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Winter 2011

Gales of November Come Not So Early:

Supreme Court Scuttles Court of Appeals Decisions in Adams & Floyd

By C. Jason Willcox
Moore Clarke Rodgers & Duvall

"The lake it is said never gives up her dead, when the skies of November turn gloomy...."

On November 30, 2010, the Supreme Court of Georgia issued opinions reversing the Georgia Court of Appeals decisions in *Adams v. State Farm Mutual Automobile Insurance Company* and *Floyd v. American International South Insurance Company*, regarding uninsured motorist (UM) insurance exposure. *State Farm Mutual Automobile Insurance Company v. Adams*, Case No. S09G1710 (Nov. 30, 2010). This article provides a historical analysis of these two matters, explains how we arrived at the wreck of The Edmund Fitzgerald, and provides insight on the Georgia Supreme Court decisions which brightened the December outlook for many Georgia insurance carriers (but did not shorten Gordon Lightfoot's song or raise a ship from the Great Lakes).

On April 4, 2009, the Georgia Court of Appeals pleased plaintiffs' attorneys statewide when it issued the far-reaching decision in *Adams v. State Farm Mutual Automobile Ins. Co.,* 298 Ga. App. 249 (2009). The opinion in *Adams* extended the reasoning of *Thurman v. State Farm Mutual Automobile Insurance Co.,* 278 Ga. 162 (2004), to hold that available liability insurance can be reduced by hospital liens which were issued pursuant to O.C.G.A. § 44-14-470.

Under O.C.G.A. § 33-7-11(b)(1)(D), the definition of an uninsured motor vehicle includes a vehicle as to which there is "liability insurance with available coverages which are less than the limits of" UM coverage. The rulings in *Adams*, *Floyd*, and *Thurman* centered on circumstances which can deplete liability coverage so as to reduce the "available" liability limits and thus create UM exposure. Before discussing the significant impact that the supreme court's *Adams* decision has had on UM insurance, a brief review of the *Thurman* opinion is necessary.

In *Thurman,* Plaintiff Gail Thurman was injured while working for the USPS as a postal carrier, when the vehicle she was operating was struck by Mamie Brown. Defendant Brown maintained a liability policy with per person limits of $100,000. Plaintiff Thurman filed a civil action against Defendant Brown seeking damages in excess of Defendant Brown's $100,000 policy limits. Plaintiff Thurman and her husband settled with Defendant Brown's liability carrier for $95,554.19, which rep-

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Inside This Issue

To Compete or Not to Compete?

By Catherine M. Bowman
The Bowman Law Office

It is every business owner's nightmare – a trusted employee is given access to customer contacts and relationships, confidential information, and the goodwill generated from the business – then that employee leaves the business' employ and uses those relationships and information to compete against his former employer's business. The law prior to November 2, 2010 recognized an interest in limiting such unfair competition, but the Georgia Constitution limited the courts from enforcing many non-compete clauses, and despite Georgia's reputation as an employer friendly state, the courts were quite hostile in enforcing such covenants. The required case-by-case analysis resulted in a history of case law that was often confusing and sometimes conflicting.

In April 2009, the legislature passed Georgia House Bill 173 (codified at O.C.G.A. § 13-8-50, et seq.), which will make sweeping changes to the law on restrictive employment covenants in an attempt to create statutory guidelines to govern the enforcement of such covenants. The new law

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GDLA Office

Jennifer M. Davis, Executive Director
P.O. Box 8558
Atlanta, GA 31106
Tel: 404.816.9455
E-mail: jdavis@gdla.org

President's Message

As you hopefully have noticed, GDLA's website and newsletter have progressed considerably in recent times as a result of the efforts of several members and officers of the Association.

These efforts are certainly appreciated and are a great benefit to all members.

If you haven't been to the website recently, I would encourage you to do so and feel free to offer suggestions for further content or form improvements.

We are in continual need of items for the brief bank and the tort reform database. You and your firms are actively involved in issues that should be added and providing your work product, as well as decisions, on important topics could be very beneficial to other members and the Association itself.

GDLA's Amicus Committee has been very active in recent weeks. Many of the tort reform issues are currently reaching the appellate courts and the Association has participated in a few of these cases. Amicus briefs filed this year are listed on page 6.

The Association is also working with sponsors to conduct educational seminars on relevant topics. GDLA recently held another successful Deposition Boot Camp for younger lawyers (see page 24). Of course, under the guidance of an excellent faculty, the annual Trial Academy in January is an excellent training course for the next generation of great litigators.

The more active the membership, the better the Association.

The more active the membership, the better the Association. I would encourage each of you to contribute all that you can toward improving the experience for the benefit of all.

Yours for the defense,

Edward M. Hughes
President

Member & Legal News

Member News

GDLA congratulates Judge-elect **Kelly Amanda Lee**, formerly of the Law Offices of Kelly Amanda Lee, on her election to the *Fulton Superior Court* bench.

Thomas M. Cole, a partner with *Whelchel Dunlap Jarrard & Walker* in Gainesville, has been inducted as a Fellow of the American College of Trial Lawyers. Cole, who has been practicing 32 years, is an alumnus of The University of Georgia School of Law. Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada. Membership in the College cannot exceed one percent of the total lawyer population of any state or province.

Christopher M. Ziegler completed 40 hours of civil mediation training and is registered with the Georgia Office of Dispute Resolution as a civil mediator, mediating civil cases throughout Georgia in his new venture, *Ziegler Mediation*. He continues his civil litigation practice at *Gray Rust St. Amand Moffett & Brieske* in Atlanta.

After 25 years serving transportation, insurance and premises liability clients, *Dennis Corry Porter & Smith* is pleased to announce the addition of **Assunta S. Fiorini** and **Barbara L Mulholland**.

Miller & Martin is pleased to announce **Curtis J. Martin II** has joined the firm as Of Counsel in its Atlanta office. Martin was previously a partner with Mozley Finlayson & Loggins. He will continue to represent businesses in litigation matters and also counsel clients on issues related to the workplace. Martin currently serves as the President-elect of the Gate City Bar Association, an affiliate chapter of the National Bar Association and Georgia's oldest African American bar association. He is on the Board of Directors of Horizons Atlanta, a non-profit designed to provide an academic enrichment program to public school children from economically disadvantaged families. Martin was recognized as a 2010 Super Lawyers Rising Star and named in the 2010 edition of *Who's Who in Black Atlanta*.

Cases of Note

In August 2010, **Timothy H. Bendin** and **Kristin L. Hiscutt** of Atlanta's *Bendin Sumrall & Ladner*, recently formed in April 2010, obtained a defense verdict on behalf of an emergency medicine physician and hospital in a medical malpractice trial lasting two weeks.

The case involved claims that the ED physician failed to consider a vertebral artery dissection in the differential diagnosis, failed to obtain a neurology consult, and failed to obtain certain neuroimaging studies for an 18-year-old patient who became unresponsive following an assault and who experienced a prolonged period of at least 16 minutes without adequate oxygenation prior to arrival at the hospital. In the ED, the patient was found to be 11.5 weeks pregnant. The patient's family elected to maintain the patient in the ICU in order to achieve fetal viability and delivery; nearly 4 months later, the baby, then 28 weeks' gestation, spontaneously delivered and survived. Following the delivery, testing confirmed that the patient was brain dead, and mechanical ventilation was discontinued.

The case involved claims against the emergency medicine physician, a pulmonologist, and a neurologist for medical malpractice and wrongful death on behalf of the mother, as well as a medical malpractice claim for *in utero* injuries to the fetus.

The defense presented testimony by renowned medical experts, such as pediatric neurologist Joseph Volpe, MD; maternal-fetal medicine specialist Mary D'Alton, MD; neurosurgeon Dan Barrow, MD; emergency medicine physicians Richard Zane, MD and Marlon Priest, MD; and pulmonologist Arthur Wheeler, MD. The jury returned verdicts in favor of all three physicians.

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Amicus Briefs Filed by GDLA

Under the leadership of 2009-10 Amicus Committee Chair Jamie Weston of Augusta's Hull Barrett, along with 2010-11 Chair Jeff Ward of Brunswick's Gilbert Harrell Sumerford & Martin and Vice-chair Rusty Gunn of Macon's Martin Snow, GDLA filed the following amicus briefs in 2010.

To view each amicus brief or to review our policy if you wish to request one in the future, visit the Members Only area of our website: www.gdla.org/members/amicus/amicus.html.

GDLA thanks all the authors for volunteering their time to help convey the voice of the defense bar to the courts.

Baker v. WellStar (Case No. S10A0994), Supreme Court of Georgia. Topic: Qualified protective orders for ex parte conferences with doctors under HIPAA. GDLA amicus brief filed November 30, 2010; authors: Jo A. Jagor and Crystal Filiberto, Hall Booth Smith & Slover, Atlanta; and Kristin Hiscutt, Bendin Sumrall & Ladner, Atlanta. GDLA filed its brief as a supplement to the Motion for Reconsideration filed by Henry D. Green Jr., of Atlanta's Green & Sapp, counsel for appellee WellStar.

State Farm Mutual Automobile Insurance v. Randolph Adams (Case No. S09C1710), Supreme Court of Georgia. Topic: UM exposure (see article on page 1). GDLA amicus brief filed July 25, 2010; authors: Edward R. Stabell, III and Britton G. White, Brennan Harris & Rominger, Savannah; Evelyn Fletcher Davis and Jason L. Groch, Hawkins Parnell Thackston & Young, Atlanta.

