse collapsed onto a neighboring shoe store five months

after the warehouse suffered a fire. The court analyzed proximate cause stating: "The active efficient cause that sets in motion a chain of events which brings about a result without the intervention of any force started, and working actively from a new and independent source, is the direct and proximate cause …."[20] The Court explained further that: "The proximate cause is not always nor generally the act or omission nearest in time or place to the effect it produces. … In the sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the moving cause, and yet subordinate to and often themselves influenced, if not produced, by it."[21] This case demonstrates the Efficient Proximate Cause Doctrine at its greatest reach.

C. Louisiana, Mississippi, and California

The Efficient Proximate Cause Doctrine has been put to the test in the Gulf States that are seeing damage from the hurricanes, such as Louisiana[22] and Mississippi.[23] In fact, Louisiana has taken a particularly protective role for insureds in multi-peril cases. Where an insured can show some evidence that wind caused the damage, Louisiana courts have justified coverage because there are rarely witnesses present in the worst of a storm. [24]

Louisiana,[25] Mississippi,[26] and California[27] have modernized the Efficient Proximate Cause Doctrine holding that, in order for the loss to be covered, the covered cause must not only be the efficient cause, but also the **dominant** cause. In other words, for a loss to be covered, the insured peril does not have to be the first or initial cause in the chain, but rather the "predominating" cause. In recent years, we are seeing a trend that states following the Efficient Proximate Cause doctrine are looking to the dominant or predominant cause of the loss.

III. CONCURRENT CAUSE DOCTRINE

The Concurrent Cause Doctrine allows for insurance coverage when two or more perils contribute to a loss as long as at least one of the causes arose out of an insured risk, regardless of whether another cause is excluded.[28]

A. Florida

The Florida Supreme Court confirmed that Florida follows the Concurrent Cause Doctrine in the case *Sebo v. American Home Assurance Co.*[29] There, Mr. Sebo, the policyholder, insured his Naples, Florida, home under an "all risk" policy, which included water damage but excluded faulty construction. The home experienced major leaks during rainstorms as a result of faulty construction and subsequently sustained further damage after a hurricane. The insurer denied most of the Mr. Sebo's water loss claims, taking the position that the proximate cause was the excluded faulty construction.[30] Mr. Sebo brought a declaratory judgment action and prevailed at the trial level.[31]

On appeal, the Second District Court of Appeal of Florida elected to apply the Efficient Proximate Cause Doctrine, reasoning, in part, that "a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy."[32] The Supreme Court, however, rejected the intermediate court's conclusion upon its review of the case. The Supreme Court held that there was "no reasonable way to distinguish the proximate cause - the rain and construction defects acted in concert to create the destruction of Mr. Sebo's home."[33] Thus, the loss should be covered so long as one cause was a covered peril. On this basis, the Florida Supreme Court reinvigorated the Concurrent Cause Doctrine. Most recently, the 4th District

reaffirmed that Florida courts should apply the Concurrent Cause Doctrine.[34]

B. Texas

Texas applies a more restrictive variation of the Concurrent Cause Doctrine that places the burden on the policyholder to segregate loss attributable to insured causes in order to receive any coverage.[35] Where property damage results from covered and non-covered concurrent causes, the insured may only recover for the portion of the loss caused by the covered peril.[36] In coverage cases, the insured must prove the damages attributed solely to the covered cause.[37]

A 2008 Texas Court of Appeals case, *All Saints Catholic Church v. United National Insurance Co.*,[38] provides an example of just how limiting Texas's version of this doctrine can be. In that case, a church filed a claim with this commercial insurance carrier for roof damage following a hail storm.[39] The insurer paid only the amount necessary to repair roof tiles damaged by hail (a covered peril), even though it was determined that the entire roof needed to be repaired due to the age and condition of the roof after normal wear-and-tear (an excluded risk).[40] The Court of Appeals endorsed the insurer's position upon review of the church's suit to receive replacement coverage. Since the necessity to replace the roof was indisputably tied to the wear-and-tear, the court did not allow for a windfall for the insured merely because "the hailstorm brought [the tiles'] condition to the forefront."[41] This case, where the covered and uncovered losses could be logically divided, does not, however, forecast what a Texas court would do in the face of a more complex loss from a major storm of the magnitude that the state has experienced in recent years.

Upon comparison, the Concurrent Cause Doctrine in Texas looks like an entirely different animal than that of Florida. While Florida courts appear more generous

to insureds in their willingness to find coverage where *some* covered peril is present, Texas courts will view the particulars with a more scrutinizing eye. That the vastly different methods of analyzing a multiple-peril losses share the same name adds to the already confusing landscape of causation theories in insurance law.

IV. ANTI-CONCURRENT CAUSE CLAUSES

To address issues related to the varying interpretations of policy coverage when there are concurrent causes, insurance companies sometimes include an "anti-concurrent cause" provision in a policy. An ACC provision can help clarify an insurance company's intent to extend exclusion provisions to circumstances where a loss results from concurrent causes.[42]

Georgia's Supreme Court has not directly spoken to the enforceability of ACC clauses. The inconsistency with which other proximate cause jurisdictions have interpreted ACC provisions gives little insight for the purposes of prediction.

The approaches taken by efficient proximate cause jurisdictions in ACC cases can be grouped into three categories. The first, followed by California, is that the Efficient Proximate Cause Doctrine in the context of insurance coverage for concurrent causes represents a concept worthy of statutory protection.[43] The second relies heavily on contractual principles and will enforce a sufficiently unambiguous ACC policy.[44] The third balances the principles underlying the Efficient Proximate Cause Doctrine with contractual freedom by enforcing the provisions narrowly.[45]

California, which follows the Efficient Proximate Cause Doctrine, has by statute, specifically prohibited ACCs as a way for insurance companies to get out from under the Efficient Proximate Cause Doctrine.[46] The reasoning is that, given the

frequency of losses resulting from concurrent causes, it would be unfair to allow insurance companies to avoid liability every time an excluded cause and covered cause contribute to the same loss.[47]

In contrast, Alabama has determined that the Efficient Proximate Cause Doctrine does not take priority over an unambiguous contractual term.[48] In *State Farm Fire & Casualty Co. v. Slade*,[49] the Supreme Court of Alabama interpreted a homeowner's policy that covered losses caused by lighting but excluded earth movement. The policy included an ACC that read, in relevant part:

"We do not insure under any coverage for any loss which would not have occurred in the absence of … excluded events ... regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether the causes acted concurrently or in sequence with the excluded event to produce the loss; or (d) (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as the result of any combination of these."[50]

In *Slade*, the policyholders sued State Farm for breach of contract and bad-faith for failing to cover a property loss which they contended was caused by lightning.[51] State Farm contended its denial was based on its finding that one of the causes of the loss was earth movement, an excluded risk, and that the ACC provision precluded coverage, no matter what other causes may have contributed to the loss.[52]

On appeal, the court addressed State Farm's argument that the trial court should not have allowed the jury to find for the policyholder under the theory that lightning caused the earth movement that damaged the home, and therefore, under the Efficient Proximate Cause Doctrine, resulted in a covered loss. The court disagreed, because the efficient proximate was not a matter of

public policy that would usurp the clearly contracted ACC provision.[53] Ultimately, the court concluded that the ACC was enforceable because it unambiguously precluded coverage when earth movement was a contributing cause of the loss.[54]

The Supreme Court of Mississippi takes the third approach, a more stringent examination of ACC provisions with the overarching purpose of insurance coverage in mind. In *Corban v. United States Services Automobile Association*, [55] the court was tasked with interpreting an ACC provision in an all-risk policy insuring a home that suffered a wind and storm surge water loss in the wake of Hurricane Katrina. The policy excluded water damage, and the ACC portion read as follows: "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."[56] The court determined that only when the evidence shows that the covered and excluded causes "converged, operating in conjunction to cause loss, that the 'concurrent' provision will apply."[57] With respect to the "in any sequence" piece, the court determined that such language would "divest an insured's right of indemnity for a covered loss."[58] The court reasoned that a loss attaches at the time a covered event damages the policyholder's property. As such, the insurance company's obligation to indemnify for the covered loss is not eliminated by an excluded loss that occurs later.[59] Concluding that the ACC, as written, only applied if wind and storm surge were concurrent causes, the court remanded the case to the trial court to allow the insured to prove that wind was the "direct" cause of the loss.[60]

Although Florida has not yet ruled on the enforceability of ACC clauses, in *Sebo*, the Court seemed to encourage the use of an ACC provision.[61] In rebuttal to the

Second District Court's reasoning that applying the Concurrent Cause Doctrine would render the all-risk policy exclusions ineffective, the Florida Supreme court noted that the insurer "explicitly wrote other sections of Sebo's policy to avoid applying the [Concurrent Cause Doctrine]." It stated: "Because [the insurer] did not explicitly avoid applying the [Concurrent Cause Doctrine], we find that the plain language of the policy does not preclude recovery in this case."[62] This language seems to indicate that, if an ACC provision had been included, then it would have been enforced and there would not have been coverage.

Texas also permits an insurer to protect the use of an ACC provision.[63] In a fairly recent Texas Supreme Court case, the court specifically held that ACC clauses are enforceable. The Court stated: "[U]nder Texas law, the anti-concurrent causation clause and the exclusion for losses caused by flood, read together, exclude from coverage any damage caused by a combination of wind and water.[64] Underscoring the primacy of policy interpretation in its analysis, the court repeated its driving opinion throughout the opinion: "we look first to 'the language of the policy because we presume parties intend what the words of their contract say.'"[65]

Whether a Georgia court would be likely to enforce an ACC may depend, to some extent, on the provision itself. Like most around the country, Georgia courts tend to uphold policies unless the terms are in direct contravention with law or policy.[66] Contract principles may justify a court to enforce an unambiguously, specifically drafted, ACC from which the policyholder could reasonably understand that the presence of the excluded cause precludes coverage regardless of the role that a covered cause played.[67] However, an ACC so expansive that it operates "to exclude

virtually all risk of loss or that fails to provide protection from loss would cease to be a contract of insurance or warranty."[68] Thus, a more specific provision, like the one examined in *Slade* may be enforceable whereas a less defined ACC, similar to the one in *Corban*, may gain less traction.[69]

[1]Adam B. Smith, *2017 U.S. billion-dollar weather and climate disasters: a historic year in context*, NATIONAL CENTERS FOR ENVIRONMENTAL INFORMATION, https://www.climate.gov/news-features/blogs/ beyond-data/2017-us-billion-dollar-weather-and-climate-disasters-historic-year.

[2] Currently, at least 29 other states use the Efficient Proximate Cause Doctrine: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Washington, D.C., Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, M, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia and Wyoming.

[3] *See, e.g.*, Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 404, 770 P.2d 704, 709 (1989).

[4] This article contemplates situations where the multiple causes are related and/or flow from the same event. Distinguishable are situations where a loss, in whole or in part, can be attributed to an independent, intervening cause. *See, e.g.*, Lorio v. Aetna Ins. Co., 232 So.2d 490, 494 (La. 1970). Also not discussed is the concept of "ensuing loss," where an excluded risk causes the loss, and a subsequent loss flowing out of the initial, excluded cause is attributable to a covered cause. *See, e.g.*, Henderson v. Ga. Farm Bureau Mut. Ins. Co., 328 Ga. App. 396 (2014).

[5] Florida, Kentucky, Minnesota, North Carolina, Pennsylvania, Texas, and Wisconsin.

[6] *Weather-related disasters are increasing*, The Economist, Aug. 29, 2017, https://www.economist.com/blogs/graphicdetail/2017/08/daily-chart-19.

[7] *See* Dunbar v. Davis, 32 Ga. App. 192, 193-94 (1924).

[8] *See* Savannah Electric Co. v. Wheeler, 128 Ga. 550, 562 (1907) (quoting Ins. Co. v. Boon, 95 U.S. 117 (1877)).

[9] *See* Stephens v. Cotton States Mut. Ins. Co., 104 Ga. App. 431, 432-33 (1961).

[10] Savannah Electric Co. v. Wheeler, 128 Ga. 550 (1907).

[11] Burgess v. Allstate Ins. Co., 334 F. Supp. 2d 1351, 1360 (N.D. Ga. 2003).

[12] *Id.* at 1357–58.

[13] *Id.* at 1363–64.

[14] *Id.* at 1363.

[15] *Id.* at 1361.

[16] Ace Am. Ins. Co. v. Exide Tech., Inc., No. 1:16cv1600 (MHC), at *3 (N.D. Ga. Sept. 19, 2017).

[17] *Id.* at 24.

[18] *Id.* at 25.

[19] 201 Ala. 376, 378, 78 So. 232, 234 (1917).

[20] *Id.* at 379.

[21] *Id.*

[22] *See* Landry v. Louisiana Citizens Prop. Ins. Co., 2007-247 (La. App. 3 Cir. 8/28/07), 964 So. 2d 463, 466, *vacated in part on other grounds*, 983 So.2d 66 (La. 2008).

[23] Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 694 (S.D. Miss. 2006).

[24] *Landry*, 964 So. 2d at 478.

[25] *See, e.g.*, Roach-Strayhan-Holland Post, et al. v. Cont'l Ins. Co. of N.Y., 237 La. 973, 979, 112 So.2d 680, 682 (1959) (causes, wind (covered) and improper construction; trial court noted, "a building can be insured when it is improperly constructed"); *Lorio*, 232 So. 2d at 493.

[26] Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 431 (5th Cir. 2007) ("The default causation rule in Mississippi regarding damages caused concurrently by a covered and an excluded peril under an insurance policy is that the insured may recover if the covered peril was the 'dominant and efficient cause' of the loss." (citing Evana Plantation, Inc. v. Yorkshire Ins. Co., 214 Miss. 321, 325, 58 So.2d 797, 798 (1952))).

[27] *Garvey*, *supra* note 3, 48 Cal. 3d at 404.

[28] Sebo v. Am. Home Ins. Co., 208 So. 3d 694, 698 (Fla. 2016).

[29] 208 So. 3d 694.

[30] *Id.* at 696.

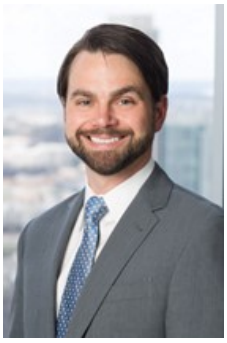
[31] *Id.*

[32] Sebo v. Am. Home Assur. Co., Inc., 141 So. 3d 195, 201 (Fla. Dist. Ct. App. 2013).

[33] *Sebo*, 208 So. 3d at 700.
[34] *See* Jones and Kiernan v. Federated Nat'l Ins. Co., No. 4D16-2579 (4th DCA January 17, 2018).
[35] *See* All Saints Catholic Church v. United Nat'l Ins. Co., 257 S.W.3d 800 (Tex. App. 2008).
[36] *See, e.g.*, Farmers Group Ins., Inc. v. Poteet, 434 S.W.3d 316, 325 (Tex. App. 2014).
[37] *Id.* at 326.
[38] 257 S.W.3d 800 (Tex. App. 2008).
[39] *Id.* at 802.
[40] *Id.*
[41] *Id.*
[42] Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 431 (5th Cir. 2007).
[43] Howell v. State Farm Fire & Cas. Co., 218 Cal. App. 3d 1446, 1458-59, 267 Cal. Rptr. 708, 716 (Cal. Ct. App. 1990), *overruled on other grounds by* Reid v. Google, Inc., 50 Cal. 4th 512 (Cal. 2010).
[44] State Farm Fire & Casualty Co. v. Slade, 747 So. 2d 293, 307–15 (Ala. 1999).
[45] Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601, 615–16 (Miss. 2009).
[46] 6 Cal. Ins. Code § 530 (West 2018).
[47] *Howell*, 218 Cal. App. 3d at 1458.
[48] *Slade*, 747 So. 2d at 310.
[49] 747 So. 2d 293 (Ala. 1999).
[50] *Id.* at 299.
[51] *Id.* at 302.
[52] *Id.* at 307.
[53] *Id.* at 314.
[54] *Id.* at 314.
[55] 20 So. 3d 601, 608 (Miss. 2009).
[56] *Id.* at 613.
[57] *Id.* at 615.
[58] *Id.* at 615.
[59] *Id.* at 613.
[60] *Id.* at 619.
[61] Sebo v. Am. Home Assur. Co., Inc., 141 So. 3d 195, 201 (Fla. App. Dist. Ct. 2013).
[62] *Id.*
[63] JAW The Pointe, LLC v. Lexington Ins. Co., 460 S.W.3d 597 (Tex. 2015).
[64] *Id.* at 608.
[65] *Id.* at 602, 608 (citing Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's of London, 327 S.W.3d 118, 126 (Tex. 2010)).
[66] Burgess v. Allstate Ins. Co., 334 F. Supp. 1351, 1359 (N.D. Ga. 2003).
[67] *See* Western Pac. Mut. Ins. Co. v. Davies, 267 Ga. App. 675, 680 (2004) ("When the language of an insurance contract is ambiguous and subject to more than one reasonable construction, the policy must be construed in the light most favorable to the insured, which provides him with coverage."); Broome v. Allstate Ins. Co., 144 Ga. App. 318, 319 (1977) ("Under general rules of contract construction, a limited or specific provision will prevail over one that is more broadly inclusive.").
[68] Western Pac. Mut. Ins. Co. v. Davies, 267 Ga. App. 675, 681 (2004).
[69] *Compare Western Pac.*, 267 Ga. App. at 680 (quoting Alley v. Great Am. Ins. Co., 160 Ga. App. 597, 600 (1981)) ("Exclusions to an insurance policy require a narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms.") (internal quotation marks omitted), *with* Corban v. United States Servs. Automobile Ass'n, 20 So. 3d 601, 615–16 (Miss. 2009) (finding ambiguity in the inclusion of "in any sequence" in the water damage, which, if read in favor of the insurance company, would render coverage provisions virtually powerless).

NEGLIGENT BAD FAITH? LIMITING INSURANCE BAD FAITH TO ITS ROOTS

By: Amanda Proctor and Christopher Freeman



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Although frequently distinguished, an insurance policy is a contract like any other. It is a written agreement between parties that expressly sets forth the parameters of their relationship, including the consideration to be paid, the risks to be borne, and the conditions precedent to enforcement of the contract. Despite this fact, courts often wrestle with how to address perceived imbalances in bargaining power at the time the deal is struck. And while the concepts underpinning contracts of adhesion may be present, for instance, in many form automobile policies, the same cannot be said for many other liability policies, such as those obtained by Fortune 500 companies for D&O, E&O, or specialty liability coverage. Such contracts are customarily heavily negotiated. There is no inequality in bargaining power. It presumably follows then that there are circumstances under which the jurisprudence underlying follow-form auto liability policies should not apply with equal weight to other insurance contracts that are

more heavily negotiated. As discussed below, the circumstance where this disparity is most apparent is that of "bad faith" extra-contractual liability.

As a general matter, there is no tort of "bad faith" claims handling under Georgia law. O.C.G.A. Section 33-4-6 provides the exclusive remedy for claims of alleged bad faith failure to pay policy proceeds.[1] Under this statute, "an insurer is subject to imposition of a penalty and attorney fees if it refuses in bad faith to pay a covered loss 'within 60 days after a demand has been made by the holder of the policy.'"[2] For the purposes of O.C.G.A. Section 33-4-6, "a refusal to pay in bad faith means a *frivolous and unfounded denial of liability*."[3] The recovery authorized by Section 33-4-6 serves as a penalty to insurers, and as such, it is disfavored.[4]

Ordinarily, the question of good or bad faith is for the jury.[5] However, as Georgia courts have repeatedly recognized, "when there is no evidence of *unfounded* reason for nonpayment, or if the issue of liability is close, the court should disallow imposition of bad faith penalties. Good faith is determined by the reasonableness of nonpayment of a claim."[6] Because bad faith penalties are not authorized where an insurer "has any reasonable ground to contest the claim and where there is a disputed question of fact," an insurer with *any* legal or factual basis for contesting a claim should be entitled to summary judgment as a matter of law.[7]

This principle has been twice reaffirmed by the Georgia Court of Appeals in recent years. First, in *American Safety Indemnity Company v. Sto Corporation*,[8] an insurer had denied coverage under a CGL policy based on several exclusions to coverage. Unfortunately, however, the trial court found that the insurer's denials followed its accepting the defense of its insured without first adequately reserving its

rights to deny coverage.[9] Although the claims adjuster testified he had mailed the reservation of rights letter to the insured in the ordinary course, the insurer was unable to affirmatively prove having sent the letters, which the insured denied receiving. Accordingly, because of Georgia precedent regarding an insurer being estopped from denying coverage after accepting a defense without an adequate reservation of rights, the trial court determined – and the Court of Appeals agreed – that there was no basis to deny coverage as a matter of law.[10] Notwithstanding this fact, the Court of Appeals reversed the trial court on its denial of the insurer's motion for summary judgement on the statutory claim for bad faith:

> Based on the record before us, we conclude that [the insurer] was entitled to summary judgment on [its insured's] bad faith claim. The question of whether the previous reservations of rights were still effective had not been squarely answered in Georgia, and it may have appeared from a review of [the insurer's] records that reservation of rights letters had been subsequently sent out once [it] agreed to cover the litigation.[11]

In other words, alleged negligence in the mailing of the reservation of rights letters (itself sufficient to result in an estoppel) was insufficient to support an extra-contractual claim of bad faith under O.C.G.A. Section 33-4-6.

Similarly, in *Lee v. Mercury Insurance Company of Georgia,*[12] the Georgia Court of Appeals addressed a circumstance in which the insured asserted a statutory bad faith claim due to his insurer's alleged unfounded denial of his claim. In *Lee*, a divided court determined that the term "residence premises" was ambiguous as used and, thus, was construed in favor of coverage under a homeowners' policy.[13] Despite the Court of Appeals' reversal of the grant of summary judgment to the insurer on the issue of coverage, however, the court made clear that its determination of coverage was of no consequence to the issue

of statutory bad faith under the circumstances: "As we cannot say that Mercury had *no* reasonable grounds to contest Lee's claim, we affirm the trial court's grant of summary judgment to Mercury and the denial of summary judgment to Lee on the issue of Mercury's bad faith."[14] In other words, because the insurer had *some* legitimate basis to deny coverage, a claim under O.C.G.A. Section 33-4-6 would not lie.

Thus, in the context of the only bad faith claim specifically recognized by the Georgia Legislature, a *bona fide* basis for disputing coverage under the contract – regardless of whether any extra-contractual bases for a denial of coverage are also allegedly present – is sufficient to avoid a statutory bad faith claim. Under these circumstances, the terms of the parties' contract alone governs.

