PRESIDENT'S MESSAGE

I appreciate the opportunity to have served as the 2006-2007 President of the Georgia Defense Lawyers Association. Frankly, the President's job may be the easiest one within the organization. We have done a very good job over the years of creating a system where many of the labor-intensive duties required to run this organization are handled by those in positions below the Presidency. Serving as GDLA President then becomes a simple task so long as you have the ability to run a meeting and make a few decisions. Obviously, this only happens when the members and other officers assume their duties and fulfill them as required. I have been very fortunate since everyone in these positions has surpassed these expectations and has done everything that I could have asked for. This dedication is what makes this association such a vibrant organization.

Our association continues to grow. We are well managed, not only by the lawyer members of the organization, but also by our Executive Director, Steve Milano. Our finances are secure and there is absolutely nothing to impede the organization's efforts to continue to grow and to serve its membership.

Our mission statement, which can be found on our website at www.gdla.org, in essence states that we are an association devoted to improving the practice of law as conducted by lawyers who devote most of their professional time to the handling of litigated matters where they are representing defendants. Anyone who has been actively involved in the organization can readily see that. However, we have many members who, likely because of time constraints, have not been actively involved, although they thankfully continue to maintain their membership. I would like to invite those members who have not actively participated to do their best to become more active in the organization. Please consider attending this year's annual meeting which has been put together by Executive Vice President, Robert "Bob" M. Travis.

This meeting will be held in Amelia Island at the Amelia Island Plantation from June 7-10th, 2007. Bob has done a remarkable job of putting together an incredible meeting that will certainly serve as a benchmark for those that follow. The CLE will be interesting and entertaining, but more importantly, the meeting will provide an opportunity for fellowship among the lawyers that attend. With each meeting new friendships are established that will last a lifetime and increase one's enthusiasm for the practice of law.

One of my goals this year was to increase the diversity within the organization. We are making strides in that direction and I would like to encourage everyone within the organization to keep that goal in mind as we move forward. We have now established a number of substantive law committees which are chaired by various lawyers around the state. These committees can be viewed on our website. Additionally, I would like to encourage anyone with a desire to work with the organization to view these committees, contact either the chair or vice-chair, and get involved. Only through that involvement will these committees grow and as the committees grow it increases our ability to diversify the organization.

Another goal this year was to increase our membership among the "large" Atlanta law firms. We have begun a path to achieve that by meeting with various members of those firms; in particular, individuals who are heads of their firm's litigation sections in order to explain the benefits of GDLA membership and to encourage them to consider having lawyers within their firm join the organization. As we all know, some Atlanta firms have grown incredibly large and provide a deep, talent-rich pool for potential members of this organization. Over the next few years we expect numerous lawyers from those firms to join the association as members. That will do two things. It will allow the organization to expand its membership and it will also bring in

members specialized in areas of law in which the organization currently has few members.

Some of the improvements that I hope you will notice this year are a revamped GDLA website that is more user-friendly and informative. Contained within the Resources link of the website are various members' areas that provide valuable information including a brief bank and discovery tools. One of the most valuable tools for members of the organization is the blast e-mail capability that can be conducted by members from the website. I am sure most of you have received a number of e-mails from fellow members asking for information about experts, opposing counsel, judges, and other important information. The ability of our organization to communicate cohesively is a valuable tool.

If you are reading this message, you obviously are reading it through another valuable benefit of the organization, the GDLA Law Journal. The insightful and informative articles contained within this Journal and the ones that have preceded it, are brought to you only by the hard work of our members who take the time to write the articles. Once written, those articles must be compiled into the actual Journal, and we were fortunate this year to have that task assigned to Mel Haas who serves as one of our Vice-Presidents. I would like to thank all that contributed to the Journal this year, and in particular note a very interesting article authored by Amy Snell and Leigh Hicks devoted to appellate advocacy. The GDLA would like to especially thank the Honorable Justice Benham and the Honorable Judge Barnes for providing their time and valuable insight to the authors.

There are many other members that I could thank for their hard work on behalf of the organization this year. However, rather than do that, I would invite each of you to take a look at our re-vamped website where you can explore what contributions various members of the organization are making. One final mention regarding our website. The website contains a link to various

sponsors of this organization. I will not name them in this message, but, our sponsors provide valuable services and financial support to the organization. Please consider utilizing our sponsors when the need arises. They have been an integral part in allowing the organization to provide some of its benefits and programs. We want to do our best to thank them for their involvement in the organization by continuing to support them where we can.

The current officers below the presidency are all very capable and dedicated to the organization. With their and your help the organization will continue to grow, thrive, and prosper. None of this can take place without time being volunteered by the organization's members and I would once again encourage each of you to try and find time to become more involved in the GDLA. You will find it a rewarding professional experience and will see that it has valuable social aspects as well. Given the contentious and stressful nature of our practices, the ability to make long-lasting friendships with other lawyers who are experiencing the same things that you are is an opportunity that shouldn't be missed. Once again, thank you for the privilege of serving as your president this year and I will leave this organization in the more than capable hands of Bob Travis.

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ACKNOWLEDGMENT

I owe a great deal of gratitude to many individuals in connection with this year's Journal. The advice from Bubba Hughes, editor of last year's Journal, was invaluable with respect to the many technical issues that had not even occurred to us, particularly now that the Journal appears on our website and is distributed in booklet form to judges and on disk to the membership.

President Warner S. Fox has been very supportive, championing this Journal's importance to our Association and to those who look to the members of our Association for counsel. Johnny Foster was also a great help with respect to consideration and enlistment of potential authors and topics.

The hard work and dedication of our article contributors: Frank P. Brannen, Jr., William M. Clifton, III, David A. Cole, John D. Dixon, L. Lee Hicks, II, W. Jonathan Martin, II, Christopher E. Parker, Amy R. Snell, and Brian J. Schneider is also very much appreciated. Their efforts have resulted in a compilation of excellent legal authorities that will hopefully be useful to all who review it and retain it for future reference.

Justice Robert Benham of the Supreme Court of Georgia, and Chief Judge Anne Elizabeth Barnes of the Court of Appeals of Georgia, deserve our special honor and thanks for the insights they shared in "How to Fill Your Quiver With Effective Appellate Arrows," authored by Amy R. Snell and L. Lee Hicks, II.

Steve Milano, our Executive Director, was as always, helpful on the many practical issues involving distribution of the Journal, coordinating with the printer, and similar matters.

Finally, I want to express my special thanks to Quentin B. Lynch, Law Clerk at Constangy, Brooks & Smith, LLC, who spent many hours assisting in editing, proof reading, formatting, and related activities without which the Journal could not have been published.

I hope that the Journal will be helpful to all of you.

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GEORGIA
DEFENSE LAWYERS
ASSOCIATION

2007
JOURNAL

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How to Fill Your Quiver With Effective Appellate Arrows

By Amy R. Snell and L. Lee Hicks, II***

Effective trial advocates do not always make effective appellate advocates. An emotional closing argument addressed to a jury will generally make little, if any, impression on an appellate court judge. If you want to succeed in the appellate court arena, you must arm yourself with skills essential to your success

The Honorable Robert Benham, Justice of the Supreme Court of Georgia, describes this point with colorful imagery: "The art of practicing law is the art of persuasion. The more arrows you have in your quiver, the more chances you have of succeeding." The authors of this article, rather than repeating what can be readily found by googling "effective appellate advocacy," have taken a different approach. We asked the jurists who decide our appeals to share their views about what they find persuasive in appellate advocates and about what discredits lawyers who appear before them, either by way of briefs or at oral argument.

We are very pleased that Justice Benham and The Honorable Anne Elizabeth Barnes, Chief Judge of the Court of Appeals of Georgia, agreed to be interviewed for this article. What follows are their practical suggestions that, if heeded, will arm you with a plentiful supply of arrows for your appellate quiver.

EFFECTIVE BRIEF WRITING

"This is a court for the correction of errors."

We asked Justice Benham and Chief Judge Barnes to tell us what they considered to be the number one mistake made by lawyers in writing briefs.

Ever mindful of the limited role of an appellate court, Justice Benham responded, "Not being clear about the standard of review and not researching the issue of jurisdiction." If the appropriate standard of review in your case is abuse of discretion but you do not explain to the appellate court how the trial judge improperly exercised his or her discretion, the appellate court will not take the time to dig that information out of the record. You need to be clear. Further, did you know that the jurisdictional parameters of the Supreme Court set forth in the Constitution of Georgia have been pared back by case authority? If not and your case involves a jurisdictional issue, you could lose credibility, and your appeal, if you fail to consult that case authority. While these may seem to be mere academic issues to trial lawyers, they are fundamentally important at the appellate court level.

Chief Judge Barnes, when asked this question, said without hesitation, "enumerating too many errors." Explaining her answer, Chief Judge Barnes said, "This is a court for the correction of errors. This isn't law school. No extra credit is given for spotting all of the issues." Her point is clear. A shotgun approach to enumerating error only results in a loss of credibility. Our appellate judges rightly believe that Superior Court judges rarely commit reversible error. As such, when an appellate court judge reads fifteen enumerations of error, for example, the appellant's lawyer loses credibility. An appellant who has lost at trial, and is statistically about to lose again on appeal, better aim his or her arrows wisely and enumerate only the two to four errors that have the most chance of success.

"Grammatical and citation errors in a brief are like wearing blue jeans to oral argument."

Let's face it, we have all read an opponent's brief and secretly thought that the brief was so bad in terms of grammatical and citation errors that there was little, if any, chance of losing. Then, much to our surprise and disappointment, the appellate court finds in favor of our opponent. We are left wondering how this could happen, leaving our cynical side to think, next time a brief is due, if the time and effort is really worth it. For that reason, therefore, we bluntly asked Justice Benham and Chief Judge Barnes if grammar and citation errors really matter. According to both jurists, they definitely do.

Justice Benham and his colleagues on the bench form their opinion of a lawyer through the brief. By the time the lawyer gets to oral argument, the Court will already have an idea about whether the lawyer is conscientious, analytical, and organized or otherwise. "If the brief is well written, the Justices know that the lawyer understands the law and knows how to be a persuasive advocate on behalf of his or her client." Misspelled words, wrong or missing punctuation, lack of parallel structure, poor grammar, etc., all detract from persuasiveness. Worse yet, such careless technical blunders color the Court's attitude about you as a lawyer. "If a lawyer cannot use proper spelling, punctuation, or grammar, the Court feels that it cannot rely on him or her to give a clear statement of the law." While the Court always scrutinizes the facts and law discussed in briefs, technical errors in a brief cause it to be given much closer, and skeptical, study. Further, if the question presented in the appeal is a close one, technical mistakes may sway the Court against the brief writer's position.

Chief Judge Barnes concurred. Without equivocation, she said such errors do matter and result in a loss of credibility for the lawyer. Chief Judge Barnes compared citation and grammar errors

in a brief to showing up for oral argument in blue jeans. Blue jeans, like grammatical and citation errors, don't exactly scream credibility when making oral arguments.

"A legal brief is like a good dessert – it requires cooling time."

Justice Benham finds that lawyers rush too much when preparing their briefs. He recommends that you give your brief some "cooling time" after you write it. Let is sit for awhile, allowing you to ponder the legal and factual arguments presented. Go back and read it over after it has cooled. Have you stated your position clearly, concisely, and logically? Is it free of unnecessary words and arguments? Again using vivid imagery, Justice Benham remarks that, "Even ice cream has to have a cooling time."

We asked Chief Judge Barnes to tell us what one point of advice she would tell lawyers to follow when it comes to writing briefs. She responded with some very frank advice about the appellant's initial brief, the appellee's response brief, and the appellant's reply brief. For the appellant's initial brief, Chief Judge Barnes made clear, as before, to enumerate errors wisely and to focus on the best argument. For the appellee's brief and the reply brief, Chief Judge Barnes said that it was critical to point out any misstatements made in the record by an opponent. Do not wait to bring such an issue to light when you go to write your motion for reconsideration. Statistically speaking, it will be too late. She made the point that no judge is going to sift through a huge record to confirm a factual point on which the parties seemingly agree. However, when an appellee or an appellant's reply brief highlights a factual point of contention, the record will absolutely be consulted. Failing to highlight a misstatement is tantamount to an admission.

Bad briefs

We wondered what would cause appellate judges to read a brief, lay it down on their desk, and then think to themselves what they just read was awful. Heaven forbid that a member of the GDLA would have authored such a brief. So, we asked Justice Benham and Chief Judge Barnes to identify characteristics of a bad brief.

Judge Benham lamented that lawyers have gotten away from using the traditional tools of persuasion – cause and effect, comparison and contrast, definition, narration, and syllogism. These are attention-grabbing analytical tools that impress the Justices and give them a certain comfort level about the substance of the brief. Lawyers too often resort to rhetorical tools that detract from their persuasiveness – appeal to tradition, prestige, bias or prejudice. Some lawyers will even engage in ad hominem attacks on their opponent or their opponent's client. Nothing stops an appellate arrow quicker than disparaging your opponent or his or her client.

Chief Judge Barnes, without pausing, told us that a bad brief will have one of the following three characteristics, or some combination thereof. First, the brief describes the facts wrongly or incompletely. Second, not surprisingly, the brief over-enumerates error. Third, the brief makes it obvious that the author failed to proofread or to apply the Court of Appeals rules. Chief Judge Barnes gave the defense bar high marks for avoiding these common problem areas. Readers, keep up the good work.

The life of a brief in the Court of Appeals

No doubt, you have wondered, like us, when you are burning the midnight oil, whether anyone will ever actually read your brief other than your secretary. For that reason, we asked Chief Judge Barnes to describe what happens to a brief from the

time it is filed in the Clerk's office to the time an opinion is issued. Chief Judge Barnes was kind enough to walk us through the life of a brief in the Court of Appeals. After filing, the Clerk's office prepares a "yellow sheet" that provides basic case information on a form. The "yellow sheet," along with the briefs and the record, are all then bound together and distributed to the appropriate judge. Once received, Chief Judge Barnes will typically read through the brief and important parts of the record. Afterwards, she will assign the case to one of her three staff attorneys with a note about whether she is inclined to affirm or reverse. From there, the staff attorney and she will draft an opinion, which she, with the assistance of all her staff attorneys, will review and edit until it meets with her satisfaction.

So, the next time you are working in the wee hours of the morning, you can rest assured that not only will a very devoted staff attorney read your brief, but the Judge authoring your opinion most likely will as well.

A very busy Court

The Court of Appeals, consisting of twelve judges, considers 2,400 to 3,000 matters each year. Each judge authors roughly three opinions per week. That does not count motions for reconsideration, applications for interlocutory or discretionary appeal, or considering and voting on the opinions of other panel member judges. Combine that with the "two-term rule," which provides that an appealed judgment is affirmed by operation of law if it is not ruled on within two terms of docketing, see Ga. Const. 1983, Art. VI, § IX, ¶ II; In re Singh, 276 Ga. 288, 289, 576 S.E.2d 899, 901 (2003); Superb Carpet Mills, Inc. v. Thomason, 183 Ga.App. 554, 556, 359 S.E.2d 370, 372 (1987), and the result is a very busy Court of Appeals. No doubt, all briefs submitted to the Georgia Court of Appeals will be thoroughly considered. It would be foolish, however, to ignore the reality of our overburdened Court of Appeals. For practitioners, this means we should pay

close heed to Chief Judge Barnes' sound advice to choose our battles wisely and focus our appellate arrows towards the middle of the target rather than scattering them in all directions.

