Georgia Defense Lawyer ©

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Investigation of Metallurgical Failures

Insurance claims often involve personal injury or property loss which has resulted from the failure of some metallic device or structural member. Determining the specific cause of such failures is often necessary to resolve a claim.

Metals failure can have any number of origins - among them are:

*Deficiencies or changes in design
*Presence of microstructural defects or imperfections
*Subjection to improper fabrication or processing procedures
*Failure to consider service operating conditions or environments
*Inadequate maintenance or inspection protocol.

Of primary importance to the litigator or claims professional is the assignment of responsibility for the failure.

As long as the original fracture surface is preserved, it can be analyzed in much the same way as a palm reader can read your lifeline, but using engineering and physical science as a basis. The fracture trail can be followed from its start to finish, measuring starts and stops, changes in direction and in crack growth mechanism [fatigue, ductile overload, impact, environmental assistance or creep]. Providing answers to questions of why and when the fracture started where it did are routine to the experienced failure analyst.

In fact, the entire component can be critically analyzed - stored within its volume is evidence of what it was made from [elemental composition], how it was manufactured [forged, cast, sintered], its processing history [thermomechanical heat treatment, including annealing temperatures and times, quench rates], any extremes in service temperature and mechanical duty cycles, corrosivity and composition of service environment. All this information is stored

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2005 Annual Meeting Set for Ponte Vedra

Judges Highlight Speaker Line-up!

Mark your calendars for June 16-19, the dates for the GDLA Annual Meeting.

This year's meeting will be held at the beautiful Ponte Vedra Inn & Club in Ponte Vedra, Florida, a past favorite of GDLA members.

An impressive speaker lineup includes: **Gino Brogdon**, Superior Court of Fulton County; **John J. Ellington**, GA Court of Appeals; **James C. Hill,** U.S. Court of Appeals, 11th Circuit; **Michael L. Karpf**, Superior Court, Chatham County; **William C. O'Kelley**, U.S. Dist. Court, Northern Dist., GA; **Thomas Day Wilcox, Jr.**, Superior Court, Bibb County; and **Scot V. Pool**, Forbes & Bowman.

The weekend's activities include our family-oriented Kool-Aid and Cocktails party, golf and tennis tournaments, sand castle building contest and the GDLA's Annual Dinner Dance.

Please visit www.gdla.org for more details or see our ad on page nine of this issue.

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President's Message

Please make plans to join us for the GDLA's Annual Meeting at the wonderful Ponte Vedra Inn and Club just south of Jacksonville, Florida on June 17-19, 2005. If you have not been, you are missing one of the classic southern resorts. Check out the resort's web site at http://www.pvresorts.com/. The rooms are right on the beach and the tennis courts and golf courses are right across the street. This is an excellent rate for the middle of summer at Ponte Vedra.

Johnny Foster has lined up an all star program featuring Fulton Superior Judge, Gino Brogdon, 11th Circuit Court of Appeals, Georgia Court of Appeals Judge John J. Ellington, Senior Judge James C. Hill, Chatham Superior Court Judge Michael L. Karpf, United States District Judge William O'Kelly, Macon Circuit Superior Court Judge Tommy Day Wilcox, Jr. and Scot V. Pool of Forbes & Bowman in Savannah. Don't miss this opportunity to obtain quality CLE with a view from the bench. In addition, you will have an opportunity to meet several state trial judges in various jurisdictions, a federal trial judge and a senior judge with the 11th Circuit Court of Appeals.

As in past years, we will have a golf tournament, tennis tournament and that family favorite, the sand castle building contest.

On a more somber note, I was shocked and saddened by the tragic murder of Fulton Superior Judge Rowland Barnes, his court reporter, a Fulton County deputy and a U.S. Customs agent on March 11, 2005 in Atlanta. By all accounts, Judge Barnes was an outstanding judge. Moreover, he treated everyone in his courtroom with respect and had a knack for keeping things light even in a serious environment.

On a more somber note, I was shocked and saddened by the tragic murder of Fulton Superior Judge Rowland Barnes, his court reporter, a Fulton County deputy and a U.S. Customs agent on March 11, 2005 in Atlanta.

With a practice exclusively devoted to the defense of civil cases, I took courthouse security for granted. In fact, I confess that I used to grumble under my breath when the security lines were long or when deputies refused to let me get into the courtroom before 8 a.m. during a trial. In light of what has happened, I have adjusted my attitude and will be slower to complain about security measures at the courthouse. My thoughts and prayers are with the families of those murdered on March 11.

Grant B. Smith
President

Executive Director's Message

Last Call -- Twice!

We are fast coming to the close of our 2004-2005 membership year and we hope you have had a chance to take advantage of a number of the many benefits of being a member of the Georgia Defense Lawyers Association.

We will be sending dues renewal notices for the 2005-2006 year (this year's membership expires on June 30), and we'd like to make sure you receive your dues renewal.

If you have not logged into the Members Area of www.gdla.org, I'd like to invite you to do so today.

We would also like to complete our Discovery Tools and Briefs Bank areas of our Web site by the end of this membership year.

Please stop by and see what we are missing. A number of members have generously donated interrogatories, depositions, RFPs and motions, and the Web site is looking much improved over previous years.

Thank you in advance for your donation in the form of a text file or pdf. Please e-mail contributions to contact@gdla.org.

Steve Milano
Executive Director

At the very least, you'll want to make sure your online directory listing and contact information is up to date.

Check out our Briefs Bank and Discovery Tools, research links, past issues of "Georgia Defense Lawyer" and other helpful tools.

At the very least, you'll want to make sure your online directory listing and contact information is up to date.

Simply go to the Web site, click on "Members Area" and login with your e-mail address and bar number.

If you have any trouble the e-mail address we have for you may be incorrect; just contact us at 404-817-9377 or contact@gdla.org and we'll make sure we set you up.

Condolences

The GDLA offers condolences to the family of former association member A. Rowland Dye of Augusta, who passed away on April 14. We were informed by GDLA member Benjamin H. Brewton at Tucker, Everitt, Long, Brewton & Lanier in Augusta.

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Join a Committee!

Do you want to help serve the interests of defense lawyers in Georgia? There are opportunities for you to serve on GDLAcommittees or sub-committees. Call or e-mail the GDLA today and let us know your area of interest.

Member News

Ted Freeman, **Freeman, Mathis & Gary**, Atlanta, obtained a complete reversal of a district court order denying summary judgment in an inmate-on-inmate assault case where Ted represented the sheriff and jail administrator of Toombs County. In Purcell v. Kight, No. 02-11994, ---F.3d---, 2005 WL 428412 (11th Cir. February 24, 2005), plaintiff alleged that the sheriff and jail administrator failed to protect plaintiff's son from a brutal attack that resulted in severe injuries, including permanent brain damage. After nearly three years on appeal, Ted convinced the 11th Circuit that plaintiff failed to present sufficient evidence that a substantial risk of serious harm existed or that defendants were "deliberately indifferent," even if such a risk were present. The court also concluded that defendants were entitled to qualified immunity and that the sheriff, in his official capacity, was entitled to 11th Amendment immunity.

In a separate case, Ted recently obtained a favorable order in a due process case where Ted represented a sheriff and his bond administrator. In Liberty Group Inc., et al. v. Sheriff Garrison, et al., Civil Action No. 1:04-CV-1783-WCO (2/25/05), plaintiffs, owners of a bonding company, alleged that their procedural and substantive due process rights were violated when the sheriff revoked their bonding privileges. In a case of first impression in the Eleventh Circuit, the district court agreed with defendants' assertion that Georgia's statutes regulating bonding companies do not create a property interested protected by the Fourteenth Amendment.

Lynn M. Roberson, **Swift, Currie, McGhee & Hiers**, Atlanta, recently received a decision for a client from the Georgia Court of Appeals in Gantt v. Dave & Busters of Ga. Inc., Case No. A04A1668 (Ga.App., Jan. 28, '05).

In this trip and fall case, the Court of Appeals upheld summary judgment to the proprietor of a restaurant/gaming establishment.