The same cannot be said for all insurance bad faith claims, however. In addition to the statutory bad faith claim codified in Section 33-4-6, Georgia law also recognizes a limited common law tort where an insurer fails to settle a claim against its insured for policy limits under certain, specified circumstances. The Georgia Supreme Court set forth the basic principle in *Southern General Insurance Company v. Holt*[15] as follows: "An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim."[16] The rationale behind this principle "is that the insurer may not gamble with the funds of its insured by refusing to settle within the policy limits."[17] Instead, "[i]n deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured."[18] To avoid tort liability, the insurer "must accord[] the

insured the same faithful consideration it gives its own interest."[19]

Though the principle as stated by the court in *Holt* appears straightforward, the scope of conduct for which an insurer may be found liable for failing to settle within policy limits remains unclear in Georgia jurisprudence. At one end of the spectrum, there can be no reasonable dispute that an insurer can be held liable for its *bad faith* refusal to settle a claim brought against the insured for policy limits.[20] Under this standard, an insurer is liable for its "capricious refusal . . . to entertain an offer of compromise within the policy limits made on behalf of the injured party where no regard is given to the position of the insured should the case proceed to trial and a judgment in excess of the policy limits be render."[21]

What is less clear, however, is whether an insurer can be liable for mere negligence in failing to settle a claim within policy limits.[22] Some Georgia cases imply that *only* a "bad faith" refusal to settle within policy limits is actionable.[23] Others, however, suggest that a mere "negligent" failure to settle may be sufficient to impose liability on an insurer.[24] Despite the oft repeated "bad faith or negligent failure to settle" phrase, it remains the case that not a single Georgia court has actually held that mere negligence alone is sufficient to subject an insurer to extra-contractual liability.[25]

"Negligence" in the context of an insurer's failure to settle has its origin in *Francis v. Newton*.[26] In *Francis*, the Georgia Court of Appeals considered whether a garnishment action brought by a claimant against the insured's insurance carrier could proceed when the carrier had already tendered its policy limits. The court ultimately held that the claimant could not proceed with the action. In so holding, the court, relying on law from other

jurisdictions, stated that "an automobile liability insurance company may be held liable for damages to its insured for failing to adjust or compromise a claim covered by its policy of insurance, where the insurer is guilty of negligence or of fraud or bad faith in failing to adjust or compromise the claim to the injury of the insured."[27] The court specifically noted, however, that "[t]here [was] no contention by the insured that the insurer was negligent or failed to exercise good faith towards her in handling the claims of the plaintiff and his father against her, and the evidence d[id] not authorize a finding that the insurer violated any legal duty it owed to the plaintiff by failing to adjust or compromise his claim against the insured or in defending his action against the insured as it was authorized to do under the terms of its contract with the insured."[28] Thus, any discussion regarding the standard for imposing extra-contractual liability on the carrier was clearly dicta in *Francis*.

Nevertheless, the modern trend of blurring the lines between what is binding authority and what is dicta has resulted in continued citation to *Francis* for the proposition that mere negligence alone can provide a sufficient basis for imposing excess liability on the insurer. Subsequent Georgia cases, however, provide little analysis as to what type of negligence will suffice. To propound confusion over whether simple negligence is sufficient to impose extra-contractual liability on an insurer, some cases have gone so far as to blend bad faith and negligence into the same standard. Generally, bad faith and negligence are treated as "disjunctive or alternative tests."[29] But, without explanation, the Georgia Court of Appeals has held that, in this context, the difference in terminology means little.[30] Instead, the same standard is applied:

> [W]hether the basis for imposing tort liability on the insurer is phrased in terms of bad faith or negligence, an insurer may be

> liable for damages for failing to settle for the policy limits if, but only if, such ordinarily prudent insurer would consider that choosing to try the case rather than accept an offer to settle within the policy limits would be taking an unreasonable risk that the insured would be subjected to a judgment in excess of the policy limits.[31]

This type of blending is evident in the Supreme Court's decision in *Cotton States Mutual Insurance Company v. Brightman*:[32]

> An insurance company may be liable for the excess judgment entered against its insured based on the insurer's bad faith or negligent refusal to settle a personal claim within the policy limits. Judged by the standard of the ordinarily prudent insurer, the insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk. The rationale is that the interests of the insurer and insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy. The insured is interested in protecting itself against an excess judgment; the insurer has less incentive to settle because litigation may result in a verdict below the policy limits or a defense verdict.[33]

By blending the distinct concepts of bad faith and negligence into the same standard, it appears that Georgia courts have imputed a degree of intent into their analysis of Georgia law. In other words, by stating that an insurer acts negligently if it "*choos[es]* to try the case rather than accept an offer to settle within the policy limits," Georgia law recognizes that *a choice* must be made to take a course of action that results in rejection of an opportunity to settle within policy limits. An insurer's intent, then, must be considered. For if an insurer does not choose or intend to reject a settlement demand within policy limits – if the rejection, for example, is truly the result of a negligent failure to respond – the insurer cannot fairly be said to have chosen anything, much less acted in bad faith.

The Supreme Court's decision in *Fortner v. Grange Mutual Insurance Company*,[34] provides an illustrative example. In *Fortner*, the claimant was injured in a car accident caused by Grange's insured. The insured's business was also

insured under a policy issued by Auto Owners Insurance Company. After the accident, the claimant offered to settle all claims for $50,000 from Grange (contingent upon additional payment by Auto Owners). Grange offered to pay $50,000 contingent upon the claimant's agreement to sign a full release with indemnification language and dismiss with prejudice the suit against the insured. Given the additional terms Grange proposed, the claimant viewed this as a rejection of the policy limit demand, proceeded to trial, and received a $7 million verdict. The court held that the jury could consider the additional conditions imposed by Grange in determining whether Grange was liable for failing to settle the claim against its insured within policy limits.[35]

In *Fortner*, Grange was exposed to extra-contractual tort liability because it rejected the claimant's demand by adding conditions to the settlement. Thus, it appears that, to be held liable in tort for a bad faith refusal to settle, an insurer must make some sort of choice that amounts to an unreasonable rejection of the policy limit demand. There may be negligence in the decision-making process (e.g., failing to consider medical evidence supporting damages, or a police report evidencing clear liability), but some sort of deliberate choice is still required.

But what if, by contrast, the insurer is negligent in its efforts to *accept* the policy limit demand? Take for example, a situation where the insurance company is faced with a 30-day policy limit demand. The claims representative calendars the response deadline, but inadvertently calendars the deadline for 31 days. On the 31st day, the insurer accepts and tenders policy limits. Or, perhaps the insurer verbally accepts a $100,000 policy limits demand but inadvertently omits a zero on the settlement check, resulting in the delivery of a check for $10,000. Or, what if the insurer timely

accepts a policy limits demand, correctly drafts the check, but then sends the check to the wrong address?

These hypothetical situations cannot support a claim of bad faith, and under these facts, mere negligence should not expose the insurance company to tort liability because it is evident the insurance company did not "choos[e] to try the case rather than accept an offer to settle within the policy limits."[36] In fact, the insurance carrier made the opposite decision: It decided to tender its policy limits and eliminate the risk of excess exposure to its insured.

To assign extra-contractual liability for the insurer's alleged negligence in these scenarios would run afoul of the very purpose of the tort recognized by Georgia courts in the first instance. As mentioned above, the basis for finding the insurer liable for failing to settle a claim against its insured within policy limits is based upon the notion that the insurer should not "gamble" with the insured's funds and should give equal consideration to the insured's interest as it would its own. Imposing extra-contractual liability when the insurer has not only recognized the exposure to the insured, but also attempted to tender its policy limits cannot be squared with the courts' recognition of why an insurer may be subject to liability beyond that which it agreed to assume under contract. In these examples, the insurer has adequately considered the insured's interests and, accordingly, has tendered the policy limits. Unintended human error in effectuating the settlement should not result in excess exposure to the insurer.

Regardless of the legal theory, extra-contractual liability is, by definition, in derogation of the parties' intent as expressed in the plain language of their insurance policy. Despite efforts to distinguish it from other contracts (even those between sophisticated parties), an insurance policy is,

at bottom, a contract like any other. It sets forth the risks an insured wishes to have covered, the risks an insurer is willing to assume, and the amount of consideration necessary for an insurer to bear those risks. It is difficult to imagine another circumstance in which an alleged negligent failure to perform under a contract would subject the breaching party to *extra-contractual* liability. Why should contracts of insurance be any different?

[1] *See* Anderson v. Ga. Farm Bureau Mut. Ins. Co., 255 Ga. App. 734, 737 (2002).
[2] Jones v. State Farm Mut. Auto. Ins. Co., 228 Ga. App. 347, 350 (1997).
[3] Swyters v. Motorola Emps. Credit Union, 244 Ga. App. 356, 358 (2000) (emphasis added).
[4] Love v. Nat'l Liberty Ins. Co., 157 Ga. 259, 259 (1924).
[5] Fla. Int'l Indem. Co. v. Osgood, 233 Ga. App. 111, 115 (1998).
[6] *Id.* at 116 (emphasis added) (finding of waiver of coverage defenses did not give rise to bad faith penalties as a matter of law; the waiver did not eliminate the underlying facts and was a "close question"); Lawyers Title Ins. Co. v. Griffin, 302 Ga. App. 726, 731 (2010) ("Bad faith is shown by evidence that under the terms of the policy under which the demand is made and under the facts surrounding the response to that demand, the insurer had no good cause for resisting and delaying payment.").
[7] Amica Mut. Ins. Co. v. Sanders, 335 Ga. App. 245, 250 (2015).
[8] 342 Ga. App. 263 (2017).
[9] *Id.* at 268-70.
[10] *Id.*
[11] *Id.* at 274.
[12] 343 Ga. App. 729 (2017).
[13] *Id.* at 733-39.
[14] *Id.* at 749 (emphasis in original).
[15] 262 Ga. 267 (1992).
[16] *Id.* at 268 (citing McCall v. Allstate Ins. Co., 251 Ga. 869, 870 (1984)).
[17] *McCall*, 251 Ga. at 870 (internal quotation marks omitted).
[18] *Holt*, 262 Ga. at 268.
[19] *Id.* at 269 (internal quotation marks omitted).
[20] *See* Shaw v. Caldwell, 229 Ga. 87, 91 (1972) ("It is no longer open to question in this State that the claim of an insured under a[ ]... liability policy for damages on account of the bad faith tortious refusal of the insurer to settle a liability claim against him within the policy limits resulting in damage to him in the form of a judgment in excess of the policy limits being returned against him is a legitimate charge against the insurer upon which recovery may be had by the insured.").
[21] Cotton States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 741 (1962).
[22] *See* Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1547 (11th Cir. 1991) ("Georgia law is ambiguous, however, as to whether an insured may recover for the insurer's negligent, as well as bad faith, failure to settle."); Domercant v. State Farm Fire & Cas. Co., No. 1:11-CV-02655-JOF, 2013 WL 11904718, at *1, *5 (N.D. Ga. Mar. 5, 2013) ("Georgia law has not defined precisely the contours of the action for tortious failure to settle."); Butler v. First Acceptance Ins. Co., 652 F. Supp. 2d 1264, 1275 (N.D. Ga. 2009) ("Thus, it appears that the unsettled nature of Georgia law in the tort of negligent or bad faith failure to settle persists.").
[23] *See Delancy*, 947 F.2d at 1547 (citing Jones v. S. Home Ins. Co., 135 Ga. App. 385, 388 (1975); Cotton States Mut. Ins. Co. v. Phillips, 112 Ga. App. 600, 601 (1965)).
[24] *See, e.g.*, Home Ins. Co. v. N. River Ins. Co., 192 Ga. App. 551, 556 (1989) ("While there are Georgia cases which refer to a recovery predicated on a bad faith refusal to settle and make no reference to the availability of a recovery for a negligent refusal to settle, such should not be viewed as inferring that a mere negligent refusal is inadequate to support a recovery.").
[25] Brief for Georgia Defense Lawyers Association as Amicus Curiae Supporting Appellant, *Camacho v. Nationwide Mut. Ins. Co.*, 692 F. App'x 985 (2017) (No. 16-14225) 2017 WL 2350412, at *1, *2-3.
[26] 75 Ga. App. 341 (1947).
[27] *Id.* at 343.
[28] *Id.* at 345.

[29] U.S. Fid. & Guar. Co. v. Evans, 116 Ga. App. 93, 94, *aff'd*, 223 Ga. 789 (1967).
[30] *Id.*
[31] Baker v. Huff, 323 Ga. App. 357, 363 (2013) (quotation marks and brackets omitted).
[32] 276 Ga. 683 (2003).
[33] *Id.* at 684–85.
[34] 286 Ga. 189 (2009).
[35] *Id.* at 191.
[36] *Baker*, 323 Ga. App. at 363.

PUBLIC NUISANCE: THE MONSTER IN THE CLOSET IS REAL AND IS ON THE LOOSE IN CALIFORNIA

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Public nuisance has been characterized as the "monster that would devour in one gulp the entire law of tort."[1] And commentators have long warned that the unchecked use of public nuisance law in the area of products would result in the erosion of tort law.[2] Until recently, it seemed that courts were keeping the "monster" safely locked away. However, in late 2017 the California Court of Appeal for the Sixth District ("Sixth District") upheld a bench decision applying the law of public nuisance to a consumer product.[3] In December 2017, the Sixth District summarily denied rehearing[4] and in February 2018, the California Supreme Court declined review.[5]

This decision is cause for concern for every CEO and General Counsel of any company that is currently selling or advertising, or has at any time in the past sold or advertised, consumer products in the state of California. Why? Because unchecked judicial activism in California has run roughshod over decades of established product liability doctrine, public nuisance law, and constitutional protections.

I. Background

In *People v. Atlantic Richfield*, No. 1-00-CV-788657, plaintiffs, who were 10 cities and counties in California, claimed that the defendants' sale and promotion of two lead pigments used in interior residential paints caused a public nuisance

that exists today. The sale and alleged promotion of the two pigments dated back to the late 1800s and ended by 1950, by when white lead pigments were largely removed from interior residential paints. Some of the defendants had removed the pigments from interior paints much earlier and some scarcely used the pigments for interior paints at all. The alleged nuisance consisted of subclinical harms at very low blood lead levels ("BLLs") (less than 10 µg/dl) from microscopic lead dust. It was undisputed that the pathway of alleged harm (household dust) was not recognized until the mid-1970s and the types of harm (subclinical harms from BLLs under 10 µg/dl) were not reported until after 2000.

II. Early Procedural History

In March 2000, Santa Clara County brought a class action suit against five companies (or their successors) who were alleged to have manufactured white lead carbonate or white lead sulfate pigments[6] for use in paints.[7] The case originally alleged claims of violation of the California Business and Professions Code, products liability, negligence, fraud, unjust enrichment, and indemnity.[8] In September 2000, Santa Clara County amended its complaint to add more plaintiff counties and a cause of action for nuisance.[9]

The nuisance claim originally alleged that the presence of paint containing white lead carbonate and white lead sulfate pigments in both publicly and *privately* owned properties constituted a public nuisance. Facing statute of limitation problems and the prospect of adverse evidence against the public entities who had sued, plaintiffs voluntarily removed public properties from the suit. Thus, only *privately* owned properties remained as the alleged public nuisance. The People claimed that the presence of those pigments was "an obstruction to the free use of property" and "interfere[d] with the

comfortable enjoyment of property."[10] The plaintiff counties brought their lawsuit despite the fact that California has in place a comprehensive legislative and regulatory scheme[11] and set of programs run by the Childhood Lead Poisoning Prevention Branch ("CLPPB") directed at the prevention of childhood lead poisoning.

The owners of the private properties in which the pigments (and thus the nuisance) were allegedly present were not parties to the lawsuit. Indeed, the plaintiff counties were not required to identify a single location that actually contained the pigments at issue.

In 2001, the trial court granted defendants' demurrer to the public nuisance cause of action.[12] Defendants then moved for summary judgment on the remaining claims. In 2003, the trial court granted summary judgment in favor of defendants finding that the statute of limitations barred all remaining claims.[13]

In 2006, the Sixth District, in *Santa Clara I*, reversed the dismissal of the representative public nuisance claim finding that a cause of action for public nuisance could be maintained in a representative capacity (*i.e.*, on behalf of "the People"). [14] *Santa Clara I* cautioned, however, that the People would have to prove both actual knowledge –

> liability is premised on defendants' promotion of lead paint for interior use with knowledge of the hazard that such use would create

– and a heightened level of wrongful conduct –

> [t]his conduct is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product.[15]

It described the necessary level of culpability as akin to that found in *City of Modesto Redev. Agency v. Super. Ct.*, 119 Cal.App.4th 28 (Cal. Super. Ct. 2004), *i.e.*, "instructing the purchaser to use the product in a hazardous manner" in violation of an environmental statute.[16]

The number of public entities prosecuting the suit increased to ten, and the representative public nuisance was recast, in the Fourth Amended Complaint, as "a public welfare problem" that is "injurious to the health of the public so as to substantially and unreasonably interfere with the comfortable enjoyment of life and/or property."[17] In addition, plaintiffs withdrew their demand for a jury trial and moved to strike the jury demands of the defendants.[18] The trial court granted the motion, the court of appeal summarily denied writ relief, and the California Supreme Court denied review.[19]

III. The Bench Trial –The Monster Peeks Out of the Closet

In the summer of 2013, the case proceeded to a time-limited bench trial.[20] The People's case at trial was built around harm purportedly caused by very small amounts of lead dust from friction surfaces and deteriorating surfaces resulting in blood lead levels below 10 µg/dl. The People claimed that the five company defendants were responsible for the harms described above because they sold and promoted paints containing white lead pigments in the ten plaintiff cities and counties.

Their case, however, failed to show any evidence of the type described in *Santa Clara I*. There was no showing of actual knowledge at the time of sale of the alleged public nuisance hazards or harm. Nor was there a showing of promotion of the products at issue for interior residential use. In a discordant decision riddled with internal inconsistencies, the trial court held three of the five defendant companies liable for creating a public nuisance. The public nuisance was held to exist in the plaintiff counties wherever lead paint is found on windows and doors, on floors and walls at certain levels (as confirmed by certain testing methods) or in a deteriorated condition in private residences built before 1981. The trial judge entered a judgment of $1.15 billion to be paid into a fund to inspect

for and abate the purported public nuisance in private residences. The judgment encompassed more than a century's worth of housing.

A. No Showing of Knowledge

It was undisputed at trial that the idea that lead in house dust might be a hazard was a "new theory" that had not even been "hypothesi[zed]" until 1974.[21] Before the late 1970s, "no evidence to support th[e] idea" existed.[22] Nor was it disputed that medical science did not begin to contemplate harms at blood lead levels below 10 µg/dl until after 2000.[23] Indeed, the CDC's "level of concern" for blood lead measurements was 60 µg/dl until 1975 when it dropped to 30 µg/dl.[24] In 1985, CDC lowered the level of concern to 25 µg/dl where it remained until 1991 when it dropped to 10 µg/dl.[25] It remained at 10 µg/dl until 2012 when CDC implemented a "reference value" approach.[26] And plaintiffs' expert testified that defendants knew nothing more than what was published in the contemporaneous medical literature.[27] Thus, not only was the harm unknown in the decades when defendants were alleged to have sold and promoted the products, but it was unknowable.

B. No Showing of Promotion

As with knowledge, there was no showing for several of the defendants, including some who were held liable, that they promoted the lead pigments at issue for interior residential use. For example, one defendant, The Sherwin-Williams Company had only used the pigments at issue in a handful of interior paint formulas (principally for a couple colors of floor paint between 1910 and 1913).[28] There were no advertisements for that product. Instead, the People presented two items as evidence of Sherwin-Williams' wrongful conduct. First, they identified a single brand advertisement promoting a line of paints. Second, they identified small contributions by Sherwin-

Williams to a trade association that ran a "better paint" promotion campaign. Plaintiffs' own historian expert witness admitted that he "can't tell" whether any of the pigments at issue are present in any of the ten cities or counties as a result of the advertising.[29]

C. An Ill-founded Judgment With Expansive Liability Beyond the Products at Issue

In rendering its judgment, the court found defendants jointly and severally liable despite voluminous evidence supporting apportionment. The court also never heard evidence of harm at any particular place, nor did it determine which homes even contain defendants' products, let alone how much was present or its condition. Rather it ordered defendants to go find the homes that contain *any interior lead paint* – not just paint containing the pigments that were at issue in the lawsuit—and abate *any lead paint* found on a friction surface or in a deteriorated condition.[30] Thus, the court's judgment required three defendants to abate not just the white lead pigments that they manufactured, but all of the lead paint manufactured by other companies over the course of 100 years or more. And while the defendants have the opportunity under the court's judgment to go into a specific house and prove that the lead pigments in paint in the house are not theirs, this completely flips the burden of proof.

The judgment also inexplicably requires abatement of housing components other than paint, such as roofs, that were not part of the lawsuit in any way. And it looks to dust lead levels to determine certain components of remediation. However, at least some, if not a significant portion, of the lead in dust comes from resuspension of lead in soil that contains decades of lead deposits from leaded gasoline and industrial emissions. Thus, defendants are ordered to abate products that were not even part of the

lawsuit and products that they did not manufacture.

Additionally, the court brushed aside the comprehensive scheme of federal, state, and local laws, regulations, and programs that exists in California to prevent childhood lead exposure.[31] In the trial judge's opinion, the existing regulatory framework lacks adequate resources to prevent all childhood lead exposure, so he then expanded current programs and resources with a judicially crafted remedy, despite conceding that the Legislative programs have successfully reduced children's BLLs:

> "The Court is not persuaded that since the various lead control programs have been successes no further efforts are appropriate. . . . the numbers have gone down; no one can dispute that. What is at issue is whether we should close the door on this issue and do no more than what we are doing now."[32]

Perhaps, most egregiously, the trial judge entered its order, all the while acknowledging that the defendants did not have knowledge of the alleged harms found today at the time they sold and advertised their products. In a section titled "Hindsight," the court stated:

> The related issue is whether the Defendants can be *held retroactively liable* when the *state of knowledge was admittedly in its nascent stage*. The Court takes judicial notice of the fact that drugs, facilities, foods, and products of all kinds that were at one time viewed as harmless are later shown to be anything but. . . . All this says is medicine has advanced; *shouldn't we take advantage of this more contemporary knowledge to protect thousands of lives*?[33]

The three defendants found liable by the perfect 20/20 hindsight of the trial judge appealed.

