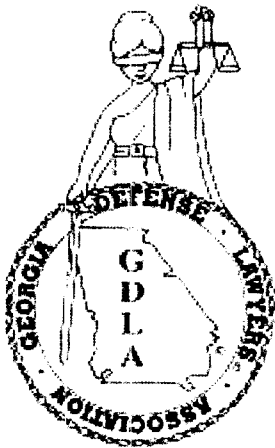


GDLA NEWSLETTER

Volume 15

Editor: John A. Foster

January 2002



THE PRESIDENT'S MESSAGE

By: Walter McClelland



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In the last newsletter, I reported that I wanted to increase membership in the GDLA. I am please to say that the membership campaign is underway, and is going well. However, the GDLA needs your help. It would be very much appreciated if each member could look around his or her community or law firm, and identify two or three people who would benefit from membership in the GDLA. Once they have been identified, let them know what the GDLA has to offer (see a partial listing in the last newsletter), and encourage them to submit an application. The application process has now been streamlined and no longer requires the endorsement of a current GDLA member. The application is on our website, or can be obtained from Salty Forbes, Al Shurley, or me. Salty reminded me

that in addition to the benefits directly provided by the GDLA, any new member will receive a one year complimentary membership to the DRI and admission to one free DRI seminar. These DRI benefits alone are worth hundreds of dollars.

I appreciate your assistance in this regard and I have no doubt that we will be able to meet the goal of 150 new members by the time of the Annual Meeting in Ponte Vedra this summer.

Elsewhere in this newsletter you will find an update as to the status of the proposed formal advisory opinion regarding litigation guidelines and auditing of bills by third-parties. I am very disappointed that the Supreme Court did not adopt the proposed opinion and did not give any guidance

as to why the opinion was not adopted. A motion for reconsideration has been filed by the Formal Advisory Opinion Board and we will keep the membership posted on the status of this very important issue.

Staten Bitting and Luanne Clarke are putting together a blockbuster CLE program, scheduled for February 15, 2002. Please mark your calendars now and plan to attend. Details will follow.

I hope that each of you had a happy holiday with family and friends. I wish you all a joyous and prosperous 2002.

WALTER MC CLELLAND

GDLA GOES TO PONTE VEDRA

Mark your calendars now for July 18 – 21, 2002! The Annual Meeting of the Georgia Defense Lawyers Association will be held at the beautiful Ponte Vedra Beach & Resort outside of Jacksonville, Florida. This is our home away from home and the folks at Ponte Vedra have promised a superlative meeting site.

Our Executive Vice President, Jerry Buchanan, is planning one of those “you-don’t-want-to-miss-this” type of program. There are tentative plans for a presentation on law firm economics by the renowned speaker, Dr. Bill McAllister. His talk will cover how to make the practice of law more profitable – something every lawyer needs to hear. I can promise you that if you implement one or more of his tips, it will more than pay for your attendance at this event.

Jerry is also planning a presentation by DecisionQuest whereby they will make available to us a “technology petting zoo.” Even those of you who are computer-challenged will find this presentation informative and helpful.

Your Georgia Defense Lawyers Association has tried to make this year’s program family-friendly and there will be planned events for the children such as a sand-castle building contest and their own dinner reception, while you and your

spouse attend our dinner banquet complete with a live band for your dancing/listening pleasure.

One of the many benefits of joining this association is the opportunity of networking with fellow civil defense attorneys and establishing friendships that will last many years in the future. As has been the custom in the past, we will be hosting two complimentary cocktail parties that you will not want to miss. Our traditional golf tournament will likewise be held and this year, we will also have a tennis tournament with prizes.

While you are reading this article, please put July 18 –21, 2002 on your calendar. You will be receiving mailings, Emails, and the final program once all of the speakers have been confirmed. Please make your reservations by the deadline indicated. This is extremely important as we must fill the block of rooms allocated or suffer a penalty. Please give this your attention and help make 2002 our best convention to date!

See you at the beach in Ponte Vedra in 2002!

STEVE KYLE
Conference Coordinator



Reward!

At its fall 2,000 meeting, the GDLA Board of Directors approved a recruitment incentive. Here’s how it works: Hereforth, any member who recruits a new lawyer for membership in our organization will receive a certificate redeemable for a fifty dollar discount on the registration cost of any GDLA event - annual meeting, Winter CLE, and trial academy. Please take advantage of this incentive and help GDLA increase its membership.