EFFECTIVE ORAL ARGUMENT

Play by the rules

Both jurists we interviewed stressed that lawyers must read and become very familiar with the appellate court rules before oral argument (although this advice applies with equal force to brief writing. File a brief that fails to conform in terms of margins, page length, type size, etc. and watch how quickly it gets bounced by the Clerk's office). Compliance with the rules is mandatory. You can also consult the Courts' website or call the Clerk of Court for advice or answers to your questions. Both the Supreme Court and Court of Appeals Clerks' offices are extremely user-friendly.

"Practice – Practice – Practice"

An appellate oral argument is not that different from a Broadway play. Your audience is a panel of judges, rather than a theatergoer, but your objective is the same: to convince your audience to believe in you. The most effective way to do that, as all actors understand, is to practice. Justice Benham advises doing a dry run with someone in your office familiar with the case. Beyond critiquing the substance of your presentation, your "judge" should note whether you are maintaining eye contact, whether your tone and cadence are appealing, and whether you use persuasive words of action rather than passive and uninteresting verbiage. Chief Judge Barnes advises that we, "practice, practice, practice."

Along those same lines, Justice Benham recommends that you go to Court in advance of your argument and become familiar with your surroundings. Better yet, sit in on an oral argument. Watch not only the lawyers but also the judges. What types of questions are they asking, if any? How are they reacting to the lawyers' arguments?

Spend adequate time preparing

According to Chief Judge Barnes, "lawyers don't spend enough time preparing for oral argument." Know your record. Read all of the cases cited in both your brief and your opponent's brief thoroughly.

Once you have prepared your brief, look for cases decided by the judges sitting on the bench. If any of the judges authored any of the opinions cited in your brief, come prepared to point that out to the judges. According to Justice Benham, this has a very persuasive effect on the Justice who wrote the opinion and turns that Justice into your advocate when the Court meets to discuss cases. In Chief Judge Barnes' words, "judges are interested in hearing what they write themselves."

If, on the other hand, one of the judges on your panel has written a dissenting opinion that hurts your client's appeal, be prepared to address that dissent at oral argument. That judge has very strong feelings on that issue and will likely question you about it. If that happens, a proper response would be for you to acknowledge that the judge authored a dissenting opinion but then state that you realize how important precedent is to the Court and that it would be contrary to the Court's wonderful tradition of adhering to the doctrine of *stare decisis* to follow the dissenting opinion.

Grab the Court's attention – "If you don't have the judges' attention, oral argument doesn't do you any good."

Oftentimes, the Court will hear several arguments in one session. When you begin your argument, therefore, particularly as the appellant, Justice Benham recommends that you plan your argument so that you immediately grab the Court's attention. Start out with a concise statement designed to immediately attract the Court's attention. That is especially true in complex cases. Give the Court an opportunity to lock onto your complex issue from the beginning. If you do, you have a greater chance of keeping the Court's attention throughout your argument. Failure to grab the Court at the outset, however, may mean that they hear nothing you say.

Justice Benham advises defense counsel who are appearing on behalf of the appellee to begin by labeling the case with an opening sentence such as "this is a garden-variety tort case in which the trial court properly granted summary judgment to the defendant." This opening makes the case sound routine and, hopefully, inclines the Court to determine that this is not one of those statistically-speaking rare cases that merits reversal.

Chief Judge Barnes agrees that it is best for the appellant to start off giving a sentence or two overview of what the case is about. For example, "this is a premises liability case in which the trial court granted summary judgment to the defendant on the grounds that there was no dispute that the hole in the sidewalk was open and obvious. The primary issue before the Court today is . . . ." This opening refreshes the judges' recollection of what the case is about and telegraphs to the audience what they are about to hear.

First appearance before the Court?

Don't be afraid to admit it. It is entirely proper to tell the Court that this is your first appellate argument. This gives you an opportunity to relax and calm yourself while allowing the bench to take on a helpful attitude. Supreme Court Justices, upon hearing that you are a novice appellate litigator, will try not to do anything to throw you off balance or upset your game plan, as they might do with an experienced appellate litigator.

Address the entire panel

According to Chief Judge Barnes, a common mistake, particularly made by lawyers appearing before the Court of Appeals for the first time, is to address only the presiding judge on the panel rather than the entire panel (or, in the Supreme Court, only Chief Justice Sears or Presiding Justice Hunstein). Unless you are responding to a question posed by a particular judge, address your points to the entire panel. Don't run the risk of angering the Justice or judge who ultimately writes the opinion by failing to address him or her when arguing your client's appeal.

Be an attraction, not a distraction

An area that trips up many lawyers who argue before an appellate court is reading case names and citations to the panel during oral argument. If you have cited a case in your brief, do not read the full name and citation to the judges during oral argument. According to Chief Judge Barnes, it is very distracting to the judges to hear case citations during oral argument because they feel compelled to write down the citation and stop listening to what you are saying. The better practice is to mention the name of the case, say that it is cited in your brief, and discuss what the case is about without repeating the citation.

If new authority is issued between the time that you file your brief and the date of your oral argument, try and bring it to the attention of the Court prior to oral argument by way of a letter, with a copy served on opposing counsel. If it is a late-breaking case and you do not have time to bring it to the Court's attention before the argument, simply mention it to the judges during oral argument and request the opportunity to file a supplemental brief that discusses the recent authority in detail.

"I'll get back to you on that one"

If a judge asks you a question about a point you were not prepared to discuss until later in your argument, don't postpone answering the judge's question by saying, "I will discuss that later." Justice Benham advises that it would be much more effective to respond, "Judge, I had planned on arguing that point later in my argument, but I would be glad to answer it for you now." That response gives you time to assemble your thoughts and lets the Court decide if it wants to jump ahead to that point or be content to hear it later.

Chief Judge Barnes offered a suggestion, however, about when it may make sense to dodge a judge's question, at least temporarily. If, as appellant, you are nearing the end of your opening argument and are asked a question that you need to think about, it may be appropriate to ask the judge's permission to answer the question during your rebuttal argument.

"Bad lawyering"

Chief Judge Barnes finds that the most common mistake at oral argument, which she termed "a cardinal sin," is not reserving time for rebuttal, followed along closely by reserving time for rebuttal but then talking through it during your opening argument. Rebuttal is important. It gives the appellant the last opportunity to

address the judges and take parting shots at his/her adversary's argument. In Chief Judge Barnes' words, "it is bad lawyering not to give yourself the opportunity to respond to the arguments made by the appellee." Thus, you should reserve 5 minutes for rebuttal, and then stop yourself from talking through your rebuttal by talking into your opening argument. Both the Supreme Court and the Court of Appeals adhere rather strictly to the time limit for argument. When you are planning your argument, make sure you leave yourself 5 minutes for rebuttal.

If, during the appellee's argument, you sense from the judges' questioning of appellee's counsel that they appear to be in agreement with the arguments you made in your opening argument, you may not need to take the entire 5 minutes for rebuttal. Spend a minute or two addressing the questions that the Court asked of the appellee, emphasize why the judges are correctly viewing the appellee's arguments with skepticism, and then sit down.

"Come prepared to put on a show"

Make your presentation interesting, and your appellate arrows will have a greater chance of hitting the target. If you don't have the judges' attention, then you've wasted your time and theirs by requesting oral argument. In Chief Judge Barnes' words, "come prepared to put on a show."

An excellent attention-grabbing device that definitely "puts on a show" is the use of visual aids or exhibits during your argument, particularly a Power Point presentation. Did you know that the Supreme Court of Georgia, with the most technologically advanced courtroom in Georgia, has the capability for you to bring a Power Point presentation on a CD and play it during your oral argument? Justice Benham finds Power Point presentations especially effective because they cause the Court to lock in on your presentation. They do more than just tell the Justices what the law

is or what the facts in your case entail. They appeal to the senses. Remarkably, Justice Benham advises that an astounding 90 percent of appellants who make Power Point presentations prevail on their appeal. The lawyer who devotes this much time and effort to put together a visual presentation like this telegraphs to the Court that he or she has spent time organizing his or her argument for the Court and, therefore, gains credibility. And, as Chief Judge Barnes cogently reminded us, "It's all about credibility."

If you intend on making a Power Point presentation, Justice Benham recommends that you call ahead and advise the Clerk's Office. Make arrangements to visit the courtroom in advance, bring your CD with you, and practice a dry run so that your presentation comes across effortlessly and most effectively.

The Court of Appeals' courtroom is equipped with an Elmo. Visit the courtroom in advance, get to know how the equipment works, practice with it if you can, and then use it effectively during your argument.

What <u>never</u> to say or do during oral argument

Justice Benham gave us some examples of mistakes that he sees all too often at oral argument that we should not be making.

Never say, "Judge, if you'd just read the record . . . ." Obviously, this is very disrespectful and makes the judge look like he or she isn't prepared. A more appropriate statement might be, "I know you've read the record, but let me refresh your recollection." Be very careful in this area.

Never say, "Judge, that authority is really not very relevant in my case." If the judge asks you about that case authority, the judge must think it has some relevance. You would be more effective if you expressed your appreciation for the judge's

concern about the case authority and recognize its importance but then state that it is not in play in your particular case.

Never make disparaging remarks about opposing counsel or about a government official who has taken some action in his or her official capacity.

Don't discuss facts outside the record unless the Court asks you to do so or your opponent raises them.

Finally, if your client or co-counsel is in the courtroom, either at counsel table or in the audience, tell them not to shake their head, grimace, groan, mutter, or exhibit any such reactions during the argument. These antics are very distracting to the judges, who can see everything that goes on in the courtroom from the bench. If you don't school your client or co-counsel on proper courtroom etiquette, the well-honed appellate quivers that Justice Benham and Chief Judge Barnes have provided us with in this article could easily miss their mark.

* * * * *

The authors of this article wish to express their deepest thanks to Justice Benham and Chief Judge Barnes for sharing their time and their views with our membership to help us prepare more effective briefs and present more effective arguments in their Courts.

* * * * *

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Georgia Labor and Employment Law: 2007 Update

*By W. Melvin Haas, III**
*William M. Clifton, III ***
*and W. Jonathan Martin, II ****

I. Introduction

This Article surveys recent developments in state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions from the Georgia Court of Appeals and Georgia Supreme Court from June 1, 2005 to May 31, 2006. This Article also highlights specific revisions to the Official Code of Georgia Annotated ("O.C.G.A.").

II. Recent Legislation

A. Employment Security Law

Without regard to the General Assembly's changes to the "Worker's Compensation" section[1] of the Georgia Labor and Industrial Relations Code ("Labor Code"),[2] the General Assembly passed one significant amendment to the employment security section of the Georgia Labor Code during the survey period.

The General Assembly limited the definition of employment for purposes of employment security law by amending Official Code of Georgia Annotated ("O.C.G.A.") section 34-8-35.[3] In doing so, The General Assembly added an additional paragraph to the statute which excludes from the definition of "employment" certain types of "direct sellers".[4]

Specifically, the new paragraph excludes from the definition of "employment":

> (18) Services performed by a direct seller, provided that:
> (A) Such individual:
> (i) Is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment; or
> (ii) Is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, in the home or otherwise than in a permanent retail establishment;
> (B) Substantially all the remuneration, whether or not paid in cash, for the performance of the services described in subparagraph (A) of this paragraph is directly related to sales or other output, including the performance of services, rather than to the number of hours worked; and
> (C) The services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee for federal and state tax purposes.[5]

The United States Internal Revenue Service has recognized a distinction between such "direct sellers" and "common retailers" for some time, addressing the issue in IRS publication 911 and providing that "direct sellers" are self-employed.[6] The recent amendment brings Georgia's labor code into accord with the United States Internal Revenue Code, as it applies to "direct sellers".[7]

While the amendment has not been controversial to date, it does raise a series of questions as to its necessity and clarity. Regarding the necessity of the amendment, it seems intuitive that "direct sellers" are in business for themselves, and not employees of their respective corporate suppliers. As to clarity, the amendment advances, without apparent explanation, a significantly

lower standard of scrutiny for individuals to qualify as "direct sellers" when compared to the immediately preceding paragraph which deals with individuals performing services for "common carriers".[8] Although substantially similar to the definition of "direct seller," in order to qualify for exemption from the term "employment" under O.C.G.A. § 34-8-35 (17), "common carriers" must, *inter alia*, have "*a written contract with the common carrier*" that does not prohibit the individual from the pickup, transportation, or delivery of property for more than one common carrier or any other person or entity, and that the individual knows *"the work is not covered by the unemployment compensation laws of Georgia*."[9] The new amendment, however, does not require "direct sellers" to pass any relatively stringent level of scrutiny.[10] Finally, the recent amendment, while seemingly intended to define "direct seller", may inspire unintended confusion as to who is a "direct seller", because the requirements for qualification under the statute may apply to occupations traditionally held to be included under the term "employment".[11] For example, an agent for an insurance broker, who would have previously been covered as an "employee" might now be excluded from the unemployment insurance safeguards if he or she works from home.[12]

B. Immigration Law

The most significant employment legislation passed by the Georgia General Assembly during the survey period was the "Georgia Security and Immigration Compliance Act", commonly known by its Senate Bill acronym SB529 ("The Act").[13] The Act has been characterized as controversial and far-reaching, with provisions amending seven titles to the O.C.G.A. and creating several short titles.[14] The Act seeks to ensure greater control over, and sanctions against, employers who hire persons not authorized to work in the United States.[15] Three particular provisions directly impact employers, namely: (1) the imposition of criminal sanctions for trafficking a person for labor servitude; (2) the requirement that entities who contract with the State of Georgia, or

its political subdivisions, register and participate in the federal work authorization program; and (3) income tax and tax withholding implications associated with the employment of persons not authorized to work in the United States.[16] Opponents of the law have threatened challenging its legality with possible preemption and equal protection litigation.[17]

1. Criminal Sanctions. The Act adds a new criminal code section to the O.C.G.A. that provides criminal penalties for any person or corporation that "knowingly subjects or maintains another in labor servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of labor servitude."[18] The activities that trigger the criminal provisions of the Act are broadly defined. For example, "Labor Servitude" is defined as "work or service of economic or financial value which is performed or provided by another person and is induced or obtained by coercion or deception."[19] "Coercion" and "deception" are also broadly defined under the act. "Coercion" includes any act resulting in bodily harm, threats of bodily harm, restraint, exposing or threatening to expose a person to criminal or immigration proceedings, or confiscating documents.[20] "Deception" includes conduct that is generally considered deceptive, such as creating or confirming another's false impressions or promising benefits not intended to be delivered.[21]