"Viewed in the light most favorable to Gantt, the evidence showed that while visiting a Dave & Busters family entertainment center, Gantt and her sister stepped up onto a raised platform to play a race car video game. After the two finished, Gantt stepped back down the same single step and fell, injuring her ankle and leg. Gantt deposed that she looked down but did not see the step-down. The step-up was marked by a white border across the vertical portion of the top level (visible only from the bottom level), while the top level was marked with a brown strip along its edge."

The Court held that Gantt had equal knowledge of the step-down because "'when a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom.'" Since the evidence showed Gantt stepped up onto the platform, she was charged with knowledge that she had to step down upon leaving the area.

The Court rejected Gantt's argument that Dave & Busters had a duty to warn her of the step-down because "it is in the business of games and entertainment where everything is designed to distract and divert the attention of the invitees. This argument is without merit, since Gantt failed to show that she was distracted as she stepped down from the platform. In fact, Gantt deposed that she was looking where she was walking just prior to her fall.

"Therefore, as Gantt had knowledge of the condition at least equal to that of Dave & Busters, she has failed to show superior knowledge on the part of Dave & Busters."

In a separate case, Lynn received a favorable opinion from the Georgia Court of Appeals. The court issued a decision affirming summary judgment to the proprietor in Greta Gantt v. Dave & Busters of Georgia, Inc., Case No. A04A1668 (Ga.App., Jan. 28, 2005). The Court of Appeals affirmed summary judgment to Dave & Busters in this trip and fall case in which plaintiff claimed she did not see the step down because of an optical illusion.

Plaintiff and her sister had already stepped up that same step to get into the gaming room. When they finished playing the games, they were leaving the room, and plaintiff tripped at the step down because she forgot the step was there and believed the step was not as visible from the top as it was from the bottom. The court held she had equal knowledge of the step because "when a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting there from." Since the evidence showed that Gantt stepped up onto the platform, she was charged with knowledge that she had to step down upon leaving the area. Congratulations, defense!

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Lowell S. Fine and **Karen Raby Monson** of **Alembik, Fine & Callner**, Atlanta, obtained a defense verdict in a product liability wrongful death case in December. The jury trial in Warren v. BIC Corp. was held in U.S. District Court for the Middle District of Georgia in Albany. Plaintiffs' decedent, a restaurant manager, perished in an early morning fire that started in his office while he was counting the day's proceeds.

Continued on page 6

Member News

Plaintiffs in the civil action, the widow and the estate of the deceased manager, alleged that the fire started as a result of a defective disposable butane lighter manufactured by the defendant, the remains of which were found in the office in close proximity to the point of origin of the fire. Plaintiffs' initial claims of manufacturing defect, design defect and failure to warn were limited to design defect by the time of trial. Plaintiffs presented an expert to testify regarding the alleged defect in the lighter design.

The defense denied that the lighter was the source of the fire and countered with expert testimony from a company representative and an independent lighter expert that the remnants indicated that the lighter was damaged during the fire and was not the source of the fire. In addition, the defense used a fire dynamics expert, who had originally been retained by the ATF and determined that the lighter could not have been the source of the subject fire. After five days of trial, the 12-person jury rendered a unanimous verdict for the defendant.

An extensive investigation was conducted by local, state and federal authorities. Evidence obtained at the scene revealed tampering of a lock on a rear door to the restaurant on the day before the fire; however, the only other person in the building at the time of the fire testified that he did not hear or see anyone else in the restaurant prior to the fire. The witness testified that he heard a "popping" sound and the decedent yell "Fire" before hearing the door to the office slam shut. The wallet of the decedent was never located, and a forensic examination of the remains of the money found in the fire-damaged office led investigators to believe that over $1,000 was potentially missing. A black cap, camouflage jacket and footprint were located outside the restaurant after the fire, but law enforcement witnesses differed on the importance of these items to the investigation. No evidence of an accelerant was found.

Several witnesses were identified months after the fire who gave statements implicating a restaurant employee and his cousin in the setting of the fire. Most of these witnesses recanted or were unavailable to testify at the civil trial. The Bureau of Alcohol, Tobacco & Firearms concluded that the decedent was doused with an accelerant and intentionally set on fire during the course of a robbery.

Prior to the handing down of criminal indictments, the restaurant employee suspect died. His cousin was twice tried for robbery, arson and murder, but neither trial resulted in a conviction.

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Al Adams, **Holland & Knight**, Atlanta, represented Sears Roebuck & Co. in an action before Judge Marvin Shoob, U.S. District Court, N. D. Ga., C.A. # 1:04-CV-1390-MHS, in which Judge Shoob granted summary judgment to Sears on a premises liability case, based on control of the premises.

Sears attempted to install a large TV at a customer's home, and when the TV did not work properly, it was stored in a box on the customer's front porch, pending pick up by Sears. Allegedly, some of the packing from the box blew out of the box three or four days later, allegedly causing the plaintiff, a guest at the home, to slip and fall. Plaintiff had not sued her host, a social friend. The Court found that Sears was not in control of the premises and was not legally responsible for the box material at the time of the accident, citing Johnson v. Kimberly Clark, 233 Ga.App. 508 (1998).

New Members

The GDLA welcomes the following new members:

Chiake Adele, Sommers, Scrudder & Bass, Atlanta; **Rick Baker**, Owen, Gleaton, Egan, Jones, Sweeney, Atlanta; **Jonathan A. Barash**, Magill & Atkins, Atlanta; **W. Scott Barber**, Tisinger, Tisinger, Vance & Greer, Columbus; **W. Bruce Barrickman**, Barrickman, Allred & Young, Atlanta; **S. Derek Bauer**, Powell, Goldstein, Atlanta; **Tom Cathey**, Hull, Towill, Norman, Banett & Salley, Augusta; **James Chafin**, Tisinger, Tisinger, Vance & Greer, Columbus; **Shalena M. Cook**, Carter & Ansley, Atlanta; **James E. Crowe, Jr.**, McCall, Phillips & Williams, Albany; **Catherine M. Duke**, Martin Kent, Savannah; **J. Slade Edwards**, Martin, Snow, Macon; **Richard A. Epps, Jr.**, Martin Snow , Macon; **B. Ryan Fellman**, Drew, Eckl & Farnham, Atlanta; **Jim Garland**, Hall, Bloch, Garland & Meyer, Macon; **Henry D. Green**, Green, Johnson & Landers, Atlanta; **Sarah Hart**, Hatcher, Stubbs, Land, Houis & Rothschild, Columbus; **Cynthia Hill**, Drew, Eckl & Farnham, Atlanta; **Charles Hoffecker**, Swift, Currie, McGhee & Hiers, Atlanta; **Andrew Holliday**, Fulcher, Hagler, Augusta; **Robert C. Hughes, III**, Brannen, Searcy & Smith, Savannah; **Paul D. Ivey, Jr.**, Tisinger, Tisinger, Vance & Greer, Columbus; **Alex Kaplan, McCall**, Phillips & Williams, Albany; **Timothy M. Klob**, Speed & Seta, Lawrenceville; **Molly Lewis**, Bouhan, Williams & Levy, Savannah; **Edward L. Long, Jr.**, Martin Snow, Macon; **N. Daniel Lovein**, Hall, Booth, Smith & Slover, Brunswick; **Virginia S. Martin**, Mullins, Whalen & Westbury, Griffin; **Blake N. Melton**, Page, Scrantom, Sprouse, Tucker & Ford, Columbus;

Thomas P. Mitchell, Hawkins & Parnell, Atlanta; **Stephen B. Moseley**, Brinson, Askew, Berry, Seigler, Richardson & Davis, Rome; **Patricia M. Peters**, Hawkins & Parnell, Atlanta; **Valerie Pinkett**, Swift, Currie, McGhee & Hiers, Atlanta; **Kelli Pushman**, Constangy, Brooks & Smith, Macon; **Christopher E. Reeves**, Powell, Goldstein, Atlanta; **John Richard**, Powell, Goldstein, Atlanta; **James Scarbrough**, Mabry & McClelland, Atlanta; **Peter H. Schmidt**, II, Drew, Eckl & Farnham, Brunswick; **Daniel Benjamin Sessions**, Beck, Owen & Murray, Griffin; **Lesli R. Seta**, Speed & Seta, Lawrenceville; **Charles A. Shenton, IV**, Young, Thagard, Hoffman, Smith & Lawrence, Valdosta; **J. Wallace Speed**, Speed and Seta, Lawrenceville; **Truman L. Tinsley, IV**, Young, Thagard, Hoffman, Smith & Lawrence, Valdosta; **Laura Tubbs**, Magill & Atkinson, Atlanta; **Marion George Waters**, Speed and Seta, Lawrenceville; **Kyle Wise**, Mabry & McClelland, Atlanta; **Erica Wright**, Hicks, Casey & Foster, Marietta; **James H. Miller**; Georgia Power Company, Atlanta.

