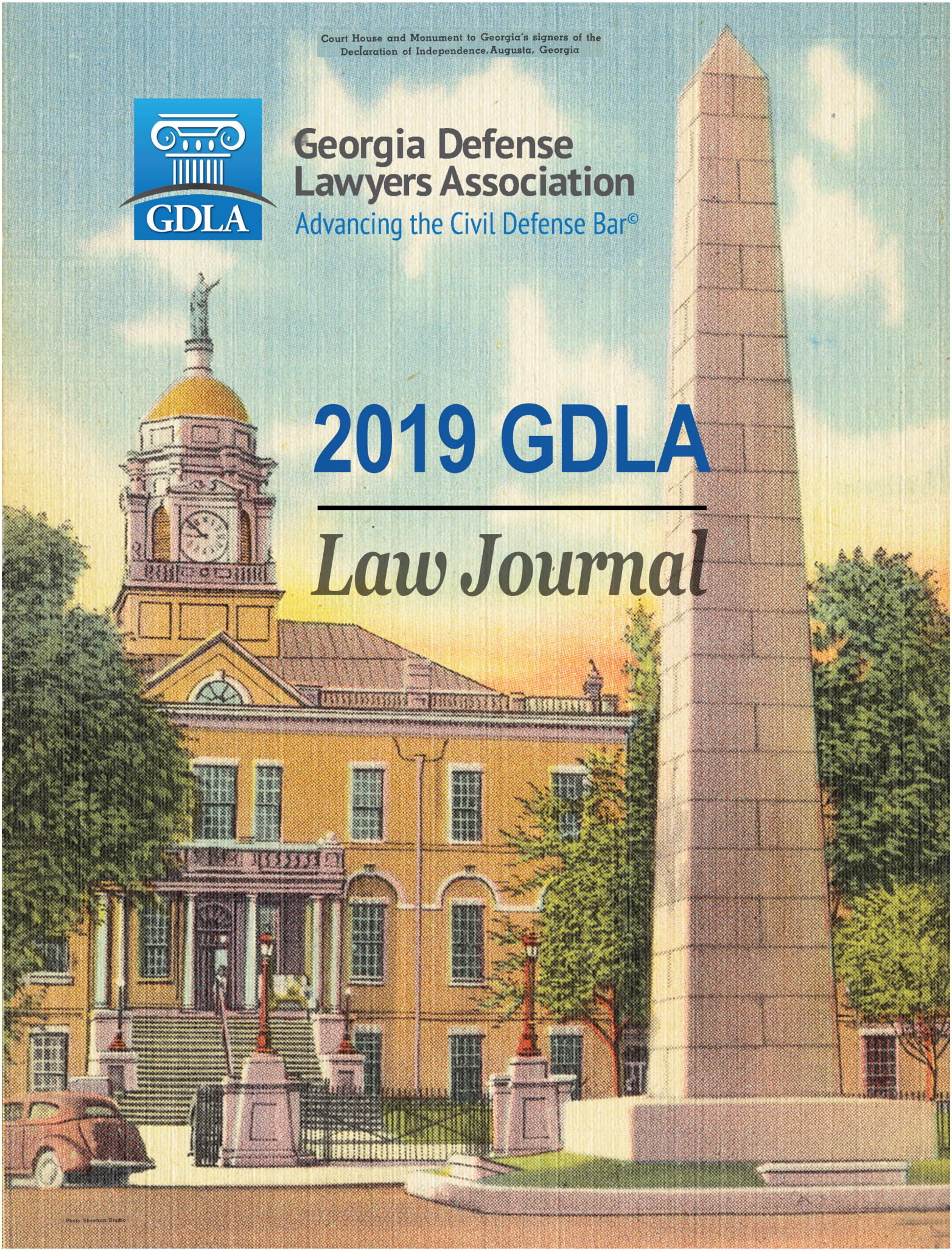

Georgia Defense Lawyers Association

Advancing the Civil Defense Bar©

2019 GDLA

Law Journal

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PRESIDENT'S MESSAGE

Hall McKinley has been practicing for 38 years with Drew Eckl & Farnham in Atlanta, GA. His practice focuses on defending trucking companies, the retail industry, insurance companies and large self-insured corporations. He has served as the GDLA President for 2018-2019, and in 2018 was awarded the American Bar Association's Andrew C. Hecker Memorial Award recognizing lifetime achievement.

It has been a privilege to serve as GDLA President for 2018-2019. As always, the year comes to an end with the publishing of our GDLA *Law Journal*. This is one of the real benefits of membership as it includes articles on current and significant legal issues.

I want to thank this year's Editor, GDLA Secretary George Hall of Augusta, for bringing together this excellent edition of the *Journal*, and also the many authors who contributed their time and effort to prepare the fine articles, which should be of great benefit to your busy law practices.

I thank the Board of GDLA, its Executive Director, Jennifer Davis, and all the 900 plus members of the organization for making this a very special year for me as President. Enjoy this *Journal*.

For the Defense,

Hall McKinley

Hall McKinley
GDLA President
Drew Eckl & Farnham
Atlanta

EDITOR'S ACKNOWLEDGEMENT

George R. Hall is a partner with Hull Barrett, P.C. in Augusta, Georgia. He has been a trial lawyer for 32 years, practicing in both Georgia and South Carolina. He is a Fellow in the American College of Trial Lawyers and has served as a mediator for 20 years.

I am pleased to present the 2019 GDLA *Law Journal*. We have a wide range of articles covering cutting-edge topics and cases. I encourage you to read the entire *Journal*.

I am extremely appreciative of the many hours of hard work by the authors of this publication including Jordan T. Bell, N. Staten Bitting, Jr., Philippa V. Ellis, W. Melvin Haas, III, Melody C. Kiella, N. Shannon Gentry Lanier, Jason C. Logan, Philip W. Savrin, Patricia-Anne Upson, Mary E. "Libby" Watkins and James S. V. Weston.

Please thank the authors for their important contribution when you see them, or drop them a note or email.

I am deeply indebted to Ben Dinges and Shannon Lanier of my firm who spent many hours in editing the final draft of the *Journal*. Finally, I need to thank my long-time paralegal, Mary Marschalk, who did the final formatting of the *Journal*. As always, thanks to Jennifer Davis for help in recruiting authors and keeping me on task. This is a worthwhile project which I hope you will support in the future.

For the Defense,

George R. Hall
GDLA Secretary
Hull Barrett, Augusta

FEDERAL PREEMPTION IN GEORGIA COURTS: IN THE MIDST OF CHAOS, THERE IS ALSO OPPORTUNITY**

By N. Shannon Gentry Lanier Jordan T. Bell

N. Shannon Gentry Lanier is Of Counsel with Hull Barrett, P.C. Shannon focuses on motions work, with an emphasis on commercial litigation and tort defense.

Jordan T. Bell is an associate in the firm's Augusta office. Jordan focuses primarily on commercial litigation and intellectual property matters.

**Generally credited to *Sun Tzu On The Art of War*. Put another way: "Dracarys."

Litigation involves chaos. Disgruntled witnesses, contradictory testimony and dueling documents are the rule, not the exception. The use of federal preemption represents an opportunity to stop the chaos and conclude the litigation based on an issue of law. Properly asserted, federal preemption bars state law claims and affords great protection to litigants of certain industries.[1]

This article will examine the use of federal preemption in Georgia courts in three industries (railroads, financial services, and insurance). These industries are target-rich environments for federal preemption defenses.

INTRODUCTION

The rule in Georgia is well-established: "Georgia law is preempted only (1) where there is direct conflict between state and federal regulation; (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or (3) where Congress has occupied the field in a given area so as to oust all state regulation."[2]

RAILROADS

"Railroads are among the most heavily regulated American industries."[3] The following two cases are examples of Congress "occupying the field in a given area so as to oust all state regulations."[4] They involved, respectively, the Federal Railroad Safety Act ("FRSA")[5], and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA")[6].

First, in *Midville River Tract, LLC v. Cent. of Ga. R.R.*,[7] the Georgia Court of Appeals held FRSA preempted state tort claims for damage to property, trespass and nuisance allegedly caused by a train derailment.

The derailment in *Midville* spilled chemicals onto real property owned by Midville River Tract, LLC ("the landowner"). Central of Georgia operated the train and owned the railroad track where the derailment occurred; Norfolk Southern (collectively, the "railroads") owned the locomotive at the front of the train. An internal flaw in a weld in the train track caused the weld to break, leading to the derailment.[8] The railroads and the landowner agreed the internal flaw in the track weld was undetectable. Likewise, the landowner agreed the railroads complied with all federal standards of care regarding train speed and track inspections.[9]

The landowner contended the weld broke because it was welded incorrectly.[10] More specifically, the landowner contended that for the weld to break, the welder must have "failed to comply with [the railroads'] own safety standard regarding thermite welding, known as Standard 425."[11]

The Court agreed with the railroads that federal law preempted the landowner's state tort claims. Congress passed FRSA to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents" and authorized the Secretary of Transportation to "prescribe

regulations and issue orders for every area of railroad safety" in order to carry out this purpose.[12] FRSA preempts "any state or local law, regulation, or order that is 'an additional or more stringent law, regulation or order related to railroad safety or security.'"[13]

In 2007, Congress amended the preemption provision to provide "clarification regarding state law causes of action."[14] Under the 2007 Clarification Amendment, federal law does not preempt state law causes of action seeking to recover damages for personal injury, death, or property damage alleging that a party "(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters)" or "(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by [the Secretary of Transportation]."[15]

The issue in *Midville* was whether Standard 425 governing thermite welding was "created pursuant to a regulation or order issued by" the Secretary of Transportation. The Court found it was not. The Court held that pursuant to 49 C.F.R. § 213.118, the railroads were "required to have in effect and comply with a plan regarding the installation of continuous welded rail, 49 C.F.R. § 213.118(a), and that the plan must be filed by the railroads and approved by the Federal Railroad Administration ("FRA")."[16] The required minimum elements of the federally-mandated plan are set forth in 49 C.F.R. § 213.119. These required minimum elements did not direct the adoption of an internal standard governing thermite welding.[17]

Importantly, the railroads' plan governing continuous welded rail, as submitted to and approved by the FRA, was in the evidentiary record of the case.[18] The Court was able to compare the plan's contents to the required minimum elements.

This comparison showed that Standard 425 was not created pursuant to federal regulation; instead, Standard 425 was "an internal standard exceeding the minimum plan requirements set forth in 49 C.F.R. § 213.119."[19] Accordingly, the Court affirmed the grant of summary judgment to the railroads and held the landowner's claims were preempted.

Second, in *Fox v. Norfolk S. Corp.*,[20] the Court of Appeals held ICCTA did not preempt a landowner's claim for inverse condemnation based on an unreasonable interference with the landowner's private right of access across a set of railroad tracks and onto other property.[21] The dispute in *Fox* centered around a right-of-way owned by Norfolk Southern Railroad Company (the "railroad") and bisecting a parcel of land owned by C. Randall Fox (the "landowner").[22] The railroad built a side track running parallel to the existing track situated in the right-of-way.[23] The parties disputed whether the side track unreasonably interfered with the landowner's private right of access across the tracks and onto other property.

Fox is notable because it addressed both a jurisdictional question and the difference between categorical preemption and preemption as-applied under ICCTA.

As an initial matter, the Court of Appeals addressed whether it had jurisdiction over the appeal. "It is well-established that appellate jurisdiction lies exclusively with the Supreme Court of Georgia in cases where a party asserts an affirmative claim of preemption. Thus, where a plaintiff sues seeking declaratory or injunctive relief based on an assertion that a Georgia law, ordinance, or regulation is void in its entirely because it is preempted by federal law, appellate jurisdiction lies in the Supreme Court."[24] In contrast, the Court of Appeals exercises appellate jurisdiction in cases "where preemption is raised as a defense and where

that defense does not involve a direct constitutional challenge to an entire statute, ordinance or regulation on preemption grounds. In other words, … in those cases where a defendant argues that the plaintiff's otherwise cognizable state law claim is preempted under the circumstances of the particular case."[25]

Next, the Court distinguished categorical preemption and preemption as-applied. ICCTA vests exclusive jurisdiction in the Surface Transportation Board (the "Board") with respect to legal remedies related to "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities."[26] "In 2005, the Board articulated a framework for analyzing preemption claims, and under that framework, state and local laws and/or claims asserted under those laws may be preempted as either categorially or as applied."[27] "A state or local law (and any action brought thereunder) is categorically preempted if the law itself or the remedy it provides 'directly conflicts with exclusive federal regulation of railroads' and thereby unreasonably burdens interstate commerce."[28]

The landowner's traditional state law claim for condemnation fell under the Board's second category of preempted state laws: "The second category of preempted state laws are those that are preempted as applied. The as-applied preemption analysis is used in those cases involving a traditional state law cause of action – i.e., a cause of action that arises under generally applicable statutory or common law that is not directly specifically at railroads or their property."[29] "In such cases, preemption occurs not because the law itself seeks to regulate railroads but because allowing a particular state law claim to proceed would 'have the effect of unreasonably burdening or interfering with rail transportation.'"[30]

Finally, the question before the Court was whether rail transportation would be unreasonably burdened if the landowner prevailed on his inverse condemnation claim.[31] "The railroad is required to show that [the landowner's] inverse condemnation claim, if successful, would burden or interfere with rail transportation. Moreover, the railroad must be able to identify an articulable, specific burden or interference that [the landowner's] claim would impose on rail transportation."[32] "General evidence or assertions" that the claim "would somehow affect rail transportation" are insufficient.[33] The Court held there was no evidence showing that rail transportation would be unreasonably burdened if the landowner prevailed on his inverse condemnation claim.[34] Accordingly, the inverse condemnation claim was not preempted.

FINANCIAL SERVICES

Like the railroads, financial services firms are highly regulated. The following two cases show the impact of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")[35] on state law claims based upon allegedly fraudulent transfers. Both cases arose out of the financial crisis of 2007-2008.

First, in *RES-GA McDonough, LLC v. Taylor English Duma LLP*, [36]the Supreme Court of Georgia held FIRREA did not preempt Georgia's assignment statute, O.C.G.A. § 44-12-24.[37] The dispute in *RES-GA McDonough* centered around the FDIC's assignment of a note, deed to secure debt, and guaranties from an insolvent bank to a public / private partnership and subsequently to RES-GA (the "guaranties-holder"). The guaranties-holder was later substituted as a plaintiff in an underlying action seeking recovery on the guaranties. It allegedly informed the law firm representing it that the

defendant in the underlying action had transferred real property in an apparent fraudulent transfer. The real property was ultimately sold to a bona fide purchaser.[38]

The guaranties-holder then filed an action for legal malpractice against the law firm, contending that it failed to assert a timely claim under the former Georgia Uniform Fraudulent Transfers Act ("UFTA")[39]. In the malpractice case, the guaranties-holder alleged that because of the delay in filing, it lost the opportunity to execute its judgment against the transferred property.[40]

The Supreme Court held that under then-existing provisions of UFTA, the underlying claim arose from fraud, and was not assignable pursuant to Georgia's assignment statute, O.C.G.A. § 44-12-24.[41] Therefore, as a matter of law, the guaranties-holder could not have prevailed in the underlying action to recover on the guaranties, and could not prevail in its claim for legal malpractice against the law firm.[42]

In so holding, the Court rejected the guaranties-holder's argument that FIRREA preempted O.C.G.A. § 44-12-24. The relevant provision of FIRREA granted the FDIC the power to "succeed to" the rights of the bank which had been declared insolvent.[43] The guaranties-holder took this a step further; it contended it was a "downstream or subsequent assignee" of the FDIC, and therefore not subject to the non-assignment provisions of O.C.G.A. § 44-12-24.[44] The guaranties-holder contended that FIRREA's silence on the issue of "whether powers granted to the FDIC may be extended to subsequent downstream assignments or transfers between *private entities and individuals*" meant that the issue was unclear.[45] The guaranties-holder argued that if the issue was unclear, the statute was preempted.[46]

The Court held the guaranties-holder's argument ran "directly counter to the well-established rule in Georgia."[47] "[T]o prevail on its preemption claim, [the guaranties-holder] was required to show the 'clear and manifest purpose of Congress' to preempt [O.C.G.A. § 44-12-24] with respect to downstream assignees."[48] That the guaranties-holder could not do. Accordingly, the Court found FIRREA did not preempt Georgia's assignment statue.[49]

Second, the financial crisis of 2007-2008 also spawned *Community & Southern Bank v. Lovell*.[50] In *Lovell*, the Supreme Court held the FDIC Extender Statute of FIRREA preempted both statutes of limitations and statutes of repose.[51] The dispute in *Lovell* centered around the FDIC's assignment of a judgment from an insolvent bank to a second bank (the "creditor"). The creditor subsequently filed suit to collect the judgment against the original debtor and several other entities, alleging a number of fraudulent transfers and asserting claims under UFTA.[52] The debtor contended, and the lower court agreed, that the creditor's claims were time-barred under former O.C.G.A. § 18-2-79(1) of UFTA. In response, the creditor argued the FDIC Extender Statute of FIRREA preempted former O.C.G.A. § 18-2-79(1) and its claim was timely. [53]

Lovell required the Court to compare conflicting state and federal statutes. Under former O.C.G.A. § 18-2-79(1), "a cause of action with respect to a fraudulent transfer … under [UFTA] is extinguished unless action is brought … [u]nder [O.C.G.A. § 18-2-74(a)(1)] within four years after the transfer was made … or, if later, within one year after the transfer … was or could reasonably have been discovered by the claimant."[54] In contrast, under the FDIC Extender Statute, "the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be … in the case

of any tort claim … the longer of … the 3-year period beginning on the date the claim accrues [] or … the period applicable under State law."[55] For these purposes, a tort claim accrues on "the later of … the date of the appointment of the [FDIC] as conservator or receiver [] or … the date on which the cause of action accrues."[56]

In *Lovell*, the conflict between the state and federal statutes was open and obvious. Nonetheless, the Supreme Court limited its opinion and held the FDIC Extender Statute preempted both statutes of limitations and statutes of repose, without determining whether O.C.G.A. § 18-2-79(1) was one or the other.[57] The Court remanded the case to the lower court to determine several outstanding issues, including application of its ruling with respect to preemption.[58]

INSURANCE

Finally, "the business of insurance is [] an area traditionally regulated by the states."[59] However, notwithstanding traditional state regulations, cases involving the insurance industry often present the opportunity to use federal preemption defenses. In *Reis v. OOIDA Risk Retention Group, Inc.*,[60] the Supreme Court held the federal Liability Risk Retention Act of 1986 ("LRRA")[61] preempted Georgia's direct action statutory provisions.[62]

Reis was a straightforward personal injury case resulting from a motor vehicle accident between a car and a 2001 Freightliner. Plaintiffs filed suit against the driver of the truck, the owner of the truck, and OOIDA Risk Retention Group, Inc. (the "insurer") as insurer of the truck.[63] Importantly, the insurer was a liability risk retention group created pursuant to LRRA.[64]

Reis is another example of a case where there was direct conflict between state and federal regulation.[65] The question before the Court was whether LRRA preempted Georgia's direct action statutory provisions,

O.C.G.A. §§ 40-1-112(c) and 40-2-140(d)(4). The relevant section of LRRA provided that "a risk retention group is exempt from any State law … to the extent that such law … would make unlawful, or regulate, directly or indirectly, the operation of a risk retention group."[66] The Supreme Court found the "clear goal" of LRRA was to "streamline the operations of risk retention groups like the insurer by subjecting them to consistent regulation overseen by their chartering state."[67]

In contrast, the direct action statutes "subject insurers of motor carriers to lawsuits as parties, and thus, exposes them directly to liability and any consequent damages. As such, direct action statutes both directly and indirectly regulate the operations of insurers of motor carriers in Georgia. While this type of regulating may be permissible with respect to traditional insurance carriers, it is not allowed in the case of a foreign risk retention group by the express act of Congress in LRRA…. And, we cannot disregard Congress's command."[68] Accordingly, the Court held LRRA preempted Georgia's direct action statutory provisions and affirmed the grant of summary judgment to the insurer.

CONCLUSION

Defense lawyers who represent clients in the railroad, financial services and insurance industries should always contemplate the use of federal preemption defenses in state actions. The use of federal preemption represents an opportunity to stop the chaos of litigation and conclude the litigation based on an issue of law.

[1] The protection afforded by federal preemption comes at a cost. Industries that benefit the most from preemption are, necessarily, the industries most highly regulated by the federal government.
[2] RES-GA McDonough, LLC v. Taylor English Duma LLP, 302 Ga. 444, 450 (2017).
[3] Zimmerman v. Norfolk Southern Corp., 706 F.3d 170, 174 (3d Cir. 2013).
[4] *RES-GA McDonough*, 302 Ga. at 450.
[5] 49 U.S.C.S. § 20101, *et seq*.
[6] 49 U.S.C.S. § 10101, *et seq*.

