GDLA NEWSLETTER

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AFFIRMATIVE ACTION: WILL BUSH DE-FANG THE OFCCP?

By: *Mandy Smith & Kristie Smith*
Constangy, Brooks & Smith

During President Clinton's eight years in office, we witnessed an increased vigor on the part of the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). The OFCCP recovered record-breaking settlements during compliance audits and has topped a million dollars in a number of cases, including $4.5 million from Boeing Corp.

The agency has found its groove by focusing on two specific areas: compensation and selection (I.e., impact ratio analysis), the two aspects of OFCCP compliance that can result in significant monetary liability. Although the OFCCP says it cares only about improving diversity at the workplaces of government contractors, in reality it is going for the big bucks. The other aspects of compliance, including accurate development of written affirmative action plans and good-faith efforts to accomplish established goals, seem to have taken second place and are scrutinized only after the agency determines that there are no big-money issues. This aggressive stance on the part of OFCCP is truly unprecedented

More evidence of the OFCCP's new-found aggression lies in the regulatory changes that took effect in mid-December 2000. Among other things, the changes now allow the agency to send mandatory Equal Employment Opportunity (EEO) surveys to all government contractors requesting information in two areas. (Here's a test: which two areas do you think the surveys ask about? If you answered the "big-money" issues compensation and selection activity, you win). Based on its initial review of the survey information, the OFCCP will target employers who have "potential problems" and schedule them for focused audits. The agency itself has admitted that the targets of these focused audits will be only those contractors who appear to have major inconsistencies in compensation or adverse impact in the selection of females and minorities (a. k.a. "potentially large monetary liability"). This development alone gives Clinton some of that legacy he's

been searching for and should give George W. Bush plenty of mischief.

Now, of course, the big question is this: Will Bush get the OFCCP back in touch with its former, less-aggressive self? The Lawyer Answer: It depends. Bush is clearly less sympathetic to OFCCP's objectives than either Clinton or Gore. However, Bush's lack of a mandate (not to mention a majority vote) could severely weaken his ability to do what he might like to do with the agency. He may prefer bipartisanship and fence-mending to taking an aggressively pro-business stance. If so, we expect the new OFCCP regulations and its new focus on big-buck liability to continue with a Bush II Administration.

On the other hand . . . Bush's ill-fated nomination of conservative Linda Chavez as

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Secretary of Labor indicates he may not be as conciliatory toward the Democrats as one might have expected, given the election results. Although Chavez didn't make it, if a like-minded individual becomes Secretary of Labor, we can almost certainly expect some paring back of the Department of Labor and particularly the OFCCP. (Whether a like-minded individual can survive the Senate confirmation process is somewhat less certain). Not even a conservative Secretary of Labor will be able to change the new regulations anytime soon, which was exactly Clinton's plan. Thus, we can expect the OFCCP to "proceed as planned with sending out EEO Surveys to 50 percent of the government contractor population in 2001 and the remaining 50 percent in 2002, and picking fights whenever it smells money.

Until Elaine Chao, or whoever survives the confirmation process, can rein in the OFCCP, we recommend that contractors take a proactive approach to affirmative action issues. Employers who procrastinate until the 30-day letter arrives are almost certain to get nailed. In addition to keeping your affirmative action plans up to date, I recommend that you go beyond "full compliance" by conducting quarterly reviews of the two major monetary liability areas. This will allow you to identify problems and develop a plan to correct them without the assistance of the OFCCP. I can guarantee that if the OFCCP has to "help" you correct these problems, it will expect no less than full recognition for doing so.

Welcome to the "new and improved" OFCCP.

Mark your Calendars!

GDLA 34th ANNUAL CONVENTION

July 19-22, 2001
San Destin Golf & Beach Resort
San Destin, FL
1-800-320-8115

CLE credits, Golf, Tennis, Beach, a Banquet and 2 Cocktail Parties

A great way to get CLE credits, socialize with old friends and meet new ones. Special room rates have been negotiated at the conference center. A limited number of beachside rooms are available. Call now is you are interested in being beachside as these rooms will go quickly.

A great opportunity for a family vacation. Bring the children!

Registration and seminar information will be sent soon.

See you there!

IMPORTANT REMINDER

By: Walter B. McClelland

By now you should have received your registration and agenda for the 34th Annual Convention to be held at Sandestin Golf & Beach Resort in Destin, Florida, from July 19 – 22, 2001. This is an exceptional opportunity to socialize with your fellow defense lawyers, obtain 6 hours CLE credits, and have a great family vacation. For only $350.00 you get 6 CLE credits, a great program, 2 cocktail/kool-aid parties and an elaborate banquet for you and your family. In addition, course registrants will receive continental breakfast for 2 days. What a deal! If anyone did not receive a copy of the registration and agenda, please let me know and I will get one to you.

The GDLA has negotiated a special rate with the Sandestin Golf & Beach Resort, for rooms as low as $155.00 per night, double occupancy (2 children per room stay free). More expensive rooms are available while they last. You must, however, contact Sandestin Golf & Beach Resort directly at 1-800-320-8115, by June 19, 2001, to receive this special room rate. Please indicate that you are a member of the GDLA.

I truly believe that this will be an exceptional program, and a great opportunity. If you have not already done so, I urge you to register immediately. Of course, if you have any questions about the convention, please let me know.

LEGISLATIVE UPDATE FOR 2001 Georgia General Assembly

By John Edwards

There were several bills enacted by this session of the General Assembly which may be of interest to members of the Civil Defense Bar.

Senate Bill 269 amends O.C.G.A. § 5-3-30 by adding a subparagraph (b) which provides upon an appeal being filed from the magistrate court to the superior or state court, the monetary limitation or cap of $15,000 provided in O.C.G.A. § 15-10-2 will no longer apply to any verdict and judgment that might be rendered in favor of the plaintiff in superior or state court. This Bill becomes effective July 1, 2001.

House Bill 478 amends O.C.G.A. § 33-4-6 pertaining to first party bad faith damage claims against insurance companies by increasing the limit of the penalty that can be awarded against the insurance carrier from 25-50% of the liability of the insurer for the loss or $5,000, whichever is Greater. More importantly, this same bill created a new code section known as O.C.G.A. § 33-4-7 giving a third party claimant a cause of action for bad faith damages where an insurer fails to adjust a loss fairly and promptly, fails to make a reasonable effort to investigate and evaluate the claim, and, where liability is reasonably clear, fails to make a good faith effort to settle under the policy issued to its insured. Any insurer who breaches this duty may be liable to pay the claimant, in addition to the loss, not more than 50% of the liability of the insured for the loss or $5,000, which is greater, and all reasonable attorney's fees for the prosecution of the action. An insurer can be liable under this code section if it offers less than the amount reasonably owed after liability has become reasonably clear. This Bill becomes effective July 1, 2001.

Although the third-party claimant cause of action for bad faith damages appears to apply only to property damage at the present, we understand the GTLA is going to try to get legislation passed next year applying it to personal injury cases.

Senate Bill 30 amends O.C.G.A. § 31-33-1 relating to the amount that can be charged by a hospital provider for furnishing copies of medical records. In addition to a $20 administrative cost and a $7.50 fee for certifying the record, the copying costs shall not exceed 75¢ per page for the first 20 pages, 65¢ per page for pages 21-100 and 50¢ for each page copies in excess of 100 pages. Payment of the cost may be required by the provider prior to the records being furnished. This Bill becomes effective July 1, 2001.

House Bill 156 creates what is known as the "Patient Right to Know Act of 2001" creating

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O.C.G.A. § 43-34-A-1 et seq. This Bill requires the Composit State Board of Medical Examiners to create physician profiles on each physician licensed in the state, which profiles shall be made available to the public through the Internet. The physician profile will include any final, public disciplinary action by a regulatory board as well as any second or subsequent final private reprimand. It will also include any final revocation or disciplinary action resulting in restriction of hospital privileges, either involuntary or by agreement, for reasons related to competence or character in the most recent ten years. This will include resignation from, non-renewal or restriction of staff privileges at a hospital in lieu of pending disciplinary action.