Member Referrals

The following GDLA members referred new members to the association and receive a $50 credit good toward GDLA CLE seminars.

W. Earl McCall referred James Crowe and Alex Kaplan; **Carlton Joyce** referred Molly Lewis; **Mel Hass** referred Kelli Pushman; **William Casey** referred Erica Wright. **Martin Kent** referred Catherine Duke; **Rick Rominger** referred Brad Harmon; **Bob Brinson** referred Stephen Moseley; **William Dallas** referred Daniel Sessions, **William Horlock** referred Chiaka Adele.

Moore, Clarke, DuVall & Rodgers is proud to announce that GDLA member **Kevin Gaulke** has been made a partner. Kevin practices out of the Atlanta office and limits his practice to workers' compensation and employment law.

Alexander & Vann has moved. The new address is 411 Gordon Avenue, Thomasville, GA 31792.

The new address for **Alembik, Fine & Callner** is SunTrust Plaza, 37th Floor, 303 Peachtree Street, NE, Atlanta, Georgia 30308

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Georgia Legislative Update

By Barry Fleming
Fulcher Hagler, Augusta

Senate Bill 3

This is the much-discussed comprehensive civil justice reform bill. Its purposes are to better the system of resolving health care liability claims, to encourage more affordable health care liability insurance, to encourage business in Georgia and to improve health care services for Georgians. The bill amends the provisions which govern where a lawsuit takes place, creates an offer of judgment rule, establishes specific criteria for expert witness testimony, raises the liability standard for emergency room care from negligence to gross negligence, replaces joint and several liability with proportionate liability and limits recovery of non- economic damages in medical malpractice cases.

As regards venue, a defendant in a medical malpractice action may require that the case be transferred to the county of his residence if that defendant is a resident of the county where the injury occurred. In all types of cases defendants may require that the case be transferred to another county if all defendants from the current county are discharged from liability. The plaintiff may choose the county if more than one county of proper venue exists. Finally, in the interest of justice and for convenience of the parties, a court may transfer a case to another Georgia county or dismiss the case if venue is proper in another state.

The offer of judgment rule provides that only in tort claims for monetary relief, either party may make an offer of judgment, which if rejected shall entitle the offering party to attorney's fees and costs if the judgment rendered is significantly less favorable to the rejecting party than was the offer. In addition, a jury may determine if a frivolous claim or defense was asserted and may award attorney's fees and expenses of litigation if so.

For expert witness testimony, while the bill does not change the rule for criminal actions, it raises the standard for such testimony in civil actions by adopting a law based on federal requirements that experts be reliable and relevant. The bill also includes other specific requirements only for experts in medical malpractice actions.

For health care liability claims arising out of the provision of emergency medical care, the bill raises the standard of recovery from negligence to clear and convincing evidence of gross negligence by a physician or other health care provider.

Instead of joint and several liability in civil actions, the bill holds that the trier of fact (judge or jury) shall determine the percentage of fault for each defendant and apportion damages accordingly. Furthermore, the plaintiff receives nothing if plaintiff is 50 percent or more responsible.

Finally, Senate Bill 3 limits the recovery of noneconomic damages per claimant in a medical malpractice case to $350,000 from all physicians or other health care providers involved, $350,000 from each medical facility, $700,000 from all medical facilities, and $1,050,000 from all defendants.

House Bill 200

This bill moves the date for eliminating the Subsequent Injury Trust Fund ("SITF" or "Fund") from June 30, 2008 to June 30, 2006. The SITF was originally established to assist injured workers in finding employment. The Fund encourages Georgia companies to hire previously injured workers by alleviating the fear that the injured worker will increase business costs by filing future workers' compensation claims. SITF has built up an unfunded liability of more than $1 billion. Conservative estimates predict almost $60 million of additional liability will be added yearly. By moving the sunset to June 30, 2006 and preventing any new claims after that, this bill may prevent years of new claims and save the SITF close to $250 million.

Arguments in support of House Bill 200 included: it hastens the removal of a poor program and reduces the size of state government; it reduces business costs by shutting off a program that forces all businesses to pay premiums but only rewards the limited number of businesses that use the Fund; it promotes responsibility of Georgia businesses in making hiring decisions and planning for the future.

House Bill 327

House Bill 327 is due in large part to the analysis and input of the workers' compensation advisory board. This bill includes a continuation of the 7.5% discount for certified drug-free workplaces, a clarification of the workers' compensation board's ability to communicate electronically, a modification to the definition of catastrophic injury, a rebuttable presumption of noncatastrophic injury for two and a half years following the injury if the worker resumes light duty work or if the worker reaches the age of retirement, a process by which a party may request a periodic evaluation of whether a worker has a catastrophic injury, a mechanism to recognize when an injured worker becomes entitled to social security retirement benefits, and an increase in income benefits from a maximum of $425 to $450 weekly.

House Bill 327 represents a periodic revisiting of workers' compensation policy in Georgia. In addition to addressing the definition and duration of a catastrophic injury designation, the bill aims to keep the workers' compensation system in stable condition while also clarifying how the workers' compensation board may take advantage of modern technology.

Georgia Defense Lawyers Association

Annual Meeting

June 16-19

Ponte Vedra Inn & Club

Featured Speakers:

Honorable M. Gino Brogdon
Superior Court of Fulton County

Honorable John J. Ellington
Georgia Court of Appeals

Honorable James C. Hill
U. S. Court of Appeals, 11th Circuit

Honorable Michael L. Karpf
Superior Court, Chatham County

Honorable William C. O'Kelley
U.S. Dist. Court, Northern Dist.

Honorable Thomas Day Wilcox, Jr.
Superior Court, Bibb County

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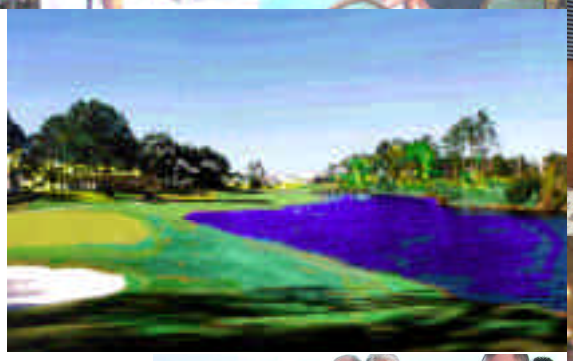

Weekend At a Glance

Friday, June 17

Continental Breakfast
Exhibit Area Open
Educational Program
Benedict Engineering Golf Tournament
Kool-Aid & Cocktails sponsored by
Minnesota Lawyers Mutual

Saturday, June 18

Continental Breakfast
Exhibit Area Open
GDLA Annual Business Meeting
Educational Program
Brown Reporting Co. Tennis Tournament
Sand Castle Building Contest
Forcon International Cocktail Reception
Kids Night -- Pre-teens
Teens Night Out -- Teens
GDLA Annual Dinner & Dance
sponsored by **Forcon International**
Awards Ceremony
Dancing to Diggin' in Dreamland

Questions?
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Workers' Compensation Update

By Luanne Clarke
Moore, Clarke, DuVall & Rodgers, Albany

Opinions from the Georgia Court of Appeals

Minter v. Tyson Foods, Inc. No. A04A2055, 2004 Ga. App. LEXIS 1658 (Dec. 31, 2004)

On December 31, 2004, the Georgia Court of Appeals decided in Minter v. Tyson Foods, Inc., No. A04A2055, 2004 Ga. App. LEXIS 1658 (Dec. 31, 2004), three issues which were presented to the Court on appeal from the Superior Court of Marion County. The first issue before the Court was whether the superior court erred in remanding the award of TTD benefits to the State Board because it was unclear as to whether or how the standards and requirements of the Padgett and/or Maloney decisions were applied. The second issue was whether the superior court erred in affirming the Appellate Division's decision vacating the award of assessed attorney fees. Lastly, the Court decided whether O.C.G.A. § 34-9-108(b)(4) could be applied retroactively.

