ACKNOWLEDGMENT

By: Grant B. Smith
Dennis, Corry & Porter, L.L.P.
2575 Cumberland Parkway
Atlanta, Georgia 30339
(770) 432-2323

This year's *Law Journal* breaks new ground by being the first *Journal* published exclusively on the GDLA's website. There was much discussion at several Board meetings about whether to publish the *Journal* in hard copy and on the web. We decided to experiment and see if the members and other readers of the *Journal* find the web-only version as useful as the printed book. Please e-mail me at Gbs@dcplaw.com and let me know if you like the new format or if you would prefer the hard-bound version. As you can imagine, the Association is saving a significant amount of money by publishing the *Journal* on the web.

Many thanks to the authors who sacrificed a tremendous amount of time to contribute articles to the *Journal*. Special thanks to those who submitted articles last year and whose articles are being published this year. I appreciate your patience.

Karen Raby authored an excellent article on the new ethical rules governing lawyers practicing in Georgia. Everyone should read this article carefully. Statten Bitting provided us with an excellent survey of new cases in the field of workers' compensation for 1999 and 2000. Cam Bowman submitted a very thorough survey of automobile insurance decisions in Georgia over the past two years. Mike Goldman and Michelle Coburn wrote a probative article about the admissibility of similar accidents and subsequent remedial measures in product liability cases. David Nelson wrote a cogent article on the family exclusion in an automobile liability insurance policy. DeeAnn Boatright Waller thoroughly examined the areas of personal and advertising injuries in her article. Bob Monyak wrote an excellent article on protecting trade secrets and

propriety information in product liability cases. Lee Pruett authored an entertaining and informative article outlining the defense of the server of alcohol in bar fight cases. Ed Stabell prepared an outstanding and comprehensive article about how to defend a truck/train collision. It is a "must read" for lawyers involved in such claims. Finally, Bill Claxton provided us with a primer on internet research options.

I hope these articles are useful to you in your practice. Each spent a tremendous amount of time and effort to produce articles for this year's *Journal*. Please thank them for their efforts.

Grant B. Smith
Editor

TABLE OF CONTENTS

DEFENDING THE SERVER OF ALCOHOL IN BAR FIGHT CASES

By: H. Lee Pruett
Swift, Currie, McGhee & Hiers, LLP
The Peachtree, Suite 300
1355 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 874-8800

INTRODUCTION

As everyone knows, public sentiment against the negative effects of alcohol can run strong. Many years ago, the first Chief Judge of the Georgia Court of Appeals felt compelled to write of "the monstrous and measureless evil of intoxicating liquors," a "hydra-headed and remorseless monster, [that] with ceaseless and tireless energy, wastes the substance of the poor, manufactures burdensome taxes for the public, monopolizes the valuable time of the courts, fills jails, penitentiaries, and asylums, ruins homes, destroys manhood, terrorizes helpless women and innocent children, baffles the church, and mocks the law."[1] Similar outrage led, of course, to the eighteenth amendment to the United States Constitution in 1919 which prohibited "the manufacture, sale, or transportation of intoxicating liquors."[2] Although this amendment was repealed only fourteen years later,[3] there is still today a broad public awareness of, and concern about, the ugly results of alcohol abuse, especially the problems associated with underage drinking [4] For example, a recent survey by the University of Minnesota found that 96% of adults are concerned about the problem of teenage drinking.[5]

---

1 *Langston v. State*, 10 Ga. App. 82, 72 S.E. 532 (1911).

2 U.S. Const., amend. XVIII (repealed 1933).

3 U.S. Const., amend. XXI.

4 Citing statistics from the National Highway Traffic Safety Administration, Mothers Against Drunk Driving (MADD) reports that in 1999, 35.5% of the traffic fatalities in Georgia were alcohol related. MADD also reports that 35% of all deaths of 16 to 20 year olds result from motor vehicle crashes, and 37% of these crashes are alcohol related. *See* www.madd.org.

5 "Fact Sheet: Public Attitudes and Opinion on Youth Access to Alcohol," www.cspinet.org/booze/rwjfsurvey.htm.

Negative attitudes about alcohol are often directed at the provider. The Minnesota survey found that "82% of adults agree that stores and bars are not careful enough in preventing teenagers from buying alcohol," that "88% of adults favor a law that would require owners of bars and restaurants to attend a one day training course every year on how to deal with intoxicated patrons and underage drinkers," and that 89% of adults favor a law that would require the employees of bars and restaurants to attend the same training course.[6] Facing this hostile attitude can be a daunting task for the attorney defending a drinking establishment in a negligence case. A review of recent Georgia cases involving bar fights, however, shows that the courts are compelled to apply general principles of law which often cut in favor of the bar owner. In the eyes of the law, at least, the bar owner is not more apt to be found liable simply because he sells alcohol. While the attorney defending the server of alcohol must acknowledge and deal with negative attitudes about alcohol, the cases surveyed show the law in Georgia still offers substantial defenses to the bar owner.

THE BAR OWNER'S DUTY AND THE FORESEEABILITY OF CRIMINAL CONDUCT

In cases arising from physical fights in or around the bar-owner's property, the courts will apply long-standing principles of premises liability law. The rules of law are generally the same whether the bar patron is attacked by a third-party criminal, another patron, or the bar-owner's employee. Assuming the patron/plaintiff is an invitee[7] the owner owes the patron a duty "to exercise ordinary care in keeping the premises and approaches safe." The courts have repeatedly

---

6 *Id.*

7 This article will discuss liability only as to an invitee. The standard of care will differ, of course, if the injured party is deemed a licensee or a trespasser. *See Lenny's Two, Inc. v. Echols*, 192 Ga. App. 371, 384 S.E.2d 898 (1989); *Armstrong v. Sundance Entertainment, Inc.*, 179 Ga. App. 635, 347 S.E.2d 292 (1986) (circumstances such as a patron being asked to leave the premises may change his status to that of licensee or even trespasser).

held that a proprietor is not bound to insure the safety of a patron; rather, the proprietor may be liable if the plaintiff can show the proprietor had superior knowledge of the existence of the dangerous condition that subjected the patron to an unreasonable risk of harm.[8] If the bar owner has reason to anticipate a criminal act such as an assault and battery, the owner has a duty to exercise ordinary care to protect the patron from the criminal activity.[9]

In determining whether the criminal conduct was foreseeable to the defendant bar owner, the court may consider whether the bar owner had notice of the individual assailant's propensity to commit the act or whether the bar owner had knowledge of "substantially similar incidents"[10] so as to impose on the bar owner the duty to protect the patron against crime generally. In *W.D. Enterprises, Inc. v. Barton,*[11] the Court stated that a proprietor is not responsible for unforeseeable injuries to an invitee caused by a third party if the proprietor had "no notice of dangerous conduct on the part of customers or third persons *on the occasion in* question."[12] In this case, a fight occurred between two patrons at the Three Dollar Café in Buckhead. On a Saturday night, the plaintiff and several of his friends were sitting on the deck of the restaurant. The table of people from which the assailant eventually emerged was described as "loud," "rowdy," and "wasted."[13] The plaintiff testified that he complained about the group to the waitress and the waitress called them a bunch of jerks."[14] The assailant, one Anderson, suddenly

---

8 *Howell v. Three Rivers Security, Inc.,* 216 Ga. App. 890, 456 S.E.2d 278 (1995); *Good Old Days Downtown, Inc. v. Yancey,* 209 Ga. App. 696, 434 S.E.2d 740 (1993).

9 *Habersham Venture, Ltd. v. Breedlove,* 244 Ga. app. 407, 535 S.E.2d 788 (2000); *Collins v. Shepherd,* 212 Ga. App. 54, 441 S.E.2d 458 (1994).

10 To show "substantially similar incidents," the plaintiff is not required to show the exact same crime occurred in the past, but simply the prior incidents were "sufficient to attract the owner's attention to the dangerous condition which resulted in the litigated accident." *Confetti Atlanta, Ltd. v. Gray,* 202 Ga. App. 241, 242, 414 S.E.2d 265 (1991) (citation and punctuation omitted).

11 218 Ga. App. 857, 463 S.E.2d 529 (1995).

12 *W.D. Enterprises,* 218 Ga. App. at 858 (quoting *Belk-Hudson Co. v. Davis,* 132 Ga. App. 237, 207 S.E.2d 528 (1974)) (emphasis added).

13 218 Ga. App. at 857.

14 *Id.*

rushed at one of the plaintiff's friends "like a linebacker" and knocked the plaintiff's friend down and then yelled at him "What are you looking at?"[15] When the plaintiff stood up, Anderson struck him. After the trial court denied Three Dollar Café's motion for summary judgment, the case was tried before a jury and a verdict rendered in favor of the plaintiff. The Court of Appeals reversed, ruling the Three Dollar Café was not liable as a matter of law. The Court emphasized that the plaintiff himself acknowledged the attack by Anderson was sudden and unprovoked. Neither the plaintiff nor the plaintiff's friend felt threatened by Anderson before the attack. The Court held that the Three Dollar Café had no notice of Anderson's propensity for the violent acts even though his table "was loud, boisterous, and perhaps even rude to the waitress" and despite the management's decision to refuse them more alcohol.[16] Thus, the presence of an obnoxious drunk will not suffice for notice of a mean drunk.

When the evidence is focused on the bar owner's notice as to the individual assailant, then, the question of foreseeability is often one of timing. As another example, in *Confetti Atlanta, Ltd. v. Gray*,[17] the Court of Appeals distinguished a number of cases cited by the defendant bar owner in holding the plaintiff "did not receive his injuries as the result of an isolated criminal attack by an unknown assailant," but "as the result of an argument which turned into a violent fight."[18] In this case, one Cooley, a patron at the old Confetti nightclub in Atlanta, "behaved in an annoying manner" toward the plaintiff's group inside the club. When the club closed, the plaintiff and his group left and went into the parking lot. There, Cooley's friend and a friend of the plaintiff got into a fight, soon joined by Cooley and the plaintiff. Within a few minutes, Cooley walked away from the fight, got into a pickup truck, and ran over the plaintiff

15 *Id.* The waitress testified that she heard Anderson yell "What the h__ are you looking at?" *Id.*

16 Id. at 858.

17 202 Ga. App. 241, 414 S.E.2d 265 (1991).

18 *Confetti,* 202 Ga. app. at 243.

with the truck.[19] The Court of Appeals affirmed the jury's verdict for the plaintiff and against the nightclub. The Court succinctly stated the rules applicable in these cases:

> It is the duty of a proprietor to protect an invitee from injury caused by the misconduct of employees, customers and third persons if there is any reasonable apprehension of danger from the conduct of said persons or if injury could be prevented by the proprietor through the exercise of ordinary care and diligence. Ordinarily, even where the proprietor's negligence is shown, he would be insulated from liability by the intervention of an illegal act which is the proximate cause of the injury. However, the above rule has been held inapplicable if the defendant (original wrongdoer) had reasonable grounds for apprehending that such criminal act would be committed.[20]

The Court of Appeals refused to analyze the fight as "an isolated criminal attack." Instead, the Court focused on "the circumstances which set into motion the chain of events leading to the attack" and considered the incident of Cooley striking the plaintiff with a pickup truck as "the extension of an uncontained, uninterrupted fight."[21] "[I]t is certainly foreseeable that any fight which continues unchecked and without interruption could escalate into a more violent encounter as the emotions of the participants intensify."[22]

Hunter v. Cahe Group, Inc.[23] offers important distinctions for the defendant bar owner. In this case, the assailant and the plaintiff were both patrons in a bar/restaurant called Jeffrey's which had a "sports motif" and attracted a crowd including "lawyers, doctors, and blue-collar workers."[24] The assailant, one Parrish, was, appropriately enough, sitting at a table inside a boxing ring. Parrish and friend were enjoying a pitcher of beer when Parrish learned that a friend of the plaintiff named Nash was in the restaurant. Though Parrish did not know Nash,

---

19 *Id.* at 241.
20 *Id.* at 242 (citations and punctuation omitted).
21 *Id.* at 243.
22 *Id.* at 241.
23 244 Ga. App. 162, 535 S.E.2d 248 (2000).
24 *Hunter,* 244 Ga. App. at 163.

there was bad blood on Parrish's part because Nash had previously dated Parrish's girlfriend and Parrish did not like the way Nash had treated her. Parrish had Nash come over to his table where Nash "briefly" spoke to him. Nash then returned to his table which included the plaintiff. Parrish followed Nash, saying "I'm not done talking to you." The plaintiff described Parrish as "irate, mad, and loud." The plaintiff walked up to Parrish and asked him to leave. The plaintiff stated, "the next thing I remember is just being pummeled."[25] The plaintiff estimated that less than fifteen seconds elapsed between the time he stood up from his table and the time the fight started. The trial court granted the bar/restaurant's motion for summary judgment, and the Court of Appeals affirmed. Distinguishing *Confetti*, the Court held there was "no evidence here of an escalating course of conduct between the assailant and the victim which was sufficient in itself to give notice to Jeffrey's of the danger."[26] The Court also noted that, unlike in *Confetti*, there was no admissible evidence of "numerous prior fights which had broken out in the club and parking lot."[27] The Court characterized the fight as a sudden and unprovoked attack. "That the attacker might have been loud, rowdy, and wasted was not enough to put the proprietor on notice of an impending attack on another customer."[28] Thus, absent evidence of numerous prior fights and subsequent lack of security, the courts will focus on the length of time of the actual altercation itself to determine whether the injury-causing event was foreseeable to the bar owner. Again, the fact that a patron is loud, obnoxious, and drunk is simply not enough to give such notice.

A defendant bar owner must be prepared, however, to distinguish also *Good 01' Days Downtown, Inc. v. Yancey*[29] which the *Hunter* court did not discuss. In *Good 01' Days,* the assailant and the plaintiff were both patrons at the defendant's restaurant in Sandy Springs. The

25 *Id.*
26 *Id.* at 164.
27 *Id.*
28 *Id.*
29 209 Ga. app. 969, 434 S.E.2d 740 (1993).

assailant, one Haynes, accused the plaintiff of taking his beer and insisted that the plaintiff buy him a beer. For approximately five minutes Haynes "continued to stand over [the plaintiff's] table insisting that [the plaintiff] buy him a beer." "Haynes' voice became gradually louder, and his tone grew impatient." After waiting a few more minutes for the waitress to bring a beer, the plaintiff stood up to get the beer, and then Haynes struck the plaintiff "in the face with his fist and then hit him in the face with a pool cue."[30] The Court of Appeals affirmed the trial court's denial of the restaurant's motion for summary judgment. The Court rejected the restaurant's argument that the attack was sudden and unprovoked and, thus, not foreseeable. The Court characterized Haynes' behavior as "abusive" which "consisted of loud cursing and repeated demands that [the plaintiff] buy him a beer."[31] Although the restaurant's employees testified they were aware only of a "discussion" between Haynes and the plaintiff, the Court stated this evidence created at least a question of fact as to whether the restaurant could have foreseen the risk of injury and intervened prior to the attack.[32]

It appears, therefore, that while loudness, rowdiness, and being "wasted" is not enough to put the bar owner on notice of a dangerous situation, any evidence of aggression will at least create an issue of fact as to foreseeability if there is sufficient time for the bar to intervene and prevent the criminal attack. Indeed, the Court of Appeals made this distinction in *W.D. Enterprises, Inc. v. Barton,* [33] where it held that, unlike in *Good 01' Days,* there was no evidence that the defendant bar owner's employee "had time to react to [the assailant's] outburst before he attacked [the plaintiff]."[34]

---

30 *Good Ol' Days,* 209 Ga. App. at 696-697.
31 *Id.* at 698.
32 *Id.*
33 218 Ga. App. 857, 463 S.E.2d 529 (1995).
34 *W. D. Enterprises,* 218 Ga. app. at 858.

In other cases, the courts have focused not on the specific aggressor but on the bar owner's knowledge of prior fights in general.[35] One such case, *Collins v. Shepherd*,[36] arose out of a fight between two patrons at Whiskey River in Macon. In a case of mistaken identity, a woman began fighting the plaintiff in the women's restroom, and the plaintiff was injured when she was struck on the head with a beer bottle by the initial assailant's friend. The bar's security person, an off-duty police officer, heard the commotion from the men's room and was able to respond and break up the fight. In support of its motion for summary judgment, Whisky River argued that, although there was a fight each month for two years prior to the incident in question, including a fight in which a patron was struck in the head with a pool stick, and although there was evidence of fist fights and at least one other fight which involved beer bottles or other weapons, these prior incidents were not "substantially similar" to the incident in question so as to put the bar on notice of any danger of criminal activity. Not surprisingly, however, the Court found the evidence created at least a question of fact as to whether the bar had a duty to exercise ordinary care to protect its patrons against the risk of injury from fighting.

Nevertheless, the ***Collins*** Court affirmed summary judgment in favor of the bar. The Court found that there was no question of fact as to whether the bar had exercised ordinary care. The employment of one off-duty police officer as a security guard was enough in this case. The Court rejected the argument that there should have been more than one security guard in a place the size of Whiskey River because the Court found no evidence the security measures taken were inadequate or that a "different security system" would have prevented the fight and injuries in question. "Undertaking measures to protect patrons does not heighten the standard of care; and

35 *See Hunter v. Cabe Group, Inc.*, 244 Ga. App. 162, 535 S.E.2d 248 (2000); *W. D. Enterprises, Inc. v. Barton,* 218 Ga. App. 857, 463 S.E.2d 529 (1995); *Collins v. Shepherd,* 212 Ga. App. 54, 441 S.E.2d 458 (1994).

36 212 Ga. App. 54, 441 S.E.2d 458 (1994).

taking some measures does not ordinarily constitute evidence that further measures might be required."[37]

Although the bar owner has a duty to anticipate and guard against criminal acts when the bar owner has "prior experience with substantially similar types of crime," the bar owner has no duty to investigate police files to determine whether any such prior crimes have occurred on the premises.[38] The courts have also rejected the argument that bars, like ATMs, create the potential for criminal attacks.[39]

A plaintiff will not be able to show the criminal attack was foreseeable simply because the attack occurred in a place where alcohol is served.[40] In *Knudson v. Lenny's, Inc.*,[41] the Court of Appeals rejected the plaintiff's argument "that because fights and arguments in general are predictable in a drinking establishment, then the issue of foreseeability . . . should be a jury question."[42] The plaintiff must still show the bar owner knew or should have known of the particular assailant's aggression or, because of prior similar incidents, the risk of crime generally.[43]

PROVIDING SECURITY

What are the legal consequences of a bar owner providing no security? Or providing some security which proves inadequate to prevent the criminal incident? The answers usually depend on the bar owner's knowledge of prior similar incidents and, again, the timing and

37 *Collins*, 212 Ga. App. at 56 (citation and punctuation omitted).
38 *Habersham Venture Ltd. v. Breedlove*, 244 Ga. App. 407, 535 S.E.2d 788 (2000).
39 *Id.*
40 *W.D. Enterprises, Inc. v. Barton*, 218 Ga. App. 857, 463 S.E.2d 529 (1995); *Knudson v. Lenny's, Inc.*, 202 Ga. App. 85, 413 S.E.2d 258 (1991).
41 202 Ga. App. 85, 413 S.E.2d 258 (1991).
42 *Knudson*, 202 Ga. App. at 86.
43 *W.D. Enterprises, supra; Knudson, supra.*

manner of the response to the given situation. In *Confetti Atlanta, Ltd. v. Gray*,[44] the nightclub hired one security guard who was responsible for security inside and outside the club. At closing time, however, the security guard was responsible for making sure all patrons left the club and the doors were locked, which made it necessary for him to stay inside. There was evidence of previous fights both inside and outside the club. In affirming the jury verdict in favor of the plaintiff, the Court of Appeals found, therefore, "there was some evidence from which a jury could have concluded that the fight which resulted in [the plaintiff's] injuries was foreseeable and that the fight could have been avoided if [the plaintiff's] security guard had been stationed on the outside of the nightclub until all of the patrons of the club had left the parking lot."[45]

When the bar owner provides some security, however, and the security person reacts promptly to a physical disturbance, the law appears to favor judgment in favor of the defendant bar owner. For example, in *Knudson v. Lenny's, Inc.*, [46] because only five seconds elapsed between the time the assailant shouted at the plaintiff and the moment the plaintiff was struck, the Court of Appeals rejected the plaintiff's argument that the bar owner was negligent in performing its duty to provide security. The Court found that the bar owner's "employees came to the scene of the fight immediately and promptly deescalated the tensions, cared for the parties and called the police."[47] "Undertaking measures to protect patrons does not heighten the standard of care; and taking some measures does not ordinarily constitute evidence that further measures might be required."[48]

---

44 202 Ga. App. 241, 414 S.E.2d 265 (1991).
45 *Confetti,* 202 Ga. App. at 244.
46 202 Ga. App. 85, 413 S.E.2d 258 (1991).
47 *Knudson,* 202 Ga. App. at 87.
48 *Id.* (quoting *Lau's Corp. v. Haskins,* 261 Ga. 491, 405 S.E.2d 474 (1991)).

The Court of Appeals applied these same principles in *Collins v. Shepherd* [49] where, although the bar owner employed only one security guard in a very large club which had an extensive history of fights, the one security guard and other employees promptly responded to the fight and broke it up as soon as they were aware of it. Thus, although the bar owner had notice of the risk of criminal activity, there was no issue of fact as to whether the bar owner had fulfilled its duty to exercise ordinary care to prevent the specific fight in question. Importantly, the Court found the plaintiff had presented no evidence that a different security system, i.e., more security guards, would have prevented the fight.[50]

Howell v. Three Rivers Security, Inc.,[51] is another interesting and important case involving alleged negligent security at a nightclub. Defendant Three Rivers provided uniformed security guards for a bar called Shenanigans in Rome, Georgia. Prior to the incident in question, two patrons named Bennett and Morriss had been banned from Shenanigans for life for fighting. For reasons unexplained, these two were allowed into Shenanigans on the night in question. There was bad blood between the plaintiff and Bennett. A few weeks before the incident, Bennett had threatened the plaintiff because of something which occurred between the plaintiff and Bennett's girlfriend. On the night in question, the plaintiff learned Bennett was in Shenanigans, but the plaintiff never told any of the security guards or any other employees of the bar that he might be in some danger. In an altercation that lasted from ten to thirty seconds, Bennett came at the plaintiff, the plaintiff grabbed Bennett in a headlock, fell to the floor, injuring his knee, and was kicked in the head by Morriss. Despite evidence that the bar and the security company had actual knowledge that Bennett and Morriss both had a propensity for violence and posed a danger to the patrons, and in spite of the plaintiff's expert's opinion that the

49 212 Ga. App. 54, 441 S.E.2d 458 (1994).
50 *Collins*, 212 Ga. App. at 56.
51 216 Ga. App. 890, 456 S.E.2d 278 (1995).

defendants had breached their duties to the plaintiff by allowing Bennett and Morris into the club after being banned for life, the Court of Appeals affirmed summary judgment in favor of the bar owner and the security company. The Court focused on whether the defendants had superior knowledge of the dangerous condition. The Court agreed that the defendants breached their duty to the plaintiff, but the plaintiff had superior knowledge of the danger as evidenced by the plaintiff "deliberately dancing in close proximity to a security guard."[52] "[Plaintiff] knew, or certainly should have known, that this strategy would not totally neutralize the known risk to him of remaining on the premises. To ignore this consequence would be tantamount to making [the defendants] the insurer of [the plaintiff's] safety."[53] The Court held, therefore, that the defendants' breach of duty was not the proximate cause of the plaintiff's injuries.[54]

ASSUMPTION OF THE RISK AND MUTUAL COMBAT

A powerful weapon in the defense of many bar fight cases is the defense of assumption of the risk. *Fagan v. Atnalta, Inc.* [55] is an older but still important case which provides a good discussion of the defense. In this case, the plaintiff was a patron at the (original) Beer Mug in Atlanta. On the night in question, the bar was staffed only by one female bartender, one female waitress, and a cook. After an altercation erupted in the pool room area, the waitress and the bartender attempted to make the participants leave through the back door. The plaintiff and

52 Howell, 216 Ga. App. at 892.

53 *Id.* (citation and punctuation omitted).

54 Howell was a full-panel decision. In a dissent joined by Judge McMurray, Judge Pope emphasized the rule that, "once a proprietor undertakes the duty of providing security for invitees, it must do so in a non-negligent manner." *Howell,* 216 Ga. App. at 892 (Pope, J., dissenting). Judge Pope also emphasized evidence that the bar owner's officer "knew what Bennett and Morriss were there for, and yet, still let them into the bar knowing that they had previously been banned for life." Judge Pope argued such evidence clearly created a factual issue as to whether the plaintiff's knowledge of the danger was equal or superior to that of the defendants. *Id.* (Pope, J. dissenting).

55 189 Ga. App. 460, 376 S.E.2d 204 (1988).

another male patron came up behind the two female employees. When one of the pool room rowdies grabbed the bartender, the plaintiff grabbed the bartender from behind to keep her from being pulled outside. The rowdies then grabbed the plaintiff, "pulled him outside and administered a severe beating."[56]

The plaintiff filed suit against the bar owner, alleging negligent security based on the absence of any security personnel "or even a male employee."[57] Moving for summary judgment, the defendant argued the plaintiff had equal knowledge of prior criminal assaults, and that he voluntarily assumed the risk of injury by getting involved in the initial altercation.

In a 6-3 decision, the Court of Appeals affirmed the trial court's grant of the defendant's motion for summary judgment. The Court laid out the elements of the defense of assumption of risk: "(1) a hazard or danger which is inconsistent with the safety of the invitee, (2) the invitee must know and appreciate the danger, and (3) there must be an acquiescence or willingness on the part of the invitee to proceed in spite of the danger."[58] The Court emphasized the plaintiff's own testimony that when he approached the group of rowdies, he knew that if a fight developed he would "be in big trouble."[59] The majority found "only one conclusion is permissible," that the plaintiff "saw the situation, recognized the danger to himself, and voluntarily and deliberately thrust himself into the melee, without being asked."[60]

"Mutual combat" is a closely related concept that, when proven, negates the element of the bar owner's superior knowledge of the conditions creating the risk of harm to the patrons.[61]

---

56 *Fagan*, 189 Ga. App. at 460.
57 *Id.*
58 *Id.* at 460-461.
59 *Id.* at 461.
60 *Id.*
61 In one case, the Court of Appeals considered facts which might have shown "mutual combat," but the Court found it unnecessary to even consider the defense of assumption of the risk. Where the plaintiff voluntarily confronted a belligerent person, the Court said, the plaintiff showed "equal or

Sailors v. Esmail International,[62] provides a good discussion of "mutual combat." In this case, following a night of bar hopping, the plaintiff and his friends ended up at the T-Bird Lounge on Fulton Industrial Boulevard in Atlanta around midnight. They drank more beer and then left the lounge between 2:30 and 3:00 a.m. One of the plaintiff's friends urinated in the parking lot, and this apparently offended four people driving by in a car. Two men got out of the car, obscenities were exchanged between the two groups, and a fight ensued. Although the plaintiff attempted at first to defuse the situation, he made an unpleasant remark about one of the other men's girlfriend. After ducking a pool cue, the plaintiff wrestled the pool cue away, then used it to break a window of the other party's car. One of the girls then got out of the car and fought with the plaintiff. While fighting with this girl, the plaintiff was stabbed with a knife.[63] Affirming judgment on the jury's verdict for the bar owner, the Court of Appeals restated the rule of liability that the proprietor must have superior knowledge of the dangerous condition posing the unreasonable risk of harm.

> In a case of mutual combat, the superior knowledge must always remain with the combatants, as they, by their voluntary participation, have selected the time, date, and place for the altercation. Any injuries to the combatants resulted from their own conduct and under such circumstances, the existence of prior criminal acts on the premises is irrelevant and cannot form a basis for liability on the premises owner. . . . Mutual combat exists where there is a fight with dangerous or deadly weapons and when both parties are at fault and are willing to fight because of a sudden quarrel. . . . In the present case, [the plaintiff] voluntarily joined an ongoing altercation and engaged in mutual combat. The proprietor had no duty to protect the plaintiff from himself. In fact, it is the plaintiff who had a duty of ordinary care for his own safety.[64]

---

superior knowledge of a dangerous condition existing on the defendant's property" which equates to a failure "to exercise reasonable care to avoid the danger." *Rappenecker v. L.S.E., Inc.*, 236 Ga. App. 86, 510 S.E.2d 871 (1999).

62 217 Ga. App. 811, 459 S.E.2d 465 (1995).

63 *Sailors*, 217 Ga. App. at 811.

64 *Id.* at 813. Unlike the Court in *Rappenecker*, the *Sailers* Court made no distinction between "mutual combat" and assumption of the risk.

In *Brown v. AMF Bowling Center, Inc.*,[65] the Court of Appeals distinguished *Sailors*. In *Brown*, the plaintiff was injured when, in an attempt to stop a bar fight, she got into a fight with the defendant's bartender who allegedly threw her to the floor after the plaintiff bit him on the chest. In reversing the grant of summary judgment in favor of the bar owner, the Court of Appeals held that assumption of the risk and mutual combat did not apply because the plaintiff was not engaged in mutual combat with a third person. Liability was based on *respondeat superior,* not superior knowledge, and issues of fact remained as to whether the bartender was acting within the scope of his employment at the time the plaintiff was injured.[66] As recently shown in *Hahersham Venture, Ltd. v. Breedlove*,[67] however, the defense of mutual combat is alive and well when the plaintiff voluntarily jumps into a fight with persons not employed by the defendant.

MINORS

As to premises liability, at least, the fact that the bar serves alcohol to a minor does not increase the bar's exposure to liability. In *Collins v. Shepherd,*[68] for example, the plaintiff brought an action against Whiskey River because of injuries sustained by her seventeen year old daughter who was injured in a fight in the women's room. Whiskey River employed someone to check identification cards at the door, but the plaintiff's daughter's identification was not checked. The Court of Appeals specifically rejected the plaintiff's argument "that defendant had a 'heightened' duty of care because [the plaintiff's daughter] was a minor."[69] Regardless of

65 236 Ga. App. 277, 511 S.E.2d 619 (1999).
66 *Brown,* 236 Ga. App. at 278-279.
67 244 Ga. App. 407, 535 S.E.2d 788 (2000).
68 212 Ga. App. 54, 441 S.E.2d 458 (1994).
69 *Collins,* 212 Ga. App. at 56.

whether Whiskey River was negligent in failing to exclude the plaintiff's daughter from the club, the Court ruled, such negligence was not the proximate cause of the injuries.[70]

In *Knudson v. Lenny's, Inc.*,[71] the bar had in place a policy of prohibiting anyone under the age of twenty-one without a parent or guardian after 9:00 p.m. One Scoggins, who appeared older but was in fact just twenty years old, struck the plaintiff in the face with a glass or bottle following a verbal altercation. The plaintiff argued that the bar's negligence in failing to exclude the underage assailant was the proximate cause of the plaintiff's injuries. The Court of Appeals rejected this argument. The Court restated the rule that "an injured person seeking to impose liability upon another for the negligent performance of a voluntary undertaking must show either detrimental reliance or an increased risk of harm."[72] The Court found that "simply because the bar enacted a policy of excluding minors, such a policy does not render [the plaintiff's] injury foreseeable to [the defendant]."[73] The Court found no evidence that the bar's employees knew or should have known an underage person would react as Scoggins did. Because Scoggins' actions were the intervening cause, and because these actions were not foreseeable to bar owner, the plaintiff failed to establish the element of proximate cause.[74]

CONCLUSION

Defending the server of alcohol presents unique challenges to the attorney. Counsel may very well confront resentment from the jury - or even the bench - because of awareness of the social costs of alcohol abuse. Nevertheless, in bar fight cases, general principles of premises liability law apply equally to the bar owner as to any other business owner or proprietor. The bar

70 *Id.*
71 202 Ga. App. 85, 413 S.E.2d 258 (1991).
72 *Knudson*, 202 Ga. App. at 86.
73 *Id.*
74 *Id.* at 86-87.

owner's duty to exercise ordinary care to prevent criminal attacks on his patrons does not arise until the owner has notice of the assailant's criminal propensities or, because of substantially similar prior occurrences, the bar owner could reasonably foresee the unreasonable risk of harm posed by a dangerous condition. In any event, the mere fact that the proprietor serves alcohol will not create an issue of fact as to whether the criminal conduct of battery was foreseeable. Providing security often fulfills the bar owner's duty to exercise ordinary care when there is a general risk of crime. Once the bar owner undertakes the duty to provide security, it must do so in a non-negligent manner. Providing some security, however, does not make the bar owner an insurer of the patrons' safety. The bar owner should not be held liable for inadequate security if there is evidence the owner's employees responded promptly once the assailant's aggressive behavior became known. Even if a bar owner breaches the duty to provide adequate security, the owner should be entitled to judgment as a matter of law if the facts show the plaintiff assumed the risk of injury by voluntarily engaging in a fight with a third party. Finally, all of these concepts should apply whether or not the plaintiff or the assailant is a minor.

PROTECTING TRADE SECRETS AND PROPRIETARY INFORMATION IN PRODUCT LIABILITY CASES

By: Robert P. Monyak
LOVE, WILLINGHAM, GILLELAND & MONYAK LLP
Suite 2200, NationsBank Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 607-0100

INTRODUCTION

Trade secrets can be the business lifeblood of product manufacturers. With product liability lawsuits a virtual inevitability, the protection of commercially valuable information from dissemination through litigation is crucial.

Standard discovery in most product liability lawsuits frequently encompasses confidential material. Plaintiffs routinely seek proprietary information about the product's design and testing, the manufacturing processes used, the quality assurance systems in place, and data relating to customer complaints, warranty returns, and field experience. For many manufacturers, most if not all of this sort of information is commercially valuable and, therefore, kept confidential.

Preventing trade secret leakage in litigation requires a solid confidentiality order and enforcement mechanisms sufficient to coerce compliance. In theory, a confidentiality order, obeyed by plaintiffs and witnesses given access to confidential information, should be all that is required.

Unfortunately, there are many hurdles and disincentives to an effective protective scheme. Because some trade secrets are more valuable than the case itself, plaintiffs may seek settlement leverage by demanding enormous quantities of sensitive information and simultaneously resisting a meaningful confidentiality order. And, many courts underappreciate the potential competitive value of unfamiliar, seemingly innocuous information, find trade secret

protection efforts simply another unwelcome discovery squabble, and tend to error reflexively on the side of disclosure and free exchange.

This paper will review some of the basic issues involved in protecting confidential information. It also addresses some of the recurring battlegrounds, such as the appropriateness of "sharing" provisions and the use of confidentiality orders at trial.

DISCOVERY OF CONFIDENTIAL MATERIAL

The first available avenue for safeguarding trade secrets is to restrict their discovery in the first place. In federal court, if commercially sensitive information is demanded in discovery, plaintiffs are required to show a "reasonable" for it, not merely that it is "reasonably calculated to lead to the discovery of admissible evidence." *See* 8 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2043 (1990 & Supp. 1998); *American Standard. Inc. v. Pfizer Inc.*, 828 F.2d 734, 740-41 (Fed. Cir. 1987); *Heat & Control. Inc. v. Ester Industries*, 785 F.2d 1017, 1025 (Fed. Cir. 1986); *In re: Independent Serv. Ore. Antitrust Litigation*, 162 F.R.D. *355, 356* (D. Kan. 1995); *Dunlan Corp. v. Deering Milliken. Inc.*, 397 F.Supp. 1146, 1185 (D.S.C. 1974) ("'[T]he courts are loath to order disclosure of trade secrets absent a clear showing of an immediate need for the information requested.'") (quoting *Moore's Federal Practice* ¶ 26.60[4], pp. 242-45). The federal rule is ultimately a balancing test in which the "burden is on the party seeking discovery to establish that the information is sufficiently *relevant* and *necessary* to his case to outweigh the harm disclosure would cause to the person from whom he is seeking the information." F*ederal Practice and Procedure, supra,* p. *559* (emphasis added).

Other jurisdictions similarly restrict the discovery of trade secrets. *See, e.g.,* Fla. Stat. Ann. § 90.506 (qualified discovery privilege for trade secrets); *Goodyear Tire & Rubber Co. v.*

Cooey, 359 So.2d 1200, 1202 (Fla. 1st DCA 1978) ("plaintiff must demonstrate that disclosure of the privilege is reasonably necessary to the development of the plaintiffs case"); *In re: Continental General Tire. Inc., Realtor*, slip op. No. 98-0125 (Tex. Nov. 12, 1998) (granting mandamus relief to defendant after appellate court upheld trial court order to produce highly confidential formulas); *Bridgestone/Firestone v. Superior Court*, 9 Cal. Rptr. 2d 709 (Cal. App. 1992) (trade secrets were not necessary to plaintiffs' claim).

The "need" requirement is considerably tougher to meet than the traditional "reasonably calculated" standard. Mere "usefulness," for example, is insufficient. *See Continental, supra* (plaintiffs must show trade secrets were necessary for a fair trial); *Bridgestone/Firestone, supra* (mere usefulness insufficient to require discovery of trade secrets).

In resisting discovery, it may be appropriate to point out that confidentiality orders protect trade secrets only to the extent of compliance. Post-leakage remedies are obviously unsatisfactory and there are many reported instances of protective order violations. *E.g., Grace v. Center v. Auto Safety*, 155 F.R.D. 591 (ED. Mich. 1994); *Coleman v. American Red Cross*, 145 F.R.D. 422 (E.D. Mich. 1993); *Dialog Information Services. Inc. v. Am. Chemical Society*, 1991 WL 283710 (D.D.C. 1991); *Am. Computer Trust Leasing v. Jack Farrell Implement Co.*, 136 F.R.D. 160 (D. Minn. 1991); Parkway *Gallery Furniture. Inc. v. Kittinger/Pennsv1vania House Group. Inc.*, 121 F.R.D. 264 (M.D.N.C. 1988). Human nature and the inevitability of violations are the reason for the enhanced standard governing the discovery of trade secrets.

The stricter discovery standard for trade secrets has not yet been explicitly recognized in Georgia. Because Section 26(c)(7) of the CPA is virtually identical to Federal Rule 26(c)(7) and because Georgia has adopted the UTSA, a strong argument can be made that Georgia, too, should follow the lead of the federal courts and other jurisdictions.

SOURCES OF AUTHORITY FOR ENTRY OF CONFIDENTIALITY ORDERS

If the trial court declines to employ the enhanced discovery standard or directs that the discovery take place, the entry of a meaningful confidentiality order is essential. Confidentiality orders are routinely entered in most products liability cases and are specifically authorized by Georgia law to protect trade secrets and other proprietary information produced in discovery:

> [T]he court . . . may order . . . [t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

O.C.G.A. § 9-1 1-26(c)(7). The Federal Rule is similar:

> [T]he court . . . may make any order . . . including . . . that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

Fed.R.Civ.P. 26(c)(7).

The Georgia Trade Secrets Act, O.C.G.A. §§ 10-1-760 *et seq., directs* courts to protect trade secrets revealed in litigation by reasonable means:

> [A] court *shall* preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

O.C.G.A § 10-1-765 (emphasis added). The GTSA is derived from the Uniform Trade Secrets Act, which has been adopted in nearly every state. *See* 14 Uniform Laws Annotated, Master Edition.

A frequent complaint from plaintiffs is that confidentiality orders are in derogation of public policy favoring broad discovery and open courts and, therefore, should be narrowly

tailored and interpreted, if not refused altogether. To the contrary, the GTSA unequivocally codifies Georgia's public policy of promoting commerce and commercial competitiveness by requiring the protection of trade secrets through reasonable means. Under the GTSA, the Georgia courts have repeatedly enjoined trade secret disclosure, notwithstanding the allegedly contrary "public policy." *E.g.*, *American Buildings Co. v. Pascoe Building Systems. Inc.*, 260 Ga. 346 (1990); *Thomas v. Best Manufacturing Corp.*, 224 Ga. 787 (1975). Other arguments in favor of a public policy demanding the protection of trade secrets are (1) the long-recognized common law tort actions for misappropriation or conversion of trade secrets, (2) the Restatement of Torts' long-existing recognition of that cause of action, *e.g.*, Restatement (Second) Torts, § 757, and (2) the criminalization of unauthorized trade secret disclosure. *E.g.*, Economic Espionage Act of 1996, 18 U.S.C.A. §§ 1831-1839.

Confidentiality orders are especially important given the reality of industrial espionage in the global marketplace. In 1996, for example, there were more than 1,100 known incidents of illegal industrial espionage affecting 1,300 companies, a dramatic increase from 589 incidents and 246 companies in 1992. [Ruth Pagell, *Economic Espionage*, Database, August 18, 1998 at 23] According to the White House Office of Science and Technology, United States companies alone lose over $100 billion each year through industrial espionage. [John Shors, *The Thief in Your Office*, Business Records, September 29, 1997, at 10] "[O]ne tiny piece of information [gained through competitive intelligence] . . . might dramatically alter the way you look at a project and save you millions in the long run." [Mason King, *Corporations Take Snooping Mainstream*, Indianapolis Business Journal, March 10, 1997, at 1]

American product liability suits, which regularly involve the exchange of confidential information, are an enormous potential source of trade secret leaks. The great value of some

trade secrets makes the simple, legal act of regularly checking court dockets and searching for publicly available discovery logical and inevitable. Confidentiality orders, therefore, are essential.

GENERALLY - RECOGNIZED CATEGORIES OF CONFIDENTIAL MATERIAL

A broad variety of information may qualify as a protectable trade secret. Under the GTSA, a "trade secret" is defined as:

> information including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which:
>
> (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

O.C.G.A.§ 10-1-761(4). The Restatement provides that a "trade secret":

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing . . .
>
> Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in this business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitor; *(5)* the amount of effort or money expended by him in developing information; (6) the ease or difficulty with

> which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757, comment b.

What follows is a compilation of authorities supporting the confidential or trade secret status of several categories of information commonly sought from manufacturers in products liability suits. As set forth below, the courts recognize a wide variety of confidential information.

What follows is a compilation of authorities supporting the confidential or trade secret status of several categories of information commonly sought from manufacturers in products liability suits. As set forth below, the courts recognize a wide variety of confidential information.

Descriptions of the manufacturing process

Under Georgia law, the processes and procedures used by a manufacturer are trade secrets. *See American Bldg. Co. v. Pascoe Bldg. Sys. Inc.*, 260 Ga. 346, 349-50 (1990) (manufacturer's processes a trade secret; injunction prohibiting defendant's use or disclosure of information upheld). This is universal law. *See Bowen v. U. S. Food & Drug Admin.*, 925 F.2d 1225, 1227-28 (9th Cir. 1991) (manufacturing processes were trade secrets not discoverable under Freedom of Information Act); *Graphic Management Assocs., Inc. v. Speckel. et al.*, 1986 WL 9723, No. 86-1047, *6 (E.D. Pa. Sept. 4, 1986) (newspaper manufacturer's assembly line process a trade secret); *Valco Cincinnati. Inc. v. N & D Machining Inc*., 492 N.E.2d 814, 818-19 (Ohio 1986) (manufacturing processes of glue manufacturer); *Haves-Albian v. Kudesski*, 364 N.W.2d 609, 612,614-16 (Mich. 1984) (methods, techniques, and processes of silicon rubber manufacturer); *Raven v. A. Klien & Co.*, 478 A.2d 1208, 1210-11 (N.J. App. 1984) (fabrication methods of box manufacturer); *Johns - Manville Corp. v. Guardian Indus. Corp.*, 586 F.Supp. 1034, 1069-73 (E.D. Mich. 1983) (techniques and refinements of fiberglass insulation

manufacturer) *amended on other grounds by* 1984 WL63627 (1984) *aff'd* 770 F.2d 178 (Fed. Cir. 1985); *Rohm &Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 431-32 (3rd Cir. 1982) (paint manufacturer's processes); *Henry Hope X-Ray Products. Inc., v. Morron Correl. Inc.*, 674 F.2d 1336, 1340-42 (9th Cir. 1982) (production techniques of film processors); *CPG Prods. Corp. v. Mego Corp.*, 502 F.Supp. 42, 44-45 (S.D. Ohio 1980) (toy manufacturer's methods of production); *Hulsenbusch v. Davidson Rubber Co.*, 344 F. 2d 730, 734-35 (8th Cir. 1965) (crash pad manufacturer's production procedures) *cert. denied* 382 U. 5. 977 (1966).