IV. The Sixth District Court of Appeal Ruling ("Santa Clara II") --The Monster On the Loose

On appeal, the Sixth Appellate District upheld the trial judge's decision declaring all deteriorated interior lead paint, all interior lead paint on doors and windows, and lead paint or dust on floors and windows (if tested at certain levels far below EPA requirements) in private homes to be an

indivisible public nuisance.[34] It limited the trial court's ruling, however, to houses constructed prior to 1951, rather than all houses constructed prior to 1981.[35]

Santa Clara II corrected none of inconsistencies contained within the trial judge's ruling, and added more of its own. For example, *Santa Clara II* perpetuated the trial judge's irreconcilable findings of disparate liability based on the trade association activity. Specifically, the trial judge found, and *Santa Clara II* affirmed, that one defendant ("Defendant A") was not liable for creation of the public nuisance, but defendant the Sherwin-Williams Company was. *Santa Clara II* identified two facts supporting Sherwin-Williams' liability for advertising: (1) the single ad from 1904 run in Los Angeles and San Diego and (2) contributions to the Forest Products Better Paint advertising campaign run by trade group the Lead Industries Association ("LIA"). It found that the People had failed to prove promotion on the part of Defendant A. However, Defendant A was far more involved with LIA and its advertising campaigns than was Sherwin-Williams.

For example, Defendant A was a member of LIA from 1928 until 1971.[36] The Sherwin-Williams Company was a member for a much shorter time -- 1928 to 1947.

Defendant A contributed to two of LIA's advertising campaigns --the Forest Products Better Paint campaign and the White Lead Promotion program. Sherwin-Williams never contributed to the White Lead Promotion program. Defendant A participated on the Advisory Committee of the White Lead Promotion program; Sherwin-Williams did not.[37] Defendant A contributed to the Forest Products Better Paint campaign during the entirety of its existence (1934-1941). Sherwin-Williams contributed from 1937-1941 only.[38] Moreover, during the time that Sherwin-

Williams contributed to the Forest Products Better Paint campaign, it did not even make any interior residential paints with the white lead pigments at issue.

On these facts, the trial court found that Defendant A's more substantial contributions to and participation in the campaigns did not provide a basis for liability: "The People's own experts were unable to make the case that [Defendant A] promoted lead paint in the jurisdictions."[39] That finding by the trial court should have precluded the contradictory finding that contributions in a lesser amount over a lesser period by Sherwin-Williams constituted substantial evidence of promotion.

Similarly, *Santa Clara II* held that brand promotion of paint for interior use without explicit suggestion that "lead paint be used for interiors" was insufficient to support a finding of liability:[40]

> "Here the alleged basis for defendants' liability for the public nuisance created by lead paint is their *affirmative promotion of lead paint for interior use . . . .*"[41]

This was the basis for limiting the judgment to pre-1951 houses. However, that precise evidence – promotion of a line of paints under the company brand that did not contain any explicit suggestion that lead paint be used for interiors – was used to hold Sherwin-Williams liable for pre-1950s houses.

The *Santa Clara II* court identified as the substantial evidence supporting the liability of Sherwin-Williams a single advertisement that was run once in San Diego and once in Los Angeles; both in 1904.

The advertisement, reproduced above, promoted a line of paints with its brand name for "painting buildings inside and out." The paint line contained exterior paints and interior paints, and plaintiffs stipulated that the labels on the paint cans indicated which paints were for which purpose.[42] *None* of the interior paints in the line contained the lead pigments that purportedly caused the nuisance. Nor does the advertisement instruct consumers to use lead paints on interiors. In fact, the ad does not mention the word lead at all. Why such promotion was not evidence sufficient to support liability after 1950, but constituted substantial evidence to support liability before 1950 is a mystery.

Another irreconcilable incongruity in the opinion concerns the Sixth District's delineation of how long a promotion can be said to be influencing the use of the product. The Sixth District stated with respect to the post-1950 time frame, "[w]e can find no evidence in the record that supports an inference that the promotions of defendants prior to 1951 continued to cause the use of lead paint on residential interiors decades later."[43] It went on to say "we reject plaintiff's claim that it is a reasonable inference that the impact of those promotions may be assumed to have continued for the next 30 years." Yet, that is precisely what the court did to hold Sherwin-Williams liable prior to 1950.

Despite scouring decades of newspapers and thousands of advertisements, the People could not find and did not present a single ad

recommending the use of interior lead paint.[44] Had the *Santa Clara II* court applied the same standard to Sherwin-Williams, which had only the single brand ad in 1904, Sherwin-Williams would not have been liable for the vast majority of houses included within the nuisance. Indeed, it is inexplicable on what basis Sherwin-Williams is being held liable in the eight plaintiff jurisdictions where *no* advertising by it was identified at *any* time.

These examples show the dangers of result-driven judicial activism. Such activist rulings not only create irregular legal standards, but also inconsistent application of the selected standard. The result is dangerous precedent without evident boundaries.

V. The Status of Public Nuisance Law in California

Until the Sixth District's recent opinion in *Santa Clara II*, a public nuisance in California had to rise to the level of "offenses against, or interferences with, the exercise of rights common to the public."[45] In fact, the author is unaware of any precedent—from any state—supporting application of public nuisance law to ordinary promotion of products for lawful uses or to separate uses of a product in different private locations, at different times, by different people without evidence of harm to any.

In addition, the power to define what is and is not a public nuisance had been, as it should be, reserved to the legislature.[46] Courts did not have the authority to declare programs instituted by the Legislature, such as California's Childhood Lead Poisoning Prevention Program ("CLPPP"), or their funding inadequate.[47] Where the Legislature has decided the amount and method of funding, and has declared that funding to be exclusive and sufficient,[48] the courts cannot not create and fund their own supplemental and conflicting programs because they decide that more should be

done.[49] However, with the California Supreme Court declining review of *Santa Clara II*, there is now conflict in the California appellate courts on this issue as well.

A. The First District

The First District follows traditional public nuisance law and only allows a public nuisance claim for criminal misconduct that is distinct from product manufacture and promotion. In *City of Modesto Redev. Agency v. Super. Ct.*, 119 Cal.App.4th 28 (Cal. Super. Ct. 2004), the court allowed a public nuisance action against manufacturers of drying cleaning solvents who instructed dry cleaners to dump those solvents into the sewer in violation of the Porter-Cologne Water Quality Control Act. That instruction dealt with product disposal, not liability for a product defect, product advertising or failure to warn, and it told dry cleaners to commit a criminal violation. The result was contamination of public water resources, a public nuisance by statutory definition.[50] Causation in fact and legal causation were direct and unequivocal, and the existing water code provided undisputed knowledge of the hazard.

Notably, the First District in *Modesto* refused to apply public nuisance law to "manufacturing or selling solvents to dry cleaners, with knowledge of the hazards of those substances, without alerting the dry cleaners to proper methods of disposal."[51] It reasoned, "any failure to warn was not an activity connected with the disposal of solvents."[52] Therefore, that conduct "does not fall within the context of nuisance, but is better analyzed through the law of negligence or products liability, which have well-developed precedents to determine liability for failure to warn."[53] As in *City of San Diego*, *infra*, the court focused on the nature of the alleged conduct, not the nature of the alleged remedy, to determine whether

to apply product liability or public nuisance law.

B. The Second District

In *City of San Diego*, 30 Cal.App.4th 575, the Second District refused to allow the city to use a public nuisance theory to recover for property damage arising from deterioration of asbestos products.[54] In that case, the City alleged that the deterioration of asbestos-containing building materials in city-owned buildings created a continuing public nuisance.[55] The City argued, just as plaintiffs did in *Santa Clara I* and *II*, that the statutory definition of nuisance is broad, encompassing "[a]nything which is injurious to health, . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."[56]

The Second District in *City of San Diego* concluded that product liability law, not public nuisance, governed the manufacture, sale, and promotion of products. It ruled that the city's claim was "a products liability action in the guise of a nuisance action."[57] It cited myriad cases from other jurisdictions that likewise have rejected the use of public nuisance to prosecute product liability claims for the reason that allowing such public nuisance claims "would convert almost every product liability action into a nuisance claim."[58]

C. The Sixth District

As of 2006, the Sixth District was still at least partially in line with its sister Districts. Its decision in *Santa Clara I* required actual knowledge of the harm and required plaintiffs to prove wrongful conduct that is "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product."[59]

The Sixth District's recent decision in *Santa Clara II*, however, flies in the face of the holdings in *Santa Clara I*, *Modesto*, and *City of San Diego* and puts the Sixth

District directly at odds with other California Courts of Appeal and the rest of the country. The Court of Appeal lowered the bar for public nuisance liability in conflict with *Modesto* and *City of San Diego*, which treat claims concerning the manufacture and sale of products as product liability claims. Instead, the Sixth District allow public nuisance law to supplant product liability rules. As a result, there are no longer uniform standards for whether and, if so, when public nuisance can substitute for product liability rules governing the manufacture, sale, or promotion of lawful products in California.

Santa Clara II also conflicts with the First District's decision in *Modesto* not to apply a public nuisance theory against those who sold products with known hazards. It sows confusion by holding a defendant liable though it did not know *at the time of promotion* the "particular risk" identified as the public nuisance—in direct contravention of *Santa Clara I's* actual knowledge requirement. *Santa Clara II* attempts to circumvent the actual knowledge requirement by finding that defendants "must have" known some harm would result from their products.[60] This is a far cry from requiring that defendants have "knowledge of the hazard that such use would create."

The trial court—in its own words—held defendants "retroactively liable" based on "nascent" knowledge.[61] The liability was retroactive because, even the People acknowledged, "[i]t was only in 1998 that scientific studies demonstrated . . . that even very low levels of exposure to lead paint could cause serious damage."[62]

By not requiring that a defendant know *at the time of promotion* of the potential public nuisance harm for which it is held liable (in this case over a century later), the court's opinion obliterates any culpability requirement and unreasonably subjects product manufacturers to liability

using 20/20 hindsight of changing scientific and regulatory norms.

Santa Clara II further muddies the waters of nuisance law by permitting product-based nuisance claims in an area already comprehensively addressed by the Legislature, thus trespassing into the Legislature's realm.[63] Instead of enforcing the public policy as already set forth by the Legislature and rejecting the trial court's improper declaration of nuisance and improper remedy, *Santa Clara II* sanctioned the trial court's decision that set new, dangerous, and conflicting public policy.[64]

The trial judge's and Sixth District's decisions not only break with every other appellate court nationwide to have considered whether the application of public nuisance law to lead paint in private homes is appropriate, but also all precedent rejecting public nuisance liability for the manufacture, promotion, and sale of products.[65]

VI. The Resulting Problems

A. Adverse Implications of Supplanting Product Liability Law with Nuisance

In contrast to the finely tuned product liability rules of law that have been crafted over decades, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'."[66] Public nuisance has been described, *inter alia*, as "lawless,"[67] "a wilderness of law,"[68] a "mongrel" tort "intractable to definition,"[69] and a "legal garbage can."[70]

The Sixth District's misapplication of *Santa Clara I* eradicates the line between public nuisance and products liability, and only serves to confuse further the legal landscape and jurisprudence of nuisance and the roles of the judiciary and legislature.

In failure-to-warn cases, the California Supreme Court has held that a plaintiff must prove that a risk was known or knowable "in light of the generally

recognized and prevailing best scientific and medical knowledge available at the time."[71] *Santa Clara I* held that the People would have to prove "affirmative promotion" of interior lead paint with "knowledge of the hazard that such use would create."[72] This was in line with its proclamation that to be liable for public nuisance a defendant would have to have engaged in conduct "distinct from and far more egregious than simply producing a defective product or failing to warn."[73]

Instead, however, the trial judge and *Santa Clara II* court ignored the clearly stated standards of *Santa Clara I*:

- They permitted a cause of action that requires no showing of actual, contemporaneous knowledge, while *Santa Clara I* required "knowledge of the hazard that such use would create."
- *Santa Clara I* held "liability is premised on defendants' promotion of lead paint for interior use," while they found liability premised on general brand advertising and contributions to a general trade association "better paint" campaign.
- *Santa Clara I* required conduct "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product." Yet they permitted liability with no showing of culpability or causation. For example, plaintiffs provided no evidence that Sherwin-Williams' white lead pigment is actually present in their jurisdictions, let alone where it is, how much there is, or in what condition, and their expert could not say that any promotion caused any Sherwin-Williams white lead paint to be present. *See n.*26.

Beyond the evident conflicts with *Santa Clara I*, the decision is dangerous

because (1) it completely ignores substantial evidence from which a judgment could be apportioned, instead imposing joint and several liability; (2) it ignores the boundaries between the judiciary and the legislature; and (3) it infringes upon other constitutional rights that are beyond the scope of this article. [74]

As a result of ignoring apportionment evidence, the decision imposes severely disproportionate liability of the type eschewed by the United States Supreme Court and the California Supreme Court.[75] For example, Sherwin-Williams demonstrated that it manufactured almost no interior residential products containing the lead pigments at issue, a complete lack of promotion in eight of the 10 plaintiff jurisdictions, and a single advertisement in one year (1904) in the other two.[76] Yet it was saddled with joint and several liability for a $1.15 billion dollar judgment by the trial judge.

Next, by imposing a judicially crafted and mandated public health program that ignores existing legislative programs and funding, it sets a dangerous precedent. The trial judge's decision and *Santa Clara II* make the legislature superfluous any time a judge disagrees with the scope, priorities, or funding decisions of the legislators who the people actually elected to determine such matters. The decisions are the quintessential embodiment of the separation of powers concerns expressed by legal scholars.[77]

James A. Henderson, co-reporter of the American Law Institute's revision of the products liability portions of the Restatement of the Law of Torts from 1992-1998,[78] warned that aggregative torts including public nuisance, dispense with important delineations between the judiciary and the legislature:

> Instead, the lawlessness of aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards

> for determining liability and measuring damages. In effect, these new torts empower judges and triers of fact to exercise discretionary regulatory power at the macro-economic level of such a magnitude that even the most ambitious administrative agencies could never hope to possess.

The end result, as recognized by commentators, is a virtually standard-less public nuisance cause of action that is far easier to meet than any product liability cause of action:

> Public nuisance is attractive as a grab bag last course of action because its focus is on current injury, making it more viable than a product liability claim.[79]

And this expansive "standard" is coupled with remedies that exponentially enlarge traditional tort remedies.

Using this unprincipled and drastically lowered standard, in the Sixth Appellate District, plaintiffs arguably can bring a cause of action, and liability apparently can be imposed, with:

- No proof of actual presence of any of the defendants' products.
- No proof of actual knowledge on the part of defendants. Rather, a *current* judicial desire to remedy a perceived problem based on the *current* state of knowledge suffices to impose liability for advertising a century earlier.
- No evidence of promotion of the products at issue. (Recall the court held one defendant liable for generic promotions in two plaintiff jurisdictions in 1904 only. There was no company advertising in eight of the 10 plaintiff jurisdictions and no company advertising in any year except 1904).
- No evidence of affirmative instruction for a then-unlawful disposal or use within the advertising.

The court has opened the door for every product seller to be subject to public nuisance liability if its product can, decades

later, be claimed to have caused injury. In such actions, manufacturers do not have access to important and well-established product liability defenses such as statutes of limitations and repose, useful life, and change in condition. Manufacturers become insurers of their products in perpetuity, however misused or ill maintained they may be.

Moreover, any judgment will be made without defendants' access to a jury.[80]

B. The Slippery Slope

The potential application of the trial judge's and Sixth District's ill-defined public nuisance law to varied industries and products is not the stuff of childhood fairy-tales or idle fears. California cities and counties have already begun to use the trial judge's blueprint to sue oil companies for global warming and drug manufacturers for production, sale, and advertisement of medications.[81] Indeed, in the few weeks after Sixth District's decision, plaintiff lawyers filed multiple product-based public nuisance lawsuits in California counties.[82] It does not take an overly creative imagination to envision suits against myriad other industries as well.

Plaintiff attorneys and environmental groups predict, "[w]e are at the dawn of what is a massive wave of litigation" resulting from lead paint litigation.[83] Public nuisance lawsuits have been identified as "the wave of the future."[84] Legal scholars recognize that a public nuisance theory allowing plaintiffs to focus on harm occurring today, from products manufactured long in the past, opens the door to public nuisance suits for "all sorts of products."[85]

How might plaintiff lawyers use this new, expansive, public nuisance cause of action?

- Under the trial judge's and *Santa Clara II's* application of the law, plaintiffs' attorneys may try to claim

that auto manufacturers who affirmatively promote cars, which account for tens of thousands of deaths yearly and hundreds of millions of dollars in government emergency services and health care, are creating a public nuisance.

- The manufacturers of asbestos, who were targeted unsuccessfully in the Court of Appeals for the Second District, face the prospect of renewed scrutiny in the Sixth District as their products were undoubtedly used in private housing components at some point in time since the 1800s.
- Manufacturers of fast food, sugary drinks, candy, gum, and other "junk" foods that contribute to obesity and dental problems could be targeted for causing increased healthcare and dental costs, as could manufacturers of fatty foods that may contribute to heart disease.
- Perhaps use of cell phones will eventually be linked to an adverse health effect in the future or to the costs of distracted driving (there are numerous cell phone advertisements touting low cost data plans and unlimited texting).

New product risks are continually coming to light based on emerging science with respect to products once thought to be safe. In the Sixth District, if a single judge hearing such a case wonders whether society as a whole ought be doing "more than what we are doing now" or thinks that it ought to "take advantage of this more contemporary [medical] knowledge to protect thousands of lives," your clients may find themselves on the wrong side of an expensive and expansive abatement judgment.

VII. Conclusion

Consumer product manufacturers of any product that has the potential to cause unintended harm years or decades into the

future should be concerned with the recent ruling in *Santa Clara II*. While an aberration, this decision is now California law, at least in the Sixth District. Companies and their counsel should be prepared for, and think through strategies to combat, what will be the inevitable attempts of the plaintiffs' bar to further expand public nuisance law into the realm of product liability.

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* This publication should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and are not intended to create an attorney-client relationship. The views set forth herein are the personal views of the author and do not necessarily reflect those of Jones Day.

[1] City of San Diego v. U.S. Gypsum Co., 30 Cal. App.4th 575, 586 (Cal. Ct. App. 1994).

[2] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003); Richard O. Faulk and John S. Gray, *Alchemy In the Courtroom? The Transmutation of Public Nuisance*, MICH. ST. L. REV. 941 (2007); James A. Henderson Jr., *The Lawlessness of Aggregative Torts*, HOFSTRA L. REV. 34: Iss. 2, Article 2 (2005).

[3] People v. ConAgra Grocery Products Co., No. H040880, Decision (Cal. Ct. App. Nov. 14, 2017).

[4] People v. ConAgra Grocery Products Co., No. H040880, Order (Cal. Ct. App. Dec. 6, 2017).

[5] People v. ConAgra Grocery Products Co., No. S246102, Order (Cal. Feb. 14, 2018).

[6] Many other lead-containing pigments were used in residential paints dating back to the 1800s including lead chromates, leaded zinc oxide, molybdate orange, and lead oxide. None of these pigments, or their historical manufacturers, were included in the lawsuit.

[7] People v. Atlantic Richfield Co., No. 1-00-CV-788657, 4th Am. Compl. at 5 (Cal. Super Ct. Mar. 16, 2011); Responses to DuPont's Special Interrogatories Set One, dated July 3, 2012, at 8:16-20 7 (No. 13) (Aug. 15, 2012), ECF No. 2051.

[8] *Id.*

[9] People v. Atlantic Richfield Co., No. 1-00-CV-788657, 1st Am. Compl. (Cal. Super Ct. Sept. 1, 2000).

[10] *Id. at* 48.

[11] *See, e.g.*, Calif. Health & Safety Code §§17920, 17980-17997, 10526; Cal. Code Regs. Tit 17, §35022; Civil Code §§1941-1941.1.

[12] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order (Cal. Super Ct. May 31, 2001).

[13] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order (Cal. Super Ct. Aug. 27, 2003).

[14] Cty. of Santa Clara v. Atlantic Richfield Co., 137 Cal. App.4th 292, 309 (Cal. Ct. App. 2006) ("*Santa Clara I*").

[15] *Id.*

[16] *Id.*

[17] People v. Atlantic Richfield Co., No. 1-00-CV-788657, 4th Am. Compl. at 2, 19 (Cal. Super Ct. Mar. 16, 2011).

[18] People v. Atlantic Richfield Co., No. 1-00-CV-788657, People's Notice of Mot. and Mot. to Strike the Jury Demands and Have a Trial By The Court (Cal. Super. Ct. Dec. 2, 2011).

[19] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order After Hearing at 12-16 (Cal. Super. Ct. Feb. 6, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. H038014, Order (Cal. Ct. App. June 22, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. S203735, Order (Cal. Aug. 8, 2012).

[20] The trial judge imposed severe time restrictions, giving each side just 40 hours in which to present their respective cases. This left each defendant with just eight hours to put on a defense to a case that resulted in a $1.15 billion judgment by the trial court (later reduced by the Sixth District). The trial judge also permitted re-direct, but no re-cross. Thus, over repeated objection by defendants, the People routinely saved their most important points for re-direct and defendants were not permitted to cross-examine witness on the new testimony.

[21] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 6267-69 (Cal. Super. Ct. July 17, 2013) (testimony of defense expert Dr. Peter English).

[22] James W. Sayre et al., *House and Hand Dust As a Potential Source of Childhood Lead Exposure*, AM. J. DISEASE OF CHILDREN (Feb. 1974).

[23] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 3962-63 (Cal. Super. Ct. July 17,

2013) (testimony of the People's expert Dr. Bruce Lanphear).

[24] CDC, *Preventing Lead Poisoning in Young Children*, p.8 (1991)

[25] *Id.*

[26] https://www.cdc.gov/nceh/lead/acclpp/lead_levels_in_children_fact_sheet.pdf

[27] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 5386 (Cal. Super Ct. July 17, 2013) (testimony of the People's expert Dr. Gerald Markowitz).

[28] Plaintiffs stipulated that almost none of Sherwin-Williams paints meant for interior residential use contained the white lead pigments issue. *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stips. 28-29, 48, 53-54, 57-58, 72-73, 84-85 (Cal. Super Ct. July 1, 2013); Trial Ex. 1889.

[29] Plaintiffs' expert historian, Dr. Rosner, conceded that "we can't really tell" whether Sherwin-Williams had any effect on the presence of white lead in California. *See People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Dep. Tr. at 740:5-22 (Cal. Super Ct. Dec. 17, 2012).

[30] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 3 (Cal. Super Ct. Mar. 26, 2014).

[31] *See, e.g.*, Health & Safety Code §§ 17980, 105256; 23 Cal. Gov't Code §§ 25845, 38771; Cal. Civ. Code §§ 1941-1941.1.

[32] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 97 (Cal. Super. Ct. Mar. 26, 2014) (emphasis added).

[33] *Id.* at 96.

[34] People v. ConAgra Grocery Products Co., No. H040880, Opinion (Cal. Ct. App. Nov. 14, 2017) ("*Santa Clara II*").

[35] *Id.* at 2, 53-54.

[36] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 4160:15-17 (Cal. Super Ct. July 22, 2013) (testimony of the People's expert Dr. David Rosner).

[37] *Id.* at 4159:2-4, 14-20, 4169:13-15.