...the Georgia Court of Appeals decided in Minter v. Tyson Foods, Inc. ... three issues which were presented to the Court on appeal from the Superior Court of Marion County.

In regards to the first issue, following a hearing on the case, the ALJ found that the Employer only offered the Employee employment beyond her physical restrictions and her injury was the reason for her continued unemployment. Therefore, the ALJ, under the reasoning of Padgett v. Waffle House, found the Employee was entitled to recommencement of benefits. The ALJ also noted that even if Padgett did not apply, the Employee was entitled to benefits under Maloney v. Gordon County Farms.

In review, the Georgia Court of Appeals stated the evidence arguably did not support the ALJ's conclusion that Padgett applied to the facts of the case. In the decision the Court noted that in Padgett, the employee was terminated from her employment for reasons which were directly related to her job injury. However, in this case, the Employee's job loss originally stemmed from a general layoff.

On the other hand, under the Maloney reasoning the Court held there was some evidence supporting the findings that the Employee sustained a compensable work-related injury, is unable to return to work, and had made a diligent but unsuccessful attempt to find employment elsewhere. Therefore, the award of TTD benefits for the Employee was upheld.

On the second issue the Georgia Court of Appeals held the Appellate Division was entitled to find an additional award of attorney's fees excessive and not supported by a preponderance of the evidence. In the ALJ's award he awarded attorney fees under O.C.G.A. § 34-9-108(a) in the amount of 25 percent of the Employee's weekly benefits and also awarded a lump sum attorney fee of $3,000 in accordance with O.C.G.A. § 34-9-108(b). The Appellate Division found the additional award of attorney's fees excessive which was affirmed by the Georgia Court of Appeals.

Lastly, the Georgia Court of Appeals held O.C.G.A. § 34-9-108(b)(4) which allows for the recovery of litigation expenses creates a substantive right. O.C.G.A § 34-9-108(b)(4) was enacted on July 1, 2001. The Employee's injury in this case occurred in September 1999 which was prior to the enactment of the statute. The Court reasoned prior to the enactment of O.C.G.A. § 34-9-108(b)(4) the Employee had no right to payment of litigation expenses. Therefore, the superior court properly affirmed the Appellate Division decision on this issue denying costs of litigation to the Employee.

Johnson v. Tyson Foods, Inc., No. A04A2058 (March 3, 2005)

On March 3, 2005 in an unofficially reported decision, the Georgia Court of Appeals in Johnson v. Tyson Foods, Inc., No. AO4A2058 (March 3, 2005) upheld its recent decision in Minter v. Tyson Foods, Inc., No. A04A2055, 2004 Ga. App. 1658 (Dec. 31, 2004), that litigation costs pursuant to O.C.G.A. § 34-9-108(b)(4) created a substantive right and was not to be retroactively applied. Further, the Georgia Court of Appeals found there was evidence in the record to support the reduction of civil penalties by the Board.

In this case the issues before the Georgia Court of Appeals included: (1) Whether the Board's reduction of civil penalties from $30,000 to $4,000 was supported by the evidence; and (2) Whether O.C.G.A. § 34-9-108(b)(4) can be retroactively applied. The facts showed the Employee worked on the chicken breast pull production line for the Employer. In June 2000, the Employee began to experience pain in wrist and was diagnosed with carpal tunnel syndrome and underwent surgery for the condition. The Employee subsequently sought workers' compensation benefits and a hearing was held before the ALJ. In the ALJ's award the ALJ imposed civil penalties against the Employer for failure to explain the panel of physicians in a timely fashion as required by O.C.G.A. § 34-9-201(c).

The ALJ found the Employer failed to comply with this Code section each of the 30 times the Employee presented to the nurse's station for treatment and assessed a $1,000 penalty for each violation which equaled $30,000. Additionally, the ALJ awarded litigation costs to the Employee.

The case was appealed to the Appellate Division of the State Board of Workers' Compensation who found the civil penalties were appropriate. However, the Board reduced the civil penalty award from $30,000 to $4,000 because the Employee presented to the nurse's station on four separate days. The Board concluded on each of these days the Employee was not provided the opportunity to see a doctor for her injuries constituted a violation for which civil penalties were imposed. The Board assessed $1,000 for each day of violation ($4,000). In review of this issue the Georgia Court of Appeals stated:

Findings of fact made by an ALJ must be accepted by the appellate division where such findings are supported by a preponderance of competent and credible evidence contained within the records. Thus, the appellate division must weight the evidence and assess the credibility of witnesses and if it determines that the award of the ALJ is supported by a preponderance of admissible evidence it will be accepted. But, if after assessing the evidence of record, the appellate division concludes the award does not meet the statutes' evidentiary standards, the appellate division may substitute its own alternative findings for those of the ALJ, and enter an award accordingly.

Bankhead Enterprises v. Beavers, 267 GA. 506, 507, 480 S.E.2d 840 (1997). If any evidence supports the Board's decision it must be affirmed. See, Johnson v. Weyerhaeuser Co., 231 Ga. App. 627, 628-29, 499 S.E.2d 916 (1998). The Court of Appeals found there was some evidence to supports the Board's findings and therefore, affirmed.

Further, the Georgia Court of Appeals upheld the Board's award striking the award of litigation costs against the Employer. The Court held the statute permitting certain litigation costs, O.C.G.A. § 34-9-108(b)(4), could not be retroactively applied as the statute created a substantive right. In this case the Employee's date of injury occurred prior to the enactment of O.C.G.A. § 34-9-108(b)(4) and the Employee was not entitled to recover litigation costs as decided in the Minter decision. Minter v. Tyson Foods, Inc., No. A04A2055, 2004 Ga. App. LEXIS 1658 (Dec. 31, 2004).

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within the metal microstructure in much the same way that information is stored within a computer chip. Furthermore, various mechanical properties [hardness, yield and fracture strength, ductility and fracture toughness] can all be measured using specimens prepared from the failed component.

Comparison to material specifications obtained from the manufacturer, reference literature or from an exemplar component will usually result in responsibility being definitively assigned.

Them's the Breaks

Often a mechanical failure originates from causes which have nothing to do with the metallurgical aspects of the component which failed - composition, microstructure, processing, etc. As a case in point, consider the investigation into a motor vehicle accident which investigators attributed to fracture of the three bolts which held the steering gear in place. Examination of the fracture surfaces revealed that of the three, two had undergone high speed ductile overload fracture while the third showed the classic features of a fatigue fracture. Chemical analysis showed the bolt to conform to the composition of a material commonly used for such applications. Hardness measurements were consistent with a properly quenched and tempered steel. With the material conforming to what was probably the manufacturer's specifications and the experience that bolts properly torqued should not be subjected to the cyclic stresses required to initiate fatigue cracks, the bolt failure was attributed to an improperly tightened bolt. The presence of the "chord" area, concentrically oriented with respect to secondary cracks and 90° displaced from the origin of the fatigue crack is the "fingerprint" for reverse-bending mode of fatigue crack failures [Figure 1].

Fracture surface of failed bolt showing classic chevron markings characteristic of a fatigue failure. "Chord" indicates a reverse bending failure mode.

