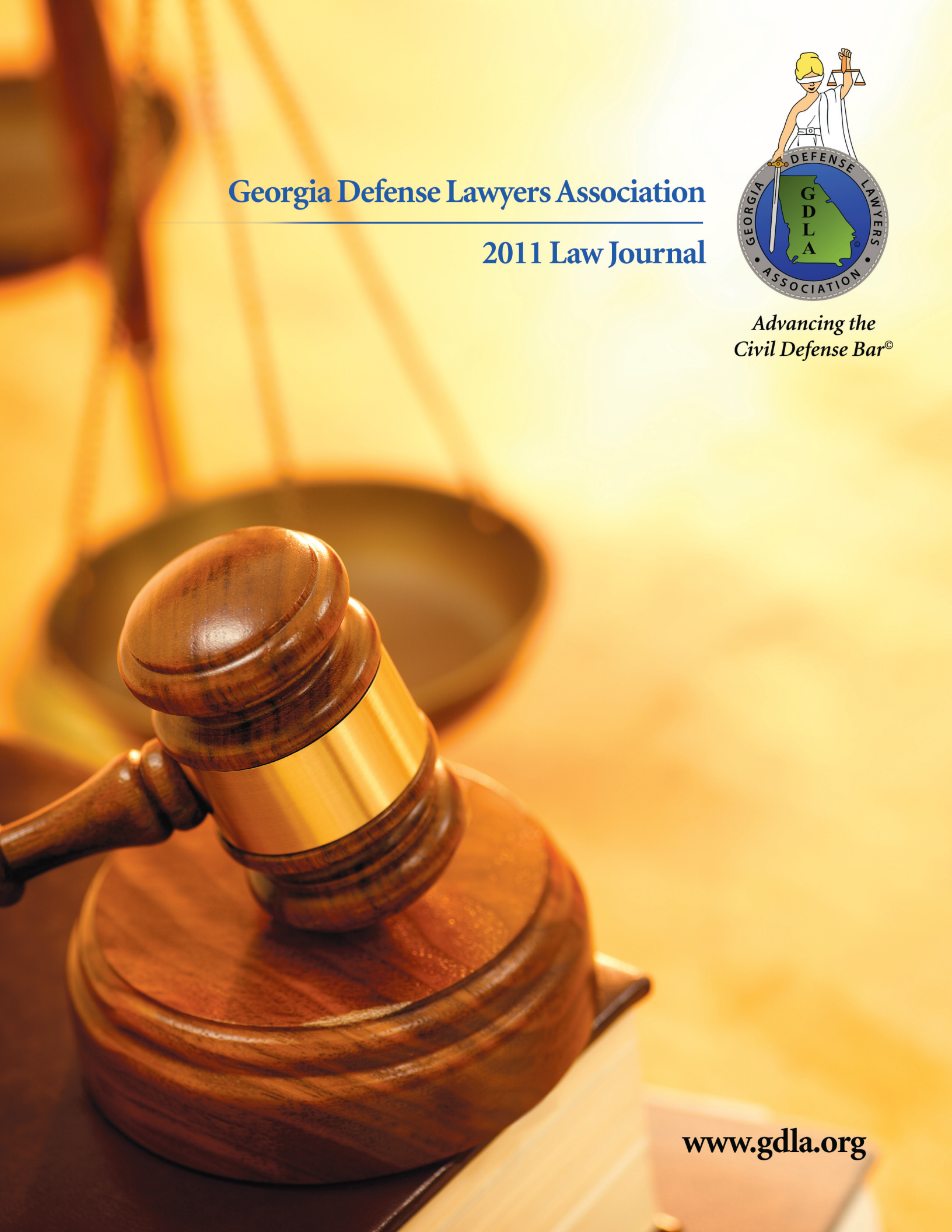

Georgia Defense Lawyers Association

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PRESIDENT'S MESSAGE

On behalf of the membership, I want to thank all of the authors for the articles contributed to this year's *Law Journal*. The articles continue to represent excellent analysis of timely topics of interest to the membership and the trial bar in general, as well as to the judges.

The fact that members are willing to give of their time and expertise each year to create a quality publication like the *Law Journal* is an obvious example of the value of membership and participation.

I also want to thank Sally Akins for editing the *Law Journal*. It is not an easy task to recruit authors, ensure timely submittals, coordinate publication and edit the product but Sally, as anticipated, has done an outstanding job, and I think you will be pleased with the final product.

I want to also recognize Jennifer Davis, our Executive Director, for her work in connection with this *Law Journal* and the many other matters she handles on behalf of the association.

The result of the effort of all of those involved no doubt will be a more informed and enjoyable practice in the upcoming times and the furtherance of professionalism for all of our benefit.

For the defense,

Edward M. Hughes
GDLA President
Callaway, Braun, Riddle & Hughes, P.C.

Sarah (Sally) Brown Akins is the managing partner of Ellis, Painter, Ratterree & Adams LLP in Savannah. Since serving as a judicial clerk, she has been engaged in a civil litigation practice. She handles cases involving premises liability, automobile and truck accidents, professional negligence, both medical and legal, litigation involving counties and municipalities and insurance coverage litigation. She also serves as a civil mediator.

EDITOR'S ACKNOWLEDGMENT

The following individuals generously volunteered their time and contributed articles to the GDLA *Law Journal* this year: Alexander ("Alec") T. Galloway, III - *Moore, Ingram, Johnson & Steele, LLP*; Stephen Graham and David A. Smith - *Drew, Eckl & Farnham, LLP*; Troy Lance Green - *McNatt, Green & Peterson*; Carlton E. Joyce - *Bouhan, Williams & Levy, LLP*; Jason Logan and Mel Haas - *Constangy, Brooks & Smith, LLP*; George T. Major, Jr. - *Oliver Maner, LLP*; Megan Usher Manly - *Ellis, Painter, Ratterree & Adams LLP*; David C. Marshall, Christian J. Lang and Marcus Wisehart - *Hawkins Parnell Thackston & Young LLP*; Amy R. Snell - *Fulcher Hagler LLP*.

The publication of the *Law Journal* also takes the time and effort of those working behind the scenes. First and most importantly, I would like to express my unending gratitude to Gwinea Burns, my long serving assistant, who spent many hours tirelessly editing, formatting, proofreading, editing again and proofreading again. Without her efforts, the *Law Journal* could not have been published.

The Board of Directors, especially Johnny Foster, assisted invaluably in encouraging and enlisting many of the authors who contributed articles as well as suggesting important and timely topics for the articles.

Bubba Hughes, as a past editor of the *Law Journal* and the current President, provided important tips and advice for publishing the Journal and gave his great support to this project, which, I hope will be a great benefit to the members of GDLA.

My law partner, Tracy O'Connell, assisted with proofreading and editing and her help was immeasurable and greatly appreciated.

Jennifer M. Davis, our outstanding Executive Director, pulled everything together and, as usual, "made it happen" with her characteristic enthusiasm and good humor.

I hope you will find the articles in this year's *Law Journal* informative, helpful and interesting.

For the defense,

Sarah (Sally) B. Akins
Editor, GDLA *Law Journal*
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THE GEORGIA COURT OF APPEALS HAS SPOKEN: APPORTIONMENT IS REQUIRED IN MULTI-DEFENDANT CASES EVEN WHEN PLAINTIFF BEARS NO FAULT

By Amy R. Snell

Amy Snell is a partner at Fulcher Hagler LLP. For more than twenty-five years, she has represented clients in state and federal trial and appellate courts in a wide variety of matters, including premises liability, railroad accidents, commercial litigation, business torts, employment law, domestic matters, municipal and government law, civil rights, and consumer credit disputes. She is a past chair of the GDLA's appellate practice substantive law committee and authored an amicus curiae brief for the GDLA in the case under review in this Article.

Last year's Law Journal reported[1] that five years had come and gone since Tort Reform in 2005 without any Georgia appellate court decisions addressing the changes made to the apportionment statutes, O.C.G.A. §§ 51-12-31 and 51-12-33. The silence was broken on July 9, 2010, however, when the Georgia Court of Appeals decided the companion cases of Cavalier Convenience, Inc. v. Sarvis and Ken's Supermarket, Inc. v. Sarvis ("Sarvis").[2] In a unanimous decision examining the 2005 revisions to O.C.G.A. § 51-12-33, the Court held that the Legislature changed that statute such that a jury is now *required* to apportion its award of damages among multiple liable defendants *irrespective* of whether the plaintiff is at fault.[3] The Georgia Defense Lawyers Association and the Georgia Chamber of Commerce filed amicus curiae briefs supporting that position.[4]

This article will explain the evolution of joint and several liability law in Georgia, discuss two Superior Court decisions addressing the 2005 revisions that illustrate why the Court of Appeals took up the issue in Sarvis, examine Sarvis closely, and finish with suggested arguments defense counsel may find helpful as plaintiffs, displeased with Sarvis, jockey to position an apportionment case for review by the Supreme Court of Georgia.

The Evolution of Joint and Several Liability Law in Georgia

The common law rule of joint and several liability does not allow a jury to apportion damages between or among multiple defendants. The rule was derived from the principle that a trespass

is carried out in a joint enterprise for a common purpose, so each tortfeasor is liable for the entire damage done, and the jury would not be permitted to apportion damages.[5] Legal scholars believe the rule originated almost 400 years ago in an English reported case.[6]

By the early 1900s, joint and several liability/non-apportionment of damages in multiple tortfeasor cases was the majority rule in almost every jurisdiction in the United States save a few.[7] Notably, Georgia was one of those few states that refused to follow the majority rule. After the Supreme Court of Georgia applied the common law rule in an early case,[8] the Legislature created an exception in its first codification of the Georgia Code in 1863: "[W]hen several trespassers are sued jointly, the plaintiff may recover against all, the greatest injury done by either. *But the jury may, in their verdict, specify the particular damage to be recovered of each.*"[9] The Supreme Court, arguably invading the province of the Legislature by construing a plainly worded statute, stated in an 1884 case that "this section refers to trespasses committed on property, and not to such a tort [malicious arrest and false imprisonment] as is set forth in the declaration of defendant in error."[10] Nevertheless, it was clear by even the late nineteenth century that the common law rule of joint and several liability in multiple tortfeasor cases had been rejected in Georgia in favor of an exception in trespass to property cases. In such cases, the jury was free to apportion damages between or among the several defendants.[11]

The first of two more legislative repudiations of joint and several liability law in Georgia occurred in the late 1980's during the era of what one commentator termed "the modern tort reform movement."[12] During this period, "the doctrine of joint and several liability ha[d] been a frequent target of tort reform efforts."[13] Georgia's common law joint and several liability rule was one such "target." In 1987, the Georgia Legislature, which nearly a decade earlier had already created a limited exception to joint liability law in property trespass cases, created yet another exception when it enacted the Tort Reform Act of 1987. As codified at O.C.G.A. § 51-12-33, a jury was permitted to apportion damages among all parties in cases involving injury to person or property in which the plaintiff was also at fault:

> (a) Where an action is brought against more than one person for injury to person or property and the plaintiff is himself to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.[14]

Read in conjunction with O.C.G.A. § 15-12-31, the two Code sections allowed a jury to apportion damages in cases involving either trespass to property[15] or injury to person or property if there was evidence the plaintiff was also at fault.[16]

In 2005, the General Assembly targeted joint liability law once again. Senate Bill 3 of the 2005-2006 regular session made substantive revisions to O.C.G.A. § 51-12-33 so that a jury is now required to apportion damages in cases involving multiple alleged tortfeasors even absent any allegation or evidence of contributory negligence by the plaintiff. The amended subsections of O.C.G.A. § 51-12-33 is set forth below, with the language added in 2005 underlined and the language removed struck through to clarify the differences between the 1987 and 2005 versions of the statute:

> (a) Where an action is brought against ~~more than one person~~ one or more persons for injury to person or property and the plaintiff is ~~himself~~ to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, ~~may~~ shall ~~apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution~~[17] determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.
>
> (b) ~~Subsection (a) of this Code section shall not affect venue provisions regarding joint actions~~. Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

Not surprisingly, the 2005 revisions to Sections 33(a) and (b) did not sit well with plaintiffs hoping to recover one hundred percent of their damage award from a deep pocket defendant or defendants only minimally involved in the incident.

The Road to Sarvis

Despite the very clear language used by the Legislature when it revised Sections 33(a) and (b), lower courts disagreed about whether apportionment was mandatory in multi-defendant cases in the absence of evidence of fault by the plaintiff. This disagreement is illustrated in the following two cases.

In Maxwell Taylor v. DeKalb County, Georgia,[18] a plaintiff asked the trial court to strike the defendant's Notice of Fault of Non-Party, filed pursuant to O.C.G.A. § 51-12-33(d),[19] contending that it should be disregarded because, inter alia, O.C.G.A. § 51-12-33 applies only in cases where the plaintiff is to some degree responsible for his injuries and there was no such evidence or allegation of contributory negligence in that case. The defendant answered that O.C.G.A. § 51-12-33 provides for consideration of the fault of all parties to the action regardless of whether the plaintiff is also to some degree at fault. The trial court agreed with the defendant and concluded that:

> Plaintiff has failed to carry his burden to show that O.C.G.A. § 51-12-33 applies only where Plaintiff is to some extent responsible for his injury or damages claimed; . . . O.C.G.A. § 51-12-33 addresses the "reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties." . . . Contrary to Plaintiff's contention that O.C.G.A. § 51-12-33 addresses reduction and apportionment of award only when Plaintiff is responsible for his injury or damages claimed, the statute also addresses apportionment of award when Plaintiff is not responsible for his injury or damages claimed.[20]

Six months later, another judge on that very same bench reached the opposite conclusion. In Conners v. DeKalb Med. Ctr, Inc.,[21] a defendant asked the trial court to dismiss another defendant's contribution cross-claim, contending that Georgia law no longer allows joint liability among tortfeasors and that the contribution cross-claim was, therefore, barred. The court disagreed, noting that O.C.G.A. § 51-12-33(b) delineates "the only situation in which Georgia law proscribes joint liability" but only if there is evidence of fault by the plaintiff:

> In other words, it is only if a jury determines that a plaintiff is partly at fault for an injury that the jury must award damages severally, and not jointly, "among the persons who are liable according to the percentage of fault of each person." O.C.G.A. § 51-12-33(b). This is done after the award to the plaintiff is reduced according to the plaintiff's degree of fault.[22]

Because the jury had not yet determined that the plaintiffs were partly at fault for the injuries they alleged and reduced any damages awarded to the plaintiffs, the trial court refused to find as a matter of law that the defendants were severally liable, thus barring a claim for contribution. Accordingly, the court denied the defendant's motion to dismiss the cross-claim.[23]

The Taylor v. Conners dichotomy – apportionment is mandatory regardless of whether there is evidence of plaintiff's fault v. apportionment is not mandatory unless there is evidence of plaintiff's fault – set the stage for the Court of Appeals to take up the issue in Sarvis.[24]

Sarvis Settles the Score

Christopher Sarvis sustained serious injuries when his car was struck by a car being driven by defendant Jeremi Dillon Bath. Bath, only 17 years old, was admittedly intoxicated at the time of the accident. Sarvis filed a lawsuit in the State Court of Evans County seeking damages from Bath, who stipulated liability. After learning during discovery that Bath claimed to have purchased alcohol at two convenience stores, Cavalier Convenience and Ken's Supermarkets, these stores were added as defendants. Cavalier admitted to having sold alcohol to Bath but contended it did so based upon identification he presented. Ken's expressly denied having sold any alcohol to Bath.

Hoping to recover a large damage award out of the deep pockets of the defendant convenience stores, which were only marginally at fault, if at all, the plaintiff filed a motion *in limine* asking the Court to prevent the issue of apportionment of liability among the defendants from being argued or submitted to the jury. Plaintiff contended that the issue should not be submitted to the jury because, there being no allegation or evidence of his contributory negligence, the facts of the case do not support application of O.C.G.A. § 51-12-33. The plaintiff raised basically the same argument that carried the day in Conners. The defendants argued, consistent with Taylor, that the Legislature mandated apportionment in multiple defendant cases when it revised O.C.G.A. § 51-12-33 in 2005, even absent evidence of fault by the plaintiff.

The trial court found the Conners rationale more persuasive and resolved the issue in favor of the plaintiff, finding that O.C.G.A. § 51-12-33 is not applicable. The Court reached its conclusion ostensibly by reconciling subsections (a) and (b) of section 51-12-33:

> Subsection (a) clearly states that the first step of the apportionment process is establishing the reduction to be made for comparative negligence on the part of the plaintiff. Subsection (b) then provides that the apportionment among defendants is to be made "after a reduction of damages pursuant to subsection (a) of this Code Section, if any." The "after" language contemplates that comparative negligence must at the minimum be an issue considered by the jury before proceeding to apportionment under subsection (b). In a case such as this one,

> where there is no allegation or factual issue as to plaintiff's fault, the jury never even considers subsection (a) and the threshold for the apportionment stage of subsection (b) is never reached.[25]

The trial court thus granted plaintiff's motion and precluded the parties from mentioning or arguing apportionment of damages to the jury.[26]

Because the trial court's order was a non-final order, Cavalier and Ken's sought and were granted interlocutory review by the Court of Appeals. The issue on appeal was "whether, under recently amended OCGA § 51-12-33, a trier of fact is required to apportion its award of damages among multiple liable defendants when the plaintiff bears no fault."[27] The Court of Appeals answered the question affirmatively, holding that the trial court reversibly erred in its construction of the revised apportionment statute.[28]

The appellate decision turned on principles of statutory construction, most fundamentally the "cardinal rule" of "ascertain[ing] the legislative intent and purpose in enacting the law, and then . . . giv[ing] it that construction which will effectuate the legislative intent and purpose."[29] "[T]he best indicator of the General Assembly's intent is the statutory text it actually adopted and . . . [a]s long as the statutory language is clear and does not lead to an unreasonable or absurd result, it is the sole evidence of the ultimate legislative intent."[30]

The Court of Appeals' analysis of the issue was similar to the trial court's analysis – statutory reconciliation – but in a very different way. Rather than reconciling subsections (a) and (b) of O.C.G.A. § 51-12-33, which are clearly written and need no reconciliation, the appellate court compared the pre-2005 Tort Reform version of O.C.G.A. § 51-12-33 with the post-2005 version, focusing on the following language from subsection (b): "*shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person*." "Given the 'if any' clause so placed in that portion of OCGA § 51-12-33(b) emphasized above, it is clear from that subsection's plain language that the legislature did not intend for apportionment to be limited to those cases wherein the plaintiff was to some degree at fault."[31] The trial court's construction was simply incorrect because it overlooked the use and placement of the "if any" clauses in subsection (b). "Where the language of a statute is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms."[32]

Because the language used by the Legislature in its revised version of subsection (b) is "unambiguous," the Court held that "where damages are to be awarded in an action brought against more than one person for injury to person or property – whether or not such damages must be reduced pursuant to OCGA § 51-12-33(a) – the trier of fact 'shall . . . apportion its award of damages among the persons who are liable according to the percentage of fault of each person.' "[33] "Had the legislature intended for *subsection (b) of OCGA § 51-12-33* to be triggered *only* upon a reduc-

tion of damages pursuant to subsection (a) of that Code section, it could have so stated; but it did not impose any such prerequisite."[34]

The Court of Appeals also gave short shrift to the policy arguments raised in amicus curiae briefs filed by the Georgia Trial Lawyers Association and the DeKalb Rape Crisis Center in support of the trial court order. The GTLA argued that the negligence of the convenience store defendants foreseeably placed innocent motorists at risk for the reckless conduct of the underage driver, to whom a jury is likely to apportion 100% of the fault, relieving the store owners from liability entirely despite their wrongful conduct and removing any independent duty on the part of the store owners. [35] The Center argued, based on the Restatement (Third) of Torts: Apportionment of Liability §14,[36] that in a rape victim's civil action against a landlord, liability is based on the landlord's negligent conduct that exposed the victim to an intentional tort, and but for that conduct, the victim would not have been harmed. "It is neither unfair nor irrational for an innocent victim to collect full damages from a negligent defendant who knew, or should have known, that an injury would be intentionally inflicted and failed in its duty to take reasonable steps to prevent it."[37] The Court of Appeals would not consider these arguments because it had "no authority to adopt a construction that is contrary to the General Assembly's intent as plainly stated."[38] Under the separation of powers doctrine, "construction belongs to the courts, legislation to the legislature."[39]

Christopher Sarvis, understandably disappointed with the result of the appeal, filed a Petition for Writ of Certiorari, which was granted by the Supreme Court but later withdrawn after the parties reached an amicable resolution of the case.

Sarvis Redux

Because the Court of Appeals' interpretation of revised subsections 51-12-33(a) and (b) impacts considerably on a plaintiff's ability to collect a judgment, essentially eliminating the deep pocket or pockets in some cases, it is very likely that the Supreme Court will grant certiorari in another Sarvis-like case and take up the issue at some point in the near future. As the apportionment issue winds its way back up through the courts towards the Supreme Court, defense counsel will likely continue to face challenges to the revised apportionment statutes. Presented below are some of the arguments plaintiffs may raise (in italics) with suggested rebuttals from the defense (in normal font) immediately following:

- *Apportionment is not mandatory when the plaintiff bears no fault because O.C.G.A. § 51-12-31 provides that a jury "may specify the particular damages to be recovered of each defendant."* The plaintiff made this argument in Sarvis, [40] but the appellate court rejected it as "misplaced" because "[t]he legislature has plainly restricted application of *OCGA § 51-12-31*; that statute applies except as provided in *Code Section 51-12-33*."[41]

- *The amendments to O.C.G.A. §§ 51-12-31 and 51-12-33(b) simply provide clarification procedurally as to what the law in Georgia has always been and was not intended to change the law.* This argument was also raised and rejected in Sarvis as inconsistent with the

plain language of these Code provisions.[42] This argument is also is inconsistent with the plain language in the caption of Senate Bill 3, the 2005 Tort Reform Bill, that expressly stated the Legislative intent to make substantive changes relating to the apportionment statutes:

> To amend Title[ ] . . . 51 of the Official Code of Georgia Annotated, relating respectively to . . . torts, so as to provide for substantive and comprehensive revision of provisions regarding . . . liability in tort actions in general . . .; *to change provisions relating to apportionment of award according to degree of fault* ; . . .[43]

"The title *or caption* of an act . . . while no part thereof, may always be examined by the court when the act is doubtful, for the purpose of finding the legislative intent thereof."[44] The caption to S.B.3, while not wholly unequivocal, does exhibit an intention to *change* the substantive law relating to apportionment of damages, not merely clarify the law as it existed. Any equivocation in the stated purpose of the Act is eliminated, however, by a comparison of the language in the Act's caption ("to change the provisions relating to apportionment of award according to degree of fault") with the title of O.C.G.A. § 51-12-33 before it was amended by S.B. 3: "Apportionment of award according to degree of fault; individual liability." That the very same language appears in both places, in conjunction with language found at the outset of the preamble – an Act intended to "provide for substantive and comprehensive revision of provisions regarding liability in tort actions in general" – provides strong support for the conclusion that the Legislature intended to make substantive changes to the apportionment provisions of O.C.G.A. §§ 51-12-33(a) and (b).

This change is the predictable next step in a long evolution that started in the 1863 Code – away from indiscriminate application of the common law joint and several liability doctrine in all tort cases towards a more equitable approach that takes into account the fault of all persons for the injuries or damages experienced by the plaintiff.

- *The Court of Appeals interpretation of O.C.G.A. § 51-12-33(b) renders meaningless related Code sections 51-12-31 and 51-12-32, leaves no case that could fall under those statutes, and runs counter to the principle of statutory construction providing that all statutes relating to the same subject matter are to be construed "in pari materia."* The plaintiff in Sarvis raised this argument, also, but it was no more successful than his other arguments.[45] Furthermore, the Court of Appeals has already rejected the argument that the right of contribution no longer exists under Georgia law after the 2005 amendment to O.C.G.A. § 51-12-33(b).[46] O.C.G.A. § 51-12-32, retaining the right of a tortfeasor to contribution, would continue to apply in instances where one party claimed liable resolved the plaintiff's entire claim by way of settlement and then pursues an action for contribution against others claimed to be responsible. As to the "in pari materia" argument, "[t]he Supreme Court of Georgia has instructed: statutes in pari materia may *not* be resorted to where the language of the statute under consideration is clear. Where the language of a statute [such as subsection

33(b)] is plain and unambiguous, judicial construction is not only unnecessary but forbidden."[47]

- *Subsections 33(a) and (b) must be read together, rather than independently, in order to rationally understand the meaning of section 51-12-33.* This construction ignores the plain language added to subsection (b) in 2005. The words "after reduction of damages pursuant to subsection (a) of this Code section, if any" was inserted immediately before the apportionment language in subsection (b). The placement of this additional phrase requires a jury to factor its calculation of the percentage of plaintiff's contributory fault into its damage apportionment calculation but only *if any* such contributory fault is found to exist. *If* the jury does not find *any* fault on the part of the plaintiff, it is still required to apportion damages among the defendants whom it finds liable. "The fundamental rules of statutory construction require [the court] to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage."[48]

- *The words "if any" in subsection 33(b) merely emphasize a condition precedent to application of the statute as a whole, e.g., that the jury award damages.* Again, this assertion ignores the plain language of subsection 33(b). Further, if the Legislature had intended to make fault of the plaintiff a prerequisite for triggering joint and several liability, it would not have included the second "if any" in subsection 33(b).

- *The language of subsection 33(b) is not plain and unambiguous.* The Court of Appeals has already held otherwise in Sarvis. It found this subsection "plain and susceptible of but one natural and reasonable construction" and "unambiguous."[49]

- *Construing subsection 33(b) as requiring apportionment in multiple defendant cases is contrary to public policy and the Georgia Constitution.* That is a matter for the Legislature, not the judiciary.[50] Furthermore, there is nothing unfair about holding a defendant accountable for only that portion of damages attributable to that defendant's degree of fault. A plaintiff has no constitutional right to receive full compensation against a defendant that is not judgment proof.

Conclusion

The Court of Appeals may have spoken about the proper construction of O.C.G.A. §§ 51-12-33(a) and (b), but Sarvis is not likely to be the last word on that issue. While many trial judges are properly applying the apportionment statutes and using verdict forms that allow a jury to apportion damages between or among multiple defendants in tort cases even when the plaintiff bears no fault, some trial judges continue to be resistant. Attorneys who regularly represent defendants in tort cases need to familiarize themselves with the arguments plaintiffs may raise in multi-defendants cases and be prepared to rebut those arguments, particularly if they represent a deep pocket defendant, such as the convenience stores in Sarvis, who has minimal responsibility as compared to other tortfeasors.

[1] Andrew W. Wilkes & George T. Major, Jr., The Evolution of Georgia's Tort Reform Legislation: Five Years After SB3, 2010 Georgia Defense Lawyers Association Law Journal 1, 9-10.

[2] 305 Ga. App. 141, 699 S.E.2d 104 (2010), cert granted, No. S10G1895, 2011 Ga. LEXIS 34 (Ga. Jan. 18, 2011), *and motion to withdraw petition granted* (Feb. 24, 2011). GDLA President Edward M. "Bubba" Hughes represented Ken's Supermarkets, Inc. in both the trial and appellate courts.

[3] The 2005 amendments also require a jury to consider the fault of non-parties when determining percentages of fault, see O.C.G.A. § 51-12-33(c)-(f), and codifies longstanding Georgia law prohibiting recovery by a plaintiff whom the jury finds to be 50 percent or more responsible for the injury or damages claimed, *see* O.C.G.A. § 51-12-33(g); Union Camp Corp. v. Helmy, 258 Ga. 263, 267, 367 S.E.2d 796, 800 (1988) ("a tort plaintiff cannot recover if his negligence is greater than or equal to the negligence of the defendant"). These reforms were not at issue in Sarvis and will not be addressed in this Article.

[4]The GDLA's brief is on its website, http://www.gdla.org/members/torts/joint.html. The author of this Article can also provide a copy of both amicus briefs upon request.

[5] See W. Page Keeton, et al., Prosser and Keeton on Torts, § 46, at 322-323 (5th ed. 1984) (hereinafter "Prosser and Keeton.")

[6] Sir John Heydon's *case*. 77 Eng. Rep. 1150, 1151 (K.B. 1613) (trespass of battery action against multiple defendants in which court found that when "jury finds for the plaintiff . . . the jurors cannot assess several damages against the defendants because all is one trespass"); see also Prosser and Keeton, supra note 5, § 46, at 323.

[7] See Restatement (Third) of Torts: Apportionment of Liability § 17, A18, cmt. (noting that "only a few" American courts resisted adopting joint liability).

[8] Simpson v. Perry, 9 Ga. 508, 509 (1851) ("The rule is, in an action for *joint tort* against several defendants, that the Jury are to assess damages against all the defendants *jointly*, according to the amount which in their judgment, the most culpable of the defendants ought to pay") (emphasis in original; citation omitted).

[9] Orig. Code 1863, § 3007 (emphasis added). The modern version of § 3007 is found at O.C.G.A. § 51-12-31: "Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally."

[10] McCalla v. Shaw, 72 Ga. 458, 460 (1884).

[11] See, e.g., United States Fidelity & Guaranty Co., Inc. v. Paul Associates, Inc., 230 Ga. App. 243, 248, 496 S.E.2d 283, 289 (1998) (noting jury has right to disregard joint and several liability and to return separate verdicts when "damage to a property interest, as opposed to a personal injury, is inflicted") (citing Union Camp Corp., supra note 3 at 268, 367 S.E.2d at 800; Jones v. Hutchins, 131 Ga. App. 808, 207 S.E.2d 224 (1974); Craven v. Allen, 118 Ga. App. 462, 164 S.E.2d 358 (1968); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964); Daniel v. Robinson, 96 Ga. App. 342, 100 S.E.2d 94 (1957)).

[12] Marcus, Nancy, Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability, 60 Ark. L. Rev. 437, 440 (2007) ("The modern 'tort reform' movement, which blossomed in the 1980s and encompassed a myriad of modifications to state tort laws, resulted in many states legislating the limitation of joint and several liability in tort actions.") (footnote omitted). According to research conducted by the American Tort Reform Association, forty states have modified their common law rule of joint and several liability in some fashion since 1986. See ATRA Tort Reform Record (Dec. 23, 2009), http://www.atra.org/files.cgi/8442_record_12-09.pdf, at 4-13.

[13] Marcus, supra note 12 at 438.

[14] 1987 Ga. Laws page no. 921, § 8.

[15] O.C.G.A. § 51-12-31.

[16] O.C.G.A. § 51-12-33.

[17] All of the language struck through in subsection (a) except for the word "himself" was moved into the new subsection (b).

[18] Case No. 06A50694-7 (State Ct. DeKalb Co., Jan. 22, 2009). A copy of this Order is on the GDLA's website, http://www.gdla.org/members/torts/joint.html.

[19] O.C.G.A. § 15-12-33(d)(1) provides that "[n]egligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault." Section 33(d)(2) provides that "notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault."

[20] Id. at 8-9.

[21] Case No. 07-A-79146-2 (State Ct. DeKalb Co., Aug. 6, 2009). The author of this Article can provide a copy of the Order upon request.

[22] Id. at 4.

[23] Id. at 5.

[24] Prior to Sarvis, other lower court decisions addressed apportionment of damages based upon liability of non-parties under O.C.G.A. § 51-12-33(c) and (d). See, e.g., Bennett v. Wal-Mart Transp., LLC, No. 2B06CV406 (State Ct. Bulloch Co. July 5, 2007) (denying Plaintiff's Omnibus Motion Regarding the Unconstitutionality and Inapplicability of All or Part of O.C.G.A. section 51-12-33, as amended, which sought to (1) strike the "Second Defense" of Defendants' answer to the extent it reserved the right to show a third party was at fault and the cause of the collision; (2) grant partial summary judgment to the plaintiff on the issue of apportionment of damages involving a third party; and (3) order in limine that there be no presentation of evidence or argument concerning reduction of an award based on the negligence of any person who was not named as a party to the suit); Peters v. Waddell, No. 07A77984-6 (State Ct. DeKalb Co., June 30, 2008) (holding that defendant insurer could not bring a third-party claim against a driver not named in the complaint because 2005 Tort Reform Act eliminated joint and several liability, requires apportionment of damages among parties and non-parties, and took away the insurer's right to contribution); Reasoner v. Schwartz, No. 08A92811-3 (State Ct. DeKalb Co., July 30, 2009) (granting plaintiff's Motion to Strike Defendant's Notice and Designation of a Negligent or At Fault Party, interpreting 2005 Tort Reform Act as eliminating joint and several liability only in cases involving contributory negligence). The Bennett and Peters Orders are on the GDLA's website, http://www.gdla.org/members/torts/joint.html.

[25] Sarvis v. Bath, et al., No. 06SV-045 at 2-3 (State Ct. Evans Co., Aug. 31, 2009).

[26] Id. at 3.

[27] Sarvis, 305 Ga.App. at 141, 699 S.E.2d at 105.

[28] Id.

[29] Id., 305 Ga. App. at 142, 699 S.E.2d at 105 (quotations & citations omitted).

[30] Id. (quotations & citations omitted).

[31] Id., 305 Ga. App. at 144, 699 S.E.2d at 106 (footnote omitted).

[32] Id., 305 Ga. App. at 144-145, 699 S.E.2d at 107 (quotations & citations omitted).

[33] Id., 305 Ga. App. at 145, 699 S.E.2d at 107 (quoting O.C.G.A. § 51-12-33(b)).

[34] Id. (emphasis in original).

[35] Id., 305 Ga. App. at 146 n. 24, 699 S.E.2d at 108 n. 24.

[36] This Restatement Section provides in its entirety: "A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person."

[37] Sarvis, 305 Ga. App. at 146 n. 24, 699 S.E.2d at 108 n. 24.

[38] Id., 305 Ga. App. at 146-147, 699 S.E.2d at 108.

[39] Id., 305 Ga. App. at 147, 699 S.E.2d at 108 (quotations & citations omitted).

[40] Sarvis, 305 Ga. App. at 145, 699 S.E.2d at 107.

[41] Id. (internal quotations and citation omitted; emphasis in original).

[42] Id.; *see also* Michael L. Wells, 39 Georgia Law Advocate, Joint Tortfeasor Rules 18 (Spring/Summer 2005).

[43] 2005 Ga. Laws page no. 1 (emphasis added).

[44] Moore v. Robinson, 206 Ga. 27, 40, 55 S.E.2d 711, 721 (1949) (citation omitted & emphasis added).

[45] Sarvis, 305 Ga. App. at 146, 699 S.E.2d at 107.

[46] Murray v. Patel, 304 Ga. App. 253, 255, 696 S.E.2d 97, 99 (2010).

[47] Sarvis, 305 Ga. App. at 146, 699 S.E.2d at 108 (citations omitted).

[48] Blue Moon Cycle, Inc. v. Jenkins, 281 Ga. 863, 864, 642 S.E.2d 637, 638 (2007) (quotations & citation omitted), recon. denied (Apr. 10, 2007).

[49] Sarvis, 305 Ga. App. at 144-145, 699 S.E.2d at 107.

[50] Id., 305 Ga. App. at 147, 699 S.E.2d at 108.

HAS THE LEGISLATURE SPOKEN?