Cavalier Convenience, Inc. v. Sarvis (Appeal No. A10A0538) and *Ken's Supermarket, Inc. v. Sarvis* (Appeal No. A10A0539), 305 Ga. App. 141 (2010). Topic: O.C.G. A. § 51-12-33 apportionment. GDLA amicus brief filed February 9, 2010; author: Amy R. Snell, Fulcher Hagler, Augusta.

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Success at Mediation: It's in the Details

By William S. Allred
BAY Mediation & Arbitration Services, LLC

Two lawyers of the defense bar who have known each other for some time are on the phone together. After discussing a case that was the reason for the call, they chit chat generally to catch up with one another. At some point, the focus of the conversation turns to their actual trial practice. Both grudgingly lament the fact that they just aren't trying as many cases as they used to. Litigation has become too expensive, too time consuming for self-paying parties and too fraught with risk. Sound familiar?

Mediation, it would seem, has become such a common aspect of "litigating" that we are surprised that we don't find it in the Civil Practice Act somewhere between O.C.G.A. § 9-11-37 and 9-11-38. And yet, for as commonplace as mediation has become, it is still surprising to encounter lawyers who simply haven't prepared for the session. Where mediation was once a stop along the way, it has now become the terminus for so many litigated files. And for good reason: your insurance company clients and your insured clients are usually pleased when they learn the case is over and will not have to be litigated any further. So how can you prepare and increase the odds of getting to a resolution at mediation?

Preparing Yourself for Mediation

Is there a right time to mediate? There is some literature to suggest that early is better.[1] These studies tend not to be focused on a particular type of case, though, and in the business of bodily injury claims, I typically find that early mediations are less likely to work simply because neither side has a sufficient understanding of all the liability, damages, and causation issues to be able to move in their respective positions on valuation. The insurers, moreover, almost always insist on completion or near completion of discovery prior to the scheduling of mediation.

Nothing takes the place of aggressive discovery aimed at compiling all available information, documents, and things that relate to your case. It's surprising to mediate cases where witnesses identified in the police report were never called and where everyone still doesn't have a complete medical history on the plaintiff in a personal injury case. Typically, in my experience, the master of the details enjoys an advantage at mediation.

Still, there are sometimes overriding concerns which might justify scheduling a mediation before all the details are known. Health considerations of a party might be one reason. Bad facts concerning a party (e.g., a bad criminal record or another loss that the other side might not know about yet). Regardless of when the parties choose to mediate, defense counsel needs to become the master of the details.

If you know that much turns on a legal issue, pull the cases and have copies of highlighted cases or statutes ready to distribute at mediation. Frankly, when attorneys *argue* that the law is in their favor, the other side is often skeptical, and both sides end up asking about what the law really says on the point. Be prepared and bring the law with you. A lot of times, much of the value of the case turns on what an expert will say (a doctor, an engineer, etc.). Do the best you can to have that expert's written opinion there with you at the mediation. While parties frequently mediate prior to experts' depositions to save on expenses, a simple letter from the expert on the narrow point helps to eliminate a lot of the guesswork.

Prepare the Adjuster for Mediation

There is no substitute for "bottom-reading" the file: that is, reading every communication, note, and record in the file. Both the defense lawyer and the adjuster should be bottom-reading the file. However, with the downsizing that has taken place at insurance companies over the past five years, with fewer adjusters being assigned to more files than ever, we know in practice that only a few of our adjusters have time to bottom-read every file. This means, of course, that it is now more imperative than ever that defense counsel be the master of the details and in a position to pass

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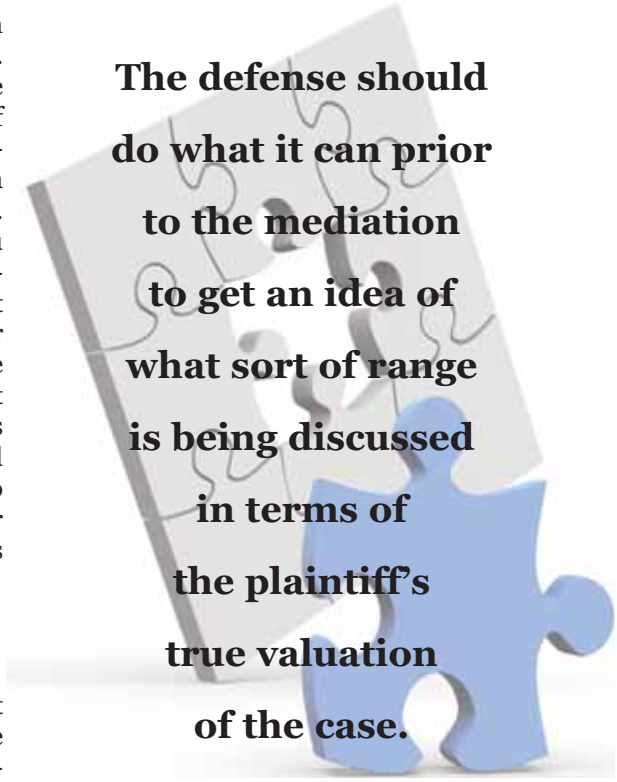
those details along to the adjuster with a meaningful discussion of risks and verdict ranges. Of course, losing sight of the forest for the trees isn't helpful at all. The idea is that in mastering the details, counsel can master the overarching plan of attack.

It is also up to defense counsel to make sure the adjuster is aware of the date and time of the mediation. Hopefully, counsel is having some strategy conferencing with the adjuster just prior to the mediation date. Through that personal contact, the attorneys can verify that they are going to have an adjuster in place at mediation. We've had some mediations where all the attorneys and the plaintiff show up, and we learn – after waiting — that the adjuster had no idea the mediation had been scheduled. It goes without saying that you actually increase the odds of resolution by having your adjuster at the mediation in person rather than by telephone. And while practitioners tend to give great deference to adjusters on this issue, owing to workload and expense, judges typically don't, so be sure to verify whether your adjuster's presence by telephone is permitted.

Preparing the Plaintiff's Attorney for Mediation

Often, plaintiff's counsel is not being paid by the hour, and we see rather often that busy solo practitioners find themselves hustling to put together the documentary support for their client's claim at the last minute. It is not uncommon now for plaintiff's attorneys to come to mediation with copies of a large "settlement discussion package" that contain far more by way of medical records and bills than had ever seen the light of day prior to the mediation. Where prior discovery responses indicated that special damages were one number, many are surprised to learn that damages are actually much higher when they walk into the mediator's offices. Of course, this kind of "sandbagging" – whether intentional or not – often derails a mediation simply because the adjusters at mediation typically cannot get adequate increases in authority on what is now a different case for them to evaluate than the one everyone was looking at before the mediation.

It is certainly true that defense counsel cannot control everything, and it certainly is not defense counsel's "fault" that the adjuster is learning of significantly greater special damages only at mediation, but there are things defense counsel can do to lessen the odds of this taking place. One of those things is to begin to discuss the scheduling of mediation early. With plenty of lead time, the defense attorney can diary a file to be sure that the plaintiff's attorney is reminded of what the defense understands the alleged special damages to be. Defense counsel can follow up with the plaintiff's lawyer only a couple of days before mediation to be sure everyone is still on the same page. At least by doing this, mediation can be postponed where parties learn that one or both of them are not prepared.



Lastly, the defense should do what it can prior to the mediation to get an idea of what sort of range is being discussed in terms of the plaintiff's true valuation of the case. If there is any sense at all that the case is going to settle for only a few thousand dollars, counsel should be questioning whether the case warrants an additional $1,000+ expense for the plaintiff for the cost of mediating it. On the other hand, in a large case, consider whether permitting the mediator to have some pre-mediation visits with the parties, at least by phone, would be in order, and in that way everyone can work together to narrow the issues that really merit discussion at the actual mediation session.

Preparing the Mediator for Mediation

Mediators are people, too. They are generally subject to the same tools of persuasion that work on jurors. And, in this regard, mediators get played, too, during mediations. Parties seldom come into a mediation and advise the mediator, "My number is *X*. Do whatever you need to do to get there." In fact, what we learn quite often is that when parties tell the mediator what their final number is, those parties actually had more room to move.

Therefore, be up front with your mediator. You don't need to prepare a *magnum opus* of a pre-mediation statement (you can, but it's certainly not necessary, and your mediator is going to bill you for the time to read it), but you do really need to set forth a full account of your position or defenses during the opening session. Some disputants' lawyers make the mistake of asking that parties skip the openings. But this has proven itself time and time again to be penny wise but pound foolish. No matter how much we think we know our case, going

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The Diminishing Role of the Fire Investigator

By Michael Hoffman, M.S., C.F.I., C.F.E.I., *SEA, Ltd.*

Over the past several years, I have observed a troubling trend within the fire investigation community – the intentional diminishing role of the Fire Investigator ... by the Fire Investigators.