More importantly, the Act provides for disclosure of certain judgments and settlements in medical malpractice actions within the past ten years. For the first settlement or judgment, only a judgment in excess of $100,000 or a settlement of $300,000 will be disclosed. The restrictions on the monetary amounts of the judgment or settlements change depending on the number of such judgments or settlements. This Act becomes effective upon signature by the Governor.

House Bill 187 amends O.C.G.A. § 33-7-11(B) by requiring insurance companies to offer uninsured motor vehicle limits equal to the limits of liability for bodily injury.

House Bill 497 amends Chapter 9 of Title 34 of the Code relating to workers compensation to provide for the award of reasonable litigation expenses under certain conditions; to increase the number of physicians on the posted panel from four to six; to increase the maximum temporary total disability benefits from $375 per week to $400 per week; to increase the minimum temporary total disability benefits from $37.50 per week to $40 per week; to increase the maximum temporary partial disability benefits from $250 per week to $268 per week.

DRI: State Reps Report

David T. Whitworth
DRI Georgia State Representative
Whitworth Law Firm, PC
Brunswick, Georgia

I had the pleasure of attending the DRI State Representative's Meeting in Chicago on March 9-10, 2001. (This was at no cost to the GDLA, incidentally). It is probably natural as the schedule of meetings gets longer for one to wonder whether a given one is worth the time. This meeting, however, proved to me again that DRI continues to improve its role as the national organization for defense practitioners like ourselves.

The State Representatives' meetings are intensive, typically commencing at 8:00 a.m. and running until early evening, and much of what goes on has to do with the mechanics of operating DRI and its numerous functions, and promotion of the state organizations themselves. Evaluation and improvement of DRI's annual meeting, promotion of minority membership, and DRI's involvement in outreach to judges and law schools were among many topics discussed.

Of greatest interest to me, however, are the activities of DRI that are geared directly to supporting and assisting defense practitioners and, particularly in my case, small firm practitioners.

DRI is conscious of the fact that a majority of its members come from "small" firms (which DRI defines as less than 18 attorneys), and is taking the concerns and "plight", if you will, of small defense firms seriously. While at the state rep's meeting, I became better informed about DRI's Small Firm Symposium which was developed by Dick Collins in Florida, and that this seminar was to be presented in conjunction with the Mid-Atlantic Regional Meeting. Those of you who have provided GDLA with your email address received notification of this meeting in North Carolina (which, due to no fault of mine, was not well in advance of the meeting). At least one Georgia lawyer other than myself was able to attend.

Simply put, the Small Firm Symposium is by far the best of its kind that I have ever observed. Dr. Bill McCallister, a Ph.D economist who has special

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ized for years in law firm economics, anchors the program. I hope that it may be possible to incorporate this seminar into a GDLA annual meeting in the future.

Beginning approximately May of this year, it will be possible for DRI members to gain access to Dr. McCallister's wealth of information for a small, specially arranged fee through DRI's web site. For those of you GDLA members who are not DRI members, this soon-to-be available service should provide you with a serious incentive To join DRI. And, if that is not enough, DRI is offering a year of membership *free* to any member of GDLA. An application will be included with this Newsletter, and I hope you will avail yourself of this special opportunity.

I have also asked John Foster to include with this Newsletter updated information on the DRI Expert Witness Data Bank.

I appreciate having the opportunity to serve as your representative to DRI, and hope that I can make available to you resources which may make your practice more enjoyable and rewarding.

DRI Witness Bank

DRI has entered into a contract with Juritas, a Chicago based Internet company which provides online database services to the legal profession. Juritas has almost completed scanning the entire DRI expert witness bank (including transcripts, CVs and summaries) which will very soon be available for online access through the DRI site or Juritas.com. This will be available only to DRI members, with password access. Juritas has absorbed the significant up-front cost for digitizing this database. Its payoff will be through fees for access to the database (searches will be free). Additional discussions will take place as to the price structure for this service. At this point the proposed per page transcript charge may need to be adjusted in order to promote usage. As an anticipated second phase to the relationship with Juritas, discussions are underway to put the entire DRI library on the web, that is, FTD, newsletters, seminar materials, special publications, etc. This library would be key word searchable.

At its fall 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.

THE GEORGIA DEFENSE LAWYERS ASSOCIATION WINTER BOARD MEETING, FEBRUARY 17, 2001

The Winter meeting of the Board of Directors of the Georgia Defense Lawyer's Association was held at the offices of Bovis, Kyle, and Burch, in Atlanta, Georgia, February 17, 2001.

Present at the meeting were Greg Melton, Jerry Buchanan, Walter McClelland, Steve Kyle, George Duncan, Warner Fox, Salty Forbes, John Edwards, Rick Rominger, Jimmy Singer, Sandy Owens, Bob Travis, Grant Smith, Drew Hill, Johnny Foster, Clay Ratterree, Wade Monk, David Whitworth, and Lou Ann Clark.

The meeting was called to order by Mr. Melton, President.

Fall Board Minutes: Mr. Melton called for a motion to approve the minutes of the fall board meeting, which motion was made, seconded, and unanimously approved.

Treasurer's Report: Jerry Buchanan gave the treasurer's report. The treasurer's report was approved as read.

PFAO Report: Mr. Melton called on Bob Travis to report on the status of the AIG/Zurich/PFAO matter. Mr. Travis reported on the Amicus brief, the oral argument in the Supreme Court, and the current status of the matter, to include the following: John Marshall of Powell Goldstein argued the matter before the Supreme Court, which argument was well received. After oral argument, Zurich and AIG filed supplemental briefs, as did GDLA through Powell Goldstein. We argued against negotiating a compromised position, and against further fact development. The Supreme Court has not yet taken any action, but the matter is on the Court's calendar for the first week in March. Mr. Travis reported that he feels optimistic about a favorable decision from the Supreme Court.

It was also reported that, since our argument, there has been an opinion of the Massachusetts Supreme Court that may relate to the issue of the PFAO.

Trial Academy: Jerry Buchanan reported on the trial academy for Rusty Gunn. The trial academy was successfully sponsored by the GDLA in December of 2000.

Mr. Melton stated that the emphasis in the future must be put on marketing and better participation. The faculty of 10-12 lawyers devote 3 full days to the academy and provide an excellent program.

During the discussion of this issue, it was noted that the larger firms are the life blood of the academy, and are essential to support it. It was also noted that the notice of the academy should be sent earlier. There was also discussion of considering having the academy every other year, the possibility of inviting lawyers from other states to attend and participate, and other ideas. It was concluded that it is likely that the 2000 academy low attendance was an aberration and that the academy should continue on its present course for now.

Mid-Year ClE Report: Greg Melton delivered the report. This year's meeting is set for March 2, and a good program has been put together by Wiley Wasden. Mr. Melton asked that we all talk up the CLE meeting and encourage attendance.

Mr. Kyle reported the GDLA had to sign a contract to guarantee 50 lunches, and if people don't sign up, we have to pay them. The fee for the CLE Program is $125 per person.

Mr. Singer suggested that, if the CLE meeting could be in January, if we could know in advance when it is to be held each year, and advertise in advance, we might have better attendance. He stated that having the program before the CLE affidavit must be signed is important.

Dick Richardson Memorial Fund: Grant Smith reported that we could have a named scholarship for $100,000, but the most practical idea is a "most outstanding student" for $10,000, named for Dick Richardson, and this would provide an award of $500 per year. He suggested the name "Dick Richardson Outstanding Trial Practice Student." In order for the University to accept the program, we must commit to funding $10,000 in 5 years.