There's No Such Thing as a Free Lunch

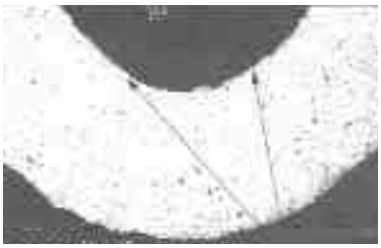
A number of years ago, the Bourdon tube in an air pressure gauge used in SCUBA diving cracked, blowing out the gauge cover glass and resulting in personal injury to an individual who was not the owner of the equipment. A testing laboratory [not Forcon] determined that the cause of failure of the Bourdon tube, a iron-nickel alloy, was caused by stress corrosion cracking [SCC]. They based their conclusion upon the composition of the corrosion products found on the interior surface of the Bourdon tube, and upon the occurrence of cracks which propagated through the alloy microstructure [Figure 2]. The report issued by the laboratory held that the equipment owner was at fault for not adequately maintaining his gear.

Photometallograph of subject Bourdon tube alloy cross-section. Note appearance of both microstructure and corrosion attack (intergranular).

When asked to provide a second opinion, I sought to obtain an exemplar from a local dive shop. The closest I could come was a gauge manufactured a year or two prior to the subject - same manufacturer, same alloy composition, same design. The interior of the exemplar gauge is shown in Figure 3.

Photograph of exemplar pressure gauge showing Bourdon tube assembly.

A photometallograph of the cross-section of the exemplar microstructure is shown in Figure 4.



Photometallograph of exemplar Bourdon tube alloy microstructure. Compare with Figure 2 as to alloy microstructure and appearance of corrosion attack.

Compositions of corrosion products found on interior surfaces of the exemplar were similar to those found on the subject. But the appearance of the corrosion attack was noticeably different - as was the alloy microstructure. Rather than intergranular penetration, corrosion was general, distributed uniformly over the interior surface of the Bourdon tube.

Figures 5a and b compare the exemplar and subject microstructures at elevated magnification. The

intergranularity of the corrosion attack in the subject alloy appears associated with a second phase which decorates the grain boundaries of the subject but which is absent in the exemplar. The appearance of this phase was attributed to an improper heat treatment of the material. Later, records were discovered in which the conventional heat treatment process had been changed in response to a demand for increased strength. Unfortunately, the means by which this increased strength was obtained resulted in a decrease in corrosion resistance - a decrease which was never anticipated nor tested for by the manufacturer.

It should be noted that serendipity can often be a critical component of the resolution of a failure analysis. What if my exemplar had been manufactured in the same

High magnification photomicrograph of exemplar structure.

High magnification photomicrograph of subject microstructure.

fashion as the subject [i.e. same heat treatment]? Would the outcome have been the same? I would like to think so, but without this "smoking gun", the process would have been a lot more involved.

Preserving the Evidence: Abuse it and you Lose it

Since claims professionals sometimes find themselves in situations where they need to remove critical evidence from the accident scene to keep it from disappearing, let me conclude by offering a few suggestions concerning procurement and handling of forensic evidence as related to material failure analysis.

If the forensic analyst cannot be on the actual scene, whenever and wherever possible, evidence should

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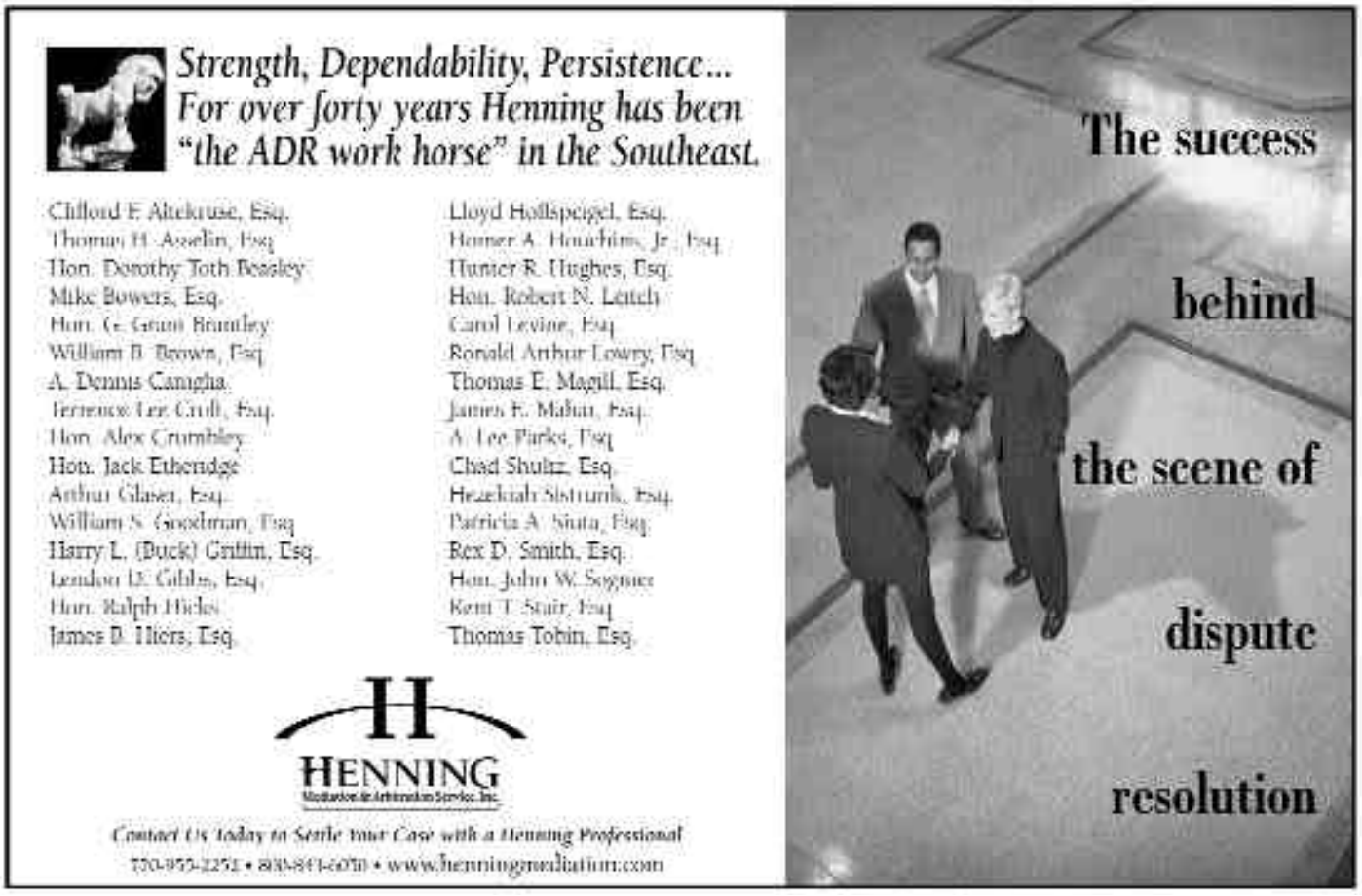

2005 GDLA Worker's Compensation Academy A Sell-Out Success

More than 20 young lawyers from across Georgia met to learn the latest information on workers' compensation law at the GDLA's first Workers' Compensation Academy, February 11.

The GDLA surpassed its first-year goal for attendance.

"Our approach to planning the first GDLA Workers' Compensation Academy was to follow the doctrine I first heard enunciated by Past President Jerry Buchanan, which is to 'set modest goals and be willing to compromise them frequently'," said academy c0-chair, **N. Staten Bitting** of Fulcher Hagler. "**Luanne Clarke** and I were delighted to find it necessary to recruit additional faculty members because of the number of registrants. All who participated seemed to think it went well."

Faculty who donated their time included Bitting, Clarke, Moore, Clarke, DuVall & Rogers; **William Anderson**, Hamilton, Westby, Antonowich & Anderson; **Judge Melodie Belcher**, administrative law judge; **Jennifer Chapin**, Savell & Williams; **Andy Hamilton**, Hamilton, Westby, Antonowich & Anderson; **Judge David Imahara**, administrative law judge; **David Smith**, Drew, Eckl & Farnham.