Perhaps respected organizations such as the IAAI and NAFI should create a simpler new title for certification to accommodate this increasingly more common, self-directed, lesser role: The Origin Investigator. After all, a "Fire Investigator" as required by NFPA 1033 has to have the requisite knowledge and skills to determine not only the origin, *but also the cause of a fire.*[1]

However, in order to become certified as an Origin Investigator, one would need to have only a basic understanding of determining the origin of a fire and also an elementary understanding of what items are capable of starting a fire. Armed with this knowledge, the Origin Investigator could conduct a brief, cursory inspection and identify the appropriate expert (i.e., mechanical/electrical engineer), notify the client, and arrange for a second inspection with other interested parties present. The Origin Investigator could then delegate all other responsibilities for determining the cause of the fire to the engineer. This technique would permit the Origin Investigator to minimize time and effort at a fire scene and minimize his/her role in any litigation because he/she would be able to defer responsibility for cause determination, and if there was no readily observable potential for subrogation, the scene could quickly be closed down.

Am I advocating this new position within the industry? Of course not, but it does unfortunately mirror what is going on, more and more, in the real world. But what's wrong with this approach, you ask? It often lowers the quality of the investigation to that of a person with little or no fire science background and places the cause determination 100% on the engineer who may or may not have the appropriate background and experience. It oftentimes results in a fire scene that is never properly processed, and thus who knows what may be missed or overlooked. It could increase the liability risk of the client. In some cases, it could even increase costs. One of the main reasons for this diminishing role is that Fire Investigators, bowing to the demands of insurance companies and others to minimize costs, have allowed financial specialists to dictate minimum fire investigative standards that really should be decided by the fire experts themselves who know what's professionally needed. It's time for Fire Investigators to step up and do their full job. I am not interested in my becoming an Origin Investigator, and neither should you.

There have been far too many occurrences in recent months where I have arrived at a fire inspection representing an interested party and within mere minutes recognized that minimal previous investigation had taken place and asked mysel,f "Why am I even here?" I understand that, to a certain extent, investigators are extremely concerned about spoliation issues and are hesitant to disturb a fire scene because potential subrogation may exist. However, this should not replace a competent investigation or minimize the overall role of the Fire Investigator. NFPA 921 states, "Fire Investigation usually requires the movement of evidence or alteration of the scene. In and of itself, such movement of evidence or alteration of the scene should not be considered spoliation of evidence. Physical evidence may need to be moved prior to the discovery of the cause of the fire."[2] Several times I have arrived at fire scenes and conducted my preliminary inspection and documentation, and then an engineer conferences with another "Fire Investigator", a call is made to a client, and all parties are advised that no further investigation will be completed, and they are closing the matter. This has occurred without substantive debris removal, fire scene reconstruction, or removal of evidence.

There have also been far too many occurrences whereby I have reviewed depositions of "Fire Investigators" who are representing various parties of interest, only to realize that there was almost nothing substantive in their deposition regarding cause determination. Are we not supposed to be Origin *and Cause* Investigators? Does the following sound familiar?

Q: What did you determine?

A. I determined the fire originated in the master bedroom and identified several potential sources of ignition that were electrical items. I retained an electrical engineer to evaluate these items and determine the cause.

Q: Do you have an opinion on what caused this fire or elimination of these electrical potentials?

A. No, you'll have to ask the Electrical Engineer, I have no opinion on that.

Time and time again, I have reviewed these depositions only to determine that the Origin and Cause investigator was nothing more than an "Origin Investigator." Other experts/engineers are assets to an investigation, but it is the Fire Investigator who has responsibility to ultimately determine the *origin and cause* of the fire.

NFPA 1033 states that a Fire Investigation is the process of determining the origin, cause, and development of a fire or explosion[3] and a Fire Investigator is an individual who has demonstrated the skills and knowledge necessary to conduct, coordinate, and complete a fire investigation.[4] It is the Fire Investigator whose role it is to determine "the circumstances, conditions, or agencies that bring together a fuel, ignition source, and oxidizer."

Other experts, such as mechanical and electrical engineers, can be resources that allow the Fire Investigator to determine the cause of a fire (or that's the way it used to be) and are meant to provide technical assistance. NFPA 921 states that "fire investigation is a specialized field. Those individuals not specifically trained and experienced in the discipline of fire investigation and analysis, even though they may be experts in related fields, may not be well qualified to render opinions regarding fire *origin and cause*."[5] Unless an engineer is appropriately qualified in fire investigation and actually does an appropriate fire investigation, it is the Fire Investigator who should make the call. And even if an engineer is qualified in fire investigation and does perform the necessary investigation to render an appropriate opinion regarding cause, the Fire Investigator should still have an opinion on cause, even if he has to defer some of the technical details to the engineer.

Why is the fire investigation community willingly deferring and diminishing that which they are charged to do? A fire investigation is often analogized with a jigsaw puzzle. There are many pieces that must be brought together to determine the cause of a fire. It is the Fire Investigator's role to put these pieces together, not an assisting electrical engineer hired to look at an appliance, not an assisting mechanical engineer hired to look at a furnace. That appliance and that furnace are mere pieces of the puzzle; they are not the end all of a complete fire investigation.

The electrical engineer, for example, may conduct a thorough inspection of a dwelling's electrical system and electrical items of interest. The engineer may then advise the Fire Investigator that the "widget" sustained an electrical failure and provide the Fire Investigator with the evidence that the widget failed. The engineer may even be able to further state that the reason the widget failed was because the manufacturer utilized an improperly sized wire.

All of this is great information, but in a vacuum, it means nothing. This information becomes important when coupled with all other information such as a report that the widget wasn't working properly

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GDLA Board Holds Fall Meeting at Grove Park

The GDLA Board of Directors gathered for its Fall Meeting at the picturesque Grove Park Inn in Asheville, North Carolina, during the spectacular foliage weekend of October 15-17, 2010.

In attendance were *Officers and Executive Committee:* President Bubba Hughes of Callaway Braun Riddle & Hughes, Savannah; Executive Vice President Mel Haas of Constangy Brooks & Smith, Macon; Secretary-Treasurer Lynn Roberson of Swift Currie McGhee & Hiers, Atlanta; Immediate Past President Staten Bitting of Fulcher Hagler, Augusta; and Past President Bob Travis of Bryan Cave, Atlanta. *Vice Presidents:* Ted Freeman of Freeman Mathis & Gary, Atlanta; Kirby Mason of Hunter Maclean, Savannah; and Matt Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta. *Board of Directors members:* Sally Akins of Ellis Painter Ratterree & Adams, Savannah; Evelyn Fletcher Davis of Hawkins Parnell Thackston & Young, Atlanta; Craig Avery of Cowsert & Avery, Athens; Rusty Gunn of Martin Snow, Macon; Hall McKinley of Drew Eckl & Farnham, Atlanta; Dave Nelson of Chambless Higdon Richardson Katz & Griggs, Macon; Jeff Ward of Gilbert Harrell Sumerford & Martin, Brunswick; Jamie Weston of Hull Barrett, Augusta. *Past Presidents:* Joe Chambless, Newnan; Salty Forbes of Forbes Foster & Pool, Savannah; Steve Kyle of Bovis Kyle & Burch, Atlanta; Walter McClelland of Mabry & McClelland, Atlanta; and Bruce Welch of Hawkins Parnell Thackston & Young, Atlanta. Also present was Executive Director Jennifer Davis.

The group gathered in the hospitality suite on Friday for a welcome reception, then adjourned to the Grove Park Inn Dining Room for its renowned seafood buffet. The Board convened on Saturday morning until noon, then the afternoon was free to enjoy hiking, golfing, college football, spa luxuries, shopping, and more.

Following are highlights from the Board meeting; photos on next page:

- The membership report indicated the Association currently has 569 members. The individuals listed on page 6 were proposed for

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Fall Board Meeting Photo Highlights

1. (l-r) Vice President Kirby Mason, Board members Dave Nelson, Rusty Gunn and Sally Akins at the meeting. 2. President Bubba Hughes (right) and his wife Debbie visit with Executive Vice President Mel Haas at Friday's reception. 3. (l-r) Past Presidents Salty Forbes and Bruce Welch visit with Secretary-Treasurer Lynn Roberson. 4. Past President Walter McClelland, Immediate Past President Staten Bitting and Vice President Matt Moffett enjoy the opening reception. 5. (l-r) Past President Joe Chambless listens as Past President Bob Travis gives the Judicial Relations Committee report.

resented the liability policy limits less the amount paid to the USPS for the damage to the postal truck.

Because Plaintiff Thurman had received lost wage benefits under the Federal Employees Compensation Act (FECA) and medical expense benefits under the Federal Employee Health Benefits Act (FEHBA), both providers claimed a right of subrogation against the settlement proceeds, pursuant to 5 U.S.C. § 8132, which states in part, "No court, insurer, attorney, or other person shall pay or distribute to the beneficiary the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States."

Pursuant to this code section, Defendant Brown's liability carrier issued three separate checks: one to Plaintiff Thurman and her husband, one to Plaintiff Thurman and the worker's compensation carrier, and one to Plaintiff Thurman and the group medical insurance carrier. Ultimately, Plaintiff Thurman and her husband received $60,887.87 from the settlement proceeds.

Plaintiff Thurman and her husband then sought uninsured motorist insurance proceeds in the amount of $14,112.13 from their uninsured motorist insurance carrier, State Farm. Plaintiff Thurman contended that Defendant Brown's vehicle was uninsured up to the difference between the net proceeds of the settlement received by the Thurmans and the stacked uninsured motorist insurance coverage which Plaintiff Thurman maintained from State Farm. The trial court granted summary judgment to State Farm, and the Georgia Court of Appeals affirmed the decision based on the contention that Defendant Brown maintained liability insurance in an amount greater than the Plaintiff's stacked uninsured motorist insurance limits, and pursuant to O.C.G.A. § 33-7-11(b)(1)(D)(ii) Defendant Brown's vehicle was not uninsured or underinsured.