[38] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stip. 214 (Cal. Super Ct. July 1, 2013).

[39] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 22, 111 (Cal. Super. Ct. Mar. 26, 2014); *see also* People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 5287 (Cal. Super. Ct. Aug. 5, 2013) (testimony of the People's expert Dr. Gerald Markowitz).

[40] *Santa Clara II* at 53-54.

[41] *Id.* at 35.

[42] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stip. 263 (Cal. Super Ct. July 1, 2013).

[43] *Santa Clara II* at 55.

[44] *Id.* at 37-38.

[45] People ex rel. Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

[46] *Id.* at 1107; Friends of H St. v. City of Sacramento, 20 Cal. App. 4th 152, 165 (1993) (issue was a "legislative function beyond our power to control"); Cty. of Butte v. Super. Ct., 176 Cal. App. 3d 693, 699 (1985) ("The budgetary process ... is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available."); Korens v. R. W Zukin Corp., 212 Cal.App.3d 1054, 1059 (1989) ("We decline the invitation to do that which the Legislature has left undone.").

[47] *See* People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 94, 111 (Cal. Super. Ct. Mar. 26, 2014) ("Existing programs at all government levels lack the resources to effectively deal with the problem."); Cal. Sch. Bds. Ass'n v. State, 192 Cal.App.4th 770, 798-799 (Cal. Ct. App. 2011); Cty. of Butte, 176 Cal. App. 3d at 699.

[48] Health & Safety Code § 105310 subd. (f).

[49] *See* Cal. Sch. Bds. Ass'n, 192 Cal. App. 4th at 797; Cty. of Los Angeles v. Comm'n of State Mandates, 32 Cal.App.4th 805, 820 (Cal. Ct. App. 1995).

[50] *Id.* at 33, 35.

[51] *Id.* at 42.

[52] *Id.*

[53] *Id*.

[54] City of San Diego, 30 Cal. App. 4th at 585-87.

[55] *Id*. at 584.

[56] *Id*.

[57] *Id*, at 587.

[58] *Id.* at 586 (quoting *Johnson Cty., Tenn. v. U.S. Gypsum*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (*partially rev'd on other grounds by Johnson Cty., Tenn. v. U.S. Gypsum*, 664 F.Supp. 1127 (E.D. Tenn. 1985)).

[59] *Santa Clara I*, at 309.

[60] *Santa Clara II*, at 27.

[61] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 96 (Cal. Super. Ct. Mar. 26, 2014).
[62] *Santa Clara I*, at 330.
[63] *See* Friends of H Street v. City of Sacramento, 20 Cal.App.4th 152, 165 (Cal. Ct. App. 1993); People ex rel. Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997); Wolfe v. State Farm Fire & Cas. Ins. Co., 46 Cal.App.4th 554, 568 (Cal. Ct. App. 1996) (abstention appropriate when the Legislature "has expressly decided to tackle the problem").
[64] *Santa Clara II*, at 64-69.
[65] State of Rhode Island v. Lead Industries Ass'n, Inc., 951 A.2d 428, 454 (R.I. 2008); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007); In re Lead Paint Litigation, 924 A.2d 484 (N.J. 2007); City of Chicago v. American Cyanamid Co., 823 N.E.2d 126 (Ill. Ct. App. 2005).
[66] Prosser & Keeton, *Torts* (5th ed. 1984) §86,616.
[67] James A. Henderson Jr., *The Lawlessness of Aggregative Torts*, HOFSTRA L. REV. 34: Iss. 2, Article 2 (2005).
[68] Horace Wood, *The Law of Nuisances iii* (3d ed. 1893).
[69] F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949).
[70] William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942)
[71] Carlin v. Superior Court, 920 P.2d 1347, 1351 (Cal. 1996).
[72] *Santa Clara I*, at 292, 309-10.
[73] *Id.* at 309.
[74] There are myriad constitutional problems presented by *Santa Clara II*, including infringement of 1st Amendment freedom of speech and freedom of association rights, due process rights and separation of powers. While some of these are touched upon briefly, they present problems that are beyond the scope of this article.
[75] *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 581 (1996) (Due Process requires a "reasonable relationship between the ... award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.") (citation omitted); *see also* Hans Rees' Sons v. State of North Carolina ex rel. Maxwell, 283 U.S. 123, 135-136 (1931) (striking tax remedy that was "out of all appropriate proportion to the business transacted by the appellant in that State."); St. Louis, Iron Mountain & Southern Ry. v. Williams, 251 U.S. 63, 67 (1919) (statutory penalty violates due process where it "is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"); Hale v. Morgan, 584 P.2d 512, 518 (Cal. 1978) (statutory remedy can be unconstitutional when the harsh result is wholly disproportionate to the legislative goal); Kaufman v. ACS Sys., Inc., 110 Cal. App. 4th 886, 922 (Cal. Ct. App. 2003) (recognizing due process challenge to a disproportionate statutory penalty); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.")
[76] Sherwin-Williams presented additional evidence that it was a *de minimus* contributor to the presence of white lead in California at all. *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stip. 187 (Cal. Super Ct. July 1, 2013); *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Trial Tr. at 3003:22-3004:3 (Cal. Super. Ct. July 17, 2013) (almost all of Sherwin-Williams' white lead carbonate pigment went to non-residential paints); *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Trial Tr. at 2877:11-20 (Cal. Super. Ct. July 17, 2013) (testimony of defense expert Dr. Kent Van Liere) (undisputed evidence at trial indicated that Sherwin-Williams' WLC for all uses in California contributed a mere one-tenth of one percent (0.1 %) of the total lead consumed in the state from 1894 to 2009).
[77] James A. Henderson Jr., *The Lawlessness of Aggregative Torts*, HOFSTRA L. REV. 34: Iss. 2, Article 2 (2005); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, BOSTON COLLEGE L. REV. 49:913 (2008).
[78] http://www.lawschool.cornell.edu/faculty/bio.cfm?id=31
[79] *Is the Public Nuisance Universe Expanding?*, Bloomberg Environment, Jan. 31, 2017 (quoting Professor Albert C. Lin, U.C. Davis School of Law).
[80] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order After Hearing at 12-16 (Cal. Super. Ct. Feb. 6, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. H038014, Order (Cal. Ct. App. June 22, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. S203735, Order (Cal. Aug. 8, 2012).
[81] People v. BP P.L.C., No. 3:17-cv-06012-WHA (N.D. Cal.); People v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC (Orange Cty. Sup. Ct.); People ex rel. City of Oakland v. BP P.L.C., Case No. 3:17-cv-06011-WHA (N.D. Cal.); People

ex rel. City of San Francisco v. BP P.L.C., Case No. 3:17-cv-06012-WHA (N.D. Cal.); County of Marin v. Chevron Corp., Case No. 3:17-cv-4929-VC (N.D. Cal.); City of Imperial Beach v. Chevron Corp., Case No. 3:17-cv-4934-VC (N.D. Cal.); County of Marin v. Chevron Corp., Case No. 3:17-cv-4935-VC (N.D. Cal.).

[82] County of Santa Cruz v. Chevron, Case No. 17-CV-3242 (Cal. Super. Ct. Dec. 20, 2017); City of Santa Cruz v. Chevron, Case No. 17-CV-3243 (Cal. Super. Ct. Dec. 20, 2017); City of Richmond v. Chevron Corp., Case No. MSC18-00055 (Cal. Super. Ct. Jan. 22, 2018).

[83] Hayes, Exxon Mobil, BP, Others Face New Climate Change Suits, Bloomberg BNA Toxics Law Rptr. (Dec. 21, 2017), available at https://www.bna.com/exxon-mobilbp-n73014473249 (last visited Jan. 28, 2018).

[84] *Id.*

[85] *Is the Public Nuisance Universe Expanding?*, Bloomberg Environment, Jan. 31, 2017 (quoting Professor Albert C. Lin, U.C. Davis School of Law).

SCAPA DRYER FABRICS, INC. V. KNIGHT: TOXIC TORTS, EXPERT TESTIMONY, AND CAUSATION

By: William J. Martin

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In July 2016, the Georgia Supreme Court handed down its opinion in the matter of *Scapa Dryer Fabrics, Inc. v. Knight*, disapproving of the so-called "cumulative exposure theory," popular among plaintiffs' experts in asbestos litigation as a poorly-disguised substitute for the increasingly rejected "every fiber contributes" theory. *Knight* involved a personal injury case where the plaintiffs alleged Mr. Knight's cancer was caused in part by his exposure to asbestos at Scapa's manufacturing facility in Waycross, Georgia, in the 1960s and 70s. After a nearly three-week trial in June 2010, the jury returned an apportioned verdict of $4.2 million against Scapa. Scapa appealed, arguing, in part, that the trial court had erred by admitting the testimony of plaintiffs' expert Dr. Jerrold Abraham that any exposure to asbestos, no matter how small, caused Mr. Knight's disease. In 2015, the Court of Appeals affirmed the trial court with respect to the admission of Abraham's testimony, and Scapa requested cert.

The Supreme Court's decision in *Knight* reversed the Court of Appeals, set aside the jury's verdict against Scapa, and overturned the admission of the disputed expert testimony, an area long-established as one where the trial court holds wide discretion. But it is the substance of Abraham's testimony, and the Court's treatment of it, that makes this case worthy of discussion. Plaintiffs will contend, correctly, that the *Knight* Court's rejection

of the cumulative exposure theory was not absolute, and does not go so far as to require plaintiffs or their experts to provide quantified doses specific to each potential source. Meanwhile, defendants can point to *Knight* as another step toward clarifying a plaintiff's burden with respect to specific causation, while reinforcing the rejection of experts who fail to tie their causation opinions to the particular facts of a case.

***Fulmore, Butler* and *Fouch*: Specific Causation in Toxic Tort Cases**

In Georgia, a toxic tort plaintiff must prove both general causation (e.g., "is exposure to asbestos capable of causing mesothelioma?") *and* specific causation ("did this plaintiff's exposure to asbestos from this product cause his mesothelioma?").[1] In 2001, the Court of Appeals reversed summary judgment for defendants in *Fulmore v. CSX Transportation*. In *Fulmore*, plaintiffs alleged disease resulting from exposure to asbestos at defendants' premises during various periods of time. The defendants argued they were entitled to summary judgment because plaintiffs could not show the actual quantity of their exposures to asbestos for the specific time periods at issue. The Court of Appeals overturned the trial court, holding that while plaintiffs were required to "present some reliable evidence" as to the extent of plaintiffs' exposures, they did not need specific measurements or quantification in order to meet this burden. The court went on to acknowledge that, in toxic tort cases, "some reliable evidence" generally meant reliable expert testimony addressing causation.[2]

In 2011, the Court of Appeals delivered its opinion in *Butler v. Union Carbide*, affirming summary judgment for the defendants predicated on the trial court's exclusion of the plaintiff's medical causation expert, Dr. John Maddox.[3] Maddox testified that "each and every

exposure" to asbestos at levels above background contributed to the plaintiff's disease. Dr. Maddox offered no opinions specific to plaintiff's use of any defendant's product, instead taking the position that each exposure contributed to plaintiff's cumulative exposure. The trial court applied the *Daubert* standards and excluded Maddox's causation opinions as unreliable. The each and every exposure theory had never been tested, could not be tested, and thus was "scientifically unreliable" for purposes of supporting Dr. Maddox's causation opinions.[4] Further, while Maddox pointed to a host of studies and literature he relied on, he failed to connect his reliance materials to evidence of the duration, frequency, and fiber type involved in the occupational exposures actually incurred by the plaintiff. Under these circumstances, the trial court was justified in finding that Dr. Maddox had failed to reliably apply his methodology to the case-specific facts.[5] Since the plaintiff could not prove causation without expert testimony, the Court of Appeals also affirmed defendants' summary judgment.[6]

Just a few years after *Butler*, in 2014, the Court of Appeals relied heavily on *Fulmore* when it overturned summary judgment for defendants in *Fouch v. Bicknell Supply Company*.[7] In *Fouch*, the plaintiff worked as a sandblaster for more than a decade, and alleged that his exposure to silica during this work using defendants' products led to his lung disease and an eventual double-lung transplant. The defendants argued, and the trial court agreed, that plaintiff could not meet his burden as to specific causation without evidence of the quantity of silica he breathed while using each defendant's product. The Court of Appeals reversed, citing *Fulmore* to reaffirm that toxic tort plaintiffs were not required to show actual measurements or dosages in order to prove causation.[8]

The cases leading up to *Knight* show us the parameters of plaintiff's burden with respect to causation in toxic tort cases. As illustrated by *Fulmore* and *Fouch*, a particular quantity or measurement of the exposure is not required. Further, plaintiffs do not have to show that exposure from a particular defendant's product was a "substantial factor" in causing their injuries, only that it was a "contributing factor."[9]

However, the contribution to the injury must be more than merely *de minimis*.[10] Additionally, proof of causation *does* require reliable expert testimony[11] sufficient to "show at least a probable cause, as distinguished from a mere possible cause."[12]

Knight: Connecting the Dots Between Causation and Admissibility of Expert Opinion

For the first time since the *Butler* case, *Knight* analyzed the admissibility of an expert opinion in light of a plaintiff's burden as to causation in a toxic tort case. Indeed, it is important to note that in *Fulmore* and *Fouch*, both cases where defense summary judgments were reversed on appeal, the admissibility of plaintiff's expert testimony on causation had not been challenged. Conversely, the defendants in *Butler* and *Knight* sought to resolve the question of causation in their favor by first attacking the expert testimony relied on by the plaintiffs.

While both *Butler* and *Knight* highlight the interplay between the admission of expert testimony and causation, *Knight* goes a step further. In *Butler*, the defendants challenged Dr. Maddox's testimony as unreliable under *Daubert*. In *Knight*, while Scapa did challenge Dr. Abraham's causation opinions as unreliable, they also used the standard for causation to show that his opinions should be excluded as irrelevant. Under *Daubert* and O.C.G.A. § 24-7-702(b),[13] expert testimony must assist the trier of fact. "[E]xpert testimony is helpful to the trier of

fact only to the extent that 'the testimony is relevant to the task at hand and logically advances a material aspect of the case.'"[14] On cert, the Supreme Court embraced this aspect of Scapa's argument, finding Dr. Abraham's testimony that *any* exposure beyond background contributed to Knight's cumulative exposure "could not have been helpful to the jury."[15]

It is routine for defendants in products liability and toxic tort cases to seek exclusion of expert testimony in order to lay the foundation for a dispositive motion on liability. *Knight* shows how the elements of a claim and related legal standards should be used as a framework in which to challenge the relevance of an expert's opinion under *Daubert*. In a toxic tort case, Georgia law requires that a defendant-specific exposure must be more than a *de minimis* contribution to the plaintiff's injury in order to satisfy plaintiff's burden as to specific causation. If the expert's opinion fails to qualify or characterize that specific exposure as being more than *de minimis*, it does not then "fit" with the issue to be determined by the jury, and should be excluded under O.C.G.A. § 24-7-702(b).[16]

Since *Knight*

In addition to serving as a strong reminder of the often-overlooked relevance prong of the *Daubert* test for admissibility, *Knight* re-affirmed existing standards for evaluating exposure and causation evidence in toxic tort cases. Georgia still has not adopted the substantial contributing factor test used in many other jurisdictions. But *Knight* introduced the term "meaningful contribution" to the existing "more than *de minimis*" standard for a causative exposure to a toxin.

Moreover, *Knight* (and *Butler* before it) makes clear that while a causation expert in a toxic tort case does not have to measure or quantify specific doses of exposure, they must "undertake to estimate the extent of

exposure in [a] meaningful way."[17] Where, like Dr. Maddox in *Butler* and Dr. Abraham in *Knight*, the expert makes no effort to evaluate and characterize the extent of exposure from a particular defendant or source, and does not qualify his causation opinion "upon a reliable estimate of actual exposure,"[18] his opinion could properly be excluded as irrelevant and/or unreliable under O.C.G.A. § 24-7-702(b). "There is a difference… between… claiming causation in a conclusory fashion and identifying, through use of expert testimony, a significant and sustained exposure in the plaintiff's history."[19]

There have been very few reported cases citing *Knight* since the decision was published in July 2016. In Georgia, we have seen *Knight* cited for a basic restating of Georgia's adoption of the *Daubert* standard without any further meaningful analysis or reliance.[20] In a December 2016 mold exposure case, the Court of Appeals reversed the trial court's denial of the defendant's summary judgment motion, holding that the expert testimony failed to show that the alleged mold exposure made a "meaningful contribution" to the plaintiff's injuries.[21] Most recently, in October 2017, the Georgia Court of Appeals relied on *Knight* in finding that the defendants' human factors expert failed to satisfy the reliability or relevance prongs of 24-7-702(b).[22]

Knight is also representative of a growing national trend disapproving the "each and every exposure" and "cumulative exposure" theories and excluding expert causation testimony predicated on them. Similar opinions from the federal appellate courts,[23] federal district courts,[24] and other states' high courts[25] are becoming more pervasive. While many of these cases come from jurisdictions that follow the "substantial factor" test for causative exposures to toxic substances, the reasons for their rejection of "each and every

exposure" and "cumulative exposure" opinions are equally applicable to Georgia's "meaningful more than *de minimis* contribution" standard as espoused in *Knight*. A dearth of case law from the Eleventh Circuit and its district courts indicates this trend may have been slower to develop in the southeast. It is reasonable to expect that *Knight* and its immediate progeny will play a significant role in speeding up that development.

Conclusion

For Georgia litigators representing product defendants and premises owners, the importance of *Knight* is likely to increase as it becomes more familiar to trial courts and, over time, discussed in more substantive ways by our appellate courts. As authority fleshing out and reaffirming Georgia's standards with respect to specific causation, *Knight* is a step in the right direction for defendants.

But *Knight* also reminds us that it is not enough for experts to be qualified and give opinions based on reliable methodology and well-established science. The opinion testimony must also "fit" with the inquiry being made by the jury. Opinions delivered by an impressive expert witness can persuade the jury, even if those opinions are irrelevant to the issues the jury is supposed to determine. Attorneys should be mindful to use *Daubert* and O.C.G.A. § 24-7-702(b) to exclude opposing experts based on relevance.

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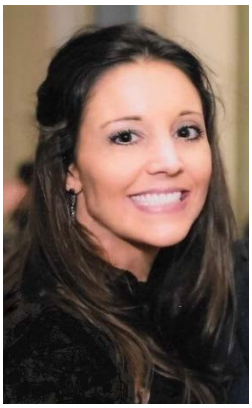
[1] Toole v. Georgia-Pacific, LLC, No. A10A2179, 2011 WL 7938847, *8 (Ga. Ct. App. Jan. 19, 2011).
[2] Fulmore v. CSX Transp., 252 Ga. App. 884, 891-92 (2001).
[3] Butler v. Union Carbide, 310 Ga. App. 21, 30 (2011).
[4] *Id.* at 24.
[5] *Id.* at 26-27.
[6] *Id.* at 31.
[7] Fouch v. Bicknell Supply Co., 326 Ga. App. 863, 868-69 (2014).
[8] *Id.*
[9] *Id.* at 869.
[10] John Crane, Inc. v. Jones, 278 Ga. 747, 750 (2004).
[11] *Butler*, 310 Ga. App. at 30.
[12] *Fouch*, 326 Ga. App. at 869.
[13] Formerly O.C.G.A. § 24-9-67.1.
[14] *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 290 (2016).
[15] *Id.* at 291
[16] *Id.* at 291-293.

[17] *Id.* at 292
[18] *Id.* at 293
[19] *Id.* at 292 (quoting Quirin v. Lorillard Tobacco Co., 23 F. Supp. 3d 914, 920 (N.D. Ill. 2014)).
[20] Cash v LG Elecs., Inc., 342 Ga. App. 735, 736 (2017); Hosp. Auth. v. Fender, 342 Ga. App. 13, 24 & n.6 (2017).
[21] Barko Response Team, Inc. v. Sudduth, 339 Ga. App. 897, 900-01 (2016).
[22] Vineyard Indus. v. Bailey, 343 Ga. App. 517, 522 (2017).
[23] *See generally* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2008); McIndoe v. Huntington Ingalls Inc., 817 F.3d 1170 (9th Cir. 2016); Stallings v. Georgia-Pacific Corp., 675 F. App'x. 548 (6th Cir. 2017); Krik v. Exxon Mobil Corp., 870 F.3d 669 (7th Cir. 2017).
[24] *See generally* Yates v. Ford Motor Co., 113 F. Supp. 3d 841 (E.D.N.C. 2015); Rockman v. Union Carbide Corp., 266 F. Supp. 3d 839 (D. Md. 2017); Barabin v. Scapa Dryer Fabrics, Inc., No. C07-1454JLR, 2018 WL 840147 (W.D. Wash. Feb. 12, 2018).
[25] *See generally* Schwartz v. Honeywell Int'l, Inc., No. 2016-1372, 2018 WL 793606 (Ohio Jan. 24, 2018).