[7] Midville River Tract, LLC v. Cent. of Ga. R.R., 339 Ga. App. 540 (2016).
[8] *Id.* at 547.
[9] *Id.*
[10] *Id*. at 548.
[11] *Id*. at 549.
[12] *Id*. at 548 (quoting 49 U.S.C. § 20101 and 49 U.S.C. § 20103(a)).
[13] *Id*. at 548, (quoting 49 U.S.C. § 20106(a)(2)).
[14] *Id*. at 549 (quoting 49 U.S.C. § 20106(b)).
[15] *Id*. at 549 (quoting 49 U.S.C. § 20106(b)(1)).
[16] *Id*. at 549 (quoting 49 C.F.R. § 213.118(b)).
[17] *Id*. at 549.
[18] *Id*. (compare Skrovig v. BNSF R. Co., 855 F.Supp.2d 933, 944 (D. S.D. 2012) (plaintiff's claims were not preempted – defendant railroad failed to produce federally-mandated plan).
[19] *Id.* at 550.
[20] Fox v. Norfolk S. Corp., 342 Ga. App. 38 (2017).
[21] *Id.* at 55-60.
[22] *Id.* at 38.
[23] *Id.* The parties disputed the width of the right-of-way and whether the side track was constructed entirely within it. The Court of Appeals agreed with the railroad on both of these factual issues.
[24] *Id*. at 43.
[25] *Id*. at 44.
[26] *Id*. at 55 (quoting 49 U.S.C.S. § 10501(b)(2)).
[27] *Id.* at 55-56.
[28] *Id.* at 56.
[29] *Id*.
[30] *Id.* at 57.
[31] *Id.*
[32] *Id.* at 58.
[33] *Id.*
[34] *Id.* at 57-58.
[35] Pub. L. 101-73, 103 Stat. 183.
[36] *RES-GA McDonough,* 302 Ga. 444 (2017).
[37] *Id.* at 450, *see supra* note 6.
[38] *Id*. at 444-45.
[39] O.C.G.A. § 18-2-70, *et seq.* UFTA was superseded by Ga. L. 2015, p. 996, effective July 1, 2015, and is now known as the Uniform Voidable Transactions Act ("UVTA").
[40] *RES-GA McDonough*, 302 Ga. App. at 445.
[41] *Id.* at 448.
[42] *Id.*
[43] *Id*. at 441 (interpreting 12 U.S.C. § 1821(d)(2)(A)(i)).
[44] *Id.* at 449-50.
[45] *Id*. at 450 (emphasis in original).
[46] *Id*.
[47] *Id.*
[48] *Id. See also* Arizona v. United States, 567 U.S. 387, 400 (2012) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."); Castillo-Solis v. State, 292 Ga. 755, 762 (2013).
[49] *Id.*
[50] Community & Southern Bank v. Lovell, Ga. 375 (2017).
[51] *Id.* at 379-380.
[52] *Id.* at 375.
[53] *Id*. at 377-380.
[54] *Id*. at 377-378 (citing former O.C.G.A. § 18-2-79(1)).
[55] *Id*. at 378 (citing 12 U.S.C. § 1821(d)(14)(A)(ii)).
[56] *Id*. (citing 12 U.S.C. § 1821(d)(14)(B)).
[57] *Id*. at 379-80.
[58] *Id*. Note the creditor in *Lovell* was a direct assignee of the FDIC. The guaranties-holder in *RES-GA McDonough* was an alleged subsequent downstream assignee.
[59] Reis v. OOIDA Risk Retention Group, Inc., 303 Ga. 659, 660 (2018).
[60] *Id.*
[61] 15 U.S.C.A. § 3901 *et seq.*
[62] *Reis*, 303 Ga. at 660.
[63] *Id.* at 659-60.
[64] *Id*. at 660.
[65] *Id*. at 660-61 ("[A] state law enacted for the purpose of regulating insurance [will] not yield to a conflicting federal law unless the federal law specifically requires it.").
[66] *Id*. at 663 (citing 15 U.S.C. § 3902(a)(1)).
[67] *Id*. at 666.
[68] *Id*.

GEORGIA WORKERS' COMPENSATION SUBROGATION LIENS REVISITED

By
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INTRODUCTION

Effective July 1, 1992, Georgia's General Assembly reinstated a subrogation lien right for payors of workers' compensation benefits.[1] The lien is against recoveries by injured workers from third-party tortfeasors.[2] This statute was amended effective July 1, 1995 to correct problems with the language of the 1992 version of the statute. Most states provide workers' compensation insurers and self-insured employers with subrogation lien rights against an injured worker's recovery from a third-party tortfeasor.[3]

At the time of the reinstitution of the workers' compensation subrogation lien, there was considerable angst among members of the plaintiff and defense civil litigation bar. There was concern that the subrogation lien would disrupt discovery, complicate trials and render cases difficult to settle. The statute also left a significant number of questions unanswered.

One of the authors of this article prepared an article analyzing the subrogation lien statute, with some predictions, which was included in the 1997 GDLA Law Journal. Expressing optimism that the Georgia Workers' Compensation subrogation lien statute would not be as

disruptive as feared, the article was entitled *Workers' Compensation Subrogation Liens are not a Cataclysm Predicted by Nostradamus*. For most tort lawsuits, plaintiff and defense lawyers have found the workers' compensation subrogation lien statute to be something of a paper tiger. The subrogation lien is not a consideration in the resolution of most civil suits at this time.

The 1997 Journal article predicted that that very little change should be expected in the provisions of the statute. In fact, the statute has not been amended since the 1995 revisions. It was also pointed out in the earlier article that one commentator estimated the statute would produce no more than a 1% to 2% recovery of benefits paid.[4] While no statistics have been seen attesting the accuracy of that prediction, the experiences of most practitioners suggest that the recovery rate by employers and insurers is low. Some insurers appear to have abandoned efforts to enforce their workers' compensation subrogation liens in civil suits because the effort and expense are not worth the meager recovery results.

Like a bad rash, however, the assertion of a workers' compensation lien appears from time to time. When that occurs, the lawyers for the plaintiff and defendant find there is a lawsuit within the lawsuit as to the subrogation lien claimant. This article will review questions that have been resolved since the effective date of the 1995 version of the subrogation lien statute and identify some that have yet to be resolved.

SYNOPSIS OF THE STATUTE

The Georgia Workers' Compensation subrogation lien statute is, generally speaking, concise and straight-forward. The provisions of O.C.G.A. § 34-9-11.1 can be summarized as follows.

- *An employee injured or killed in a work-related incident for which workers' compensation benefits are paid can sue a wrongdoer who*

caused the injury unless that wrongdoer has immunity from suit under the Workers' Compensation Act.[5]

This portion of the statute adds nothing to the law but does make clear the intent of the legislature to leave the right of action in the employee and preserve tort immunity.

- *Where the employer or insurer has paid, in whole or in part, workers' compensation benefits which it is obligated to pay, the employer or insurer (the payor) has a subrogation lien against the recovery of the employee from the tortfeasor.*[6]

To be entitled to the subrogation, the employer or insurer must have actually paid specified benefits. The right of the payor is a lien right only. The lien is against sums recovered by settlement or payment of a verdict or judgment. The payor's right is not a transfer of the substantive rights in the cause of action from the employee to the employer or insurer under the present version of the statute.

- *The amount of the recovery by the payor is limited to the amount of disability benefits (temporary total, temporary partial, permanent partial), death benefits, and medical expenses paid pursuant to the Workers' Compensation Act.*[7] Some are asserting subrogation claims for rehabilitation benefits, statutory penalties and assessed attorney's fees paid under the Workers' Compensation Act. Items not expressly provided for in the statute are generally not recoverable.[8] When asserting a subrogation claim or when defending against the assertion of one, care should be taken to determine what elements constitute

the amounts sought and which are recoverable.

- *The payor may intervene in any action to protect and enforce the lien*.[9] The role of the intervenor has been restricted by appellate decisions as will be considered later.
- *The statute restricts recovery to benefits paid.*[10] Other states provide for recovery of benefits paid and for which the payor has become obligated (future benefits).[11] The effect of the Georgia statute is to create a situation where a catastrophic workers' compensation claim may produce significant financial obligations on the part of the compensation carrier which a quick settlement by the employee with the tortfeasor would render incapable of recovery. This has also been addressed by the appellate court.
- *The employer or insurer paying benefits may recover under its subrogation lien only if the injured employee has been fully and completely compensated as to economic and non-economic losses resulting from the injury, taking into consideration both the workers' compensation benefits paid and the recovery from the third party.*[12] This language is an obvious compromise by members of the General Assembly. It is the source of considerable disagreement. It has been the source of considerable litigation.
- *Suit must be filed within the applicable statute of limitations.*[13] Even this simple statement has been the subject of dispute.
- *The employee has the sole right to bring suit during the first year*

following injury.[14] No notice to the payor is necessary during this time.

- *If the injured employee fails to "assert" the claim within one year after the date of the injury, then the employer or insurer may assert the employee's cause of action either in its own name or in the name of the employee.*[15] Assertion of the claim appears to mean the initiation of a civil action.
- *If the employer or insurer asserts the claim, the employer or insurer must immediately notify the employee of their assertion of the claim and the employee then has the right to intervene.*[16] There are no specifics as to notice. There is no case law indicating what can be done if notice is impossible. If notice is impossible, could this impossibility create a problem with the pursuit of the subrogation rights? Also not mentioned in this section is the limiting language found in section (b) of the statute relating to the role of the insurer or employer.
- *The employee may also assert the claim subsequent to one year from the date of injury but prior to the running of the statute of limitations.*[17] If the claim is asserted during this period, the employee must immediately notify the employer or insurer of the assertion of the claim and the employer or insurer has the right to intervene. Again, limiting language is not present in this section of the statute. It seems likely that it would be read into the statute here to make it consistent with section (b). An employee giving notice does not appear to be a problem here. The payor had to meet the informational filing requirements of the State Board of Workers' Compensation. No

appellate decisions have addressed this issue.

- *If the payor recovers more than the lien amount, the excess recovery is to be paid to the employee.*[18] This apparently would be the excess after the reduction in the recovery amount by the amount of the attorney's fees contemplated by the statute.
- *In the event of recovery from a third party, the attorney representing the injured worker is entitled to a reasonable fee.*[19] It is presumed that this would be paid from the recovery, although the statute does not say this.
- *If the employer or insurer engages an attorney in effecting recovery, a court of competent jurisdiction may apportion the attorney's fees between the attorneys representing the injured employee and the insurer.*[20]
- *The statute provides expressly that O.C.G.A. §§ 15-19-14 and 15 regarding liens for attorney fees apply to the fees contemplated by this statute.*[21]

Questions Resolved

Many of the questions raised by the Workers' Compensation subrogation lien statute have been resolved. Questions resolved include the following, which are considered *seriatim.*

- **No Waiver of Rights.** A payor that does not intervene in the employee's civil suit has not waived their subrogation rights.[22] The payor can assert the subrogation lien rights after payment of a settlement or after a verdict amount is paid where the payor chose not to intervene. The right of intervention is not mandatory.
- In *Canal Ins. Co. v Liberty Mutual Ins. Co*. the payor did not intervene "or otherwise seek to protect in court its derivative subrogation right…."[23] The case was settled for a lump sum

amount that was less than the special damages, with the settlement documents characterizing the settlement as being only for non-economic damages. The suit was dismissed. The Court of Appeals noted that Canal Insurance, "by its inaction, made it impossible to prove" that the injured employee had been fully compensated. The summary judgment against the payor on its lien claim was affirmed. The court also noted that "[a] primary legislative concern was that the injured employee first be made whole."[24] This unanimous full court opinion has provided trial judges, who are not inclined to enforce subrogation liens, a solid basis for finding the payors' lien claims unenforceable.

- **No Right to Jury Trial.** One of the early concerns was how could a civil suit be tried, which included issues relating to workers' compensation insurance payments, without running afoul of the laws of evidence prohibiting evidence of payment of insurance benefits. This matter was resolved by bifurcation of the trial and having the issue of enforceability of the subrogation lien decided by the judge and not by the jury.[25] There is no right to a jury trial on the subrogation lien issues.[26] The court can set limitation of participation by the payor in discovery and at trial.
- **The Date on Which the Lien Amount Is Fixed**. The amount of the lien claim is determined as of the date of settlement of the civil or the date of the verdict.[27] Workers' compensation benefits may still be paid following these dates but none of these benefits creates a lien. The lien is against the recovery. It can only be asserted for workers' compensation

benefits paid up to the date of the recovery.

- **Statute of Limitations for Payors**. Because the payor of the workers' compensation benefit may assert the lien right by initiating a civil suit against the tortfeasor after the first year following the incident, the question was raised as to what statute of limitations would apply. One payor asserted the 20-year statute of limitations provided for in O.C.G.A. § 9-3-22 should apply.[28] The court rejected this argument. The statute of limitation for the payor is the same as the same as the statute of limitations for the injured employee.[29]
- **No Comparative Negligence.** There was some question as to whether a subrogation lien might be reduced by an amount equal to the reduction in the plaintiff's recovery when there was comparative fault. If the plaintiff was found to be 40% at fault, could the subrogation lien be reduced by 40%? The answer is no.[30] As the old Frank Sinatra balled goes, it is "all or nothing at all." Unlike other states, see for example South Carolina, neither the court nor the State Board of Workers' Compensation has the authority to adjust the amount of the subrogation lien.[31] It is either fully recoverable or not recoverable at all. This has been a significant factor in hindering effective assertion of workers' compensation subrogation liens. Comparative negligence cannot be considered by the trier of fact when determining the enforceability of a workers' compensation subrogation lien.[32]
- **No Part of Non-Economic Damages Is Subject to the Workers' Compensation Lien**. No amounts awarded for pain and suffering, loss

of enjoyment of life, or any other non-economic damages are subject to the workers' compensation lien.[33] The Workers' Compensation Act does not provide for payment for non-economic damages.[34] Thus no lien can be asserted against amounts recovered for non-economic damages. Similarly, if the courts are unable to determine how much of the settlement or verdict is allocated between economic and non-economic damages, the workers' compensation lien is rendered unenforceable.[35]

- **Payor's Right to a Hearing**. Even if the payor does not intervene in the tort suit, and the tort suit is settled without the participation of the payor, the payor still has a right to a hearing on the enforceability of the lien.[36]
- **Burden of Proof**. The burden of proof as to the enforceability of the lien is on the payor.[37] It must provide the preponderance of the evidence that the employee has been fully compensated, taking into consideration the tort recovery and the workers' compensation payments, in order to enforce the lien.
- **Settlement of the Tort Suit Does Not Establish Full Compensation**. The fact that the employee settles the tort suit is not sufficient to conclusively establish full compensation.[38]
- **If the Verdict Specifies an Amount for Medical Expenses, the Lien May Be Enforced to the Extent of Medical Payments**. Where a special verdict form is used, and the verdict for medical expenses is separate from other damages, the lien amount that pertains to medical expenses may be enforceable against the recovery of the medical expenses even though the rest of the lien is not enforceable.[39]

- **If the Employee and the Employer Each File a Lawsuit, the Second Filed Suit Is Subject to Dismissal**. During the second year after the date of incident, the employee and the employer can both file a lawsuit to enforce the lien. They may each file a suit and be unaware of the other suit at the time of filing. The parties to a suit in which the payor seeks enforcement of a workers' compensation subrogation lien should check to be sure no similar suit was filed previously. The second filed suit is subject to dismissal, even after the first suit is dismissed.[40]
- **No Lien Against Payments by the Uninsured Motorist Insurer**. The subrogation lien statute does not provide a lien against recovery by the injured worker from his or her uninsured motorist insurer.[41]
- **No Lien Recovery if Pre-Accident Wages Exceed the Workers' Compensation Payments.** The primary basis for calculating workers' compensation temporary total disability benefits is by using 2/3 of the average weekly wage of the injured employee, up to a statutory maximum benefit. By definition, the workers' compensation benefit does not fully compensate the injured employee, which is the test for enforceability of the subrogation lien.[42]
- **The Subrogation Lien Is Not Applicable to Workers' Compensation Benefits Paid Under the Laws of Another State.** In many work-related accidental injuries more than one state may simultaneously have jurisdiction. Benefits may be paid under the laws of more than one state, as long the total benefits paid do

not exceed the largest amount payable in any state with jurisdiction. Where the employee received workers' compensation benefits under the laws of another state, the payor cannot recover under the Georgia subrogation lien statute.[43]

- **The Attorney for the Payor Is Not Entitled to Any Portion of the Attorneys' Fee Unless the Lien Is Enforceable.** The attorney for the payor asserting a subrogation lien is only entitled to a portion of the attorney's fees paid out of the recovery if the lien is found to be enforceable.[44] This may seem self-evident, but before 2001 attorneys for the payors asserted they had a right to a portion of the attorney's fees paid at the time of settlement.
- **The Tortfeasor Must Have Actual Knowledge of the Comp Claim or Lien Claim.** For a payor to enforce a workers' compensation subrogation lien against a tortfeasor, the tortfeasor must have actual knowledge that the injured party received workers' compensation benefits or the payor is asserting a lien.[45] Constructive knowledge is not sufficient.

Some Questions Remaining to be Answered

- **Can the Payor Prevent the Judge from Knowing the Amounts of the Lien and Settlement Amount Until the Issue of Full Compensation Is Decided by that Judge?** There is concern among counsel that the judge deciding whether the employee has been fully compensated, thus determining whether the lien is enforceable, would be subject to anchor bias if informed of the amount of the lien and the settlement amount before deciding if the employee has been fully compensated. Judges have been reluctant to enforce the

subrogation lien, if not openly hostile to enforcement. It is a difficult argument to ask the court to take money out of the pocket of an injured person (often a voter in the county where the judge presides) and turn to money over to a profitable insurance company. To attempt to address this problem, some counsel for payors are attempting to get the judge to decide on what amount of recovery establishes that the employee is "fully compensated" without being informed of the lien amount claimed or the amount of the settlement.

- **Where the Payor Brings the Lawsuit, is the Defendant Entitled to Obtain Medical Records of the Employee Without Notice to the Employee?** The Payor can bring the lawsuit against the tortfeasor in year two, following the date of the incident. It need not include the injured employee as a party to the suit. When the defendant seeks production of medical records from the health care provider, in order to not run afoul of HIPAA must the defendant serve the request to produce on the injured employee? What if the defendant cannot locate the injured employee? It is likely that the provisions of 45 CFR §164.512(l) protect the payor and medical provider from a HIPAA violation, but providers may still be reluctant to provide privileged records without the patient's knowledge or consent.

CONCLUSION

Over twenty-five years have passed since the subrogation lien was reintroduced in the Georgia Workers' Compensation Act. Since that time the difficulties of enforcing a lien claim have been greater than the difficulties defending against the assertion of

a lien claim. The subrogation lien has not been a cataclysm for civil litigation.

[1] O.C.G.A. § 34-9-11.1.
[2] O.C.G.A. § 34-9-11.1(b).
[3] Larson, *The Law of Workers' Compensation*, §74.00 *et seq*.
[4] G. Mark Cole, *Workers' Compensation: Revise Extensively the Provisions Concerning Benefits and Coverage, Employer Ratings by Insurers, The Award Process, and Other Miscellaneous Aspects of the System*, 9 Ga. St. U. L. Rev. (1992).
[5] O.C.G.A. § 34-9-11.1(a).
[6] O.C.G.A. § 34-9-11.1(b).
[7] *Id.*
[8] Wausau Ins. Co. v. McLeroy, 266 Ga. 794, 796 (1996).
[9] O.C.G.A. § 34-9-11.1(b) and (c); O.C.G.A. § 9-11-24(a).
[10] O.C.G.A. § 34-9-11.1(b).
[11] *See, e.g.,* S.C. Code Ann. § 42-1-560(b).
[12] O.C.G.A. §34-9-11.1(b).
[13] O.C.G.A. § 34-9-11.1(c).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] O.C.G.A. § 34-9-11.1(d).
[20] *Id.*
[21] *Id.*
[22] Rowland v. Dept. of Admin. Services, 219 Ga. App. 923 (1996); City of Warner Robins v. Bolger, 225 Ga. App. 601(2002).
[23] Canal Ins. Co. v Liberty Mutual Ins. Co., 256 Ga. App. 866 (2002).
[24] *Id.* at 871-72 (quoting Bartow Cty Bd. of Educ. v. Ray, 229 Ga. App. 333 (1997))
[25] *Id.*; *but see* Endsley v. Geotechnical & Envtl Consultants, Inc., 339 Ga. App. 663 (2016) (calling into question the need for bifurcation).
[26] Liberty Mut. Ins. Co. v. Johnson, 244 Ga. App. 338 (2000).
[27] Ga. Star Plumbing v. Bowen, 225 Ga. App. 379 (1997).
[28] Newsome v. Dep't of Admin. Servs., 241 Ga. App. 357, 358 (1999).
[29] *Id.*
[30] *Canal*, 256 Ga. App. at 873.
[31] S.C. Code Ann. § 42-1-560(f).
[32] Homebuilders Ass'n v. Morris, 238 Ga. App. 194 (1999).
[33] O.C.G.A. § 34-9-11. Benefits expressly provided for by the Georgia Workers' Compensation Act are the exclusive remedies for injuries arising out of and in the course of employment.
[34] *Id.*
[35] *Canal*, 256 Ga. App. at 873.
[36] SunTrust Bank v. Travelers Prop. Cas. Co. of Am., 321 Ga. App. 538, 545 (2013).
[37] City of Warner Robins v. Bolger, 225 Ga. App. 601 (2002).
[38] *Id.*
[39] N. Bros. Co. v. Thomas, 236 Ga. App. 839 (1999).
[40] Astin v. Callahan, 222 Ga. App. 226 (1996).
[41] Stewart v. Auto Owners Ins. Co., 230 Ga. App. 265 (1998).
[42] Hammond v. Lee, 244 Ga. App. 865 (2000); O.C.G.A. §34-9-261.
[43] Liberty Mut. Ins. Co. v. Roger, 297 Ga. App. 612 (2009).
[44] Simpson v. Southwire Co., 249 Ga. App. 406 (2001).
[45] Anthem Cas. Ins. Co. v. Murray, 246 Ga. App. 778, 782 (2000).

IMPERFECT REALITY: A SURVEY OF UM LAW IN GEORGIA

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For some practitioners, the ins-and-outs of the Georgia Uninsured Motorist Act ("the Act") and its surrounding case law can be daunting. Once a lawsuit has been filed, an uninsured motorist carrier must carefully consider its litigation strategy so as to effectively preserve any applicable coverage defenses as well as its rights as an unnamed defendant pursuant to the Act. This article seeks to isolate areas in which the uninsured motorist carrier is treated differently from the named defendant, identify recent appellate court decisions which may affect an uninsured motorist carrier's discovery strategy, and highlight currently-undetermined areas of law that may impact the uninsured motorist carrier's litigation strategy.