The fact that some basics about the manufacturing process are generally known is irrelevant. A manufacturer's particular refinements and adjustments to commonly-known processes are long-recognized trade secrets. *See Integrated Cash Management Servs. Inc. v. Digital Transaction. Inc.*, 920 F.2d 171, 173-75 (2nd Cir. 1990) (software company's arrangement and combination of publicly-known generic programs was a trade secret); *Lee v. Cercoa. Inc.*, 433 So.2d 1, 2 (Fla. DCA 1982) (glass manufacturer's combination of commonly-known elements into its production process a trade secret); *Air Prods. & Chems., Inc. v. Johnson*, 442 A.2d 1114, 1119-22 (Pa. Super. Ct. 1982) (petroleum company's methods for dealing with problems arising in commonly-known processes a trade secret); *Koch Engineering Co. v. Faulconer*, 610 P.2d 1094, 1101-05 (Kan. 1980) (chemical distillery's refinements to commonly-known general process were trade secrets); *Ventura Mfg. Co. v. Locke*, 454 S.W.2d 431, 432-34 (Tex. App. 1970) (aircraft component manufacturer's specific techniques incorporated in generally-known production line process were trade secrets); *Components for Research. Inc. v. Isolation Prods. Inc.*, 241 Cal. App. 2d 726, 727-29 (Cal. App. 1966) (electronic component manufacturer's production techniques using commonly-known combination of materials were trade secrets); *Allen Mfg.*

Co. v. Loika. 144 A.2d 306, 309-10 (Coin. 1958) (screw manufacturer's process of combining generally-known components was a trade secret).

Configuration of manufacturing equipment

A manufacturer's particular configuration of equipment is a trade secret. *See Essex Group. Inc. v. South Wire Co.,* 269 Ga. *553,* 555-557(1998) ("arrangements of components and equipment" and "how, when and where [certain] storage containers had to be positioned" to maximize efficiency were trade secrets); *Pascoe,* 260 Ga. at 349-50 (configuration of manufacturing machinery is a trade secret); *Thomas v. Best Manufacturing Corp.,* 234 Ga. 787, 790(1975) ("configuration" of machinery a trade secret). Again, this is universal law. *See Saforo & Assocs., Inc. v. Porocel Corp.,* 991 S.W.2d 117, 121 (Ark. 1999) (configuration of washing system); *Lee Shukrecht & Sons. Inc. v. P. Vineri & Sons. Inc.*, 927 F. Supp. 610, 614 (W.D.N.Y. 1996) (configuration of harvester's cycle bar cutter); *Taco Cabana Int'l v. Two Pesos. Inc.*, 932 F.2d 1113, 1123-25 (5th Cir. 1991) (kitchen equipment layout), *aff'd* 505 U.S. 763 (1992); *Air Products*, 442 A.2d at 1119-22 (plant configuration); *Weed Eater. Inc. v. Dowling*, 562 S.W.2d 898, 901-02 (Tex. App. 1978) (layout of assembly line).

Machinery used

The machinery used by manufacturers is a traditional trade secret. *Essex Group*, 269 Ga. at *555* ("selection . . . of equipment and components" is a trade secret); *Pascoe*, 260 Ga. at 349-50 (machinery used is a trade secret); *Thomas*, 234 Ga. at 790 (same). This is also universal law. *See Raven*, 478 A.2d at 1210-11 (machinery used by box manufacturer a trade secret); *Lowndes Prods.*, 191 S.E.2d at 764-66 (textile manufacturer's equipment); *Space Aero Prods. Co. v. R. E.*

Darling Co., 208 A.2d 74, 78-86 (M.D. App. 1965) (oxygen manufacturer's equipment and components) *cert denied* 382 U.S. 843 *(1965)*; *Minnesota Mining & Mfg. Co. v. Technical Tape Corp.*, 192 N.Y.S.2d 102,107-08,114-19 (N.Y. Sup. Ct. 1959) (tape manufacturer's equipment and machinery) *aff'd* 226 N.Y.S.2d 1021 (N.Y. App. 1962).

Quality assurance information

A manufacturer's quality assurance procedures are a trade secret. *See Christopher M's Hand Poured Fudge. Inc. v. Hennon*, 699 A.2d 1272, 1274-76 (Pa. 1997) (quality assurance information found to be a trade secret); *Bowen*, 925 F.2d of 1227-28 (quality control measures); *Smithy. BIC Corp.*, 869 F.2d 194, 199-202 (3rd Cir. 1989) (cigarette lighter manufacturer's quality control information); *Minnesota Mining*, 192 N.Y.S.2d at 107-08, 114-19 (quality control procedures). Quality control procedures are integral to a manufacturer's production processes, which, as set forth above, are universally-recognized trade secrets.

Manufacturing standards and specifications

A manufacturer's standards, tolerances, and production-line specifications are traditional trade secrets. *See Hennon*, 699 A.2d at 1274-76 (manufacturing standards a trade secret); *Uniroyal Goodrich Tire Co. v. Hudson*, 873 F. Supp. 1037, 1044-45 (ED. Mich. 1994) (plant specifications are trade secrets) *aff'd* 97 F.3d 1452 (6th Cir 1996).

Plant production and capacity

A manufacturer's plant capacity and production figures are trade secrets. *See Pyromatic v. Petruziello*, 454 N.E.2d 588, 590-95 (Ohio App. 1983) (quartz products manufacturer's machine

yield, a trade secret); *Den-Tal-Ez v. Siemens Capital Corp.*, *566* A.2d 1214, 1230 (Pa. Super. Ct. 1989) (inventory data protectable as a trade secret).

In short, there is ample authority in Georgia and from other jurisdictions to meet judicial skepticism and plaintiffs' challenges to assertions of confidentiality.

CONFIDENTIALITY ORDER TERMS

Standard Terms

Standard terms of a confidentiality order include:

(1) Limitations on the dissemination of trade secrets only to qualified personnel (typically the attorneys, parties, and witnesses with a need to know);

(2) A requirement that any non-party given access to confidential information execute a nondisclosure assurance, agreeing to be bound by the confidentiality order and acquiescing in the forum's jurisdiction;

(3) Limitations on the use of the trade secrets solely for purposes of the case;

(4) A procedure for designating documents produced in the future as confidential, without the need to seek a separate order;

(5) A procedure for designating as confidential future testimony in depositions, affidavits, or the like, without the need to seek a separate order;

(6) A procedure for plaintiffs to challenge a confidentiality designation, incorporating a time limit for the challenge and preserving confidentiality until the matter can be actually ruled upon by the Court;

(7) A ruling that pleadings discussing or quoting confidential information are themselves confidential and must be filed under seal; and

(8) The return at the case's conclusion of all trade secrets;

Additional, slightly more restrictive terms frequently incorporated in confidentiality orders include:

(1) A prohibition or limitation on the making of copies of trade secrets;

(2) A requirement that plaintiffs maintain a log tracking the chain of custody of all trade secrets;

(3) A requirement that plaintiffs notify the defendant before disclosing trade secrets to a non-party so the defendant will have an opportunity to object; and

(4) The immediate return of any trade secrets found inadmissible.

The more restrictive the proposed order, the more likely it is that plaintiffs will complain about alleged inhibitions on their prosecution, administrative burdens, and compliance minefields. And, as set forth above, many trial courts will be intuitively reluctant to impose a series of frequently unfamiliar conditions on plaintiffs' discovery. The common wisdom is to evaluate the trade secrets potentially at issue and the court, and seek the best order that is reasonably attainable.

Perhaps the most common disagreement in crafting confidentiality orders is the inclusion of a "sharing" provision allowing plaintiffs' counsel to trade confidential material with other plaintiffs' counsel. Other frequently disputed issues include the use of document repositories in lieu of actual production, the applicability of confidentiality orders at trial and on appeal, and the availability of confidential material from court reporters. Those issues are discussed below.

Sharing" Provisions

A "sharing" order is a provision allowing plaintiffs' counsel to pass trade secrets to plaintiffs' counsel in other cases. The typical provision demanded by plaintiffs authorizes sharing with counsel in "similar" cases (a nicely vague standard), and permits a secret transfer, with no notice to defendants. Plaintiffs generally justify these provisions as allegedly essential safeguards against discovery abuse - - plaintiffs can supposedly check to see if a defendant has withheld documents.

Sharing provisions should be resisted wherever possible. The general argument that a defendant *might be* withholding documents which *might be* found in the subject case's confidential production is a variation of the familiar "I need to see everything to make sure I'm getting all of what I'm entitled to" argument. That assertion, of course, assumes noncompliance by the defendant and obliterates any meaningful limits on discovery. The standard justification logically applies only when (1) there is legitimate reason to believe documents have been withheld in the sharing recipient's case, (2) the discovery scopes of the two cases overlap with respect to the suspected withholding, and (3) the sharing is limited to the documents allegedly withheld.

The basic problem with a blanket sharing provision is that it grants *plaintiffs* the right to decide secretly who should have the defendant's trade secrets, instead of a *court* on a case-by-case basis. If the dissemination is ever discovered at all, the only judicial review is after-the-fact, hardly a comforting prospect for a manufacturer which may have enormously valuable information at stake.

Other courts have reasoned that a protective order allowing sharing of trade secrets with litigants in other cases endangers fundamental rights of a defendant: (1) it substantially increases the risk of harmful disclosure to the defendant's competitors and makes compliance monitoring and enforcement far more difficult, and (2) it forecloses the defendant's right to object in the forum court to the third-party litigant's right to trade secrets in that case.

In *Culinary Foods. Inc. v. Ravchem Corp.*, 151 F.R.D. 297 (N.D.Ill. 1993), for example, the trial court initially entered a protective order forbidding dissemination of confidential information to third parties, including litigants involved in similar cases against the defendant. The trial court denied the plaintiffs request for permission to share the confidential information

with litigants in those other cases. The trial court reasoned that "if [the plaintiff] were allowed to disseminate the confidential information, this would unduly raise the risk that [the defendant's] competitors will obtain access to this confidential information. [Sharing] also would make enforcement of this protective order overly burdensome to [the defendant], should the confidential information be allowed to be disseminated by [the plaintiff]." *Id.* at 306-07.

A sharing provision also forecloses the defendant from exercising its right to object to discovery of its trade secrets in those other actions. In *Forest Oil Corp. v. Tenneco. Inc.*, 109 F.R.D. 321 (S.D. Miss. 1985), *appeal dismissed, Stack v. Gamill*, 796 F.2d 65 (5th Cir. 1986), certain plaintiffs in two other cases against the same defendant sought to intervene to examine to confidential documents produced by the defendant. The trial court denied the motion, reasoning that allowing the interveners to have access to the documents would prejudice the defendant's right to assert discover defenses in the other tow cases that it might not have asserted in the instant case. *Id.* at 323 (the court was "hesitant to interfere with" the other court's control over its own cases).

A blanket "sharing" provision allows plaintiffs in other cases to bypass the law and obliterate the defendant's right to litigate in those other eases what the proper scope of discovery should be. If the plaintiffs in other cases have automatic access to a defendant's trade secrets pursuant to a "sharing" provision, the manufacturer would be deprived of its opportunity and right to contest those plaintiffs' entitlement under the forum's discovery laws to that information.

Many courts have declined to allow sharing of confidential information with other litigants in cases involving the same defendant where there is no showing of a substantial need for the specific proposed dissemination. *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) ("although [the] [plaintiffs claim harm from the inability to share and compare information with

other litigants in other cases, no prejudice has been shown. . . ."); *H.L. Haden Co. v. Siemens Medical Systems, Inc.*, 106 F.R.D. *551,556* (S.D. N.Y. 1985) (trial court denied to modify protective order to allow disclosure to two State's Attorneys General, who were conducting preliminary investigation into the defendant's activities). Nominal interests of third parties in obtaining access to confidential information have regularly and routinely been rejected by other courts. *E.g, In Re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987) (protective order reaffirmed, denying newspaper publisher's intervention attempts to obtain confidential materials); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 660-661 (D.D.C. 1986) (same); *Iowa Beef Processors. Inc. v. Bagley*, 601 F.2d 949, 954~55 (8th Cir. 1979) (district court abused discretion by modifying protective order to allow disclosure of confidential information to government committee); *Coalition Against Police Abuse v. Superior Court*, 170 Ca. App.3d 888, 215 Cal. Rptr. 614, 624 (1985) (rejecting that confidential documents should be retained for use in other litigation); *Hammock v. Hoffmann-LaRoche. Inc.*, 142 N.J. *356*, 379-380, 662 A.2d 546, 558 *(1995)* (rejecting citizen advocacy group's intervention to modify protective order to allow access to confidential material).

If a sharing provision of some sort is an inevitability, the clause should at least provide for (1) notice to the defendant of the sharing so the defendant can object, (2) the recipient's agreement to be bound by the subject cases's confidentiality order and the forum's jurisdiction, and (3) a prohibition on sharing unless the recipient's ease involves the same defendant and unless the material to be shared has been ordered produced by the other court or has been produced by the defendant in that case. The latter requirement is essential to ensuring that the sharing does not sweep beyond the supposed "discovery completeness check" justification.

Document Repositories

Another frequent issue concerns the use of document repositories in lieu of actual production as a special safeguard for trade secrets which are either especially sensitive, voluminous, or difficult to reproduce or transport. Documents repositories are typically used to address the need for access by multiple parties to large quantities of material, but are an important method for safeguarding trade secrets, as well.

In the age of mass-produced products, a manufacturer will frequently face multiple lawsuits addressing the same products and issues and may find itself in the position of having to reproduce several times a large collection of virtually identical, confidential documents. This can be enormously burdensome and invites inadvertent duplication errors and the loss, alteration, or destruction of documents during the copying, collating, and transportation process. It also invites disputes about the completeness of any particular production since the recipients may also inadvertently lose, destroy, or misplace portions of a substantial production. And, obviously, the sheer size of a confidential document production increases the risk of inadvertent trade secret leakage, particularly when the production is duplicated several times, as the many persons with access will have different degrees of sensitivity to strict compliance with the confidentiality order.

One solution to this dilemma is the use of a document repository. Typically, instead of producing copies of large quantities of confidential material, the defendant makes a single set of the documents available to qualified persons at a secure location. This protects the defendant by ensuring that the complete production is made available to plaintiffs, and that there are no inadvertent variations in the productions made in different cases. It also enormously enhances the

security of the confidential material by controlling access and eliminating the need for the physical dissemination of multiple copies.

In appropriate cases, the use of document repositories to safeguard trade secrets should be considered. The Manual For Complex Litigation approves the use of document repositories, noting they "may reduce substantially the expense and burden of document production and inspection." MFCL, Third § 21.444. Trial courts are typically receptive to repositories. *See In Re: Shell Oil Refinery,* 125 F.R.D. 132, 133 (E.D. La. 1989) (approving use of centralized document depository as "there is a substantial need for measures to ensure the integrity of the documents").

Court Reporters

Court reporters are not universally required to execute confidentiality orders or sign nondisclosure agreements. They are, however, a potential source for trade secret leakage, primarily because most court reporting companies lack the mechanisms to track sealed transcripts and prevent their later sale to plaintiffs' counsel.

The typical scenario involves a standard confidentiality order allowing the designation of deposition testimony as confidential. A deposition is then conducted in which the witness discusses confidential documents or information. Defendant's counsel then notifies that court reporter and plaintiffs that certain testimony is confidential under the terms of the Order. Years later, perhaps long after the case has resolved, counsel in another case makes a seemingly innocuous telephone call to the court reporting company and politely requests a copy of the transcript. With no tracking mechanism in place, the court reporting company simply generates

another copy of the transcript, portions of which are subject to the long-forgotten confidentiality order, and sends it along.

Seeking confidential material directly from court reporters allows plaintiffs' counsel to plausibly claim ignorance of any applicable confidentiality order. The attorney need only say, likely truthfully, that no one told him or her about any protective order when he or she requested the transcript. This method also tends to shield plaintiffs' counsel of record in the underlying case, who could plausibly claim no knowledge of or role whatsoever in the spread of the confidential information. If anything at all, the only action required on counsel of record's part would be the disclosure of the nonconfidential fact of a deposition and identity of the transcribing court reporter.

The following steps are available to minimize the risk created by this untenable situation:

(1) Require the court reporters to execute the applicable confidentiality order and nondisclosure agreement;

(2) Include a statement at the beginning of every deposition which might contain confidential information that the transcript could be subject to a protective order; this will prevent persons who later obtain a copy of the transcript from claiming ignorance of its potential confidentiality;

(3) Require in the confidentiality order that all transcripts designated confidential be permanently marked as such not just with a stamp, but on the actual transcription notes and disk, so that any copies printed in the future would indicate it; and

(4) Include within the confidentiality order a requirement that the court reporting company return at the case's conclusion all transcript copies, notes, disks, etc.

Confidentiality Orders at Trial

It makes no sense to protect trade secrets throughout discovery but then allow them to be published in open court during a public trial. Nonetheless, trial courts frequently recoil when

confronted with the natural extension of a discovery-birthed confidentiality order: the partial closure of the trial and sealing of certain trial exhibits. The concept of "open" trials is deeply engrained.

It is well established, however, that in formal court proceedings, including jury trials, the right of access to confidential information may be strictly circumscribed when a civil litigant's property interests are affected. For example, in *Nixon v. Warner Communications. Inc.*, 435 U.S. 589, 98 S.Ct. 1306, *55* L.Ed.2d 570 (1978), the United States Supreme Court stated:

> It is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.' . . . Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, . . . *or as sources of business information that might harm a litigant's competitive standing* . . .

435 U.S. at 597-99 (emphasis added) (citations and footnotes omitted).

In *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17(1984), the Court held that a litigant has a right to have confidential information obtained through pre-trial discovery protected from public dissemination:

> As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. . . . Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.

467 U.S. at 32 (citations and footnote omitted).

Uniform Court Rules 21 and 22 were designed specifically to allow litigants to shield certain information from public view. In *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982), the Georgia Supreme Court specifically recognized the property rights of a litigant in cases where trade secrets are at issue:

> Businessmen, perhaps as victims of the crime for which the defendant is on trial, may have legitimate interests in preserving their trade and business secrets from the general knowledge of the community.

249 Ga. at 579. As the Georgia Court of Appeals said in *Lowe v. State*, 141 Ga. App. 433, 233 S.E.2d 807 (1977):

> The 'public trial' concept has however never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice.

141 Ga. App. at 435 (citations omitted).

The Georgia legislature has expressly granted courts broad power to limit disclosure of trade secrets. Indeed, as noted before, the legislature has specifically directed courts to protect trade secrets from disclosure through the Georgia Trade Secrets Act of 1990.

Under this authority, a pre-trial motion must be filed asking that the courtroom be closed to all nonqualified persons when trade secrets are published and that all confidential exhibits be sealed. Publication in open court is arguably a waiver of trade secret status if no protection is sought.

The fact that the jury and courtroom personnel will have seen the trade secrets is obviously not a wavier. In *Boeing Co. v. Sierrasin Corp.*, 4 U.S.P.Q.2d 1417, 108 Wash. 2d 38, 738 P.2d 665 (1987), it was alleged that Boeing had lost its trade secrets through publication of

exhibits at trial. The Washington Supreme Court specifically held that such publication did not destroy the trade secret status of the information. Boeing had moved to exclude the general public from the courtroom during presentation of testimony concerning the trade secret evidence. The opposing party vigorously opposed the motion for closure, but ultimately stipulated to protection of the confidential data at trial. The procedure employed for protection of the trade secrets was specifically approved by the Court as "it is obvious that otherwise trade secret holders would be prevented from defending their rights in court." 4 U.S.P.Q. at 1423. The Court held that this reasoning applies specifically to use of exhibits at trial. "As a trade secret holder who in good faith sought legal remedy to protect its rights, Boeing did not thereby 'publish' and lose its secrets at trial." 4 U.S.P.Q. 2d at 1423.

Enforcement of Confidentiality Orders

Georgia courts are vested with "very broad discretion" to address violations of confidential court orders. *Sellers v. Nodvin*, 207 Ga. App. 742, 744 (1993); *Tandy Corp. v. McCrimmion*, 183 Ga. App. 744, 745-46 (1989) (discretion is "particularly broad" with respect to "a party's failure to obey a discovery Order"). Section 9-11-37 of the Civil Practice Act authorizes a wide range of sanctions for failure to obey discovery orders. That statute authorizes any orders "as are just" and enumerates a series of example sanctions available to address violations. Id. § 9-11-37 (b)(2)(A) -(D).

In addition, Georgia courts possess inherent power to compel obedience and control the conduct of court officers. O.C.G.A. § 15.1-4(4). According to the Court of Appeals:

> It is fundamental that every court possesses the inherent power to preserve and enforce order and compel obedience to its judgment and orders, to control the conduct of its officers and all other persons connected with the judicial proceedings before it.

Checker Cab Co., Inc. v. Fedor, 134 Ga. App. 28,29(1975); *see also Orkin Exterminating Co., Inc. v. McIntosh*, 215 Ga. App. 587, 589 (1997) (recognizing inherent power). The trial court's exercise of this inherent power is discretionary. *Fedor*, 134 Ga. App. at 29.

Furthermore, Georgia courts are constitutionally empowered to address through contempt disobedience of judicial rulings. Ga. Const. Art. I, § II, § VI. Liability for civil contempt requires proof of a valid court order, knowledge of the order, and willful disobedience. *Griggers v. Bryant*, 239 Ga. 244, 246 (1977). Willfulness is proven if the alleged contemnor was aware of the clear provisions of the order, but either mistakenly or purposely disobeyed it. *Johnson v. Kaplan*, 225 Ga. App. 53, 57 (1997). An actual intent to violate the order need not be shown. *Potter v. American Medcare Corp*., 225 Ga. App. 343, 346 (1997).

A full range of sanctions is available, therefore, to address violations of confidentiality orders. If the disobedience is willful or in bad faith, a dismissal of all or some of the violator's claims is authorized. *See* O.C.G.A. § 9-11-37(b)(2)(A), (B); O.C.G.A. § 9-11-41 (b) ("For failure of the plaintiff to comply with . . . any Order of court, a defendant may move for dismissal of an action for any claim against him."); *Weeks v. Weeks*, 243 Ga. 416 (1979) (affirming dismissal of divorce action for failure to comply with court order); *Omni Express. Inc. v. Kennedy*, 216 Ga. App. 485, 486 (1995) (dismissing action where plaintiff failed to comply with order); *accord Marrocco v. General Motors Corp.*, 966 F. 2d 220, 223-24 (7th Cir. 1992) (deliberate violation of protective order justified dismissal).

Other available remedies include the award of attorney's fees and costs, *see* O.C.G.A. § 9-11-37(b)(2)(E); *Ostroff v. Coyner*, 187 Ga. App. 109, 118 (1988); *Jones v. Zezzo*, 162 Ga. App. 281, 283-84 (1982); *accord Greiner v. City of Champlin*, 152 F.3d 787, 789-90 (8th Cir. 1998) (same), the imposition of fines against the offending party and/or counsel, *see Malautea v.*

Suzuki Motor Corp., 987 F. 2d 1536, 1538, 1546(11th Cir. 1993) ($5,000 fine against each defendant and $500 fine against each attorney for willful violation of discovery Order), the requirement that the offending party post a bond against additional violations *see Grove Fresh Distributors. Inc. v. John Labatt Ltd.*, 888 F.Supp. 1427, 1446-48 (ND. Ill. 1995), *aff'd* 134 F.3d 374 (7th Cir. 1998) (plaintiff required to post $50,000 bond for failure to seal appellate brief containing confidential information), and the disqualification of counsel. *See Kleiner v. First Nat. Bank of Atlanta*, 751 F. F.2d 1193, 1198-99 (11th Cir. 1985) (disqualification of attorney, $50,000 fine, and attorney's fees and costs assessed for willful violation of court orders).

It should be noted that a confidentiality order can be enforced against a non-party who has not signed the confidentiality agreement. Under Georgia law, the "contemptuous violation of a court's Order may be punished though the party charged with such violation was not a party to the proceedings." *In re Smith*, 211 Ga. App. 493, 496 (1993); *Anthony v. Anthony*, 240 Ga. 155, 157 (1977); *Spence v. Woodman Co.*, 212 Ga. 573, 576 (1957). A "court's contempt power must be broad enough to reach those who, while not a party to the decree, seek to subvert the effectuation of a court's decree." *Wilkerson v. Tolbert*, 239 Ga. 702, 704 (1977).

The only requirement for enforcing an Order against a nonparty is proof "that the contemnor had actual notice of the Order for disobedience of which he is sought to be punished." *Id.; see also Spence*, 213 Ga. at 576 ("actual notice of the Order"); *In re Smith*, 211 Ga. App. at 496 (same). The nonparty need not know the exact contents of the order; it is sufficient that he knows generally that an order exists requiring certain conduct. *Id.* at 497-98 (a contemnor cannot "maintain a studied ignorance of the terms of a decree").

Last year, the Georgia Supreme Court reaffirmed the inherent power of Georgia courts to compel obedience by non-parties with their orders. In *Bootery. Inc. v. Cumberland Creek*

Properties. Inc., 271 Ga. 271 (1999), the Court explicitly held that "the violation of a court's order by one who was not a party to the proceedings can be punished as a contempt *Id*. at 272.

The application of non-party contempt for disobedience with a confidentiality order is vividly demonstrated in *Ouinter v. Volkswagen of America*, 676 F.2d 969 (3rd Cir. 1982). In *Ouinter*, the trial court entered a confidentiality order as to certain documents Volkswagen considered to be trade secrets. The plaintiffs expert, a non-party, claimed the confidentiality order did not apply to him because he was neither the "plaintiff nor his counsel." *Id.* at 971. As a result, the expert provided copies of confidential documents to a plaintiffs lawyer in other litigation against Volkswagen and used them as a stage prop during a television interview. *Id*. Volkswagen sought an adjudication of civil contempt against the non-party expert for violation of the confidentiality order.

After a full evidentiary hearing, the trial court found the expert to be in contempt and compelled his obedience with the confidentiality order. *Id*. at 972. It also awarded Volkswagen costs, expenses, and attorney's fees associated with the contempt proceeding. The Third Circuit affirmed and held the expert "was not immune from liability for civil contempt, even though he was not a party on the original decree." *Id*. at 973.

See also Peterson v. Highland Music. Inc., 140 F.3d 1313, 1322 (9th Cir. 1988)(non-party respondents liable for contempt because they had notice of the trial court's order and abetted the defendant in violating it.); *National Labor Relations Board v. Sequoia District Council of Carpenters*, 568 F.2d 628, 633-634 (9th Cir. 1977) (non-party union officers were liable for contempt because they had notice of the trial court's order and were legally identified with the party that violated it.); *Stotler and Co. v. Able*, 870 F.2d 1158, 1164 (7th Cir. 1989)(citing

Ouinter with approval); Fed. R. Civ. P. 71; C. Wright & A. Miller, *Federal Practice and Procedure* §§ 3031-3033 (1997).

It is irrelevant if the non-party resides out-of-state. An out-of state nonparty who knowingly violates a protective Order is subject to the personal jurisdiction of the forum court. *See Reebok International. Ltd. v. McLaughlin*, 49 F.3d 1287, 1391-92 (9th Cir. 1995); *Waffenschmidt v. MacKay,* 763 F. 2d 711,716-17 (5th Cir. 1985); *United States v. Barnette,* 902 F. Supp. 1522, 1532 (M.D. Fla. 1995).

CONCLUSION

The dilemma created by the need for reasonable discovery disclosures and the importance of safeguarding trade secrets is solvable. Defense counsel charged with protecting a product manufacturer's proprietary information should seek to limit, where possible, the discovery of trade secrets, and take all steps necessary to secure a meaningful confidentiality order. The recognition of business trade secrets and the necessity for protecting them need not interfere with the legitimate rights of plaintiffs.

CATASTROPHIC RAILROAD GRADE CROSSING ACCIDENTS IN GEORGIA– FROM THE COMMERCIAL MOTOR CARRIER'S PERSPECTIVE

By: Edward R. Stabell, III
BRENNAN, HARRIS & ROMINGER LLP
Post Office Box 2784
Savannah, Georgia 31402
(912) 233-3399
email: ers@bhrlegal.com

Handling a catastrophic railroad grade crossing accident on behalf of a commercial motor carrier can be a life-altering experience for an insurance defense attorney accustomed to handling motor vehicle accidents on behalf of motor carriers. In the typical motor vehicle accident between a motor vehicle and another vehicle, the issues, although sometimes complex, are usually limited in scope to issues of personal injury and property damage to the common carrier and the owner and operator of the motor vehicle involved or his or her representative. When a tractor-trailer and a freight train collide, the railroad and the motor carrier likely will have substantial property damage and potential loss of life to the train crew and/or driver of the tractor-trailer. In severe accidents, property damage to the railroad can include damage to the train itself, track, road bed, and grade crossing. When a tractor-trailer and a passenger train collide, derailing the passenger train, a truly catastrophic accident can occur, involving significant property damage to the railroad and injuries and deaths to train crew and passengers. In such accidents, defense counsel for the motor carrier will be faced not only with a dizzying array of claims by the railroad, train crew, passengers, and in some case neighboring landowners, but also with an immediate, probing, and potentially damaging investigation by the National Transportation Safety Board ("NTSB"), the Georgia Public Service Commission, and local police and news agencies. These investigations require immediate and effective defensive action.

This article is designed to aid and assist the defense attorney for the motor carrier in overcoming the "learning curve" that often accompanies a "catastrophic" grade crossing accident so that he or she may render early and effective representation to his or her clients when and if that call to action comes.

INVESTIGATION BY THE NTSB[75]

When the NTSB Becomes Involved

The National Transportation Safety Bureau ("NTSB") investigates accidents involving automobiles, trains, buses, pipelines and marine vessels. Highway accidents are investigated by the NTSB when, in the judgment of the NTSB, they are catastrophic, involve problems of a recurring character or involve the release of hazardous materials, or would otherwise carry out the policy of the Independent Safety Board Act of 1974. 49 C.F.R. § 831.2(c) (2000). The NTSB conducts investigations "to determine facts, conditions, and circumstances relating to an accident or incident and the probable cause thereof." *Id.*

What Investigation Is Performed By The NTSB

If the NTSB determines that the truck/train collision is catastrophic, the NTSB will send a team of investigators to the site of the accident in many cases within hours of the accident having actually occurred. With regard to tractor-trailer accidents, the team likely may consist of

[75] The author wishes to acknowledge the substantial assistance that he received in preparing this section from materials prepared by J. Ric Gass and Mary Ogorchock for a seminar given them at the Trucking Insurance Defense Association conference on October 16, 1997, entitled "Pandemonium Following a Catastrophic Trucking Accident: A Template for Handling the NTSB on Top of Your Usual Handling of an Emergency." Mr. Gass and Ms. Ogorchocks' template was invaluable in quickly preparing the author and his clients for a probing visit by the NTSB following a catastrophic grade crossing accident.

a Motor Carrier and Highway Group, Operations Group, Human Performance Group, Vehicle Group, Mechanical Group, Track and Signal, and Survival Factors Group.

The Motor Carrier and Highway Group gathers information about the motor carrier such as the United States Department of Transportation number, states licensed to operate, products transported, total mileage recorded, number of employees, fleet size, safety or compliance review results, date began operating, lease information, and ownership information. It gathers information about the driver, such as typical route driven, personal history, and previous employers and will demand the production of the driver's personnel file, including his or her qualifications, application, daily itinerary and log sheets, time cards and pay information, and pre-accident and post-accident alcohol and drug testing results, medical information, and criminal and driving history. It also obtains information regarding the highway approaching and crossing the tracks, including, the grade and dimensions of the approaches, crossing protective devices, and highway speed limit, signs and markings. This Group may coordinate its investigative efforts and work in tandem with the Georgia Public Service Commission, which, as more fully set forth below, may seek to shut down the motor carrier's operations absent full cooperation and disclosure and/or seek written admissions of alleged regulatory violations from the motor carrier arising from the grade crossing accident.

The Operations Group reviews the performance of the railroad and train operations methods, practices, procedures, and personnel and/or dispatch communications. The personnel files of the train crew and railroad operations and/or dispatch personnel involved in the grade crossing file will be reviewed, including, qualifications, performance, hours of service, rules and safety compliance and testing, and toxicological testing, if performed.

The Human Performance Group will focus on the conduct of the carrier's driver as a causative factor of the accident and will investigate toxicology, driver fatigue, employment history and training, medical history, driver performance, rules violations, and disciplinary history, driver logs, driver's license information and accident history. The Human Performance Group will request an interview with the carrier's driver. The interview likely will cover a description of the driver's activities in the days leading up to the accident, the medical history of the driver, the employment history of the driver, including the training, experience, qualifications, safety record, alcohol and drug testing history, driving history, and licensing of the driver, the facts and circumstances of the accident, alcohol or drug use in close proximity to the accident, the driver's hours of work during the weeks preceding the accident, any injuries received by the driver as a result of the accident, significant events occurring in the driver's life in the year preceding the accident such as death, divorce, etc., the driver's familiarity with the route and site of the accident and his or her vehicle and any problems with that vehicle and information provided by the carrier to the driver for the trip. The Human Performance Group also will investigate the conduct of the train crew. This Group may seek toxicological from the driver of the motor carrier and/or the train crew.

The Vehicle Group investigates the mechanical condition and compliance of the tractor-trailer, including reviewing vehicle damage, safety violations, mechanical defects and systems such as braking and gear systems, and tractor and trailer dimensions and identification and tire information.

The Mechanical Group reviews the mechanical condition and compliance of the train, including the brakes, couplers and any other part of the train believed to have possibly contributed to the grade crossing accident.

The Track and Signal Group investigates the mechanical condition and compliance of the section of track and signals involved in the grade crossing accident. This Group will obtain copies of the track profile, track tonnage chart, U.S. Department of Transportation - AAR crossing inventory information, daily track inspection reports, U.S. Department of Transportation inspection reports, timbering work reports, last rail laid reports, geometry car inspection reports, gage restraint measurement system/exception reports, rail defect detection reports, agreements between the owner/operator of the track and the owner/operator of any third party train involved in the grade crossing accident, any agreements between the railroad and any other third party that has any causal connection to the grade crossing accident, applicable Georgia statutes or rules, signal department inspection reports, signal department trouble logs, dispatcher logs of events, and signal schematic drawings of signal circuits.

The Survival Factors Group prepares an accident scene diagram, performs background checks on drivers, including, driving records, CIB check, interstate identification index, and criminal files; obtains and reviews surface weather information, roadway information, accident statistics for the area, traffic count information, and highway maintenance information; performs a background check on the tractor and trailer, including ownership, leasing and permitting; gathers newspaper articles.

What Investigative Powers the NTSB Has

The NTSB has broad powers to review, obtain, or test documents and tangible items and to interview witnesses. An authorized representative of the NTSB, upon presentation of his or her credentials, is authorized to inspect, photograph, and/or copy any transportation vehicle or component thereof, facility, equipment, process or controls relevant to the investigation, or any

pertinent records or memoranda, including all files, hospital records, and correspondence then or thereafter existing and to question any person having knowledge relevant to an accident/incident, study, or special investigation. 49 C.F.R. § 831.9(a) (2000). Any employee of the NTSB, upon presenting appropriate credentials, is authorized to test or examine any vehicle when the testing is determined to be required for purposes of such investigation. *Id.* § 831.9(c). Authorized representatives of the NTSB also have exclusive authority, on behalf of the NTSB, to decide the way in which any testing will be conducted, including decisions on the person that will conduct the test, the type of test that will be conducted, and any individual who will witness the test. *Id.* § 831.9(a).

The NTSB may issue a subpoena, enforceable in federal district court, to obtain testimony or other evidence. *Id.* "As a general rule, an administrator subpoena should be enforced 'if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information is reasonably relevant.'" *United States v. Florida Azalea Specialists*, 19 F.3d 620, 623 (11th Cir. 1994) (quoting *Federal Election Com'n v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284 (11th Cir. 1982)).

What Rights the Motor Carrier Has

As a party involved in the accident, the commercial motor carrier has a right to be designated a "party to the investigation" by the NTSB and to participate in the investigation. 49 C.F.R. § 813.11(a) (2000). As a "party to the investigation," the motor carrier will be permitted access to the wreckage, records, mail and cargo in the NTSB's custody. *Id.* § 831.12(a).

The NTSB Report

The NTSB will provide a "party to the investigation" with a preliminary report on the factual findings of its investigation to review for accuracy. This is the carrier's opportunity to provide facts to the NTSB exonerating the driver and/or carrier. This normally occurs within the first 3 to 6 months post-accident. The NTSB may accept or reject the carrier's recommendations in its discretion.

After completing its investigation, the NTSB is required to issue a final report on the facts and circumstances regarding the accident and make the report available to the public. 49 U.S.C. § 1131(e). Pursuant to regulation, the NTSB accident report is supposed to include two sections: the "Board accident report" and a "factual accident report." The "Board accident report" is defined as the "report containing the Board's determinations, including probable cause of an accident, issued either as a narrative report or in a computer format (briefs of accident)." 49 C.F.R. § 835.2. The "factual accident report" is the investigator's report of his or her investigation of the accident. The NTSB then issues a final report, which will set forth its factual findings any may set forth the probable cause of the accident. This report normally is issued within 6 to 12 months post-accident.

Admissibility of the NTSB Report

The probable cause finding in the NTSB report is inadmissible in evidence. 49 U.S.C.A. § 1154(b) provides that "[n]o part of the report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." *Id.* § 1154(b) (1996). There appear to be no

court decisions that hold that NTSB probable cause findings may be admitted into evidence. On the contrary, as more fully set forth below, courts addressing the issue appear to hold uniformly that the probable cause finding is not admissible.

The real battleground is whether portions of the "factual accident report" are admissible into evidence. On the one hand, at least one court has applied what it considered to be the plain language of section 1154 to prohibit use of any portion of the NTSB report. *See, e.g., In re Air Crash Disaster at Sioux City Iowa on July 19, 1989*, 780 F. Supp. 1207 (N.D. Ill. 1991). The *Sioux City* court agreed that the statute was designed to prevent the usurpation of the jury's rule as ultimate factfinder, but concluded that "Congress plainly chose to serve its purpose in preventing NTSB data from usurping the function of the jury by absolutely barring admission of NTSB reports, while permitting limited testimony from NTSB employees." *Id.* at 1210. The court reasoned that the regulatory scheme allows the NTSB investigator or employee to provide deposition testimony and to refer to a factual accident report to refresh his or her memory during the course of such testimony, but prohibits the use of the factual report for any other purpose. *Id.* The court in *Sioux City* was also concerned that the admission of NTSB reports, combined with the broad construction accorded Fed. R. Civ. P. 803(8), "pose[d] the possibility that a vast array of NTSB conclusions and opinions that stop short of an ultimate determination of probable cause are likely to be admissible in civil actions." *Id.* at 1212.

On the other hand, the regulations authorize the admission of portions of the "factual accident report" through the testimony of the NTSB investigator or employees, who investigated the accident. For instance, 49 C.F.R. § 835.3(b) states that the NTSB investigator or employees may "testify as to the factual information that they obtained during the course of an investigation, including factual evaluations embodied in their factual accident reports." *Id.* § 835.3(b) (2000).

49 C.F.R. § 835.4(a) provides that, in so testifying, the NTSB investigator or employees "may use a copy of his factual report as a testimonial aid, and may refer to that report during his testimony or use it to refresh his memory." *Id.* § 835.4(a) (2000). Other regulations outline the method for obtaining the testimony of the NTSB investigator or employees regarding the accidents. Section 835.5(a), for example, provides that the "[t]estimony of [NTSB] employees may be available for use in actions or suits for damages arising out of accidents through depositions or written interrogatories. [NTSB] employees are not permitted to appear and testify in court in such actions." *Id.* § 835.5(a) (2000). Section 835.5(b) states that "[n]ormally, depositions will be taken and interrogatories answered at the [NTSB's] office to which the employee is assigned, and at a time arranged with the employee reasonably fixed to avoid substantial interference with the performance of his duties." *Id.* However, section 835.5(c) expressly allows an NTSB employee to testify only once in connection with any investigation they have made of an accident, regardless of the number of lawsuits that arise out of the accident, and places the burden squarely on counsel seeking the deposition to identify all other litigants and their counsel and to advise them of the fact that a deposition has been granted, so that all interested parties are afforded the opportunity to participate therein. *Id.*

Although there are no Eleventh Circuit or Georgia decisions resolving whether the "factual accident report" is admissible, the majority approach appears to be that section 1154(b) allows the admission into evidence of the factual reports or findings, but not any opinions or conclusions regarding the probable cause of the accident. *See, e.g., Travelers Ins. Co. v. Riggs*, 671 F.2d 810, (4th Cir. 1982); *Keane v. Detroit Diesel Allison*, 569 F.2d 547, 551 (10th Cir. 1978); *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628, 632 (3d Cir.), *cert. denied*, 375 U.S. 895 (1963); *Matter of the Petition of Cleveland Tankers, Inc.*, 821 F. Supp. 463, 464 (E.D. Mich.

1992). *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F.2d 1493, 1496 (D. Colo. 1989); *Daniels v. Tew Mac Aero Services, Inc.*, 675 A.2d 984, 987 (Me. 1996). To reach that result, the courts have looked to the statute's legislative history and purpose and found that the statutory restriction is designed to "prevent usurpation of the jury's role by evidentiary use of the Board's conclusions as to probable cause" and admitting into evidence the factual portions of the report pose no threat to the jury's status as fact finder and advance another purpose of the regulatory scheme, which is to prevent the NTSB from becoming involved in civil litigation. *Daniels*, 675 A.2d at 987-988.

INVESTIGATION BY THE GEORGIA PUBLIC SERVICE COMMISSION AND/OR THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Either the Georgia Public Service Commission ("PSC") or the Federal Motor Carrier Safety Administration ("FMCSA") may pay a visit to the motor carrier shortly after a railroad grade crossing accident. This investigation probably will consist of an agent coming to the motor carrier's place of business and personally inspecting the motor carrier's records. It would be advisable to warn the motor carrier of the possibility of such an inspection so that the motor carrier can have counsel present during the inspection. It is also prudent to warn the motor carrier not to sign any "voluntary statements" or other such confessions without previously submitting the document to counsel for review.

Determining Which Agency Has Jurisdiction

There may be an issue which agency, the PSC or the FMCSA, has jurisdiction. Georgia law is preempted by federal law when the suit involves a passenger or property being transported in interstate commerce. Georgia law is not preempted by federal law when a member of the

public (i.e., a person other than a passenger or property owner whose property is being transported in interstate commerce) sues a carrier that has qualified to conduct both inter- and intrastate commerce in Georgia. Georgia law is not preempted by federal law when such member of the public sues the motor carrier engaged solely in intrastate commerce. Jenkins & Miller, *Georgia Automobile Insurance Law*, § 41-5 (2000) (*citing Westport Trucking Co. v. Griffin*, 254 Ga. 361, 363, 329 S.E.2d 487 (1985) and *Watkins v. H.O. Croley Granary*, 555 F. Supp. 458 (N.D. Ga. 1982)).