Attendees included **Chiaka Adele**, Sommers, Scrudder & Bass; **Geoffrey M. Bentzel**, Sommers, Scrudder & Bass; **Lynda Chapman**, Carlock, Copeland, Semler & Stair; **John B. Critchfield**, Constangy, Brooks & Smith; **Jeremy R. Davis**, Speed & Seta; **John De Foor**, Savell & Williams; **Edward Denker**, Savell & Williams; **Samuel Earley**, Speed & Seta; **Amy Ferguson**, Carlock, Copeland, Semler & Stair; **Annette Freeman**, Drew, Eckl & Farnham, **Laura Geissler**, Drew, Eckl & Farnham; **Christine Harper**, Drew, Eckl & Farnham; **Georginia Beth Howard**, Speed & Seta; **James Jenarious**, Drew, Eckl & Farnham; **David Kay**, Drew, Eckl & Farnham; **Grant Lanford**, Speed & Seta; **Michael Moebes**, Drew, Eckl & Farnham; **Jacqueline Piland**, Carlock, Copeland, Semler & Stair; **Bryan Ramos**, Drew, Eckl & Farnham; **David B. Ranieri**, Carlock, Copeland, Semler & Stair; **Stephanie A. Rockwell**, Speed & Seta; K**elly Shepard**, Drew, Eckl & Farnham; **Aarati Subramaniam**, Drew, Eckl & Farnham

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be photographed in place from a number of perspectives. A fine-grained, high resolution film should be used. Videotaping of the inspection and specimen retrieval events is of great help in reconstructing the incident.

Orientation of the specimen with respect to motion, direction of fluid flow, etc. should be conspicuously indicated by an indelible marker.

When removing the component which has failed, consider the effect that the procedure used to remove it might have on the structure of that component. The heat generated by a hack-saw in cutting an aluminum alloy can irreversibly change the alloy microstructure, at the very least confusing an otherwise straight forward analysis. Avoid generating excess heat - if cutting with a welding torch, insulate or cool adjacent metal sections.

It is better to send the analyst too much to analyze than not enough. At a minimum, include in the sample enough material so that specimens both near to and remote from the failure site can be studied.

When fracture is involved, fracture surfaces should never even be touched, let alone placed in contact with each other. Corrosion products or other deposits should be left in place. Wrap all components in an impact resistive material - I use "bubble-wrap". Ship in a package well protected with vermiculite, pearlite or Styrofoam "peanuts".

If necessary to dry the specimen, a rinse in distilled water, followed by a rinse in ethyl alcohol [denatured] and exposure to dry air is usually acceptable. Never use methanol [wood alcohol], carbonyl [acetone, MEK] or halogenated [methylene chloride, chloroethanes] solvents to dry or degrease a specimen. If absolutely necessary to remove organic matter, use mineral spirits or kerosene, followed by an ethanol rinse and air drying.

Closing Remarks

This article was intended to "showcase" forensic analysis of metallurgical failures. I must add that although the forensics of metal failure is probably more well established as an analytical procedure, failures in other materials classifications - ceramics and glasses, polymers and electronic materials - can be accomplished as well.

Finally, a caveat - we, the materials analysts, are neither omniscient nor infallible. We base our opinions and conclusions on a number of contributing factors - [1] an in-depth knowledge of the relationship between materials behavior and the compositional and structural characteristics of that material, [2] a fairly well-developed power of observation and [3] an analytical sense of how things are supposed to work within the confines of the mechanical system in which they operate. Considering the complexity of some of our modern engineering systems, this is not always an exact science. Secondly, there is seldom a "smoking gun" within the residue of a failure nor were we there as observers while the failure was in progress. Some of what we do is more like detective work than scientific analysis. We prepare a scenario or sequence of events which is consistent with all available-evidence and facts - we can leave no loose ends if our conclusions are to be above suspicion or beyond question. I hesitate to add that without all the facts and evidence, we haven't got much of a chance.

Forcon International consultant Dr. John Ambrose obtained his B.S. in Chemistry from Washington and Lee University and his PH.D. from the University of Maryland.

He has been a research chemist for Newport News Shipbuilding and Dry Dock Company, a research scientist in the Corrosion and Electrodeposition section of the National Bureau of Standards and an Associate Professor of Materials Science and Engineering at the University of Florida. He has extensive experience in the application of materials selection criteria for corrosion prevention or control in systems design, and in the forensic analysis of corrosion related materials failure.

Dr. Ambrose is a member of the National Association of Corrosion Engineers and served as its Southeast Region Chairman. He is a member of the Metallurgical Society of the American Institute of Mining, Metallurgical and Petroleum Engineers and is a Registered Professional Engineer in the State of Florida.

He has provided expert witness services regarding specific examples of failure analysis in product liability litigation.

A Primer on Judicial Estoppel

NOTE: If you are interested in reading the entire article, complete with footnotes, you may download it at www.gdla.org/estoppel.htm.

Judicial estoppel. For plaintiff's counsel, those two words could spell the potential termination of your suit. As a defense attorney, judicial estoppel could be your best defense in a case.

This begs the question: When was the last time you, as a defense attorney, even asserted the defense of judicial estoppel? If you are not inquiring into the applicability of judicial estoppel in every case, you could be overlooking a valuable defense to your client. However, evaluating whether judicial estoppel applies in your case is a bit like looking into a carnival, fun-house mirror. At times, it is difficult to know exactly what you are looking at or even where it begins or ends. To help elucidate this area of the law, this article will focus on:

1) what is judicial estoppel;
2) the key elements in any analysis of judicial estoppel; and
3) the difference in the application of judicial estoppel between state and federal courts.

Overview

Before launching into a full analysis of judicial estoppel, a brief overview of what type of defense this is may be in order. First, judicial estoppel is an affirmative defense. Jones v. Littlejohn, 222 Ga. App. 494, 496-497, 474 S.E.2d 714 (1996). As such, it must be raised in either the first responsive pleading or in a motion for summary judgment. If you omit to raise an affirmative defense like judicial estoppel in your answer or in your initial brief for summary judgment, you have waived the defense. Rimes Tractor & Equip. v. Agricredit Acceptance Corp., 216 Ga. App. 249, 454 S.E. 2d 564 (1995). ("Estoppel is an affirmative defense and must be set forth affirmatively in a responsive pleading or in a motion for summary judgment. Accordingly, [defendant] waived this defense by untimely asserting it in its supplemental brief.") See also, Brown v. Little, 227 Ga. App. 484, 489 S.E. 2d 596 (1997).

With those practical matters in mind, judicial estoppel is based on a federal doctrine that works to preserve the integrity of judicial proceedings by precluding a party from presenting a legal position which is inconsistent with a position previously and successfully asserted in a prior proceeding. New Hampshire v. Maine, 532 U.S. 742, 121 S.Ct. 1808 (2001); Chicon v. Carter, 258 Ga. App. 164, 573 SE 2d 413 (2002). In short, judicial estoppel is aimed at preventing a party from purposely misleading the bankruptcy court about the non-existence of an actual or potential claim and thereby gaining an unfair advantage from it. In practical terms, the doctrine is commonly applied to preclude a bankruptcy debtor from pursuing a monetary damages claim that was omitted from his assets in the bankruptcy petition. A failure to reveal assets, including unliquidated tort claims , operates as a denial that such assets exist because it deprives the bankruptcy court of the core information it needs to evaluate and rule upon the bankruptcy petition. It also deprives the creditors of resources that may satisfy unpaid obligations. Thus, the application of judicial estoppel preserves the integrity of the judicial forum.

Given that background, it is important for defense counsel to determine whether judicial estoppel is even potentially at play in your case early on. It can take several months of discovery to confirm whether or not judicial estoppel is applicable in your case. As initial step, upon receipt of the complaint, a search should be done of the bankruptcy records for the plaintiff using LEXIS or a similar online legal resource. In searching the bankruptcy records, it is best to have as much information about the plaintiff as possible, including the plaintiff's social security number. If you do not have time to make such a background check into the plaintiff prior to the filing of the answer, you should assert the defense of judicial estoppel in the answer to preserve the defense.

