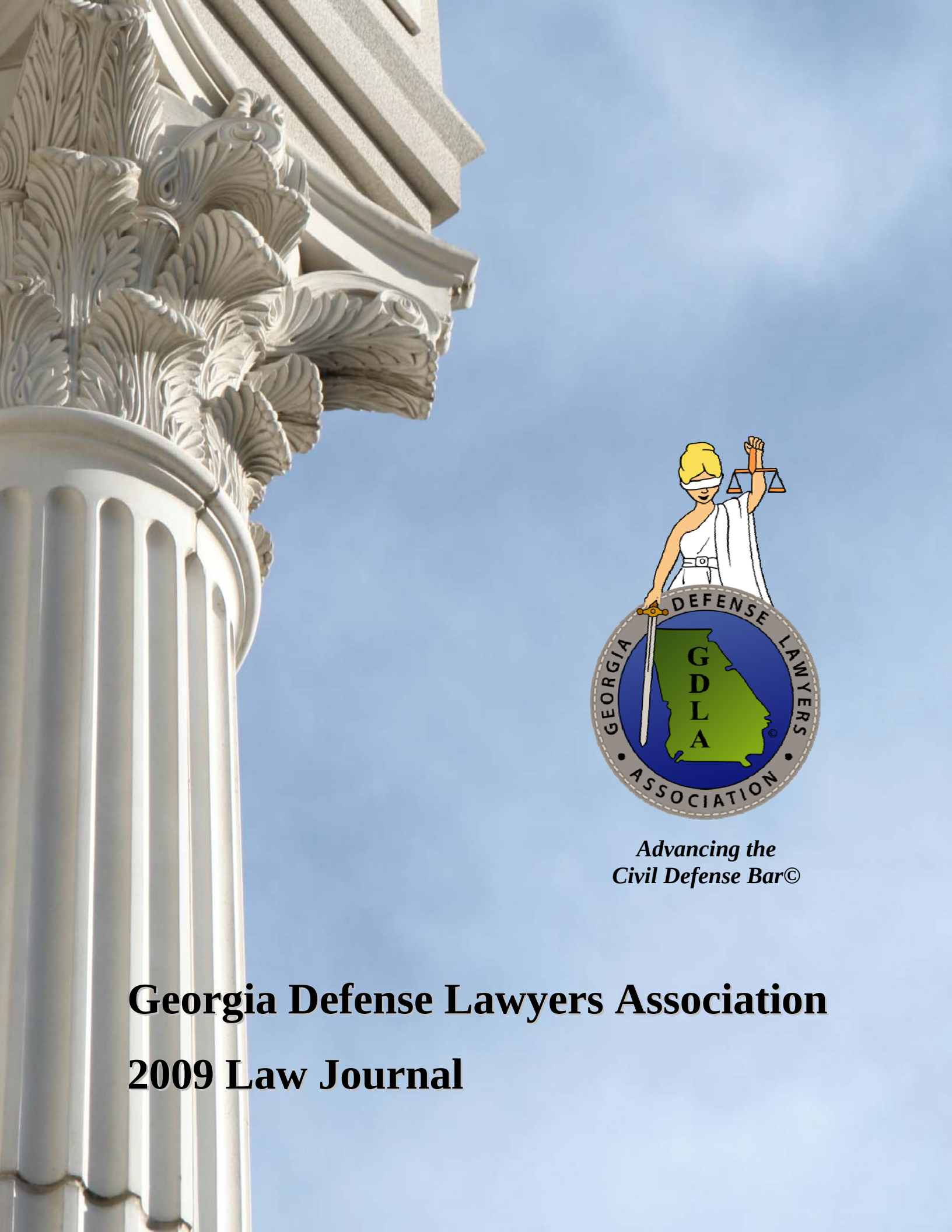

Advancing the
Civil Defense Bar©

Georgia Defense Lawyers Association

2009 Law Journal

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PRESIDENT'S MESSAGE

The purpose of our journal is to provide authoritative and scholarly works on a variety of topics which will be interesting to our members and helpful to our members' practices. To that end, I refer you to the articles some of our fellow members have worked so hard to produce, and our editor, Lynn Roberson, diligently combined, edited, and placed in this format.

I did, though, want to take this opportunity to point out two things I hope you will consider about our organization. First, in this constantly changing economy, and in an environment in which entire industries are closing their doors, I have no doubt the Georgia Defense Lawyers Association will be here not only five, but also fifty years down the road. The reason is the commitment of its members to each other and to service beyond self. I have observed, over the last twenty years, the continued presence of the past Presidents at meetings and other functions. I see firsthand the incredible amount of behind the scenes work constantly and continually performed by your Board of Directors, led by past Presidents, in assistance to this Association. I am incredibly encouraged by that continued commitment, and trust you will be as well. It truly speaks volumes that those who have gone before us see such continued value in our Association.

Second, if you are not taking advantage of the many opportunities to enhance your practice provided by the GDLA, shame on you. In addition to the judicial receptions, Annual Meeting, trial academy for younger lawyers, workers' compensation seminar, and Skits and Suds ethics and professionalism training for younger lawyers, this year we will be putting on a two-day intensive deposition boot camp for young lawyers. Almost monthly we are conducting, in conjunction with various sponsors of the Association, different short CLE seminars on topics dealing with various expert issues. We have twelve substantive law groups, and participating not only allows you to network, but also puts you

on the cutting edge when cases come down in a particular area of law. And, in January, for the first time, we will be participating with the Alabama Defense Lawyers Association and the Florida Defense Lawyers Association in a ski CLE in Big Sky, Montana. This first of its kind program will prove to be not only a fantastic networking opportunity, but also an opportunity to obtain some good CLE hours in a great location at a very minimal cost.

This Association is made up of volunteers. Like anything else in life, you are going to get out of it what you put into it. I encourage you, as the past Presidents who have gone before us have modeled, to get involved and to participate in this Association. You will be glad you did.

James E. Singer
Bovis, Kyle & Burch, LLC

EDITOR'S ACKNOWLEDGMENT

It has been a pleasure and privilege this year working with the many authors and generous contributors to the GDLA Law Journal whose work will certainly prove to be of great benefit to our readership. I certainly also want to thank our former President, Johnny Foster, and our brand new Executive Director, Jennifer Davis, for their assistance in putting the Law Journal together.

The hard work, dedication and unselfish willingness to contribute to this issue on the part of the following authors cannot be overstated or praised enough:

William M. Clifton III Glen R. Fagan Rachel Fuerst W. Melvin Haas, III Michael W. Horst Paul I. Hotchkiss W. Jonathan Martin II	K. Martine Nelson Kenneth Sisco Matthew P. Stone J. Benson Ward Richard A. "Rusty" Watts James S. V. “Jamie” Weston

This year's Law Journal contains a number of articles to help the GDLA to educate its members and the judiciary on numerous, important areas of substantive law.

We hope that each of you will enjoy and benefit from the Law Journal and will find it useful for many years to come as a research reference. I have appreciated the opportunity to serve.

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The Disappearing Defense of Federal Preemption

By Rachel Fuerst

In recent years, greater numbers of defendants have argued that federal law preempts state tort claims in various areas. No area has seen as dramatic an increase in litigation and preemption arguments as pharmaceutical and medical device litigation. Pharmaceutical companies and medical device manufacturers face litigation over product liability claims ranging from failure-to-warn to defective design. There seems to be an explosion of television and other advertisements for potential plaintiffs for drug and medical device litigation. As the frequency of drug and medical device litigation increases, the pharmaceutical and medical device manufacturers have argued that many, if not all, of the state tort claims are preempted by federal law.

In 2008, the United States Supreme Court issued an important opinion with respect to medical device product liability allegations and federal preemption in *Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008). In *Riegel*, the Supreme Court held some of the various state tort claims alleged were federally preempted. Less than one year later, the Supreme Court has issued an opinion in a pharmaceutical company case: *Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). On March 4, 2009, the Supreme Court ruled that federal law did not preempt a state tort failure-to-warn case involving a pharmaceutical label.

This article provides a very brief summary of the majority opinion in *Wyeth* as delivered by Justice Stevens. The concurrences and dissent will not be addressed; however, the six to three split and multiple opinions should be reviewed by anyone with an interest in the federal preemption defense.

BACKGROUND OF *WYETH V. LEVINE*

Wyeth manufactures Phenergan, an anti-nausea medication. The injectible form of Phenergan is corrosive and causes irreversible gangrene if it enters a patient's artery. Phenergan can be administered intramuscularly or intravenously via either IV-push directly into a vein or via an IV drip. When administered via IV-push, Phenergan can enter an artery accidentally either through a needle or by escaping from the vein into the surrounding tissue and artery.

The Plaintiff was injured when a nurse injected Phenergan via IV-push into Levine's arm. Levine developed gangrene and ultimately her right hand and entire forearm were amputated. Her career as a professional musician ended and she

filed suit for pain and suffering, medical expenses, loss of livelihood and punitive damages.

The Plaintiff sued Wyeth in Vermont alleging that (1) Wyeth's label was defective and (2) Phenergan is not reasonably safe for intravenous use. The trial court denied Wyeth's summary judgment motion and a jury found in favor of the Plaintiff and awarded significant damages.

On appeal, the Vermont Supreme Court held that the verdict did not conflict with Food and Drug Administration (FDA) labeling requirements because Wyeth could have warned against IV-push without prior FDA approval and federal labeling requirements create only a floor, and not a ceiling, for state regulation.

The United States Supreme Court granted certiorari on the issue of whether the FDA's drug labeling judgment preempts state tort claims premised on the theory that different labeling judgments were necessary to make a drug safe for use.

INITIAL PREEMPTION ISSUES ADDRESSED BY THE SUPREME COURT

Wyeth made two preemption arguments: (1) it would have been impossible for Wyeth to comply with a state law duty to modify the Phenergan label without violating federal law and (2) recognition of the Plaintiff's state tort action creates an unacceptable obstacle to the execution of the purposes and objectives of Congress because it substitutes a lay jury's decision for the expert opinion of the FDA.

The Court's rulings were guided by the "two cornerstones" of preemption jurisprudence established in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (a medical device case). These basic principles are (1) congressional purpose for legislation is the ultimate touchstone in every preemption case and (2) in all preemption cases, particularly those in which Congress has legislated in a field which the States traditionally occupy, the Court starts with the assumption that the historic police powers of the states are not to be superseded by the federal government unless that was the clear and manifest intent of Congress.

To identify the congressional purpose behind the legislation at issue in *Wyeth*, the Court reviewed the history of the FDA and the federal Food Drug and Cosmetic Act (FDCA). Of particular importance, in 1962 the FDCA was amended and the burden of proof for pharmaceutical safety rested not with the FDA but with the manufacturer. Additionally, in 1962 Congress ensured the preservation of state law with a savings clause that indicated that a provision of state law would only be invalidated upon a direct and positive conflict with the FDCA. Then when

Congress enacted an express preemption provision for medical devices in 1976, Congress did not enact such a provision for prescription drugs. In 2007, when Congress amended the FDCA, the FDA was granted for the first time the authority to require a manufacturer to change a drug label based on safety information available after initial FDA approval.

THE RULINGS OF THE SUPREME COURT

1. The Court Rejected Wyeth's Impossibility Argument

The Supreme Court disagreed with Wyeth's argument that the FDA rather than the pharmaceutical manufacturer bore primary responsibility for drug labeling. The Court held that the many amendments to the FDCA and FDA regulations maintained the central premise that the manufacturer was charged with and bore the responsibility for the content of its label and with ensuring that the warnings remain adequate as long as the drug is on the market. In fact, prior to the 2007 FDCA amendments discussed above, the FDA lacked the authority to order manufacturers to revise their labels. Thus, the Supreme Court held that when the risk of gangrene for Phenergan IV-push became apparent, Wyeth had a duty to provide an adequate warning and the FDA regulations permitted Wyeth to provide such a warning before receiving FDA approval.

The Supreme Court held that in the absence of clear evidence that the FDA would not have approved the label change, it would not conclude that it was impossible for Wyeth to comply with both federal and state requirements. The mere fact that the FDA approved Wyeth's label did not establish that the FDA would have prohibited a change to unilaterally strengthen its warnings. The Supreme Court noted that "[i]mpossibility is a demanding defense" and Wyeth failed to demonstrate impossibility.

2. The Court Rejected the Floor and Ceiling Preemption Argument

The Supreme Court found no merit in Wyeth's implied preemption argument. Wyeth contended that the FDCA established both a floor and a ceiling for drug regulation--once the FDA approved a drug's label, then a state law verdict may not deem the label inadequate regardless of whether the FDA considered the warning at issue. The floor and ceiling argument was rejected because the Supreme Court held that all evidence of congressional purpose pointed to the opposite conclusion.

Congress has not provided a federal remedy for consumers harmed by unsafe or ineffective drugs. The Supreme Court held the lack of federal remedy was essentially a congressional determination that state's rights of action provided

appropriate relief for injured consumers and state law remedies further consumer protection by motivating manufacturers.

Also, the Supreme Court noted that when Congress enacted an express preemption for medical devices in 1976, it did not enact a similar provision for prescription drugs. Congress's silence in the face of the well-known prevalence of state tort litigation was strong evidence that Congress did not intend for FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.

The Supreme Court disregarded the FDA's opinion on preemption noting that the floor and ceiling language of the FDA preamble was enacted without notice to interested parties and opportunity for comment. The FDA preamble was at odds with evidence of congressional intent and prior to the Plaintiff's injury, the FDA did not suggest that state tort law was an obstacle. In fact, the FDA traditionally regarded state law as a complementary form of drug regulation and an additional layer of consumer protection.

CONCLUSION

The Supreme Court ruled that Wyeth's arguments that failure-to-warn claims obstructed the federal regulation of drug labeling were not persuasive. This ruling will not answer all the questions raised by pharmaceutical companies and medical device manufacturers with respect to federal preemption. In fact, the Supreme Court noted that "some state-law claims might well frustrate the achievement of congressional objectives," but that was not the case with the failure-to-warn claims raised in Wyeth. This is an important opinion in the areas of product liability and federal preemption and later cases should be expected to raise these issues of federal preemption with regard to the "other" state tort claims.

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An Analysis of Aging Workers and Their Impact in the Workers' Compensation System

By K. Martine Nelson and Richard A. Watts

I. Introduction: The Role of the "Boomer" in Workplace Demographics

In many workplace environments, a dynamic develops where the culture of the younger employee is juxtaposed to that of the older employee. Age can become a prominent determining factor when dealing with issues such as work ethic, experience, seniority, risk management, productivity, salaries, and promotions or advancement. The aging of the "Baby Boomer" generation has certainly emerged as a key factor in demographic changes in the workforce, and in the United States overall. The U.S. Census Bureau defines a "Baby Boomer" to be someone born during the demographic birth boom between 1946 and 1964.[1] In 1980, individuals age 50 and above represented 26% of the population; in 2003, they represented 28% of the population; and in 2050, they are projected to represent 37% of the population.[2]

With the increase in older individuals in the population, more and more workers are choosing to stay in the workforce longer, many beyond their expected age of retirement (65). The median age of the labor force was 40.5 years in 1962, "the highest level attained before the Baby Boomers entered the labor force." It dropped steadily until 1980, and since then has steadily risen to 39.3 in 2000. The median age is expected to return to 40.6 years in 2010 as the Boomers age and continue to work.[3] There are, of course, a variety of reasons why individuals decide to work longer. Financial reasons (or "job-lock") seem to be a major factor in that decision. This is perhaps even more true in the recent economic climate. With individuals living longer and longer, the costs of retirement are also increasing. Health benefits also play a role. Many older workers enjoy better health coverage or benefits through their employer provided plans than they feel they may be provided under Medicare or individual insurance. Some seniors may be motivated to continue to work by personal gratification or a continued desire to contribute to society.

For those whose primary reason for continuing to work is financial, the reality is that Social Security benefits can no longer provide 100% of one's retirement income, particularly in today's economy. For the average earner retiring at age 65, Social Security replaces only about 41% of pre-retirement

[1] U.S. Census Bureau-Oldest Boomers turn 60 (2006)
[2] U.S. Census Bureau, 2005:12-13.
[3] Fullerton & Tossi, 2001:36.

earnings. [4] Older workers' expectations about Social Security certainly reflect this reality. According to the A Work-Filled Retirement survey, "4 in 10 workers believe their principle source of retirement income will come from employer-sponsored pensions or 401(k) plans. Twenty-two percent believe their own personal savings will be their main income source, with Social Security the third most cited primary retirement income source (14%)."[5]

A) Age and Claims Severity

With an increasing number of older individuals staying in the workforce, there is sure to be an impact on the number of disability claims and workers' compensation claims filed across the country. This begs the question, "Are there differences in the frequency and severity of claims of older workers versus younger workers?" In looking at some statistics, the results are generally mixed. In a recent 2007 study, workers aged 50-59 made up approximately 19% of the workforce and 19% of short-term disability claims, but 34% of long-term disability claims. By comparison, workers aged 30-39 made up 22% of the work force, but 30% of short term disability claims and 18% of long term disability claims.[6] Additionally, UnumProvident performed an analysis of their 2002-2004 Disability Database and found that "workers over the age of 40 accounted for 50% of all received short term disability claims, and up to 75% of all received long term disability claims."[7] With that study, it was found that musculoskeletal injuries were the most prevalent cause of short term disabilities for workers over the age of 40, accounting for almost 40% of STD claims in manufacturing and healthcare, and approximately 30% in transportation, education and banking. [8]

However, some studies show favorable statistics when analyzing certain factors involved with older injured workers versus younger injured workers. The same UnumProvident study found that workers over the age of 40 have lower incidences of work injuries, short term disability, and unscheduled absences than the employee under the age of 40. However, workers over 40 experienced greater time off from when an injury or illness occurred.[9] Also, a 55 year old worker was found to have a 40% lower risk of being injured on the job than a 30 year old worker. After a work related injury or illness, workers aged 55 and over needed an average of 12 days away from work, compared to 10 days for workers aged 45-54, and 9 days for those aged 35-44. [10]

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[4] Center for Retirement Research, 2006:8.
[5] Reynolds, Ridley, & Van Horn, 2005: 18
[6] Based on analysis of data from UnumProvident Company, 2005; and Bureau of Labor Statistics, 2007.
[7] UnumProvident Company (2005). Health and productivity in the aging American workforce: Realities and opportunities. Chattanooga, TN: UnumProvident Company.
[8] *Id., Fig. 2.7, p. 6.*
[9] *Id. P. 3*
[10] *Id., p. 4;* Bureau of Labor Statistics and Current Population Survey, 2003.

Some studies show, however, there are only minor differences in return to work rates of older injured workers as compared to younger injured workers. According to a 2005 work-related injuries survey, 79% of workers over the age of 55 had returned to work after their injury, compared to 84% of workers under 55. The mean duration of work disability was 11 days for both groups.[11] Additionally, older workers (over 55) were only slightly more likely to report working fewer hours due to the injury (13.7%), compared to workers aged 55 or under (10.2%)[12] Furthermore, twice as many younger workers (under age 55) felt they should have returned to their jobs later than was recommended by their medical care provider compared to workers aged 55 or over (17% vs. 8% respectively).[13] Finally, some studies show the rate of non-fatal injuries or illnesses in workers aged 45-64 were nearly twice as high than the rate of workers aged 20-24.[14] Additionally, a 2004 report from the Bureau of Labor Statistics shows that the fatality rate for workers 65 and older was nearly three times higher than the all worker rate. [15]

B) Age and Claims Cost

The picture changes dramatically, however, when looking at the average costs of claims of older injured workers compared to younger injured workers. The National Council on Compensation Insurance (NCCI) has reported that although younger workers suffer workplace accidents more frequently than older workers, the average cost per claim for an illness or injury to an older worker is much greater. Based on data reported to NCCI in 2006, the average costs per claim for older workers were more than twice as high on lost-time claims (more than $27,000.00 for older workers vs. just over &12,000.00 for younger workers.) [16] Claim costs for workers aged 20-24 have maintained a constant level nearly 60% lower than workers aged 55-64 for indemnity and 40% lower for medical. [17] Additionally, it was found that older workers were significantly more likely to rate their injury as "severe" (34% of those aged 55 or older compared to 24% of those under age 50).[18]

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[11] Pransky, G.S., Benjamin, K.L., Savageau, J.A., Currivan, D., & Fletcher, K. (2005). Outcomes in work-related injuries: A comparison of older and younger workers. American Journal of Industrial Medicine, 47(2), 104-112.
[12] *Id., p. 108*
[13] *Id.*
[14] Restrepo, T., Sobel, S., & Shuford, H. (Dec 2006). Ages as a driver of frequency and severity (NCCI research brief). Boca Raton, FL: National Council on Compensation Insurance. (This NCCI research brief from December 2006 examines Bureau of Labor Statistics data and claims data reported to NCCI to determine the effects of age as a driver of frequency and severity of employee injuries.)
[15] U.S. Bureau of Labor Statistics. (2007). Fatal workplace injuries in 2004: A collection of data and analysis. Washington, DC: U.S. Department of Labor. This 2007 report is based on analysis of the 2004 Census of Fatal Occupational Injuries, administered by the Bureau of Labor Statistics.
[16] *Id.*
[17] *Id.*
[18] Pransky, G.S., Benjamin, K.L., Savageau, J.A., Currivan, D., & Fletcher, K. (2005). Outcomes in work-related injuries: A comparison of older and younger workers. American Journal of Industrial Medicine, 47(2), 104-112.