The Georgia Supreme Court reversed the court of appeals decision. The court stated in part, "We conclude that when a federal employee is required by FECA or FEHBA to reimburse the provider of benefits and the federal employee has not been fully compensated for injuries sustained, the amount reimbursed to the benefit providers constitutes a reduction in the 'limits of coverage [of the tortfeasor's liability insurance]... by reason of ... or otherwise." In holding that the federal subrogation right reduced the limits of available coverages, the Supreme Court of Georgia held that State Farm was ultimately responsible to pay the difference between the stacked UM policy amounts and the netted settlement amount. O.C.G.A. § 33-7-11(b)(1)(D)(ii) states that the "available" liability limits are the original limits "less any amounts by which [the limits] have, by reason of payment of other claims or otherwise, been reduced below" the UM limits.

Four years later, the Georgia Court of Appeals extended the rationale of *Thurman* to include subrogation and reimbursement claims in the context of Medicare liens. *See Toomer v. Allstate Insurance Co.,* 292 Ga. App. 60 (2008). *Toomer* expanded the reasoning of *Thurman* beyond federal subrogation claims and held that a Medicare right of reimbursement reduced the amount of available coverages of the Defendant's liability policy.

Adams v. State Farm Mutual Automobile Ins. Co., 298 Ga. App. 249 (2009) extended the reasoning of both *Thurman* and *Toomer* to Georgia medical liens, as defined in O.C.G.A. § 44-14-470. O.C.G.A. § 44-14-470 provides:

> (a) Except where the context otherwise requires in subsection (b) of this Code section, as used in this part, the term:
>
> (1) "Hospital" means any hospital or nursing home subject to regulation and licensure by the Department of Community Health.
> (2) "Hospital care, treatment, or services" means care, treatment, or services furnished by a hospital or nursing home.
> (3) "Nursing home" means any intermediate care home, skilled nursing home, or intermingled home.
> (4) "Physician practice" means any medical practice that includes one or more physicians licensed to practice medicine in this state.
> (5) "Traumatic burn care medical practice" means care, treatment, or services rendered by a medical practice with respect to a patient whose burn care, treatment, or services resulted in charges in excess of $50,000.00, arising out of a single accident or occurrence.
>
> (b) Any person, firm, hospital authority, or corporation operating a hospital, nursing home, or physician practice or providing traumatic burn care medical practice in this state shall have a lien for the reasonable charges for hospital, nursing home, physician practice, or traumatic burn care medical practice care and treatment of an injured person, which lien shall be upon any and all causes of action accruing to the person to whom the care was furnished or to the legal representative of such person on account of injuries giving rise to the causes of action and which necessitated the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice care, subject, however, to any attorney's lien. The lien provided for in this subsection is only a lien against such causes of action and shall not be a lien against such injured per-

son, such legal representative, or any other property or assets of such persons and shall not be evidence of such person's failure to pay a debt. This subsection shall not be construed to interfere with the exemption from this part provided by Code Section 44-14-474.

In light the statute's use of "available" liability insurance limits in defining uninsured motor vehicles , the court of appeals' rationale for expanding the reasoning of *Toomer* and *Thurman* was based largely upon Georgia's public policy of complete compensation of an injured party.

In *Adams*, Plaintiff Randolph Adams sued the tortfeasor to recover for injuries sustained in a motor vehicle accident. During the course of the underlying litigation, Nationwide Insurance Company, the tortfeasor's automobile liability insurer, made two payments that exhausted its $25,000 policy limits. The first payment was in the amount of $9,217.66 to Grady Hospital to compromise its hospital lien for medical services provided to Adams. The second payment in the amount of $15,782.34 was made to Plaintiff Adams in exchange for a limited release.

Plaintiff Adams sought additional compensation for his injuries under his insurance policy with State Farm, which provided him with $100,000 UM coverage. State Farm contended that it should be able to set off the entire $25,000 that Nationwide paid under its liability coverage. Plaintiff Adams, however, contended that State Farm should get credit only for the $15,782.34 that had been paid to him personally, and not the $9,217.66 paid by Nationwide directly to Grady Hospital to satisfy its lien.

After both parties filed motions for summary judgment, the trial court denied Adams' motion and granted State Farm's motion allowing State Farm to set off from its $100,000 uninsured motorist coverage the full $25,000 paid from the tortfeasor's liability policy. The trial court reasoned that Plaintiff Adams' election to voluntarily divert part of the $ 25,000 liability payment to Grady Hospital to satisfy his hospital bill did not reduce the available liability coverage below $25,000 or increase his uninsured motorist coverage.

The court of appeals set out to determine whether the language in O.C.G.A. § 33-7-11(b)(1)(D)(ii) regarding the payment of "other claims or otherwise" included the payment made directly to Grady Hospital. The court of appeals noted that "[t]he natural meaning of 'or,' where used as a connective, is to mark an alternative and present choice, implying an election to do one of two things." Based on Georgia's long-standing public policy of complete compensation, the court of appeals reversed the trial court and held that, based on the decision in *Thurman*, the hospital lien was an "other claim or otherwise" within the meaning of the statute. As such, State Farm was not allowed to take credit for the money paid directly to the hospital in satisfaction of the § 44-14-470 hospital lien, because the payment in satisfaction of that lien reduced the amount of available

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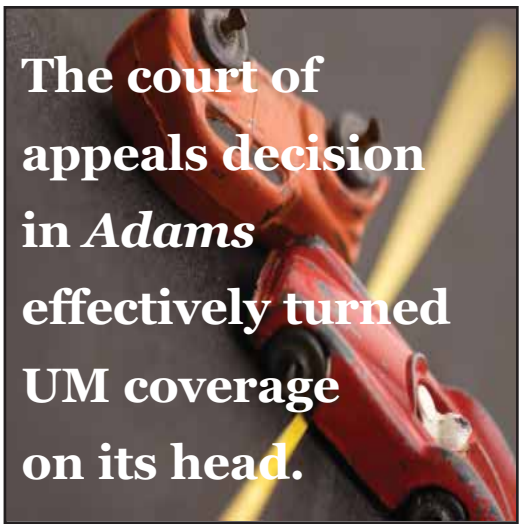
liability coverages by payment of other claims "or otherwise." Ultimately, the result of the court of appeals' *Adams* holding was that, where a claimant has a hospital lien and is attempting to recover uninsured motorist benefits, any offset from the tortfeasor's liability policy payments is reduced by the amount of the hospital lien.

The Georgia Court of Appeals decision in *Floyd.,* 298 Ga. App. 771 arrived only three months after *Adams*. Because the factual situation in *Floyd* closely mirrored that of the factual situation in *Adams,* the Court of Appeals found that the policy limits available under a tortfeasor's liability policy must be reduced by the amount of an unpaid hospital lien ultimately resulting in the increase of the UM carrier's exposure.

A basic example of the principle dictated in the court of appeals' *Adams* ruling can be shown through a simple undisputed liability motor vehicle accident. The plaintiff, who has $25,000 in UM coverage, is injured by the tortfeasor in an automobile collision. The tortfeasor maintains $25,000 in liability insurance. The plaintiff incurs $25,000 in medical expenses. In an effort to protect its interest in the plaintiff's incurred medical expenses, the hospital issues a lien in the amount of $25,000. Tortfeasor's liability policy pays its policy limits to plaintiff in exchange for a limited liability release. In a pre-*Adams* Georgia, the tortfeasor's vehicle would not be underinsured pursuant to O.C.G.A. § 33-7-11(b)(1)(D)(ii) because the hospital lien did not reduce available liability coverages by payment of other claims "or otherwise." Thus, the UM carrier would be entitled to the full $25,000 set off paid by the liability policy, and the plaintiff would be entitled to recover $0.00 from his UM carrier.

Adams effectively turned UM insurance coverage on its head. Where a lien filed pursuant to O.C.G.A. § 44-14-470(b) existed, the UM carrier was not entitled to a set off of the liability proceeds paid to the lienholder. The setoff was reduced in an amount equal to the lien. The result in the example above was that the tortfeasor's available liability policy limits were reduced in an amount equal to the hospital lien, because the hospital lien constituted the payment of other claims "or otherwise." Because liability policy limits were reduced to zero by the payment of other claims "or otherwise," the tortfeasor's vehicle was uninsured up to $25,000. Thus, the plaintiff's -UM carrier was entitled to no set off and would be responsible for payment to the plaintiff for UM policy limits of $25,000.



In addition to exposing UM carriers to substantially greater payout amounts and much higher likelihoods of paying out UM proceeds, *Adams* raised a number of other questions. Did the mere presence of medical bills and, thus, the possibility of medical liens reduce available coverages by the payment of other claims or otherwise? Did Medicaid liens fit the same mold as Georgia medical liens and Medicare liens, and, therefore, fall under the same reasoning as *Adams* and *Thurman*?

On January 11, 2010, the Supreme Court granted certiorari in the court of appeals decisions in *Adams* and *Floyd*, to determine "Whether the Court of Appeals erred in extending the rationale of *Thurman* to the satisfaction of a hospital lien by the tortfeasor's liability insurer." Oral arguments were heard from both sides on April 4, 2010, and GDLA filed an amicus brief on July 25, 2010.