I. Procedural Considerations and Affirmative Defenses

a. Service and Statute of Limitations:

O.C.G.A. § 33-11-7 allows an uninsured motorist carrier to assert any service-based defense otherwise available to the named defendant.[1] Furthermore, proper service on the tortfeasor, i.e. the named defendant, is a condition precedent for recovery against the uninsured motorist carrier[2] and, pursuant to Georgia law, the duty to investigate the whereabouts of and to perfect service on the named defendant falls

squarely on any plaintiff seeking to recover from his or her uninsured motorist carrier.[3] However, a plaintiff seeking to preserve his or her claim against the uninsured motorist carrier may be able to avoid dismissal of his or her action due to insufficient service on the named defendant by obtaining a "nominal judgment" against the named defendant through service by publication[4] The "nominal judgment" gives the trial court sufficient jurisdiction over the named defendant to allow the lawsuit to proceed; however, it does not fully absolve the plaintiff of his or her duty to later serve the named defendant.[5] If the plaintiff still fails to find and serve the named defendant, then the uninsured motorist carrier still has viable grounds for a dismissal of the action despite the "nominal judgment" levied against the named defendant.[6]

Similarly, an uninsured motorist carrier may also assert any statute of limitations defense available to the named defendant.[7] Typically, this is the two (2) year personal injury statute of limitations[8] as well as any applicable tolling period for any "criminal acts" associated with the motor vehicle accident.[9] O.C.G.A. § 33-7-11 also requires that a plaintiff serve the uninsured motorist carrier "within either the remainder of the time allowed for valid service on the defendant or 90 days after the day on which the party seeking relief discovered, or in the exercise of due diligence should have discovered, that the vehicle was uninsured or underinsured, whichever is greater."[10] However, Georgia appellate courts have held that the purpose of serving the uninsured motorist carrier is "only to give the [uninsured motorist carrier] 'notice of the existence of a lawsuit in which it ultimately may be held financially responsible'" rather than to establish personal jurisdiction over the uninsured motorist carrier and make it a full-fledged party.[11] Accordingly, O.C.G.A. § 33-7-11 allows a plaintiff to add an

uninsured motorist carrier well after the start of litigation.[12] Furthermore, a plaintiff is allowed to serve one or more additional uninsured motorist carriers in a renewal action even if the carriers were not parties to the initial proceeding.[13] Georgia courts reason that, because the uninsured motorist carrier is not a party, it should not be afforded rights greater than a named defendant.[14] Notwithstanding these other cases, at least one Georgia Court of Appeals panel has affirmed the dismissal of the uninsured motorist carrier because a plaintiff failed to serve his carrier within the time limit provided under O.C.G.A. § 33-7-11.[15]

Based on the foregoing, an uninsured motorist carrier is unlikely to prevail by asserting O.C.G.A. § 33-7-11 as a statute of limitations defense.[16] It appears as though O.C.G.A. § 33-7-11's statute of limitations defense would be effective in the unlikely event that the plaintiff does not serve the uninsured motorist carrier within the time allowed and fails to dismiss and refile due to either inadvertence or an inability to dismiss under Georgia's renewal statute.

b. Other Affirmative Defenses:

Typically, an uninsured motorist carrier has standing to assert any affirmative defense available to the named defendant.[17] Unsurprisingly, there several exceptions to this rule if obtaining judgment against the named defendant is impossible due to circumstances outside the plaintiff's control. For instance, Georgia courts have refused to allow an uninsured motorist carrier to avoid suit if the named defendant previously discharged the liability in bankruptcy[18] or if the defendant is entitled to sovereign and/or official immunity.[19]

c. Venue

The Georgia Constitution provides that venue generally lies in the county where the defendant resides.[20] In the event of multiple defendants residing in different counties, venue will lie in any county in

which any defendant may reside.[21] In cases against an unknown owner/operator, "the residence of such 'John Doe' defendant shall be presumed to be in the county in which the accident causing the injury or damages occurred."[22] Therefore, when bringing an action against a John Doe defendant, a plaintiff may elect to file either in the plaintiff's county of residence or in the county where the accident giving rise to the litigation occurred.

The Supreme Court of Georgia recently affirmed these venue provisions of the Uninsured Motorist Act in actions brought against more than one defendant when at least one defendant is a known Georgia resident and one is a true John Doe defendant.[23] The *McMann* decision establishes that a plaintiff may elect to bring suit in the defendant's county of residence, the plaintiff's own county of residence, or the county in which the accident occurred. It is worth mentioning, however, that the McMann decision explicitly warns plaintiffs that they cannot attempt to forum shop by adding a nominal "John Doe" defendant in order to file suit in a more favorable venue.

While Georgia's Uninsured Motorist Act provides clear guidance regarding actions involving a John Doe defendant, it fails to address the issue of venue in actions against the uninsured motorist carrier directly. Nonetheless, Georgia Courts have held that the provisions of O.C.G.A. § 33-4-1, which governs actions against insurance companies in general, can be extended to apply to uninsured motorist cases.[24] Pursuant to these provisions, there are several possible venues for actions against insurance companies, including "in any county… where the person entitled to the proceeds of an insurance contract upon which action is brought maintains his legal residence." Thus, under current interpretations,[25] a plaintiff seeking to recover from his uninsured motorist carrier may file suit in the county

where he resides, even if the uninsured motorist carrier maintain neither an office nor an agent in the plaintiff's county of residence.

As discussed, the issue of venue in lawsuits arising from motor vehicle accidents has been pretty well established, save from one notable exception: the proper venue for lawsuits in which a plaintiff seeks to recover uninsured motorist benefits by serving his own insurance carrier as an unnamed defendant. Georgia Courts have been surprisingly silent on the issue, leaving the representation of uninsured motorist carriers clouded with uncertainty. Extrapolating on the rule governing actions brought against uninsured motorist carriers directly, one could presume that a plaintiff seeking to recover against his uninsured motorist carrier would be able to opt between filing in the county of residence of the known tortfeasor or in the plaintiff's own county of residence. However, filing in the latter would essentially divest the named defendant of his constitutional right to be sued in his own county. Therefore, defense counsel faced with a litigant who seeks to take advantage of this apparent loophole may want to consider a venue-based constitutional challenge as part of their litigation strategy.

II. The uninsured motorist carrier's ability to "take an action" under O.C.G.A. § 33-7-11.

Before the State Legislature amended [current O.C.G.A. § 33-7-11] in 1967, "an uninsured motorist insurer had no right to file pleadings or defenses for itself, and if it filed defenses for the defendant, it was precluded from denying coverage under the policy." [26] The Georgia Legislature amended the uninsured motorist statute in order to give uninsured motorist carriers greater flexibility in defending cases by granting it "the right at its election to participate indirectly in the proceedings, without becoming a named party, by filing pleadings or taking other action allowable by law, in the name of the owner or operator, or both."[27]

An uninsured motorist carrier currently has "the right at its election to participate indirectly in the proceedings, without becoming a named party, by filing pleadings or taking other action allowable by law, in the name of the owner or operator, or both."[28] If the uninsured motorist carrier elects to proceed in the name of an alleged tortfeasor, "its actions are governed by the rules of practice and procedure applicable to that party."[29]

Following the 1967 amendment, the Georgia Court of Appeals issued a flurry of opinions attempting to divine the State Legislature's intent in amending O.C.G.A. § 33-7-11. First, when an uninsured motorist carrier elects to proceed and defend in its own name, it is essentially opting to become a named party.[30] As a result, the rules and provisions of the Civil Practice Act apply to uninsured motorist carriers and to the named defendant equally.[31] As long as the uninsured motorist carrier files its answer within the time provided by law, it is entitled to take any and all actions permissible by law to effectuate an adequate defense. In fact, Georgia law firmly establishes that default by the named defendant cannot be imputed to an uninsured motorist carrier defending under its own name, as doing so would harm the uninsured motorist carrier's statutory right to appear at trial under its own name.[32]

Additionally, an underinsured motorist carrier may also file an answer "on behalf of" the named defendant.[33] Insofar this answer is filed within the time provided by law, the answer will be deemed timely to the same extent as if the answer had been filed by the actual named defendant.[34] However, under current Georgia law, an underinsured motorist carrier does not have the right to control litigation contrary to the wishes of the named defendant.[35] As a result, a named defendant's confession of judgment filed by counsel is also binding against the uninsured motorist carrier.[36] However, in

instances where the uninsured motorist carrier elects to exercise its statutory right to participate in litigation in the name of the named defendant(s), it becomes bound by the rules of practice and procedure applicable to that party.[37] Consequently, Georgia law dictates that an uninsured motorist carrier that elects to act in the name of a named defendant who is already in default is only able to remove default or defend the litigation to the extent allowed by law for any party in default.[38] With respect to cases other than those involving default, Georgia appellate courts have not elaborated on the full extent of an uninsured motorist carrier's ability to "file pleadings" and "take any action authorized by law" that would otherwise be available to the named defendant(s)." This is necessary because there are several situations in which the underinsured motorist carrier is the only defending party with an actual financial interest in the case. For instance, cases in which the named defendant is wholly uninsured, unrepresented by counsel, and is "judgment proof," or cases in which the named defendant has secured a limited release from the plaintiff. In these cases, any fear that the underinsured motorist carrier may "hijack" the litigation should not apply. Moreover, the underinsured motorist carrier's use of the tortfeasor's name does not "deprive [the named defendant] of [his or her] property rights in the use of [his or her] name without due process."[39] As a result, and absent any contrary case law, the underinsured motorist carrier should be able to take the position that it can take "any action authorized by law" including admitting fault and/or liability as though it were the named defendant.

II. Discovery for Coverage-Based Defenses:

a. Excuse for failing to comply with policy's notice provision:

Prior to the Georgia Court of Appeal's decision in *Progressive Mountain Insurance Company v. Bishop*,[40] a defense

based on an insured's failure to comply with his or her policy's notice provision was largely an analysis of the provision's plain language, coupled with the length of the delay in providing notice.[41] As a result, the defense did not require in-depth discovery.

With *Bishop*, the Court of Appeals added another wrinkle to the defense whereby the insured can explain away his or her delay if he or she "did not realize the extent of his injuries and thought the other driver's insurance would be sufficient to cover them."[42] In support of this excuse, an insured need only provide his or her own affidavit stating that he or she did not subjectively anticipate[43] or understand[44] that the full extent of the injuries would implicate the insured's uninsured motorist coverage. In fact, the insured does not need actual knowledge of the policy's notice provision in order to avail himself of this defense.[45] In 2018, the Georgia Court of Appeals re-affirmed its decision in *Bishop* holding that, although the insured failed to provide adequate notice as a matter of law, a question of fact remained as to whether the insured could excuse this delay due to the insured's ignorance regarding the extent of her injuries.[46]

At the same time, the Georgia Court of Appeals has refused to excuse an insured's failure to comply with a policy's notice provision when the sole reason for delay was the insured's attorney's erroneous belief that uninsured motorist coverage would not apply to the subject motor vehicle collision.[47] The Court held that an insured's beliefs or misunderstandings regarding coverage did not relieve the insured of his or her contractual duties and that "enforcement of the notice requirement of the policy was not dependent on the attorney's beliefs, incorrect or otherwise, regarding coverage."[48] Similarly, an insured is not excused from complying with a notice provision if his or her attorney incorrectly assumed that the

underlying liability limits would sufficiently cover the insured's alleged injuries.[49]

In order to avoid defeat of its late notice defense due to a plaintiff's self-serving affidavit, the uninsured motorist carrier should, at minimum, seek to secure plaintiff's deposition to determine the extent of plaintiff's alleged injuries and excuse for failing to comply with the policy's notice provision before filing any dispositive motions. When taking the plaintiff's deposition, the uninsured motorist carrier should secure admissions that the insured did not read his or her policy and was unaware of any notice provisions. Moreover, the underinsured motorist carrier should frame the issue as the insured's misplaced reliance on his or her attorney's expertise rather than his or her own inability to discover the true extent of the claimed injuries. However, if all else fails, the notice provision may still place the plaintiff in a "catch-22" in which the insured must either (a) downplay the extent of the injuries in order to justify the delay in providing notice of the motor vehicle collision to his or her uninsured motorist carrier; or (b) overly-exaggerate his pain and suffering at the outset, thereby undercutting any notice defenses the insured may have had.

b. <u>Selection and Rejection of Uninsured/Underinsured Motorist Coverage</u>:

An uninsured motorist carrier seeking to take advantage of an insured's affirmative selection of minimum uninsured motorist coverage limits must first consider when the policy was initially issued. Prior to 2001, uninsured motorist coverage defaulted to the statutory minimum limits rather than to the policy's liability limits.[50] In fact, Georgia's Uninsured Motorist Act specifically provides a safe-harbor provision that does not require the uninsured motorist carrier to increase a policy's uninsured motorist coverage limits to match the policy's liability limits[51] or to

notify the insured about the new statutory minimum.[52]

If the applicable policy was issued after July 1, 2000, the uninsured motorist carrier must demonstrate an insured's "affirmative selection" of uninsured motorist coverage limits that are lower than the liability limits.[53] However, the selection need not be in writing.[54] Since the selection must be affirmative, the policy's declarations page is insufficient to demonstrate the insured's selection of uninsured motorist coverage limits.[55] Typically, this is done by the production of a form, signed by the insured, in which the insured affirmatively selected lower uninsured motorist coverage limits. The uninsured motorist carrier must also be able to demonstrate that the policy renewed - as opposed to replaced older policies - following the insured's affirmative selection of lower limits. A change in policy numbers[56], addition or subtraction of vehicles insured under the policy[57], an increase in premiums[58], the subtraction of coverages other than uninsured motorist coverage[59], a change in the insuring company[60], or the use of the term "replaced" in the declarations page are all insufficient to demonstrate that the insurer issued a new, replacement policy.[61]

However, an insurer's attempt to attach additional conditions to the selection of uninsured motorist coverage will void the insured's affirmative selection and prohibit the policy from renewing with lower uninsured motorist coverage limits.[62] Also, if the insured attempts to add uninsured motorist coverage back to his or her policy after previously rejecting uninsured motorist coverage in writing, an insurer cannot simply provide minimum uninsured motorist coverage limits but must explain all available uninsured motorist coverage options to its insured.[63]

Finally, effective July 1, 2018, the Georgia Legislature amended the policy

renewal statute applicable to motor vehicle policies.[64] The amendment created new rules for policies seeking to reduce coverage. The amendment defines a "reduction in coverage" as "any change made by the insurer which results in a removal of coverage, diminution in scope or less coverage, or the addition of an exclusion."[65] To be effective, any reduction in coverage must be mailed to the insured or his representative at least thirty (30) days prior to the effective date of the reduction.[66] This is a departure from the previous version of O.C.G.A. § 33-24-45 which defined renewal as any policy that contained coverage equal to or greater than the previous policy period.[67]

Based on the foregoing, it is important to determine whether the insured is alleging the uninsured motorist carrier misled him about the availability of uninsured motorist coverage and whether he is contesting that the policy was a renewal policy. Moreover, the insurer should determine whether the insured is going to contend that he attempted to raise the uninsured motorist coverage limits but the increase never went into effect. If so, then such extrinsic evidence is inadmissible to alter the unambiguous policy terms.[68] Likewise, the insured has a duty to read his policy and determine whether the coverage change went into effect.[69]

IV. Conclusion:

While it may seem as though the ever-evolving case law surrounding the Act moves solely in the direction of restricting the uninsured motorist carrier's ability to properly defend litigation, recent developments in Georgia law indicate that Courts are willing to expand the rights of the uninsured motorist carrier given the right test case. While this article falls woefully short of providing a comprehensive analysis of all Georgia decisions pertaining to the rights of uninsured motorist carriers, the areas discussed herein should spark the interest of

any practitioner seeking to frame his or her litigation strategy so as to better preserve the rights of the uninsured motorist carrier

[1] *See e.g,* Brown v. State Farm Mut. Auto. Ins. Co., 529 S.E.2d 439 (Ga. Ct. App. 2000).
[2] Swanson v. State Farm Mut. Auto. Ins. Co., 530 S.E.2d 516 (Ga. Ct. App. 2000).
[3] Bailey v. Lawrence, 508 S.E.2d 450 (Ga. Ct. App. 1998), *overruled by* Ragan v. Mallow, 744 S.E.2d 337 (2012).
[4] Luca v. State Farm Mut. Auto. Ins. Co., 637 S.E.2d 86 (Ga. Ct. App. 2006).
[5] O.C.G.A. § 33-7-11(e).
[6] *Id.*
[7] Allstate Ins. Co. v. Baldwin, 536 S.E.2d 558 (Ga. Ct. App. 2000).
[8] O.C.G.A. § 9-3-33.
[9] O.C.G.A. § 9-3-99.
[10] O.C.G.A. § 33-7-11(d).
[11] Malave v. Allstate Ins. Co., 541 S.E.2d 420 (Ga. Ct. App. 2000) (citing Stout v. Cincinnati Ins. Co., 502 S.E.2d 226 (Ga. Ct. App. 1998)).
[12] Hayward v. Retention Alternatives Ltd., 661 S.E.2d 862, 864 (Ga. Ct. App. 2008), *aff'd,* Retention Alternatives, Ltd. v. Hayward 678 S.E.2d 877 (Ga. 2009); *see also* Malave v. Allstate Ins. Co., 541 S.E.2d 420 (Ga. Ct. App. 2000).
[13] *Id.*
[14] *Id*.
[15] Calhoun v. Gov't Employees Ins. Co., Inc., 675 S.E.2d 523 (Ga. Ct. App. 2009).
[16] *See e.g.*, Hayward v. Retention Alternatives Ltd., 661 S.E.2d 862 (Ga. Ct. App. 2008).
[17] Cohen v. Allstate Ins. Co., 626 S.E.2d 628 (Ga. Ct. App. 2006).
[18] Wilkinson v. Vigilant Ins. Co., 224 S.E.2d 167 (Ga. Ct. App. 1976).
[19] Ward v. Allstate Ins. Co., 595 S.E.2d 97 (Ga. Ct. App. 2004).
[20] Ga. Const. of 1983, Art. VI, Sec. II, Par. VI.
[21] *Id*.
[22] O.C.G.A. § 33-7-11(d)(1).
[23] Carpenter v. McMann et al., 817 S.E.2d 686 (Ga. Ct. App. 2018).
[24] *See, e.g*., Mercer v. Doe, 216 S.E.2d 339 (Ga. Ct. App. 1975).
[25] Morton v. Fuller, 592 S.E.2d 460 (Ga. Ct. App. 2003).
[26] Londeau v. Davis, 220 S.E.2d 43 (Ga. Ct. App. 1975).
[27] O.C.G.A. § 33-7-11(d).
[28] *Id*.
[29] Planet Ins. C. v. Woods, 182 S.E.2d 520 (Ga. Ct. App. 1971).
[30] Glover v. Davenport, 210 S.E.2d 370 (Ga. Ct. App. 1974).
[31] Kelly v. Harris*,* 766 S.E.2d 146 (Ga. Ct. App. 2014).
[32] *Id*.
[33] Lewis v. Waller, 637 S.E.2d 505, 508 (Ga. Ct. App. 2006).
[34] *Id.*
[35] Londeau v. Davis, 220 S.E.2d 43 (Ga. Ct. App. 1975).
[36] *Id.*
[37] *Lewis*, 637 S.E.2d at 508.
[38] Home Indem. Co. v. Thomas*,* 178 S.E.2d 297 (Ga. Ct. App. 1970).
[39] Jones v. Southern Home. Ins. Co*.,* 217 S.E.2d 620 (Ga. Ct. App. 1975).
[40] Progressive Mt. Ins. Co. v. Bishop, 790 S.E.2d 91 (Ga. Ct. App. 2016).
[41] *See e.g.*, Lankford v. State Farm Mut. Auto. Ins*. Co.*, 703 S.E.2d 436 (Ga. Ct. App. 2011).
[42] *Bishop*, 790 S.E.2d at 95.
[43] *Id.* at 91.
[44] Bramley v. Nationwide Affinity Ins.Co. of Am., 814 S.E.2d 770 (Ga. Ct. App. 2018) (physical precedent only).
[45] *Id.*
[46] *Id*.
[47] Silva v. Liberty Mut. Fire Ins. Co., 808 S.E.2d 886 (Ga. Ct. App. 2017).
[48] Geico Indem. Co. v. Smith, 788 S.E.2d 150 (Ga. Ct. App. 2016) (physical precedent only).
[49] *Silva*, 808 S.E.2d at 866.
[50] Jones v. Ga. Farm Bureau Mut. Ins. Co., 546 S.E.2d 791 (Ga. Ct. App. 2001).
[51] O.C.G.A. § 33-77-11(a)(1)(3).
[52] Tice v. American Employers' Ins. Co., 619 S.E.2d 797 (Ga. Ct. App. 2005); McKinnon v. Progressive Bayside Ins. Co., 629 S.E.2d 100 (Ga. Ct. App. 2006).
[53] O.C.G.A. § 33-7-11.
[54] Lambert v. Alfa General Ins. Co., 660 S.E.2d 889 (Ga. Ct. App. 2008).

[55] McGraw v. IDS Property & Cas. Ins. Co. 744 S.E.2d 891 (Ga. Ct. App. 2013).
[56] Roberson v. Leone, 726 S.E.2d 565 (Ga. Ct. App. 2012).
[57] Soufi v. Haygood, 639 S.E.2d 395 (Ga. Ct. App. 2006).
[58] *Roberson,* 726 S.E.2d at 568-69.
[59] Borders v. Global Ins. Co., 430 S.E.2d 854 (Ga. Ct. App. 1993).
[60] Infinity General Ins. Co. v. Litton, 707 S.E.2d 885 (Ga. Ct. App. 2011).
[61] *Roberson*, 726 S.E.2d at 569.
[62] Ga. Farm Bureau v. North, 714 S.E.2d 428 (Ga. Ct. App. 2011).
[63] Gov't Employees Ins. Co. v. Morgan, 800 S.E.2d 612 (Ga. Ct. App. 2017).
[64] O.C.G.A. § 33-24-45.
[65] O.C.G.A. § 33-24-45(b)(3).
[66] O.C.G.A. § 33-24-45(f)(4).
[67] O.C.G.A. § 33-24-45(a)(2).
[68] *Litton*, 707 S.E.2d at 889.
[69] *See* Payne v. Middlesex Ins. Co. 578 S.E.2d 470 (Ga. Ct. App. 2003).