Mr. Melton noted that there was a strong feeling that this organization needed to do something significant to recognize Dick Richardson as a lasting memorial. This group must find the way to raise the money.

Mr. Forbes stated that the money should come from the members, and that GDLA should create an oversight committee for this fund, and use that committee to solicit the money.

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Ms. Clarke suggested that golf tournaments are money-making events, and that GDLA could name a golf tournament after Mr. Richardson.

Mr. Smith noted that, if we begin with a goal of $10,000, we can convert it to a scholarship if we get up to $25,000.

Mr. Melton asked Grant Smith to organize a committee and come to Kiawah with a proposal. The target should be the older half of membership, since they are the ones who knew Dick best.

Mr. Duncan moved that the organization commit to $10,000 for the named award, which motion was seconded and unanimously approved.

Luann Clark and Grant Smith were appointed to head the effort, with assistance from Mr. Forbes.

Annual Meeting Update: Mr. McClelland reported that all speakers are in place and that we need to get brochures printed and out to the membership. Speakers include: Dr. Joe Burton, Paul Painter, a premises liability presentation by Mike Gorby and Mr. Dyche; Ed Henning will give a presentation about updates in mediation, Benedict Engineering on experts, and Johnny Foster will present the law update.

He reported that the meeting is at San Destin, a family friendly venue, with a good beach and good food.

He reported that he would email and send out notices in the near future. His goal was stated to be 100 lawyers. Mr. Kyle stated that San Destin was a great family place with great rates.

Future Meetings: Mr. Kyle reported that the next board meeting is scheduled for April 27-28 at Kiawah Island, South Carolina.

DRI Report: Mr. Forbes reported that DRI had a winter board meeting the previous weekend and adopted a number of matters. "For the Defense," the DRI newsletter/magazine will be sent to all trial judges in the U.S. It is to be sent to Georgia judges under a cover letter signed by the president of GDLA. If anyone knows of any recent appointees to bench, they are asked to notify Mr. Forbes.

Mr. Forbes also reported that DRI is holding its second international conference in Brussels, May 16-18, 2001.

DRI will sponsor a regional meeting at the Annual Meeting of GDLA in San Destin, and the annual meeting of DRI in October in Chicago.

Committee Reports

Law Journal: Grant Smith reported that he has seven firm commitments for articles, including Lynn Roberson on premises liability; Staten Bitting on Workers Compensation; Mel Haas on labor law; Ed Stabell on truck train collisions; Cam Bowman on legislative updates on auto law; and Mike Goldman is preparing an article on prior occurrences and subsequent remedial measures.

Mr. Melton noted that we have agreed to do a slick brochure and publish this year's Law Journal on the internet. The brochure will go to judges and all members of GDLA.

Mr. Chambless inquired as to whether we are irrevocably committed to having no written journal. He commented that it was one of the best things we did for members. It was decided that there is no permanent decision as to the Journal, but that we should try internet web site publication and see what reaction we receive.

Mr. Duncan noted that we can print it for anyone who wants it.

The target dates for the Journal are as follows: Articles by mid April, packaged up and ready to go by the end of May.

Substantive Law Committees: Mr. Melton stated that we have asked each substantive law committee to become more active, to participate in annual meetings, write articles for law journal, newsletter, etc.

Long-Range Planning Committee: Jerry Buchanan reported that the LRCP had met on Friday, February 16, 2001 and had discussed the financial viability of the association and various ways the GDLA could increase revenues and decrease spending. He reported that the LRPC had suggestions regarding membership increases. First, it was the recommendation of the LRPC that the by-laws be amended so as to allow in-house counsel for corporations other than insurance companies to become members. The committee felt that this would give our members an opportunity to interact with counsel for corporations who regularly hire trial counsel in the state. It was also the opinion of the committee that the membership process should be made less cumbersome by deleting the requirement for a nominator and a letter of recommendation from second members of GDLA. It was also proposed by the LRPC that the application be amended to state the requirements for membership, and

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have the applicant certify that he or she meets those requirements.

Mr. Buchanan also reported on other matters discussed at the LRPC, including the possibility of changing the status and duties of the executive secretary. It was stated that at this time, the committee was not ready to make a formal proposal regarding the executive secretary's position, but that a committee of past presidents would look into the matter to determine exactly what the position should entail and what duties the executive secretary would perform.

Following the LRPC report, Greg Melton and Rick Rominger discussed the viability of the Winter CLE meeting due to lack of interest and its expense. Mr. Chambless observed that CLE started in Macon, where we had about 25 people, and the venue was changed to Atlanta to get more people, but the change has not been completely successful. It was reported that in recent years, the attendance at the Winter CLE program has been in the range of the mid-fifties.

Mr. Chambless also inquired as to whether the LRPC had considered the DRI expenses, and it was stated that the Board had approved a new plan for paying DRI expenses at the fall board meeting in Brasstown Valley. Mr. Duncan then made a motion to amend the by-laws. The motion was unanimously adopted and the proposed by-law change will be submitted to the membership for a vote at the next annual meeting in July.

Mr. Kyle called for a motion to modify application for membership procedure as had been suggested by the LRPC. After much discussion, the following motion was made:

Motion: that the membership application be amended to reflect the criteria for membership, and that the applicant certify that he or she meets those criteria, and list two references. There need be no nominator and no seconding letter of recommendation. The membership committee will continue to conduct such investigation into applicants as it deems appropriate and report the results of any such investigation to the Board. Membership shall be subject to a vote of the board of directors.

The motion was seconded and unanimously adopted.

Drew Hill and salty Forbes were asked to come up with a draft application form to be reviewed at the board meeting at Kiawah in April.

Legislative Committee: John Edwards reported that following the Supreme Court's ruling in King v. State regarding medical records obtained without the patient's knowledge, the Georgia Hospital Association has proposed a new statute regarding the subpoenaing of medical records, which has a provision that it shall not apply to RFP under § 9-11-34-c, but it does have provision of § 9-11-34 regarding communications to psychiatrists.

There is potential for a requirement that there be a determination by a judicial hearing officer that the medical condition of the plaintiff has been put in issue before records can be obtained. Mr. Edwards requested that the board designate someone as a contact for GHA to let them know how we feel about this proposed legislation. It was suggested that Sandy Owens, John Edwards and Wade Monk should contact GAHA, the Georgia Association of Hospital Attorneys and express the GDLA concerns about the proposals. This proposal was unanimously adopted.

Mr. Edwards reported on another legislative initiative that would create a doctor-patient privilege. A motion was made that GDLA oppose this amendment creating doctor-patient privilege. The motion was unanimously approved.

Mr. Edwards also reported on legislation that would remove the 25% penalty cap on claims against insurance companies. He also reported on the proposed Patient Right to Know Act, which would make information about doctors available to anyone. No action was proposed or taken on these two matters.

Amicus Committee: Jimmy Singer reported that the Amicus Committee is in a little lull, after having advocated a position in the King case, where the Supreme Court carved out exception as GDLA had requested. GDLA also filed a brief in the Time-Warner case, but the Supreme Court denied certiorari.

The Amicus Committee also filed a brief in the Security Life case. He reported that at this time there was nothing in the hopper for the Amicus Committee to do.

Newsletter: Johnny Foster reported that the newsletter was mailed last weekend at a cost of $1,194, with the increased cost resulting from the length of the newsletter going to 28 pages, which doubled postage costs. He reported that the only difficulty is keeping on schedule.

Recent developments Committee: Johnny Foster reported that this is a new committee, just now getting organized. Mr. Melton suggested that we step up the committee activity and try to publish on our website and email to members hot topics or recent developments. He used the Alabama "hotsheet" as an example of reporting on recent developments.

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Membership Committee: Mr. Forbes reported that we have 4 new member applications, Donna S. Bass of Hawkins and Parnell, W. Richard Dekle of Hunter MacLean, Timothy Newton, of Constangy, Brooks and Smith, and Anne Presley of Mabry and McClelland. Also, Michael White of the Martin Snow firm in Macon. These proposed members were placed in nomination and their membership unanimously approved.