Authority of the Georgia Public Service Commission to Inspect the Motor Carrier's Records

The PSC, which has general supervision of all common carriers in Georgia, has the authority pursuant to O.C.G.A. § 46-2-20(e) "to examine the affairs of all companies under its supervision and to keep informed as to their general condition . . . with reference to compliance with all laws, orders of the commission, and charter requirements." Pursuant to subsection (f) of the statute, "[t]he commission shall also have the power and authority to examine all books, contracts, records, papers and documents of any person subject to its supervision and compel production thereof." *Id.* § 46-2-20(f). Pursuant to subsection (g), "[t]he commission shall have the power through any of its members at its discretion to make personal visits to the offices and places of business of the companies under its supervision for the purpose of examination...." *Id.* § 46-2-20(g).

Authority of the Federal Motor Carrier Safety Administration to Inspect the Motor Carrier's Records

The authority for an examination conducted by the FMCSA is found in Appendix B to Subchapter B of 49 C.F.R. 301 *et seq.* (2000), which provides as follows:

> 1. *Authority.* Persons appointed as special agents of the Federal Highway Administration ("Administration"), are authorized to enter upon, to inspect, and to examine any and all lands, buildings, and equipment of motor carriers and other persons subject to the Interstate Commerce Act, the Department of Transportation Act, and other related Acts, and to inspect and copy any and all accounts, books, records memoranda, correspondence, and other documents of such carriers and other persons.
>
> 2. *Compliance.* Motor Carriers and other persons subject to these Acts shall submit their accounts, books, records, memoranda, correspondence and other documents for inspection and copying, and they shall submit their lands, buildings and equipment for examination and inspection, to any special agent of the Administration upon demand and display of an Administration credential identifying him/her as a special agent.

Id.

Issuance of Notice of Claim for Violations of the Agency's Regulations

Following the inspection, a Notice of Claim may be issued by either the PSC or the FMCSA. The PSC has adopted the Motor Carrier Safety Regulations, thus, the procedure is essentially the same. (*See, e.g.*, Georgia Department of Public Safety Rules for Motor Carriers § 1-14-1.01).

Pursuant to 49 C.F.R. § 386.12, a complaint may be filed by any person, including any government agency, requesting the issuance of a notice of investigation. The complaint must be of a "substantial violation" which is defined as a violation which could reasonably lead to, or has resulted in, serious personal injury or death. *Id.* § 386.12 (2000). Section 386.14 requires that the respondent file a reply within 15 days after the claim letter is served. The reply must contain an admission or denial of each allegation of the claim and a concise statement of facts constituting each defense. If the respondent contests the claim, the reply must also contain either a request for an oral hearing or a notice of intent to submit evidence without an oral hearing. If

the respondent does not reply to the notice of claim within the prescribed time period, the claim letter will become a final agency order 25 days after it is served.

Contesting the Notice of Claim

In his article entitled "Mission Impossible: Practice Tips for Responding to a FMCSA Notice of Claim," *The Transportation Lawyer*, Richard A. Westley provides some insightful advice for dealing with a Notice of Claim. The following is a paraphrase of the advice that he gives to the practicing lawyer in this situation:

> 1. Read any "voluntary confession" by the motor carrier carefully. Many of these statements contain factual allegations that are untrue, such as that the declarant has reviewed the records which establish the falsity of the driver logs. A declarant's failure to review the records may go to the competency of that person to admit the alleged violations.
>
> 2. Challenge the factual premises of the Notice of Claim, for example, toll tickets are not always an accurate measure of time; logs, while not false, may simply be inaccurate as a result of sloppy record keeping; and, the methodology for determining the log may be inaccurate.
>
> 3. Challenge the amount of the forfeiture. The agency is required to take into account such things as the nature, circumstances, extent, and gravity of the violation, the degree of culpability, the history of prior offenses, ability to pay, effect on ability to continue to do business, and "such other matters as justice and public safety may require" in assessing forfeitures. See, e.g., 49 U.S.C.A. § 521(b)(2)(C) and 5123(c).
>
> 4. Invoke the Small Business Regulatory Enforcement Fairness Act of 1996 found in 5 U.S.C.A. § 601 which purports to require "each agency regulating the activities of small entities" to establish a policy or program to provide for the reduction or even waiver of civil penalties for regulatory violations by "small entities."
>
> 5. Invoke the Equal Access to Justice Act found in 5 U.S.C.A. § 504(a)(1) and (2) which provides that a corporation

> whose net worth does not exceed $7.0 million and which has less than 500 employees may recover its attorney's fees and other expenses upon a showing that the agency's position is not "substantially justified."
>
> 6. Raise constitutional issues where the Fifth and Fourteenth Amendments have been violated.

Id.

PERTINENT LEGAL ISSUES

Federal Pre-emption

As a result of the Federal Railroad Safety Act of 1970 ("FRSA"), 49 U.S.C.A. § 20101 *et seq.* (1997) and the Highway Safety Act of 1973, 23 U.S.C.A. § 101 *et seq.* (1990), the legal issues that may arise in a catastrophic highway grade crossing accident will need to evaluated to determine whether Georgia law has been pre-empted by federal law. The FRSA was enacted "to promote safety . . . and to reduce railroad-related accidents." 49 U.S.C.A. § 20101 (1997). The Secretary of Transportation was and is authorized to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." *Id.* § 20103(a). Congress declared "[l]aws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." *Id.* § 20106. Congress passed a savings clause allowing states to adopt or continue in force any law relating to railroad safety until the Secretary of Transportation adopted a rule covering the same subject. *Id.* Congress also passed a second savings clause allowing states to adopt more stringent state rules in order to eliminate a local safety hazard as long as the state rule is not incompatible with federal standards and the state rule does not unreasonably burden interstate commerce. *Id.*

The HSA, among other things, created the Federal Railway-Highway Crossings Program ("Crossings Program") that makes funds available to States for the "cost of construction of

projects for the elimination of hazards of railway-highway crossings." 23 U.S.C.A. § 130(a). To participate in the Crossings Program, all States must "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* § 130(d). That schedule must, "[a]t minimum ... provide signs for all railway-highway crossings." *Id.* The Secretary, through the Federal Highway Administration ("FHWA"), has promulgated several regulations implementing the Crossings Program, which are set forth in 23 C.F.R. § 646.1 *et seq*. (2000). Section 646.214 addresses the design of grade crossing improvements and sections 646(b)(3) and (4) address the adequacy of warning devices installed under the program. *See, e.g., Id.* §§ 646.214(b) & (d).

The author has attempted to identify common legal issues that may arise in a catastrophic railroad grade crossing accident and to note where federal pre-emption has been found or where it appears, based upon a review of the regulations, that federal pre-emption applies. However, due to changing nature of federal regulations in this area, defense counsel should re-evaluate legal issues that arise in a railroad grade crossing accident for federal pre-emption.

In *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), *aff'd*, 507 U.S. 658 (1993), the Eleventh Circuit Court of Appeals has summarized the three circumstances under which State law will be pre-empted under the Supremacy Clause of the United States Constitution as follows:

> First, pre-emption will occur when Congress explicitly indicates that it intends to pre-empt state law. English v. General Elec., ----U.S.----, 100 S. Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). The courts, however, will attempt to narrowly tailor the scope of the pre-emption to match congressional intent. Id. Second, pre-emption will be implied when Congress has indicated that the federal government will exclusively occupy a field of regulation. The English court noted that congressional intent can be implied

> when the statutes and regulations are so pervasive that there is no room left for federal regulation or when there are strong federal interests in exclusively regulating the field. Id. However, congressional intent must be "'clear and manifest'" if the allegedly pre-empted field includes areas of traditional state interest. Id. (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). Third, pre-emption will be implied when state law "actually conflicts with federal law." Id. Under this variety of pre-emption, if a party cannot comply with both federal and state law or when state law interferes with the accomplishment of congressional objectives, courts will imply pre-emption."

Easterwood, 933 F.2d at 1552.

After reviewing the applicable legislative history for the Railroad Safety Act, the Eleventh Circuit in *Easterwood* concluded that because Congress was concerned with the problems created by the hodgepodge of state regulations it explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations. 933 F.2d at 1553. If any federal regulations have been promulgated which cover the conduct in issue, federal law will pre-empt state law covering the same conduct. *Id.*

RAILROAD/TRAIN OWNER/OPERATOR CONDUCT

Principal/Agent Relationship between the Railroad and the Owner/Operator of Train

Agency principles remain state law issues. In a train accident involving a passenger train service that is not owned or operated by the railroad owning or operating the tracks, such as the National Passenger Railroad Corporation ("Amtrak"), an issue may arise whether the passenger train service or railroad owning or operating the tracks is the agent of the other. In the case of Amtrak, it likely will be operating over the rails of the owner/operator railroad pursuant to a

written contract that delegates control of the movement of the Amtrak train over the tracks to the owner/operator railroad. The owner/operator railroad also may place other controls on Amtrak, such as requiring its employees to submit to training or performance reviews by the owner/operator railroad. These issues of control need to be evaluated to determine whether a principal/agency relationship arises.

Railroad's Liability for Damages in General

Railroads generally are liable under Georgia law for injuries to persons and property due to their negligence or improper conduct. O.C.G.A. § 46-8-290 provides:

> In all cases where an individual is injured, or his property is damaged or destroyed, by the carelessness, negligence, or improper conduct of any railroad company or an officer, agent, or employee of such company, in or by the running of cars or engines of the company, such company shall be liable to pay damages to anyone whose person or property may be so injured, damaged, or destroyed, notwithstanding any bylaws, rules, regulations, or notices which may be made, passed, or given by such company and which purport to limit the company's liability.

Id. § 46-8-290 (1992).

Pursuant to section 46-8-290, in an action against a railway for damages to persons or property, as a rule of evidence, proof of injury inflicted by the running of locomotives or cars of such railway is prima facie evidence of the lack of reasonable skill and care on the part of the servants of the railroad in reference to such injury. *Id.* § 46-8-290 (1992). However, if the railway produces evidence disproving the negligence alleged, the presumption vanishes and the burden is upon the plaintiff to prove by a preponderance of evidence that the negligence of the defendant railway was the proximate cause of the injury or damages. *Coast Line R.R. v. Rowe,* 83 Ga. App. 540, 64 S.E.2d 216 (1951) (decided under former Ga. Code Ann. § 68-710).

Failure to Install Protective Devices at a Grade Crossing

The FRSA, in conjunction with 23 C.F.R. §§ 646.214(b)(3) and (4), pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the devices' installation. In *Easterwood*, *supra*, the United States Supreme Court held that because sections 646.214(b)(3) and (4) "establish requirements as to the installation of particular warning devices," "when they are applicable, state tort law is preempted." 507 U.S. at 670. The Court in *Easterwood* and in *Norfolk Southern Railway Co. v. Shanklin*, ---- U.S. ---- (Case No. 99-312, April 17, 2000) ruled that sections 646.214(b)(3) and (4) are mandatory for all warning devices actually installed with federal funds." 507 U.S. at 666.

According to section 646.214(b)(3), "[a]dequate warning devices ... on any project where Federal-aid funds participate in the installation of devices are to include automatic gates with flashing light signals" if any of several conditions are met. 23 C.F.R. § 646.214(b)(3). Those conditions include (a) "[m]ultiple main line railroad tracks," (b) multiple tracks in the vicinity such that one train might "obscure the movement of another train approaching crossing," (c) high speed trains combined with limited sight distances, (d) a "combination of high speeds and moderately high volumes of highway and railroad traffic," (e) the use of the crossing by "substantial numbers of school buses or trucks carrying hazardous materials," or (f) when a "diagnostic team recommends them." *Id.* § 646.214(b)(3)(i). Section 646.214(b)(4) states that "[f]or crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning devices to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." *Id.* § 646.214(b)(4).

The only traffic control device that the railroad is statutorily required to erect under Georgia law is a cross buck sign. See, e.g., O.C.G.A. § 46-8-194 (1992). Otherwise, the railroad appears to have no statutory or common law duty under Georgia law to install protective devices on a public road at a grade crossing. *Evans Timber Co. v. Central of Georgia R. Co.*, 239 Ga. App. 262, 266, 519 S.E.2d 706 (1999). In *Evans*, the court held that the Georgia Code of Public Transportation ("GCPT"), O.C.G.A. § 32-1-1 *et seq.*, enacted in 1973, pre-empted a common law cause of action against a railroad for failure to install protective devices at a grade crossing on a public road where the railroad has not been requested to do so by the appropriate governmental entity. *Id.* at 266. The court in *Evans* found that "the GCPT delegated responsibility for the installation of protective devices on a public road to the governmental entity:

> 'Whenever, in the judgment of the department in respect to the state highway system, a county in respect to its county road system, or a municipality in respect to its municipal street system, such protection is reasonably necessary for the safety of the traveling public, the department or the county or the municipality may order the protection of the grade crossing by the installation of protective devices.'"

Id. at 265 (quoting O.C.G.A. § 32-6-200).

As noted by the *Evans* court, "'protective devices' means gates, flashing light signals, and similar devices or combinations thereof, together with necessary appurtenances, to be installed or in operation at any grade crossing and which comply with the safety standards determined by the department as being adequate at that time for the protection of traffic." *Id.* (quoting O.C.G.A. § 32-1-3(23)). The court in Evans based its holding in part upon *Kitchen v. CSX Transp.*, 265 Ga. 206, 453 S.E.2d 712 (1995), wherein the Georgia Supreme Court held that railroads, due to pre-emption by the GCPT, had no statutory or common law duty to install

protective devices on a public road on which a overpass had been removed over its tracks. *Evans,* 239 Ga. App. at 263-264 (citing *Kitchen,* 265 Ga. at 207-208).

Failure to Maintain Protective Signals at Grade Crossing

The court in *Evans*, *supra*, expressly left open the question whether a railroad may be liable for the failure to install protective devices once requested by the governmental entity to do so or to maintain protective devices that have been installed. As noted by the court, after the protective device has been ordered and approved by the responsible governmental entity, the railroad has a duty to install the device. 239 Ga. App. at 265 (citing O.C.G.A. § 32-6-200(a)). The *Evans* court also recognized that "[w]ithout question, the common-law duty of the railroad, except with respect to initiating and authorizing the installation of protective devices at a railroad crossing, remains in effect." *Id.* The railroad, for instance, has a duty to maintain grade crossings and protective crossings after installation. *Id.* (citing O.C.G.A. § 32-6-190, *infra*). Moreover, there are federal reporting, maintenance, and inspecting requirements for grade crossing signal systems. *See, e.g.,* 49 C.F.R. § 234.1 *et seq.* (2000).

Vertical Profile of the Grade Crossing

A high vertical "hump" profile of a grade crossing may contribute to a tractor-trailer accident by causing drivers to slow down and concentrate to such a degree on the hump that they fail to notice approaching trains and/or by posing a danger of "high centering" and becoming stuck thereon. Consequently, identifying the entity responsible for creating and/or maintaining the hump crossing becomes a pivotal issue. Defense counsel for the motor carrier also will need to undertake immediate efforts to ensure that the grade of the crossing and scene of the accident

is surveyed and photographed and/or videoed by competent engineers and investigators. If the crossing is damaged, the railroad likely will seek to repair the same as soon as practicable to allow passage of train traffic. The repairs may substantially alter the vertical profile of the grade crossing.

The grade crossing itself is located within the railroad's right-of-way, which normally includes 25 to 50 feet on either side of the track. The railroad right-of-way may take the form of an outright conveyance of land for railroad purposes or may be construed as an easement only, by virtue of the grant read in light of the surrounding circumstances. Even where the grant falls short of an outright conveyance, however, the right-of-way is more than an easement; it is an interest in land "special and exclusive in its nature," involving full possession of the land with the right to maintain on the right-of-way not only its roadbed and rails, but also warehouses and other buildings accessorial to the operation of the railroad, and it may delegate rights in the right-of-way to others by means of easements, licenses or leases, including a public or private way across its right-of-way. *See, e.g., Pindar's Georgia Real Estate Law and Procedure*, § 8-33, p. 458 (5th Ed. 1998) (citations omitted). The owner of the approaching roadway (e.g., the state, county, municipality or private owner) will have a roadway right-of-way over the track.

There is no federal statute or regulation regulating who has a duty to maintain the roadway within the railroad's right-of-way or the angle of the roadway as it approaches the railroad track. *See, e.g., Easterwood*, 933 F.2d at 1556. However, O.C.G.A. § 32-6-190 provides:

> Any railroad whose track or tracks cross a public road at grade shall have the duty to maintain such grade crossings in such condition as to permit the safe and convenient passage of public traffic. Such duty of maintenance shall include that portion of the

> public road lying between the track or tracks and for two feet beyond the ends of the crossties on each side of such crossing.

Id. § 32-6-190 (1996).

The railroad's failure to comply with the duties under this section, proximately causing or contributing to the injuries and damages at issue, is negligence per se. *See, e.g., Southern Ry. v. Brooks*, 112 Ga. App. 324,326,145 S.E.2d 76 (1965) (decided under former Ga. Code Ann. 1933, § 94-503).

The grade of a high vertical "hump" crossing, in most cases, will include portions of roadway that lie outside two feet beyond the ends of the crossties. When faced with a tractor-trailer/train accident caused by a tractor-trailer becoming lodged on a crossing due to the high vertical profile of the grade crossing, the railroad likely will take the position that its duty to maintain under § 32-6-190 does not extend outside two feet beyond the ends of the crossties on each side of the crossing. The motor carrier, of course, will want to argue that the railroad's duty to maintain the grade crossing not only "includes," but also extends beyond two feet from the ends of the crossties.

There are no Georgia cases that resolve these issues. However, the Eleventh Circuit in *Easterwood, supra*, noted that section 32-6-190 strongly implies that the railroad's duty to maintain the grade crossing as to permit the safe and convenient passage of traffic may extend beyond the two feet mentioned in the statute. 933 F.2d at 1557, n. 8. Although not expressly stated, the court in *Easterwood* presumably was impressed with the use of the term "includes" rather than more restrictive language such as "shall be limited to" or "shall not extend beyond" in describing the breadth of the area of the crossing to which the railroad's duty applies.

Regardless of the breadth of the railroad's duty to maintain under section 32-6-190, a number of arguments can be made by the carrier that railroad cannot create a dangerously high

vertical profile at a grade crossing without incurring a duty to eliminate or warn others of the danger. In *Kitchen, supra*, for instance, the court expressly left open the question whether a common law duty independent of the GCPT remained, which requires the railroad to guard the safety of those who may be injured by an inherently dangerous condition and nuisance that it allegedly caused and maintained on its land immediately adjacent to the public highway. Instead, the court distinguished those holdings from the facts at hand. 265 Ga. at 208-210 (citing and distinguishing *Nashville, Chattanooga & St. L. Ry. Co. v. Cook*, 177 Ga. 196, 170 S.E. 28 (1933) and *Int'l Paper Realty Co. v. Bethune*, 256 Ga. 54, 344 S.E.2d 228 (1986)). As noted by the *Kitchen* court, the court in *Nashville, Chattanooga* held:

> "Where immediately at the end of a paved road, and upon the property of the landowner abutting the end of the road, there is knowingly and negligently maintained by the landowner, without rails or barriers, an excavation or ditch ..., the owner of the land is liable in damages for injuries received by a person traveling along the roadway at night who, in the exercise of due care and without negligence, runs into the ditch or excavation."

Kitchen, 265 Ga. at 209 (quoting *Nashville, Chattanooga*, 177 Ga. at 198-199).

In *Bethune*, the court "extended a private owner's liability for damages to a child who was injured on adjacent public property because of a protruding iron surveying pin which defendants had placed in the ground to mark their property and defined the duty of the landowner as follows:

> "[A] landowner may not, without incurring a duty, maintain an artificial condition so situated that persons lawfully using the public way may, by accident or some force not their own fault, fall upon and be injured by the artificial condition. [Cit.] If an artificial condition exists under these circumstances, the landowner owes a duty of care to guard, cover or protect it for the safety of those on the public way."

Kitchen, 265 Ga. at 209-210 (citing and quoting *Bethune*, 256 Ga. at 55).

The principles of liability set forth in *Nashville, Chattanooga* and *Bethune* more recently have been applied to situations where an adjacent landowner creates a potentially dangerous artificial condition as a result of a trespass on another person's property. *See, e.g., City of Winder v. Girone*, 265 Ga. 723, 462 S.E.2d 704 (1995); *Soto v. Roswell Townhomes, Inc.,* 183 Ga. App. 286, 358 S.E.2d 670 (1987). A number of decisions also hold that if a person assumes a duty, which the person knew or should have known must be properly performed so as to avoid potential injury or harm to a third person, such person may be held liable by the third person for the failure to use ordinary care in the performance of the duty. *See, e.g., Blossman Gas Co. v. Williams*, 189 Ga. App. 195 (1988); *Mixon v. Dobbs Houses, Inc.*, 149 Ga. App. 481, 254 S.E.2d 481 (1979).

In determining whether the railroad created the grade profile of the relevant crossing, defense counsel for the motor carrier should be mindful that railroads, to maintain their tracks, perform "track raises" every 8 to 10 years. In a "track raise, " railroad gangs physically raise the crossties and rails, replace worn out crossties and rail, add or replace ballast stone to the rail bed, lay the crossties and rail back down on the ballast stone of the rail bed, and "tamp" the crossties and rails until they are level and uniform. To perform a "track raise" through a paved railroad/roadway crossing, the paved surface of the roadway and the crossing boards must be torn out before the crossties and rail can be raised, ballast stone is added, and the rails are "tamped" back into place. The crossing is then repaved and graded to tie it into the level of the existing roadway. A "track raise" will physically raise the level of the rails by two inches to two feet. The obvious result is that the profile of a crossing will be raised and result in a high vertical or "hump" roadway crossing unless the grade of the roadway approaches to the crossing are altered to take into account the higher level of the track.

If the motor carrier can prove that the railroad created the grade profile of the crossing, evidence of industry customs or practices likely will be admissible to show that the railroad was negligent by failing to exercise that degree of care customarily followed in its trade. *See, e.g.*, *Coffeen v. Doster*, 161 Ga. App. 529,530, 288 S.E.2d 327 (1982). The motor carrier can argue that the Manual for Railway Engineering, published by the American Railway Engineering Association ("AREA"), sets forth an industry custom or practice regarding the construction or reconstruction of highway-railway crossings. The Manual was first published by the American Railway Engineering and Maintenance of Way Association in 1905 and has been continuously revised and re-issued since that date. American Railway Engineering Association, *Manual for Railway Engineering*, p. v (1995) (the "Manual"). Although designated as "recommended practices," the contents of the Manual "are published as a guide to railways in establishing their individual policies and practices relative to the subjects, activities and facilities covered in the Manual, with the aim of assisting them to engineer and construct a railway plant which will have inherent qualities of safe and economical operation as well as low maintenance cost." *Id.* at iii.

Section 8.1.2 of the Manual sets forth the following guidelines for the profile and alignment of crossings and approaches:

> Where crossings involve two or more tracks, the top of rails for all tracks shall be brought to the same plane where practicable. The surface of the highway shall be in the same plane as the top of the rails for a distance of 2 ft. outside of rails for either multiple or single-track crossings. The top of the rail plane shall be connected with the grade line of the highway each way by vertical curves of such length as is required to provide riding conditions and sight distances normally applied to the highway under consideration. It is desirable that the surface of the highway be not more than 3 in. higher or 6 in. lower than the top of the nearest rail at a point 30 ft. from the rail, measured at right angle thereto, unless track superelevation dictates otherwise.

> If practicable, the highway alignment should be such as to intersect the railroad track at or nearly right angles.

Id.

These same guidelines appear in the railroad grade crossing section of the 1990 American Association of State Highway and Transportation Officials ("AASHTO") policy on geometric design of highways and streets.

The carrier should check the actual and manufacturer's specification for clearance of its trailer. They likely will exceed the clearance needed to successfully negotiate a grade crossing complying with the above-stated AREA and AASHTO standards.

Sight Obstruction by Vegetation or Other Material

Another issue that may arise is whether excessive vegetation on the side of the track obstructed the views of the train engineers and/or the driver of the tractor-trailer, thereby causing or contributing to the accident. The Eleventh Circuit in *Easterwood, supra*, found this claim to be partially pre-empted. 933 F.2d at 1554 (citing 49 C.F.R. § 213.37 (1990), 45 U.S.C.A. § 434 (1986), and *Missouri Pac. R.R. Co.*, 833 F.2d 570 (5th Cir. 1987)). 49 C.F.R. § 213.37 requires that track owners keep vegetation on or immediately adjacent to the tracks under control. *Id.* § 213.37 (2000). The court in *Easterwood*, however, ruled that a claim that excessive vegetation near, but not immediately adjacent to the track, obstructed the views of the train engineers and/or of the driver was not federally pre-empted because the Secretary of Transportation only chose to regulate excessive vegetation immediately adjacent to the track. 933 F.2d at 1554. Consequently, a claim of view obstruction caused by vegetation or other material within the railroad's right of way, but not immediately adjacent to the tracks appears to be maintainable under Georgia negligence principles.

Railroad/Train Employee Negligence

Fatigue

Like commercial motor vehicle drivers, railroad employees are subject to federally regulated hours of service. *See, e.g.*, 49 U.S.C.A. § 20101 *et seq.* (1997); 49 C.F.R. § 228.1 *et seq.* (2000). An "employee" for purposes of regulation of hours of service means "a dispatching service employee, a signal employee, or a train employee." 49 U.S.C.A. § 21101(3). Section 21103 provides that "[e]xcept as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain on duty–(1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty. *Id.* Subsection (c) sets forth an emergency work exception for an employee on the crew of a wreck or relief train, which allows 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. *Id.* § 21101(c).

Alcohol or Drug Use

Similar to drivers of commercial motor carriers, railroad employees are also subject to federally mandated alcohol and drug testing procedures. *See, e.g.*, 49 U.S.C.A. § 20140 (1997); 49 C.F.R.§ 219.1 *et seq.* (2000). Unfortunately for the motor carrier, the regulations prohibit the railroad from disseminating any record of alcohol or drug testing for any purpose other than compliance with the regulations without the voluntary written consent of the employee. *Id.*

§ 219.711. However, the railroad is required to report the results of alcohol or drug tests to the FRA if alcohol or drugs are involved in a highway grade accident involving equipment of others as a part of Rail Equipment Accident/Incident Reports, which reports must be submitted on a monthly basis. *See, e.g., Id.* §§ 225.11 through 225.17. These reports can be requested from the FRA.

Failure to Warn Train of Obstruction

If the failure or inability to warn a train of a tractor-trailer stalled or obstructing the tracks is an issue, the motor carrier will need to review the dispatch and signal operations and emergency practices and procedures of the railroad owning or operating the section of track upon which the accident occurred. Railroads are responsible for the movement of trains over tracks that they own or operate. Pursuant to 49 C.F.R. § 214.7, the train dispatcher is the railroad employee assigned to control and issue orders governing the movement of trains on a specific segment of railroad track in accordance with the operating rules of the railroad that apply to that segment of track. *Id.* § 214.7 (2000). As noted above, if the train involved in the accident is owned by a third party such as Amtrak, there likely will be a written contract setting forth or delegating the control of such trains to the owner or operator railroad tracks. Railroad lines are divided up into divisions and subdivisions, and dispatch operations are ordinarily handled out of a centralized dispatch center. Dispatch control in the centralized dispatch center is likewise organized by divisions and subdivisions of railroad lines. Dispatch orders to the train are transmitted by teletype, two way radio, and fixed signals along the track.

There is no federal statute or regulation regulating the activities of train dispatchers in the handling cases of emergency instructions, other than that “emergency transmissions” shall be

given and take precedence in emergency situations such as obstructions to tracks. *See, e.g.*, 49 C.F.R. § 220.47 (2000). Thus, Georgia statutory and common law principles of negligence should apply in most instances. Although uncommon, due to reductions in staff, improper training, and/or dispatcher error or fatigue, train accidents can and do occur as a result of the failure of the railroad timely to identify and warn an oncoming train of an obstruction on its tracts after receiving notice of the same. Global positioning systems are available so that the position of a train can be accurately determined, but may not have been implemented by the railroad. Dispatchers responsible for a certain section of track should be (but are not always) familiar with the names of roadways crossing their section of track either through reviewing track charts, riding the rails, or viewing videos of the same. Dispatch personnel may have been taught to identify roadway crossings by Federal Railway Administration ("FRA") milepost numbers, which may be posted on small metal tags located on cross bucks, rather than by street names. To avoid crossing identification problems, the FRA also has been pushing railroads to voluntarily and conspicuously post signs at containing a 1-800 emergency number and the DOT - AAR milepost and crossing number, with varying degrees of success.

Where the railroad is notified of an obstruction on its track at a crossing through proper emergency channels and has sufficient time to stop a train and avoid a collision, yet fails to do so, and the obstruction is alleged to have been negligently caused by the owner operator of the tractor-trailer, the motor carrier can make a strong argument for summary judgment on the issue of proximate cause. The motor carrier can argue, for instance, that there are two lines of cases involving intervening negligence. In the first line, the "non-motorist/non-motorist" cases, which involve successive waives of negligent non-motorists, Georgia courts have found that the negligence of the subsequent actor intervened, as a matter of law, to break the chain of causation

between the negligence of the original actor because the subsequent negligence is relatively rare in human experience and thus not reasonably foreseeable by the original actor. *See Howard v. McFarland*, 237 Ga. App. 483, 515 S.E.2d 629 (1999) (negligence of builder in failing to sufficiently elevate home superceded, as a matter of law, by fraud of immediate buyers in knowingly and falsely denying its existence to their buyers); *Seely v. Loyd Johnson Constr. Co.*, 220 Ga. App. 719, 470 S.E.2d 283 (1996) (negligence of plumber retained to repair leak caused by negligence of carpentry contractor intervened as a matter of law). In the second line, the "motorist/motorist" cases, Georgia courts allow the matter to go to a jury because it is relatively common and thus reasonably foreseeable that a motorist may negligently barrel into an accident scene negligently caused by another motorist. *See Smith v. Commercial Transp.*, 220 Ga. App. 866, 868, 470 S.E.2d 466 (1996) ("jury could conclude that when one negligently turns over a tractor-trailer full of produce, it is reasonably foreseeable that the time required to clear it and the resulting traffic back-up will be immense").

The motor carrier can then argue that the situation where the railroad is notified of the location of a vehicle obstructing its tracks through its emergency response notification system with sufficient time to stop an approaching train and avoid a collision, yet fails to do so, is analogous to the "non-motorist/non-motorist" cases because the negligence of the railroad is so uncommon that the driver of the vehicle would not reasonably expect that the railroad would not to be able to identify a crossing on its track and avoid the collision by notifying an oncoming train of the obstruction.

Train Speed

The speed of trains has been established by regulations of the Secretary of Transportation, governing the maximum speed for passenger and freight trains on various classes of track. *See, e.g.*, 49 C.F.R. § 213.9 (2000). In *Easterwood, supra*, the Eleventh Circuit found that a claim based upon Georgia law that a train involved in a grade crossing accident was traveling "too fast for conditions" was pre-empted by this regulation. 933 F.2d at 1553-1554.

Duty to Warn of Approach of Train to Crossing

Georgia law appears to apply to the duty of the railroad to warn of the approach of a train to a grade crossing of a public street. Railroads, for instance, are required to equip their locomotives with a signal bell or a whistle or horn and their locomotives on main lines with a headlight which shall consume not less than 300 watts at the arc and with a reflector not less than 23 inches in diameter. O.C.G.A. § 46-8-170(a) (1992). They also are required to erect blow posts at a point 400 yards from the center of the railway's intersection at grade with any public road or street and, as a signal of approach to the crossing, blow through the whistle two long blasts, one short blast, and one long blast, said blasts to be long and distinct. *Id.* §§ 46-8-190(a) and (b). Railroads are not required to erect blow posts or to blow the whistle of their locomotives in approaching a crossing within the corporate limits of cities, but the engineer is required to signal the approach of his or her train to a crossing in said corporate limits by constantly tolling the bell of the locomotive and is required to keep and maintain a vigilant lookout along the track ahead of the engine. *Id.* § 46-8-191.

Duty to Persons or Vehicles about to Come upon Crossing

Under Georgia law, railways have a special duty to prevent injury at a crossing after discovering that a vehicle is about to come upon the crossing. *See, e.g., Isom vs. Schettino*, 129 Ga. App. 73, 199 S.E.2d 89 (1973); *Georgia, S.W. & G. Ry. Co. v. Lassetter*, 39 Ga. App. 393, 147 S.E. 166 (1929).

Duty When Uncertain of What Lies Ahead

There is a duty pursuant to Georgia law imposed upon railways to stop their train when they are uncertain of what is located ahead on the tracks. *See, e.g., Seaboard Coast Line R.R. Co. v. Clark*, 122 Ga. App. 237, 176 S.E.2d 596, 602 (1970); *Brewer v. James*, 76 Ga. App. 447, 46 S.E.2d 267 (1948). The court in *Seaboard Coast Line* approved a jury instruction stating that "[i]f trainmen are uncertain what an object ahead of them on the track is, they have a duty to immediately reduce speed of the train and not to wait until it is too late to discover human peril and then engage in futile attempts to avoid injury." 176 S.E.2d at 602. Applying that principle to the facts of the case, the court recognized that the engineer's own testimony established that after sighting an object on the tracks, he could not determine whether it was a piece of paper or plasterboard even though his view was unobstructed for over 200 yards and his headlight was brightly shining. During the time of this uncertainty, the engineer did not slacken his speed or apply the brakes until he was sure that it was, in fact, a human on the tracks. The court held that if the engineer was uncertain as to what the object was, he had a duty to immediately stop the train. *Id.*

In *Brewer*, a train engineer noticed an object between the rails of the track some 600 to 700 feet ahead. 46 S.E.2d at 269. Without reducing his speed or otherwise attempting to stop

the train, the engineer conferred with a fireman aboard the train, and the two believed the object to be a brown paper bag. *Id.* at 269-270. The engineer discovered that the object was a human approximately 300 feet away, and although the engineer immediately applied the brakes, the entire 200 foot length of the train passed over the child's body. *Id.* at 270. The court ruled that the jury was entitled to find that the engineer was uncertain of what was on the track because although he testified that he thought that it was a piece of paper, he nevertheless asked the opinion from the fireman, who himself had to take more than one view. *Id.* The court held that "[i]n brief, a railroad company has no right to gamble with human life and when uncertain of what an object on a track is, it cannot wait until it is too late to discover human peril and then engage in futile attempts to avoid injury. In this case the engineer did not begin to check the speed of the train immediately upon discovery of an object on the track but waited until he was sure it was a human being and then it was too late to avoid striking him. The jury was authorized to find that the railroad was bound to anticipate the presence of the child and that it failed to take such steps as were consistent with the exercise of ordinary care to avoid injuring him." *Id.* at 271.

Duty to Follow Dispatch Signals or Orders

Federal regulation of railroad operating rules is *de minimus*. The minimum requirements for railroad operating rules and practices are set forth in 49 C.F.R. § 218.1 *et seq.* (2000). Each railroad may prescribe additional or more stringent requirements in its operating rules, timetables, timetable special instructions, and other special instructions. *Id.* § 218.1. The movement of trains, for the most part, is left to the railroad. The operating rules manual of the railroad or any written contract allowing a third party passenger train to traverse the rails of a

railroad owning or operating a section of track likely will require that the engineer comply with the instructions of train dispatchers, which are given by teletype or computer train orders, two way radio orders, or track signals. The types of signals (e.g., slow, medium slow, etc.) and their meanings also should be set forth in the railroad's operating rules manual. If the train engineer fails to follow a dispatch order or signal, and that failure proximately results in a grade crossing accident, negligence principles should apply.

Certification Requirements for Locomotive Engineers

49 C.F.R. § 240.1 *et. seq.* (2000) contains certification requirements for railroad engineers. Those requirements include mandatory criteria for eligibility based upon prior safety conduct, *see, e.g., Id.* § 240.109, prior safety conduct as a motor vehicle driver, *see, e.g., Id.* § 240.115, operating rules compliance, *see, e.g., Id.* § 240.117, substance abuse disorders and alcohol/drug rules compliance, *see, e.g., Id.* § 240.119, visual and hearing acuity, *see, e.g., Id.* § 240.121, initial and continuing education, *see, e.g., Id.* § 240.123, testing knowledge, *see, e.g., Id.* § 240.125, examining skills performance, *see, e.g., Id.* § 240.127, and monitoring operational performance. *See, e.g., Id*. § 240.129.

Negligent Hiring, Supervision, and/or Retention

There appears to be no federal statute or regulation that would pre-empt a claim for negligent hiring, supervision and/or retention of railroad employees whose conduct contributed to the grade crossing accident. Habitual alcohol or drug use and/or violations of operating rules are typical grounds for such a claim.

Other Railroad Conduct

Other railroad conduct that may be relevant is mechanical condition of the braking system on the train and/or signal systems. The FRA administers certain rules, among others, regarding freight car safety standards, *see, e.g.,* 49 C.F.R. § 215.1 *et seq.* (2000), railroad radio standards, *see, e.g., Id.* § 220.1 *et seq.*, locomotive standards, *see, e.g., Id.* § 230.1 *et seq.*, locomotive inspections, *see, e.g., Id.* § 231.1 *et seq.*, railroad safety appliance systems, *see, e.g., Id.* § 231.1 *et seq.*, railroad power brakes and drawbars, *see, e.g., Id.* § 232.1 *et seq.*, signal system reporting requirements, *see, e.g., Id.* § 233.1 *et seq.*, and grade crossing signal system safety, *see, e.g., Id.* § 236.1 *et seq.*

THE COMMERCIAL MOTOR CARRIER'S CONDUCT

Liability of Carrier in General

Motor carriers, in general, are liable for damage to a railway company caused by their negligence in grade crossing accident and their damages may be defeated or reduced by their contributory/comparative negligence or assumption of the risk. For example, O.C.G.A. § 46-8-291 provides:

> No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence, provided that if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him.

Id. § 46-8-291 (1992).

This provision is to be construed in *pari materia* with O.C.G.A. § 51-11-7 and embodies the comparative negligence rule. *See, e.g., Southern Ry. v. Nichols*, 135 Ga. 11, 68 S.E. 789 (1910); *Central of Georgia Ry. v. Rountree*, 10 Ga. App. 696, 743 S.E. 1095 (1912). A person

who is injured by the running of a train may not recover from the railroad if such person could have avoided the accident by the exercise of ordinary care after the defendant railway's negligence was known or should have been known to such person. *Clements v. Central of Ga. Ry.*, 41 Ga. 310, 152 S.E. 849 (1930).

Duty to Stop at Railroad Crossing

O.C.G.A. § 40-6-140 requires motorists to stop within 50 feet but not less than 15 feet of the nearest rail at all grade crossings when "[a] clearly visible ... signal device gives warning of the immediate approach of a train," "a crossing gate is lowered or a human flagman gives or continues to give a signal of the approach of the passage of a train," or "an approaching train is plainly visible and is in hazardous proximity to such crossing." *Id.* § 40-6-140 (1997). Violation of this provision results in the motorist being contributorily negligent as a matter of law. *See, e.g., Atlantic Coast Line R.R. Co. v. Hall Livestock Co.*, 116 Ga. App. 227, 228, 156 S.E.2d 396 (1967).

Notice of Intent to Cross Grade Crossing

There appears to be no federal statute or regulation covering a motorist's obligation to give prior notice of an intent to cross a grade crossing. However, Georgia, by statute, provides for notice of intent to cross a grade crossing by a person operating or moving heavy equipment under certain circumstances. In particular, O.C.G.A. § 40-6-143 provides:

> (a) No person shall operate or move a crawler-type tractor, steam shovel, derrick, roller, or any equipment or structure having a normal operating speed of ten miles per hour or less or a vertical body or load clearance of less than one-half inch per foot of the distance between any two adjacent axles or in any event of less than nine inches, measured above the level surface of a

> roadway, upon or across any tracks at a railroad grade crossing without first complying with this Code section.
>
> (b) Notice of any such intended crossing shall be given to a station agency of such railroad and a reasonable time shall be given to such railroad to provide proper protection at such crossing.
>
> (c) Before making any such crossing, the person operating or moving any such vehicle or equipment shall first stop it not less than 15 feet nor more than 50 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train and for signals indicating the approach of a train and shall not proceed until the crossing can be made safely.
>
> (d) No such crossing shall be made when warning is given by automatic signal or crossing gates or a flagman or otherwise of the immediate approach of a railroad train or car. If a flagman is provided by the railroad, movement over the crossing shall be under his direction.

Id. § 40-6-143 (1997).

No Georgia court has construed section 40-6-143 or determined whether a violation of this statute by a carrier is negligence per se.

The conduct mandated by subsections (b), (c), and (d) appears clear. However, it is less than clear whether and how subsection (a) applies to tractor-trailers and in particular low boy trailers. A low boy trailer will often have two axles in close proximity in the rear of the trailer and a long trailer bed upon which the heavy equipment to be transported is positioned. The axle adjacent to the rear axles is the axle on the tractor. The question arises, therefore, whether the clearance is determined by measuring the distance between the two rear axles on the trailer or between the rear axle on the trailer and the adjacent axle on the tractor. In other words, should the tractor-trailer be treated as one piece of "equipment" or "structure" for the purpose of determining clearance or is the trailer alone the relevant "equipment" or "structure"? Obviously,

a construction of the statute finding the latter favors the motor carrier. Under either construction, as applied to an interstate motor carrier, an argument could be made that section 40-6-143 constitutes an unlawful restraint on trade in violation of the Commerce Clause of the United States Constitution. *See, e.g.*, 49 U.S.C.A. § 20103 (1997).

Alcohol or Drug Use by the Driver

Before the carrier is given notice and is able to respond to the scene of the accident, the responding police may attempt to obtain a breath, blood and/or urine sample to test for alcohol or drugs from the motor carrier's driver. The NTSB and Georgia Public Service Commission also may request the results of any testing conducted by the motor carrier.

Federal regulations regarding the testing and use of alcohol and drugs are contained in 49 C.F.R. § 382.1 *et seq.* (2000) and have been adopted by the Georgia Public Service Commission. They prohibit a driver from reporting to duty with a blood alcohol content of 0.04 or greater or while using controlled substances. *Id.* §§ 382.201 & 382.213 (2000). The regulations further require a pre-employment drug and alcohol screen and prohibit the employment of any drivers with a blood alcohol level of 0.04 or greater or any positive result for a controlled substance. *Id.* §§ 382.301. Post-accident testing is required where the accident: (1) involved the loss of human life; or (2) where the driver received a citation and the accident involved (a) bodily injury requiring treatment away from the scene of the accident, or (b) disabling damage to one or more vehicles. *Id.* § 382.303(a). Random and reasonable suspicion testing is also required. *Id.* §§ 382.305 and 382.307. If a driver tests positive for alcohol and/or drugs, the driver must be removed from safety-sensitive functions and undergo a return-to-duty alcohol test with an alcohol concentration of less than 0.02 and/or drug test with verified negative results. *Id.*

§ 382.309. Following a determination under section 382.605(a) by a substance abuse professional that a driver is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances, each employer is required to ensure that the driver is subject to unannounced follow- up alcohol and/or drug testing as directed by the substance abuse professional in accordance with section 382.605(c)(2)(ii). *Id.* § 382.605(a).

The carrier is required to maintain records of alcohol and drug testing for 5 years. *Id.* § 382.401(b). The confidentiality of the records is maintained except in the following situations:

(1) As authorized by law or expressly authorized or required by section 382.405;

(2) At the written request of the driver;

(3) At the request of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or the driver;

(4) When requested by the NTSB as a part of an accident investigation;

(5) To a subsequent employer upon written request by the driver;

(6) To the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the driver and arising from the result of an alcohol and/or controlled substance test administered under this part, or from the employer's determination that the driver engaged in conduct prohibited by this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver; and/or

(7) As directed by specific written consents signed by the driver authorizing the release of the information.

See, e.g., Id. § 382.405.