LIABILITY INSURANCE COVERAGE FOR PROFESSIONALS BREAKING BAD

By James S. V. Weston, III

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Professionals can make mistakes. They purchase liability insurance to provide them with coverage for their mistakes. Professionals can also commit horrific crimes. Liability insurance generally does not cover civil claims arising out of these crimes, but there may be exceptions to this general rule.

The recent USA Gymnastics sex abuse scandal arises out of a professional's engaging in criminal behavior. Larry Nassar served as the organization's national team doctor for almost twenty years. More than 250 former youth gymnasts have alleged that he sexually assaulted them while ostensibly providing medical care. Although the criminal proceedings against Nassar have concluded, the civil litigation has just begun. And, as expected, the victims' lawsuits involve insurance coverage issues.[1]

This article discusses several Georgia cases which have addressed whether professional liability insurance covers civil claims against professionals who engage in criminal and other "unprofessional" behavior. As in all coverage disputes, the courts conduct a fact-specific analysis and look carefully at the applicable policy language. The immorality or illegality of the professional's acts is not the determinative factor in determining coverage; rather, the courts apply the same principles as they

would in any other coverage action. It is surprising, though, that under certain circumstances our courts *will* require an insurer to defend these claims, or they have found that a fact issue exists regarding coverage.

Sexual Misconduct

This article does not mean to single out doctors as the only professionals who behave badly. The simple fact is that several pertinent cases involve sexual misconduct by doctors and concomitant claims by their patients. And, as is noted above, the decisions reached by the Georgia Court of Appeals are in some ways surprising (and in other ways not) in light of the conduct at issue.

In *St. Paul Fire and Marine Ins. Co. v. Mitchell*,[2] the issue was whether the defendant psychiatrist, Kleber, "mishandled the transference phenomenon" in treating his patient, plaintiff Mitchell. In their complaint Mitchell and her husband alleged, *inter alia*, that Kleber "wrongfully manipulate[ed] the doctor-patient relationship," that he negligently treated and counseled Mitchell, and that his "mishandling of the transference phenomenon resulted in [his] having sexual relations with" Mitchell.[3] St. Paul, Kleber's malpractice insurance carrier, filed a declaratory judgment and "moved for partial summary judgment on the ground that the Mitchells' suit was a tort not action not covered under Dr. Kleber's malpractice policy."[4] Kleber and the Mitchells moved for summary judgment on all issues. The trial court held that St. Paul was required to defend the malpractice suit against Kleber but denied the motions on the coverage issues.[5] St. Paul appealed, and the Mitchells cross-appealed.

The court of appeals affirmed the trial court in an 8-1 decision. The pertinent policy language stated that St. Paul will

> pay on behalf of the *Insured* all sums which the *Insured* shall

> become legally obligated to pay as *damages* arising out of the performance of *professional services* rendered or which should have been rendered, during the *policy period,* by the *Insured* or by any person for whose acts or omissions the *Insured* is legally responsible.[6]

St. Paul argued that Kleber's acts were "outside the category of professional services for purposes of coverage."[7] The court of appeals disagreed, relying largely on decisions from other states which held that conduct such as Kleber's "may be considered malpractice by a psychiatrist."[8] Notably, the Michigan Court of Appeals found in *Cotton v. Kambly*,[9] that:

> Plaintiff alleges that defendant induced her to engage in sexual relations with him as part of her prescribed therapy. We see no reason for distinguishing between this type of malpractice and others, such as improper administration of a drug or a defective operation. In each situation, the essence of the claim is the doctor's departure from proper standards of medical practice. Therefore, while the facts alleged by plaintiff might also state a cause of action for common law seduction, we do not find that seduction was the gist of her malpractice claim.[10]

The Missouri Supreme Court held in *Zipkin v. Freeman*,[11] that a malpractice insurer was obligated to defend a transference phenomenon claim against a psychiatrist. In deciding *Mitchell*, the Georgia Court of Appeals relied on the following from *Zipkin*:

> However, it is an oversimplification to focus on the more spectacular and extreme

> acts of the doctor as determinative of the issue. Under the extremely broad terms of the policy before us, defendant agreed to pay damages 'based on'-which would also mean resulting from, or caused by, or due to-professional services rendered or which should have been rendered. The word 'damages' is not limited to any particular kind of damage or injury and applies to any claim or suit, with certain specific exceptions not here material. Defendant would limit the damages to the very act itself of professional services, but the policy clearly covers the results and liability flowing from professional services rendered or which should have been rendered.
>
> The gravamen of the petition is that defendant did not treat Mrs. Zipkin properly and as a result she was injured. He allegedly mishandled the transference phenomenon, which is a reaction psychiatrists may anticipate and which must be handled properly. He allegedly mishandled it over a long period of time. As [experts] explained, to take the relationship outside the office into social relationships, 'would allow the patient to develop all sorts of unusual ideas just around the feelings that she has about the doctor[.]'[12]

The Mitchell court found that Cotton and Zipkin were "ample authority for holding that acts such as those alleged in the Mitchell's complaints come within St. Paul's contractual obligation to defend for matters arising out of Dr. Kleber's performance of his professional duties."[13] The court was also careful to point out:

> In deciding the issue of whether St. Paul should defend, we are not required to find that the doctor's alleged activities were immoral, illegal or against public policy. At this stage of the litigation, Dr. Kleber has not been adjudicated a wrongdoer and has denied all wrongdoing. We are deciding only that the allegations are sufficient to bring the suit within the ambit of the contract to require the insurer to defend.[14]

At issue in *American Home Assurance Co. v. Smith*,[15] was a "special provision" in a psychologist's professional liability policy which addressed "actual or alleged erotic physical contact." The psychologist, Smith, provided treatment to his patient, Kennedy, regarding the latter's multiple personality disorder. Suspecting that Smith's treatment was inappropriate, Kennedy contacted the police.[16] The police had Kennedy wear a concealed microphone, and she returned to see Smith for additional treatment.[17] During one of their sessions, Smith engaged in the inappropriate behavior which had previously concerned Kennedy, and after she said "a code word," the police interrupted the session.[18]

Kennedy sued Smith for malpractice, and his insurance carrier, American Home, filed a DJ action to determine the scope of coverage. After the trial court denied American Home's summary judgment motion, the court of appeals identified the issues before it as:

> First, whether the trial court erred in holding that a special provision relating to sexual misconduct in the Psychologists Professional Liability Policy issued by American Home to Smith, which limits recovery to $25,000 for claims against its insureds arising out of "actual or

> alleged erotic physical contact," contravenes public policy and is void; and second, whether the trial court erred in concluding that there was a jury question as to whether Smith's acts constitute sexual misconduct as defined in the policy.[19]

The court reversed on both issues. Regarding the $25,000 limit, the court found that an insurer does not violate public policy by limiting "coverage in actions involving sexual misconduct."[20] The court explained:

> [S]imply because the Georgia legislature has evinced an interest in protecting the public from sexual exploitation by therapists, it has not created a statutory obligation requiring psychologists to maintain malpractice liability insurance at all, much less insurance for claims of sexual misconduct. Therefore, it cannot be contrary to the public interest to allow insurers to limit their coverage for this specific risk, that is, their insured's sexual misconduct.[21]

As for the second issue, the court conducted a very specific analysis of the policy language and found that Smith's actions triggered the policy's special provision. The court concluded that "Smith's conduct was erotic physical contact, not mere physical contact, precisely the behavior the limitation in the special provision of the policy contemplated."[22] Again, instead on focusing – or even addressing – the undeniable impropriety of the professional's behavior, the court focused on the specific facts and policy language at hand.

The dispute was (seemingly) less complicated in *St. Paul Fire and Marine Ins. Co. v. Alderman*.[23] The patient, Mrs. Alderman, alleged that her physician, Sellek, sexually assaulted her twice during the same

visit. She and her husband sued Sellek, and St. Paul, Sellek's professional liability carrier, subsequently filed a DJ action regarding its coverage obligation. The trial court granted the Aldermans' summary judgment motion in the DJ action, "concluding that St. Paul had a duty to defend and indemnify Sellek because Sellek's conduct was inalterably linked to his providing of professional medical services to Mrs. Alderman."[24]

St. Paul appealed, and in another 8-1 decision the court of appeals reversed. Writing for the majority, Judge Pope focused on the policy's use of the term "professional services." Noting that in its specific factual context the case was one of first impression, Judge Pope wrote:

> To begin, we note that this court has never addressed the meaning of "professional services" in a factual context like the one presented here. However, we do find guidance for our analysis in the case decisions of numerous other courts. In determining whether an insured's actions constitute the providing of "professional services," the majority of courts look to the nature of the act the insured performed, rather than the title or status of the insured or the place where the act occurred. See *Prior v. S.C. Med. Malpractice Liability Ins. Joint Underwriting Assn.*[25] "The scope of 'professional services' does not include all forms of a doctor's conduct simply because he is a doctor." *Hirst v. St. Paul Fire, etc., Ins. Co.*[26] "Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or

> application of special learning or attainments of some kind." *Marx v. Hartford Accident, etc., Co.,* 183 Neb. 12, 157 N.W.2d 870, 871(3), (4) (1968); see *Roe v. Fed. Ins. Co.,* 412 Mass. 43, 587 N.E.2d 214, 217 (1992).[27]

The court sided with the "majority viewpoint" which holds that "no coverage exists under a professional liability insurance policy for claims involving sexual assault, abuse or harassment."[28] Sellek's actions did not constitute "medical treatment of a physical ailment," nor did they involve "the application of any specialized learning or skills."[29] His "actions were solely for the satisfaction of his own prurient interests."[30]

In the sole dissent, Judge McMurray wrote that in his view the "sexual battery committed on the unsuspecting female patient by the physician during a medical examination is covered under the medical professional liability insurance policy issued by St. Paul in this case."[31] His reading of the policy "reveal[ed] *no* exclusions for intentional acts or for sexual misconduct. Since the sexual batteries alleged in the underlying tort action took place during a medical examination, it is my view that they fall within the coverage provided by the broad but nevertheless unambiguous language 'providing or withholding professional services.'"[32] It would be inaccurate to label Judge McMurray's dissent as the "minority position" on coverage for sexual misconduct by a professional; instead, he simply read the applicable policy language differently from the majority in *Alderman*. The dissent does show that, regardless of how the repugnant the professional's conduct may be, there are arguments in favor of insurance coverage for that conduct.

The "Innocent Insured"

The facts in *Fidelity Nat'l Title Ins. Co. of New York v. OHIC Ins. Co.*[33] show that a professional's lack of intent or actual

involvement in the underlying misconduct is not dispositive in a coverage dispute. At issue were claims against a lawyer for misappropriating funds for a real estate closing. The title insurance company, Fidelity National, sued the lawyer after she failed to return closing funds to a lender. The lawyer's liability insurer, OHIC, denied coverage "on the ground that [Fidelity National's] claims arose out of conversion, misappropriation, or improper commingling of client funds."[34] The evidence showed that one of the lawyer's employees stole "the lion's share of the funds" which had been wired to the lawyer's trust account for the subject closing.[35] The lawyer denied knowing anything about or participating in her employee's scheme.[36]

In OHIC's DJ action, the trial court denied both its and Fidelity National's motions for summary judgment. On appeal, OHIC argued "that the trial court should have ruled, as a matter of law, that the claims were excluded [under the lawyer's malpractice policy], regardless of whether [the lawyer] personally participated in the wrongful acts."[37] The court of appeals agreed. The exclusionary language at issue stated that OHIC's policy did not cover "claims based upon or arising out of conversion, misappropriation, or improper commingling of client funds."[38] The court sided with OHIC in determining that "the plain and unambiguous language of" the exclusion applied to Fidelity National's claims, "regardless of whether [the lawyer] herself converted, misappropriated, or commingled the funds."[39]

Fidelity National contended that other exclusions in the OHIC policy resulted in the lawyer still being covered, since "she did not personally participate in any such wrongful acts," nor did she "consent to criminal violations by others."[40] The court of appeals rejected this "innocent insured" argument, holding:

> The more specific conduct described in Exclusion 4 (stealing clients' money), which is a subset of the general conduct described in the other exclusionary clauses, is so reprehensible and far beyond the type of conduct normally covered by legal malpractice insurance that the insurance company understandably sought (and the insured understandably agreed to) its complete exclusion, with no exceptions. In other words, even though criminal or dishonest conduct generally is excluded only if the insured personally participated or consented to the conduct, that subset of criminal or dishonest misconduct which involves the theft or misappropriation of client funds is so abhorrent and beyond the pale of ethics that it is not covered under any circumstances.[41]

The court of appeals effectively rendered a public policy decision by finding that there can never be coverage for conduct as "abhorrent" as the theft of client funds. In any event, under the applicable policy language, the lawyer's lack of participation in the misconduct was not relevant; instead, what mattered was that the misconduct occurred in the provision of professional services. Therefore, no liability coverage was available.

Conclusion

In professional liability coverage issues, the egregiousness of the professional's behavior is far from determinative. Georgia courts will, as in all coverage disputes, dig deep into the specific facts and policy language at hand to decide if a liability carrier must defend or cover claims against a professional.

[1] Marisa Kwiatkowski, Tim Evans and Ryan Martin, USA Today, *USA Gymnastics sues insurance carriers to compel coverage in Larry Nassar lawsuits*, April 10, 2018.
[2] 164 Ga. App. 215 (1982).
[3] *Id.* at 216-217.
[4] *Id.* at 215-216.
[5] *Id.* at 216.
[6] *Id.* at 217 (omitted punctuation) (emphasis in original).
[7] *Id.*
[8] *Id.*
[9] 300 N.W.2d 627 (1980).
[10] *Mitchell*, 164 Ga. App. at 217.
[11] 436 S.W.2d 753 (Mo. 1968).
[12] *Mitchell*, 164 Ga. App. at 217-218, (quoting *Zipkin*, 436 S.W.2d at 761).
[13] *Mitchell*, 164 Ga. App. at 218.
[14] *Id.* at 218-219. In a footnote to his partial dissent, Judge Deen stated that "[t]here is considerable authority that sexual acts by a psychiatrist to and with his patient may be part of 'professional services' rendered." *Id*. at 222, n.1. It is hard to believe that a jury would agree.
[15] 218 Ga. App. 536 (1995).
[16] *Id.* at 537.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 539.
[21] *Id*. at 538-539.
[22] *Id.* at 540.
[23] 216 Ga. App. 777 (1995).
[24] *Id.* at 778.
[25] 305 S.C. 247, 407 S.E.2d 655, 657 (2) (S.C. App.1991); *Niedzielski v. St. Paul Fire, etc., Ins. Co.,* 134 N.H. 141, 589 A.2d 130, 131-132(1) (1991); *Standard Fire Ins. Co. v. Blakeslee,* 54 Wash.App. 1, 771 P.2d 1172, 1176(3) (1989).
[26] 106 Idaho 792, 683 P.2d 440, 444 (1) (Idaho App.1984).
[27] *Id.* at 778-779.
[28] *Id.* at 779.
[29] *Id.*, (citing *Smith v. St. Paul Fire, etc., Ins. Co.*, 353 N.W.2d 130, 132 (Minn. 1984)).
[30] *Id.*(citing *Smith,* 353 N.W.2d at 132). Recently in *Rushton v. U.S.*, 2018 WL 3028946, *4 (June 18, 2018), the federal district court clarified that *Mitchell* and *Alderman* do not support a vicarious liability claim against an employer for a physician's alleged sexual harassment. Judge Hall's order in *Rushton* limits the scope of *Mitchell* and *Alderman* to the specific facts and claims in those cases.
[31] *Id.* at 780.
[32] *Id*.
[33] 275 Ga. App. 55 (2005).
[34] *Id.* at 56.
[35] *Id.* at 55-56.
[36] *Id.* at 56.
[37] *Id.* at 57.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 58.
[41] *Id.* at 59-60.

THE EVOLVING STANDARDS OF LONG-ARM JURISDICTION IN 'STREAM OF COMMERCE' CASES

By Philip W. Savrin

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Introduction

A fundamental tenet of civil procedure is that a nonresident defendant must have "minimum contacts" with the forum state to be subject to personal jurisdiction consistent with the due process clause. With the advent of the internet and the growth of the global economy, "minimum contacts" are becoming increasingly easier to establish. Nevertheless, limitations still remain as exemplified by a recent decision by the Court of Appeals in *Intercontinental Services of Delaware, LLC v. Kent*,[1] that reversed the trial court's denial of a motion to dismiss under the long-arm statute. Using *Intercontinental* as an example, this article addresses the challenges courts face in drawing the constitutional line where products cause injuries after being introduced into the stream of commerce by a nonresident.

The *Intercontinental* Decision

Cleston Kent was killed when a railcar containing borax overturned at an unloading facility in Sandersville, Georgia. The borax had been sold by Etimine U.S.A., Inc. ("Etimine") who arranged for it to be transported by Norfolk Southern Railway Company ("Norfolk Southern") to the buyer in Georgia. Intercontinental Services of Delaware, LLC ("ICS") was hired by Etimine to load the borax from its warehouse in Delaware onto the railcars, knowing that the shipment was bound for Georgia. ICS neither owned nor sold the borax, however, and was compensated for its work in

Delaware regardless of the destination of the product.

While the railcar was at an unloading facility in Georgia, it overturned on Mr. Kent causing his death. His widow Leanne Kent brought a wrongful death action in Bibb County, claiming ICS was negligent in the manner in which it had loaded the borax, which proximately caused it to overturn when it reached its destination in Georgia. ICS promptly moved to dismiss, contending it was beyond the personal jurisdiction permitted by Georgia's long-arm statute as circumscribed by the due process clause. In support, ICS showed that it owned no property and conducted no operations in Georgia, and that its business activities are confined to Delaware including its loading of the borax at issue such that it lacked the "minimum contacts" necessary for long-arm jurisdiction to satisfy due process norms. Kent countered that ICS had purposely introduced the borax into the stream of commerce knowing it was bound for Georgia, such that it was fair play for it to defend the negligence claims in a Georgia forum.

In reviewing the evidence and the case law, the trial court agreed with Kent, concluding that "ICS performed the purposeful act of sending a chemical product into a nationwide stream of commerce with the express knowledge that the product would end up in Georgia to be sold or used there." The trial court reasoned that it did not offend due process for ICS to be subject to jurisdiction in Georgia, as "[t]his case is not one where a defendant shipped a product and had no idea that it would end up in a particular forum only as a result of a fortuitous circumstance." Accordingly, the trial court denied ICS's motion to dismiss but entered a certificate of immediate review after which interlocutory jurisdiction was accepted by the Court of Appeals.

After hearing oral argument and permitting supplemental briefs, the Court of Appeals reversed the trial court's decision, reasoning that "[w]hile Intercontinental was indisputably involved in the process by which Etimine's product made its way to Georgia, we do not agree that it was Intercontinental that placed that product into the stream of commerce." [2] The court explained:

> We note that this body of law continues to evolve in light of the growth of the service sector in the United States and the advent of advanced communication and information technologies. However, for purposes of personal jurisdiction analysis, this Court's prior decisions have drawn a critical distinction between manufacturers and sellers of a physical product and persons or entities that provide a site-specific service, even if such service involves or relates to products that will travel to Georgia.[3]

It then reversed the trial court, explaining that, "we cannot say that Intercontinental availed itself of the privilege of doing business in Georgia … [so as to have] the substantial connection with Georgia that is required before the exercise of personal jurisdiction in Georgia is proper." [4]

In announcing its holding in *Intercontinental*, the Court of Appeals cited to the Supreme Court's decision in *Asahi Metal Industrial Company, Ltd. v. Superior Court of California*.[5] To put both these opinions in context, it is important first to review the chronology of the Supreme Court's decisions that led up to *Asahi* and its progeny.

"Stream of Commerce" Decisions by the Supreme Court

Reaching back almost four decades to 1980, the Supreme Court decided *World-Wide Volkswagen Corp. v. Woodson*, [6] where a car dealer in New York was sued in Oklahoma where the injury occurred. The argument in favor of jurisdiction was that automobiles are mobile by definition such that it was reasonably foreseeable that a vehicle sold in New York could be involved in an accident in Oklahoma. The Supreme Court decided otherwise, however, reasoning that foreseeability that an injury might occur in a forum is insufficient to satisfy due process concerns; instead, the "minimum contacts" must arise from purposeful contact with the forum. Even though the nonresident could foresee that a vehicle sold in New York could cause an injury in Oklahoma, the absence of purposeful contact with Oklahoma that gave rise to the cause of action was fatal to Oklahoma's ability to exercise personal jurisdiction over the New York dealer. Instead, for jurisdiction to exist, the nonresident would need to direct its efforts to the forum state even if the product that caused the forum injury was initially sold elsewhere.

The Supreme Court reiterated this concept five years later in *Burger King Corp. v. Rudzewicz*,[7] where it concluded that the nonresident must "purposefully avail itself of the privilege of conducting activities within [the forum state], thus invoking the benefits and protections of its laws," to satisfy the due process clause.[8]

A mere two years later, the Supreme Court issued *Asahi*, which is comprised of multiple decisions without a majority opinion. *Asahi* involved California's effort to exercise jurisdiction over Asahi, a Japanese company that provided a component part of a motorcycle that was later sold in California where the injury occurred. In contrast to the circumstances in *World-Wide Volkswagen* that involved an isolated occurrence of the vehicle finding its way to Oklahoma, the

nonresident in *Asahi* knew that its valve would be incorporated into motorcycles sold in California. Although a majority of the Supreme Court justices determined that Asahi was beyond the personal jurisdiction of California, they issued splintered decisions on the reasoning. Writing for a plurality, Justice O'Connor reasoned as follows:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product in the stream into an act purposefully directed toward the forum State.[9]

Justice Brennan, joined by three other justices, concurred in the judgment but on the separate basis that notions of "fair play and substantial justice" outweighed the exercise of jurisdiction despite the presence of "minimum contacts." In that regard, Justice Brennan expressly disagreed with the plurality's "stream of commerce" rationale. In his concurring opinion, he contrasted the random accident in *World-Wide Volkswagen* with what he saw as "the regular and anticipated flow of products from the manufacture to distribution to retail sale."[10] He opined that the nonresident who "benefits economically from the retail sale of the final

product in the forum State" meets the due process requirement of purposefully availing oneself of the benefits of that state's laws.[11] In yet a third opinion, Justice Stevens, joined by two other justices, found that the plurality's discussion of the "stream of commerce" standard was unnecessary given unanimous agreement on other grounds, and concluded moreover that Justice O'Connor's standard would be met by the facts: "I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'personal availment.'"[12]

Given its splintered opinions, *Asahi* did not resolve whether placing a product in the stream of commerce, with knowledge of its destination, satisfies the due process concern in exercising jurisdiction over a nonresident defendant. The Supreme Court had another opportunity to address this issue in the more recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*,[13] where a New Jersey resident sued an English company (McIntyre) that had manufactured a machine that caused his injury. McIntyre had very limited contacts within the United States, and in fact its products were distributed through an independent American company. As in *Asahi*, the Supreme Court determined that due process prohibited New Jersey from exercising jurisdiction, but once again could not agree on the reasoning.