By Megan Usher Manly

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"What you don't know can't hurt you." "Ignorance is bliss." We tend to use these phrases in a rather tongue-in-cheek fashion, when we know we probably *should* pay special attention to something, but we decide it is better to refrain, so we can avoid being held accountable for knowing too much and not doing enough in response.

The Georgia legislature has clearly and unequivocally told professional health service providers and their review committees that what they *do* know *won't* hurt them when it comes to their self-evaluations. Through O.C.G.A. § 31-7-143, the legislature has granted what has been termed a "self-critical analysis privilege," protecting the confidentiality of certain medical review proceedings, communications, and findings due to "concern that the candor necessary for these committees would be destroyed if their proceedings and conclusions were subject to use in malpractice litigation."[1] The legislature enacted the statute because these review committees "play an important role in guaranteeing 'the delivery of quality health care services by providing a method for the in-house review of clinical work performed in the hospital.'"[2]

Realistically, however, professional health service providers are not the only ones who could benefit from being able to perform candid and critical in-house reviews of their work and their employees with confidence that the information will not later be subject to discovery simply because a suit is filed. For instance, both manufacturers and consumers would benefit from a manufacturer's willingness to perform tests on its products that are more critical than what is required by law. And manufacturers would likely be willing to put their products through more rigorous testing if they knew that the resulting (potentially damaging) self-criticism could likely be protected from discovery. Likewise, a company could benefit from making records and reports about on-the-job accidents or negligence and the specific employees involved therein, but that company would likely refrain from exercising such a beneficial level of self-criticism if it realized that this information could later be discovered during litigation.

For just those reasons, a number of courts have recognized a self-critical analysis privilege in contexts other than medical review committees. For instance, in Bradley v. Melroe Co., the District Court for the District of Columbia applied a self-critical analysis privilege to protect a manufacturer from producing its in-house investigative files for seven accidents that involved circumstances very similar to the accident in which the plaintiff had been injured.[3] The court explained that

> [t]he reasoning behind [the self-critical analysis privilege] is that the ultimate benefit to others from this critical analysis of the product or event far outweighs any benefits from disclosure. Valuable criticism could not be obtained under the threat of potential or possible public exposure for it is not realistic to expect candid expressions of opinion or suggested changes in policies, procedures or processes knowing that such statements or suggestions may very well be used against colleagues and employees in subsequent litigation.[4]

Nonetheless, the Georgia legislature limited its statutory self-critical analysis privilege to review committees for professional health service providers and did not enact any similar statutes for other industries or professions. And neither the Georgia Court of Appeals nor the Georgia Supreme Court has found that such a general self-critical analysis privilege exists under common law. Indeed, quite to the contrary, the Georgia Court of Appeals has indicated that, unless the legislature enacts additional statutes, the privilege will not extend any further than O.C.G.A. § 31-7-143 expressly permits.

In DeLoitte Haskins & Sells v. Green, the Georgia Court of Appeals provided clear commentary about the exclusivity of the privilege.[5] In that case, the plaintiff, who alleged that he had been given negligent tax advice by certain employees of the defendant-employer, sought to obtain the personnel records and any evaluations made by the employer of the employees who had given the allegedly negligent tax advice.[6] When the employer refused to produce the documents, the plaintiff filed a motion to compel, which was ultimately granted by the trial court (though with some limitations "calculated to protect the privacy of the employees whose personnel records and evaluations were at issue").[7] On appeal, the court noted at the outset that, "with the exception of the discoverability of the proceedings and records of a medical review committee (see O.C.G.A. § 31-7-143), the issue of the discoverability of the internally generated personnel records and evaluations made by an employer of his allegedly negligent employees has not previously been addressed by the appellate courts of this State."[8]

The DeLoitte court then began its analysis by addressing "whether the materials sought to be discovered by appellee constitute privileged matter."[9] Although the court acknowledged that, "clearly, the discoverability of the materials being sought by appellee must be balanced against the competing interests that appellant and its affected employees have in the maintenance of the

confidentiality and privacy of the internally generated personnel records and evaluations," the court proceeded to explain that "it is, however, also equally clear that, under existing Georgia authority, the asserted need to protect the privacy of the internally generated personnel records and evaluations of allegedly negligent employees is not sufficient to render the material privileged from discovery as a matter of law."[10] In support of this assessment, the court turned to O.C.G.A. § 31-7-143, the statute affording discovery protection to the internally generated proceedings and records of a medical review committee.[11] The court emphasized the fact that this specific statute "is in derogation of the general policy in favor of the discovery and admissibility of probative evidence," and that it therefore "reflects the legislative creation of a narrow exception to the general rule of broad discovery recognized in this state, rather than the legislative recognition of a broad privilege against the discovery of any and all employee personnel records and evaluations."[12] The court then concluded that there was no viable basis for broadening or extending the statutory privilege created exclusively for the medical setting.[13] Accordingly, the court held that, "notwithstanding appellant's claim of a privilege of privacy and confidentiality, it has no blanket right to refuse to allow appellee to engage in discovery as to the internally generated personnel records and evaluations of its allegedly negligent employees."[14]

Interestingly, however, despite DeLoitte's seemingly clear holding and the dearth of any other Georgia case recognizing such a privilege (outside of the medical context), several United States District Courts in Georgia have concluded that a self-critical analysis privilege does exist beyond the medical context under Georgia law.

In Shipes v. Bic Corp., the plaintiff, who had been burned by an allegedly defective Bic lighter, sought production by Bic of various internal review documents regarding all of their lighters.[15] Although the court acknowledged that "Georgia courts have not decided whether a common law privilege exists for self-critical analysis," it (unlike the DeLoitte court) was encouraged by the existence of Georgia's statutory privilege for self-critical analysis generated in medical peer review committees.[16] Making no reference to DeLoitte, the district court concluded that, "in light of the public policy served by protecting Bic's self-evaluation disclosures ... and the analogous protection afforded under Georgia's Medical Peer Review Statute, ... Georgia courts would endorse the self-critical analysis privilege and apply the privilege to confidential self-evaluation documents created by a manufacturer."[17]

In Joiner v. Hercules, Inc., the plaintiffs sought production by the defendant of certain documents that the defendant had created in order to evaluate its own compliance with environmental laws.[18] The court actually acknowledged that "the Georgia legislature has not yet clearly embraced the [self-critical analysis] privilege" in non-medical contexts, but nonetheless held that, because other federal courts had recognized it, and it "promote[d] sufficiently important interests to outweigh the need for probative evidence," the privilege would be granted to the defendant manufacturer.[19]

In stark contrast, however, another district court in Georgia recently harshly criticized the foregoing de-

terminations. In Lara v. Tri-State Drilling, Inc., the Northern District of Georgia stated that "the history and application of the self-critical analysis privilege ... are anything but clear ... [and] application of the privilege has been rare."[20] The court blasted the Shipes and Joiner courts for relying too heavily on federal case law from other states and virtually ignoring the fact that Georgia's courts and legislature have clearly not recognized the privilege.[21] The court agreed with the Shipes and Joiner courts' assessment that "the self-critical analysis privilege is based on the same rationale supporting the medical peer-review privilege," but concluded that "the fact that the peer review privilege in this particular [statutory] context is limited to review organizations within the healthcare field weighs heavily against extending such privilege to a corporate organization."[22] The court emphasized its point by noting "the legislative history of [O.C.G.A.] § 31-7-133 narrowing the definition of 'review organization' to include only those working in the healthcare industry."[23] In sum, the court held that "[t]he narrow approach taken by the Georgia legislature, and the complete absence of the Georgia courts having recognized a self-critical analysis privilege, leads this court to conclude that Georgia law does not allow for such a privilege."[24]

The Lara court additionally touched on the fact that, in 1990, the United States Supreme Court, in Univ. of Pa. v. E.E.O.C.,[25] decided against creating a common law peer review privilege in the context of Title VII employment discrimination allegations. Several courts have commented that the viability of the self-critical analysis privilege is "doubtful" after Univ. of Pa.[26] Notably, the Univ of Pa. Court, in addressing whether a federal common law privilege should apply, emphasized the fact that "[t]he balancing of conflicting interests of this type [in the privilege context] is particularly a legislative function."[27] Thus, the Supreme Court's deference to the legislature mirrors that of the Georgia Court of Appeals in DeLoitte.[28]

As demonstrated above, there is a bit of a federal district court "split" in Georgia with regards to this issue. Unfortunately, neither the Eleventh Circuit nor the Georgia Court of Appeals or Supreme Court has spoken since the Shipes, Joiner, and Lara orders were entered. In light of the DeLoitte decision, the Lara court likely has the most accurate perspective -- that the privilege is not currently available under Georgia law. While a slightly stronger argument in support of the privilege could be made to a federal district court sitting in diversity and applying Georgia substantive law (because of the existence of the Shipes and Joiner cases), an attorney should be hesitant to urge that a Georgia state court apply such a privilege, in light of the fact that no Georgia state court has recognized the privilege and the DeLoitte court has made rather clear that there is no self-critical analysis privilege beyond that set forth in O.C.G.A. § 31-7-147.[29]

Outside of the context of litigation, companies should be aware that the protection over their self-critical in-house reviews is lacking in both Georgia state courts and federal courts. The damage is already done, so to speak, if a company waits until litigation arises to realize that certain privileges and protections do not exist. While companies should not be discouraged from making honest and critical reviews and reports,

especially if such review policies result in a *reduction* in litigation, the companies nonetheless should be made aware from the outset that their incident reports and review files will not necessarily be protected from discovery, and they may want to temper their reports accordingly.

[1] Emory Univ. Hosp. v. Sweeney, 220 Ga. App. 502, 504 (1996) (citing Eubanks v. Ferrier, 245 Ga. 763, 765 (1980)).

[2] Id. (citing Eubanks, 245 Ga. at 765).

[3] 141 F.R.D. 1 (D.D.C. 1992).

[4] Id. at 3.

[5] 187 Ga. App. 376 (1988).

[6] Id. at 376.

[7] Id.

[8] Id. at 377.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id. at 378.

[14] Id.

[15] 154 F.R.D. 301 (M.D. Ga. 1994).

[16] Id. at 306-07.

[17] Id. at 307.

[18] 169 F.R.D. 695, 698-99 (S.D. Ga. 1996).

[19] Id.

[20] 504 F. Supp. 2d 1323, 1326 (N.D. Ga. 2007).

[21] Id. at 1327.

[22] Id. at 1328.

[23] Id. (citing Emory Clinic v. Houston, 258 Ga. 434, 435 n.1 (1988)).

[24] Id.

[25] 493 U.S. 182 (1990).

[26] Lara, 504 F. Supp. 2d at 1326; see also Cochran v. Nat'l Processing Co., 2010 WL 820943, at *3 (E.D. Ky. March 4, 2010); Granberry v. Jet Blue Airways, 228 F.R.D. 647, 650 (N.D. Cal. 2005).

[27] Univ. of Pa., 493 U.S. at 189.

[28] 187 Ga. App. at 378 ("There is no viable basis for asserting that the privilege created by OCGA § 31-7-143 can or should be judicially extended.... '[T]he separate classification of medical malpractice actions is a rational exercise of the legislative power.'") (citing Eubanks, 245 Ga. at 766).

[29] Because the DeLoitte court's holding focused on the fact that the legislature had created such a privilege only in the medical malpractice context, it would be difficult -- if not impossible -- to make a good faith argument that its holding should be confined to the specific facts of the case.

ENFORCING ARBITRATION IN CONSTRUCTION DEFECT LITIGATION

by Alexander ("Alec") T. Galloway III

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An often overlooked provision in a building contract is the alternative dispute resolution paragraph. Arbitration provisions in contracts never become important until a dispute over the subject matter of the contract arises. Oftentimes when the dispute arises, it may be too late to enforce an arbitration agreement if the arbitration provision is deficient, not properly executed, or if the proper documentation is not available to prove that the parties agreed to arbitrate.

This article will discuss why arbitration provisions can be very important in the construction setting and the best ways to ensure that an agreement to arbitrate is enforceable. Next the article will delve into a discussion of the Georgia Arbitration Act[1] and the Federal Arbitration Act[2]. Finally, there will be a discussion of the principle of equitable estoppel, which can be used to compel a plaintiff's claims against nonsignatories to an arbitration agreement to arbitration.

I. WHY ALL THE FUSS?

For any practitioner who has conducted *voir dire* in a construction defect case (particularly a *residential* construction defect case), the answer to this question is obvious (and most likely "Duh!"). Jurors do not like contractors. Jurors do not trust contractors. Furthermore, while defense attorneys in civil litigation generally prefer educated, working homeowners to serve as jurors for their cases, in construction defect litigation those are the people who, more likely than not, have had a bad experience with a builder. Contractors charged with defending against a claim of alleged construction defects in a residential setting come in as 56 point underdogs – while playing without their starting quarterback!

Arbitrators, on the other hand, are generally very knowledgeable about construction issues and have a realistic approach to what is truly defective and what is not defective. Thus, while they ultimately may find for the plaintiffs on

some of their claims, it will not be based upon an unfair bias or stereotype. Furthermore, arbitrators, unlike most jurors, will be able to separate the wheat from the chaff – the chaff being the often petty and emotional squabbles between the builder and the homeowner.

Furthermore, some posit that arbitration is less costly. While this is generally true because the case will not usually linger in discovery for several years, arbitration is far from cheap – discovery will have to be conducted, and, depending on the case, the arbitration itself could take several days or even weeks. Nevertheless, as a general rule, arbitration, while not inexpensive, usually is less expensive and quicker to a resolution than the traditional civil jury trial route.

Finally, arbitration usually avoids the extremes of jury trials – runaway verdicts and outright defense verdicts. While most practitioners have experienced some outright defense verdicts in construction arbitrations, it is usually not the norm, as most of the time a homeowner will have at least one legitimate claim. On the other hand, and more importantly, there are no "runaway verdicts" in arbitration for the homeowners. Typically, a homeowner will have an incredibly long list of alleged defects in addition to claims for breach of contract, breach of warranty, fraud, deceit, misrepresentation, unjust enrichment, equitable rescission, diminution of value, loss of use and attorney's fees, etc. The dollar value placed upon all such claims by counsel for the homeowner usually exceeds the value of the home itself. While the wrong jury might give plaintiff everything under the sun, an arbitrator (who is selected with input from defense counsel) will almost never do so. Further, counsel for the homeowner will most likely have a claim for exorbitant attorney's fees which will invariably be requested in addition to the homeowner's damages. A carefully crafted arbitration agreement will eliminate such exposure.

II. HOW TO ENSURE THAT THE ARBITRATION CLAUSE IS VALID

a. The Purchase and Sale Agreement

Typically, the standard Purchase and Sale Agreement issued by the Georgia Association of Realtors will have a provision for the arbitration of disputes. However, not all purchase and sale agreements contain such a provision and those that do contain such a provision have language which indicates that the provision is not enforceable unless initialed by both parties. In closings, the initialing of the arbitration provision is often overlooked – many times to the chagrin of the builder when it is sued for alleged construction defects. Typical arbitration provisions provide as follows:

> Buyer and Seller agree that any construction defect claim not resolved after following the procedure in O.C.G.A. § 8-2-38 and all other claims between the parties shall be settled by arbitration through the services of an arbitrator mutually agreed upon by the parties. The decision of the arbitrator shall be final and may be enforced by any court having jurisdiction thereof. The arbitration shall be conducted

> in accordance with O.C.G.A. § 9-9-1 et seq. Notwithstanding the provisions of this subparagraph, if Buyer is claiming under a warranty provided by Seller, the terms and procedures of that warranty shall first apply to the resolution of the claim. **In order for this paragraph to be part of this Agreement it must be initialed by Buyer and Seller; if not initialed it shall be void and unenforceable.** (emphasis added).

The requirement that the agreement to arbitrate be initialed by both parties is mandated by O.C.G.A. § 9-9-2 (c) (8) which provides as follows:

> (c) This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply:
> ...
>
> (8) Any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement. This exception shall not restrict agreements between or among real estate brokers or agents;

Accordingly, because this language must be included in order to compel arbitration under the Georgia Arbitration Act[3], it is crucial for builders to insure that both they AND the homeowners initial this paragraph.

b. The Warranty

The sample arbitration provision cited above from a typical Purchase and Sale Agreement also incorporates and references a 2-10 Home Buyers Warranty. If the homeowners have initialed the arbitration provision and the homeowners have signed a typical 2-10 Warranty Application, enforcing arbitration is that much easier for a builder. The typical Warranty Application indicates that by signing the Warranty Application, homeowners acknowledged that they have "read a sample copy of the Warranty Booklet, and CONSENT TO THE TERMS OF THESE DOCUMENTS INCLUDING THE BINDING ARBITRATION PROVISION contained therein."

The typical 2-10 Warranty Booklet contains a broad arbitration clause wherein the parties agree as follows:

> ARBITRATION Any and all claims, disputes and controversies by or between the Homeowner [and] the Builder . . . arising from or related to this Warranty, to the subject Home, to any defect in or to the subject Home or the real property on which the subject Home is situated . . . including without limita-

> tion, any claim of breach of contract, negligent or intentional misrepresentation or nondisclosure in the inducement, execution or performance of any contract, including the arbitration agreement, and breach of any alleged duty of good faith and fair dealing, shall be submitted to arbitration . . . .

Moreover, the typical 2-10 Warranty arbitration agreement goes on to state that "[a]ny disputes concerning the interpretation or enforceability of this arbitration agreement, including without limitation, its revocability or voidability for any cause, the scope of arbitrable issues, and any defense based on waiver, estoppel or laches, shall be decided by the arbitrator." Furthermore, the arbitration agreement typically expressly states that the parties agree that the Warranty and arbitration agreement "involve and concern interstate commerce and are governed by the provisions of the Federal Arbitration Act (9 U.S.C. § 1, et seq.)."

This is important because the Federal Arbitration Act is much broader than the Georgia Arbitration Act and does not require the parties to initial the arbitration clause in the Warranty.

III. ARBITRATION STATUTES

a. The Georgia Arbitration Act

In 1988 the Georgia General Assembly enacted the current Georgia Arbitration Code (hereinafter "GAC"). The enactment of this Act by the Georgia General Assembly established "a clear public policy in favor of arbitration" in this state. Witherington v. Adkins.[4] "Georgia courts are required to uphold valid arbitration provisions in contracts." Saturna v. Bickley Constr. Co.[5]

Georgia Code section 9-9-3 provides in pertinent part:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable without regard to the justiciable character of a controversy and confers jurisdiction on the court of the state to enforce it and to enter judgment on an award.

The GAC further states that the court **"shall"** order the parties to arbitrate "[i]f the court determines there is no substantial issue concerning the validity of the agreement to submit to arbitration . . . ." O.C.G.A. § 9-9-6(a) (emphasis supplied). Moreover, broad arbitration clauses which apply to all claims between parties are enforceable. See D.S. Ameri Constr. Corp. v. Simpson.[6]

When the language of the arbitration clause is broad enough to encompass "all claims", Georgia courts have no jurisdiction over the subject matter of the claims except for confirmation of an arbitration award. See LaSonde v. Citi-Financial Mortgage Co.[7] (upholding trial court's dismissal of case where all of the causes of actions against the defendant were compelled to arbitration, and there was nothing left for the trial court to resolve).

b. The Federal Arbitration Act

The Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1 et. seq., is much more broad and much easier to enforce. Thus, offering a 2-10 Warranty can be of great benefit to a builder. The typical arbitration agreement contained within the Warranty provides that the parties expressly agree that the arbitration agreement involves and concerns interstate commerce and that the agreement is governed by the FAA.

The FAA provides in relevant part that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Under the FAA, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Wise v. Tidal Constr. Co.[8]

Broad arbitration clauses which apply to all claims between the parties are enforceable and encompass claims that an entire contract should be rescinded due to fraud. See Harrison v. Eberhardt,[9] (analyzing identical arbitration language from a 2-10 Home Buyers Warranty and finding that all of the plaintiff's claims were subject to arbitration even though the plaintiff did not bring her claims under the Home Buyers Warranty); Wise v. Tidal Constr. Co.,[10] (finding broad arbitration agreement in 2-10 Home Buyers Warranty applied to all of the plaintiffs' claims, including

their breach of contract and negligence claims); Bennet v. Cotton,[11] (upholding broad arbitration clause and finding same applied to claims for fraud and deceit); see also Prima Paint Corp. v. Conklin Mfg. Co.,[12] (finding fraud in the inducement claim was an issue for the arbitrator to decide; not an issue for the trial court).

c. Major Differences Between the GAA and the FAA

The first and most significant difference between the Federal Act and the Georgia Act is that in Georgia, a potential plaintiff cannot be forced to arbitrate "future claims arising out of personal bodily injury or wrongful death based on tort." O.C.G.A. § 9-9-2 (c) (10). The Federal Act has no such limitation. Thus, if the arbitration clause is drafted carefully and broadly enough, even claims for personal injury against the builder will be subject to arbitration if the agreement specifies that the FAA shall apply. This will help tremendously in the ever popular mold injury claims against builders.

The second significant difference is the fact that arbitration agreements under the Georgia Act are not enforceable unless all parties have initialed the arbitration provision. O.C.G.A. § 9-9-2 (c) (8). Under the FAA, there is no requirement that the paragraph which contains the agreement to arbitrate be initialed. Thus, so long as the agreement itself is signed by the parties, the claims listed in the arbitration provision must be resolved through arbitration.

IV. ENFORCING ARBITRATION FOR SPECIFIC CLAIMS

a. Claims for Attorney's Fees

Claims for attorney's fees can be a major issue for even minor construction defect disputes. For example, assume a homeowner has alleged approximately $30,000 in construction defects and efforts to resolve with the builder have failed. The homeowner then hires an attorney who bills at the rate of $300 per hour. The attorney tries to negotiate a resolution with the builder with no success – 10 hours of time. Next, the attorney tries to negotiate with an adjuster with the builder's general liability insurance carrier with no success – 10 hours of time. Accordingly, the attorney files suit, initiates discovery, takes depositions etc. – 50 hours of time. Further assume that defense counsel, through discovery, is able to convince the plaintiffs and their attorney that their defect claims are really only worth $15,000. However, the plaintiffs have incurred $21,000 in attorney's fees and have made a claim for same in their lawsuit. They now want $36,000 to settle and they are willing to take their chances with a jury, most of whom will hate the builder and may very well award attorney's fees. A well drafted arbitration provision can eliminate any potential for recovery of such fees.

In Hope & Associates, Inc. v. Marvin M. Black Company,[13] the Georgia Court of Appeals held that in an arbitration setting, attorney's fees are a matter of contract. Thus, the parties can decide in the contract whether or not attorney's fees are recoverable by the prevailing party.[14]

First the Court held that "In Georgia, attorney['s] fees are recoverable only when authorized *by statute or by contract*."[15] The court then noted that there is no statute specifically authorizing attorney's fees in arbitration proceedings.[16] However, the parties in Hope & Associates did agree in the contract that the prevailing party would be entitled to an award of attorney's fees.[17] Thus, the Court upheld this award.[18]

More importantly, however, is the language in the Court's holding where it stated that:

> If the parties contract for attorney's fees, that agreement will be enforced. If the parties do not contract for attorney's fees, **each party will be responsible for the payment of his own attorney's fees.[19]**

Furthermore, absent a specific agreement for the payment of attorney's fees, the homeowner still cannot win an award of fees pursuant to O.C.G.A. § 13-6-11. See Walton Acoustics v. Currahee Constr. Co.[20]

Under the FAA, the issue of an award of attorney's fees is likewise a matter of contract and absent statutory authorization or contractual agreement, the normal American rule for attorney's fees would apply. See, e.g. Menke v. Monchecourt.[21]

Some builders will balk at not having a provision to recoup their attorney's fees should a homeowner file for arbitration against them. However, as can be seen from the example above, a provision in an arbitration agreement

for the prevailing party to recover attorney's fees has costs which are simply outweighed by the benefits.

b. Are Claims for Rescission and/or Fraud in the Inducement Subject to Arbitration?

The Court of Appeals answered this question in the affirmative in the case of Harrison v. Eberhardt.[22] In Harrison, a homeowner filed suit against her builder alleging that she had been fraudulently induced to purchase the property and sought rescission of the purchase and sale agreement. Harrison.[23] In the process of purchasing her home, the homebuyer signed a document acknowledging and consenting to the terms of a 2-10 Home Buyers Warranty.[24] This document expressly noted that the warranty included a binding arbitration provision.[25] The plaintiff did not bring her suit under the warranty, but instead instigated the action on the basis of the purchase and sale agreement for the property.[26] The builder moved to compel arbitration under the arbitration clause contained within the 2-10 Home Buyers Warranty.[27] The Court of Appeals relied on Wise v. Tidal Constr. Co.[28] and found that the language of the broad arbitration agreement was enforceable under the FAA, and that it encompassed the plaintiff's claim for fraudulent inducement.[29]

Thus, when a typical 2-10 Warranty is provided, even claims for fraud in the inducement and equitable rescission will be subject to arbitration. However, what about cases where a 2-10 Warranty is not provided? Fortunately, the Court of Appeals recently answered this question in the affirmative in the recent case of Order Homes, LLC v. Iverson et. al.[30]

In Iverson, Allen "The Answer" Iverson and his wife, Tawanna, filed suit in the Superior Court of Fulton County against their homebuilder and several other sub-contractors, individuals and other entities, asserting claims for fraud, deceit, misrepresentation, negligent hire, continuing nuisance, strict products liability, unjust enrichment, and violation of the Uniform Deceptive Trade Practices Act.[31]

The builder, its principals, the builder's related companies and their principals moved to compel arbitration pursuant to the arbitration provision contained within the Purchase and Sale Agreement (a GAR standard contract).[32] The arbitration provision at issue provided as follows:

> Buyer and Seller agree that any construction defect claim not resolved after following the procedure in O.C.G.A. § 8-2-38 and **all other claims between the parties shall be settled by arbitration** through the services of an arbitrator mutually agreed upon by the parties. The decision of the arbitrator shall be final and may be enforced by any court having jurisdiction thereof. The arbitration shall be conducted in accordance with O.C.G.A. § 9-9-1 et seq. Notwithstanding the provisions of this subparagraph, if Buyer is claiming under a warranty provided by Seller, the terms and procedures of that warranty shall first apply to the resolution of the claim. In

> order for this paragraph to be part of this Agreement it must be initialed by Buyer and Seller; if not initialed it shall be void and unenforceable. (emphasis added).

The Iversons attempted to avoid the binding arbitration provision in several ways. First, they argued that despite the broad language quoted above, claims for equitable rescission and/or fraud in the inducement could not be subject to arbitration because, if successful, the Purchase & Sale Agreement would be void *ab initio* and, thus, there would not be any arbitration agreement for the Court to enforce.[33]

In support of their argument in this regard, the Iversons cited the case of D.S. Ameri Construction Corporation v. Simpson.[34] In Simpson, the arbitration clause at issue provided as follows:

> Any unresolved claims or dispute between Seller and Buyer arising out of or relating to such warranty, if any, and any other claim or dispute of any kind or nature between Seller and Buyer arising out of or relating in any manner to this Agreement or this transaction shall be decided by binding arbitration.... The provisions of this paragraph shall survive closing and delivery of the warranty deed to Buyer and *shall apply to any claim for rescission of the Agreement.* Any questions regarding the interpretation of this arbitration provision or about the arbitrability of a dispute under this provision shall be decided by the arbitrator, unless specifically required by law to be decided by a court, and shall be binding on the parties.[35]

Furthermore, the Iversons asserted a count under the Fair Business Practices Act which was done for only one transparent reason – to attempt to get around the arbitration provision of the contract.[36] O.C.G.A. § 9-9-2 (c) (7) provides that claims for "[a]ny contract involving consumer acts or practices or involving consumer transactions as such terms are defined in subsection (a) of Code Section 10-1-392, relating to definitions in the "Fair Business Practices Act of 1975" are not required to be arbitrated. Thus, the Iversons attempted to characterize the purchase and sale of their home as a "consumer transaction" based upon the fact that O.C.G.A. § 10-1-392 (a) (10) defined "consumer transactions" to include "the sale, purchase, lease, or rental of goods, services, or property, real or personal, primarily for personal, family, or household purposes."

Surprisingly, the trial court judge agreed with the Iverson's logic on this. Fortunately, however, the Court of Appeals reversed on this issue and held that the contract language was unambiguous and that the intent to arbitrate not only construction defect claims but also "all other claims between the parties" was clear and enforceable, including claims for fraud in the inducement and equitable rescission and under the Fair Business Practices Act ("FBPA").[37] As to the definition of "consumer transactions" in the FBPA, the Court noted that the *general* exception to consumer

transactions in the GAC does not override the specific inclusion of an agreement for the construction of a new home if the arbitration clause is initialed. O.C.G.A. § 9-9-2 (c) (8).[38]

IV. EQUITABLE ESTOPPEL

The final way that the Iversons tried to avoid arbitration was by suing other entities and individuals related to the builder but who had not signed the arbitration agreement.[39] Thus, plaintiffs argued that their claims against non-signatories to the arbitration agreement should be allowed to proceed to a jury trial. The trial court agreed and again the Court of Appeals reversed. [40]

The Court of Appeals held that the trial court committed error by refusing to apply the doctrine of equitable estoppel and not allowing non-signatory Defendants to compel Plaintiffs' claims against them to arbitration.[41] In so holding, the Court of Appeals noted that it has repeatedly held that a non-signatory defendant may enforce an arbitration agreement against a signatory plaintiff.[42] see, e.g., Price v. Ernst & Young, LLP,[43] (applying equitable estoppel and finding a non-signatory may compel a signatory plaintiff to arbitration); AutoNation Fin. Serv. Corp. v. Arain,[44] (equitably estopping signatory party from asserting non-signatory could not enforce arbitration clause) (physical precedent only); Paine, Webber, Jackson & Curtis, Inc. v. McNeal,[45] ("If arbitration defenses could be foreclosed simply by adding as a defendant a person not a party to an arbitration agreement, the utility of such agreements would be seriously compromised").

The Court of Appeals first adopted the equitable estoppel doctrine in AutoNation Financial Services Corporation v. Arain,[46] (physical precedent only). Since the Arain opinion was issued, it has been relied upon and cited on multiple occasions with approval.[47] In Arian, a non-signatory finance company sought to enforce the arbitration provision contained in an installment contract and compel the plaintiff's RICO claims to arbitration.[48] The court determined that the FAA governed the dispute.[49] On the appeal of the trial court's denial of the non-signatory defendant's motion to compel arbitration, the Court held that the plaintiff was equitably estopped from asserting that the non-signatory finance company cannot enforce the arbitration clause. [50]

The Court of Appeals has considered several factors for applying equitable estoppel, including the potential for conflicting decisions if a non-signatory is not brought to arbitration, the status of the parties as joint tortfeasors, and the relationship of the claims to the arbitration contract.[51] Prior to the Iverson case, the Court cited to the Eleventh Circuit and noted two different circumstances where equitable estoppel allows a non-signatory to compel arbitration: 1) "when the signatory to written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory" or 2) "when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract."[52] The Court further held that applying the equitable estoppel doctrine was "in accordance with existing Georgia law."[53]

In Arian, both of the equitable estoppel prongs were met.[54] First, the plaintiff's claims against the non-signatory were sufficiently related to the arbitration agreement because the complaint referenced the subject sale and the "gist" of the complaint was that the charge for the purchase was excessive.[55] Second, the claims were based on the same acts and were "inherently inseparable" because the plaintiff sued multiple defendants and alleged that the defendants worked in concert together.[56] see also Price,[57] (expanding on Arian and looking to the complaint as a whole, which referenced the transaction on which the agreement centered over 40 times and further alleged that all defendants collectively damaged the plaintiffs).

The Court held that equitable estoppel applied in the Iverson case in the same manner as it applied in Arian and Price. Under the first prong, Plaintiffs' claims against all the Defendants relate to and rely on the subject Contract. Plaintiffs' Complaint references the "agreement" or "contract" between the parties over 20 times, and additionally makes voluminous references to the construction of the subject home. These repeated references show that all of Plaintiffs' claims, including their tort claims, presume the existence of the subject agreement. The "gist" of Plaintiffs' Complaint is that they were damaged as a result of the construction of their house.[58]

Second, the Court held that equitable estoppel applied to the Iverson case because Plaintiffs' Complaint raises allegations of substantially interdependent and concerted misconduct by both signatory Defendant Order Homes and the other non-signatory Defendants.[59]

Specifically, the Court noted that "[t]he Iversons are attempting to sue non-signatories for claims arising out of the Contract on one hand, while avoiding the arbitration clause pertaining to these same claims on the other hand. Equitable estoppel doctrine should apply in this case to prevent the Iversons from avoiding arbitration with the non-signtory appellants."[60]

Interestingly, the Court appeared to indicate that the other parties to the litigation (sub-contractors of the builder who had been sued by the Iversons) could have used the doctrine of equitable estoppel to force the Iversons to litigate their claims against them in arbitration; however, some of the defendants failed to seek arbitration under the Agreement. Thus, the Court allowed the claims against those sub-contractors to proceed with litigation.

CONCLUSION

Carefully crafted and properly executed arbitration agreements are extremely strong tools which can greatly benefit a builder should a disgruntled homeowner seek to assert claims for construction defects. Keeping the ultimate decision on such matters out of the hands of jurors and putting them in the hands of skilled arbitrators is but one reason to have such provisions in contracts between builders and homeowners. Further, by eliminating the possibility that the homeowner will be able to obtain an award of attorney's fees greatly reduces the incentive for the homeowners and their attorneys to be unreasonable and to engage in expensive and protracted litigation. It is up to us as attorneys to advise our builder clients to incorporate such language into their contracts and it is up to us to seek en-

forcement of the agreement to arbitrate when the time comes. However, it is incumbent upon the builder to make sure the contract is properly executed, the arbitration provision is properly initialed and to see to it that all necessary documentation is maintained appropriately. If such steps are taken by all parties involved, the defense of construction defect claims will be much more streamlined, efficient and easier to resolve on a fair and reasonable basis.

[1] O.C.G.A. §§ 9-9-1 et. seq.

[2] 9 U.S.C.A. §§ 1 et. seq.

[3] The Federal Arbitration Act does not require the agreement to arbitrate to be initialed. Langfitt v. Johnson, 284 Ga. App. 628, 644 S.E.2d 460 (2007).

[4] 271 Ga. App. 837, 843, 610 S.E.2d 561, 566 (2005) (citing Haynes v. Fincher, 241 Ga. App. 179, 181, 525 S.E.2d 405, 407 (1999)).

[5] 252 Ga. App. 140, 141, 555 S.E.2d 825, 827 (2001) (quoting Bishop Contracting Co. v. Center Bros. Inc., 213 Ga. App. 804, 805, 445 S.E.2d 780, 781 (1994)).

[6] 271 Ga. App. 825, 826, 611 S.E.2d 103, 104 (2005); Bennett v. Cotton, 244 Ga. App. 784, 786, 536 S.E.2d 802, 804 (2000).

[7] 273 Ga. App. 113, 116, 614 S.E.2d 224, 227 (2005).

[8] 261 Ga. App. 670, 672 (2003) (quoting the United States Supreme Court in Moses H. Cone Mem. Hosp. v Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

[9] 287 Ga. App. 561, 564-65 (2007).

[10] 261 Ga. App. at 672.

[11] 244 Ga. App. 784, 786 (2000).

[12] 388 U.S. 395, 402 (1967).