Fast forward almost eight months later, and UM insurance carriers around the state rejoice. The Supreme Court of Georgia, in a 5-2 decision, reversed the holdings in *Adams* and *Floyd*. Justice Melton wrote for the majority in its succinct ten-page opinion.

The supreme court reviewed the foundation principles of both the uninsured motorist laws of this state and the "fundamental nature" of O.C.G.A. § 44-14-470 hospital liens. The purpose of the uninsured motorist laws, the supreme court had previously held, is "to place the injured insured in the same position as if the offending uninsured motorist were covered with liability insurance." *Smith v. Commercial Union Assur. Co.,* 246 Ga. 50, 51 (1980). Further, the principle of the Georgia uninsured motorist statute is to "protect the insured as to his actual loss, *within the limits of the policy or policies of which he is a beneficiary." State Farm Mut. Auto. Ins. Co. v. Murphy,* 226 Ga. 710, 714 (1970) (emphasis supplied). The cited principle is not furthered by the subtraction of the amount of a hospital lien from a tortfeasor's liability policy limits and in fact, the Court held, such subtraction can and does lead to a form of "double recovery." The mere fact that insurance proceeds are paid on behalf to a plaintiff directly to a hospital in satisfaction of a hospital lien does not mean that the plaintiff does not receive a benefit from that payment. Stated summarily, "payment of the hospital lien gives [the plaintiff] the full benefit of the maximum underinsured motorist coverage for which he contracted," therefore satisfying the basic principle of uninsured motorist insurance.

In considering the fundamental nature of O.C.G.A. § 44-14-470, which covers a myriad of medical liens as noted above, the Georgia Supreme Court reasoned that the

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Gales of November

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lien is not a subrogation right, but merely a statutory claim against the plaintiff/patient's recourse against the tortfeasor for causing the plaintiff/patient's injuries. Ultimately, a hospital lien simply allows a hospital to step into the shoes of the plaintiff/patient in order to receive payment for "economic damages represented by the hospital bill." Simply because a hospital lien exists does not mean that the medical services and hospital bills are not still part of the economic damages owed to the plaintiff/patient, nor does the lien allow for an additional claim against the tortfeasor's insurance policy. The satisfaction of a lien by the liability carrier is done for the benefit of the plaintiff/patient, and it cannot be said that such a payment reduces the amount of available coverages. A hospital bill is part of the plaintiff/patient's economic damages caused by the tortfeasor, and these economic damages are a part of the plaintiff/patient's cause of action against the tortfeasor. The end result is that the plaintiff/patient "receives protection for his actual loss, within the limits of the policy or policies of which he is a beneficiary."

In conclusion, the supreme court's opinion effectively holds that a hospital lien does not reduce the amount of available liability insurance coverages by payment of other claims or otherwise. As such, the existence of a hospital lien no longer entitles a plaintiff/patient to UM insurance proceeds in an amount equal to that hospital lien. Further, the existence of a hospital lien will not eliminate the UM carrier's set off for liability payments made by the liability carrier of a tortfeasor to a plaintiff/patient.

Of significant note, the court of appeals based its decisions in *Floyd* and *Adams* largely upon the strong public policy supporting the complete compensation rule: an insurer is prohibited from obtaining reimbursement for amounts paid under medical payments coverage unless and until the insured has been completely compensated for his or her loss. *Thurman* at 163-164. The supreme court indicated that instances dealing with hospital liens are not within the realm of the complete compensation rule, because "no subrogation rights of *an insurer* are associated with a hospital lien." Because *Adams* and *Floyd* both involved alleged incomplete compensation pursuant to § 44-14-470 hospital liens, the supreme court reasoned that no subrogation rights of an insurer were involved. As such, *Adams* and *Floyd* were easily distinguishable from *Thurman*. Further, the foundation of the court of appeals decision in *Adams* was thus one of the key distinguishing factors in the supreme court's reversal of the court of appeals' prior decision.

It is important to note that the supreme court's November 30, 2010 decision in no way affects the prior decisions in *Thurman* and *Toomer*. The majority opinion specifically noted that *Thurman* "involved the imposition of a federal lien from which reimbursement was mandatory, and the analysis and equities in that case are not applicable to the present matter." The supreme court's reasoning appears to make it clear that statutory subrogation claims and statutory rights of reimbursement are still covered under the panoply of the complete compensation rule. As such, a thorough coverage analysis should be performed in those claims in which a plaintiff is pursuing uninsured motorist insurance proceeds where liability policy limits paid have been allegedly reduced by outstanding statutory subrogation claims and/or statutory rights of reimbursement. Plaintiffs in those instances could have a valid claim for uninsured motorist proceeds based upon the reasoning in *Thurman* and *Toomer*.

A motion for reconsideration was denied on December 14, 2010.

C. Jason Willcox is a partner at Moore Clarke DuVall & Rodgers in Albany. His civil defense practice includes insurance coverage, automobile and employment litigation. He serves on GDLA's Board of Directors and chaired Deposition Boot Camp. He thanks associate Christopher L. Foreman for his contribution in authoring this article.

Fall Meeting Highlights

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membership and unanimously accepted.

◆The Education Committee will be led by Chair Wayne Melnick. Jennifer Davis reported Deposition Boot Camp, chaired by Jason Willcox, is set for November 11-12 (see report on page 20). Board members were encouraged to send young lawyers.

◆Chair Lynn Roberson reported Trial Academy is set for January 20-22, 2011, at Callaway Gardens. Trial Academy now plans to have a vice-chair (Matt. Moffett) serve for a two-year term, followed by two years as chair.

◆Dave Nelson reported on the work of the Website Committee and the need to continue updating content, specifically the Tort Reform Database and Brief Bank; they plan to work with the SLCs to accomplish this. One of our sponsors, Courtroom Visuals, scanned our old newsletters at no cost for posting on the website. You can also now search for a defense attorney by firm under Find a Defense Lawyer.

◆Bob Travis reported on the activities of the Judicial Relations Committee, which has been

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NAME	BASED IN	PROFILE ONLINE AT	PHONE	DATES†
Donald D. Rentz	Albany	georgiamediators.org/donald-rentz	(229) 883-2782	☑
J. Edward Allen	Athens	georgiamediators.org/edward-allen	(706) 548-1151	☑
Denny C. Galis	Athens	georgiamediators.org/denny-galis	(706) 549-8242	☐
Miles J. Alexander	Atlanta	georgiamediators.org/miles-alexander	(404) 815-6410	☐
William Allred	Atlanta	georgiamediators.org/william-allred	(678) 222-0248	☑
Clifford F. Altenbaugh	Atlanta	georgiamediators.org/clifford-altenbaugh	(770) 955-2252	☑
W. Bruce Barrickman	Atlanta	georgiamediators.org/bruce-barrickman	(678) 222-0248	☑
Hubert (Hugh) J. Bell Jr.	Atlanta	georgiamediators.org/hugh-bell	(404) 873-8007	☑
Gino Brogdon	Atlanta	georgiamediators.org/gino-brogdon	(678) 222-0248	☑
William B. Brown	Atlanta	georgiamediators.org/william-brown	(770) 850-9300	☐
Dennis Caniglia	Atlanta	georgiamediators.org/dennis-caniglia	(404) 313-2706	☑
Terrence Lee Croft	Atlanta	georgiamediators.org/terrence-croft	(404) 588-0900	☑
Scott D. Delius	Atlanta	georgiamediators.org/scott-delius	(678) 320-9118	☑
Robert N. Dokson	Atlanta	georgiamediators.org/robert-dokson	(404) 233-7000	☑
R. Daniel Douglass	Atlanta	georgiamediators.org/daniel-douglass	(404) 739-8807	☑
Victor J. Faenza	Atlanta	georgiamediators.org/victor-faenza	(678) 222-0248	☑
Hon. Keegan Federal Jr.	Atlanta	georgiamediators.org/keegan-federal	(678) 443-4044	☑
Michael E. Fisher	Atlanta	georgiamediators.org/michael-fisher	(404) 607-9350	☑
Arthur H. Glaser	Atlanta	georgiamediators.org/arthur-glaser	(770) 955-2252	☑
William S. Goodman	Atlanta	georgiamediators.org/william-goodman	(770) 955-2252	☑
Joan C. Grafstein	Atlanta	georgiamediators.org/joan-grafstein	(404) 588-0900	☐
Herbert H. Gray III	Atlanta	georgiamediators.org/herbert-gray	(404) 588-0900	☑
Harry L. (Buck) Griffin	Atlanta	georgiamediators.org/buck-griffin	(404) 853-8094	☑
Daniel E. Gulden	Atlanta	georgiamediators.org/daniel-gulden	(404) 873-8629	☑
James B. Hiers Jr.	Atlanta	georgiamediators.org/james-hiers	(770) 955-2252	☑
Hunter R. Hughes III	Atlanta	georgiamediators.org/hunter-hughes	(404) 420-4622	☐
Hon. G. Conley Ingram	Atlanta	georgiamediators.org/conley-ingram	(404) 588-0900	☐
Patrick G. Jones	Atlanta	georgiamediators.org/patrick-jones	(770) 955-2252	☑
N. S. (Ken) Kendrick III	Atlanta	georgiamediators.org/ken-kendrick	(770) 955-2252	☑
Patricia Kilroy Worth	Atlanta	georgiamediators.org/patricia-worth	(404) 882-3965	☑
F. Carlton King Jr.	Atlanta	georgiamediators.org/carlton-king	(404) 588-0900	☐
Daniel M. Klein	Atlanta	georgiamediators.org/daniel-klein	(404) 781-1100	☑
Linda A. Klein	Atlanta	georgiamediators.org/linda-klein	(404) 221-6530	☐
Frank A. Lightmas Jr.	Atlanta	georgiamediators.org/frank-lightmas	(404) 876-3335	☑
Ellen Malow	Atlanta	georgiamediators.org/ellen-malow	(404) 556-0757	☑
Randolph A. Mayer	Atlanta	georgiamediators.org/randolph-mayer	(404) 584-9588	☑
John K. Miles Jr.	Atlanta	georgiamediators.org/john-miles	(678) 320-9118	☑
Joseph M. Murphey	Atlanta	georgiamediators.org/joseph-murphey	(678) 320-9118	☑
William U. Norwood III	Atlanta	georgiamediators.org/william-norwood	(404) 523-7706	☑
David C. Nutter	Atlanta	georgiamediators.org/david-nutter	(678) 320-9118	☑
Penn Payne	Atlanta	georgiamediators.org/penn-payne	(404) 841-3295	☑
George C. Reid	Atlanta	georgiamediators.org/george-reid	(404) 365-6557	☐