Writing for the plurality, Justice Kennedy acknowledged that the courts have struggled to reconcile Asahi's "competing opinions."[14] He nevertheless found that the uncertainty did not need to be resolved because there was no indication that McIntyre had "engage[d] in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws."[15] Justice Breyer joined by Justice Alito concurred separately, finding that the isolated occurrence of the product being used in New

Jersey was akin to the random injury in Oklahoma that was deemed insufficient to confer jurisdiction in *World-Wide Volkswagen*.

Justice Ginsburg, joined by Justices Sotomayor and Kagan, issued a stinging dissent, however, accusing McIntyre of engineering its distribution channels to avoid litigation in the United States: "McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, 'purposefully availed itself' of the United States market nationwide … [and] thereby availed itself of the market of all States in which is products were sold by its exclusive distributor."[16] Accordingly, the dissenters opined that McIntyre was subject to personal jurisdiction in New Jersey.

Reading these cases together, it appears that all justices adhere to the notion that a nonresident must "purposefully avail" itself of the benefits of the forum state's laws to meet the due process test but disagree on the appropriate standard or the level of proof to meet that standard. As Justice Kennedy aptly acknowledged, the courts (including in Georgia) have had to reconcile the Supreme Court's splintered decisions in applying the law to discrete facts.

Georgia's Reconciliation of the Supreme Court's Opinions

The Court of Appeals addressed the disparate Supreme Court opinions directly in *Showa Denko K.K. v. Pangle*,[17] where the plaintiff claimed she was injured from ingesting the raw material in a non-prescription food supplement. She sued the Japanese producer of the raw material in Catoosa County, along with its American subsidiaries that marketed and distributed the raw material to American pharmaceutical manufacturers. The Japanese parent (but not the subsidiaries) challenged personal jurisdiction relying on the reasoning of Justice O'Connor's plurality opinion that "mere awareness" that a product may find its way into the forum state is insufficient to

meet the due process test absent evidence of an intent to serve the specific market in the forum state.

After noting that Justice O'Connor's reasoning was not adopted by the majority and that *Asahi* provides no clear guidance in this area, the Court of Appeals decided to follow the stream of commerce analysis set forth in *World-Wide Volkswagen*.[18] Applying that analysis, the court found jurisdiction was properly exercised because "plaintiff's purchase and use of defendant's product in Georgia was a result of defendant's deliberate and purposeful nationwide distribution of its product."[19] Subsequent Georgia decisions have articulated the "stream of commerce" standard as follows:

> The stream of commerce establishes minimum contacts with a state in which the product is ultimately sold depends on the foreseeability that the product would be sold there; however, the foreseeability that is critical to due process analysis is not the mere likelihood that the product will find its way to the forum state, rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[20]

It was against this backdrop that the Court of Appeals found that the limits of the due process clause would have been exceeded by exercising jurisdiction of ICS in the *Intercontinental* case. Significantly, in each of the Georgia cases approving the exercise of jurisdiction, the nonresident defendant had either sold or shipped the product at issue that caused injury in Georgia.[21] In contrast, although ICS knew the borax it was loading on the railcar was destined for Georgia, ICS neither owned the

product nor shipped it into Georgia, and did not benefit financially from the product being shipped to Georgia as opposed to any other jurisdiction. Consequently, despite the foreseeability that an injury could result in (or en route to) Georgia, ICS did not "purposefully avail" itself of the benefits and protections of the laws of Georgia to permit the constitutional exercise of personal jurisdiction in Bibb County. As the court concluded, "Although shipments loaded by Intercontinental make their way to Georgia, these activities by Intercontinental cannot be reasonably characterized as creating purposeful contact with Georgia."[22] Accordingly, the *Intercontinental* decision draws a bright line between nonresident who are merely part of the stream of commerce as opposed to owners or shippers of products who purposefully target the Georgia marketplace thereby purposefully availing themselves of the benefits and protections of Georgia's laws.

Conclusion

The *Intercontinental* decision is based on sound constitutional principles supported by several decades of Supreme Court decisions. The vast majority of courts follow similar logic,[23] although at least one court has stretched the boundaries of the due process clause to find that a company's "choice to contract its services to national carriers constitutes purposeful availment of the benefits and protections of the laws of the States affected by the services."[24] To be sure, the application of the important constitutional principles at stake in these cases will need to adapt to the dramatic growth of the globalized economies and technological advances. Although the application of the concepts may change, they remain an important pillar in the concept of governance known as federalism.

[1] 343 Ga. App. 567, 807 S.E.2d 485 (2017).

[2] *Id.* at 572, 807 S.E.2d at 490.

[3] *Id.*
[4] *Id.* at 574, 807 S.E.2d at 492.
[5] 480 U.S. 102 (1987).
[6] 444 U.S. 286, 299 (1980)
[7] 471 U.S. 462 (1985).
[8] *Id*. at 475.
[9] *Asahi Metal Indus. Co.*,480 U.S. at 104.
[10] *Id*. at 117.
[11] *Id.*
[12] *Id.* at 111.
[13] 564 U.S. 873 (2011).
[14] *Id*. at 883.
[15] *Id*. at 887.
[16] *Id*. at 904.
[17] 202 Ga. App. 245, 414 S.E.2d 658 (1991).
[18] *Id*. at 250, 414 S.E.2d at 662.
[19] *Id*. at 248, 414 S.E.2d at 661.
[20] Cont'l Research Corp. v. Reeves, 204 Ga. App. 120, 124-125, 419 S.E.2d 48, 53 (1992) (quotation marks omitted); *see also* Vibratech, Inc. v. Frost, 291 Ga. App. 133, 138, 661 S.E.2d 185, 190 (2008).
[21] *See, e.g.,* Sky Shots Aerial Photography v. Franks, 250 Ga. App. 411, 551 S.E.2d 805 (2001); McDonnell v. Roy E. Beatty & Assoc., Inc., 203 Ga. App. 807, 418 S.E.2d 95 (1992); Value Engineering Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29 (1976).
[22] *Kent,* 343 Ga. App. at 573, 807 S.E.2d at 490-91.
[23] Carefree Cartage, Inc. v. "K" Line, 2006 WL 3227892, at *4 (N.D. Ill. Nov. 2, 2006) (collecting cases). *See also* Auxier v. BSP Warehouse & Distribution, Inc., 2011 WL 3903010 (D. Kan. Sept. 6, 2011) (finding no jurisdiction over the loader where the owner of the product determined where, how, and when the product would be shipped); Haley v. Champion Int'l Corp., 2000 WL 1472880 (D. Kan. Apr. 21, 2000) (nonresident who loaded paper for the product's manufacturer did not purposefully avail itself of the protections of the forum's laws as it had no control over or interest in the product's destination); Matter of Nat. Marine v. Sours Grain Co., Inc*.,* 1998 WL 43139 (E.D. La. Jan. 30, 1998), *aff'd sub nom.* In re Nat'l Marine, Inc., 166 F.3d 340 (5th Cir. 1998) (nonresident's loading of grain on a barge did not establish minimum contacts with the forum state).
[24] CSX Transp. v. Preussag Int'l Steel Corp., 201 F. Supp. 2d 1228, 1236 (M.D. Ala. 2002).

THE INTERSECTION BETWEEN AUTONOMOUS VEHICLES AND PRODUCT LIABILITY LITIGATION

By Philippa V. Ellis

Philippa V. Ellis is an original partner of Owen, Gleaton, Egan, Jones & Sweeney, in Atlanta. She has extensive trial experience as first chair, defending high stakes tort, product, commercial and insurance litigation. She leads the firm's product liability team and has handled matters in federal and state courts, at the trial and appellate levels, and before administrative agencies. She is a frequent speaker on various product liability and trial strategy topics, has served as faculty for national trial academies is a returning instructor for GDLA's Trial and Mediation Academy, and has held many other offices of service at the state and national levels. Phillipa is the 2019 Director for the ABA-ABOTA National Trial Academy, held at the National Judicial College in Reno, Nevada.

The implementation of varying levels of autonomous vehicle technology has resulted in product liability litigation shifts over the years for manufacturers. As technology edges toward driverless automobiles, questions regarding who bears responsibility for accidents are on the horizon. Advances in technology have proven beneficial, with fewer accidents, injury prevention, and a reduction in vehicular related deaths.[1] Likewise, autonomous vehicles provide a transportation alternative for individuals currently experiencing transportation restrictions due to personal mobility limitations, regardless of whether the limitations are permanent or temporary. Nonetheless, accidents do happen. When mishaps occur in fully autonomous vehicles, and injured parties file suit claiming their injuries were caused by a product defect, who is ultimately liable? This article explores the question of whether full autonomy marks a change in causation defenses and whether claims and litigation related to autonomous vehicle accidents will change product liability litigation.

The Evolution of Automotive Technology

Over the years, technology has evolved to the extent varying levels of autonomous vehicles are already on the road.[2] The U.S. Department of Transportation National Highway Traffic Safety Administration (NHTSA) appears to equate technological advances and "Eras of Safety" as one in the same; however, a synopsis of the eras or evolution of automotive technology follows:[3]

Years	Categories of Features	Itemized Features
1950 - 2000	Safety/Convenience	Cruise Control Seat Belts Antilock Brakes
2000 – 2010	Advanced Safety	Electronic Stability Control Blind Spot Detection Forward Collision Warning Lane Departure Warning
2010 – 2016	Advanced Driver Assistance	Rearview Video Systems Automatic Emergency Braking Pedestrian Automatic Emergency Braking Rear Automatic Emergency Braking Rear Cross Traffic Alert Lane Centering Assist
2016 - 2025	Partial Automation	Lane keeping assist Adaptive cruise control Traffic jam assist Self-park
2025+	Full Automation	Highway autopilot

The Regulatory Crawl

Change is inevitable as highly autonomous and self-driving vehicles arrive on North American roads; however, the transition is occurring faster than federal and state legislative enactment. The wheels of regulatory oversight are turning slowly and have yet to keep pace with the autonomous

vehicle manufacturers' design, development and build rate. As a result, no comprehensive Federal Motor Vehicle Safety Standard (FMVSS) exists for fully autonomous vehicles as of the date this article is published.

On November 16, 2018, the NHTSA issued a Federal Register notice for the extension of the Pilot Program for Collaborative Research on Motor Vehicles with High or Full Driving Automation[4] advance notice of proposed rulemaking (ANPRM) comment period, through December 10, 2018. Meanwhile, the NHTSA is closely following the actions of automobile manufacturers in the autonomous vehicle space and, recently, sent requests for information to an original equipment manufacturer (OEM) about its unfulfilled production promises. While the NHTSA calibrates its microscope, investigative inquiries have been launched by the Securities and Exchange Commission (SEC) and the Justice Department regarding promises made concerning the promised rollout date of highly autonomous vehicles. Technological capabilities dictate when and whether fully autonomous vehicles are manufactured in a safe manner; thus, an OEM's decision to halt production availability should be applauded by regulatory bodies as a reasonable and safety-based decision. Consumer litigation has followed buyers' complaints of broken promises and delayed delivery of fully autonomous vehicles.[5]

The NHTSA released a guideline, entitled "A Vision for Safety 2.0," on September 12, 2017, which is voluntary guidance for automated driving systems. NHTSA issued another guidance on October 4, 2018, entitled "Preparing for the Future of Transportation," which reiterates the Department of Transportation's support of the advent of safe self-driving automobiles and a suggestion that regulation can stifle

innovation. NHTSA, in traditional fashion, invites and welcomes input from a broad range of stakeholders in the rulemaking process. Federal preemption is currently unavailable in the realm of product liability litigation defenses, as federal regulations are silent on manufacturing standards for highly autonomous vehicles.

The automotive industry awaits action by the Congress. Proposed legislation, the SELF-Drive Act, passed the House in September 2018, with unanimous bipartisan support but failed to advance in the Senate due to stated safety concerns. Federal legislative action for autonomous vehicles appears to have taken a back seat to other pressing national issues.

What Is the Law in Georgia Concerning Autonomous Vehicles?

The Georgia legislature has been attentive to the pending arrival of fully autonomous vehicles; however, currently enacted legislation relies on the enactment of federal regulations governing the activities of manufacturers. Under Georgia law:[6]

> (a) A person may operate a fully autonomous vehicle with the automated driving system engaged without a human driver being present in the vehicle, provided that such vehicle:
>
> (1) Unless an exemption has been granted under applicable federal or state law, is capable of being operated in compliance with Chapter 6 of this title and this chapter and has been, at the time of its manufacture, certified by the manufacturer as being in compliance with applicable federal motor vehicle safety standards;
>
> (2) Has the capability to meet the requirements of Code Section 40-6-279;

(3) Can achieve a minimal risk condition in the event of a failure of the automated driving system that renders that system unable to perform the entire dynamic driving task relevant to its intended operational design domain;

(4) (A) Until December 31, 2019, is covered by motor vehicle liability coverage equivalent to 250 percent of that which is required under:

(i) Indemnity and liability insurance equivalent to the limits specified in Code Section 40-1-166; or

(ii) Self-insurance pursuant to Code Section 33-34-5.1 equivalent to, at a minimum, the limits specified in Code Section 40-1-166; and

(B) On and after January 1, 2020, is covered by motor vehicle liability coverage equivalent to, at a minimum:

(i) Indemnity and liability insurance equivalent to the limits specified in Code Section 40-1-166; or

(ii) Self-insurance pursuant to Code Section 33-34-5.1 equivalent to, at a minimum, the limits specified in Code Section 40-1-166; and

(5) Is registered in accordance with Code Section 40-2-20 and identified on such registration as a fully autonomous vehicle or lawfully registered outside of this state.

(b) It shall be the responsibility of the occupants of a fully autonomous vehicle to comply with the requirements of Code Sections 40-8-

> 76 and 40-8-76.1 regarding the use of safety belts and child passenger restraining systems.
>
> (c) Unless otherwise provided in this Code section, fully autonomous vehicles, automated driving systems, and any commercial use or operation of fully autonomous vehicles shall be governed by this Code section, Code Sections 40-1-1 and 40-5-21, Chapter 6 of this title, and this chapter notwithstanding any other provision of law to the contrary. No rules or regulations relative to the operation of fully autonomous vehicles or automated driving systems shall be adopted which limit the authority to operate such vehicles or systems conferred by this Code section.

The Georgia legislature has also passed legislation concerning the potential involvement of autonomous vehicles in collisions,[7] and states: "Notwithstanding the provisions of this chapter to the contrary, when an accident involves a fully autonomous vehicle with the automated driving system engaged, the requirements of subsection (a) of Code Sections 40-6-270, 40-6-271, 40-6-272, 40-6-273, and 40-6-273.1 shall be deemed satisfied if such fully autonomous vehicle remains on the scene of such accident as required by law and such fully autonomous vehicle or operator promptly contacts a local law enforcement agency and communicates the information required by this chapter."

In Georgia, the rules of the road and longstanding insurance coverage and seatbelt laws apply to highly autonomous and any other vehicle equally.

Will There Exist A Next Wave of Product Liability Litigation or A Disruption of Traditional Product Liability Defenses?

The transformation of automobiles into computing platforms begs the question: Will the introduction of autonomous vehicles on U.S. roads disrupt product liability

litigation? Traditional automotive product liability actions center around allegations that the plaintiff suffered injuries or death due to an OEM or the component part manufacturer's alleged failure to properly design, manufacture, and/or inspect the subject vehicle or component.[8]

Plaintiffs' claims and allegations are likely to appear in a different form, yet traditional available defenses are expected to remain. Jurors are likely to shift blame more heavily away from plaintiffs and toward OEMs and component parts manufacturers at higher levels of autonomous technology.

In Georgia, an autonomous vehicle plaintiff can pursue an action for injury or death action against a product manufacturer, alleging negligent manufacture or design. Plaintiffs can also seek recovery under theories of strict liability. Although, the line can be blurred between negligence and strict product liability allegations, available defenses differ in some respects. In Georgia, negligence is proven if the plaintiff meets the burden of showing evidence of the existence of a duty to conform to a standard of conduct, a breach of duty, injuries, a causal connection exists between the breach and injuries, and the plaintiff's negligence, if any, is less than or equal 50% of the defendant(s)' negligence.[9] Further, if plaintiff prevails, his recovery would be adjusted downward by the proportionate amount of his negligence.[10] In addition to contributory negligence, assumption of the risk is an available defense to negligence actions against product manufacturers and design entities.[11]

The assumption of the risk defense centers around whether the plaintiff had knowledge of the alleged danger, understood or appreciated the risks associated with the danger, and opted to voluntarily expose herself to the risk.[12] Likewise, if the danger of a potential injury is so obvious that a reasonably prudent person should appreciate

the risk presented by the circumstances, constructive knowledge can be proven.[13]

Depending on the level of autonomous technology incorporated in the vehicle, a contributory negligence or assumption of the risk defense may not remain available. If the vehicle is operating wholly independent without a recommendation of human interaction or a warning that operations monitoring is advisable, contributory negligence would likely not be a viable defense. Conversely, assumption of the risk may be a mainstay defense in negligent product liability actions if potential dangers, associated with being transported in a driverless vehicle, are comprehensible.

Consider the litigation filed on behalf of Walter Huang, who was a Mountain View, California 38-year old Apple engineer when he died in a March 2018 crash. The incident occurred while he was riding in his Tesla with the Autopilot function activated. His wife alleges he complained to her that the Autopilot function had steered the Tesla Model X into the same highway barrier on many occasions. Ultimately, the Autopilot function steered his Model X into the previously complained-of barrier and Huang died in the fiery crash that followed. Tesla alleges Huang's hands were not in contact with the steering wheel during the pre-collision maneuvers occurring six seconds before impact. Tesla's response to Huang's family's lawyer indicates drivers are warned that the Autopilot function requires drivers to remain alert and maintain physical contact with the steering wheel. The Huang family lawyer, Mike Fong, responded, "Its sensors misread the painted lane lines on the road and its braking system failed to detect a stationary object ahead."[14] The following full statement from Tesla provides a glimpse into its defense posture:

> *"We are very sorry for the family's loss.*

According to the family, Mr. Huang was well aware that Autopilot was not perfect and, specifically, he told them it was not reliable in that exact location, yet he nonetheless engaged Autopilot at that location. The crash happened on a clear day with several hundred feet of visibility ahead, which means that the only way for this accident to have occurred is if Mr. Huang was not paying attention to the road, despite the car providing multiple warnings to do so. The fundamental premise of both moral and legal liability is a broken promise, and there was none here. Tesla is extremely clear that Autopilot requires the driver to be alert and have hands on the wheel. This reminder is made every single time Autopilot is engaged. If the system detects that hands are not on, it provides visual and auditory alerts. This happened several times on Mr. Huang's drive that day.

We empathize with Mr. Huang's family, who are understandably facing loss and grief, but the false impression that Autopilot is unsafe will cause harm to others on the road. NHTSA found that even the early version of Tesla Autopilot resulted in 40% fewer crashes and it has improved substantially since then. The reason that other families are not on TV is because their loved ones are still alive."[15]

The potential Huang litigation defenses include misuse, in response to strict liability allegations, and contributory negligence and assumption of the risk in response to a negligence theory. Here, the existence of a high level of autonomous technology bears no relevance to the availability of traditional product liability defenses.

Another well-publicized accident involves Elaine Herzberg's fatal accident on March 18, 2018. Herzberg was walking her bicycle across a 6-lane freeway in Tempe, Arizona at night when she was struck and killed by an Uber-modified Volvo SUV in autonomous mode. A human operator was seated in the driver's seat at the time of the incident but did not have her hands on the steering wheel. The vehicle's Light Detection and Ranging System (LIDAR) sensors did not detect Herzberg's presence when it struck and killed her at 38 miles per hour. Police videos show the operator was distracted.[16] The vehicle's LIDAR sensors are designed to detect objects in the path of the vehicle and communicate a signal to activate the brakes and/or issue a warning so the safety driver may engage an evasive steering maneuver. Here, the operator was tasked with remaining alert and reacting in an emergency situation for accident avoidance purposes. Although a lawsuit was not filed prior to the resolution of the Herzberg's family's claim, the target defendants would have undoubtedly included, at a minimum, the distracted safety driver, Uber, Volvo, and the LIDAR sensor supplier. Available traditional product liability defenses include product alteration and modification, as well as misuse, because the vehicle was operated in an unintended manner. Further, vehicle-related warnings required the safety driver to keep a proper lookout and assume control of the steering wheel to avoid striking anything or anyone in its path. Here, a comparative negligence defense is also a viable option.