The possible penalties for violating the criminal provision are significant. Convicted offenders will be classified as felons.[22] The statutory sentencing range varies depending upon the age of the victim.[23] Where the victim is over the age of eighteen (18), the sentence can range from a minimum of one (1) year to a maximum of twenty (20) years. For victims under the age of eighteen (18), the punishment is a minimum of ten (10) years to a maximum of twenty (20) years.[24] The Act also specifically allows for the prosecution of a corporate entity when an agent of the corporation, acting within the scope of employment, performs the illegal

conduct and it is "authorized, requested, commanded, performed, or within the scope of . . . employment . . . or constitute[s] a pattern of illegal activity that an agent knew or should have known was occurring."[25]

2. Federal Work Authorization Program Requirement. The Act amends Title 13 of the Official Code of Georgia, adding two code sections related to contracts with the State of Georgia or its political subdivisions. Together, these two code sections specifically prohibit these public entities from entering into contracts in connection with the "physical performance of services" within Georgia unless the contractor or subcontractor is registered and participates in the "federal work authorization program" to verify information pertaining to all new employees.[26]

The term "contractor" is not defined in the Act. However, the Act states that the term "'[s]ubcontractor' includes a subcontractor, contract employee, staffing agency, or any contractor regardless of its tier."[27] Of particular note is the specific inclusion of "contract employees"; this would seem to indicate that an individual independent contractor would have to register and participate in the federal work authorization program. Also, the inclusion of staffing agencies within the definition of "subcontractor" requires any of these entities supplying workers to public entities on a temporary basis to register and participate in the federal work authorization program as well.[28]

The Act's requirement to register and participate in the "federal work authorization program" is not as clear cut as it may seem. The Act defines "'[f]ederal work authorization program'… [as] any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United Sates Department of Homeland Security to verify information of newly hired employees…".[29] Given that the Georgia Act has just recently been signed into law and thus, there

are no rules or regulations, it is believed that this provision requires participation in the federal employment verification pilot program currently operated by the Department of Homeland Security ("DHS") entitled "Basic Pilot".[30]

Currently, employers may use the "Basic Pilot" program on a voluntary and free basis.[31] The "Basic Pilot" program started out in five states and has now been expanded to allow participation by employers throughout the United States.[32] However, there has been concern regarding whether DHS will be able to sustain the cost and the infrastructure if participation in the program is greater than expected.[33] In fact, DHS has specifically noted that if significantly more employers than anticipated choose to participate, the program may have to be limited to certain number of participants.[34] This is especially pertinent because the Act requires use of a viable DHS work authorization program.[35] Presently, "Basic Pilot" is the only available work authorization program, and it is unknown what effect a significant national increase in "Basic Pilot" volume may have on the implementation of Georgia's Act. If DHS is unable to meet demand, complying with the Georgia Act would become impossible and it is unlikely that the Act could be used to punish an employer who, because of such impossibility, could not satisfy the requirements of the Act. Notwithstanding, the language of the Act appears to contemplate that the "Basic Pilot" program will be expanded, enhanced, renamed, or otherwise altered, but that, regardless of the disposition of "Basic Pilot", any entity that contracts with the State will be required to use whatever program DHS substitutes for "Basic Pilot", if any.[36]

i. Registration and Participation. Registration and use of the "Basic Pilot" program appears to be fairly straightforward. The program is an internet application accessed via a webpage.[37] Users simply follow the instructions on the screen to complete the process. The user is required to execute a Memorandum of Understanding and will receive a user

identification and password. The "Basic Pilot" program allows an employer to specify an entity DHS refers to as a "Designated Agent" who would perform the actual verification process on its behalf.[38] The Act does not seem to take this into account; it appears to require that the actual contractor or subcontractor register and participate in the program.[39]

Following registration, the user must complete a web-based tutorial on the use of the program that walks the user through the various steps in the process.[40] The "Basic Pilot" program is designed to allow the employer to verify the employment eligibility of newly hired employees.[41] The verification of employment query is performed after an employee has been hired and the normal I-9 process has been completed, but must be completed within three business days of the employee's hire date.[42] The system cannot be used to pre-screen applicants for employment.[43] After joining the program, an employer would not be allowed to check the status of existing employees (re-verification).[44]

ii. Issuance of Rules and Regulations. The Act grants the Commissioner of the Georgia Department of Labor the authority to promulgate forms, rules, and regulations to administer the Act.[45] Interestingly, the Act alternatively provides that the Commissioner of the Georgia Department of Transportation has the authority to issue forms, rules, and regulations for contracts involving public transportation.[46] The Act further specifies that these rules and regulations are to be posted on the respective websites of each department.[47]

iii. Staggered Dates of Implementation. The Act has staggered dates of implementation, requiring that public employers, contractors, and subcontractors with 500 or more employees must comply with the Act beginning on or after July 1, 2007; those with 100 or more employees must comply by July 1, 2008; and all must be in compliance by July 1, 2009.[48] The

staggered implementation dates likely are reflective of the Georgia General Assembly's confidence and expectation that DHS will improve the federal work authorization system to keep up with demand over the course of the two year phase-in period.

3. Tax Implications. The Act also amends Title 48 of the O.C.G.A as it relates to revenue and taxation.[49] The Act provides that on or after January 1, 2008, no wages for labor services of $600.00 or more may be claimed as a business deduction for state income tax purposes unless the employee is authorized for employment (an authorized employee) in the United States as defined by federal law.[50] Thus, the Act removes a significant benefit from any employer who choose not to authorize employees through the "Basic Pilot" program. Yet, the General Assembly did provide several exceptions. This portion of the Act does not apply to: (1) any business domiciled in Georgia which is exempt from compliance with federal employment verification procedures; (2) any individual hired by the taxpayer prior to January 1, 2008; (3) any taxpayer where the individual being paid is not directly compensated by that taxpayer; or (4) wages paid for labor services to any person who holds and presents to the taxpayer a valid license or identification card issued by the Georgia Department of Driver Services.[51]

Although the Act also provides an exemption for any person who holds and presents valid license or identification card issued by Georgia Department of Driver Services,[52] Georgia employers should be cautious to avoid a hiring only individuals, or a disproportionate number of individuals, who present these documents. A refusal to hire unless the employee has either a valid license or identification card could lead to liability for I-9 violations.[53] The provision inadvertently, yet inherently encourages "document abuse,"[54] which occurs when an employer requests more or different documents than are required to verify employment eligibility and identity, reject reasonably genuine-looking documents or specify certain documents over others. All

work-authorized individuals are protected from document abuse.[55] The choice of documents belongs exclusively to the employee.

The passage of SB529 has raised reasonable cause for concern among immigrant workers and employers alike. The implementation of the Act's provisions over the course of the next two years will force many Georgia employers to become more proactive in their approach to immigration compliance. Georgia's working immigrant population will also be forced to become more educated on the new "authorized worker" requirements, while illegal immigrants will likely find it increasingly difficult to find work in Georgia.

III. Employment Law Principles – Case Law

A. Wrongful Termination

1. Employment-at-Will. The doctrine of employment-at-will has two readily identifiable features: first, either the employee or employer may terminate the employment relationship at any time, with or without cause; and second, upon the termination of an employment-at-will contract, the employee is barred from maintaining a wrongful termination claim.[56] O.C.G.A. § 34-7-1 explicitly provides for the doctrine of employment-at-will, indicating, unless the parties contract otherwise, employment contracts in Georgia are presumed to be at-will.[57] A large majority of the states now recognize a public policy exception to the doctrine of employment-at-will.[58] While the employment-at-will doctrine has significantly eroded in other jurisdictions, it has continued to be a practically inviolable in Georgia.[59]

For example, in Reid v. City of Albany,[60] the Georgia Court of Appeals reviewed an employee's allegation of wrongful termination stemming from the employee reporting his superior's improper use of city resources.[61] The trial court dismissed the complaint for failure to state a claim.[62] On appeal, the plaintiff contended that he was terminated in retaliation for reporting his superior's wrongful use of city resources and that such termination violated the City's personnel policies and various state statutes.[63] In response the, the Court of Appeals wrote:

> Under Georgia law, at-will employees may be terminated for any or no reason, and they generally cannot recover for wrongful discharge. The motivation underlying the termination usually does not matter; an employer may discharge an at-will employee without liability. As noted by our Supreme Court, this bar to wrongful discharge claims in the at-will employment context "is a fundamental statutory rule governing employer-employee relations in Georgia."[64]

Moreover, the Court of Appeals held that "allegations that an at-will employee's termination violated the employer's discipline polices do not give rise to a wrongful discharge claim."[65]

The Court of Appeals specifically declined to create a judicial exception to the statutory bar against former at-will employees maintaining wrongful termination claims. The court noted, "Although there can be public policy exceptions to the [bar against wrongful discharge claims], judicially created exceptions are not favored, and Georgia courts generally defer to the legislature to create them."[66] Because the court could not find a legislative public policy exception excluding whistleblowers from employment-at-will in this case, the Court of Appeals affirmed the trial court's ruling.[67]

This case is significant because it demonstrates the reluctance of Georgia courts to create public policy exceptions to the doctrine of employment-at-will.[68] Rather, the Georgia Court of Appeals will defer to the legislature notwithstanding the fact that other jurisdictions create such public policy exceptions.[69] Thus, it is appears that the doctrine of employment-at-will is destined to remain impervious to wrongful termination claims until the Georgia General Assembly creates an applicable exception.

2. Duration Terms and Employment-at-Will. Employment contracts in Georgia are presumed to be at-will unless the parties contract otherwise.[70] This means that in the absence of a specified length of employment, an employment-at-will relationship is created.[71] Contract provisions specifying "permanent employment, employment for life, or employment until retirement" are per se indefinite, and are therefore employment-at-will contracts.[72] For example, in Taylor v. Calvary Baptist Temple,[73] a teacher formerly employed by a private school sued the school and its principal, alleging breach of his employment contract.[74] The trial court granted summary judgment in favor of the school, and the teacher appealed.[75] On appeal, the teacher argued that his contract had a one-year term because his contract provided, "although there are 187 working days, '[e]mployment is based upon a twelve month's pay system. Employees will be paid the yearly salary agreed upon in twelve equal monthly payments…'."[76] Specifically, the former employee relied on O.G.C.A. § 34-7-1 which states, "If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period…".[77]

The Georgia Court of Appeals rejected the teacher's arguments, pointing out that any presumption of duration was rebutted by language in the contract that specifically provided "all employees are hired 'At Will,' and that '[s]hould employment be terminated prior to the end of the school year, the termination pay will be prorated on the number of days worked…'."[78] Also, the court noted that the statement the teacher relied upon referred only to a twelve (12) month "pay system" not a contractual obligation to pay the teacher for a stipulated period of twelve months.[79] Accordingly, the Court of Appeals held that the contract was unambiguous in creating an employment-at-will agreement, and thus, the school was authorized to terminate the teacher with or without cause.[80]

The Georgia Court of Appeals reached a similar decision in Jenkins v. Georgia Department of Corrections.[81] In that case Jenkins, a former Georgia Department of Corrections employee, sued the department for breach of contract after it terminated him despite the making of an oral promise to grant him employment for "as long as he wanted."[82] The language that Jenkins relied on was a part of an earlier settlement agreement reached between the litigants.[83] The trial court granted the Department of Corrections' motion to dismiss, and Jenkins appealed.[84] Although Jenkins' original Complaint did not allege fraud against the Department of Corrections, on appeal Jenkins asserted that he was fraudulently induced to sign the settlement agreement by the oral promise of permanent employment.[85]

Turning first to the status of Jenkins' employment, the Court of Appeals conceded that the settlement agreement could be interpreted as an employment contract.[86] It went on to hold, however, that because the agreement did not contain any contractual language specifying a time frame of employment, the employment was presumed to be at-will.[87] Accordingly, the employment relationship could be terminated by either party for any reason.[88] Furthermore, the Court of Appeals found Jenkins'

fraud argument unpersuasive, holding, "It is well settled that in the absence of a controlling contract, an oral promise of 'permanent employment' or 'employment for life' is unenforceable and gives rise to no cause of action against an employer for wrongful termination."[89] Moreover, the court noted in dicta, that "[f]raud cannot be predicated on a promise which is unenforceable at the time it is made … promises of lifetime employment upon which the promisee relies for establishing fraud were unenforceable even absent any fraud at the time of their utterance."[90]

These cases indicate Georgia courts' unwillingness to allow the doctrine of employment-at-will to be eroded by ambiguous agreements. An employment contract will continue to be presumed at-will, unless specified time frames are written in to such a contract.[91]

3. Quantum Meruit. In Fay v. Custom One Homes, LLC,[92] the Georgia Court of Appeals allowed recovery of the value of services rendered, notwithstanding an employee being barred from maintaining a wrongful termination claim by the doctrine of employment-at-will. Fay was the president of Custom One Homes, LLC ("Custom One"). After being evicted from its offices, Custom One began building its own office building, and it put Fay in charge of the project as the general contractor. Evidence indicated that the CEO of Custom One orally contracted with Fay by agreeing to give him a twenty or thirty percent stake in the office building or the holding company that owned the office building as compensation for a job well done. Subsequently, Fay was terminated, and the parties could not come to agreement on the value of his stake in the office building or holding company. When negotiations failed Fay sued for the quantum meruit value of services rendered in excess of his job as president of Custom One.[93] The trial court found that Fay's "status as 'an at-will salaried employee' precluded his recovery in quantum meruit.[94] Consequently, it granted summary judgment in favor of Custom One, and Fay appealed.[95]

On appeal, the Georgia Court of Appeals held that the trail court erred in granting summary judgment on Fay's quantum meruit claim. The Court of Appeals noted, "In Georgia, the reasonable value of extra work performed outside the scope of one's job duties can be recovered in quantum meruit."[96]

B. Torts Associated With Employment

1. Negligent Hiring and Retention. The theories of negligent hiring and negligent retention are closely related, and are proved up by virtually the same elements. The distinction between the theories of negligent hiring and negligent retention is that an employer negligently hires a dangerous employee in the former, whereas the employer negligently retains a dangerous employee in the later.[97] Employees and third parties may make claims for negligent hiring and/or negligent retention.[98] Georgia case law and the Georgia Code establish that a claim of negligent hiring and/or retention requires: (1) that the employer knew or should have known, in the course of ordinary care; (2) that the employee was incompetent; (3) and that such incompetency was the direct and proximate cause of damage to the complaining party, under color of the employee's employment or during the employee's work hours.[99]

In Poole v. North Georgia Conference Of the Methodist Church, Inc.,[100] a pastor was accused of maintaining a clandestine sexual relationship with a parishioner's wife while simultaneously counseling the parishioner on his marital problems. The parishioner brought action against the church and pastor, seeking damages for negligent hiring and retention arising out of the alleged breach of confidential relationship.[101] The trial court granted the defendant's motion for summary judgment, and the parishioner appealed. On appeal, the Georgia Court of Appeals affirmed the lower court, holding that the parishioner did not

establish a negligent hiring or retention claim because he failed show that the church knew or should have known, in the ordinary course of care, that the pastor was not suited for the particular employment prior to the alleged tort.[102] Evidence showed that the pastor was interviewed by the District Committee of Ordained Ministry and then by the Conference Board of Ordained Ministry, and finally, psychologically evaluated by a psychologist with the Emory School of Medicine prior to being hired. None of the evaluative bodies indicated that the pastor was unfit for service.[103] Relying on a fundamental element of negligent hiring/retention, the Court of Appeals wrote, "an employer may be held liable only where there is sufficient evidence to establish that the employer reasonably knew or should have known of an employee's 'tendencies' to engage in certain behavior relevant to the injuries allegedly incurred by the plaintiff."[104]