PFAO 99-R2

By: Robert M. Travis
Powell, Goldstein, Frazer & Murphy

Proposed Formal Advisory Opinion Request No. 99-R2 ("PFAO"), issued by the Formal Advisory Opinion Board of the State Bar of Georgia, provided that: "(1) A lawyer may not disclose to a person who pays the lawyer's billings other than the client, or to third-parties such as an insurer's outside audit service, confidential information concerning the client without the client's consent, except for disclosures that are impliedly authorized to carry out the representation; (2) A lawyer should not comply with the requirement of a person who pays the lawyer's billings, other than the client, that the lawyer seek or obtain the client's consent to disclosure of client confidences or secrets in billing statements to be submitted to an outside audit service [and]. . . 3) A lawyer whose professional services are paid for by a person other than the client can ethically comply with guidelines of the person paying the bill, provided the guidelines do not require disclosure of confidential or secret information of the client, without the client's consent, or interfere with the attorney's independent

professional judgment in rendering legal services to the client or with the attorney-client relationship." PFAO No. 99-R2 at 1.

In November 2000, the Georgia Defense Lawyers Association ("GDLA") submitted an Amicus Curiae brief to the Georgia Supreme Court in support of the PFAO. The GDLA argued that the PFAO resolves the "Catch 22" that attorneys face, between their ethical duties to the client/insureds and their obligations to the insurers. The GDLA also argued that the PFAO reaffirmed that attorneys must maintain the secrets and confidences of the client/insureds, and that attorneys must exercise independent professional judgment on behalf of the client/insureds.

Representatives of the insurance industry, including American International Companies, the American Insurance Association, and Zurich U.S., however, submitted formal comments to the Court urging the Court to decline to

issue the PFAO.

The insurance companies argued that the PFAO misconstrued an attorney's ethical obligations to exercise independent judgment. They further argued that insurers need recognition of their rights as clients, billing guidelines issued by the insurers tend to promote ethical billing practices, and the insurer has the contractual right and obligation to control defense claims.

Oral argument before the Court on the PFAO took place on November 13, 2000. On September 17, 2001, the Court issued a one-sentence order concerning the PFAO that stated that the Court "disapproves of the proposed opinion as submitted." Subsequent to the Court's decision, on November 7, 2001, the Formal Advisory Opinion Board filed a motion requesting that the Court reconsider its disapproval of the PFAO.



**THE GEORGIA DEFENSE LAWYERS
ASSOCIATION FALL BOARD MEETING,
OCTOBER 20, 2001**

FALL BOARD MEETING

The Board of Directors of the Georgia Defense Lawyers Association met at Brasstown Valley Resort on October 20, 2001. President McClelland called the meeting to order and welcomed new board members W. Melvin Haas, III, Thomas D. Harper and Gary L. Seacrest. Also in attendance at the board meeting were George Duncan, Sandy Owen, Bruce Welch, Warner Fox, David Whitworth, Luanne Clark, Greg Melton, Bob Travis, Staten Bitting, Johnny Foster, Morton Forbes, Steve Kyle, C. Wade Monk, II, and Richard Rominger.

A motion was made, seconded and passed to dispense with the reading of the minutes of the last meeting (all minutes of the last three meetings will be sent to the Board of Directors).

The treasurer's report was given.

Bob Travis reported on the PFAO; a September 17th Order from the Supreme Court of Georgia disapproving of the proposed opinion as submitted. The Court's opinion did not specifically address the tri-partite relationship. There was a discussion of possible next steps the Board should or could take, especially with the general counsel of the State Bar.

Mel Haas is to Email information to Greg Melton. A report of a meeting regarding this subject will be Emailed to the Board.

George Duncan discussed the November 8, 2001, seminar with food and beer in Atlanta. The seminar will be from 4:00 to 6:00 p.m. with two hours of CLE program credits. The purpose of the seminar is attract younger lawyers to our organization. The seminar is at Manuel's Tavern. George disseminated flyers concerning this seminar to the Board.

It was reported to the Board that the Trial Academy is to be held on November 29 through December 1, 2001. Rusty Gunn is again organizing the Trial Academy this year. The proposed budget for the Trial Academy was discussed.

The mid-year CLE seminar was discussed. Staten Bitting is chairing this seminar. The initial plan is to have the morning session discuss matters common to all lawyers who try damage suits and handle workers' compensation proceedings. In the afternoon, the present concept is to break out into two or more groups with programs appropriate to each group. Past problems with attendance were discussed,

especially the relationship of attendance to the notice of the seminar. There was a general consensus of using Al Shurley more than we have in the administration of the organization and especially the seminar. Salty Forbes indicated we need to set up a master calendar for at least two years in advance. There was a lengthy discussion of the other ways to have Al Shurley more involved in the administration of the organization.

Walter McClelland reported on the Willis J. (Dick) Richardson, Jr. award for excellence. Grant Smith has contacted Walter regarding setting up the fund account. Resolutions need to be completed to open the Solomon Smith Barney account for the scholarship. A motion was made, seconded and approved that the resolution for the Solomon Smith Barney account be completed.