If a vehicle is partially or fully autonomous, and the owners' manual or warning signals inform the occupant of advisable and safe methods of operation, inclusive of monitoring the functions of the vehicle while it is in motion, contributory negligence and assumption of the risk defenses remain as valid defenses. Regardless of the level of autonomous technology incorporated in the vehicle, Georgia law requires jurors to examine causal conduct from a global standpoint among and between the parties. "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases, the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."[17]

In the negligence context, the breach of duty element of proving negligence is scrutinized where warnings are concerned. Warnings can be derived from many sources, including owner's manuals, public service messages, manufacturer-issued customer bulletins, dealership notifications, dashboard indicators lights, and audible signals. As defense counsel, you can look to such warning sources to counter the breach of duty element for defending a "negligent failure to warn" claim. It is also important to note that there is no separate claim for "negligent failure to warn" because it is subsumed into an overall negligence breach of duty element of proof.

Strict liability lawsuits are most commonly pursued by plaintiffs in the product liability space because, in part, contributory negligence defenses are nullified. A spotlight cannot be shone on plaintiff's conduct as a defense in strict liability actions; however, plaintiff's acts remain relevant to causation for a jury's consideration. In strict product liability actions, plaintiff has the burden of proving

the allegedly defective vehicle was: (1) defective at the time it was first sold to a consumer; (2) not structurally altered or modified after it was first sold to the extent it is in the same condition as when it left the manufacturer's possession; (3) used for its intended purpose or in a reasonably foreseeable manner at the time of the accident; and (3) the proximate cause of plaintiff's injuries.[18]

With the advent of higher levels of autonomous vehicles, plaintiffs' anticipated claims include an allegation that manufacturers' duty to warn of a defect extends to older non-autonomous vehicles. Likewise, plaintiffs may argue vehicles lacking higher levels of autonomy should be recalled as defective and unsafe, or that they should be updated by manufacturers with autonomous technology under the guise of calling such an approach a necessary safety measure. The Georgia Court of Appeals has spoken on this potential liability theory. The court concluded that "absent special circumstances, no common law duty exists under Georgia law requiring a manufacturer to recall a product after the product has left the manufacturer's control. Under our products liability jurisprudence, a manufacturer's duty to implement alternative safer designs is limited to the time the product is manufactured, not months or years later when technology or knowledge may have changed".[19] ("[T]he trier of fact may consider evidence establishing that at the time the product was manufactured, an alternative design would have made the product safer than the original design and was a marketable reality and technologically feasible."). Any other rule would render a manufacturer a perpetual insurer of the safety of its products, contrary to established Georgia law.[20] ("[A] manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury.").[21] Thus, a claim that manufacturers should recall non-autonomous

vehicles as defective and unsafe would lack merit. The product misuse defense remains a method by which manufacturers can protect their interests and defend product liability lawsuits, regardless as to the level of autonomous technology incorporated in the accident-related vehicle.

While the NHTSA is working through its rulemaking process related to autonomous vehicles, federal preemption will not be an available defense as the regulatory space has not yet developed for driverless vehicles. During this current period where no regulatory governance exists, product liability defendants must look to traditionally-available defenses exclusive of federal preemption.

As technology rapidly expands, the trends of innovation will ebb and flow, as is evidenced by how rapidly mobile phones morphed from bulky bag analog phones into pocket digital computers with Wi-Fi connectivity. Also, consider the stretch of change from the advent of automatic braking systems to the arrival of features such as lane keeping assist and blind spot detection technology. The context of state of the art and standard of the industry defenses will surely evolve alongside the quickly pivoting advances in autonomous vehicle technology.

Historically, an OEM could prevail on a summary judgment motion, in product liability litigation, with evidence a product complied with state of the art and industry standards in existence at the time of design and manufacture. Pursuant to the *Banks* risk-utility test, evidence of industry standards and state of the art no long extinguish design defect allegations in strict liability actions.[22] Nonetheless, these defenses can and should be used to defend product liability litigation although they may not provide dispositive relief. Compliance with industry standards can be utilized in instances where punitive damages are alleged because proving compliance

addresses allegations of conscious indifference to the consequences or malicious intent.[23]

Conclusion

The trend toward highly autonomous vehicles is not expected to disrupt the traditional notions of who may be sued in product liability actions. Ultimately, who will be pursued as target defendants is not likely to change, except computer programmers and platform designers may more frequently enter the product liability spotlight. Traditional defendants, including OEMs, ostensible manufacturers, design entities, suppliers, component part manufacturers, raw materials suppliers, distributors, and sellers should expect little to no changes in the nature or complexity of product liability allegations. With highly autonomous vehicles, the blame is expected to be shifted from the operator to the vehicle and its computer systems and sensors, which are designed to assist in accident avoidance. The higher the level of autonomous technology, the more likely blame will be placed on the vehicle.

The safety benefits of autonomous vehicles, as recognized by the NHTSA[24] will not shield manufacturers from product liability litigation. Again, accidents do occur and manufacturers cannot anticipate and design out every conceivable scenario potentially encountered by a vehicle. Mishaps occur despite the best efforts of manufacturers, design entities, suppliers, distributors, quality control processes, and dealers to make available safe vehicles for consumers' enjoyment and transportation needs. Providing safe vehicles will remain the focus of vehicle manufacturers despite the highly-charged darts and arrows flying in the direction of product liability defendants. After all, entities involved in the process of introducing autonomous vehicles into the stream of commerce do not have an inherent

desire to injure individuals, as is often alleged by litigation opponents.

OEMs are in a virtual race to roll out the nation's first mainstream fleet of fully autonomous vehicles, and many are entrenched in the design, development and testing phases. Consumer expectations require OEMs to keep up and adapt to technological advancements. Therefore, it is vital for national regulations to catch up to technological innovation and adopt regulations specific to autonomous vehicles. In the interim, the current state of autonomous vehicle technology and federal regulations signals little to no change in product liability defense theories. Ultimately, a world consisting of driverless vehicles will not likely upend the current landscape of viable product liability defenses.

[1] The Evolution of Automated Safety Technologies, https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety#issue-road-self-driving (last visited April 10, 2019).
[2] Dan Neil, *Who's behind the Wheel? Nobody*, WALL ST. J., September 24, 2012.
[3] *Id.*
[4] 83 FR 59353 (extending the comment period for the ANPRM published on October 10, 2018 at 83 FR 50872).
[5] Tim Higgins, *Tesla Meets Model 3 Production Goal, but Struggles With Deliveries*, WALL ST. J. (Oct. 3, 2018), https://www.wsj.com/articles/tesla-produced-80-142-vehicles-in-third-quarter-1538484764.
[6] O.C.G.A. § 40-8-11.
[7] O.C.G.A. § 40-6-279.
[8] *See generally*, Restatement (Third) of Torts: Product Liability § 19 (1997).
[9] O.C.G.A. §§ 51-11-7 and 51-12-33.
[10] O.C.G.A. § 51-12-33.
[11] O.C.G.A. § 51-11-7.
[12] *See* Dean v. Toyota Indus. Equip. Mfg., Inc., 246 Ga.App. 255, 258-259, 540 S.E. 233, 236 (2000); Smith v. Ontario Sewing Mach. Co., 249 Ga. App. 364, 548 S.E. 2d 89 (2001), *cert. denied*, 2001 Ga. LEXIS 803 (Oct. 1, 2011).
[13] *See,* Hunt v. Harley-Davidson Motor Co., 147 Ga. App. 44, 248 S.E.2d 15 (1978).
[14] Exclusive: Tesla Issues Strongest Statement Yet Blaming Driver for Deadly Crash; https://abc7news.com/automotive/exclusive-tesla-issues-strongest-statement-yet-blaming-driver-for-deadly-crash/3325908/ (last visited April 10, 2019).
[15] *Id.*
[16] Troy Giggs & Daisuke Wakabayashi, *How a Self-Driving Uber Killed a Pedestrian in Arizona*, N.Y. Times (Mar 21, 2018), https://www.nytimes.com/interactive/2018/03/20/us/self-driving-uber-pedestrian-killed.html (Warning: The video contains graphic material).
[17] O.C.G.A. § 51-11-7.
[18] O.C.G.A. § 51-1-11.
[19] *See* Banks v. ICI Ams., 264 Ga. 732, 736, 450 S.E.2d 671 (1994).
[20] *See id*. at 737, 450 S.E.2d 671.
[21] Ford Motor Company v. Reese, 300 Ga.App. 82, 684 S.E.2d 279, 284 (2009).
[22] *Banks* 264 Ga. at 732, 450 S.E. 2d 674 (1994); *see also*, Moore v. ECI Mgmt., 246 Ga. App. 601, 605, 542 S.E. 2d 115, 120 (2000), *cert. denied*, 2001 Ga. LEXIS 363 (Apr. 30, 2001).
[23] Barger v. Garden Way, Inc., 231 Ga. App. 723, 728, 499 S.E. 2d 737 (1998).
[24] The Evolution of Automated Safety Technologies" https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety#issue-road-self-driving (last visited April 10, 2019).

The Turn of the Tide:
A Labor and Employment Update

by:

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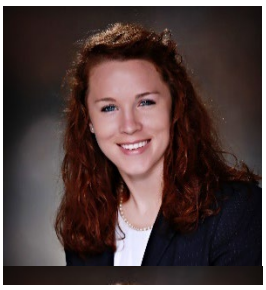

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Since President Donald J. Trump took office in January of 2017, there has been an overall shift in federal labor and employment law to a more pro-employer position. This shift has been evident in both the court systems and the agencies that oversee the enforcement of the federal labor and employment laws.

Despite the fact that the courts and agencies are moving to a more pro-employer position, employers still face significant concerns when it comes to Labor & Employment law. Media, whether it is news, social media, etc., has induced employees and employers to pay more attention to sexual harassment in today's workplace. That is employees are speaking out against harassment (past and present) and employers are forced to be proactive in trying to prevent it. Also, employers across the country are confused as to whether or not sexual orientation is a protected characteristic under the Title VII of the Civil Rights Act of 1964.

The circuits across the country have differing opinions, federal agencies have differing opinions, and neither the Supreme Court nor Congress will address the issue.

I. Decisions by the U.S. Supreme Court

On May 21, 2018, the Supreme Court held 5-4, in *Epic Systems v. Lewis*,[1] that class waivers in arbitration agreements between employees and employers are valid.[2]In so doing, the Court rejected the argument from the National Labor Relations Board that class waivers prevent employees from participating in protected concerted activity.[3]

While the Federal Arbitration Act states that arbitration agreements must be enforced, the NLRB argued that there is an exception within the act that applied to this situation – when "such grounds [] exist at law or in equity for the revocation of any contract."[4] According to the NLRB, since the class or collective waivers violated the NLRA, then the waivers fell into this exception, and thus were unenforceable.[5] The Federal appeals courts were split on the issue prior to *Lewis*.[6]

In its decision to uphold bars to class or collective actions, the Supreme Court reasoned that Congress's preference for enforcing arbitration agreements could not be overcome by the implications of another statute.[7] Additionally, it held that there was no indication that Congress intended to protect class or collective actions when it enacted the NLRA in the 1930s.[8] Thus, employers' arbitration agreements could include a class or collective waiver wherein employee claims may only be brought individually, not together as a group with other employees.

This decision is welcome news to employers who already have or would like to implement arbitration agreements with their employees. Arbitration agreements can help curb the expense and uncertainty factor of civil litigation. However, this ruling does not

offer a blank slate, anything goes type of situation. Employers must still ensure that their arbitration agreements, class waivers in particular, comply with applicable state standards prohibiting "unconscionable" contract provisions.

Another win for employers came in the Court's decision in *Navarro et al v. Encino Motorcars LLC*. [9] Here, the Court held that "service advisors" in car dealerships fall under the Fair Labor and Standards Act ("FLSA") exemption outlined in 29 U.S.C. §213(b)(10)(A) because they are "salesm[e]n . . . primarily engaged in . . . servicing automobiles."[10] While the holding is significant for car dealerships around the nation, it is the reasoning that is meaningful for all employers.

Under the FLSA, all employees must be paid at least minimum wage and must receive overtime (time and a half) for all hours worked over 40 in a given workweek.[11] However, employees who meet the specified duties in a particular exemption under the FLSA do not have to receive minimum wage or overtime, but instead must receive a guaranteed salary each week without consideration of hours worked.[12]

Justice Thomas, writing for the 5-4 majority, stated that the Ninth Circuit Court of Appeals, below, erred when it "narrowly construed" the exemptions under the FLSA.[13] That is, the Ninth Circuit improperly weighted the scales against the employer. The Ninth Circuit, along with many other Federal District and Appellate Courts, have taken the stance that exemptions under the FLSA should be construed narrowly, whereas the remedial provisions should be construed liberally.[14] However, the Court "reject[ed] this principle as a useful guidepost for interpreting the FLSA."[15]

The majority held that there is no indication in the text of the statute that the exemptions should be construed in this manner, and therefore, there is "no reason to

give [them] anything other than a fair (rather than a 'narrow') interpretation."[16] Justice Thomas pointed out that within the FLSA there are over two dozen exemptions, and those are just as much a part of the statute as the overtime pay requirements.[17] Therefore, in interpreting the FLSA courts should give a fair reading to both the exemptions and the remedial provisions.[18]

This decision will not affect the day-to-day dealings for employers, but it does offer more protection should they find themselves in court defending an exemption applied to an employee.

In *Mt. Lemmon Fire District v. Guido*,[19] the Supreme Court unanimously decided, 8-0 (Justice Brett Kavanaugh did not participate in the decision), that the Age Discrimination in Employment Act of 1967 ("ADEA") applies to all state and local governments, without consideration of the number of employees.[20] The Court held that the ADEA defines "employer" in two ways (1) "a person engaged in industry affecting commerce who has twenty or more employees . . .," and (2) "also means . . . a State or political subdivision of a State . . ."[21] The Court pointed out that "also means" signifies that the statute should be read in a manner that an employer can fall under either definition.[22] Therefore, the 20-employee minimum applicable to private sector employers does not apply to state or local governmental employers.[23]

The employer argued to the Supreme Court that the 20-employee minimum also applied to state and local governments because the ADEA should be read consistently with Title VII.[24] However, the Court rejected this argument.[25] The Court reasoned that when enacted, neither Title VII nor the ADEA applied to state or local governments, but both have been amended, albeit differently, to apply to state and local governments.[26] In 1972, Congress amended the definition of "person" under Title VII to

include "governments, governmental agencies, [and] political subdivisions . . .," and "industry affecting commerce" to include "any governmental industry, business or activity."[27] Congress did not change the 15-employee threshold as applied to these entities. Conversely, when the ADEA was amended in 1974, the change was made to the definition of "employer" with the addition of (2), as described above. [28]

The impact on state and local governments is expected to be significant. The Eleventh Amendment of the Constitution will shield state employers from private suits by employees, but it does not shield employers from suits from other government entities such as the Equal Employment Opportunity Counsel ("EEOC").[29] Unfortunately, local governments – such as municipalities, counties, and school boards – cannot claim immunity under the Eleventh Circuit, so they are not shielded from private suit under the ADEA.

II. The #MeToo Movement

While "Me Too" was coined by Tarana Burke in 2006 to support sexual abuse victims, specifically in low-income areas, it became a viral movement shortly after Harvey Weinstein was arrested in 2017.[30] After Alyssa Milano tweeted urging women to share their story of sexual violence using the hashtag "metoo," it was reportedly used and shared over twelve million times in just twenty-four hours across multiple social media sites.[31]

Women across the globe shared their "#metoo" stories and some of them involved high powered men including actors, reporters, politicians, and business executives.[32] While many of the stories we see on the news involve action that took place decades ago and is likely no longer actionable in court, its influence on women in the workplace has not gone undetected.

A. Federal Law

Throughout much of 2018, the Equal Employment Opportunity Commission (the

"EEOC") stated that it was not seeing an uptick in sexual harassment charges in light of the #MeToo movement, which began on October 5, 2017.[33] This was not particularly surprising for Chairman Victoria Lipnic since most employees have 300 days [34] to file a charge with the EEOC.[35] In September of this year, Commissioner Feldblum identified that the Commission was seeing a slight increase of approximately three percent in charges of sexual harassment. [36]

On the one year anniversary of the the #MeToo Movement, the EEOC released information indicating that it was experiencing a significant impact stemming from the movement.[37] This included a twelve percent increase in charges claiming sexual harassment from FY 2017 until FY 2018.[38] The Commission has recovered $70 million dollars in recovery through litigation and administrative enforcement. [39] Lastly, the Commission filed 41 lawsuits alleging sexual harassment, which it cites as a fifty percent increase since FY 2017. [40]

We have also seen some action from Congress on this issue. When it passed the Tax Cuts and Jobs Act, effective on January 1, 2018, it included a provision now known as the "Harvey Weinstein Tax."[41] This provision bars employers from deducting the cost of a settlement related to sexual harassment or abuse (including legal fees) if that payment is subject to a nondisclosure agreement.[42] In short, if you want to keep the payment a secret then you cannot itemize it as a loss on your taxes.

B. What About State Action?

If any employee misses the deadline under Federal law or believes that an employer may have a strong defense, then the employee (or their attorney) may decide instead to file a claim in state court. A tort claim in Georgia state court is going to have a two-year statute of limitations and it is going to be a little broader.[43] An employee may claim negligent hiring, retention, and/or

supervision, intentional infliction of emotional distress, or any other number of torts that may (or may not) apply to the particular situation.

Like in many situations where Congress is stagnant, the state and local legislatures are taking action. Some states including California,[44] Connecticut,[45] Delaware,[46] Maine,[47] and New York State[48] already have laws that require employers to conduct sexual harassment training on an annual basis. We are likely to see this across the nation as the momentum on this movement continues to build.

C. Practical Advice

No matter where the eventual claim may be brought, employers can put themselves in a defensible position by promulgating and enforcing a strong non-discrimination/harassment policy with a reporting mechanism, training their supervisors on how to handle complaints, and taking swift action when there is a complaint.

III. Sexual Orientation – Protected Characteristic under Title VII?

Is sexual orientation a protected characteristic? The simple lawyer answer – it depends. The answer to this question could vary depending on what jurisdiction you are in or what federal agency you are in front of.

Gender stereotyping has long been protected under the umbrella of "sex" in Title VII.[49] That is when an employer discriminates against a female employee for being to "masculine" in her looks or demeanor or against a male for being "effeminate."[50] For this reason, transgendered persons are generally protected under Title VII because to discriminate would be unlawful gender stereotyping.[51]

Proponents of protecting sexual harassment under Title VII take the position that discrimination based on sexual orientation is a kind of gender stereotyping. That is the person does not fit in the gender

stereotype as to who should be attracted to whom.

A. Not In Georgia – At Least For Now.

In March of 2017, the Eleventh Circuit Court of Appeals (Alabama, Florida, and Georgia), held in *Evans v. Georgia Regional Hospital*[52] that sexual orientation is not a protected characteristic under Title VII.[53] Jameka Evans, security guard at Georgia Regional Hospital in Savannah, claimed that she was subjected to discrimination and harassment because she is a lesbian. While Evans' claim based on sexual orientation was dismissed, the Eleventh Circuit remanded her claim that she was treated differently because she failed to conform to gender stereotypes.[54]

This decision was reaffirmed in May of 2018, in Bostock v. Clayton County Board of Commissioners.[55] There, the Plaintiff, Bostock claimed that he received good performance reviews and praise for over ten years as a child welfare services coordinator for the Juvenile Court until he joined a gay recreational softball league. He claimed that after that he was subjected to criticism, an internal audit, and he was ultimately terminated. However, the district court dismissed his case, and the Court of Appeals affirmed.[56] Both of these decisions come from three person panels and were denied *en banc* review. Therefore, the issue has yet to be heard *en banc* in the Eleventh Circuit.

Currently, there is a circuit split on the issue of whether or not sexual orientation is a protected characteristic. The Second (Connecticut, New York, and Vermont),[57] Sixth (Kentucky, Michigan, Ohio, and Tennessee),[58] and Seventh (Illinois, Indiana, and Wisconsin)[59] circuits have taken an opposite view from the Eleventh Circuit. All of these courts have taken the view that it is discrimination to take adverse action against an employee based on their sexual orientation.[60] With this circuit split, the issue is ripe for review from the Supreme Court of

the United States.[61] However, in the past, the Court has declined review (i.e. Evans) and left it up to Congress to amend Title VII.[62] With the change in the makeup of the court, as mentioned above, we will have to wait to see how the Court decides to handle this uncertainty within the law.[63]

B. Department of Justice v. the EEOC

The EEOC and the Department of Justice ("DOJ") have taken differing views on whether or not sexual orientation is a protected characteristic under Title VII. This disagreement came to light when both the EEOC and the Department of Justice filed an amicus brief in Zarda, while it was pending in the United States Court of Appeals for the Second Circuit.[64] Whereas, the EEOC has stated in their Strategic Enforcement Plan since December of 2012, to include "'coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply' as a top Commission enforcement priority."[65] The EEOC takes the position that discrimination based on sexual orientation is gender stereotyping (as explained above).[66] However, the DOJ shares the views of the Eleventh Circuit in that the statute, as currently written, was not intended to prohibit discrimination based on sexual orientation.[67] If the Supreme Court ultimately makes a decision on the issue, the agencies will be forced to alter their position accordingly.

IV. Conclusion

The Trump Administration's changes have swung the scales of justice somewhat back to center when it comes to Labor & Employment. With Congress split between the Republicans and the Democrats, it is hard to imagine that much will be accomplished statutorily. Therefore, any changes or progress will likely come either through different regulations or the continued de-regulation, or in the alternative through case law.