2. Respondeat Superior, Authorization, and Ratification. The term respondeat superior refers to a legal doctrine by which vicarious liability may be imposed on an employer, without finding fault, for the torts of an employee.[105] The conditions under which respondeat superior liability may be imposed on an employer vary widely:

> [L]iability can be imposed under one or more of three theories: (1) that the tortious conduct was within the tortfeasor's scope of employment; (2) that the tortious conduct was within the tortfeasor's scope of apparent authority; and/or (3) that the employer authorized or ratified the tortious conduct. Recovery under the first theory is entirely dependent upon the employer-employee (master-servant) relationship. The other theories may be viable where the tortfeasor is an agent but not an employee of the defendant.[106]

In Travis Pruitt & Associates, P.C. v. Hooper,[107] Hooper, a former employee of Travis Pruitt, brought action against the company, alleging sexual harassment perpetrated upon her by Taylor, a former co-worker, while at work. She sought damages

under the principles of respondeat superior or ratification.[108] After the employer's motion for summary judgment was denied by the trial court, the Georgia Court of Appeals granted the employer's application for interlocutory appeal. On appeal the court reversed the trial court's ruling, and held that Hooper could not make out a prima facie case under either respondeat superior or ratification.[109]

In so holding, the Court of Appeals pointed out, "Under the principle of respondeat superior, an employer is liable for negligent or intentional torts committed by an employee *in furtherance of and within the scope of the employer's business*."[110] The court further noted that Taylor's alleged harassment was directed at Hooper "for purely personal reasons entirely disconnected from the company business."[111] Consequently, Travis Pruitt could not be held liable under respondeat superior for Taylor's actions because Taylor's actions were not committed in the scope of the employer's business.[112]

Turning to Hooper's ratification claim, the court began by overruling the holdings of Wiley v. Ga. Power Co.,[113] Newsome v. Cooper-Wiss, Inc.,[114] Trimble v. Circuit City Stores,[115] and Mears v. Gulfstream Aerospace Corp.,[116] four previous Georgia Court of Appeals cases, to the extent they held that an employer could be liable via ratification for sexual harassment committed by an employee not in furtherance of the employer's business, but for purely personal reasons, entirely disconnected from the employer's business.[117] The court held that for liability via ratification to be imposed on an employer "there must be evidence that the employee's conduct was done in the furtherance of the employer's business and within the scope of the employment."[118] In this regard, the court stated that "contrary to the holdings in Wiley, Newsome, Trimble, and Mears, the long-established rule is that, where an employee 'was acting solely for himself . . . there is no such thing as a master assuming, by ratification, liability for an act of another in which the master had no part.'"[119]

The court further stated that not only had a clear rule been defined in the Georgia Court of Appeals and Georgia Supreme Court cases regarding ratification but, that there is a statutory basis for the rule as well.[120] In reversing the trial court's ruling on Hooper's ratification claim, the Court of Appeals provided ample clarification for Georgia practitioners that in Georgia ratification can not lie where an employee has committed a tortious act exclusively for himself and not at all for the employer.[121]

C. Restrictive Covenants

1. General Parameters. Agreements that place general restraints on trade with the effect of lessening competition and encouraging monopolies are void as against public policy.[122] Generally, non-competition agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition.[123] Nonetheless, courts will uphold a non-compete agreement when the agreement merely places a partial restraint upon trade.[124] A non-competition agreement is valid as a partial restraint on trade if the agreement is (1) written and specifies (2) time, (3) territorial limitation, and (4) activity restriction.[125] Additionally, the agreement must be reasonable. Whether it is reasonable is a question of law for the court to decide.

The court will apply varying levels of scrutiny to determine whether the contract is reasonable, depending upon the type of contract it is.[126] When the agreement is ancillary to an employment agreement, then a strict standard applies, meaning the entire agreement is invalid if any provision therein is considered overbroad or unreasonable.[127] But when the agreement is made pursuant to a contract for the sale of a business, a less stringent standard applies, meaning the agreement will survive despite the presence of broad provisions. In applying this less stringent

standard, the court may "blue pencil," i.e. rewrite or sever, provisions deemed overly-broad or unreasonable.[128]

2. Legal Duty. In Mau, Inc. v. Human Technologies, Inc.,[129] several former employees left Mau, Inc. ("MAU") and started Human Technologies, Inc. ("HTI") in a targeted growth area of MAU. The former employees were aware of MAU's attempts to enter the market in the area where they set up HTI, but MAU had not bound the former employees to enforceable restrictive covenants in the area. MAU sued HTI alleging, inter alia, that one of the former employees, previously the vice president of the MAU, breached his fiduciary duty to the company.[130] The trial court granted HTI summary judgment on the breach of fiduciary duty claim, and MAU appealed the judgment. Conversely, HTI appealed the denial of summary judgment on a tortious interference claim leveled against it by MAU; the former employer alleged that the former employees had a duty not to interfere with the business contracts and relationships it had established.[131] On appeal, the Georgia Court of Appeals held that absent valid non-competition and non-solicitation covenants, the former employees could not have breached any legal duty owed to MAU because such duties did not exist.[132] In dicta, the Court stated that even if a duty had been demonstrated, MAU failed to identify any of its customers who were improperly contacted by HTI .[133]

Similarly, in Continental Maritime Services, Inc. v. Maritime Bureau, Inc.,[134] Continental Maritime Services, Inc. ("Continental") sued Maritime Bureau, Inc. ("MBI") for tortious interference with business relations after the discharge of a Continental employee who was a principal in MBI. The former employee had solicited business for Continental as part of his employment duties. After the former employee was discharged from Continental he contacted several potential clients he solicited while in the employ of Continental to apprise them that he was no longer with Continental and that he would be able to serve their

needs through MBI.[135] At the trial level, the superior court judge granted MBI's motion for a directed verdict, and Continental appealed. [136]

On appeal, the Georgia Court of Appeals held that the MBI was not liable for tortious interference because there was no "employment contract or noncompete agreement" prohibiting the former employee from contacting Continental's customers.[137] In addition, the court held that the tortious interference claim could not stand because Continental presented no evidence to show that it would have developed business from any of the customers that the former employee contacted.[138]

3. Reasonableness.

i. Overbreadth. In Whimsical Expressions, Inc. v. Brown,[139] Brown, a former painter for Whimsical Expressions, Inc. ("Whimsical"), continued to paint at the request of past clients of Whimsical. Whimsical brought a breach of contract action against Brown for violation of non-compete and non-solicitation covenants. The restrictive covenants stated:

> Employee agrees not to work as a painter or sales person in the decorative or faux painting business within Fulton, Gwinnett, Cobb and Forsyth Counties, Georgia for a period of two (2) years following termination of Employee's engagement with the Company … Employee agrees not to solicit or attempt to solicit any decorative or faux painting business from any clients of the Company whose residence or principal place of business is located within Fulton, Gwinnett, Cobb and Forsyth Counties, Georgia with whom Employee had material contact during his or her employment with the Company, for a period of two years (2) following termination of Employee's engagement with the Company. Material contact exists between Employee and a client if the Employee dealt with the client or furnished painting service to the client while working as an employee of the Company within one (1) year prior to the date of Employee's termination of employment with the Company.[140]

Beyond handing out the former employer's cards the former employee never worked as a sales person for the former employer. At the trial level, the superior court granted the former employee's motion for summary judgment, and the former employer appealed.[141]

On appeal, the sole issue before the Georgia Court of Appeals was whether the non-compete/non-solicitation clauses of the former employee's contract were valid.[142] The former employer maintained that the trial court erred in finding the covenants unenforceable. The Georgia Court of Appeals, however, did not agree and affirmed the lower court's ruling, concluding, "…because it attempted to preclude [former employee] not only from performing painting services for prior clients, but also from acting as a salesperson in the … painting business, [the covenant] was overly broad."[143] The court further emphasized that the overbreadth of the covenant was its fatal flaw, noting, "Whimsical did not employ 'sales persons' and there was no evidence…that [the former employee] ever acted as one…".[144] Turning to the non-solicitation clause, the court stated that the non-solicitation covenant was not breached, despite the former employee continuing to work with prior clients of the former employer, because the prior clients sought out and requested services from the former employee. The court maintained the differentiation between affirmative solicitation and performance of services for a previous customer.

Thus, a former employee bound by a no-solicitation covenant can continue to work with customers of his previous employer so as he or she does not affirmatively seek their business. This case indicates Georgia courts' predisposition to disallow any covenant that is not narrowly tailored to the justified protection needs of employers.[145]

ii. Time and Territorial Restrictions. In Palmer & Cay of Georgia, Inc. v. Lockton Companies, Inc.,[146] the Supreme Court of Georgia was called upon to determine whether a non-solicitation covenant was unenforceable because of a failure to include a restriction on the period of time during which employees had served customers and its lack of territorial limitation. Leading up the suit, several employees left Palmer & Cay of Georgia, Inc. ("P&C") and accepted positions with Lockton Companies, Inc. ("Lockton"). Prior to leaving P&C, the former employees signed a restrictive covenant agreement which fundamentally provided, for a two year period after leaving their employment, that the former employees would not, in any way solicit or attempt to solicit or take away the insurance business of any of the customers of their former employer who were served by the former employees during their terms of employment with P&C. There was no time limit on when the former employees may have served P&C's customers.[147] Lockton filed a declaratory judgment action to determine the enforceability of the non-solicitation covenant, asserting that the non-solicitation covenant was unenforceable for failure to include a restriction on the period of time during which the former employees had served customers of P&C. Alternatively, Lockton argued that the non-solicitation covenant was unenforceable for lack of territorial limitation.[148] The trial court found that the covenant was not enforceable. On appeal, the Georgia Court of Appeals affirmed.[149]

Before the Supreme Court, on certiorari, the court held that the non-solicitation covenant was not rendered unenforceable by failure to include restriction on the period of time during which employees had served customers. The court also held that the lack of territorial limitation did not render the covenant unenforceable. At first glance, the Supreme Court's holdings seem to be a break from long held restrictive covenant precedent.[150] However, the court explained that its holding was consistent with longstanding precedent, in that the obligations of the non-solicitation covenant were not vitiated by failure to include restrictions on the period of

time during which the employees had served P&C's customers. The critical factors were whether the former employees had ever served the customers and whether the customers were still doing business with P&C.[151] The court also emphasized that "the employer has a protectible interest in the customer relationships its former employee[s] established and/or nurtured while employed by the employer [citation omitted], and is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer."[152] This interest is "not diminished by the length of time since the former employee may have ceased to serve the customer, but depends instead on the fact that the customer relationship was either established or nurtured by the employee."[153] Explaining its holding as to the territorial restriction, and again quoting W.R. Grace & Co. v. Mouyal, the court noted in pertinent part:

> Where the parameters of the restrictive covenant are as narrow as those set forth in the certified question, i.e., where the former employee is prohibited from post-employment solicitation of employer customers which the employee contacted during his tenure with the employer, there is no need for a territorial restriction expressed in geographic terms.[154] Thus, W.R. Grace & Co. is not a departure from any of our prior cases which recognize that, when dealing with a covenant that prohibits the solicitation of customers whom the employee served, the entire length of service of the employee establishes the permissible temporal boundary. Had the intent been to hold that a lesser time limit on the former employee's contact with the customer was required, this Court would have overruled, not reaffirmed prior cases which recognize the employer's unqualified interest in protecting its customers who were served by the former employee.[155]

4. The Arbitration Exception. As noted earlier long established Georgia jurisprudence requires that a restrictive covenant meet certain bright line test before it may be upheld.[156] Yet, in Malice v. Coloplast Corporation,[157] the Georgia Court of Appeals rejected a bright line when reviewing the decision of the Superior Court confirming an arbitrator's award enforcing restrictive covenants ancillary to an employment contract.[158] The case arose from a dispute between a former high level executive and his former employer about the terms of the former employee's separation package.

Prior to resigning from his position with the former employer, the executive signed an employment agreement which contained several restrictive covenants, including non-compete and non-solicitation covenants which were extremely broad territorially (essentially a national prohibition on trade) and which forbade competition not only in products similar to those that the former employer sold and distributed, but also any products that it "contemplated selling or distributing" while the former employee was in its employ. The agreement also included an arbitration clause, which provided that all disputes would be submitted to arbitration under the rules of the American Arbitration Association-Commercial Division.

Later the employment agreement was amended to include new duties and severance pay even if the former employee chose to leave and was not terminated. In addition, the agreement included advanced severance pay should the former employer exercise its right to invoke the covenant not to compete provision in the employment contract. Soon after the amendment to the contract became effective, the former employee resigned. Upon notice of the employee's resignation, the employer attempted to tender severance to the employee on two occasions but the checks were immediately returned. Subsequently, the former employee became a partner in a new business that competed in the industry of his former employer. The former employer brought suit against

the former employee and the dispute was removed to arbitration. The arbitrator found that the restrictive covenants were enforceable and the superior court affirmed. The former employee appealed to the Georgia Court of Appeals, alleging that the arbitral award operated as a sanction in violation of public policy and the law of restrictive covenants in Georgia.[159]

On appeal, the Georgia Court of Appeals held that the restrictive covenants were enforceable because the employment agreement specified that any dispute would be governed by the American Arbitration Association's Commercial Arbitration Rules and thus, the Federal Arbitration Act (FAA) was the prevailing law on confirmation of an arbitral award, not Georgia law.[160] Consequently, the Court of Appeals could only invalidate the confirmation of the arbitrator's award if it manifestly disregarded applicable state law.[161] The Court noted that manifest disregard for the law can only be shown if the arbitrator: 1) appreciated the existence of a clearly governing legal principle; and 2) decided to ignore or pay no attention to it.[162] The Court of Appeals held that the arbitrator did at least consider the clear legal principles (even if he did not enforce those principles). Therefore, manifest disregard for applicable state law could not be proven. Consequently, despite precedent striking overly broad restrictive covenants as a matter of course,[163] the court found that the arbitrator did not commit manifest disregard because he considered Georgia law, even if such consideration yielded a decision in conflict with precedent.[164]

IV. Conclusion

Although labor and employment issues arising under Georgia law often are not as complex as their federal counterparts, the issues which arise under state law become more challenging with each passing year. Adding to this challenge is the increasing overlap of state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, trial, or

other matters pertaining to labor and employment law, it is important to recognize that the laws and legal proceedings in one area of law can and do impact relations between employer and employee in others.

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[1] Recent developments in workers compensation law are discussed in H. Michael Bagley et. al., *Worker's Compensation*, 58 MERCER L. REV. 453 (2006).

[2] O.C.G.A. §§ 34-1-1 to 34-15-42 (2005 & Supp. 2006).