Salty Forbes is to send a letter to past presidents to solicit funds. A resolution was proposed and adopted to open a Solomon Smith Barney account in accordance with the corporate resolution for the Richardson award account.

Salty Forbes presented the names of the proposed new members of

(Continued on page 5)

(Continued from page 4)

the Georgia Defense Lawyers Association. Five applications were received: Edwin L. Hamilton, Frank McKay, Greg Talley, Frederick Wright, II and Frank P. Harris. Mr. Forbes moved for the approval of these individuals for membership. His motion was seconded and approved by vote of the Board.

Salty Forbes discussed By-law number 3 regarding honorary memberships. Mr. Forbes proposed the honorary membership of Jack McCuen of Florida. An appropriate motion was moved, seconded and passed unanimously bestowing honorary membership to the GDLA on Jack McCuen.

President McClelland indicated that his goal is to add 150 new members to the organization. There was a discussion of ways to increase awareness of the GDLA. Mr. Forbes reminded the Board that new members of the GDLA get one year free membership in the DRI and one free tuition to a DRI program. There was a discussion of the possible creation of a section of "Young Lawyers" of the GDLA. Bob Travis was asked to see about the possible addition of new members from the Atlanta area firms, especially large firms.

Johnny Foster is preparing an outline for sponsors' information. Al Shurley should be the disbursing point of all information that needs to be sent to the sponsors. Mr. Foster indicated that the form let-

ter to sponsors would be sent by Al Shurley telling the sponsors about the benefits they would be receiving. A general discussion regarding sponsorships ensued. The total cost of the July newsletter was \$1,310.00. Mr. Foster expects the upcoming newsletter to be out before the end of October.

There was a general discussion of the Annual Meeting. The Annual Meeting date will be July 18 through July 21, 2002. Jerry Buchanan plans to do a "law office economics" program on one day of the meeting. Another day is expected to be occupied by a "decision quest" program. President McClelland recommends a band for the banquet. Jimmy Singer suggested that kids be entertained with child care at a separate location during the banquet. George Duncan made a motion to have the Executive Committee and the officer consider the costs and activities at the banquet of the Annual Meeting, including any separate plans for children.

Steve Kyle discussed future meetings. Steve first discussed costs and commitments of the future annual meetings. For the Ponte Vedra meeting on July 18 through July 21, 2002, Steve is looking for twelve exhibitors. There was a discussion of exhibitor numbers and the room needed for them.

The Winter Board meeting will be held in Atlanta at 10:00 a.m. Dates to be announced. Two possible dates were discussed for the Spring Board meeting. April 26 - 28, 2002, and May 3 - 5, 2002 were the dates discussed. Future Annual Meeting sites will be discussed by the Executive Committee.

Salty Forbes presented the DRI report. A motion was passed to have the GDLA resolve to the DRI, in line with the Alabama Defense Lawyers Association, regarding litigation guidelines.

The Board meeting was adjourned.

Respectfully submitted,

Richard A. Rominger
Secretary

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TRIAL JUDGES HOLD AMENDMENTS TO DIRECT ACTION STATUTE NOT RETROACTIVE

By John A. Foster
Forbes & Bowman
Savannah, Georgia

Common law prohibits naming an alleged tortfeasor's liability insurance carrier as a defendant in a tort suit against that alleged tortfeasor. Georgia's direct action statute, O.C.G.A. §46-7-12, carves out an exception to that rule in cases against motor common carriers.

In the past, however, courts have strictly construed the direct action statute and held that proof of the insurance coverage alone is not sufficient to name the insurance carrier, but instead, it must be proven that the filing requirements under the direct action statute have been met. Plaintiff had to prove that the motor carrier had either posted a bond with the Georgia Public Service Commission, or filed an approved policy of insurance with the Georgia Public Service Commission. The Georgia Public Service Commission Rules provided that, in lieu of filing the policy, that a Form E certificate of insurance could be filed.

In Kinard v. National Indemnity Co., 225 Ga. App. 176, 483 S.E.2d 664 (1997), the Court of Appeals intimated that proof of the mere filing of a Form E certificate of insurance should not be enough to sustain

a direct action since the direct action statute itself did not authorize the filing of a certificate of insurance in lieu of filing an approved policy or posting a bond.

Then, in McAdams v. U. S. Fire Insurance Co., 234 Ga. App. 324, 506 S.E.2d 679 (1998), the Court of Appeals was poised to toss out the direct action on the ground that the Form E certificate had been filed in lieu of filing the policy or posting a bond, but found that it did not need to reach that issue because it found the Form E certificate itself to be defective. The Form E certificate has language on it which the Court of Appeals construed to mean that in order to be effective, it had to be accompanied by a Form F endorsement. Since there was no Form F endorsement in the McAdams case, no direct action could be maintained. In practice, Form F's were rarely if ever filed.