If the court records indicate that the Plaintiff has filed for bankruptcy, then you need to request the entire bankruptcy file from the appropriate bankruptcy court. This typically entails calling the clerk for that bankruptcy court and inquiring into the costs for an authenticated copy of the debtor's bankruptcy file. It usually takes the bankruptcy court two (2) to four (4) weeks to comply with this request.

Once you have the bankruptcy file, you next need to delve into the specific facts of your case. At the outset, you will want to check the schedule of assets that your plaintiff/debtor filed with the bankruptcy petition to see if he/she ever listed the case as an asset on the schedule or amended the petition to list the asset. If the claim is listed, that ends the analysis. Judicial estoppel does not apply if the plaintiff/debtor disclosed to the bankruptcy court the claim against your client. If the claim is not listed, then you next want you to determine what kind of bankruptcy case this is. In other words, is it a Chapter 7, 11 or 13 case? The distinction between the type of bankruptcy cases is most critical in state court cases where the defense of judicial estoppel is being contemplated.

Did the asset or claim become part of the bankruptcy estate?

The significance of the type of bankruptcy to any judicial estoppel analysis is most clearly explained by the Georgia Supreme Court in

By Randall Farmer
Hall, Booth, Smith and Slover, Athens

Period Homes, Ltd. v. Wallick, 275 Ga. 486, 487, 569 S.E. 2d 502 (2002). There, the Georgia Supreme Court explained the standard as:

Unlike a bankruptcy proceeding under Chapter 13, there are only limited circumstances in which Chapter 7 or 11 debtors must amend the schedule of assets to reflect property acquired after commencement of the case. 11 USC §541 (a)(7). This is in stark contrast to the amendment requirement that a Chapter 13 debtor is under, which directs that all property acquired after the commencement of the bankruptcy proceeding be included in an amended schedule of assets. 11 USC §1306 (a). There is no analogous provision for bankruptcy proceedings under Chapter 7 or 11. Accordingly, a debtor under Chapter 7 or 11 is under no statutory duty to amend its schedule of assets. Period Homes, 275 Ga. at 487.

In determining whether an asset or claim became part of the bankruptcy estate , and therefore has to be disclosed, the Georgia Supreme Court in Period Homes clearly laid out a pre-petition or post-petition dichotomy for the various types of bankruptcies. Hence, the strongest case for the potential application of judicial estoppel in state court is typically in the context of a Chapter 13 bankruptcy case. That's because a Chapter 13 debtor is under an affirmative duty to amend and disclose a potential asset on the schedule of assets in a Chapter 13 Bankruptcy Petition no matter when the asset arose, either before or after the filing of the bankruptcy petition. Harper v. GMAC Mortgage Corp., 245 Ga. App. 729, 538 S.E. 2d 816 (2000). If the plaintiff/debtor fails to list a claim, or amend a bankruptcy petition to list a claim, then the case for judicial estoppel is much stronger. Smalls v.Walker, 243 Ga. App. 453, 532 S.E. 2d 420 (2000); Byrd v. JRC Towne Lake, Ltd., 225 Ga. App. 506, 484 S.E. 2d 309 (1997); Wolfork v. Tackett, 273 Ga. 328, 540 S.E. 2d 611 (2001); Spoon v. Johnson, 247 Ga. App. 754, 545 S.E. 2d 328 (2001).

However, a Chapter 13 plaintiff/debtor who has not listed a potential claim will doubtlessly attempt to avoid the application of judicial estoppel. For such a plaintiff/debtor, two potential arguments exist.

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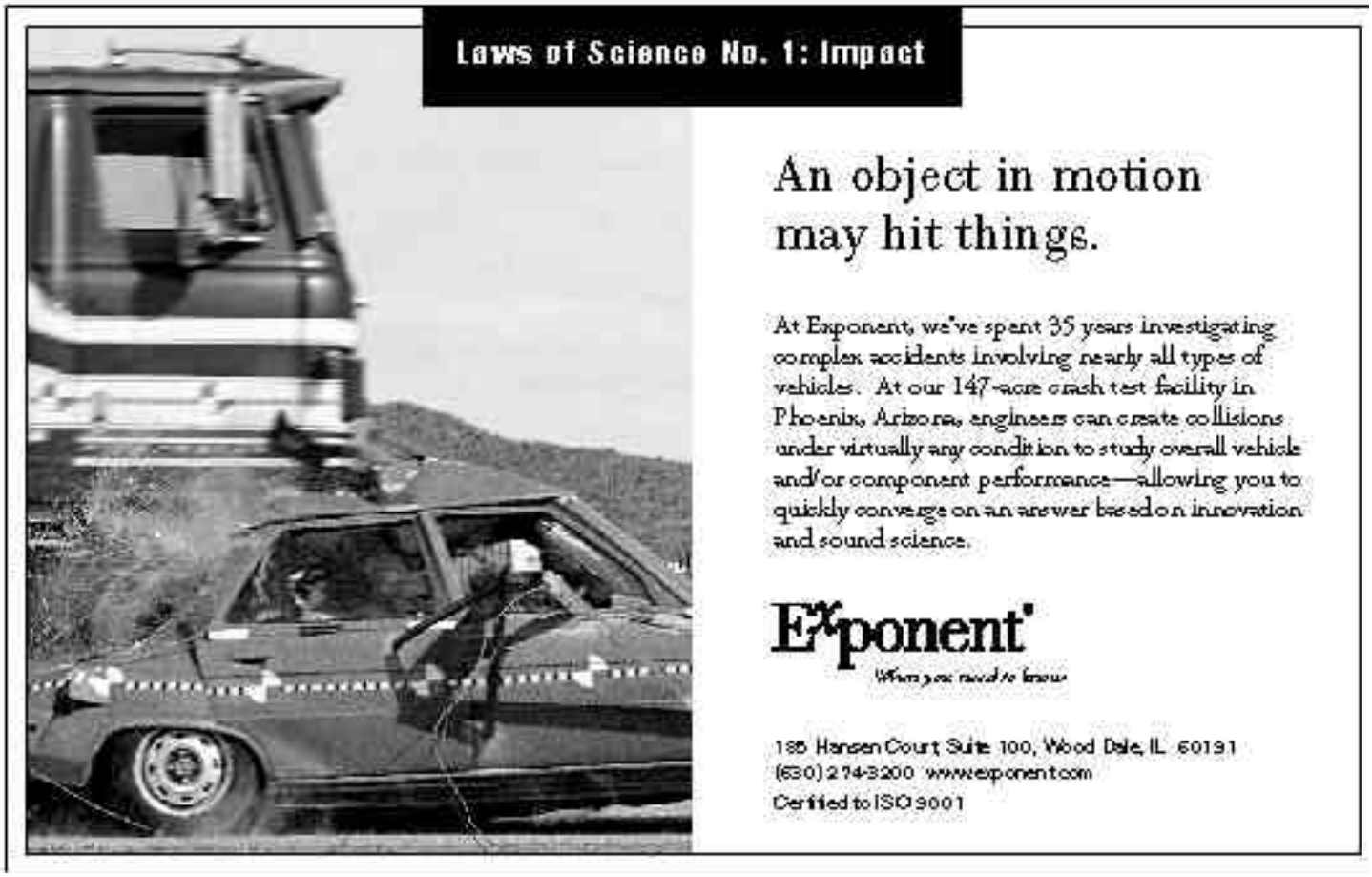

A Primer On Judicial Estoppel

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First, the plaintiff/debtor may argue that he/she is not under any obligation to disclose a claim or asset because that claim or assent never formed a part of the bankruptcy estate. Chicon v. Carter, 258 Ga. App. at 164. In Chicon, the plaintiff/debtor and another driver were involved in a motor vehicle collision. Prior to the collision, the debtor filed a Chapter 13 bankruptcy petition providing for payment of all their creditors in full. The plaintiff/debtor was discharged and the bankruptcy case was closed. The Georgia Court of Appeals held that the injury and the tort suit occurred after the confirmation of the bankruptcy plan. The plaintiff/debtor gained no unfair advantage by nondisclosure and the bankruptcy court determined that their personal injury claim did not form a part of the bankruptcy estate. "It stands to reason that the Georgia court in which the tort claim is asserted should honor the bankruptcy court's actions. To hold otherwise would produce overly harsh and inequitable results." Chicon, 258 Ga. App. 166.