[3] Ga. Senate Bill 486, Reg. Sess. (2006) (amending O.C.G.A. § 34-8-35 (2005)).

[4] Id. at para. (18)(A)(i).

[5] Id. (for example, direct seller representatives such as Amway, Mary Kay, Tastefully Simple and others would not be considered employed by the respective corporate brands).

[6] Internal Revenue Service, Publication 911, (Rev. November 2004) (You are a direct seller if you meet all the following conditions.

1. You are engaged in one of the following trades or businesses.

    a. Selling or soliciting the sale of consumer products, either—

        i. In a home or other place that is not a permanent retail establishment, or

        ii. To any buyer on a buy-sell basis or a deposit-commission basis for resale in a home or other place that is not a permanent retail establishment.

    b. Delivering or distributing newspapers or shopping news (including any services directly related to that trade or business).

2. Substantially all your pay (whether paid in cash or not) for services described in (1) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked.

3. Your services are performed under a written contract between you and the person for whom you perform the services, and the contract provides that you will not be treated as an employee for federal tax purposes.).

[7] Id.

[8] O.G.C.A. § 34-8-35 at para. (17).

[9] Id.

[10] Ga. Senate Bill 486, at para (18) (no requirement that direct sellers be paid exclusively in commissions or for task performed, no prohibition on contractual exclusivity, no emphasis on direct seller's responsibility for taxes or lack of workers compensation coverage).

[11] Id.

[12] This seems to be at odds with the provisions of O.C.G.A. § 34-8-35 (f) which places the burden of proof upon the employer to establish that an employee is an independent contractor.

[13] Ga. Senate Bill 529, Reg. Sess. (2006).

[14] Id. at 1 ("[t]o amend Titles 13, 16, 35, 42, 43, 48, and 50 of the Official Code of Georgia Annotated, relating to contracts, crimes and offenses, law enforcement officers and agencies, penal institutions, professions and businesses, revenue and taxation, and state government, respectively, so as to provide for the comprehensive regulation of persons in this state who are not lawfully present in the United States; to provide for a short title; to provide for statutory construction; to provide for definitions; to provide for procedures and requirements applicable to certain contracts or subcontracts; to provide for powers, duties, and authority of the Commissioner of Labor; to provide that it shall be unlawful to traffic a person for labor or sexual servitude; to provide that the commissioner of public safety is authorized and directed to negotiate the terms of a memorandum of understanding between the State of Georgia and the United States Department of Justice or Department of Homeland Security concerning the enforcement of federal immigration laws and related activities; to provide for a definition; to provide for certain training; to provide for funding; to provide for certain authorized activities by certain peace officers; to provide for valid identification documents; to provide for exceptions; to provide procedures for determining nationality and immigration status of certain persons who are booked into a jail; to provide for the development of guidelines relative to such booking procedures; to provide for the comprehensive regulation of private immigration assistance services; to provide for a short title; to provide a statement of purpose and definitions; to specify conditions under which certain compensation paid by a taxpayer shall be disallowed as a business expense for state income tax purposes; to provide for powers, duties, and authority of the state revenue commissioner; to provide for additional withholding requirements and procedures; to provide for exceptions; to provide for verification of lawful

presence requirements, procedures, and conditions regarding applications for certain benefits; to provide for exceptions; to provide for the promulgation of regulations; to provide for criminal and other penalties; to provide for related matters; to provide for effective dates; to provide for applicability; to repeal conflicting laws; and for other purposes.").

[15] See generally Id.

[16] Id.

[17] Jim Tharpe, *Perdue signs bill on illegals* (last visited Aug. 14, 2006) <http://www.ajc.com/tuesday/content/epaper/editions/tuesday/news_444477275 3f0615a00d4.html>.

[18] Ga. Senate Bill 529, at section 3(b).

[19] Id. at section 3(a)(3).

[20] Id. at section 3(a)(1)(A) - (D).

[21] Id. at section 3(a)(2)(A) - (C).

[22] Id. at section 3(d).

[23] Id.

[24] Id.

[25] Id. at section 3(g).

[26] Id. at section 2 (adding O.C.G.A. §§ 13-10-90, 13-10-91).

[27] Id. at section 2(4).

[28] Id.

[29] Id. at section 2(2).

[30] U.S. Citizenship and Immigration Services, *Basic Pilot Information*, <https://www.vis-dhs.com/EmployerRegistration/RequestParticipation.aspx?BPAccessMethod=WEB->.

[31] U.S. Citizenship and Immigration Services, *Verification Information System (VIS)*, <https://www.vis-dhs.com/>.

[32] Id.*;* see also INSTITUTE FOR SURVEY RESEARCH, TEMPLE UNIVERSITY & WESTAT, FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION, 61 (2002) (The Basic Pilot program was implemented in the five States with the largest estimated populations of undocumented immigrants: California, Florida, Illinois, New York, and Texas).

[33] INSTITUTE FOR SURVEY RESEARCH, TEMPLE UNIVERSITY & WESTAT, FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION, at 199-202.

[34] U.S. Citizenship and Immigration Services, *Save Verification Program*, (Last Modified 03/24/2006) <http://www.uscis.gov/graphics/services/SAVE.htm>.

[35] See generally Ga. Senate Bill 529.

[36] See Ga. Senate Bill 529, at section 2(2), 2(a), 2(b)(1).

[37] U.S. Citizenship and Immigration Services, *Employer* Registration, <https://www.vis-dhs.com/EmployerRegistration>.

[38] Id.

[39] Ga. Senate Bill 529, at section 2(b)(1) - 2(2).

[40] U.S. Citizenship and Immigration Services, *Gaining Access to VIS for Employers*, <https://www.vis-dhs.com/employer_information.htm>.

[41] U.S. Citizenship and Immigration Services, *SAVE Program*, (Last Modified 03/24/2006) <http://www.uscis.gov/graphics/services/SAVE.htm#twoA>.

[42] Id.

[43] Id.

[44] INSTITUTE FOR SURVEY RESEARCH, supra note 30, at 113.

[45] Ga. Senate Bill 529, at section 2(d) - 2(e).

[46] Id.

[47] Id. (Georgia Department of Labor, http:<//www.dol.state.ga.us/; Georgia Department of Transportation, http://www.dot.state.ga.us/>).

[48] Id. at section 2(3).

[49] Id. at section 7.

[50] Id. at section 7(a) – 7(b).

[51] Id. at section 7(c) - 7(f).

[52] Id. at section 7(c) – 7(f).

[53] Form I-9 Compliance, *The Law*, <http://www.formi9.com/form-i9-law.aspx>. ("The Immigration Reform and Control Act of 1986 (IRCA) legally mandates that U.S. employers verify the employment eligibility status of newly-hired employees. IRCA made it unlawful for employers to knowingly hire or continue to employ unauthorized workers. In response to the law, the Immigration and Naturalization Service (INS), now an integrated component of the Department of Homeland Security (DHS), created Form I-9 and mandated its accurate and timely completion by all U.S. employers and their employees").

[54] See generally, Robison Fruit Ranch, Inc. v. U.S., 147 F.3d 798 (9th Cir. 1998).

[55] 8 U.S.C. § 1324b(a)(1); 8 U.S.C. § 1324b(a)(6) ("A person's or other entity's request, … for more or different documents than are required … or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual …").

[56] See generally, JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW, 20-21 (3d Ed. & Supp 2006).

[57] O.C.G.A. § 34-7-1 (2005 & Supp. 2006).

[58] Nancy Baumgarten, "*Sometimes the Road Less Traveled is Less Traveled For a Reason": The Need For Change in Georgia's Employment-At-Will Doctrine and Refusal to Adopt the Public Policy Exception*, 35 Ga. L. Rev. 1021, 1025-1026 (2001).

[59] Id. at 1025 ("… Georgia and Alabama remain the only two states that still refuse to recognize [a judicially created public policy] exception to the employment-at-will doctrine").

[60] 276 Ga. App. 171, 622 S.E.2d 875 (2005).

[61] Id. at 172.

[62] Id. at 171.

[63] Id. at 171-172.

[64] Id. (footnotes omitted) (quoting Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 280, 528 S.E.2d 238 (2000)).

[65] Id. at 172.

[66] 276 Ga. App. 172 n.9 (quoting Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 280, 528 S.E.2d 238 (2000)).

[67] Id. at 172.

[68] Id. at 172 n.9.

[69] Id. at 172 n.10.

[70] § 34-7-1.

[71] See generally WIMBERLY, supra n.4, at 20-21.

[72] Id. at 20.

[73] 279 Ga.App. 71, 630 S.E.2d 604 (2006).

[74] 630 S.E.2d at 605.

[75] Id.

[76] Id.

[77] Id. (quoting O.C.G.A. § 34-7-1).

[78] Id. at 605.

[79] Id. at 605-606.

[80] Id. at 605

[81] 279 Ga.App. 160, 630 S.E.2d 654 (2006).

[82] Id. at 655.

[83] Id.

[84] Id.

[85] Id. at 656.

[86] Id. at 655.

[87] Id. at 655-656.

[88] Id.

[89] Id. at 656. See also Balmer v. Elan Corp., 278 Ga. 227, 599 S.E.2d 158 (2004) (citing Ford Clinic v. Potter, 246 Ga. App. 320, 540 S.E.2d 275 (2000) oral

promise as to an employment contract for an indefinite period of time is not enforceable); Moore v. BellSouth Mobility, 243 Ga. App. 674, 534 S.E.2d 133 (2000) (oral promises as to future events are not enforceable by at-will employees and cannot provide grounds for a breach of contract claim); Alston v. Brown Transport Corp., 182 Ga. App. 632, 356 S.E.2d 517 (1987) (oral promise of promotion unenforceable where the employment contract is terminable at will).

[90] Id., see also WIMBERLY, *supra* n.4, at 21 (even if an employer's policy is considered as a contract, it is terminable at will unless it specifies a period of employment).

[91] Georgia Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442 (1978); Moran v. NAV Services, 189 Ga. App. 825, 377 S.E.2d 909 (1989); Porter v. Buckeye Cellulose Corp., 189 Ga. App. 510, 376 S.E.2d 393 (1988); Bramblett v. Bass, 189 Ga. App. 10, 375 S.E.2d 106 (1988).

[92] 276 Ga.App. 188, 622 S.E.2d 870 (2005).

[93] Id. at 190.

[94] Id. at 192.

[95] Id. at 190.

[96] Id. at 193; *see* Gerdes v. Russell Rowe Communications, 232 Ga. App. 534, 537(3), 502 S.E.2d 352 (1998). But see Everett v. Goodloe, 268 Ga. App. 536, 541, 602 S.E.2d 284 (2004) (no claim for quantum meruit where employee prohibited by law from acting outside of scope of employment); Rodriguez v. Vision Correction Group, 260 Ga. App. 478, 479-480, 580 S.E.2d 266 (2003) (no claim for quantum meruit where employee admits that compensation received was reasonable and case does not contain allegation that employee performed work outside the scope of her employment).

[97] WIMBERLY, *supra* n.4, at 391.

[98] Id.

[99] Id. at 391-393. But see TGM Ashley Lakes v. Jennings, 264 Ga. App. 456, 590 S.E.2d 807 (2003) (holding negligent hiring or retention may be applicable

to torts committed by employees outside the scope of their employment where there is a relationship between the employer and the tort victim).

[100] 273 Ga. App. 536, 615 S.E.2d 604 (2005).

[101] Id. at 536.

[102] Id. at 540 & n.10.

[103] Id. at 538.

[104] Id. at 538.

[105] Lauren Krohn, *Cause of Action Against Employer to Recover Under Doctrine of Respondeat Superior for Intentional Torts Committed b*y Employee, in 17 Causes of Action 647, § 2 (Series No. 1, 2005).

[106] Id. (citations omitted).

[107] 277 Ga. App. 1, 625 S.E.2d 445 (2005).

[108] Id. at 1.

[109] Id. at 2-5.

[110] Id. at 2 (emphasis added).

[111] Id.

[112] Id.

[113] 134 Ga. App. 187, 192-193, 213 S.E.2d 550 (1975) (overruled on other grounds).

[114] 179 Ga. App. 670, 673, 347 S.E.2d 619 (1986).

[115] 220 Ga. App. 498, 501, 469 S.E.2d 776 (1996).

[116] 225 Ga. App. 636, 641, 484 S.E.2d 659 (1997).

[117] 277 Ga. App. at 3.

[118] Id. at 3-4.

[119] Id. at 4, 625 S.E.2d at 449 (quoting Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 119-120, 185 S.E. 147 (1936)) (citation omitted).

[120] See O.C.G.A. § 51-1-12.

[121] 277 Ga. App. at 4.

[122] See O.C.G.A. § 13-8-2 (1982 & Supp. 2003).

[123] WIMBERLY , supra n.4 at 75.

[124] Id.

[125] Id.

[126] Id.

[127] Id.

[128] Id.

[129] 274 Ga. App. 891, 619 S.E.2d 394 (2005).

[130] Id. at 891.

[131] Id.

[132] Id. at 896.

[133] Id.

[134] 275 Ga. App. 533, 621 S.E.2d 775 (2005).

[135] Id. at 534.

[136] Id. at 533.

[137] Id. at 536.

[138] Id.

[139] 275 Ga. App. 420, 620 S.E.2d 635 (2005).

[140] Id. at 421-422.

[141] Id. at 420.

[142] Id.

[143] Id. at 423 (noting that that the finding of the covenants' overbreadth requires the affirmation of lower court's ruling because Georgia does not follow the doctrine of severability in the context of employment contracts).

[144] Id.

[145] Howard Schulz & Assoc. v. Broniec, 239 Ga. 181, 183; 236 S.E.2d 265 (1977).

[146] 280 Ga. 479, 629 S.E.2d 800 (2006).

[147] Id. at 801.

[148] Id.

[149] Id.

[150] Compare Howard Schulz & Assoc., 239 Ga. at 183; Rakestraw v. Lanier, 104 Ga. 188, 30 S.E. 735 (1898).

[151] See Wiley v. Royal Cup, 258 Ga. 357, 370 S.E.2d 744 (1988); Marcoin v. Waldron, 244 Ga. 169, 259 S.E.2d 433 (1979); W.R. Grace & Co., Dearborn Div. v. Mouyal, 262 Ga. 464, 422 S.E.2d 529 (1992).

[152] 629 S.E.2d at 802 (quoting W.R. Grace & Co., Dearborn Div., 262 Ga. 464).

[153] Id. at 802.

[154] 629 S.E.2d at 803 (quoting W.R. Grace & Co., Dearborn Div., 262 Ga. 467-468).

[155] Id.

[156] Howard Schulz & Assoc., 239 Ga. at 183.

[157] 278 Ga. App. 395, 629 S.E.2d 95 (2006).

[158] Id. at 397 ("It is well established under both federal and Georgia law that 'judicial review of an arbitration award is among the narrowest known to the law. [Cit.]'") (punctuation omitted).

[159] Id. at 396-397.

[160] Id. at 397 ("'…[T]he FAA rather than Georgia law controls confirmation of an arbitration award made pursuant to the FAA [Cit.]'"). Compare Howard Schulz & Assoc., 239 Ga. at 183 (describing a very strict standard of review when construing the validity of a restrictive covenant in an employment contract context under Georgia law).