NAME	BASED IN	PROFILE ONLINE AT	PHONE	DATES†
James A. Rice Jr.	Atlanta	georgiamediators.org/james-rice	(678) 320-9118	☑
William H. Schroder	Atlanta	georgiamediators.org/william-schroder	(404) 577-0900	☑
John A. Sherrill	Atlanta	georgiamediators.org/john-sherrill	(404) 885-6703	☑
Pat Smith	Atlanta	georgiamediators.org/pat-smith	(770) 955-2252	☑
G. Michael Smith	Atlanta	georgiamediators.org/michael-smith	(678) 320-9118	☑
Rex D. Smith	Atlanta	georgiamediators.org/rex-smith	(770) 955-2252	☑
James G. Stewart	Atlanta	georgiamediators.org/james-stewart	(678) 222-0248	☑
R. Wayne Thorpe	Atlanta	georgiamediators.org/wayne-thorpe	(404) 588-0900	☐
Thomas W. Tobin	Atlanta	georgiamediators.org/thomas-tobin	(770) 955-2252	☑
Valerie Tobin	Atlanta	georgiamediators.org/valerie-tobin	(678) 222-0248	☑
Amy Totenberg	Atlanta	georgiamediators.org/amy-totenberg	(404) 622-6970	☐
Hon. Elizabeth G. Watson	Atlanta	georgiamediators.org/elizabeth-watson	(404) 588-0900	☐
Wayne C. Wilson	Atlanta	georgiamediators.org/wayne-wilson	(678) 320-9118	☑
F. Scott Young	Atlanta	georgiamediators.org/scott-young	(678) 222-0248	☑
David M. Zacks	Atlanta	georgiamediators.org/david-zacks	(404) 815-6100	☑
Charles B. Zirkle Jr.	Atlanta	georgiamediators.org/charles-zirkle	(770) 551-3871	☐
Percy J. Blount	Augusta	georgiamediators.org/percy-blount	(706) 722-3786	☑
Hon. Neal Dickert	Augusta	georgiamediators.org/neal-dickert	(706) 826-2001	☑
Stephen E. Garner	Bremen	georgiamediators.org/stephen-garner	(770) 537-3876	☑
Wallace E. Harrell	Brunswick	georgiamediators.org/wallace-harrell	(912) 265-6700	☐
Thomas E. Greer	Carrollton	georgiamediators.org/thomas-greer	(770) 836-8327	☑
David H. Belinger	Cleveland	georgiamediators.org/david-belinger	(770) 314-8130	☑
Jerry A. Buchanan	Columbus	georgiamediators.org/jerry-buchanan	(706) 323-2848	☐
E. Hugh Kemp	Dalton	georgiamediators.org/hugh-kemp	(706) 226-2222	☑
Philip S. Coe	Fayetteville	georgiamediators.org/philip-coe	(770) 719-9363	☐
James E. Mahar	Gainesville	georgiamediators.org/james-mahar	(770) 532-0312	☑
Bert King	Gray	georgiamediators.org/bert-king	(478) 986-6000	☑
Mark F. Dehler	Hiawassee	georgiamediators.org/mark-dehler	(706) 896-4332	☑
Robert R.Gunn II	Macon	georgiamediators.org/rusty-gunn	(478) 749-1730	☑
Roger Mills	Macon	georgiamediators.org/roger-mills	(478) 743-1400	☑
Tyron Elliott	Manchester	georgiamediators.org/tyron-elliott	(706) 846-8438	☑
Thomas E. Cauthorn	Marietta	georgiamediators.org/thomas-cauthorn	(770) 528-0150	☐
Laurence Christensen	Marietta	georgiamediators.org/larry-chrisensen	(770) 421-0102	☑
Hon. Norman Fletcher	Rome	georgiamediators.org/norman-fletcher	(706) 291-8853	☐
Daniel C. Cohen	Savannah	georgiamediators.org/daniel-cohen	(912) 234-8875	☑
Robert S. Glenn Jr.	Savannah	georgiamediators.org/robert-glenn	(912) 233-9700	☑
Patrick T. O'Connor	Savannah	georgiamediators.org/patrick-oconnor	(912) 236-3311	☑
Larry S. Kimel	St. Simons Isl.	georgiamediators.org/larry-kimel	(912) 506-4082	☑
William C. Sanders	Thomasville	georgiamediators.org/will-sanders	(229) 226-2565	☑
Joe Gray	Tifton	georgiamediators.org/joe-gray	(229) 388-1925	☐
Hon. Ralph F. Simpson	Tifton	georgiamediators.org/rusty-simpson	(229) 388-8420	☑

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extremely busy reviewing applicants for various judgeships throughout Georgia for appointment by the Governor. The responses received from the membership regarding the candidates have been very meaningful.

◆After many years of devoted service, Steve Kyle will be stepping down as meetings coordinator next year after training Immediate Past President Staten Bitting to succeed him. Visit www.gdla.org/calendar for future meetings and events.

◆Sally Akins is seeking articles for the 2011 *Law Journal*, as she is acting as editor this year.

◆Jennifer Davis reported on sponsorships. Collision Specialists signed on as a Platinum sponsor for the remainder of 2010. Sponsorships have provided GDLA with a significant increase in income, and the sponsors have all expressed great satisfaction with the return on their investment. GDLA members are encouraged to use our sponsors when the need for their services arises. All ads in this newsletter are sponsor companies/firms and a list may also be found in the Members Only area of our website.

◆Evelyn Fletcher Davis provided the DRI report. She has planned a regional dinner for Wednesday during the DRI Annual Meeting in San Diego. The DRI Women's Committee's seminar is being held in Miami Beach, February 3-4, 2011. Kirby Mason will serve as GDLA's liaison to the DRI Women's Committee. The 2011 DRI Annual Meeting will be October 26-30 in Washington, D.C. The 2011 DRI joint Southern/ Southeastern Regional Meeting will take place April 28-31, 2011, in Cabo San Lucas.

◆Jeff Ward will serve as chair of the Amicus Committee with Rusty Gunn as vice-chair. The committee reported on their involvement in various amicus matters in the past year (see page 6).

◆Lynn Roberson and Jennifer Davis reported on the sound financial health of the association.

◆Various membership dues levels will appear on the next dues notice to clarify categories already in place – *i.e.*, senior members age 65 and over who have been active with GDLA for 10 years will pay the young lawyers' rate, and past presidents age 65 and over are exempt.

◆The travel policy for DRI was clarified: For the DRI Annual Meeting, reasonable expenses for the President, Executive Vice President, DRI State Representative and Executive Director will be reimbursed (does not include reimbursements for spouse/guest).

◆A motion was made, duly seconded and passed unanimously to authorize the Executive Director to sign GDLA checks up to $2,500, provided the check is not payable to the Executive Director. A motion was also made, duly seconded and passed unanimously to authorize the Executive Director to be on the American Express account.

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2nd Annual Deposition Boot Camp a Success

The second annual GDLA Deposition Boot Camp was held November 11-12, 2010, at Sutherland's Elbert P. Tuttle Courtroom. The seminar was chaired by C. Jason Willcox of Moore Clarke DuVall & Rodgers.

Twenty-six lawyer students participated in the intensive training seminar under the leadership of a distinguished faculty: Shaun M. Daugherty and Jo A. Jagor, Hall Booth Smith & Slover; Ted Freeman, Freeman Mathis & Gary; Trish Peters, Hawkins Parnell Thackston & Young; Amy Kolczak, Owen Gleaton Egan Jones & Sweeney; Curtis J. Martin, Miller & Martin; Lynn M. Roberson, Swift Currie McGhee & Hiers; and Wayne S. Melnick, Gray Rust St. Amand Moffett & Brieske.

Topics were first presented by a faculty member, then attendees broke into small groups to discuss and role play with a "real" case.

Presentations included beginning and concluding the deposition, preparing your witness, defending the deposition, responding to the difficult litigator, questioning the witness, using documents in a deposition, etc.

State Bar President S. Lester Tate III was the keynote speaker at Thursday's luncheon, addressing "The Plaintiff's Perspective: How the Other Side Sees Us." As a former defense attorney turned plaintiff's lawyer, Tate was able to share great insight from both sides of litigation.