Mr. Forbes also reported that DRI and GDLA will try to coordinate their membership lists to solicit new members.

Membership Recruitment: Drew Hill reminded the board of the current dues and initiation fee requirements. We also have adopted an incentive plan whereby members receive a $50 certificate to apply toward any GDLA function. This plan does not apply to members of the Board of Directors.

Mr. Hill stated that, with the removal of the requirement for nominators and sponsors, he could now engage in mass mailing solicitations for new members. He will come up with a letter to send to prospective members after the new change is approved at the July annual meeting.

Alternative Revenue: Rick Rominger gave the report of this committee, focusing primarily on how to identify potential new sponsors. He intends to email the membership and ask all to try to solicit sponsors or identify. He reported that our current sponsors are: Benedict Engineering, Forcon, ISI and Applied Technology. Expert Legal Video was a potential sponsor that exchanged an ad for services at the annual meeting.

Technology Committee: Bill Claxton is a chairman of the committee and has expressed a number of good ideas to move that committee forward.

New Business: Warner Fox reported on the request from the ABA to give our position on multi-jurisdictional practice of law.

A motion was made, duly seconded and unanimously passed that Sandy Owens and Warner Fox would come up with a recommendation to the board, and the matter would be submitted to the board by an email vote.

Mr. Kyle next addressed the Annual Meeting cancellation policy: George Duncan proposed that if members sign up for an annual meeting and cancel, and the GDLA incurs expenses in the form of hotel guarantees, registration fees, expenses for printing, committing to coffee breaks, etc., dinner expenses and the like, we need a policy regarding the registration fee.

It was decided that this subject should be revisited at the April board meeting.

Jury Charge Project: Jerry A. Buchanan informed the board that Sally Akins has volunteered to undertake a revision of the GDLA jury charges for posting on the website. This project was unanimously approved by the board, and Ms. Akins was authorized to form her committee and undertake the project.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Jerry A. Buchanan, Secretary-Treasurer
Georgia Defense Lawyers Association, Inc.

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:

MORTON G. FORBES
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Savannah, Georgia 31416-0929
(912) 352-1190
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SUPREME COURT APPROVES MANDATORY ARBITRATION REQUIREMENTS IN EMPLOYMENT CONTRACTS

EDGAR W. ENNIS, JR.
CONSTANGY, BROOKS & SMITH, L.L.C.

(Editorial note: This article is adapted from an article to be published in the client newsletter of Constangy, Brooks & Smith, L.L.C.)

In 1925 Congress passed the Federal Arbitration Act (the "FAA"), which requires the judicial enforcement, in federal and state courts, of written arbitration clauses in *"any maritime transaction or a contract evidencing a transaction involving commerce."* Does the FAA apply to arbitration-based dispute resolution programs in the employment arena? If so, what if an employee files a lawsuit in court over an employment dispute, even though the employer has a mandatory arbitration program? The Supreme Court answered these questions on March 21, 2001, in its opinion in *Circuit City Stores, Inc. v. Adams*. The effect of the Supreme Court's ruling is this: an employer who has instituted a mandatory arbitration program to which its employees have validly agreed under state contract-law principles is entitled to have a court stay the proceedings in a lawsuit filed by an employee. The court must require the employee to pursue any remedy before an arbitrator instead. The trial court retains jurisdiction for the sole purpose of enforcing the arbitrator's award.

Background: The FAA contains a provision exempting from its coverage any *"contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."* This exemption language has been the subject of varying interpretations in the federal courts. Some courts have interpreted the phrase *Any other class of workers engaged in foreign or interstate commerce"* to be limited in its meaning by the phrases which preceded it, i.e. the references to seamen and railroad employees. In other words, those courts have limited the exemption to employment contracts of seamen, railroad employees, and other workers actually engaged in the interstate transportation industry. Other courts have given a broader interpretation to the third phrase of the exemption and concluded that the words *Any other class of workers engaged in foreign or interstate commerce"* applied to the employees of any business if the activities of that business had an effect on interstate commerce. This latter interpretation would make the exemption apply to nearly every employee, because almost every business has an effect on interstate commerce. The practical effect of this interpretation would be that the Federal Arbitration Act would not apply to any employment contract.

On March 21, 2001, the United States Supreme Court resolved these conflicting decisions when it rendered its opinion in *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 2001 U.S. LEXIS 2459 (March 21, 2001). In a 5-4 decision, Justice Kennedy, writing for the court, concluded that the " better interpretation is to construe the statute . . . to confine the exemption to transportation workers." (Emphasis added). In other words, the Federal Arbitration Act provides for judicial enforcement of an arbitration provision in any contract of employment, except contracts of employment involving seamen, railroad employees, and other transportation workers (and, of course, that very tiny fraction of employees whose employers are not engaged in businesses affecting interstate commerce).

Both Justice Stephens and Justice Souter wrote dissenting opinions, collectively representing the four dissenting justices. Although the majority opinion and the two dissenting opinions focused heavily on arcane principles of statutory construction in an effort to discern the true meaning of the legislative intent of the phrase *"workers engaged in foreign or interstate commerce,"* each of the opinions appears to have been informed, at least in part, by the writer's philosophical position on the question of the correctness of the underlying policy favoring arbitration as an alternative to litigation. For example, in the majority opinion, Justice Kennedy writes:

> "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. . . . Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment re-

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> lationship . . . and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others. . . . The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protections against discrimination prohibited by federal law; . . . by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Circuit City Stores, Inc. v. Adams, 2001 U.S. LEXIS 2459, at *31-33 (Kennedy, J.). In contrast, Justice Stephens wrote:

> As the history of the legislation indicates, the potential disparity in bargaining power between individual employees and large employers was the source of organized labor's opposition to the Act, which it feared would require courts to enforce unfair employment contracts. . . . When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.

2001 U.S. LEXIS 2459, at *49-50 (Stephens, J., dissenting). In the same vein, Justice Souter wrote:

> It would seem to have made more sense either to cover all coverable employment contracts or to exclude them all. In fact, exclusion might well have been in order based on concern that arbitration could prove expensive or unfavorable to employees, many of whom lack the bargaining power to resist an arbitration clause if their prospective employers insist on one.

2001 U.S. LEXIS 2459, at *59-60 (Souter, J., dissenting).

Regardless of the route the Supreme Court followed in arriving at its decision, its significance to employers is clear. Employers and employees may agree to resolve employment-related disputes by arbitration rather than litigation. If they make such an agreement, all courts, federal and state, are bound to enforce it.

Practical Considerations: The Circuit City case cannot be read in isolation. Many other factors come into play in deciding whether to implement a mandatory arbitration program for employees. The Supreme Court and other federal courts have provided guidance concerning some of these issues in earlier decisions, while other issues in this area are still unsettled.

1. *May employers require employees to arbitrate employment discrimination claims which are based upon federal equal employment opportunity statutes?*

The answer is "yes," (at least as to Age Discrimination in Employment Act claims) according to the Supreme Court. In *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), by a 7-2 majority, Justice White, writing for the majority, said:

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. " 1-7; 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. ' 78*j*(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. ' 1961 *et seq.*; and ' 12(2) of the Securities Act of 1933, 15 U.S.C. ' 77*l*(2). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi, supra*, at 628.

500 U.S. at 26.

Gilmer, a 62 year-old stockbroker, had been terminated by his employer, Interstate Johnson/Lane. Gilmer's claim against his employer was based upon the Age Discrimination in Employment Act of 1967 (the "ADEA"). In the course of registering with the New York Stock Exchange following his initial employment by Interstate/Johnson Lane, Gilmer had agreed to an arbitration clause in his registration application, which his employer then sought to have enforced

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for the purpose of resolving the ADEA claim. Gilmer argued "that compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA." 500 U.S. at 27. However, the Court noted:

> Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." [cit. omitted.] In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. [cit. omitted.] If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. [cit. omitted.] Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." [cit. omitted.]