[1] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[2] *Id.* at 1619.
[3] *Id*.
[4] *Id.* at 1622 (quoting 9 U.S.C. § 2).
[5] *Id.*
[6] Murphy Oil USA, Inc. v. N.L.R.B., 808 F.3d 1013, 1015 (5th Cir. 2015), *aff'd sub nom. Epic Sys. Corp.*, 138 S. Ct. 1612; Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, Epic Sys. Corp. v. Lewis,137 S. Ct. 809 (2017), and *rev'd. Epic Sys.*, 138 S. Ct. 1612 (2018); Morris v. Ernst & Young, LLP, 894 F.3d 1093 (9th Cir. 2018).
[7] *Epic Sys*., 138 S. Ct. at 1627.
[8] *Id.* at 1631.
[9] Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1138 (2018).
[10] *Id.* at 1137.
[11] 29 U.S.C. §§ 203, 206 (2016).
[12] 29 U.S.C. § 213 (2016).
[13] *Encino Motorcars*, 138 S. Ct. at 1148 n.7.
[14] *Id.* at 1142.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 139 S. Ct. 22 (2018).
[20] *Id.* at 24.
[21] *Id.*
[22] *Id.* at 25
[23] *Id.*
[24] *Id.* at 25
[25] *Id.*
[26] *Id.* at 24
[27] *Id.* at 25
[28] *Id.*
[29] U.S. Const. amend. XI
[30] Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017) https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html.
[31] *Id.*
[32] Fiza Pirani, *One Year After Weinstein: A Timeline Of Powerful Men Accused Of Sexual Misconduct*, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 5, 2018), https://www.ajc.com/news/national/from-weinstein-kavanaugh-timeline-the-year-biggest-high-profile-sexual-harassment-cases/UlrSiSF8IrBUrICPJqGPGI/.
[33] *Opening Statement of Acting Chair Victoria A Lipnic*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 11, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/lipnic.cfm.
[34] Here in Georgia, employees are required to file their charge with the EEOC within 180 days of the alleged violation – discrimination, harassment, or retaliation. *Timeliness*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/field/atlanta/timeliness.cfm (last visited Nov. 30, 2018).
[35] *Opening Statement of Acting Chair Victoria A Lipnic*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 11, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/lipnic.cfm.
[36] Chris Opfer, *Sex Harassment Claims on Rise, EEOC Finds*, BLOOMBERG LAW (Sept. 12, 2018), https://www.bna.com/sex-harassment-claims-n73014482501/.
[37] *EEOC Releases Preliminary FY 2018 Sexual Harassment Data*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Oct. 4, 2018) https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] 26 U.S.C. § 162(q) (2017).
[42] *Id.*
[43] O.C.G.A § 9-3-33 (2015).
[44] Cal. Gov't Code § 12950.1 9 (2018).
[45] Conn. Agencies Regs. §§ 46a-54-200 through 46a-54-207 (1993).
[46] 19 Del C. § 711A(g) (2018) (effective January 1, 2019).
[47] 26 M.R.S.A. § 807 (2017).
[48] N.Y. Lab. Law § 201-g (2018).
[49] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
[50] *Id.*
[51] *Id.*
[52] Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).
[53] *Evans*, 850 F.3d at 1256.
[54] *Id.*
[55] Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018).
[56] *Id.*
[57] Zarda v. Altitude Express, Inc., 883 F.3d 100, 107 (2d Cir. 2018).
[58] Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).
[59] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).
[60] *See supra* notes 57-59.
[61] Robin Shea, *Supreme Court Will Soon Decide Whether to Take Up LGBT Rights Case*, EMPLOYMENT & LABOR INSIDER (November 9, 2018), https://www.constangy.com/employment-

labor-insider/supreme-court-will-soon-decide-whether-to.

[62] Evans v. Georgia Reg'l Hosp., 138 S. Ct. 557 (2017) (denying petition for writ of certiorari).

[63] *Bostock*, 723 F. App'x 964 (11th Cir. 2018), petition for cert. filed, No. 17-1618.

[64] Brief for the United States as Amicus Curiae, Zarda v. Altitude Express, Inc., 2017 WL 3277292 (C.A.2) (No. 15-3775); En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission, Zarda v. Altitude Express, Inc., 2017 WL 2730281 (C.A.2) (No. 15-3775).

[65] *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 8, 2016), https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.

[66] En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission, Zarda v. Altitude Express, Inc., 2017 WL 2730281 (C.A.2) (No. 15-3775).

[67] Brief for the United States as Amicus Curiae, Zarda v. Altitude Express, Inc., 2017 WL 3277292 (C.A.2) (No. 15-3775).

THIRD-PARTY LITIGATION FUNDERS: THE "PARTY" YOU DIDN'T KNOW WAS EXERCISING CONTROL OVER YOUR LITIGATION AND WHAT YOU CAN DO ABOUT IT

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I. Introduction to Litigation Funding

It is undeniable that litigation funding is taking the legal world by storm. In 2017, 36% of U.S. law firms reported using litigation funding, which was a 414% increase in use since 2013 (when only 7% of law firms reported using it).[1]

In its most basic form, litigation funding allows a plaintiff or a lawyer to obtain a cash advance from a third-party lender in exchange for a percentage of the proceeds recovered from the litigation.[2] Typically, the advances are nonrecourse in that the lender cannot recover anything outside of the litigation.[3] Therefore, if the amount recovered in the lawsuit is less than the total amount owed to the lender, the lender may be entitled to the proceeds recovered, but nothing more. Similarly, if the case fails for whatever reason, nothing is owed to the lender.

Funding companies advertise their services to a wide-range of players, including individual plaintiffs pursuing claims against a corporate defendant with deep pockets (often referred to as "David v. Goliath" lawsuits by those in favor of litigation funding), class action plaintiffs, plaintiffs engaging in expansive litigation requiring significant out-of-pocket expenses, and plaintiffs' lawyers and law firms. The advances received from the funding company

can be used to fund litigation or for non-litigation related expenses, such as the payment of rent, groceries, and other necessities by individual plaintiffs.[4]

Those who support litigation funding argue that it evens the playing field between individual plaintiffs and large corporations and allows greater access to the judicial system.[5] While litigation funding may allow greater access to "justice", it is clear that litigation funding is rife with potential ethical issues and dilemmas, including the potential for inappropriate relationships between lawyers and funding companies, the potential abuse and manipulation of unsophisticated plaintiffs, the funding of litigation for purposes other than to right a wrong done to an injured plaintiff, and the inappropriate exercise of influence over the litigation by third-party funders.[6]

II. Ethical Issues to be Aware of in Cases Involving Litigation Funding

A. The Possibility That a Funding Agreement Might Allow a Non-Party to Exercise Influence and Control Over Pending Litigation

Rule 5.4 of Georgia's Rules of Professional Conduct (the "***Rules***") prohibit, among other things, a lawyer from sharing legal fees with a non-lawyer and from allowing a person who employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.[7] The purpose of the foregoing rule is to "protect the lawyer's professional independence of judgment."[8]

Recently, the New York City Bar Association considered whether funding agreements between lawyers and funding companies were ethical in light of Rule 5.4's prohibition against fee-sharing between lawyers and non-lawyers. The Bar Association concluded that typical funding agreements between a lawyer and a funding company were unethical pursuant to Rule 5.4 because the Rule forbids a funding

arrangement in which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received.[9] "The Bar Association explained that, "when non-lawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer."[10]

In essence, the New York City Bar Association's opinion suggests that funding agreements between lawyers and funding companies may interfere with the lawyer-client relationship and the duties owed by the lawyer to the client. Those in favor of litigation funding arrangements argue that there is no ethical difference between a non-lawyer's security interest in a contract right (fees not yet recovered from the lawyer) or accounts receivable (fees earned by the lawyer) and that the Bar Association's decision substantially undermines the ability for non-wealthy people to prosecute civil claims.[11] However, it is not irrational to worry that a funder's interest in fees not yet received by a lawyer and the funder's interest in recovering the greatest amount of money possible could result in a situation in which the lender exerts (or attempts to exert) control over the lawyer and the litigation. As explained by the Institute of Legal Reform, litigation funding "undercuts plaintiff and lawyer control over litigation because the [funding] company, as an investor in the plaintiff's lawsuit, presumably will seek to protect its investment, and can therefore be expected to try to exert control over the plaintiff's and counsel's strategic decisions."[12]

To better illustrate the control that a third-party funder may exercise over a pending litigation, let's consider a real-life example. In connection with the case of *Gbarabe v. Chevron,*[13] Plaintiffs' counsel entered into a funding agreement with Therium Litigation Funding LLC ("***Therium***").[14] Pursuant to the funding

agreement, plaintiffs' counsel agreed, among other things, as follows:

(1) That plaintiffs' counsel provided only accurate information to Therium about the claim and did not fail to disclose any information, document, or material/evidence that would be relevant to Therium's decision to enter into and remain bound by the agreement;

(2) To prosecute the case in accordance with the litigation plan and within the budget agreed to by counsel and Therium;

(3) Not to make any changes to the litigation plan without Therium's prior consent;

(4) Not to engage any co-counsel or hire any experts without the prior approval of Therium; and

(5) To use all "reasonable endeavors, consistent with the professional conduct of the Claim in accordance with the terms of this Agreement, to recover the maximum possible Contingency Fee in respect to the Claim, either through an agreed settlement, a judgment, an order, or jury trial as soon as reasonably possible".[15]

Additionally, the agreement allowed Therium to (1) receive traditionally privileged attorney-client information, which the agreement states does not waive plaintiffs' privilege; (2) challenge any invoice for services performed in connection with the litigation that it did not consider "reasonable costs"; and (3) terminate the

funding if there was a material breach of the agreement.[16]

If we unpack the legal terms in the foregoing agreement, we can easily see that it allows Therium to exercise a significant amount of control over the litigation and the litigation strategy. For example, while the agreement does not specifically state that Therium has the ability to "control" the decisions being made in connection with the litigation, the agreement allows Therium to pull funding if it doesn't agree with any decision, including the strategy being pursued by plaintiffs' counsel or the experts hired. The terms of the agreement essentially ensure that plaintiffs' counsel will run every decision by Therium in an effort to maintain the funding needed to continue with the litigation.

Another cause for concern is the fact that plaintiffs' counsel owes a contractual duty to Therium, which duty is independent from counsel's duties owed to the plaintiffs.[17] Because plaintiffs' counsel must jump through certain hoops to fulfil their contractual obligations owed to Therium, there is a potential that they will be unable to fulfill their duty of independent judgment owed to their clients. For example, counsel would most likely discuss the hiring of any expert with Therium and may even decide to forego hiring an expert they believed critical to their clients' case if they knew Therium did not approve of the hiring. In fact, one of plaintiffs' expert witnesses testified at his deposition that his report had not yet been provided because plaintiffs "were putting the money in place for the work to proceed."[18] Thus, it appears that the expert's work would not have proceeded if plaintiffs' did not receive funding, which we know was coming from a third-party funder.

Additionally, the funding agreement requires the lawyers to recover the largest possible fee as soon as reasonably possible. Not only does the foregoing provision

suggest that the lawyers were in communication with Therium regarding settlement offers made and the acceptance of any such offers, such a provision would undoubtedly promote prolonged litigation and the consideration of interests other than the clients' best interests. Moreover, the fact that the lawyers' had a financial stake in the outcome of the litigation beyond the recoupment of traditional legal fees suggests that a potential conflict of interest existed under Rule 1.7(a), which prohibits a lawyer from representing a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to a third person will materially and adversely affect the representation of the client.[19] There is no question, based on the terms of the agreement, that the lawyers in the case of *Gbarabe v. Chevron* and their financial interest in the outcome of the litigation could have interfered with their duty to provide honest, impartial advice to the client.

Moreover, as with all litigation funding arrangements, the repayment terms of the funding agreement in *Gbarabe v. Chevron* could have influenced settlement recommendations made by Chevron's lawyers, settlement decisions made by the plaintiffs, and how the case proceeded through litigation. For example, if the plaintiffs succeeded in the *Gbarabe* litigation, plaintiffs' counsel would have been required to pay Therium $10.2 million plus all costs paid in connection with the litigation, which would have resulted in a total payment of $11.9 million to Therium.[20] Although $11.9 million was nothing when compared to the purported value of the case, there is no world in which the repayment of $11.9 million does not play a part in the manner in which any settlement offer is presented to plaintiffs and the consideration of whether plaintiffs should settle or hold out for a larger settlement. The fact that the lawyers might take into account the amount

they owed to the funder when discussing settlement options with the plaintiffs would render the lawyer incapable of providing unbiased advice as required under the Rules.

As you can see from a review of the funding agreement in *Gbarabe*, litigation funding agreements between lawyers and the funder have the potential to allow a non-party to influence and exercise control over various aspects of a pending litigation. While some litigation funding agreements may not be as far reaching as the terms in the agreement in *Gbarabe*, it is clear that the potential for influence by a non-party with a stake in the litigation should at the very least be discoverable in litigation and properly examined by the opposing party and the court.

B. The Potential Manipulation of Individual Plaintiffs and the Effects on Settlement

Sometimes an individual plaintiff in need of fast cash will leverage their lawsuit in exchange for a cash advance that can be used on non-litigation related expenses. In essence, a plaintiff receiving an advance from a litigation funder in such a scenario is selling a portion of her future recovery at a very large discount.

For example, a typical funding agreement might require the funder to pay the plaintiff $2,500 in exchange for recovering $3,000 from the plaintiff when she recovers in connection with her pending lawsuit.[21] However, in addition to the $3,000 owed, such an agreement would likely state that the plaintiff also owed an additional $180 per month for every month the $3,000 was not paid. Thus, the plaintiff would owe the funder $3,000 in exchange for an advance payment of $2,500, plus $2,160 per year until the funder was paid in full. If the litigation dragged on for 3 years after the plaintiff received the advance, the plaintiff would owe the funder a total of $9,480 for a one-time payment of $2,500, which is more than 3.7 times the initial advance.

For most people, $2,500 does not last very long. For someone with no savings and/or bad credit, ongoing litigation might mean that more than one advance is received by an individual plaintiff. In the end, a plaintiff might end of owing a third-party funder more than she recovers in the lawsuit due to the interest and fees paid in exchange for the one-time advance payment. Just as with payday loan sharks, funding companies are benefiting significantly from the manipulation of unsophisticated plaintiffs in need of quick cash.

C. The Potential Impediments to Settlement When Funding Agreements Are Involved

There is no doubt that the repayment terms in funding agreements can significantly impede settlement. First, a plaintiff may view a litigation funder's nonrecourse payment as an endorsement that the plaintiff's case is valuable, resulting in an increase of the plaintiff's settlement reference point.[22] Most litigators know that overconfidence is an impediment to settlement regardless of whether the overconfidence comes from the plaintiff or the defendant. This is because overconfidence results in the overestimation of the reasonable bargaining range, making it impossible for the parties to meet in the middle. When a plaintiff overestimates the value of her case and the odds of succeeding at trial, she may reject a reasonable settlement offer and choose to go to trial.[23] In the end, the plaintiff may recover significantly less at trial than she would have had her settlement range not been inflated by the receipt of funds by a third-party funder.

Second, litigation funding can take what would typically be seen as a reasonable and fair settlement and turn that number into a loss in the mind of a plaintiff who received a nonrecourse advance from a litigation funder. This is because the plaintiff will automatically take off the amount owed to the third-party lender from the settlement offer made by the defendant despite the fact that

she received this payment in advance and has already recouped that benefit. Thus, a plaintiff who owes a litigation funding company $20,000 in principal and fees will view a $60,000 settlement offer as a $40,000 settlement offer.[24]

"For whatever reason, people are wired to be willing to take risks to avoid losses but are unwilling to take risks to accumulate gains."[25] If a plaintiff views a settlement as a gain, she is more likely to accept it, but if she views it as a loss she is more likely to take her chances with trial. [26] Thus, litigation funding can increase a plaintiff's intended settlement amount by the amount owed to the litigation funding company, which can in turn decrease the overall likelihood of settlement due to a distorted settlement range.[27]

D. The Potential That Lawsuits Will be Filed for Purposes Other Than Obtaining Recovery for an Injured Plaintiff

In addition to the potential for conflicts of interest, the exercise of control by a third-party, and possible impediments to settlement, third-party funding may allow a third-party funder with a score to settle against a particular defendant to fund a plaintiff's case for purposes of settling that score.

Take the case of *Bollea v. Gawker Media, LLC*. The lawsuit was filed as a result of a 2012 posting by Gawker Media, LLC ("***Gawker***"), a celebrity news and gossip website, of an excerpt of a video depicting Terry Bollea, more famously known as Hulk Hogan, having consensual sexual relations with his friend's wife.[28] It was not revealed until the conclusion of Hogan's case against Gawker, which took four years to take to trial, that Hogan's legal bills (estimated to total approximately $10 million dollars) were paid entirely by Peter Thiel ("***Theil***"), the billionaire co-founder of PayPal, and that Hogan and his Florida lawyers had no

knowledge of Thiel's identity and motives for funding the litigation until the conclusion of the litigation.[29] In fact, Thiel's own lawyer, Charles Harder ("***Harder***"), who pursued Hogan and offered to represent him against Gawker and assured him that all of his legal fees would be paid by a third-party funder, also did not know the identity of the person paying his fees.[30] It was later discovered that Thiel and his associate, who has only been identified as "Mr. A", used encryption apps to speak with Harder about the litigation.

Gawker, who was no stranger to lawsuits filed by humiliated celebrities outed by its writers, intended to prolong the litigation in an effort to force Hogan to settle without proceeding to trial.[31] However, Hogan's access to Thiel's secret money allowed Hogan to continue through the lengthy four-year litigation and to incur legal expenses he admittedly would not have been able to afford without Thiel's funding.

Immediately prior to trial Gawker made a last-ditch settlement offer of $10,000,000 to Hogan, "which could have been very attractive to Hogan but self-defeating for Thiel."[32] The settlement offer was rejected and no counteroffer was made on behalf of Hogan.[33] In 2016, the jury returned a verdict in favor of Hogan in the amount of $140 million, which was later reduced to $115 million in damages, $15 million in punitive damages against Gawker, $10 million in punitive damages against Nick Denton, the founder of Gawker, and $100,000 in punitive damages against Albert Daulerio, the Gawker editor who posted the video of Hogan.[34]

The legal world was buzzing after Thiel later disclosed that he had secretly funded Hogan's civil lawsuit because it was clear that Thiel, who had been outed by Gawker years before Hogan's lawsuit for being gay and who had publicly stated his distaste for Gawker and its writing, had

funded Hogan's lawsuit as a way to get even with Gawker. And in the end, Thiel's funding of Hogan's civil case against Gawker resulted in the media company going bankrupt.

So, the story of Hogan and Gawker brings to light the possibility that litigation funding may allow a third-party with an interest in getting back at or destroying a particular defendant to do just that without having to disclose his identity or motives. Even though Hogan was in fact harmed by Gawker's release of a video depicting him during a moment in his private life, should Thiel have been permitted to fund $10 million in legal fees without having to disclose to Gawker or the court his identity and the benefit, if any, he was to obtain in connection with the funding? As one person said, "[n]o harm, no foul, is the rule in basketball but not in legal ethics."[35]

It would seem that, due to the potential conflicts that could arise in not disclosing and understanding the identity of a third-party funder and the funder's interest in the lawsuit, the funder's identity and agreement with the plaintiff should at least be disclosed to the opposing party.

III. Defense Attorneys Need to be Proactive in Discovering and Pursuing Litigation Funding Agreements

Not every agreement involving a third-party funder will be relevant to your litigation or will disclose a relevant conflict, but, as you can see from the foregoing, it is imperative that defense counsel identify potential funding agreements and obtain copies of the agreements during discovery. To do so, defense counsel should incorporate questions about potential funding arrangements and agreements in their discovery to all plaintiffs, including individual plaintiffs. The request for such information and the receipt of any and all documents bearing on the issue of third-party funding are essential to the fairness of all parties involved in litigation. In Georgia,

defendants are required to disclose the limits of their applicable insurance.[36] Why should the disclosure and production of funding agreements and advance payments received by a plaintiff in connection with the lawsuit be any different?

When you receive information regarding a third-party funding arrangement, make sure to send a non-party request to the funder and request any and all documents relating to the relationship, the funds provided to the plaintiff, the lawyer's role in the arrangement, and the amount to be paid by the plaintiff at the conclusion of the litigation. If the funder refuses to provide responsive documents, challenge the refusal by filing a motion to compel with the court. Right now, the trend in Georgia (as with other states) seems to be favoring the discoverability of such agreements.[37]

Once the funding agreement is received, study it and identify any potential conflicts and see if the agreements can help defend against certain claims asserted by the plaintiff against the defendant. For example, if the plaintiff alleges that the defendant was stubbornly litigious by continuing to engage in litigation despite the lack of any evidence supporting a denial of liability or a challenge as to the plaintiff's damages, evidence of the funding agreement and the significant amounts owed by the plaintiff in exchange for a small one-time advance payment may support your argument that it was actually the plaintiff, not the defendant, who was stubbornly litigious and who insisted on protracted litigation.[38]

In the end, educating other lawyers, the court, and the Georgia legislature about the potential harms and conflicts involved with litigation funding may be the best (and only way) to properly address the issue. As the Georgia Court of Appeals stated, while litigation funding engaged in by [parties to a lawsuit], with its associated fees and charges, may legitimately be labeled financially

insidious, it is the General Assembly, not this Court, which must, if it so chooses, expressly promulgate laws to regulate this activity."[39]

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[1] *2017 Litigation Finance Survey*, BUFORD CAPITAL, p. 8, *available at* http://www.burfordcapital.com/wp-content/uploads/2017/09/Burford-2017-Litigation-Finance-Research-Whitepaper.pdf.
[2] *See ABA Commission on Ethics 20/20 Informational Report to the House of Delegates*, p. 1, *available at* https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf; 2017 Litigation Finance Survey, BUFORD CAPITAL, p. 4, available at http://www.burfordcapital.com/wp-content/uploads/2017/09/Burford-2017-Litigation-Finance-Research-Whitepaper.pdf.
[3] *See ABA Commission on Ethics 20/20 Informational Report to the House of Delegates*, p. 5-6, *available at* https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.
[4] *Id*. at p. 5.
[5] *Id.*
[6] *Id.*
[7] GA. RULES OF PROF'L CONDUCT, R. 5.4(a) and (c).
[8] *Id.* Comment 1.
[9] *Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees*, NEW YORK BAR ASSOCIATION, p. 4, *available at* https://s3.amazonaws.com/documents.nycbar.org/files/2018416-Litigation_Funding.pdf.
[10] *Id.*
[11] Anthony E. Davis and Anthony J. Sebok, *New Ethics Opinion on Litigation Funding Gets it Wrong*, August 31, 2018, *available at* https://www.law.com/newyorklawjournal/2018/08/31/new-ethics-opinion-on-litigation-funding-gets-it-wrong/.
[12] U.S. Chamber Institute for Legal Reform, Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation (2012), p. 3, *available at* http://www.instituteforlegalreform.com/doc/stopping-the-sale-on-lawsuits-a-proposal-to-regulate-thirdparty-investments-in-litigation).
[13] Natto Iyela Gbarabe, et al. v. Chevron Corp., 14-cv-00173-SI (N.D. Ca. 2014).
[14] *Id*. Declaration of Craig E. Stewart in Support of Chevron Corp.'s Motion to Compel Plaintiffs to Produce Litigation Funding Documents and Comply With Rule 3-15, at ¶ 20, Exhibit 19; *see also* a copy of the Litigation Funding Agreement at: https://www.documentcloud.org/documents/3898552-Funding-Agreement.html
[15] *See Litigation Funding Agreement*, at pp. 6-7, *available at* https://www.documentcloud.org/documents/3898552-Funding-Agreement.html.
[16] *Id*. at pp. 8-10.
[17] *Id.* at p. 6, ¶ 3.1.2 (stating that the lawyers must "comply diligently with the terms of, and their obligations under this Agreement.").
[18] Ben Hancock, *How Jones Day Unmasked a Litigation Funding Deal and Won*, October 29, 2017, *available at* https://www.law.com/americanlawyer/sites/americanlawyer/2017/10/29/how-jones-day-unmasked-a-litigation-funding-deal-and-won/..
[19] GA. RULES OF PROF'L. CONDUCT, R. 1.7(a).
[20] Ben Hancock, *How Jones Day Unmasked a Litigation Funding Deal and Won*, October 29, 2017, *available at* https://www.law.com/americanlawyer/sites/americanlawyer/2017/10/29/how-jones-day-unmasked-a-litigation-funding-deal-and-won/.
[21] This hypothetical is based on an actual litigation funding agreement entered into by an individual plaintiff and Green Link Solutions, LLC, which funding agreement is in the possession of the author.
[22] Jean Xiao, *Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table*, 68 VAND. L. REV. 261, 282-84 (2015).
[23] *Id.* at 283-84.
[24] *Id.* at 284-89.
[25] Barbara A. Reeves, *How Third-Party Funders Change the Chemistry of Settlements*, JAMS, August 2017 at p. 1, *available at* https://www.jamsadr.com/files/uploads/documents/articles/reeves-advocate-how-third-party-funders-change-the-chemistry-of-settlements-2017-august.pdf.
[26] *Id.*
[27] *Id.*
[28] Gawker Media, LLC v. Bollea, 170 So. 3d 125, 127 (Fla. Dist. Ct. App. 2015).