Driver Fatigue

The railroad and any other affected parties likely will be interested in obtaining and reviewing the tractor-trailer driver's log books for compliance with federal hours of service requirements. The Federal Motor Carrier Safety Regulations prohibit fatigued driving:

> No driver shall operate a commercial motor carrier, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in the case of grave emergency where the hazard of occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which that hazard is removed.

49 C.F.R. § 392.3 (2000).

Section 395.3 sets out the requirements for hours of service by providing, unless excepted under section 395.1:

> No motor carrier shall permit or require the driver used by it to drive nor shall any such driver drive:
>
> (1) More than 10 hours following 8 consecutive hours off duty; or
>
> (2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.
>
> (b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after–
>
> (1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
>
> (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

Id. § 395.3 (2000).

Section 395.8 requires drivers to maintain log books showing off-duty and on-duty hours. *See, e.g.*, *Id.* § 395.8. The Georgia Public Service regulations adopt these requirements. The

destruction of driver log books gives rise to a rebuttable presumption of driver fatigue under O.C.G.A. § 24-4-22. *J. B. Hunt Transport, Inc. v. Bentley*, 207 Ga. App. 250, 427 S.E.2d 499 (1993).

Negligent Hiring, Retention, and/or Supervision

The motor carrier also may face a negligent hiring, retention, and/or supervision claims based upon habitual alcohol or drug use, accident history, hours of service violations, and/or safety violations. The driver qualification file and log book will be the source of evidence supporting such a claim. Pursuant to 49 C.F.R. § 391.51, the carrier must maintain a driver qualification file containing documentation such as certificates of completion of a written test and road test and pre-employment background checks, including a driving history, and certificates of medical fitness. *See, e.g., Id.* (2000). As previously noted, the motor carrier also must maintain records of drug and alcohol testing of its drivers for five years.

PERTINENT DAMAGES ISSUES

If there are any injuries to the train crew, passengers, and/or the truck driver and damage to the tractor-trailer, the usual personal injury and property damage issues will arise. Due to the familiarity of defense counsel with these issues, they will not be reviewed in this article.

However, in all likelihood, there will be significant damage to the train itself, track, road bed, and grade crossing and punitive damages issues may arise against the railroad and/or carrier, which may or may not be so familiar to defense counsel. These issues are discussed below.

Damage to Railroad Equipment[76]

The railroad claim for damage to equipment will involve direct costs and indirect/overhead costs. Direct costs are those that are incurred in returning the railroad equipment to the condition that existed prior to the accident and include costs such as labor, material, contractor/vendor invoices, personal expenses and all other costs that would not have been incurred by the railroad but for the accident. The following alleged "direct costs" should be questioned by the motor carrier:

(1) Material items having a cost more than $1,000 per single unit are usually reduced to allow for replacement or depreciation. The railroad likely will take the opportunity afforded by the accident not just to repair a damaged item, but to bring the item back up to 100% useful life and seek to recover these costs while ignoring the condition or depreciation of the item at the time of the accident in its damage claim. Railroad equipment, such as locomotives, cars, and rails, have a certain useful work life and will be scheduled for take down and renovation or replacement based upon a set time schedule. The motor carrier should argue that the depreciated value and/or remaining useful work life of the damaged item of equipment and depreciation should be subtracted from the railroad's damage claim because these costs were not caused by the accident;

(2) For the same reasons set forth in subsection (1) above, the carrier should argue that labor costs associated with the replacement of depreciation should be subtracted from the railroad's damage claim; and

(3) Some or all of the damaged items, which cannot be repaired, may still have salvage value, which needs to be recognized.

The railroad also likely will seek as damages certain indirect/overhead costs as a result of the accident. Once again, the railroad will be seeking to "double dip" because it cannot prove that the following alleged "indirect costs" would not have been incurred but for the accident:

(1) Overhead costs for railroad employees involved in removing and/or repairing or replacing damaged equipment, which are applied as a percentage to labor should be deducted from the railroad's claim. These include markups such as railroad

[76] The author would like to acknowledge the assistance of Calvin H. Nelson, Advantage Consultants, Inc., 5206 Graystone Lane, Houston, TX 77069-3320 in identifying the direct and indirect cost issues stated herein that arise in valuing the railroad's claim for damage to equipment.

retirement and unemployment taxes, paid vacations and holidays, health and welfare benefits, personal days off, vacation accruals, supervision, FELA costs, shop expense (e.g., overhead expenses at the railroad shop where repairs are made), and general and administrative overhead (e.g., costs for office of the President, General Counsel, Board of Directors, general office headquarters, etc.). Close questioning of the railroad's damages witnesses likely will reveal that most, if not all, of these costs are fixed and would have been incurred regardless of the accident;

(2) The railroad sometimes will add a percentage additive to the direct cost of material to cover purchasing, handling, storing and distribution of materials. Railroads often use an arbitrary 15% factor that has been in effect for over 50 years and does not take into account changes in handling of materials and supplies. The railroad also may use a 1% mark up on the cost of materials or vendor invoices, regardless of the actual cost of handling. These markups likely will have no direct relationship to any cost incurred as a result of the accident and thus should be eliminated from the railroad's damages claim;

(3) The railroad may seek damages for loss of use of damaged locomotives or equipment that were not directly incurred as a result of the accident. The railroad probably will claim that the cost of ownership of a piece of equipment constitutes the loss of use of equipment (i.e., the original cost of the equipment, multiplied by a pre-developed ownership factor or percentage, divided by 365 days (to come up with a daily rate), multiplied by the days the equipment was out of service. The resulting amount can equal the original cost of the equipment long before the useful work life of the equipment runs and ignores the condition of the item equipment at the time of the accident, normal down time associated with routine maintenance schedules and side track time, the cost and time incurred in performing other repairs not wreck- related at the same time that wreck-related repairs are performed, and other fixed costs such as insurance, taxes and licenses that are incurred regardless of use of the equipment;

(4) The railroad may seek to recover rental costs for use of railroad owned or leased equipment. This equipment is used in the day-to-day operations and maintenance of its properties, regardless of the particular accident at issue; and

(5) Costs allegedly associated with delay to trains may be sought. Rather than calculating the actual costs associated with delay of trains caused by the accident, which are readily calculable, the railroad may seek to use an arbitrary "cost per train per hour."

Punitive Damages

If the motor carrier is facing a compensatory damages claim based upon the negligent entrustment, hiring, supervision, and/or retention of the driver, the motor carrier may want to admit that that the driver was acting within the course and scope of his employment. By doing so, it can prevent the admission of potentially prejudicial prior similar acts evidence that is relevant only to the negligent hiring, supervision, and/or retention claim. *See, e.g., Bartja v. Nat. Union Fire Ins. Co.*, 218 Ga. App. 815, 817, 463 S.E.2d 358 (1995) (citations omitted). In *Bartja*, the court reaffirmed that where a plaintiff alleges both respondeat superior and negligent entrustment against an employer for the acts of its driver where no punitive damages are sought, a defendant employer's admission of liability under respondeat superior establishes "'the liability link from the negligence of the driver . . . rendering proof of negligent entrustment unnecessary and irrelevant.'" *Id.* (citing and quoting *Thomason v. Harper*, 162 Ga. App. 441, 442-443, 289 S.E.2d 773 (1982)). In so holding, the *Bartja* court noted that "[t]his rule arises from the countervailing problems inherent in protecting the employee from prejudicial evidence of his prior driving record and general character for recklessness in driving while admitting the proof necessary for the negligent entrustment case to proceed." *Id.* (citing *Thomason*, 162 Ga. App. at 442). The court found the above principle equally applicable to negligent hiring, supervision, and/or retention claims. *Id.* at 818.

If the motor carrier is facing a punitive damages claim based upon negligent entrustment, hiring, retention, and/or supervision, it cannot preclude such a claim by admitting liability for its driver's acts under the doctrine of respondeat superior; however, the motor carrier will have a strong argument that the trial should be trifurcated into a compensatory liability and damages phase, liability for punitive damages phase, and an amount of punitive damages phase, thereby

preventing the introduction of highly prejudicial prior similar acts evidence (e.g., prior alcohol and drug use and/or driving history of the driver) in the compensatory damages phase. *See, e.g., Bartja*, 218 Ga. App. at 817; *accord Durban v. American Materials, Inc.*, 232 Ga. App. 750, 503 S.E.2d 618 (1998); *Goss v. Total Chipping, Inc.*, 220 Ga. App. 643, 469 S.E.2d 855 (1996); *Hanie v. Barnett*, 213 Ga. App. 158, 444 S.E.2d 336 (1994); *Smith v. Tommy Roberts Trucking Co.*, 209 Ga. App. 826, 829, 435 S.E.2d 54 (1993); *Jackson v. Intl. Harvester Co.*, 190 Ga. App. 765, 380 S.E.2d 306 (1989); *Chupp v. Henderson*, 134 Ga. App. 808, 809, 216 S.E.2d 366 (1975)). As observed by the court in *Barja*, "[i]n contrast, where the employer's liability is not the same on both claims because punitive damages are sought only on the negligent entrustment claim, the appropriate solution for avoiding the prejudice to the driver is a separate trial on the negligent entrustment issue. 218 Ga. App. at 817 (citations omitted).

PERTINENT DISCOVERY

The allegations and facts of a particular case obviously drive much of the discovery needed to defend the motor carrier. Moreover, a railroad grade crossing accident will require discovery regarding personal injuries and property damage to passengers and crew typical to any truck accident. However, certain not so typical documents and information will need to be obtained to properly assess the parties respective liabilities and the damages claim of the railroad and/or third party train owner/operator. The not so typical documentary discovery and probable objections to discovery of the railroad and/or third party train owner/operator are discussed below.

Documents and Information to Obtain

The NTSB Accident Reports

As suggested above, in a catastrophic accident, the NTSB preliminary and final accident reports provide a wealth of information about the railroad's and carrier's role in the accident. They contain not only a detailed report of the factual findings and/or probable cause determination of the accident, but also append many relevant documents. The primary problem encountered is the delay in receiving the information. A stay of any pending lawsuit arising out of the accident should be sought from the court until such time as the parties receive the NTSB final report. The information obtained not only will reduce the amount of written discovery needed, but also will help direct any follow up discovery efforts. Due to the problems regarding admissibility of the report, the carrier would be well advised to prove helpful facts contained in the report independent of the report.

The NTSB reports can be obtained under FOIA from the National Transportation Safety Board, Attention: FOIA Officer, RE-51, 490 L'Enfant Plaza, S.W., Washington, DC 20594-2000, phone: (202) 314-6540 or (800) 877-6799, fax: (202) 314-6598, or via the NTSB's website at http://www.ntsb.gov/info/foia.him, using the request form contained therein. The NTSB report for any accident involving the carrier, however, will be provided by the NTSB to the carrier.

FRA Inventory/Accident Reports

The carrier also should request the FRA U.S. DOT-AAR Crossing Inventory for the grade crossing at issue and the Rail-Highway Grade Crossing Accident/Incident Reports for the

grade crossing accident at issue and/or any other prior similar grade crossing accidents involving the relevant railroad. The Inventory will provide information regarding location and classification of the crossing, detailed information about the crossing (e.g., number of trains per day through the crossing, maximum timetable speed, type and number of tracks, type of warnings devices and signs, any train activated devices, method of signals, etc.), physical data regarding the crossing, and highway department information about the crossing. The Railway-Grade Accident/Incident Report contains information, among other things, the incident situation, environment, train and track, crossing warning, motorist action, highway vehicle property damage/casualties, hazardous materials, narrative description, and drug and alcohol testing and/or termination/transfer of railroad employees.

FRA Crossing Inventory and Accident/Incident Reports may be obtain by written request addressed to Sandi Robinson, 400 7th Street, S.W., Stop 10, Washington, DC. The request should indicate that it is being made pursuant to the FOIA, be sent in an envelope prominently marked: "FOIA", be reasonably specific as to what is sought (i.e, title of document or FRA Accident Investigation report number, U.S. Grade Crossing number (which should be posted on a small metal tag nailed to the cross bucks at the crossing), age/date of birth of applicable person, job title, and types of injuries sustained), and include your fax number or telephone number. Fees may be charged. Other useful information can be obtained from the FRA's website at http://www.fra.dot.gov/officeofsafety.

Locomotive Event Recorder Records

Each locomotive is equipped with an event recorder that records information about speed at mile post markers, whistle blows, engine throttle position, brake operations, and stopping distance of the train.

Locomotive/Cars Maintenance and Repair Records

As noted above, the U.S. Department of Transportation requires that the braking and certain other mechanical systems of the locomotive and cars be inspected and tested and that reports of such inspections and testing be kept. These reports should be requested on the relevant locomotive(s) and cars.

Operating Rules Book and Procedural Instruction Files

Each railroad is required to maintain an operating rules book or manual, which may contain rules, among other things, regarding automatic block signal systems, blue signal protection, bulletins and notices, camp car protection, centralized train dispatching systems, communications of signals, conductors, control stations, current of traffic, defect detectors, defective equipment, direct traffic control block systems, electrically locked switches, engine horn and bell signals, engine number lights, engineering department employees, engineers, flagging signals, forms of train messages, general signals, hand, flag and lantern signals, use of headlights, industrial spur operations, interlocking signals, markers, movement of trains, observation of trains, on-track equipment and work authority, operators, passenger service, power-operated switches, use of radios, speed, timetables, traffic control signals, train

dispatchers, trainmen, utility employees, wayside signs, and yardmasters. The operating rules book or manual also may be supplemented by procedural instruction files applicable to different classes of railroad workers such as train dispatchers or railroad police, which need to be requested.

Grade Crossing and Track Records

As previously noted, railroads are required to meet certain track safety standards established by regulation of the U.S. Department of Transportation. The motor carrier should request U.S. Department of Transportation inspection reports, timbering work reports, last rail laid reports, lists of severe defects, graphic charts, car movement reports, defective rail reports, traffic profiles, and exception reports. Railroad design specifications for new and/or existing grade crossings also should be requested. They may show that the railroad applies or certainly is aware of the AREA and AASHTO standards set forth above.

Design Maintenance, Repairs, or Alterations of Signals

Signal schematic drawings, railroad operating rules, signal testing and inspection reports, and the relevant railroad line timetable should be requested. Defense counsel for the motor carrier will need to review these reports for any malfunctions as well as to establish proper train speed and braking.

Design, Installation, Maintenance, Repairs, or Alterations to Protective Devices

As noted above, railroads are required by federal and Georgia law to maintain, inspect, and test signal systems and devices at railroad highway grade crossings. These documents

should be requested. Discovery should also be directed to the Georgia and U.S. Department of Transportation to determine whether federal funds were used to install the existing protective devices and whether the Georgia Department of Transportation has requested the railroad to install additional protective devices.

Prior Similar Accidents

Given the high number of railroad highway grade crossing accidents, the railroad likely will be in possession of documents and information regarding prior similar accidents, which need to be requested. Information and documents regarding prior similar accidents also can be obtained from the NTSB and the FRA.

Damages Claimed by Railroad

Equipment damage reports, diagrams, material cost sheets, maintenance history and schedule reports, revenue reports, depreciation schedules, and use schedules for the locomotive(s) and cars alleged to have been damaged in the accident should be requested. Third party invoices for clearing the wreck or repairing the track and roadway and documentation regarding the settlement of any personal injury of passengers or Federal Employees Liability Act (45 U.S.C.A. § 51 et seq. (2000)) claims by train crew, invoices also should be requested. The railroad likely will have settled many of these claims and will be seeking contribution or indemnity from the motor carrier.

Contracts Between Railroad and Third Party Freight or Passenger Services

These contracts should be requested to resolve and agency or contractual indemnity issues between the railroad and any third party train operator/owner.

Staff Reduction Records

At least one railroad in Georgia has undergone a large reduction in dispatch and maintenance of way personnel with substantial monetary savings. Documents and information regarding any such staff reductions and savings should be requested.

Employee Personnel and Qualification Files

Employee personnel and qualification files should be requested, including information and documentation regarding employee training, certification, qualification, medical and alcohol and drug testing, and performance.

Objections to Discovery

Besides the usual discovery objections, the railroad may attempt to limit the scope of discovery by arguing that much of the above-referenced documents or information is protected from discovery by 23 U.S.C.A. § 409. Section 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for

> damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Id. § 409 (2000).

With regard to the first prong of the statute, 23 U.S.C.A. § 130 requires each State to "conduct and systematically survey all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* § 130 (1998). 23 U.S.C.A. § 144 establishes a highway bridge replacement and rehabilitation program and apportions monies to carry out the program. *See, e.g., Id.* § 144 (2000). 23 U.S.C.A. § 152 requires each State to:

> conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

Id. § 152 (2000).

Judicial interpretations of the scope of section 409 are somewhat limited. However, as the foregoing suggests, the first prong of the statute requires state action. *See, e.g., Lusby v. Union Pacific R. Co.*, 4 F.3d 639 (8th Cir. 1993); *Robertson v. Union Pacific R. Co.*, 954 F.2d 1433 (8th Cir. 1992). The second prong requires that the original purpose of the survey, report or other document be for some safety enhancement program for which federal highway funds are available and may protect some documents solely prepared by the railroad. *See, e.g., Kitts v. Norfolk and Western Ry. Co.*, 152 F.R.D. 78 (S.D. W.Va. 1993); *Hanshew v. U.S. Fidelity and Guar. Co.*, 746 F. Supp. 55 (D. Kan. 1990).

CONCLUSION

Catastrophic railroad grade crossing accidents involving a commercial motor carrier require immediate and effective defensive action by defense counsel for the motor carrier. The motor carrier will be met with immediate and probing investigations, requests for documents, requests for interviews, and/or requests for alcohol and drug testing of the motor carrier's driver by the NTSB, PSC, FMCSA, and/or local investigative agencies. The motor carrier also will need to address potential spoliation issues associated with the alteration of the accident scene by the railroad and ensure that the grade of the crossing and scene of the accident are properly documented. Pertinent legal issues will need to be identified and discovery directed to the railroad and relevant government agencies pending receipt of the NTSB report, a copy of which, absent a stay or extension of discovery, will not be received in time to materially assist the motor carrier in discovery. At the same time, the railroad likely will be represented by counsel experienced in similar claims. Getting ahead of the "learning curve" rapidly and competently is critical to rendering an effective defense to the commercial motor carrier and its insurer, which are unfortunate enough to become involved in such an accident.

SIMILAR ACCIDENTS/PRIOR OCCURRENCES AND SUBSEQUENT REMEDIAL MEASURES – A PRACTICAL APPROACH FOR THE PRODUCTS LIABILITY LITIGATOR

By: Michael J. Goldman and Michelle D. Coburn
Hawkins & Parnell, LLP
4000 SunTrust Plaza
303 Peachtree Street, N.E.
Atlanta, Georgia 30308-3243
(404) 614-7400

Two evidentiary issues frequently facing the products liability defense attorney are first, similar accidents or prior occurrences, and, second, subsequent remedial measures. Given the latitude often afforded on discovery, such evidence will likely be subject to production. Therefore, it is more likely the real battle will arise concerning the admissibility of this evidence at trial. This article will conduct a brief survey of Georgia law regarding admissibility of evidence of similar accidents and subsequent remedial measures and will offer some practical advice to defense counsel faced with these issues in the products liability arena.

SIMILAR ACCIDENTS

In products liability cases filed in Georgia, evidence of similar accidents or prior occurrences is used to prove notice of a defect or to support a claim for punitive damages. *See Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 545 (1993). In some instances, such evidence may be used to prove that a manufacturer knows a particular product can cause injury if used in a certain manner.

The "rule of substantial similarity" prohibits the admission into evidence of other transactions, occurrences or claims unless the proponent first shows there is a "substantial similarity" between the other transactions, occurrences or claims and the claim at issue in the litigation. The showing of substantial similarity must include a showing of similarity as to

causation. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 544 (1993). The trial court is required to make a determination of "substantial similarity" as a condition precedent to the admissibility of such evidence. *Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 258 (1995), *aff'd in part, rev'd in part on other grounds*, 267 Ga. 226 (1996). There must be some independent proof that the particular product in question suffered from the same defect in the prior occurrence as is alleged in the present case. *Harley-Davidson Motor Co. v. Daniel*, 244 Ga. 284, 286 (1979).

The admissibility of prior occurrences must be considered on a case-by-case basis. In *Uniroyal Goodrich*, the Court of Appeals reversed the trial court's denial of a motion in limine seeking to exclude evidence of recall notices concerning tires other than those involved in the case. Although the tires subject to the recalls were manufactured by Uniroyal, they were not the same tire involved in the accident and they were of a different load range, size and category. There was no showing made that the tire type was in any way similar, nor was any showing made that the belt or tread separation occurred in a similar fashion. The Court of Appeals reversed the trial court holding it failed to satisfy the condition precedent requirement of the "substantial similarity test." *Uniroyal Goodrich*, 218 Ga. App. at 258.

In *Ray v. Ford Motor Co.*, 237 Ga. App. 316 (1999), *cert. denied*, 1999 Ga. LEXIS 727 (1999), the Court of Appeals affirmed the trial court's decision not to admit evidence of prior instances of "inadvertent vehicle movement." Ray was run over and pinned underneath her 1989 Ford Mustang when she parked the car on an incline and apparently failed to place the gear shift in the "park" position. Ray claimed the vehicle suffered from a design defect in that it lacked an ignition/transmission interlock device, which prevents the removal of the ignition key unless the transmission is in the "park" position.

After a jury verdict in favor of Ford, Ray appealed claiming the trial court erred in granting Ford's motion in limine to exclude evidence from a Ford database listing prior instances of "inadvertent vehicle movement" in cars lacking the ignition/transmission interlock device. Ray claimed her accident was substantially similar to 546 incidents in the Ford database because of a number of common factors: (1) the key was out of the lock or could be withdrawn from the lock; (2) the engine was not on; (3) no mechanical factor affected the accident; and (4) the shifting mechanism was not located on the steering column. Ray also sought to introduce testimony regarding a group of 20,000 incidents of "inadvertent vehicle movement," compiled without regard to the underlying circumstances of the incidents. *Id*. at 317-18.

In support of its motion to exclude this evidence, Ford offered evidence that the database was not confined to a particular model or year and that the codes utilized in the database were extremely broad and any one designation could include a wide variety of fact patterns. Moreover, among other things, the database had not been verified. *Id*. at 318.

The Court of Appeals held that Ray failed to meet the "substantial similarity" test. While Ray did cite to four factors among the group of 546 incidents that were consistent with her accident, they were taken from the Ford database which Ford proved to be unreliable as merely anecdotal. Ray failed to offer evidence from underlying source documents or any other verification of the database to prove that her accident and the other incidents were substantially similar. Thus, the evidence was properly excluded. *Id.* at 319.

The Georgia Supreme Court has recently issued a decision favorable for the defense on the issue of similar accidents in *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454 (2001). In *Crosby*, the Court takes a hard line approach to the "substantial similarity" test and rejects the Court of Appeals' attempt to loosen the requirements for the admission of such evidence.

Crosby sued a tired manufacturer after she and her daughter were injured, and her husband killed, in an auto accident she claimed was caused by the blow-out of a defective tire. The jury found for the defendant and the Court of Appeals reversed and remanded for new trial. The Supreme Court granted *certiorari* to address the Court of Appeals' ruling on the admissibility of evidence of consumer claims honored by the tire manufacturer for tires manufactured at the tire plant where the tire involved was manufactured.

In the underlying case, Crosby claimed the accident was caused by a separation of the tire's radial belting due to defective manufacturing. Cooper Tire argued that the subject tire had been driven for more than 30,000 miles and that the tire blow-out was caused by an impact with a road hazard.

The evidence in question came from Cooper Tire's "adjustment statistics," i.e. honored consumer claims – for all tires manufactured at the same Cooper Tire plant at which the tire involved in the *Crosby* accident was allegedly manufactured. Crosby failed to show a "substantial similarity" between the belt separation alleged to have caused the wreck in her case and the reasons why the tires reflected in the adjustment data were returned by other consumers. Crosby argued the adjustment data was admissible without a showing of substantial similarity.

The trial court excluded the proffered adjustment statistics. The Court of Appeals reversed, holding the trial court erred in excluding this evidence. Interestingly, the Court of Appeals held that the rule of substantial similarity:

> does not mean that the defects, tires or occurrences must be identical, but only sufficiently substantially similar to be probative so that a jury can reasonably draw an inference of defect, causation, dangerousness, knowledge, producing the tire failure, or failure to warn . . . this means [there is] a continuum of admissible substantially similar occurrences, where at one extreme the occurrences were the same and at the other extreme the occurrences were barely sufficient to be substantially similar for

admission so as not to be an abuse of discretion.

Id. at 456. The Supreme Court strongly disagreed.

First, the Supreme Court noted, Crosby was required to satisfy the "substantial similarity" test which included evidence of a substantial similarity between the other transactions, occurrences or claims and the claim at issue in the litigation as well as evidence of a substantial similarity as to causation. Crosby offered no evidence that the tires reflected in the adjustment data were the same make and model as the tires involved in her accident. Similarly, Crosby made no showing that the tires reflected in the adjustment data suffered from the same defect as alleged in her suit. Finally, Crosby had no evidence of substantial similarity between the cause of the defects alleged in the adjusted tires and the cause of the defect in her tire. The Court held it was "impossible" for Crosby to satisfy the rule of substantial similarity without any showing that Crosby's tire and the adjusted tires (1) shared a common design and manufacturing process; (2) suffered from a common defect; and (3) any common defects shared the same causation. *Id*.

Moreover, the Supreme Court disagreed with the Court of Appeals' holding that there is a "continuum of admissible substantially similar occurrences," holding there was no precedential directive from the Supreme Court or any other court to support such a conclusion. Under the Court of Appeals' reasoning, the admissibility of prior occurrences in products liability cases would include even those occurrences that are "barely" similar to the occurrence at issue –and that, according to the Supreme Court, was far broader than the controlling precedent.

Finally, the Supreme Court made it clear that the decision on this issue must be committed to the trial court which is familiar with the facts of the case. As the Supreme Court stated, the trial court's decision must be "so flawed" as to constitute an abuse of discretion. *Id*. at 457.

Other Georgia cases holding that evidence of prior occurrences was not admissible include *General Motors Corp. v. Moseley*, 213 Ga. App. 875 (1994)(jury verdict in favor of plaintiffs vacated and case remanded where plaintiff's counsel repeatedly referred to 120 other lawsuits during opening statement, examination and cross examination of witnesses and closing argument without presenting evidence of "substantial similarity"); *Browning v. Paccar*, 214 Ga. App. 496 (1994)(plaintiff not permitted to prove evidence of prior occurrences through complaints and court opinions filed in other cases). Georgia cases permitting the use of such evidence include *Mack Trucks v. Conkle*, 263 Ga. 539 (1993)(evidence of numerous complaints of cracks in the frame rails of the type tractor-trailer truck driven by plaintiff held admissible where court concluded the other cracks were "substantially similar" and were caused by circumstances similar to those at issue in case); *Skil Corp. v. Lugsdin*, 168 Ga. App. 754 (1983)(evidence of prior complaints involving similar failures on same or similar model product was relevant to issues of notice and knowledge and punitive damages under products liability).

Although the focus of this article is Georgia law, federal courts in the Eleventh Circuit have reached similar conclusions under applicable federal law. Of course, the admissibility of evidence is a procedural issue and, therefore, in federal court this issue is governed by the Federal Rules of Evidence. *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396 (11th Cir. 1997). Like Georgia courts, the Eleventh Circuit gives great deference to the decisions of the District Courts on evidentiary matters. The Eleventh Circuit "will only reverse a district court's ruling concerning the admissibility of evidence where 'the appellant can show that the judge abused his broad discretion and that the decision affected the substantial rights of the complaining party.'" *Id*. at 1395, *quoting Wood v. Morbark Indus., Inc.*, 70 F.3d 1201, 1206 (11th Cir. 1995).

Prior accidents or occurrences involving the opposing party may be admitted in federal court to show notice, magnitude of the danger involved, the [party's] ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care in a negligence case and causation. *Heath*, 126 F.3d at 1396. The Eleventh Circuit also applies the "substantial similarity" test because, according to the Court, evidence that is not substantially similar to the accident or incident at issue is apt to confuse or mislead the jury. *Id*. Plaintiff has the burden of proof to show "substantial similarity." *Hale v. Firestone Tire & Rubber Co.*, 756 F. 2d 1332 (8th Cir. 1985).

In order to avoid the potential impact that evidence of similar accidents can have on juries, the Eleventh Circuit has placed two additional limitations on the use of such evidence: (1) the prior failure(s) must have occurred under conditions substantially similar to those existing during the failure in question, and (2) the prior failure(s) must have occurred at a time that is not too remote from the time of the failure in question. *Weeks v. Remington Arms Co.*, 733 F.2d 1485, 1490 (11th Cir. 1984). In addition, Rule 403 allows the district court discretion to exclude such evidence if its admission would unfairly surprise the defendant or confuse the issues. *Id*.; *Ramos v. Liberty Mutual Ins. Co.*, 615 F.2d 334, 339 (5th Cir. 1980).

For federal cases further discussing the rule of "substantial similarity," *see Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641 (11th Cir. 1990)(permitting evidence of prior complaints by other 1980 Jaguar XJ6 owners of fuel leaks and fuel odors in plaintiff's products liability case alleging a vehicle fire due to a fuel leak); *Jones v. Otis Elev. Co.*, 861 F.2d 655 (11th Cir. 1988)(in negligent maintenance case, testimony concerning maintenance reports of prior incidents involving elevator held admissible to show constructive notice of a defective condition with the elevator where a malfunction in the normal stopping device of the elevator was common

to each incident); *Hahn v. Sterling Drug, Inc.*, 805 F.2d 1480 (11th Cir. 1986)(in products liability action, evidence of prior accidents involving product should not be excluded where conditions involved were similar to those in case at bar and evidence goes to issue in case); *Jones & Laughlin Steel Corp. v. Matherne*, 348 F.2d 394, 400 (5th Cir. 1965)(evidence of prior failures of another product manufactured by defendant held admissible in a negligence case where the products were similar in nature and they were used in a similar manner). *See also Weeks v. Remington Arms Co., Inc.*, 733 F.2d 1485 (11th Cir. 1984)(trial court erred in refusing plaintiff access to files concerning other alleged failures of defendant's product following court's *in camera* review of the files; plaintiff could not establish similarity of conditions and proximity in time without access to the files).

Statistical evidence falls into a different category and may be admitted without a showing of substantial similarity, in many cases. *See, e.g., O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir. 1990); *Seese v. Volkswagenwerk A.G.*, 648 F. 2d 833, 846 (3d Cir. 1981), *cert. denied*, 454 U.S. 867 (1981); *U.S. v. General Motors*, 656 F. Supp. 1555 (D.D.C. 1987), *aff'd*, 841 F. 2d 400 (D.C. Cir. 1988); *U.S. v. Ford Motor Co.*, 453 F. Supp. 1240 (D.D.C. 1978).

From a practical standpoint, it may be critical to the defense of a products liability action to exclude evidence of similar occurrences. During the discovery phase, defense counsel should object in the appropriate case to the production of such materials keeping in mind that Georgia courts generally take a liberal approach to discovery. The objection may be that the information is protected by the attorney-client privilege or by the work product doctrine. For example, an internal database prepared by counsel for the manufacturer may be protected under one of these privileges.

If one of these objections cannot be made, it may be appropriate to object on the grounds that the information is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. If the information concerning the other incidents is not "substantially similar" to the incident in the case at bar, it may not be discoverable. As an example, the other incidents may not involve the same product or model, they may have dissimilar facts or they may have dissimilar causation. It may also be that the prior occurrences are so far removed in time as to be irrelevant, *see e.g. Weeks v. Remington Arms Co.*, 733 F.2d 1485 (11th Cir. 1984), or they may have occurred prior to a product modification or warning by the defendant. If necessary, an in camera inspection by the trial court may be in order prior to producing such materials.

Another potential objection is that the information concerning prior accidents is overly broad and unduly burdensome. This information would be particularly difficult to compile if a product has been widely distributed, in vast quantities, and over several years' time.

The case of *Barger v. Garden Way, Inc.*, 231 Ga. App. 723 (1998), *cert. denied*, 1998 Ga. LEXIS 1025 (1998), is worth mentioning on the issue of discovery of prior occurrences. In *Barger*, the plaintiff sought discovery of statements by and other relevant information from other persons injured by the same product at issue in plaintiff's case. The manufacturer opposed disclosure of the requested materials and information for those persons who had entered into confidentiality agreements in the settlement of their claims. The trial court denied plaintiff's motion to compel and the Court of Appeals reversed holding "the public policy of Georgia does not 'permit parties to contract privately for the confidentiality of documents [or testimony], and [thereby] foreclose others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position.'" *Id*. at 726, *quoting Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D. N.Y. 1981).

If the plaintiff's attorney has been successful in obtaining information about prior occurrences, it is recommended in most cases that defense counsel seek a ruling *in limine* before trial concerning the admissibility of this evidence. Otherwise, there is no doubt the jury will hear about its existence in plaintiff's counsel's opening statement. However, keep in mind that under *Crosby*, it may be difficult for a plaintiff to satisfy what appears to be a stringent "substantial similarity" test.

First, argue the products must be identical. This includes the model, year of manufacture and place of manufacture. The year and place of manufacture may be particularly critical in a manufacturing defect case.

Next, the facts of the prior occurrences must be "substantially similar." If the cases arise from two different types of accidents, the evidence should have little, if any, probative value.

Another important showing plaintiff must make is substantially similar causation. It would seem necessary that plaintiff have an expert to prove this part of the test. Focus on other possible causes of the prior occurrence which plaintiff may not be able to disprove.

Another possible means of precluding this evidence is a hearsay objection. Pleadings and documents from other cases are technically hearsay and such documents as a complaint are drafted by the plaintiff and frequently contain allegations that were never proven in the case. *See Soden v. Freightliner Corp.*, 714 F.2d 498 (5th Cir. 1983); *Browning v. Paccar*, 214 Ga. App. 496 (1994). Unless the plaintiff intends to introduce testimony of individuals with actual knowledge of the prior occurrences, the evidence will likely constitute hearsay and may very well be unreliable information.

If the information is not disclosed by plaintiff during discovery, defense counsel may be able to argue unfair surprise. Defense counsel needs time to investigate the prior occurrences to

determine if they are "substantially similar" to the case at bar and to determine what the defenses are to those prior occurrences.

If the evidence is being used to prove that a manufacturer knows a particular product can cause injury if used in a certain manner, often a stipulation that your manufacturer *knows* its product can cause injury if (mis)used is sufficient to prevent admission. Of course, the more typical use of such evidence is to prove that a manufacturer has notice of a defect in its product and in such circumstances, a stipulation will not be an option.

Finally, objections can be made to the admissibility of such evidence if it will confuse the issues, create a collateral issue or constitute cumulative evidence. Many products liability cases are very complicated and can be difficult for a jury to comprehend. Evidence of prior occurrences may result in the admissibility of collateral evidence which could easily become a trial within a trial. This type of situation is likely to confuse the jury on the issue before it. Once evidence of other accidents is admitted, it becomes necessary for defense counsel to disprove a defect in those prior cases as well as in the case being tried. The trial court may be less inclined to admit this information when it becomes aware of defense counsel's intentions to fully defend the claims made in those prior occurrences as well as the case at bar.

SUBSEQUENT REMEDIAL MEASURES

The defense of products liability lawsuits has traditionally focused on two fronts: the manufacturer's conduct at the time a product is put on the market and the condition of the product when it enters the stream of commerce. Increasingly, plaintiffs are attempting to introduce evidence of a manufacturer's post-sale remedial conduct. While such evidence may be admissible under some limited circumstances discussed below, evidence of subsequent remedial

measures is never admissible to prove negligence. *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 881 (1994). "The reason for excluding such evidence lies on sound public policy [that people] 'should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrong-doers.'" *Doster v. Central of Ga. R. Co.*, 177 Ga. App. 393, 396 (1985).

Unlike the federal equivalent, Georgia's exclusionary rule for evidence of subsequent remedial measures, as well as the exceptions to that rule, are grounded in common law and evolved on a case-by-case basis. Georgia courts have recognized the following exceptions to the subsequent remedial measures rule: to show a defendant's ownership or control of premises, *Stuckey's Carriage Inn v. Phillips*, 122 Ga. App. 681, 687 (1970), to prove causation, *CSX Transportation, Inc. v. Monhollen*, 229 Ga. App. 516, 520 (1997), to show availability of an alternative design, *Wilson Foods Corp v. Turner*, 218 Ga. App. 74, 78 (1995), to prove feasibility of repair or modification, *Sutton v. Winn Dixie Stores, Inc.*, 233 Ga. App. 424, 425-26 (1998), to show contemporary knowledge of a defect and to rebut a contention that it was impossible for the accident to happen in the manner claimed. *Chastain v. Fuqua Industries, Inc.*, 156 Ga. App. 719, 722 (1980). However, if this evidence is admitted, "the jury should be cautioned as to the limited purpose for which it is received and admonished not to consider it as evidence of negligence or as an admission thereof." *Stuckey's Carriage Inn*, 122 Ga. App. at 687.

While these exceptions to the rule are relatively clear and therefore can be considered when advising clients on settlement potential or trial strategy, some more amorphous exceptions must also be considered. Evidence of subsequent repair, changes or modifications may also be admissible if "it tends to prove some fact of the case on trial (other than belated awareness of negligence, of course)." *Chastain*, 156 Ga. App. at 722. For example, in *CSX Transportation,*

the plaintiff alleged injury from exposure to harmful solvents while working for CSX. A contested issue at trial was whether CSX made respirators available to employees like plaintiff during the time of his alleged exposure. CSX's witness on this topic testified that CSX did provide respirators to its employees as required by OSHA. Over CSX's objection, plaintiff was allowed to cross-examine the witness with a letter stating CSX's respiratory program was not introduced until after plaintiff left CSX's employ. The Court of Appeals affirmed the trial court's admission of this evidence as an exception to the rule because the letter proved "a material fact, i.e., that CSX failed to comply with OSHA's respiratory program while [plaintiff] was employed with CSX." 229 Ga. App. at 519-20.

Another more controversial exception is the use of subsequent remedial evidence as impeachment. The impeachment exception to the exclusionary rule "'must be applied with care, since any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach a party's testimony that he was using due care at the time of the accident…. If this counted as 'impeachment', the exception would swallow the rule.'" *Studard v. D.O.T.,* 219 Ga. App. 643, 645 (1995)*, quoting Hardy v. Chemetron Corp.,* 870 F.2d 1007 (5th Cir. 1989). Accordingly, trial courts should limit the application of this exception "to preserve the continued viability of the strong public policy against the introduction of evidence of remedial measures for purposes of proving negligence." *Royals v. Georgia Peace Officer Standards & Training Council*, 222 Ga. App. 400, 401 (1996).

The exception most difficult to prepare for is when the defendant opens the door. The case cited most often on this issue is *Brooks v. Cellin Manuf. Co., Inc.,* 251 Ga. 395 (1983*).* In that case, the plaintiffs claimed a fire started in their apartment building because cellulose insulation was negligently installed on top of recessed ceiling lights. After the fire the remaining

apartment buildings were modified by installing metal shields to prevent insulation from coming in contact with the lights. At trial, defense counsel elicited testimony that no other fires occurred in the apartment complex. When plaintiffs tried to ask the witness whether the hazardous condition had been abated by the installation of the metal shields, thereby explaining the lack of similar fires, the trial court sustained the defendant's objection on the ground that such evidence constituted subsequent remedial measures and was, therefore, inadmissible. The Court of Appeals reversed and held the defendant opened the door to testimony about the subsequent remedial measures by leaving the jury with the impression that the lights in the other buildings remained covered with insulation. *Id.* at 397-98. *See also, APAC-Georgia, Inc. v. Padgett*, 193 Ga. App. 706, 709 (1989) (allowing plaintiff to inquire into post-injury changes to the accident scene after the defendant elicited testimony that adequate warnings were in place even though the witness had not observed the scene before the remedial measures were in place). This is so even if a witness' answer is unresponsive to the question posed by defense counsel. *Gunter v. Jackson Electric Membership Corp.*, 198 Ga. App. 629, 631 (1991).

Where the subsequent remedial measures fall within an exception to the general exclusionary rule, trial courts still have discretion to exclude such evidence "if its probative value is substantially outweighed by the risk that its admission will unduly prejudice or mislead the jury or confuse the issues being tried." *Royals,* 222 Ga. App. at 402. The trial court's exercise of this discretion will not be disturbed on appeal absent manifest abuse. *Id.* at 402. For example, in *Ratliff v. CSX Transportation, Inc.*, 219 Ga. App. 53 (1995), the plaintiff worked as a railroad switchman who claimed he injured his back while "throwing" a manual switch that moved rails from one connection to another. At trial, the plaintiff urged the court to allow his expert to explain that he did not visit the accident site because CSX already corrected the alleged

problem before the expert was retained. In upholding the trial court's exclusion of that testimony, the Court of Appeals recognized the "potential was great" for the jury to improperly infer from such evidence that "CSX recognized and admitted negligence." *Id*. at 55.

While Georgia's appellate courts have often addressed the admissibility of subsequent remedial measures in negligence actions, as evidenced by the majority of cases discussed above, there are noticeably fewer opinions in the specific context of products liability law. Even so, a few cases are instructive. In *Orkin Exterminating Co., Inc. v. Dawn Food Products*, 186 Ga. App. 201 (1988), the defendant manufactured a portable donut fryer which was dislodged by an Orkin employee while performing his pest control duties. The fryer then slid off the table and spilled hot oil on the floor that injured a woman who fell into the oil spill. The injured woman sued Orkin who in turn filed a third-party complaint against Dawn Food Products alleging negligent design, testing and manufacture of the portable donut fryer. In granting Dawn Food Products' motion for summary judgment, the trial court refused to consider evidence regarding subsequent remedial measures taken to prevent the donut fryer from again being dislodged. The Court of Appeals sustained the trial court's ruling, citing the long-standing rule that evidence of subsequent remedial measures is inadmissible to prove negligence. *Id. at 201. See also, Chastain v. Fuqua Industries, Inc.,* 156 Ga. App. 719, 722-23 (1980) (excluding evidence that defendant attached seats to its riding mowers after plaintiff was injured by falling off seat that plaintiff had to install on the mower).

More recently, in *Wilson Foods Corp v. Turner*, 218 Ga. App. 74 (1995), the plaintiff purchased and cooked with shortening that was sold in a container made of composite materials resembling metal. The plaintiff then poured the unused hot shortening back into its original container which allegedly dissolved and leaked hot grease that burned his son. In his products

liability suit against the can maker, plaintiff alleged in part that the manufacturer was negligent in designing the lid without a warning not to pour hot oil into the container. Over objection, the trial court allowed the plaintiff to introduce a plastic shortening lid from another manufacturer that contained a warning label. Interestingly, that warning was not present on the other manufacturer's lid at the time of Turner's accident. With this evidence, the jury returned a verdict in favor of plaintiff and the manufacturer appealed.

The Court of Appeals reversed the judgment on other grounds and did not directly address whether the trial court erred in admitting the subsequent remedial measures of another manufacturer. However, the appellate court borrowed an evidentiary principle from federal law – that "evidence of remedial design changes by other manufacturers of similar products normally would be inadmissible due to its potential to confuse a jury" – and instructed the trial court to reexamine the admissibility of such evidence in that light. *Id.* at 78, *citing with approval, Grenada Steel Indus. v. Alabama Oxygen Co.,* 695 F.2d 883, 889 (5th Cir. 1983)(establishing that evidence of subsequent remedial measures is not admissible in a product liability lawsuit) and *Middleton v. Harris Press & Shear, Inc.,* 796 F.2d 747, 753 (5th Cir. 1986)(following *Grenada Steel).*

While the cases discussed above address products liability law generally, it was not until 1994 that Georgia took a definitive stance on the admissibility of subsequent remedial measures in cases involving strict products liability. In *General Motors Corp. v. Moseley*, 213 Ga. App. 875 (1994), Mr. Moseley's parents filed a wrongful death action against General Motors ("GM") after their son was killed in a car fire. Mr. Mosely was operating a GM pickup truck that caught fire after it was struck on the side by another vehicle. The plaintiffs alleged that the truck caught fire, and their son died, because of GM's improper placement of a side saddle gas fuel tank in its

pickup trucks. Before trial, GM moved in limine to prevent plaintiffs from introducing evidence that GM later "totally redesigned its full-size pickup trucks" and in so doing situated the fuel tank inside the frame of the truck. The trial court denied GM's motion and, after the jury returned a sizeable award for the plaintiffs, GM appealed.