Fulton County Superior Court Judge Kimberly Esmond Adams delivered Friday's keynote address on professionalism. She had just presided over the so-called "Easter (hit-and-run) crash" that made national headlines. Judge Adams offered wisdom from her time on the bench – including the most recent trial that she called "the hardest case I have ever dealt with" – as well as her days as both a labor and employment lawyer at Constangy Brooks & Smith and Chief Senior Assistant District Attorney in Fulton County.

Thursday concluded with a networking reception, giving students time to get to know one another and ask the faculty questions on an informal basis.

GDLA thanks Sutherland Asbill & Brennan for graciously hosting us in its state-of-the-art Elbert P. Tuttle Courtroom.

1. Jo Jagor (left) leads a breakout group. 2. Faculty member Trish Peters and program chair Jason Willcox welcome guest speaker, State Bar President Lester Tate (center). 3. Curtis Martin teaches beginning and concluding depos. 4. Wayne Melnick offered "Rules to Surviving Depositionland: Preparing Your Witness." 5. (l-r) Omeeka Loggins, Andrew Murdison, Andrew Capobianco and Joe Stephens at the reception. 6. Keynote speaker Judge Kimberly Esmond Adams. 7. Networking after the first day are (l-r) Robbie Fuller, Dan Kingsley, Michael Sayegh, Bill Buchanan and faculty member Amy Kolczak.

GDLA Sponsors Charity Golf Tourney with ESI

GDLA teamed up with its longtime Platinum Sponsor ESI to sponsor the Swing for Siblings Charity Golf Tournament, September 10, 2010, at the Trophy Club of Atlanta, named one of Golf Digest's "Best Places to Play 2009."

The Swing for Siblings Charity Golf Tournament is an annual fundraising event for Camp To Belong Georgia (CTB). An international non-profit 501(c)(3), CTB has been actively reuniting brothers and sisters placed in separate foster, adoptive or kinship homes through summer camp programs and year round events since 1995. In Georgia, CTB is a partner of Camp Twin Lakes.

The tournament concluded with an awards banquet and silent auction. This is the first year GDLA has sponsored a charity event with ESI.

Pictured at the tournament are: 1. (l-r) GDLA Past President Steve Kyle of Bovis Kyle & Burch, Board Member Craig Avery of Cowsert & Avery and ESI's Frank Hagan. 2. (l-r) Jay O'Brien and Jim Strawinski of Strawinski & Stout. 3. Scott Masterson of Lewis Brisbois Bisgaard & Smith.

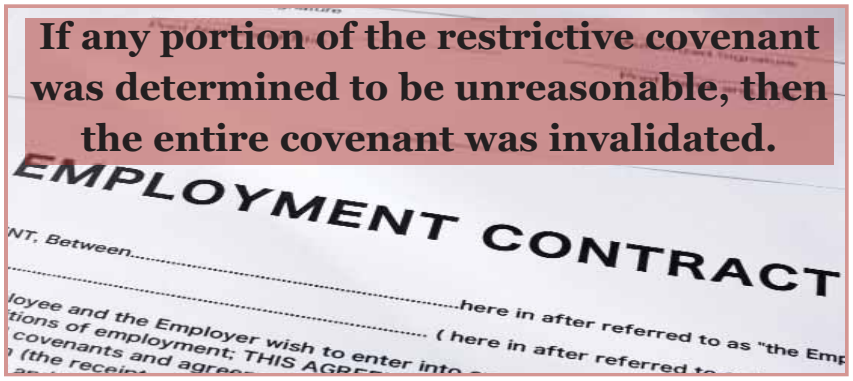
addresses common definitions which courts may apply for the scope of covenants and the categories of employees that may enter into enforceable covenants. However, because Georgia's Constitution prohibited the legislature from passing laws that restrain trade,[1] it was necessary to amend the constitution before HB 173 could become effective. On November 2, 2010, Georgia voters, hoping to create a more favorable business environment by allowing all parties to such agreements to be certain of the validity and enforceability of the covenants, amended the Constitution.

Prior Restrictive Covenant Law

The prior law will continue to be in effect for any restrictive covenant signed prior to November 3, 2010.[2] Under the old law, the reasonableness of a restrictive covenant was a question of law for the courts to determine, considering the nature and extent of the trade or business, the situation of the parties, and all other relevant circumstances.[3] The amount of judicial scrutiny given to the restrictive covenant depended upon the type of contract in which the restrictive covenant was contained.[4] In resolving the issue, restrictive covenants were subject to three levels of judicial scrutiny: strict scrutiny, which applied to employment contracts and franchise and distribution agreements; middle or lesser scrutiny, which applied to professional partnership agreements;[5] and much less scrutiny, which applied to the sale of business agreements.[6] The courts justified the increased scrutiny because of the disproportionate bargaining power between the parties.[7] The individualized strict scrutiny increased the difficulty for drafting restrictive covenants so that they could withstand the heightened judicial scrutiny.

During scrutiny, the restrictive covenant was individually reviewed for a determination of reasonableness, which depended upon the individual facts of each case.[8] A restrictive covenant in an employment contract, whether a non-solicitation covenant or a non-competition covenant, was considered to be in partial restraint of trade and was enforced only if it (1) was reasonable, (2) was supported by consideration (which may be employment or continued employment)[9] (3) was reasonably necessary to protect the restraining party's interest, and (4) did not unduly prejudice the interests of the public.[10]

If any portion of the restrictive covenant was determined to be unreasonable, then the entire covenant was invalidated.



When enforcing or invalidating restrictive covenants, the courts attempted to balance the interests of employees and employers. On one hand, the courts recognized the employee's right to earn a living and reviewed the covenant to ensure the employee was able to determine with certainty the prohibited activity.[11] On the other hand, the courts recognized the need to protect the employer's interest in customer relationships created or furthered by its former employee during employment and the employer's right to protect itself from unfair appropriation of contacts the employee developed while being paid by the employer.[12] Therefore, traditionally Georgia courts enforced restrictive covenants only if the restrictions were limited to those necessary to protect an employer's legitimate business interests and if the agreement reasonably and specifically defined limitations with respect to duration (temporal), scope of activity, and territory (geographical).

Most importantly, and unfortunately for employers with agreements signed prior to November 3, 2010, the courts did not allow the "blue penciling" of agreements reviewed under strict scrutiny – the courts would not allow modification of the contract to make the agreement more reasonable (and therefore enforceable) even though to do so would more fairly meet the intent of the parties when they entered into the contract. If any portion of the restrictive covenant was determined to be unreasonable, then the entire covenant was invalidated.

Agreements Signed After November 3, 2010

O.C.G.A. § 13-8-50 et seq. defines terms often used in restrictive covenants and gives guidance to employers as to what is reasonable in a particular type of contract. However, the most important aspect of the bill is that it will allow courts to modify covenants to make them reasonable in scope rather than throwing out the entire covenant *in toto*.[13] The ability to modify the scope of the covenant or to strike the language that makes the covenant unenforceable will enable the courts to enforce the parties' intent at the time they entered the covenants, and the courts will be able to modify a covenant otherwise void as long as the modification doesn't make the covenant more restrictive than the parties originally intended.[14] The intent of O.C.G.A. §13-8-53 is to protect legitimate business interests by allowing the courts to interpret reasonable restrictions of competition and to rid Georgia of

the strict standards previously required of covenants.[15]

The new law defines many commonly used terms in restrictive covenants including "employee".[16] Importantly, the new code section uses its definitions to ensure that legitimate business interests are being protected through the restrictive covenants. For example, through the definition of "employee," the new law requires that only those employees who have protectable information, skills, or contacts furnished by their work with the employer are estopped from competing. If an employee lacks selective or specialized skills, learning, abilities or customer contacts, customer information, or confidential information from the employer then restrictive covenants against them will not be enforced.[17] Those employees who regularly solicit customers or prospective customers, salespersons, managers, professionals, spokespersons, and those persons with specialized skills and learning or customer contacts and information derived from working with the employer may also be estopped from competition post employment.[18]

O.C.G.A. §13-8-53 anticipates that a postemployment covenant entered into prior to termination may not accurately describe the job activities the employee will ultimately engage in while working for the employer and therefore states that the postemployment covenant will be construed to cover only those activities actually conducted by the employee while working, in the geographical areas in which the employee actually worked. O.C.G.A. §13-8-53 also limits the scope of business activity restriction ("of the type conducted, authorized, offered or provided within two years prior to termination), and it suggests standard language to be used to restrict the solicitation of customers.[19]

The new law also sets forth a burden-shifting paradigm in litigation for the enforcement of restrictive covenants.[20] First, the party attempting to enforce the restriction must plead and prove at least one legitimate business interest justifying the covenant. Under O.C.G.A. § 13-8-55, if the enforcing party establishes by prima facie evidence that the restraint is in compliance with O.C.G.A. §13-8-53 (which defines the employees that may be restricted, and discusses the geographic area and scope of activities to be prohibited), the burden will then shift to the opposing party to establish that the restrictive covenant does not comply with proposed O.C.G.A. §13-8-53 or that the covenant is unreasonable.

The new law then sets forth rebuttable presumptions and levels of scrutiny which courts should use to review the covenant depending on whether or not the business endeavor is still ongoing (within term) or has concluded. The new law does not divide up the differences in the same way prior case law does. For example under the old law, restrictive covenants for franchisees, distributors and employees with no ownership interest were subjected to the same

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To Compete or Not to Compete?