The GPSC responded in April 1999 by deleting Form F from its forms. The legislature responded during the 2000 legislative session amending the direct action statute so as to provide that it is the insurance carrier's responsibility (rather than the motor carrier's) to file the correct forms with the GPSC, that the GPSC is authorized to accept certificates of insurance in lieu of the posting of a bond or the filing of an approved policy, and finally that the failure to file the correct paperwork could

not serve as a bar to a direct action. The 2000 Amendment became effective July 1, 2000.

At least two trial court opinions though would support an argument that in cases where the GPSC filings were made before the amendments went into effect, that it was the law as it existed at the time the filings were made that must be applied in order to determine whether a direct action can be maintained.

On March 9, 2001, U. S. District Judge Jack Nangle entered an Order in Proman v. McKenzie Tank Lines, Inc., et al, dismissing the motor carrier's insurance carrier. The insurance carrier argued in its Motion for Summary Judgment that it was not subject to direct action under the Georgia direct action statute because the requirements of that statute were not complied with in that no insurance policy was filed with the GPSC with respect to the coverage and that the Form E was defective in that it was not accompanied by Form F. Judge Nangle said:

Plaintiff argues that Georgia's direct action statute as amended effective July 1, 2000, should be applied retroactively, thereby relieving Plaintiff from demonstrating compliance with the former provisions of the statute, like posting of a bond, or filing of a policy of insurance.

(Continued from Page 8)

The Court declines Plaintiff's invitation to apply the amendment to O.C.G.A. §46-7-12 retroactively. There is no indication that the Georgia legislature intended O.C.G.A. §46-7-12 as amended, to apply retroactively. Further, the Court construes the Amendment as substantive, rather than procedural, thereby precluding retroactive application in this instance. Thus, since there was no Form F filed with respect to National Union's coverage for McKenzie, National Union is entitled to summary judgment.

Proman v. McKenzie Tank Lines, Inc., et al. USDC, SDGA, Savannah Division, Case No. CV-400-102.

In another case, **Hackle v. New Hampshire Insurance Co.**, Superior Court of Bulloch County, Georgia, Civil Action No. 1B00-CV208-T, Judge John R. Turner was faced with basically the same issue and he began his analysis of the effect of the direct action statute by saying, "The direct action statute in effect at the relevant time (it has since been amended) required the filing of a bond or policy with the Commission as a prerequisite to direct recovery from the surety or insurer. . ." Judge

Turner was clearly applying the amendments prospectively only.

In the **Hackle** case, the GPSC filings were made in 1997 and the accident happened March 6, 1999, both events occurring prior to the amendments to both the GPSC Rules and the direct action statute.

In **Proman**, the GPSC filings were made in 1996, but the accident happened November 3, 1999, which was after the GPSC Rules were amended but before the direct action statute was amended. In determining what law to apply, Judge Nangle's analysis focuses on the law that was in effect at the time the GPSC filings were made (the pre April 1999 GPSC Rules) and not on the time at which the accident happened, which was after the GPSC Rules had been amended.



If you or someone you know is not already a member of Georgia Defense Lawyers Association we invite you to apply for membership. If interested, please contact Morton G. Forbes at the following:

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2002 GDLA MID-YEAR SEMINAR**FEBRUARY 15, 2002**

Please mark your calendars for the February 15, 2002 GDLA Mid-Year Seminar. It will be at the Georgia International Convention Center. This year the seminar will offer updates and recent developments in various areas of interest to practitioners who try civil suits and also those who defend workers' compensation claims. Details will be provided in a brochure. The topics will include:

JOINT MORNING SESSION

- Subrogation Lien Update
- Exclusive Remedy Update
- Georgia Discovery Issues Update
- Georgia Evidence Update
- Ethics Update

AFTERNOON CIVIL TRIAL BREAKOUT

- Punitive Damages Update
- Jury Issues Update
- Federal Evidence Update
- Federal Procedures Update
- Challenging Junk Science
- Tort Law Update

WORKERS' COMPENSATION BREAKOUT

- Board Update and Legislative Preview
- Governor's Committee Update
- Employer's Issues Update
- Return to Work/Suspension of Benefits Strategies
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Mark your Calendars!

2002

- February 15 GDLA Mid-Year Seminar
Location: Georgia International
Convention Center
1902 Sullivan Road
Atlanta, (College Park) Georgia
- July 18-21 GDLA Annual Meeting
Ponta Vedra

See you there!

NEWS WORTHY ITEMS WANTED

Are you aware of a recent important legislative enactment or a major defense victory in the Courtroom? Have you attended any events our readers would be interested in? We would like to report it in the GDLA Newsletter. Send your items to: John Foster, Post Office Box 13929, Savannah, Georgia 31416, or call him at (912) 352-1190,

or e-mail him at jfoster@forbesbowman.com



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