[13] 205 Ga. App. 561, 422 S.E.2d 918 (1992).

[14] 205 Ga. App. at 562.

[15] Id. at 561. (quoting City of Lawrenceville v. Heard, 194 Ga. App. 580, 583, 391 S.E.2d 441 (1990)).

[16] Id.

[17] Id.

[18] Id. at 562.

[19] Id. at 562 (emphasis added).

[20] 197 Ga. App. 659, 388 S.E.2d 753 (1989); but see Hope & Associates, 205 Ga. App. 561, 422 S.E.2d 918 (1992) (overruling Walton, but only to the extent that it held that the parties to a contract were not free to contract for an award of attorney's fees).

[21] 17 F.3d 1007 (7th Cir. 1994).

[22] 287 Ga.App. 561 (2007).

[23] 287 Ga. App. at 561.

[24] Id.

[25] Id. at 561-62.

[26] Id. at 564-65.

[27] Id. at 562.

[28] 261 Ga. App. 670 (2003).

[29] Id. at 565.

[30] 300 Ga. App. 332, 685 S.E.2d 304 (2009).

[31] Id. at 334.

[32] Id. at 332.

[33] Id. at 334.

[34] 271 Ga. App. 825, 611 S.E.2d 103 (2005).

[35] 271 Ga. App. at 826 (emphasis in original).

[36] Iverson, 300 Ga. App. at 334.

[37] Iverson, 300 Ga. App. at 335.

[38] Id. at 337-338.

[39] Id. at 339.

[40] Id.

[41] Id.

[42] Id. at 337.

[43] 274 Ga. App. 172, 176 (2005).

[44] 264 Ga. App. 755, 761 (2003).

[45] 143 Ga. App. 579, 581 (1977).

[46] 264 Ga. App. at 755.

[47] See Price, 274 Ga. App. at 176.

[48] 264 Ga. App. at 755.

[49] Id. at 756.

[50] Id. at 761.

[51] Id. at 758.

[52] Id. at 759 (quoting MS Dealer Serv. Corp v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)).

[53] Arian, 264 Ga. App. at 761.

[54] Id. at 761.

[55] Id.

[56] Id.

[57] 274 Ga. App. at 175-76.

[58] See Price. 274 Ga. App. at 175-76; Arain, 264 Ga. App. at 761; Iverson, 300 Ga. App. at 338-339.

[59] See Arain, 264 Ga. App. at 761; Iverson, 300 Ga. App. at 339.

[60] Iverson, 300 Ga. App. at 339.

APPORTIONMENT OF FAULT TO A NON-PARTY – POINTING FINGERS TO VICTORY

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In 2010, David and Christian tried the case of *Herrera v. Miles Properties, Inc.* in the State Court of DeKalb County – one of the first cases in Georgia where a jury apportioned a large amount of fault to non-party criminals in a negligent security action.

Apportioning fault to a non-party is one of the most effective weapons in a defense attorney's arsenal. Its full impact was exhibited in Herrera (Hagan) v. Miles Properties, Inc, which involved the murder of a 26 year old man at an apartment complex. Two people were convicted of charges related to their involvement in the murder. Over plaintiff's objection, the Court permitted the two non-party criminals to be listed on the verdict form. The jury allocated 95% of fault to the non-party criminals and 5% to the defendant property management company.

Out of fear of similar outcomes, the plaintiff's bar has been working tirelessly in an attempt to limit defense counsel's ability to point the finger at non-parties that are at fault. Specifically, they are attempting to limit the application of O.C.G.A. § 51-12-33 to scenarios where a plaintiff is partly at fault, as opposed to scenarios where the plaintiff is "innocent." Plaintiff's parsed interpretation is contrary to the plain language and intent of the statute. Had it been accepted by the trial court, it most certainly would have significantly altered the outcome of Herrera (Hagan) v. Miles Properties, Inc.

The recent Georgia Court of Appeals decision in Cavalier Convenience, Inc. v. Sarvis,[1] correctly rejected the plaintiff's bar interpretation. This ruling has defined the parameters of Georgia's apportionment statute in future cases.

This article will examine the history of joint and several liability, the birth of apportionment of liability to non-parties, how it was used in a negligent security case, the advantages and challenges of using apportionment, and how the plaintiff's bar is attempting to chip away at the defense's ability to use it.

I. History:

A. Joint and Several Liability:

Georgia law on joint and several liability traces its roots back to the mid 1800s. In 1851 the Georgia Supreme Court held that the rule is that where there is "an action for a *joint tort* against several defendants, that the Jury are (sic.) to assess damages against all the defendants *jointly*, according to the amount which in their judgment, the most culpable of the defendants ought to pay."[2]

In 1884 the Georgia Supreme Court again addressed the issue of joint and several liability in the context of the first Georgia Code. In a case in which Plaintiff alleged false imprisonment at the hands of two defendants, the Georgia Supreme Court rejected the application of Georgia Code § 3075 which provided that "when several trespassers are sued jointly, the plaintiff may recover against all, the greatest injury done by either. But the jury may, in their verdict, specify the particular damage to be recovered of each."[3]

The Georgia Supreme Court held that section 3075 referred to trespasses committed to property and not to the commission of a personal tort such as false imprisonment. [4] The court instead held that Code Section 2992 which stated that, "If the imprisonment be the act of several persons, the party may sue them jointly or separately; and if jointly, all shall be responsible for the entire recovery" should apply.[5]

Under Georgia law there also existed a right of contribution between joint tortfeasors set forth by Georgia Code § 3008. This law, enacted in 1863, provided that, "If the judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution."

The Georgia Supreme Court maintained the distinction between damage to property and personal torts in 1903, when it held that where a plaintiff sought theories of recovery for trespass and malicious abuse of legal process, it was error for the court to charge the jury that they may find a verdict for the plaintiff for different amounts against the different defendants without charging also that such a verdict could only be found in the event they find for the plaintiff solely on the count in trespass.[6]

In 1975 the Georgia Supreme Court went further in defining joint liability in holding that there need not be a concert in action between joint tortfeasors in finding that defendants are joint tortfeasors, and that each defendant should be liable for the full amount of a plaintiff's damages.[7]

B. Negligence of the Plaintiff:

The Georgia Supreme Court set forth an excellent summary of the state of contributory and comparative negligence as it existed prior to the enact-

ment of OCGA § 51-12-33 in Union Camp Corp. v. Helmy,[8]. The Court held that:

> Under Georgia law, there is found what can be described as a hybrid form of the doctrines of both contributory negligence and comparative negligence.
>
> As a matter of contributory negligence, it is the rule in this state that, if the plaintiff, in the exercise of ordinary care, could have avoided the accident, he is denied recovery. O.C.G.A. § 51-11-7; see, e.g.; *Clark v. Carla Gay Dress Co.*, 178 Ga. App. 157, 160 (342 S.E.2d 468) (1986). However, in all other cases, Georgia law's comparative-negligence rule is that if the plaintiff's negligence was less than the defendant's, the plaintiff is not denied recovery although his damages shall be diminished by the jury in proportion to the degree of fault attributable to him. See, e.g., *Ga. Power Co. v. Maxwell*, 52 Ga. App. 430 (2) (183 SE 654) (1936). Thus, a tort plaintiff cannot recover if his negligence is greater than or equal to the negligence of the defendant. O.C.G.A. § 51-11-7, supra. *Walton v. United States*, 484 F.Supp. 568 (S.D. Ga. 1980).[9]

The specific question posed in Union Camp was whether defendants would be jointly and severally liable where a plaintiff's negligence was greater than one defendant but not the aggregate negligence of all defendants. The Court answered the question in the affirmative and held that "unless the plaintiff's negligence is equal to or greater than the aggregate negligence of all defendants, plaintiff may recover. Therefore, a plaintiff whose comparative fault exceeds that of one defendant but does not exceed that of another defendant is entitled to a judgment against both defendants ..."[10]

By way of example, under the law prior to the enactment of O.C.G.A. § 51-12-33, if defendant A was 50% negligent, defendant B was 5% negligent and plaintiff was 45% negligent, plaintiff could still recover 55% of an award jointly against both defendants. Defendant B, despite being much less negligent than Plaintiff, would be jointly liable and would have to resort to a contribution claim against defendant A.

C. Tort Reform Act of 1987:

Code Section 3075 cited above eventually became O.C.G.A. § 51-12-31. The 1987 version of O.C.G.A. § 51-12-31 read as follows:

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several trespassers, the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them. In its verdict, the jury may specify the particular damages to be recovered of each defendant.

Judgment in such case must be entered severally.

As noted above, this statute only applied to property damage claims.

O.C.G.A. § 51-12-32 was born of Code Section 3008 and continued to provide for the right of contribution between joint tortfeasors as follows:

(a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

Finally O.C.G.A. § 51-12-33 which was first enacted in 1987 read as follows:

(a) Where an action is brought against more than one person for injury to person or property and the plaintiff is himself to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in

> this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

This statute provided a better remedy for a party in Defendant B's position in the earlier illustration, as he is only liable for 5% of Plaintiff's award.

In interpreting this statute the Georgia Court of Appeals specifically noted that O.C.G.A. § 51-12-33(a) only applied to apportion fault to parties to an action, and could not be used to apportion fault to parties who had been dismissed from an action[11]. In other words, prior to 2005, O.G.C.A. § 51-12-33 did not allow for apportionment of fault to a non-party. Further, the statute is clear that apportionment was only available in cases where plaintiff was to some degree responsible for her injury. Joint liability continued to exist for an innocent plaintiff filing suit against multiple defendants.

II. Senate Bill 3 – The Birth of Apportionment of Fault to a Non-Party:

A. O.C.G.A. § 51-12-31:

The latest version of tort reform was passed in 2005 through Senate Bill 3. It made several changes to both O.C.G.A. §§ 51-12-31 and 51-12-33. O.C.G.A. § 51-12-31 was amended to read as follows:

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

The primary change is that this statute now states that a plaintiff may recover damages for an injury "only against the defendant or defendants liable for the injury." Further this statute replaces the word "trespassers" which connotes damage to property with "persons."

B. O.C.G.A. § 51-12-32:

This section was left unchanged and allows for a scenario where one "joint trespasser" may assert a contribution claim against another.

C. O.C.G.A. § 51-12-33:

The most noteworthy change was to O.C.G.A. § 51-12-33 which reads:

> (a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded,

if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

> (g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

The latest version of O.C.G.A. § 51-12-33 revolutionizes how liability of multiple "at fault" parties is viewed in Georgia. It also provides the defense a brand new weapon to use in defending cases – the ability to apportion fault to a non-party that contributed to the injury alleged.

The legislative intent in enacting O.C.G.A. § 51-12-33 is to hold persons accountable for their own actions and not for the actions of others, which arguably is fundamentally fair to all persons. In that context, the legislature set forth three scenarios:

Section (a) establishes guidelines pertaining to comparative negligence. In so doing, this Section provides for the scenario where a plaintiff is to some degree at fault for the alleged injury to person or property. It is equally applicable to actions where there are one or more defendants. This Section simply reduces a plaintiff's recovery by his proportion of fault; however, plaintiff is not entitled to any recovery if he is 50% or more at fault.

Section (b) establishes apportionment where multiple persons are at fault for an alleged injury to person or property. This Section apportions fault to each responsible person, both plaintiff and defendants, but does not require plaintiff to be any degree at fault. Instead, the plain language of the statute instructs the trier of fact to first reduce the total amount of damages by plaintiff's degree of fault **if any** and then to apportion damages amongst the defendants according to the percentage of fault of each defendant.

Sections (c) through (f) are entirely new sections and were added to allow for the apportionment of fault to non-parties. Section (c) states that the trier of fact **shall** consider the fault of all persons or entities who contributed to the alleged injury or damages, **regardless of whether the person or entity was, or could have been, named as a party to the suit**. Section (d) states that "Negligence or fault of a nonparty **shall** be considered" where Plaintiff has entered into a settlement agreement with a nonparty or where the Defendant provides **notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.** (emphasis added).

Section (e) was added to reserve defenses or immunities to defendants unless expressly stated in this section. Section (f) provides that "assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties." This section cannot be used to subject a non-party to liability and cannot be used as evidence of liability in another suit. Finally section (g) re-asserts that a Plaintiff cannot recover where he is found more than 50% liable.

III. Using Apportionment of Fault to a Non-Party:

Apportionment of fault to a non-party can be used by the defense in many different factual scenarios. The most basic is the motor vehicle accident where the phantom vehicle causes an accident, before disappearing into the night. Fault can then be apportioned against "John Doe" offering little more than a description of the mystery vehicle. This statute can also be used to apportion fault to the driver of a vehicle in which plaintiff is a passenger, where he or she is potentially liable but is not a party to the suit.

Further O.C.G.A. § 51-12-33(d) provides that fault may be apportioned against a non-party "regardless of whether the person or entity was, or could have been, named as a party to the suit." This opens the door for a party to apportion fault against parties otherwise immune or protected from suit such as a plaintiff's employer, governmental entities, or insolvent parties.

As referenced in the introduction of this article, one of the more effective uses for the apportionment statute is to apportion fault to a non-party criminal wrongdoer in a premises liability or negligent security case. These types of cases typically involve a person that is in some way harmed by a criminal who then sues an apartment complex or property management company because of their solvency rather than the person directly responsible for the harm – the likely judgment-proof (or unknown) criminal actor(s).

Traditionally, the criminal party frequently was not named and the case would be focused entirely on the acts or omissions of the apartment complex or the property management company. The apartment complex, property management company or security company would be the only names on the verdict form. Now, the apportionment statute allows a jury to properly consider the fault of the non-party criminal wrongdoer. Despite the protest by the plaintiff's bar, the plain language and intention of the apportionment statute is to hold persons accountable for their individual actions and not for the actions of others. After all, this is the very essence of individual responsibility.

The apportionment statute was used effectively in Herrera (Hagan) v. Miles Properties, Inc. In that case, Wesley Hagan was shot and killed by two individuals who conspired to rob him earlier that day. At approximately 11:00 p.m., while Mr. Hagan was walking on the grounds of the apartment complex, towards his mother's apartment, he was shot several times and died approximately one month later. The jury was informed of the names of the two individuals who were involved in the shooting, that one of those individuals pled guilty to conspiracy to commit robbery and that the other was convicted of felony murder. One of the non-party criminals even testified at trial. The jury considered the facts of the shooting and apportioned 95% of fault amongst the two people involved in the shooting and only 5% against the management company, resulting in a $9,000 verdict against the management company.

It is likely that the use of the non-party apportionment statute is more effective in a case like Herrera where the criminal wrongdoer's identity is known and the jury can identify a specific person to blame. The application of the ap-

portionment statute becomes a bit more abstract where the criminal wrongdoer escapes capture or is otherwise unknown and appears on the jury verdict only as "John Doe." Without a specific person to identify, it is easier for a plaintiff to re-direct the focus of the case away from the criminal wrongdoer and back toward the apartment complex, property management company or security company.

IV. The Future of the Apportionment Statute:

Undoubtedly, the plaintiff's bar understands the value of the addition of the non-party apportionment statute to the defense's arsenal and has made a concerted effort to limit its use. Although contrary to the clear and unambiguous language of the apportionment statute, the primary argument set forth by the plaintiff's bar is that joint and several liability is not dead and that apportionment of fault is improper in the case of an innocent (non-negligent) plaintiff. In effect, the plaintiff's bar is attempting to turn back the hands of time to the law as it existed prior to 2005.

A. Cavalier Convenience v. Sarvis

The Court of Appeals took up the issue of the apportionment statute in Cavalier Convenience, Inc. v. Sarvis.[12] Sarvis arose out of an auto accident between Sarvis and Bath, who Sarvis alleged was intoxicated at the time of the accident. Sarvis also named Cavalier Convenience, Inc. and Ken's Supermarkets as Defendants alleging that they unlawfully sold intoxicating beverages to Bath.

Prior to trial Sarvis filed a motion seeking to preclude the issue of apportionment from being argued or submitted to the jury. Essentially, Sarvis was seeking a ruling that the defendants should be jointly and severally liable for any verdict awarded to Sarvis. Defendants countered by arguing that O.C.G.A. § 51-12-33 **mandated** apportionment where multiple defendants are found liable[13]. Sarvis responded that O.C.G.A. § 51-12-33 mandated apportionment among defendants **only** in cases where the plaintiff was alleged to have been responsible for some degree for the injury and damages claimed[14]. There was no such contention that Sarvis was responsible for his injuries.

The State Court of Evans County agreed with Sarvis' position and entered an Order prohibiting any mention to the jury of apportionment of damages.[15] Essentially, liability against Bath, Cavalier, and Ken's would have been joint and several. Cavalier and Ken's applied for and were granted interlocutory appeal of this order.

The Court of Appeals reviewed the history of apportionment and tort reform in Georgia and noted that prior to 2005, O.C.G.A. § 51-12-33 only provided for apportionment where plaintiff was partially at fault. O.C.G.A. § 51-12-33(b), enacted post tort reform, provides that the trier of fact in its determination of the total amount of damages "shall **after** a reduction of damages pursuant to subsection(a), **if any,** apportion its award of damages among the persons who are liable according to the percentage of fault of each person."[16] (emphasis added).

In granting Sarvis' motion, the trial court held that:

> The 'after' language contemplates that comparative negligence must at a minimum be an issue considered by the jury before proceeding to apportionment under subsection (b). In a case such as this one, where there is no allegation or factual threshold as to plaintiff's fault, the jury never even considers subsection (a) and the threshold for the apportionment stage of subsection (b) is never reached.[17]

The Court of Appeals disagreed focusing on the "if any" clause following the "after". The Court held that with the insertion of this language, the legislature clearly did not intend to make plaintiff's liability a threshold issue, or to limit apportionment to cases where the plaintiff is partly at fault[18]. The Court concluded that both Sarvis and the trial court's interpretation overlooked the use of the phrase "if any".

The Court of Appeals ultimate holding was that

> where damages are to be awarded in an action brought against more than one person for injury to person or property – whether or not such damages must be reduced pursuant to O.C.G.A. § 51-12-33 (a) – the trier of fact 'shall' apportion its award of damages among the persons who are liable according to the percentage of fault of each person.[19]

The Court of Appeals noted that had the legislature wanted to limit apportionment to situations where there was a reduction of damages pursuant to subsection (a) (where Plaintiff was partly at fault) it could have specifically done so.[20]

Additionally, Sarvis argued that O.C.G.A. § 51-12-31 authorized the trial court to find that apportionment is not mandated where the plaintiff bears no fault. The Court of Appeals rejected this argument noting that the language of O.C.G.A. § 51-12-31 clearly limits its use to situations where O.C.G.A. § 51-12-33 does not apply.[21]

The Court of Appeals also rejected Sarvis' argument that such an interpretation of O.C.G.A. § 51-12-33 renders OCGA §§ 51-12-31 and 51-12-32 meaningless as there are no cases that would fall under those statutes[22]. Sarvis argued that these three statutes must be read "in pari materia" to ascertain legislative intent[23]. The Court of Appeals disagreed and held that reading statutes in pari materia may not be resorted to where the language of the statue under consideration is clear, and that this was one of those cases where the language was clear[24].

The important thing about this portion of the opinion is that O.C.G.A. § 51-12-33 does arguably render O.C.G.A. § 51-12-31 obsolete, as it is hard to envision a factual situation where this statute would apply to possibly allow for joint and several liability. However, the Court's holding was simply that this possibility need not even be addressed as the language of O.C.G.A. § 51-12-33 was clear.

Finally the Court of Appeals rejected Sarvis' public policy arguments noting that its only job was to interpret

the statute as written and that it had no authority to adopt a construction contrary to that of the legislature.[25] As noted below, several groups chimed in with their opinion as to why the Court of Appeals interpretation of the statute is bad policy.

The Georgia Supreme Court granted plaintiff's Petition for Writ of Certiorari[26], and this case was to be argued before the Georgia Supreme Court on April 20, 2011. However, the parties consented to a withdrawal of this petition on February 24, 2011, likely as the result of a settlement.

B. Sarvis and Apportionment of Fault to Non-Parties

The situation in Sarvis involved the apportionment of fault to a fellow defendant rather than a non-party; however, the decision is relevant in that the plaintiff's bar has raised identical arguments in opposition to defendants' attempts to Apportion Fault to Non-Parties. In fact there are two amicus curiae briefs referenced in the Sarvis opinion that raise arguments that you can expect the next time you attempt to apportion fault as was done in Herrera.

First, the GTLA argues that if apportionment were allowed in a case like Sarvis, a jury would likely apportion fault almost completely on the driver absolving the other defendants of any fault. This would relieve the other defendants from liability and "effectively remove any independent duty on the part of the initial tortfeasor".[27]

Second, the DeKalb Rape Crisis Center argues even more directly that:

> In a rape victim's civil action against landlord, liability of the property owner is based on its negligent conduct which exposed the victim to the intentional tort, and but for that conduct, the victim would not have been harmed. It is neither unfair nor irrational for an innocent victim to collect full damages from a negligent defendant who knew or should have known that an injury would be intentionally inflicted and failed in its duty to take reasonable steps to prevent it.[28]

Also, one should expect plaintiffs to argue that joint and several liability has existed in Georgia for over 150 years and that with the passage of the 2005 version of O.C.G.A. § 51-12-33, the legislature did not intend to change 150 years of law. Plaintiffs will reference the interplay between O.C.G.A. §§ 51-12-31, 51-12-32 and 51-12-33 in support of this argument.

With the withdrawal of the petition for certiorari, Sarvis provides a green light for defendants to properly point the finger to the responsible persons, regardless of whether the plaintiff is at fault or if those at fault are parties to the action. However, this is an issue that the plaintiff's bar will not cease contesting, meaning the Sarvis decision is likely not the end of this story.

[1] 305 Ga. App. 141 (2010).

[2] Simpson v. Perry, 9 Ga. 508 (1851).

[3] McCalla v. Shaw, 72 Ga. 458 (1884).

[4] Id. at 460.

[5] Id. at 459.

[6] Hay v. Collins, 118 Ga. App. 243 (1903).

[7] Mitchell v. Gilson, 233 Ga. 453 (1975).

[8] 258 Ga. 263 (1988) Despite being passed in 1987 O.C.G.A. § 51-12-33 did not apply to this section as it applied to actions arising after July 1, 1987 – a fact noted by the Court.

[9] Id. at 267.

[10] Id.

[11] Schriever v. Maddox, 259 Ga. App. 558 (2003).

[12] 305 Ga. App. 141 (2010).

[13] Id. at 142.

[14] Id.

[15] Id.

[16] Id. at 143.

[17] Id. at 144.

[18] Id.

[19] Id. at 145.

[20] Id.

[21] Id.

[22] In fact, the Court of Appeals recently rejected the argument that the right of contribution no longer exists in Georgia in Murray v. Patel, 304 Ga. App. 253 (2010).

[23] Id. at 146.

[24] Id.

[25] Id. at 147.

[26] 2011 Ga. LEXIS 34.

[27] Sarvis, at 147.

[28] Id.

DAUBERT AND GEORGIA'S DEVELOPMENT OF EXPERT ADMISSIBILITY STANDARDS

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Introduction

Georgia's adoption of the federal expert testimony admissibility standards was passed in 2005 as part of the sweeping tort reform legislation known in Georgia as Senate Bill 3 ("SB 3").[1] This article will explore the development of expert admissibility in Georgia following the enactment of SB 3 and the following appellate decisions. By no means is this article exhaustive of every opinion concerning the admissibility of proffered expert testimony in Georgia, nor is this article intended to serve as a review of federal cases concerning expert admissibility. Instead, this article will recount the decided constitutional issues as well as case law developments in expert admissibility carved by Georgia's appellate courts.

SB 3 and Georgia's Recognition of Federal Admissibility Standards

SB 3 arose primarily as part of the legislature's recognition of "a crisis affecting the provision and quality of health care services in [Georgia]" and its intent to curb medical malpractice lawsuits in the state.[2] However, the General Assembly did not stop at reforming only medical malpractice actions, and expressly stated SB 3's partial applicability to other civil actions: "The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act." [3] O.C.G.A. § 24-9-67.1, concerning the admissibility of expert testimony, is one such reform of general applicability.[4]

The General Assembly was clear in its intent that Georgia's expert evidence admissibility standards be comparable to federal standards, going so far as to enumerate hallmark cases defining

admissibility in federal cases. O.C.G.A. § 24-9-67.1 states in pertinent part:

> It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.
>
> O.C.G.A. § 24-9-67.1(f).

The United States Supreme Court, in Daubert v. Merrell Dow Pharmaceuticals, Inc., [5] listed the requirements for determining admissibility of expert testimony as: (1)whether a "theory or technique…can be (and has been) tested"; (2) whether it "has been subject to peer review and publication"; (3) whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and (4)whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."[6]

"[T]he test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case."[7] "[T]he law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination."[8] "Daubert makes clear that the factors it mentions do not constitute a 'definitive checklist or test.'"[9]

O.C.G.A. § 24-9-67.1 and Constitutional Challenges

The constitutionality of O.C.G.A. § 24-9-67.1 has been attacked on various constitutional grounds in both the Georgia Court of Appeals and Supreme Court of Georgia.

In Gibson v. Ford Motor Co.,[10] the Georgia Supreme Court was called upon to determine the constitutionality of the retroactivity of O.C.G.A. § 24-9-67.1.[11] In Gibson, a defendant challenged the trial court's failure to apply the statute to exclude plaintiff's expert witness.[12] In doing so, the trial court had determined that O.C.G.A. § 24-9-67.1 was unconstitutional because it would have denied the plaintiff due process "by imposing a 'new standard for expert witnesses.'"[13] The Georgia Supreme Court found other grounds for affirming the effect of the trial court's ruling and declined to determine the constitutionality of O.C.G.A. § 24-9-67.1 on due process grounds. [14]

In Mason v. Home Depot U.S.A., Inc., the Georgia Supreme Court analyzed the constitutionality of O.C.G.A. § 24-9-67.1 on multiple grounds.[15] The plaintiffs, in response to defendant's motion to exclude experts pursuant to the newly enacted O.C.G.A. § 24-9-67.1,

contended that the statute denied due process, denied equal protection, violated the constitutional guarantee of trial by jury, and violated the prohibition against retroactive laws.[16] The trial court "found a portion of subsection (b)(1) to deny due process because it contradicts part of subsection (a), and cured the problem by excising part of subsection (b)(1) and found subsection (f) violative of the principle of separation of powers, but cured that defect by severing subsection (f) from the statute." [17]

On appeal, plaintiffs first contended that the statute denied them equal protection under the United States Constitution and Georgia Constitution because it "impose[d] more stringent requirements for the admission of expert testimony in their tort action than applicable statutes would in criminal cases and in civil condemnation cases."[18] The Georgia Supreme Court disposed of the equal protection attack on the statute by finding that plaintiffs could not establish that they were similarly situated to others being treated differently.[19] In order to do so, the court noted the distinct procedural "spheres" of criminal and civil law, and that criminal and civil litigants could therefore not be "similarly situated."[20] Thus, plaintiffs lacked standing to bring the equal protection challenge. [21]

Plaintiffs next challenged the statute on due process grounds claiming subsections (a) and (b)(1) were contradictory.[22] The trial court agreed that the subsections were contradictory, but declined to strike the entire statute as requested by plaintiffs and instead "severed the contradictory language from subsection (b)(1)".[23] The Georgia Supreme Court affirmed the trial court's determination that the statute was vague and the trial court's severance of the unconstitutional language. [24]

The third ground upon which O.C.G.A. § 24-9-67.1 was attacked in Mason v. Home Depot was that the statute constituted an unconstitutional delegation of legislative authority and worked to deny plaintiffs due process.[25] Plaintiffs based their contention upon the language contained in subsection (f) of the statute providing for Georgia courts to look to federal opinions applying the standards from Daubert among other federal cases. [26] The trial court agreed with plaintiffs and found that the statute was an impermissible "'attempt by the legislature to perform a judicial function by construing a law.'"[27] The Georgia Supreme Court disagreed.[28] Seizing on the legislature's use of the word "may" in the statute, the court held that the statute "did not invade the province of the judiciary because it was not couched in mandatory terms and merely stated a principle of law regularly employed by Georgia courts. [Cit.]"[29] However, the Supreme Court's decision did not require that the trial court's decision be overturned because the trial court had applied the severability clause in declaring subsection (f) unconstitutional in its entirety. [30]

Though not decided by the trial court below, the Georgia Supreme Court next determined whether the first sentence of O.C.G.A. § 24-9-67.1(f) is constitutional.[31] Plaintiffs argued on appeal that the first sentence of subsection (f) was unconstitutional because it delegated the power to Georgia courts, as well as the courts of other jurisdictions, the "legislative authority to prescribe rules of evidence".[32] Thus, plaintiffs claimed the statute "denies due process

of law to litigants because it has no clear guidelines on how Georgia courts are to exercise the delegated powers" and that the subsection "constitutes a command to the courts of Georgia to rewrite Georgia law anytime any other jurisdiction announces a more strict standard for the admission of expert testimony."[33] The court found this "assertion the fatal flaw in [plaintiffs'] argument" because the first sentence constituted an "explication by the legislature of its goal in enacting the statute."[34] Because the first sentence of subsection (f) was read by the court as a statement of legislative intent, it does not constitute an improper delegation of legislative authority. [35]

In Mason, the plaintiffs' final argument as to the constitutionality of O.C.G.A. § 24-9-67.1 was that application of the statute to their case violated the prohibition against retroactive laws.[36] The Supreme Court dismissed this contention, finding that the plaintiffs had "no vested property right" and that the law constituted a procedural, rather than substantive, law.[37]

Georgia's Development of Expert Admissibility After Adoption Of Federal Standards

In addition to constitutional challenges to O.C.G.A. § 24-9-67.1, the appellate courts in Georgia have been tasked with reviewing the trial courts' decisions to admit or exclude expert testimony under the adopted federal standards.

In Nathans v. Diamond[38] the Georgia Supreme Court was required to analyze the requirements of subsection (c) of O.C.G.A. § 24-9-67.1.[39] In Nathans, the plaintiffs attached the affidavit of a pulmonologist to their medical malpractice complaint against the defendant otolaryngologist.[40] On summary judgment, the trial court excluded the expert under O.C.G.A. § 24-9-67.1 after a hearing and entered summary judgment in defendants' favor, finding that plaintiffs had failed to meet the mandatory affidavit requirements for a professional malpractice action.[41] The appellate courts affirmed, holding that "the requirement that the expert have 'actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given' means that the plaintiff's expert does not have to have knowledge and experience in the 'same area of practice/specialty as the defendant doctor.'"[42] Finding that the expert physician does not have to practice in the same specialty as the defendant physician, the Supreme Court established the level of sufficient knowledge necessary to meet O.C.G.A. § 24-9-67.1: "it is not sufficient that the expert just have a minimum level of knowledge in the area in which the opinion is to be given. Instead, the expert must have 'regularly engaged in the active practice' of the area of specialty 'in which the opinion is to be given' and must have done so 'with sufficient frequency to establish an appropriate level of knowledge ... in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.'"[43] The Georgia Supreme Court, viewing the trial court's determination to exclude the expert's opinion under an abuse of discretion standard, found no error.[44] It should be noted that in Nathans, the alleged malpractice concerned a failure to adequately inform plaintiffs of the po-

tential risks and complications of a surgical procedure and not the actual performance of the procedure. [45] Thus, even if the alleged malpractice is of a general nature, such as obtaining proper informed consent, the courts will not look to whether the expert has sufficient experience in obtaining informed consent generally, but will instead examine whether the expert has sufficient qualifications to obtain informed consent *for the underlying procedure*. [46]

In Condra v. Atlanta Orthopaedic Group, P.C.[47] the Georgia Supreme Court overruled the prior body of cases holding that evidence of the personal practices of an expert witness was inadmissible in medical malpractice actions.[48] In overruling Johnson v. Riverdale Anesthesia Assoc., the Georgia Supreme Court pointed to the then recent enactment of O.C.G.A. § 24-9-67.1.[49] Because the admissibility of expert testimony under application of O.C.G.A. § 24-9-67.1 is partially dependent on the expert's personal experience and practice, "it would defy logic to find such [personal practice] experience categorically irrelevant in assessing the credibility of the expert's testimony."[50] Citing language from an Arizona appellate case, the court stated, "'[T]he jury is entitled to fully evaluate the credibility of the testifying expert, and the fact that an expert testifies that the standard of care does not require what that expert personally does in a similar situation may be a critical piece of information for the jury's consideration.'"[51] The court also found that though the presentation of this additional testimony could confuse the jury, such confusion "may be remedied through the careful use of jury instructions," including pronouncement of the principle that a mere difference in views between physicians does not by itself prove malpractice.[52] Further, a party whose expert has been cross-examined will have the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care.[53] The court acknowledged that the growing body of case law from other jurisdictions supportive of the admissibility of expert personal practices was important in reaching its determination to overrule Johnson.[54]

In HNTB Georgia, Inc. v. Hamilton-King,[55] the Georgia Supreme Court analyzed whether an expert witness' "professional experience" is sufficient to overcome lacking principles and methods. There, plaintiffs sought to introduce the testimony of a licensed engineer in a case which alleged defendants failed to properly design traffic control in a construction zone.[56] Prior to trial, defendants moved to exclude the engineer on the basis that he lacked the education and experience necessary to testify and that his proffered testimony failed to meet reliability requirements under O.C.G.A. § 24-9-67.1.[57] The trial court granted the motion to exclude the expert and subsequently granted summary judgment in defendants' favor.[58] The Georgia Court of Appeals, however, reversed, finding that the trial court "abused its discretion by excluding [the expert's] testimony based upon its too 'rigid' application of Daubert."[59]

On certiorari, the Supreme Court reversed the Court of Appeals finding that the trial court did not abuse its discretion in determining "that although [the expert] was qualified to testify as an engineering expert, [plaintiff] failed to provide any indication of the principles and methods employed by [the expert] in reaching his conclusions, rendering

them unreliable as defined by O.C.G.A. § 24-9-67.1(b)(2) and (3)". [60] The Supreme Court recounted the trial court's recognition that the expert "failed to cite any treatise or authority supporting his belief that under readily ascertainable and verifiable standards recognized by practitioners in the field, the construction design was below standard. [Cit.]" and that there was an "absence of any testing indicating evidence of similar accidents on interstate highways and the difficulty of ascertaining error rates in the use of engineering judgment."[61] The court noted, and tacitly approved, the trial court's look toward testing or error rates, though not required by Georgia evidence law, as a means of adjusting and applying the Daubert factors to the circumstances of the particular case.[62] The Supreme Court rejected plaintiffs' assertion that the expert's professional experience and judgment were sufficient to overcome a deficiency in principles and methods because the expert had testified that he had never "designed, reviewed or evaluated a construction plan for a similar bridge construction project and had never been qualified as an expert in any case involving bridge construction design."[63] Similarly, he could not cite any instances of experience or any written authority supporting his opinions.[64] However, the Georgia Supreme Court noted that professional experience may, in some cases, provide for enhancement of reliability: "This is not to say that professional experience cannot provide some evidence of reliability, only that experience, standing alone, does not render reliable all opinions an expert may express."[65]

In Anderson v. Mountain Mgt. Services, Inc.,[66] the Court of Appeals relied upon the Supreme Court's decision in Nathan v. Diamonds to determine whether plaintiffs' expert met the standards required by O.C.G.A. § 24-9-67.1. At the trial court level, both of plaintiffs' expert witnesses, a nurse and a physician, were disqualified upon defendants' motion.[67] The nurse's testimony was excluded because the trial court concluded that she had not rendered the specific treatment at issue, weighing patients in a family practice setting, with sufficient regularity to meet the requirements of O.C.G.A. § 24-9-67.1(c).[68] The physician's testimony was excluded because the trial court found that the physician was not qualified to testify as to the standard of care applicable to nurses weighing patients.[69]

The Court of Appeals reversed in part and affirmed in part.[70] Regarding the testimony of the nurse expert, the Court of Appeals found that the trial court had improperly excluded the proffered testimony.[71] In doing so, the court examined the "area of specialty" aspect of O.C.G.A. § 24-9-67.1(c) and held that the trial court had used too narrow of a review in determining the specialty at issue.[72] On defendants' motion, the trial court had examined whether the nurse expert had sufficient experience in weighing patients in a family practice setting and concluded that the proffered expert had not performed this task with sufficient regularity to render an opinion.[73] The Court of Appeals reexamined the pleadings and found that the alleged malpractice constituted a much broader function than was framed by defendants, and that the area of specialty for purposes of determining whether an expert's experience was sufficient was "managing patient safety while moving or directing patients." [74] Having expanded the scope of the specialty from the scope utilized by the trial

court, the Court of Appeals found that the nurse expert met the standard set forth by O.C.G.A. § 24-9-67.1(c)(2). With regard to plaintiffs' physician expert, the Court of Appeals affirmed the trial court's exclusion of that expert because the record was devoid of any evidence that the expert "'supervised, taught, or instructed nurses'" within the appropriate time period. [75]

Recently, in Wilson v. McNeely [76], the Georgia Court of Appeals distinguished between experience and licensing. In Wilson, a pro se plaintiff in a legal malpractice case sought to proffer an expert on the eve of trial to testify regarding the acceptable behavior of an attorney in performing a real estate closing.[77] The expert, a licensed attorney who was also the plaintiff's brother, was excluded by the trial court because he had not practiced law at the time the allegedly negligent closing had been performed.[78] On appeal, the court noted that while the proposed expert had been licensed and a member of the State Bar of Georgia at the time of the alleged malpractice, he had not been engaged in the practice of law as defined by Georgia statute O.C.G.A. § 15-19-50.[79] Instead, the proposed expert had been working with the family business, and though he testified that he performed some legal functions for that business, the court pointed out that he lacked a municipal business license to work as an attorney and did not have attorney's malpractice insurance.[80]

The trial court, in excluding plaintiff's expert, had also drawn an analogy to the "area of specialty" provisions applicable to medical malpractice actions under O.C.G.A. § 24-9-67.1(c)(2). The trial court did so presumably to highlight that even though the expert was an active member of the bar, he had no experience in drawing deeds and conveyancing properties. The Court of Appeals agreed with plaintiff, finding that the express language of subsection (c)(2) limited application of the subsection to medical malpractice actions. [81] However, the Court of Appeals found the trial court's "misguided 'analogy'" to not result in any reversible error. [82]

Conclusion

Like the other laws enacted by SB 3, O.C.G.A. § 24-9-67.1 came under constitutional attack almost immediately. Further, O.C.G.A. § 24-9-67.1 has been analyzed by the appellate courts many times for the purpose of determining whether a trial court's admission or exclusion of an expert witness was proper. At just over five years past Georgia's adoption of the Daubert standards of expert admissibility, there is sure to be more development of the intricacies of this area of law despite the legislature's attempt to clear up the big picture by referencing established federal cases.