After recognizing the split among the federal courts that had already addressed this issue under Federal Rule of Evidence 407, the Georgia Court of Appeals sided with those courts that allow the introduction of subsequent remedial measures taken by a manufacturer in cases of strict liability. *Id.* at 882-83. In explaining its decision, the Court cited the "'numerous exceptions to the general [exclusionary] rule in negligence actions" and adopted the view that "it is manifestly unrealistic to suggest that … a [mass] producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.'" *Id.* at 882-83, *quoting Ault v. Int'l. Harvester Co.,* 13 Cal. 3d 113 (Ca. 1974). Nonetheless, the Court did go on to require limiting instructions "as to the proper use and limits" of evidence regarding subsequent remedial measures "where negligence and strict liability theories are asserted jointly in an action." *Moseley,* 213 Ga. App. at 883. In such cases, the Court further suggested "it may be advisable to bifurcate or trifurcate the proceeding in order first to litigate the negligence claim, wherein the evidence of subsequent remedial measures may not be admissible, and then proceed to hear evidence on the strict liability theory (including evidence of any subsequent repairs or modifications, if the defendant prevails in the negligence phase of the trial)." *Id.* at 883.

However, the Eleventh Circuit adopted the exact opposite approach the very next year. In *Wood v. Morbark Industries, Inc.,* 70 F.3d 1201 (11th Cir. 1995), the plaintiff's husband was

killed after he was pulled into an "Eeger Beever" wood chipper. In her lawsuit against the manufacturer, the plaintiff alleged the wood chipper was defective and unreasonably dangerous in part because the infeed chute was too short to adequately protect the operator. The district court initially ruled this evidence was inadmissible, but later allowed plaintiff to explore the issue briefly because the defendant partially opened the door. The jury returned a defense verdict and the plaintiff appealed after the district court denied her motion for new trial.

Federal Rule of Evidence 407 provides as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is no admissible to prove negligence or culpable conduct in connection with the event. This rule does no require the exclusion of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, ***if controverted***, or impeachment.

(emphasis added). Even though Rule 407 applies only to negligence claims, the Eleventh Circuit extended its reach and applied the exclusionary rule "in strict products liability cases when the plaintiff alleges that a product is defective because the design is unreasonably dangerous." *Id.* at 1206. In so doing, the Eleventh Circuit did not address the policy concerns underlying Georgia's use of the exclusionary rule. Instead, the federal appellate court reasoned "that Rule 407 is necessary in such cases to focus the jury's attention on the product's condition or design at the time of the accident." *Id.* at 1207. Because the admissibility of subsequent remedial evidence may be dispositive in a strict product liability case, and considering the split of authority between Georgia's state and federal courts, choosing the forum in which to defend an action becomes critical.

SCOPE OF COVERAGE FOR "PERSONAL INJURY" AND "ADVERTISING INJURY" IN A COMMERCIAL GENERAL LIABILITY INSURANCE POLICY

By: DeeAnn Boatright Waller
Mabry & McClelland LLP
2200 Century Parkway
Tenth Floor
Atlanta, Georgia 30345
(404) 248-2884

PERSONAL INJURY COVERAGE

Coverage for "personal injury" in a commercial general liability insurance policy is built "from the ground up: It affords coverage only for defined risks." *Jefferson-Pilot Fire & Cas. v. Sunbelt Beer*, 839 F.Supp. 376 (D.S.C. 1993). "What is plainly not included within the coverage is by definition excluded." *Id*. (emphasis in original). *American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc.*, 19 Cal.App.4th 1342, 24 Cal.Rptr.2d 106 (1993) (where policy defined "personal injury" to include claims for racial and religious discrimination, claim for sex discrimination not covered); *American Guar. and Liability Ins. Co. v. Vista Medical Supply*, 699 F.Supp. 787 (N.D.Calif. 1988); *United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744 (11th Cir. 1991). As such, analysis of coverage focuses largely upon the meaning of the enumerated offenses which comprise the policy's definition of "personal injury."

Enumerated Offenses

False arrest, detention or imprisonment

The parameters of coverage for the torts of false arrest, detention or imprisonment have generated little case law, presumably because the issue is so clear. However, on a few occasions coverage has been refused where the complaint could not be read to allege one of the enumerated torts. *Commercial Union Ins. Co. v. Sky, Inc.*, 810 F.Supp. 249 (W.D.Ark. 1992) (where sexual

harassment complaint did not allege facts which would support false imprisonment claim, no coverage afforded for "personal injury"); *Vargas v. Calabrese,* 714 F.Supp. 714 (D.N.J. 1989) (claim that policyholder delayed plaintiff from voting did not remotely assert claim for false arrest or imprisonment within contemplation of policy).

Malicious prosecution

Much of the case law addressing coverage for malicious prosecution concerns whether protection is also afforded for the related tort of abuse of process. In *Atlantic Mutual Ins. Co. v. Atlanta Datacom,* Inc., 139 F.3d 1344 (11th Cir. 1998) (applying Georgia law), the court affirmed summary judgment in favor of Atlantic Mutual on the grounds that coverage for the enumerated offense of "malicious prosecution" did not extend to the separate tort of abusive litigation. As the underlying lawsuit was filed against the insured in Georgia and the policy was delivered to the insured in this state, Georgia law determined the scope of the term "malicious prosecution." Embracing the insurer's argument that Georgia law distinguishes between the two torts, the court concluded that coverage for malicious prosecution was limited to claims based upon the commencement of a criminal prosecution and did not include coverage for the distinct tort of abusive litigation which applies only to civil proceedings. *See also Parker Supply Co. v. Travelers Indem. Co*., 588 F.2d 180 (5th Cir. 1979) (applying Alabama law); *R. A. Hanson Co. v. Aetna Ins. Co*., 26 Wash.App. 290, 612 P.2d 456 (Wash.App. 1980).

Other courts have concluded that the term is ambiguous and may be reasonably understood by a policyholder to include claims for abuse of process as well. *Lunsford v. American Guarantee & Liability Ins. Co.,* 18 F.3d 653 (9th Cir. 1994) (applying California law); *Koehring Co. v. American Mut. Liability Ins. Co.,* 564 F.Supp. 303 (E.D.Wis. 1983). This is

particularly true in states where the tort of malicious prosecution is not limited solely to criminal proceedings but may be based upon an abusive civil proceeding as well. *See, e.g. St. Paul Fire & Marine Ins. Co. v. Naples Comm. Hosp., Inc.*, 585 So.2d 374 (Fla. 2nd DCA 1991).

Wrongful eviction, wrongful entry or other invasion of the right of private occupancy

This prong of the definition of "personal injury" has received considerable attention by courts across the nation. Much of this litigation has centered on whether the listed torts are limited to claims alleging an interference with possessory rights in real property as opposed to the right to use and enjoy such property. A number of courts across the country have considered whether claims for trespass and nuisance may qualify for coverage under the policy's protection against liability for "wrongful entry." Some have concluded that unlike trespass and nuisance, wrongful entry involves interference with rights to occupancy and possession of real property and have thus found no coverage. *See Liberty Mut. Ins. Co. v. East Central Oklahoma Elec. Coop.*, 97 F.3d 383 (10th Cir. 1996) (applying Oklahoma law) (wrongful entry or invasion of other property right requires invasion of an interest in real property as in the landlord-tenant context); *Dryden Oil Co. v. Travelers Indem. Co.*, 91 F.3d 278 (1st Cir. 1996) (applying Massachusetts law to conclude that claim for "wrongful entry" is limited to claims by tenant against landlord); *City of Delray Beach v. Agricultural Ins. Co.*, 85 F.3d 1527 (11th Cir. 1996) (applying Florida law); *Whitesville Oil Co., Inc. v. Federated Mut. Ins. Co.*, No. 95-2015 (4th Cir. 1996 decided June 14, 1996) (unpublished opinion) (under North Carolina law permeating fumes did not involve a physical entry onto plaintiff's land); *Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203* (5th Cir. 1991) (applying Louisiana law) (claims based on migration of contaminated water into plaintiff's lake not covered as "wrongful entry"); *Martin v. Brunzelle,*

699 F.Supp. 167 (N.D. Ill. 1988); *National Union Fire Ins. Co. v. Rhone-Poulenc, Inc.*, No.87C-SE-11, slip op. at 7-8 (Del.Super.Ct. New Castle County May 19, 1993) (migration of toxic wastes into groundwater "obviously . . . does not" amount to an invasion of possessory rights to real property); *County of Columbia v. Continental Ins. Co.*, 189 A.D. 391, 595 N.Y.S.2d 988 (1993).

Likewise, some courts have refused to find coverage for pollution claims under the "personal injury" protection of the policy on the grounds that to do so would render the pollution exclusion "a dead appendage to the policy." *Titan Corp. v. Aetna Casualty & Sur. Co.*, 22 Cal.App.4th 457, 27 Cal.Rptr.2d 476 (Cal.Ct.App. 1994); *see also Harrow Products, Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015 (6th Cir. 1995); *W.H. Breshears, Inc. v. Federated Mut. Ins.Co.*, 832 F.Supp. 288 (E.D.Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1994)

Other courts have found the policy provision ambiguous and have interpreted it in favor of coverage for such claims. *See Royal Ins. Co. of America v. Kirksville College of Osteopathic Medicine*, 191 F.3d 959 (8th Cir. 1999); *New Castle County v. National Union Fire Ins. Co.*, 174 F.3d 338 (3rd Cir. 1999) (applying Delaware law) (claims against county for refusal to issue building permit for plaintiff's property arguably covered as "invasion of right of occupancy"); *Scottish Guarantee Ins. Co. v. Dwyer*, 19 F.3d 307 (7th Cir. 1994) (applying Wisconsin law) (negligent trespass is equivalent to "wrongful entry"); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992) (claim for negligent trespass qualifies as "other invasion of the right of private occupancy"); *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265 (1st Cir. 1990); *Northrop Corp. v. American Motorists Ins. Co.*, No C 710

571 (Cal.Super.Ct. April 14, 1992); *Town of Goshen v. Grange Mut. Ins. Co.*, 120 N.H. 915, 424 A.2d 822 (1980).

In the recent decision in *Truitt Oil & Gas Co, Inc. v. Ranger Ins. Co.*, 231 Ga. App. 89, 498 S.E.2d 572 (1998), the Georgia Court of Appeals seemingly aligned itself with those courts finding no coverage for claims of trespass under the personal injury coverage of a liability policy. Truitt Oil involved a policyholder's claim for coverage in connection with an environmental pollution loss. When Truitt Oil's underground storage tanks leaked gasoline into the ground and sewer system, the road on which the business was located had to be closed for several weeks while clean-up operations were undertaken. Subsequently, a neighboring business sued Truitt Oil for damages in the form of lost profits it incurred as a result of the road being closed. Truitt Oil's liability carrier refused to defend on the basis of a pollution exclusion in its policy.

In the coverage action, the court of appeals held that the claims against Truitt Oil to recover lost profits fell squarely within that part of the definition of "property damage" in Truitt Oil's policy defining the term to include "loss of use of tangible property that is not physically injured." According to the court, the loss of use of the real property resulting in lost profits to the business satisfied this definition. The court rejected Truitt Oil's argument that the policy required physical injury to the property. Based on its conclusion that the claims fell within the policy's definition of "property damage," the court held that those claims were excluded from coverage by the pollution exclusion.

The insured argued the claims against it did not allege "property damage" which was subject to the policy's pollution exclusion. Instead, the insured argued the claim fell within the

policy's coverage for "personal injury" which was not subject to the pollution exclusion. "Personal injury" was defined to include the offense of wrongful entry. Rejecting this argument, the court concluded:

> Truitt argues that two types of actions included in the policy's definition of 'personal injury,' namely wrongful entry and invasion of the right of private occupancy, apply in this case. However, neither is alleged by Sun N' Shade in its complaint. Rather the complaint allegations fall squarely within the 'loss of use of property' section of the property damage definition.

Truitt Oil, 231 Ga. App. at 91, 498 S.E.2d at 572.

In the only other reported Georgia decision to address the scope of coverage for "personal injury," the court of appeals found coverage for claims by a tenant against the insured landlord for wrongful entry into warehouse space leased to the tenant. *Cincinnati Ins. Co. v. Davis*, 153 Ga. App. 291, 265 S.E.2d 102 (1980). Although the court rejected the insurer's argument that "personal injury" coverage did not extend to the claim against the insured for conversion of the tenant's personal property, the result is consistent with the view that the coverage for wrongful entry, eviction or other invasion of the right of private occupancy is limited to the context of claims between landlord and tenant.

Slander or libel

This offense is defined in some policies as simply "slander" or "libel," while other policies define this offense as "oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." An issue that frequently arises concerns whether a complaint which does not specifically assert a claim for slander or libel, per se, may nevertheless trigger coverage under this prong of the coverage for "personal injury."

No Georgia cases directly address this issue, and the Court of Appeals sidestepped the question in a fairly recent case. In *O'Dell v. St. Paul Fire & Marine Ins. Co.*, 223 Ga. App. 578, 478 S.E.2d 418 (1996), the insured sought coverage under the personal injury portion of his commercial general liability policy. He argued that while the underlying complaint did not specifically make a claim for slander, the lawsuit alleged facts on which a cause of action for slander could be based. According to the insured, "recovery for slander could have been possible under an unstated cause of action based on the facts that were alleged." Those allegations included claims that the insured called the plaintiff a "whore" and a "slut" and that when she would walk into a room in front of the insured, he would say to the others present, "I could have that if I wanted it."

The court resolved the issue as follows:

> We do not reach here the issue of whether an insurer is obligated to defend an as yet 'unstated cause of action.' Even assuming that the complaint somehow provided notice to St. Paul that Gilleland raised a slander claim, Gilleland's lawsuit was filed more than a year after her employment was terminated on March 23, 1993. An action for slander was therefore barred by the one year statute of limitation pursuant to O.C.G.A. § 9-3-33.

Id.

In this way the court avoided resolving the issue of whether an insurer is obligated to defend an as yet unstated cause of action. Instead, the court decided the insurer could avoid its duty to defend by showing that to the extent the underlying complaint asserted a claim for slander, such a claim was barred by the statute of limitations.[77]

77 It is important to note that subsequent decisions make it clear a carrier cannot avoid its defense obligation by showing the underlying claims cannot succeed. Instead, if the complaint contains claims which, if successful, would potentially be covered under the policy, the carrier must defend. Any defenses to the insured's liability on the underlying complaint must be raised by the carrier on behalf of the insured in the underlying case and may not be used by the carrier in the coverage action to avoid its

No other Georgia cases address this precise issue. However, a number of courts in other states have found a duty to defend in the face of similar allegations. In a recent Wisconsin Court of Appeals case, the court held that an insurer was obligated to defend its insured against a complaint that arguably alleged defamation and/or disparagement. *Towne Realty, Inc. v. Zurich Ins. Co.*, 534 N.W.2d 886 (Wis. Ct. App. 1995), *aff'd in part and rev'd in part on other grounds*, 548 N.W.2d 64 (Wis. 1996). In *Towne Realty*, the plaintiff, a co-owner of a business, sued the insured for stripping his business' assets, alleging that the insured had thereby "maligned" him. The insurer denied coverage, contending that the plaintiff had failed to state a claim for defamation as defined under the policy's "personal injury" coverage section.

The court concluded that the insurer was obligated to defend the insured because the allegation that the insured had "maligned" the plaintiff was sufficient to state a claim for defamation under section d. of the definition of "personal injury" found in the CGL policy. The court reasoned:

> Thus, while the [plaintiff's] complaint did not expressly state a claim for libel or slander, the implication of this allegation is that [the insured] published false or misleading statements about them that caused damage to [the plaintiff's] reputation. ... Moreover, we note that the policy's definition of 'personal injury' includes the disparagement of one's services. The [plaintiff's] allegation suggests that [the insured] disparaged the [plaintiff's] services. Accordingly, the [plaintiff's] allegation was sufficiently broad to suggest a claim within the policy's definition of 'personal injury.'

Id. at 891. Thus, the court held that the complaint alleged "personal injury" as defined by the policy, and the insurer wrongfully denied coverage and refused to defend the insured.

Similarly, in *Psychiatric Assoc's v. St. Paul Fire & Marine Ins. Co*, a Florida court held that an insurer wrongfully denied coverage for claims that arguably fell within the personal

---

duty to defend. *See Penn-America Insurance Co. v. Disabled American Veterans Inc.*, 268 Ga. 564, 490 S.E.2d 374 (1997).

injury coverage of the insured's policy. 647 So. 2d 134 (Fla. 1st Dist. Ct. App. 1994). In that case, the plaintiff sued the insured alleging several "unartfully drafted counts," including an allegation that the insured made "false allegations" against the plaintiff in an attempt to harm him. Distinguishing another Florida decision, the court held that the plaintiff's complaint alleged some claims that "fall within the 'personal injury' coverage of the policies." *Id.* at 138 (distinguishing *St. Paul Fire & Marine Ins. Co. v. Naples Community Hosp., Inc.*, 585 So. 2d 374 (Fla 2d Dist. Ct. App. 1991)). The other decision distinguished by the court involved possible allegations of defamation. However, in that case, the plaintiff was a corporation, which "has no reputation in the sense that an individual does and, therefore, has a much more limited right of action for slander or defamation than does an individual." *Id*. Thus, no coverage was provided in that case because the plaintiff failed to allege the proper damages recoverable by a corporation. The plaintiff in *Psychiatric Assoc's*, however, was an individual who alleged that he suffered recoverable damages. Accordingly, the claims were covered by the policy's personal injury coverage, and the insurer wrongfully refused to defend.

Furthermore, courts have noted that even where a complaint fails to adequately state a claim for defamation, this is not grounds to deny defense to the policyholder, but rather is a matter which should be raised as a defense to the insureds' liability in the underlying case. In a recent Louisiana decision addressing this very issue, the court held that the plaintiffs' complaint triggered a duty to defend under the insured's policy. *Rio Rouge Dev. Corp. v. Security First Nat. Bank*, 610 So. 2d 172 (La. Ct. App. 1992). In that case, two insurers defended their denial of coverage for the plaintiffs' defamation claims on the grounds that the plaintiffs' complaint failed to adequately plead a cause of action for defamation. The court disagreed, holding that "although the allegations of the plaintiffs' petition are inartfully drawn and broadly stated, we

find that the petition alleges sufficient facts which may constitute a claim for defamation." Responding to the insurers' argument that the complaint failed to adequately detail its defamation claim and did not allege that the derogatory statements made were false, the court stated:

> We are well aware that in order to establish a case of defamation, these two elements have to be proven. However, for purposes of our analysis of the insurers' duty to defend, the absence of these elements of the cause of action do not defeat our conclusion that the allegations state, at least rudimentarily, a claim which may be covered by the contract of insurance. Simply stated, in interpreting the allegations liberally, we find they set forth grounds which bring the claim within the scope of the insurer's duty to defend.
>
> . . .
>
> In conclusion, we note that it may be that [the insured] may not ultimately be found liable because the elements of defamation cannot be proven. Nonetheless, as pointed out earlier, the insurer's duty to defend is broader than its duty to pay for losses.

Id. (internal citations omitted); *see also Penn-America, supra*.

Invasion of Privacy

Some policies afford personal injury coverage for "invasion of privacy," while others restrict coverage to "oral or written publication of material that violates a person's right of privacy." This seemingly minor distinction in the way the offense is defined can have significant implications on the scope of coverage. For example, cases involving allegations of sexual harassment commonly involve claims for invasion of privacy. Where the claim is based upon offensive comments made by the insured to the plaintiff which were not communicated to a third party, coverage will depend upon whether the policy requires "oral or written publication of" the allegedly offensive statement. *See e.g., Springdale Donuts, Inc. v. Aetna Cas. and Sur. Co.*, 247 Conn. 801, 724 A.2d 1117 (1999) (comments made privately to plaintiff not sufficient to trigger

coverage where publication required); *David v. Nationwide Mut. Ins. Co.*, 106 Ohio.App.3d 298, 665 N.E.2d 1171 (1995); *MGM, Inc. v. Liberty Mut. Ins. Co.;* 253 Kan. 198, 855 P.2d 77 (1993) (no coverage for insured's interception of private telephone conversations in absence of publication to third party); *cf. Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*, 1997 Me. 188, 699 A.2d 1153 (1997).

In contrast, provisions defining coverage more broadly to include "invasion of privacy," will afford coverage for claims where no publication of private information is alleged. *See, e.g., Purrelli v. State Farm Fire and Cas. Co.*, 698 So.2d 618 (Fla. 2nd DCA 1997) (coverage for claim based upon videos taken of chiropractic patient without her permission during treatment) *Bailer v. Erie Ins. Exchange*, 344 Md. 515, 687 A.2d 1375 (Md.App. 1995) (coverage for claim based upon insured videotaping plaintiff in shower without her consent).

Offense Committed During Policy Period

Typically whether an offense for purposes of "personal injury" coverage has been committed during the policy period will be easy to determine. However, in the context of claims for malicious prosecution, this issue has generated some controversy. Specifically, the issue presented concerns whether the tort of malicious prosecution occurs when the criminal charges are filed or when the prosecution is resolved in the plaintiff's favor. The distinct majority of courts which have considered the question find that malicious prosecution "occurs" for insurance coverage purposes when the underlying criminal charges are filed against the plaintiff. *City of Erie v. Guaranty Nat'l. Ins. Co.*, 109 F.3d 156 (3rd Cir. 1997) (applying Pennsylvania law); *Royal Indem. Co. v. Werner*, 979 F.2d 1299 (8th Cir. 1992) (applying Missouri law); *Southern Maryland Agric. Ass'n., Inc. v. Bituminous Cas. Corp.*, 539 F.Supp. 1295 (D.Md. 1982); *Ethicon,*

Inc. v. Aetna Cas. and Sur. Co., 688 F.Supp. 119 (S.D.N.Y. 1988); *S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.*, 396 A.2d 195 (D.C. 1978); *American Family Mut. Ins. Co. v. McMullin*, 869 S.W.2d 862 (Mo.Ct.App. 1994); *Patterson Tallow Co, Inc. v. Royal Globe Ins. Cos.*, 89 N.J. 24, 444 A.2d 579 (N.J. 1982); *Zurich Ins. Co. v. Peterson*, 188 Cal.App.3d 438, 232 Cal.Rptr. 807 (Cal.App. 1986). Two courts comprise the minority view which holds that malicious prosecution occurs on the date when the plaintiff receives a favorable termination of the underlying proceeding since before that date, no claim for malicious prosecution may be maintained. *Roess v. St. Paul Fire and Marine Ins. Co.*, 383 F.Supp. 1231 (M.D.Fla. 1974); *Security Mut. Cas. Co. v. Harbor Ins. Co.*, 65 Ill.App.3d 198, 382 N.E.2d 1, 21 Ill.Dec. 707 (Ill.App. 1978), *rev'd. on other grounds*, 77 Ill.2d 446, 397 N.E.2d 839, 34 Ill.Dec. 167 (Ill. 1979).

Suit Must Seek "Damages"

A suit seeking "damages" because of "personal injury" is a prerequisite to the insurer's duty to defend and indemnify. If the plaintiff is not seeking damages for an injury sustained, but is merely seeking injunctive relief to prevent the threat of anticipated injury, no coverage may be afforded. For example, in *Legal Services Corp. v. Continental Ins. Co.*, No. 93-15326 (9th Cir. decided December 7, 1994), union members sued the insured over its right of access to personnel records of the members. The insured sought coverage under the "personal injury" coverage of its policy for "invasion of privacy." As the underlying lawsuit sought only injunctive relief to prevent the release of information contained in the employees' personnel files and contained no prayer for damages already incurred, the court found no potential for coverage and thus no duty

to defend. This case serves as a reminder not to overlook the basics when we are analyzing coverage for a particular claim.

Exclusions

Defamation done by or at direction of insured with knowledge of falsity

Many policies contain an exclusion for "personal injury" "arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." Other policies attempt to accomplish the same result by requiring that "personal injury" be caused by an "occurrence." Such provisions may give rise to the question of whether an insurer can expressly provide coverage for libel, while at the same time excluding coverage for injury caused by an insured's intentional act. Some cases find an apparent conflict exists when the policy first expressly affords coverage for libel, which is traditionally viewed as an intentional tort, and then attempts to exclude coverage for intentional acts. The potential exists that the two provisions will be held to be repugnant to each other, and therefore the one most favorable to the insured will be applied. In other words, if the policy grants coverage in one provision only to take it away completely in another, the coverage is illusory, and the provision eliminating coverage will be ignored. *See e.g. Hilde v. U.S. Fire Ins. Co*., 172 Ga. App. 161, 322 S.E.2d 285 (1984); (*Lincoln National Health and Cas. Ins. Co. v. Brown*, 782 F.Supp 110 (M.D.Ga. 1992). Few courts have addressed this particular issue, and the results have been varied. However, most have found that the insurer at least has a duty to defend.

Based upon the rationale that a claim for libel may succeed on a showing that the defendant acted negligently or recklessly with regard to the truth of the statements, many courts have found that the intentional acts exclusion does not apply and the insurer must defend such

claims. For example, in *Fuisz v. Selective Ins. Co. of America*, 61 F.3d 238 (4th Cir. 1995), the complaint contained both allegations that the insured knew his statements were false and acted with the intent to injure the plaintiff as well as allegations that the insured published the statements with reckless disregard as to whether they were true or false. The court held that the former allegations were excluded by the intentional injury exclusion, but the latter allegations based upon reckless conduct were not excluded. Thus, the insurer had a duty to defend.

The fifth circuit reached the same conclusion in *E.E.O.C. v. Southern Publ. Co., Inc.*, 894 F.2d 785 (5th Cir. 1990). There the complaint alleged the insured's statement "was known by the said Defendant to be false or *was stated with gross and reckless disregard of the truth*." The allegations of gross and reckless conduct triggered the insurer's duty to defend. *See also Guardian Trust Co. v. American States Ins. Co.,* Case No 95-4073-SAC (D.C.Kan. July 30, 1996) (unpublished decision); *Alfa Mut. Ins. Co. v. Morrison*, 613 So.2d 381 (Ala. 1993); *Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co.,* 766 F.Supp. 324 (E.D.Pa. 1991); *United Services Automobile Assoc. v. Elitzky*, 358 Pa.Super. 362, 517 A.2d 982 (1986).

Some courts have gone further and held that insurance policies specifically affording coverage for defamation, but excluding coverage for intentional acts are inherently ambiguous and must therefore be construed in favor of coverage. *See e.g. Hurst-Rosche Eng'rs v. Commercial Union Ins. Co.*, 51 F.3d 1336 (7th Cir. 1995) (applying Illinois law); *Davidson v. Cincinnati Ins. Co.,* 572 N.E.2d 502 (Ind.Ct.App. 1991).

In a similar context, a number of courts have held that where a policy affords coverage for such torts as assault and battery and invasion of privacy but also excludes coverage for intentional acts, the coverage is illusory and the policy must afford protection to the insured. One such case was decided recently by the Georgia Court of Appeals. In *Isdoll v. Scottsdale Ins.*

Co., 219 Ga. App. 516, 466 S.E.2d 48 (1995), Scottsdale insured the City of Forest Park's police department under a policy which provided coverage for damages because of "wrongful acts" which result in "personal injury" caused by an "occurrence" and arising out of the performance of the insured's duties to provide law enforcement activities. "Occurrence" was defined as "an event...which results in personal injury...sustained during the policy period..." "Personal injury" was defined to include "assault and battery...and [the] violation of [a person's] civil rights protected under 42 USC 1981 et sequential or State Law..."

An inmate of the jail was sexually assaulted by one of her jailers. She sued the city and the jailer under 42 USC 1983 and for assault under state law. Scottsdale denied coverage and refused to defend based upon an exclusion in its policy for "damages arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured . . ." Rejecting Scottsdale's position, the court of appeals held:

> [T]hat exclusion conflicts with the specific endorsement affording coverage for personal injury, including assault and battery and civil rights violations, which by their very nature involve wilfulness. 'Thus we have a situation where one provision of the policy excludes liability and another accepts liability. Every written provision of an insurance contract must be given its apparent meaning and effect. The provisions currently under consideration are repugnant to one another. When that occurs in an insurance contract, the provision most favorable to the insured will be applied. *Welch v. Gulf Ins. Co.*, 126 Ga. App. 115, 117, 190 S.E.2d 101 (1972)....' *United States Fire Ins. Co. v. Hilde*, 172 Ga. App. 161, 322 S.E.2d 285 (1984).

Id.

A federal district court in Georgia reached the same result in *Lincoln National Health and Cas. Ins. Co. v. Brown*, 782 F.Supp. 110 (M.D.Ga. 1992). In that case, the insured county and members of its sheriff's department were sued for assault and battery under 42 USC Section

1983. The county's insurer filed a declaratory judgment action to determine its obligations. In a frank opinion rejecting the insurer's position, the district court held:

> [T]here is an ambiguity in the policy. The policy defines 'personal injury' to mean not only 'bodily injury' but also 'false arrest,' 'malicious prosecution,' and 'assault and battery.' When this definition is read with the provision that only unintentional and unexpected 'personal injury' is covered, then the policy only applies to unintentional malicious prosecution, and unintentional assault and battery. This is complete nonsense. Thus, while under one provision, the policy claims that it covers claims for intentional acts such as malicious prosecution, false arrest, and assault and battery, on the other hand, the policy really covers no such claims....
>
> Therefore, the court finds that this policy contains two conflicting provisions. Under Georgia law, when two provisions in an insurance policy 'are repugnant to one another,' 'the provision most favorable to the insured will be applied.' The other provision is disregarded.

Id. at 112-13. *See also North Bank v. Cincinnati Ins. Co.*, 125 F.3d 983 (6th Cir. 1997); *Bailer v. Erie Ins. Exchange*, Case No. 137, Sept. Term, 1995 (Md.Ct.App. January 27, 1997) (policy affording coverage for intentional tort of invasion of privacy while excluding coverage for intentional acts is ambiguous and will be construed in favor of coverage); *Lineberry v. State Farm Fire & Cas. Co.*, 885 F.Supp. 1095 (M.D.Tenn. 1995) (coverage for invasion of privacy was illusory in face of exclusion for intentional acts; policy construed in favor of coverage).

Finally, at the other end of the spectrum, a few courts in Florida and New York have found no ambiguity and no duty to defend in such cases. In *Shapiro v. Glens Falls Ins. Co.*, 39 N.Y.2d 204, 347 N.E.2d 624, 383 N.Y.S.2d (1976), the complaint against the insured alleged that the statements made by the insured "were false and defamatory, were known to said defendant to be false and defamatory and were spoken willfully and maliciously with intent to injure and damage the plaintiffs..." The insured's policy specifically afforded coverage for libel

and also contained an exclusion for personal injury caused intentionally by the insured. With no discussion, the court concluded since the allegations charged the insured with speaking falsely, willfully and maliciously with intent to injure, the exclusion applied and there was no duty to defend. *See also Brandstetter v. USAA Cas. Ins. Co.*, 163 A.D.2d 349, 558 N.Y.S.2d 562 (1990); *Federal Ins. Co. v. Applestein*, 377 So.2d 229 (Fla.Dist.Ct.App. 1979). *Accord Aromin v. State Farm Fire & Cas. Co.*, 908 F.2d 812 (11th Cir. 1990) (applying Florida law) (coverage for assault and battery does not conflict with intentional acts exclusion).

As demonstrated above, the law is somewhat unsettled regarding the effect of an intentional acts exclusion where the policy specifically grants coverage for such torts as libel, slander and invasion of privacy. Some courts find such policies inherently ambiguous and hold that the coverage they purport to provide is merely illusory. These courts resolve this ambiguity in favor of coverage and therefore disregard the intentional acts exclusions.

At the opposite end of the continuum, a few courts in New York and Florida have found no contradiction between a provision affording coverage for libel and an exclusion for intentional acts. Those courts have enforced the exclusion to preclude any duty under the policy.

However, it seems most courts that have addressed this issue have adopted an approach that falls somewhere between the two extremes. These courts recognize a distinction between claims for negligent or reckless libel and claims for intentional libel. Based on this rationale, these courts are able to reconcile the intentional acts exclusion with the specific coverage grant for libel. As a result, these courts find a duty to defend where the complaint can be read to allege that the insured acted negligently or recklessly in verifying the truth of the allegedly libelous statements.

Georgia has not yet addressed the specific issue of whether a policy may expressly provide coverage for libel or slander and at the same time exclude coverage for intentional acts. Which approach the Georgia courts will adopt on this issue is difficult to predict. However, several Georgia decisions shed light on how the Georgia courts may approach this question. First, in *Brayman v. Allstate Ins. Co.*, 212 Ga. App. 96, 441 S.E.2d 285 (1994), the court of appeals considered whether claims against the insured for slander were covered under a homeowner's policy. The policy in *Brayman* insured against bodily injury and property damage, where bodily injury was defined as physical harm to the body, including sickness or disease, and resulting death. The insurer filed a declaratory judgment action contending the claims did not allege bodily injury, and if they did, the intentional acts exclusion applied. The court affirmed summary judgment to the insurer on both grounds, reasoning:

> [E]ven if we were to assume the plaintiff did assert a claim for bodily injury, such would only be covered if it occurred as the result of an accident. The plaintiff's complaint asserts that the Brayman's statements about her were false and malicious and were deliberately calculated to cause her harm. Although the policy does not define the term 'accident,' it specifically excludes coverage for intentional acts. Moreover, the term 'accident' has been defined generally as 'an undesirable or unfortunate happening that occurs unintentionally and usually results in harm, injury, damage or loss....' Thus, given the plaintiff's allegations that the Braymans' acts were intentional, we cannot say that any alleged bodily injury she may have suffered occurred as the result of an accident.

Id.

While the *Brayman* court found the intentional acts exclusion applied to eliminate coverage for slander, it is important to note that the policy under consideration did not specifically provide coverage for slander.

Also instructive is the decision in *Isdoll v. Scottsdale Ins. Co.,* 219 Ga. App. 516, 466 S.E.2d 48, where the court found a policy inherently ambiguous because it specifically provided coverage for assault and battery and at the same time excluded coverage for damages arising out the wilful violation of a penal statute. On several occasions, the Georgia courts have refused to enforce specific policy exclusions where those exclusions were in direct conflict with another provision of the policy. *See Tifton Machine Works, Inc. v. Colony Ins. Co.,* 224 Ga. App. 19, 480 S.E.2d 37 (1996) (where "care, custody and control" exclusion could not be given effect without eviscerating specific coverage granted by policy, the exclusion was disregarded); *Hilde*, 172 Ga. App. 161, 322 S.E.2d 285 (1984) (when two provisions in policy are repugnant to one another, provision most favorable to insured will be applied).

It is certainly possible to harmonize an intentional acts exclusion with a specific coverage grant for libel or slander based upon the fact that in Georgia claims for defamation can be based upon a finding that the insured acted (1) negligently, (2) recklessly, or (3) intentionally in verifying the truth of the statements made. *See Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 317 S.E.2d 534 (1984); *Peoples v. Guthrie*, 199 Ga. App. 119, 404 S.E.2d 442 (1991); *Southern Bell Tele. & Tel. Co. v. Coastal Transmission Service, Inc*., 167 Ga. App. 611, 307 S.E.2d 83 (1983). If the allegations of the complaint are limited to claims of negligence, or perhaps even recklessness, the intentional acts exclusion would not apply and the policy would afford coverage. However, if the complaint only contained allegations that the insured knew his statements were false or that they were made with wilful and wanton disregard for the truth, the exclusion would apply to eliminate coverage.

First publication of material before beginning of policy period

Many policies affording personal injury coverage will exclude coverage for such injury when it arises out of "oral or written publication of material whose first publication took place before the beginning of the policy period." This exclusion is fairly straightforward and has been applied to eliminate coverage where the offending statements were first made prior to the inception of the policy. *See, e.g. Sam Z. Scandaliato & Assoc., Inc. v. First Eastern Bank & Trust Co.,* 589 So.2d 1196 (La.App. 4th Cir. 1991).

Willful violation of a penal statute

An exclusion for personal injury "arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured" has been applied to exclude coverage for claims of invasion of privacy based upon sexual molestation. *Nodak Mut. Ins. Co. v. Heim*, 1197 N.D. 36, 559 N.W.2d 846 (1997). The same exclusion has been upheld in the context of a claim for invasion of privacy based upon interception of private telephone calls in violation of federal or state law. *MGM, Inc. v. Liberty Mut. Ins. Co.,* 253 Kan. 198, 855 P.2d 77 (1993); *Reliance Ins. Co. v. Lazzara Oil Co.,* 601 So.2d 1241 (Fla. 2nd DCA 1992); *Western Cas. and Sur. Co. v. City of Palmyra*, 650 F.Supp. 981 (E.D.Mo. 1987).

Courts have also relied upon the exclusion to bar coverage for claims based upon willful violation of federal and state anti-discrimination statutes. *Bensalem Township v. Western World Ins. Co.,* 609 F.Supp. 1343 (D.C. Pa. 1985); *Howard v. Russell Stover Candies, Inc*., 649 F.2d 620 (8th Cir. 1981). The exclusion has been applied in a variety of other contexts as well. *American Home Assur. Co. v. Diamond Tours & Travel, Inc.,* 78 AD.2d 801, 433 N.Y.S.2d 116 (App.Div. 1980) (no coverage for claim based on fraud); *Travelers Indem. Co. v. Nieman*, 563

S.W.2d 724 (Ky.Ct. App. 1977) (pharmacist repeatedly sold amphetamines to customer without prescription); *Stevens v. Horne,* 325 So.2d 459 (Fla.Ct.App. 1975) (union members hung likeness of non-union employee in effigy).

ADVERTISING INJURY

Over the last decade, insurers and policyholders have witnessed an explosion of litigation over the scope of coverage afforded for "advertising injury" under the standard CGL policy. The analysis of coverage under this aspect of the policy requires consideration of at least three conditions. First, the injury must arise from one of the enumerated offenses. Next, the injury must be caused by an offense committed in the course of the insured's advertising. Finally, the offense must occur during the policy period.

Enumerated Offenses

Oral or written publication of material that slanders or libels a person or organization

Courts have interpreted this language as providing coverage for claims that arise under trade libel. *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968 (9th Cir. 1994). Trade libel is defined as "an intentional disparagement of the quality of property, which results in pecuniary damage." *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346 (9th Cir. 1988).

In *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968 (9th Cir. 1994), the policyholder sought coverage for claims brought by its competitor. In the underlying action, it was alleged that the insured had been passing off its competitor's computer software as its own. The underlying complaint alleges claims based on false designation of origin, unfair competition, and misappropriation of trade secrets. In the declaratory judgment action, the insured's theory

for coverage under the advertising injury portion of the policy was that hurting its competitor's reputation by passing off its competitor's software as its own amounted to libel, disparagement or belittlement. The court held:

> The closest the underlying complaint gets to alleging libel or slander is its allegation that Microtec, 'by marketing Plaintiff's and Microtec's compilers under Microtec's name, threaten[s] that reputation by representing that Microtec has independently developed compilers that equal or surpass those of Plaintiff.' The complaint does not allege Microtec made any false statements about Green Hills, only that Microtec was falsely representing that it developed the compilers independently. This court has held that where the gravamen of an underlying complaint is that the defendant 'palmed off' the plaintiff's product, it does not give rise to coverage under a policy that protects against libel and slander.

Id. at 970; *see also Select Design, Ltd. v. Union Mut. Fire Ins. Co*., 165 Vt. 69, 674 A.2d 798 (1996) (disparagement as used in policy does not mean comparing a competitor's product or service unfavorably with one's own, but must constitute an injurious falsehood to be actionable); *Sentex Systems, Inc. v. Hartford Accid. & Indem. Co*., 882 F.Supp. 930 (C.D.Calif. 1995).

At least one court has interpreted this language to include coverage for a claim of inducement of patent infringement. *Foundation for Blood Research v. St. Paul Marine and Fire Ins. Co.*, 1999 Me. 87, 730 A.2d 175 (1999) (coverage afforded for belittling to a third party the validity of the patent held by another).

Misappropriation of advertising ideas or style of doing business

The majority of courts have interpreted the phrase "misappropriation of advertising ideas or style of doing business" as providing coverage for trademark infringement under the advertising injury portion of the policy. *See Sentex Systems, Inc. v. Hartford Accid. & Indem. Co.*, 882 F.Supp. 930 (C.D. Calif. 1995), *aff'd* 93 F.3d 578 (1996); *Proxima Corp. v. Federal Ins.*

Co., 26 F.3d 132 (9th Cir. 1994) (unpublished disposition); *Poof Toy Products, Inc. v. U.S.F.& G.*, 891 F. Supp. 1228, 1231 (E.D. Mich. 1995); *J.A. Brundage Plumbing v. Massachusetts Bay Ins.*, 818 F. Supp. 553 (W.D.N.Y. 1993) (*vacated to accommodate settlement*, 153 F.R.D. 36, W.D.N.Y. 1994); *Lebas Fashion Imports of USA v. ITT Hartford Ins. Group*, 50 Cal.App.4th 548, 59 Cal.Rptr.2d 36, 41 (1996). Courts have reached the same result regarding claims for unfair competition under the federal statutes. *See Dogloo, Inc. v. Northern Ins. Co. of New York*, 907 F.Supp. 1383 (C.D.Calif. 1995).

For example, in *J.A. Brundage Plumbing v. Massachusetts Bay Ins*., 818 F. Supp. 553 (W.D.N.Y. 1993) *(vacated to accommodate settlement*, 153 F.R.D. 36, W.D.N.Y. 1994), the underlying dispute involved claims against Brundage by Roto-Rooter for federal trademark and servicemark infringement, false designation of origin, dilution and unfair competition. Roto-Rooter had granted Brundage a license and franchise to perform and sell sewer service, and in connection with their agreement, had granted limited authority for Brundage to use Roto-Rooter's trademarks. Roto-Rooter claimed, among other things, that Brundage had improperly used its trademarks in connection with sales and service performed by unauthorized entities. The court was faced with the question of whether each of the causes of action alleged advertising injury within the meaning of the policy. Brundage conceded that subsections (a) and (b) of the definition of advertising injury did not apply. Rather, the insured contended that coverage was afforded under subsections (c) and/or (d) -- i.e., advertising injury arising out of "misappropriation of advertising ideas or style of doing business" or "infringement of . . . title or slogan".

The J.A. Brundage Plumbing court held:

> [I]n the ordinary sense of these terms, misappropriation of an ‘advertising idea’ would mean the wrongful taking of the manner

> by which another advertises its goods or services. This would include the misuse of another's trademark or tradename ... A trademark is defined under the federal statute as 'any word, name, symbol or device or any combination thereof, adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.' 15 U.S.C. §1127 Similarly, one's mark and name is an integral part of an entity's 'style of doing business.' Such misappropriation of 'style of doing business' would include trademark, trade name or servicemark infringement.

Id.