SURVEYING LIABILITY MODELS FOR AUTONOMOUS VEHICLE TECHNOLOGY

By: Katherine Dale Sheriff



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Seven years ago, an autonomous vehicle was a budding concept to most Americans, including most attorneys.[1] However, those closest to the product development predicted that autonomous vehicles would become a common sight on U.S. roads in the 'near' future.[2] For example, Google announced its creation and successful testing of "the world's first truly autonomous car" in October of 2010.[3] In its unveiling, Google's driverless technology guide, Google VP and Fellow Sebastian Thrun detailed progress in Google's test-driving its self-driving cars that "logged over 140,000 miles," proclaiming that, "[we] think this a first in robotics research."[4]

Academic overviews of the technology supporting autonomous vehicles were plentiful and the subject was discussed at length by various scholars and research groups.[5] Some discussed, generally, the development of autonomous vehicles, perhaps suggesting an implementation timeline.[6] Other discussions were specifically about the technology "under the hood of Google's autonomous car," for example.[7] Industry teams proposed technological frameworks for autonomous vehicles and discussed integrating sensing, planning and acting functions.[8] Ideas like vehicle-to-vehicle ("V2V") connectivity, through which companies will be able to

remotely update software, remotely monitor systems and know even more about customers were trending.[9]

Today, the current legal framework assumes a human driver is in control of a vehicle.[10] However, this paradigm must be adapted to include the vehicle making driving-relevant decisions autonomously.[11] For instance, the Blind Driver Challenge, aimed at assisting blind persons through Department of Defense Defense Advanced Research Projects Agency suggested using autonomous vehicles to facilitate independence that would otherwise be impossible.[12] To incorporate driverless vehicles into the assistive methodology would require adaptation of the law to fit the new technology: "[t]he integration of automobile use – predicated already on human control of a product that must not be defective – with software, which is loosely regulated, is the dilemma for those regulatory schemes for a car designed for blind drivers." Navigating itself through traffic, an autonomous vehicle makes critical decisions, which theoretically could contribute to accidents.[13] Yet, unlike the traditional product liability paradigms for motor vehicles, an autonomous vehicle decision would not properly be considered a technical failure as would a faulty tire.[14] Thus, autonomous vehicles present novel situations in which artificial intelligence makes decisions for 'passengers.'[15]

This article provides an overview of potential liability models as applied to autonomous vehicles.[16] Uncertainty is rampant among courts, regulators, legislators, law enforcement and consumers when considering how to react to accidents involving autonomous vehicles – however unlikely.[17] Uncertainty during a technological transition provides fertile ground to test the boundaries of the law and to identify what attorneys need to know in

the 'near' future to continue successful practices.[18]

MODEL ONE

HANDS-OFF APPROACH:

APPLYING THE EXISTING PRODUCTS LIABILITY FRAMEWORK

Suppose the States and Congress have one type of regulation – safety oriented – and leave liability alone.[19] Americans tend to incorporate liability into the invention available to consumers.[20] University of Washington Professor of Law Ryan Calo provides an analogy of autonomous vehicles to the internet to illustrate what he terms a "hands-off" approach, distinguishing treatment of the internet: "Early decision in the life cycle of the internet, such as the decision to apply the First Amendment there and to immunize platforms for what users do, allowed that technology to thrive."[21] Calo believes that the extent to which a "hands-off" approach was possible with the internet will not be possible with robotic systems interacting with the world physically – like autonomous vehicles.[22]

MODEL TWO

NO-FAULT APPROACH:

COMPLIANCE WITH GOVERNMENT STANDARDS AND SAFE HARBOR PROVISIONS

The second approach would be to describe at the outset what liability would look like, such as whether there would be extra liability for a particular group.[23] The RAND Report also supported this approach.[24] By examining how the system regulates other issues, an informed analysis can choose to implement systems that work in analogous contexts and leave liability to rest where it falls.[25] UCLA Professor of Law Mark Grady explored the effect that improvements in technology have had on medical liability.[26] In his exploration, Grady analyzes the no-fault model pushed by another scholar, Harvard Law School Professor Emeritus Paul Weiler, as it applies

to automobiles and compares the application of the no-fault system on medical technology.[27] By understanding how the no-fault system regulates other issues – namely, worker's compensation and automobile accident liability – Grady is able to distinguish medical advances.[28]

Grady's thesis, countering Weiler's main proposal, states: "The no-fault standard that currently exists in the negligence rule – combined with rapid improvements in medicine – is causing the malpractice crisis."[29] Grady points out that returning to a common-law scheme the new administrative system proves worse is very difficult.[30] Grady likens it to be urban renewal: "If the system is destroyed, it becomes very difficult to recreate it."[31] In this way, Grady argues that the optimal reform would be the opposite of the no-fault scheme Weiler proposed.[32] Grady concludes that, instead, lawmakers should consider how no-fault features might be reduced. In an ideal world, this reduction of no-fault liability would be through temporary reform, like legislation with built-in sunset provisions or common-law decisions.[33]

One important question raised by the no-fault approach is whether it would be exacerbated at two points – first, the transition point, and second, the point at which such technology is fully integrated.[34] Grady seems to answer this query in the affirmative: "[T]he extreme explosion [of medical malpractice liability] of the past decades may represent an acute imbalance between the development of new basic technology, which increases claims, and a lag of "bells and whistles," which reduces claims…the recent [decrease] in the claim rate may well be attributable to a partial restoration of the balance. If so, [modern dialysis machines are] an extremely desirable technological development."[35]

Like the automobile industry, the purpose of tort law in the medical field – or

malpractice system – is to compensate negligently injured patients and deter substandard care.[36] The Obama Administration expressed early interest in the safe harbor concept as it applies to the medical field.[37] Physicians who adhere to preapproved clinical practice guidelines should be able to use compliance as a strong, if not impenetrable, shield against malpractice claims.[38]

Safe harbors continue to attract attention because they offer "a potential [two-for-one] policy benefit: they address physicians' concerns over [non-meritorious] lawsuits, and by providing an incentive to follow evidence-based guidelines, they may address current gaps in guideline adherence and improve healthcare quality."[39] An example of safe harbor legislation was introduced in Congress as part of the Saving Lives, Saving Costs Act.[40]

MODEL THREE

FEDERAL STATUTE LIMITING TORT – PREEMPTION

The idea behind the third approach is that the administrative body must take care of liability chosen to promote this technology.[41] Doing so would give an added layer of statutory compliance under this liability system (akin to vaccine-related injuries).[42] Where Congress has not made its intent clear, the courts must determine whether preemption is warranted and which claims are to be preempted.[43] This necessitates a 'case-by-case' analysis of whether a claim is preempted, in part because of the varying statutes to apply.[44] The 'case-by-case' analysis is also required because some claims under a given statute could be preempted while others are not under special preemption – "frustration of purpose preemption and impossibility preemption."[45]

One example of this case-by-case analysis was in reaction to standards the National Highway Traffic Safety Administration (NHTSA) promulgated, which permitted automobile manufacturers to include an airbag or an alternative form of passive restraints.[46] In *Geier v. American Honda Motor Co.*, the Supreme Court considered whether a plaintiff should be able to bring a crashworthiness claim based on the manufacturer's failure to include an airbag.[47] The Court held the plaintiff's claim was preempted because NHTSA's purpose – encouraging development of other kinds of passive restraints to ascertain optimal effectiveness – would be frustrated if the plaintiff's claim went forward.[48]

Similarly, in *Morgan v. Ford Motor Co.*, the West Virginia court considered whether the plaintiff should be able to bring a crashworthiness claim based on the manufacturer's use of tempered glass on the side window.[49] In this case, NHTSA's vehicle safety standard at issue was for windows and permitted a manufacturer to use tempered or laminated glass in side windows.[50] Plaintiff's expert submitted that choosing glass was important because laminated glass was more likely to keep a passenger's body from being ejected during an accident.[51] Like the Supreme Court in *Geier*, the court held that the claim was preempted because, like its purpose with passive restraints, NHTSA's purpose in allowing both due to safety concerns related to neck injuries with laminated glass would be frustrated.[52]

Like *Geier* and *Morgan*, *Wyeth v. Levine* involved similar arguments for frustration of purpose preemption and impossibility preemption.[53] However, distinctively, the *Wyeth* Court did not find that the FDA's purpose would be frustrated by permitting state tort law claims based on failure to warn.[54] The *Wyeth* opinion reflects

that implied preemption creates a substantial burden of proof for the manufacturer.[55]

Implied preemption can occur when a tort claim creates a situation where it would be impossible for a defendant to comply both with what the plaintiff in the tort claim is arguing and with what the federal law requires.[56] In the context of medical devices and drugs, the law governing devices, the Medical Devices Amendments of 1976 (MDA), contains different preemption language from the law governing drugs, the Federal Food, Drug, and Cosmetic Act (FDCA).[57] One issue is whether medical devices and drugs should be treated differently given this disparity in language in their respective statutes.[58]

Further, the medical devices context provides ample territory to discuss the best policy reasons in favor of and against preemption.[59] Note that Congress can clarify its intent at any point if it does not agree with the Court's interpretation.[60] In fact, legislation was introduced in the 111th Congress that would eliminate preemption in medical device cases like *Riegel v. Medtronic*.[61] *Riegel* stands for the Supreme Court's 2008 discussing The Medical Devices Amendments of 1986 (MDA) and the Supreme Court's holding that the MDA bars common law claims challenging safety or efficacy of a medical device marketed in a form that received premarket approval from the FDA.[62]

The liability approach discussed here, federal preemption of state common law, should not be confused with another approach to liability discussed – compliance with government standards.[63] Compared with federal preemption of state law, the major difference between the models is that the manufacturer's compliance with government standards is evidence that the jury may consider, but does not bind jury decisions.[64] Meanwhile, a regulatory standard issued by the federal government

may preempt, or completely preclude the bringing of, state claims – but only in the limited circumstances that the court determines Congress intended for such preemption.[65]

The majority rule permits defendants to introduce evidence of compliance with government standards on the issue whether the manufacturer was negligent or, in a strict liability case, whether the product was defective.[66] The minority rule provides that compliance with government standards creates a rebuttable presumption that the product was not defective.[67] For example, in *Schultz v. Ford Motor Co.*, the Indiana court considered a jury instruction for the Indiana statute that provides a rebuttable presumption that a manufacturer was not negligent or a product was not defective if that manufacturer proves that it complied with applicable government safety regulations.[68]

The difficult question raised in cases like *Schultz* is whether the jury should be permitted to "second guess" the governmental agency that issued the standard.[69] In fact, most jurisdictions permit such "second guessing" by allowing the jury to consider the manufacturer's compliance with the applicable government standards as evidence.[70] However, again, the jury is not bound by evidence of compliance.[71]

Ultimately, whether the government opts for a no-fault approach depends on the degree to which society wants to regulate the particular product.[72] If the market would militate so strongly against a product that development would not be possible, a good example is one reflecting interests in the public health.[73] When lawmakers really cannot defend the public good with just the ordinary market presumptions and tort law assumptions, and there is a positive impetus for technology to be introduced, the no-fault model can be introduced with a much

stronger argument for government intervention.[74]

When considering product liability, academics have canvassed the interaction of federal regulation and state tort law and concluded that, with increasing congressional legislation and federal agency regulatory authority, preemption will remain a dominant issue in tort law in the age of the administrative state.[75] *Wyeth v. Levine* is one of two recent Supreme Court cases exemplary of products liability in the administrative state.[76] In *Wyeth*, the Court considered the preemptive effect of agency regulation (*e.g.*, FDA) for warnings given on prescription drugs (*e.g.*, Phenergan), after the trial court held the warning label was inadequate under state law.[77]

There were two arguments for preemption in *Wyeth*: first, complying with state law would violate federal law, and second, that complying with tort law would detract from the purpose and objectives of federal drug labeling regulations – that the Court would affect the substitution of a lay juror's opinion for the FDA's expertise.[78]

After considering preemption arguments, the Court held there was no preemption for two reasons: first, the question turned on the "purpose of Congress," and second, the assumption that state tort law is not superseded unless Congress's intent was clear and manifest.[79] The Court made clear that the responsible party could have strengthened its warning on the label even though an earlier warning had been FDA- approved.[80] Responding to the second argument, the Court found no predicate evidence relating to Congressional intent or purpose because all that was set against the application of State law was agency assertion of obstruction.[81]

After *Wyeth*, agency expertise warranting deference depends on the agency's "thoroughness, consistency, and persuasiveness" in its findings.[82] Questions

raised include whether the law achieved any stability after *Wyeth* and whether there is merit in competing legislative and regulatory findings from a federalism standpoint.[83]

To some, even considerations favoring preemption in certain circumstances, such as cost-shifting, national uniformity, and democratic accountability, generally do not justify negation of state law.[84] Federalism, with its overlapping jurisdictions may present distinct advantages.[85]

MODEL FOUR

PURE NO-FAULT OR IMMUNITY:

COMPLETE STATUTORY REGULATION

EXEMPTING MANUFACTURERS FROM

LIABILITY

Because insurance premiums might align more readily with risk and institutions may monitor physician behavior effectively, institutional coverage might have advantages over traditional liability insurance.[86] Proponents of the no-fault system, like Paul Weiler, have been countered by others like Mark Grady as to the model incorporating safe harbors.[87] Notably, Weiler's work derives from a large empirical study on medical malpractice in New York.[88]

NUCLEAR POWER:

AN UNFAIR COMPARISON?

The private nuclear power industry faced a similar liability conundrum in the 1950s.[89] While it is rare for legislators to intervene to protect specific technologies, specific legislative protections have been set forth for the nuclear industry.[90] In fact, "the rationale for such legislative intervention [protecting against, or limiting, liability] would be supported by the fact that autonomous vehicles represent a socially beneficial technology that may be hindered by real or perceived liability concerns."[91] Note that legislative intervention could diminish traditional incentives provided by a

strict liability framework for manufacturers to make safety improvements in their products.[92]

VACCINES:

DOES THE 'ALL-OR-NOTHING' THEORY APPLY TO AUTONOMOUS VEHICLES?

The administration of vaccines provides an interesting parallel to autonomous vehicles because vaccines, like autonomous cars, are most effective when everyone has one.[93] Consumers injured through vaccinations can be reimbursed by the vaccine makers without the makers being forced to admit fault.[94] Perhaps, a similar system could encourage innovation while still protecting consumers with autonomous vehicles to foster a healthy market.[95] The rationale was that liability for the harmful effects of vaccines deterred their beneficial development, production, and use in the context of products liability.[96] To alleviate this concern, a no-fault compensation program was introduced under the National Childhood Vaccine Injury Act of 1986 (NCVIA), under which a claimant may opt for a common law claim or can rely on the statutory coverage.[97] This is an instance of preemption in which federal law has overridden state law to protect the public.[98]

Under the NCVIA, consumers can file injury claims through a dedicated office of the U.S. Court of Federal Claims, and vaccine manufacturers provided compensation without admitting fault.[99] The Act seeks to protect the relatively small number of people hurt by vaccines while encouraging vaccine manufacturers to keep producing the drugs, because to prevent disease an unvaccinated person must be surrounded by thousands of vaccinated ones.[100] Arguably, autonomous technology is similar in that, "[i]t won't make us safer until it's in most vehicles. Maybe it deserves special treatment to get it on the road."[101]

ADMINISTRATIVE HEALTH COURTS

In the context of medical device or drug liability, the structure of "health courts" in the United States vary, but all share common features.[102] Features include noneconomic damages and the traditional negligence standard is replaced by a pure no-fault standard or one that asks whether the injury would have been avoided had care conformed to best practice.[103] This approach has been applied or considered in a growing number of jurisdictions.[104] For example, the 2013 Georgia legislature proposed Senate Bill 141, the "Patient Injury Act," would create an administrative compensation system similar to worker's compensation for the payment of medical malpractice claims.[105]

International examples of this approach include successful systems in Sweden and New Zealand and proposed in Australia.[106] Other examples of this approach have been organized as new reform efforts.[107] Further examination should focus on distinguishing enterprise liability from common carrier liability and clarifying what constitutes pure no-fault, finely parsing each model.[108]

MODEL FIVE

STRICT LIABILITY FOR

ULTRAHAZARDOUS PRODUCTS

Arguments that strict liability for ultrahazardous products ought to apply to autonomous vehicle technology include analogies to owner's canine liability and parental liability for one's children in the United States (or Italy).[109] For instance, "[d]ogs and computers are both treated as chattel under tort law, and are similar in that they can act independently, yet are considered property of another."[110]

Counterarguments to such applications include those made by scholars like South Carolina attorney Jeffrey K. Gurney.[111] Gurney suggests that there is a fluid, linear spectrum, with attentiveness

increasing from the first type of driver to the last type of driver:

(1) The Distracted Driver;
(2) The Diminished Capabilities Driver;
(3) The Disabled Driver; and
(4) The Attentive Driver.[112]

Alternatively, Gurney suggests a spectrum ranging from full driver liability to full manufacturer liability.[113] The suggested spectrum contrasts the bright-line 'dogs are like computers' rule in that it recognizes the fundamental difference presented by autonomous technologies – a difference with nuances that might not be captured by squeezing autonomous technology into existing tort doctrine.[114]

OTHER PROPOSED LIABILITY MODELS

FREE-MARKET APPROACH

The point at which Calabresi and free-market theory converge effectively pits both the free-market theory and Calabresi's followers against the Chicago school theory.[115] The Chicago approach deals with uncertainty by resorting to regulation or judicial intervention, whereas Calabresi sides with the free-market theorists and considers such uncertainty inevitable.[116] Calabresi and free-market theorists agree on two main points: first, the allocation of liability should follow a default rule, according to which the principal is liable until the transaction is completed.[117] Second, Calabresi's argument for risk spreading when accidents occur and nobody is at fault is based not on efficiency, but on the existence of a hypothetical social contract – according to which, when no one is at fault, the whole community should be considered a victim and suffer consequences.[118] Calabresi related his view, stating: "The moment one realizes that the liability rule is used not merely to do what a market is unable to do, but is, instead, an independent instrument of collective decision making, then its seemingly peculiar application in these areas [] becomes readily explainable."[119] Calabresi explains that many early analyses of the liability rule have

"viewed the collective price to enter into the liability rule as being one designed to mirror, or mimic, the market price that would have been present had a free market been possible."[120]

Arguably, Calabresi's view on uncertain costs is that default liability should be assigned to the seller-producer, perhaps because the seller-producer is in a better position "to evaluate the nature and probability distribution of risky events, to contract away at least part of the cost to third parties, or to do both."[121]

Another liability approach Calabresi supports is spreading the burden of uncertain costs through a state insurance program financed by taxpayers at large.[122] Alternatively, Calabresi suggests levying a lump-sum tax on all producers subject to uncertain costs.[123] Calabresi's rationale for that the taxation solution "is more appealing (1) in the presence of accidents and substantial judicial costs, (2) when enterprise liability might drive some companies out of business, leading to significant secondary effects, such as lower output and more unemployment, or (3) when the activities involved are [extra-hazardous]."[124]

The only significant gap between Calabresi and the free-market approach is the connection of liability between accidents and social responsibility.[125] Free-market theorists treat an accident as relating to the existence of an 'injurer' – without which the victim has no right to compensation and precaution is impossible.[126] Calabresi harkens to the social contract and the redistribution of wealth between rich and poor, a philosophical matter beyond the scope of this article.[127]

IRREBUTTABLE PRESUMPTION OF DRIVER CONTROL

Driver liability is established through an irrebuttable presumption in a minority of jurisdictions, including Washington, D.C.

and California.[128] Industry generally favors this approach.[129] Elon Musk of Tesla has suggested the conceptual model should be an autopilot engaged by the driver rather than self-driving cars.[130]

One hypothetical is that an accident occurs while the driver of the autonomous vehicle was sleeping in the operator's seat, assuming others are injured, to apply this liability approach.[131] Applying the D.C. rule results in driver liability in the hypothetical scenario in a number of states.[132] Additional support of the driver liability result may be found in the second restatement.[133]

PROXIMITY-DRIVEN LIABILITY

University of South Carolina Assistant Professor of Law Bryant Walker Smith's proximity theory of product liability entails increasing the duty of manufacturers to users.[134] Manufacturers' duty to users is increased relative to the manufacturer's continuing relationship with the user, access to the user, knowledge of the user, knowledge of the product, access to the product, and continuing connection with the product.[135]

In connection with his theory, Smith posits the following three scenarios after which some physical or financial injury results. In the first scenario, the manufacturer stops updating or supporting an older automation system.[136] In the second scenario, the driver receives no warnings about her own inattention, fatigue, or carelessness.[137] In the third scenario, the driver's particularized misuse of the vehicle or automation system is foreseeable based on personally identifiable information.[138]

TRANSPORTATION-AS-SERVICE MODEL

In response to the suggestion that the introduction of autonomous vehicles into the market will result in expansive liability for manufacturers, a service model might provide a solution.[139] According to Smith, one response to the difficulties identified for manufacturers is that they maintain greater

control over vehicles and automation systems.[140] One way is by introducing advanced systems through fleet and pilot programs.[141] Another strategy is retiring older automation systems.[142]

Also, Smith emphasizes managing the human operator as part of the overall human-machine system.[143] Smith suggests adopting a transactional approach to automation.[144] But some disagree and argue, for example, that manufacturers' concerns about increased liability are not warranted because the increase is less concerning than anticipated.[145] Smith discounts fears of rising manufacturer liability as unwarranted because manufacturers (original equipment manufacturer, suppliers, data providers, and software developers) are arguably closer to their vehicles than eventual users of those vehicles.[146] This closeness may expand the obligation of manufacturers toward people at risk of harm from those vehicles.[147] Smith identifies a transportation-as-service model as one that might accept and then manage such obligations.[148]

CONCLUSION:

PROPOSED LIABILITY MODEL FOR IMPLEMENTATION

Theories of loss shifting and reallocation are appealing as procedural devices to lift tensions existing in tort liability for professionals and the inevitable new tensions or aggravations spawned by attempted applications of existing tort law to autonomous vehicle situations.[149] From this point of view, the most logical approach appears to be the hybrid Calabresi/free-market approach.[150] Calabresi's idea to provide government-funded insurance has many weaknesses, but solves problems of direct liability of owners and drivers and the chilling effect all legislators want to avoid for manufacturers.[151]

Of the five models proposed, the analogy of prescription drugs under FDA regulation seems the most appropriate

analogy.[152] However, from a policy standpoint, the most malleable approach is that put forth by Gurney, delineating four categories of defendant to which the relevant law is applied according to the nature and ability of the individual.[153]

Alternatively, Gurney's suggested spectrum ranging from full driver liability to full manufacturer liability provides flexibility and recognizes the nuances inherent in the new technology.[154]

Although Gurney does not denote his categorization as a "spectrum" *per se*, this article suggests the modification is effective.[155] By considering liability model categorization in a more fluid sense, more situations can be accounted for or recognized.[156] Once recognized, situations can be accommodated and more individuals with varying needs and abilities will be included in the liability analysis.[157]

Regarding regulation, Regulators are acclimating to the technological transition in transportation.[158] In September 2017, the United States Department of Transportation published guidelines, urging states to "consider how to allocate liability among ADS owners, operators, passengers, manufacturers, and other entities when a crash occurs."[159] At the state level, Georgia's House Bill 248 reflects "thoughtful effort" to perform a legal audit analyzing all statutes and regulations that could adversely impact automated driving.[160] Georgia's House Bill 248 also incorporates concepts from SAE J3016, which recognizes the manufacturer of an autonomous vehicle as that vehicle's driver.[161] Notably, the definitions proposed in SAE3016 contemplate deployment of autonomous vehicles in fleets within defined geographic areas.[162] What remains undetermined is whether the framework proposed by SAEJ3016, and reflected in Georgia House Bill 248, precludes other

approaches to autonomous vehicle deployment.[163]

At this stage of development, the federal government need not regulate until it has determined what standards of safety are required for each autonomous vehicle.[164] At that point, a system that allows evidence of manufacturer compliance to government standards to serve as evidence, or a system which protects complying manufacturers with safe harbor provisions, would be appropriate models to revisit.[165]

[1] *See generally*, Andrew P. Garza, *"Look Ma, No Hands!": Wrinkles and Wrecks in the Age of Autonomous Vehicles*, 46 N. ENG. L. REV. 581 (2012), available online at: http://www.boyleshaughnessy.com/Collateral/Documents/English-US/Garza%20No%20Hands.pdf (last accessed: March 2, 2018).

[2] *See id.* at 582.

[3] *See* John Markoff, *Google Cars Drive Themselves, in Traffic*, N.Y. TIMES (Oct. 9, 2010), available online at: http://www.nytimes.com/2010/10/10/science/10google.html?pagewanted=1&hp (last accessed: March 2, 2018).