In order to mount a successful challenge (or defense) of proffered expert testimony, the practitioner should always look towards the federal standards established by Daubert and its progeny as set forth by the Georgia General Assembly. Next, the practitioner should review current trends of federal admissibility following the Daubert line of cases. The cases cited herein should serve as a helpful guide to navigating Daubert as applied in the Georgia courts and the specific issues that may be encountered.

[1] Ga. L. 2005, p. 1, § 7/SB 3.

[2] Ga L. 2005, p. 1, § 1/SB 3.

[3] Id.

[4] See O.C.G.A. § 24-9-67.1(b).

[5] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993).

[6] Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149-50, 119 S.Ct. 1167 (1999) (quoting Daubert, 509 U.S. at 592-94).

[7] Id. at 141.

[8] Id. at 142 (citing General Electric Co. v. Joiner, 522 U§. 136, 143, 118 S.Ct. 512 (1997)).

[9] Id. at 150 (citing Daubert, 509 U.S. at 593).

[10] Gibson v. Ford Motor Co., 283 Ga. 398, 403-04, 659 S.E.2d 346, 351-52 (2008).

[11] Id.

[12] Id.

[13] Id. (It should be noted that plaintiff's claims arose in 1999, prior to the enactment of SB3.)

[14] Id. at 404.

[15] Mason v. Home Depot U.S.A., Inc., 283 Ga. 27, 658 S.E. 2d 603 (2008) (Melton, J., concurring specially; Hunstein, P.J., dissenting).

[16] Id. at 272.

[17] Id.

[18] Id.

[19] Id.

[20] Id. at 274-75.

[21] Id. at 275.

[22] Id.

[23] Id. at 275, n.3 (severing the phrase "which or will be admitted into evidence at the hearing at trial")

[24] Id. at 275.

[25] Id. at 276.

[26] Id.

[27] Id. (quoting Martin v. Baldwin, 215 Ga. 293, 299, 110 S.E. 2d 344 (1959)).

[28] Id.

[29] Id. (citations omitted).

[30] Id. at 277.

[31] Id. (The trial court did not rule on this matter because it had already declared the entirety of subsection (f) unconstitutional. The Georgia Supreme Court, citing judicial economy, determined to resolve the matters raised by plaintiffs.)

[32] Id.

[33] Id.

[34] Id.

[35] Id. (noting that Georgia Court of Appeals had previously held the sentence to be one of legislative intent in Cotton v. Phillips, 280 Ga. 285-86, 633 S.E. 2d 655 (2006)).

[36] Id. at 278.

[37] Id.

[38] Nathans v. Diamond, 282 Ga. 804, 654 S.E. 2d 121 (2007) (Carley, J. and Hunstein, P.J., dissenting as to Division I).

[39] Id. at 806.

[40] Id. at 804 (The affidavit was submitted pursuant to O.C.G.A. § 9-11-9.1).

[41] Id. at 805.

[42] Id. at 806 (quoting Cotton v. Phillips, 280 Ga. App. 280, 284, 633 S.E. 2d 655 (2006); accord MCG Health v. Barton, 285 Ga. App. 577, 581, 647 S.E. 2d 81 (2007); Mays v. Ellis, 283 Ga. App. 195, 198, 641 S.E. 2d 201 (2007)) (emphasis in original).

[43] Id. (quoting O.C.G.A. § 24-9-67.1(c)(2)(A)).

[44] Id.

[45] Id.

[46] Id. at 807.

[47] Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E. 2d 152 (2009).

[48] See Id. (overruling Johnson v. Riverdale Anesthesia Assoc., 275 Ga. 240, 563 S.E. 2d 431 (2002)).

[49] Id. at 669.

[50] Id. at 670.

[51] Id. (quoting Smethers v. Campion, 210 Ariz. 167, 108 P.3d 946 (Ariz. Ct. App. 2005)).

[52] Id. at 672.

[53] Id.

[54] Id. at 671.

[55] HNTB Georgia, Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E. 2d 770 (2010).

[56] Id. at 641.

[57] Id.

[58] Id.

[59] Id. at 641-42.

[60] Id. at 643.

[61] Id. at 643-44.

[62] Id. at 644.

[63] Id.

[64] Id.

[65] Id. at 645.

[66] Anderson v. Mountain Mgt. Services, Inc., 306 Ga. App. 412, 702 S.E. 2d 462 (2010).

[67] Id. at 413.

[68] Id.

[69] Id.

[70] Id. at 417.

[71] Id. at 416.

[72] Id. at 414-15.

[73] Id.

[74] Id. at 415.

[75] Anderson v. Mountain Mgt. Services, Inc., 306 Ga. App. at 417.

[76] Wilson v. McNeely, No. A10A2268 (Ga. App. Jan. 24, 2011).

[77] Id. at *1.

[78] Id.

[79] Id. at *4-5.

[80] Id.

[81] Id. at *7.

[82] Id.

COMING TO A THEATER NEAR YOU—RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

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I. INTRODUCTION

Calendar year 2010 proved to be a time of high drama for human resource professionals and labor and employment law counsel. A number of significant and far-reaching decisions were handed down by the courts, and agencies continued the past year's employee and union-friendly theme, the consequence of which is to make life more difficult for employers.

This survey provides a brief synopsis of the leading developments in labor and employment law during the period January 1, 2010 to December 31, 2010. It is intended to keep readers up-to-date on the changing employment-law landscape, and provide insight on what to expect from the judicial and regulatory theaters in 2011.

II. TITLE VII, SECTION 1981, EEOC

A. New Charges of Discrimination Reach Record High

The Equal Employment Opportunity Commission received 99,922 private sector discrimination charges in fiscal 2010, the highest level in the agency's 45-year history. The Commission's previous record was 95,402 charges received in fiscal 2008.

According to the Commission, this spike in charge activity added to the 15.9% backlog accumulated between fiscal 2008 and 2009. 86,338 charges of discrimination were carried forward into 2011.

Alleged race discrimination continued to be the most prominent form of charge filed during the survey period, followed by retaliation, gender, disability, age, national origin, and religion (in that order). 201 charges were filed alleging a violation of the Genetic Information Nondiscrimination Act of 2008 (GINA). There was a 2.2% increase in disability-based charges, and a 1.9% increase in race-based charges over the prior fiscal year.

The Commission obtained a record-high 319 million dollars for alleged discrimination victims through its administrative enforcement in fiscal 2010.

B. Final Regulations on GINA

On November 9, 2010, the EEOC published in the *Federal Register* final regulations interpreting GINA. GINA became effective for employers on November 21, 2009. The regulations took effect January 10, 2011. In general, GINA does the following:

- Prohibits the use of genetic information in employment decision making
- Restricts deliberate acquisition of genetic information
- Requires that genetic information be maintained as a confidential medical record
- Places strict limits on disclosure of genetic information

While the statute appears reasonable on its face, it is riddled with traps and technicalities that can create problems for inattentive employers. The final regulations largely adopt the interim regulations published more than a year ago but there are some important changes and additions as well. For example:

- Safe harbor for employers who give warnings – the final regulations note that an employer may receive genetic information even if it does not request it, particularly if the employer legitimately requests medical information. For example, an employer that asks an employee to submit a medical certification for FMLA leave or documentation of a disability and need for reasonable accommodation under the ADA may also receive genetic information. In these situations, an employer's acquisition of genetic information will be considered "inadvertent" – and will not violate the law – if the employer tells the employee or health care provider not to provide genetic information. The regulations provide sample language employers can use to give this notice, in writing or orally:

> Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic

> information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

- Online searches – employers may obtain genetic information on an employee without breaking the law if the information is acquired inadvertently or through information that is publicly and commercially available (for example, from an article in a newspaper). According to the final regulations, these exceptions do not apply if the employer acts deliberately, including by searching for genetic information online. For example, the inadvertent exception protects an employer if a manager is Facebook friends with an employee who posts personal genetic information. It does not protect an employer that conducts an Internet search that is likely to yield genetic information (such as a Google search for the employee's name and a genetic disease or disorder). Similarly, an employer that acquires genetic information from commercially and publicly available sources has not violated the law, but an employer that accesses these sources with the intent to gather genetic information (for example, by visiting sites about genetic testing) is not protected by the exception.

- Incentives for wellness programs – an exception applies to employers who offer help or genetic services as part of a wellness program, as long as employee participation is knowing and voluntary. The final regulations address what "voluntary" participation means when an employer offers incentives to participate in the program (for example, a payment for completing a health risk assessment). In this circumstance, the employer will be covered by the exception if employees are not required to provide genetic information nor penalized for refusing to do so. For example, if employees are offered $100 to complete a health risk assessment with questions about genetic information, employees should be told that answering the genetic questions is voluntary, and that the $100 will be paid whether or not these questions are answered.

- Cleaning up personnel files – the final regulations provide that genetic information placed in employee personnel files before November 21, 2009 (the effective date of GINA) does not have to be removed. However, GINA's prohibition on employer use and disclosure of genetic information applies to all such information, whether the employer acquired it before or after the law went into effect. Therefore, as a practical matter, employers should

review personnel files, remove any genetic information contained in them, and create separate, confidential medical files for this information. Most employers will already have confidential medical files to comply with the ADA, so this should not pose much of a burden.

C. EEOC Examines Potential Bias from Employers' Use of Credit Checks

On October 20, 2010, the EEOC heard testimony from human resource professionals, attorneys, and psychologists about the potential discriminatory impacts of employers using workers' credit histories in hiring and other employment decisions. This is in response to a survey conducted by SHRM which found that 60% of its employer-members consult the credit reports of applicants and/or employees in deciding whether to hire, fire, promote, or otherwise affect their employment status. The Commission explained that the purpose of the hearing was to explore the fairness of the practice, whether an individual's poor credit history can be correlated with job performance, and whether employers' use of such information has an adverse impact on racial minorities, women, or persons with disabilities. Representatives of civil rights groups informed the Commission that some studies have suggested that racial minorities, Hispanics and women tend to have lower credit scores than non-Hispanic white males. Such groups contend that employers can show no job-related justifications for using credit histories in employment decisions.

Witnesses representing management and human resource organizations told the Commission that most employers that consider applicants' credit histories do so as part of legally mandated background checks for jobs that involve access to customers' money, confidential information, or national security data. The Commission did not indicate what it plans to do with the information it received at the hearing; however, it did indicate that no immediate action would be taken.

D. Supreme Court Revives Disparate Impact Suit

In a case hailed by civil rights organizations as an important step toward equal opportunity for racial minorities in public employment, the U.S. Supreme Court ruled that African American fire fighter candidates who were denied jobs could state a disparate impact claim under Title VII each time the city hired from an eligibility list based on an allegedly flawed test cutoff score.[1] The Supreme Court reversed the U.S. Court of Appeals for the Seventh Circuit's ruling that the candidates' suit was subject to dismissal because no class member had filed an EEOC charge within 300 days of the city's announcement of the fire fighter entry exam results and cutoff score.[2] The Seventh Circuit had reasoned that the only potential act of discrimination occurred in January 26, 1996 (the day the city announced in a press release that it would begin drawing randomly from the top tier of scores), not later when the city selected fire fighters from an eligibility list based on the cutoff score on various occasions between 1996 through 2002.[3] In reversing the court of appeals' decision, the Supreme Court found that a new violation occurred each time the city subsequently hired from its eligibility list.[4]

Read together, the Supreme Court's decisions in Ricci v. DeStefano,[5] and Lewis[6] place employers in a "Catch-22," in that they can choose to use the exam results which have an adverse impact and risk a claim from the group adversely impacted each time or discard test results and risk a claim from those who stand to benefit from the results. In Ricci, the Supreme Court held that a race-based employment action is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable for disparate impact discrimination.[7]

E. Supreme Court Clarifies When Enhanced Award of Attorneys' Fees is Appropriate

In Perdue v. Kenny,[8] the Supreme Court ruled that an enhanced award of attorneys' fees to prevailing plaintiffs in federal civil rights cases may be proper, but only in "rare" and "exceptional" circumstances in which superior attorney performance is not taken into account in calculating the "loadstar" (i.e., reasonable hours worked times reasonably hourly rate). The Justices found that the loadstar may not adequately measure an attorney's true market value, and extraordinary outlay of expenses, or exceptionally protracted litigation or delay in payment of fees.[9]

F. Entity Not Named in EEOC Charge Cannot Later be Sued

In Lewis v. Asplundh Tree Expert Co.,[10] the U.S. Court of Appeals for the Eleventh Circuit was called upon to interpret Title VII's requirement that a person seeking to sue under the civil rights statute must first file a charge with the EEOC alleging a Title VII violation and then obtain authorization from the EEOC (or in the case of a political subdivision of a state government, the Attorney General). The Eleventh Circuit held that because an employee of an independent contractor for the City of Gainesville had failed to name the City of Gainesville in his EEOC charge, he could not later sue the City as a party in his lawsuit claiming race discrimination.[11]

Robert D. Lewis, an African-American, contended that he should be able to sue the City of Gainesville as well as Asplundh, because in the body of his EEOC charge he identified an inspector with Gainesville's utility agency as the harasser and an employee of the City, and thus had put the City on notice of his claim.[12] Lewis argued that Title VII's naming precondition should be liberally construed.[13] While recognizing that the statutory provision is not meant to be a "rigid test," and that other factors may be relevant, the Eleventh Circuit held that it would be a stretch for an EEOC investigator to consider the relationship between Lewis and the City to be an employer-employee relationship that would trigger liability under Title VII.[14] The court held that permitting Lewis to sue the City of Gainesville, despite his failure to name it as a party in his EEOC charge, would not further the purposes of Title VII.

G. Fire Fighter Did Not Show Protected Activity in Grievance Aid

In Ross v. Perry,[15] the Eleventh Circuit held that a former fire fighter for the City of Perry, Georgia, had failed to

show that he engaged in statutorily protected activity – opposing sexual harassment – when he merely assisted a female fire fighter with a grievance.

The case arose from a grievance filed by Ross's female co-worker, Renee Kitchens, concerning Kitchens' supervisor wearing a tee-shirt depicting another fireman laying on the front of a fire truck, dressed in shorts, slippers, a hat, and a shirt pulled up exposing his stomach.[16] His legs were spread apart and something appeared to be in his mouth.[17] Above the picture were the words, "stop it before it spreads," and beneath the picture was a caption that said, "just say no."[18] Around the picture was a red circle with a slash going through the picture.[19]

In her grievance, Kitchens asserted that the tee-shirt offended her.[20] Kitchens had Ross proofread her grievance and put the grievance in an envelope which Ross then put under the door of Kitchens' supervisor's office.[21] The grievance triggered an internal affairs investigation.[22] The appointed investigators interviewed Ross as part of the investigation.[23] Ross initially told investigators that he had not read Kitchens' letter but later admitted that he had proofread it for her. Ross also admitted that, although Kitchens found the tee-shirt "offensive," he only thought it "unprofessional."[24] Upon completion of the investigation, the investigators determined that Ross had lied in the departmental investigation.[25] Ross was given the choice of resigning voluntarily or being terminated. Following a hearing, Ross resigned.[26]

Ross sued, contending, inter alia, that his separation was retaliatory for his assistance to Kitchens in her grievance.[27] The Eleventh Circuit agreed with the trial court's determination that Ross had not stated a claim of retaliation because he did not show an "objectively reasonable and subjectively genuine belief that he was engaging in statutorily protected activity" – opposing sexual harassment.[28] The Eleventh Circuit emphasized that to make out a case of retaliation, an employee must, in part, show that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices; and must show that this belief objectively is reasonable in light of the facts and record presented.[29] The court of appeals found that Ross had not showed that his belief was subjectively genuine because the wording of the grievance that he read did not mention or allege sexual harassment.[30] Moreover, Ross testified that he personally did not find the tee-shirt offensive.[31] Therefore, Ross's assistance to Kitchens in filing the grievance was not statutorily protected activity.[32]

H. Pharmacist's Failure to Establish Protected Activity Doomed his Retaliation Claim

Howard v. Walgreen Co.,[33] also involved the opposition clause in Title VII. Howard, a black employee who was hired as a full-time staff pharmacist, initially worked as a floater, which meant he worked in various stores.[34] One month into his employment, Howard was assigned to a new supervisor who placed him in an overnight pharmacist position.[35] Howard's relationship with his new supervisor was less than cordial.[36] For example, Howard accused his new supervisor of speaking to white pharmacy employees but not speaking

to him, the only African-American employee present.[37] Howard also alleged that his new supervisor used the phrase "you people" – which Howard said was considered racially derogatory by the Black community.[38]

Howard's relationship with his new supervisor deteriorated and resulted in Howard being terminated based upon an absenteeism issue.[39] Howard was scheduled to work a 4-day workweek – December 6 through December 9 – before leaving on a vacation trip to Las Vegas with his fiancée.[40] Although he worked December 6 as scheduled, he called in sick December 7 and December 8, telling the pharmacy scheduler December 8 that he likely also would not be coming in the next night.[41] Howard did not show up for work or call December 9.[42] When the supervisor learned about it, the supervisor called Howard and, unable to reach him, left a message stating that Howard's job was in jeopardy because he "pulled a no call/no show."[43]

On December 13, while on vacation, Howard called his supervisor and told his supervisor that he had informed the pharmacy scheduler when he spoke with her on December 8 not to count on him to work December 9.[44] Howard also told his supervisor that he did not like having his job threatened and that he felt that he was being discriminated against.[45] Howard told his supervisor that he would be reporting the matter to his supervisor's superiors.[46]

Upon his return from vacation, Howard delivered to Walgreens's management a letter complaining about the way he was treated by his supervisor.[47] He concluded his letter by stating that his treatment was based on discrimination and that he would not tolerate discrimination.[48] When Howard reported to work the evening his letter was delivered, he was informed by his supervisor that he had been fired.[49] He sued, claiming that Walgreens discriminated against him because of his race and terminated him because of his race and in retaliation for his race bias complaint.[50]

The case went to a jury which awarded Howard $300,000 in damages for his retaliation claim.[51] Walgreens appealed. The United States Court of Appeals for the Eleventh Circuit held in favor of Walgreens, finding that Howard had failed to show that he engaged in statutorily protected conduct under the "opposition clause" of Title VII.[52] According to the Eleventh Circuit, to establish statutorily protected conduct under Title VII's opposition clause, an employee must establish that he or she held a good faith, reasonable belief that the employer action complained of was actually unlawful.[53] The appellate court found that the record was devoid of any facts to show that Howard's supervisor's message resulted in a serious and material change in the terms, conditions, or privileges of employment.[54] Thus, Howard's belief could not be objectively reasonable.[55]

I. EEOC's Failure to Conciliate Results in Dismissal of Retaliation Claims

Under Title VII, after the EEOC investigates a charge of discrimination or retaliation and makes a determination that there is reasonable cause to believe the charge is true, the

Commission is required to notify the parties and to endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Generally, the agency may file a lawsuit to enforce Title VII only after conciliation has failed.

In EEOC v. Bloomberg L.P. (2010),[56] the U.S. District Court for the Southern District of New York found, in part, that the EEOC had failed to make an adequate effort to conciliate and resolve the retaliation issues before filing a lawsuit against the employer. Conciliation of the retaliation allegations began after a cause determination had been made and the EEOC sent Bloomberg a proposed conciliation agreement that provided for monetary relief for individuals who filed retaliation charges as well as monetary relief for a proposed class and injunctive relief.[57] In response to the conciliation proposal, Bloomberg requested additional time to respond and then delivered a written counterproposal.[58] The company stated that it was not in a position to offer individual monetary relief or create a class fund as proposed by the EEOC, but Bloomberg noted that it was awaiting additional information about the EEOC's determinations that retaliation had occurred.[59] The EEOC responded to Bloomberg by stating that once the company responded to the Commission's monetary proposals, the Commission would discuss the company's counterproposals.[60] The EEOC refused Bloomberg's request for information as unnecessary.[61] Moreover, the EEOC stated that the information was protected from disclosure by its deliberation process privilege.[62]

For five months, Bloomberg and the EEOC engaged in writing letters to one another, during which the EEOC repeatedly refused to counter Bloomberg's response until the company made "reasonable" monetary offers.[63] While Bloomberg suggested mediation of the dispute, the Commission rejected the idea.[64] Eventually, the EEOC sent Bloomberg a written notification that conciliation of the retaliation claims had been "unsuccessful," and the EEOC pursued its litigation.[65]

The court held that the EEOC had failed to meet the requirement that it respond in a reasonable and flexible manner to the employer in conciliation.[66] It reasoned that the EEOC "consistently stonewalled" Bloomberg concerning its request for information and it labeled Bloomberg's attitude as reasonable.[67] The court noted that Bloomberg confirmed during the negotiations that it was amenable to further discussions.[68] Such posture, according to the court, stood in marked contrast to the EEOC's approach.[69] The court found that dismissal of the retaliation claim was an appropriate sanction against the EEOC for its conduct.[70]

J. EEOC'S Failure to Investigate or Attempt Conciliation of Claims Before Filing Suit Results in Dismissal of Suit

EEOC v. Cintas Corp[71] represents another example of the aggressive attitude of the EEOC which many employers are encountering today. The case began in 2000, when a female applicant filed a charge of discrimination with the EEOC alleging sex discrimination when she was denied

employment by Cintas.[72] The EEOC subsequently determined there was reasonable cause to believe Cintas had discriminated against the female applicant, and other individuals sued under Title VII in 2004, seeking certification as a class action.[73] In 2005, the EEOC sued as an intervening plaintiff in the individuals' suit.[74]

The trial court subsequently denied the individual plaintiffs' motions for class certification.[75] The trial court ordered the EEOC to name all the individuals on whose behalf it was bringing its lawsuit.[76] Initially, the EEOC listed 46 women. It later trimmed the total down to 13 female applicants.[77] The trial court found that prior to bringing its lawsuit, the EEOC had not engaged in any efforts to conciliate, i.e., try to settle, those 13 female applicants' claims with Cintas.[78] Moreover, none of the 13 females had ever filed a sex discrimination charge with the EEOC.[79] Cintas argued that the EEOC's claims on behalf of all 13 individuals should be dismissed for failure to exhaust administrative remedies.[80] The U.S. District Court for the Eastern District of Michigan agreed and dismissed the claims[81].

The district court noted that Section 706 of Title VII permits the EEOC to sue a private employer on behalf of "persons aggrieved" by an employer's alleged unlawful employment practices.[82] Title VII also requires the EEOC to investigate discrimination charges, to determine whether or not "reasonable cause" exists to believe discrimination has occurred, and to make "a good-faith attempt to settle the matter through conciliation."[83] The court noted that other federal courts have emphasized the importance of the statutory requirements that the EEOC investigate, issue a cause determination, and conciliate prior to filing suit.[84] Those requirements help to ensure that an employer is "fully notified of the violations being alleged" and to give the EEOC the opportunity to consider the allegations and to resolve violations through voluntary compliance if possible.[85] The court concluded that the EEOC had engaged in no individualized conciliation proceedings of any kind.[86] Moreover, the court found that the EEOC had failed to investigate the specific allegations of any of the 13 females until after the individual plaintiffs and the EEOC had filed their respective court complaints.[87] The Commission never made any individualized "cause" determinations regarding any of the 13 individuals and never attempted to conciliate their Title VII claims with Cintas prior to filing suit. Therefore, the court found it appropriate to dismiss the EEOC's lawsuit with prejudice.[88]

K. Nonpromotion of White Fireman Upheld Due to Talk of Retirement

In Stockwell v. City of Harvey,[89] a white fire fighter contended that he was the subject of reverse discrimination after he was not selected for promotion.[90] The U.S. Court of Appeals for the Seventh Circuit ruled in favor of the city.[91] The court found that the city had stated a legitimate nondiscriminatory reason for not promoting the white fire fighter.[92] The white firefighter had implied that he planned to retire soon.[93] According to the court, even if the chief mistakenly concluded that the white fire fighter intended to retire, a "reason honestly described but poorly founded is not a

pretext, as that term is used in the law of discrimination."[94]

L. Healthcare Facility's Policy of Complying with Patients' Racial Preference Requests Found Unlawful

Plainfield Healthcare Center is a long-term healthcare facility.[95] The Center complied with a resident's request that assistance not be provided from black certified nursing assistants.[96] The Center did so by providing instructions to a black nursing assistant, Brenda Chaney, in writing every day that "no black" assistants should enter this resident's room or provide her with care.[97] Chaney sued, claiming that the Center's practice of acceding to the racial biases of its residents was illegal and created a hostile work environment.[98] The trial court entered summary judgment in favor of the Center on the claims of hostile workplace and discrimination.[99] The court concluded that the note on Chaney's assignment sheet advising her of the resident's preference was reasonable given the Center's good-faith belief that ignoring the resident's preferences would have violated the State of Indiana's "patient-rights laws."[100]

On appeal, the U.S. Court of Appeals for the Seventh Circuit reversed the trial court's ruling in favor of the Center.[101] The court of appeals distinguished its holding from those cases that have held that Title VII permits sex discrimination in the healthcare setting.[102] Those cases conclude that gender may be a legitimate criterion – a bona fide occupational qualification – for accommodating patients' privacy interests.[103] The court reasoned that the privacy interest that is offended when one undresses in front of a doctor or nurse of the opposite sex does not apply to race.[104] Just as the law tolerates same-sex restrooms or same-sex dressing rooms, but not White-only rooms to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex healthcare providers but not same-race providers.[105]

M. Lily Ledbetter Fair Pay Act Found Not Applicable to Promotion Claim

The Lily Ledbetter Fair Pay Act was signed by President Obama on January 29, 2009. This Act amended Title VII, the ADEA, and the Rehabilitation Act to make it clear that a new time period for filing a discrimination charge begins to run each time a paycheck affected by discrimination is issued, regardless of when the discriminatory compensation decision actually occurred. The scope of the Ledbetter Act remains uncertain.

In Noel v. Boeing Co.,[106] a black Haitian employee contended that Boeing had failed to promote him because of his race and national origin.[107] Boeing moved to dismiss because the employee had not filed an EEOC charge within 300 days after the promotion decision.[108] The trial court agreed with Boeing and dismissed the suit.[109] On appeal, Noel argued that his failure-to-promote claim was really a failure to raise claim, and thus, the Ledbetter Act preserved his claim.[110] The U.S. Court of Appeal for the Third Circuit disagreed with this argument.[111] The Third Circuit joined the District of

Columbia Circuit in holding that the Ledbetter Act does not apply to failure-to-promote claims.[112] The Court of Appeals reasoned that the fact that white co-workers who were promoted received more pay than Noel did not transport Noel's failure-to-promote claim into a discrimination-in-compensation claim.[113]

N. Prison Held Liable for Harassment of Female Employees by Inmates

In Beckford v. Dep't. of Corrections,[114] the U.S. Court of Appeals for the Eleventh Circuit held that the Florida DOC was liable under Title VII for the sexual harassment of female employees by prison inmates because the Department unreasonably failed to take steps to stop the harassment.[115] The court rejected the argument that prisons are exempt from the rules governing third-party harassment under Title VII.[116] Instead, the court found that prisons, like other employers, are liable for the sexual harassment of its employees by third parties, and prison inmates are no different than other third-party harassers.[117] The court found that the DOC failed to correct the harassing behavior even though reasonable options were available.[118]

O. Complaining Only to Sexual Harasser Defeated *Faragher/Ellerth* Defense

In Gorzynski v. JetBlue Airways Corp.,[119] the female harassee complained only to the manager who was harassing her despite the fact that the employer's policy allowed harassment complaints to be brought to the attention of the employee's supervisor, human resources, or any member of management.[120] The trial court concluded that the harassee's Title VII sexual harassment claim was barred because the harassee had not taken reasonable steps to notify the employer and to protect herself from harassment.[121] JetBlue had argued to the trial court that the decision only to report the matter to the manager who was harassing her was unreasonable as a matter of law under Faragher/Ellerth,[122] and that she should have complained to human resources or to her manager.[123]

The employee appealed the dismissal of her case to the U.S. Court of Appeals for the Second Circuit.[124] The Second Circuit reversed the grant of summary judgment for JetBlue, reasoning, "We do not believe that the Supreme Court, when it fashioned this affirmative defense, intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints."[125] The Second Circuit also found that the employee had presented evidence that pursuing other avenues of complaint would have been futile.[126]

P. Prompt Remedial Action Precluded Liability for Harassment

In Speigner v. Shoal Creek Drummond Mine,[127] the U.S. Court of Appeals for the Eleventh Circuit held that the employer had acted promptly in responding to an employee's complaint that his supervisor sexually harassed him and, therefore, should not be held liable for the harassment.[128] As soon as Speigner reported to his general manager that his supervisor, David Cain,

had sexually harassed him, the general manager interviewed Cain, counseled him to avoid harassing conduct, and moved Speigner to a different crew, without any change in Speigner's pay or hours.[129] Therefore, the Eleventh Circuit held, the employer was able to successfully invoke the Faragher defense.[130] Under Faragher v. Boca Raton,[131] the Supreme Court held that when an employer takes a tangible, adverse employment action against an employee complaining of hostile environment harassment by an immediate supervisor, the employer is subject to vicarious liability; however, when no tangible employment action is taken, a defending employer may raise an affirmative defense to liability.[132] To establish the defense, the Supreme Court held that the employer has to prove (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the employee unreasonably failed to take advantage of the preventing and corrective opportunities it provided, or otherwise failed to avoid harm.[133]

Q. No Religious Discrimination Found When Employer Refused to Hire on Account of Dreadlock Hairstyle

Xodus v. Wackenhut Corp.*[134]* concerned an employer's refusal to hire an applicant because of his dreadlock hairstyle. Applicant Lord Osunfarian Xodus sued Wackenhut claiming it violated Title VII.[135] Wackenhut defended the claim by contending that Xodus never brought to the interviewer's attention that his religious belief precluded him from cutting his dreadlocks.[136] During the interview process, Xodus told the interviewer that he had previously been terminated from another security firm because he wore dreadlocks and refused to cut them because of his religion.[137] The Wackenhut interviewer told Xodus that Wackenhut had a similar grooming policy and that he would have to cut his hair to gain employment.[138] Wackenhut's interviewer testified at trial that he noticed Xodus's dreadlocks as soon as the two met and he immediately initiated this discussion of Wackenhut's grooming policy.[139] According to the interviewer, he told Xodus that he would not be hired unless he cut his hair.[140] Xodus then got up, began to walk out of the room, and said, "That's why I'm suing Securitas (his prior employer) . . . it's against my belief."[141] The interviewer testified that he was not aware of any religious belief that dreadlocks symbolize a bond with God and that he did not equate Xodus's use of the word "belief" with religion.[142] At the end of the trial, the trial court found in favor of Wackenhut, finding that Xodus failed to bring his religious belief to Wackenhut's attention during the interview.[143]

On appeal, the U.S. Court of Appeals for the Seventh Circuit agreed with the trial court, holding that the word "belief" as used by Xodus during the interview, and the dreadlocks themselves, did not notify the interviewer of the religious nature of his hairstyle.[144] Unlike race or sex, a person's religion is not always readily apparent. This finding doomed Xodus's claim of religious discrimination.