Why does the cost of a claim change dramatically when dealing with an older worker? One reason may be that older workers more often take longer to recover from an injury or illness than a younger worker. Also, older workers tend to earn more money, thereby making their compensation rate higher. Additionally, NCCI reports older workers tend to experience more higher-cost injuries, such as rotator cuff strains and knee injuries, than younger workers who tend to suffer mere sprains.[19] However, in a later study, NCCI reported that younger workers (aged 20-34) were 17% more likely to visit a hospital ER than are older employees, and that the share of ER claims to total claims was 5.9% greater for younger workers.[20]

Although some of the data does not indicate any significant differences in older injured workers versus younger workers, the majority suggests there are certainly polarities when examining factors such as costs. The recent NCCI research seems to suggest the trends in the historical impact Baby Boomers have made in claim costs have already occurred and there is reason to believe that relationship may be diminishing. [21] However, with more and more older workers remaining in the workforce, only time will tell if this trend slows. Either way, employers and insurers need to make additional considerations when dealing with the older employee who has filed a claim for workers' compensation benefits. Furthermore, there are legal issues that generally arise more often in a claim filed by an older employee.

C) Benefits of the Older Worker in the Workforce

There are many benefits to hiring and retaining older employees. Older workers now are vibrant, talented individuals who bring with them years of expertise and are looked upon by employers as respected and knowledgeable in the prime of working life.[22] There are a number of attributes older workers can bring to both big and small businesses. Despite many false assumptions about older workers and their ability to perform well on the job, older workers provide stability, maturity and dependability. A 2005 AARP/Towers Perrin "Business Case for Workers Age 50+" study noted that although small business owners feared hiring workers over 50 for fear their health insurance premiums would rise, the same study noted that the same workers exceeded those small business

[19] Restrepo, T., Sobel, S., & Shuford, H. (Dec 2006). Age as a driver of frequency and severity (NCCI research brief). Boca Raton, FL: National Council on Compensation Insurance
[20] Wolf, M.H., (Fall 2007). Younger Workers vs. Older Workers Going to the Emergency Room: Explaining the Differences in Utilization and Price. (NCCI Research Brief)
[21] *Id.*
[22] Employment Digest.net: Employer can benefit from hiring older workers, (posted June 17, 2007).

owners' expectations.[23] Furthermore, the AARP study noted the benefits of maintaining a stable workforce and avoiding turnover costs can exceed the incremental compensation and benefit costs for older workers.[24]

Workplace surveys found the "over 50" employees to be as productive as younger employees and just as committed. They are also found to be more reliable and less distracted than younger workers and willing to stay in place longer. Older workers are also more likely to look for flexible schedules or temporary assignments which may help keep down the benefit costs of some employers.[25] Reduced labor costs are a huge benefit when hiring older workers. Most already have insurance plans from prior employers or have an additional source of income and are willing to earn less money.

Another asset that older workers have is a healthier lifestyle. A recent study by employee assistance program provider, ComPsych, found that older workers in their 50's or 60's are likelier to have healthy diets, exercise regularly, and have lower stress levels than workers in their 30's. [26]

Employers should consider how the many attributes of an older worker can provide a potential cost savings to their company in both time and money. For instance, older workers have better organizational skills. A startling statistic is that more than a million man hours are lost each year simply due to workplace organization.[27]

Finally, there are other intangible benefits to employing older workers. They tend to be more punctual, more detail-oriented, and have better communication skills especially when dealing with work-place politics. They can also serve as positive role models and mentors to the younger employees. Employers should consider all the benefits of the experience and maturity older workers bring to the work environment versus the potential costs of high turnover in the more youthful workforce.[28]

II. The Catastrophic Claim and the Older Injured Worker.

It is common for employers, insurers, and defense counsel to be concerned that a workers' compensation claim filed by an older employee may eventually become a claim for catastrophic designation. This is especially true in claims

[23] Stern, Gary M." "Hiring Older Workers" Small Business Review, Human Resources
[24] Employment Digest.net: Employer can benefit from hiring older workers, (posted June 17, 2007).
[25] Stern, Gary M." "Hiring Older Workers" Small Business Review, Human Resources
[26] Benefits of Older Workers: U.S. News and World Report, November 26, 2008.
[27] Bastien, S.: "12 Benefits of Hiring Older Workers", Entrepreneur.com (as posted September 20, 2006.)
[28] *Id*.

involving higher-cost injuries (such as rotator cuff, knee, or back injuries), where the older employee requires surgery. Typically, these types of injuries also involve degenerative disk or joint diseases and the issue of aggravations of those pre-existing conditions must be addressed. Logically, the older employee will tend to have a more severe injury when already dealing with arthritic or degenerative changes. As such, these scenarios also serve to drive the costs of claims up as employers and insurers are often faced with defending a claim for catastrophic designation.

Imagine a typical scenario where an employee, usually over the age of 55 years old, who has been working for many years doing moderate to heavy labor, sustains an injury to his back or his knees. During the course of treatment, it is not surprising to find the injury was superimposed upon an already significantly degenerated spine or joint. Because of his age, the employee naturally has arthritic or degenerative changes which were already present at the time of his injury. The injury ultimately requires surgery and, because we are dealing with an older employee, the recovery period takes longer than what might be anticipated. The 55 year old injured employee, who typically has been performing the same type of work for the majority of his adult life, is now out of work due to his injury for a period of one or two years, or even more. He is ultimately given permanent sedentary or light duty restrictions either by the authorized treating physician, or as demonstrated by a valid functional capacities evaluation, or both. These restrictions clearly prevent the employee from performing his pre-injury job which qualified in the moderate to heavy duty category.

Suddenly, this employee becomes a prime candidate for a claim for catastrophic designation, especially if he has been kept out of work for more than two years. Inevitably, the argument about his re-employability will come down to his age. If he has little to no transferrable skills, a typical argument posed by attorneys and vocational experts is that due to the employee's advanced age, and his permanent restrictions, he cannot be retrained to learn new skills. Indeed, when analyzing a claim for catastrophic designation under O.C.G.A. §34-9-200.1(g) (6) (A), the employee's age is a factor to consider in determining whether other jobs exist for which the employee is qualified.

In Georgia, O.C.G.A. §34-9-200.1(g) (1)-(6) sets the standard and definition for what qualifies as a catastrophic claim. Aside from a specific set of injuries, the rule provides a "catch all" clause and states, in part:

> Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified; provided, however,

> if the injury has not already been accepted as a catastrophic injury by the employer and the authorized treating physician has released the employee to return to work with restrictions, there shall be a rebuttable presumption, during a period not to exceed 130 weeks from the date of the injury, that the injury is not a catastrophic injury.

The phrase "any work available in substantial numbers within the national economy" is derived from language contained in the Social Security Act. As of 1995, the rule no longer affords such persons the presumption of catastrophic designation. O.C.G.A.§34-9-200.1(g)(6)(A) now goes on to state "A decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act shall be admissible in evidence and the board shall give the evidence the consideration and deference due under the circumstances regarding the issue of whether the injury is a catastrophic injury; provided, however, that no presumption shall be created by any decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act." In other words, the award of SSDI benefits is evidence of catastrophic status, but it is not dispositive.

Finally, in 2005 the legislature further amended the rule to create a rebuttable presumption that an injury was no longer catastrophic once the employee had reached the age of eligibility for retirement benefits as defined in 42 U.S.C. Section 416(1), as amended in March 2, 2004.[29] In effect, this allows employers to "roll back" a previous finding of catastrophic designation or to deny a claim for catastrophic designation with the help of the statutory presumption. This legislative tool could be a great help to employers and insurers as the work force ages. However, such determinations may only be made by the board after conducting an evidentiary hearing. [30]

A recent decision by the Court of Appeals discussed the issue of age and catastrophic designation. In *Caswell, Inc. v. Spencer, 280 Ga. App. 141, 633 S.E.2d 449, (2006),* 62 year old Ernest Spencer, who had sustained a back injury, applied for designation of his injuries as catastrophic under O.C.G.A. §34-9-200.1(g) (6). An administrative decision was issued by the Board granting the designation as the rehabilitation coordinator found the injuries were catastrophic because, among other things, Spencer's age of 62 years old rendered him unable to adapt to even light duty work. Caswell requested a hearing before the

[29] 42 U.S.C. 416(1) defines the term "retirement age" as one at which an individual is going to be age 65 or some age older than 65, on the basis of a formula, depending on the date on which an individual reaches early retirement age. As amended in March 2, 2004, the section provides that term "early retirement age" is one which "means age 62 in the case of an old age, wife's or husband's insurance benefit, and age 60 in the case of a widow or widower's benefit.

[30] O.C.G.A. §34-9.200.1(g)(6)(B)

Administrative Law Judge (ALJ), who rejected the administrative decision, expressly disagreeing with the finding that a 62 year old was unable to adapt to light duty work, and found that Spencer's injuries were not catastrophic. The appellate division adopted the ALJ's decision as its own, and the employee appealed to superior court.

On appeal, Spencer argued that the Board erred in failing to consider his age in deciding his claim. The superior court agreed and remanded the case to the Board for reconsideration and finding that the expert opinion on which the ALJ relied did not include consideration of Spencer's age. Caswell filed for discretionary appeal and the Court of Appeals reversed the Superior Court's remand order finding that the ALJ did in fact consider the employee's age in rendering his decision.

Specifically, the record contained evidence and testimony by Spencer's rehabilitation counselor, "that a 62 year old is not able to learn new skills easily because of his age." The ALJ expressly disagreed with this assessment that a 62 year old is inherently unable to adapt to the demands of work within the light duty range. In doing so, the ALJ pointed to the testimony of a vocational expert, William Thompson, who did testify, and found his testimony credible. Thompson agreed that it is important to consider age in rendering an opinion on a person's ability to perform work, however, he disagreed that a 62 year old was unable to learn new skills. Further, he testified that he knows of no rule or school of thought in vocational rehabilitation that a 62 year old cannot learn new skills. In fact, he propounded that new research indicates that many people of retirement age are going back to work, opining that people at any age can learn a new skill. Based on this testimony, the ALJ concluded that there are jobs available in the national economy which Spencer was qualified for and which he can perform. [31]

The Social Security Administration generally considers that if the claimant is under age 50, his age does not seriously affect his ability to adapt to a new work situation. If the claimant is between 50-54 years of age, the Social Security Administration considers that his age, along with a severe impairment and limited work experience, may seriously affect his ability to adjust to a significant number of jobs in the national economy. If a claimant is 55 years of age or older, he is considered to be of advanced age and the Social Security Administration regards his age as having a significant adverse effect upon his ability to do substantial gainful activity. [32] Note that once the claimant is over 55 years of age or older, this alone, even without severe impairment or limited work experience, is sufficient for the Social Security Administration to render that individual as virtually unemployable. Although at some point advanced age may be a work

[31] *Caswell, Inc. v. Spencer*, 280 Ga.App. 141, 688 S.E.2d 449, @ 4-5 (2006)
[32] 20 C.F.R. § 404.1563.

prohibiting factor, in a workers' compensation setting, it may not be as determinative a factor on its own.

The *Caswell* case is an example of a court's willingness to reject a standard Social Security argument that employees of advanced age cannot be retrained. The United States Supreme Court has held that consideration of the comparable federal provision requires an assessment of an individual's abilities in order to determine whether jobs exist that a person having the individual's qualifications could perform.[33] This would include consideration of the individual's "physical ability, age, education, and work experience."[34] However, as the *Caswell* case demonstrates, consideration of a person's age does not necessarily automatically serve as an "exclusion from the workforce" simply because the person is of advanced age. Unlike the general standards applied by the Social Security Administration, a board or ALJ in deciding a workers' compensation claim for catastrophic designation in Georgia is not necessarily bound by any set of "standard" presumptions simply based on the individual's age. However, based on the 2005 amendment to O.C.G.A.§34-9-200.1(g)(6), age does become a factor in determining whether the employee is entitled to continuing catastrophic designation status, in that it is now presumed they are not catastrophic once they reach the age of retirement under 42 U.S.C. Section 416(1).[35]

Why would this specific event, that of reaching the age of retirement, automatically create such a presumption? Primarily, it is because the "catch-all" provision under O.C.G.A. §34-9-200.1(g) (6) has remained a controversial issue in Georgia workers' compensation since its inception. As such, employers and insurers sought to limit those types of claims which may be designated as catastrophic under this provision. The 2005 amendment allowing for the shift in the rebuttable presumption once the employee reached age of retirement is one of the tools now available to employers and insurers in challenging those claims. Additionally, the *Caswell* case serves as an example against the often touted proposition that older employees cannot be retrained to learn a new skill.

III. Medicare Considerations and the Aging Worker

Another inevitable consideration when dealing with an older injured worker is their eligibility for and receipt of Medicare benefits. This usually arises as a result of their successful claim for disability benefits with the Social Security Administration. Often times, older employees (over age 62 or 65) were already receiving Medicare benefits, while working, when they sustained their on-the-job injury. If an employer or insurer is looking to settle these types of claims, Medicare's interests must be taken into account. The Medicare Secondary Payer

[33] *Heckler v. Campbell*, 461 U.S. 458, 460-461 (103 SC 1952, 76 LE2d 66) (1983)
[34] *Id. At 460(I).*
[35] O.C.G.A. §34-9.200.1(g)(6)(B)

Statute, originally created by the Omnibus Reconciliation Act of 1980, established that Medicare should only be secondarily responsible for medical expenses incurred by those simultaneously covered by other insurance.

The current federal law mandates that Medicare payments shall not be made for any item or service to the extent that payment "has been made or can reasonably be expected to be made promptly…under a workers' compensation law or plan of the United States or a state or under an auto or liability insurance policy or plan (including a self-insured plan) or under no-fault insurance."[36] Further, the federal law provides that if a workers' compensation settlement "stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury or disease, Medicare payment for such services are excluded until medical expenses related to the injury or disease equal the amount of the lump sum settlement."[37] Additionally, if Medicare should determine it has paid for medical expenses of an individual that are related to an on-the-job injury, the Center for Medicare & Medicaid Services (CMS) may bring direct action against an employer and insurer to recover payments made by Medicare that should have been the primary responsibility of other insurance. Additionally, attorneys may also be found liable if settlement funds are disbursed to an employee without consideration of Medicare's interests or reimbursement to Medicare for conditional payments previously made. [38]

As such, when considering settlement of a workers' compensation claim of an older injured worker, employers and insurers must be certain Medicare's interests are protected. This is usually accomplished by obtaining a Medicare Set-Aside Allocation Agreement, which is then submitted to CMS for approval. If the individual is of advanced age, he or she is either likely already a Medicare recipient, or has a reasonable expectation of Medicare enrollment within the foreseeable future. [39] Of course, there are additional costs involved in enrolling the services of a company to prepare the Medicare Set-Aside Agreement and ultimately submitting the proposal to CMS for approval. Again, these issues do not only arise in cases of older injured individuals, but they typically are more common concerns at the forefront when the employee is over 55 years of age.

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[36] 42 U.S.C. 1395y(b)(2)(A)(iii)
[37] 42.C.F.R. 411.46
[38] *United States of America v. Paul J. Harris*, United States District Court, Northern District of West Virginia, Civil Action No. 5:08CV102
[39] The two situations in which an MSA **must** be submitted to CMS as part of settlement of a workers' compensation case are: a) where the claimant is already a Medicare beneficiary and the total settlement amount is greater than $25,000.00, and b) where the claimant has a "reasonable expectation" of Medicare enrollment within thirty months of the settlement date and the anticipated total settlement amount is expected to be greater than $250,000.00. Thomas Griffin, April 22, 2003 ARA letter, at PP. 1-2.

IV. What Measures can Employers Take?

The above discussion certainly demonstrates the numerous additional financial and legal factors that can come into play when dealing with an older injured worker that may not necessarily arise in claims of younger injured employees. Do not be mistaken that issues of catastrophic claims, higher-cost claims, and Medicare only arise in claims filed by older employees. However, a legitimate argument can be made that these issues are certainly more often on the table when an older employee is injured on the job. In the end, cost is the major driving factor.

Considering the wide range of work environments, there is no one set of recommendations that will apply to all work situations. However, there are some general measures that employers can take to help reduce the likelihood of work-related injuries suffered by older employees. For instance, a primary objective would be to help eliminate slip and falls which can be more common in the older worker population. Employers can do so by ensuring there is adequate lighting, even flooring, prompt cleaning of spills or slippery surfaces, and that there are no obstructions that can contribute to falls in the workplace.[40]

Additionally, ergonomic measures can be implemented to help reduce the risk of over-exertion injuries or injuries that typically aggravate pre-existing conditions such as arthritis of the knee, degenerative changes in the rotator cuff or degenerative disc disease. Such measures would include reducing the overall physical requirements of the job for older workers, particularly for lifting, pulling, or twisting. Also, limit the older worker to tasks performed between mid-thigh to mid-chest level and avoid above the shoulder work.[41] Prevention and early immediate care of injuries are essential to keeping costs low.

Depending on the industry, there are countless potential ways an employer can help reduce the risk of their older workers sustaining an on-the-job injury. Implementing such preventative measures on a large scale will benefit any company and can help reduce injuries overall, regardless the age range of the workforce for that employer. Generally, employers should modify job duty expectations based on the age of the employee. Employers need to be aware when an employee has "aged out" of a position, particularly from a physical perspective.

In addition to safety measures, employers should also consider programs and incentives designed to address the needs of their older workers. Everyone knows a respected employee is also a happy and loyal employee. Some

[40] The Journal of Workers Compensation (2004): Employing older workers and controlling workers' compensation costs.
[41] *Id*.

companies have recognized this and have taken appropriate steps to foster open lines of communication and respect between employee and employer.

For example, providing the older worker with additional flexibility in their work schedules is often appreciated. Some companies allow their senior employees to transfer among locations or stores without having them reapply for their jobs. This allows for "snow birds" to work winters in the south, and then migrate north for the summer.[42] Another example is allowing older employees a "phased retirement" out of the work force slowly by progressively cutting their hours for a few years before retirement. This may in fact induce valued older workers to stay longer.[43]

Some employers have added benefits that acknowledge the particular health challenges of aging by providing on-site health screenings or age-related wellness seminars. Most importantly, some companies recognize that older workers do not want to work for an employer or organization that does not respect their age and wisdom. As such, more employers are adding the topic of age discrimination to their diversity training and encouraging older employees to serve as mentors to their younger colleagues. [44]

By taking some or all of the above measures or implementing age-friendly programs, the result can be a mutual benefit to both employee and company. There are incentives for employers in ensuring their older employees are better protected as older workers do provide a multitude of benefits to an employer that may not necessarily be afforded by a much younger employee. Older workers who feel valued, protected, and respected will certainly be more productive and loyal. This is vital considering older employees tend to stay with the same employer for many years.

V. Conclusion: What should be the Employer's Perspective?

Although the older injured worker can potentially present a host of additional problems that a younger injured employee does not, there are many social and economic benefits for retaining and bringing older workers back to work. Studies do show that older workers are less prone to injuries resulting from traumatic events than younger workers.[45] With advanced age comes the benefit of wisdom and experience. Employers can enjoy employing and retaining older workers who tend to be more careful, responsible, and better skilled at their jobs. This usually lends itself to a lower likelihood of sustaining a work-place injury

[42] The HR Specialist.com: "The 7 benefits to keep older workers in the fold."- June 20, 2007.
[43] *Id*.
[44] *Id*.
[45] Burton, J.F. and Spieler, E: "Workers' Compensation and Older Workers" National Academy of Social Insurance Number 3, April 2001.

when compared to a more inexperienced, and perhaps more "reckless" younger employee.

There is no doubt that recent trends indicate the older worker is remaining in the workforce longer. With the advancements in health care and technology, and changes in overall lifestyles, people are living healthier and therefore longer. From a risk management perspective, employers should face the eventual demographics of their particular workforce and implement necessary work-place safety measures. The alternative is to lose experienced and knowledgeable employees and to suffer increased claims cost.

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What In The World Is EMTALA?

An Introduction to the Emergency Medical Treatment and Active Labor Act

By James S. V. "Jamie" Weston

INTRODUCTION

In a recent medical malpractice suit, the plaintiffs deposed a hospital employee who worked in the emergency department. The witness's job included receiving calls from physicians at another hospital who wanted to transfer a patient. The witness would contact an attending physician at her hospital and connect him with the transferring physician. Plaintiff's counsel asked the witness if the patient in the subject case was stable before he left the transferring hospital. The witness said she hoped so; otherwise, the transferring hospital would have violated EMTALA. Apparently flummoxed by this response (and perhaps not realizing that he was talking out loud), plaintiffs' counsel remarked: "What in the world is EMTALA?" After a brief, off-the-record conversation, the deposition continued. EMTALA was not mentioned again during the deposition or, for that matter, during the rest of the case.

It would take much more than a brief, off-the-record conversation to scratch the surface of the Emergency Medical Treatment and Active Labor Act.[46] To be sure, this article does not intend to tackle the myriad regulations and interpretive guidelines applicable to EMTALA. Nor will it address in great detail the regulatory enforcement process for an EMTALA complaint. The goal here is to provide a general overview of the Act itself and cases interpreting it. Part I summarizes what the Act covers, and Part II examines private causes of action for an alleged EMTALA violation. Part III analyzes recent EMTALA decisions. Part IV concludes with practice tips for defending an EMTALA claim.

[46] 42 U.S.C. § 1395dd. Unless otherwise indicated, all citations to the Act are to the current version, last amended in 2003.