[4] Sebastian Thrun, *Google: We've Been Secretly Building and Testing Robot Cars that Drive Themselves*, Official Google Blog (Oct. 9, 2010), available online at: http://www.businessinsider.com/google-weve-been-secretly-building-and-testing-robot-cars-that-drive-themselves-2010-10 (last accessed: March 2, 2018). Thrun was a tenured professor of computer science and electrical engineering at Stanford prior to becoming a Google VP and Fellow. Thrun then led the Google X driverless car team and ran the project until 2012. *See* Sebastian Thrun Interview, available online at: https://www.cnbc.com/2017/06/01/sebastian-thrun-udacity-googlex.html (last accessed: March 2, 2018). The self-driving car team is now known as Waymo. *See* Alex Davies, *Waymo Has Taken the Human Out of Its Self-Driving Cars*, WIRED (Nov. 7, 2017), available online at: https://www.wired.com/story/waymo-google-arizona-phoenix-driverless-self-driving-cars/ (last accessed: March 2, 2018). Waymo continues to lead the pack. *See* Alan Ohnsman, *Waymo Is Millions of Miles Ahead in Robot Car Tests: Does It Need A Billion More?*, FORBES (March 2, 2018), available online at: https://www.forbes.com/sites/alanohnsman/2018/03/02/waymo-is-millions-of-miles-ahead-in-robot-car-tests-does-it-need-a-billion-more/#15a9fe2b1ef4 (last accessed: March 2, 2018).

[5] Garza, *supra* note 1, at 583.

[6] *See id.*

[7] *Id.*

[8] *See, e.g.*, Nidhi Kalra, James Anderson, Martin Wachs, *Liability and Regulation of Autonomous Vehicle Technologies*, RAND Corporation, at 12-13 (2009); s*ee also*, James M. Anderson, Nidhi Kalra, Karylin D. Stanley, Paul Sorensen, Constantine Samaras, Oluwatobi A. Oluwatola, *Autonomous Vehicle Technology: A Guide for Policymakers*, RAND Corporation, at 165 (2014).

[9] *See* Bryant Walker Smith, Blog Post: *Automated Vehicles Are Probably Legal in the United States*, ROBOTICS AND THE LAW (Apr. 15, 2013, 11:58 a.m.).

[10] *See* Georgia House Autonomous Vehicle Technology Study Committee, *Report of the Georgia House Autonomous Vehicle Technology Study Committee*, Georgia General Assembly, at 3 (2014), available online at: http://www.house.ga.gov/Documents/CommitteeDocuments/2014/Autonomous_Vehicles/Final%20Autonomous%20Vehicle%20Committee%20Report.pdf (last accessed: March 2, 2018).

[11] *See* Dana M. Mele, *The Quasi-Autonomous Car as an Assistive Device for Blind Drivers: Overcoming Liability and Regulatory Barriers*, 28 SYRACUSE J. SCI. & TECH. L. REP. 26, 53 (2013), available online at: http://jost.syr.edu/wp-content/uploads/Mele-Final.pdf (last accessed: March 2, 2018).

[12] *See id.* at 48-49.

[13] *See id.* at 52.

[14] *See id.*

[15] *See* Smith, *supra* note 9, at 508-17 (suggesting potential legislative action and legal language to

distinguish between passengers and drivers for liability purposes).

[16] Additional research by the author is available online. *See, e.g.*, Katherine Sheriff, *Applying the Sudden Emergency Doctrine to Autonomous Vehicles: The Case of the Speeding Truck and the Polar Bear*, Social Science Research Network (2016), available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807597 (last accessed: March 2, 2018); Katherine Sheriff, *Defining Autonomy in the Context of Tort Liability: Is Machine Learning Indicative of Robotic Responsibility?* (hereinafter "Sheriff Autonomy"), Social Science Research Network (2015), available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735945 (last accessed: March 2, 2018).

[17] *See generally*, UGO PAGALLO, THE LAW OF ROBOTS: CRIMES, CONTRACTS AND TORTS, Law, Governance and Technology Series, Vol. 10 (Casanovas & Sartor, series editors) (Springer, 2013); Dorothy J. Glancy, Robert W. Peterson, Kyle F. Graham, National Cooperative Highway Research Program: *A Look at the Legal Environment for Driverless Vehicles*, LEGAL RESEARCH DIGEST 69, Transportation Research Board, Washington D.C. (Feb. 2016); Daniel A. Crane, Kyle D. Logue, Bryce C. Pilz, *A Survey of Legal Issues Arising from the Deployment of Autonomous and Connected Vehicles*, 23 MICH. TELECOMM. & TECH. L. REV. 191 (2017).

[18] *See* Mele, *supra* note 9, at 52.

[19] *See* David C. Vladeck, *Machines without Principles: Liability Rules and Artificial Intelligence*, 89 WASH. L. REV. 117, 141 (2014); *see generally* DAVID F. PARTLETT, PROFESSIONAL NEGLIGENCE (The Law Book Company Limited, Sydney, Australia, 1985). David Partlett is the Griggs Candler Professor of Law at the Emory University School of Law. Additional information is available online at: http://law.emory.edu/faculty-and-scholarship/faculty-profiles/partlett-profile.html (last accessed: March 2, 2018).

[20] *See generally* Stephen P. Wood, Jesse Chang, Thomas Healy, John Wood, *The Potential Regulatory Challenges of Increasingly Autonomous Motor Vehicles*, 52 SANTA CLARA L. REV. 1423 (2012).

[21] *See* Ryan Calo, White Paper: *The Case for a Federal Robotics Commission*, Center for Technology Innovation at Brookings Institute, at 15-16 (Sept. 2014). Ryan Calo holds the Lane Powell & D. Wayne Gittinger Endowed Professorship and is an Associate Professor of Law at the University of Washington. Additional information is available online at: https://www.law.washington.edu/directory/profile.aspx?ID=713 (last accessed: March 2, 2018).

[22] *See id.* at 15-16*; see generally* James M. Anderson, Paul Heaton, Stephen J. Carroll, *The U.S. Experience with No-Fault Automobile Insurance: A Retrospective*, RAND Corporation (2013), available online at: https://www.rand.org/pubs/monographs/MG860.html (last accessed: March 2, 2018).

[23] *See generally* VICTOR E. SCHWARTZ, KATHRYN KELLY, DAVID F. PARTLETT, PROSSER, WADE, SCHWARTZ'S TORTS: CASES AND MATERIALS (hereinafter "SCHWARTZ, KELLY, PARTLETT, TORTS"), TWELFTH ED. (Foundation Press, 2010).

[24] *See* Anderson, *supra* note 8, at 165.

[25] *See* Mark F. Grady, Book Review: *Better Medicine Causes More Lawsuits, and New Administrative Courts Will Not Solve the Problem*, 86 NW U. L. REV. 1068, 1080 (1992). Mark Grady is a Distinguished Professor of Law at University of California Los Angeles School of Law. Additional information is available online at: https://law.ucla.edu/faculty/faculty-profiles/mark-f-grady/ (last accessed: March 2, 2018).

[26] *See* Grady, *supra* note 25, at 1080.

[27] *See id.* at 1080*; see also*, PAUL WEILER, MEDICAL MALPRACTICE ON TRIAL (Cambridge: Harvard University Press, 1991) (urging the adoption of a regulated no-fault liability framework). Paul Weiler is the Henry J. Friendly Professor of Law, Emeritus at Harvard Law School. Additional information is available online at: https://law.ucla.edu/faculty/faculty-profiles/mark-f-grady/ (last accessed: March 2, 2018).

[28] *See* Grady, *supra* note 25, at 1074.

[29] *Id.* at 1093.

[30] *See id.* at 1074.

[31] *Id.* at 1093.

[32] *See id.* at 1074.

[33] *See id.*

[34] *See id.* at 1090-91.

[35] *Id.*

[36] *See generally* Michelle M. Mello, David M. Studdert, Allen Kachalia, *Special Communication: The Medical Liability Climate and Prospects for Reform*, 312 JAMA 2146-55 (2014).

[37] *See id.* at 2152 n.71.

[38] *See id.*

[39] *Id.* at 2152 n.72.

[40] *See id.* at 2153 n.75.

[41] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816-17, 1127-28.

[42] *See id.*

[43] *See id.*

[44] *See id.*
[45] *Id.* at 816 n.3.
[46] *See id.*
[47] *See generally* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).
[48] *See id.*
[49] *See generally* Morgan v. Ford Motor Co., 224 W. Va. 62, 680 S.E.2d 77 (2009).
[50] *See id.*
[51] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.3 (discussing *Morgan*).
[52] *See id.*
[53] *See generally* Wyeth v. Levine, 555 U.S. 555 (2009).
[54] *See id.*
[55] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.3.
[56] *See id.*
[57] *See id.* at 816 n.4; *see generally* Lawrence O. Gostin, *The Deregulatory Effects of Preemption of Tort Litigation: FDA Regulation of Medical Devices*, 299 JAMA 2313 (2008).
[58] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.4.
[59] *See id.*
[60] *See id.*
[61] *See generally* Riegel v. Medtronic, Inc., 552 U.S. 312 (2008).
[62] *See id.; see also* Gostin, *supra* note 57, at 2313; Warner-Lambert Co., LLC v. Kent, 552 U.S. 441 (2008).
[63] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816-17 n.5.
[64] *See id.*
[65] *See id.; see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b) (1998)*; but see generally* Taylor v. Smithkline Beecham Corp., 468 Mich. 1, 658 N.W.2d 127 (2003).
[66] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816-17 n.5
[67] *See id.*
[68] *See generally* Schultz v. Ford Motor Co., 875 N.E.2d 977 (Ind. 2006); SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.5.
[69] *See Schultz*, 875 N.E.2d 977; SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.5.
[70] *See generally Schultz*, 875 N.E.2d 977; SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.5.
[71] *See generally Schultz*, 875 N.E.2d 977; SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.5.
[72] *See generally Schultz*, 875 N.E.2d 977; SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.5.
[73] *See generally Schultz*, 875 N.E.2d 977; SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.5.
[74] *See generally Schultz*, 875 N.E.2d 977; SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 816 n.5.
[75] *See generally Wyeth*, 555 U.S. 555; *see also* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1227 n.4 (discussing *Wyeth*).
[76] *See generally Wyeth*, 555 U.S. 555; *see also* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1227 n.4.
[77] *See generally Wyeth*, 555 U.S. 555; *see also*, SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1227 n.4.
[78] *See generally Wyeth*, 555 U.S. 555.
[79] *See id.*
[80] *See id.*
[81] *See id.*
[82] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1227 n.4*; see also* Robert A. Schapiro, *Monophonic Preemption*, 102 NW U. L. REV. 811, 812 (2008).
[83] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1227 n.4*; see also* Schapiro, *supra* note 82, at 812.
[84] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1227 n.4*; see also* Schapiro, *supra* note 82, at 812.
[85] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1228 n.4; Schapiro, *supra* note 82, at 812*; see generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (University of Chicago Press, 2009).
[86] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1252 (discussing 1993 Harvard Medical Malpractice Study).
[87] *See id.*
[88] *See id.*
[89] *See* Gary E. Marchant, Rachel A. Lindor, Symposium Article: *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 SANTA CLARA L. REV. 1321, 1337 (2012).
[90] *See id.*
[91] *Id.*
[92] *See id.*
[93] *See* SCHWARTZ, KELLY, PARTLETT, TORTS, *supra* note 23, at 1252.
[94] *See id.*
[95] *See id.*
[96] *See id.*
[97] *See id.*
[98] *See id.*
[99] *See id.*
[100] *See id.*
[101] Jacob Ward, Article: *Who Is to Blame When A Robotic Car Crashes?*, POPULAR SCIENCE (Apr. 26,

2012), available online at: https://www.popsci.com/cars/article/2012-04/who-blame-when-robotic-car-crashes (last accessed: March 2, 2018).

[102] *See* Mello, *supra* note 36, at 2146.

[103] *See id.*

[104] *See id.*

[105] *See id.*

[106] *See id.*

[107] *See id.*

[108] *See id.; see also* Vladeck, *supra* note 19, at 129 n.39.

[109] *See* PAGALLO, *supra* note 17, at 124-25, 126-27, 130; Sophia H. Duffy, Hopkins, *Sit, Stay, Drive: The Future of Autonomous Car Liability*, 16 SMU SCIENCE & TECHNOLOGY L. REV. 101, 102-03 & n.10 (2014).

[110] *See* Duffy, *supra* note 109, at 102.

[111] *See id.* at 102; *see generally* Jeffrey K. Gurney, *Sue My Car, Not Me: Products Liability and Accidents Involving Autonomous Vehicles*, 2013 U. ILL. J.L. TECH. & POL'Y 247 (2013)*;* Kevin Funkhouser, *Paving the Road Ahead: Autonomous Vehicles, Products Liability and the Need for a New Approach*, 2013 UTAH L. REV. 437 (2013); *see* Vladeck, *supra* note 19, at 147 n.91.

[112] *See* Gurney, *supra* note 111, at 255-57.

[113] *See id.*

[114] *See* Sheriff Autonomy, *supra* note 16.

[115] *See* Enrico Colombatto, *A Free-Market View on Accidents and Torts*, 77 LAW & CONTEMP. PROBS. 117, 121 n.23 (2014).

[116] *See id.* at 131-32.

[117] *See id.* at 127.

[118] *See id.; see also* Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 77 LAW & CONTEMP. PROBS. 1, 5 (2014).

[119] Calabresi, *supra* note 118, at 9.

[120] *See id.* at 5.

[121] Colombatto, *supra* note 115, at 121 n.20.

[122] *See id.* at 121 n.23.

[123] *See id.*

[124] *See id.*

[125] *See id.* at 133.

[126] *See id.*

[127] *See id.*

[128] *See* A. Swanson, *"Somebody Grab the Wheel!:" State Autonomous Vehicle Legislation and the Road to a National Regime*, 97 MARQ. L. REV. 1085, 1119 n.204 & n.205 (2014); D.C. CODE § 50-2352 (2014); CAL. VEH. CODE § 38750(b)(2) (West. Supp. 2014) (addressing driver preparedness in context of autonomous vehicle testing).

[129] *See* Anderson, *supra* note 8, at 100, 144; Alan Ohnsman, *Tesla CEO Talking with Google about 'Autopilot' Systems*, BLOOMBERG (May 7, 2013), available online at: https://www.bloomberg.com/news/articles/2013-05-07/tesla-ceo-talking-with-google-about-autopilot-systems (last accessed: March 2, 2018).

[130] *See* Swanson, *supra* note 128, at 1118-19 & n.204 (listing other state statutes under which application of D.C. rule would result in driver liability).

[131] *See id.*

[132] *See id.*

[133] *See id.*

[134] *See* Smith, *supra* note 9. Bryant Walker Smith led aspects of the self-driving program at Stanford University and is an Assistant Professor of Law at the University of South Carolina. Additional information is available online at: http://sc.edu/study/colleges_schools/law/faculty_and_staff/directory/smith_bryant.php (last accessed: March 2, 2018).

[135] *See id.*

[136] *See id.*

[137] *See* Bryant Walker Smith, Blog Post: *Uncertain Liability*, CTR. FOR INTERNET & SOC'Y (May 27, 2013, 5:25 p.m.).

[138] *See* Bryant Walker Smith, Blog Post: *The Reasonable Self-Driving Car*, VOLOKH CONSPIRACY (Oct. 3, 2013, 2:38 a.m.).

[139] *See generally* Bryant Walker Smith, *How Governments Can Promote Automated Driving*, 47 N.M. L. REV. 99 (Winter 2017).

[140] *See id.* at 113.

[141] *See id.* at 118.

[142] *See id.* at 119.

[143] *See id.* at 123.

[144] *See id.* at 117.

[145] *See, e.g.*, Garza, *supra* note 1, at 583, 605-13.

[146] *See* Smith, *supra* note 139, at 115; Bryant Walker Smith, *Proximity-Driven Liability*, 102 GEO. L. J. 1777, 1818-19 (2014).

[147] *See* Smith, *supra* note 146, at 1812 (listing affirmative sources of liability).

[148] *See id.* at 1818-19.

[149] *See generally* PAGALLO, *supra* note 17, at 139; Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185 (1994); Robert Peterson, Dorothy Glancy, American International Group, Inc.: *The Future of Mobility and Shifting Risk*, Part 8 (2017), available online at: https://www.aig.com/content/dam/aig/america-canada/us/documents/insights/aig-the-future-of-

mobility-and-shifting-risk.pdf. (last accessed: March 2, 2018).

[150] *See generally* J. Albright, J. Schneider, C. Nyce, *The Chaotic Middle: The Autonomous Vehicle and Disruption in Automobile Insurance*, KPMG (June 2017); Ben Husch, Anne Teigen, *A Road Map for Self-Driving Cars*, 28 State Legislatures (Jan. 2017), available online at: http://www.ncsl.org/Portals/1/Documents/magazine/articles/2017/SL_0117-SelfDriving.pdf (last accessed: March 2, 2018).

[151] *See generally* Joni Hersch, W. Kip Viscusi, *Assessing the Insurance Role of Tort Liability after Calabresi*, 77 LAW & CONTEMP. PROBS. 135 (2014).

[152] *See* Calo, *supra* note 21, at 10 n.22 & n.23*; see also* Rai Sulbha, *Robotic Surgery and Law in USA – A Critique*, Social Science Research Network (2013), available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425046 (last accessed: March 2, 2018).

[153] *See* Gurney, *supra* note 111, at 255-57 (outlining the fluid linear spectrum)*; see generally* Report: *Distracted Driving*, CENTERS FOR DISEASE CONTROL & PREVENTION (Mar. 7, 2016) (CDC Research: 69 percent of drivers ages 18 to 64 reported talking on their cell phones while driving; 31 percent of drivers ages 18 to 64 reported reading or sending text messages while driving in the month preceding the survey).

[154] *See* Gurney, *supra* note 111, at 255-57.

[155] *See id.*

[156] *See* Sheriff Autonomy, *supra* note 16.

[157] *See* Gurney, *supra* note 111, at 255-57.

[158] *See* David Shepardson, *House Unanimously Passes Bill to Ease Deployment of Self-Driving Cars*, INSURANCE JOURNAL (Sept. 6, 2017) , available online at: https://www.insurancejournal.com/news/national/2017/09/06/463530.htm (last accessed: March 2, 2018); s*ee also* Tina Bellon, *Autonomous Vehicle Regulation Highlights: Federal vs. State Divide*, INSURANCE JOURNAL (Sept. 19, 2017), available online at: https://www.insurancejournal.com/news/national/2017/09/19/464721.htm (last accessed: March 2, 2018).

[159] *See* National Highway Traffic Safety Administration (NHTSA), *Automated Driving Systems (ADS): A Vision for Safety 2.0*, U.S. Department of Transportation (Sept. 2017), available online at: https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf (last accessed: March 2, 2018).

[160] *See* Bryant Walker Smith, Blog Post: *Legislative Shout Outs to Georgia and Virginia*, CTR. INTERNET & SOC'Y (Feb. 8, 2017, 8:12 p.m.); GEORGIA HOUSE BILL 248, available online at: http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/248 (last accessed: March 2, 3018).

[161] *See* SAE J3016, Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles, SAE International (Sept. 30, 2016), available online at: https://www.sae.org/standards/content/j3016_201609/ (last accessed: March 2, 2018).

[162] *See* Smith, *supra* note 160.

[163] *See id.*

[164] *See* Sheriff, *supra* note 16.

[165] *See, e.g.*, O'Brien v. Intuitive Surgical, Inc., 2011 WL 304079, at *1 (N.D. Ill. 2011) (granting summary judgment to manufacturer); Mracek v. Bryn Mawr Hosp., 610 F. Supp. 2d 401, 402 (E.D. Pa. 2009), *aff'd*, 363 F. App'x 925 (3d Cir. 2010); s*ee generally*, Katherine Sheriff, *Educating Lawmakers and Testing Autonomous Decision Makers: Working Reaction Article to 2016 Autonomous Vehicle Safety Regulation World Congress*, Social Science Research Network (2017); Katherine Sheriff, *Professional Liability after Quantum Leaps in Technology: The Advent of Autonomous Vehicles and Technology's Uncertain Fit within Existing Tort Law*, Social Science Research Network (2015).

TRENDS AND RECENT CASES AFFECTING MEDICAL MALPRACTICE CASES IN GEORGIA

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This coming year will be an interesting time for those handling medical malpractice cases. Just recently, the Georgia Supreme Court overturned a $22 million jury verdict, and several cases which will impact the handling of medical malpractice cases are currently pending in Georgia's appellate courts. This article summarizes some of these recent cases and upcoming issues.

The Georgia Supreme Court Overturns a $22 Million Verdict Where A Trial Court Erroneously Charged On Ordinary Negligence

On March 5, 2018, the Georgia Supreme Court reversed a $22 million verdict in a medical malpractice case, finding that the trial court had erroneously charged the jury on ordinary negligence.[1] The issue centered on whether the jury could be charged on ordinary negligence when devices, such as blood pressure monitors, could be purchased without a prescription, which the plaintiff argued negated the need for an expert's knowledge. In this case, the patient received an epidural steroid injection from an anesthesiologist at a surgery center.[2] After receiving a sedative, a pulse oximeter used to monitor the patient's blood oxygen level indicated a drop in her oxygen.[3] Although nurses and medical support staff tried to increase the patient's oxygen level, the anesthesiologist believed that the machine was malfunctioning and the patient's true oxygen saturation level was acceptable.[4] After the patient continued to

deteriorate, EMS was requested.[5] After the patient was emergently transported to a hospital, the anesthesiologist never informed the providers at the hospital that the patient had experienced respiratory complications.[6] The patient remained profoundly cognitively impaired and a quadriplegic for six years until her death.[7]

The trial judge charged the jury on both ordinary negligence and medical negligence, and the jury returned a verdict for $22 million.[8] On appeal, the Court of Appeals concluded the trial court had correctly charged ordinary negligence because a lay person would not need expert testimony to understand the meaning of data provided by pulse oximeters and blood pressure monitors because the devices could be purchased without a prescription by lay persons.[9] The Supreme Court disagreed that the ordinary negligence charge was proper, finding it harmful to the defendants and ordered a retrial.[10]

Although there will be continuing battles as to what acts or omissions constitute ordinary negligence versus professional negligence, this case helps defense counsel faced not only with confusing jury requests on both professional and ordinary negligence, but should also be considered when a complaint is styled as one of ordinary negligence instead of professional negligence.

Can a Plaintiff Present New Claims By Amending the Complaint (or an Expert Affidavit) after the Expiration of Statute of Limitations?