R. EEOC Permitted to Pursue Lawsuit for Muslim Women Allegedly Denied Jobs Due to Head Scarves

In EEOC v. White Lodging Services Corp.,[145] the U.S. District Court for the Western District of Kentucky held that the EEOC could pursue a religious discrimination claim under Title VII against a hotel management firm that allegedly denied housekeeper jobs to four Muslim female applicants because they would not remove head scarves worn for religious reasons. The four female applicants were introduced to White Lodging Services for consideration in housekeeping jobs at the Louisville Marriott which was managed by White Lodging Services.[146] The four female applicants were Somali Muslims who wore the hijab in accordance with Muslim practice.[147] Marriott's dress code did not permit hotel workers to wear hats unless it was part of their uniform.[148] When the White Lodging Services manager who was charged with hiring housekeepers saw the four applicants waiting in a hotel hallway, he asked whether the applicants would have a problem removing their head scarves.[149] The applicant who spoke the best English replied it was "impossible."[150] As a result, the applicants were not interviewed for housekeeper positions.[151]

The EEOC contended in its lawsuit against White Lodging Services that White Lodging Services was required to seek to accommodate the applicants' sincere religious beliefs unless it would cause undue hardship to do so.[152] In order to make out a prima facie case under Title VII of religious discrimination, a Title VII plaintiff must prove through evidence that: (1) the employee holds a sincere religious belief that conflicts with an employment requirement; (2) the employee has informed the employer about the conflict, and (3) the employee was not hired for failure to comply with the requirement.[153] The court found that the case should not be dismissed because a reasonable jury could conclude that White Lodging Services knew the women wanted to work at the Marriott and also knew that their religious belief made it impossible for them to remove their head scarves in order to comply with the dress code for employment.[154] Moreover, the court rejected White Lodging Services' argument that there was no obligation to ask any questions or to presume that the applicants sought an accommodation to work at the Marriott.[155] According to the court, "to take such a position is to bury one's head in the sand."[156] The court held that it was up to the employer to address the matter as the employer was wholly in control of whether interviews would take place.[157]

II. THE AMERICANS WITH DISABILITIES ACT ("ADA")

A. Cancer is a Disability Under ADAAA

The ADA Amendments Act of 2008 ("ADAAA") became effective on January 1, 2009. That legislation significantly broadened the definition of a "disability" to include most physical and psychological conditions, such that many more applicants and employees will fall into this protected category. Under the ADAAA, whether an employee is substantially limited in a major life activity must be construed

more broadly than under the original ADA. Furthermore, the new law provides that an applicant or employee only needs to be impaired with regard to one major life activity, and the new law substantially expanded the number and type of major life activities or bodily functions, the impairment of which, would cause an individual to have a disability. In addition, an applicant or employee may be protected against discrimination even if not disabled in the event that the applicant or employee is regarded as disabled by an employer. Under the ADAAA, in order to meet these regarded as tests, an applicant or employee needs only to establish that the adverse employment action was because of a perceived physical or mental condition, whether or not the employer perceived the individual *to be limited in a major life activity*. The ADA cases after the enactment of the ADAAA have been pretty much "business as usual," simply because the alleged wrongful conduct occurred before the effective date of the ADAAA.

In Hoffman v. Carefirst of Fort Wayne, Inc., [158] the ADAAA was applicable to the facts. The issue in Hoffman was whether or not an employee who has cancer is considered to be "disabled" for statutory purposes even if his or her condition is in remission at the time of the alleged adverse employment action.[159] Applying the new ADAAA standards, the U.S. District Court for the Northern District of Indiana answered this question in the affirmative.[160]

Thirteen months after service technician Stephen Hoffman had surgery for stage three renal cancer, his employer, Carefirst of Fort Wayne, told him he would have to begin working 65 to 70 hours a week, instead of the 40 hours per week he had been working.[161] All other service technicians, who brought medical devices such as oxygen and wheelchairs to patients' homes were told the same thing.[162] Hoffman objected and produced a doctor's note saying he was limited to his existing 40-hour schedule.[163] At first, his employer said it could not meet that condition, but then proposed that he work a 40-hour week, but out of the company's Fort Wayne, Indiana office, rather than out of his Angola, Indiana, home.[164] Citing the 2-3 hours in unpaid commuting time that would add to his day, Hoffman indicated that the proposal was unacceptable, leaving the parties at an impasse.[165] Hoffman never returned to work.[166] He sued the company under the ADA, as amended by the ADAAA, claiming it failed to accommodate his disability, and fired him because he was disabled or regarded as disabled.[167] Noting that his cancer was in remission at the time of the events in question, the company sought summary judgment.[168] This motion was denied by the trial court.[169]

The trial court reasoned that the ADAAA's stated purpose and express language, as well as interpretive regulations issued by the EEOC, support the conclusion that cancer is a covered "disability" under the new law, regardless of whether it is at an active or inactive stage. According to the court, as a result of the passage of the ADAAA, Hoffman did not need to show that his cancer substantially limited him in a major life activity at the time in question to recover on his claims.[170] Moreover, the court found that there were issues of fact as to whether or not Hoffman's proposed accommodation would have imposed an undue business hardship on

his employer and whether the company's proposed accommodation was reasonable.[171]

B. Fired Employee With HIV may Pursue ADAAA Claims

Horgan v. Simmons[172] was another decision during the survey period applying the ADAAA. After working for about seven years as a sales manager for Morgan Services in Los Angeles, Horgan was promoted to general manager of its Chicago facility.[173] Although Horgan had been diagnosed as HIV-positive for 10 years, he kept his medical condition confidential except for telling a few close friends.[174] Horgan alleged that his HIV status never interfered with his ability to perform his job and that he had always met or exceeded Morgan Services' legitimate job expectations.[175]

Seven months after his promotion, Morgan Services' president summoned Horgan for what the company called a "social visit."[176] When they met, the president told Horgan that he was "really worried" about Horgan.[177] Although Horgan replied by discussing his work performance, Horgan alleges that he was cut off by the president, who told Horgan, "this is not about results and that, if there was something medical going on with Horgan, then [the president] needed to know."[178] According to his lawsuit, Horgan replied to the president that nothing had happened that affected his work, but the company's president continued to insist that something physical or mental was affecting Horgan.[179] In his lawsuit, Horgan alleged that he then felt compelled to tell the company's president he was HIV positive.[180]

According to the allegations in the lawsuit, the company president then asked Horgan about his prognosis and Horgan replied that he had been HIV positive for a long time, that his condition was under control, and that his T-cell count was above 300.[181] When the company president asked him what would happen if the T-cell count fell below 200, Horgan replied he would then have AIDS.[182] Horgan asserted that the company president then wondered aloud how Horgan could perform his job and continue to work "with a terminal illness."[183] Horgan then alleged that the company president closed the meeting by telling Horgan that he needed to "recover" and "should go on vacation" and "leave the plant immediately."[184] The following day, the company sent an email to its general managers and corporate staff, including Horgan, indicating that effective immediately Horgan was no longer a member of the company.[185]

Horgan alleged unlawful termination because of his disability as well as an impermissible medical inquiry. He also alleged the company, and the company's president, invaded his privacy in violation of state law.[186]

In moving to dismiss the lawsuit, Morgan Services argued that although being HIV positive is a physical impairment, Horgan failed to plead any limitation of a major life activity, and, therefore, failed to state a disability under the ADA.[187] The court rejected this contention, finding that when Congress passed the ADAAA, it made significant changes in how the three-category definition of disability was interpreted.[188] The court held that the ADAAA clarified that the operation of major bodily functions (including an

individual's immune system) are major life activities for purposes of the ADA's definition of actual disability.[189] The court noted that after passage of the ADAAA, and ADA-covered disability should not demand an extensive analysis. The court let the case go forward and denied the company's motion to dismiss.[190]

C. Teacher With Seasonal Affective Disorder Wins Suit Due to Denial of Windowed Room

In Ekstrand v. School District of Sommerset[191], a jury awarded a high school teacher more than two million dollars for failing to provide the teacher (who experienced seasonal affective disorder) a classroom with a window. After working for five years in the school system, Ekstrand was moved in 2005 to a room with no windows.[192] After she informed the school district that she had SAD (a form of depression that occurs in relation to the seasons and varying exposure to natural light) the district failed to accommodate her needs by allowing her to switch to a room with a window.[193]

D. Shift Change to Ease Commute May be Required Accommodation

Colwell v. Rite Aid Corp.[194] also dealt with the ADA's accommodation requirement. In the Spring of 2005, Colwell was hired as a cashier at the Rite Aid store in Old Forge, Pennsylvania.[195] Although the shifts that she worked varied, most were for weekdays from 5 p.m. to 9 p.m.[196] During her employment, Colwell was recognized by her superiors for good performance.[197] In the Summer of 2005, Colwell was diagnosed with "retinal vein occlusion and glaucoma in her left eye," and eventually became blind in that eye.[198] In mid-September 2005, Colwell informed her supervisor that her partial blindness made it dangerous and difficult for her to drive to work at night.[199] Public transportation was not an option for her because bus service ended at 6 p.m. and there were no taxis.[200] Nonetheless, Rite Aid told Colwell that she would not be assigned only to day shifts because it would not be fair to the other workers.[201]

Some time in late September or early October 2005, Colwell sent her supervisor a note from her doctor stating, "I recommend that [Colwell] not drive at night."[202] After receiving the note the supervisor again informed Colwell that she was unwilling to assign Colwell exclusively day shifts.[203] Colwell asserted that shuttling her to and from work for night shifts by her family created a hardship.[204] Nevertheless, the supervisor continued to schedule Colwell for a mixture of day and night shifts.[205]

In mid October 2005, Colwell submitted her resignation by leaving her supervisor a handwritten note that gave two weeks notice.[206] In her resignation note, Colwell asserted that she had been given unfair treatment and had been the subject of prejudice.[207] A few months later, Colwell filed her lawsuit under the ADA.[208] Upon cross-motions filed, the trial court dismissed Colwell's claims against Rite Aid.[209] In essence, the court found that Colwell had not suffered any adverse employment action and that because Colwell had agreed in her pleadings that she did not need accommodation to perform her job once

she arrived at work, the accommodation that she sought concerning the shift change had nothing to do with the work environment or the manner and circumstances under which she performed her work.[210] The court found that Rite Aid had no duty to accommodate Colwell in her commute to work.[211]

On appeal, the U.S. Court of Appeals for the Third Circuit held that Colwell should be allowed to proceed with a failure-to-accommodate claim under the ADA.[212] The appellate court found that Colwell's testimony that night driving was her only limitation did not negate a finding that she was substantially limited in her ability to see and thus disabled under the ADA, inasmuch as her inability to drive at night was relevant to the extent to which her ability to see was restricted.[213] Moreover, the court of appeals rejected Rite Aid's contention that because commuting was an activity outside the workplace, there was no duty to change Colwell's schedule to enable her to commute independently.[214] The court found that the ADA required accommodation of disability-related difficulties in getting to work, if reasonable.[215] Since a shift change was a workplace condition under the employer's control, the court found that it was within the province of a jury to decide whether a shift change was a reasonable accommodation under the circumstances.[216]

E. Weight-Loss Drug's Side Effects Did Not Render Employee Disabled

Sulima v. Tobyhanna Army Depot[217] posed the issue of whether the meaning of "disability" under the ADA can encompass an impairment resulting solely from the side effects of medication, whether or not the underlying health problems are disabling. Although the U.S. Court of Appeals for the Third Circuit found that the side effects may, under certain conditions, constitute a disabling impairment, such side effects experienced by Ed Sulima did not constitute a disabling impairment.[218]

Sulima was morbidly obese.[219] He also suffered from sleep apnea, likely related to his obesity.[220] The sleep apnea caused him to occasionally stop breathing for short periods while sleeping, at times requiring him to use a machine to help him breathe while he sleeps.[221] It was recommended that Sulima lose weight in order to reduce the severity of the sleep apnea.[222] Thus, he took weight-loss medications for several years.[223] One such medication which he was taking, Xenical, is sold over the counter.[224] After Sulima consulted with his physician, he began taking Lactulose, a laxative sometimes sold under the brand name "Kristalose."[225] The medication that Sulima began taking in the latter months of 2005 caused him to need to use the restroom frequently.[226]

In October 2005, Sulima's supervisor observed him leaving his work station several times, remaining in the restroom for a total of approximately two hours during his shift.[227] When the supervisor spoke with Sulima about the frequent breaks, Sulima told him that they were due to a medication he was taking.[228] Sulima was instructed to get a note from a doctor, and the next day Sulima brought in a note from his physician which stated: "Due to gastrointestinal disorder [Sulima] may

need to use the restrooms more than the usual."[229] After Sulima brought in the note, his supervisors prepared a sheet of two written questions regarding his medical condition.[230] In response to the questions, Sulima wrote that he was not sure how long he would need the medication, but that he was "going back to my doctor to see if he can give me different medication."[231]

After Sulima continued to take frequent long breaks, it was suggested that Sulima be transferred to a different work area.[232] When Sulima became aware of the transfer issue, he spoke with his physician and brought to his employer a note, dated December 9, which indicated that Sulima's mediation had been changed and he was now able to work without needed frequent long breaks.[233] Nevertheless, the decision to transfer Sulima was made but there was no other work area available at the time. Sulima accepted a layoff on December 12, 2005, in advance of a general round of layoffs scheduled to take effect in January of 2006.[234]

Sulima filed a lawsuit alleging several violations of the ADA including that he had been transferred and subsequently laid off because of his "disability" or, in the alternative, because his employer regarded him as disabled.[235] He also claimed that he had been transferred in retaliation for having requested extra time to use the restroom during work hours.[236] The trial court dismissed Sulima's lawsuit, finding that he was not disabled and that he had not been the subject of either retaliation or a failure to accommodate.[237]

On appeal, the U.S. Court of Appeals for the Third Circuit held that because Sulima was claiming an impairment based on the side effects from medication, the factual situation presented was somewhat different from a typical ADA claim. The Third Circuit first assumed for the sake of argument that Sulima had adequately shown that the medication's side effect, i.e., Sulima's gastrointestinal difficulties, actually constituted a substantial limitation on a major life activity.[238] But the court concluded that Sulima was not disabled because the medications were not "medically necessary."[239] In reaching this conclusion, the court agreed with the trial court's determination that Sulima's physician discontinued the medication after he was made aware of the problematic side effects.[240] Moreover, the appellate court agreed with the trial court that the two-month period between the side effects beginning and the discontinuation of the medications – assuming they could be deemed medically necessary during that time – was not a long enough duration to qualify as a "disability" under the ADA.[241] With respect to his regarded as disabled argument, the appellate court agreed with the trial court's finding that Sulima had not alleged any facts to support a conclusion that his employer thought that his gastrointestinal problems were going to last for an extended period of time.[242] The appellate court also agreed with the trial court's determination that when Sulima requested the accommodation, he did not have a good faith belief that he was disabled within the meaning of the ADA, and thus could not state a claim for retaliation.[243]

F. Alleged Depression and Anxiety Rejected as a Disability

In Richard v. DuPont Co.,[244] an administrative assistant, Kerri Richard, was terminated for poor performance. She brought suit under the ADA and Title VII claiming discrimination.[245] With respect to her ADA claim, Richard alleged that depression and anxiety caused her to be substantially limited in the major life activity of thinking and that DuPont wrongfully denied her repeated requests for accommodations.[246] The U.S. Court of Appeals for the Fifth Circuit agreed with the trial court that Richard had failed to prove that she was substantially limited in the major life activity of working or thinking.[247] Significantly, Richard's physician testified that she was not disabled as a result of her depression and was able to function in the workplace.[248] Moreover, evidence showed that Richard's concentration level was sufficient to allow her to manage the construction of her new home, manage her household finances, and care for her son.[249]

G. Diabetic Not Disabled Under ADA

In Carreras v. Sajo, Garcia & Partners,[250] the U.S. Court of Appeals for the First Circuit held that an art director, whose Type II diabetes necessitated dietary adjustments that were not unusually restrictive, and his alleged infrequent episodes of blurred vision due to high sugar levels, did not substantially limited the art director in a major life activity and thus was not disabling under the ADA.

H. Employee Who Only Can Work From Home Has No Claim of Non-Promotion

In McEnroe v. Microsoft Corp.,[251] the U.S. District Court for the Eastern District of Washington held that Microsoft had not violated the ADA for refusing to promote an employee who could only work from home. The employee's condition, which included panic disorders, agoraphobia, major depression, post-traumatic stress disorder, irritable bowel syndrome, and other conditions, did not require Microsoft to permit her to a telework arrangement as a reasonable accommodation for the positions for which the employee sought promotion required in-person attendance and ability to travel.

I. Police Chief Discharged For DWI Not Qualified Individual Under ADA

In Budde v. Kane County Forest Preserve,[252] the U.S. Court of Appeals for the Seventh Circuit agreed with the trial court's determination that an alcoholic police chief who was discharged after a drunk driving accident was not a qualified individual with a disability, despite his contention that the essential job function of operating a vehicle differed from not having a valid driver's license. The court determined that the police chief's claim must fail because as a result of his misconduct (violating a standard operational procedure which prohibited officers from being publicly intoxicated as well as a procedure that prohibited employees from violating public laws) he could not perform essential job functions in that he failed to comply

with universal workplace rules and could not perform an essential job function in that he was unable to operate a motor vehicle due to his suspended driver's license.[253] Importantly, the court of appeals stated that violation of a work rule, even if it is caused by a disability, is no defense to discipline up to and including termination.[254]

J. Worker Who Failed to Check Correct Box for EEOC Charge Could Not Pursue ADA Claim

In Mozdzierz v. Accenture, LLP,[255] Steven Mozdzierz filed an EEOC charge alleging that his termination from employment constituted retaliation under the ADA.[256] On the charge form, Mozdzierz checked the boxes for "retaliation" and "other," but not for "discrimination."[257] The EEOC issued a right to sue letter and Mozdzierz sued his employer, Accenture, for alleged discrimination.[258] The company then moved to dismiss, claiming that Mozdzierz was barred from bringing a discrimination claim because he had never filed an EEOC charge claiming discrimination.[259] The U.S. District Court for the Eastern District of Pennsylvania agreed with Accenture, and dismissed Mozdzierz's lawsuit.[260] Although the court noted that the scope of an EEOC charge is "fact specific" and leaves "ample room for exceptions," Mozdzierz never alleged in the charge that Accenture discriminated against him because of his disability.[261] As such, nothing in the charge would have led the EEOC to investigate possible discrimination claims.[262]

K. Monetary Damages and Right to Jury Trial Held Not Available in ADA Retaliation Lawsuits

Although *Alvarado v. Cajun Operating Co.*[263] (2009) was decided in December 2009, since it was not covered in last year's materials and is significant, it is included herein. In *Alvarado*, the U.S. Court of Appeals for the Ninth Circuit held that only equitable remedies are available for ADA retaliation claims and that such remedies are not within the province of a jury.[264]

L. Jobs Held by Temporary Workers Were Not "Vacant" for ADA Purposes

Duvall v. Georgia-Pacific Consumer Products,[265] concerned the issue of whether or not positions staffed by temporary workers were "vacant" for purposes of the ADA's accommodation requirement. Travis Duvall had worked in the shipping department of Georgia-Pacific Consumer Products for seven years, and was transferred when the mill began outsourcing shipping functions due to the economy.[266] After the paper dust in the air made it impossible for Duvall to work in the new position, he requested a return to the shipping department or transfer to the mill's storeroom, which was also in flux at the time with temporary employees.[267] When his quest for the accommodation was denied, he brought a failure-to-accommodate claim under the ADA.[268]

The U.S. Court of Appeals for the Tenth Circuit agreed with the trial court that while the ADA imposed a duty to accommodate with reassignment to a

vacant position, positions staffed by temporary workers during the outsourcing transition (which were not available to similarly situated, non-disabled co-workers) were not "vacant" for purposes of the ADA.[269] Thus, there was no obligation for Georgia-Pacific to provide Duvall access to a position held by a temporary worker.[270]

III. AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA")

A. Speech Raises Inference of Age Bias

A supervisor's or manager's speech is oftentimes at the heart of age discrimination claims. This was certainly the case in three sample decisions from 2010, Mauer v. Deloitte & Touche, LLP,[271] Marlow v. Chesterfield County School Board,[272] and Jackson v. Cal-Western Packaging Corp.[273]

In the Mauer[274] case, a protected-age auditor was terminated for "poor performance" shortly after an upper level manager had given a speech to the staff in which the manager analogized shedding low performers with "pruning a blueberry bush."[275] The terminated auditor filed a claim of age discrimination alleging that when the manager was asked what he meant by pruning, he stated the process of pruning blueberry bushes is to "cut off older branches to make room for younger ones."[276] When questioned further, according to the auditor, the manager responded that the idea was to get rid of the older people and "bring in younger people."[277] These comments were allegedly made by the manager who made the decision to terminate the auditor.[278] Given their proximity to the termination decision, the U.S. District Court for the Southern District of Ohio determined that they constituted direct evidence of age bias.[279] Therefore, the court held that a jury should decide whether the auditor was discharged because of his age.[280] Significantly, the court also noted that the auditor had always received an "on track" rating in performance evaluations but received an "off track" rating shortly after the "blueberry bush" speech, and this also raised an inference of discrimination sufficient to defeat summary dismissal of the lawsuit.[281]

In the Marlow case, a 60-year-old public school administrator took early retirement rather than accept a demotion following a job elimination.[282] The administrator then sued, claiming discrimination in violation of the ADEA, and contended that when the school superintendent told her that she was being laid off, the superintendent stated that the administrator "lacked 21st century communication skills."[283] This allegation, combined with the fact that the school district eliminated the administrator's position yet kept a younger, less experienced colleague who held the administrator's former job, according to the U.S. District Court for the Eastern District of Virginia, presented a reasonable jury inference of age discrimination.[284] The court stated that although the superintendent's "21st century" comment was not "direct evidence of discrimination," in context, such reference is circumstantial evidence of discriminatory motivation.[285]

In Jackson v. Cal-Western Packaging Corp.,[286] chief operating officer Wayne Jackson was employed by

Cal-Western in various managerial positions for eight years, until June 2007. In May 2007, one of Jackson's co-workers, Karen Hopper, emailed her supervisor asserting that Jackson had engaged in behavior that made her "uncomfortable."[287] She recounted that Jackson had asked to see her breasts and had commented that her boyfriend must like "big boobs."[288] She also alleged that Jackson had on many occasions made inappropriate statements or comments in front of her and her female co-workers.[289] As a result of these allegations, an internal investigation was conducted and the allegations were corroborated.[290] When Jackson was interviewed, he asserted that he was "vindictive" and would try "legally" to retaliate against those making allegations against him.[291]

In June 2007, Jackson was terminated for his non-compliance with the company's written sexual harassment policy.[292] Jackson was 69 years old when he was terminated. He was replaced by a 43 year old male.[293]

Jackson sued Cal-Western for age discrimination.[294] His claim primarily relied on a remark the chief operating officer (who had conducted the sexual harassment investigation) allegedly made to another worker one year earlier to the effect that Jackson was an "old, gray-haired fart."[295] The trial court granted Cal-Western's motion for summary judgment, finding that Jackson had not presented any evidence that Cal-Western's offered reason for his termination (violation of sexual harassment policy) was pretextual.[296]

On appeal, the U.S. Court of Appeals for the Fifth Circuit agreed with the trial court.[297] With respect to the alleged age-based comment, the Fifth Circuit found that it was not direct evidence of discrimination.[298] The court found that the comment was not proximate in time to the termination or related to the employment decision, and thus the comment could not qualify as direct evidence.[299]

B. Terminated Workers Who Did Not Sign Releases Have No Claim Under The Older Worker Benefit Protection Act ("OWBPA")

In 1990, Congress passed the OWBPA which amended the ADEA to safeguard older workers' employee benefits from age discrimination. The OWBPA impacts releases which seek to release federal age discrimination claims. Many employers seek a general release from employees in connection with voluntary or involuntary severance payments or early retirement benefits to limit their exposure to lawsuits by employees challenging the employer's selection decisions. Whenever employers seek a release of federal age discrimination claims, they must comply with the OWBPA. In some circumstances, employees' rights under the OWBPA and the ADEA can be waived if specific criteria are met. Of utmost importance is the requirement that the waivers of potential age discrimination claims be "knowing and voluntary."

In Hageman v. Accenture,[300] Hageman and others brought a collective action against Accenture, claiming that it violated the ADEA. In part, they sought a declaratory judgment that the releases of claims Accenture sought for class members were invalid

for failure to comply with the requirements of the OWBPA.[301] Hageman and the others alleged that between April 2009 and February 2010, Accenture discharged numerous employees on the basis of age.[302] They argued that 72% of the employees fired were older than 40 and the termination rate for the age group was more than double the rate for employees younger than 40.[303] They further alleged that 47 of the 73 employees let go in a reduction-in-force in April and May 2009 were older than 40.[304]

In connection with the RIF, Accenture offered a severance package that included a release that employees were required to sign before receiving separation benefits.[305] The release waived any claims that an employee might have against Accenture, including claims under the ADEA.[306] Significantly, there was no allegation in the lawsuit filed by Hageman and others that they had executed a release.[307] Three of the named participants in the litigation appeared to have initially signed a release, but one never returned her signed release to Accenture and the other two later rescinded their signed releases.[308] Therefore, the U.S. District Court for the District of Minnesota found that the group of plaintiffs had no standing to sue under the OWBPA because none of those releases became effective.[309] The court emphasized that to have standing there must be injury in fact to the plaintiff that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision.[310] Simply being offered a release but not validly executing it causes no injury, according to the court.[311]

C. Employer Who RIF'd Two Oldest Employees Exonerated

Schoonmaker v. Spartan Graphics Leasing, LL*C*[312] involved another challenge to a RIF. As a result of economic conditions, Spartan Graphics decided to reduce its workforce by eliminating two positions.[313] Spartan Graphics RIF'd the two oldest employees (58 and 65) in the department.[314] Not only did the employer choose the two oldest employees in the department for the reduction in force, but also the decision maker for the RIF acknowledged he did not consider the company's policies which stated that if qualifications were relatively equal, seniority would govern.[315] The 65 year old employee had been chosen because she was retiring at the end of the year anyway.[316] Additionally, the decision maker retained a 29 year old employee over the 58 year old plaintiff because co-workers agreed that the younger employee would be the better team player.[317] On a favorable note, the 58 year old plaintiff was not replaced.[318] The junior of the two filed a lawsuit claiming age discrimination. [319]

The U.S. Court of Appeals for the Sixth Circuit agreed with the trial court's decision to grant Spartan Graphics' motion for summary judgment, and thereby dismiss the case. The court of appeals reasoned that Schoonmaker (the RIF'd 58-year-old) had provided no proof of age discrimination other than an age differential between a retained employee and herself.[320] The court found that that was insufficient.[321] She would have to show that she possessed superior qualities in order to establish a prima facie case in the context of a

workforce reduction, said the court.[322] Moreover, the court found that the fact that the two oldest employees in the department were let go was insufficient because of the small statistical base.[323] Finally, the court concluded that the failure to follow its own criteria was not additional evidence of discrimination.[324]

D. Early Retirement Program Violates ADEA

EEOC v. Minnesota Dep't. of Corrections[325] involved allegations that an early retirement program violated the ADEA. Minnesota's Department of Corrections negotiated collective bargaining agreements with several unions, including AFSCME, the Minnesota Nurses Association, and the Minnesota Law Enforcement Association.[326] The negotiated collective bargaining agreements with these unions included provisions for an "age 55 cliff" early retirement program.[327] Under the program, if an employee retired during the pay period of his or her 55th birthday, he or she would be eligible to receive continuation of DOC's contribution toward the employee's health and dental insurance premiums until the employee reached age 65.[328] If, however, an employee retired after the age of 55, he or she would not be eligible for contributions toward health and dental insurance.[329] The "age 55 cliff" was removed from some of the bargaining agreements after the State Attorney General informed the DOC that the early retirement program might violate the ADEA.[330] Only DOC's bargaining agreement with the Minnesota Law Enforcement Association retained the "age 55 cliff" language.[331] But while the "age 55 cliff" was taken out of most of the bargaining agreements, all of the modified bargaining agreements contained "anti-grandfathering clauses."[332] These clauses allowed the DOC to exclude from eligibility for employer-paid health insurance contributions any employee who was age 55 or older at the time the agreements were modified to take out the "age 55 cliff."[333]

The U.S. District Court for the District of Minnesota agreed with the EEOC's assertion that the cliff provision in the Minnesota Law Enforcement Association bargaining agreement and the anti-grandfathering clause in the other agreements violated the ADEA.[334] The court found that the bargaining agreements were facially discriminatory.[335] The relevant distinguishing feature among different employees with regard to the "age 55 cliff" was their age, reasoned the court.[336] The court further rejected the DOC's contention that the ADA's safe harbor provision found in Section 623(F) insulated it from liability.[337] This section provides that it is not unlawful for an employer to observe the terms of a "bona fide employee benefit plan" that is a voluntary early retirement incentive plan consistent with the purposes of the ADEA.[338] The court explained that if the DOC's early retirement program had not conditioned benefits solely on age, it would have fallen under the safe harbor and would not be illegal.[339] As a remedy for DOC's violation, the court awarded retirees damages in the amount of health and dental insurance premiums that the DOC would have paid absent the illegal early retirement incentive program.[340] Retirees were also awarded back pay and front pay.[341]

E. Neither Assigning New Territory Nor Increasing Workload Was Adverse Action

In a case of age discrimination filed under the Florida Civil Rights Act, the U.S. Court of Appeals for the Eleventh Circuit agreed with the trial court's finding that the employer's assignment of an age-protected insurance adjuster to a new area which lengthened his daily commute by three hours and which increased his overall workload was not adverse action and, therefore, was not discriminatory. Diaz v. AIG Marketing, Inc.[342]. The court reasoned that Florida's Civil Rights Act is patterned on the ADEA.[343] Therefore, federal caselaw under the ADEA applies to cases brought under the Florida Civil Rights Act.[344] In a case involving circumstantial evidence, which was the case in *Diaz*, and ADEA plaintiff must prove, at a minimum, that he or she sustained an adverse action in a job for which he or she was qualified and that similarly situated younger employees were treated more favorably.[345] The Eleventh Circuit emphasized that it was not the court's role to second-guess AIG's business decisions, and changes to an employee's work assignments are rarely sufficiently "adverse' to warrant scrutiny under the anti-discrimination laws.[346]

IV. FAMILY AND MEDICAL LEAVE ACT ("FMLA")

The FMLA arms employees with two types of causes of action against employers. The FMLA's "interference" provision declares it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" any right provided by the FMLA.[347] And its "retaliation/discrimination" provisions prohibit employers from discharging or discriminating against employees for "opposing any practice made unlawful" by the FMLA.[348]

This dichotomy forms the framework for analyzing an FMLA claim. Retaliation/discrimination claims are analyzed under traditional anti-discrimination burden-shifting standards. But these traditional standards do not apply to interference claims. Rather, when an employee asserts interference with his or her FMLA entitlement, he or she generally has to show only that he or she was entitled to benefits under the FMLA and was denied them. Put simply, if an employee is denied a lawfully entitled right under the FMLA, the employer is generally deemed to have violated the FMLA regardless of the employer's intent. Retaliation and interference claims under the FMLA are becoming more popular with employees and plaintiffs' attorneys. On the surface, the dichotomy between retaliation and interference claims appears self-evident. It becomes convoluted, however, in fact patterns brought before the courts under the FMLA. The following is a sampling of the development in this area in 2010.

A. Right to Non-Interference With the Start of FMLA Leave is Not Absolute

Krutzig v. Pulte Home Corp.[349] involved claims of retaliation and interference under the FMLA. The case presented an appeal by Betsy Krutzig of a grant of summary judgment in favor of Pulte Home Corporation.[350] Krutzig was

terminated from her employment with Pulte and claimed that her termination was an act of retaliation and interference under the FMLA.[351]

Krutzig was hired by Pulte in January, 2005, as a sales associate selling homes in Sarasota, Florida.[352] In June 2007, Krutzig fell and injured her foot.[353] She did not initially request any leave from work.[354] Thereafter, in July 2007, Krutzig received two written warnings from her immediate supervisor and was placed on a 30-day performance improvement plan.[355] One month later, Krutzig contacted an HR representative and requested FMLA leave for a period of time during which she was scheduled to have surgery on her injured foot.[356] The HR department sent forms relative to medical leave by facsimile to Krutzig's office and also provided contact information so that Krutzig could file a claim for STD benefits with an insurance company.[357] In response, Krutzig faxed the HR department a form signed by her doctor.[358] Although Krutzig attempted to have her supervisor sign her leave form on the same day, her supervisor was in her office with her door shut, and Krutzig never was able to ask for approval.[359]

The same date that the FMLA paperwork had been faxed by Krutzig to the HR department, Krutzig met with a disgruntled customer who was unhappy with Krutzig and the way she had handled a sale.[360] Pulte's vice president of sales and marketing was told of the complaint by the customer and, following a discussion, the director of sales advised the vice president of sales by telephone that he had decided to terminate Krutzig.[361] Three days later, Krutzig was terminated by the director of sales.[362]

Krutzig filed a complaint in federal district court as a result of her termination, alleging that she had been the victim of FMLA retaliation and interference.[363] The trial court granted Pulte's motion for summary judgment as to Krutzig's FMLA retaliation claim, on the ground that there was no evidence in the record that management at Pulte was aware of Krutzig's FMLA leave request at the time the decision was made to terminate her.[364] The court also granted Pulte's summary judgment motion as to FMLA interference claim on the basis that Krutzig failed to provide any medical evidence substantiating her alleged medical condition and entitlement to FMLA leave.[365] The court concluded that Krutzig failed to present evidence that she submitted a valid request for FMLA leave.[366] Moreover, the court, in the alternative, granted summary judgment to Pulte on the FMLA interference claim, based on a finding that Krutzig would have been terminated regardless of any request for FMLA leave.[367]

The case was appealed to the U.S. Court of Appeals for the Eleventh Circuit.[368] In reviewing the record, the Eleventh Circuit reasoned that a prima facie case of retaliation under the FMLA requires a showing that (1) the employee engaged in statutorily protected conduct, (2) the employee suffered an adverse employment action, and (3) there is a causal connection between the two.[369] The causal connection element is satisfied if a plaintiff shows that the protected activity and adverse action were "not wholly unrelated."[370] Generally, a plaintiff can show the two events are not wholly unrelated if the plaintiff shows that the decision maker

was aware of the protected conduct at the time of the adverse employment action. Temporal proximity alone is not sufficient to establish a causal connection when there is evidence that the decisionmaker was not aware of the protected activity. It is the knowledge of the decision maker which is critical.