I. WHAT DOES EMTALA COVER?

A. History of the Act

Congress enacted EMTALA in 1986 namely to address "dumping" patients who did not have health insurance. Patient dumping is the practice "of hospital emergency rooms refusing to treat or transferring indigent patients to public hospitals without first assessing and/or stabilizing the patient's condition."[47] Several studies in the mid-1980s showed that large numbers of uninsured patients seeking emergency treatment were transferred to public hospitals, oftentimes when they were in serious condition.[48] Through EMTALA Congress sought to prevent patient dumping by requiring any hospital that had an emergency department and that participated in the Medicare program to "treat any patient in an emergency condition, regardless of the patient's ability to pay."[49] Congress had no trouble in getting hospitals' attention, as penalties under the Act were potentially severe. An offending hospital faced not only civil monetary penalties (originally $25,000 per violation, now $50,000), but also civil actions by a patient and other medical facilities that suffered a financial loss due to the violation.[50] More significantly, if the hospital "knowingly and willfully, or negligently" violated the Act, it could lose its funding from Medicare.[51]

B. Requirements Under the Act

To prevent patient-dumping, EMTALA imposes "limited substantive requirements" on hospitals participating in Medicare.[52] There are, in fact, two main requirements: "medical screening" and "stabilization." The medical screening requirement arises when a patient presents to a "hospital emergency department" and requests (or someone requests for her) an "examination or treatment for a medical condition."[53] In such a situation, "the hospital must

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[47] *Rodriguez v. American Int'l Ins. Co. of Puerto Rico*, 402 F.3d 45, 47 (1st Cir. 2005); *see*). See *also Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002).
[48] Karen I. Treiger, Note, *Preventing Patient Dumping: Sharpening the COBRA's Fangs*, 61 N.Y.U. L. REV. 1186, 1189-91 (1986) (citations omitted).
[49] *Id*. at 1188.
[50] 42 U.S.C. § 1395dd(d)(2)-)-) and (3) (1987 version).
[51] 42 U.S.C. § 1395dd(d)(1) (1987 version). The First Circuit Court of Appeals has succinctly explained the legislative intent of the penalty provisions: "Needing a carrot to make health-care providers more receptive to the stick, Congress simultaneously amended the Social Security Act, conditioning hospitals' continued participation in the federal Medicare program – a lucrative source of institutional revenue – on acceptance of the duties imposed by the new law." Correa v. Hosp. San Francisco, 69 F.3d 1184, 1189-90 (1st Cir. 1995).
[52] *Rodriguez*, 402 F.3d at 47.
[53] 42 U.S.C. § 1395dd(a).

provide for an appropriate medical screening examination . . . to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists."[54] If the hospital determines an "emergency medical condition" exists, it must provide treatment necessary to stabilize the patient, or it must transfer her as subsection (c) of the Act mandates.[55]

The Act's definition of "an emergency medical condition" is key. Subsection (e)(1) defines "emergency medical condition" as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –
>
> (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
>
> (ii) serious impairment to bodily functions, or
>
> (iii) serious dysfunction of any bodily organ or part; or
>
> (B) with respect to a pregnant woman who is having contractions -
>
> (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
>
> (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.[56]

If the hospital determines that no such condition exists, it may transfer the patient and need not comply with the Act's "transfer rule."[57] Several courts have simplified the issue by stating that the Act applies if the patient "is in imminent danger of death of serious disability."[58]

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[54] *Id.*
[55] 42 U.S.C. § 1395dd(b)(1).
[56] 42 U.S.C. § 1395dd(e)(1)(A)-)-(B).
[57] 42 U.S.C. § 1395dd(c)(1)-)-(2).
[58] *E.g.*, *Thornton v. Sw. Detroit Hosp.*, 895 F.2d 1131, 1134 (6th Cir. 1990); *Rivera v. Doctors Ctr. Hosp.*, Inc., 247 F. Supp. 2d 90, 98 (D.P.R. 2003) (citation omitted).

Another important provision is subsection (h). It precludes a hospital from delaying "provision of an appropriate medical screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status."[59] This goes to the heart of EMTALA: a patient's ability to pay is totally irrelevant as to whether she is entitled to emergency care.

The Act does provide a hospital with two "outs," at least regarding the stabilization requirement. First, the hospital satisfies subsection (b)(1) if it offers an examination and stabilizing treatment to a patient with an emergency medical condition, but she refuses the treatment.[60] The hospital also discharges its stabilization duties if it offers to transfer the patient in accordance with the "transfer rule" and she refuses to consent to the transfer.[61] In both situations, the hospital must inform the patient of the "risks and benefits" of the treatment or transfer, and it must "take all reasonable steps to secure the individual's (or person's) written informed consent to refuse" the same.[62]

As one might imagine, the Act applies to the overwhelming majority of hospitals in the country.[63] This is because most hospitals not only have emergency departments—most also participate in the Medicare program.[64] However, it is important to note that the Act does not apply to all hospitals. Obviously, if a hospital does not have an emergency department, it is not subject to the medical screening requirement. In addition, an entity which is not a "hospital" is not subject to EMTALA.[65]

Furthermore, subsection (d), the "enforcement" subsection, merits special attention. The enforcement provisions, which include civil monetary penalties, the private right of action, and funding termination, refer only to "participating

[59] 42 U.S.C. § 1395dd(h).
[60] 42 U.S.C. § 1395dd(b)(2).
[61] 42 U.S.C. § 1395dd(b)(3).
[62] 42 U.S.C. § 1395dd(b)(2)-(3).
[63] Trieger, *supra* note 3, at 1188 n.19,, 1207 n.145.
[64] *Id.*
[65] In general, a hospital means an entity that primarily engages in providing diagnostic, therapeutic, and rehabilitation services and care to inpatients. 42 U.S.C. § 1395x(e)(1); *Rodriguez v. Am. Int'l Ins. Co. of Puerto Rico*, 402 F.3d 45, 48-49 (1st Cir. 2005) (holding that a entity was not a hospital because it did not provide services to outpatients and Puerto Rico law did not characterize or license the entity as a hospital); *Jackson v. E. Bay Hosp.*, 246 F.3d 1248, 1260 (9th Cir. 2001) (holding that a company that provided "administrative, purchasing, and financial services" to a hospital was not a hospital and therefore could not be held liable under EMTALA).

hospitals."[66] A "participating hospital" is one "that has entered into a provider agreement under section 1395cc of this title."[67] In other words, it means any hospital that receives Medicare funding. Thus, the only hospitals that are *not* subject to the Act's penalties are those that do not have an emergency department or that do not receive Medicare funding. Apparently, there are no specific penalties for a non-participating hospital that violates the Act. This is presently a very small number of hospitals;[68] however, in today's health insurance environment, it cannot be overlooked.

Although the Act does subject physicians to civil monetary penalties,[69] it does not appear that they can be sued individually under the Act. The plain language of the Act states that the "civil action" provisions refer only to actions against "participating hospitals," not physicians.[70] It appears that the majority of jurisdictions have so ruled, with only one court consistently allowing direct actions against physicians.[71]

II. EMTALA LITIGATION

Before discussing EMTALA litigation, it is paramount to realize what the Act is not: it is not a federal medical malpractice statute.[72] Subsection (f) clarifies that the Act is not meant to supplant state law: "The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."[73] Accordingly, a misdiagnosis in the emergency room or "faulty screening" may be actionable under state malpractice laws, but not under EMTALA.[74]

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[66] 42 U.S.C. § 1395dd(d).
[67] 42 U.S.C. § 1395dd(e)(2).
[68] Am. Hosp. Ass'n, Underpayment by Medicare & Medicaid Fact Sheet 1, http://www.aha.org/aha/content/2006/pdf/underpaymentfs2006.pdf (Oct. 2006) (stating that very few hospitals refuse to participate with Medicare because of tax condition exemptions and the number of Medicare patients requiring care).
[69] 42 U.S.C. § 1395dd(d)(1)(B).
[70] 42 U.S.C. § 1395dd(d)(2)(A)-)-(B); see also *Frazier v. Angel Med. Ctr.*, 308 F. Supp. 2d 671, 679 (W.D.N.C. 2004) (citation omitted).
[71] Melissa K. Stull, Annotation, *Construction and Application of Emergency Medical Treatment and Active Labor Act (42 USCS § 1395dd)*, 104 A.L.R. FED. 166 § 8a (1991).
[72] *Nolen v. Boca Raton Cmty. Hosp., Inc.*, 373 F.3d 1151, 1154 (11th Cir. 2004) (citation omitted); *Merce v. Greenwood*, 348 F. Supp. 2d 1271, 1274 (D. Utah 2004) (citation omitted); *Dollard v. Allen*, 260 F. Supp. 2d 1127, 1131 (D. Wyo. 2003) (citations omitted).
[73] 42 U.S.C. § 1395dd(f). An example of a preempted state statute is *In re Baby "K"*, 16 F.3d 590, 597 (4th Cir. 1994), where the court found that a Virginia statute directly conflicted with EMTALA because it exempted physicians from rendering care that they consider medically or ethically inappropriate.
[74] *Reynolds v. MaineGeneral Health*, 218 F.3d 78, 83 (1st Cir. 2000); *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1192-93 (1st Cir. 1995); *Lane v. Wellmont Health Sys.*, 46 F. Supp. 2d 477, 479 (W.D. Va. 1999).

As noted above, EMTALA imposes two requirements on participating hospitals: the medical screening requirement and the stabilization requirement. "As an enforcement mechanism for these requirements, EMTALA creates a private right of action for violations."[75]

A. The Medical Screening Requirement

When a patient comes to an emergency room and requests examination or treatment,[76] EMTALA requires a participating hospital to provide an "appropriate medical screening examination within the capability of the hospital's emergency department."[77] Although "appropriate medical screening" is not defined by the Act, "[m]ost of the courts that have interpreted the phrase have defined it as a screening examination that the hospital would have offered to any other patient in a similar condition with similar symptoms."[78]

Thus, a hospital may violate the EMTALA screening requirement by not applying its own screening procedures uniformly to individuals presenting with similar complaints. Evidence of a hospital's standard procedures, such as written policies and testimony of hospital staff, will be essential in establishing a violation of the screening requirement.[79] In addition, contracts and records of other patients with similar conditions may provide evidence of a hospital's standard practices.[80]

On the other hand, mere de minimis deviations from a hospital's procedure are probably insufficient to constitute violations of the screening requirement.[81] A hospital will not violate EMTALA for failing to perform examinations that are not within the particular capabilities of the hospital.[82] For instance, a hospital will not violate the Act's screening requirement where it provides screening for physical

[75] Cruz-Queipo v. Hosp. Espanol Auxilio Mutuo de Puerto Rico, 417 F.3d 67, 70 (1st Cir. 2005) (citing 42 U.S.C. § 1395dd(d)(1)-(2)).
[76] "Coming" to an emergency department includes entering a hospital ambulance. *Hernandez v. Starr County Hosp. Dist.*, 30 F. Supp. 2d 970, 973 (S.D. Tex. 1999). However, entering through an emergency room door alone is insufficient to constitute presentation to an emergency room where the patient is not seeking and does not request examination or treatment. *Lopez-Soto v. Hawayek*, 20 F. Supp. 2d 279, 282 (D.P.R. 1998); *Rios v. Baptist Mem'l Hosp. Sys.*, 935 S.W.2d 799, 803-04 (Tex. App. 1996).
[77] 42 U.S.C. § 1395dd(a).
[78] *Marshall v. E. Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 323 (5th Cir. 1998) (citations omitted).
[79] BARRY R. FURROW ET AL., HEALTH LAW § 10-7, 518 (2d ed. 2000).
[80] *Id.*
[81] *Feighery v. York Hosp.*, 59 F. Supp. 2d 96, 108 (D. Me. 1999).
[82] 42 U.S.C. § 1395dd(a).

but not psychiatric emergencies, so long as the hospital lacks mental health capabilities.[83]

Furthermore, a discriminatory motive may be necessary to establish that a deviation from screening procedures violates EMTALA. The Sixth Circuit requires proof of a discriminatory motive in order for a hospital to violate the screening requirement.[84] Discrimination based on "any reason" such as political opinion, medical condition, race, sex, ethnic group, or personal dislike constitutes a discriminatory motive.[85] Other courts hold that a discriminatory motive is not required or is irrelevant in determining whether an appropriate screening has been provided; thus, any variation from standard procedures, whether written or not, may constitute a violation of EMTALA.[86] The Supreme Court has yet to resolve the issue of whether a discriminatory motive is a prerequisite to a violation of the Act's screening requirement.

A hospital may also violate the Act if no screening is provided or the screening provided is so cursory as to not constitute a screening that is "reasonably calculated" to identify an emergency medical condition.[87] For example, in *Correa v. Hosp. San Francisco*,[88] the First Circuit held that the evidence supported a jury's conclusion that a hospital effectively denied a patient a screening examination.[89] The court reasoned that the hospital's "delay in attending to the patient was so egregious and lacking in justification as to amount to an effective denial of a screening examination."[90] In addition, despite internal procedures requiring written documentation of visits, monitoring of vital signs, and treatment of patients with chest pains as critical, the hospital could not provide any records of the patient's visit.[91] Therefore, the court upheld the jury's finding that the hospital failed to provide an "appropriate medical screening."[92]

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[83] *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 995 (9th Cir. 2001).
[84] *Cleland v. Bronson Health Care Group*, 917 F.2d 266, 272 (6th Cir. 1990).
[85] *Id.* ("A hospital that provides a substandard (by its standards) or nonexistent medical screening for any reason (including, without limitation, race, sex, politics, occupation education, personal prejudice, drunkenness, spite, etc.) may be liable" for violating EMTALA's screening requirement.).
[86] *E.g.*, *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 798 (10th Cir. 2001); *Romo v. Union Mem'l Hosp., Inc.*, 878 F. Supp. 837, 842 (W.D.N.C. 1995).
[87] *Marrero v. Hosp. Hermanos Melendez*, 253 F. Supp. 2d 179, 194 (D.P.R. 2003); *Kilroy v. Star Valley Med. Ctr.*, 237 F. Supp. 2d 1298, 1306 (D. Wyo. 2002).
[88] 69 F.3d 1184 (1st Cir. 1995).
[89] *Id.* at 1193.
[90] *Id.*
[91] *Id.*
[92] *Id.*

B. The Stabilization Requirement

Unless an exception applies,[93] a hospital violates EMTALA by failing to provide stabilizing treatment at all or, likewise, by failing to provide stabilizing treatment and conducting an inappropriate transfer.[94] Therefore, once a hospital determines that an emergency medical condition exists, the hospital must provide stabilizing treatment or comply with the transfer rule.[95] Most courts require actual knowledge of an emergency medical condition; the duty to stabilize does not arise and is not violated where no determination of an emergency condition is made, even if the hospital should have known that an emergency medical condition existed.[96] The key language here is in subsection (b)(1): "if any individual … comes to a hospital *and the hospital determines that the individual has an emergency medical condition*, the hospital must provide either … for such further medical examination and such treatment as may be required to stabilize the medical condition, or … for transfer of the individual to another medical facility in accordance with subsection (c) of this section." (Emphasis added.)

Additionally, presentment to an emergency room may be necessary in order for a hospital's duty to stabilize to arise. Some courts apply a conjunctive interpretation of EMTALA; the duty to stabilize and transfer rule apply only when an individual comes to an emergency department and is determined to have an emergency condition.[97] Other courts, however, apply a disjunctive interpretation and do not require emergency room presentment.[98] These courts hold that "EMTALA would arguably apply to all hospital inpatients as well as all outpatients who receive treatment outside of the emergency department."[99]

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[93] *See supra* notes 15-17 and accompanying text.
[94] 42 U.S.C. § 1395dd(c)(1)-(2). Transfer includes discharge. 42 U.S.C. § 1395dd(e)(4).
[95] 42 U.S.C. § 1395dd(c)(1)-(2).
[96] *Broughton v. St. John Health Sys.*, 246 F. Supp. 2d 764, 772 (E.D. Mich. 2003) ("[T]he circuit courts that have addressed this issue have concluded uniformly that liability for transfer or discharge under subsection (c) is predicated upon the hospital's determination that an individual has an emergency medical condition . . . .") (citations omitted). Suspicions, risks, and differential diagnoses have been held to be insufficient to constitute a determination of an emergency medical condition; therefore, the duty to stabilize did not arise in such circumstances. *Camp v. Harris Methodist Fort Worth Hosp.*, 983 S.W.2d 876, 880 (Tex. App. 1998); *Reynolds v. MaineGeneral Health*, 218 F.3d 78, 85 (1st Cir. 2000); *Harris v. Health & Hosp. Corp.*, 852 F. Supp. 701, 703-04 (S.D. Ind. 1994).
[97] Lowell C. Brown et al., *The Emergency Medical Treatment and Active Labor Act: Practical Tips and Legal Issues*, BNA § 2900.03(A) (citing *James v. Sunrise Hosp.*, 86 F.3d 885, 888 (9th Cir. 1996); *Bryan v. Rectors & Visitors of Univ. of Va.*, 95 F.3d 349 (4th Cir. 1996)).
[98] Brown, *supra* note 52 (citing *Lopez-Soto v. Hawayek*, 175 F.3d 170 (1st Cir. 1999); *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1134 (6th Cir. 1990)).
[99] Brown, *supra* note 52.

Assuming the duty to stabilize has arisen, the hospital must provide stabilizing treatment or make an appropriate transfer. Stabilized means "that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition [of a pregnant woman having contractions], that the woman has delivered (including the placenta)."[100] Unlike the screening requirement, stabilization is not viewed from the hospital's standard practices; instead, whether a patient is stabilized is viewed from the perspective of professional standards.[101] Thus, complying with hospital standards alone will not be sufficient to preclude violation of the EMTALA stabilization requirement.

A hospital need not fully treat a condition[102] or cure a person in order to satisfy the stabilization requirement.[103] Courts rely on many factors in determining whether a patient has been stabilized. For example, whether a patient was admitted and treated,[104] the period of time after admission,[105] the judgment of the treating physician,[106] and whether deterioration has actually occurred may factor into a determination of whether a patient was stabilized.[107]

On the contrary, a discriminatory motive does not factor into a court's analysis of whether a person was stabilized as defined by the Act. In *Roberts v. Galen of Va., Inc.*,[108] the Supreme Court held that proof of a discriminatory motive was not required to establish a violation of EMTALA's stabilization requirement.[109] The Supreme Court, however, left open the question of whether a discriminatory motive was required to state a claim for violation of the screening requirement.

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[100] 42 U.S.C. § 1395dd(e)(3)(B).
[101] FURROW, *supra* note 34, at § 10-8, 520; *see also In re* Baby "K," 16 F.3d 590, 595 (4th Cir. 1994) ("[T]he duty of the Hospital to provide stabilizing treatment for an emergency medical condition is not coextensive with the duty of the Hospital to provide an 'appropriate medical screening.'").
[102] *Brooker v. Desert Hosp. Corp.*, 947 F.2d 412 (9th Cir. 1991); *Frazier v. Angel Med. Ctr.*, 308 F. Supp. 2d 671, 679 (W.D.N.C. 2004).
[103] *Bergwall v. MGH Health Servs., Inc.*, 243 F. Supp. 2d 364, 374 (D. Md. 2002) (citations omitted).
[104] Admitting a patient to the hospital may end a hospital's obligations under EMTALA, unless admitting the patient was designed to avoid the stabilization requirement. *Mazurkiewicz v. Doylestown Hosp.*, 305 F. Supp. 2d 437, 447 (E.D. Penn. 2004) (citations omitted).
[105] *Bryan v. Rectors & Visitors of Univ. of Va.*, 95 F.3d 349, 352 (4th Cir. 1996).
[106] Bergwall, 243 F. Supp. 2d at 376.
[107] FURROW, *supra* note 34, at § 10-8, 520.
[108] 525 U.S. 249 (1999).
[109] *Id.* at 253.

III. RECENT EMTALA DECISIONS

In recent cases, courts have addressed a variety of issues relating to EMTALA claims. These issues include litigation involving the screening and stabilization requirements, discovery of peer review materials, and sovereign immunity.