500 U.S. at 26. The Court ruled in favor of the employer, concluding "that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." 500 U.S. at 35.

Relying upon *Gilmer,* other courts have found that the FAA requires enforcement of arbitration agreements in cases where the claims were based upon other equal employment statutes. *Brown v. ITT Consumer Financial Corp.,* 211 F.3d 1217 (11th Cir. 2000) (holding that statutory claims, including claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), can be subject to compelled arbitration); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (Title VII); *Brisentine v. Stone & Webster Engineering Corporation*, 117 F.3d 519 (11th Cir. 1997) (Assuming but not deciding that claims under the Americans with Disabilities Act of 1990 (the "ADA") are subject to arbitration based upon language of the statute itself: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. " 12212). In *Brisentine*, the Court noted three criteria an arbitration agreement must satisfy in order to constitute a bar to litigation of a federal statutory claim: first, the employee must have agreed individually to the contract containing the clause; second, the language of the agreement must authorize the arbitrator to resolve federal statutory claims; third, the agreement must give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in any grievance process. 117 F.3d at 526-27.

2. *May an arbitration agreement impose a limitation upon the remedies available to an employee?*

In states covered by the Eleventh Circuit, the answer is "no." In *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), the Court, relying upon its interpretation of language in the Supreme Court's *Gilmer* opinion, held that A. . . arbitrability of [Title VII] claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies. . . . When an arbitration clause has provisions that defeat the remedial purpose of the statute, therefore, the arbitration clause is not enforceable." 134 F.3d at 1062. The Court focused upon a provision in the arbitration agreement which provided that "the arbitrator is authorized to award damages for breach of contract only and shall have no authority whatsoever to make an award of other damages." Because the Court found that the employee was denied the possibility of obtaining meaningful relief in an arbitration proceeding on her Title VII claim, the agreement was not enforceable, and Ms. Paladino was entitled to pursue her Title VII claim in court.

3. *May an arbitration agreement limit the amount of time within which an employee may bring a claim?*

Title VII and the ADA (for example) give an employee 180 days following an act alleged to be discriminatory within which to file a charge of discrimination with the EEOC. The employee then has 90 days following receipt of a copy of the EEOC's "Dismissal and Notice of Right to Sue" within which to bring a lawsuit based upon the claim. Although the Eleventh Circuit has not addressed the question, other courts around the country have held that provisions designed to shorten such statutory time limits rendered the arbitration agreement unenforceable. *See Krahel v. Owens-Brockway*, 971 F. Supp. 440 (D. Or. 1997); *Salisbury v. Art Van Furniture*, 938 F. Supp. 435 (W.D. Mich. 1996).

4. *Who bears the cost of arbitration?*

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Typically, the assignment of cost is addressed by the arbitration agreement itself. Some courts, including the Eleventh Circuit, have suggested that requiring the employee to bear unduly burdensome costs in an arbitration agreement renders the agreement unenforceable. *See Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Shankle v. B-G Maintenance Mgmt. of Colorado, Inc*, 163 F.3d 1230 (10th Cir. 1999); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997). In the *Paladino* case, the arbitration agreement provided that the employee would be liable for at least half the cost of an arbitration in addition to paying the $2,000.00 filing fee. The Court said "we consider cost of this magnitude a legitimate basis for a conclusion that the clause does not comport with statutory policy." *Paladino*, 134 F.3d at 1062. Outside the employment context, the Eleventh Circuit reached a similar result in *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999). That case involved consumer claims under the Truth in Lending Act and the Equal Credit Opportunity Act. The Court found, as one of its bases for ruling in favor of the Plaintiff, that the arbitration agreement was silent with respect to the payment of costs of arbitration, and this left open the possibility that the Plaintiff would not be able to vindicate her statutory rights. However, the Supreme Court has reversed the Eleventh Circuit in the *Randolph* case. In *Green Tree Financial Corp. v. Randolph*, 2000 U.S. LEXIS 8279 (Dec. 11, 2000), the Supreme Court said:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.
>
> To invalidate the agreement on that basis would undermine the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital*, 460 U. S., at 24. . . . [W]e believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point. The Court of Appeals therefore erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable."

2000 U.S. LEXIS 8279, at *20-23. The Supreme Court implies that an arbitration agreement could, under some circumstances, impose too heavy a financial burden upon an employee and for that reason be made unenforceable. However, the Supreme Court did not draw that line, and no Eleventh Circuit case decided since the Supreme Court reversed its decision in *Randolph* has attempted to draw the line.

5. *Is an arbitrator's award subject to judicial review?*

The Federal Arbitration Act sets forth certain limited circumstances under which an arbitrator's award may be reversed by a court. Sections 10 and 11 of the Act provide as follows:

> **Sec. 10. Same; vacation; grounds; rehearing**
>
> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy;

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or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

. . . .

Sec. 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration -

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. A 10-11.

There is another basis for judicial reversal of an arbitration award: "Manifest disregard of the law." The scope of this basis for judicial review was described by the Eleventh Circuit as follows:

The thread that runs through our precedent in this regard is our reluctance to suggest explicitly or implicitly that an arbitration board's decision can be reviewed on the basis that its conclusion or reasoning is legally erroneous. We do not permit review under these circumstances and reject any argument that to err legally always equates to a "manifest disregard of the law."

. . .

An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it. . . . In the case before us, that is precisely what the panel was flagrantly and blatantly urged to do. The arbitrators expressly took note of this plea in their award when summarizing the parties' arguments. There is nothing in the award or elsewhere in the record to indicate that they did not heed this plea. In the absence of any stated reasons for the decision and in light of the marginal evidence presented to it, we cannot say that this is not what the panel did. [footnote omitted] We conclude that a manifest disregard for the law, in contrast to a misinterpretation, misstatement or misapplication of the law, can constitute grounds to vacate an arbitration decision.

Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456 (11th Cir. 1997). The Eleventh Circuit's approach is quite conservative compared to the approach taken by the District of Columbia Circuit which held that "manifest disregard of the law" was a concept whose definition depended upon the underlying facts, which were to be assessed on a case-by-case basis. *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

The Fifth Circuit concluded in a non-employment case that where the parties to an arbitration agreement had included a provision within the agreement itself setting forth additional bases for judicial review, a court would be free to

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review the arbitrator's award, not only upon the statutory bases for review, but also upon the contractual bases for review set forth in the arbitration agreement. *Gateway Technologies., Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995).

6. *Are there other limitations on the scope of issues which may be determined under an arbitration agreement?*

In order for a matter to be the subject of arbitration under an arbitration agreement, the agreement itself must provide for arbitration of such matters. Thus, while Title VII claims (for example) *may* be lawfully arbitrable, it does not follow that Title VII claims are automatically arbitrable under an arbitration agreement. It depends on what the agreement says. Arbitration is a matter of contract, and a party can be compelled to arbitrate any claims which he or she has agreed to submit to arbitration. *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998). In *Paladino*, the plaintiff had agreed to arbitration of "any controversy or claim arising out of or relating to my employment or the termination of my employment." *Paladino*, 134 F.3d at 1056. The Court said:

> "Any" is not ambiguous, and if any claim "aris[es] out of . . . termination," it is a Title VII gender-discrimination claim. This provision makes Title VII claims arbitrable, as this circuit has held for language that is materially similar. *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 n. 1 (11th Cir.1992) (Title VII claim included in "any dispute, claim or controversy that may arise between me and my firm").

Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1061 (11th Cir. 1998).

7. *What constitutes a "valid arbitration agreement"?*

"The FAA puts arbitration clauses on even footing with all other clauses in a contract. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 275 , 115 S.Ct. at 840. They are therefore interpreted according to ordinary state-law rules of contract construction. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 , 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995)." *Paladino*, 134 F.3d at 1061.