With respect to the interference claim, the court of appeals reasoned that to establish an interference claim, an employee need only demonstrate by a preponderance of the evidence that he was entitled to the benefit denied.[371] The employee need not allege that his employer intended to deny the benefit, because the employer's motives are irrelevant.[372] The Eleventh Circuit held that the FMLA right to non-interference with the commencement of leave was not absolute, and that if a dismissal would have occurred regardless of the request for FMLA leave, an employee may be dismissed, preventing her from exercising her right to leave or reinstatement.[373] Simply stated, an employee who requests FMLA leave has no greater protection against her employment being terminated for reasons unrelated to an FMLA request than she did before submitting the request.[374] Importantly, the court also found that the right to commence FMLA leave is not absolute and that an employee can be dismissed, preventing her from exercising her right to commence FMLA leave without thereby violating the FMLA if the employee would have been dismissed regardless of any request for FMLA leave.[375]

In the case at hand, the Eleventh Circuit found that the unrebutted evidence that the decision maker was not aware, at the time of the decision to terminate Krutzig, of her request to commence FMLA leave establishes as a matter of law that Krutzig's termination was for reasons other than her requested leave.[376] Therefore, the Eleventh Circuit agreed with the trial court's dismissal of the lawsuit.[377]

B. Employee Terminated in a RIF After FMLA Leave Request Lacked Valid Retaliation or Interference Claim

In Cobbs v. Bluemercury, Inc.,[378] the employer decided to eliminate redundant positions at headquarters due to dire financial conditions facing the business. The company ranked employees in similar job titles by job performance, and terminated through a RIF nine headquarters employees based upon the performance ranking.[379]

One of the employees terminated in the RIF, Adele Cobbs, often needed to take medical leave because of injuries sustained in two car accidents as well as other medical problems, including flu and the need to have an abscess removed.[380] In the months leading up to the RIF, Cobbs missed several days of work because of the abscess, neck and back injuries suffered in her first car accident, and flu.[381] Bluemercury was very generous to Cobbs in granting her time off, even though she was out of paid leave.[382] Two months before the RIF, while Cobbs was still undergoing physical therapy for her first car accident, she had a second auto accident, causing injuries to her neck and arm.[383] When she asked for four or five days off following that accident, her second level supervisor denied her request.[384] The company reasoned that Cobbs lacked the sick leave and was able to work in a neck brace and arm sling.[385]

Bluemercury continued to grant Cobbs intermittent leave to attend physical therapy, however.[386]

After Cobbs' second accident, workplace tensions arose about Cobbs' more frequent absences.[387] Bluemercury asked her to submit a disability certificate and a medical treatment plan.[388] Weeks before the RIF, Cobbs joined a pending lawsuit alleging that Bluemercury owed employees unpaid overtime under the state's minimum wage law.[389] She also formally requested intermittent leave under the FMLA.[390] One week later, Bluemercury notified Cobbs and the other RIF'd employees that she was one of nine employees whose jobs were eliminated under the RIF. She sued, alleging FMLA retaliation and interference.[391]

The U.S. District court for the District of Columbia granted Bluemercury's motion for summary judgment on both Cobbs's retaliation and interference claims.[392] The court found that undisputed evidence showed that Bluemercury was in serious financial trouble and had a legitimate business reason for the elimination of the positions.[393] According to the court, a planned reduction in force is a legitimate reason for terminating an employee.[394]

C. Pregnant Worker Has no Claim for Retaliation for Layoff in RIF

Lewis v. D.R. Horton, Inc.[395] involved another RIF factual pattern. Plaintiff was laid off during a RIF one day after she asked to start her early maternity leave.[396] She sued, alleging FMLA retaliation.[397] The U.S. District Court for the District of New Mexico granted summary judgment for D.R. Horton because plaintiff could not show that Horton's asserted reasons for laying her off were a pretext for discrimination.[398] The district court stated that while an employer may not discriminate against a worker for exercising her rights under the FMLA, an employee who requests FMLA leave has no greater protection against being terminated for reasons not related to his or her FMLA request than before submitted the request.[399] Simple proximity is not enough to show retaliation.[400]

D. Employee Fired for Violating Call-In Policy Lacked Interference Claim

In Thompson v. CenturyTel of Century Arkansas, LLC,[401] the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision that CenturyTel was not liable for an FMLA interference claim because it showed it would have discharged the terminated employee even if she had not exercised her FMLA rights because of her repeated violations of its call-in policy. Citing the FMLA's implementing regulations, the court stated that an employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work.[402] CenturyTel's policy provided that an employee will be considered to have voluntarily terminated his or her employment if he or she fails to call in three times during a one-year period.[403] Thompson violated that policy seven times in the twelve months leading to her termination.[404]

E. Demotion After Maternity Leave Was Not Retaliatory

In Schaff v. SmithKline Beecham Corp.,[405] the U.S. Court of Appeals for the Eleventh Circuit affirmed the grant of summary judgment to SmithKline concerning claims of interference and retaliation under the FMLA. The lawsuit followed a demotion of a vice president of sales due to managerial ineffectiveness discovered during her absence for FMLA maternity leave.[406] Noting that the plaintiff must prove that her leave was the "proximate cause" of an adverse employment action, not just a "but-for cause," the Eleventh Circuit rejected her contention that the company would not have learned of her deficiencies had she not taken FMLA leave.[407] The court stated that the purpose of the FMLA is to allow workers to temporarily put their careers on hold while they tend to personal health matters, not to aid an employee in covering up work-related deficiencies.[408] The court further held that plaintiff's claim for retaliation failed because she did not present evidence that the company's performance-related reasons for demoting her were pretextual.[409]

V. FAIR LABOR STANDARDS ACT ("FLSA")

A. "Plan/Prevent/Protect" – DOL's New Strategy

In April 2010, in conjunction with the Spring 2010 Regulatory Agenda of the Department of Labor, the Secretary of Labor announced a new enforcement strategy called "Plan/Prevent/Protect: The Beginning of a Broader Regulatory and Enforcement Strategy." According to the DOL, the purpose of this new initiation is to replace what it has termed the "catch me if you can" approach. In other words, the strategy is aimed at requiring employers to "find and fix" violations and ensure they are in compliance with wage and hour, and workplace safety laws before the arrival of DOL investigators. As the DOL explained, the new strategy calls for employers to take three steps to ensure compliance with the law:

- Plan – employers and other regulated entities will have to create a plan to find and fix violations of the law and other risks to workers.

- Prevent – employers and others will have to thoroughly implement their plans in a way that actually prevents violations of the law and other risks and hazards.

- Protect – employers and others will have to ensure that their plans actually protect workers.

The DOL cautions that it intends to consider any employers who do not take these steps to comprehensively address risks, hazards, and inequities in their workplaces to be out of compliance with the law.

DOL is clearly increasing its emphasis on enforcement measures. The White House announced an unprecedented collaboration between a federal agency and a private bar association. Starting December 13, 2010, the DOL's Wage and Hour Division started working with the Standing Committee on Lawyer Referral and Information Service of the American Bar Association. Employees

who contact the Division may now be referred to "qualified private-sector attorneys" to handle their cases as private actions. According to the DOL, this new joint effort was precipitated by the Wage and Hour Division's inability to handle all complaints it receives. Even though the Division has hired 350 new investigators during the past two years, it has been unable to assist all of the more than 35,000 employees who seek its assistance each year.

The private-sector enforcement measure is considered part of the Obama Administration's Middle Class Task Force Initiative. According to the DOL, they will "both provide workers a better opportunity to seek redress for FLSA and FMLA violations and help level the playing field for employers who want to do the right thing." All of this means that employers will undoubtedly face an increase in private lawsuits alleging FLSA and FMLA violations. Employers will now have to give careful consideration to whether the information and documentation they provide to the DOL will be made available to private plaintiffs' counsel without the protections and filter of the Freedom of Information Act.

B. Eleventh Circuit Clarifies "Enterprise Coverage" Under FLSA

In a case which may have a sweeping effect on the enforcement of the FLSA, Polycarpe v. E&S Landscaping Service, Inc.,[410] the U.S. Court of Appeals for the Eleventh Circuit held that various district courts in the Eleventh Circuit had inaccurately interpreted the FLSA's "handling clause" when those courts dismissed cases on summary judgment as a matter of law. *Polycarpe* was a consolidation of six cases which were appealed by workers whose FLSA claims had been dismissed by the district courts.[411] All of the cases involved interpreting the FLSA to determine whether employers were covered by the Act.[412] Plaintiffs were all employees who work for defendant employers in various capacities: landscapers, security-system technicians, and construction workers, among others.[413] The defendant-employers were principally local service providers to customers within the state of Florida, although some defendants also provided products in connection with their services.[414]

All of the plaintiffs claimed that, during their employment, they worked more than 40 hours per week and that their employers failed to pay them either the proper minimum wage, overtime pay, or both.[415] The defendants did not dispute that they did not pay their employees the minimum wage or overtime wages.[416] With one exception, the plaintiffs provided evidence that the defendants grossed more than $500,000 each in annual sales.[417]

In each of the cases at the district court level, the lower courts dismissed the cases because the courts concluded that the FLSA did not cover the businesses.[418] The district courts concluded that, because the employers had purchased potentially qualifying "goods" or "materials" *intrastate*, *after* those items had "come to rest," no sufficient *interstate-commerce* connection existed to bring about FLSA coverage.[419]

In the consolidated appeal, the Eleventh Circuit was only concerned with "enterprise coverage."[420] An

employer falls under the enterprise coverage section of the FLSA if it (1) has employees engaged in interstate commerce or in the production of goods for interstate commerce, or has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate commerce by any person, and (2) has at least $500,000 of annual gross volume of sales made or business done.[421] If an employer has two or more workers engaged in interstate commerce or the production of goods for interstate commerce, FLSA coverage extends to all of the enterprise's employees.[422]

An employer would be considered to be an "enterprise engaged in commerce" if it has employees "*handling*, selling, or otherwise working on goods that have been moved in or produced for commerce."[423] In 1974, Congress amended the FLSA in a way that satisfying the handling clause was an independent basis for bringing an enterprise under the FLSA coverage. In other words, if a business has any employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce by any person, enterprise coverage is found. The "handling clause" only pertains to goods or materials that have been moved in or produced for commerce by any person.[424]

Under a "coming to rest" doctrine, interstate goods or materials can lose their interstate quality if the items have already come to rest within a state before intrastate purchase by a business. Significantly, the Eleventh Circuit found that the "coming to rest" doctrine only applies to "individual coverage" issues, not "enterprise coverage" issues.[425] In essence, employers fall under enterprise coverage if they have employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate commerce. There is no requirement of continuity in the present, found the court.[426] Therefore, according to the Eleventh Circuit, if a trial court applied the "coming to rest" doctrine by looking at where the employer bought an item instead of where an item was produced, the order of the trial court should be vacated if there is a question about where the goods or materials were produced or where they have moved.[427]

The Eleventh Circuit went on to define the handling clause's use of the term "materials."[428] The FLSA provides enterprise coverage for employers whose employees are engaged in "handling, selling, or otherwise working on goods or materials."[429] The Eleventh Circuit found that "materials" means tools or other articles necessary for the doing or making something, explaining that such an interpretation is true to the ordinary meaning of the term, avoids conflict with the statutory definition of "goods," and is supported by the legislative history of the FLSA.[430] This definition of the word "materials" as used in the law requires the additional step of showing that these materials are being used by the employer's business in a substantial commercial context that subject an employer to enterprise coverage under the FLSA's handling clause.[431]

Applying these new interpretations to the appealed cases, the Eleventh Circuit vacated and remanded all but one case to the district courts, finding that the Florida district

courts mistakenly relied on the "coming to rest" doctrine, and failed to apply the correct definition of "materials" when they determined that the employers were not subject to enterprise coverage under the FLSA because all of the commercial items their employees used were purchased locally.[432]

C. Fluctuating Workweek Calculation Approved in Misclassification Case

In Urnikis-Negro v. American Family Property Services,[433] the U.S. Court of Appeals for the Seventh Circuit found that the district court had properly applied the fluctuating-workweek method of calculating an employee's regular rate of pay (dividing weekly salary by the actual hours worked in that week) and overtime in the case of an employee who was improperly classified as an exempt administrative employee. The court of appeals rejected the employee's contention that the method should not be applied because the employee's hours never fluctuated below 40 per week.[434]

D. Eleventh Circuit Declines to Rehear Ruling that Denied FLSA Plaintiff Attorneys' Fees and Costs

In Sahyers v. Prugh, Holliday & Karatinos, P.L.,[435] the U.S. Court of Appeals for the Eleventh Circuit denied rehearing of a March 2009 ruling that an FLSA plaintiff who accepted an offer of judgment resolving an overtime lawsuit was not entitled to an award of attorneys' fees or costs because her lawyer showed a lack of "lawyer-to-lawyer collegiality and civility." Plaintiff, after leaving her employment with her employer (a law firm), filed a lawsuit without any warning or advanced notification, alleging FLSA overtime violations.[436] Her lawsuit did not specify how many hours she claimed to have worked, or what amount she claimed in back pay or damages under the FLSA.[437] She later made unsupported demands for $25,000 to settle her claims, but after discovery and the litigation closed, she accepted her employer's offer of judgment under Rule 68 of the Federal Rules of Civil Procedure.[438] Thereafter, she filed a motion asking the trial court to award her $13,800 in attorneys' fees and $1,840 in costs.[439] This motion was denied by the trial court and affirmed by the court of appeals.[440]

While the FLSA provides that the court "shall" award the successful plaintiff in an FLSA suit reasonable attorneys' fees and costs, the trial court found that there are some cases in which a reasonable fee is *no* fee.[441] This was agreed to by the Eleventh Circuit.[442] Significantly, the Eleventh Circuit stated that plaintiff's lawyer made "absolutely no effort – no phone call; no email; no letter – to inform [the employer] of Plaintiff's impending claim much less to resolve this dispute before filing suit."[443]

E. What is Compensable Time?

Several cases during the survey period involved the issue of what is compensable time. In McDonald v. Kellogg Co.,[444] the U.S. District Court for the District of Kansas ruled that time hourly employees at a bakery spend putting on and removing personal protective equipment was not compensable under the FLSA, but that the employer may have to pay

employees for time spent walking between locker rooms and the plant floor.[445]

The court applied Section 203(o) of the FLSA, which provides that in determining compensable working hours, "there shall be excluded any time spent in changing clothes . . . at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement."[446] While the parties' collective bargaining agreement did not address compensation for donning and doffing, the court said that Section 203(o) was satisfied in that such time was traditionally non-compensable by custom and practice under the agreement.[447] In so ruling, the district court rejected a June 2010 Opinion Letter from the DOL which found that personal protective equipment does not fall within the definition of "clothes" in the Section 203(o) exclusion.[448]

In Administrator's Interpretation No. 2010-2 (June 16, 2010), DOL's Wage and Hour Division reversed several Bush-era Opinion Letters on the FLSA's exclusion from compensable time for the period spent "changing clothes." According to the new Interpretation, Section 203(o) of the FLSA does not excuse an employer's failure to pay an employee for time spent donning and doffing protective equipment that is required by law, by the employer, or by the nature of the job.

The U.S. District Court for the Northern District of California held in Gilmer v. Alameda-Contra Costa Transit District[449] that bus drivers could pursue their overtime claims against a transit district for "start-in" and "split-shift" travel time, because time spent returning from the ending point of a daily run to its starting point, and the time it takes to travel between the ending point of one shift and the beginning point of another that is separated by more than 60 minutes constituted "hours worked" under the FLSA.

The court held that the employer benefitted from being able to schedule bus routes from different starting and ending points, and most bus drivers had to return to the starting point of their run before they could begin their commute home.[450] Therefore, the "split-shift" travel constituted a "principal activity" under the Portal-to-Portal Act and was compensable inasmuch as driver's had to get to and from diverse relief points to complete the bus routes assigned to them.[451]

F. Sales Reps Held To Be Exempt

In Smith v. Johnson & Johnson,[452] the U.S. Court of Appeals for the Third Circuit ruled that a senior professional sales representative employed by Johnson & Johnson to extol the benefits of a particular drug to prescribing doctors qualifies as an administrative employee. The representative visited doctors and hospitals in her assigned territory to make presentations on the drug and was unsupervised 95% of the time.[453] The representative was required to produce a "strategic plan" for sales which guided the executive in performing her duties.[454]

G. Sales Reps Held Not to be Exempt

In Re: Novartis Wage & Hour Litigation,[455] the U.S. Court of Appeals for the Second Circuit determined that sales representatives employed by their pharmaceuticals employer to educate and urge doctors to write prescriptions for its drug products did not qualify as "outside salesmen" or administrative employees exempt from the overtime requirements of the FLSA. The court found that the representatives did not in any sense make the sale and thus did not qualify for the exemption.[456] With respect to the administrative exemption issue, the court held that marketing skills the employees gained and/or honed through company training sessions did not involve the exercise of discretion or independent judgment required for exempt status.[457] According to the court, the employer had not proved that the sales employees had authority to negotiate for the company on any matters of significance or to deviate from the company's standard practices without obtaining prior approval.[458]

H. Crane Rental Firm Dispatcher Held to be Exempt

In Rock v. Ray Anthony Int'l, Inc.,[459] the U.S. Court of Appeals for the Eleventh Circuit held that a salaried dispatcher for a crane rental division was an administrative employee and was not entitled to unpaid overtime compensation because the dispatcher had "effectively managed" the crane rental department and had exercised discretion and independent judgment. The dispatcher could hire and fire employees, set employee pay, had authority to resolve a wide array of technical problems, and was responsible for overseeing a wide range of employees.[460] The dispatcher also routinely handled emergency situations that required neither input nor approval from his supervisor.[461]

I. Break Time for Nursing Mothers Under the FLSA

The federal healthcare reform bill that was signed into law on March 23, 2010, also amended the FLSA. Included in the healthcare law was a change (effective March 23, 2010) that now requires employers to provide reasonable break time and a private place – other than a bathroom – for a female employee to express breast milk after giving birth to a child. Section 4207 of the Patient Protection and Affordable Care Act (the healthcare law) amended Section 7 of the FLSA. The amendment has five requirements:

- An employer must provide reasonable break time for nursing mothers. While there is nothing in Section 4207 that explicitly defines how often "reasonable breaks" must be provided or how much time a break should be, the law does indicate that the break should be long enough for an employee to express milk and should be provided each time such employee has a need to express milk. Employees may take these breaks until the nursing child is one year old.

- A private place other than a bathroom must be provided for the breaks. Section 4207 requires that an employer provide a private place where nursing employees can go to express milk. The place cannot be a bathroom and must be a place that is shielded

from view and free from intrusion from co-workers and the public.

- Compensation during the breaks is not required. Under the new law, an employer is not required to compensate an employee receiving reasonable break times for expressing milk.

- An "undue hardship" exemption exists for small employers. An employer with less than 50 employees is not required to comply with this new provision if providing reasonable break time, or a private, shielded place for nursing mothers would impose an "undue hardship" by causing the employer significant difficulty or expense when considering the relation to the size, financial resources, nature, or structure of the employer's business.

- State laws providing greater protections to nursing mothers still apply. If a state's laws provide greater protections to employees than the protections provided under Section 4207, then employers in those states must still adhere to the state's more expansive requirements.

DOL's Wage and Hour Division issued Fact Sheet #73 (Break Time for Nursing Mothers Under the FLSA) in July, 2010, and updated the Fact Sheet in December, 2010. In the Fact Sheet, DOL explains that only employees who are not exempt from the overtime provisions of the FLSA are entitled to breaks to express milk. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the overtime pay requirements, they may be obligated to provide such breaks under state laws. DOL also reminds employers that FLSA's general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies.

VI. NATIONAL LABOR RELATIONS ACT AND UNIONS

A. NLRB Issues Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act ("NLRA")

On December 21, 2010, the NLRB announced a proposed rule requiring businesses to post notices informing employees of their rights as employees under the NLRA. The proposed rule establishes the size, form, and content of the notice, and sets forth provisions regarding sanctions and remedies that may be imposed if an employer fails to comply with its obligations under the rule. Members of the public were invited to submit comments on the proposal until February 22, 2011.

B. NLRB General Counsel Issues Memorandum on Injunctions

In a memorandum to the NLRB's regional offices (Memorandum GC 10-07), Acting General Counsel Lafe Solomon said he intends to focus efforts on obtaining remedies for firings during organizing campaigns that allegedly violate the anti-discrimination provision in the NLRA. Section 10(j) of the NLRA authorizes the NLRB to seek a federal district court injunction granting temporary relief while unfair labor practice charges are being considered by

the NLRB. According to Solomon in his memorandum, Section 10(j) injunctions have provided a "substantial and relatively swift remedy by requiring employers to offer interim reinstatement to unlawfully discharged employees pending the Board's order."

C. Supreme Court Holds Two-Member NLRB Lacked Authority to Issue Rulings

On June 17, 2010, the Supreme Court ruled that the NLRB, which operated for 27 months with just two members and three vacancies, did not have the authority to issue decisions in unfair labor practice and representation cases. New Process Steel, L.P. v. NLRB.[462] It is not clear at this point what will happen regarding the nearly 600 rulings issued by Board members Wilma Liebman (a Democrat) and Peter Schaumber (a Republican) between early January 2008 and late March 2010, when President Obama made the above-referenced recess appointments to the NLRB.

D. NLRB Rules for Electronic Posting of Notices to Remedy Unfair Labor Practices

In a three-one decision, the NLRB on October 22, 2010, decided that it now will require employers or labor organizations not only to post paper notices to remedy unfair labor practices, but also to distribute the notices electronically in cases where the charged party customarily uses such technology for other messages. J & R Flooring, Inc. d/b/a J. Pacini Flooring.[463]

E. NLRB Decides to Compound Interest on Back Pay on a Daily Basis

In a decision released October 25, 2010, the NLRB adopted a new policy under which interest on back pay and other monetary awards now will be compounded on a daily basis, using established methods for computing back pay and for determining the applicable rate of interest. Kentucky River Medical Center.[464]

VII. IMMIGRATION

A. Enforcement Stepping Up

In fiscal 2010, the Department of Homeland Security's Immigration and Customs Enforcement ("ICE") removed a record number of illegal immigrants from the country and dramatically stepped-up workplace audits and enforcement actions. Homeland Security Secretary Janet Napolitano touted that the agency had issued more financial sanctions on employers who violated immigration laws than during the entire previous administration. Since January 2009, ICE has audited the Form I-9 employment verification records of over 3,200 employers suspected of hiring illegal immigrants, debarred 225 companies from securing work on federal contracts, and imposed approximately fifty million dollars in financial sanctions, according to Secretary Napolitano.

VIII. OSHA

A. Increased Enforcement Under Obama Administration

In March, 2010, OSHA sent 15,000 letters to workplaces with high rates of injury and illness. The letters highlighted standards that frequently were violated and offered its assistance in helping the companies to come into compliance. The letters also said OSHA could target up to 4,500 workplaces identified in the survey for inspection in the coming year. While OSHA has been using this targeted approach for some time, 15,000 letters is the most it has ever sent.

In April 2010, OSHA launched its Severe Violator Enforcement Program, under which the agency will increase enforcement and conduct mandatory follow-up inspections.

OSHA officials have publically announced that OSHA strongly supports the whistleblower provisions in the most recent draft of the proposed Protecting America's Workers Act (H.R. 2067, S. 1580). The provisions of this proposed law would expand OSHA's anti-retaliation provisions, codify workers' rights to refuse to perform unsafe work, prohibit employer retaliation against employees reporting injuries or illnesses, and grant workers the further right to pursue their case if OSHA does not proceed in a timely fashion.

B. OSHA's Top Ten Most Frequently Cited Violations for Fiscal 2010

While the list of OSHA's Top 10 most frequently cited violations remains mostly unchanged, the following represents the list covering the period October 1, 2009 through September 30, 2010.

- Scaffolding – general requirements
- Fire protection – general requirements
- Hazard communication
- Respiratory protection
- Ladders
- Lock-out/Tag-out
- Electrical – wiring methods
- Powered industrial trucks
- Electrical – general requirements
- Machine guarding – general requirements

IX. WORKER READJUSTMENT AND RETRAINING NOTIFICATION ACT ("WARN")

WARN generally requires employers to provide affected employees with 60 days notice prior to a plant closure or mass layoff. In Beach v. J.D. Lumber, Inc.,[465] the issue was whether the plaintiffs, who received their 60 days notice of a mass layoff, could be terminated without WARN Act protections *before* the notice period had run. Plaintiffs sought compensation for the time between their termination date and the end of the 60 days notice period.[466]

On August 1, 2008, J.D. Lumber provided oral notice to all employees that they would be laid off as of October 3, 2008.[467] The following day J.D. Lumber gave written notice to all

employees of a "mass layoff" resulting from "an asset purchase sale with a competitor whereby the competitor is purchasing the sawmill plant, property, and equipment."[468] The August 2, 2008, written notice stated that all employees would be officially separated from employment on October 3, 2008.[469]

On August 22, 2008, prior to the end of the notice period, J.D. Lumber terminated 40 employees on the second shift, including plaintiffs.[470] The company alleged that, despite its best efforts to acquire logs, there was an "unforeseen" log shortage in August, 2008, that forced J.D. Lumber to terminate the second shift.[471] J.D. Lumber wrote a memorandum to affected employees to that effect.[472] J.D. Lumber subsequently shut down the entire mill on September 25, 2008.[473] In a transaction that closed on October 20, 2008, J.D. Lumber sold its assets pursuant to an asset purchase agreement.[474]

The magistrate judge determined under his interpretation of the WARN Act that the employees terminated on August 22 were "affected employees" entitled to the protections of the Act, but that genuine issues of material fact existed as to whether or not a reduction in the statutory 60 day notice period was justified for "unforeseen business circumstances."[475] Therefore, the magistrate judge refused to dismiss the lawsuit.[476]

The company requested that the assigned district court judge in the U.S. District Court for the District of Idaho reverse the magistrate's determination, arguing that the magistrate judge had misinterpreted the WARN Act.[477] According to the company, the number of persons terminated on August 22, 2008, was less than 50, so the terminations could not be considered a "mass layoff" under the statutory definition.[478] Only 40 employees had actually been terminated on August 22.[479]

The district court judge disagreed with the employer's argument.[480] According to the court, if an employer gives over 50 employees notice of a mass layoff and then terminates *any* of those "affected employees" the employer is liable for back pay for each day of violation (up to a maximum of 60 days calculated from the date of termination to the date of the statutory 60 day notice period would have expired) unless an "unforeseen business circumstance" justifies the employer terminating any of those noticed employees prior to the 60 day notice period.[481] The district court judge also agreed with the magistrate judge that there was a genuine issue of material fact as to whether the alleged log shortage was a business circumstance that was reasonably foreseeable when the August 2, 2008, WARN Act notices were provided to all 220 employees.[482]

X. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT ("USERRA")

A. Fired Employee Fails to Show Discrimination Due to His Military Service

In Dees v. Hyundai Motor Manufacturing,[483] the U.S. Court of

Appeals for the Eleventh Circuit determined that an Alabama National Guard Member who had been fired from his job at an auto assembly plant had failed to present evidence that his former employer had discriminated against him and fired him because of his military service in violation of USERRA.

Jerry Dees worked for Hyundai Motor Manufacturing as a maintenance technician.[484] He was also a staff sergeant in the Army National Guard who had served two tours in Iraq.[485] After a committee of managers, not including Dees's direct supervisor, terminated Dees for sleeping on the job, he sued under USERRA, alleging discrimination, unlawful termination, and harassment.[486] Dees alleged that his direct supervisor harassed him about his military service, assigned him to difficult and dangerous work more frequently than other employees, and eventually fired him because of his National Guard membership.[487]

The district court judge granted the company's motion for summary judgment on Dees's discriminatory termination claim, but allowed the hostile work environment harassment claim to proceed to trial.[488] Dees and the company requested reconsideration, and the district court judge then vacated his earlier decision and granted the company full summary judgment on all claims.[489]

On appeal, the U.S. Court of Appeals for the Eleventh Circuit agreed with the district court, finding that Dees had failed to show sufficient evidence that he had been the victim of discrimination on the basis of his military service, and that Dees had no standing to bring his USERRA harassment claim because Dees had not suffered any lost wages or employment benefits resulting from alleged harassment.[490]

B. Termination Within 12 Months of Returning From Active Military Duty Raised Question of Fact

USERRA's "cause" provision provides:

> A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause – within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days. 38 U.S.C. § 4316(c)(1).

Unfortunately, USERRA does not define "cause," but the relevant DOL regulation provides:

> In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge. 20 C.F.R. § 1002.248

Anthony Gairnese was an active member of the U.S. Army Reserves when he was hired, and throughout his employment with King Pharmaceuticals.[491] During his tour of duty in Afghanistan from September 26, 2007 to January 28, 2008, King Pharmaceuticals paid Gairnese the difference between his salary and military pay, issued him incentive pay for sales within his territory, issued period pay increases, and gave benefits as if he were actively employed.[492] Gairnese was reinstated in February, 2008, and from May to September, 2008 he met or exceeded sales goals.[493] In October, 2008, Gairnese was issued a verbal warning that included a development plan to improve his selling skills. In December, 2008, he was terminated.[494]

Gairnese sued, claiming that his termination was in violation of the notice and cause provisions of USERRA. Gairnese filed a motion for summary judgment on both claims, and his motion was denied. The U.S. District Court for the Northern District of California determined that there were genuine issues of fact regarding reasonable cause for discharge and sufficient notice.[495]

C. Military Veteran Waives USERRA Rights by Signing Release

In Wysocki v. Int'l. Business Machines Corp.,[496] the U.S. Court of Appeals for the Sixth Circuit was asked to determine the effectiveness of a release of a USERRA claim. In July, 2007, George Wysocki reported to work at IBM's facility in Lexington, Kentucky.[497] As he had done upon previous returns from military service, Wysocki requested time to update his knowledge of IBM's program, software, and technology.[498] Although IBM previously had done so, this time it refused to provide any assistance and discharged Wysocki in October, 2007.[499] At the time of his separation, Wysocki signed a release as part of a separation agreement stating that he waived "all claims, demands, actions or liabilities" he might have against the company "of whatever kind," such as "any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on . . . veteran's status."[500] He accepted payment of $6,000 then sued IBM, alleging that the company violated USERRA.[501] The district court upheld the release.[502]

On appeal, the Sixth Circuit rejected the argument that a USERRA provision protecting covered individuals' rights automatically superseded the release.[503] The Sixth Circuit observed that 38 U.S.C. 4302 expressly exempts agreements that provide benefits "more beneficial" than rights under this section.[504]

XI. PRIVACY

A. Supreme Court Issues Ground Breaking Public Sector Social Media Decision

On June 17, 2010, the U.S. Supreme Court, in City of Ontario, California v. Quon,[505] held that the City of Ontario did not violate its employees' Fourth Amendment rights against unreasonable search and seizure when the City reviewed text messages made by an employee on a City-issued text-message pager. The Supreme Court

found that under the facts of the case, the City of Ontario's search of text messages was reasonable because it was motivated by legitimate work-related purpose and was not excessive in scope.[506]

In reaching its conclusion, the Supreme Court rejected the U.S. Court of Appeals for the Ninth Circuit's "least intrusive" means approach to the issue.[507] The Supreme Court did not reach the issue of whether or not a public employee has a reasonable expectation of privacy in text messages transmitted on City-owned pagers when the City has no official privacy policy for the pagers.[508] While the City of Ontario did not have an official text-messaging privacy policy, it did have a general "Computer Usage Internet and E-mail Policy."[509] In that Policy, the City of Ontario reserved the right "to monitor and log all network activity including e-mail and internet use, with or without notice."[510] Moreover, the policy provided that users should have no expectation of privacy or confidentiality when using these resources.[511] Under the facts as disclosed in the case, employees were told orally that text-messaging pagers were considered e-mail and subject to the general policy.[512] A review of the messages was triggered when the City noticed that its employees had exceeded the character limits that the City had purchased on their behalf for several months.[513]

The decision establishes that employers should exercise care and caution in monitoring employee messages and that employers must act in good faith and only for business-related purposes. The key is whether an employer's motivation for a search is legitimate. Although Quon does not directly apply to private sector employees, the opinion will have influence on state court judges and federal judges defining the common law rights of privacy applicable to private employees. If there is a message from this case to be learned, it is think before you monitor employees' personal communications and develop clear policies with respect to the monitoring of communications.

B. Former Prison Guard States Claim Based on Vehicle Search Policy

In True v. Nebraska,[514] (another public sector case) the U.S. Court of Appeals for the Eighth Circuit held that a prison guard could proceed with a lawsuit claiming the prison's policy of randomly searching employees' vehicles violated the Fourth Amendment's prohibition against unreasonable search and seizures. In so holding, the Eighth Circuit reversed, in part, the decision of the U.S. District Court for the District of Nebraska, which had granted summary judgment in favor of the State of Nebraska.[515] The Eighth Circuit cited City of Ontario, California v. Quon,[516] finding that Plaintiff Brian True had raised fact issues about the reasonableness of the search policy by presenting evidence that employee vehicles at the correctional institution were in a guarded parking area that was protected from inmate access.[517]

C. Employees' E-mails to Lawyer on Company Laptop Found Protected

A unanimous New Jersey Supreme Court ruled that a healthcare service executive who used a company laptop to exchange messages with her

attorney on a personal password-protected e-mail account had a reasonable expectation of privacy that was violated when her employer retrieved and read the messages from the computer's hard drive.[518] Unfortunately for the employer in the case, it had no clear written policy mentioning personal e-mail accounts.[519] But the court stressed that even a more clearly written company policy would not have necessarily justified the employer's intrusion into the employee's communications with her lawyer.[520] The court rejected the argument that the company had a right to search company-owned equipment for information about the employee after she had left the company and accused the firm of unlawful discrimination.[521]

XII. BENEFITS

A. DOL Releases Proposed Fiduciary Definition Regulations

On October 21, 2010, the DOL released proposed regulations more broadly defining who is considered under the definition of "fiduciary" by reason of providing investment advice to an employee benefit plan or a plan's participants. The definition of "fiduciary" under ERISA can be found at Section 3(21)(A). This definition includes parties rendering investment advice for a direct or indirect fee with respect to plan assets. In 1975, the DOL issued regulations interpreting when offering advice resulted in fiduciary status. The regulations provide a 5-part test. The proposed regulations would replace the existing 5-part test with a new test. While the new test does incorporate elements of the old test, it expands upon who may be considered a fiduciary.

B. Supreme Court Holds That to Obtain Attorneys' Fees in ERISA Litigation, Party Need Not be "Prevailing Party"

On May 24, 2010, the U.S. Supreme Court decided Hardt v. Reliance Standard Life Insurance Co., holding that the ERISA fee-shifting provision does not require a claimant to be the "prevailing party," but only to have achieved some degree of success on the merits.[522] In 2003, Bridget Hardt stopped working due to pain caused by carpal tunnel syndrome.[523] She later applied for long-term disability benefits from her employer's plan.[524] Reliance Standard Life Insurance Company, which had the authority to decide whether a claimant qualified for benefits under the employer's plan, provisionally approved Hardt's claim.[525] After conducting a functional capacity evaluation, however, Reliance denied the claim.[526] Hardt filed an administrative appeal and Reliance reversed its decision in part, awarding Hardt temporary disability benefits for 24 months.[527]

While her administrative appeal was pending, Hardt began experiencing new symptoms and was diagnosed with small-fiber neuropathy, which increased her pain and decreased her physical capabilities.[528] Hardt eventually applied for, and received, disability benefits from the Social Security Administration.[529]

In 2005, Reliance informed Hardt that her plan benefits would expire at the end of the 24-month temporary disability period.[530] Hardt

filed another administrative appeal and provided Reliance with supplemental medical records and the information she had submitted to the SSA.[531] Reliance again asked Hardt to participate in two functional capacity evaluations, but it did not ask the evaluators to review Hardt for neuropathic pain.[532] Reliance also retained a physician and a vocation rehabilitation counselor to review Hardt's claim, but the physician did not examine Hardt or review all of her medical records.[533] Reliance ultimately denied Hardt's administrative appeal.[534]

Hardt filed a lawsuit against Reliance, alleging that it had violated ERISA by wrongfully denying her claim for long-term disability benefits.[535] The district court denied both parties' motions for summary judgment, but noted that Reliance's decision to deny long-term benefits was based on incomplete information and that the court found compelling evidence on the record that Hardt was totally disabled due to her neuropathy.[536]

The district court sent the case back to Reliance for further consideration of Hardt's claim.[537] Reliance conducted another review and found Hardt eligible for long-term disability benefits.[538] Hardt then moved for attorneys' fees and costs.[539] The district court granted her motion, but the U.S. Court of Appeals for the Fourth Circuit reversed, finding that Hardt was not a "prevailing party" in the litigation.[540]

The Supreme Court reversed on appeal.[541] The Supreme Court noted that the plain and unambiguous language of ERISA does not include the term "prevailing party."[542] Instead, ERISA grants district courts discretion to award fees to either party. Thus, a fee claimant need not be a prevailing party to be eligible for an award of fees. The court held that a fees claimant must show "some degree of success on the merits" before a court may award attorneys' fees under ERISA.[543] Applying this standard, the Supreme Court held that the district court properly exercised its discretion under ERISA to award attorneys' fees to Hardt.[544]

C. Supreme Court Holds Plan Administrator's Interpretation is Entitled to Deference Even After Reversal for Violating ERISA

In Conkright v. Frommert,[545] the U.S. Supreme Court held that a single honest mistake in plan interpretation did not justify stripping the plan administrator of that deference for subsequent related interpretations of the plan. The decision is of interest to both businesses that provide ERISA benefit plans, and employees who benefit from such plans.