A. Screening

In three recent cases, courts have granted summary judgment to defendant hospitals because the plaintiffs failed to establish a genuine issue of material fact as to the failure to perform an "appropriate medical screening." First, in *Spillman v. Sw. La. Hosp. Ass'n*,[110] the plaintiff argued that the defendant failed to perform an appropriate screening and supported this assertion with expert testimony that once appendicitis is included in the differential diagnosis, it should remain a part of the diagnosis until ruled out or until referral to a surgeon.[111] The court, however, found that while the facts may support a medical malpractice claim, they did not support an EMTALA screening violation. Specifically, there was no evidence of disparate treatment.[112]

The court also rejected the plaintiff's argument that evidence of disparate treatment is impossible to obtain.[113] It may be difficult but is not impossible to obtain.[114] Evidence of a deviation from the standard treatment could be obtained from the medical records of other patients with similar symptoms.[115] Therefore, the court granted summary judgment to the defendant because the patient failed to establish an issue of material fact as to whether an appropriate screening was provided.[116]

Similarly, in *Cintron v. Pavia Hato Rey Hosp.*,[117] the court granted summary judgment in favor of the defendant hospital on an alleged screening violation because the plaintiff failed to create a genuine issue of material fact as to whether an appropriate screening was provided.[118] The court relied upon

[110] No. 2:05 CV 450, 2007 U.S. Dist. LEXIS 25547 (W.D. La. Apr. 4, 2007).
[111] *Id.* at *11.
[112] *Id.* at *13.
[113] *Id.* at *12.
[114] *Id.*
[115] *Id.* at *12-13 (citation omitted).
[116] *Id.* at *16.
[117] No. 05-2077, 2007 U.S. Dist. LEXIS 44809 (D.P.R. Mar. 27, 2007).
[118] *Id.* at *17.

plaintiff's expert's admission that a mandatory examination was performed.[119] In addition, the court rejected plaintiff's assertion that leaving the patient unattended in an emergency room for several hours violated the screening requirement because this was an issue for a medical malpractice claim, not an EMTALA claim.[120] Furthermore, the plaintiff failed to argue or show that the alleged essentials of an appropriate screening were within the hospital's capabilities.[121]

Finally, in *Garrett v. Detroit Med. Ctr.*,[122] the plaintiff created an issue of material fact as to whether a substandard screening was performed in accordance with the defendant hospital's own procedures, where it was alleged that at least one physician suspected a pulmonary embolism but failed to follow hospital procedure to confirm or rule out the diagnosis.[123] However, the court awarded summary judgment to the hospital because the plaintiff failed to establish a genuine issue of material fact as to whether the hospital had an improper motive for treating the patient differently.[124] The court rejected the plaintiff's argument that an improper motive was demonstrated by the hospital's "out-of-network" status with the patient's insurance carrier and the hospital's transfer of the patient in accordance with the insurance carrier's request.[125] The court reasoned that there was no evidence that the hospital improperly initiated a transfer, that the hospital delayed treatment, that the procedure was unusual, or that the patient would have been treated differently if he had "in network" insurance.[126] Furthermore, the evidence showed that several tests were ordered, a diagnosis was made, and a screening was provided shortly after the patient's arrival.[127]

On the other hand, summary judgment was denied in *Isaac-Burgos v. Rodriguez*[128] where the plaintiff produced affidavits stating that the patient's wife told a screener and physician the patient was suffering from chest pains and had a prior history of heart disease.[129] Inferring from this evidence that the hospital "knew" of the patient's chest pains, the court concluded that an issue existed as to whether the hospital's procedures were followed because a patient with chest pains would be classified as a "category 1" patient (not a "category 3") and placed

[119] *Id.* at *15.
[120] *Id.*
[121] *Id.* at *15-16.
[122] No. 06-10753, 2007 U.S. Dist. LEXIS 17584 (E.D. Mich. Mar. 14, 2007).
[123] *Id.* at *11.
[124] *Id.* at *15-16.
[125] *Id.* at *14-15.
[126] *Id.*
[127] *Id.* at *15.
[128] 485 F. Supp. 2d 14 (D.P.R. 2007).
[129] *Id.* at 20.

on a "chest pain protocol" with repeat tests.[130] In addition, despite the emergency department's manual requiring screening by a nurse or physician, the patient was screened by a person who attended a foreign medical school and did not have a license to practice medicine.[131]

Likewise, both parties' motions for summary judgment were denied in *Romar v. Fresno Cmty. Hosp. & Med. Ctr.*[132] The plaintiff's expert identified thirty patients who she contended were "similarly situated" with the patient but received superior screenings. On the other hand, the defendant's expert contended that no patients in the records produced were "similarly situated" with the patient.[133] The court distinguished an earlier case, *Hoffman v. Tonnemacher*,[134] which held that a patient was not "similarly situated" with other patients because they did not share certain "key symptoms."[135] *Hoffman* involved uncontradicted medical testimony, whereas in *Romar*, the plaintiff and defendant presented conflicting expert testimony.[136] Therefore, the court concluded that there was a question of fact as to whether the patient received a disparate screening.[137]

B. Stabilization

Recent cases involving the stabilization requirement have addressed whether the plaintiff provided evidence sufficient to withstand summary judgment regarding the defendant's actual knowledge of an emergency medical condition. In two recent cases, courts have awarded summary judgment to the defendant hospitals. In *Spillman v. Sw. La. Hosp. Ass'n*,[138] the court rejected the plaintiff's argument that a presumptive diagnosis amounted to actual knowledge and a duty to stabilize. The court was "unable to find nor does the plaintiff cite any cases which support the theory that a presumptive diagnosis triggers a hospital's duty to stabilize or transport under the EMTALA."[139]

Similarly, in *Garrett v. Detroit Med. Ctr.*,[140] the defendant hospital obtained summary judgment because the plaintiff failed to present evidence that the

[130] *Id.*
[131] *Id.*
[132] No. 03-6668, 2007 U.S. Dist. LEXIS 25927 (E.D. Cal. Mar. 23, 2007).
[133] *Id.* at *55-56.
[134] *Hoffman v. Tonnemacher*, 425 F. Supp. 2d 1120 (E.D. Cal. 2006).
[135] 2007 U.S. Dist. LEXIS 25927, at *36-37 (citation omitted).
[136] *Id.* at *38.
[137] *Id.* at *39.
[138] No. 2:05 CV 450, 2007 U.S. Dist. LEXIS 25547 (W.D. La. Apr. 4, 2007).
[139] *Id.* at *15.
[140] No. 06-10753, 2007 U.S. Dist. LEXIS 17584 (E.D. Mich. Mar. 14, 2007).

hospital had actual knowledge of an emergency medical condition.[141] The plaintiff contended that a differential diagnosis of a pulmonary embolism could be an emergency medical condition. She did not allege "that this condition was an emergency medical condition that was not stabilized at the time of transfer."[142] In essence, the plaintiff argued that the defendant should have conducted more tests to determine whether such condition existed before the patient's transfer.[143] The court concluded that this amounted to an assertion that the hospital "should have known" of an emergency medical condition and, therefore, did not constitute a violation of EMTALA's stabilization requirement.[144]

In *Isaac-Burgos v. Rodriguez*,[145] however, the court concluded that a genuine issue of fact existed as to whether a hospital violated the stabilization requirement.[146] As noted above, the court inferred that the hospital "knew" that the patient was suffering from chest pain because the patient's wife stated that she informed the screener and a physician of this fact.[147] Likewise, the court inferred that the hospital had "the obligation to stabilize the medical condition causing the chest pain."[148] The court stated that the hospital failed to treat the patient's chest pain and underlying heart condition and that when the patient left the hospital "he was urinating uncontrollably, disoriented, and 'could hardly walk.'"[149] Therefore, the court denied defendant's motion for summary judgment as to the stabilization claim.[150]

C. Discovery of Peer Review Materials

The Eastern District Court of Michigan has recently addressed the issue of whether peer review materials were relevant and thus discoverable where a patient alleged violations of the screening and stabilization requirements of EMTALA and medical malpractice under state law.[151] The plaintiff argued that the peer review materials were relevant to the EMTALA claim and that the state statute protecting peer review materials did not apply.[152] After stating that federal law

[141] *Id.* at *17-18.
[142] *Id.*
[143] *Id.* at *18.
[144] *Id.*
[145] 485 F. Supp. 2d 14 (D.P.R. 2007).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Moses v. Providence Hosp. & Med. Ctrs., Inc.*, No. 04 CV 74889 DT, 2007 U.S. Dist. LEXIS 45367, *5-6 (E.D. Mich. June 22, 2007).
[152] *Id.* at *7.

governed discovery relating to the EMTALA claim, the court concluded that the documents were not relevant to the alleged screening and stabilization violations "because EMTALA is not intended to be a federal malpractice action."[153] Therefore, the court denied plaintiff's motion to compel discovery of peer review materials.[154]

Regarding stabilization, the court noted that the peer review materials, "which may include a post-mortem conference designed to address whether staff *should have known* of some underlying condition," were not relevant to whether the hospital had "actual knowledge" of an emergency medical condition.[155] The court rejected a broad reading of the Act that would require stabilizing treatment "outside the context of a transfer [or discharge]."[156] Thus, because the patient was admitted, treated, and hospitalized for six or seven days, the court found that the peer review documents were not relevant to the stabilization claim.[157] The court also noted that some courts have allowed discovery of peer review materials where they did not look to the relevance of the subject matter of the claim or concluded there was no basis for recognizing a medical peer review privilege. However, the court stated that even if the documents were relevant, courts would "generally look to state law" as a guide for whether peer review materials are privileged.[158]

D. Sovereign Immunity

In *Johnson v. Virginia*,[159] the issue arose as to whether the Eleventh Amendment's sovereign immunity for states barred suit under EMTALA against the state and a state arm, i.e., the operator of a state university hospital.[160] Sovereign immunity would be unavailable if Congress abrogated the immunity, the state waived its immunity, or in an action for injunctive or declaratory relief against individual state officers.[161] After noting that the third exception (injunctive relief against state officers) did not apply, the court addressed the other two exceptions and concluded that Congress had not expressed its intent to abrogate state immunity from suit under EMTALA and that the state had not expressly or impliedly consented to such suit.[162]

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[153] *Id.* at *6-7.
[154] *Id.* at *11.
[155] *Id.* at *8-9 (emphasis supplied).
[156] *Id.* at *9-10.
[157] *Id.* at *10.
[158] *Id.* at *10-11 n.4.
[159] No. 3:06cv00061, 2007 U.S. Dist. LEXIS 37898 (W.D. Va. May 24, 2007).
[160] *Id.* at *5-6.
[161] *Id.* at *7.
[162] *Id.* at *7 n.3, *22.

Regarding the first exception, the court noted that "all relevant cases" have concluded that Congress has not "unequivocally expressed" its intent to abrogate state immunity from suit under EMTALA and that Congress could not abrogate states' immunity when acting pursuant to its power for enacting EMTALA.[163] As to the second exception, the court concluded that the state's Tort Claims Act did not amount to an express waiver of Eleventh Amendment immunity.[164]

Additionally, the court rejected the argument that the state had impliedly consented to suit under EMTALA by "fil[ing] an agreement with the federal government 'to adopt and enforce a policy to ensure compliance with the requirements of [EMTALA]'" which is required of participating hospitals by the Social Security Act.[165] The court reasoned that

> [h]ere, Congress is conditioning participation on a hospital's agreeing to adopt and enforce a policy that complies with EMTALA. Failure to do so means only that the hospital may no longer receive federal funds. It cannot be said that a state-run hospital has agreed to be sued based on breach of the agreement; instead, it would be more fair to say that the state-run hospital has agreed to stop receiving federal reimbursement should it breach the agreement.[166]

Finally, the court pointed out that unlike a state's grant of immunity, under the Supremacy Clause Eleventh Amendment immunity "trumps federal law," including EMTALA.[167] Therefore, while EMTALA may preempt a state's grant of immunity because it directly conflicts with EMTALA, Eleventh Amendment immunity is not preempted by EMTALA.[168]

IV. EMTALA LITIGATION PRACTICE TIPS

Beyond EMTALA's screening and stabilization requirements, issues may arise as to federal jurisdiction, the statute of limitations, and incorporation and preemption of state law. As to jurisdiction, courts have consistently held that an EMTALA claim may be brought in federal or state court.[169] Counsel should keep in mind that a medical malpractice claim alone is insufficient to confer federal jurisdiction; however, a federal court may determine that it has ancillary

[163] *Id.* at *9-10 (citations omitted).
[164] *Id.* at *11.
[165] *Id.* at *11-12.
[166] *Id.* at *19.
[167] *Id.* at *21.
[168] *Id.* at *20-21.
[169] Stull, *supra* note 26, § 3a (citations omitted).

jurisdiction over state law claims, including medical malpractice claims, if an EMTALA claim is asserted based on the same operative facts.[170]

EMTALA also provides a two year statute of limitations for claims based on the Act.[171] An EMTALA action accrues from the date of violation, and the Act does not contain a tolling provision.[172] Several courts have held that state tolling provisions are preempted by and do not toll the limitations period for EMTALA claims.[173] For example, state statutes that toll the running of the limitations period until after discovery have been held not to apply to EMTALA claims.[174]

Finally, issues may arise as to whether the Act incorporates state law such that it applies to EMTALA claims and whether state law directly conflicts with and is preempted by the Act.[175] Two main questions must be dealt with in this regard. The first issue relates to recoverable damages. EMTALA provides that an individual plaintiff may "obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate."[176] Some courts have held that EMTALA incorporates state statutory caps on the recovery of malpractice damages, thereby limiting the amount of damages recoverable for EMTALA claims. For example, in *Smith v. Botsford Gen. Hosp.*,[177] the Sixth Circuit held that Michigan's statutory cap on malpractice damages applied to an EMTALA stabilization claim because such action constituted a malpractice action under Michigan law.[178] Other courts, however, have refused to incorporate state malpractice limits on damages.[179] Furthermore, courts have held that state immunity statutes do not apply to[180] or directly conflict with and are preempted by EMTALA's provision for the recovery of damages.[181]

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[170] Stull, *supra* note 26, § 3b (citing *Sorrells v. Babcock*, 733 F. Supp. 1189 (N.D. Ill. 1990)).
[171] 42 U.S.C. § 1395dd(d)(2)(C).
[172] *Id.*
[173] *Saltares v. Hosp. San Pablo Inc.*, 371 F. Supp. 2d 28, 35 (D.P.R. 2005) (citations omitted).
[174] *Id.* at 35 ("State law statute of limitations, accrual principles, and tolling provisions should not be applied when, as here, they run counter to EMTALA's statutory goal of protecting patients rights to emergency medical care.").
[175] 42 U.S.C. § 1395dd(f).
[176] 42 U.S.C. § 1395dd(d)(2)(A).
[177] 419 F.3d 513 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1912 (2006).
[178] 419 F.3d at 519; see also *Lee v. Alleghany Reg'l Hosp. Corp.*, 778 F. Supp. 900, 903-04 (W.D. Va. 1991) (holding that Virginia's statutory cap on damages in medical malpractice actions applies to EMTALA claims).
[179] *Cooper v. Gulf Breeze Hosp., Inc.*, 839 F. Supp. 1538, 1543 (N.D. Fla. 1993) (refusing to apply Florida's statutory limit on medical malpractice damages to EMTALA claims where limits were based on pre-suit procedure).
[180] *Lane v. Calhoun-Liberty County Hosp. Ass'n Inc.*, 846 F. Supp. 1543, 1551-52 (N.D. Fla. 1994) (holding that Florida's Good Samaritan Act, for acts of simple negligence, did not apply to EMTALA claims because EMTALA neither relies on nor incorporates state malpractice law).
[181] *Helton v. Phelps County Reg'l Med. Ctr.*, 817 F. Supp. 789, 791-92 (E.D.Mo.1993). However, immunity under the Eleventh Amendment may still apply. *See supra* pp. 11-12; see also *Ward v. Presbyterian Healthcare Servs.*, 72 F. Supp. 2d 1285, 1293 (D.N.M. 1999).

Another issue involves whether state procedural requirements apply to EMTALA claims and whether they are preempted by EMTALA. If a state procedural requirement is broad enough to encompass an EMTALA claim, a court may apply the procedural requirement if it does not directly conflict with EMTALA.[182] However, a court may find that a state procedural requirement is not broad enough to encompass an EMTALA claim or that it directly conflicts with and therefore is preempted by EMTALA.[183]

Special attention should be paid to peer review issues. Hospital risk management departments and peer review committees are well-advised not to assume that the protection normally provided by state peer review statutes applies in the EMTALA setting. It does not appear that EMTALA ignores the work product privilege; of course, any material counsel seeks to protect as work product must have been obtained in anticipation of litigation.[184] In any event, hospital defense attorneys should be cognizant of the federal and state case law in his/her jurisdiction regarding peer review and be prepared to advise hospital clients accordingly.

CONCLUSION

EMTALA must always be on the mind of attorneys who represent and defend hospitals. While courts stress that EMTALA is not a federal medical malpractice statute, it nonetheless does focus on the specific acts of health care providers in an emergency department setting. This article hopefully provides a framework for helping hospital attorneys recognize those situations to which EMTALA does and does not apply, as well as practice pointers for handling EMTALA claims.

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[182] For example, where compliance with EMTALA's statute of limitations and state notice-of-claim provisions is possible, courts have concluded that such provisions do not directly conflict with and therefore are not preempted by EMTALA. *Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 795 (2d Cir. 1999); *Draper v. Chiapuzio*, 9 F.3d 1391, 1394 (9th Cir. 1993).

[183] *E.g.*, *Merce v. Greenwood*, 348 F. Supp. 2d 1271, 1274-77 (D. Utah 2004) (finding that Utah's notice-of-claim requirement combined with tolling of the statute of limitations for a pre-litigation review process directly conflicted with and thus were preempted by EMTALA); *Brooks v. Md. Gen. Hosp., Inc.*, 996 F.2d 708, 717 (4th Cir. 1993) (holding that a state law requiring arbitration procedures for medical malpractice claims does not apply to EMTALA claims).

[184] *See* FED. R. CIV. P. 26(b)(3).

Personal Injury Statute Of Limitations:

Tolled While Criminal Prosecution is Pending

By Michael W. Horst

Imagine a scenario wherein your client (an insurer) retains you to investigate a motor vehicle accident. The other vehicle's driver suffered bodily injuries in the wreck. Your driver was cited by the investigating officer for following too closely. The accident occurred on March 1, 2006. A month later, on April 1, 2006, your driver's citation was resolved when he forfeited his bond.

Assume you speak with the claimant's counsel and convince him your investigation revealed causes other than your driver as being responsible for the accident and that filing suit would be futile. You later confirm the claimant's counsel took your advice and, as of March 2, 2008, had not filed suit. The two year statute of limitations for personal injuries had expired.[185] All that is left is shipping your file to storage and congratulating yourself on another job well done, right? Perhaps that may have been the proper course of action several years ago, but may be no longer.

I. O.C.G.A. § 9-3-99

In 2005, Georgia passed the Crime Victims Restitution Act of 2005.[186] Included within the act was a statute tolling the statute of limitations for tort actions while a criminal prosecution was pending. It provides:

> The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years.[187]

[185] O.C.G.A. § 9-3-33.
[186] H.B. 172, 148th Gen. Assem., Reg. Sess. (Ga. 2005).
[187] O.C.G.A. § 9-3-99.

Most who read this statute soon after its passage likely assumed a violation of the Uniform Rules Of The Road[188] did not constitute a "crime" under the language of the statute. Indeed, the first reported case which addressed this new statute (in 2007) did not address whether O.C.G.A. § 9-3-99 applied to the Uniform Rules Of The Road.[189] Clarification would not come until July 17, 2008.

II. *Beneke v. Parker*

In *Beneke v. Parker*, the issue before the Georgia Court of Appeals was, *inter alia*, whether a traffic violation for following too closely constituted a "crime" under O.C.G.A. § 9-3-99.[190] In *Beneke*, a motor vehicle accident occurred on April 27, 2005. Alan Beneke was cited for following too closely. On May 19, 2005, his citation was resolved when he forfeited his bond. Patricia Parker filed a personal injury suit against Mr. Beneke on May 11, 2007, a full two weeks after the two year statute of limitations ran but eight days prior to the two year anniversary of when Mr. Beneke forfeited his bond. Mr. Beneke filed a motion for summary judgment which the trial court initially granted, but later vacated when evidence was submitted that the traffic citation was not resolved until May 19, 2005. Mr. Beneke was granted leave to pursue an interlocutory appeal.

In deciding whether a "crime" included violations of the Uniform Rules Of The Road, the Court looked to the Georgia code for a definition of "crime." Mr. Beneke argued for a restrictive definition found in O.C.G.A. § 17-15-2(3). However, the Court chose a general definition of "crime" found in O.C.G.A. § 16-2-1. That statute provides:

> (a) A 'crime' is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence.
>
> (b) Criminal negligence is an act or failure to act which demonstrates a willful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby.[191]

The Court found that the fact that Mr. Beneke struck Ms. Parker's vehicle with such force that it overturned could be evidence of a willful, wanton, or reckless

[188] O.C.G.A. § 40-6-1 et. seq.
[189] *McGhee v. Jones*, 287 Ga. App. 345, 652 S.E.2d 163 (2007).
[190] *Beneke v. Parker*, 293 Ga. App. 186, 667 S.E.2d 97 (2008).
[191] O.C.G.A. § 16-2-1

disregard for the safety of others.[192] The Court also held that whether a traffic violation is an intentional act or constitutes criminal negligence is a jury issue.[193] Since the trial judge had concluded Mr. Beneke's actions showed a willful disregard as a matter of law, the Court vacated the order with instructions that the question be resolved by a jury.

The Supreme Court of Georgia granted certiorari in the *Beneke* case in August, 2008. Oral argument was scheduled for April 13, 2009.

III. Repercussions of *Beneke*

Undoubtedly, *Beneke* will have far reaching implications if the Supreme Court allows it to stand. Within the opinion, the *Beneke* court recognized that its holding will have a significant impact on personal injury cases arising out of motor vehicle accidents. The well established two year statute of limitations for bodily injury claims known by even lay people is suddenly not so clear. It is only after the date of the disposition of the potential defendant driver's citation that one can pinpoint the claimant's last day to file suit.

Beneke also creates confusion as to predicting which offenses will constitute a "crime" in the eyes of a jury under O.C.G.A. § 16-2-1. While offenses accompanied by intent are rare in the motor vehicle accident context, the language defining criminal negligence is familiar. Similar terminology is found in the punitive damages statute.[194] Specifically, punitive damages are warranted when "it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, . . . wantonness, . . . or that entire want of care which would raise the presumption of conscious indifference to consequences."[195] Imagine the scenario wherein the judge dismisses the punitive damages claim as a matter of law but the jury is asked to resolve whether the defendant's actions constitute criminal negligence (i.e., "a willful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby.").[196] In that case the judge has, for all practical purposes, decided that the defendant's actions do not constitute "criminal negligence," but the jury is nevertheless free to disagree.

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[192] *Beneke*, 293 Ga. App. at 189, 667 S.E.2d at 100.
[193] *Id.* at 189, 667 S.E.2d at 100-101.
[194] O.C.G.A. § 51-12-5.1.
[195] O.C.G.A. § 51-12-5.1(b).
[196] O.C.G.A. § 16-2-1(b).

Finally, there is a concern in the amount of time, money and effort both sides will have to expend to learn whether the statute of limitations was tolled. The parties would be required to litigate the case through trial so the jury may decide whether the defendant's actions constituted "criminal negligence." If the jury answers in the negative, the statute of limitations bars the plaintiff's suit and much of the written discovery, depositions, expert discovery, pre-trial motions, and the trial itself addressing the plaintiff's substantive claims was unnecessary. Permitting the judge to decide whether the statute of limitations was tolled would save a considerable amount of time and expense.

IV. Conclusion

Every defense attorney who practices law in Georgia needs to be aware of O.C.G.A. § 9-3-99 and its application to motor vehicle accidents. Its effect can be significant, potentially tolling the statute of limitations several years beyond the well established two years. Unenviable is the attorney who has to explain to his client that despite his assurances the case was over when suit was not filed within two years of the date of loss, the plaintiff's recently filed suit is actually timely.