[161] See B.L. Harbert In'tl., LLC v. Hercules Steel Co., 441 F.3d 905, 2006 WL 462368, at * 1 (11th Cir. 2006). See also O.G.C.A. § 9-9-13(b)(5) (codifying the term "manifest disregard of the law" as basis for vacating an arbitration award).

[162] 278 Ga. App. at 398.

[163] See Howard Schulz & Assoc., 239 Ga. at 183; American Software USA v. Moore, 264 Ga. 480, 448 S.E.2d 206 (1994) (where territory covered is "anywhere in the United States of America," prohibition on contacting customers with whom the employee did not have a relationship is too broad to

be reasonable); AGA, LLC v. Rubin, 243 Ga. App. 772, 773, 533 S.E.2d 804, 806 (2000) (holding a territorial limitation not determinable until the time of the employee's termination invalidates the provision and the entire agreement); W.R. Grace & Co., 262 Ga. at 467(2), n. 2 ("'[P]rohibition against doing business with *any* of an employer's customers, whether or not a relationship existed between the customer and the former employee, is overbroad' in the absence of a reasonable territorial restriction."); Sanford v. RDA Consultants, Ltd., 244 Ga. App. at 310, 535 S.E.2d 321 (2000) (quoting W.R. Grace & Co., 262 Ga. at 467, n.2).

[164] 278 Ga. App. at 399 ("An error in interpreting the applicable law does not constitute 'manifest disregard.' The applicable law must have been deliberately ignored").

Playing with Fire: Appealing Arbitrator Awards

By Christopher E. Parker and David A. Cole***

An interesting trend has emerged recently: courts awarding sanctions against parties that improperly appeal arbitration awards. For example, in November 2005, the California Court of Appeals issued a scathing opinion against the plaintiffs for appealing an arbitrator's award on the basis that the JAMS streamlined rules should not have applied, that the arbitrator failed to make a necessary finding that the arbitration was binding, and that the arbitrator's award was not timely.[1] The Court of Appeals rejected these arguments and chastised the plaintiffs for making what it considered to be a frivolous appeal:

> The substance of the appeal was frivolous. In an arbitration, the parties do not get to appeal an adverse decision. That is just what the plaintiffs have tried to do here. Courts have repeatedly instructed litigants that challenges to the arbitrator's rulings on discovery, admission of evidence, reasoning, and conduct of the proceedings do not lie. Plaintiffs' crude attempt to characterize their claims so they would fall within acceptable bases for an appeal is an artifice we condemn.[2]

The court then awarded sanctions against the plaintiffs:

> Because of the many violations of the Rules of Court and the patently frivolous nature of the appeal, and to discourage similar conduct in the future, sanctions must be substantial. Under the arbitration agreement defendants are entitled to attorneys fees and we remand to the trial court to determine the amount of attorney fees defendants reasonably incurred in defending this appeal and the

> attorney fees reasonably incurred in making the motion for sanctions. Using the amount thus determined as a loadstar, the Court shall award an equal amount to defendants as sanctions. A mere award of attorney fees, to which defendants are entitled under the contract, would fail to compensate defendants for the burdens imposed on them as a result of this unnecessary and unnecessarily burdensome appeal. Sanctions are awarded jointly and severally against plaintiffs and their lawyer.[3]

Certain federal courts have shown their willingness to award sanctions as well. The Eleventh Circuit Court of Appeals, for example, recently took a party to task for improperly appealing an arbitrator's award, and warned that it may consider imposing sanctions in the future.[4] In doing so, the court recognized that the Federal Arbitration Act ("FAA") liberally endorses and encourages arbitration as an alternative to litigation, but that the laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, as opposed to an additional layer in a protracted contest. As the Court explained, "[i]f we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less."[5]

To prevent litigants from undermining the goals of the FAA, the Eleventh Circuit warned that it will in the future consider sanctioning parties that appeal arbitrator awards without sufficient justification.

> Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the

> short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions. A realistic threat of sanctions may discourage baseless litigation over arbitration awards and help fulfill the purposes of the pro-arbitration policy contained in the FAA. It is an idea worth considering.[6]

Most recently, the Seventh Circuit Court of Appeals imposed sanctions against an employer for appealing an arbitrator's award based on an argument that the arbitrator improperly interpreted its collective bargaining agreement.[7] The court based its decision on the "long line of Seventh Circuit cases that have discouraged parties from challenging arbitration awards and have upheld Rule 11 sanctions in cases where the challenge to the award was substantially without merit."[8] It then issued a warning for lawyers in the Seventh Circuit:

> A company dissatisfied with the decisions of labor arbitrators need not include an arbitration clause in its collective bargaining contracts, but having agreed to include such a clause it will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscionably through the filing of meritless suits and appeals. For such conduct the law authorizes sanctions that this court will not hesitate to impose. Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts . . . Lawyers practicing in the Seventh Circuit, take heed![9]

The basis for the award of sanctions in all of these cases is the narrow grounds that exist for appealing an arbitrator's award. The FAA provides four (4) statutory grounds for vacating an arbitration decision, which cover situations where: (1) the award was procured by corruption, fraud, or undue means; (2) the arbitrator demonstrated partiality or corruption; (3) or was guilty of misconduct; and (4) the arbitrator exceeded his powers.[10] In addition to these grounds, courts generally recognize three (3) non-statutory grounds for vacating an arbitrator's award: (1) the award was arbitrary and capricious; (2) enforcement of the award would be contrary to public policy; and (3) the award was made in manifest disregard for the law. Parties are most likely to face renewed judicial scrutiny when they appeal an arbitrator's award on the basis that it was made in manifest disregard for the law.

Under the traditional meaning of "manifest disregard," courts will uphold the arbitrator's award unless the appellant can show that the law was clear and unambiguous, the arbitrator knew of the law, and he deliberately disregarded it. A showing that the arbitrator merely misinterpreted, misstated, or misapplied the law is insufficient.[11] The natural consequence of such a narrow definition is that very few awards will be overturned on this ground. According to these recent opinions, this is exactly the point of an eye towards sanctions.

Not to be outdone, the Seventh Circuit Court of Appeals has taken the more extreme position of limiting reversal under the "manifest disregard" standard to situations where the arbitrator actually directs the parties to violate the law.[12] In reaching this decision, the Seventh Circuit undertook a comprehensive review of case law in this area and held that an assertion of legal error, even clear legal error, cannot be enough to constitute a punitive "manifest disregard of the law." Instead, it held that "manifest disregard of the law" is limited to situations where the arbitrator has directed the parties to violate the law.[13] The Seventh Circuit has recently reaffirmed this interpretation.[14]

At least one circuit, however, appears to apply a less deferential standard of review. The Sixth Circuit Court of Appeals has recognized that the standard for reviewing arbitration awards is "one of the narrowest standards of judicial review in all of American jurisprudence," but at the same time, stated that "our review is not toothless when an arbitrator's award disregards the collective bargaining agreement and its terms[.]"[15] The Court explained its standard of review in this manner:

> When an award draws its essence from the collective bargaining agreement, we will uphold it; when it does not, we will vacate the award. An award does not 'draw its essence' from the collective bargaining agreement . . . when any of the following is true: (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement.[16]

Applying this four-part standard, the Sixth Circuit recently vacated an arbitrator's award on the grounds that it did not draw its essence from the contract.[17] At issue in Michigan Family Resources, was a collective bargaining agreement that entitled union employees to annual wage increases. In May 2003, the company notified union employees they would receive a 2.5% increase for 2003, while non-union employees would receive a 4% increase. The union then filed a grievance against MFR, which proceeded to arbitration, arguing that the CBA required parity between union and non-union employees in the payment of cost-of-living increases.

The arbitrator agreed with the union, and concluded that the CBA required union employees to receive an increase equal to that of non-union employees. According to the arbitrator, the CBA's provision regarding cost of living increases was ambiguous, and that such ambiguity should be resolved in light of the employer's past practice of granting identical cost-of-living increases to all employees.[18]

On appeal, the Sixth Circuit disagreed with the arbitrator's conclusion that the CBA provision was ambiguous. Rather, it concluded that the CBA clearly did not require parity in wage increases, and that the arbitrator "had no basis for consulting evidence of the parties' custom of wage increases and no basis for invoking that custom as a source in construing the agreement."[19] Although the court framed its holding in terms of the arbitration award "not drawing its essence from the contract," the bottom line is that the Sixth Circuit felt the arbitrator interpreted the CBA incorrectly. While this may be true, under the traditional application of "manifest disregard for the law," it is simply not a sufficient basis for overturning an arbitrator's award.

In recognition of its inconsistency with other courts, the Sixth Circuit panel concluded its opinion by hinting to the union that it should request an en banc rehearing. As the court wrote:

> In reaching this conclusion, we are not unmindful of appellant's argument that an arbitration award should not be vacated merely because the arbitrator commits a legal error in construing the collective bargaining agreement . . . If appellant is to have success on this front, . . . it will have to be through a petition for rehearing enbanc, one that the three of us would be open to consider in this case or in any other case presenting the issue.[20]

The union's attorney is reported to have welcomed this request and stated that she will seek full court review, saying, "we couldn't possibly turn down" the Judge's invitation.[21]

Yet, the Sixth Circuit may not be as isolated as it feels. In Michigan Family Resources, Judge Sutton, in his concurring opinion, also accused the First and Fifth Circuits of failing to adhere to the standard of limited judicial review of arbitrated decisions.[22] In addition, a recent decision of the Fourth Circuit Court of Appeals also gave less deference to an arbitrator's award than perhaps it should, although its opinion at least provided lip service to the correct standard for "manifest disregard of the law.[23]

So what does all of this mean for parties who chose to resolve disputes through arbitration? First, when discussing the advantages and disadvantages of arbitration with a client, it clearly is important to explain that arbitrators are not always likely to interpret and apply the law correctly. This may be especially true in labor and employment cases where the arbitrator is not always familiar with the relevant body of law. Second, if you find yourself at the losing end due to an arbitrator's mistake, you are most likely out of luck. Before appealing the award in an effort to achieve corrective justice on behalf of your client, thoroughly analyze your jurisdiction's interpretation and application of the "manifest disregard for the law" standard. If you are in the Sixth or Fourth Circuit, you may perhaps get by on an argument that the arbitrator was simply wrong in his interpretation. But for the majority of cases, the "manifest disregard for the law" standard will require that you simply, in the words of one commentator, "take your lumps and go home."[24] Otherwise, you face a realistic risk of losing on appeal and getting hit with sanctions.

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[1] Evans v. Center Stone Development Co., 134 Cal. App. 4th 151, 35 Cal. Rptr. 3rd 745 (2005).

[2] Evans, 134 Cal. App. 4th at 167, 35 Cal. Rptr. 3rd at 757 (citations and punctuation omitted.)

[3] Evans, 134 Cal. App. 4th at 168, 35 Cal. Rptr. 3rd at 757-758 (citation and punctuation omitted.)

[4] B.L. Harbert Intern., LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

[5] Id. at 907.

[6] Id. at 913-914.

[7] CUNA Mut. Ins. Society v. Office and Professional Employees Intern. Union, Local 39, 443 F.3d 556 (7th Cir. 2006).

[8] Id. at *4.

[9] Id.

[10] 9 U.S.C. § 10(a) (2006).

[11] See e.g., Pike v. Freeman, 266 F.3d 78 (2d Cir. 2001); Continental Airlines, Inc. v. International Broth. of Teamsters, 391 F.3d 613 (5th Cir. 2004); Electrolux Home Products v. United Auto. Aerospace and Agr. Implement of Workers America, 416 F.3d 848 (8th Cir. 2005); B.L. Harbert Intern., 441 F.3d at 910; LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702 (D.C. Cir. 2001).

[12] George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2001).

[13] Id.

[14] Butler Manuf. Co. v. United Steel Workers of America, 336 F.3d 629 (7th Cir. 2003).

[15] Michigan Family Resources, Inc. v. Service Employees Intern. Union, Local 517M, 438 F.3d 653 (6th Cir. 2006) (punctuation omitted).

[16] Id. at 656 (citations and punctuation omitted).

[17] Id. at 657.

[18] Id. at 655.

[19] Id. at 657.

[20] Michigan Family Resources, Inc., 438 F.3d at 657.

[21] Pamela A. McClean, *Federal Judge Raises Alarm Over Vacated Arbitration Awards* <http://www.law.com/jsp/article.jsp?id=11411211112997> (March 2, 2006).

[22] Id. at 662 (citing David E. Feller, Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards, 19 Berkley J. Emp. & Lab. L 296, 303 (1998)).

[23] Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 237 (4th Cir. 2006). In a dissenting opinion, Judge Luttig agreed that the arbitrator's decision was clearly erroneous, but argued that "clear error alone is insufficient to vacate an arbitrator's award." Id.

[24] Ross Runkel, *Sanctions for Attacking Arbitration Awards*, <http://www.lawmemo.com/arbitrationblog/2006/03/sanctions_for_a.html> (March 1, 2006)

The Direct Action Statute: Misunderstandings and Misapplications

*By John D. Dixon**

The overwhelming majority of states recognize it is prejudicial to allow the inclusion of a defendant's insurer in a civil action. Georgia recognizes this prejudicial effect, except when the defendant is a motor carrier. O.C.G.A. §§ 46-7-12[1] and 46-7-12.1[2] allow a plaintiff to add a motor carrier's insurer under certain circumstances. This article focuses primarily on O.C.G.A. § 46-7-12.1 and its impact on insurers of motor carriers transporting regulated commodities[3] solely in interstate commerce.

The Georgia Direct Action Statute is a limited statutory exception to the general rule that direct actions may not lie against insurance carriers. Section 46-7-12.1 requires carriers issued a permit to file with the commission proof of financial responsibility. For the purposes of this article, it is assumed that the carrier meets the financial responsibility laws by filing a Form E, Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of Insurance. The filing of a Form E subjects the insurer to a direct action.[4]

The analysis is not complex. However, many insurers are improperly joined because of the failure to recognize the impact of the registration scheme mandated by the federal government which was overhauled in the 1990's and Georgia's reaction to these changes. An historical perspective is helpful in understanding why the number of proper direct action cases has dwindled over the last ten years.

Federal Registration Scheme

Congress has the power to regulate commerce among the several states and to make all laws which shall be necessary and proper for carrying into execution that power.[5] Under the Commerce Clause, states may only impose significant regulatory burdens on interstate motor carriers if authorized by Congress.[6] Over the years, Congress has authorized the states to require registration of interstate motor carriers subject to the supervision of the former Interstate Commerce Commission (ICC).[7] In 1991, Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA), which directed the ICC to restructure the existing regulations governing vehicle registration and registration fees.[8] As a result, in 1993, the ICC promulgated the single state registration system (SSRS).[9] The ICC intended for the SSRS to serve as the sole avenue for state registration of interstate carriers.[10] This is the point where the confusion begins.