D. President Obama Signs Health Overhaul Into Law But Legislative and Judicial Challenges Continue

On March 23, 2010, President Obama signed into law a bill (H.R. 3590) overhauling the healthcare system. Titled the Patient Protection and Affordable Care Act, the law is massive and complex. Some of its provisions would include the capping of contributions to popular consumer-driven health plans such as health savings accounts and flexible spending

accounts, and the requirement that American businesses with 50 or more employees offer "affordable" coverage to their employees or pay a stiff fine. Part-time employees' cumulative hours are part of the calculation in determining the 50-employee threshold, and low-wage workers may trigger additional $3,000 fines. The U.S. Chamber of Commerce has emphasized that the new healthcare law will create 159 agencies, commissions, panels and other bodies.

The Patient Protection and Affordable Care Act has been under attack since its passage. Two federal judges, one in Florida and the other in Virginia, have ruled that the provision mandating Americans to buy insurance as part of the health overhaul is unconstitutional and would invite unbridled exercise of federal police power. It is expected that these cases will wind their way through the appellate system and most likely be heard by the Supreme Court in 2011.

On January 19, 2011, the U.S. House of Representatives, swiftly honoring a campaign pledge, pushed legislation to repeal the new healthcare overhaul. The 245-189 vote was largely along party lines. This repeal effort, however, was rejected by the Senate on February 2, 2011, by a vote of 51-47 against repeal. Sixty votes were needed to pass the measure. Republicans have vowed to continue to press for the repeal of the legislation.

XIII. CONCLUSION

Without question, the past year has been an active year of change with ongoing debate over the various labor and employment laws and how they should be applied to the various individuals and entities they purport to protect. Calendar year 2011 is already underway with many cases expected to be heard by the U.S Supreme Court that could potentially impact employers concerning such matters as arbitration, retaliation, class certification, immigration, and employee benefits. In addition, a host of bills have been introduced in Congress which create new obligations and restrictions on employers. Employers should also expect that federal administrative agencies will continue to be more aggressive in promulgating regulations that are aimed at accomplishing goals espoused in proposed legislation. In summary, the drama experienced in 2010 will most certainly continue into the next season.

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[1] Lewis v. Chicago, 130 S.Ct. 2191 (2009).

[2] Id.

[3] Id.

[4] Id.

[5] Ricci v. DeStefano, 129 S.Ct. 2658 (2009).

[6] 130 S.Ct. 2191 (2009).

[7] 129 S.Ct. 2658 (2009).

[8] 130 S.Ct. 1662 (2010).

[9] Id.

[10] Lewis v. Asplundh Tree Expert Co., 402 Fed.App. 454 (11th Cir. 2010).

[11] Id.

[12]Id.

[13] Id.

[14] Id.

[15] Ross v. Perry, 396 Fed.App. 668 (11th Cir. 2010).

[16] Id.

[17]Id.

[18] Id.

[19] Id.

[20] Id.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

[25] Id.

[26] Id.

[27] Id.

[28] Id.

[29] Id.

[30] Id.

[31] Id.

[32] Id.

[33] 605 F.3d 1239 (11th Cir. 2010).

[34] Id.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.

[40] Id.

[41] Id.

[42] Id.

[43] Id.

[44] Id.

[45] Id.

[46] Id.

[47] Id.

[48] Id.

[49] Id.

[50] Id.

[51] Id.

[52] Id.

[53] Id.

[54] Id.

[55] Id.

[56] 2010 WL 4237077 (S.D.N.Y. Oct. 25, 2010).

[57] Id.

[58] Id.

[59] Id.

[60]Id.

[61] Id.

[62] Id.

[63] Id.

[64] Id.

[65] Id.

[66] Id.

[67] Id.

[68] Id.

[69] Id.

[70] Id.

[71] 2010 WL 3733978 (E.D. Mich. Sept. 20, 2010).

[72] Id.

[73] Id.

[74] Id.

[75] Id.

[76] Id.

[77] Id.

[78] Id.

[79] Id.

[80] Id.

[81] Id.

[82] Id.

[83] Id.

[84] Id.

[85] Id.

[86] Id.

[87] Id.

[88] Id.

[89] 597 F.3d 895 (7th Cir. 2010).

[90] Id.

[91] Id.

[92] Id.

[93] Id.

[94] Id.

[95] Chaney v. Plainfield Health Center, 612 F.3d 908 (7th Cir. 2010).

[96] Id.

[97] Id.

[98] Id.

[99] Id.

[100] Id.

[101] Id.

[102]Id.

[103] Id.

[104] Id.

[105] Id.

[106] 622 F.3d 266 (3rd Cir. 2010).

[107] Id.

[108] Id.

[109] Id.

[110] Id.

[111] Id.

[112] Id.

[113] Id.

[114] 605 F.3d 951 (11th Cir. 2010).

[115] Id.

[116] Id.

[117] Id.

[118] Id.

[119] 596 F.3d 93 (2nd Cir. 2010).

[120] Id.

[121] Id.

[122] Faragher v. Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

[123] Gorzynski v. JetBlue Airways Corp., 596 F.3d 93 (2nd Cir. 2010).

[124] Id.

[125] Id.

[126] Id.

[127]Speigner v. Shoal Creek Drummond Mine, 402 Fed.App. 428 (11th Cir. 2010).

[128] Id.

[129] Id.

[130] Id.

[131] 524 U.S. 775, 118 S.Ct. 2275 (1998).

[132] Id.

[133] Id.

[134] 619 F.3d 683 (7th Cir. 2010).

[135] Id.

[136] Id.

[137] Id.

[138] Id.

[139] Id.

[140] Id.

[141] Id.

[142] Id.

[143] Id.

[144] Id.

[145] 3:06CB-353-S, 2010 WL 1416676 (W.D.Ky. Mar. 31, 2010).

[146] Id.

[147] Id.

[148] Id.

[149] Id.

[150] Id.

[151] Id.

[152] Id.

[153] Id.

[154] Id.

[155] Id.

[156] Id.

[157] Id.

[158] 1:09-CV-251, 2010 WL 3940638 (N.D. Ind. Oct. 6, 2010).

[159] Id.

[160] Id.

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[164] Id.

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[166] Id.

[167] Id.

[168] Id.

[169] Id.

[170] Id.

[171] Id.

[172] 704 F.Supp.2d 814 (N.D.Ill. Apr. 12, 2010).

[173] Id.

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[175] Id.

[176] Id.

[177] Id.

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[179] Id.

[180] Id.

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[183] Id.

[184] Id.

[185] Id.

[186] Id.

[187] Id.

[188] Id.

[189] Id.

[190] Id.

[191] 08-cv-193-bbc, 2010 WL 3123143 (W.D.Wis. Aug. 6, 2010).

[192] Id.

[193] Id.

[194] 602 F.3d 495 (3rd Cir. 2010).

[195] Id.

[196] Id.

[197] Id.

[198] Id.

[199] Id.

[200] Id.

[201] Id.

[202] Id.

[203] Id.

[204] Id.

[205] Id.

[206] Id.

[207] Id.

[208] Id.

[209] Id.

[210] Id.

[211] Id.

[212] Id.

[213] Id.

[214] Id.

[215] Id.

[216] Id.

[217] 602 F.3d 177 (3rd Cir. 2010).

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[219] Id.

[220] Id.

[221] Id.

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[223] Id.

[224] Id.

[225] Id.

[226] Id.

[227] Id.

[228] Id.

[229] Id.

[230] Id.

[231] Id.

[232] Id.

[233] Id.

[234] Id.

[235] Id.

[236] Id.

[237] Id.

[238] Id.

[239] Id.

[240] Id.

[241] Id.

[242]Id.

[243] Id.

[244] Richard v. DuPont Co., 396 Fed.App. 168 (5th Cir. 2010).

[245] Id.

[246] Id.

[247] Id.

[248] Id.

[249] Id.

[250] 596 F.3d 25 (1st Cir. 2010).

[251] CV-09-5053-LRS, 2010 WL 4806864 (E.D.Wash. Nov. 18, 2010).

[252] 597 F.3d 860 (7th Cir. 2010).

[253] Id.

[254] Id.

[255] 06-3877, 2010 WL 4273323 (E.D.Pa. Oct. 29, 2010).

[256] Id.

[257] Id.

[258] Id.

[259] Id.

[260] Id.

[261] Id.

[262] Id.

[263] 588 F.3d 1261 (9th Cir. 2010).

[264] Id.

[265] 607 F.3d 1255 (10th Cir. 2010).

[266] Id.

[267] Id.

[268] Id.

[269] Id.

[270] Id.

[271] 2010 WL 4345719 (S.D.Ohio Oct. 26, 2010).

[272] 2010 WL 4453463 (E.D.Va. Nov. 3, 2010).

[273] 602 F.3d 374 (5th Cir. 2010).

[274] 2010 WL 4345719 (S.D.Ohio Oct. 26, 2010).

[275] Id.

[276] Id.

[277] Id.

[278] Id.

[279] Id.

[280] Id.

[281] Id.

[282] Marlow v. Chesterfield County School Board, 2010 WL 4453463 (E.D.Va. Nov. 3, 2010).

[283] Id.

[284] Id.

[285] Id.

[286] 602 F.3d 374 (5th Cir. 2010).

[287] Id.

[288] Id.

[289] Id.

[290] Id.

[291] Id.

[292] Id.

[293] Id.

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[299] Id.

[300] CIV.10-1759 RHKFLN, 2010 WL 3749246 (D.Minn. Sept. 21, 2010).

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[303] Id.

[304] Id.

[305] Id.

[306] Id.

[307] Id.

[308] Id.

[309] Id.

[310] Id.

[311] Id.

[312] 595 F.3d 261 (6th Cir. 2010).

[313] Id.

[314] Id.

[315] Id.

[316] Id.

[317] Id.

[318] Id.

[319] Id.

[320] Id.

[321] Id.

[322] Id.

[323] Id.

[324] Id.

[325] 702 F.Supp.2d 1082 (D.Minn. 2010).

[326] Id.

[327] Id.

[328] Id.

[329] Id.

[330] Id.

[331] Id.

[332] Id.

[333] Id.

[334] Id.

[335] Id.

[336] Id.

[337] Id.

[338] Id.

[339] Id.

[340] Id.

[341] Id.

[342] Diaz v. AIG Marketing, Inc., 396 Fed.App. 664 (11th Cir. 2010).

[343] Id.

[344] Id.

[345] Id.

[346] Id.

[347] 29 U.S.C. 2615(a)(1).

[348] 29 U.S.C. 2615.

[349] 602 F.3d 1231 (11th Cir. 2010).

[350] Id.

[351] Id.

[352] Id.

[353] Id.

[354] Id.

[355] Id.

[356] Id.

[357] Id.

[358] Id.

[359] Id.

[360] Id.

[361] Id.

[362] Id.

[363] Id.

[364] Id.

[365] Id.

[366] Id.

[367] Id.

[368] Id.

[369] Id.

[370] Id.

[371] Id.

[372] Id.

[373] Id.

[374] Id.

[375] Id.

[376] Id.

[377] Id.

[378] 746 F.Supp.2d 137 (D.D.C. 2010).

[379] Id.

[380] Id.

[381] Id.

[382] Id.

[383] Id.

[384] Id.

[385] Id.

[386] Id.

[387] Id.

[388] Id.

[389] Id.

[390] Id.

[391] Id.

[392] Id.

[393] Id.

[394] Id.

[395] 375 Fed.App. 818 (10th Cir. 2010).

[396] Id.

[397] Id.

[398] Id.

[399] Id.

[400] Id.

[401] 403 Fed.App. 114 (8th Cir. 2010).

[402] Id.

[403] Id.

[404] Id.

[405] 602 F.3d 1236 (11th Cir. 2010).

[406] Id.

[407] Id.

[408] Id.

[409] Id.

[410] 2010 WL 4162116 (11th Cir. Oct. 25, 2010).

[411] Id.

[412] Id.

[413] Id.

[414] Id.

[415] Id.

[416] Id.

[417] Id.

[418] Id.

[419] Id.

[420] Id.

[421] Id.

[422] Id.

[423] Id.

[424] Id.

[425] Id.

[426] Id.

[427] Id.

[428] Id.

[429] Id.

[430] Id.

[431] Id.

[432] Id.

[433] 616 F.3d 665 (7th Cir. 2010)

[434] Id.

[435] 603 F.3d 888 (11th Cir. 2010).

[436] Id.

[437] Id.

[438] Id.

[439] Id.

[440] Id.

[441] Id.

[442] Id.

[443] Id.

[444] 08-2473-JWL, 2011 WL 484191 (D.Kan. Feb. 7, 2011).

[445] Id.

[446] Id.

[447] Id.

[448] Id.

[449] C-08-05186 CW(EDL), 2011 WL 718797 (N.D.Cal. Jan. 14, 2011).

[450] Id.

[451] Id.

[452] 593 F.3d 280 (3rd Cir. 2010).

[453] Id.

[454] Id.

[455] 611 F.3d 141 (2nd Cir. 2010).

[456] Id.

[457] Id.

[458] Id.

[459] 380 Fed.App. 875 (11th Cir. 2010).

[460] Id.

[461] Id.

[462] 130 S.Ct. 2635 (2010).

[463] 356 NLRB No. 009 (2010).

[464] Kentucky River Medical Center, 356 NLRB No. 008 (2010).

[465] CV-08-416-JLQ, 2010 WL 3942117 (D.Idaho Oct. 5, 2010).

[466] Id.

[467] Id.

[468] Id.

[469] Id.

[470] Id.

[471] Id.

[472] Id.

[473] Id.

[474] Id.

[475] Id.

[476] Id.

[477] Id.

[478] Id.

[479] Id.

[480] Id.

[481] Id.

[482] Id.

[483] 368 Fed.App. 49 (11th Cir. 2010).

[484] Id.

[485] Id.

[486] Id.

[487] Id.

[488] Id.

[489] Id.

[490] Id.

[491] Gairnese v. King Pharmaceuticals, *Inc.*, 09-CV-04839-LHK, 2010 WL 4117685 (N.D.Cal. Sept. 27, 2010).

[492] Id.

[493] Id.

[494] Id.

[495] Id.

[496] 607 F.3d 1102 (6th Cir. 2010).

[497] Id.

[498] Id.

[499] Id.

[500] Id.

[501] Id.

[502] Id.

[503] Id.

[504] Id.

[505] 130 S.Ct. 2619 (2010).

[506] Id.

[507] Id.

[508] Id.

[509] Id.

[510] Id.

[511] Id.

[512] Id.

[513] Id.

[514] 612 F.3d 676 (8th Cir. 2010).

[515] Id.

[516] 130 S.Ct. 2619 (2010).

[517] 612 F.3d 676 (8th Cir. 2010).

[518] 990 A.2d 650 (N.J. 2010).

[519] Id.

[520] Id.

[521] Id.

[522] 130 S.Ct. 2149 (2010).

[523] Id.

[524] Id.

[525] Id.

[526] Id.

[527] Id.

[528] Id.

[529] Id.

[530] Id.

[531] Id.

[532] Id.

[533] Id.

[534] Id.

[535] Id.

[536] Id.

[537] Id.

[538] Id.

[539] Id.

[540] Id.

[541] Id.

[542] Id.

[543] Id.

[544] Id.

[545] 130 S.Ct. 1640 (2010).

DIAMOND CRYSTAL BRANDS, INC. VS. FOOD MOVERS INTERNATIONAL'S IMPACT ON GEORGIA'S LONG-ARM STATUTE

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The Eleventh Circuit Court of Appeals' recent decision in Diamond Crystal Brands v. Food Movers International,[1] represents a significant departure from previous cases interpreting Georgia's Long Arm Statute, O.C.G.A. § 9-10-91. There, the Court recognized that the "transacting business" standard imposed by Georgia law is separate and distinct from the due process analysis required by the Fourteenth Amendment to the United States Constitution. That is to say, the standard for assessing long arm jurisdiction under Georgia law is not necessarily co-terminus with the requirements of the 14th Amendment as prior cases have held.

Although the text of subsection one of Georgia's Long Arm Statute has not changed a letter in the last five years, its interpretation has undergone several changes. It is worth briefly sketching the recent history of subsection one of Georgia's Long Arm Statute before turning to discuss the impact of the Eleventh Circuit Court of Appeals' recent interpretation of it.

I. The Text and Interpretation Pre-2005

The text of the subsection one of the Long Arm Statute reads as follows:

> A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession

> enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:
>
> (1) Transacts any business within this state;[2]

Prior to 2005, Georgia Courts interpreted subsection one of the Long Arm Statute to only apply to contract cases. See, e.g., Whitaker v. Krestmark of Alabama, Inc,[3] Additionally, Georgia Courts interpreted subsection one to require physical presence in the state: phone and mail contacts were insufficient. ETS Payphone v. TK Indus.[4]

II. From Innovative Clinical to Food Movers

In 2005, however, the Supreme Court of Georgia held that there was no textual basis in the Long Arm Statute for limiting its application to contract cases or requiring that the defendant be physically present in Georgia to transact business. Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank of Ames.[5] The Court reasoned that, under a literal construction, subsection one "grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State."[6] Recognizing that such a reading would expand the personal jurisdiction of Georgia Courts beyond that permitted by due process, the Supreme Court construed subsection one to reach only to the maximum extent permitted by procedural due process. [7]

Since Innovative Clinical, Georgia Courts appear to have assumed that the subsection one of the Long Arm statute is coextensive with the limits of due process. See Sol Melia, SA v. Brown,[8] (analyzing personal jurisdiction under subsection one of the Long Arm Statute by engaging only in due process analysis).

Georgia Courts have articulated a test for jurisdiction under subsection one that does not differ from the due process analysis that must be undertaken. In ATCO Sign & Lighting Co., LLC v. Stamm. Mfg., Inc.,[9] the Court of Appeals analyzed whether jurisdiction was permissible under subsection one of the Long Arm Statute and articulated the test as follows:

> Jurisdiction exists if (1) the nonresident defendant has purposefully done an act or consummated a transaction in Georgia, (2) the cause of action arises from or is connected with the act or transaction, and (3) the Georgia court's exercise of jurisdiction does not offend traditional fairness and substantial justice.[10]

Thus, to satisfy subsection one of the Long-Arm Statute a defendant must have "purposefully done an act or consummated a transaction in Georgia," while to satisfy the due process clause, a defendant must only have "purposefully directed his activities at the forum." White v. Roberts.[11] In spite of this subtle difference, Georgia Courts, as discussed below, conflate the analysis of subsection one and the due process clause.

III. Food Movers

In January, 2010, the Eleventh Circuit Court of Appeals in Diamond Crystal Brands, Inc. v. Food Movers Int'l,[12] examined Georgia's Long Arm Statute in depth for the first time since Innovative Clinical.

The great innovation of Food Movers is its explicit statement that, under subsection one of the Long Arm Statute, "literally transacting business within Georgia remains a precondition to long-arm jurisdiction that is independent from the dictates of due process."[13] (emphasis added). At times, as the Innovative Clinical Court recognized, a defendant who transacts business in Georgia will not be subject to personal jurisdiction consistent with his due process rights. Conversely, as the Food Movers Court recognized, subsection one can impose "limiting conditions [that] *preclude* a Georgia court from exercising personal jurisdiction over the nonresident to the fullest extent permitted by constitutional due process." The Food Movers Court found further support in its holding that subsection one was more limiting than the due process clause in the fact that – should subsection one be coextensive with due process, it would render subsections 2 and 3 of the Long Arm Clause superfluous, violating a fundamental canon of statutory interpretation.[14]

Thus, whereas Georgia courts had appeared to interpret Innovative Clinical as extending the boundaries of subsection one to be coextensive with the limits set by due process, Food Movers makes clear that subsection one is not coextensive with due process. In some circumstances, the literal language of subsection one may be broader than due process. One can imagine, perhaps, a foreign corporation that does not intend to transact business in Georgia, but ultimately does so through the unauthorized and unilateral activity of a third party – a rogue middleman. Such a transaction of business would literally fall within the boundary set by subsection one, but would not involve the purposeful availment necessary under the due process clause – jurisdiction would be precluded by World-Wide Volkswagen[15]. Similarly, one can imagine a purposeful directing of activities towards Georgia – perhaps the expression of some speech directed at a Georgia resident, that would not constitute the transaction of business within Georgia, but could give rise to a cause of action in which the exercise of personal jurisdiction over the defendant would be consistent with due process.

As noted above, although Georgia Courts stated that subsection one required an analysis of whether a defendant had, "purposefully done an act or consummated a transaction in Georgia," the Courts conducting an analysis of whether jurisdiction was proper under subsection one invariably conducted only a typical due process analysis. See ATCO Sign & Lighting Co., LLC v. Stamm Mfg., Inc.,[16] (stating rule under subsection one, but engaging in factual analysis only for due process inquiry); Sol Melia, SA v. Brown,[17] (looking to due process analysis in Oldfield v. Pueblo De Bahia Lora, S.A.,[18] to determine if jurisdiction was permissible where subsection one of Long Arm Statute was the alleged basis for jurisdiction). Indeed, in some cases, the Court of Appeals has flatly stated that "The Georgia long-arm statute confers personal jurisdiction over nonresidents to the maximum extent permitted by due process." Home

Depot Supply, Inc. v. Hunter Management, LLC.[19]

Because Georgia courts have not provided any analysis of what "transacts business means" independent of a due process analysis, it is unclear in what circumstances subsection one is more limiting than the due process clause. The Court in Food Movers recognized this, and noted that, "Ultimately, unless and until the Georgia courts provide further guidance, courts in this circuit construing the statute literally will have to delineate the precise contours of the '[t]ransacts any business within this state' requirement of O.C.G.A. § 9-10-91(1) according to the facts of each case."[20]

Food Movers does provide some initial guidance, however, as to how to interpret subsection one of the Long Arm Statute. A court should "examine all of a nonresident's tangible and intangible conduct and ask whether it can fairly be said that the nonresident has transacted any business within Georgia."[21] The Court noted that the defendant, Food Movers, had the following contacts with Georgia:

a) Food Movers sent purchase orders to a Georgia corporation through a third party broker;
b) Food Movers' placed orders with a Georgia corporation which were picked up by clients of Food Movers';
c) Under the UCC, Food Movers took title to the purchased goods when the Georgia corporation tendered the purchased goods;
d) Food Movers promised to pay for the goods by transferring money to Georgia.[22]

The Court held that these contacts were sufficient to constitute transacting business in Georgia. Because there was no physical presence necessary in Georgia after Innovative Clinical, actions such as taking title, if not possession, to goods in Georgia were adequate to constitute a purposeful transaction of business, and the routing of purchase orders through a third-party broker was no different than using the postal service, the court reasoned.[23]

Although, with the exception of Food Movers, there is a paucity of precedent analyzing subsection one of Georgia's long arm statute independently of the due process analysis, courts may look to similarly worded Long Arm Statutes from other jurisdictions. See, e.g., Robb v. Robb,[24] (relying on New York case law to interpret Connecticut's identically worded long-arm statute); Cronin v. Washington Nat. Ins. Co.,[25] (holding that 5th Circuit precedent interpreting Georgia Long-Arm Statute was applicable to similarly worded Florida Long Arm Statute); F.D.I.C. v. Hiatt,[26] (holding that cases interpreting Illinois' Long-Arm Statute were persuasive because statutes were identical); Sears, Roebuck & Co. v. Sears, plc,[27] (Illinois cases persuasive authority for Delaware Long Arm Statute interpretation); Stabilisierungsfonds fur Wein v. Kaiser Stuhl Wine Distr. Pty. Ltd.,[28] (Virginia and Maryland Long-Arm Statute cases are persuasive authority for interpreting Washington D.C. Long-Arm Statute).

Although neither Florida[29] nor Alabama's Long-Arm Statutes[30] are similar to Georgia's, other states do have Long-Arm statute provisions identical to subsection one. For instance, Connecticut's Long-Arm Statute provides that:

> (a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent: (1) Transacts any business within the state;[31]

The language found in subsection one of Georgia's Long Arm Statute is not uncommon, it is found in the long arm statutes of many other states, including New York[32], New Hampshire[33], Nebraska[34], Michigan[35], and Minnesota[36]. There is accordingly no shortage of persuasive precedent from which litigants may draw to present their arguments to the court as to the manner in which subsection one of the Long Arm Statute is more restrictive than the due process clause.

New York, for example, appears to have a particularly rich body of precedent analyzing whether certain business contacts constituting "transacting business within the state" under the Long-Arm Statute. For example, the Supreme Court, Appellate Division, recently summarized precedent analyzing whether there were contacts sufficient to "transact business" as follows:

> In Fischbarg v. Doucet (9 N.Y.3d at 377, 849 N.Y.S.2d 501, 880 N.E.2d 22), the defendants were located in California and the plaintiff attorney was located in New York. The Court of Appeals determined that, over the course of approximately nine months, the defendants, through numerous telephone calls, faxes, mail contacts, and e-mails, attempted to establish an attorney-client relationship with the plaintiff to represent them in an action in the State of Oregon (id. at 380, 849 N.Y.S.2d 501, 880 N.E.2d 22). The Court of Appeals noted that it was the quality of the contacts with New York that was the primary consideration in determining whether a party transacted business within the meaning of New York's long-arm statute (id). The Court of Appeals stated:
>
> "The quality of defendants' contacts here establishes a transaction of business in New York. Defendants sought out plaintiff in New York and established an ongoing attorney-client relationship with him. Plaintiff's time records and affidavit demonstrate that during the course of the representation, defendants communicated regularly with him in this state" (id. at 380-381, 849 N.Y.S.2d 501, 880 N.E.2d 22).
>
> The Court emphasized that a party's physical presence in New York was not ne-

cessary for that party to be subject to the jurisdiction of the New York courts (id. at 381-382, 849 N.Y.S.2d 501, 880 N.E.2d 22). The Court characterized the transaction under consideration as a "sustained and substantial transaction of business in New York" (id. at 382, 849 N.Y.S.2d 501, 880 N.E.2d 22). The Court also stated that, in retaining a New York attorney, the defendants invoked the benefits and protections of New York law in connection with the attorney-client relationship (id.). The Court concluded that "[i]t is the nature and quality of these contacts, through which defendants established a substantial ongoing professional commitment between themselves and plaintiff, governed by the laws of our state, which support long-arm jurisdiction" (id. at 382-383, 849 N.Y.S.2d 501, 880 N.E.2d 22).

In Parke-Bernet Galleries v. Franklyn (26 N.Y.2d 13, 17, 308 N.Y.S.2d 337, 256 N.E.2d 506), the defendant, in California, "although never actually present, was receiving and transmitting bids over an open telephone line and was an active participant in an auction held" in New York by the plaintiff. The defendant was also directly assisted by another, who was present in New York (id.). The Court of Appeals stated that the situation fell "between the situation where a defendant was physically present at the time the contract was made-the clearest sort of case in which our courts would have 302 jurisdiction-and the situation where a defendant merely telephones a single order from outside the State-a case in which our courts would not have such jurisdiction" (id. [citations omitted]).

The Court of Appeals determined that the defendant was subject to the jurisdiction of the New York courts in connection with an action arising out of the auction (id. at 17-18, 308 N.Y.S.2d 337, 256 N.E.2d 506). The Court determined that participation in an auction over a live telephone line and bidding against prospective purchasers who were present in New York constituted more substantial contacts than the simple placement of a single telephone order (id. at 18, 308 N.Y.S.2d 337, 256 N.E.2d 506). The Court also held that the defendant's participation in the auction, "which resulted in the paintings' [sic] being sold to him amounted to the sustained and substantial transac-

tion of business here" (id.).[37]

Obviously, no comprehensive solution to how to interpret "transacts any business within the state" in a manner more restrictive than the due process clause can be offered at this point. Using persuasive precedent that permits courts to look to jurisdictions employing nearly identical Long-Arm Statutes however, to construct arguments regarding whether a particular fact pattern in a case constitutes "transacting business within Georgia," will help courts grappling with Georgia's lack of precedent interpreting subsection one create a body of case law quickly that will firm up the contours of this provision of the Long Arm Statute.

IV. Conclusion

Ironically, the influence of federal courts on Georgia's Long-Arm Statute jurisprudence has come full circle. It was a Northern District of Georgia case that first held that subsection one was limited to contract claims in 1969. Scott v. Crescent Tool Co., Div. of Crescent Niagara Corp.[38] The reasoning in Crescent Tool was then adopted by the Georgia Court of Appeals in 1981 in Whitaker v. Krestmark of Alabama, Inc.[39] Crescent Tool's holding that subsection one of the Long Arm Statute was the law of Georgia until 2005, when the Supreme Court decided Innovative Clinical. And it was the import of Innovative Clinical's holding that compelled the Eleventh Circuit in Food Movers to reexamine the meaning of subsection one of the Long-Arm Statute.

[1] 593 F.2d 1249 (11th Cir. 2010) .

[2] O.C.G.A. § 9-10-91.

[3] 157 Ga. App. 536, 278 S.E.2d 116 (1981).

[4] 236 Ga. App. 713, 513 S.E.2d 257 (1999).

[5] 279 Ga. 672, 675, 620 S.E.2d 352, 355 (2005).

[6] Id.

[7] Id.

[8] 688 S.E.2d 675, 2009 WL 4878704 at *3 (Ga. Ct. App. Dec. 18, 2009).

[9] 298 Ga. App. 528, 680 S.E.2d 571 (2009).

[10] Id. at 529, 680 S.E.2d at 573.

[11] 216 Ga. App. 273, 274, 454 S.E.2d 584, 586 (1995).

[12] 593 F.3d 1299, 2010 WL 100965, at *4-5 (11th Cir. Jan. 13, 2010).

[13] Id. at *5.

[14] Id. at *6.

[15] In this regard, *see* Gateway Atlanta Apartments, Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008). In Harris, an independent contractor for a North Carolina bail bonding company attempted to apprehend a client in Georgia who had forfeited his North Carolina bond. The client was ultimately shot and killed by the independent contractor, and the Court of Appeals of Georgia held that such unilateral activity by an independent contractor did not vest the court with personal jurisdiction consistent with due process. No independent analysis was conducted of whether the nonresident defendant bail bonding and surety companies had transacted business in Georgia.

[16] 298 Ga. App. 528, 680 S.E.2d 571 (2009).

[17] 301 Ga. App. 760, 688 S.E.2d 675, 2009 WL 4878704, at *3 (Ga. Ct. App. Dec. 18, 2009).

[18] 558 F.3d 1210 (11th Cir. 2009).

[19] 289 Ga. App. 286, 656 S.E.2d 898 (2008).

[20] 593 F.3d at 1263.

[21] Id. at *8.

[22] Id. at *8-9.

[23] Id. at *8.

[24] 620 F.Supp. 2d 282, 286 (D.Conn. 2009).

[25] 980 F.2d 663, 671 (11th Cir. 1993).

[26] 872 P.2d 879, 884 n.4 (N.M. 1994).

[27] 774 F.Supp. 1289, 1292 n.5, (D.Del. 1990).

[28] 647 F.2d 200, 206 n. 13 (D.C. Cir. 1981).

[29] Florida's Long-Arm Statute provides the following provision governing the exercise of personal jurisdiction:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

Fla. Stat. § 48.193.

[30] Ala R. Civ. P. 4.2(b) Alabama's Long-Arm Statute permits the exercise of jurisdiction to full extent permitted by due process.

[31] Conn. Gen. Stat. § 52-59b.

[32] (N.Y. Law § 302).

[33] (N.H. Rev. Stat. Ann. § 510:4).

[34] (Neb. Rev. Stat. § 25-536).

[35] (Mich. Comp. Laws § 600.705).

[36] (Minn. Stat. § 543.19).

[37] Grimaldi v. Guinn, 895 N.Y.S.2d 156, 163-164, 2010 WL 437447, at *6-7 (N.Y. App. Div. Feb. 9, 2010).

[38] 296 F.Supp. 147, 152-153 (N.D.Ga. 1969).

[39] 157 Ga. App. 536, 278 S.E.2d 116 (1981).

BATHTUBS, BAD GUYS, BUGS, AND BED CHECKS: PREMISES LIABILITY ISSUES ARISING AT HOTELS

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The use of hotels is an important part of our everyday life – both for use in traveling for work and to get away from work. Given the number of people that use hotels, motels, inns, bed and breakfasts, or any other number of overnight retreats each year it is only natural that a number of premises liability issues can arise. This article discusses the status of the law regarding some of the more common (and dangerous) issues that have been litigated in Georgia.

A. The Guest-Innkeeper Relationship

The general law regarding liability in hotels in Georgia dates back to a 1930 Georgia Court of Appeals decision in Holloman v. Henry Grady Hotel Co.[1]:

> the law imposes upon an innkeeper the duty of keeping his premises in a reasonably safe condition for the use of his patrons as well as invitees. He is not held to accountability as an insurer. Though in some jurisdictions an innkeeper is required to exercise a high degree of care with respect to the condition of his premises, the courts of our State do not seem to have subscribed to any such doctrine.[2]

It appears that there is a distinct guest-innkeeper relationship under Georgia law and that the innkeeper owes a duty to its guest. The question is what is this duty and is it greater than that of a regular property owner?

B. Bathtubs

The first thing many travelers enjoy after a long day on the road is a nice shower or bath. Unfortunately, that can be one of the more dangerous places in

the hotel room. Much of the early litigation in Georgia involved some calamity taking place in a bathtub.

In the 1960s, the Georgia Court of Appeals considered a suit where a porcelain handle used to assist a guest in getting out of a bathtub cracked injuring the guest's hand[3], and another where water running out of the faucet suddenly became scalding hot causing a guest to fall[4]. In both cases the Court concluded that a general demurrer or motion to dismiss on the part of the defendant hotel should be denied. The Court of Appeals held that "the duty of the innkeeper is to use ordinary care and diligence to furnish the guest with reasonably safe accommodations[5]", and to "afford guests premises that are reasonably safe for use and occupancy[6]."

The Court of Appeals noted that extraordinary care was not required on the part of the innkeeper toward his guest[7]. However, the innkeeper did have the duty to inspect, and was liable for injuries caused be defects that would be disclosed by a reasonable inspection[8].

The Court of Appeals addressed this issue most recently in 2006 in Bryant v. DIVYA, Inc. [9] In Bryant, the plaintiff, a guest at a Sleep Inn near Savannah attempted to take a shower. Several anti-skid strips had been placed in the shower. Despite this, the floor became slippery when she started using soap and she fell, injuring her arm. The plaintiff filed suit alleging the defendant hotel was negligent in failing to install enough anti-skid strips, failing to properly place the existing strips, and failing to properly position the safety bar[10].