A federal district court in New Hampshire reached the same result one year later in *Noyes v. American Motorists Ins. Co.*, 855 F. Supp. 492 (D.N.H. 1994). In *Noyes*, the plaintiff sought coverage for an underlying lawsuit in which he had been accused by another party of having intentionally infringed upon a trademark by using the designation "Dustfree Precision Pellets" for its laboratory animal food pellets. The underlying lawsuit alleged false designation of origin, federal trademark infringement, common law trademark infringement, and unfair competition. Again, addressing the same policy language, the *Noyes* Court held:

> The facts alleged in the complaint, are clearly not encompassed within subparts a or b of the definition of advertising injury. However, the allegation that Noyes used the name 'Dustfree Precision Pellets' in their advertising, literature and packaging, arguably falls within the ambit of misappropriation of advertising ideas or style of doing business or infringement of a title or slogan.

Id.

In *American Economy Ins. Co. v. Reboans, Inc.*, 852 F. Supp. 875 (N.D. Cal. 1994), the insured had been sued for allegedly selling counterfeit merchandise. The underlying plaintiff asserted claims against the insured for federal trademark infringement and false designation of origin in violation of the Lanham Act, unfair competition and dilution in violation of California statutes. The district court initially concluded that the trademark infringement claim was not

covered by the policy because trademark infringement was not one of the enumerated offenses contained in the definition of advertising injury. However, upon reconsideration, the court altered its position and ruled that the insurer owed a duty to defend its insured. *American Economy Ins. Co. v. Reboans, Inc.*, 900 F. Supp. 1246 (N.D.Cal. 1995). In reversing its earlier ruling, the court found that the "style of doing business" is equivalent to the more widely used term "trade dress." Thus the court held that it was objectively reasonable for the insured to expect that the policy language would encompass a claim of trade dress infringement.

While the trend seems to be to find claims for trademark infringement and unfair competition claims fall within the definition of advertising injury, there are cases which reach a different result. Generally speaking, trademark infringement is not a specifically enumerated offense under the definition of advertising injury as contained in the typical CGL policy. At least one court has found this significant in determining whether coverage should be afforded for such claims:

> Recognition of trademark and trade dress infringement as a distinct category of actionable conduct is so common that the only reasonable assumption is that if Travelers had intended to provide coverage for such liability, the insurer would have referred to it by name in the policy, as it did in the case of 'infringement of copyright, title or slogan.'

Advance Watch Company, Ltd. v. Kemper National Insurance Co., 99 F.3d 795, 803 (6th Cir. 1996).

The facts of *Advance Watch* are instructive. Advance marketed pens with the Pierre Cardin logo. The maker of Cross pens sued Advance alleging trademark and trade dress infringements, in that the Pierre Cardin pens allegedly infringed on the trademarked design of the Cross pens. Cross particularly alleged that Advance published a writing instrument catalog which depicted the writing instruments which were the alleged imitations of the Cross pens and

asked that Advance be enjoined from further advertising of the pens and that all such advertising be destroyed. Kemper and Travelers, the carriers for Advance during different time periods, both denied a duty to defend/indemnify the action under the CGL policies. Advance brought suit against both carriers. The district court granted summary judgment in favor of Advance, and Travelers appealed.

The Sixth Circuit reversed the district court's ruling, finding that "misappropriation of advertising ideas or style of doing business does not refer to . . . trademark or trade dress infringement." The court's decision was based in part upon the rationale that had the insurer intended to afford coverage for trademark infringement, it could easily have included that offense among those listed in the policy's definition of "advertising injury."

Thus, the clear majority rule is that trademark infringement and unfair competition based upon trademark infringement are encompassed by the policy's definition of "advertising injury." *See Swfte International, Ltd. v. Selective Ins. Co. of America*, Civ. Action No. 94-44-SLR (D. Del., Dec. 30, 1994) (unpublished opinion); *Ross v. St. Paul Fire and Marine Ins. Co.*, 520 N.W.2d 432 (Minn. Ct. App. 1994).

Infringement of copyright, title or slogan

Some courts have found that trademark infringement is also included within the policy's coverage for "infringement of . . . title or slogan". *Sentex Systems, Inc. v. Hartford Accid. & Indem. Co.*, 882 F.Supp. 930 (C.D. Calif. 1995), *aff'd* 93 F.3d 578 (1996) ("infringement of title" may refer to infringement of a business name); *Proxima Corp. v. Federal Ins. Co.*, 26 F.3d 132 (9th Cir. 1994) (unpublished disposition) (generally accepted definition of "title" involves unlawful use of a mark, style or designation, the name by which something is known); *Atlantic*

Mutual Ins. Co. v. Brotech Corp., 857 F. Supp. 423 (E.D. Pa. 1994) ("title" refers to a distinctive name or designation).

This offense has also been interpreted to include coverage for claims based upon interference with another's customer list. For example, in *The Merchant's Co. v. American Motorists Ins. Co.*, 794 F.Supp. 611 (S.D. Miss. 1992), the district court found coverage for a claim alleging the insured had obtained and improperly utilized the plaintiff's customer list. Construing the word "title" to include property interests in a customer list, the court found coverage for claims based on unauthorized use of the list.

Causal Connection

The second prerequisite to coverage requires a causal connection between the plaintiff's injury and the insured's advertising activities. In other words, the complaint must allege injury caused by copyright infringement committed in the course of the insured's advertising. The offense itself must arise out of the advertising injury. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 127-77, 833 P.2d 545, 10 Cal.Rptr.2d 538 (1992); *Sentry Ins. v. R.J. Weber Co.*, 2 F.3d 554 (5th Cir. 1993) (no coverage because insured did not identify any connection between underlying claim and the insured's advertising activities).

As the California Supreme Court explained in *Bank of the West*:

> The reasoning that supports the requirement of a causal connection is clear and persuasive: 'Taken to its extreme, [the argument that no causal relationship is necessary] would lead to the conclusion that any harmful act, if it were advertised in some way, would fall under the grant of coverage merely because it was advertised. Under this rationale, for instance, injury due to a defective product which is sold as a result of advertising activity and which later harms a consumer may fall within the coverage grant. The definition of 'advertising' is quite broad and may encompass a great deal of activity. Thus, a great many acts may fall within the ambit

> of advertising, extending advertising injury coverage far beyond the reasonable expectations of the insured.' *National Union Fire Ins. Co. v. Siliconix, Inc.*, 729 F.Supp. at 80).

Id., supra.

Applying this reasoning, a federal district court in New York found no coverage for a copyright infringement claim against the insured in *Jerry Madison Enterprises, Inc. v. Grasant Manuf. Co., Inc.*, Case No. 89 CIV. 2346 (MBH) (S.D. N.Y. decided February 14, 1990) (unpublished decision). In *Jerry Madison*, the insured manufactured and sold jewelry to a client base of approximately 30 people. The insured sent pictures or samples of its jewelry to customers and well as picture brochures. The plaintiff alleged the insured infringed plaintiff's copyrighted jewelry designs by "manufacturing, publishing and/or placing upon the market...jewelry which was copied" from plaintiff's design. The plaintiff sought an injunction preventing the insured from "infringing upon the copyrights . . . in any manner and from publishing, selling, manufacturing or marketing any copies of the jewelry which so infringe."

The insured argued plaintiff's use of the terms "placing upon the market" and "marketing" in the complaint prove that plaintiff based part of its complaint on activities leading to the sale of jewelry, including advertising activities. The insured claimed it marketed jewelry solely by distributing advertising material, e.g., brochures containing pictures of the infringing earrings, to its customers. Rejecting this argument as overly broad, the court held the insured's interpretation would impose a duty to defend whenever a defendant in a copyright case advertises allegedly infringing goods. Even if the insured's distribution of brochures actually was advertising activity, this was irrelevant because the complaint did not allege any injury arising out of the brochures. Instead, the claims focused on the infringing manufacture and sale of the jewelry.

The Sixth Circuit Court of Appeals reached the same conclusion in *Advance Watch Company, Limited v. Kemper National Ins. Co.*, 99 F.3d 795 (6th Cir. 1996). Reversing the district court, the court of appeals held that claims against the insured for trademark infringement, unfair competition and dilution did not trigger coverage under the advertising injury portion of the insured's policy. The claims against the insured alleged that writing instruments advertised and sold by the insured were copies of plaintiff's design. The complaint charged the insured with trademark infringement by importing, advertising, offering for sale, and selling writing instruments which were counterfeits and imitations of plaintiff's design. The plaintiff sought damages and injunctive relief preventing further advertising of the imitation writing instruments and asked that all advertisements of those instruments be destroyed.

The court held:

> It is true that a trademark, unlike a patent, can be infringed in an advertisement, but we find a broader requirement properly stated in these cases which Advance cannot satisfy in this case. The gravamen of Cross' complaint was that the Advance . . . writing instruments too closely resembled Cross' writing instruments themselves. It is true that Cross complained that Advance was, *inter alia*, advertising the infringing writing instruments, that Cross exhibited a copy of Advance's catalog to the complaint filed in the Cross action, and that Cross prayed, *inter alia*, that Advance be enjoined from advertising the infringing writing instruments, and that Advance be required to deliver for destruction all infringing advertisements and catalogs. However, it was not Advance's advertising in itself which provoked Cross' claim; it was the fact that in each advertisement...there was...a writing instrument deceptively similar in shape and appearance to Cross' writing instruments.
>
> Contrary to the district court's conclusion, we conclude that even if Advance could be said to have misappropriated Cross' advertising ideas or style of doing business, it cannot reasonably be said to have done so in the course of advertising its writing instruments, when it is the shape and appearance of the writing instruments themselves which Cross claimed to have caused injury. Advance argues that the appearance of its . . . writing instruments was in

> itself advertising, but this argument proves too much, for it would invoke advertising injury coverage and the duty to defend whenever a product is merely exhibited or displayed. We conclude as a matter of law that the 'committed in the course of advertising' policy language requires more, and that Travelers was entitled to summary judgment.

Id. *See also Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 84 F.3d 1105 (9th Cir. 1996) (misappropriation of trade secrets did not arise out of insured's advertising activities; even though insureds exposed their infringement by advertising, advertising activities must cause the injury, not just expose it); *Safeco Ins. Co. of American v. Pencon Int'l., Inc.*, 922 F.2d 845 (9th Cir. 1991) (unpublished decision); *St. Paul Fire and Marine Ins. Co. v. Advanced Interventional Systems, Inc.*, 824 F.Supp. 583 (E.D.Va. 1993) (infringement claim not within coverage merely because infringing product may have been advertised by insured); *Julian v. Liberty Mut. Ins. Co.*, 682 A.2d 611 (Conn.App. 1996); *A. Meyers & Sons Corp. v. Zurich American Ins. Group*, 546 N.Y.S.2d 818 (N.Y.App. 1989).

Likewise, the court in *Robert Bowden, Inc. v. Aetna Casualty and Surety Co.*, 977 F.Supp. 1475 (N.D.Ga. 1997), found no coverage and no duty to defend claims against the insured for copyright infringement. The suit against the insured alleged the insured committed copyright infringement by unauthorized duplication of software onto the hard disks of its personal computers. The court reasoned:

> In construing insurance policies providing coverage for advertising injury committed in the course of advertising, the overwhelming majority of courts which have addressed the issue have held that there must be a causal connection between an insured's advertising and the alleged injury. See *Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 94 F.3d 1219, 1221 (9th Cir. 1996) ('any of the policy's enumerated advertising injuries must be caused by [the insured's] advertising')...; *St. Paul Fire & Marine Insurance Co. v. Advanced Interventional Systems, Inc.*, 824 F. Supp. 583 (E.D. Va. 1993) ('the injury caused by the predicate offense must result from advertising'), *aff'd.*, 21 F.3d 424 (4th Cir. 1994); *Advance Watch*

> *Co, Ltd. v. Kemper Nat'l. Ins. Co.*, 99 F.3d 795, 806 (6th Cir. 1996) ('[t]he policy therefore requires some nexus between the ground of asserted liability and the insured's advertising activities'); *The Home Ins. Co. v. American Nat'l. Can Co.*, No. 97-C-0975, 1997 WL 467180, at *2) (N.D.Ill. Aug. 12, 1997) ('there must be a proximate causal connection between the advertising injuries to trigger insurance coverage').

Id. at 1480. Finding no causal connection between the copying of the plaintiff's copyrighted software and the insured's advertising activities, the court found no duty to defend or indemnify the insured. *See also Farmington Cas. Co. v. Cyberlogic Tech., Inc*., No. 97-71613, 1998 WL 99639 (E.D.Mich. March 4, 1998).

Controversy has also centered on what sort of activities are encompassed within the term "advertising." Many courts have taken the view that one-on-one solicitation of individual customers is not considered advertising. *See, Erie Ins. Group v. Sear Corp.*, 102 F.3d (7th Cir. 1996); *Select Design, Ltd. v. Union Mut. Fire Ins*., 674 A.2d 798 (Vt. 1996); *Monumental Life Ins. Co. v. USF&G*, 94 Md.App. 505, 617 A.2d 1163 (1993) (life insurer's one-to-one statements/solicitations are not "advertising"); *Smartfoods, Inc. v. Northbrook Prop. & Cas. Co.*, 35 Mass.App. 239, 618 N.E.2d 1365 (1993) (individual letter soliciting client to be distributor is not "advertising").

Instead, most of the published opinions hold that "advertising" means widespread promotional activities directed to the public at large as opposed to personal solicitations. *International Ins. v. Florists' Mut. Ins*., 201 Ill.App.3d 428, 559 N.E.2d 7 (1990); *Playboy Enterprises v. St. Paul Fire & Marine Ins.*, 769 F2d 425 (7th Cir. 1985); *Fox Chemical Co., Inc. v. Great Am. Ins. Co.*, 264 N.W.2d 385 (Minn. 1978).

Offense Must be Committed During Policy Period

Finally, coverage is only afforded for offenses committed during the policy period. Notably, the resulting injury need not occur within the policy period, but rather, the focus is on whether the advertising activities which comprise the offense took place during the policy period. *See Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495 (Tex. App. 1995). In *Two Pesos*, the insured restaurant was sued by its competitor over confusingly similar trade dress. The trial court awarded judgment against the insured, and while the case was on appeal, the insured continued its allegedly infringing trade dress. At the same time, the insured obtained a general liability policy affording coverage for "advertising injury." When the plaintiff filed a motion for supplemental damages to compensate it for injuries suffered after the original judgment was entered, the insured tendered that claim to its liability carrier. In a subsequent declaratory judgment action, the court determined that the claim for supplemental damages was not covered as it was based on an offense that occurred prior to inception of the policy.

Exclusions

Oral or written publication of material before the policy period

As the provision states, coverage is generally excluded where the claim is based upon publication of allegedly slanderous material first published before the policy incepted. *Sam Z. Scandaliato & Assoc. v. First Eastern Bank & Trust Co.*, 589 So.2d 1196 (La.Ct.App. 1991); *see also Federal Ins. Co. v. Learning Group Int'l., Inc.*, 56 F.3d 71 (unpublished decision). There are two lines of authority regarding the interpretation of the first publication exclusion. The decision in *Irons Home Builders, Inc. v. Auto-Owners Ins. Co.*, 839 F.Supp. 1260 (E.D.Mich. 1993) is representative of one viewpoint. The underlying lawsuit in *Irons* alleged a claim of

copyright infringement against the insured. As one basis for its position, the insurer argued that the first instance of copyright infringement alleged in the underlying lawsuit occurred prior to the beginning of its policy and was therefore excluded by the first publication exclusion. The court disagreed:

> The exclusion provision refers to the 'oral or written publication of material.' It mimics the provisions of the policy that relate to advertising injury involving libel, slander, and invasion of privacy. In each case, advertising injury is defined as the 'oral or written publication of material' that is slanderous or libelous or invades privacy. The clear implication is that the exclusion provision . . . merely limits the coverage for advertising injury that arises from those three particular torts. There is no exclusionary provision that limits coverage where one of several instances of copyright infringement occurred before the effective date of the policy.

Id. Based on this reasoning, the court found the exclusion inapplicable to claims arising from copyright infringement.

Other courts have applied the exclusion to eliminate coverage for claims for copyright and trademark infringement where the advertising material which gave rise to the injury was first published prior to the beginning of the policy period. See *Noyes v. American Motorists Ins. Co.*, 855 F.Supp. 492 (D.N.H. 1994); *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 696 F.Supp. 434 (D.Minn. 1988). In contrast to the approach adopted by the court in *Irons*, the courts in these cases did not limit the application of the exclusion to advertising injuries arising from libel, slander, or invasion of privacy.

Publication of material with knowledge of its falsity

Courts have displayed a reluctance to relieve the carrier of its defense obligation based upon the exclusion for knowing publication of false material where the plaintiff's recovery is not

dependent upon proof the insured knew the statements were false. *See, e.g., Universal, Inc. v. Sheboygan Emergency Med. Serv., Inc.*, 43 F.3d 1119 (7th Cir. 1994); *Sun Elec. Corp. v. St. Paul Fire and Marine Ins. Co.*, No. 94-C-5846 (N.D.Ill. May 4, 1995) (unpublished decision); *Union Ins. Co. v. The Knife Co., Inc.*, 897 F.Supp. 1213 (W.D.Ark. 1995). However, where the complaint is limited to allegations that the insured published defamatory remarks wilfully and with knowledge of the falsity of the statements, some courts will enforce the exclusion to bar coverage. *American Guar. & Liab. Ins. Co. v. Shel-Ray Underwriters, Inc.*, 844 F.Supp. 325 (S.D.Tex. 1993).

THE FAMILY EXCLUSION - - IS IT ENFORCEABLE?

By: David N. Nelson
Chambless, Higdon & Carson
577 Walnut Street
Macon, Georgia 31202
(478) 745-1181

Many insurance policies in Georgia contain policy exclusions that exclude or severely limit liability coverage for family members. Over the years, these clauses have been challenged as being against public policy in the face of Georgia's compulsory insurance laws.[78] However, time and time again the supreme court and court of appeals have found these clauses enforceable with one caveat. In the absence of intrafamily immunity the "family exclusion", as it is often called, is enforceable to the extent that it limits or precludes coverage in excess of the compulsory limits of insurance required by statute.[79]

The supreme court in *Geico v. Dickey*[80] first addressed the enforceability of the family exclusion clause. In that case, the insured, Dickey, lost control of his car and it rolled down an embankment in North Carolina killing his wife and stepdaughter. The representative of his wife's and stepdaughter's estate then brought a claim against him, but his insurer, Geico, took the position that the family exclusion clause resulted in the claims not being covered and filed a declaratory action in the Southern District of Georgia. After the district court denied Geico's motion for summary judgment, the Eleventh Circuit certified the following question to the Georgia Supreme Court:

> Would Georgia law require that the family or household exclusion clause in this automobile liability insurance contract be enforced to

78 *Harbin v. Sams*, 171 Ga. App. 263 (1984); *Southern Guaranty Ins. Co. v. Preferred Risk Mut. Ins. Co.*, 257 Ga. 355 (1987).

79 *Stepho v. Allstate Ins. Co.*, 259 Ga. 475 (1989); *Georgia Farm Bureau Mut. Ins. Co. v. Burch*, 222 Ga. App. 749 (1996); *Cotton States Mut. Ins. Co. v. Coleman*, 242 Ga. App. 531 (2000).

80 255 Ga. 661 (186).

> permit a denial of coverage and defense in a suit brought against the named insured by the estate of his wife and stepdaughter of the named insured?

The supreme court answered this question with a qualified no.[81]

The supreme court first noted that since the doctrine of intrafamily immunity existed in Georgia, the exclusion would ordinarily be enforceable as it would put the insured in no worse condition than if there were no exclusion since the suit would ordinarily be barred.[82] However, since under the facts of this case the claim arose in North Carolina, a state without intrafamily tort immunity, the supreme court held that in the absence of the existence of intrafamily tort immunity the family exclusion was unenforceable and against public policy.[83]

It is this analysis which subsequent Georgia courts have relied upon, examining individually the facts of each case to determine if there exists intrafamily immunity such that it would permit the enforcement of the family exclusion as written.[84] It is important to note, though, that even in the absence of intrafamily immunity, Georgia courts have still traditionally enforced family exclusion clauses, but only to the extent of coverage in excess of the compulsory limits.[85]

Following the *Geico v. Dickey* opinion, the supreme court in *Southern Guaranty Ins. Co. v. Preferred Risk Mut. Ins. Co.*[86] granted certiorari to again consider whether a family exclusion clause was enforceable. This time, though, the claim arose in Georgia and under the facts of the case, the doctrine of intrafamily immunity barred the claim. In *Southern Guaranty*, the insured, Mrs. Cooper, was a passenger in her husband's car while her friend, Mrs. Gordon, was driving it.

---

81 *Id.*
82 *Id.*
83 *Id.*
84 *Stepho, supra.*
85 *Id.*
86 257 Ga. 355 (1987).

Mrs. Gordon was involved in an accident and Mrs. Cooper was injured. Since Mrs. Cooper's husband owned the car, he had potential exposure under the family purpose doctrine.[87] Mrs. Cooper's insurance company, Southern Guaranty, brought a declaratory action and was granted summary judgment on the basis that Mrs. Cooper's policy contained a family exclusion clause which excluded coverage for "bodily injury to the insured or any relative of the insured residing in the same household as the insured." The grant of summary judgment was appealed by the liability insurer for Mrs. Gordon, and after the court of appeals reversed the trial court the supreme court granted *certiorari*.

The supreme court held that the family exclusion in Southern Guaranty's policy was not against public policy and was enforceable.[88] The supreme court, relying on its decision in *Geico v. Dickey*, pointed out that a crucial factor in their finding "that a family exclusion clause [was] not per se against public policy was a finding that the exclusion dovetailed with the absence of liability in Georgia, where the policy was written and delivered."[89] Here, the facts of the case curtailed any exposure to Mrs. Cooper's husband and, therefore, the family exclusion did not unfairly penalize Mrs. Cooper or leave her in an unexpected position.[90]

The supreme court did not base its decision entirely on the doctrine of intrafamily immunity.[91] It noted that Mrs. Cooper was not an innocent member of the motoring public. Rather, as an insured she was deemed to know the contents of her insurance policy, which would include knowledge of the exclusion. Since she was presumed to be knowledgeable about the exclusion, the supreme court reasoned that prior to giving permission to Mrs. Gordon to drive

87 *Id.* at 356.
88 *Id.*
89 *Id.* at 356.
90 *Id.*
91 *Id.*

her car she could have inquired about her insurance.[92] This time, under this set of facts, the supreme court found that the family exclusion clause was not against public policy and was enforceable in its entirety.

In 1989, the supreme court had two opportunities to fine tune its reasoning behind whether or not a family exclusion clause would be enforceable under any given set of facts. In the first case, *Southeastern Fidelity Ins. Co. v. Chaney*[93], Effie Chaney and her grown daughter, who were both named as insureds under Southeastern's policy, were involved in collision while her daughter was driving. Relying on the family exclusion clause in the policy, Southeastern filed a declaratory action contending that it had no liability under the insurance contract. The family exclusion clause at issue provided:

> This policy does not apply under the Bodily Injury and Property Damage Liability coverages to (1) the named insured, or (2) any person who is related by blood, marriage or adoption to and is a resident of the same household as (i) the insured or (ii) the person for whose use of the automobile or trailer the insured is legally responsible.

To determine whether this clause was enforceable, the supreme court used the intrafamily immunity test first set forth in *Geico v. Dickey*.[94] The supreme court first noted that under this set of facts, the doctrine of intrafamily immunity did not apply because the daughter was an emancipated adult.[95] It then looked to the clause to determine whether the exclusion was broader than Georgia's tort immunity. Finding that it was, and holding that an exclusion which is broader than Georgia's tort immunity would be against public policy, the supreme court held that the exclusion in this case was against public policy and unenforceable.[96]

---

92 *Id.*
93 259 Ga. 474 (1989).
94 *Id.*
95 *Id.*
96 *Id.*

Up to this point, the supreme court had almost exclusively used the doctrine of intrafamily immunity as a bellwether to determine whether a family exclusion clause would be enforceable. It had not, though, addressed whether an exclusion that was found to be unenforceable was unenforceable to extent of the full policy limits or merely to the extent of the mandatory level of insurance required under Georgia's compulsory insurance act.[97] In the second case decided in 1989, *Stepho v. Allstate Ins. Co.*[98], the supreme court addressed that issue and held that even in the absence of intrafamily immunity a family exclusion clause was enforceable to the extent the limits of coverage exceeded the mandatory minimum required under Georgia law.

In *Stepho v. Allstate Ins. Co.*, the named insured's emancipated adult son, Saad Stepho, was involved in an accident while driving his father's truck in which his younger brother, Nashwan, was a passenger. The father and named insured, Stephen Stepho, then brought an action on his son's behalf against Saad. Allstate disputed coverage and filed a declaratory action. After the court of appeals affirmed the grant of summary judgment to Allstate finding that the family exclusion clause was enforceable, the supreme court again granted certiorari to further refine the reasoning used to determine whether such a clause was enforceable. The supreme court first reiterated that Georgia's compulsory insurance act served the dual purpose of (1) protecting innocent victims from negligent members of the motoring public and, (2) the insured from unfair exposure to unanticipated liability.[99] It then noted that a "clear thread of consistency" ran through its prior decisions that resulted in the "basic rule that if either of the interests dealt with is left unprotected, the exclusionary clause in the insurance contract offends public policy. This rule does not apply when neither the injured party nor the unsuspecting

97 O.C.G.A. § 33-7-11.
98 259 Ga. 475 (1989).
99 *Id.* at 476.

insured is left unprotected."[100]

The supreme court, applying this rule to the facts of the case, first held that since the doctrine of intrafamily immunity did not apply and there was no other insurance, the injured party would be left unprotected.[101] It then went a step further, and addressed the level of protection that the injured party was entitled to once the family exclusion clause was found to be unenforceable. On this point, the supreme court looked to the rule it first announced in *Cotton States Mut. Ins. Co. v. Neese*[102] wherein it concluded that an "insurer is entitled to rely on the exclusion as to sums above those required by our compulsory insurance law."[103] Accordingly, Allstate's family exclusion clause was unenforceable only to limit of the compulsory insurance required by statute, $15,000, and it did not have liability in excess of that amount.[104]

With its opinion in *Stepho v. Allstate Ins. Co.*, the supreme court put the final touches on the basic rule for determining whether a family exclusion clause is enforceable. Even where the doctrine of intrafamily immunity does not act as a complete bar to a claim, a family exclusion clause is enforceable to the extent that the insurance policy provides for coverage in excess of the mandatory minimum required under Georgia's compulsory insurance law.[105] It is this rule that has been consistently applied by the courts since *Stepho v. Allstate Ins. Co.*, and perhaps in recognition of the holding in *Stepho v. Allstate Ins. Co.*, most family exclusion clauses now track

---

100 *Id.* at 476.

101 *Id.*

102 254 Ga. 335 (1985).

103 *Id.* at 342.

104 *Stepho, supra*. It should also be noted that just months prior to the *Stepho v. Allstate Ins. Co.* opinion the court of appeals in *Segars v. Southern Guaranty Insurance Co. of Georgia*, 192 Ga. App. 265 (1989), held that in the absence of intrafamily tort immunity a family exclusion clause is unenforceable. What is unwritten and unknown, is whether the Southern Guaranty policy provided for coverage in excess of the mandatory minimum. However, it can be assumed that since certiorari in the *Segars v. Southern Guaranty Ins. Co.* case was denied five days after the *Stepho v. Allstate Ins. Co.* opinion was published, that the Southern Guaranty policy was a minimum limits policy.

105 *Stepho, supra.*

the language of *Stepho v. Allstate Ins. Co.* and limit coverage only to the extent that it exceeds the mandatory minimum required by Georgia law.[106]

Most recently, the court of appeals in *Cotton States Mut. Ins. Co. v. Coleman*[107], applied this rule, holding that a family exclusion clause tracking the *Stepho* language was enforceable. In *Cotton States Mut. Ins. Co. v. Coleman*, the parties stipulated that Roscoe Coleman died while in his own vehicle, which was being driven with his permission by Robert L. Reeves. Coleman's heirs then filed suit and Cotton States filed a declaratory action relying on its revised family exclusion clause that provided:

> We do not provide liability coverage for 'bodily injury' and 'property damage' to you or any family member residing in your household. (1) If Intra-Familial Tort Immunity Applies; or (2) to the extent the limits of liability required by law if Intra-Familial Tort Immunity does not apply.

There was no dispute that the doctrine of intrafamily tort immunity was inapplicable in this situation since Coleman died in the accident.

The court of appeals first held that the exclusion did not violate public policy because it did not violate the rule announced in *Stepho v. Allstate Ins. Co.* since it merely limited the amount of coverage to the mandatory minimum.[108] However, the court of appeals noted that even if the clause had failed to include this limiting language and been contrary to public policy, it still would have been enforceable as to amounts in excess of the statutory minimum.[109]

Perhaps recognizing that this outcome was preordained, Coleman's heirs also mounted an attack on the endorsement, contending that it was inconspicuous, and urged the court of appeals to hold that the exclusion violated public policy because the exclusion limited the amount of

---

106 See generally *Georgia Farm Bureau Mut. Ins. Co. v. Burch*, 222 Ga. App. 749 (1996); *Cotton States Mut. Ins. Co. v. Coleman*, 242 Ga. App. 531 (2000).

107 242 Ga. App. 531 (2000).

108 *Id.*

109 *Id.*

liability stated on the declarations page.[110] These grounds were likewise rejected by the court of appeals, with it making the succinct observation that "a claim which is made by an insured against a permissive driver of his own insured vehicle is not a liability claim by an innocent third party, but a claim on behalf of the insured against his own insurance policy. To hold otherwise would rewrite Coleman's policy to provide coverage which was neither selected nor paid for by him."[111] Accordingly, the court of appeals upheld the language of the Cotton States family exclusion and found that it was enforceable in its entirety.

The current state of the law is clear - - family exclusion clauses are enforceable to the extent that there is coverage that exceeds the mandatory minimum. With that in mind, it is likely that future attacks on the enforceability of family exclusion clauses will perhaps focus on claimed ambiguities within a policy or the conspicuousness of the exclusion language. Attacks on family exclusion clauses on public policy grounds should fail, absent a complete reversal of the concise, well-reasoned basis behind the enforceability of this exclusion and others.

110 *Id.*
111 *Id.*

2001 AUTO INSURANCE UPDATE

By: Cam Bowman
Gardner & Bowman, L.L.C.
P. O. Box 113
Richmond Hill, Georgia 31324
(912) 234-3155

During 2000, Georgia appellate courts reviewed the usual number of auto insurance cases. Almost all of the major decisions arose in the context of uninsured motorist policy disputes. This review is limited to cases that squarely presented insurance issues for resolution at the appellate level, and does not include cases concerning more general principles of contract or tort law.

RENEWAL ACTIONS

In *Allstate Insurance Company v. Baldwin*,[112] Baldwin was involved in a collision with a car being driven by Wendy Wisenbaker on July 8, 1992, while driving his pickup truck. In February 1994, Baldwin sued Wisenbaker for injuries he allegedly sustained in the collision. At some time during 1994, Wisenbaker's insurance carrier, State Casualty Insurance Company, became insolvent. Baldwin's uninsured motorist insurance carrier, Allstate, had not been named or served in the suit. The case remained pending for over four years when, on March 20, 1998, Baldwin voluntarily dismissed the action against Wisenbaker without prejudice. On September 14, 1998, Baldwin and his wife attempted to recommence the action by filing suit against their uninsured motorist insurance carrier, Allstate. They failed to name Wisenbaker or any other entity as a defendant.

[112] 244 Ga. App. 664, 536 S.E.2d 558 (2000).

Allstate moved for summary judgment, arguing that the purported renewal action was invalid because it was filed solely against Allstate, when Allstate was not a party to the original action. Allstate argued that since the alleged tortfeasor, Wisenbaker, was not named in the purported renewal action, the action was not valid. And because it was not a valid renewal action, any defect therein could not be cured by amendment. On March 1, 1999, nearly six months after the time for filing a renewal action expired, but before the trial court ruled on Allstate's motion for summary judgment, Baldwin moved to add Wisenbaker as a defendant. The trial court allowed Baldwin to add Wisenbaker as a defendant and denied Allstate's motion for summary judgment, finding that the addition of Wisenbaker made the second action a valid renewal action.

The court of appeals reversed, because the action purportedly filed by Baldwin against Allstate was not a valid renewal action. Filing an action against Allstate was not the equivalent of recommencing an action against Wisenbaker. Besides never being a party to the original suit, Allstate did not occupy the same position as Wisenbaker. Allstate was not the tortfeasor and could be held liable only on a derivative basis. And, unlike Wisenbaker, Allstate, as an uninsured motorist insurance carrier, could not be forced to become a party to either tort action; Allstate could opt to participate in the proceedings in its own name, in Wisenbaker's name, or in both or could do nothing. Thus, the new petition was not substantially the same as to the essential parties.

In *Malave v. Allstate Insurance Company*,[113] the court of appeals held that service on an uninsured motorist carrier in a valid renewal action filed after the running of the statute of limitations is valid even though the carrier was not served in the original action.

[113] 246 Ga. App. 783, --- S.E.2d —, No. A00A1519, 2000 WL 1598595 (Oct. 27, 2000).

On June 8, 1997, Orlando Malave was in an automobile accident with Amy Sue Lescrynski. On June 7, 1999, one day before the expiration of the statute of limitation, Malave filed suit against Lescrynski. Malave eventually served Lescrynski five months later. Malave had uninsured motorist coverage with Allstate Insurance Company. Lescrynski had no insurance. On November 2, 1999, counsel for Malave spoke with Lescrynski and admitted he learned she did not have insurance coverage for the accident. Although Allstate received a letter regarding the suit, it was never served with a copy of the summons and complaint in that case. Allstate made a special appearance and requested dismissal from the suit on the grounds that it had never been served. Malave finally served Lescrynski, but shortly thereafter, on November 5, 1999, Malave dismissed his original case without prejudice. On November 12, 1999, he refiled his suit and this time served Allstate. Allstate again moved to dismiss, and the court granted the motion on the grounds that Allstate was not served within the applicable two-year statute of limitations nor at anytime during the first lawsuit and Malave knew the defendant was uninsured while the first case was pending.

The court of appeals however reversed holding that Malave served Allstate in a timely manner. Relying on *Stout v. Cinncinati Ins. Co.* the court held that, "O.C.G.A. § §33-7-11(d) does not require service for the purpose of making the UMC a party to the underlying tort action."[114] Rather, "service is intended only to give the UMC 'notice of the existence of a lawsuit in which it ultimately may be held financially responsible.'"[115] Accordingly, in *Stout*, the Supreme Court held, "a plaintiff can wait to serve a UMC until he files a valid renewal suit after the running of the statute of limitation."*[116]*

---

[114] *Stout*, 269 Ga. at 611, 502 S.E.2d 226.
[115] *Id*. at 611-612, 502 S.E.2d 226.
[116] *Id.* at 611, 502 S.E.2d 226.

IN PERSONAM JURISDICTION

In *Southeastern Security Insurance Company v. Lowe*,[117] Gregory J. Lowe filed suit against Kia D. Hunter in the Superior Court of Effingham County on July 2, 1998 to recover damages for injuries sustained in an automobile accident on May 21, 1997. On July 6, 1998, personal service was unsuccessfully attempted on Hunter at the address listed in the accident report. On the same day, Lowe sent a courtesy copy of the complaint by certified mail to the agent for Hunter's automobile liability insurer, Southeastern Security Insurance Company. On July 30, 1998, the superior court issued an order for service by publication based upon an affidavit of Lowe's counsel, which stated that Hunter could not be found within the state. Notice was published in the county's official legal organ for four consecutive weeks. Neither Hunter nor her insurer defended the action. On October 16, 1998, the superior court heard evidence of damages and entered judgment in favor of Lowe for $11,000.

On December 17, 1998, Lowe filed the instant declaratory judgment action against Southeastern seeking to hold it liable for the judgment entered against its insured. The parties filed cross-motions for summary judgment. The trial court granted Lowe's motion and denied Southeastern's motion. Southeastern appealed, alleging the trial court erred in ruling that service by publication in the Effingham County action sufficed to support an *in personam* judgment against the tortfeasor which could be enforced against Southeastern. The court of appeals found that this argument had merit. Judge McMurray observed that, "[t]his Court consistently has held that without personal service, *in personam* jurisdiction does not attach, and no money judgment may be recovered from the tortfeasor or his insurer."

The court noted that there are limited exceptions to this rule. Specifically, the statutory grant of service by publication upon a showing of due diligence if a plaintiff is unable to obtain

[117] 242 Ga. App. 535, 530 S.E.2d 231, 00 FCDR 1225 (2000).

personal service against an uninsured motorist.[118] A judgment so obtained is valid and may be enforced against the uninsured motorist carrier, as long as other statutory requirements are met. However, Southeastern was Hunter's liability carrier.

Although Hunter was aware of the suit, Lowe did not offer any facts to show that Hunter wilfully evaded service of process.

Accordingly, the court of appeals held that this case fell within the general rule that an *in personam* judgment against the tortfeasor must precede recovery from the insurer, and reversed the summary judgment to Lowe.

SERVICE

In *Brown v. State Farm Mutual Automobile Insurance Company*,[119] Alona Brown's suit was dismissed because she failed to timely serve the defendant after the running of the statute of limitation. The uninsured motorist carrier raised this defense in response to Brown's failure to serve. Brown appealed, contending that she diligently attempted to locate the defendant and that her motion to serve by publication should have been granted.

On October 7, 1998, five days before the running of the statute of limitation, Brown, for herself and as guardian of a minor, brought suit against Alton Snow, Jr. for injuries arising out of a car accident. Although Brown served State Farm Mutual Automobile Insurance Company, her uninsured motorist carrier, Brown has never served Snow. On January 19, 1999, State Farm filed a motion to dismiss. Over one month later, on February 22, Brown filed a motion requesting permission for service by publication. On April 9, the trial court granted State Farm's motion to dismiss. The court of appeals affirmed.

---

[118] O.C.G.A. § 33-7-11(e).
[119] 242 Ga. App. 313, 529 S.E.2d 439 (2000).

Brown's initial effort to serve the defendant failed. After three months passed, State Farm filed a motion to dismiss, and Brown did not move for service by publication for another month after the motion. Brown's attorney submitted an affidavit describing in general his efforts to locate Snow, but the affidavit contained only vague statements about his efforts, and it did not provide dates or other specifics. On the day of the hearing on State Farm's motion to dismiss, Brown submitted affidavits from Jonas Berwick, an employee of a "national locator service," and Douglas E. Dreeman, a permanently appointed DeKalb County process server. Berwick's affidavit stated in conclusory fashion that he diligently but unsuccessfully attempted to locate Snow's residence using computer databases. Dreeman stated that he was unsuccessful in attempting to serve the defendant on one day in January 1999 and another in February. He also investigated leads on two other occasions to no avail. More importantly, all of Dreeman's efforts occurred after State Farm filed its motion to dismiss. Because there was no evidence of any effort to locate or serve Snow for three months between the initial failed attempt and State Farm's motion to dismiss, the court could not say the trial court abused its discretion in finding a lack of due diligence.

Brown also contended that it is against public policy to allow the uninsured motorist carrier to move to dismiss the action based on a failure to serve the defendant when the action potentially involves that carrier and when the carrier has been properly served. The court of appeals rejected this argument. The court reasoned that the purpose of uninsured motorist legislation is to require some provision for first-party insurance coverage to facilitate indemnification for injuries to a person who is legally entitled to recover damages from an uninsured motorist, and thereby to protect innocent victims from the negligence of irresponsible drivers. It is true that a known motorist is deemed uninsured when he cannot be personally

served. But, under those circumstances, a plaintiff is not "legally entitled to recover damages from the uninsured motorist" unless he or she serves the defendant by publication and reduces his or her claim against the defendant to a judgment. And, the uninsured motorist carrier can answer in its own name, become a party to the litigation, and contest issues of liability, damages and coverage. The carrier is allowed to assert any defense that would be available to the defendant.[120]

In *Swanson v. State Farm Mutual Automobile Insurance Company*,[121] Natalie Swanson and Norma Bresil sued Andy Johnson and a John Doe for personal injuries arising out of an auto accident, on the day the statute of limitation ran, but failed to make any attempt to serve Johnson with process after the sheriff reported that he had moved and could not be found. Seeking uninsured motorist coverage, they timely served State Farm Mutual Automobile Insurance Company with process. State Farm answered, asserting all affirmative defenses that could be asserted by Johnson.

Although no pretrial conference was held, the plaintiffs and State Farm later submitted a consolidated pretrial order to the court, which made no reference to the lack of service on Johnson and which the judge did not sign or enter. It was the judge's practice to sign pretrial orders just before trial began. After two calendar calls (one of which was postponed and at one of which both sides announced "ready"), State Farm moved in writing to dismiss the complaint for failure to serve Johnson and for failure to exercise due diligence to obtain service after the initial unsuccessful attempt. Plaintiffs opposed the motion on the grounds that the pretrial order jointly submitted by the parties made no reference to this defense and that it was too late to raise the issue. Finding lack of due diligence to obtain service, the court granted the motion, which order

[120] O.C.G.A. § 33-7-11(d) and (e).
[121] 242 Ga. App. 616, 530 S.E.2d 516 (2000).

the plaintiffs appealed. Because it is undisputed that plaintiffs failed to do anything to locate or perfect service on Johnson after the initial unsuccessful attempt, evidence supported the court's finding of lack of due diligence and justified the dismissal.

Plaintiffs also argued that State Farm waived the defense by announcing "ready" at the first calendar call (without bringing the issue to the court's attention) and by not raising the issue in the proposed pretrial order. But once a party has raised the issue of insufficient service in its answer, that party waives the defense only if it engages in conduct so manifestly indicative of an intention to relinquish the defense that no other reasonable explanation of its conduct is possible. Here the evidence did not demand a finding of waiver, as the defense applied to service not on State Farm itself, but on the missing tortfeasor, and thus was not immediately apparent to State Farm; the proposed pretrial order was never entered; and the motion was filed prior to trial.

UNINSURED MOTOR VEHICLE

In *Corouthers v. Doe*,[122] Linda Corouthers brought a John Doe action to recover for personal injuries sustained when she walked into an object allegedly protruding from the back of a parked truck. After determining that her insurance policy did not provide coverage for this incident within the ambit of O.C.G.A. § 33-7-11(b)(2), the trial court awarded summary judgment to Colonial Insurance Company of California. Contending the incident was an insured event, Corouthers appealed.

Corouthers parked her vehicle 12 spaces down from the entrance of a Winn Dixie store. On a sunny day, at about 1:00 p.m., having completed her shopping, Corouthers proceeded toward her car, followed by a bag boy pushing her grocery cart. Nearly halfway there as she was walking down a row of parked vehicles, "[t]he object just struck me across the face." Corouthers

[122] 244 Ga. App. 491, 536 S.E.2d 165, 00 FCDR 2841 (2000).

never saw the object and never knew for certain what had cut her face. Corouthers immediately called for help from a friend, Berlyndia Hodges, whom she had just walked past. According to Hodges, Corouthers was covering her face with her hands to staunch the flow of blood and was "[s]tanding beside a truck with a long iron pole hanging off the truck." Hodges noticed a single pole "sticking out several feet." She testified that the tailgate was up and the pole was resting on top of the tailgate. Hodges provided immediate aid to the bleeding Corouthers and drove her to a nearby hospital. Corouthers never returned for the groceries. No evidence indicates that any note or notice was left on the truck. Neither woman wrote down the license of the vehicle. The owner of the truck and the pole or the protruding object was never established, so Corouthers sued John Doe to recover from her uninsured motorist carrier, Colonial. She argues that she satisfied Part II, "Uninsured Motorist Coverage," of her policy which requires that "[t]he bodily injury must be caused by accident and arise out of the ownership, maintenance or use of an uninsured motor vehicle."