The components essential to the making of a contract in Georgia are found in the Official Code of Georgia Annotated:

> To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.

O.C.G.A. ' 13-3-1. (The fundamental principles of contract law are similar other states.) In the context of arbitration agreements, what constitutes sufficient consideration and manifestation of assent? In a case decided by the Northern District of Georgia, the judge discussed these requirements:

> Plaintiff alleges that he did not consent to be bound by the arbitration policy. The record establishes, however, that all elements required for a binding contract to arbitrate are present in this case. . . . Here, plaintiff admits that defendant notified him of the new policy. Plaintiff's continued employment after such notification and failure to object to the new condition demonstrate his intent to be bound. Furthermore, mutuality of obligation is established by explicit policy language stating that both employer and employee are bound to submit employment disputes to arbitration. See *Albert v. National Cash Register Co.*, 874 F. Supp. 1324, 1326 (S.D. Fla. 1994). And plaintiff's continued employment with defendant after notification of the new requirement constitutes sufficient consideration for the new condition. *Durkin v. CIGNA Property & Casualty Corp.*, 942 F. Supp. 481, 1996 WL 566775 (D. Kan. 1996) at 5. In addition, "the agreement of one party to a contract to arbitrate disputes is sufficient consideration to support the other party's agreement to do the same." *Lacheney v. ProfitKey Int'l.*, 818 F. Supp. 922, 925 (E.D. Va. 1993).

Porter v. CIGNA Insurance Co., 1997 U.S. Dist. LEXIS 23810, *4-5 (N.D. Ga., Mar. 27, 1997).

The judge went on to discuss another issue which has sometimes been raised in an effort to defeat arbitration

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agreements (and other contracts) Whether the agreement is a "contract of adhesion," that is, a contract where the bargaining power of the parties is so unequal that it cannot be said that the weaker party freely assented to the contract:

> Plaintiff's contention that the arbitration policy amounts to a contract of adhesion is also unavailing. "Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements [are unenforceable]." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). Plaintiff's employment contract, including the arbitration provision, was not so unfair as to offend public policy. It is therefore not void as an adhesion contract.

1997 U.S. Dist. LEXIS 23810, at *6.

8. *May an employer rely upon an arbitration clause in a collective bargaining agreement as a waiver of employees' rights to bring lawsuits alleging employment discrimination?*

The answer to this question is almost certainly "no." Long prior to its *Gilmer* decision, the United States Supreme Court decided in the case of *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974) that an arbitration clause in a collective bargaining agreement did not operate to waive the right of an individual employee to bring a lawsuit under Title VII. As discussed above, the *Gilmer* decision dealt with an arbitration clause in a contract individually signed by the employee who later sought to bring the lawsuit. In determining that the individual§s actions constituted a waiver of his right to bring an ADEA claim in federal court, the Supreme Court did not explicitly overturn its prior *Alexander* decision. All but one of the federal Circuit Courts of Appeals to consider the question have reached the conclusion that *Alexander* is still good law. Thus, for a waiver of the right to go to federal court under federal discrimination statutes to be effective, it must be contained in a contract signed or otherwise personally assented to by the individual claimant, as opposed to a contract agreed to only by the employee's bargaining unit. The sole exception among federal circuit courts considering this issue is the Fourth Circuit. In a 1996 decision, the Fourth Circuit concluded that even an arbitration clause in a collective bargaining agreement was sufficient to waive an employee's right to bring a civil action. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 4th Cir., cert. denied, 117 S. Ct. 432 (1996).

9. *What effect does a valid arbitration clause have upon the EEOC's right to bring a lawsuit?*

There is a conflict among the Circuit Courts of Appeals on the answer to this question. While no court has taken the position that the EEOC is foreclosed from independently bringing a lawsuit based upon factual circumstances involving an individual who has entered into a valid arbitration agreement, two Courts of Appeals have ruled that in so doing, the EEOC may not pursue make-whole remedies personal to the complaining party. In other words, while the EEOC could pursue equitable remedies that would benefit the protected class whose rights have allegedly been violated (preferential hiring list, notice postings, modifications of existing employment practices, etc.) the EEOC cannot pursue back pay, compensatory or punitive damages on behalf of the individual complaining party. Both the Second Circuit and the Fourth Circuit have adopted this position. *See EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2nd Cir. 1998); *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999). In contrast, the Sixth Circuit in *EEOC v. Franks Nursery and Crafts, Inc.*, 177 F.3d 448 (1999) concluded that the EEOC's independent right to bring a lawsuit was completely unaffected by an arbitration agreement. The Supreme Court has agreed to resolve this conflict. On March 26, 2001, one week after its decision in the *Circuit City* case, the Supreme Court granted a petition by the EEOC for a Writ of Certiorari in *EEOC v. Waffle House, Inc. See*, 121 S. Ct. 1401, 2001 U.S. LEXIS 2688. The question to be considered by the Supreme Court is as follows:

> "Whether an employee§s agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission, as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as back pay, reinstatement, and damages."

We will have to wait until the Supreme Court's next term, which begins in October 2001, for the final answer to this question.

THE GOVERNOR'S WORKERS' COMPENSATION ADVISORY COMMISSION

John H. Ross Mark S. Gannon

Governor Barnes appointed the Workers' Compensation Advisory Commission on January 10, 2000 with approximately fifty-five (55) members. The Commission was to continue in force until April 15, 2001, which may be extended by the Governor in modified form. It is comprised of representatives from virtually every area of the workers' compensation arena, including the claimant and defense bar, with there being approximately twenty-five (25) attorneys as members.

The Commission was established to accomplish two (2) tasks:

(1) study the costs and benefits of the workers' compensation laws of Georgia; and

(2) evaluate whether the current system is meeting the needs of injured workers and serving the needs of Georgia's businesses in a competitive regional and national marketplace.

In order to address the wide range of issues, the Commission was divided into fourteen (14) committees, dealing with the following areas: medical, administrative, benefits, fraud, return-to-work issues, coverage, alternative dispute resolution, compensability issues, insurance and self-insurance, Subsequent Injury Trust Fund, case management, appeals, and legislative issues.

An Executive Committee is comprised of the following:

Michael Jablonski, Chair
John H. Ross, Vice Chair
Hon. Carolyn Hall
Stephen Garner
Joe Sartain
Lendon D. Gibbs

Michael Jablonski, Lendon Gibbs and Ross are GDLA members, as are Commission members Mark Gannon, Luanne Clark, and Robert Reichart.

2001 Legislative Changes to the Workers' Compensation Act

Legislation was proposed by the Governor's Workers' Compensation Advisory Commission, as well as the Chairman's Advisory Council to the State Board of Workers' Compensation. The legislation which came out of the 2001 session of the General Assembly will go to the Governor for his signature. The changes which are due to take effect July 1, 2001 include:

1. An increase from $375.00 t o $400.00 in the maximum weekly temporary total disability benefit.

2. An increase in the maximum temporary partial disability benefit from $250.00 to $268.00 per week.

3. A mandatory 10% penalty for late payment of medical benefits after 30 days from the receipt of charges and reports required by the State Board. After 60 days there would be an additional 10% penalty, and after 90 days 12% per annum interest penalty (proposed by the Georgia Workers' Compensation Advisory Commission Medical Committee).

4. An increase from 7% to 12% in Interest on all accrued amounts and on all amounts accruing prior to final judgment in the event of an appeal of an award for compensation.

5. A provision allowing administra tive law judges and the State Board to award reasonable litigation expenses upon a determination that proceedings have been brought, prosecuted, or defended without reasonable grounds. Litigation expenses would be narrowly defined to include only witness fees and mileage, reasonable expert witness fees subject to the fee schedule, reasonable deposition transcript costs, and the cost of the hearing transcript (proposed by the Georgia Workers' Compensation Advisory Commission).