The defendant hotel moved for summary judgment on the grounds that no other guests had fallen in their showers, and it did not have active or constructive knowledge of any defects. The Court of Appeals affirmed the trial court's grant of summary judgment to the defendant hotel and reviewed the suit under standard Georgia premises liability law. The Court of Appeals did not even mention a "guest-innkeeper" relationship in its analysis.

As with most garden variety premises liability cases in Georgia, the true basis of a proprietor's liability for personal injury is the proprietor's superior knowledge of a condition that may expose an invitee to an unreasonable risk of harm[11]. The Court of Appeals noted there was no evidence of a transient substance on the floor of the shower and that it did not violate any safety codes. Additionally, there had been no prior complaints of any hazardous condition to the defendant hotel. The case was ultimately decided as any other premises liability suit would be decided.

C. Bad Guys

Unfortunately, another thing that hotels can attract is bad guys. It is the duty of the hotel to keep its guests "safe" from these bad guys. The question is how far a hotel needs to go to protect its guests.

The Georgia Court of Appeals addressed this in depth in Matt v. Days Inns of America, Inc.[12] In Matt, the unfortunate plaintiffs were guests at the Atlanta Days Inn near Hartsfield Jackson Airport the night before their honeymoon. That night Mr. Matt was shot and killed in the parking lot as part of a robbery attempt. Plaintiffs filed suit alleging Days Inn was negligent in failing to provide adequate security, and to take

reasonable precautions to protect Mr. Matt from the reasonably foreseeable criminal acts of a third party. Days Inn filed a motion for summary judgment on the grounds that Plaintiffs' injuries were the result of an unforeseeable criminal conduct.

The Court of Appeals noted, as in the bathtub cases cited above, that Days Inn had an obligation as an innkeeper to exercise ordinary care to keep its premises safe for its guests[13]. Again, although the hotel is not an insurer of the safety of its guests, it is bound to exercise ordinary care to protect its guests (such as the Matts) from unreasonable risks of which the innkeeper has superior knowledge[14]. If the hotel has reason to anticipate criminal acts, it has the duty to exercise ordinary care to guard against injury caused by dangerous characters. [15]

What constitutes ordinary care varies with the circumstances and the magnitude of the danger to be guarded against[16]. For the hotel to be negligent, the conduct must be unreasonable in light of the recognizable risk of harm[17]. Knowledge that a hotel subjected its guests to an unreasonable risk of criminal attack can be shown through evidence of similar criminal incidents[18].

In Matt, Days Inn argued that for it to be liable for a third party's criminal act, there must have been at least one prior substantially similar incident, and that the plaintiffs had failed to produce evidence of a criminal incident substantially similar to the attempted armed robbery and murder of Mr. Matt[19]. The plaintiffs had introduced evidence of 81 crimes on the Days Inn parking lot including a purse snatching and robbery by force without the use of a weapon. The plaintiffs also introduced evidence of violent crimes including armed robberies, rapes, and assaults at three other hotels within a one mile radius. Days Inn countered by arguing there was no evidence of an armed robbery in its parking lot.

The Court of Appeals held that the test was, "whether the prior criminal activity was substantially similar to demonstrate the landowner's knowledge that conditions on his property subjected his invitees to unreasonable risk of criminal attack so that the landowner had reasonable grounds to apprehend that the present criminal act was foreseeable[20]." The Court of Appeals specifically rejected a "free bite" rule which would protect a hotel from liability the first time a specific criminal act was committed.

The Court held that the record of non-armed criminal conduct in the Days Inn parking lot when coupled with the record of violent crime in nearby parking lots was sufficient to create a jury question as to whether criminal conduct such as the armed robbery of Mr. Matt was foreseeable.

As part of this opinion, the Court of Appeals also held that providing security does not insulate the landowner from liability when the security measures prove to be inadequate.[21] In Matt, the Days Inn did provide an unarmed security guard, but he simply sat in his car and watched the robbery. To no surprise, the Court of Appeals held that there existed a jury question as to whether this security was adequate or performed in a negligent manner.

It is clear that an innkeeper has a duty to protect its guests from the criminal conduct of others. While apartment buildings, dormitories, and other similar premises have similar duties, as a practical matter the innkeeper's duties can be even more challenging. Rather than having normal everyday residents, the hotel constantly has different guests who are unfamiliar with the area. This can make protecting guests a tricky proposition, and one that is likely to result in more and more litigation.

D. Bugs

One of the fastest growing areas of litigation involving hotels involves guests being bitten by "bugs" in their beds. While bedbugs are the primary culprit, this has yet to be litigated on an appellate level in Georgia. However, a suit involving a spider bite has been, and this will likely provide a clue as to how future bug actions will be decided.

In Dew v. Motel Properties, Inc.[22], a guest filed suit against the Kingsland Comfort Inn after he alleged that he was bitten by a brown recluse spider that caused a serious injury to his arm resulting in surgery. The plaintiff also filed suit against Ecolab, the pest control company for negligent performance of its duties.

The plaintiff testified that he checked into the hotel, and after going to bed felt a pinching on his arm. He did not check the source and instead went back to sleep. He woke up the next day in extreme pain with red streaking on his arm. The plaintiff admitted that he never saw the spider and does not know how it would have gotten into his room.

The plaintiff filed affidavits from an entomology professor testifying as the Ecolab's alleged negligent acts, an affidavit from a former employee of Motel Properties, Inc. who testified he was bitten by brown recluse spider at another property owned by the defendant, and a former guest who had been bitten by a brown recluse spider, seen spiders, and reported them to management at another motel owned by Motel Properties.

The trial court granted the defendants' motions for summary judgment and the Court of Appeals affirmed. The Court of Appeals reviewed the plaintiff's claims and applied general premises liability law. It concluded that as the evidence showed there had been no evidence of a spider bite in that specific hotel, and the defendant had no duty to take specific steps to protect a guest from a spider. Further, the Court noted that the plaintiff had provided no actual proof that he was bitten by a spider. The Court also affirmed summary judgment to Ecolab holding that even if Ecolab was negligent, the plaintiff had not proven that the alleged negligence caused a spider to appear in his room and bite him.

As a result, it appears that when it comes to bugs there is a "free bite" rule as relates to guests staying in hotels. At the very least, if a guest is bitten by something in his bed, he should at least take steps to figure out what it is, even thought it seems highly improbable that he will be able to figure out how it got there.

E. Bed Checks

Another issue that has arisen is whether a hotel has a duty to check on or render aid to one of its guess that may

be in peril. In Rasnick v. Krishna Hospitality, Inc.[23], Sidney Rasnick was a guest at the Motel Jesup. He began staying at the hotel on March 6, 2006 until he was found on the floor on March 13 by a housekeeper. He was transported to a hospital where he passed away from cardiac problems.

Plaintiff, who resided in Texas, filed suit due to the alleged negligence of the hotel in failing to check on her husband despite her request for them to do so. Plaintiff contended that she couldn't reach her husband by phone the night before he died and becoming concerned called the hotel to ask them to check on him. Ms. Rasnick was concerned that her husband was in need of medical aid. The hotel employees blew the plaintiff off and refused to comply.

The hotel filed a Motion for Summary Judgment on the grounds that under Georgia law it had no duty to rescue Mr. Rasnick from a hazard not of its creation[24]. The plaintiff countered and argued that per the Restatement (Second) of Torts, Mr. Rasnick and the defendant had a special innkeeper/guest relationship, and that as a result, like a common carrier, the hotel owed a duty to Mr. Rasnick to provide first aid if it had reason to know he was ill or injured[25].

The Court of Appeals disagreed and affirmed the trial court's grant of the hotel's motion for summary judgment. It followed the general rule in Georgia that a person is under no duty to rescue another where he did not cause the peril, and declined to follow the Restatement rule, holding that it had not been adopted in Georgia. The Court agreed that "when some special relationship exists between the parties, social policy may justify the imposition of a duty to assist or rescue one in peril";[26] however, the Court declined to impose such a new judicially created duty on an innkeeper.

It is clear at this point there is no duty for an innkeeper to provide aid to a guest he believes may be in danger. However, this is a rule that is changing in other states. The Georgia Appellate Courts have shown no inclination to change this rule, but the legislative branch may well do so.

F. Conclusion

Georgia law has generally resisted any efforts to create or expand on a special guest/innkeeper relationship. The duty of an innkeeper is clear; he must provide a guest with reasonably safe accommodations. Generally, this duty is the same as with most property owners: inspect your premises and if you become award of a hazard take steps to protect your guests from such hazards.

The one area where Georgia law seems to require more attention from an innkeeper is providing security for its guests. It is not enough to provide an unarmed security officer in a high crime area. An innkeeper must be both aware of his surroundings and provide adequate security.

So, if the innkeeper does what he is supposed to do, you should feel secure that the next time you stay at a hotel you will be safe, not fall in the shower, and not get bitten by anything while you are sleeping, but if your spouse wants anyone to check on you, you may be out of luck

[1] 42 Ga. App. 347 (1930).

[2] Id. at 348.

[3] Hillinghorst v. Heart of Atlanta Motel, Inc. 104 Ga. App. 731 (1961).

[4] Sarno v. Hoffman, 110 Ga. App. 164 (1964).

[5] Id. at 165.

[6] Hillinghorst at 733.

[7] Sarno at 164.

[8] Hillinghorst at 735.

[9] 278 Ga. App. 101 (2006).

[10] Id. at 101.

[11] Emory Univ. v. Smith, 260 Ga. App. 900, 901 (2003).

[12] 212 Ga. App. 792 (1994).

[13] Id.

[14] Id. at 794.

[15] Lau's Corp. v. Haskins, 261 Ga. 491.

[16] Id.

[17] Id.

[18] Savannah College of Art v. Roe, 261 Ga. 764.

[19] Matt at 793.

[20] Id.

[21] Id.

[22] 282 Ga. App. 368 (2006).

[23] 302 Ga. App. 260 (2010).

[24] City of Douglasville v. Queen, 270 Ga. 770, 771 (1999).

[25] Id.

[26] Thomas v. Williams, 105 Ga. App. 321 (1962) .

WORKERS' COMPENSATION SUBROGATION UPDATE

By David A. Smith and Stephen Graham

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It seems no one today is immune from the rising costs of health care. As a result, more and more insurers are seeking alternative ways in which to curb expenses and reduce total exposure per claim. One common example is the increasing prevalence of actions by group health insurers seeking reimbursement for payments made to, or on behalf of, an injured worker, which arguably should have been the primary responsibility of a workers' compensation insurance carrier or self-insurer. By the same token, there seems to be an increasing trend in workers' compensation carriers looking to potentially liable third parties for reimbursement of wage and medical benefits paid as a result of on-the-job injuries. However, instead of contractual clauses and policy provisions, such actions arise solely by operation of statute. [1]

Subrogation Statute

O.C.G.A. § 34-9.11.1 was enacted by the legislature in 1992 and governs workers' compensation subrogation in Georgia.[2] The statute provides employers and insurers with a subrogation lien for workers' compensation benefits paid to an employee who is injured by another person or party; however, subsection (b) provides that "the employer or insurer's recovery under this Code section shall be limited to the recovery of the amount of disability benefits, death benefits, and medical expenses paid under this chapter and shall only be recoverable if the injured employee has been ful-

ly and completely compensated, taking into consideration both the benefits received under this chapter and the amount of the recovery in the third-party claim, for all economic and non-economic losses incurred as a result of the injury."[3] While simple enough in theory, the statute can be difficult to apply in practice.

Full and Complete Compensation

Undoubtedly, the greatest barrier for employers and insurers seeking to recover under the subrogation statue is the so called "made whole" rule, that is, the requirement that an injured worker be fully compensated for all economic and noneconomic losses incurred as a result of the injury. Although the statute prescribes no method by which to make such determination, case law does provide some guidance.

It is well established that the employer/insurer has the burden of establishing full and complete compensation.[4] Where a suit is filed by the employee against an alleged tortfeasor, the worker's compensation carrier must intervene to protect and enforce its subrogation lien.[5] Where there is an economic recovery, the trial court must determine if the benefits paid exceed the recovery or if there are remaining economic damages unrecovered.[6] "Neither the employer nor the insurer can assert a subrogation lien against noneconomic damages, i.e., pain and suffering, where, under the Act, no noneconomic benefits were paid."[7] Furthermore, the Court of Appeals has held that no presumption of full and complete compensation arises merely from the fact that the award exceeds the amount of workers' compensation benefits received or the amount of economic damages proven.[8] "To conclude otherwise would in effect relieve the subrogee employer of its burden to establish that the injured employee has been fully and completely compensated."[9]

The Court of Appeals has held that an employer/insurer does not have the right to a jury trial on the issue of full and complete compensation.[10] The trial court alone must determine the issue and has the authority to reduce an employee's general award including personal injuries to cover the subrogation lien where the court has determined that the employee has been made whole.[11] However, "the trial court may not consider the affirmative defenses of contributory/comparative negligence assumption of risk in determining whether or not the employee has been fully and completely compensated for his injuries, because the employee's total economic and noneconomic losses make up the full and complete compensation unreduced by such defenses under the Act."[12]

The Georgia Court of Appeals has more than once suggested that utilization of a special verdict form may be the most practical solution for determining full and complete compensation.[13] A general verdict alone is likely to be inadequate because of the impossibility of determining what portion of the award applies to economic losses and what portion applies to noneconomic losses.[14] As a result, "[t]he outcome in many such situations would be that a workers' compensation subrogation lien could not be enforced."[15] It is the responsibility of the workers' compensation provider to protect its interest by intervention and special verdict requests.[16] The Court of Appeals has approved of the bifurcation of the tort trial in subroga-

tion cases, finding it appropriate to avoid revealing to the jury that the employee has already recovered from a collateral source.[17]

Settlement of the Third-Party Suit

While utilization of a special verdict form may be helpful in determining full and complete compensation in those cases that actually reach a jury, the majority of cases will never get to that point, and may settle pre-trial or, in some instances, pre-suit. The Court of Appeals addressed the issue of pre-suit settlements in the case of Rowland vs. Department of Admin. Servs.[18] There, the claimant was involved in a motor vehicle accident while in the course and scope of his employment for The Department of Administrative Services (DOAS). The parties stipulated that the injuries sustained by the employee were caused by defendant Rowland's negligence. The DOAS paid the employee workers' compensation benefits and then brought suit to recover the benefits paid from Rowland. The DOAS subsequently discovered that the employee had already settled his personal injury claim with Rowland without filing suit. The DOAS had no knowledge of the employee's claim and Rowland had no knowledge of the workers' compensation subrogation lien.[19] The court found that under the plain wording of O.C.G.A. § 34-9-11.1 the employer had no remaining right of action against the tortfeasor. However, the loss of the right to bring the cause of action did not extinguish DOAS's lien on the recovery, now in the hands of the injured employee.[20]

Even in situations where the employer/insurer has given proper notice of their subrogation lien, a settlement between the injured worker and the third-party defendant can still have an adverse effect on the employer/insurer's ability to recover, due primarily to the difficulties in proving full and complete compensation. This point is illustrated in the case of City of Warner Robins v. Baker.[21] In Baker, the employee sustained a compensable injury while working for the City of Warner Robins.[22] He subsequently sued the party responsible for the accident and negotiated a settlement. The city notified the employee of its intent to file a subrogation lien against any settlement he might receive but did not intervene in the lawsuit. The employee accepted a settlement from the tortfeasor and the lawsuit was dismissed with prejudice. Shortly thereafter, the employee filed a motion to extinguish the subrogation lien arguing that the city had waived their lien or was estopped to enforce it and that he had not been "fully and completely compensated" as required by O.C.G.A. § 34-9-11.1(b).[23] The Court of Appeals found that the city's lien survived the settlement, but that they were not entitled to any recovery as they had failed to show that the employee had been made whole. The court specifically noted that a lump sum settlement is the same as a general verdict form, in that an appellate court cannot determine what portion of the award or recovery was meant to compensate the employee for economic losses and what portion was meant to cover non-economic losses. "The result is that the lien cannot be enforced, because full and complete compensation cannot be shown."[24] Although this language appears to suggest that an employer/insurer would be unable to meet their burden in any case involving a lump sum settlement, the court nonetheless proceeded to analyze the facts of the case, following which they concluded

that the trial court did not abuse its discretion in failing to find the employee had been fully and completely compensated.[25]

In the subsequent case of Georgia Electric Membership Corp. v. Garnto, the court again examined whether an employer/insurer had met their burden of proving full and complete compensation in a case involving a lump sum settlement between the claimant and the third-party defendant. [26] After analyzing evidence presented by both parties, including the affidavit of an expert submitted by the employer/insurer, the court concluded that the trial court had not erred in finding the employer/insurer had failed to carry its burden of showing full and complete compensation.[27] The court made no reference to the language in Baker, thus suggesting that full and complete compensation can be established in cases involving a lump sum settlement, but that the employer/insurer had failed to meet their burden in the case at bar.

In a very recent decision by the Court of Appeals, Austell Healthcare, Inc. v. Scott, the court referenced the above-cited proposition from Baker, but found unavailing the appellant's argument that the trial court erred in holding that they "cannot" show that the employee was fully compensated.[28] The court based its finding on the fact that the employer and insurer had failed to proffer any evidence to establish full and complete compensation, and did not address whether such showing was precluded as a matter of law. However, in dicta, the court noted that "[a]lthough it appears that the trial court mistakenly believed that only after a liability award could the court hear evidence on whether the employee had been fully and completely compensated, there is no evidence that this was reversible error."[29] Accordingly, it appears as if the court acknowledged the appellant's argument, suggesting that full and complete compensation can be established in cases involving pre-trial settlements, assuming the trial court finds sufficient evidence was proffered by the employer/insurer.

Practical Considerations

Regardless of the motives behind Georgia's workers' compensation subrogation statute, the reality is that it rarely affords any recovery due to the requirement that the claimant be "fully and completely compensated." As a result, actions to recover on subrogation claims are often not worth the cost of litigation, and many such liens are ultimately settled for pennies on the dollar. The difficulty in obtaining recovery despite a statute specifically designed to accomplish this goal can be frustrating for both attorneys and their clients, especially those operating in other jurisdictions where subrogation statutes may be more favorable to employers and insurers. In some cases, an employer/insurer may want to consider waiving their statutory right to subrogation in exchange for a more favorable settlement of the underlying workers' compensation claim. This option is appealing to the employee since it allows them to keep whatever they may recover in their third-party suit and also benefits the employer/insurer in that they are able to realize some recovery without having to overcome the often insurmountable burden of proving full and complete compensation.

[1] Canal Ins. Co. v. Liberty Mutual Ins. Co., 256 Ga. App. 866, 867, 570 S.E. 2d 60, 67 (2002) (*quoting* Ga. Star Plumbing v. Bowen, 225 Ga. App. 379, 381-382, 484 S.E.2d 26, 29 (1997)).

[2] Ga. L. 1992, p. 1942, § 2.

[3] O.C.G.A. § 34-9-11.1.

[4] City of Warner Robins v. Baker, 255 Ga. App. 601, 603, 565 S.E.2d 919, 922 (2002).

[5] Canal, supra at 866.

[6] Id. at 871.

[7] Id. at 874.

[8] Id.

[9] Bartow Co. Bd. of Educ. v. Ray, 229 Ga. App. 333, 335, 494 S.E.2d 29, 31 (1997).

[10] Liberty Mutual Ins. Co. v. Johnson, 244 Ga. App. 338, 340, 535 S.E.2d 511, 513-514 (2000).

[11] Canal, supra at 873-874.

[12] Id. at 874.

[13] See Dept. of Admin. Svcs. v. Brown, 219 Ga. App. 27, 28, 464 S.E.2d 7, 9 (1995); *Bartow Co. Bd. of Educ. v. Ray*, 229 Ga. App. 333, 335, 494 S.E.2d 29, 30 (1997).

[14] Ray, *supra* at 335.

[15] Canal, supra at 871.

[16] Id.

[17] Id. at 870.

[18] Rowland v. Dept. of Admin. Svcs., 219 Ga. App. 899, 466 S.E.2d 923 (1996).

[19] Id. at 900.

[20] Id. at 901.

[21] Baker, 255 Ga. App. 601.

[22] Id. at 601-602.

[23] Id. at 602.

[24] Id. at 604-605.

[25] Id. at 605.

[26] Ga. Electric Membership Corp. v. Garnto, 266 Ga. App. 452, 597 S.E.2d 527 (2004).

[27] Id. at 455.

[28] Austell Healthcare, Inc. v. Scott, ___ S.E.2d ___, 2011 Ga. App. LEXIS 193, (Ga. App. Mar. 11, 2011).

[29] Id. at 6.

MEDICARE ISSUES

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Introduction

Those of us who practice workers' compensation law have been dealing with the Medicare ogre for some time. This has resulted in a wealth of information (which most of us don't understand) concerning our responsibility when handling and resolving cases involving a Medicare recipient. Volumes have been written on these issues and it is not the purpose of this limited paper to address every facet of this vexing issue. I will limit my scope to Medicare issues in liability settlements. Unfortunately, this area is not as developed as the workers' compensation field and we're still on a learning curve. However, suffice it to say Medicare sees this as a bountiful area in which to recover conditional and future payments made to recipients. In other words folks, there's trouble on the horizon.

How We Got Here

Medicare came into existence in 1965 as the primary payer for medical services provided to Medicare beneficiaries, except when workers' compensation coverage was available. In 1980, our illustrious Congress passed certain laws referred to as the Medicare Secondary Payer (or "MSP") statutes which established Medicare as a "secondary payer" to certain other insurance plans (identified as "primary payers"). [1] As a secondary payer, Medicare was only required to pay for medical treatment and services once the primary insurance plan paid out on the Medicare beneficiary's claim. In 2003, Congress verified that Medicare is always considered a secondary payer whenever a primary insurance plan (including self-insurance) has made or should have made a primary payment for medical services to a Medicare beneficiary. [2] In the broad MSP context, "primary insurance plans" include liability insurers and all types of auto insurers. [3]

While the laws for recovery were in place, however, Medicare often did not pursue enforcement of the existing reporting requirements. The absence of penalties for failing to report rendered Medicare unable to aggressively pursue recovery of conditional payments from personal injury settlements. Nevertheless, out of an abundance of caution, many workers' compensation insurers had already begun dealing with the po-

tential for the sleeping giant to awaken by crafting Medicare Set Aside ("MSA") agreements on a regular basis. In this regard, memorandums issued by Medicare formed a guide path for Medicare settlements involving workers' compensation claimants. However, in the liability sphere, until the second term of the Bush administration, Medicare was laying like a ball in high weeds.

Where We Are Now

On December 29, 2007, Former President George W. Bush signed into law the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA" or "the Act"). [4] The Act protects Medicare's interests in personal injury matters when a plaintiff is a Medicare beneficiary. Section 111 of the MMSEA sets forth reporting requirements that establish civil penalties and fines for not properly reporting claims to Medicare. Under the new rules, all insurers with respect to liability, no-fault, and workers' compensation, as well as self-insurers (referred to as "Responsible Reporting Entities" or "RREs") are required to determine whether a claimant is entitled to Medicare benefits. Failure to comply with the reporting requirements carries a civil penalty of $1,000.00 per claim, per day. A comprehensive detailing however, of what insurers and self-insurers must do to comply with Section 111 reporting requirements, is far beyond the scope of this paper. However, suffice it to say it is very important for you and your clients to learn your responsibilities under the MMSEA.

Originally, reporting by liability insurers, no-fault insurers, and workers' compensation insurers was to begin on July 1, 2009. However, because it took time to develop a protocol, the Centers for Medicare & Medicaid Services ("CMS") pushed the deadline back several times. Most mandatory requirements should be satisfied by March 31, 2011, even though this is again subject to some change. Obviously, this new law could have a chilling effect on settlements. Moreover, Medicare will now be aware of every dollar paid to a Medicare beneficiary as a result of a settlement, judgment, award, or other payment(s) and will be aggressively seeking reimbursement of its conditional payment(s) already made and insuring its interests are taken into account when making future payments.

What To Do

As a prefatory note here, let me say Medicare protocol in liability settlements lags far behind the workers' compensation arena. Through a series of detailed and confusing memos, we have some idea of what we're supposed to do in terms of protecting Medicare's interest. Obviously, this will serve as a guidepost to handling liability settlements involving Medicare beneficiaries. The first area that needs to be considered is payments that have already been made by Medicare. This will be very important in the liability sphere as opposed to the workers' compensation field. In the traditional workers' compensation settlement, most medical bills have already been paid by the workers' compensation insurer or self-insurer, therefore, conditional payments are not as large a problem. However, in a typical liability situation, the tortfeasor, as a general rule, has not made any payments on behalf of the injured plaintiff. Therefore, when settlement is contemplated, you may be dealing with a considerable claim by Medicare for incurred medical expenses

for which it has made payment on behalf of the claimant. These are the so-called "conditional" payments. Medicare has what is referred as to a *priority right of reimbursement* which allows it to seek recovery of its conditional payments from virtually everyone involved in the personal injury claim. That would include the parties, the lawyers, the insurers, and even the medical providers. [5] It is not a simple "lien."

If not reimbursed, the United States has many avenues of recovery available and can sue virtually everyone in the settlement and can seek double damages. One pointer here is to never allow the settlement to flow through your trust account because it could then be argued defense counsel received a "primary payment" and thus may be sued by the United States to recover Medicare's claim. In a recent case, the United States filed a massive collection suit against plaintiffs' lawyers, defendants, and insurers. Summary judgment was eventually granted to the defendants and the United States did not appeal. However, this case illustrates the frightening nature of Medicare reimbursement. [6] The claimed reimbursement involved more than $60 million dollars. This case also addressed the issue of the statute of limitations for Medicare claims which certainly bears consideration by a practitioner.

One thing that is very frustrating about dealing with Medicare is the fact their recovery rights are not affected by things which typically reduce the value of the claim, such as contributory and comparative negligence, burdens of proof, rules of evidence, and damage limitations. [7] Characterizing damages as pain and suffering in order to avoid Medicare is ineffective. Their recovery rights will not be affected unless the allocation is contained in a court order issued on the merits of the case. [8] Also, Medicare will not participate in settlement negotiations nor attend mediations and will not conclusively determine the amount it is owed until *after* the parties reach settlement. [9] Medicare can seek reimbursement even in cases where the settlement or judgment does not purport to compensate the plaintiff for medical expenses. [10] Also note, Medicare is not bound by the terms of any release between the parties and there is no low dollar threshold for Medicare reimbursement. [11]

Once an injury case is resolved, the law and supporting regulations require Medicare beneficiaries to reimburse Medicare's conditional payments within sixty (60) days of receiving payment. [12] The parties will receive a final demand letter and the sixty (60) day countdown begins at that point. [13] Moreover, simply putting Medicare's name on the settlement check will not necessarily protect the primary payer from the possibility of paying twice and legal action to recover double damages. [14] The safest practice is to wait and prepare a separate check to Medicare for the full amount of its final recovery demand once the beneficiary receives the demand letter. Also, always make sure the Coordinator of Benefits Contractor ("COBC") is notified of the claim as soon as you determine a plaintiff is entitled to Medicare. Further, during settlement negotiations, explicitly address and agree upon a procedure for reimbursing Medicare. One should insist Medicare be reimbursed from the settlement proceeds and make full payment of Medicare's final demand an express condition of the settlement. Also, include Medicare's specific language in

your release. Always pay Medicare's reimbursement demand directly to Medicare whenever possible.

Back To The Future, Marty McFly

The final thing I will address is *future* medical payments that involve Medicare beneficiaries. Those of us in the workers' compensation arena are very familiar with this and the liability world will soon have to learn. Just because you settle your case it doesn't mean your obligations are over. When the settlement or judgment includes compensation for future accident-related medical expenses, *parties may have to consider how to protect Medicare's status as a secondary payer in the future.* Formerly, it was a standard practice to settle a personal injury case and shift the burden to Medicare for paying future accident-related medical care even though the settlement had included sums to cover future medical expenses. Medicare has become much more aggressive as of late and it's not your grandfather's settlement any more. One of the primary ways Medicare has accomplished this has been to recommend that in addition to reimbursing Medicare's past conditional payments from personal injury settlement funds, Medicare beneficiaries should "set aside" a portion of their settlement to cover the costs of future medical expenses so it is not shifted to Medicare. This concept arose from the so-called "Patel Memo" from 2001. [15] Again, this has become standard procedure in a workers' compensation settlement and will probably become standard in liability settlements in the future.

An MSA is simply an interest bearing bank account established for the claimant to spend exclusively for future accident related medical expenses that would otherwise be covered by Medicare. After it is depleted, Medicare will step in and pay the claimant's expenses even if those expenses are accident related. As stated, MSAs are widely used in settling workers' compensation cases because of the series of memorandums issued by CMS. There is no consensus on whether CMS is going to require these allocations in no-fault and liability settlements. There is some speculation that with the advent of Section 111 reporting, Medicare may take steps to establish a procedure for establishing MSAs in no-fault and liability settlements. For example, effective July 6, 2009, Medicare added a definition of a "set aside arrangement" to its Medicare Secondary Payer Manual which for the first time defined MSAs in a way that did not limit them to the workers' compensation scenario. The manual clearly states the parties may use a No-Fault Liability Medicare Set-aside ("NFSA") arrangement or a Liability Medicare Set-aside ("LMSA") arrangement. [16] However, to date Medicare has declined to formally establish uniform procedures for utilizing MSAs outside of the workers' compensation context. Therefore, some Medicare regional offices will agree to review MSAs in liability cases while others will not. Its own manual states that "there should be no recovery of benefits paid for services rendered after the date of a liability settlement." [17] The debate rages on.

At present, there is no clear directive from Medicare as to when or how to use MSAs outside of the workers' compensation context and there is no established procedure for having Medicare review and/or approve MSAs outside of the workers' compensation context.

Moreover, in many liability settlements and judgments, there is no reliable way to determine how much of the settlement or judgment was intended to compensate the claimant for future medical expenses. If Medicare is unwilling to recognize the parties' efforts to allocate damages after a court order on the merits, how can it rationalize a requirement that future damages be allocated by the parties and set aside?

Again, remember an MSA is not required. It is simply a tool that Medicare has come up with specifically in the workers' compensation context. Also, recognize there are no protocols out there for the liability scenario, so one must use the workers' compensation protocols for a guide. If you decide to do that, Medicare will review MSA proposals (and thus agree with your assessment on protecting its interests) when: (1) the claimant is currently a Medicare beneficiary *and* the total settlement amount is greater than $25,000.00; or (2) there is a reasonable expectation the injured worker will become a Medicare beneficiary within thirty (30) months *and* the total settlement amount is greater than $250,000.00. [18] It is important to note the parties may have an obligation to consider Medicare's potential interests in settlements even if the claim does not fall within these thresholds, as CMS has cautioned that even though they will review the MSA, there are no "safe harbors." [19] If one decides an MSA is appropriate, there are many additional steps that must be taken that are beyond the scope of this paper. It is highly recommended that one secure the assistance of an expert allocator to assist in determining how much to be set aside to protect Medicare's interests. The key is to try to show you have protected Medicare's interests. If you decide to not use an MSA, then one should probably recite in the settlement agreement the medical evidence supports the conclusion that no future accident related medical care is necessary. Have the claimant acknowledge the settlement may affect their Medicare benefits and they nevertheless knowingly choose to proceed to settlement.

Medicare has specified circumstances in the workers' compensation arena under which an MSA arrangement need not be established and that may provide a guidepost for liability cases. It is unnecessary for the individual to establish a set aside arrangement for Medicare if all of the following are true: (1) the facts of the case demonstrate the injured individual is only being compensated for past medical expenses; (2) there is no evidence the individual is attempting to maximize other aspects of the settlement to Medicare's detriment; and (3) the individual's treating physicians conclude (in writing) that to a reasonable degree of medical certainty the individual will no longer require Medicare-covered treatment related to the injury. [20]

Conclusion

There is simply no hard and fast answer as to what liability insurers' obligations are to Medicare. This is especially true in terms of future medical expenses where the debate rages on. I would expect some policy memos to come down the pipeline in the next few months that will address these issues. What is clear is that you must report and you are on the hook if you pay out a settlement without taking Medicare's conditional payments into consideration. You and your client could be sued. I recently attended a seminar on Medicare

issues where the speaker indicated CMS was licking its chops over getting into the liability sphere.

First, the damages are much more significant. There's a lot more money to go after. Moreover, in a typical liability scenario, none of the medicals have been paid by any source other than Medicare or health insurance. Finally, CMS recognizes what we all know, that most liability attorneys and insurers are novices when it comes to Medicare issues. They see a golden opportunity to rake in some serious cash against inexperienced insurers and attorneys. Workers' compensation practitioners have been fighting this battle for over ten (10) years, so they're a little more savvy. Look for some chilling decisions over the next few years out of our federal courts against attorneys and insurers concerning Medicare reimbursement issues. Nobody likes to be the first one on the guillotine, but it's going to happen.

[1] See 42 U.S.C. § 1395.

[2] See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 301, 117 Stat. 2066 (2003).

[3] See 42 C.F.R. §§ 411.20 and 411.50(b).

[4] See 42 U.S.C. § 1395y(b)(8).

[5] See 42 C.F.R. §§ 411.24(g) & (e).

[6] See United States v. Sticker, et al., Civil Action 1:09-CV-02423-KOB (N.D. Ala. Eastern).

[7] See 42 U.S.C. § 1395y(b)(2)(B)(ii)-(iii); 42 C.F.R. §411.22(b)(2); Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.4 and 50.4.5.

[8] See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.4.

[9] See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.1, 50.4.2 and 50.4.3; 42 C.F.R. § 411.24(b).

[10] See 42 C.F.R. § 411.37(d).

[11] See Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.0 and 50.5.3.

[12] See 42 C.F.R. § 411.24(h) and 42 U.S.C. § 1395y(b)(2)(B)(ii).

[13] See 42 C.F.R. § 411.24(h) and 42 U.S.C. §1395y(b)(2)(B)(ii).

[14] See 42 C.F.R. § 411.22(c)(1) and (2); 42 C.F.R. § 411.24(c)(2); Medicare Secondary

Payer (MSP) Manual, Ch. 7, 50.4.3(B).

[15] Memorandum issued by Parashar B. Patel, Deputy Director, Purchasing Policy Group, Center for Medicare Management to All Associate Regional Administrators on July 23, 2001, particularly at Footnote 1, available at http://www.cms.hhs.gov/WorkersCompAgencyServices/.

[16] See Medicare Secondary Payer (MSP) Manual, Ch. 1 – Background and Overview, section 20 – Definitions. (Emphasis added).

[17] See Medicare Secondary Payer (MSP) Manual, Ch. 7 – Contractor MSP Recovery Rules, section 50.5.

[18] See Memorandum from Director Center for Medicare Management to All Regional Administrators, dated May 23, 2003 at Question 1, available at: http://www.cms.hhs.gov/WorkersCompAgencyServices/.

[19] See Memorandum from Director Financial Services Group Office of Financial Management to All Regional Administrators, July 11, 2005, at Question 1, available at: http://www.cms.hhs.gov/WorkersCompAgencyServices/.

[20] See Memorandum of Thomas L. Grissom, Director, Center for Medicare Management, to All Regional Administrators, April 22, 2003.