Plaintiff asserted that the vehicle need not exert any physical force upon the instrumentality which was the immediate cause of the injury. Corouthers overlooked the fundamental fact that Part II of her policy was explicitly replaced in its entirety by a "Georgia Uninsured Motorist Endorsement (C494)." Subsection (3)(c) of the uninsured motorist endorsement at issue defined an "[u]ninsured motor vehicle" to mean "a land motor vehicle or trailer of any type: ... which is a hit-and-run vehicle whose operator or owner is unknown and which hits or causes an accident resulting in bodily injury or property damage without hitting: (i) you. . . ." (Emphasis in original.) The endorsement further provides, "[i]f there is no physical contact with the hit- and-run vehicle the facts of the accident must be corroborated by

competent evidence of any eyewitness other than a person making a claim under this or any similar coverage."

The dispositive issue was whether a pedestrian injured as a result of walking into a stationary object located in the back of a parked vehicle can obtain uninsured motorist benefits. Having reviewed this policy, the court found she could not. The record was devoid of any evidence that this stationary pickup truck parked within a grocery store lot was a "hit-and-run" vehicle within the meaning of this section. The truck did not hit her. Instead, the physical contact occurred solely between her and an object. But under the express terms of the policy, a "hit-and-run vehicle" must cause the accident, not an object of some kind. A piece of pipe resting in a truck bed was not such an integral part or component of a vehicle so as to be deemed a "vehicle."

JOHN DOE

In *Finch v. Doe,*[123] Kenneth Finch was driving his car southbound on Interstate 85, on February 14, 1997, pulling a trailer that had been manufactured by his employer. Traffic became congested, and Finch had to stop his car behind a truck. In his rearview mirror, Finch saw that an approaching sport utility vehicle was not slowing quickly enough to stop, and he braced himself for a collision. The SUV crashed into the trailer, which then hit Finch's car. The impact pushed Finch's car into the truck in front of him. The driver of the SUV pulled around Finch's car and left the accident scene. As the SUV drove away, Finch could not see its driver because the vehicle windows were tinted, but he did see that the vehicle was a black Chevrolet Blazer and that it had an out-of-state license tag. Finch noted that the tag was blue and white, and he wrote down the tag numbers and letters. A short time later, the police arrived at the accident scene.

[123] 247 Ga .App. 298, 2000 WL 1747446 (2000).

Finch gave the vehicle and tag information to a police officer investigating the accident. The police later traced the tag to Michigan and discovered that the registered owner of the Blazer was named Eugene Hall, who lives in Detroit. The police sent several letters to Hall, but he did not respond to them. The police informed Finch of Hall's identity.

Finch filed the instant lawsuit for damages arising out of the accident against "John Doe." Finch served copies of the complaint on Allstate Insurance Company, his uninsured motorist carrier, and on Travelers Property Casualty, the uninsured motorist carrier for his employer. Allstate and Travelers each moved for summary judgment on the ground that Finch cannot maintain his "John Doe" action because he knows the identity of the hit-and-run driver. The trial court granted the motions. Finch appealed from the trial court's summary judgment rulings. Because there were genuine issues of material fact as to the identity of the driver of the vehicle that hit Finch, the court of appeals held that the trial court erred in granting summary judgment to the insurance companies.

Finch knew before he filed his lawsuit that Hall was the registered owner of the SUV that hit him. But Finch did not see, and did not know, who was driving the vehicle at the time of the collision. While the hit-and-run driver might have been Hall, there was no evidence in the record identifying him, or anyone else, as the driver. Because the driver was unknown, Finch properly filed a "John Doe" action under the alternative language of the uninsured motorist statute.

SUBROGATION

In *Landrum v. State Farm Mutual Automobile Insurance Company*,[124] King sued Samuel Landrum for damages arising out of an automobile accident. State Farm cross-claimed against Landrum, the tortfeasor, for indemnity or repayment of any award that King collected from State

[124] 241 Ga. App. 787, 527 S.E.2d 637, 00 FCDR 526 (2000).

Farm under King's uninsured motorist coverage. Prior to trial, Colonial Insurance Company of California, Landrum's automobile liability insurer, tendered its policy limits to King and King released Colonial and Landrum for all claims "except to the extent other insurance coverage is available which covers such claim or claims."

The release, drafted by Landrum's attorneys, was limited as follows:

> This limited release is in no way intended to release any claims for uninsured or underinsured motorist coverage I [King] have or may have against State Farm Insurance Company. This release cannot and does not release whatever rights and interests State Farm Insurance Company might have or claim hereafter against Samuel Landrum pursuant to *Darby v. Mathis*, 212 Ga. App. 444, 441 S.E.2d 905 (1994). This provision takes precedent [sic] to any other provisions herein to the contrary.

King then proceeded to trial, the jury awarded him $300,000, and the trial court entered judgment against Landrum. The parties agree that after the insurers paid their policy limits, $85,000 of the jury's award to King remained unsatisfied. After releasing the jury, the trial court heard argument on State Farm's cross-claim and entered judgment for State Farm against Landrum in the amount of State Farm's payment to King, $115,000. Landrum argued that because King did not receive full compensation for his loss, State Farm may not assert its subrogation rights against him. State Farm argued that under the circumstances of this case, King was fully compensated.

State Farm was subrogated to King's rights against Landrum to the extent of the payment it made to King. The release King signed not only reserved his cause of action against Landrum to the extent of his UM coverage, it was conditioned upon a reservation of whatever rights State Farm might thereafter claim against Landrum. In this case, State Farm had not sought reimbursement from King, the injured party. Therefore, the court of appeals concluded that the

"full compensation" rule did not prohibit State Farm's subrogation claim against Landrum.[125] Further, State Farm had not sought to recover medical or disability payments it made to King either from King or from Landrum pursuant to a subrogation agreement. State Farm exercised its statutory subrogation rights pursuant to O.C.G.A. § 33- 7-11(f) and sought reimbursement from the tortfeasor for the amount it paid to King. Because King released Landrum for all claims except to the extent of his UM coverage, King has no further claim against Landrum nor is he entitled to any potential recovery from Landrum. Thus, State Farm is not asserting priority to any part of King's actual or potential recovery. Consequently, this is not a contest between the insured and the insurer which could result in the insured going unpaid to some extent. Thus, regardless of whether King was fully compensated for his loss under the circumstances of this case, allowing State Farm to exercise its subrogation rights against Landrum would not deprive King of his priority under the full compensation rule.

In *State Farm Mutual Automobile Insurance Company v. Wright.*,[126] Miller's car was struck from behind by a "John Doe" driver, causing his vehicle to collide with Wright's vehicle. When Wright sued Miller to recover for injuries sustained in the accident, she also served her uninsured motorist carrier, State Farm. State Farm answered in its own name and cross-claimed against Miller. Thus State Farm participated as an underinsured motorist carrier, covering damages above Miller's liability insurance coverage of $25,000, and as an uninsured motorist carrier because of "John Doe's" involvement. The jury awarded Wright a total of $48,856. The next day, Miller objected to the inclusion of a statement regarding the cross-claim on the judgment. Counsel met in chambers at which time State Farm requested the trial court enter judgment on the cross-claim. Following the judge's reservation of ruling, State Farm filed a

[125] O.C.G.A. § 33- 24-56.1(b)(1).
[126] 245 Ga. App. 493, 538 S.E.2d 147, 00 FCDR 3449 (2000).

motion to set aside the judgment. The trial court ultimately denied State Farm's motion to set aside the judgment and the motion to enter judgment on the cross-claim, concluding that State Farm waived its cross-claim for subrogation by not pursuing it during trial. State Farm satisfied its portion of the judgment in the amount of $24,359.44. On appeal, State Farm contended the trial judge erred in ruling that State Farm waived its right to the cross-claim because it did not reassert the cross-claim prior to the rendering of judgment, the cross-claim was valid because it was asserted in State Farm's answer and preserved in the pre-trial order, the cross-claim could not be asserted during the course of the trial because it would lead to impermissible evidence, and the claim did not ripen until damages were determined by the jury. The court of appeals reversed and remanded with direction to enter judgment on the cross-claim.

State Farm argued that even though the cross-claim was not mentioned in the succinct outline of the case portion of the Consolidated Pre-Trial Order, but rather in the "special authorities" section, it should nevertheless be preserved. State Farm's portion of the proposed pre-trial order states: "State Farm is entitled to a judgment against the Defendant for any amount it is determined to owe." However the court of appeals disregarded this issue, because the judge never signed the proposed pre-trial order.

State Farm correctly argued that its cross-claim did not ripen until damages were determined by the jury and paid by the insurer. The subrogation claim did not ripen until the judgment was satisfied. Once the judgment was satisfied by payment, the material facts were established, leaving no issue for jury resolution.

Since State Farm's statutory right to subrogation for the sum certain it paid Wright in its capacity as an uninsured motorist carrier presented no jury question, the court did not address

whether pursuing the claim before the jury would inject impermissible evidence into the proceeding.

NOTICE OF ACCIDENT

In *Manzi v. Cotton States Mutual Insurance Company*,[127] on April 18, 1997, Lisa Manzi was injured in an automobile collision. She sued Wendell Kistler, who she claimed was driving the truck in which she was a passenger. On November 3, 1997, she served Cotton States Mutual Insurance Company, her uninsured motorist carrier. Cotton States moved for summary judgment, arguing that it had no liability under the policy because Manzi failed to notify it of the accident in a timely manner. The trial court granted the motion, and Manzi appealed. The court of appeals affirmed.

Section IV of the insurance policy issued to Manzi, entitled "DUTIES AFTER AN ACCIDENT OR LOSS," provided in relevant part:

> We must be notified promptly, but in no event later than 60 days, of how, when and where the accident or loss happened.

It was undisputed that Cotton States was not notified of the accident until November 3, 1997, when it was served with Manzi's complaint. Although the policy did not expressly state that the 60-day period begins on the date of the accident or loss, that was clearly implied by the policy language, which required prompt notice of "how, when and where the accident or loss happened."

According to the court of appeals the "natural, obvious meaning" of this language was that the occurrence of the accident or loss triggered the requirement to provide notice. The notice provision applied to all claims made under the policy, not just to uninsured motorist claims. And

[127] 243 Ga. App. 277, 531 S.E.2d 164, 00 FCDR 1381 (2000).

thus was to be read consistently with all of the coverages available under the policy. The court of appeals observed that,

> Indeed, the purpose of a notice provision is not simply to inform the insurer that a claim is being made under the policy, but to notify the insurer of the occurrence of a potentially covered event.

In *O'Neal v. State Farm Mutual Automobile Insurance Company*,[128] Earl Michael O'Neal appealed the trial court's order granting summary judgment to the defendant, State Farm Mutual Automobile Insurance Company. Applying Tennessee law, the trial court granted summary judgment to State Farm based upon O'Neal's failure to comply with the notice provisions in the insurance contract. O'Neal contended that, under Georgia law, an issue of fact remained as to whether timely notice was provided. State Farm cross-appealed the denial of its motion for summary judgment on coverage grounds.

O'Neal was a Tennessee resident and the insurance contract was executed and delivered in Tennessee. O'Neal asserted that on February 5, 1996, he was injured while he was a passenger in a rental car which was involved in a collision with a large bale of hay attached to the front end of a farm tractor. The collision occurred in Georgia. The rental car was not badly damaged, and the police were not notified of the collision. O'Neal averred that he called State Farm to provide notice of the collision within two or three months after it occurred. O'Neal deposed that he left a message with Linda who worked in the agent's office. Linda Gentry, who worked in the agent's office, testified that O'Neal first notified her on March 10, 1997, over 13 months after the collision.

The insurance contract provided that any person making a claim under the uninsured motor vehicle coverage shall: "report an accident to the police within 24 hours and to us within 30 days which involves a land motor vehicle whose owner or operator is unknown." It is

[128] 243 Ga. App. 756, 533 S.E.2d 781, 00 FCDR 1937 (2000).

undisputed that O'Neal failed to comply with the notice provision. Construing the evidence in the light most favorable to O'Neal, he informed State Farm of the collision two to three months after it happened, and the police were not informed for more than a year after the collision. Pursuant to *Alcazar v. Hayes*,[129] once it is determined that the insured has failed to provide timely notice in accordance with the insurance policy, it is presumed that the insurer has been prejudiced by the breach. The insured, however, may rebut this presumption by proffering competent evidence that the insurer was not prejudiced by the insured's delay. The Tennessee Supreme Court offered a nonexclusive list of factors for determining whether the insurer had been prejudiced: the availability of witnesses to the accident; the ability to discover other information regarding the conditions of the locale where the accident occurred; any physical changes in the location of the accident during the period of the delay; the existence of official reports concerning the occurrence; the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene; the ability of experts to reconstruct the scene and the occurrence; and so on.

Applying the list of factors to the circumstances of this case the court of appeals concluded the trial court properly applied Tennessee law and properly granted summary judgment to State Farm on the notice issue. The court of appeals did not consider the cross-appeal because the issue had been mooted by the decision in the primary appeal.

STATUTE OF LIMITATIONS

Does the two- year statute of limitation for a personal injury claim apply to an insurer who brings a subrogation action to recover for the uninsured motorist benefits payments it made to its insured, or does O.C.G.A. § 33-7-11(f) create a statutory right of subrogation that gives the

[129] 982 S.W.2d 845, 856 (Tenn. 1998).

insurer, twenty years from the date of the collision to file suit? In *Whirl v. Safeco Insurance Company*,[130] the court of appeals concluded that, under the plain and unequivocal language of O.C.G.A. § 33-7-11(f), in a subrogation action by an insurer to recover personal injury payments it made to its insured under Georgia's Uninsured Motorist Act, an insurer is bound by the two-year statute of limitation that is applicable to the insured to whom the insurer is subrogated, because the insurer stands in the shoes of its insured.

On July 13, 1995, Willie E. Richmond was involved in an automobile collision with Shawn Whirl. When the collision occurred, Whirl was uninsured. Richmond was insured by Safeco Insurance Company. Safeco paid Richmond UM benefits for damages he sustained as a result of the collision in the amount of $788.04 for property damage and $15,000 for personal injuries. On October 26, 1998, more than two years after the date of the collision, Safeco instituted this subrogation action against Whirl to recover the property damage and personal injury uninsured motorist benefits paid to Richmond. Whirl timely answered and raised the affirmative defense that the suit was barred by the statute of limitation for personal injuries. Thereafter, Whirl moved for judgment on the pleadings on the basis that Safeco's personal injury subrogation claim was barred by the statute of limitation since it had not been commenced within two years of the July 13, 1995 collision. On April 14, 1999, the trial court denied Whirl's motion and held that, under O.C.G.A. § 9-3-22, the statute of limitation for a subrogation claim brought pursuant to O.C.G.A. § 33-7-11(f) is 20 years. The court of appeals granted Whirl's application for interlocutory review.

The court of appeals noted that under the Uninsured Motorist Statute "the insurer, as subrogee, stands in the shoes of the insured and must pay its proportionate share of costs, expenses, and attorney fees to the insured. Consequently, the rights to which the subrogee

[130] 241 Ga. App. 654, 527 S.E.2d 262 (May 26, 2000).

succeeds are the same as, and no greater than, those of the subrogor; therefore, the subrogee's rights are subject to any limitations incident to them in the hands of the subrogor, and subject to any defenses that might have been urged against the subrogor."

Since the language of the uninsured motorist statute is plain and unequivocal, the court could not interpret the legislative intent contrary to that language. Therefore, the insurer, as subrogee, is bound by the two-year statute of limitation for personal injury actions of its insured.

SETOFF

In *Yates v. Dean*,[131] Clayton Yates, Jr., his wife Debra Yates, and his children Clayton Yates III, Carmen Yates, and Cecelia Yates, appealed the judgment entered on the jury verdict in their favor in the suit they filed against Robert Lawrence Dean III to recover damages incurred in an automobile collision. The jury returned a verdict in favor of Clayton and Debra Yates for medical bills in the amount of $5,360.90; in favor of Carmen Yates in the amount of $3,000; and in favor of Cecelia Yates and Clayton Yates III, in the amount of $1,000 each. The trial court reduced the jury's award to Clayton and Debra Yates by $5,138.65, based upon evidence that the Yateses' uninsured motorist insurance carrier had previously paid medical bills in that amount. The Yateses raised five enumerations of error, all involving the write-off. The court concluded that the write-off was proper, and affirmed the judgment.

State Farm was served as the Yateses' uninsured motorist carrier. It answered in the name of Dean and cross-claimed against him. At trial, out of the presence of the jury, State Farm presented its records showing payment of the Yateses' medical bills. The Yateses' attorney objected to the introduction of this exhibit on the ground that she had never seen it and it had not been listed in the pretrial order. The Yateses contended that State Farm could seek

[131] 244 Ga. App. 333, 535 S.E.2d 335, 00 FCDR 2653 (2000).

reimbursement for its medical bill payments only after the insureds had been fully compensated for the loss,[132] and in this case they had not been fully compensated. The court of appeals however, concluded that by its terms, the subrogation statute clearly applied only "[i]n the settlement of any claim for personal injury." This claim was not settled; it was litigated and resulted in a jury verdict. Nor did it involve "reimbursement." State Farm did not seek to recover payments made to the Yateses; it merely sought to set off the amount it had already paid them from the amount of the judgment. The Yateses did not deny they received the payments from State Farm. Disallowing the set-off would have resulted in a double recovery for the Yateses.

The provisions of O.C.G.A. § 33-24-56.1 apply when the benefit provider is seeking reimbursement, which was not the case here. The policy itself provided for non-duplication of payments. As a contractual matter, therefore, this fell outside the purview of the statute. Moreover, the scheme of notices in the statute begins with the provision that when a benefit provider has paid medical benefits, the person asserting a claim for recovery against a third party must provide notice to the benefit provider by certified mail of their claim against the third party.[133] No evidence in the record indicates that this notice was provided to State Farm by the Yateses.

The Yateses asserted that the write-off was improper because State Farm did not raise this defense or claim for set-off in their answer and counterclaim, as required by O.C.G.A. § 9-11-12(b), or in the pretrial order. The court did not accept this argument. Nonduplication of payments is not an affirmative defense listed in O.C.G.A. § 9-11-12(b), nor is it a compulsory counterclaim; it is not an independent claim for recovery against the plaintiffs. State Farm was therefore not required to raise this issue in its answer or counterclaim. Instead, it is simply a

[132] O.C.G.A. § 33-24- 56.1(c)
[133] O.C.G.A. § 33-24- 56.1(g).

reason for reducing the amount of a verdict so that the plaintiff does not recover more than the amount of actual damages.

SALVAGE

In *Lamb v. Salvage Disposal Company of Georgia,* Matthew K. Lamb appealed from the trial court's order granting the motions to dismiss or for summary judgment of Sadisco and State Farm Mutual Auto Insurance Company. The court of appeals affirmed.

On March 9, 1996, Sally A. Soggs' vehicle, insured by State Farm, collided with a car Lamb was driving. Lamb's 1987 Honda CRX sustained severe front end damage, including a bent steering wheel, broken windshield, and dashboard damage. Chadwick's Wrecker Service towed the damaged vehicle to its lot in Columbus. State Farm determined that the Honda, which had more than 177,000 miles, was a total loss. While settlement negotiations were pending, State Farm arranged for Sadisco to tow the vehicle from Chadwick's to a salvage yard in Atlanta belonging to Sadisco.

Lamb sued Soggs for the property damage to his vehicle and for damages for personal injuries. A jury awarded $26,461.39 in damages to Lamb in that litigation. Lamb brought a separate suit for conversion against State Farm in Muscogee County Superior Court. Lamb alleged that State Farm had arranged for his vehicle to be moved from Columbus to Atlanta without his permission, a claim vigorously repudiated by State Farm. In suing State Farm for conversion, Lamb sought general damages, punitive damages, costs, interest, and attorney fees. After State Farm won a directed verdict on all issues except the purported conversion of the vehicle, Lamb voluntarily dismissed the action. Lamb, however, appealed the directed verdict. In *Lamb v. State Farm Ins. Co.*,[134] we affirmed the trial court's ruling.

[134] 240 Ga. App. 363, 522 SE2d 573 (1999).

While Lamb's appeal was pending, Lamb instituted litigation in the Superior Court of Fulton County on March 16, 1998. In this suit, Lamb again sued State Farm for conversion but added Sadisco as a defendant. Lamb alleged that the defendants "unlawfully seized, detained and converted to their own use" his Honda. Lamb sought $4,500 in general damages for the value of the Honda, punitive damages, interest, costs, and attorney fees. In responding to Sadisco's interrogatories, Lamb claimed that O.C.G.A. § 44-12-150 *et seq*. applied and that his "damages are based on the value before the conversion and the value after the conversion."

Sadisco and State Farm filed separate motions to dismiss or in the alternative for summary judgment. In its motion, Sadisco claimed that because a State Farm representative had instructed it to move Lamb's vehicle and since it acted only as State Farm's agent, it was in lawful possession of the vehicle. Sadisco further contended that no genuine issue of material fact existed about any intentional breach on its part of any duty to Lamb. The trial court agreed and awarded summary judgment to Sadisco.

Noting that the Superior Court of Muscogee County had directed a verdict in favor of State Farm on Lamb's claims for punitive damages, attorney fees, and expenses of litigation, the trial court dismissed those claims. The court also decided Lamb's "prayer for general relief ($4,500.00 for value of the car) must be DISMISSED as the Plaintiff has already received compensation for the value of the vehicle in the January 7, 1998, jury verdict (in his Muscogee County personal injury case)." The court noted, "[Lamb] is not allowed a double recovery."

In his sole enumeration of error, Lamb contended the trial court erred in granting Sadisco's and State Farm's motions to dismiss or for summary judgment. While the court arrived at the same decision as the trial court, it got there by a different route.

In a suit to recover personal property, a plaintiff may elect to recover, alternatively, the property or its value, damages only, or the property and its hire. In this case, notwithstanding the return of his personal property, Lamb sought to recover solely damages. But the statute offering an election of remedies must be construed in conjunction with O.C.G.A. § 44-12-153.

O.C.G.A. § 44-12-153 provides:

> In actions for the recovery of personal property, if the defendant disclaims all title and tenders the property to the plaintiff when he files his answer, together with reasonable hire for the same since the conversion, the costs of the action shall be paid by the plaintiff unless he proves a previous demand of the defendant and a refusal to deliver.

Here, it was undisputed that State Farm never claimed title to the property and tendered the property back to Lamb by returning the vehicle before it answered Lamb's complaint. When a plaintiff does not ask for any reasonable hire, a defendant may comply with this statute without tendering reasonable hire from the date of the conversion. When Lamb submitted a written demand in September 1996 for the return of his car, he did not make any request for reasonable hire, insisting only that the car be returned to him in Columbus by October 10, 1996. In any event, it would not appear that this totaled vehicle could have any value "for hire" even had Lamb sought an amount.

Lamb asserted his entitlement to "damages . . . based on the value before the conversion and the value after the conversion." Under O.C.G.A. § 44-12-152, "the plaintiff may recover a sum in the amount of the highest value which he is able to prove existed between the time of the conversion and the trial." Nevertheless, in an action for conversion, the measure of damages as set forth in O.C.G.A. § 44-12-152 applies only when the property continues to be "unlawfully detained." When a party elects to sue for damages for conversion and the property has been

returned before trial, as here, the damages are limited to recovery "for the diminution in value of the [property] only for the time period between the alleged conversion and the property's return."

Even assuming that Sadisco and State Farm converted the car in March 1996 as Lamb claims, the evidence indisputably established that the vehicle was returned to Lamb before trial. Even further assuming the measure of damages was the diminution in value of this Honda between March 1996 and March 1997, the amount in damages is zero. Before the alleged conversion, the car had sustained severe body damage in excess of the vehicle's fair market value. No evidence suggested otherwise. Thus, in March 1996 at the time of the alleged conversion, the Honda was a total loss, and in March 1997, it was still a total loss. Since the only claim remaining against State Farm is the amount, if any, of damages for the alleged conversion, and those damages are zero, State Farm was entitled to judgment as a matter of law.

Lamb also contended that Sadisco was not entitled to benefit from the directed verdict obtained by State Farm on the issues of punitive damages, costs, and attorney fees. He asserts that a jury must resolve the issue of conversion and the amount of damages he can recover from Sadisco.

Lamb's argument overlooks the fact that O.C.G.A. § 13-6-11 does not create an independent cause of action but merely permits in certain limited circumstances the recovery of the expenses of litigation incurred as an additional element of damages. Similarly, punitive damages are not recoverable unless general damages have been awarded. Since Lamb could not establish under O.C.G.A. § 44-12-150 *et seq.* any amount of damages for the alleged conversion of his vehicle, he could not obtain the other relief he sought. Accordingly, the court found that Sadisco was entitled to judgment as a matter of law.

BAD FAITH

In *Shaffer v. State Farm Mutual Automobile Insurance Company*,[135] Netera Shaffer sued State Farm seeking to recover payment of benefits and bad faith penalties and attorney fees pursuant to O.C.G.A. §§ 33-4-6. The trial court granted State Farm's motion for partial summary judgment on the O.C.G.A. §§ 33-4-6 bad faith claims, and Shaffer appealed. The court of appeals affirmed.

Shaffer was involved in an automobile accident on July 6, 1995. She was insured by State Farm under a policy providing for payment of reasonable medical bills incurred as the result of an automobile collision. Shaffer received medical treatment at South Fulton Hospital on the day of the accident, and State Farm paid the resulting medical bill, as well as the cost of transport by ambulance. The next day, Shaffer sought medical attention from Dr. Patricia Glenn, an internist, who referred her to Atlanta Human Performance Center for physical therapy. State Farm paid Dr. Glenn's bill in the amount of $180. The bill for Shaffer's treatment at Atlanta Human Performance Center, which was submitted to State Farm, exceeded $5,000.

State Farm submitted plaintiff's medical bills and records to Turner Services, an independent consulting firm, who retained Douglas Smith, M.D., a licensed physician, to conduct a review. In his original report, Dr. Smith concluded that certain medical bills were excessive, and that the records did not demonstrate the necessity of physical therapy for treatment of the injuries Shaffer suffered as a result of the accident. After additional medical records were provided, Dr. Smith issued a supplemental report, which concluded that a portion of the physical therapy treatment was excessive, and that the billing statements included duplicate charges. Dr. Smith recommended partial payment in the amount of $1,185.81, which State Farm tendered to Shaffer.

[135] 246 Ga. App. 244.

Shaffer filed suit, seeking payment of all medical bills, as well as statutory penalties and attorney fees under O.C.G.A. §§ 33-4-6 for State Farm's refusal to pay certain benefits. On State Farm's motion, the trial court granted partial summary judgment on the O.C.G.A. §§ 33-4-6 claims, finding that "the [d]efendant's refusal to pay was reasonable as a matter of law because a licensed physician advised the [d]efendant that certain treatments were not necessary."

Insurers are subject to penalties and attorney fees if they refuse to pay a covered loss in bad faith.[136] However, it is well-settled that bad faith penalties are not authorized “if an insurer has a reasonable and probable cause for refusing to pay a claim.”

The advice of an independent medical examiner that the treatment furnished a claimant is not in fact necessary treatment for injuries arising from the accident covered by the insurance policy, unless patently wrong based on facts timely brought to the insurer's attention, provides a reasonable basis for an insurer's denial of a claim for payment for such treatment.

Here, Dr. Smith, an independent physician, advised State Farm that the treatment furnished to Shaffer was not medically necessary for the injuries she sustained as a result of the accident. Shaffer suggests that Dr. Smith might have been biased toward the denial of her claims; however, she failed to present evidence that his opinion was “patently wrong.” Thus, State Farm had a reasonable basis upon which to deny Shaffer's claims. Therefore, the court concluded that the trial court properly granted partial summary judgment to State Farm on plaintiff's claims for statutory penalties and attorney fees.

FORM E CERTIFICATE

In *Raintree Trucking Company, Inc. v. First American Insurance Company*,[137] The issue on appeal was the effect of a "Form E" certificate of insurance filed with the Texas Railroad

[136] O.C.G.A. §§ 33-4-6

Commission. The "Form E" certificate represented that First American Insurance Company insured Raintree Trucking Company for damages caused by Raintree's trucks; in fact, Raintree had no insurance from First American, but only from Commonwealth General Insurance Company, which had been placed in receivership. First American refused to pay a Texas judgment entered against Raintree for property damages caused by one of its trucks, so Raintree filed the present Georgia action against First American to recover for having satisfied the judgment. The court of appeals held that representations contained in Form E certificates are not intended to benefit the motor carrier but to benefit those injured by the carrier (i.e., the traveling public), and therefore in a dispute with the insured, an insurance company is not estopped from denying coverage where no insurance contract exists.

As of June 1992, Commonwealth insured Raintree and filed the requisite federal certificate with the then Interstate Commerce Commission to reflect that coverage. Commonwealth experienced problems regarding its qualifications to file the correlating state certificate (Form E) with the Texas Railroad Commission, and so in March 1993, Commonwealth entered into an indemnity or "fronting agreement" with First American, which agreement allowed Commonwealth to file Form E certificates in the name of First American as of February 1, 1993. Under this arrangement, the Form E certificates showed that First American insured Commonwealth clients, when in fact Commonwealth did. Commonwealth indemnified First American for any liability First American incurred as a result of filing the Form E certificates. Based on this agreement, Commonwealth filed a Form E with the Texas Railroad Commission in April 1993 (amended in May 1993), certifying that as of June 1992 First American was the liability insurer of Raintree.

---

[137] 245 Ga. App. 305, --- S.E.2d --- (2000).

Meanwhile, in September 1992, a driver operating a Raintree truck caused an accident in Texas, resulting in property damage to a vehicle owned by Davidson Oil. Davidson Oil filed suit against Raintree in July 1993. Commonwealth went into receivership, and so Raintree demanded that First American provide coverage and defense for the action. First American eventually declined. In 1996, a Texas jury awarded Davidson Oil $46,646 against Raintree, which judgment Raintree satisfied.

Raintree sued First American in Georgia to obtain reimbursement, arguing that although there was no insurance policy between First American and Raintree, the April/May 1993 Form E certificates filed with the Texas Railroad Commission estopped First American from denying coverage to Raintree and thus obligated First American to reimburse Raintree for payment of the judgment. First American countered that Form E certificates were not for the benefit of the insured but for the sole benefit of those who may have a cause of action for damages for the negligence of the motor common carrier. The trial court agreed and granted summary judgment to First American. Raintree appealed, contending that the court erred in finding no fact issue on the question of whether First American was estopped from denying coverage, or on the question of whether Raintree was a third-party beneficiary of the fronting agreement.

The court of appeals concluded that Georgia law applied because no other state's law had been pleaded or proved.

Raintree contended that First American was estopped to deny the express statement in the Form E certificate that First American issued a liability policy to Raintree. Raintree also argued that the Form E certificate filed pursuant to the fronting agreement between First American and Commonwealth created a retroactive contract of insurance coverage. The court rejected both arguments and noted that Georgia common law is clear that estoppel cannot create a contract of

insurance coverage where none existed when the loss occurred. The court's reasoning was that the insurance coverage reflected in such legally mandated certificates "is not for the benefit of the insured (motor common carrier) but for the sole benefit of those who may have a cause of action for damages for the negligence of the motor common carrier." Since the purpose of the Form E certificate was to protect the public, not Raintree; Raintree could not reasonably rely on the certificate for protection. Accordingly the court concluded that there was no estoppel.

The court also refused to apply the doctrine of third-party beneficiary. Raintree contended that it was a third-party beneficiary to the fronting agreement between First American and Commonwealth, in which First American agreed to file the Form E certificates. The court rejected this argument as well for two independent reasons. First, the concept of the "third-party beneficiary" doctrine is to allow a third party to sue to enforce the agreement. Here the fronting agreement provided that in compensation for First American filing certificates of insurance, Commonwealth would indemnify First American for any liability arising out of such filings. In compliance with that agreement, First American allowed the Form E certificate to be filed in its name with the Texas Railroad Commission. Thus, First American complied with its obligations as provided in the fronting agreement. There is no basis for a third party to sue to enforce that agreement, as the agreement had been performed.

Second, even if there were a breach, Raintree would have no standing to sue for that breach. That claim belongs to Commonwealth or its receiver. For a third party to have standing to sue, it must clearly appear from the contract that it was intended for his benefit. The intent must appear from the face of the contract. The fronting agreement in this case is itself styled as an indemnity agreement and makes no reference to Raintree or to any insureds of Commonwealth. Nowhere does it clearly appear that the agreement was intended by the parties

to be for Raintree's benefit. Moreover, to the extent the agreement was intended to benefit Raintree, the benefit was to allow Raintree to operate in Texas by providing minimum liability coverage to members of the motoring public and not to require First American to reimburse it for damages it negligently caused.

The court held that summary judgment to First American was proper.

CONCLUSION

There were no watershed decisions affecting auto insurance law in Georgia during the past year. Virtually all of the major decisions of the Georgia appellate courts were extensions or refinements of previous decisions. Most of the decisions at the appellate level arose in the context of uninsured motorist cases.

RECENT CASE LAW DEVELOPMENTS IN GEORGIA WORKERS' COMPENSATION (1999)

By: N. Staten Bitting, Jr. and Sonja R. Tate
Fulcher, Hagler, Reed, Hanks & Harper, LLP
Augusta. Georgia 30903-1477
(706) 724-0171

INTRODUCTION

In 1999, the Supreme Court of Georgia and the Court of Appeals of Georgia once again considered a large volume of appeals of workers' compensation awards as well as appeals from tort suits involving workers' compensation issues, primarily the exclusive remedy provisions of the act. This article provides a synopsis of cases decided between February 15, 1999, and February 15, 2000. Because of the large number of decisions, every effort is made to make each synopsis succinct, particularly where the decision does not appear to add significantly to the development of the law and in cases which were decided primarily based on the any evidence rule. The Administrative Law Judge who conducted the hearing will be referred to as the ALJ. The Workers' Compensation Act will sometime be referred to as simply WCA.

APPEALS

Brassfield & Gorrie v. Ogletree, 241 Ga. App. 56, 526 S.E.2d 103 (1999). The Superior Court affirmed State Board award within 20 days of the hearing of the appeal. It postponed ruling on the employee's motion for an award of fees for frivolous appeal. More than 20 days after the hearing, the Superior Court entered an award of attorney's fees in favor of employee. The Court of Appeals held that Superior Court lost jurisdiction over the matter 20 days after the hearing. The fee award was reversed.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Boyd Brothers Transportation Co v. FonvilIe, 237 Ga. App. 721, 516 S.E.2d 573 (1999). The continuous employment doctrine is the central issue. The Claimant made his home in North Carolina. He requested to be transferred to a terminal in Georgia. The employer accommodated his request and provided him with lodging facilities in addition to his salary. He was struck by a car and injured while walking from the Georgia terminal to a convenience store for food. The employer argued that the continuous employment doctrine should not apply because the employee was working at the Georgia terminal at his request and was not required to do so by the employer. The Court of Appeals rejected this argument finding that the placement of the driver at the Georgia terminal was mutually beneficial, found that the continuous employment doctrine applied and that the injury was compensable.

Hulbert v. Domino's Pizza, Inc., 239 Ga. App. 370, 521 S.E.2d 43 (1999). The employee delivered pizzas. While on his route, he pulled over to the side of the road in response to a vehicle following him flashing blue lights. When the employee exited his vehicle, someone doused him with gasoline and set him on fire. The employee could not identify the assailant. The Claimant argued that he was the victim of an unexplained accident and entitled to the presumption that the injury arose out of and in the course of his employment. The ALJ found that the Claimant was not entitled to a presumption that the accident was work related and that the employee failed to satisfy his burden of showing his injury arose out of his employment. The Appellate Division and the Superior Court affirmed the ALJ's award. The Court of Appeals reversed, finding that the accident resulted from a risk reasonably incident to the employment and that the risk belonged to and was connected with what a worker does in fulfilling his duties. The court found there was a causal connection between the conditions under which the employee

was being performed and the resulting injury. It further concluded that pizza delivery persons are exposed to dangers due to the nature and hours of their work. This decision provides a good general discussion of the test to be utilized when determining when an injury arose out of and in the course of employment.

Webster v. Dodson, 240 Ga. App. 4, 522 S.E.2d 487 (1999). The appeal is from a tort suit. A supervisor gabbed the employee by the shoulder to get her attention and quiet her down while she was dealing with a customer complaint. The Court of Appeals held that the injury from the supervisor's conduct arose out of and in the course of employment. The tort suit was barred by the exclusive remedy provisions of the Workers' Compensation Act.

AVERAGE WEEKLY WAGE

Groover v. Johnson Controls World Service, 241 Ga. App.. 791, 527 SE.2d. 639 (2000). The employee argued that the term "wages" under O.C.G.A. § 34-9-760 includes amounts paid by the employer toward the employees' health insurance plan and that these insurance payments should be used in calculating the average weekly wage. The Board and the Court of Appeals rejected this argument.

CHANGE OF CONDITION

Georgia-Pacific Corp. v. Wilson 240 Ga. App. 123, 522 S.E.2d 700 (1999). The ALJ found that the employee failed to prove linkage between the original injury and the later appearing Reflex Sympathetic Dystrophy and psychological complaints. The change of condition and medical benefits claims was denied. The Superior Court reversed the Board. The Appellate Court reversed the Superior Court based on the any evidence rule.

Aldrich v. City of Lumber, 241 Ga. App. 724, 530 S.E.2d. 195 (1999) *cert. granted* (July 13, 2000). The employee claimed benefits from a first accident while working with first employer. The date of the first accident was 09/22/89. The ALJ denied the claim. The employee then began secretly working for other employers. The Appellate Division reversed the ALJ and awarded benefits on 05/03/91. The employee then began receiving Social Security Disability Income benefits also. The employee claimed another accident with the second employer. The first employer found out about the secret employment and the second claim, suspended income benefits, then requested reimbursement for benefits paid during the time employee was secretly working for other employers. The ALJ and the Appellate Division found a change of condition under O.C.G.A. § 34-9-104(d)(1) as of 02/07/91 and ordered repayment by the employee. The employee asserted (a) that the 05/03/91 award could not be modified because of approval of reimbursement agreement between Subsequent Injury Trust Fund and the employer in 1994, and (b) that the Board erroneously altered retroactively its finding of a compensable injury in its award of 05/03/91 back to 02/07/91. The reimbursement agreement argument was rejected. The Court of Appeals, per Judge Smith, initially agreed with employee that the Board impermissibly altered its award retroactively in violation of O.C.G.A. § 34-9-104(d)(1), reversing in part and remanding. On a motion for reconsideration, the substitute opinion per Judge Eldridge affirmed the Board and found the retroactive modification of the award permissible. The Court relied on *Bahadori v. National Union Fire Ins. Co.*, 270 Ga. 203, 1, 507 S.E.2d 467 (1998).

CREDITS/OFF-SETS

Georgia Forestry Commission v. Taylor, 241 Ga. App. 151, 526 S.E.2d 373 (1999), *cert. denied* (Apr. 28, 2000). This is a case of first impression. The issue is whether the employer's

credit under § 243(b) of the Workers' Compensation Act is to be calculated on the gross amount of the disability benefits paid by the employer or on the net amount of disability benefits received by the employee. The Court of Appeals held that the credit was to be based on the net amount of benefits received by the employee. Note that this decision involved State Disability Retirement benefits, but the issue of whether the employer is entitled to a credit under this plan was not raised or addressed.

EMPLOYMENT/STATUTORY EMPLOYER

Greg Fisher, Ltd v. Sample, 238 Ga. App. 825, 520 S.E.2d 280 (1999). The Claimant owned a carpentry business which was subject to the Workers' Compensation Act. Although he performed work along with his employees, he had exempted himself from coverage pursuant to O.C.G.A. § 34-9-2.2. His business acted as a subcontractor on a construction job. When the Claimant was injured, he made a claim against the General Contractor as statutory employer. The General Contractor controverted the claim on the basis that the Claimant had exempted himself from coverage in his own business. The Claimant then argued that the general contractor and its insurer were estopped from asserting the defense of no coverage as to him under the provisions of O.C.G.A. § 34-9-124(b), which provides that an insurer cannot assert the defense of no coverage under the act after it has issued a policy insuring an employer. The Court of Appeals found that the Claimant could not recover, however, by making a finding that he was an employer within the definitions of the Workers' Compensation Act and not an employee.

EXCLUSIVE REMEDY

Berry v. Davis Feed & Seed, Inc., 237 Ga. App. 768, 516 S.E.2d 812 (1999). The

Plaintiff was an employee of Teston Construction. Teston was building a house for Mr. Davis, the owner of Davis Feed. Davis Feed had certain employees also working at the construction site attempting to raise a wall. The Plaintiff sued Davis Feed under the doctrine of respondeat superior, alleging that one of its employees negligently injured the Claimant while assisting in the construction work. Davis Feed filed a motion for summary judgment asserting that the allegedly negligent Davis employee was a borrowed servant and fellow servant and that the tort suit was thus barred by the exclusive remedy provisions of the Act. The Court of Appeals found that the evidence showed that the allegedly negligent Davis Feed employee was under the exclusive control and direction of Teston Construction at the time of the injury and that Davis Feed was entitled to a summary judgment based upon the fellow servant doctrine and exclusive remedy provision.

Dove v. Sentry Insurance, 236 Ga. App. 754, 513 S.E.2d 289 (1999). The Plaintiff brought a wrongful death suit on behalf of a minor child against the workers' compensation insurance carrier, claiming that the insurance company intentionally withheld authorization for medical treatment and that this caused the death of the Plaintiff's husband, the father of the child. It was argued that this case was distinguishable from *Doss v. Food Lion*, 267 Ga. 312, 477 S.E.2d 577 (1996) in that the right of action here existed in a minor child who was not covered by the Act. The Court of Appeals rejected this argument and found that the claim was barred by the exclusive remedy provisions of the Act.

Johnson v. Holiday Food Stores, Inc., 238 Ga. App. 822, 520 S.E.2d 502 (1999). The employee brought a premises liability civil suit against his employer after the employee was attacked by a personal acquaintance while at work. The employer asserted the defense of exclusive remedy among its defenses. The Court of Appeals held that the exclusive remedy was

not applicable and did not bar the claim, but that the injuries were caused by intentional acts of a third person motivated by personal animosity.

Georgia Power Co. v. Franco Remodeling Co., 240 Ga. App. 771, 525 S.E.2d 152 (1999). This is a decision on remand from Georgia Supreme Court. It involves a tort suit. The High-Voltage Safety Act indemnity provisions could be enforced without offending the exclusive remedy provisions of the Comp Act.

Maguire v. *Dominion Development Corp.*, 241 Ga. App. 715, 527 S.E.2d. 575 (1999), *cert. denied* (May 26, 2000). A civil suit was filed involving a construction dispute. The employee worked for a subcontractor. The general contractor had successfully defended a Workers' Compensation claim on the basis that the employee had not pursued his remedy against the immediate employer first. The employee then filed a tort suit against the general contractor, arguing that the successful defense in the Workers' Compensation claim by the general contractor removed the case from the exclusive remedy provisions of the Act. The Court of Appeals held that the tort immunity still applied on these facts because of the nature of the defense to the compensation claim.

Sam's Wholesale Club v. Riley, 241 Ga. App. 693, 527 S.E.2d. 293 (1999), *cert. denied* (May 26, 2000). The Plaintiff filed a civil suit against Sam's alleging various wrongs which occurred while at work, including intentional infliction of emotional distress, assault and attempts to commit physical injuries by employees of the defendant. Sam's failed to timely answer and a default judgment was entered as to compensatory damages in the amount of $750,000. The court then scheduled the trial to reconvene on the issue of punitive damages. Notice was then given to Sam's. Sam's filed an appearance and attempted to set aside the default and interpose various defenses. Among the defenses asserted was that the tort claim was barred

by the exclusive remedy provisions of the Workers' Compensation Act. The Court of Appeals rejected the defendant's argument and affirmed the judgment, concluding (a) because the defendant was in default, the allegations of the complaint were deemed to be supported by proper evidence, (b) the defendant did not provide a transcript of the evidence taken at the trial on compensatory damages, and (c) intentional tort claims are generally not precluded by the exclusive remedy provisions of the Act.