6. The legislation also included a provision expanding the minimum number of physicians on the employer's posted panel from four (4) to six (6). The State Board may grant exemptions to the six (6) doctor panel in medically under-served areas (proposed by the Georgia Workers' Compensation Advisory Commission Medical Committee). This particular provision takes effect January 1, 2002.

A number of other recommendations will be forthcoming from the Governor's Workers' Compensation Advisory Commission; however, these are not in final form. It is anticipated that a final Commission report will be made available in the forthcoming months, and GDLA members will have an opportunity to offer input.

THE NEW ETHICS RULES ARE IN EFFECT!

By: Karen M. Raby,
Chair GDLA Ethics and
Professionalism Committee

While you were celebrating the New Year on January 1, 2001, something very important happened. The new Georgia Rules of Professional Conduct ("Rules") went into effect and replaced the familiar Directory Rules and Ethical Considerations, which previously governed the actions of Georgia lawyers ("Code"). By making this switch, Georgia joins the more than 45 states that have adopted a modified version of the ABA Model Rules of Professional Conduct. All Georgia lawyers should thoroughly review the new rules to note distinctions between the former Code and the new Rules, particularly those which affect their individual practices. A copy of the new Rules is contained in your 2000-2001 State Bar of Georgia Directory & Handbook (the blue one). However, you may want to hang onto last year's handbook! Although the new rules became effective on January 1, 2001, a lawyer's conduct is governed and will be reviewed in any disciplinary proceeding under the version of the disciplinary rules in effect at the time of the action. Therefore, any complaints or grievances regarding actions (or inactions) of Georgia lawyers which took place before January 1, 2001, will be reviewed under the old Code. Only actions taken by lawyers on or after January 1, 2001, will be examined under the new Rules.

Either by design or happenstance, the new Rules are more "user-friendly." They are divided up in to nine sections, which makes it a lot easier to locate the particular guidance you are looking for. All rules within each section are numbered beginning with the numeral shown before it in the list below. (For example, all rules relating to the Client-Lawyer Relationship will start with a "1" (i.e., Rule 1.1, 1.2, and so on). The following is a list of the nine parts and their highlights:

1. **Client-Lawyer Relationship**, which includes a variety of topics, such as competence, fees, confidentiality, client communication, conflicts of interest, an organization as a client, and sale of a law practice.

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2. **Counselor**, which includes rules relating to advising clients, serving as an intermediary and making evaluations for use by third-parties.

3. **Advocate**, including information about meritorious claims, expediting litigation, candor towards the tribunal, fairness to the opposing party and counsel, impartiality, decorum, and trial publicity, just to list a few.

4. **Transactions with Persons Other Than Clients**, which includes communication with opposing parties who are represented, and those who aren't, as well as respecting the rights of third-parties.

5. **Law Firms and Associations**, which includes rules relating to duties of supervising and subordinate lawyers, responsibilities regarding non-lawyer assistants and law related services, as well as the unauthorized practice of law.

6. **Public Service**, including rules regarding pro bono service, accepting appointments, membership in legal service organizations, and law reform activities affecting clients.

7. **Information about Legal Services**, such as advertising, communications regarding legal services, contact with prospective clients, and firm names and letterheads.

8. **Maintaining the Integrity of the Profession**, including rules relating to bar admissions, judicial and legal officials, misconduct, and reporting professional misconduct.

9. **Miscellaneous,** the "catch-all" part including a variety of topics, such as those relating to reporting requirements, settlements of claims against lawyers, cooperation with disciplinary authorities, reciprocal discipline and lawyers as public officials.

Following each rule is a statement of the maximum penalty for the violation of that rule. In addition, the rules are each followed by explanatory comments to assist lawyers in understanding that particular rule. It should be noted that some rules are mandatory, while others allow for lawyer's judgment and discretion. If the rule contains the word "shall," its mandatory.

It would be impossible to discuss all of the new or different provisions of the new Rules in this short article. Rather, the goal is to promote awareness of the fact that we have new rules and to give some general information about the contents and organization. A more thorough review of the additions and changes will be included in this year's GDLA Journal.

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@forbesandbowman.com

2001 LEGISLATIVE SESSION UPDATE

By: Cam Bowman

EDITORS NOTE:

The following article by Cam Bowman was submitted to the editor for publication in March. Had it been published at that time, it would have been very timely. However, there were delays in getting this edition to press. Although Cam's superb article is not as timely now as it would have been in March, it nevertheless contains valuable information on bills that were proposed during the 2001 legislative session, some of which passed, some of which did not, and some of which were changed. And so, it is being published at this time with the Editor's apologies for the delay. Elsewhere in this edition, there is an article by John Edwards summarizing the final versions of the bills that were ultimately signed into legislation.

Well, the session of the Georgia General Assembly is upon us. It is therefore appropriate to review the pending proposals that may have an effect on the membership.

In Senate Bill 30, relating to Patient's Health Records Rene Kemp of Hinesville, among others, has proposed to amend O.C.G.A. § 31-33-3 to set a ceiling for charges for medical records, to set a deadline for providing those records and to allow the patient's survivor or personal representative to secure copies on request.

In Senate Bill 269 Rene Kemp of Hinesville, among others, has proposed to amend O.C.G.A. § 5-3-30 to eliminate the jurisdictional ceiling imposed in Magistrate's court once the matter has been appealed to State or Superior Court. At present the jurisdictional limit is $15,000.00.

Senate Bill 25 proposes that numerous provisions of the Official Code of Georgia Annotated be amended so as to authorize delivery of notices previously required to be delivered by registered or certified mail to be provided by overnight or commercial delivery.

In Senate Bill 210 certain senators have proposed to amend Part 2 of Article 2 of Chapter 9 of Title 24 of the O. C.G.A. relating to medical information, so as to clarify the procedures for subpoenaing medical records; to provide for legislative findings, and to reconcile new federal privacy regulations with state judicial decisions. The bill was also intended to address the consequences of the *King* decision from the Georgia Supreme Court last year that found that there was a constitutional right of privacy in medical records.

This bill has passed the Senate and is currently before the House.

It should be noted at the outset that the proposed statute does not change the law with respect to requests for production under O.C.G.A. § 9-11-34, nor does it govern situations in which the patient has placed his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding. However it does impose on the proponent of a request for production or subpoena under the circumstances above a duty to furnished the provider with a written statement signed by an attorney at law confirming the fact that the patient has placed his care or treatment in issue. In addition the statute specifically exempts psychiatric, psychological, mental health, AIDS confidential information, or substance abuse records of a patient, none of which may be released pursuant to a subpoena.

The most important provision of the bill is one that imposes on the person seeking records by subpoena a duty to give to the medical provider "satisfactory assurance from the person seeking the records that reasonable efforts have been made by such person to ensure that the patient who is the subject of the medical records being subpoenaed has been given notice of the subpoena and an opportunity to object." This assurance should take the form of a written statement and a certificate of service signed by the person seeking such records, demonstrating that the party propounding the subpoena has made a good faith attempt to deliver to the patient or the patient's attorney of record a copy of the subpoena or, if the patient 's location is unknown, to mail a copy of the subpoena to the patient's last known address. The subpoena or accompanying notice to the patient must include sufficient information about the litigation, to permit the patient to raise an objection to a court having jurisdiction to hear such objection. Also thirteen days must pass after the date a copy of the subpoena was delivered, mailed, or deposited for delivery to the patient have passed before the subpoena was issued to the provider and that no objections were filed by the patient; or that all objections by the patient have been resolved and the disclosures being sought are consistent with such resolution.

Interestingly, the proposed statute goes on to provide that the patient's failure to timely object to a subpoena waives all privileges associated with those records.