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Georgia Auto Insurance Law Update 2008-2009

By Matthew P. Stone and Paul I. Hotchkiss

This article summarizes significant decisions and developments in the area of Georgia auto insurance law between January 2008 and February 2009; it is not an exhaustive summary of all cases in that area.

I. Judicial Reformation of Policies

***Turner v. Gateway Ins. Co.*, 290 Ga. App. 737, 660 S.E.2d 484 (2008)**. The plaintiff, a passenger in a commercial van, sustained injuries in a motor vehicle accident. The van company had liability insurance with limits of $100,000/$300,000. The plaintiff asked the court to rewrite the policy to increase the limits to $5,000,000, the amount required for motor carriers, such as the van company, under the Federal Motor Carrier Safety Act, 49 U.S.C. § 31138(b). The Court of Appeals held that reformation was unavailable for the "purpose of making a new and different contract for the parties, but is confined to establishment of the actual agreement." *Id.* at 739-40, 660 S.E.2d at 486. The Court concluded that, "regardless of whether public policy dictates that motor carriers . . . maintain the level of insurance coverage outlined in the federal statute, no authority or policy requires insurers . . . to provide ex post facto coverage in amounts that exceed what was actually contracted for and purchased by their insured." *Id.* at 740, 660 S.E.2d at 486.

II. The Meaning of the Phrase, "Arise Out of the Ownership, Maintenance, or Use"

***Kinzy v. Farmers Ins. Exch.*, 293 Ga. App. 509, 667 S.E.2d 673 (2008)**. The plaintiff sued to recover under his underinsured motorist (UM) coverage for injuries he sustained in a "road rage" incident with another motorist. The incident began while both were driving, but the plaintiff did not sustain injuries until *after* both drivers had exited their vehicles and confronted each other. The trial court held that the UM coverage did not apply to the plaintiff's personal injury damages because they did not arise out of the ownership, maintenance, or use of an underinsured vehicle; specifically, "Georgia law requires a causal connection between the use of the vehicle and the injury sustained." *Id.* at 509-10, 667 S.E.2d at 674-75. The Court of Appeals affirmed, finding that, although the other motorist's driving may have provoked the altercation, the assault was independent of any use or ownership of the vehicle. *Id.* at 510, 667 S.E.2d at 675. "Simply put, [the plaintiff's] physical injuries were too remote from the [other motorist's] vehicle use. . . ." *Id.* at 510-511, 667 S.E.2d at 675.

***Lancer Ins. Co. v. United Nat'l Ins. Co.*, 294 Ga. App. 261, 668 S.E.2d 865 (2008)**. Two tractor-trailer drivers, Goode and Porter, engaged in aggressive driving agreed (over the CB radio) to pull over to settle their differences. As Goode exited his truck, Porter quickly pulled back out onto the highway into the path of the plaintiffs' vehicle, causing them to lose control and crash. In a declaratory judgment action filed by one Goode's insurers, the Court of Appeals held that the plaintiffs' damages did not arise out of Goode's use of his truck because Goode had pulled off the highway and exited the truck; therefore, he was not "employing [the vehicle] for any purpose" when the accident occurred. *Id.* at 262-63, 668 S.E.2d at 867.

***Travco Ins. Co. v. Williams*, 297 Fed. Appx. 949, 2008 WL 4737422 (11th Cir. Oct. 29, 2008)** (unpublished opinion). While parked in a parking lot, the plaintiff was paralyzed by a stray bullet fired from a nearby pick-up truck, also parked in a parking lot. The plaintiff sought recovery from her underinsured motorist (UM) carrier. The district court granted the insurer's motions for summary judgment, finding that the plaintiff's injuries did not arise out of the use of the pick-up truck, which was not in motion at the time and had no contact with the plaintiff's vehicle; the Eleventh Circuit affirmed, finding that the policy did not extend to such remote circumstances:

> Under Georgia law, there must be a "causal connection between the use of the vehicle and the injury sustained." *USAA Property & Cas. Ins. Co. v. Wilbur*, 207 Ga. App. 57, 427 S.E.2d 49 (1993). Georgia courts have held that the phrase "arising out of" is interpreted broadly to encompass situations where "the injury originated from, had its origin in, grew out of, or flowed from the use of the vehicle." *Southeastern Fidelity Ins. Co. v. Stevens*, 142 Ga. App. 562, 236 S.E.2d 550 (1977). But this broad interpretation does not extend the contract language "to something distinctly remote." *Id.* Rather, the state courts have explained the general rule is that "where a connection appears between the 'use' of the vehicle and the discharge of the firearm and resulting injury such as to render it more likely that the one grew out of the other, it comes within the coverage defined." *Id.*; *see also Westberry v. State Farm Mut. Auto. Ins. Co.*, 179 Ga. App. 700, 347 S.E.2d 688, 689 (1986).

Id. at 951.

***Williams v. Whitfield County*, 289 Ga. App. 301, 656 S.E.2d 584 (2008)**. The Court of Appeals found that a motorcyclist's injuries did not "arise out of the ownership, maintenance, or use" of an excavator parked near the accident site, as the latter was not involved in the accident; it was merely parked "as a static mass."

Id. at 301-04, 656 S.E.2d at 585-88. NOTE: This case involved a claim against a county and the issue of whether the county had waived its sovereign immunity; the Court noted that the excavator in question was owned by a private contractor that does not appear to have been a party to the case.

III. Vehicles Covered

***Nghiem v. Allstate Ins. Co.*, 292 Ga. App. 588, 664 S.E.2d 925 (2008)**. The plaintiff sustained injuries in an accident while riding as a passenger in a vehicle owned by Thao and driven by Thao's girlfriend, Hannah. The plaintiff settled with Thao's insurer and sought additional payments from Hannah's insurer. The insurer filed a declaratory judgment action, contending that the policy excluded coverage for non-owned vehicles regularly used by the insured. The Court of Appeals affirmed summary judgment for the insurer, finding that Hannah was more than an incidental user of the vehicle; specifically, she had her own key, had unlimited access and use of the vehicle and, before the accident, had regularly garaged the vehicle at her father's home. *Id.* at.588-89, 664 S.E.2d at 926-27.

IV. Uninsured/Underinsured Motorist (UM) Coverage

***Zilka v. State Farm Mut. Auto. Ins. Co.*, 291 Ga. App. 665, 662 S.E.2d 777 (2008)**. The plaintiffs, husband and wife, sought to recover for damage to their jointly-owned Toyota under the husband's UM coverage on their Dodge. The wife had a separate policy on the Toyota, but it had been cancelled for failure to timely pay the premium. The husband's insurer denied the claim based on language in the policy stating that an "uninsured motor vehicle" does not include a motor vehicle "furnished for the regular use of you, your spouse or any relative." *Id.* at 666, 662 S.E.2d at 779. The plaintiffs argued that the policy language violates the terms of O.C.G.A. § 33-7-11. The Court of Appeals upheld summary judgment for the insurer, finding that the policy complied with the statute because the insurer agreed to provide UM coverage within the statutory limits and the wife, as a spouse, was included as an insured on the Dodge. *Id.* at 669-70; 662 S.E.2d at 781-82. In sum, the Court held that "no 'uninsured motor vehicle' for purposes of the policy was involved in the accident." *Id.* at 670; 662 S.E.2d at 782.

***Toomer v. Allstate Ins. Co.*, 292 Ga. App. 60, 663 S.E.2d 763 (2008)**. The plaintiff sued the at-fault driver for injuries sustained in a collision and served her UM carrier. After settling with the at-fault driver's liability insurer for his policy limits, the plaintiff's insurer moved to dismiss on the ground that its UM limits were equal to the at-fault driver's limits. The trial court granted the motion, and the plaintiff appealed, arguing that her total settlement should be reduced by $8,600, the amount of a Medicare lien for collision-related-medical bills. The

Court of Appeals agreed and reversed, finding the outcome to be controlled by *Thurman v. State Farm Mut. Auto. Ins. Co.*, 278 Ga. 162, 598 S.E.2d 448 (2004). *Toomer*, 292 Ga. App. at 63, 663 S.E.2d 765-66. Specifically, the Court held that, because federal law required the plaintiff to reimburse Medicare out of the settlement proceeds, she could seek additional benefits in that amount from her own insurer, even though the at-fault driver's policy limits were the same as her own UM limits. *Id.* at 62-63, 663 S.E.2d 765-66.

***State Farm Mut. Auto. Ins. Co. v. Manders*, 292 Ga. App. 793, 665 S.E.2d 886 (2008)**. The plaintiffs filed suit against the at-fault driver two days before the statute of limitations expired and served their own UM carrier. The insurer filed an answer asserting insufficiency of service on the at-fault driver as an affirmative defense. The plaintiffs could not locate the at-fault driver and, more than six months after filing suit, moved for an order permitting service by publication. The insurer subsequently moved for summary judgment based on insufficiency of service (which was accomplished a month after the insurer filed its motion). The trial court denied the motion, but the Court of Appeals reversed, reiterating the well-established rule that, "'[w]hen the statute of limitation has expired and a defendant raises the issue of defective service, from that point forward a plaintiff must act with "the greatest possible diligence" to ensure proper and timely service or risk dismissal of [his or] her case.'" *Id.* at 793, 665 S.E.2d at 887. Here, the evidence showed that the plaintiffs' efforts "fell far short of this exacting standard." *Id.* at 793-94, 665 S.E.2d at 887.

***Zurich Am. Ins. Co. v. Beasley*, 293 Ga. App. 8, 666 S.E.2d 83 (2008)**. The plaintiff, who was injured by a third-party, sought recovery under his employer's UM policy. The case turned on whether the policy was a "renewal" policy, which had $75,000 limits, or a new policy that did not specify the amount of coverage, in which case the limits were $1,000,000 under a Georgia law providing that the coverage defaults to the policy's liability limits. The Court of Appeals held that the policy was a "renewal" policy, although it was issued under a different insurer's name (but part of the same group) and had a new policy number, because it stated on its face that it was a renewal policy and served the purpose of a renewal contract by continuing the obligation to insure." *Id.* at 10-11, 666 S.E.2d at 85.

***Thompson v. Allstate Ins. Co.*, 673 S.E.2d 227 (Ga., Feb. 9, 2009),** *reversing Allstate Ins. Co. v. Thompson*, 291 Ga. App. 465, 662 S.E.2d 164 (2008). The plaintiffs, husband and wife, sued for injuries sustained in a collision. The at-fault driver had liability insurance with limits of $100,000/$300,000. In exchange for payment of $100,000, the plaintiffs executed a limited liability release which specifically provided that it did not include a release of claims for UM coverage and that the plaintiffs retained the right to sue the at-fault driver and

his insurer for purposes of establishing such a claim. The husband then filed suit, seeking to recover under his UM coverage. The Supreme Court reversed summary judgment in favor of the UM insurer, finding that the release did not unambiguously show that the husband received less than the at-fault driver's limits. *Id.*, 2009 WL 290183, at *1-3. The Court noted that there was insufficient evidence to conclude that any of the $100,000 was paid to the wife for her own injuries, as opposed to her claim for loss of consortium. *Id.*, 2009 WL 290183, at *2-3.

***State Farm v. Nelson*, 673 S.E.2d 588 (Ga. App., Feb. 12, 2009)**. The decedent's parents sued the driver of the truck that rear-ended the vehicle in which their son was a passenger. They also named as a "John Doe" the driver of a vehicle that had been in front of the truck driver but swerved at the last minute. At trial, numerous eyewitnesses corroborated the existence of the John Doe driver and testified that he was partly responsible for the accident. The Court of Appeals found the evidence sufficient to support an apportionment of liability to the John Doe driver and, ultimately, to the parents' UM carrier. *Id.*, 2009 WL 331635, at *2.

***Adams v. State Farm Mut. Auto. Ins. Co.*, Case No. A08A2315 (Ga.App., April 14, 2009),** *reversing on reconsideration Adams v. State Farm Mut. Auto. Ins. Co.*, Case No. A08A2315 (Ga.App., Feb. 17, 2009), which had held that after the plaintiff settled with the at-fault driver for policy limits of $25,000, then pursued recovery under his own UM coverage, the UM carrier was entitled to a set-off of $9,200, which the at-fault driver's liability insurer had paid to satisfy the plaintiff's hospital lien. Finding that the plaintiff had *voluntarily* elected to divert that portion of his liability recovery, the Court held that the payment from the liability insurer to the hospital constituted a "payment of other claims" within in the meaning of O.C.G.A. § 33-7-11(b)(1)(D)(ii). The Court reasoned that the legislative intent was "not to make insureds whole, but 'to place insureds in the same position they would be in relation to coverage if the tortfeasors causing the injuries had obtained at least the minimum prescribed liability insurance.'" The Court distinguished this case from *Toomer v. Allstate Ins. Co.*, 292 Ga. App. 60, 663 S.E.2d 763 (2008), because the payments made on behalf of the plaintiff in *Adams* were not mandatory, as they were in *Toomer*.

On reconsideration by the full court, the Court of Appeals reversed its decision. ***Adams v. State Farm Mut. Auto. Ins. Co.*, Case No. A08A2315 (Ga.App., April 14, 2009)**, and held that summary judgment should have been granted to the claimant against the UM carrier. The record showed that the tortfeasor's insurer had paid $9,217.66 to Grady Hospital to compromise its hospital lien for Adams' medical services and $15,782.34 to Adams for a limited release, exhausting the $25,000 policy limits. Adams then sought additional

compensation from State Farm, his own UM insurer, arguing that State Farm should only get credit for the $15,782.34 paid to him personally. The Court of Appeals originally held that State Farm was entitled to set off Adams' $100K uninsured motorist coverage by the full $25,000 paid from the tortfeasor's insurer, but then reversed that decision in a 4-3 decision, holding that State Farm was only entitled to offset the $15,782.34 paid to him personally.

***Lambert v. Alfa Gen. Ins. Corp.* 291 Ga. App. 57, 660 S.E.2d 889 (2008)**. The Court of Appeals held that an insured's handwritten, signed statement to his insurer stating, "Please change my U/M benefits to 25/50/25 . . ." was effective to reduce those benefits. *Id.* at 57-61, 660 S.E.2d 890-93. The Court found that O.C.G.A. § 33-7-11(a)(3) only requires that an insured "affirmatively choose" less UM coverage; it does not require any of the formalities suggested by the plaintiff. *Id.* at 60-61, 660 S.E.2d 892.

***Bonamico v. Kisella,* 290 Ga. App. 211, 659 S.E.2d 666 (2008)**. The Court of Appeals upheld previous decisions finding that a UM carrier is not liable for payment of punitive damages awarded against an uninsured motorist. The main purpose of punitive damages is to punish the wrongdoer, which does not apply in the context of UM coverage. *Id.* at 212-13, 659 S.E.2d at 667.

***Hayward v. Retention Alternatives Ltd.*, 291 Ga. App. 232, 661 S.E.2d 862 (2008)**. The plaintiff filed suit against the at-fault driver and served her UM carrier. She later dismissed the action without prejudice and timely filed a renewal action, serving her excess UM carrier. The excess UM carrier filed a motion for summary judgment, arguing that the plaintiff's claim was barred by the statute of limitations because she never served it in the original action. The Court of Appeals reversed summary judgment in favor of the excess UM carrier, finding that the purpose of requiring service on a UM carrier is "to give notice, not to bring the UM carrier within the [trial] court's jurisdiction." *Id.* at 234-35, 662 S.E.2d at 864-65. The Court further held that a UM carrier may not be placed in a better position than the at-fault driver and is, therefore, limited to the same statute of limitations defenses available to the at-fault driver. *Id.* at 233, 661 S.E.2d at 864.

***Smith v. Stoddard,* 294 Ga. App. 679, 669 S.E.2d 712 (2008)**. The plaintiff sought to recover (from his UM carrier) attorney's fees and expenses awarded against the at-fault driver pursuant to O.C.G.A. § 13-6-11 based on the at-fault driver's conduct, not on the conduct of the UM carrier. The Court of Appeals held that attorney's fees and expenses awarded against the at-fault driver under O.C.G.A. § 13-6-11 could not be recovered under the UM statute or the terms of the policy at issue. *Id.* at 680, 669 S.E.2d at 714.

V. Uninsured/Underinsured Motorist (UM) Coverage: Stacking

***Dairyland Ins. Co. v. State Farm Auto. Ins. Co.*, 289 Ga. App. 216, 656 S.E.2d 560 (2008)**, *disapproved in part by Progressive Classic Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 294 Ga. App. 787, 670 S.E.2d 497 (2008) (en banc) (discussed below). The plaintiffs sued for injuries she sustained when another driver rear-ended her Jeep. The plaintiff and her husband were both listed as insureds on a State Farm policy for the Jeep which had UM limits of $25,000. They owned three other vehicles, a Plymouth, a Chevrolet, and a motorcycle. The Plymouth was also insured under a State Farm policy issued to the husband and wife; the Chevrolet was insured under a separate State Farm policy issued only to the husband; and the motorcycle was insured under a Dairyland policy issued only to the husband. Each policy had UM coverage limits of $25,000, and the plaintiffs sought to stack all four policies for a total of $100,000 in potential UM coverage.

Under O.C.G.A. §§ 33-7-11, *et seq.*, the $100,000 in potential UM coverage was to be reduced by the amount paid by the at-fault driver's insurer, so the issue focused on how to determine the priority of the policies for purposes of determining which insurer was entitled to a setoff. *Id.* at 216-17, 656 S.E.2d at 561-62. The Court of Appeals started by reciting the applicable law:

> Under Georgia law, when more than one source of uninsured motorist coverage is available, claimants may stack the policies, but the priority of the multiple uninsured motorist carriers regarding which has primary responsibility for coverage must be determined. To assist in this task, Georgia courts use three tests: the "receipt of premium" test, the "more closely identified with" test, and the "circumstances of the injury" test. Under the "receipt of premium" test, the insurer that receives a premium from the injured insured is deemed to be primarily responsible for providing coverage. Under the "more closely identified with" test, the policy with which the injured party is most closely identified must provide primary coverage. If neither of those tests is helpful in a particular case, the courts look to the circumstances of the injury to see which policy provides primary coverage. Courts may also look to "other insurance" clauses in the contracts for resolution of the priority issue. And, where OCGA § 33-7-11 provides no guidance for the resolution of the priority issue, the court may fashion a rule to fill the void.

Id. at 217, 656 S.E.2d at 562 (footnotes and citations omitted).

Because none of those tests resolved the issue, as between the State Farm policy on the Chevrolet and the Dairyland policy on the motorcycle, the Court held that it was appropriate to split the setoff between the two insurers. *Id.* at 217-19, 656 S.E.2d at 562-63. In reaching its decision, the Court rejected Dairyland's contention that prorating stackable coverage is never appropriate and held that, where the tests for priority fail to settle the issue, the trial court may fashion a reasonable remedy. *Id.* at 218-19, 656 S.E.2d at 562-63.

***Staton v. State Farm Auto. Ins. Co.*, 294 Ga. App. 208, 669 S.E.2d 164 (2008)**. The Court of Appeals held that the plaintiff-employee could stack UM coverage under two auto policies issued to his employer. *Id.* at 213, 669 S.E.2d at 168. The plaintiff sustained injuries in a collision where the at-fault driver had liability limits of $50,000. The plaintiff was driving a Suburban owned by a corporation in which he was an employee, officer, and the majority shareholder. The corporation had a State Farm policy on the Suburban with UM limits of $100,000. The corporation also owned two other vehicles, an S60 and a Navigator, each insured under separate State Farm policies with UM limits of $100,000. Since his damages exceeded $100,000, the total he could collect from the at-fault driver's insurer and the UM limits on the Suburban, the plaintiff sought to stack the policies covering all three of the corporate vehicles.

The Court of Appeals started by noting the principle that "[p]olicy exclusions which attempt to limit the statutory definition of an insured are unenforceable." *Id.* at 212, 669 S.E.2d at 167. It then noted that, instead of defining "insured" as "you" (i.e., the named insured, his or her spouse, and their relatives), the insurer defined the term as "'the first person [i.e., human being] named in the declarations,' his or her spouse, and their relatives." *Id.* Because the corporation could not qualify as "'the first person named in the declarations,' or have a spouse or relatives," the Court found the policies were ambiguous." *Id.* at 212, 669 S.E.2d at 167-68. The Court went on to hold that the ambiguity must be construed against the insurer, as the drafter of the policies, and considered in light of the insured's understanding of the agreement between the parties. *Id.* at 212-13, 669 S.E.2d at 168. In that regard, the Court found that the plaintiff, individually, and the corporation had bought "an array of insurance policies from State Farm . . . with the purpose of obtaining 'sufficient coverage for any foreseeable claim that might arise.'" *Id.* at 213, 669 S.E.2d at 168. The Court also noted that, for 10 years, the State Farm agent who advised the plaintiff and the corporation on personal and business insurance needs had assured the plaintiff that his UM coverage would stack in the event of a catastrophic accident, such as had occurred in this instance. *Id.* Accordingly, the Court held that the term "insured" should be read in accordance with the plaintiff's reasonable expectations about coverage. *Id.*

***Progressive Classic Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 294 Ga. App. 787, 670 S.E.2d 497 (2008) (*en banc*)**. This case involved a wrongful death action brought by the mother and father of a son killed by an uninsured driver and how to prioritize three policies that provided additional UM coverage. The policies at issue were (1) the father's auto policy that referenced the son as a rated drive, (2) the father's umbrella policy, and (3) a policy the father initially bought for his daughter but to which the parents were later added as named insureds. In discussing stacking, the Court first noted that:

> Georgia courts employ three tests in determining the order in which the available policies should be stacked: the "receipt of premium" test, the "more closely identified with" test, and the "circumstances of the injury" test. Under the "receipt of premium" test, the insurer that receives a premium from the injured insured is deemed to be primarily responsible for providing coverage. Under the "more closely identified with" test, the policy with which the injured party is most closely identified must provide primary coverage. If neither of those tests is helpful in a particular case, the courts look to the circumstances of the injury to see which policy provides primary coverage.