The SSRS replaced the "bingo card" system. Under the prior system, Georgia, and most other states, required motor carriers to provide proof of financial responsibility in order to transport goods within its borders.[11] Therefore, Form E's were filed by all carriers transporting goods within the State. This requirement even applied to motor carriers transporting regulated commodities solely in interstate commerce.[12] However, Georgia is now prohibited from requiring proof of financial responsibility from motor carriers transporting regulated commodities solely in interstate commerce, unless the carriers' base state is Georgia.[13]

Interstate carriers are governed by O.C.G.A. § 46-7-16. Georgia recognized the effect of the SSRS by amending that Code section. The 1995 version of this statute required all interstate carriers to "[g]ive the bond or indemnity insurance prescribed by this article."[14] The 1996 amendment provided: "Before any motor carrier engaged solely in interstate commerce under authority issued by the Interstate Commerce Commission or any successor

agency shall operate any motor vehicle on or over any public highway of this state, it shall obtain from the commission or the carrier's designated base state a registration receipt issued pursuant to rules adopted by the Interstate Commerce Commission or any successor agency as determined by federal law."[15] The 1996 amendment also required only motor carriers of unregulated commodities to file proof of financial responsibility.[16]

State Financial Responsibility Laws

Understanding the federal registration scheme and Georgia's reaction to the SSRS scheme simplifies the remaining analysis. Since interstate carriers of regulated commodities are only required to register in their "base state" and only the "base state" can require proof of financial responsibility, insurers of such carriers are not subject to a direct action. The Kimberly v. Bankers & Shippers Ins. Co.[17] case is often cited as contrary authority. However, as we now know, that case is based on a reading of O.C.G.A. § 46-7-16 that predates the enactment of the SSRS and Georgia's 1996 amendment to that Code section.

In 2000, the legislature amended the direct action statute to clarify the failure to file a Form E does not diminish the right to file a direct action.[18] However, this amendment has no effect on the ability to file a direct action against the insurer of a motor carrier transporting regulated commodities solely in interstate commerce. Under the registration scheme in place, Georgia cannot require proof of financial responsibility of any motor carrier whose "base state" is outside Georgia. Therefore, there can be no "failure to file" a Form E for such carriers.

What to do to solve the problem

Improperly joined insurers are entitled to summary judgment. To support such a motion, obtain an affidavit or deposition from the appropriate individual at the Department of Revenue.[19] This affidavit or deposition should confirm the motor carrier is not on file with the State and that Georgia does not require the carrier to file a Form E or otherwise show proof of financial responsibility.[20]

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[1] Applying to motor carrier of household goods or passengers.

[2] Applying to motor common and contract carriers.

[3] Most commodities are regulated. For exemptions see 49 U.S.C. § 13501 et seq.

[4] See Hartford Cas. Ins. Co. v. Smith, 268 Ga. App. 224 (2004).

[5] See U.S. Const., Art. I, § 8.

[6] Michigan Pub. Utility Comm. v Duke, 266 U.S. 570, 577, 45 S. Ct. 191, 69 L. Ed. 445 (1925).

[7] See Motor Carrier Act of 1935, PL 74-265, 49 U.S.C. § 301 et seq.

[8] 49 U.S.C. § 11506 (1991).

[9] 49 C.F.R. § 1023 (redesignated in 1996 as 49 C.F.R. § 367).

[10] Nat'l Ass'n of Regulatory Utility Comm'rs v. Interstate Commerce Comm'n, 41 F.3d 721 (D.C. Cir. 1994).

[11] Id.; see also O.C.G.A. § 46-7-16 (1995).

[12] See Kimberly v. Bankers & Shippers Ins. Co., 490 F.Supp. 93 (N.D. Ga. 1980).

[13] 49 C.F.R. § 367.4(h). Georgia does not require the filing of a Form E for motor carriers based in Georgia if they are operating solely in interstate commerce. Georgia accepts the federal filing in lieu of a Form E.

[14] O.C.G.A. § 46-7-16(a)(3)(1995).

[15] O.C.G.A. § 46-7-16(a)(1996). The 2007 statute contains identical language.

[16] O.C.G.A. § 46-7-16 (1996).

[17] 490 F. Supp. 93 (N.D. Ga. 1980).

[18] See O.C.G.A. § 46-7-12(c)(2000) ("The failure to file any form required by the commission shall not diminish the rights of any person to pursue an action directly against a motor carrier's insurer."). The provision is now codified at O.C.G.A. § 46-7-12.1(a).

[19] Please contact the author for the name and contact information for the appropriate person at the DOR.

[20] For examples, please contact the author.

The Admissibility of Other Incident Evidence in Product Liability Cases in Georgia State Courts

*By Franklin P. Brannen, Jr.**

Given the persuasive power of other incident evidence, the admission of evidence of allegedly similar incidents is a common battleground in product liability trials. To balance the prejudicial impact of this evidence with the probative value of truly similar events, the Supreme Court of Georgia has required that other acts or omissions must be substantially similar to the defect alleged, adopting the following stringent standard for admissibility:

> In product liability cases, the "rule of substantial similarity" prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a "substantial similarity" between the other transactions, occurrences, or claims and the claim at issue in the litigation. The showing of substantial similarity must include a showing of similarity as to causation. Before admitting proffered evidence of other transactions in products liability cases, the trial court must satisfy itself that the rule of substantial similarity has been met.[1]

This article explores the genesis of the substantial similarity rule in Georgia state courts and outlines the procedural and substantive requirements that plaintiffs must satisfy before other incident evidence may be admitted.

A. The Historical Perspective

The substantial similarity rule in product liability cases arose from negligence claims in which the plaintiffs attempted to introduce evidence of a previously-known dangerous condition. While the general rule in negligence cases is that evidence of similar acts on different occasions is not admissible to prove like acts at a different time or place, this evidence is admissible to show notice of a dangerous condition.[2] For over a century, other incident evidence has been properly admitted in negligence actions involving sidewalks[3], machinery,[4] and railroad crossings.[5]

Early lawsuits involving allegations of a product defect did not specifically require other incidents to be "substantial" similarity but did require a showing of similarity. For example, in Skil Corp v. Lugsdin,[6] the Georgia Court of Appeals affirmed the trial court's denial of a motion in limine to exclude evidence of previous circular saw complaints.[7] The appellate court found that the manufacturer's representative provided sufficient testimony about the similarity of the different models of saws involved in the other complaints.[8] With this showing of similarity, the other complaints were admissible for the purpose of showing notice of defect.[9]

B. The Substantial Similarity Rule Develops

The substantial similarity rule was first applied in a product liability case by a Georgia appellate court in Mack Trucks v. Conkle,[10] which involved a claim that the frame rail in a truck was defective.[11] At trial, plaintiff presented evidence that before the underlying accident, Mack Trucks was aware of numerous complaints of cracking in the frame rail of trucks similar to plaintiff's truck.[12]

The Supreme Court of Georgia affirmed the admission of this evidence because it was relevant to the issues of notice and punitive damages and the cracked frames were substantially similar to the alleged crack in the frame of a plaintiff's truck.[13] The supreme court found that the trial court had undertaken a sufficient analysis of the similarity and excluded evidence of cracking that was caused by different circumstances than the crack in plaintiff's truck frame.[14]

This holding from Mack Truck was first applied by the Georgia Court of Appeals in General Motors Corp. v. Moseley,[15] an automotive product liability lawsuit involving a post-collision fire.[16] Before trial, General Motors filed a motion in limine to exclude evidence of other claims involving GM trucks and post-collision fires.[17] The trial judge appropriately ruled that before any of this evidence would be admitted, plaintiff must make a showing of substantial similarity between the other claims and subject incident.[18] But during trial, plaintiff's counsel made repeated reference to other lawsuits (and deaths) without providing a foundational predicate for the admission of this evidence.[19]

On appeal, plaintiff contended that a showing of substantial similarity was required only if the evidence was admitted for the purpose of showing defect – not notice of defect.[20] The court of appeals disagreed and reaffirmed that a showing of substantial similarity between the other incident and the underlying claim was necessary in all circumstances.[21]

Two opinions from the Georgia Court of Appeals, Saltis v. Daimler Benz[22] and Crosby v. Cooper Tire & Rubber Co.,[23] indicated an apparent weakening of the substantial similarity requirement. In both cases, the court of appeals described the substantial similarity test using new language that hinted at a relaxed standard. In Saltis, the court concluded that:

> [f]or admission into evidence as to each prior or subsequent occurrence, the party must demonstrate through some evidence only of substantial similarity, which has a spectrum of evidence from identical facts and circumstances to barely substantially similar facts.[24]

And in Crosby, the court referred to the evidentiary threshold as:

> a continuum of admissible substantially similar occurrences, where at one extreme the occurrences were the same and at the other extreme the occurrences were barely sufficient to be substantially similar for admission so as not to be an abuse of discretion.[25]

While technically repeating the substantial similarity standard, the court's reference to a "spectrum" and "continuum" of evidence eroded the strict threshold for admissibility.

Apparently, the Georgia Supreme Court agreed because it granted certiorari in *Crosby* solely to address the court of appeals' substantial similarity ruling.[26] Justice Sears sharply explained how the court of appeals had stretched the rule too far:

> We find no precedential directive from this Court (or any other court) to indicate that the admissibility of prior occurrences in products liability cases rests upon a continuum so wide as to include occurrences that are "identical" to the occurrence at issue as well as occurrences that are "barely" similar to the occurrence at issue. Under this extremely broad standard, almost all prior occurrence evidence would be admissible in products liability cases, so long as there was the barest hint of possible similarity between the prior occurrence and the occurrence at issue in the litigation. In that situation, a trial court's exclusion of such evidence

> would almost always be subject to a claim of discretionary abuse by a disgruntled litigant.[27]

Accordingly, the substantial similarity rule that was first set forth in Conkle was reaffirmed by the supreme court in *Crosby*.

C. The Contours of the Substantial Similarity Rule

1. The foundational evidence must be reliable.

The foundation for the showing of substantial similarity must be based on reliable evidence. In Ray v. Ford Motor Co.,[28] plaintiff attempted to introduce evidence of previous allegations of inadvertent movement by vehicles that did not contain a shift interlock device.[29] Plaintiff's evidence was based on a review and re-compilation of information obtained from a database maintained by Ford, which plaintiff intended to introduce through the testimony of an expert witness.[30] Plaintiff proffered two groups of other incident information: one group of 564 incidents was selected on the basis of four factual criteria that plaintiff contended made them similar to the subject incident and the other group of 20,000 incidents had no common similarities but were intended to show the gravity of the alleged defect.[31] Ford moved to exclude this evidence and related testimony because the source of the information was, in large part, hearsay, contained duplicate entries, and was based on unreliable sources.[32] The trial court granted Ford's motion.[33]

The court of appeals found that without any showing of similarity the 20,000 incidents clearly did not meet the substantial similarity requirements for other incident evidence.[34] While plaintiff did offer four categories of similarity for the other group of 564 incidents, the court of appeals concluded the factual evidence used by plaintiff to support the similarity was unreliable.[35] Plaintiff had not disputed the evidence that Ford had offered regarding the myriad issues with the reliability of the

database information.[36] "In the absence of the underlying source documents or any other verification of the database, the trial judge lacked sufficient information to determine whether the incidents were substantially similar to [plaintiff's] accident."[37]

2. Circumstantial evidence can be the basis of the underlying defect.

For certain cases, the plaintiff may use circumstantial evidence to show the underlying defect for purposes of making the substantial similarity comparison. In Rose v. Figgie International, Inc.,[38] the plaintiff had no direct evidence of defect because the allegedly defective fire extinguisher was inadvertently destroyed by a third party.[39] But plaintiff wanted to introduce evidence of a product recall for the extinguisher and evidence of fifty other incidents in which consumers complained about spontaneous explosions.[40] The trial court excluded this evidence because the plaintiff could not come forward with a specific failure mode for her extinguisher that the court could use to undertake the substantial similarity analysis.[41]

The court of appeals agreed that plaintiff had the burden of showing that her extinguisher had the manufacturing defect that was the cause of the recall and other incidents but plaintiff could demonstrate that her extinguisher had this manufacturing defect through the use of circumstantial evidence.[42] For cases involving defects in manufacturing mass-produced items, "[a] defect in one such item in its design or manufacture would necessarily occur in thousands of identical products."[43] Accordingly, the court concluded that with direct evidence that plaintiff's extinguisher was manufactured during the three months that were included within the recall, there was sufficient circumstantial evidence from which a jury could conclude that plaintiff's extinguisher had the recall condition.[44]

3. Other incident evidence is admissible in both design and manufacturing defect cases.

In Rose, the court of appeals rejected the manufacturer's argument that similar incident evidence was only admissible in design defect cases – not manufacturing defect cases – and concluded:

> A design defect necessarily results in all products having the defect, whereas a manufacturing defect will only occur in those products which were improperly manufactured following design. But because a manufacturing defect involves the use of a systematic process, evidence that some goods produced during a certain time through a certain process had a defect is probative to show that other goods produced during that same time through the same process may also have the defect.[45]

Thus, because the manufacturing process can produce similarly defective parts, other incident evidence is admissible in manufacturing defect cases.[46]

4. The trial court is the gatekeeper of similar incident evidence.

The recent cases involving other incident evidence show the importance of the trial court's assessment of the evidence. For example, in Stovall v. DaimlerChrysler Motors Corp.,[47] an automotive product liability action involving a claim that a Jeep was defective because it suddenly accelerated after being shifted into gear, the court of appeals affirmed the exclusion of thirteen other incidents of alleged sudden acceleration.[48] At the hearing on DaimlerChrysler's motion in limine to exclude evidence of these other incidents, plaintiff's expert witness testified that, in his

opinion, the thirteen other incidents were substantially similar to plaintiff's claim.[49] But the expert witness admitted that there were many different potential causes of sudden acceleration and that he had reached no opinion regarding the failure mode in the thirteen other incidents of alleged sudden acceleration.[50] Because plaintiff could not show that the other incidents were caused by a defect similar to the defect alleged by plaintiff in this case, the court of appeals affirmed the exclusion of this evidence.[51]

In Colp v. Ford Motor Co.,[52] an automotive product liability case involving allegations of a defective door latch, plaintiff raised three issues on appeal regarding the exclusion of other incident evidence: (1) whether the trial court used the wrong standard; (2) whether the trial court improperly resolved disputed issues of fact; and (3) whether the trial court abused its discretion in excluding the other incident evidence.[53] In a motion in limine, Ford sought to exclude evidence regarding thirty-seven other incidents that plaintiff contended were evidence of defect or at a minimum put Ford on notice of problems with the door latch.[54] The trial court granted Ford's motion and excluded all of the other incident evidence finding that plaintiff had not shown a common design or common causation between the other incidents and the matter at issue in the lawsuit.[55]

What Is the Similarity Standard?: On appeal, plaintiff questioned whether the trial court had used the appropriate standard in its exclusion of the other incident evidence, focusing on language from the trial court's order that referred to the admissibility standard as being a "high hurdle" to cross.[56] The court of appeals distinguished the substantial similarity test from the much broader general admissibility standard for relevant evidence and concluded that plaintiff had taken the quoted statement out of context because the trial court repeatedly referred to substantial similarity – not some other evidentiary burden – throughout its order.[57]

Can the Trial Court Resolve Disputed Issues of Fact?: Plaintiff complained that the trial court should not have resolved issues of fact when analyzing the admissibility of the other incident evidence.[58] But the court of appeals clearly held that to resolve the substantial similarity rule, "the trial court must necessarily conduct a factual inquiry into whether the proponent's proffered incidents share a common design, common defect, and common causation with the alleged design defect at issue."[59]

Does Plaintiff's Allegation of Defect Control the Similarity Analysis?: Finally, plaintiff contended that the trial court should have based its analysis of similarity through the prism of plaintiff's theory of defect – specifically here, that there should have been a positive latch at the leading edge of the door.[60] Thus, other differences in design and the accident scenario would not be relevant to the evidentiary analysis. Put simply, what the trial court should examine is whether the design in the other incidents failed to have a positive latch at the leading edge of the door.[61] But, the court of appeals approved the reasoning of the trial court who concluded that plaintiff could not define his defect so broadly that all other incidents by definition became substantially similar, and thus, admissible.[62]

D. Conclusion

Over the past two decades, the Georgia appellate courts have refined the evidentiary threshold that a plaintiff must satisfy for the admission of similar incident evidence. At a minimum, plaintiffs must show that the other incident evidence and the underlying defect share a common design, common defect, and common causation.[63] Also, plaintiffs must use reliable evidence to satisfy the substantial similarity requirement.[64] In addition, trial courts must undertake a factual inquiry to determine whether the other incidents are substantially similar to the allegation of defect in plaintiff's case.[65] Evidence of other incidents is admissible only after the plaintiff has offered reliable foundational evidence to

convince the trial court that the substantial similarity rule has been satisfied.