Continued from previous page

scrutiny – strict. However, under the new laws, it will be presumed that a reasonable restriction for franchisees and distributors may be a year longer than for employees – three years instead of two. Also, under the old law, partnership dissolutions were given a middle scrutiny, while sellers of business assets were subjected to a lesser scrutiny. Under the new laws, the sellers of any interest in a "material part" of a business, including a partnership interest or limited liability company membership will be subject to the longest reasonable duration- five years or the entire time they are being paid, whichever is longer. [21]

While parties to a covenant may make the restrictions broader than those outlined in the proposed law's presumptions, wisdom dictates that this be done only if the agreement also set forth the legitimate business reasons justifying the broader restrictions in those particular circumstances. If the parties don't agree up front why their restrictions should be different than the guidelines, it is likely that the courts will fall back on past case law to make the determinations.

O.C.G.A. §13-8-58 allows the court to consider the economic hardship imposed by enforcement of a covenant against a former employee, but, not against a distributor, lessee, partner, franchisee, or seller of a business. The new law also allows third party beneficiaries of restrictive covenants or successors in interest to enforce the covenants.[22] The courts may enforce restrictive covenants by any appropriate means, including but not limited to damages, and injunctive relief. [23]

Conclusion

The state of restrictive covenant law was in need of repair. Businesses have legitimate business interests in restricting competition and solicitation from those in whom they confide their business contacts and secrets. The inability of the courts to "blue pencil" overly broad covenants had not allowed those interests to be met. The new laws will meet those needs.

Catherine M. Bowman is with The Bowman Law Office in Savannah, practicing employment law and litigation. She thanks Amanda Love for her contribution in authoring this article.

[1] Ga. Const. art. III, § VI, ¶ V.
[2] H.R. 173, 149th Gen. Assem., Reg. Sess. (Ga. 2009).
[3] *W.R. Grace & Co. v. Mouyal,* 422 S.E.2d 529, 531 (Ga. 1992).
[4] *New Atlanta Ear, Nose & Throat Assoc., P.C. v. Pratt,* 560 S.E.2d 268 (Ga. App. 2002).
[5] *Rash v. Toccoa Clinic Med. Assoc.*, 320 S.E.2d 170, 173 (Ga. 1984).
[6] *Am. Control Sys., Inc. v. Boyce*, No. A09A2287, 2010 WL 1172996, at *2 (Ga. App. 2010).
[7] *Watson v. Waffle House, Inc.,* 324 S.E.2d 175, 177 (Ga. 1985).
[8] *W.R. Grace & Co.*, 422 S.E.2d at 531.
[9] *Landrum v. J. F. Pritchard & Co.*, 228 S.E.2d 290, 291 (Ga. App. 1976).
[10] *W.R. Grace & Co.*, 422 S.E.2d at 531.
[11] *Sysco Food Svcs. v. Chupp*, 484 S.E.2d 323, 325 (Ga. App. 1997).
[12] *Id.*
[13] O.C.G.A. § 13-8-54.
[14] O.C.G.A. §13-8-53(d).
[15] O.C.G.A. §13-8-54.
[16] O.C.G.A. § 13-8-51 (5).
[17] O.C.G.A. § 13-8-51 (5).
[18] O.C.G.A. § 13-8-53 (a); O.C.G.A. § 13-8-51 (8), (14).
[19] (*any reference* to *a prohibition against "soliciting or attempting to solicit business from customers" or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products and services that are competitive with those provided by the employer's business*)
[20] O.C.G.A. § 13-8-55.
[21] O.C.G.A. § 13-8-57 (d).
[22] O.C.G.A. § 13-8-58 (a).
[23] O.C.G.A. § 13-8-58 (c).

Success in Mediation

Continued from page 10

through the exercise of giving an opening at mediation is important. It's important to the lawyer as it usually represents the first time the lawyer has had to distill everything about the case into a succinct statement or argument. You know very well, as you go through this process, what you're able to state boldly and what you find yourself having to tip-toe around. You learn your case better by preparing an opening. It's important for your client. Your client has a lot invested in the case, especially emotionally. You and, perhaps, others on your side of the case have been the only ones to really discuss the case with your client, which means your client has really not heard the other side. Everyone needs to appreciate all the evidentiary and practical arguments and positions in the case. It's important for the mediator as well. Openings are often when the mediators learn more about the case than they are going to learn during any other part.

Conclusion

The odds of success of a mediation are governed by the extent to which the lawyers for the parties are prepared. Arguing your case in the openings, politely, but with great confidence goes a long way. Supporting those arguments with as much objective material as possible goes even farther. In the end, if the parties are "intentional" about resolving the case, resolution at mediation is nearly a sure thing. I'll see you at mediation!

[1] "What is the Best Time to Mediate a Case?," *Practical Dispute Resolution,* November 19, 2008, by Cobb Mediation, LLC.

William S. Allred, of BAY Mediation & Arbitration Services LLC in Atlanta, is a GDLA member. BAY is a Platinum Sponsor of GDLA.

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on the day of the fire, the fire originated in the precise location where the widget was located, there was a sufficient fuel load at or near the widget, and the failure associated with the widget was a competent ignition source to initiate and spread the fire. A Fire Investigator should have all of this information, and now that the investigator has collected the additional information from the engineer, he is in a position to determine the cause of the fire.

In such a circumstance, it would be appropriate and acceptable that when the investigator is questioned about the cause of the fire to opine the cause of the fire was the failure of the widget. The Fire Investigator obtained the necessary information to determine the cause of the fire based upon his own investigation activities and the report of the electrical engineer. The investigator, of course, can defer to the engineer for technical questions that go beyond the investigator's expertise. The information provided by the engineer assisted *the Fire Investigator* in determining the cause of the fire. Did the engineer determine where the fire started? Did he/she determine there were no other potential sources of ignition? Did he/she determine that a human act was eliminated? Did he/she determine that there was a competent fuel load to propagate the fire from the point of origin? Did he/she utilize the scientific method for cause determination? In order to determine the cause of the fire, it is generally understood that one must first determine the fire's origin, identify potential sources of ignition, collect witness data, fuel load data, etc. So if the scientific method is applied and the engineer hypothesizes that the failed widget caused the fire, what is the data he/she used to support *causation*?

Trying to understand the thought process and new methodology of the "Origin Investigator approach," how would it be professionally acceptable for only the assisting electrical engineer to determine the cause of a fire? Not only must the engineer know the origin of the fire to determine cause, but he/she must also have knowledge of all potential sources of ignition, understand the fuel package, have knowledge of interviews with witnesses and fire personnel, and be able to eliminate all potential sources of ignition not related to the evidence the engineer reviewed.

And even if the Fire Investigator provides all of this other needed information to the assisting engineer, is he/she capable of determining cause? Maybe, maybe not; it depends on the background and experience of the engineer as well as his/her involvement in the total investigation. But interestingly, some people seem to think the inverse is not true, *i.e.*, that it is unacceptable for the fire investigator to utilize the data generated from an electrical analysis by an engineer and combine it with

Continued on next page

his/her own investigation to determine cause.

If you consider the "pieces of the jigsaw puzzle" analogy, the Fire Investigator often has about nine of the 10 pieces to determine the cause of the fire while the engineer has about one piece. The "Origin Investigator" then hands over all of his nine pieces to the engineer so the engineer can determine the fire cause. But simply examining electrical evidence and identifying a failure is *not determining fire cause*. The engineer simply cannot know the cause of the fire by simply identifying a failure of a piece of evidence. This does not comply with the scientific method as nearly every aspect of the fire cause determination was not actually done or analyzed by the assisting engineer.

Consider these other analogies: if you have a medical condition that requires a medical imaging scan such as an X-ray or other radiological scan, your doctor will defer the responsibility of examining the imaging scan and generating a report of their findings. The radiologist, however, does not give the patient a diagnostic conclusion. Your doctor will interpret the results, and coupled with his/her knowledge of your medical condition will provide a diagnosis. Or, what about the accelerant detection canine? Did the dog determine the cause of the fire? The dog may have provided the Fire Investigator critical information in isolating and identifying the presence of an ignitable liquid, but the dog does not know if the liquid was located in an area of origin and the dog does not know if the ignitable liquid was from a foreign source. It is the Fire Investigator that collects all of the data and is in a better position to render an opinion on the cause of the fire.

I urge the fire community to take back its profession and to be an origin *and cause* investigator**.** I urge attorneys and insurers to utilize those investigators to their fullest potential.

[1] NFPA 1033, 2009 ed., ch. 4.6.5
[2] NFPA 921, 2008 ed., ch. 11.3.5.6
[3] NFPA 1033, 2009 ed., ch. 3.3.3
[4] NFPA 1033, 2009 ed., ch. 3.3.4
[5] NFPA 921, 2008 ed., ch. 14.5.1.2

Michael Hoffman is a licensed investigator in the Charlotte, North Carolina office of GDLA Platinum Sponsor SEA, Ltd., a multi-disciplined forensic engineering/fire investigation firm. is a Certified Fire Investigator with the International Association of Arson Investigators and a Certified Fire and Explosion Investigator with the National Association of Fire Investigators. He has a B.S. from Clemson University and a M.S. in Forensic Science from Marshall University.

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