In Senate Bill 124 Seth Harp of Columbus has proposed certain amendments to Chapter 9 of Title 24 relating to the release of medical information and confidentiality between physician and patient. Specifically the bill would add physicians to the list of professionals whose communications with the patient are privileged. The bill would further require that records could not be released except upon court order although it does retain an exception that the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding.

In Senate Bill 190 the sponsors propose that there shall be a denial of recovery of damages to persons injured

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while committing felonies, and a limitation on recovery of non-economic damages by uninsured motorists, drivers injured while under the influence of alcohol or drugs and who have been convicted of that offense, and motorists injured while driving with suspended or revoked drivers' licenses. The proposal also provides that an insurer shall not be liable directly or indirectly under a policy of liability or uninsured motorist insurance to indemnify for nonconomic losses of a person injured while DUI, while uninsured, or while driving on a revoked or suspended license.

There have been several proposals to regulate the use of cell phones in autos this session. Senate Bill 167 is one of those proposals and provides for the assessment of 3 points for the improper use of mobile phones resulting in an accident and a $50.00 fine for the same.

Senate Bill 115 is another bill relating to the use of cellular telephones while operating a vehicle. The bill would require that every person operating a motor vehicle while using a cellular telephone would be required to have a headset or hands-free device. A violation of the requirements would draw a $50.00 fine. House Bill 335 is the parallel version of this proposal currently pending in the House.

In House Bill 741 the sponsors have proposed to modify default judgment procedures, such that if a default judgment has been rendered at the discretion of the court pursuant to O.C.G.A. § 9-11-37 (b)(2)(C), relating to compelling discovery, the judgment against the disobedient party shall be conditioned upon a waiver by the opposing party of a jury trial of any and all remaining issues.

In House Bill 669 Tom Bordeaux of Savannah, among others, has proposed that O.C.G.A. § 33-24-51 relating to purchase of motor vehicle liability insurance by local governments and other sections of the code be amended so as to provide for waiver of the immunity of local government entities for injury or damage arising out of the negligent use of motor vehicles. The proposal also seeks to amend Chapter 92 of Title 36 relating to immunity of municipal corporations and counties. The proposed statute would provide for waiver of the governmental immunity of local government entities for loss arising out of claims for the negligent use of a covered motor vehicle up to a minimum of $500,000.00 per person per occurrence, $1,000,000.00 aggregate per occurrence, and $250,000.00 aggregate for property damage per occurrence. The waiver may be increased to any amount if the governing body by resolution or ordinance voluntarily adopts such higher waiver, or the local government entity becomes a member of an interlocal risk management agency to the extent of the coverage purchased, or the local government entity purchases commercial liability insurance in the amounts purchased. The statute goes on to provide that there would be no waiver of immunity in the federal courts.

The statute further codifies the doctrine of official immunity, and provides that individual officers of a local government entity would not be subject to suit for actions taken in their official capacity. No award of damages against a local entity may include punitive or exemplary damages or interest prior to judgment.

The fact finder must determine that the negligence of the officer or employee operating the covered motor vehicle was the dominant cause of the injury or damage for an award to be proper under the proposal. The fact finder must apportion the negligence which led to the injury or damage between the local government entity and any other parties, including the claimant, involved in the occurrence. Subject to the statutory limits of liability, an award of damages against a local government entity cannot exceed the percentage of negligence determined to be applicable to the local government entity on behalf of which the covered motor vehicle is being operated, multiplied by the amount of total loss suffered by the claimant found by the jury.

Ante-litem notice would be required within six months of the occurrence, and no action could be entertained by the courts against the local government entity until the cause of action therein had been first presented to the governing authority for adjustment.

In House Bill 569 it has been proposed to amend O.C.G.A. § 9-11-5 relating to service and filing of pleadings subsequent to the original complaint, so as to provide that service of judgments is also not required when service is waived by failure to file pleadings, and to amend O.C.G.A. § 15-6-21 relating to time for deciding, filing, and notification of motions, so as to provide that notification is not required when service has been waived by law.

In House Bill 548 the General Assembly has before it a proposal to amend O.C.G.A. § 33-34-3 to require that an insurer which issues a motor vehicle liability insurance policy provide the owner of the insured vehicle written notice of the amount and terms of any settlement between such insurer and any other party for damages caused or alleged to have been caused by such vehicle. The notice would be sent by registered or certified mail or statutory overnight delivery within ten days following the other party 's agreement to such settlement.

In House Bill 531 the sponsors seek to amend O.C.G.A. § 40-6-3 to apply the uniform rules of the road to all shopping centers or parking lots or similar areas whether or not they are customarily used by the public as through streets or connector streets.

House Bill 524, also known as the Right to Choose Your Attorney Act; would provide that an attorney may not represent or claim to represent, or sue or claim to sue on behalf of, any person

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as a member of a putative or certified class or any class action removed or transferred from the court of another state or a federal court, unless the attorney first provides to the Georgia court such person's express written authorization to be so represented and to become a member of the class. The authorization shall also state that the attorney has provided to such person a good faith estimate of the dollar amount of any attorney's fee, together with an explanation of how any attorney's fee will be calculated and funded, and an explanation of the relative recoveries that the attorney or firm and such person would receive if the claim is settled or decided favorably.

Any attorney seeking to represent the class would be barred from soliciting potential members of the class. No settlement of a class action and no decision or judgment of a court in any such action shall bind as a party any person who has not affirmatively consented to joining such action as a member of the putative or certified class.

Any person who violated any provision of the proposed statute in connection with any class action in a Georgia court would be prohibited from representing any party in such action or in any other action arising out of the same subject matter. In addition, the court could subject any such person to an appropriate sanction including an order to pay to the court a sum not to exceed the greater of 10 percent of the amount in controversy, 25 percent of the maximum potential contingency fee, if any, or $100,000.00, in the discretion of the court.

In House Bill 478 several plaintiff's attorneys in the Legislature have proposed to amend O.C.G.A. § 33-4-6, the bad faith penalty statute, to allow the recovery of punitive damages instead of the 25 percent penalty currently included in the statute. The bill also seeks to amend the Unfair Claims Practices Act to provide for a private cause of action for the recovery of damages in excess of $500.00.

In House Bill 435 a plaintiff's attorney in the legislature has proposed to amend O.C.G.A. § 9-11-35 relating to the physical and mental examination of persons by allowing court ordered mental examinations to be conducted by licensed psychologists as opposed to physicians.

House Bill 340 would create a new subset of state privilege that would prevent law enforcement officers or officials from being required to testify concerning a pending criminal investigation prior to the issuance of an arrest warrant or the return of a true bill of indictment, except upon subpoena issued on behalf of the state.

House Bill 329 seeks authorize certain psychologists to prescribe drugs in certain circumstances and to provide that the practice of psychology includes administering, ordering, and prescribing drugs in certain circumstances. The proposal would limit such prescriptions to those for mental or nervous disorders or illnesses.

House Bill 291 would amend O.C.G.A. § 40-8-76.1, to include pickup trucks within the definition of passenger vehicles, regardless of the age of the occupants.

House Bill 187 would, if passed, amend O.C.G.A. § 33-7-11 relating to uninsured motorist coverage under motor vehicle liability policies, so as to provide that minimum uninsured motorist coverages shall be equal to the limits of liability contained in the insured's automobile or motor vehicle liability policy.

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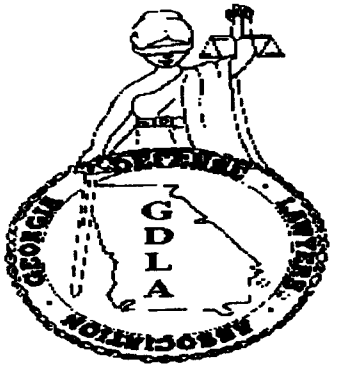

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- July 19-22 GDLA Annual Meeting, Sandestin Beach

2002

- July 18-21 GDLA Annual Meeting, Ponte Vedra