An action for medical malpractice is to be brought within two (2) years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.[11] When presenting professional negligence claims, O.C.G.A. §9-11-9.1 requires the plaintiff file an expert affidavit. O.C.G.A. §9-11-15(a) provides that a party may amend its pleading as a matter of course and without leave of court at any time before the entry of a pretrial order, and

even after that, "the party may amend his pleading by leave of court." These three statutes are the center of much controversy in the realm of handling medical malpractice cases and this year is no exception.

Both before and after the enactment of O.C.G.A. §9-11-9.1 in 2005, multiple courts have issued decisions dealing with various circumstances on whether a plaintiff may amend his pleadings (or expert affidavit) in attempts to present additional claims or even parties after the statute of limitations period expired.[12] The myriad of these resulting decisions has been complicated and, at times, confusing.

In the case most relied upon by defendants, *Thomas v. Medical Center of Central Georgia*, 286 Ga. 147 (2007), an amended complaint was deemed untimely and dismissed when it raised new claims against a hospital (which had been sued for its vicarious liability for its employed physicians' negligence) when the plaintiff sought to sue the hospital for its nurses' negligence in the same treatment of the same patient (which had not been alleged when the hospital's physicians were sued).[13] In another case, the court dismissed an untimely amended complaint when the plaintiff claimed O.C.G.A. §9-11-9.1 allowed an amended complaint to cure a failure to file an affidavit.[14] Yet, the holding in *Thomas* has been continually challenged, and at times, often seemingly eroded where courts have held a plaintiff had the right to file an amended affidavit of his expert and thus present additional claims.[15] In yet another case, a plaintiff initially alleged ordinary negligence against a physician and did not submit an expert affidavit, and after the statute of limitations expired, the plaintiff filed an amended complaint alleging professional negligence (with the support of an expert affidavit), which was deemed timely.[16]

These issues continue to be the subject of much litigation, and there are two case currently pending before the Georgia Supreme Court that require monitoring, *Thomas v. Tenet Healthsystem GB, Inc.*, 340 Ga. App. 78 (2017), *cert. granted* (Aug. 28, 2017) and *Oller v. Rockdale Hosp., LLC*, 342 Ga. App. 591 (2017) (No. S18C0149).[17]

In the first case pending before the Supreme Court, *Tenet Healthsystem*, the Georgia Supreme Court is considering whether a complaint can be amended to add a claim for simple negligence against a hospital and its nurse for the alleged failure to follow hospital protocols. In the original complaint, the plaintiff alleged the hospital was vicariously liable for the emergency physician's and interpreting radiologist's failure to diagnose a neck fracture.[18] The hospital denied vicarious liability for the physician's actions on the basis that they were independent contractors. During the discovery, a conflict in evidence arose as to whether one of the physicians and a hospital nurse followed the hospital's protocol for removal of the cervical collar following radiographic clearance. After the statute of limitations period expired, the plaintiff amended the complaint to add the claim for simple negligence against the hospital and its nurse for failure to follow this protocol. Although the trial court granted the hospital's motion to dismiss, the Court of Appeal reversed, finding the amended complaint was timely because it related back to the original complaint.

In addition to *Tenet Healthsystem*, the Supreme Court is considering another case involving whether the conduct of a physician that was not put at issue in the original complaint nor described or alluded to in any expert affidavits filed before the statute of limitations ran, can be added into a lawsuit after the limitations period has expired because a claim of general vicarious

liability, which had previously been inserted, had used to term "treating physicians."[19] In this case, the plaintiffs' last amended complaint prior to the running of the statute of limitations explicitly listed certain doctors in the physician's group and used the term "treating physicians."[20] After the statute of limitations had run, the plaintiffs filed an amended expert affidavit to include specific acts of negligence against other doctors in the physician's group and then sued under vicarious liability claim.[21] The Court of Appeals reversed the trial court's dismissal of the amended complaint, and again distinguished this case from the prior holding in *Thomas*.[22] At issue for the Supreme Court is whether plaintiffs are now permitted to amend the affidavits to include physicians (who had not previously been listed in any manner in either an expert affidavit or complaint) prior to the expiration of the statute of limitations.

It is hoped that in this pending case the Georgia Supreme Court will bring some clarity and shore up the principles found in *Thomas.*

Are Expert Affidavits Required For Negligent Credentialing Claims?

In 1972, Georgia recognized a cause of action for negligent credentialing, the process in which a hospital assesses a physician's (or other healthcare professional's) qualifications to grant privileges to practice at a hospital.[23] Although other states have held that expert testimony is necessary to support claims of negligent credentialing,[24] this State has yet to specifically address whether a negligent credentialing claim requires the support of an expert affidavit under O.C.G.A. § 9-11-9.1. Now however, this issue is currently pending in front of the Georgia Court of Appeals.[25]

In this case, the trial court denied the dismissal of the plaintiff's negligent credentialing claim of a physician when the

plaintiff did not file an expert affidavit in accordance with O.C.G.A. §9-11-9.1. In seeking the dismissal, the hospital argued negligent credentialing claims sound in professional negligence, particularly where Georgia's state regulations require that physicians serve on a hospital's credentialing committee when reviewing the qualifications of other physicians.[26] The hospital also argued that courts have held the negligent retention of a physician (a companion tort to the tort of negligent credentialing) falls within the realm of medical malpractice.

After the trial court denied the hospital's motion, the hospital sought and received the right to seek an interlocutory appeal. At issue before the Court of Appeals will be whether the tort of negligent credentialing requires the exercise of professional judgment such that an expert affidavit must be submitted at the time of filing the complaint. Although specifically focused on whether negligent credentialing claims require an expert affidavit, this case may eventually have a broader impact. The court will also be considering whether an expert affidavit is required to support claims alleging negligence in failing to implement or formulate hospital policies to treat and evaluate certain medical conditions and whether a plaintiff can file an amended complaint for claims of negligent credentialing and negligence in failing to implement or formulate policies after the statute of limitations has expired.

Has the Time Finally Come for Courts to Dismiss Claims of Negligent Credentialing, Negligent Hiring, Negligent Supervision, Negligent Training or Negligent Retention when the Defendant Hospital or Health Care Employer Admits Vicarious Liability?

With the rise in the number of physicians, physician assistants and other health care professionals being employed by hospitals and health care facilities, attorneys representing these entities are often faced with claims of negligent credentialing,

negligent hiring, negligent supervision, negligent training or negligent retention.

Under Georgia law, if a defendant admits it will be vicariously liable under the doctrine of respondeat superior if its employee is found negligent, the employer is entitled to summary judgment on claims for negligent entrustment, hiring, training, supervision and retention unless the plaintiff also brought a valid claim for punitive damages against the employer for its own independent negligence (hereinafter called the "Respondeat Superior Rule").[27] This rule is in place because allowing such claims "would not entitle the plaintiff to a greater recovery, but would merely serve to prejudice the employer" through, for example, the introduction of unfairly prejudicial information about the employee's prior employment history.[28]

Until recently, the courts have been reluctant to apply the Respondeat Superior Rule in the medical malpractice context.[29] However, the Court of Appeals recently overturned a trial court's order denying the dismissal of claims of negligent hiring, training, supervision and retention of hospital employees (but did not issue any ruling on negligent credentialing claims as these claims were not at issue).[30] The appellate court held that because the plaintiff was not seeking punitive damages, the claims were merely duplicative of the respondeat superior claim and should have been dismissed.[31] Moreover, the appellate court held that the Respondeat Superior Rule was not superseded by the apportionment statute (O.C.G.A. §55-12-33(b)), because the apportionment statute does not apply where an employer faces only vicarious liability under the doctrine of respondeat superior because the employer and employee "are regarded as the same tortfeasor."[32]

However, on December 11, 2017, the Supreme Court of Georgia agreed to

specifically consider whether claims of negligent hiring, training, supervision and retention of an employee are to be dismissed if there is no claim for punitive damages.[33] Counsel should continue to the monitor this case.

Additionally, although the Georgia Supreme Court will not address whether negligent credentialing claims are subject to the Respondeat Superior Rule at this time, counsel may wish to seek a dismissal of the same when a hospital admits vicarious liability for the same employee.[34] Specifically, the cause of action for negligent credentialing claims was created directly from the concept of negligent entrustment.[35] Where Georgia law holds that a plaintiff cannot seek to impose liability on employer under both the doctrine of respondeat superior and the theory of negligent entrustment, the same logical conclusion should apply to negligent credentialing claims.[36] Thus, an argument should be considered that if a plaintiff cannot seek to impose liability on employer under both the doctrine of respondeat superior and the theory of negligent entrustment, the same should apply to negligent credentialing claims.

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[1] Southeast Pain Specialist, P.C. v. Brown, No. S17G0732, 2018 WL 1143818, at *1 (Ga. Mar. 5, 2018).
[2] *Id.*
[3] *Id.*
[4] *Id.* at *2.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at *3.
[9]The Court of Appeals specifically held a charge on ordinary negligence was appropriate because: "A layperson would not need an expert to convey the implication of two pulse oximeters with readings of zero percent oxygen, or of a blood pressure monitor that continually recycles without registering a blood pressure. A layperson would also understand, without the guidance of expert testimony, that the emergency technicians and medical staff at the hospital where the patient was taken by ambulance would have been fully and truthfully informed about the incident in the operating room that indicated a hypoxic event." *Doherty v. Brown*, 339 Ga. App. 567, 572-73 (2016).
[10] The Georgia Supreme Court specifically held it is not enough to imply a layperson may not know how to use a pulse ox machine simply because it may be purchased without a prescription at a common drug store; instead, such a situation requires professional judgment as to how to respond to medical data from medical devices during a medical procedure. *Brown*, 2018 WL 1143818, at *4-5.
[11] O.C.G.A. § 9-3-71.
[12] After O.C.G.A. § 9-11-9.1 was enacted, courts also considered whether an expert affidavit could be amended such to add new claims or parties.
[13] Thomas v. Medical Ctr. of Cent. Georgia, 286 Ga. App. 147 (2007). In this case, the Georgia Court of

Appeals affirmed the trial court's grant of partial summary judgment as to the claims asserted in the plaintiff's amended complaint because the amended complaint raised new claims against previously unidentified employees, such as the nurses. *Id.* at 147. The Court held these claims were untimely and did not relate back to the filing of the original Complaint. *Id.* at 149.

[14] Fales v. Jacob, 263 Ga. App. 461, 462 (2003).

[15] Porquez v. Washington, 268 Ga. 649, 652 (1997); Gala v. Fisher, 296 Ga. 870, 875 (2015); Phoebe Putney Mem'l Hosp. v. Skipper, 235 Ga. App. 534, 537 (1998); and Hewett v. Kalish, 264 Ga. 183, 186 (1994).

[16] Jensen v. Engler, 317 Ga. App. 879 (2012). The plaintiff's original complaint raised an ordinary negligence against a physician for his failure to ensure the proper functioning of certain monitoring equipment during surgery to prevent thermal burn injuries. *Id.* at 880. The physician moved to dismiss the suit on the basis of the claim sounded in professional negligence, and that the complaint was not accompanied by the required expert affidavit. *Id.* The trial court denied the motion to dismiss, "finding that the allegations did not disclose with certainty that the plaintiff would not be entitled to relief on ordinary negligence." *Id.* After the limitations period expired, the patient amended her complaint to include new claims against the physician for professional negligence and battery and filed an expert affidavit. *Id.* The plaintiff's professional negligence claim was based upon the physician's failure to come back to the hospital when the patient had presented to the emergency room with signs of an emerging infection after having been discharged from the surgeon's performance of gall bladder surgery. *Id.* at 880-81.

The Court of Appeals rejected the defendant's second motion for dismissal, finding that there was no need to bring an expert affidavit with the original filing and because the expert affidavit was filed contemporaneously with the filing of the professional negligence claim, thus meeting the requirements of O.C.G.A. § 9-11-9.1. *Id.* at 881-82. The Court also found that the amendment was timely as the professional negligence claim arose "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Id.* at 883. The Court rejected the physician's contention that the professional negligence claim needed to be based on the same factual allegations, giving rise to the original negligence claim. *Id. But see* Pazur v. Belcher, 272 Ga.App. 456, 458 (2004) (noting that the relation/back doctrine would be inapplicable where the plaintiff characterized his new amended action against a new defendant as "wholly separate and distinct from the causes of action asserted against the [defendant] in the original complaint.")

[17] The GDLA has filed an amicus briefs in this case.

[18] Thomas v. Tenet Health System GB, Inc., 340 Ga. App. 78 (2017).

[19] *Oller*, 342 Ga. App. at 591(No. S18C0149).

[20] *Oller*, 342 Ga. App. at 593-94.

[21] *Id.* at 592.

[22] *Id.* at 595.

[23] Mitchell County Hosp. Auth. v. Joiner, 229 Ga. 140 (1972).

[24] *See, e.g.*,Brookins v. Mote, 2012 MT 283, ¶ 65, 367 Mont. 193, 215, 292 P.3d 347, 362**;** Grassie v. Roswell Hosp. Corp., 2011-NMCA-024, ¶ 62, 150 N.M. 283, 258 P.3d 1075, 1090; Johnson v. Misericordia Cmty. Hosp., 99 Wis. 2d 708, 739 (1981) ("[S]ince the procedures ordinarily employed by hospitals in evaluating applications for staff privileges *are not within the realm of the ordinary experience of mankind*, expert testimony was required to prove the same") (emphasis added); Frigo v. Silver Cross Hosp. & Med. Ctr., 377 Ill. App. 3d 43, 72 (2007), *as modified* (Sept. 20, 2007); Neff v. Johnson Mem'l Hosp., 93 Conn. App. 534, 545 (2006) ("[P]arameters of a hospital's judgment in credentialing its medical staff *is not within the grasp of ordinary jurors*. To the contrary, a hospital's decision whether to grant staff privileges to a physician is a specialized activity….") (emphasis added); Mills v. Angel, 995 S.W.2d 262, 275 (Tex. App.1999) ("Expert testimony is required to establish liability in the area of credentialing, because the procedures ordinarily used by a hospital in evaluating applications for staff privileges *are not within the realm of the ordinary experience of jurors*.") (emphasis added); *see also* Jensen v. Leonard, A08-2253, 2009 WL 3364264, at *6 (Minn. Ct. App. Oct. 20, 2009) ("[E]xpert testimony is necessary to establish a prima facie case of negligent credentialing. Consequently, the affidavit requirement applies.").

[25] Mayo Clinic Health System in Waycross, Inc. v. Burcham, No. A18A1299, (Ga. App. Feb. 26, 2018). The GDLA plans to file an amicus brief.

[26] Georgia's Department of Community Health ("DCH") regulations for hospitals state that: "The *medical staff* shall be responsible for the examination of credentials of any candidate for medical staff membership and for any other individuals seeking clinical privileges and for the recommendations to the governing body concerning appointment of such candidates." *See* Ga. Comp. R. and Reg. 290-9-7-

.11(a) (emphasis added). Further, O.C.G.A. § 31-7-15 provides that committees of *physicians* conduct the "evaluation of medical and health care services or the qualifications and professional competence of persons performing or seeking to perform such services."

[27] MasTec N. America v. Wilson, 325 Ga. App. 863, 864 (2014); Kelley v. Blue Line Carriers, LLC, 300 Ga. App. 577, 580 (2009); Durben v. Am. Materials, Inc., 232 Ga. App. 750, 751 (1998); Bartja v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa., 218 Ga. App. 815, 817 (1995).

[28] *MasTec N. America*, 325 Ga. App. at 865 (internal citations omitted).

[29] Wellstar Health Sys., Inc. v. Green, 258 Ga. App. 86, 88 (2002) (declining to dismiss a negligent credentialing claim for failure to ensure that certified nurse practitioner was qualified for privileges granted at a hospital).

[30]Hosp. Auth. of Valdosta/Lowndes Cty. v. Fender, 342 Ga. App. 13, 21 (2017), *cert. granted* (Dec. 11, 2017). However, the court noted that as "plaintiffs did not bring a negligent credentialing claim in that case, the exception for those claims to Respondeat Superior rule is inapplicable." *Id.* at 22.

[31] *Id.* at 23.

[32] *Id.* at 22 (citing PN Express v. Zegel, 304 Ga. App. 672, 680 (2010); Camelot Club Condo, Association v. Afari-Opoku, 340 Ga. App. 618, 626 (2017)).

[33] Hosp. Auth. of Valdosta/Lowndes Cty. v. Fender, 342 Ga. App. 13, 21 (2017), *cert. granted* (Dec. 11, 2017).

[34] Perhaps due to the fact that most physicians were independent contractors in the 1960's and early 1970's when numerous states, including Georgia, begin to recognize a cause of action for negligent credentialing claims it was viewed that a claim for negligent credentialing was "independent" from any malpractice allegations. Mitchell Cty. Hosp. Auth. v. Joiner, 229 Ga. 140, 141 (1972).

[35] *Id.* (citing Vaughn v. Butler, 103 Ga. App. 824 (1961)).

[36] Willis v. Hill, 116 Ga. App. 848 (1967).

USE OF ENFORCEMENT TO ENHANCE NATIONAL INFRASTRUCTURE

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Introduction

On February 12, 2018, President Trump announced a three trillion dollar plan to "Rebuild Infrastructure in America."[1] The plan involves spending $200 billion in federal dollars to leverage federal, state, local and business spending that is hoped to provide a total of 1.5 trillion dollars to replace aging infrastructure nationwide.[2] Whether the full magnitude of the administration's plan will be reached remains to be seen, but it is undeniable that major infrastructure improvements are needed. In the United States, examples abound of pot-hole-filled roads and unsafe bridges,[3] and the nation's power grid is said to be woefully obsolete.[4] Infrastructure deficiencies are not confined to transportation – our nation's dams, levees and many other infrastructure assets are aging to the point of being unsafe and inefficient, and will be costly to fix.[5]

Critical infrastructure assets that serve the public are owned by a variety of entities, including the federal, state and local governments and regulated private utilities. The typical approach to fixing public and quasi-public infrastructure is by having the political entity that owns the infrastructure asset identify and finance needed improvements.[6] Because these political cannot embark on substantial capital projects without buy-in from political

decision-makers, who are typically loath to impose new financial burdens on their constituents,[7] the maintenance of much of the critical infrastructure in our nation is the responsibility of a hodge - podge of towns, cities, counties, utility agencies and regulated utilities, with a wide variety of ability and motivation to address problems with the assets. Because of this lack of uniformity of responsible entities and the resulting lack of certainty in the ability to obtain funding, a federal approach to remedying nationwide infrastructure deficiencies is likely to be the only means for achieving meaningful nationwide improvements.

Even at the federal level, it is typically the most visible and dramatic infrastructure failures that are most likely to be funded for improvements and repairs, such as dams in danger of collapsing,[8] collapsed bridges,[9] and other infrastructure that kills or harms humans when it fails or has dramatic impacts on our quality of life.[10] When these failures occur, the direct attention they draw can result in the immediate application of resources and a speedy repair. A local example is the 2017 collapse of the I-85 bridge in Atlanta, which blocked a main artery into the city and which was subsequently removed and replaced in record time.[11] In contrast to the very visible infrastructure that has direct, dramatic impacts on people, there are numerous infrastructure assets across the country that are virtually invisible and which consequently receive only minimal attention. So long as these assets are minimally functional, they are ignored until a visible failure occurs that negatively affects our lives. Examples are our drinking water and waste water conveyance systems, which are in every substantial municipality and used by its citizens daily. These are not the type of assets that fail dramatically when they are worn out or obsolete and attract the

needed for substantial commitments to their repair. Instead, they often degrade slowly until expensive, comprehensive overhauls are needed to make them able to function adequately. So long as your drinking water is not discolored or smelly and your toilet flushes without backing up into your home, these ubiquitous systems often receive little attention from the local governments that are responsible for maintaining them, and for which oft-needed and expensive long-term improvements are delayed for as long as possible.

Even if the Trump national infrastructure plan becomes fully funded, and even though the plan specifically addresses water and waste water assets, the overall funds generated from the plan will be inadequate to address all of the nation's infrastructure shortfalls and comprehensive rehabilitation for nationwide infrastructure will fall short.[12] And because sewer and water systems are "out of sight and out of mind," they are not likely to garner a sufficient share of the 1.5 billion to be raised under the Trump approach to address the vast needs for rehabilitation of these systems.[13] Fortunately for users of our national sewer systems, which compose the majority of the population – more than 300 million citizens[14] - there has been a systematic federal effort for more than 20 years to address failing sewer systems, using the enforcement power of the United States Environmental Protection Agency ("EPA"), to identify the worst sewer system problems and require that the cities where they are located rehabilitate them systems with little direct cost to the federal government. This paper describes how EPA, with state regulatory partners, has been able to achieve remarkable results fixing this critical infrastructure and continues to do so. It also examines how a typical sewer system enforcement case arises and how counsel should approach the defense of a sewer

system case. Finally, it examines whether this enforcement approach may be effective in mandating other infrastructure enhancements using the same model.

How a Sewer System Works

A basic understanding of how a sewer system operates is of course useful for defending an enforcement case. A sewer collection system is a network of pipes that collects waste water from individual sources, including homes, businesses and public buildings, and conveys the water to a treatment plant, which treats the water and typically discharges the treated water into a body of water.[15] Systems are designed to use gravity to propel the water the greatest extent possible, but when the waste water flow must be directed uphill, it is pumped, often with large pumps housed in "pump stations." The public part of the sewer system begins where the pipes from buildings discharge into the system, which is often along a road. The lines that run from homes and businesses are private property and the property owners are generally responsible for maintaining and repairing them. Manholes are maintained along the sewer lines to provide access for maintenance of the system. Like the tip of an iceberg, the manholes, pump stations and treatment plants are the only visible parts of a sewer systems, which may have many miles of underground pipes.[16]

Older cities may have what are called "combined sewer systems," which are systems that allow storm water runoff and waste water from the sewer to mix. Because it is costly to convey and treat waste water in systems that allow storm water to mix with sewage, many cities have managed to separate their storm water systems from their sewer systems. A sewer system that does not permit stormwater to mix with sewage is referred to as a "sanitary sewer system" or "SSS."

Predicate for Enforcement Action.