[29] Steven Lubet, *The Gawker Case Has Become More Interesting*, The American Prospect, June 14, 2018, *available at* https://prospect.org/article/gawker-case-has-become-more-interesting.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Bollea v. Gawker Media, LLC, 2016 WL 4073660, at *1 (Fla. Cir. Ct. 2016).
[35] Steven Lubet, *The Gawker Case Has Become More Interesting*, The American Prospect, June 14, 2018, available at https://prospect.org/article/gawker-case-has-become-more-interesting.
[36] *See* O.C.G.A. § 33-3-28.
[37] *See* Rangel v. Anderson, CAFN: 2:15-cv-81, at pp. 17-18 (N.D. Ga. Aug. 23, 2016) (concluding that funding arrangement was relevant and discoverable because it was not a traditional collateral source, defendant was not seeking to introduce evidence of the arrangement to minimize its liability to plaintiff, and because it was relevant to the issue of the treating physicians' credibility and potential bias); *see also* ML Healthcare Servs., LLC v. Public Super Mkts., Inc., 881 F.3d 1293, 1304-05(11th Cir. Ga. 2018) (funding agreement was relevant and admissible to contest the reasonableness of plaintiff's claimed medical bills).
[38] *See* Corey v. Clear Channel Outdoor, Inc., 299 Ga. App. 487, 493 (2009) (defendant may defend against claim for attorney's fees based on alleged stubborn litigiousness by showing that it was the plaintiff rather than the defendant who was stubbornly litigious).
[39] *See* Cherokee Funding LLC v. Ruth, 342 Ga. App. 404, 410 (2017).

YOU'RE ON NOTICE: ANALYZING APPLICATION OF RELATION BACK DOCTRINE TO MEDICAL MALPRACTICE CLAIMS IN THE WAKE OF *OLLER* AND *TENET*

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Two recent Georgia appellate decisions by the Supreme Court of Georgia and Court of Appeals of Georgia have shed light on an important issue that arises frequently in medical malpractice actions: application of the relation back doctrine when a new claim of negligence is added after the statute of limitation has expired. The Court of Appeals' 2017 decision in Oller v. Rockdale Hospital, LLC[1] allowed a plaintiff to add an additional claim for vicarious liability against a corporate defendant well after the statute of limitation had expired by finding that the plaintiff had provided sufficient notice to meet its burden. This decision created troubling law for corporate medical malpractice defendants and defense attorneys. Subsequently, in 2018, the Supreme Court of Georgia decided *Tenet HealthSystem GB, Inc. v. Thomas*,[2] which provided some clarity regarding how to determine whether a claim for medical malpractice relates back to the original filing date. It provided a factorial based approach for analyzing the issue which can be used to guide defendants and their counsel on this important issue. This article examines the two decisions and their interplay, and discusses their importance going forward.

I. *Oller v. Rockdale Hospital, LLC*

a. Facts and Procedural Posture

In *Oller*, the plaintiff filed suit alleging that three corporate defendants, two

physicians (Dr. Mitchell and Dr. Hunt), and one registered nurse deviated from the applicable standard of care during their care and treatment of Shirley Nobles, who lost neurological function and ultimately died following a hypoglycemic event in June 2011.[3] Notably, the plaintiff failed to name the employer of the two physicians, 24 On Physicians, PC ("24 On"), in the Initial Complaint.[4] The plaintiff subsequently dismissed her suit and refiled five months later.[5] The Renewal Complaint named the same parties, and added vicarious liability claims against 24 On.[6] The affidavit filed contemporaneously with the Renewal Complaint, pursuant to O.C.G.A. § 9-11-9.1, did not state any claims against 24 On.[7] After 24 On moved to dismiss, the plaintiff subsequently filed an amended affidavit to include specific acts of negligence against 24 On.[8] Over four years after the care at issue, and over two years after the expiration of the statute of limitation, the plaintiff filed another amended affidavit which stated that the claims against 24 On were derived from "the negligence of the physicians that attended [decedent]" and that "the treating physicians [were] actual and/or ostensible agents or otherwise servants and/or employees of … 24 On."[9] Importantly, the alleged acts or omissions of 24 On employees, other than Dr. Hunt and Dr. Mitchell, had never been raised as an issue in the case until the filing of the amended affidavits well after the expiration of the statute of limitations.[10]

After the close of discovery, 24 On moved for partial summary judgment on the grounds that the plaintiff's claims for vicarious liability by any of 24 On's employees or physicians other than Dr. Mitchell and Dr. Hunt should be dismissed as untimely because those claims had not been asserted until after the expiration of the statute of limitation.[11] 24 On showed that it was not until the deposition of the plaintiff's expert affiant that 24 On learned that the

plaintiff was asserting vicarious liability claims against 24 On based upon the alleged negligence of another physician, Dr. Syed, who did not treat the decedent prior to her hypoglycemic shock.[12] The trial court granted the motion for partial summary judgment, and the plaintiff appealed.[13]

On appeal, the Court of Appeals reversed the trial court's decision in a unanimous opinion. The Court of Appeals relied heavily upon the liberality of notice pleading in Georgia to find that the plaintiff had provided sufficient notice that Dr. Syed's actions were at issue by alleging in the Renewal Complaint that 24 On was vicariously liable for the negligent acts of the treating physicians who were actual and/or ostensible agents of 24 On. The Court did not place significant weight upon the fact that the amended affidavits which purportedly clarified that the allegations against 24 On were based, in part, upon Dr. Syed's actions were not filed until well after the expiration of the statute of limitations. Instead, the Court found that the Renewal Complaint was timely filed and provided sufficient notice to the defendants such that they were not prejudiced.

24 On petitioned the Supreme Court of Georgia for certiorari to review the decision of the Court of Appeals. GDLA filed an amicus brief in support of arguments advanced by 24 On. Ultimately, the Supreme Court denied certiorari.

b. Issues Presented by Decision

The decision in *Oller* presents a number of issues that were appropriately briefed for the Court of Appeals, but unaddressed by the Court's decision. Perhaps most importantly, despite the Court's emphasis on the liberality of notice pleading in Georgia, there was nothing in the Renewal Complaint or timely-filed affidavits that provided notice to 24 On that it was required to defend the actions of Dr. Syed. The Initial Complaint filed by Respondents

did not assert a claim against 24 On. Plaintiffs asserted a vicarious liability claim against 24 On for the conduct of Dr. Hunt and Dr. Mitchell in their Renewal Complaint, which used the term "treating physicians." The affidavit accompanying the Renewal Complaint did not directly or implicitly describe any conduct that could be associated with Dr. Syed or any other 24 On employee other than Dr. Hunt and Dr. Mitchell.

The problem with allowing this to pass for "notice pleading" is self-evident. If, for example, the Renewal Complaint had added direct negligence claims against Dr. Syed, there would be little dispute that it would be subject to a meritorious motion to dismiss for failure to meet the pleading requirements of O.C.G.A. § 9-11-9.1. The affidavit did not mention him or any of his specific acts or omissions. The affidavit never even mentioned him by name. It merely used a catch-all by lumping him into the "treating physicians" for Ms. Nobles. Had Dr. Syed been named directly in the suit, he would have been ill-equipped to defend the lawsuit, since he would not have the notice (specifically contemplated by the Georgia legislature when it enacted O.C.G.A. § 9-11-9.1) that was necessary to prepare his defense.

If Dr. Syed would likely prevail on a motion to dismiss in such a scenario, it begs the question why 24 On should not be afforded the same protection. 24 On, as a corporate defendant, must defend the case against allegations of vicarious liability. In order to do so, it must have notice of the specific acts or omissions of its agents that form the basis for the vicarious liability claims, as required by O.C.G.A. § 9-11-9.1. In *Oller*, the Court found that by including the language "treating physicians," the plaintiffs had provided sufficient notice. The problem is that 24 On (1) was already defending the case based upon the alleged

negligence of two of its other employee physicians (Dr. Mitchell and Dr. Hunt), and (2) employed several of the physicians who treated the decedent at different times.

To the second point, Dr. Mitchell and Dr. Hunt both treated the decedent *before* the hypoglycemic event which allegedly caused Ms. Nobles' death. It would be reasonable to expect 24 On to carefully consider the alleged acts and omissions of its employees leading up to the hypoglycemic event when preparing its defense. On the other hand, Dr. Syed treated the plaintiff only *after* the hypoglycemic event occurred. No specific allegations had been presented, until well after the expiration of the statute of limitation, that the care provided by 24 On physicians after the hypoglycemic event was at issue. It is particularly telling that 24 On was not aware that the care provided by its employee physicians after the hypoglycemic event was at issue until its attorney deposed the plaintiff's expert witness. Although 24 On knew that many of its agents or employees treated the decedent at various times, the "notice" provided by the Renewal Complaint and contemporaneously-filed Affidavit directed 24 On to consider only the acts or omissions of its agents *before* the hypoglycemic event.

II. *Tenet HealthSystem GB, Inc. v. Thomas*.

In a concurring opinion joined by all three judges, the *Oller* Court emphasized that the claims regarding Dr. Syed's treatment would relate back under O.C.G.A. § 9-11-15 as it arose out of the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."[14] The Court detailed that notice pleading and the relation back provision operate to liberally allow the addition of claims that were originally described in the original complaint.[15] Approximately a year after *Oller* was decided, the Supreme Court of Georgia in Tenet subsequently detailed

when a late added claim arose out of the same conduct, transaction, or occurrence and when the claims will be considered separate and distinct.

On the positive side, it appears that Georgia courts – via the *Oller* and *Tenet* opinions - have not given carte blanche authority for plaintiff's attorneys to add new claims regarding different treatment and/or providers simply because they have timely and sufficiently pled a cause of action against a corporate defendant's agent. If such were true, there would be no need for detailed appellate opinions on relation back questions such as in *Oller* and *Tenet*.

It is apparent under Georgia law that whether a new claim relates back is a fact and case specific issue. Amended claims can (and should) only relate back to timely pled claims where certain and specific correlative factors are met. When analyzing *Oller* and Tenet as well as other persuasive federal and sister state opinions – especially those cited to directly by the Supreme Court in *Tenet* – there seems to be a rough benchmark for which claims the Supreme Court considers "related."

i. The *Tenet* Opinion.

In *Tenet*, the plaintiff was involved in a motor vehicle accident and EMS was called to the scene. After evaluation, EMS placed her in a cervical spine collar and transported the plaintiff to the emergency room of the defendant hospital. At the emergency room, Plaintiff alleged the doctors improperly determined that she did not have any cervical fractures, ordered a nurse to remove her cervical spine collar, and proceeded to discharge her. When the cervical spine collar was removed, the fracture in the plaintiff's spine was displaced, which caused a compression of her spinal cord and ultimately resulted in injury.

The original complaint alleged professional negligence against only the ED physicians – not the nurses. The Court

summarized the Plaintiff's theory of negligence espoused in the original pleadings as "failing to stabilize, protect, and treat or cause to be treated [Plaintiff's] dangerously unstable cervical spine prior to discharging her from the hospital."[16] The original complaint did state that Hospital nurses removed the patient's c-collar.

During the discovery period, the plaintiff learned that hospital policy prohibited nurses from removing c-collars. In light of this, plaintiff amended the complaint to allege simple negligence against the hospital via the nurse who removed the c-collar in violation of the policy. The question became whether that claim related back to the timely pled claims against the physicians.

In its analysis, the *Tenet* Court laid out a framework of factors to consider on the relation back "question." Specifically, the Court explained that only claims that are close in (1) time, (2) place, (3) subject matter, and (4) involve events leading up to the same injury, will be found to relate back.[17] Analysis of these factors inquires as to whether a defendant was on "fair notice" of the amended claims from the allegations in the original pleading.[18]

Applying the factors to the facts, the Supreme Court held the nursing claim did relate back because (1) it was within the 3.5 hour period of the treatment at issue, (2) it occurred at the same location, (3) it concerned the negligent treatment of plaintiff's unstable spine as originally alleged, and (4) removal of said collar was already alleged to have resulted in the same ultimate injury previously identified.[19]

ii. Persuasive Caselaw Cited in *Tenet*.

Tenet proves instructive not only for purposes of distinction. *Tenet* cites to many cases from other jurisdictions as exemplars for when amended claims were **and were not** allowed to relate back.[20] Importantly, the Supreme Court pointed to two cases – *Weber*

and *Moore* – to serve as examples of claims that were separate and distinct and did not relate back. It would stand to reason that the Supreme Court cited to these two cases – both for factual comparison as well as for legal reasoning – as a guidepost for trial courts in this State to consider and compare on the relation back question.

In *Weber*, a three-month-old was treated at the defendant hospital's emergency room and released. The child died two days later from a bowel obstruction. The plaintiff initially alleged that the emergency room defendants negligently failed to diagnose the bowel obstruction and sued the hospital on the basis of vicarious liability.[21]

As discovery progressed, the plaintiff attempted to amend her complaint to bring new claims of vicarious liability against the hospital based on the actions of the radiologist who interpreted the child's abdominal radiograph. Interestingly, as in *Tenet*, the plaintiffs in *Weber* learned of a hospital policy that required the radiologist to notify the emergency room physician upon discovery of a potentially life-threatening condition. The new claim arose from the radiologist's failure to comply with the policy.[22]

Ultimately, under Alabama's very similar Rule 15 provision – a fact noted in the *Tenet* opinion – it was determined the new claims did not relate back because the new claims were too far removed in time, place and subject matter. In citing Alabama's iteration of Rule 15 – which is substantively the same as Georgia's – the *Weber* court reasoned the amended claims did not arise from the same conduct, transaction, or occurrence in the original pleading because "[t]he original complaint contained no allegations regarding policies and procedures relating to radiographs or any alleged breach of the standard of care. In other words, the only allegations in the original complaint were based on the actions of [the emergency

room doctors]…"[23] In short, *Weber* highlighted the theory of negligence had changed in precluding the amended claims.

A second case cited by the *Tenet* Court, *Moore v. Baker*, echoes this finding.[24] In *Moore*, the plaintiff was prohibited from adding claims for negligent treatment rendered by the same doctor named in the original complaint after the statute of limitations expired.[25] In the original complaint, the plaintiff alleged informed consent violations prior to her surgery. She later attempted to add allegations of negligence during and after said surgery.[26]

In analyzing Fed. R. Civ. P. 15(c), the court noted, "[t]he critical issue [in evaluating relation back] is whether the original complaint gave notice to the defendant of the claim now being asserted."[27] The court then reasoned, "[t]he original complaint focuses on [defendant's] actions before [plaintiff] decided to undergo surgery, but the amended complaint focuses on [defendant's] actions during and after the surgery. The alleged acts of negligence occurred at different times and involved separate and distinct conduct."[28] In determining that the new claims were too removed to relate back, the court in *Moore* noted that plaintiff would have "to prove completely different facts" in order to recover on her amended claims. Specifically, the court noted that "although the complaint recounts the details of the operation and subsequent recovery, it does not hint that [the doctor's] actions were negligent."[29] Put another way, simply chronicling the medical care – without averring an express criticism – does not put the defendant on fair notice such care may be criticized after the statute has run.

III. Implications of *Oller* and *Tenet* Decisions

While the *Oller* decision created unfavorable law for the defense bar, the Supreme Court of Georgia has seemingly

provided some safe harbor in detailing guideposts for when new amendments will be permitted and found to provide defendants adequate notice. Taking into account the cases specifically cited in *Tenet*, the Supreme Court espoused the following standard: when amended claims assert the same theory of negligence regarding the same care and treatment originally at issue, those claims relate back; when amended claims assert a new theory of negligence regarding separate care and treatment such that wholly different facts underlie said allegations, those claims do not relate back. Using this standard might be the best way to distinguish the adverse opinion detailed in *Oller*. The original pleading in *Oller* arguably covered any treatment relating to the hypoglycemic event – which might explain how *Oller* and *Tenet* can be reconciled.

Although *Tenet* provided additional clarity on the issue of relation back, it did not overrule or expressly limit *Oller*. Therefore, counsel and corporate defendants should still take lessons from the implications of the *Oller* decision. At the initial stages of the litigation process, defense counsel should closely examine the complaint as usual, but should specifically look out for language such as "all treaters/providers," "all agents," or "all employees." Following the *Oller* decision, simply including this broad language seems to be all that is required of plaintiff's counsel in order to leave the door open for bringing new treaters into the case. Defense counsel would be wise to put their corporate defendants on notice of this possibility and should prepare from the beginning as if all care provided to the plaintiff is at issue. It might also be prudent to hold off on any blame shifting until it is absolutely clear that no other providers will be added to the lawsuit.

Defense counsel should also closely examine the contents of the expert affidavit for any broad and all-encompassing language

meant to "put defendants on notice." Following the *Oller* decision, it appears as if courts will liberally read language in either the complaint or the affidavit as sufficient notice of potentially involved treaters or care. Unfortunately, a corporate defendant in a medical malpractice action will no longer enjoy the certainty of knowing that it must only defend against the allegations specifically set forth in the Complaint and contemporaneously-filed Affidavit after the statute of limitations has expired. For the time being, some extra front-end preparation will be crucial to prevent late added care from sabotaging your entire defense.

Once the defense is aware of all care provided by its agents to the plaintiff or decedent, the *Tenet* decision will be helpful in pinpointing which care could afford a basis for liability later in litigation. Counsel for corporate defendants in a medical malpractice action must take care to ensure that all care provided by agents or employees of its client are analyzed under the factors set forth in *Tenet* to determine whether it should stand prepared to defend that care. For now, the defense bar must be aware that arguments of insufficient notice are not going to carry the day. These recent decisions indicate that defense counsel will have better footing when asserting the position that the newly added care arises out of an entirely different transaction or occurrence. When addressing arguments citing to *Oller*, defense counsel should focus on distinguishing the new care from the care originally at issue, highlighting any difference in time, location, type of treatment, and resulting injury.

As more cases are decided in the wake of these two opinions, the defense bar should acquire a better understanding of the type of care that courts will find relates back or previously put defendants on notice. The interplay between the liberal reading of O.C.G.A. §§ 9-11-8 and 9-11-15 with the heightened pleading requirements of

O.C.G.A. § 9-11-9.1 remains unclear. However, the *Tenet* decision was at least beneficial in providing more clarity and allowing defendants to fashion an argument to defeat late-added claims by showing that they arise from a different transaction or occurred. *Oller* and *Tenet* will likely be landmark decisions in the field of medical malpractice for the foreseeable future, placing a premium importance on the ability of defense attorneys to effectively apply and distinguish them.

[1] Oller v. Rockdale Hospital, LLC, 342 Ga. App. 591 (2017).
[2] Tenet HealthSystem GB, Inc. v. Thomas, 304 Ga. 86 (2018).
[3] *Oller*, 342 Ga. App. 591,591 (2017).
[4] *Id*. at 592.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*. at 593.
[10] *Id*.
[11] *Id.* at 593.
[12] *Id*.
[13] *Id*. at 596
[14] *Id*.
[15] *Id*.
[16] *Tenet* at 87.
[17] *Id*. at 91.
[18] *See id*.
[19] *Id*. at 91-92.
[20] *See generally*, *id*. at 86.
[21] *See* Weber v. Freeman, 3 So. 3d 825 (Ala. 2008).
[22] *Id*.
[23] *Id*.
[24] Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993)
[25] *Id*. at 1132.
[26] *Id*. at 1131.
[27] *Id*.
[28] *Id*.
[29] *Id*. at 1130 n. 1 (emphasis added).