Id. at 788, 670 S.E.2d at 499 (citations omitted).

The "receipt of the premium test" did not resolve the issue because the father had paid the premiums on all three policies, but the "more closely identified test" could be used to resolve the issue because the son was "more closely identified with" the first policy on which he was a rated driver. *Id.* at 789-92, 670 S.E.2d at 500-02. As to the remaining policies, the Court found that the son was more closely identified with the UM policy purchased in his father's name than the third policy purchased in his sister's name because "the relation between parent and child is generally held to be closer than that of siblings." *Id.* at 790-92, 670 S.E.2d at 500-02. The Court then found that proration among the latter two policies was not an available remedy because the priority of the three policies could be determined by application of one of the three enumerated tests. *Id.* at 792, 670 S.E.2d at 502.

Finally, it should be noted that, the *Progressive* Court disapproved of language used by the panel in *Dairyland*, *supra*, that "Courts may look to '"other insurance' clauses in the contracts for resolution of the priority issue." *Id.* at 791-92, 670 S.E.2d at 501. Specifically, the *Progressive* Court held that the case upon which the *Dairyland* opinion relies did not address "the issue of stacking UM policies, but rather considered which of several policies provided primary insurance and which insurer had the duty to defend." *Id.* at 792, 670 S.E.2d at 502.

Ga. Laws 2008, Act 801 (amending O.C.G.A. §§ 33-7-11, 33-9-4, and 33-9-21).[197] This new law regarding stacking of UM coverage became effective on January 1, 2009 and applies to all policies issued, delivered, issued for delivery, or renewed in Georgia on and after that date. It does not apply retroactively. Under the previous law, UM coverage would pay only the difference between its policy limits and the amount paid by the liability insurance of the at-fault driver. Under the new stacking law, Georgians can purchase UM coverage that can be stacked on top of the at-fault driver's insurance, if the amount of the at-fault driver's liability coverage is insufficient.

VI. Truckers and Motor Carriers Liability Coverage

***Coleman v. B-H Transfer Co.*, 284 Ga. 624, 669 S.E.2d 141 (2008)**, *affirming* 290 Ga. App. 503 (2008). The Supreme Court of Georgia held that a truck driver (who was an independent contractor) was not a "member of the public" entitled to protection under 49 C.F.R. §§ 387.15, the federal regulation providing minimum limits for motor common carriers, and that exculpatory language in a release and indemnity provision of the independent contractor agreement did not violate public policy. *Id.* at 627-28, 669 S.E.2d at 144. Under the federal regulation at issue, independent contractors are "employees," and the federal minimum insurance requirement does not apply to an insured trucking company's employees. *Id.* at 624-26, 669 S.E.2d at 142-43.

***Liberty Mut. Fire Ins. Co. v. Axis Surplus Ins. Co.*, 294 Ga. App. 417, 669 S.E.2d 219 (2008)**. The plaintiff, a passenger, sued for damages stemming from an accident that occurred while returning after the driver had dropped off his employer's load. The driver was operating under an exclusive lease of his truck to his employer. The employer's two insurers, one for "non-trucking automobile coverage" and the other for the business use of company trucks, disputed which one provided coverage. *Id.* On cross-motions for summary judgment, the trial court found that the driver was an insured under the business policy, not under the "non-trucking" policy. *Id.* at 417-18, 669 S.E.2d at 220. Looking at the driver's normal work pattern, the Court of Appeals affirmed, finding that "a lessor may remain in the trucking business, even after he has delivered his load, if he is acting within his normal 'work pattern' or 'operational routine' in furtherance of the interests of the lessee/trucking company." *Id.* at 419, 669 S.E.2d at 221 (citation omitted). The Court refused to alter the insurer's contractual obligations based on

[197] Ga. Laws 2008, Act 801, which amends O.C.G.A. §§ 33-7-11, 33-9-4, and 33-9-21, also allows for insureds to contract for certain, more restrictive UM coverage. Additionally, it changes some standards applicable to rates and provides for prior approval of motor vehicle insurance providing only the mandatory minimum limits. Certain provisions of Ga. Laws 2008, Act 801, became effective on October 1, 2008.

language in the collateral lease between the driver and the company. *Id.* at 418-19, 669 S.E.2d at 220-21.

VII. Use of Proceeds

Ga. Laws 2008, Act 721. This Act, which became effective on July 1, 2008 and applies to all automobile and motor vehicle liability insurance policies paying benefits to a third-party after January 1, 2009, provides that an insurer which pays benefits to a third-party must provide notice to the third-party, informing him that failure to use the proceeds in accordance with a security agreement of the third-party and a lienholder may constitute a violation of O.C.G.A. § 16-8-4 (theft by conversion).

VIII. Cancelation of Policies

***Auto-Owners Ins. Co. v. Alexander*, 293 Ga. App. 459, 667 S.E.2d 628 (2008)**. The Court of Appeals held that the insurer could not avoid coverage based on a defective attempt to cancel an auto policy for non-payment of premiums. "Under O.C.G.A. § 33-24-44, an insurance company may cancel a policy for non-payment of premiums after delivering or mailing written notice of cancellation to the insured at least ten days prior to the effective cancellation date." *Id.* at 460, 667 S.E.2d at 630. The Court of Appeals held that a notice of cancellation is only valid if premiums are actually due: "As we have found, 'notice of cancellation for failure to pay premiums, sent before the premium is actually due, is not sufficient to effect a cancellation.'" *Id.* (citing *Atlanta Cas. Co. v. Boatwright*, 244 Ga. App. 36, 38, 534 S.E.2d 516 (2000)). Because the insurer had received a check satisfying the insured's past due balance on the same day it mailed the notice of cancellation, the Court held that cancellation was improper. *Id.* at 461, 667 S.E.2d at 630-31.

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No Midnight Train to Georgia: Legal Defenses and Practical Solutions to Claimant's Request to Depose an Out-of-State Adjuster

By J. Benson Ward

Partly thanks to the benefit of technological advances, it is now common for adjusters to handle workers' compensation claims from separate parts of the country. A Georgia claim might be handled by an adjuster outside of Atlanta, or by an adjuster working out of Lexington, Kentucky or Fargo, North Dakota. In such claims handled by an adjuster outside of Georgia, an issue arises when an obstinate claimant's counsel pushes for the deposition of the out-of-state adjuster to be held in Georgia. When claimant's attorney notices the deposition of a non-resident adjuster to be held in Georgia, Georgia law provides multiple restrictions on the demand and solutions to this issue, and Georgia statute clearly provides that such a non-resident witness who is not a party to the claim may not be required to attend a deposition anywhere other than the county in which the adjuster resides, does business, or received service of the subpoena.

Discovery procedures and disputes in workers' compensation cases are to be governed according to the Georgia Civil Practice Act, and so discovery rules and procedures in workers' compensation cases will mirror those in ordinary civil cases. O.C.G.A. § 34-9-102(d). O.C.G.A. § 9-11-30 governs depositions in civil cases, and concerns basic procedural specifics of taking a deposition, including providing for when a deposition may be taken, necessary notice requirements, and deposing a corporate party. O.C.G.A. § 9-11-30(b)(6) stipulates that a party may name a corporation as the deponent. When this happens, the corporation then designates one or more agents or employees to testify on behalf of the corporation.

On the other hand, should the claimant wish to take the deposition of a specific individual associated with the insurance company, he must issue a subpoena pursuant to O.C.G.A. § 9-11-45. O.C.G.A. § 9-11-45(b) states that a person giving a deposition upon the receipt of a subpoena may not be required to attend an examination anywhere other than the county in which the person resides, does business, or received service of the subpoena.

Georgia law briefly held that any non-resident could not be compelled to attend a deposition in Georgia. *Blanton v. Blanton*, 259 Ga. 622, 385 S.E.2d 672 (1989). In *Blanton*, the Supreme Court read the geographic limitation of O.C.G.A. § 9-11-45(b) to cover any person giving a deposition, not merely those

to whom a subpoena had been directed. *Blanton*, 259 Ga. at 623. However, *Blanton*'s broad sweep was soon reined in when the Georgia Supreme Court reread the statute's geographic limitation to include only those to whom a subpoena had been directed, and to thus exclude parties to the lawsuit. *Warehouse Home Furnishings Distributors, Inc. v. Davenport*, 261 Ga. 853, 413 S.E.2d 195 (1992). In *Warehouse*, the Court remanded a trial judge's protective order prohibiting a defendant from compelling plaintiff, a Texas resident, to give a deposition in Georgia; the lower courts had deemed this order proper under *Blanton*. *Warehouse*, 261 Ga. at 853-54. The Court distinguished between a non-party, to whom a subpoena is issued and who is subject to O.C.G.A. § 9-11-45(b), and a party, to whom notice is issued and who is not covered by O.C.G.A. § 9-11-45(b)'s geographic limitations. *Warehouse*, 261 Ga. at 854.

Therefore, in light of *Warehouse*, the deposition of a non-resident employee of a defendant insurer, who is specified in a deposition notice, is governed by O.C.G.A. § 9-11-45(b) and thus would ordinarily take place within the county in which the employee resides or conducts business. Older Georgia case law also generally follows the statute in refraining from requiring non-resident employees to appear in Georgia for a deposition. *See, Global Van Lines, Inc. v. Daniel Moving & Storage, Inc.*, 159 Ga. App. 124, 283 S.E.2d 56 (1981) (noting that depositions of officers or agents of defendant corporation generally must take place at corporation's principal place of business); s*ee also Callahan v. Georgia Power Company*, 170 Ga. App. 588, 317 S.E.2d 588 (1984)(defendant who resided in Germany not compelled to give deposition in Atlanta).

When claimant's counsel remains insistent on attempting to depose a non-resident adjuster in Georgia, and serves notice, an appropriate response is to move the ALJ for a protective order pursuant to O.C.G.A. § 9-11-26(c). Georgia courts have upheld protective orders precluding a party from requiring a non-resident party to give a deposition in the forum as opposed to the out-of-state place of residence or business. *See, e.g., Reams v. Composite State Board of Medical Examiners*, 233 Ga. 742, 213 S.E.2d 640 (1975) (uphold protective order stipulating that plaintiff Board members be deposed in county of residence instead of forum county); *Bicknell v. CBT Factors Corporation*, 171 Ga. App. 897, 321 S.E.2d 383 (1984)(trial judge properly granted protective order preventing defendant from compelling New York corporate plaintiff to attend deposition in Georgia).

In support of the motion for protective order, the insurer must present the Judge with evidence of hardships arising out of the claimant's attempt to conduct

the deposition in Georgia, including oppression, undue burden or expense. Such factors include the distance between Georgia and the adjuster's residence; whether airplane travel is impractical; the expense of flight, gasoline and hotel costs; the forced time away from work necessary to travel to and from the deposition; and any other specific circumstances which make the demand burdensome and unreasonable. Furthermore, the protective order should rely upon O.C.G.A. § 9-11-45 and Georgia law holding that non-resident witnesses not party to the lawsuit may not be compelled to come to Georgia but should instead be subpoenaed for a deposition local to the witness.

As a practical matter, if claimant's attorney is insistent on deposing the adjuster, it is pragmatic to suggest alternatives to an in-person deposition, such as a telephone deposition or even a deposition taken through the use of real-time video. However, there is no reason to concede and schedule the deposition of the non-resident adjuster in Georgia, and the law supports such a position. Claimant's counsel may either notice the deposition of the insurer as a party, pursuant to O.C.G.A. § 9-11-30, or serve a subpoena pursuant to O.C.G.A. § 9-11-45. If the deposition notices the insurer, and the insurer then in turn designates the non-resident employee pursuant to O.C.G.A. § 9-11-30(b)(6), then it would be appropriate to move for a protective order under O.C.G.A. § 9-11-26(c) and/or insist the deposition be held in the state where the employee resides or where the insurance company has its principal place of business. If the adjuster is served with a subpoena, then the deposition should take place in the county of his/her residence, and the adjuster cannot be compelled to travel to Georgia to attend a deposition. It should be reassuring for an adjuster outside of the state to know that he or she may handle a Georgia claim without the concern of being dragged into the state to attend a deposition.

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Stormwater Runoff Claims:
An Overview of Georgia Law

By Kenneth Sisco

Whether building a single family home, developing a subdivision with several hundred homes, or constructing a commercial high rise, one risk facing contractors of all sizes is a stormwater runoff lawsuit from neighboring property owners. This article will provide an overview of Georgia law regarding stormwater runoff claims. Specifically, this article will provide an overview of the legal theory behind these claims, examine the potentially liable parties, and review the applicable damages claims while highlighting some of the unique issues that arise in these claims.

I. Theories of Liability

The underlying legal basis for the stormwater runoff claim is that any change in the volume, concentration or quality of the stormwater coming off a property gives the recipient a cause of action. The rational is that where properties adjoin one another, the lower lot owes a duty of servitude to the higher to receive the water which naturally runs from it, as long as the owner of the higher lot has not increased the flow by artificial means. With regard to surface water, one land owner has no right to concentrate and collect it, and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation. *Baumann v. Snider*, 243 Ga. App. 526, 528 (2000).

Though this duty of care can be the basis for a negligence claim, most stormwater runoff claims are prosecuted under theories of nuisance and/or trespass since they do not require a showing of negligence. *See Cannon v. Macon*, 81 Ga. App. 310, 318 (1950) (Negligence is not a necessary ingredient of a cause of action growing out of a nuisance.); *See also Brooks v. Ready Mix Concrete Co.*, 94 Ga. App. 791, 793 (1956) (Liability for a trespass upon real property produced by a voluntary act was absolute and did not have to be grounded in negligence, so long as the act causing the trespass or invasion was intended.).

Nuisance and trespass claims are codified, with a nuisance being defined as:

> anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man.
>
> O.C.G.A. § 41-1-1

O.C.G.A. § 51-9-1 defines trespass as an unlawful interference with one's right of enjoyment in private property.

Though the cases interpreting nuisance and trespass claims seem to use these concepts interchangeably, they are in fact distinguishable. In *Baumann,* the Georgia Court of Appeals explained the distinction as follows:

> (trespass is) a direct infringement of one's right of property, while in (a nuisance) the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it. In the one case the injury is immediate; in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected.
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> *Baumann at* 528.

Accordingly, although most plaintiffs file their stormwater runoff lawsuits under theories of both nuisance and trespass, the nuisance theory is usually the more appropriate cause of action.

Thus, under Georgia law any change to the flow of stormwater running off of one property that causes hurt, inconvenience or damage to another property is actionable. This is a very low standard in light of the fact that it is virtually impossible to not alter the stormwater runoff in one manner or another on a typical construction project. Here are some very basic and common construction activities and the manner in which they impact the stormwater coming off of a property:

- **Clearing and grading activities**- Most construction projects require that the land be cleared to allow for the construction of the new

structure. These activities typically involve the removal of trees and natural vegetation and result in an increase in the amount of exposed dirt. When it rains on the exposed dirt there is increased silt and sediment coming off of a property. Thus these activities by their nature result in a change in the character or quality of stormwater;

- **Building new structures** – Typically, new construction results in a decrease in the amount of permeable natural surfaces which absorb stormwater and an increase with impermeable surfaces (i.e. roofs, sidewalks, parking lots, etc.). Thus these activities by their nature result in an increase in the volume of stormwater that comes off of a property;

- **Stormwater management systems-** Most new construction attempts to account for the increased volume of stormwater through the use of stormwater management system to direct stormwater (i.e. curbs, gutters, downspouts, etc.) and/or to collect the stormwater (i.e. storm sewers, retention ponds, detention ponds, etc.) which tends to change the flow of stormwater from sheet flow to concentrated flow.

Needless to say, stormwater runoff claims can be very difficult to defend from a liability perspective. Almost every common construction activity impacts the quality, quantity and/or concentration of stormwater flowing from a construction project. Moreover, even if the contractor takes every precaution and complies with all of the plans and applicable codes and regulations, the contractor may still be liable if the jury finds that the change in the stormwater runoff created a nuisance. O.C.G.A. § 41-1-1, specifically states that "the fact that the act done may otherwise be lawful shall not keep it from being a nuisance."

Therefore, the contractor's best chance at prevailing on liability is to focus on whether the change in the stormwater runoff actually rises to the level of a nuisance. This means challenging the plaintiff on whether there is any actual damage or inconvenience that is not fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man. O.C.G.A. § 41-1-1. Although the issue of whether there is any actual damage or inconvenience will likely be an issue for the jury, that does not mean that it is impossible to defend and defeat these claims.

II. Who Can Be Liable?

As stormwater runoff claims can arise from construction projects of various sizes, the parties which are named as defendants, and which could ultimately be liable, can vary from a single defendant to multiple defendants. However, there are three general categories of parties which may be liable for a stormwater runoff lawsuit: (1) the construction professionals involved in the work, (2) the owner of the property discharging the stormwater, and (3) a government entity involved in maintaining stormwater infrastructure.

Regardless of the party's role in the construction project, the basis for liability is control over the cause of the harm. In *Sumitomo Corp. of America v. Deal*, 256 Ga. App. 703 (2002), the Georgia Court of Appeals explained:

> Under Georgia law, in order to be held liable for nuisance, ownership of land by the tortfeasor is not an element, but control is; the essential element of nuisance is control over the cause of the harm. The tortfeasor must be either the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance.
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> *Id.* at 707

Based upon this standard, the contractor typically has the most difficulty in avoiding liability since the contractor controls the construction project that is alleged to be the source of the nuisance.

As control is the key to liability and ownership of the property in and of itself is not sufficient to subject one to liability for the nuisance, a property owner who retains an independent contractor who controls the property throughout the construction process may be able to escape liability. However, once the property owner accepts the contractor's work, the owner may become liable for any nuisance created by its independent contractor. *See Greenwald v. Kersh*, 265 Ga. App. 196 (2004) (In connection with injuries caused by interference with the flow of water, if a defendant accepted the work so constructed by the independent contractor which constitutes a nuisance, the defendant became at once responsible for the existence of the nuisance, under a rule very similar to that which makes a principal responsible for unauthorized wrongs committed by his agent by ratifying them.)

Moreover, once an abatable nuisance exists, the owner has a legal duty to abate the nuisance, and the failure to so abate is a tort described as continuance of a nuisance. *Smith v. Branch*, 226 Ga. App. 626 (1997) This duty to abate continues even after the property is sold, if the property owner is found to be the cause of the nuisance. *Id.*

The final category of potential defendants in a stormwater runoff lawsuit is governmental agencies. Claims against governmental agencies are more complex due to sovereign immunity defenses. However, the very basic premise regarding claims against governmental agencies was summed up well in *Hibbs v. City of Riverdale*, 267 Ga. 337 (1996), which explained:

> the sole act of approving a construction project which leads to an increase in surface water runoff cannot impose liability for creating or maintaining a nuisance. However, where a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the repeated flooding of property, a continuing, abatable nuisance is established, for which the municipality is liable.
>
> *Id.* at 338

Thus, a governmental agency is not liable for approving plans or providing permits for work which may ultimately cause a nuisance, rather the agency must actually build or maintain the nuisance causing structure.

Another significant difference regarding stormwater runoff claims against government entities is that claims against counties must rise to the level of a taking of property amounting to an inverse condemnation in order to be actionable. *DeKalb County v. Orwig*, 261 Ga. 137, 138 (1991). As a result, in claims against counties, the only damages which may be recovered are those recoverable in a condemnation action. *Id.* Therefore, expenses of litigation and damages for mental distress are not recoverable. *Id.*

In summary, the key to liability for a stormwater runoff claim is control. If a party controls the creation of the nuisance or controls the property from which the nuisance emanates and fails to abate the nuisance (i.e. maintaining a nuisance), they may be liable. Thus, another potential avenue of defense is to establish that the defendant did not control the creation or maintenance of the nuisance.

III. Damages

There is a wide range of damages that a plaintiff may recover in a stormwater runoff lawsuit. However, before addressing the types of damages that can be recovered it is first important to understand how the statute of limitations (O.C.G.A. § 9-3-30) applies in a stormwater runoff lawsuit since it will impact the damages that can be recovered.

Unlike most other construction claims, the four year statute of limitations under O.C.G.A. § 9-3-30 does not necessarily run from the date of substantial completion. Rather, stormwater runoff claims are continuing abatable nuisances for which the cause of action accrues at the time of the nuisance. Therefore, every time the nuisance occurs (i.e. every time there is enough rain to cause damage) a new cause of action accrues for which the statute of limitations begins to run. *See Columbus v. Myszka*, 246 Ga. 571 (1980). Accordingly, when a lawsuit is filed more than four years after the date of substantial completion, O.C.G.A. § 9-3-30 does not bar recovery, rather it only bars recovery for damages which occurred more than 4 years prior to the filing of the suit. *Cox v. Cambridge Square Towne Houses*, 239 Ga. 127, 129 (1977).