INSURANCE

Sheehan v. Delaney, 238 Ga. App. 662, 521 S.E.2d 585 (1999). The employee received an award of workers' compensations benefits from an uninsured employer. The uninsured employer filed for protection under the Bankruptcy Code. The employee then sued the principals of the corporation alleging that they were personally liable for failure to procure workers' compensation benefits when required to under the law. The individuals asserted that the Claimant must make a prima facie showing of negligence against them before they could be held personally liable. The Court of Appeals rejected this argument and stated that the principals of the insolvent corporation could be held personally liable for the workers' compensation benefits due to the employee without a showing of negligence against them. Citing *Boyette v. Elmer*, 184 Ga. App. 108, 361 S.E.2d 3 (1987).

NOTICE OF INJURY

Satilla Regional Medical Center v. Dixon, 238 Ga. App. 619, 518 S.E.2d 723 (1999). The employee asserted that she notified her supervisor of a work injury within 30 days of it occurring. The supervisor disputed the testimony. The ALJ found as a matter of fact that the

employee had failed to provide notice of the injury within 30 days and denied the claim. The Appellate Division affirmed. The Superior Court reversed. The Court of Appeals reversed The Superior Court, finding that there was some evidence to support the ALJ's factual finding of no notice.

PENALTIES

Ayers d/b/a Advanced Materials v. Rembert, 241 Ga. App. 698, 527 S.E.2d 290 (1999). The employer received a favorable award from State Board which included income benefits, medical expenses and an assessed attorney fee. The employer did not pay the amounts due under the award. The employee petitioned the Superior Court for a judgment to be issued pursuant to O.C.G.A. § 34-9-106. The Superior Court entered a judgment which included accrued income benefits, medical expenses, attorney fees and then added a 20% penalty pursuant to O.C.G.A. §34-9-221(f). The employer argued that the penalties could not be included in the judgment because they had not been included in the underlying award from the State Board. The Court of Appeals held that the Superior Court had the authority to assess the 20% penalty and had correctly calculated the amount. The judgment was affirmed.

PSYCHOLOGICAL INJURIES

Bibb County v. Short, 238 Ga. App. 291, 518 S.E.2d 484 (1999). This is an any evidence rule case. The Board denied the psychological injury claim, finding it unrelated to a work injury. The Superior Court reversed. The Court of Appeals reversed The Superior Court finding there was some evidence to support the Board's award.

Columbus Fire Department/Columbus Consolidated Government v. Ledford, 240 Ga.

App. 195, 523 S.E.2d 58 (1999). This is an any evidence rule case. The opinion cites *Abernathy v. City of Albany* and *Southwire Co. v. George* in finding there was some evidence to support the Board's finding that the psychological condition did not arise from a discernable physical occurrence.

STATUTE OF LIMITATIONS

Harrison v. Beckham, 238 Ga. App. 199, 518 S.E.2d 435 (1999). The case before the Court of Appeals was a civil suit involving a legal malpractice issue. The allegation was of injuries sustained as a result of "a sick building." The Court of Appeals held that the test for determining when the statute of limitations accrues in sick building cases is when the Plaintiff/Claimant, in the exercise of reasonable diligence, should have discovered that she had been injured and suspects that her injuries may have been caused by the sick building. This case also makes mention of workers' compensation accrual of the claim.

Newsome v. DOAS, 241 Ga. App. 357, 526 S.E.2d 871 (1999). This is a case of first impression. DOAS filed a subrogation claim pursuant to O.C.G.A. § 34-9-11.1 two years and ten days after the date of accident. The Court of Appeals held that the claim was barred by the two year tort statute of limitations which applied to the employee's claim. DOAS argued that the 20-year statute of limitations under O.C.G.A. § 9-3-22, which governs actions for enforcement of rights accruing to individuals under statute, should apply. The Court of Appeals rejected this argument.

SUBROGATION

North Brothers Co. v. Thomas, 236 Ga. App. 839, 513 S.E.2d 251 (1999). The

plaintiff/employee sued the tortfeasor as a result of an automobile accident. The employer/insurer intervened and sought to enforce its subrogation lien under O.C.G.A. § 34-9-11.1 in an amount in excess of $60,000.00 for medical benefits paid. A special verdict form was submitted to the jury. The jury's verdict was $25,000.00 for medical expenses, $25,000.00 for pain and suffering and no other damages. The trial court ruled that the plaintiff had not been fully compensated as required by the subrogation provisions of the Act. The Court of Appeals reversed and found that an employee is not fully compensated and no lien is permitted if there are any outstanding claims for medical expenses for which the employee would be held liable. Because there was nothing in the record to show that the plaintiff had any outstanding medical expenses, or other claims or obligations at that time, he had been fully compensated for his medical benefits. Enforcement of the lien was allowed.

Homebuilders Association of Georgia v. Morris, 238 Ga. App. 194, 518 S.E.2d 194 (1999). The Court of Appeals considered for the first time whether an employee's comparative negligence or assumption of the risk is relevant in determining an insurer's right to recovery under the subrogation provisions of O.C.G.A. § 34-9-11.1. The employer and insurer paid over $100,000.00 in medical benefits and over $60,000.00 in income benefits. The employer/insurer intervened in the employee's tort suit. The employee/plaintiff on the tortfeasor settled for $200,000.00. The Trial Court ordered that the employee/plaintiff and the employer/insurer proceed to trial without the tortfeasor. The employee/plaintiff filed a motion in limine to exclude evidence of comparative negligence or assumption of risk and the trial court granted the motion. The jury awarded over $100,000.00 in past medical expenses, $75,000.00 in past pain and suffering, over $100,000.00 in lost earnings, over $175,000.00 in future medical expenses, $225,000.00 in future pain and suffering and over $200,000.00 in future lost earnings. Based on

this verdict, the trial court ruled that the employer/insurer could not recover anything from the $200,000.00 settlement as the employee/plaintiff had not been "fully compensated." The Court of Appeals affirmed the decision of the trial court, ruling that the motion in limine was properly granted. The Court of Appeals found that the subrogation provision of the Workers' Compensation Act required that the employee be made whole, regardless of fault. The court also distinguished these facts from *North Brothers v. Thomas* (see previous case summary) in finding that the jury's award of future medical expenses in excess of $300,000.00 meant that the employee would not be fully compensated by the settlement award and compensation benefits.

WORKERS' COMPENSATION CASE SUMMARY - WITH A LITTLE SOMETHING FOR THE BUSY TORT ATTORNEY (2000)

By: N. Staten Bitting, Jr.
Fulcher, Hagler, Reed, Hanks & Harper, LLP
P.O. Box 1477
Augusta, Georgia 30903-1477
(706) 724-0171

This article provides thumbnail sketches of certain cases which touch and concern workers' compensation issues and were decided between April 1, 2000 and April 1, 2001. While many of these are of interest only to those engaged in workers' compensation practice, I have attempted to flag cases which involve some workers' compensation issues but are likely to be encountered by those engaged in civil trial practice.

An effort has been made to reduce the synopsis of each case to its most basic holding. Nuances are obviously lost. There is also no analysis of the case's relation to other similar cases. The headings in this article are provided to assist in quick location of a pertinent case. There are issues in some of the cases which would fall into other categories. Because some of the cases are decided on the standard of the any evidence rule, their precedential value is questionable. The Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et. seq., will be referred to simply as the Act.

PERMANENT PARTIAL DISABILITY

In *Mix v. Allied Ready Mix*, 248 Ga. App. 261 (2001), the employee presented evidence that his permanent partial disability rating was 15% whole person and the employer offered evidence that the rating was 5%. The ALJ entered an award finding a 10% PPD. The employer appealed, arguing that the State Board was required to accept one or the other physician's

opinions, but could not average the two. The Court of Appeals held that, since the Board's decision fell within the range of the two physicians' opinions, there was some evidence to support it and the finding of a 10% PPD was affirmed.

STATUTE OF LIMITATIONS/WAIVER

In *Baugh-Carroll v. Hospital Authority of Randolph County*, 248 Ga. App. 591, 545 S.E.2d, 690 (2001), the employer asserted that the claim was barred by the one year statute of limitations found in O.C.G.A. § 34-9-82(a). After adverse rulings on this issue by the ALJ and the Appellate Division, the employer raised for the first time on appeal to the Superior Court the defense that the claim was barred by the two year statute of limitations on a change of condition found in O.C.G.A. § 34-9-104. The Court of Appeals held that the defense of the two year statute had been waived.

RETROACTIVE CHANGE OF CONDITION

The facts in *Aldrich v. City of Lumber City*, 273 Ga. 461, 542 S.E.2d. 102 (2001), are quite interesting. I particularly recommend the Court of Appeals' recitation of the facts. See *Aldrich v. City of Lumber City*, 241 Ga. App. 724, 530 S.E.2d 195 (2000). The employer successfully proved that the employee was working secretly prior to the time benefits were awarded and successfully argued to the State Board that a change of condition should be established dating back approximately three months before the award. The employee conceded that he was not entitled to keep the benefits which he received after the date of the award but argued that the State Board had no legal authority to find a change of condition prior to the date of the award. The Georgia Supreme Court held that the Board was without authority to find the change of condition on a date preceding the date on which the award was entered.

BURDEN OF PROOF/MEDICAL CARE

The employee's counsel in *Smith v. Mr. Sweeper's Stores, Inc.*, 247 Ga. App. 726, 544 S.E.2d 758 (2001), devised novel arguments which were ultimately rejected by the Court of Appeals. After a compensable injury, the employer/insurer controverted additional medical care on the basis that it was no longer related to the work injury. At the hearing, the ALJ placed on the employee the burden of proving that the additional medical care was for a work-related injury and then found for the employer/insurer. The employee appealed asserting that the ALJ should have treated the matter as an employer/insurer's request for a change of condition and placed the burden of proof on them or, in the alternative, that placing the burden of proof on the employee was a violation of due process. The Court of Appeals rejected both of these arguments and affirmed the award.

EMPLOYERS SUBJECT TO THE WORKERS' COMPENSATION ACT

Is MARTA an employer subject to the Georgia Worker's Compensation Act? According to the Court of Appeals, MARTA is subject to the Georgia Workers' Compensation Act. *Williams v. Metropolitan Atlanta Rapid Transit Authority*, 247 Ga. App. 52, 542 S.E.2d 199 (2000). The Court of Appeals rejected the argument that MARTA employees were excluded from coverage under the Act by the Georgia Employers' Liability Act.

CHANGE OF CONDITION/RETIREMENT

The employee was working in a restricted-duty profile for the City of Atlanta as a police officer. He chose to cease working when he was approved for disability retirement benefits under his employer-funded plan. The Court of Appeals held that this alone was insufficient to

establish a change of condition that would entitle the employee to a commencement of workers' compensation income benefits. The Court found that the employee was required to establish each of the elements found in *Maloney v. Gordon County Farms*, 265 Ga. 825, 462 S.E.2d 606 (1995), including a loss of earning power as a result of a compensable work-related injury and a diligent but unsuccessful effort to secure employment following his cessation of work. *City of Atlanta v. Arnold*, 246 Ga. App. 762, 542 S.E.2d 181 (2000).

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

In *Harrison v. Winn-Dixie Stores, Inc.*, 247 Ga. App. 6, 542 S.E.2d 142 (2000), the employee, while working a shift at one grocery store, was asked to work an unscheduled shift at another store as soon as his shift ended. While he was driving from one store to the other, he was involved in an automobile accident and injured. The employee argued that the employer's request that he work an unscheduled shift at another store made the travel between the stores an activity in the scope and course of employment. The Court of Appeals rejected this argument.

STATUTE OF LIMITATIONS/DEFINITION OF WEEKLY BENEFITS

The employee in *Mickens v. Western Probation and Detention Center*, 244 Ga. App. 268, 534 S.E.2d 927 (2000), sustained a compensable injury. She received wages in lieu of compensation and then permanent partial disability benefits. The Court of Appeals held that PPD benefits are "weekly benefits" under the statute of limitations provisions of O.C.G.A. § 34-9-82(a) and that the claim was filed within two years after the last payment of "weekly benefits." The Court noted the differences in the limitations provisions contained in Section 104 of the Act. The Supreme Court has granted a *writ of certiorari* in this case.

NO IMMEDIATE RIGHT OF APPEAL OF DISCOVERY ORDERS

Can a litigant in a workers' compensation proceeding appeal a decision of the State Board on a discovery issue prior to the issuance of a final award by the Board? According to the Court of Appeals in *Cartwright v. Midtown Hospital*, 243 Ga. App. 828, 534 S.E.2d 504 (2000), the answer is no. The Court held that an order denying the motion of the employer to compel a physician to disclose his Social Security Number was not a final award and the Superior Court, therefore, had no jurisdiction to hear the issue.

HEART ATTACK

The State Board of Workers' Compensation entered an award finding that work activity contributed to the onset of the employee's heart attack. The employer appealed, arguing that the Act did not permit recovery because it did not provide for the aggravation of a preexisting heart condition to be a compensable event. The Court of Appeals disagreed. *Phillips Correctional Institute v. Yarbrough*, No: A00A2265 (Ga. App. March 21, 2001).

NO CREDIT FOR DISABILITY RETIREMENT BENEFITS

To the surprise of many, the Georgia Supreme Court in the *City of Waycross v. Holmes*, 272 Ga. 488, 532 S.E.2d 90 (2000), held that an employee was *not* entitled to credit under Section 243 of the Act for payments made to employees under employer-funded disability retirement plans and policies. This decision created a number of questions concerning arrearages due employees for credits improperly taken.

CHILD SUPPORT LIEN

The Georgia Supreme Court, in construing the child support lien statute, concluded that the portion of the workers' compensation settlement which is for income benefits is subject to a lien for child support. *Cromer v. Denmark*, 273 Ga. 290, 540 S.E.2d 183 (2001). The Court performed an analysis as to how much of the settlement was to be for attorney's fees and whether any was earmarked for future medical payments. Those payments would not be subject to the lien.

TORT SUIT/EXCLUSIVE REMEDY

Can an employer controvert a workers' compensation claim as not arising out of and in the course of employment and simultaneously defend a civil suit arising out of the same occurrence by asserting that the claim is barred by the exclusive remedy provisions of the Act? The Court of Appeals affirmed the grant of a summary judgment in favor of the employer in a fall down case as barred by the exclusive remedy provisions. It then noted, although the issue was apparently not squarely before it, that the incident constituted a compensable injury. *Rockwell v. Lockheed Martin Corp.*, 248 Ga. App. 73, ___ S.E.2d ___ (2001).

Employees filed suit claiming intentional infliction of emotional distress due to the employers' refusal to install certain equipment designed to protect from radiation. They alleged emotional injury only. The Court of Appeals held that the tort claims were barred by the exclusive remedy provisions of the Workers' Compensation Act. *Betts v. MedCross Imaging Center, Inc*., 246 Ga. App. 873, 542 S.E.2d 611 (2000).

In *Kaplan v. Pulte Home Corp.*, 245 Ga. App. 286, 537 S.E.2d 727 (2000), a general contractor was sued in tort by an independent contractor sub-trade. The independent contractor had obtained workers' compensation coverage for himself. The general contractor defended the

tort claim, asserting that it was a statutory employer and thus, the exclusive remedy provisions of the Act barred the suit. The Court of Appeals held that the independent contractor was not an "employee" of anyone and had a viable cause of action in tort against the general contractor.

The case of *Stephens v. Harbor Club, Inc.*, 244 Ga. App. 384, 535 S.E.2d 256 (2000), is an exclusive remedy case but is not decided on the workers' compensation issue. The plaintiff in the tort suit alleged that the employer committed fraud by advising her that she had no workers' compensation claim and telling her that her only option was to stop working and seek benefits under ERISA. The employee then successfully filed a workers' compensation claim. The issue in the case was whether ERISA barred the suit. The decision of the Court of Appeals was that it did not. Although the issue was not argued, in a footnote the Court expressed its acceptance of the employee's position that the exclusive remedy provision of the Act did not bar the fraud claim.

In *Solis v. Lamb*, 244 Ga. App. 8, 534 S.E.2d 582 (2000), an employee sued in tort and named two co-employees as defendants. The suit alleged the co-employees inflicted physical harm for personal reasons against the plaintiff. This allegation brought the suit within an exception to the exclusive remedy provisions of the Act. The defendant co-employees served requests for admissions in which they asked the plaintiff to admit facts which would bring the incident with the provisions of the Act. These requests were not responded to. At no time did the plaintiff ask to withdraw the admissions. The Court held that the suit was barred by the exclusive remedy provisions of the Workers' Compensation Act based on the requests for admissions.

WORKERS' COMPENSATION SUBROGATION LIEN

One of the questions which arose from the language used in the subrogation lien provisions of O.C.G.A. § 34-9-11.1 was whether a workers' compensation lien claimant who intervenes has a right to a jury trial on the issues pertaining to the lien. The Court of Appeals has now answered that question. The lien claimant has no right to a jury trial on those issues. *Liberty Mutual Ins. Co. v. Johnson*, 244 Ga. App. 338, 535 S.E.2d 511 (2000).

Another question which has proved troubling under the language used in the subrogation lien provisions is whether the insurer of the tort defendant could make payment to the injured employee in the tort suit without exposure to the lien claimant. In *Anthem Cas. Ins. Company v. Murray*, 246 Ga. App. 778, 542 S.E.2d 171 (2000), the Court of Appeals provides additional direction. The subrogation lien claimant did not intervene in the civil suit. There was a trial resulting in a verdict. The defendant's insurer paid the verdict amount. The compensation carrier then sued the injured employee/tort plaintiff and the tort insurer alleging that they should have honored its lien claim. Both defendants were granted a summary judgment. The Court of Appeals held that there were issues of fact as to whether the employee/tort plaintiff had been fully compensated and remanded that part of the case. It further held that the tort insurer had no obligation to acknowledge or honor the subrogation lien when paying a verdict even though it was fully aware of the existence of the claim. The Court distinguished its prior holdings where the tort insurer made payment pursuant to a settlement rather than a verdict.

In *Hammond v. Lee*, 244 Ga. App. 865, 536 S.E.2d 231 (2000), the compensation carrier intervened. A special verdict was used. The Court of Appeals refused to allow enforcement of a subrogation lien against the portion of the verdict awarding damages for pain and suffering, as these are not provided for under the Act. It also did not allow the compensation carrier recovery

from the lost wages portion of the verdict, finding the plaintiff was not fully and completely compensated. Recovery of medical costs was permitted.

CHANGE OF CONDITION VS. FICTIONAL NEW INJURY

Is a two employer battle the same as a two insurer battle? The Court of Appeals addressed this issue in *Cypress Companies v. Brown*, 246 Ga. App. 804, 542 S.E.2d 544 (2000). The employee was injured while working for employer A who was insured by insurer A. The restaurant was then sold before the employee received any income benefits. The employee did receive medical benefits. The employee continued working in the restaurant for employer B who was insured by insurer B. Over several weeks the injury from the workers' compensation incident grew steadily worse until the employee was required to stop working and have surgery. This all occurred less than one year after the date of injury. The Court of Appeals held that there was a fictional new injury on the date the employee was forced to stop work and the new employer and insurer were responsible.

EMPLOYER BY EQUITABLE ESTOPPEL

In *Medders v. Smith*, 245 Ga. App. 323, 537 S.E.2d 153 (2000), a sub-trade was convinced to stay on the job by the general contractor who promised, *inter alia*, it would be responsible for the sub-trade's workers' compensation insurance. The sub-trade remained on the job and one of its employees was injured. A workers' compensation claim was filed and the general contractor was brought in as a party to that claim. It sought to avoid liability. The Court of Appeals held that the change of position by the sub-trade relying on the promise to provide insurance by the general contractor was sufficient to work an equitable estoppel and the general contractor should be considered an employer under the Act.

MISCELLANY

In a divorce proceeding, the husband served a request to produce, ostensibly under O.C.G.A. § 34-9-34(c), seeking medical records relating to his wife's drug treatment. The wife did not serve an objection and the hospital produced the records. The wife sued the hospital in tort alleging it violated her privilege. The Supreme Court held that she did not waive her privilege by not objecting to the request to produce. *Kennestone Hospital v. Hopson*, 273 Ga. 145, 538 S.E.2d 742 (2000).

In affirming the grant of a primary judgment in favor of the defendant law firm in a legal malpractice action, the Court of Appeals accepted the trial court's ruling that the five year dismissal for failure to prosecute statute began running at the time of the first hearing request, not the last. The Court expressly declined to so construe the statute, however. O.C.G.A. § 34-9-100(c). *Harrison v. Deming, Parker, et. al*, 246 Ga. App. 471, 541 S.E.2d 407 (2000).

In *Owens v. American Refuse Systems, Inc.*, 244 Ga. App. 780, 536 S.E.2d 782 (2000), an employee was injured when a tank cap malfunctioned. The employee obtained workers' compensation benefits. The employee then filed suit against the manufacturer of the equipment that malfunctioned. At some point the employer disposed of the device which was the subject of the tort claim. The employee then sued the employer and its compensation insurer in tort alleging, *inter alia*, spoliation of evidence. The Court of Appeals held there is no third-party tort action for spoliation of evidence.

GEORGIA'S NEW RULES OF PROFESSIONAL CONDUCT

By: Karen M. Raby[138]
ALEMBIK, FINE & CALLNER, P.A.
245 Peachtree Center Avenue
Marquis One, Fourth Floor
Atlanta, Georgia 30303
(404) 420-7127
Kraby@AFCLaw.com

On January 1, 2001, the new Georgia Rules of Professional Conduct ("Rules") went into effect replacing the familiar Directory Rules and Ethical Considerations, which previously governed the actions of Georgia lawyers ("Code"). Georgia is now part of the vast majority of states that have adopted either the ABA Model Rules of Professional Conduct, or a modified form thereof.

All GDLA members should thoroughly review the new rules to note distinctions between the former Code and the new Rules which affect their individual practices. A complete copy of the new Rules is contained in your 2000-2001 State Bar of Georgia Directory & Handbook (blue cover). Although the new rules became effective on January 1, 2001, a lawyer's conduct is governed and will be reviewed in any disciplinary proceeding under the version of the disciplinary rules in effect at the **time of the action**. Therefore, any complaints or grievances regarding actions (or inactions) of Georgia lawyers which took place before January 1, 2001, will be reviewed under the old Code. Only actions taken by lawyers on or after January 1, 2001, will be examined under the new Rules. Therefore, you may need to access the old code to respond to any complaint regarding activities which pre-date January 1, 2001. If you did not save your old Handbook, you can still review and print the former Code at the State Bar of Georgia's

[138] The author gratefully acknowledges Professor Roy M. Sobelson, J.D., LL.M, of Georgia State University and Sally Winker, Executive Director of the Chief Justice's Commission on Professionalism, for their assistance in providing information and source material for this article.

website, "www.gabar.org." It is probably a good idea to make sure you have a copy of the former code, in case the need arises.

GENERAL INFORMATION REGARDING NEW RULES

The new rules have adopted a more "user friendly" style and seem to be easier to search than the old Code. The Rules are divided into nine sections called “Parts.” Each rule within each part has the same first numeral as all other rules in that part followed by a decimal point and the specific rule number. (For example, all rules relating to the “Client-Lawyer Relationship” of Part One will start with a “1" (i.e., Rule 1.1, 1.2, and so on). This organization makes it easy for the user to determine quickly where rules applicable to his or her inquiry will be found. For example, if you are looking for rules governing the use of paralegals and other non-lawyer assistance, you should probably start your search with Section 5: “Law Firms and Associations.” It is believed that the new rules will be easier for lawyers and non-lawyers alike to understand and use.

The following is a list of the nine Parts which make up the new Rules and a summary of some highlights from each:

1. **Client-Lawyer Relationship**, which includes a variety of topics, such as competence, fees, confidentiality, client communication, conflicts of interest, an organization as a client, and sale of a law practice.

2. **Counselor**, which includes rules relating to advising clients, serving as an intermediary and making evaluations for use by third-parties.

3. **Advocate**, including information about meritorious claims, expediting litigation, candor towards the tribunal, fairness to the opposing party and counsel, impartiality, decorum, and trial publicity, just to list a few.

4. **Transactions with Persons Other Than Clients**, which includes communication with opposing parties who are represented, and those who aren’t, as well as respecting the rights of third-parties.

5. **Law Firms and Associations**, which includes rules relating to duties of supervising and subordinate lawyers, responsibilities regarding non-lawyer assistants and law related services, as well as the unauthorized practice of law.

6. **Public Service**, including rules regarding pro bono service, accepting appointments, membership in legal service organizations, and law reform activities affecting clients.

7. **Information about Legal Services**, such as advertising, communications regarding legal services, contact with prospective clients, and firm names and letterheads.

8. **Maintaining the Integrity of the Profession**, including rules relating to bar admissions, judicial and legal officials, misconduct, and reporting professional misconduct.

9. **Miscellaneous,** the "catch-all" part including a variety of topics, such as those relating to reporting requirements, settlements of claims against lawyers, cooperation with disciplinary authorities, reciprocal discipline and lawyers as public officials.

Following each rule is a statement of the maximum penalty for the violation of that rule. In addition, the rules are each followed by explanatory comments to assist lawyers in understanding that particular rule. The comments do not supersede the rule and are informational only. It should be noted that some rules are mandatory, while others allow for the lawyer's judgment and discretion. For the most part, it is easy to locate the mandatory rules - if the rule contains the word "shall," its mandatory.

The introductory portions of the rules, including the Preamble, Scope and Terminology sections, should not be skipped! They include important information regarding construction and purpose of the rules. The Scope section clarifies that the rules are not designed to be the basis for civil liability, but rather designed to provide "guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." *Scope*, paragraph [18].

SUMMARY OF SOME IMPORTANT CHANGES

It would be impossible to discuss all of the new or different provisions of the new Rules in this article. Rather, the goal is to promote awareness of the fact that we have new rules and to give some general information about their contents and organization. What follows, therefore, is not a complete list of all of the differences between the old rules and the new ones, but rather a summary highlighting some of the more noteworthy changes or differences in the two sets of rules.

Part 1 – Client-Lawyer Relationship

The new rules provide more guidance for the practitioner in dealing with common issues that arise in the representation of various clients. There are numerous critical areas covered in Part One - Lawyer-Client Relationship, which affect all not only GDLA members, but all Georgia lawyers.

The new rules appear to go farther than the old by affirmatively requiring communication with the client under Rule 1.4, which provides in pertinent part:

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, shall keep the client reasonably informed about the status of matters and shall promptly comply with reasonable requests for information.

Rule 1.4, Georgia Rules of Professional Conduct.

Note that the rule is phrased using the term "shall" which indicates that the requirements of the rule are mandatory, not merely instructional or discretionary. There are still some subjective parts to the Rules. For example, in Rule 1.4 what constitutes "reasonable" requests and how much explanation is "reasonably necessary" will be determined based on the client and

the particular "controlling factors" of each case. These points are made in the Comment following Rule 1.4.

In addition, the Rules have been modified to allow different methods of fee sharing between attorneys. Rule 1.5(e) now explicitly allows for the division of a fee between lawyers who are not in the same firm only under the following conditions:

> (1) the division is in proportion to the services performed by each lawyer, ***or*** by written agreement with the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and
>
> (3) the total fee is reasonable.

Rule 1.5(e)(1)-(3), Georgia Rules of Professional Conduct.

Therefore, under the new rules, the fee division does not need to be proportional, if the client is informed of the split and agrees <u>in writing</u> to the division and representation, the lawyers assume joint responsibility <u>and</u> the total fee is reasonable.

Rule 1.6 regarding Confidentiality of Information should be carefully reviewed by all practicing lawyers, as this is an area of great concern to clients and the courts alike. The new rule, in part, states that:

> (a) A lawyer ***shall*** maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court.

Thus, there is a wide net drawn around what constitutes "confidences" of the client to be kept by the attorney. The remainder of the rule discusses various circumstances in which a

lawyer may reveal confidences (including when required to do so by a Court) and also makes it clear that the duty of confidentiality continues even after the attorney-client relationship concludes.

Just as important, the new Rules cover the sticky area of Conflicts of Interest in Rule 1.7 (General Rules), Rule 1.8 (Prohibited Transactions) and Rule 1.9 (Former Client). These rules are critical to the practice of law and often difficult for clients and practitioners to understand. Rule 1.7 provides the general rules for dealing with conflicts and also indicates that there are some conflicts that cannot be waived. Rule 1.8(a) sets forth the requirements for an attorney to enter into a business transaction with a client or adverse to a client's interests. These requirements include that the transaction and terms upon which the lawyer acquires the interest are "fair and reasonable" to the client, fully disclosed in writing in terms understandable to the client, and consented to in writing by the client after the client has had an opportunity to seek the advice of independent counsel. Another distinction between the old rules and the new is that the new rules allow a lawyer to pay, not just advance, court costs and litigation expenses for a client unable to pay them. Rule 1.8(e)(2).

Rule 1.10 explains the general rule regarding Imputed Disqualification, that when any one lawyer in a firm practicing alone could not represent a client due to a conflict of interest, none of the lawyers in that firm shall knowingly represent that client **unless** the disqualification is waived in the manner set forth in Rule 1.7. In addition, Rule 1.10(b) explains how the departure of the attorney with the conflict affects the remaining firm. Generally, once the attorney with the direct conflict terminates his or her relationship with the firm, the firm will not be prohibited from representing those with interests materially adverse to the client of the formerly associated lawyer unless the matter is the same or substantially related and any lawyer

remaining with the firm has information protected by Rules 1.6 and Rule 1.9(c) which is material to the matter.

The Client-Lawyer Relationship section also contains specific rules designed to govern successive Government and Private Employment (Rule 1.11), the actions of Former Judges or Arbitrators (Rule 1.12), having an organization as a client (Rule 1.13), and dealing with a Client with a Disability (Rule 1.14). One other rule in this section which is bound to spark discussion is Rule 1.17, which provides the ground rules for the sale of a law practice.

Part 3 - -Advocate

Rule 3.2 (Expediting Litigation) of the Rules of Professional Conduct requires lawyers to make "reasonable efforts" to expedite litigation consistent with the interest of their client. According to the Comment following the rule, what constitutes "reasonable efforts" under the circumstances of a particular case will be judged by all of the controlling factors and does not equate with "instant efforts."

The rules regarding the requirements for a lawyer's Candor to the Tribunal are set forth in Rule 3.3. Rule 3.3(a) not only provides that a lawyer should not knowingly make a false statement of material fact or law to the tribunal, but also requires the disclosure of material facts to the tribunal if necessary to avoid assisting the client in a criminal or fraudulent act. Rule 3.3(a) further requires that a lawyer should not “knowingly fail to disclose” to the tribunal legal authority in the controlling jurisdiction which is directly adverse to the position of the client if it is not disclosed by the adverse party. Also, in cases where the attorney is acting *ex parte*, Rule 3.3(d) provides that he or she has the additional burden of informing the tribunal of all material facts known to the lawyer which the lawyer believes are necessary to enable the tribunal to make

an informed decision, whether or not the facts are adverse to the lawyer's position. Further, although covered in aspirational terms in the former Code, Rule 3.3 for the first time raises the possibility of punishment for a lawyer who does not take "reasonable remedial measures," including notifying the court or potentially affected person after the attorney determines that he or she unknowingly presented false evidence.

Rule 3.7 provides guidance for when the Lawyer becomes a Witness. Rule 3.7(a) clarifies that the lawyer may act as advocate and witness in a proceeding where the lawyer's testimony (1) relates to an uncontested issue; (2) relates to the nature and value of legal services rendered; or (3) the disqualification of the lawyer would work "substantial hardship" for the client. In addition, under the former Code, it was always somewhat unclear whether the entire firm becomes disqualified when a lawyer from the firm testifies as a witness. Rule 3.7(b) provides that a lawyer can serve as an advocate in a trial in which another lawyer in that lawyer's firm is likely to be called as a witness, so long as that lawyer is not otherwise prevented by a conflict of interest under Rule 1.7 or Rule 1.9.

Part Five – Law Firms and Associations

Every lawyer in Georgia should review Part Five of the Rules on a regular basis. This part does not contain much in the way of entirely "new" material, but is important because it deals with the responsibility of supervisory (Rule 5.1) and subordinate attorneys (Rule 5.2), as well as lawyer responsibilities regarding their nonlawyer assistants (Rule 5.3). In addition, there are rules specifically designed to provide guidance for the professional independence of lawyers (Rule 5.4), to forbid the unauthorized practice of law (Rule 5.5) and adds a new section applicable to lawyers who provide Law-Related Services (Rule 5.7).

CONCLUSION

GDLA members should remember that the new rules went into effect for all conduct occurring on or after January 1, 2001. Copies of both the old Code and the new Rules should be kept by each member of the State Bar of Georgia for reference. Not all of the rules have been changed or modified; however, you should no longer take for granted your knowledge of the rules or what actions they allow or censure. Until we have a body of cases which interpret the new rules, we will not really know how differently the new rules will treat lawyers cited for violations. Lawyers should, therefore, continue to be vigilant in their adherence to the letter and spirit of these rules.

When in doubt about a particular rule or course of action, the State Bar continues to operate its Ethics Helpline to assist attorneys in understanding the rules. The number for the Ethics Helpline in the Atlanta area is (404) 527-8741 or outside Atlanta (800) 682-9806.

INTERNET RESEARCH FOR EVERYDAY USE FOR ATTORNEYS

By: William Claxton
CLAXTON & CLAXTON, LLC
225 WINDY RIDGE PARKWAY
Suite 425
Atlanta, Georgia 30039
(770) 933-1946

What does the internet offer for attorneys who want to go beyond researching cases on Westlaw and Lexis or locating attorneys listed in Martindale-Hubble?

Links!

Is your definition of **Links** limited only to one of the following: *(1)* Individual segments that collectively form a chain; (*2)* A golf course by the sea; or *(3)* Letter, as in . . .Art Linksletter . . . you know, that really, really old guy who tells mildly amusing stories about things kids said to him on his lame television show back in the 1950's?

If so, your ability to effectively perform research which is beneficial to your client has been tremendously limited. How so? Let me give you a very simple example. My practice includes defending cases where the insurer, whom I represent, suspects that a loss might be attributable to arson by the insured. How might I locate information about arson which would greatly assist me in defending a case referred to me by one of my clients? Most attorneys would utilize a *search engine* to type in the *search word* or *search phrase* to locate websites that contain information about arson. I have discovered that the best such sites include www.google.com, www.lycos.com, www.AltaVista.digital.com (includes LawCrawler and LawRunner), www.yahoo.com, www.excite.com, www.hotbot.com and www.infoseek.com.

But there are so many other links which are such an incredible value, that to overlook them is to miss so many valuable opportunities. Information contained on these links is of such

incredible value to you and your client. Inclusion of the information which you will find on these sites in your opinion letters will not only totally amaze your clients, but will greatly enhance your stature in the eyes of your client and peers.

The best news of all . . . Each of the sites identified in this article are accessible completely ***FREE OF CHARGE***. If there is a charge involved, I will note that in the web sites description.

Here is a classic example of a little known web site which provides an incredible amount of information for free, but also provides links to other sites with similar, if not more comprehensive and detailed information. Rest assured, this is not your father's www.Britanica.com. What does this web site have to do free research, or in the example I have provided above, with fire and arson investigations? How can this site assist the attorney investigating a possible arson claim in the performance of his or her job? The answer is the www.Britanica.com site is an example of both the present and the future of investigations of all kinds and holds out great potential for real down to earth help for the futuristic attorney/investigator.

I selected www.Britanica.com because it is a practical example of how quickly and how substantially the internet is changing. Just a few years ago you would have paid thousands of dollars for a printed version of the Encyclopedia Britannica and a few years after that the price for an "on line" subscription was also substantial.

Now, the entire Encyclopedia Britannica is Free.

When Britannica first announced that it was waving all sign up and user costs in order to make access to its computer free of charge, the concept was such a hit with the public that the system of servers maintained by Britannica crashed on the first day the new policy went into

effect and had to be greatly enhanced by the company to accommodate the huge influx of new users.

One small example serves to illustrate the point. On the home page of Britannica, an investigator can use the search function to search the word, "pyrolysis." The results will include encyclopedia entries, web sites that discuss both scientific and common uses of the term and even books and articles on the topic. This "one stop shopping" should answer your research questions and give you the ability to get more helpful information on any fire-related topic . . . or, for that matter, on any other topic, just fill in the blank for “pyrolysis.”

Another wonderful site which contains unlimited possibilities, regardless of the work you perform, is located at www.YourDictionary.com. This ***free*** site is known as ***Megasite***. The site provides online ***dictionaries in 150 different languages***, as well as grammar for 70 languages. Plug in your word to look it up in the English dictionary or thesaurus, or choose from a huge selection of links to specialty dictionaries such for definitions of legal terms, medical terms, engineering terms, military terms as well as an awesome array of special “word use” sites in both English and foreign-languages.

Speaking of foreign languages, one ***free*** site which is incredibly useful for translating documents written in a foreign language, or if you wish to translate a document into a foreign language with incredible accuracy, point your browser to http://www.babylon.com**.** As of this writing, this site enables you to translate your English documents into seventeen (17) different languages (including those using non-roman alphabets). You may also find additional seven other translation site links on www.YourDictionary.com. For even more free translation combinations, try http://www.tranexp.com:2000/InterTran?help=yes. This sight is offered by ***InterTran***, which is short for Internet Translator. This is a ***free*** on-line web translation service

that can translate single words, phrases, sentences and entire web pages utilizing 767 language translation pairings.

There are an incredibly large number of Links to Web sites that can provide you with an awesome amount of information which you can have at your fingertips and might prove to be of such importance that it might change the outcome of your case. (Ok, that might be a slight exaggeration.) For example, what if you were defending an automobile case involving a swearing match where both the plaintiff and defendant contend that the light for their lane was green. Imagine that the plaintiff tells you in his deposition that he was driving home from work in a westerly direction. You would like to know if the sun was on the horizon and glaring in the eyes of the opposing driver, preventing him from detecting if the traffic light was green or red. How can you locate this information?

http://aa.usno.navy.mil/AA/data/docs/RS_OneDay.html is the Link to the U.S. Naval Observatory web site which contains, among other things, tables for calculating sunrise and sunset for any day and any location, in addition to providing information on when twilight begins and dusk ends. It also provides moon rise and moon set in addition to phases of the moon.

One of the federal judiciary's best kept secrets is the existence of United States Party/Case Index. Searching this site will provide a list of all case numbers, filing dates and filing locations for every Federal Civil, Federal Bankruptcy and Federal Criminal case anywhere in the United States which matches the identity of the person for whom information is sought. This web site is located at http://pacer.uspci.uscourts.gov. If you have already subscribed to the Pacer online research, you may then obtain not only the docket online for the cases involving the search subject, but you may also obtain any pleadings, orders or other documents on file with the

clerk of court at a rate of 7¢ per page downloaded. Subscriptions to Pacer may be obtained by calling 800-676-6856.

Do you need to convert foreign currency in order to determine the value of personal property purchased with Pounds Sterling (£) or Japanese Yen (¥)? If so, this information may be found at http://www.oanda.com/convert/classic?user=americanexpress. This site allows you to convert every currency in the world. Another useful part of this site allows you to calculate the time in all major cities and as well as all countries around the world. See: http://travel.americanexpress.com/travel/personal/resources/tools/time/?aexp_in=te_quick_link**.** If you need to convert yards to meters, inches to centimeters or hands to feet, this can be found at http://travel.americanexpress.com/travel/personal/resources/tools/conversion charts/?aexp_in=te_quick_link**.** World Wide Weather Conditions and Weather Forecasts links are at http://travel.americanexpress.com/travel/personal/resources/tools/weather, as well as www.accuweather.com, www.hurricane.com (real time satellite photos & doppler radar), www.cnn.com/weather, www.new.noaa.gov, and www.earthwatch.com (satellite photos and weather maps).

For historical/forensic weather information needed to determine weather conditions at the time of an incident, you may locate this at www.wunderground.com. This will allow you to check weather for any location, any date, any time. http://www.ncdc.noaa.gov, is the world's largest archive of weather data. This award winning website provides up-to-date satellite, climate, and radar data. You can also order NCDC products and services, including data resource consultations, subscription and publication items, copies of original records, certifications, specialized climate studies, and a host of other climate-related activities.

If you need to locate operation manuals for product descriptions, or even need to replace a lost owner's manual for a tool or device, you can locate these, in addition to product simulations on line at http://cgi.zdnet.com/slink?79107:16012470 **.** It does not matter if the device is a video camera, cell phone, or microwave oven. If you need more than just a manual, you can also check out product simulations you can search by manufacturer or product name to get an online manual**.**

If you need to locate insurance statutes from all fifty (50) states, you may locate these at http://insurance.about.com/industry/insurance/cs/statestatutes/index.htm. This is but one of many sites of special interest to attorneys who work with cases involving insurance. Another is found at http://www.ultimateinsurancelinks.com. This site provides links to an exhaustive list of property and casualty carriers, insurance organizations, insurance technology and other vendors, and insurance publishers and publications. A similar web site found at http://insurance.about.com/industry/insurance/blbiglist.htm which provides listings, addresses, phone numbers and email addresses for over 1000 insurance companies worldwide.

http://www.iso.com is the official website of the ISO, which is the "property/casualty insurance industry's leading supplier of statistical, actuarial, underwriting and claims information." A "must-see" site for all insurance company professionals, agents, brokers, regulators, risk managers, researchers, and just about anyone else who needs to know about insurance! You will find summaries of ISO research reports, press releases, information on upcoming conferences, and much, much more.

http://www.namic.org. NAMIC is a national trade association representing the interests of more than 1,200 property and casualty insurance companies. The website provides a thorough summary of key issues relating to federal, state, and regulatory affairs. Of particular interest is

the site's bimonthly Property/Casualty Insurance magazine, which provides in-depth coverage of hot issues and trends affecting the insurance industry. You can also sign up to receive a weekly email newsletter.

There are an incredible number of Links which will provide you with so much valuable information that you could not find anywhere else in one place, if you could even locate it all. For example, if you wanted to obtain the all of the addresses and all of the telephone numbers for every County Courthouses in ***all 50 states***, you may be surprised that this information may be accessed at http://www.familytreemaker.com/00000229.html. Similarly, you may access the web sites of 2290 state agency sites in ***all 50 states***, which provide you with the agencies' telephone numbers, mailing and street addresses as well as email address by pointing your browser to www.nasire.org/statesearch. The Link to the Web Site which leads you to every federal agency's telephone numbers, mailing and street addresses as well as email addresses is located at http://iridium.nttc.edu/gov_res.html. Another Link to all federal agencies may be found at http://www.fedworld.gov/gpo.htm.

If you need to obtain pertinent information, including addresses and telephone numbers, for almost any corporation in the United States, there are three sources which have a lock on this information. The first is the **Thomas Registry**. This on line service allows you to locate 157,000 Companies, 135,000 Brand Names, which are responsible for producing or providing 63,000 product and service categories. One other feature of Thomas Registry which makes it very valuable is the fact that the site also contains in excess of 700 online catalogs for various manufacturers. This service is valuable in locating products and suggested retail prices for items which may have been reported as involved in a fire or theft loss. Thomas Registry may be accessed at www.ThomasRegistry.com. **Hoover's** is the second web site that contains an

incredible amount of information about corporations with operations located in the United States. A search may be performed alphabetically by utilizing the name of the corporation, as well as by industry type, by company type or by regional location. The Link to the listings of all United States corporations may be located at http://www.hoovers.com/company/dir/0,2116,4798,00.html. The third such service is **Biz Wiz** which provides information on over 300,000 companies listed under 8,000 different categories involving 187 different industries. Their web site is at http://www.bizwiz.com.