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[1]. Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 455, 543 S.E.2d 21, 24-25 (2001).

[2]. Skil Corp. v. Lugsdin, 168 Ga. App. 754, 754-55, 309 S.E.2d 921, 922 (1983).

[3]. City of Brunswick v. Glogauer, 158 Ga. 792, 124 S.E. 787 (1924) (evidence that others passed over sidewalk without issue was admissible); Gilmer v. City of Atlanta, 77 Ga. 688 (1886) (another fall on same sidewalk was admissible); City of Dublin v. Howell, 68 Ga. App. 463, 23 S.E.2d 177 (1942) (previous fall by another in same passageway was admissible).

[4]. Georgia Cotton Oil Co. v. Jackson, 112 Ga. 620, 37 S.E. 873 (1901) (other users of allegedly defective machine permitted to testify about other instances of improper functioning of machine).

[5]. Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970) (physical condition of railroad crossing must be similar for admission of other incident).

[6]. 168 Ga. App. 754, 309 S.E.2d 921 (1983).

[7]. Id. at 756, 309 S.E.2d at 923.

[8]. Id.

[9]. Id.

[10]. 263 Ga. 539, 436 S.E.2d 635 (1993).

[11]. Id. at 539, 463 S.E.2d at 636.

[12]. Id. at 544, 463 S.E.2d at 639-40.

[13]. Id.

[14]. Id.

[15]. 213 Ga. App. 875, 447 S.E.2d 302 (1994).

[16]. Id. at 875, 447 S.E.2d at 305.

[17]. Id. at 877, 447 S.E.2d at 306.

[18]. Id.

[19]. Id.

[20]. Id. at 877, 447 S.E.2d at 307.

[21]. Id.

[22]. 243 Ga. App. 603, 533 S.E.2d 772 (2000).

[23]. 240 Ga. App. 857, 524 S.E.2d 313, aff'd in part and rev'd in part, 273 Ga. App. 454, 543 S.E.2d 21 (2001).

[24]. Saltis, 243 Ga. App. at 609, 533 S.E.2d at 778.

[25]. Crosby, 240 Ga. App. at 860, 524 S.E.2d at 318.

[26]. Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 543 S.E.2d 21 (2001).

[27]. Id. at 456, 543 S.E.2d at 24.

[28]. 237 Ga. App. 316, 514 S.E.2d 227 (1999).

[29]. Id. at 317-18, 574 S.E.2d at 230.

[30]. Id.

[31]. Id.

[32]. Id.

[33]. Id.

[34]. Id. at 319, 514 S.E.2d at 231.

[35]. Id.

[36]. Id.

[37]. Id.

[38]. 224 Ga. App. 848, 495 S.E.2d 77 (1997).

[39]. Id. at 849, 495 S.E.2d at 80.

[40]. Id. at 850, 495 S.E.2d at 80.

[41]. Id.

[42]. Id., 495 S.E.2d at 81.

[43]. Id. at 852, 495 S.E.2d at 82.

[44]. Id. at 853, 495 S.E.2d at 83.

[45]. Id.

[46]. Id.

[47]. 270 Ga. App. 791, 608 S.E.2d 245 (2004).

[48]. Id. at 791, 608 S.E.2d at 246-47.

[49]. Id. at 792, 608 S.E.2d at 247.

[50]. Id. at 793, 608 S.E.2d at 247-48.

[51]. Id.

[52]. 279 Ga. App. 280, 630 S.E.2d 886 (2006).

[53]. Id. at 283-85, 630 S.E.2d at 888-89.

[54]. Id. at 282, 630 S.E.2d at 888.

[55]. Id.

[56]. Id. at 283, 630 S.E.2d at 889.

[57]. Id. at 283-84, 630 S.E.2d at 889.

[58]. Id. at 284, 630 S.E.2d 889.

[59]. Id.

[60]. Id.

[61]. Id. at 285, 630 S.E.2d at 890.

[62]. Id.

[63]. Id. at 284, 630 S.E.2d at 889.

[64]. Ray, 237 Ga. App. at 319, 514 S.E.2d at 231.

[65]. Colp, 279 Ga. App. at 284, 630 S.E.2d at 889.

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Is Service By Mail Permitted Under The Hague Convention?

*By Brian J. Schneider**

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"), is a multilateral treaty that, among other things, provides a mechanism for perfecting service in countries that have ratified the treaty. Specifically, "[t]he primary innovation of the Convention is that it requires each state to establish a central authority to receive requests for service of documents from other countries."[1] Any analysis of service under the Convention begins with Article 10:

> Provided the State of destination does not object, the present Convention shall not interfere with --
>
> > (a) the freedom ***to send*** judicial documents, by postal channels, directly to persons abroad,
> >
> > (b) the freedom of judicial officers, officials, or other competent persons of the State of origin ***to effect service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

> (c) the freedom of any person interested in a judicial proceeding ***to effect service*** of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination.[2]

Over the past 20 years, American Courts have taken divergent views on whether service under the Convention must be perfected through a signatory country's central authority, or is permitted by mail. Neither the Eleventh Circuit nor the Georgia Supreme Court has addressed the issue,[3] and the federal district courts in Georgia are split.[4] After considering the arguments on both sides -- and applying familiar rules of statutory construction to the Convention -- the better argument is that service by mail is not permitted on international defendants under the Hague Convention.

A. The Bankston-Nuovo Pignone Line Of Cases

The question of whether service by mail is permitted under the Hague Convention was addressed by the Eighth Circuit Court of Appeals in Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989). There, the plaintiff attempted to effect service on a foreign defendant by registered mail. Noting that Japan had not objected to the sending of documents by mail, the Eighth Circuit described the two lines of cases that have arisen under Article 10 of the Convention. The first line follows the holding of the Second Circuit in Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986), permitting service of process by mail under the Convention. In so holding, these courts reason that "since the purpose of the Hague Convention is to facilitate service abroad," the reference to "send" under subsection (a) "would be superfluous unless it was related to the sending of such documents for the purpose of service."[5] Thus, these courts reason that the use of "send" rather than "service" in Article 10(a) must be attributed to careless drafting.[6]

Rejecting the Ackermann interpretation of the Hague Convention, the Eighth Circuit turned its attention to the second line of cases:

> The second line of interpretation … is that the word "send" in Article 10(a) is not the equivalent of "service of process." The word "service" is specifically used in … subsections (b) and (c) of Article 10. If the drafters of the Convention had meant for subparagraph (a) to provide an additional manner of service of judicial documents, they would have used the word "service." Subscribers to this interpretation maintain that Article 10(a) merely provides a method for sending subsequent documents after service of process has been obtained by means of the central authority.[7]

Finding this line of reasoning more persuasive, the Eighth Circuit articulated the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[8] Thus, the court of appeals concluded that sending a copy of a summons and complaint by registered mail is not a method of service permitted by the Hague Convention.[9]

The reasoning of the Eighth Circuit was subsequently adopted by the Fifth Circuit in Nuovo Pignone, SPA v. Storman Asia M/V, 310 F.3d 374 (5th Cir. 2002). Finding that registered mail does not constitute acceptable service under the Convention, the court relied "on the canons of statutory construction rather than the fickle presumption that the drafters' use of the word 'send' was a mere oversight. 'Absent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as

conclusive'."[10] "[B]ecause the drafters purposely elected to use forms of the word 'service' throughout the Hague Convention, while confining use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service'."[11]

B. Error and Surplusage Versus Ambiguity

The contrary line of cases, starting with the Second Circuit's decision in Ackermann v. Levine, reasons that use of the word "send" instead of "service" under subsection (a) constitutes a "scrivener's error" made during drafting, and that to give "send" any meaning other than "service" would render its use superfluous. For the reasons articulated in Bankston and Nuovo Pignone, the reasoning advanced in Ackermann and its progeny is incorrect. Indeed, a Court considering the question needs to look no further than Georgia's own service of process provisions to see that courts frequently require, in addition to service, that copies of initial pleadings be mailed to a defendant.[12] But even if the Levine line of cases is correct, drafting errors and surplusage do not change the fact that Article 10(a) does not permit service by mail.

This conclusion is supported by the United States Supreme Court's recent decision in Laramie v. United States Trustee, 540 U.S. 526 (2004), where similar arguments were made regarding a provision of the Bankruptcy Code that had been amended to remove attorneys from among those who could seek attorney's fees under 11 U.S.C. § 330. The Supreme Court in Laramie accepted that the amendment in question might have contained a drafting error. Nevertheless, the Court stated, "It is well established that when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms."[13]

The Court also accepted the appellant's argument that a literal reading of the statute might render certain of its provisions superfluous. But the Court stated that whether a particular reading creates surplusage "is not controlling … Surplusage does not always produce ambiguity … Where there are two ways to read the text … [w]e should prefer the plain meaning since that approach respects the words of" the drafters."[14]

Thus, even if Ackermann and its progeny are correct, neither drafting errors nor surplusage dictate the conclusion that service by mail is permitted under the Convention. The plain meaning of Article 10 controls: sending judicial papers by mail does not constitute effective service under the Convention.

C. Federal And State Service Rules Must Also Be Considered

Counsel must also consider that even if the Hague Convention authorizes service by mail, the forum state's laws must also permit service by mail. In Brockmeyer v. May, 383 F.3d 798, 804 (9th Cir. 2004), the Ninth Circuit agreed with the Second Circuit's conclusion in Ackermann that the Hague Convention does not "prohibit" or "interfere with" use of the postal channels. However, the Ninth Circuit then cited the Rapporteur for the Convention who wrote that under Article 10(a), "in order for the postal channel to be utilized, it is necessary that it be ***authorized*** by the law of the forum state."[15] The Ninth Circuit then reviewed the various subdivisions of Federal Rule of Civil Procedure 4 and concluded that it "does not go beyond means of service affirmatively authorized by international agreements." Thus, because Rule 4 does not expressly authorize service by mail, service by mail under the Convention was not permitted.[16]

A similar argument exists for a case pending in state court. The service provision of the Georgia Civil Procedure Act, § 9-11-4, is modeled on Federal Rule of Civil Procedure 4. The Georgia Court of Appeals has expressly recognized that "there is ***no*** provision

under Chapter 11 which authorizes a party to serve a defendant corporation directly by certified or registered mail."[17]

When representing an international defendant who has been sued in the United States, counsel should consider how an argument under the Hague Convention might aid in their defense of the case.

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[1] Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698-99 (1988).

[2] 20 U.S.T. 361, T.I.A.S. No. 6638 (emphases added).

[3] In Camp v. Sellers & Co., 158 Ga. App. 646, 281 S.E.2d 621 (1981), the Court of Appeals addressed the issue of service abroad under the Convention. In doing so the court did not mention service by mail under the Convention. As the court stated, the Hague Convention:

> specifically provides for the method of service in another foreign country which is a signatory to the treaty. It provides procedures whereby each signatory nation creates or designates a central authority for the purpose of accepting documents which are forwarded to it for service and that the central authority has the responsibility to effect service within its jurisdiction in a manner consistent with its own laws.

Id. at 648-49, 281 S.E.2d at 624. However, the specific issue of service by mail was not presented in Sellers.

[4] Some of these decisions hold that service by mail is permitted under Article 10(a), Schiffer v. Mazda Motor Corp., 192 F.R.D. 335 (N.D. Ga. 2000); Patty v. Toyota Motor Corp., 777 F. Supp. 956 (N.D. Ga. 1991), but also state that "there is no obviously right or wrong answer to the question." Schiffer, 192 F.R.D. at 337 (citing, among other decisions, James v. Mazda Motor Corp., No. 1:96-CV-2357 (GET) (N.D. Ga. Nov. 8, 1996), for the conclusion that use of the mail does not constitute service under Article 10(a)). But see Curcuruto v. Cheshire, 864 F. Supp. 1410, 1412 (S.D. Ga. 1994) (holding that service by mail permitted under Article 10(a)).

[5] Levine, 788 F.2d. at 839.

[6] Id.

[7] Bankston, 889 F.2d at 173-174.

[8] The Eleventh Circuit follows the same "fundamental principles of treaty construction and interpretation":

> The goal of treaty interpretation is to determine the actual intention of the parties "because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." The analysis of the parties' intentions "begin[s] with the text of the treaty and the context in which the written words are used." The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories. "If the language of the treaty is clear and unambiguous, as with any exercise in statutory construction, our analysis ends there and we apply the words of the treaty as written." As Justice Story wrote long ago, "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." But, if the treaty text is ambiguous when read in context in light of its object and purpose, then extraneous sources may be consulted to elucidate the parties' intent from the ambiguous text.

In re Commissioner's Subpoenas, 325 F.3d 1287, 1294 (11th Cir. 2003) (internal citations omitted).

[9] Bankston, 889 F.2d at 174.

[10] Nuovo Pignone, 310 F.3d at 384 (quoting *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

[11] Id.

[12] See § 9-11-4(a)(1) (requiring service on the Secretary of State as well as forwarding the complaint and summons by registered or certified mail).

[13] Laramie, 540 U.S. at 530-31, 34.

[14] Id. at 536.

[15] 1 Bruno A. Ristau, *International Judicial Assistance* § 4-3-5, at 205 (2000) (quoted in Brockmeyer v. May, 383 F.3d 798, 804 (9th Cir. 2004)) (emphasis added).

[16] Id. at 803-04.

[17] Abe Engineering, Inc. v. Travelers Indemnity Co., 210 Ga. App. 551, 551, 436 S.E.2d 754, 755 (1993) (emphasis added).