Another issue that can impact the damages that can be recovered is O.C.G.A. § 41-1-5(b), which requires that the plaintiff provide the defendant with a notice to abate the nuisance. O.C.G.A. § 41-1-5(b) states "[p]rior to commencement of an action by the alienee of the property injured against the alienee of the property causing the nuisance, there must be a request to abate the nuisance." Mere passive or constructive knowledge by a defendant of the existence of a nuisance is insufficient to satisfy the requirements of this statute. *See Ga. Power Co. v. Fincher*, 46 Ga. App. 524, 526 (1933). However, this statutory notice requirement applies only to an alienee "who merely acquires property on which there is an existing nuisance, passively permits its continuance, and adds nothing thereto. [Cits.]" *Ga. Power Co. v. Moore*, 47 Ga. App. 411, 412 (1933). Thus, the notice requirement does not apply to one who actually creates the nuisance. *Smith v. Branch*, 226 Ga. App. 626, 629 (1997). However, where notice is required, any damages accruing prior to notice are not recoverable. *Macko v. City of Lawrenceville*, 231 Ga. App. 671 (1998).

a. General and Special Damages

As a stormwater runoff lawsuit is a claim for a continuing abatable nuisance the measure of damages generally is "the diminution of the yearly rental value of

the property damaged during the existence of the nuisance . . . plus any actual damage sustained." *Atlanta v. Murphy*, 194 Ga. App. 652, 653 (1990)

In addition to the damages to the real property, plaintiffs in stormwater runoff cases may also recover personal damages. As the stormwater runoff claim involves the interference of an owner's right to the use and enjoyment of his property, the plaintiff may recover damages for "discomfort, loss of peace of mind, unhappiness and annoyance" which is determined by the enlightened conscience of the jury. *City of Gainesville v. Waters*, 258 Ga. App. 555, 557-558 (2002)

b. Injunction

In addition to monetary damages, a plaintiff in a stormwater runoff lawsuit may also obtain an injunction to prevent the continuation of the stormwater runoff. A court of equity may restrain a party from collecting greater quantities of surface water and causing it to flow onto private property. The granting of an injunction is within the sound discretion of the trial court, however it must be narrowly tailored to address the claims. *Columbia County v. Doolittle*, 270 Ga. 490 (Ga. 1999) (Finding that the trial court was proper in granting injunction but that the scope of the injunction was overbroad since it was impossible to comply with and was overreaching.)

c. Attorneys' fees

Typically, plaintiffs seek to recover attorneys' fees in stormwater runoff cases under O.C.G.A § 13-6-11, which allows for their recovery when the defendants have acted in "bad faith, . . . have been stubbornly litigious or have caused plaintiff unnecessary trouble and expense."

In support of their claim for attorneys' fees, most plaintiffs rely upon the case of *Ponce de Leon Condominiums v. Di Girolamo*, 238 Ga. 188, 190 (1977) or its progeny since in *Ponce de Leon Condominiums* the Georgia Supreme Court held that the failure to correct runoff and water onto another's property after repeated requests was sufficient to support a claim for attorneys' fees under O.C.G.A § 13-6-11. *Ponce de Leon Condominiums* creates a difficult hurdle to overcome since in most cases by the time a lawsuit has been filed the plaintiff has made multiple complaints to the defendant regarding the stormwater runoff. Therefore, it is very difficult to get the attorneys' fee claims dismissed via a motion. However, by the same token *Ponce de Leon Condominiums* does not

require that the jury award attorneys' fees. Thus, it is still a jury question as to whether the plaintiff is entitled to attorneys' fees. *Tyler v. Lincoln*, 272 Ga. 118, 122 (2000). Accordingly, the best defense to the attorneys' fee claim is to establish that the defendant responded in a fair and reasonable manner to the plaintiffs' request to abate the stormwater runoff.

d. Punitive Damages

As is the case with the recovery of attorneys' fees, the failure to abate a stormwater runoff nuisance may support a claim for punitive damages. In *Tyler*, the Georgia Supreme Court explained:

> Trespass is an intentional act. Thus, a wilful repetition of a trespass will authorize a claim for punitive damages. So too, will a claim of continuing nuisance. And specifically, the failure to adequately ameliorate the runoff of water and silt onto another's property has been held to justify a punitive damage award.

Id. at 120-121

However, unlike the claim for attorneys' fees, a defendant in a stormwater runoff may be able to defeat the punitive damages claim. In *Stone Man v. Green*, 263 Ga. 470, 472 (1993), the Georgia Supreme Court found that compliance with the law in the operation of a stone quarry showed that there was no clear and convincing evidence of willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences, and therefore upheld a grant of summary judgment denying punitive damages in an abatable nuisance claim. In light of the *Stone Man* case, defendants in stormwater runoff cases should, when supported by the record, always raise the issue of compliance with the applicable law in an effort to defeat the punitive damages claim.

IV. Conclusion

An overview of Georgia law governing stormwater runoff lawsuits shows that these are very difficult cases to defend and that the cards appear to be stacked in favor of the plaintiff. Nonetheless, stormwater runoff claims can be very defensible.

The critical issue in defending and evaluating stormwater runoff lawsuits is the relative reasonableness of each party. If the defendant can show the jury that it acted reasonably both in the activity which allegedly is the cause of the nuisance and in the manner in which it responded to the plaintiff's stormwater complaints, the chances of a defense verdict increase and in the event that there is a plaintiff's verdict, there is a greater likelihood that the verdict will be reasonable and that there will be no attorneys' fees or punitive damages awarded. Moreover, if the defendant is also able to show that the plaintiff is being unreasonable, then the chances for a defense verdict increase significantly.

The opposite may also be true, however. Where the defendant is shown to have acted unreasonably, especially in the manner in which it responded to the plaintiff's stormwater complaints, then there is greater chance for a plaintiff's verdict. By the same token, the more unreasonable the defendant's action are shown to be, the greater the likelihood that a jury will award attorneys' fees and punitive damages.

Ultimately, each stormwater runoff case must be judged by its particular own facts. Hopefully, this article has provided a good starting point for the reader to evaluate and defend his or her next stormwater runoff lawsuit.

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Georgia Labor and Employment Law

By W. Melvin Haas III, William M. Clifton III,
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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 Supreme Court and Georgia Court of Appeals from June 1, 2007 to May 31, 2008. This Article also highlights specific revisions to the Official Code of Georgia Annotated ("O.C.G.A.").[198]

II. Recent Legislation

A. Concealed Weapons on Company Property

During the survey period, Georgia Governor Sonny Perdue signed into law House Bill 89,[199] which permits employees who lawfully possess concealed weapons to store such weapons in locked vehicles while on company property.[200] Subject to several exceptions, the law prohibits employers from enforcing policies which forbid employees from storing concealed weapons in their vehicles on company property.[201] Additionally, the law limits the ability of employers to search privately owned vehicles for concealed weapons.[202]

Despite increased safety concerns, employers do not assume greater obligations under the law.[203] In fact, the law states, "[N]o employer … shall be liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a

The authors would like to thank Lauren Harris for her outstanding work in helping with the research and writing of this Article.

198 Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See generally* THE DEVELOPING LABOR LAW (Patrick Hardin et al. eds., 4th ed. 2001); BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (Paul W. Cane, Jr. et al. eds., 3d ed. & Supps. 1996-2002); Daily Lab. Rep. (BNA). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

199 H.B. 89, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

200 Business Security and Employee Privacy Act, 2008 Ga. Laws 802, § 7.

201 *Id.* § 7(b).

202 *Id.* § 7(a).

203 *See id.* §§ 7(e), (h).

firearm," unless the employer commits a criminal act with a concealed weapon while on company property or knows that another will do so.[204]

Even though the law appears broad, it has a number of exceptions that enable employers to prohibit employees and invited guests from storing concealed weapons in locked vehicles.[205] Under what is perhaps the largest exception, employers may prohibit concealed weapons in vehicles parked on properties that they legally control, as through ownership or lease.[206] Even when employers do not legally control the property used for parking, other exceptions enable them to prohibit individuals from storing concealed weapons in their vehicles.[207] For example, employers may prohibit employees who have a completed or pending disciplinary action from bringing concealed weapons onto company property.[208]

In addition to the above exceptions, the law also has numerous exceptions that enable employers to search locked vehicles for concealed weapons.[209] For example, employers may search vehicles that they own or lease.[210] Also, employers may search privately owned vehicles when a reasonable person would believe that it is "necessary to prevent an immediate threat to human health, life or safety."[211] Moreover, employers may search vehicles parked in areas not open to the general public, such as by gates or security officers, as long as all vehicles in the area are searched uniformly.[212]

III. Wrongful Termination

A. Employment-at-Will

1. Overview

Although the employment-at-will doctrine is gradually eroding in other jurisdictions it is alive and well in Georgia.[213] O.C.G.A. § 34-7-1[214] provides that

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[204] *Id.* § 7(e).
[205] See *id.* §§ 7(d), (k).
[206] *Id.* § 7(k).
[207] See *id.* § 7(d).
[208] *Id.* § 7(d)(5).
[209] See *id.* §§ 7(c)-(d), (k).
[210] *Id.* § 7(c)(2).
[211] *Id.* § 7(c)(3).
[212] *Id.* § 7(d)(1).
[213] *See* Mark A. Fahleson, *The Public Policy Exception to Employment At Will–When Should Courts Defer to the Legislature?*, 72 NEB. L. REV. 956 (1993); Melanie Robin Galberry, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000); Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Kimberly Anne Huffman, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will*

employment contracts in Georgia are at-will, unless the parties implicitly or explicitly contract otherwise.[215] Generally, this means that in the absence of a specified length of employment, the relationship is employment-at-will.[216] Contracts specifying "permanent employment, employment for life, or employment until retirement" are indefinite and thus are employment-at-will contracts.[217]

Georgia's employment-at-will doctrine has two notable characteristics. First, the employee or employer may terminate the employment relationship at any time, with or without cause.[218] Second, and a corollary of the first characteristic, the employee may not successfully maintain a wrongful termination claim upon the termination of an employment-at-will contract.[219]

During the survey period, the appellate court's decision in *Fink v. Dodd*[220] demonstrated that an employee-at-will may not maintain a wrongful termination claim.[221] In *Fink*, the defendant terminated the plaintiff after employing him for eleven months.[222] The employee subsequently brought suit against the employer for wrongful termination.[223] When the defendant failed to timely answer the complaint, the trial court entered a default judgment against him.[224] The defendant appealed, claiming that the plaintiff failed to state a claim.[225] Specifically, the defendant asserted that the facts in the complaint failed to establish a claim of wrongful termination.[226]

The court of appeals agreed with the defendant, stating, "Nowhere in the complaint does [the plaintiff] allege facts showing an enforceable contract of employment or assert facts from which such a contract reasonably may be inferred."[227] Due to the absence of an enforceable employment contract, the court deemed the plaintiff an at-will employee.[228] Because an at-will employee may be terminated at any time, he or she does not have a reasonable expectation of

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Doctrine, 139 U. PA. L. REV. 197 (1990).
[214] O.C.G.A. § 34-7-1 (2004 & Supp. 2007).
[215] *Id.*
[216] *See generally* JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 1-6 (4th ed. 2008).
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] 286 Ga. App. 363, 649 S.E.2d 359 (2007).
[221] *Id.* at 366, 649 S.E.2d at 362.
[222] *Id.*
[223] *Id.* at 364, 649 S.E.2d at 361.
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.* at 366, 649 S.E.2d at 362.
[228] *Id.*

continued employment.[229] Therefore, the court held that the plaintiff failed to successfully state a claim of wrongful termination and reversed the trial court's judgment.[230]

2. Exceptions to Employment-at-Will

The statute creating the employment-at-will doctrine states the most significant exception to the doctrine—unless the parties implicitly or explicitly contract otherwise.[231]

In *Powell v. Wheeler County*,[232] the court of appeals reviewed a case where the employee claimed he was not an at-will employee.[233] In *Powell*, the plaintiff entered into a four-year employment agreement with the board of tax assessors.[234] According to O.C.G.A. § 48-5-298(a),[235] the employment agreement was forwarded to the county commission for approval and the commissioners voted against approval.[236] The plaintiff continued to work as a tax appraiser and be paid by the county until he was terminated two years later.[237] Following his termination, the plaintiff brought suit against the county and the board of tax assessors for breach of contract.[238] The trial court granted the defendants' motion for summary judgment.[239] The plaintiff appealed, claiming that the payments from the county ratified the employment agreement.[240]

The court of appeals emphasized that a county commission's "power to approve the whole includes the power to approve any part thereof less than the whole."[241] Because the county commission voted against approving the employment contract, and therefore failed to ratify it, the court held that the payments from the county only demonstrated that the plaintiff was an at-will employee.[242] Accordingly, the court affirmed the trial court's grant of summary judgment.[243]

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[229] *Id.*
[230] *Id.* at 368, 649 S.E.2d at 363.
[231] O.C.G.A. § 34-7-1.
[232] 290 Ga. App. 508, 659 S.E.2d 893 (2008).
[233] *Id.* at 509, 659 S.E.2d at 894.
[234] *Id.*
[235] O.C.G.A. § 48-5-298(a) (1999 & Supp. 2007) (allowing for the county board of tax assessors to employ individuals when the county governing authority approves of such employment).
[236] *Powell*, 290 Ga. App. at 509, 659 S.E.2d at 894.
[237] *Id.* at 509, 659 S.E.2d at 894.
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.* at 509-510, 659 S.E.2d at 894 (quoting *Bd. of Pub. Educ. v. Zimmerman*, 231 Ga. 562, 568, 203 S.E.2d 178 (1974)).
[242] *Id.* at 510, 659 S.E.2d at 894.
[243] *Id.* at 510, 659 S.E.2d at 895.

In *Avion Sys., Inc. v. Thompson*,[244] the court of appeals reviewed a case where the employer claimed the employee was not an at-will employee, but was bound by the terms of an employment agreement.[245] In *Avion Sys., Inc.*, the employment agreement stated that the defendant was an employee at-will, but she would provide services for at least twelve months.[246] Before the expiration of the specified period, the employee terminated her employment.[247] The employer subsequently brought suit against the former employee for breach of contract.[248] The trial court dismissed the action for failure to state a claim, and the former employer appealed.[249]

The court of appeals agreed with the employer, stating, "Where, as here, the parties have explicitly set forth restrictions on the time and manner in which an employee may terminate employment, these specific terms must prevail over any conflicting general language of employment at-will."[250] Because the court found the unilateral restriction to be reasonable, the court held that the employee could terminate her employment only after the expiration of the specified period.[251] Accordingly, the court reversed the trial court's dismissal of the claim.[252]

B. Breach of Employment Contract (other than at-will contracts)

1. Formulation of Employment Contracts.

To form a valid employment agreement, basic rules of contract law apply. Therefore, there must be an offer, acceptance, and valuable consideration.[253] Additionally, an employment contract must contain a designation of the employee's place of employment, the period of employment (if other than at-will), the nature of services to be rendered, and the amount or type of consideration.[254] Such terms must be sufficiently definite to be enforceable, and this is a question of law for the judge.[255]

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[244] 286 Ga. App. 847, 650 S.E.2d 349 (2007).
[245] *Id.* at 848, 650 S.E.2d at 351.
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.* at 848-849, 650 S.E.2d at 351.
[250] *Id.* at 850, 650 S.E.2d at 352.
[251] *Id.*
[252] *Id.* at 851, 650 S.E.2d at 353.
[253] *See generally* WIMBERLY, *supra* note 19, at § 2:1.
[254] WIMBERLY, *supra* note 19, at § 2:1.
[255] *Id.*

The party relying on the employment agreement has the burden of establishing its existence and terms by a preponderance of the evidence.[256] In *Shilling v. Cornerstone Med. Assocs., LLC*,[257] the court considered whether this burden had been met. In *Shilling*, the plaintiff brought suit against the defendant to enforce an employment agreement.[258] The defendant denied the existence of any agreement and sought a copy of the alleged contract.[259] When the plaintiff finally produced an employment agreement after being served with a motion to compel, the defendant claimed that his signature was forged and pointed out that the middle initial in the typed name was incorrect.[260] Despite this, the trial court granted the plaintiff's motion for summary judgment.[261] The defendant appealed, claiming that there were issues of material fact.[262]

The trial court never addressed whether the alleged employment agreement was valid even though the defendant repeatedly denied its existence.[263] The court of appeals, emphasizing this dispute, held that the plaintiff failed to meet his burden of establishing the existence and terms of the employment agreement by a preponderance of the evidence.[264] Accordingly, the court reversed the trial court's grant of summary judgment.[265]

2. Dismissals "With Cause"

Under an employment agreement that requires "cause" for dismissal, an employer who terminates an employee without cause can be liable for breach of contract.[266] In *Am. Water Serv. USA v. McRae*,[267] the court of appeals considered whether an employee could be terminated by a third party even though his employer had overlooked his medical restrictions.[268] In *Am. Water Serv. USA*, the plaintiff was a third party beneficiary to a contract that his employer, the county, entered into with the defendant.[269] In the contract, the defendant agreed to offer employment to the plaintiff for at least eighteen months, provided the plaintiff was

[256] *Shilling v. Cornerstone Med. Assocs.*, LLC, 290 Ga. App. 169, 170, 659 S.E.2d 416, 418 (2008).
[257] 290 Ga. App. 169, 659 S.E.2d 416.
[258] *Id.* at 169, 659 S.E.2d at 417.
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *Id.* at 170, 659 S.E.2d at 418.
[264] *Id.*
[265] *Id.* at 171, 659 S.E.2d at 418.
[266] *See Savannah Coll. Of Art & Design, Inc. v. Nulph*, 265 Ga. 662, 460 S.E.2d 792 (1995).
[267] 286 Ga. App. 762, 650 S.E.2d 304 (2007).
[268] *Id.* at 762-763, 650 S.E.2d at 305.
[269] *Id.* at 762, 650 S.E.2d at 305.

"ready, willing and able to work."[270] The plaintiff could be terminated during the specified period only for cause consistent with the county's policy.[271]

While the plaintiff was working for the defendant, the defendant learned of medical restrictions placed on the plaintiff due to a prior injury.[272] These restrictions, along with a subsequent injury, prevented the plaintiff from doing certain duties necessary to his job.[273] The plaintiff would, at times, have an uncertified person complete these duties.[274] When the defendant learned of this, he terminated the plaintiff.[275] The plaintiff brought suit against the defendant, claiming breach of contract.[276] The trial court granted the plaintiff's motion for summary judgment, and the defendant appealed.[277]

The court of appeals agreed with the plaintiff, emphasizing that the county's policy included "[i]nability or unfitness to perform assigned duties" as grounds for termination.[278] Because the plaintiff was unable to perform certain duties necessary to the job, the court held that the defendant was able to terminate him, notwithstanding the fact that his employer had overlooked the restrictions.[279] Accordingly, the court reversed the trial court's grant of summary judgment.[280]

IV. Negligent Hiring or Retention

A. Overview

Under O.C.G.A. § 34-7-20, "[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency…."[281] For a plaintiff to sustain a cause of action for negligent hiring and retention, he or she must show that the employer employed an individual that "the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the

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[270] *Id.*
[271] *Id.*
[272] *Id.* at 762-763, 650 S.E.2d at 305.
[273] *Id.* at 763, 650 S.E.2d at 305.
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.* at 763, 650 S.E.2d at 305-306.
[278] *Id.* at 764, 650 S.E.2d at 306.
[279] *Id.*
[280] *Id.*
[281] O.C.G.A. § 34-7-20 (2004 & Supp. 2007).

plaintiff."[282] Generally, the determination of whether an employer used ordinary care in hiring and retaining an employee is an issue for the jury.[283]

In *Dowdell v. Krystal Co.*,[284] the court of appeals held that an employee must have dangerous tendencies in order for the employer to be liable for negligent hiring or retention.[285] In *Dowdell*, the employee had worked for the defendant for three months as a cashier.[286] On the night of the incident, the defendant's restaurant was crowded, and the employee had trouble quickly filling orders.[287] When the plaintiff asked the employee about taking his order, the employee insulted him.[288] After the plaintiff insulted the employee in return, the employee struck him, and a fight ensued.[289] The plaintiff subsequently filed suit against the defendant, alleging that he negligently hired and retained the employee.[290] The trial court granted the defendant's motion for summary judgment.[291] The plaintiff appealed, claiming that the defendant should have known that the employee posed a risk of harm to others.[292]

The court of appeals, agreeing with the defendant, emphasized that there was no evidence showing that the employee verbally argued with or physically harmed any customer other than the plaintiff.[293] Because there was no prior incident to alert the defendant of the employee's potential to harm customers, the court held that the defendant was not liable for negligent hiring or retention.[294] Accordingly, the court affirmed the trial court's grant of summary judgment.[295]

B. Award of Damages

In *Aldworth Co., Inc. v. England*,[296] the court of appeals considered the appropriate amount of damages to be awarded to an individual assaulted by an

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[282] *Dowdell v. Krystal Co.*, 662 S.E.2d 150, 154 (Ga. Ct. App. 2008) (quoting *Munroe v. Universal Health Svcs., Inc.*, 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004)).
[283] *Sparlin Chiropractic Clinic v. TOPS Pers. Servs.*, 193 Ga. App. 181, 181, 387 S.E.2d 411, 412 (1989).
[284] *Dowdell*, 662 S.E.2d 150 (Ga. Ct. App. 2008).
[285] *Id.* at 154.
[286] *Id.* at 152.
[287] *Id.*
[288] *Id.*
[289] *Id.*
[290] *Id.* at 152-153.
[291] *Id.* at 153.
[292] *Id.* at 154.
[293] *Id.*
[294] *Id.* at 154-155.
[295] *Id.* at 155.
[296] 286 Ga. App. 1, 648 S.E.2d 198 (2007).

employee that was negligently hired.[297] In *Aldworth Co., Inc.*, the defendant hired the employee to drive tractor-trailers without properly investigating his record.[298] While driving for the defendant, the employee became enraged and followed the plaintiff's vehicle into a parking lot, where he assaulted her.[299] The plaintiff subsequently brought suit against the defendant.[300] At the trial level, the jury awarded the plaintiff $750,000 in compensatory damages and $1,000,000 in punitive damages.[301] The defendant made motions for a new trial and for judgment notwithstanding the verdict.[302] When these motions were denied, the defendant appealed.[303] The appellate court affirmed the trial court's decision to deny the motions.[304] The Supreme Court of Georgia granted certiorari and remanded the case with the instruction that the appellate court examine the damages award.[305]

The court of appeals examined the damages award and held that there was sufficient evidence to support awarding compensatory and limited punitive damages to the plaintiff.[306] The court held that compensatory damages could be awarded, because the evidence established that the employee was acting within the scope of his employment at some point between the time he became enraged and when he assaulted the plaintiff.[307] The court held that punitive damages could be awarded because the evidence established that the defendant showed conscious indifference to the consequences of hiring and retaining the employee.[308] However, punitive damages had to be limited by the $250,000 ceiling set by O.C.G.A. § 51-12-5.1(g)[309] because the evidence was insufficient to establish that the defendant "acted, or failed to act, with the specific intent to cause harm."[310]

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[297] *Id.* at 1-2, 648 S.E.2d at 199-200.
[298] *Id.* at 4, 648 S.E.2d at 201.
[299] *Id.* at 1, 648 S.E.2d at 199.
[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.* at 2, 648 S.E.2d at 200.
[305] *Id.*
[306] *Id.*
[307] *Id.* at 3, 648 S.E.2d at 201.
[308] 286 Ga. App. at 3-4, 648 S.E.2d at 201.
[309] O.C.G.A. § 51-12-5.1(g) (2000 & Supp. 2007).
[310] *Aldworth Co., Inc.*, 286 Ga. App. at 4, 648 S.E.2d at 201 (quoting O.C.G.A. § 51-12-5.1(f) (2000 & Supp. 2007).