When sewer collection systems are allowed to deteriorate, the neglect often results in chronic sewer overflows that can release thousands of gallons of untreated sewage into the community from manholes, sewer line breaks and building backups. The releases are often caused or aggravated by the "infiltration" into sewers of rainwater and groundwater and the "inflow" into sewers of illicit drainage systems connected to the sewer lines, such as roof drains and storm water drainage systems. When combined with line blockages, breaks, and other defects, this infiltration and inflow - known as "I and I" - can create chronic, widespread leaks and overflows, known as "sanitary sewer overflows" or "SSOs." EPA considers SSOs that reach water bodies to be violations of the Federal Water Pollution Control Act (commonly known as the Clean Water Act ("CWA")) and equivalent state laws.[17] Sewer overflows are often also violations of permits issued by EPA or the state to operate the sewer collection system under the Clean Water Act National Pollutant Discharge Elimination System ("NPDES") requirements, which mandate permits for "point sources" that discharge "pollutants" into "waters of the United States."[18]

From the perspective of regulators, the issue is simple – pollutants are being allowed to contaminate regulated waters in violation of the CWA or to violate the conditions of applicable NPDES permits. The CWA prohibits these violations and empowers regulators to take action to punish past violations and prevent additional ones.[19] For sewer operators, which are typically cities, counties, utility districts, and other agencies created to operate collection and treatment systems,[20] the problem is challenging because to comply with the CWA, the operator must often repair a sewer system that has often been operated on a

limited budget and allowed to deteriorate. To fix the system in a manner that will stop SSOs can require costly evaluation and rehabilitation of the sewer system over a period of years[21] and the costs of rehabilitating the system must be borne by the rate payers.[22]

EPA Enforcement and Settlement

Enforcement of a substantial sewer system case in Georgia is brought by EPA, Region 4[23] and the Environmental Protection Division of the Georgia Department of Natural Resources ("EPD"). Because sewer infrastructure is ubiquitous and frequently neglected, there are many potential targets. EPA has been focusing on sewer system enforcement for the past 20 years or so, and has been working its way down from the biggest cities with sewer system problems to smaller ones. EPA Region 4 signed consent decrees with Jefferson County, Alabama in 1996, Atlanta in 1997, Chattanooga in 2013, and in Jackson, Mississippi in 2012. Several others have been signed in recent years[24] and Region 4 is currently working on several enforcement actions that are expected to result in consent decrees this year.

Nationwide, EPA has identified 1103 "large sanitary sewer systems with untreated sewage overflows.[25]" A large system is one that generates 10 million gallons per day of waste water.[26] EPA's goal is to "address" each of the remaining 89 large systems by 2019. By "address," EPA means it will have entered into a settlement agreement with each of these systems.[27] Presumably, EPA will not stop when it has addressed the large systems, but will continue to bring enforcement actions against smaller cities with chronic SSOs or other acute system-related problems for as long as it has the resources and mandate to do so.

A municipal sewer system becomes subject to enforcement when it has

experienced SSOs that reach bodies of water. In sufficient quantities, the occurrence of SSOs indicates that a system that is not operating properly and may need to be upgraded to prevent overflows. Sewer system operators are required to have permits that require the permittees to notify the permitting authority - typically the state environmental agency - when an SSO occurs.

[28] The environmental agencies may also get reports of SSOs from residents who witness overflows or their aftermath.

When EPA becomes involved in a sewer system enforcement matter, it typically works in tandem with state environmental agencies whose enforcement power for these matters is largely coextensive with that of EPA. EPA involvement is often preceded by a state enforcement action that the state agency has attempted but has been unable to resolve.[29] If the state agency cannot fully address the matter and it is sufficiently serious, EPA will join in. EPA may send its own inspection team or send a "notice of violation" ("NOV") based on the results of the state inspection. In either case, the NOV will invite the sewer system operator to a "show cause" meeting, where the operator will have the opportunity to explain why the violations are occurring. Often, it is apparent to regulators – and acknowledged by operators – that a sewer system is obsolete in whole or in part and that an extensive review and rehabilitation of the system is in order. When this is the case, the show cause meeting will involve a frank discussion of what the parties believe will be required to fix the system. EPA will explain that the remedy must be memorialized in a settlement agreement. It will then work with the operator to obtain information to enable both sides to negotiate the terms of the agreement, as discussed further below.

Operators that face enforcement often ask whether there are viable alternatives to settling. The answer is generally no, for two reasons. First, because EPA will have a list of ongoing violations that have been reported by the system operator, the agency is almost guaranteed to win on summary judgment if it has to sue.[30] Second, even if an operator is willing to concede liability, it is unlikely to obtain more favorable relief in court than through a negotiated agreement. If the government is required to litigate, it will be asking for the court to impose injunctive relief dictated by EPA, which will leave less room for the operator to negotiate with a cooperative enforcement team for acceptable terms. Given that the injunctive relief could involve comprehensive rehabilitation of the sewer system at a cost of $100,000,000 or more over more than a decade,[31] it is important for the municipality to have meaningful input on how it will be performed. In a negotiated settlement there is much more opportunity for the operator to influence the terms of the agreement. Equally important is the matter of penalties. Applicable statutory penalties under the CWA are currently $50,000 per violation per day.[32] In litigation, the government will be able to seek penalties for each violation it can prove, which can result in an extremely high penalty.[33] Using a settlement approach, the operator is subject to a much lower penalty calculated according to the EPA municipal settlement policy.[34] As illustrated above, there are few reasons to litigate a typical EPA sewer system enforcement case.

Assuming the system operator is willing to settle with EPA, the settlement will be memorialized in a binding agreement with EPA and the state agency. If the remedy is anticipated to take longer than five years, EPA will normally demand that the settlement agreement be in the form of a judicially approved consent decree. A

shorter term remedy may be able to be resolved with an administrative settlement. A consent decree is a judicially-monitored settlement with EPA, DOJ and the state that is filed in and subject to enforcement by a federal district court. State environmental agencies often become litigants in these cases and citizens' groups may seek to intervene under the citizen suit provisions of the CWA.

For the remedial part of a settlement with the government, the settling entity will be expected to commit to a long term effort to assess and repair its sewer system and to adopt a sustainable system for maintaining the sewer infrastructure and ensuring adequate capacity for sewer users into the foreseeable future. A typical consent decree obligates an operator to use various diagnostic tools to assess the condition of the system – often in stages – and then to use the information to rehabilitate and upgrade the system to ensure long term efficacy and regulatory compliance.[35] The consent decree will also include the elements of what EPA refers to as the Capacity, Management, Operation, and Maintenance system ("CMOM") to help ensure long term compliance. The CMOM provides a framework for municipalities to manage, operate, and maintain collection systems; investigate capacity-constrained areas of the collection system; and respond to SSOs. In CMOM planning, the municipality selects performance goal targets and designs CMOM activities to meet the goals, including operation and maintenance planning, capacity assessment and assurance, capital improvement planning, and financial management planning. Activities are assessed on an on-going basis to determine if performance goals are being met and to adjust goals accordingly.

Other requirements of a consent decree include requirements for sewer

mapping, modeling the operation of the sewer system, information management, and a requirement that the municipality have in place enforcement mechanisms to ensure the actions of rate payers do not undermine the remedial efforts of the operator. For example, a municipality must be able to prevent restaurants and residences from discharging grease into the sewer, which is a perennial cause of sewer blockages.

Financial Issues

The cost of settling a sewer system case depends on the size of the system and its condition. A town with a population of 50,000, for example, might face remedial costs of more than $100,000,000. Large cities can incur settlement costs of more than a billion dollars.[36] Remediation costs are borne almost entirely by rate payers, whose rates must be raised over time - often substantially - to cover higher operation and rehabilitation costs and debt service for financing the remedy. EPA recognizes the burdens imposed by its required injunctive relief and allows more time to complete the work to communities with less ability to pay. EPA assesses a municipality's ability to pay, with reference to EPA's "financial capability analysis" policy and looks to the municipality to assess its ability to pay for a rate increase through a financial analysis that includes a "rate study" and an evaluation of its ability to finance the remedy. Financing is often provided through a combination of state revolving fund loans and private bond financing. There are few opportunities for direct federal assistance.

The Settlement Team

The negotiation and settlement of a substantial sewer enforcement matter requires a team approach. Critical team members include 1) the operator's decision-makers, which may include city and county

government officials, the public utility director, or the management of the utility district or agency; 2) environmental professionals with experience negotiating the resolution of settlements with EPA and state environmental agencies and with implementing the remedy; and 3) a financial consultant to evaluate financial data and demographic information of the municipality to perform the affordability analysis. The environmental professionals should include an experienced environmental attorney and an environmental consultant. Because the attorney and consulting firms will be advising the municipality over a long period of time for matters with substantial consequences, they should be experienced, trustworthy and able to work well with the operator's management and the enforcement agencies. For a municipal operator, trusted local counsel can be a useful liaison between the environmental professionals and the operator and its decision-makers, who will be faced with decisions that can have substantial political implications.

Applying the EPA Sewer System Enforcement Model for other Infrastructure

The success of the EPA sewer system enforcement approach to revitalizing aging sewer infrastructure warrants a close look at whether other types of infrastructure assets could benefit from this approach. For this to work, the other systems must have the features that allow a federal agency with enforcement power to leverage the threat of certain victory in an enforcement case into an enforceable agreement with the owner or operator of the infrastructure assets to comprehensively rehabilitate the assets and require local users of the assets to pay for them.

In the realm of environmental law, the sewer system approach may be unique. The only other infrastructure system that comes close to being amenable to this

approach is drinking water delivery infrastructure which, like sewer systems, is in need of substantial upgrades in many parts of the United States.[37] These systems are similar to sewer systems in many ways. They are ubiquitous critical infrastructure assets the nation's citizens rely on every day. They are also systems for which maintenance is the responsibility of local governments and for which maintenance is funded by rate payers. One critical difference between water and sewer systems makes this approach less feasible, however, and that is that the regulatory regime that applies to drinking water systems does not provide regulators with the legal leverage the CWA provides for sewer systems.

Drinking water infrastructure is regulated primarily by the Safe Drinking Water Act ("SDWA")[38] which is fundamentally different in scope and effect than the CWA. While the CWA has robust civil and criminal enforcement mechanisms which make it difficult for a sewer system operator to resist an enforcement action based on known unpermitted discharges, the SDWA is weak when it comes to enforcement related to drinking water contamination. The primary means for determining whether a drinking water system is failing is via EPA's "Lead and Copper Rule,"[39] which was promulgated under the SDWA. The Lead and Copper Rule contains provisions for monitoring, treatment, customer awareness, and lead service line replacement. The lead service line replacement requirements appear at first blush to provide a starting point to enable EPA to compel drinking water operators to replace their old lines, but a combination of technical issues and weak enforcement provisions in the SDWA would make it difficult for EPA and DOJ to base a major infrastructure initiative on this rule. The weak enforcement mechanisms under the SDWA prevent EPA and DOJ cannot

directly use the statute to support injunctive relief in federal court to require cities to replace outmoded and dangerous pipes. While the CWA authorizes EPA to "commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which [it] is authorized to issue a compliance order under subsection (a) of this section . . ."[40] or to bring a felony prosecution for knowingly discharging pollutants,[41] the SDWA does not provide for immediate and direct enforcement for violations of drinking water standards. Instead, if EPA discovers that a water system does not comply with a regulation, its sole recourse is to "notify the State and such public water system and provide such advice and technical assistance to such State and public water system as may be appropriate to bring the system into compliance with the requirement by the earliest feasible time."[42] Only when a state is found not to "commence[] appropriate enforcement action," can EPA issue a compliance order.[43] This fundamental difference prevents the government from using the SDWA directly and efficiently to effect the infrastructure changes it has been able to mandate for sewer systems under the CWA.

Conclusion

The EPA enforcement approach to sewer system rehabilitation is not the typical approach for rehabilitating infrastructure in the United States, but it has the advantages of being effective for ensuring the work is done with minimal impact on the national fisc. Given that $271 billion is estimated to be needed to meet current and future demands for wastewater infrastructure over the next 25 years,[44] this approach has much to commend it. So long as EPA's hands are not tied by policy or budget limitations, it should play an important role in addressing the need to upgrade the nation's critical

waste water treatment infrastructure for many years, thereby freeing up scarce dollars needed to address our nation's other important infrastructure needs.

[1] White House Briefing, Building a Stronger America: President Donald J. Trump's American Infrastructure Initiative (Feb. 12, 2018), *available at* https://www.whitehouse.gov/briefings-statements/building-stronger-america-president-donald-j-trumps-american-infrastructure-initiative/.

[2] *Id.* (explaining that $100 billion will be used to create an Incentives Programs; $20 billion will be dedicated to the Transformative Projects Project; $20 billion will be allocated to expanding infrastructure financing programs; $10 billion will go to a new Federal Capital Revolving Fund; and $50 billion will be devoted to a new Rural Infrastructure Program.)

[3] *See e.g.* Paul Bedard, *Report: 56,000 dangerous bridges in US, DC's the worst*, WASH. EXAM'R (May 5, 2017), *available at* http://www.washingtonexaminer.com/report-56000-dangerous-bridges-in-us-dcs-the-worst/article/2622206; John Tuohy, *Indy's streets are so bad, making them "fair" would take 10 times the current budget*, INDYSTAR.COM (Feb. 16, 2018), *available at* https://www.indystar.com/story/news/2018/02/15/indys-streets-so-bad-making-them-fair-would-take-10-times-current-budget/324044002/; *Bumpy Roads Ahead: America's Roughest Rides and Strategies to make our Roads Smoother*, TRIPNET.ORG (November 2016), *available at* http://www.tripnet.org/docs/Urban_Roads_TRIP_Report_November_2016.pdf.

[4] Joshua D. Rhodes, *The outdated US electric grid is going to cost $5 trillion to replace*, BUS. INSIDER (Mar. 16, 2017), *available at* http://www.businessinsider.com/replacing-us-electrical-grid-cost-2017-3.

[5] *See, e.g.*, Casey Williams, *America's Crumbling Dams Are a Disaster Waiting to Happen*, HUFF. POST (May 18, 2016) *available at* https://www.huffingtonpost.com/entry/america-crumbling-dam-infrastructure_us_573a332be4b08f96c183deac.

"Infrastructure assets" are "the facilities and structures essential for the orderly operations of an economy [including] [t]ransportation networks, health and education facilities, communications networks, water and energy distribution systems [that] provide essential services to communities. *See* Definition of Infrastructure Assets, GOOGLE (search field for "definition of infrastructure assets").

[6] For example, state roads are repaired by State Departments of Transportation using state appropriations and whatever federal assistance they are able to scrape up, *see, e.g.*, http://www.dot.ga.gov/IS, and components of the electrical grid are repaired and upgraded by the power companies and their affiliates that own them. *See, e.g.*, *Energy Efficiency*, SOUTHERN COMPANY, https://www.southerncompany.com/corporate-responsibility/environment/energy-efficiency.html.

[7] In Georgia, for example these decision-makers include the elected commissioners on the Public Service Commission, who approve certain utility rates which provide revenue for utility infrastructure improvements. *See generally* http://www.psc.state.ga.us/. The State also funds much of the state-wide transportation infrastructure, which is overseen by an elected Department of Transportation Commissioner. *See generally* http://www.dot.ga.gov/AboutGDOT. Municipalities and counties must pay for local transportation, water and sewer infrastructure. *See Funding Sources*, CLEAN WATER ATLANTA, http://www.cleanwateratlanta.org/overview/Funding/; *About the 2015-2019 Capital Improvement Program*, CITY OF ATLANTA DEPARTMENT OF WATERSHED MGMT, http://www.atlantawatershed.org/cip/about/.

[8] For example, the February 2017 threatened failure and collapse of California's Orville Dam leading to a mass evacuation. *See* Samantha Schmidt et al., *188,000 evacuated as California's massive Oroville Dam threatens catastrophic floods*, WASH. POST (Feb. 13, 2017), *available at* https://www.washingtonpost.com/news/morning-mix/wp/2017/02/13/not-a-drill-thousands-evacuated-in-calif-as-oroville-dam-threatens-to-flood/?utm_term=.d40ccf16ef9e.

[9] For example, the March 2017 collapse of an I-85 bridge in Atlanta, Georgia, which was rebuilt in record time. *See e.g.* Kristen Reed, *Collapsed Interstate 85 bridge to reopen ahead of schedule*, USA TODAY NETWORK (May 11, 2017), *available at* https://www.usatoday.com/story/news/nation-now/2017/05/11/interstate-85-bridge-collapse-atlanta-opening/317743001/.

[10] For example, the February 2018 suburban house explosion in Dallas, Texas, following numerous gas distribution leaks in the area, resulting in a girl's

death and thousands of homes without gas service for days to weeks. *See* Lucia I. Suarez Sang, *12-year old killed, 4 others injured after house explositon in Texas*, FOXNEWS.COM (Feb. 24, 2018), *available at* http://www.foxnews.com/us/2018/02/24/12-year-old-killed-4-others-injured-after-house-explosion-in-texas.html

[11] *See supra* note 9.

[12] *See supra* note 4.

[13] Patricia Buckley et al., *The aging water infrastructure: Out of site, out of mind?*, DELOITTE INSIGHTS (March 21, 2016), *available at* https://www2.deloitte.com/insights/us/en/economy/issues-by-the-numbers/us-aging-water-infrastructure-investment-opportunities.html

[14] *See https://www.census.gov/quickfacts/fact/table/US/PST045216.*

[15] Smaller treatment plants may be permitted to "land-apply" the treated water by spraying it on cultivated fields. *See e.g.* Curtis L. Schreffler & Daniel G. Galeone, *Effects of Spray-Irrigated Municipal Wastewater on Small Watershed in Chester County, Pennsylvania*, U.S. GEOLOGICAL FACT SHEET (2005), *available at* https://pubs.usgs.gov/fs/2005/3092/#pdf; Lici Beveridge, *Spray fields successful in Florida, North Carolina*, HATTIESBURG AMERICAN (June 11, 2016), *available at* https://www.hattiesburgamerican.com/story/news/local/hattiesburg/2016/06/11/spray-fields-successful-florida-north-carolina/83926484/.

[16] *Fact Sheet, Asset Management for Sewer Collection Systems*, U.S. ENVTL. PROT. AGENCY, (April 2002), at 2, *available at* https://www3.epa.gov/npdes/pubs/assetmanagement.pdf (referencing a 1999 study by ASCE under an EPA cooperative agreement)

[17] 33 U.S.C. § 1251, *et. seq*.

[18] These so-called "NPDES permits" are required by Section 402 of the CWA, 33 U.S.C. § 1342, and are typically issued by the states under the authority granted to them by EPA under the CWA. *See* 33 U.S.C. §1342(b). For definitions of "point source," "pollutant" and "waters of the United States," *see* 33 U.S.C. §1362(6),(7) and (14).

[19] *See* 33 U.S.C. § 1319(d)(2)

[20] Most are operated by agencies of cities or towns, such as the Department of Watershed Management, in Atlanta. Some states authorize separate agencies to run independent water and sewer agencies. *See, e.g*. Tenn. Code Ann. § 68-221-601 *et seq.* (2016) (establishing a legal framework for an autonomous agency named the "Water and Wastewater Treatment Authority").

[21] For example, Chattanooga faces an estimated cost of $250,000,000 to comply with the terms of the consent decree it signed with EPA in 2013, and Atlanta's cost to comply with its settlement terms was estimated to reach almost 1.15 billion. *EPA National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater out of Our Nation's Waters, Status of Civil Judicial Consent Decrees Addressing Combined Sewer Systems*, U.S. ENVTL. PROT. AGENCY, (May 1, 2017), *available at* https://www.epa.gov/sites/production/files/2017-05/documents/epa-nei-css-consent-decree-tracking-table-050117.pdf.

[22] *See* 33 U.S.C. § 1284(b)(1) (requiring each recipient of waste water treatment services pay their proportionate share).

[23] Region 4 covers Georgia, Alabama, Tennessee, Mississippi, North and South Carolina, Kentucky and Florida.

[24] *See e.g.* Consent Decree, *U.S., et al. v. City of Greenville, MS.*, No. 4:16-cv-00018 (N.D. Miss. Jan. 28, 2016), ECF No. 2-1 (requiring municipality to complete Early Action Projects, develop and implement capacity management, operations, and maintenance programs, and conduct sewer system evaluation/rehabilitation); Consent Decree, *U.S., et al. v. City of Columbia*, No. 3:13-cv-02429 (D. S.C. Sept. 9, 2013), ECF No. 5-1 (requiring city to assess and rehabilitate its sewer system to eliminate SSOs and to develop and implement specific management, operation, and maintenance programs to address deficiencies in sewer system); and Consent Decree, *U.S., et al. v. Miami-Dade County, FL*, No. 1:12-cv-24400 (S.D. Fla. June 6, 2013), ECF No. 25-1 (requiring rehabilitation of WWTPs and sewer collection systems and development and implementation of specific programs to eliminate SSOs and achieve compliance with NPDES permits).

[25] *See* https://www.epa.gov/enforcement/national-enforcement-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our.

[26] *Id.*

[27] *Id.*

[28] See 33 U.S.C. § 1303 (requiring a permit for discharging pollutants into waters of the United States.)

[29] Certain state agencies are inclined toward leniency and their settlement agreements may not be stringent enough to resolve the underlying issues, or they may lack the resources to follow up. For a discussion of the dynamics of the relationship between the United

States EPA and state environmental agencies, *see* Adam Sowatzka and Richard E. Glaze, Jr., *EPA Compliance and Enforcement Answer Book*, Chapter 2 (PRACTISING LAW INSTITUTE 2015 ed.).

[30] The SSO self-reports are admissions that are admissible against the entity who reported them. *See* FED. R. EVID. 801(d). It is unlikely that a case would be built solely on reports from third parties but if it were, the defense case might survive summary judgment.

[31] *See supra* note 22.

[32] 33 U.S.C. § 1319(c)(2)(b).

[33]*See* Atlantic States Legal Found. v. Tyson Foods, 897 F.2d 128 (11th Cir. 1990) (indicating that in accessing a penalty, a court begins at a statutory maximum amount and reduces the penalty based on the specific factors set out in section 309(d) of the CWA.)

[34] *See Interim Clean Water Act Settlement Penalty Policy*, U.S. ENVTL. PROT. AGENCY (March 1, 1995), *available at* https://www.epa.gov/sites/production/files/documents/cwapol.pdf.

[35] *See* Consent Decree, *U.S., et al. v. City of Chattanooga*, No. 1:10-cv-281 (E.D. Tenn. Apr. 24, 2013), ECF No. 24.

[36] *See supra* note 22 (documenting the estimated costs to bring a system into compliance, including, among others, over $2.5 billion for District of Columbia's Water and Authority.)

[37] *See* Matthew Morrow, *America's Water Infrastructure Is in Need of a Major Overhaul*, FOX BUSINESS, March 12, 2016, available at https://www.foxbusiness.com/features/americas-water-infrastructure-is-in-need-of-a-major-overhaul.

[38] 42 U.S.C. § 300f *et seq*.

[39] 40 C.F.R. §141.80 *et seq.*

[40] 33 U.S.C § 1319(b)

[41] *Id.* at § 1319(b)

[42] 42 U.S.C. § 300g-3(a)(1)(A)(ii)

[43] *Id.* at § 300h-2(a)(1)

[44] Christopher Kane, *Integrated solutions for America's aging water infrastructure*, TRENDS, A.B.A SECTION OF ENV'T, ENERGY, AND RES., Vol. 49, No. 4, Mar/Apr 2018, at 7.