V. Respondeat Superior

A. Overview

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the negligence or intentional torts of employees committed within the scope of employment.[311] The following two elements must be established in order to hold an employer vicariously liable for the torts of his or her employee: "[F]irst, the [conduct] must be in furtherance of the [employer's] business; and, second, [the employee] must be acting within the scope of … [the employer's] business."[312]

B. Independent Contractor or Employee

Vicarious liability under respondeat superior generally does not apply to the acts of independent contractors.[313] Therefore, the initial determination is whether an individual is an independent contractor or employee.

For example, in *Touchton v. Bramble,*[314] the court of appeals considered whether an off-duty law enforcement officer working in an amusement park was an independent contractor or an employee.[315] In *Touchton*, a park patron mistakenly identified the plaintiff as the man indecently exposing himself in the defendant's amusement park.[316] Because of this identification, the off-duty law enforcement officer working at the park arrested the plaintiff.[317] When the plaintiff was found not guilty, he brought suit against the defendant under the doctrine of respondeat superior.[318] The trial court granted the defendant's motion for summary judgment.[319] The plaintiff appealed, claiming the defendant employed the law enforcement officer.[320]

The court of appeals stated that an employee-employer relationship exists when "the employer controls the time, manner, and method of executing the work."[321] After considering the amount of direction the defendant gave the law

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[311] CHARLES R. ADAMS, III, GEORGIA LAW OF TORTS § 7-2 (2d ed. 2002).
[312] *Id.*
[313] *Id.*
[314] 284 Ga. App. 164, 643 S.E.2d 541 (2007).
[315] *Id.* at 165-166, 643 S.E.2d at 543-544.
[316] *Id.* at 164, 643 S.E.2d at 543.
[317] *Id.*
[318] *Id.* at 165, 643 S.E.2d at 543.
[319] *Id.*
[320] *Id.*
[321] *Id.*

enforcement officer, the court held that the law enforcement officer was an independent contractor, because the defendant did not tell him how to handle security matters.[322] Accordingly, the court of appeals affirmed the trial court's grant of summary judgment.[323]

Similarly, in *Am. Ass'n of Cab Cos., Inc. v. Parham*,[324] the court of appeals considered whether a taxicab driver was an independent contractor or an employee.[325] In *Am. Ass'n Of Cab Cos., Inc.*, the driver leased a taxicab insured by the defendants and signed papers stating he would drive the vehicle on their behalf.[326] The driver was later involved in an automobile accident that injured the plaintiff.[327] The plaintiff subsequently brought suit against the defendants under the theory of respondeat superior.[328] At the trial level, the jury returned a verdict in favor of the plaintiff.[329] The trial judge denied the defendants' motion for judgment notwithstanding the evidence.[330] The defendants appealed, claiming that the driver was an independent contractor.[331]

The court of appeals considered the amount of control the defendants exercised over the driver.[332] The court emphasized that the vehicle was owned by the defendants, cotitled in their names, and bore their insignia.[333] Also, the driver testified that he would answer calls from the defendants and pick up passengers whenever they called him.[334] Based on this evidence, the court held that the driver was an employee of the defendants, because they exerted sufficient control over his operation of the vehicle.[335] Accordingly, the court of appeals affirmed the trial court's judgment.[336]

B. Private Enterprise

An employee on a private enterprise is not acting in furtherance of the employer's business.[337] Therefore, an employer is not vicariously liable for the

[322] *Id.* at 166, 643 S.E.2d at 544.
[323] *Id.*
[324] 661 S.E.2d 161 (Ga. Ct. App. 2008).
[325] *Id.* at 164.
[326] *Id.*
[327] *Id.* at 163.
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Id.* at 164.
[333] *Id.*
[334] *Id.* at 165.
[335] *Id.* at 164.
[336] *Id.* at 168.
[337] *Dowdell v. Krystal Co.*, 662 S.E.2d 150, 153 (Ga. Ct. App. 2008).

actions of an employee on a private enterprise.[338] In *Dowdell v. Krystal Co.*,[339] the court of appeals considered whether an employee who fought with a customer was on a private enterprise.[340] In *Dowdell*, discussed above, the employee and the plaintiff exchanged insults that lead to a physical altercation.[341] The plaintiff subsequently filed suit against the defendant, alleging that the defendant was liable under the theory of respondeat superior.[342] After the trial court granted the defendant's motion for summary judgment, the plaintiff appealed, claiming that the employee was acting within his employment when the fight occurred.[343]

The court of appeals concluded that the employee abandoned his employment and engaged in the fight for personal reasons, because the assault was disconnected from his cashier duties.[344] This determination was supported by the fact that the manager on duty—and not the employee—was responsible for handling complaining or hostile customers.[345] Consequently, the court held that the defendant was not liable under the theory of respondeat superior.[346] Accordingly, the court affirmed the trial court's grant of summary judgment.[347]

C. Commuting to Work

Generally, an employee is not acting within the scope of employment when commuting to work.[348] Therefore, an employer is generally not vicariously liable for the actions of an employee traveling to or from work.[349] However, in *Hunter v. Modern Cont'l Constr. Co., Inc.*,[350] the court of appeals considered the exceptions to this general rule.[351] In *Hunter*, the defendant's employee was involved in an automobile accident while driving to work that injured the plaintiff.[352] Another employee of the defendant called the employee's cell phone approximately one minute before the accident occurred.[353] The employee involved in the accident claimed he knew the call regarded business, even though

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[338] *Id.*
[339] 662 S.E.2d 150.
[340] *Id.* at 153.
[341] *Id.* at 152.
[342] *Id.* at 152-153.
[343] *Id.* at 153.
[344] *Id.*
[345] *Id.*
[346] *Id.*
[347] *Id.* at 155.
[348] *Hunter v. Modern Cont'l Constr. Co., Inc.*, 287 Ga. App. 689, 690-691, 652 S.E.2d 583, 584 (2007).
[349] *Id.* at 691, 652 S.E.2d at 584.
[350] 287 Ga. App. 689, 652 S.E.2d 583.
[351] *Id.* at 691, 652 S.E.2d at 584.
[352] *Id.* at 690, 652 S.E.2d at 584.
[353] *Id.*

he did not answer it.[354] Following the accident, the plaintiff brought suit against the defendant under the theory of respondeat superior.[355] The trial court granted the defendant's motion for summary judgment.[356] The plaintiff appealed, claiming that there were triable issues of material fact.[357]

The court of appeals stated that an employer is vicariously liable for an employee's actions while commuting to work if (1) the employee is on a special mission for the employer, or (2) there are special circumstances.[358] Here, the employee was not on a special mission for the defendant.[359] Therefore, the defendant would be liable under the theory of respondeat superior only if there were special circumstances surrounding the accident.[360] Because the details concerning the call were in question, the court held that there were triable issues of material fact.[361] Specifically, the court had to determine whether the employee was conducting business over his cell phone or was distracted by an incoming work-related phone call when the accident occurred.[362] Accordingly, the court of appeals reversed the trial court's grant of summary judgment.[363]

VI. Restrictive Covenants

A. Noncompete Agreements

1. Overview

Agreements that place general restraints on trade and have the effect of lessening competition and encouraging monopolies are void as against public policy.[364] Generally, noncompete agreements are disfavored in contractual relations, because they place restrictions on trade, thereby thwarting competition.[365] Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.[366] In general, a noncompete agreement is valid as a partial restraint on trade when the agreement is in writing and is reasonable in regards to duration, territorial coverage, and the scope of activities prohibited.[367]

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354 *Id.*
355 *Id.*
356 *Id.*
357 *Id.*
358 *Id.* at 691, 652 S.E.2d at 584.
359 *Id.*
360 *See id.*
361 *Id.*
362 *Id.*
363 *Id.*
364 *See* O.C.G.A. § 13-8-2 (1982 & Supp. 2007).
365 *See* WIMBERLY, *supra* note 19, § 2-11.
366 *Id.*
367 *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).

Whether the terms of the noncompete agreement are reasonable is a question of law for the court to decide.[368] However, depending on the type of contract, the court will apply different levels of scrutiny to determine the reasonableness of the contract. If the noncompete agreement is ancillary to an employment agreement, a stricter standard is applied, and if any provision of the agreement is considered overbroad or unreasonable, the entire agreement is invalid.[369] But, if the agreement is pursuant to a contract for the sale of a business, a less stringent standard allows for broader provisions, and even if one provision is deemed overbroad or unreasonable, the court may "blue pencil" to rewrite or sever the overly broad provision.[370]

2. Reasonableness of Prohibited Activities

Three cases during the survey period considered whether the prohibited activities were reasonable. First, in *Avion Sys., Inc. v. Thompson,*[371] discussed above, the court of appeals considered whether a restriction on all activities for pecuniary gain was reasonable.[372] In *Avion Sys., Inc.*, the employment agreement contained a noncompete provision that prohibited the defendant from

> deal[ing] directly, indirectly, or by any other means, either individually or in association with another individual or organization for any pecuniary gain with Corporation's customer or their client to whom he is assigned at the particular job site for that particular division or subdivision with whom Employee had contact.[373]

After the employee terminated her employment, she continued to work at the site assigned to her by her former employer.[374] When the employer learned of this, it brought suit against the former employee for breach of contract.[375] The trial court dismissed the action for failure to state a claim, and the former employer appealed.[376]

The noncompete agreement prohibited the former employee from dealing with the employer's clients for pecuniary gain and did not specify what activities

[368] WIMBERLY, *supra* note 19, § 2-11.
[369] *Id.*
[370] *Id.*
[371] 286 Ga. App. 847, 650 S.E.2d 349 (2007).
[372] *Id.* at 851, 650 S.E.2d at 352-353.
[373] *Id.* at 848, 650 S.E.2d at 351.
[374] *Id.*
[375] *Id.*
[376] *Id.* at 848-849, 650 S.E.2d at 351.

were restricted.[377] Thus, the restriction prohibited the employee from dealing with the employer's clients even when the employee's activities were unrelated to the employer's business.[378] Reasoning that such a broad restriction was unnecessary to protect the employer's interests, the court of appeals held that the noncompete agreement was overbroad and thus unenforceable.[379] Accordingly, the court affirmed the trial court's dismissal of the claim.[380]

Second, in *Beacon Sec. Tech., Inc. v. Beasley*,[381] the court of appeals considered whether a wide range of prohibited activities were reasonable.[382] In *Beacon Sec. Tech., Inc.*, the employee signed a noncompete agreement that stated he would not

> directly or indirectly, in Spalding, Henry, Butts, Lamar, Pike, Fayette, and Clayton Counties, Georgia, enter into or engage generally in direct competition with the Employer in the business of selling, leasing, or servicing burglar & fire alarms, Closed Circuit TV, Intercoms, Telephone & TV Hook ups, Central Vacs, and Medical Alert, or other Security systems of a type which would be in direct competition with those marketed and serviced by the Employer at the time of [his] termination for two years following his separation.[383]

When the employee terminated his employment, he began competing with his former employer.[384] After learning of this, the employer brought suit to enforce the noncompete agreement.[385] The trial court entered judgment in favor of the employee, and the employer appealed.[386]

The court of appeals stated, "[P]rohibitions on competition with respect to customers or potential customers beyond those with whom the employee dealt during his employment will not always be considered unreasonable ### A broad territorial limitation may be reasonable if the scope of prohibited behavior is sufficiently narrow."[387] Here, the court held that the noncompete agreement was

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[377] *Id.* at 851, 650 S.E.2d at 353.
[378] *Id.*
[379] *Id.*
[380] *Id.*
[381] 286 Ga. App. 11, 648 S.E.2d 440 (2007).
[382] *Id.* at 11-12, 648 S.E.2d at 441.
[383] *Id.*
[384] *Id.* at 12, 648 S.E.2d at 441.
[385] *Id.* at 11, 648 S.E.2d at 440-441.
[386] *Id.* at 11, 648 S.E.2d at 441.
[387] *Id.* at 12-13, 648 S.E.2d at 442.

unenforceable because it prohibited the former employee from doing a large number of activities with anyone in eight counties, regardless of whether he performed each prohibited activity in each county.[388] The court found that such a restriction unreasonably limited the former employee's ability to earn a living.[389] Accordingly, the court of appeals affirmed the trial court's judgment.[390]

Third, in *Stultz v. Safety & Compliance Mgmt., Inc.*,[391] the court of appeals considered whether the use of the word "includes" made the prohibited activities unreasonable.[392] In *Stultz*, the employee signed a noncompete agreement where she agreed to "not compete with [the employer] in any area of business conducted by [the employer]. This *includes* solicitation of existing accounts … for a two year period and a fifty (50) mile radius."[393] After the employee terminated her employment, she began offering similar services.[394] The former employer brought suit for breach of contract after he became aware of the former employee's competitive practices.[395] The trial court granted the employer's motion for summary judgment.[396] The former employee appealed, claiming the noncompete agreement was unenforceable.[397]

The court of appeals found that the noncompete agreement prohibited the former employee from competing with the employer, regardless of the kind of activity being done, because the use of "includes" made the listed activities illustrative and not exclusive.[398] Based on this, the court held that the noncompete agreement was overbroad and thus unenforceable.[399] Accordingly, the court of appeals reversed the trial court's grant of summary judgment.[400]

3. Need for Consideration

Like all agreements, a noncompete agreement must be supported by adequate consideration in order to be enforceable.[401] In *Glisson v. Global Sec.*

[388] *Id.* at 13, 648 S.E.2d at 442.
[389] *Id.*
[390] *Id.*
[391] 285 Ga. App. 799, 648 S.E.2d 129 (2007).
[392] *Id.* at 802, 648 S.E.2d at 132.
[393] *Id.* at 800-801, 648 S.E.2d at 131 (emphasis added).
[394] *Id.* at 801, 648 S.E.2d at 131.
[395] *Id.*
[396] *Id.*
[397] *Id.*
[398] *Id.* at 802, 648 S.E.2d at 132.
[399] *Id.* at 803, 648 S.E.2d at 133.
[400] *Id.* at 804, 648 S.E.2d at 133.
[401] *Glisson v. Global Sec. Servs.*, LLC, 287 Ga. App. 640, 641, 653 S.E.2d 85, 86 (2007).

Servs., LLC,[402] the court of appeals considered whether a noncompete agreement signed during the course of a specified term of employment had adequate consideration.[403] In *Glisson*, the employee signed a noncompete agreement while in the course of his two-year employment contract.[404] When the employer learned the employee planned to start a competing business, he terminated the employee and brought suit to enforce the noncompete agreement.[405] After the trial court entered judgment in favor of the employer, the former employee appealed, claiming that the noncompete agreement lacked adequate consideration.[406]

The court of appeals held that the noncompete agreement was unenforceable, because continued employment is not sufficient consideration when the employer has a preexisting contractual obligation to employ the employee.[407] Accordingly, the court of appeals reversed the trial court's grant of summary judgment.[408]

B. Nonsolicitation Agreements

In *Trujillo v. Great S. Equip. Sales, LLC*,[409] the court of appeals found a nonsolicitation provision to be unenforceable, because it did not contain a territorial restriction, and refused to enforce the noncompete provision as a result.[410] In *Trujillo*, the employee signed an employment agreement containing noncompete and nonsolicitation provisions.[411] The nonsolicitation provision prohibited the employee from soliciting "Customers of Employer with whom Employee had contact (whether personally, telephonically, or through written or electronic correspondence) during the three (3) year period immediately preceding the Separation Date or about whom Employee had confidential or proprietary information because of his/her position with Employer" for three years following his separation.[412]

While working for the employer, the employee received on-the-job training, was given customer lists, and was introduced to customers.[413] After terminating

[402] 287 Ga. App. 640, 653 S.E.2d 85.
[403] *Id.* at 641, 653 S.E.2d at 86.
[404] *Id.* at 640, 653 S.E.2d at 86.
[405] *Id.* at 640-641, 653 S.E.2d at 86.
[406] *Id.* at 641, 653 S.E.2d at 86.
[407] *Id.* at 642, 653 S.E.2d at 87.
[408] *Id.*
[409] 289 Ga. App. 474, 657 S.E.2d 581 (2008).
[410] *Id.* at 478, 657 S.E.2d at 584.
[411] *Id.* at 475, 657 S.E.2d at 582.
[412] *Id.* at 476-477, 657 S.E.2d at 583-584.
[413] *Id.* at 475, 657 S.E.2d at 582.

his employment, the employee began competing with the employer and soliciting his customers.[414] The employer brought suit against the former employee for breach of contract when he learned of this.[415] After the trial court entered judgment in favor of the employer, the former employee appealed, claiming that the nonsolicitation provision was unenforceable.[416]

The court of appeals agreed with the former employee, stating, "Georgia law is clear that unless the nonsolicit covenant pertains only to those clients with whom the employee had a business relationship during the term of the agreement, the nonsolicit covenant must contain a territorial restriction."[417] Here, the court found that the nonsolicitation provision prohibited the former employee from contacting any of the employer's customers, regardless of whether the former employee had contact with them while employed, because the customer lists given to the employee contained confidential information.[418] Because the nonsolicitation provision did not contain a territorial restriction, the court held that it was unenforceable.[419] The court further held that the noncompete provision was unenforceable, because Georgia courts do not use the blue pencil doctrine when applying the stricter standard for noncompete agreements ancillary to employment agreements.[420] Accordingly, the court of appeals reversed the trial court's judgment.[421]

In another case during the survey period, *Atl. Ins. Brokers, LLC v. Slade Hancock Agency, Inc.*,[422] the court of appeals found that a former employee did not violate a nonsolicitation agreement, because he did not act "on behalf of" the former employer while negotiating.[423] In *Atl. Ins. Brokers, LLC*, the plaintiff sold his business to the defendant, and the defendant hired the plaintiff in turn.[424] The plaintiff later signed a consulting agreement that contained a nonsolicitation provision where he agreed to not solicit

> any insureds who transacted business with [the defendant] and with whom [the plaintiff] dealt on behalf of [the defendant] and had

[414] *Id.*
[415] *Id.* at 475, 657 S.E.2d at 582-583.
[416] *Id.* at 475-476, 657 S.E.2d at 583.
[417] *Id.* at 477, 657 S.E.2d at 584 (quoting *Advance Tech. Consultants v. RoadTrac, LLC*, 250 Ga. App. 317, 321, 551 S.E.2d 735, 738 (2001)).
[418] *Id.* at 478, 657 S.E.2d at 584.
[419] *Id.*
[420] *Id.* at 478, 657 S.E.2d at 584-585.
[421] *Id.* at 478-479, 657 S.E.2d at 585.
[422] 287 Ga. App. 677, 652 S.E.2d 577 (2007).
[423] *Id.* at 680, 652 S.E.2d at 580.
[424] *Id.* at 677, 652 S.E.2d at 578.

> material contact, either during the two (2) year period immediately preceding the date [the plaintiff] sold his business to [the defendant], or during his subsequent employment by [the defendant], or during the term of this Consulting Agreement.

for two years following his separation.[425]

When the plaintiff terminated his employment, he began working for another employer.[426] However, the defendant and the plaintiff still communicated.[427] In fact, the defendant located an insurer for a company after being asked by the plaintiff.[428] When the policy was near expiration, the plaintiff negotiated for the company without the defendant's help.[429] After learning of this, the defendant informed the plaintiff that he considered the company to be covered by the nonsolicitation provision.[430] The plaintiff then brought a declaratory judgment action against the defendant.[431] The trial court entered judgment in favor of the plaintiff, and the defendant appealed.[432]

The court of appeals found that the plaintiff did not act "on behalf of" the defendant when he separately negotiated for the company, because the plaintiff approached the defendant for assistance with the company when he was employed by another.[433] Because of this, the court held that the plaintiff did not violate the nonsolicitation covenant.[434] Therefore, the court of appeals affirmed the trial court's judgment.[435]

VIII. Conclusion

Although labor and employment issues derived from Georgia law often are not as complex as their federal counterparts, the issues arising under state law are becoming more challenging with each passing year. Adding to this challenge is the growing overlap between 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 any one law or legal proceeding can and does impact other relations between employer and employee.

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[425] *Id.* at 678, 652 S.E.2d at 578-579.
[426] *Id.* at 678, 652 S.E.2d at 579.
[427] *Id.*
[428] *Id.*
[429] *Id.*
[430] *Id.*
[431] *Id.*
[432] *Id.* at 679, 652 S.E.2d at 579.
[433] *Id.* at 680, 652 S.E.2d at 580.
[434] *Id.*
[435] *Id.*

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