Alternatively, the Chapter 13 plaintiff/debtor can voluntarily dismiss the bankruptcy petition, which terminates the bankruptcy estate and restores the property back to the plaintiff/debtor. Weiser v. Wert, 2001 Ga. App. LEXIS 1078 (2001). As explained by the Weiser court, "there was no misleading the bankruptcy court by 'successfully taking the inconsistent and irreconcilable position in the Bankruptcy Court'" because "the bankruptcy petition for Chapter 13 was voluntarily abandoned to avoid such a possibility of an inconsistent position." Id.

As indicated in Period Homes, the plaintiff/debtor in the Chapter 7 or 11 case has a different obligation to disclose assets to the bankruptcy court and consequently may not be required to list the claim at all on the schedule of assets with the bankruptcy court. In a Chapter 7 or 11 bankruptcy proceeding, only claims arising before the filing of the bankruptcy petition are required to be disclosed. Reagan v. Lynch, 241 Ga. App. 642, 524 S.E. 2d 510 (1999); Kittle v. Conagra Poultry Co., 247 Ga. App. 102, 543 S.E. 2d 411 (2000); Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 442 S.E. 2d 265 (1994). In other words, if the claim arose after the filing of the bankruptcy petition, then the asset probably did not become part of the bankruptcy estate and thus was not required to be disclosed. Period Homes, 275 Ga. at 487.

The only exception found to the Chapter 7 or 11 pre-petition/post-petition dichotomy is if the claim "is sufficiently rooted in the pre-bankruptcy past and so little entangled the bankrupt's ability to make an unencumbered fresh start that it should be regarded as property under [Bankruptcy Code.]" In re: Raymond E. Richards, 249 B.R. 859 (E.D. Mich. 2000). While there is no Georgia case citing Richards, there is one bankruptcy case out of the Eleventh Circuit referencing that case. Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez), 224 F.3d 1273(11th Cir. 2000). In Richards, the plaintiff/debtor in that case filed for Chapter 7 bankruptcy on March 18, 1999. On October 20, 1999, he was diagnosed with an asbestos related injury. On February 23, 2000, he filed a personal injury lawsuit. There, the bankruptcy court determined that the plaintiff/debtor's claim was part of the bankruptcy estate. In re: Richards, 249 B.R. at 862. There was no discussion of the application of judicial estoppel in that case. The trustee in Richards sought the turnover of the plaintiff/debtor's lawsuit to the trustee. However, defense counsel may find these cases useful in making a judicial estoppel argument against plaintiff/debtors who have a similar fact pattern as Richards.

Successful Assertion Issue

If the asset or claim is part of the bankruptcy estate, then it is required to be disclosed to the bankruptcy court. Recall that judicial estoppel "precludes a party from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding." Southmark, 212 Ga. App. at 455. To be sure, Plaintiff/debtors are under a strict duty to disclose assets to the bankruptcy court. Byrd, 225 Ga. App. at 506.

In determining whether a party has successfully asserted an inconsistent position, the Georgia Court of Appeals has held that a party has "successfully asserted a previously inconsistent position when the first court adopts or accepts a party's previous inconsistent position in a manner that provides an unfair advantage or benefit to that partying the first proceeding." Dillard-Winecoff, LLC v. IBF Participating Income Fund, 250 Ga. App. 602, 552 S.E. 2d 523 (2001).

Over the years, the Georgia courts have rejected a rather sizeable list of "excuses" given by plaintiff/debtors who were attempting to explain why they failed to list a claim or asset with the bankruptcy court. That list includes the following: A failure to read the bankruptcy schedule or any neglect of the attorney for the plaintiff/attorney. Byrd, 225 Ga. App. at 508; informing the bankruptcy trustee of the claim is not enough. Reagan, 241 Ga. App. at 642; informing the plaintiff/debtor's attorney is not enough. Harper, 245 Ga. App. at 729.

The Georgia courts also look to see whether the plaintiff/debtor has gained any "unfair advantage" from the inconsistent positions by deter-

mining whether the bankruptcy court "confirmed the debtor's plan or discharged his or her debts." Dillard-Winecoff, 250 Ga. App. at. 604. Particularly significant to the Georgia courts are whether the plaintiff/debtor has received a discharge from bankruptcy or whether the plaintiff/debtor dismissed the bankruptcy case altogether. As the Dillard court explained: ". . . while a debtor benefits from a discharge of his debts in a case in which the bankruptcy court has accepted his underreporting of assets, there is no benefit when the case is dismissed." Id. See also, Jowers v. Arthur, 245 Ga. App. 68, 537 S.E. 2d 200 (2000); Weiser, 2001 Ga. App. LEXIS at 1078(no successful assertion of an inconsistent position because the bankruptcy petition was dismissed.) Stated more fully, a dismissal of the bankruptcy petition would not be a successful assertion because a "dismissal effectively vacates a confirmed plan, returns the debtor, with the creditors, to the status quo ante, and revests the estate's property in the debtor, with the debtor again liable for his debts and with the creditors free to pursue all legal remedies against the debtor." Dillard-Winecoff, 250 Ga. App. at. 604. As a result, the bankruptcy court has not adopted the inconsistent position.

In addition to a dismissal of the bankruptcy petition, the plaintiff/debtor can avoid judicial estoppel by timely moving to reopen the bankruptcy case, even after the case is closed, to include the damages claim with the bankruptcy court. Jowers, 245 Ga. App. at 68; Rowan v. Green Oil, 257 Ga. App. 774, 572 SE2nd 338 (2002); Cochran v. Emory University, 251 Ga. App. 737, 555, S.E. 2d 92 (2001); Johnson at 651, 478 S.E. 2d 629 (1996). The Georgia Courts are clear that a plaintiff/debtor can avoid judicial estoppel when they have "successfully amended [the] petition to include any claim against the defendant as a potential asset. Under those circumstances, it cannot be said that the present position in the trial court is inconsistent with the position asserted by plaintiff in a prior proceeding and, therefore, judicial estoppel does not bar her claim." Cochran, 251 Ga. App. at 739; See also, Chicon, 258 Ga. App. at 166 (" . . . the bankruptcy court determined that the claim in question did not form part of the bankruptcy estate. The omission of the claim therefore did not garner [plaintiff/debtor] any advantage during the bankruptcy proceedings, and did not deprive any creditors of resources against which why would satisfy their claims. As observed in Jowers, it stands to reason that the Georgia court in which the tort claim is asserted should honor the bankruptcy court's actions. To hold otherwise would produce overly harsh and inequitable results.")

The rest of this article, with foot - notes, may be downloaded at www.gdla.org/estoppel.htm

Randall Farmer works in the Athens office of **Hall, Booth, Smith and Slover**, practicing in the areas of education law and insurance defense. He earned his law degree from the University of Georgia in 2000 and his undergraduate degree from the University of North Carolina at Chapel Hill. Prior to practicing law, he taught in the Atlanta Public School System after obtaining his Master's in Education from Harvard University. In his law practice, Mr. Farmer has come across the defense of judicial estoppel on multiple occasions in both state and federal practice.

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Second Annual GDLA Judiciary Reception

More than 100 defense attorneys and judges gathered in early February to give GDLA members a chance to meet and commiserate with the judiciary in front of whom they practice.

The evening provided valuable face time between lawyers and judges in a less formal setting than the courthouse.

The evening also featured the recognition of GDLA's past presidents, eight of whom were in attendance.

The GDLA plans to expand on this successful annual event, with other judiciary receptions in other locales.

Clockwise from top left: **Michael Goldman** of Hawkins & Parnell and **Judge Al Wong**; **Judge Cynthia Becker** and **Steve Kyle**, Bovis, Kyle & Burch; **Judge Carol Hunstein** with **David Marshall**, Hawkins & Parnell and Michael Goldman; **Mike Watson**, Hawkins & Parnell, looks on as **Jim Miller**, Georgia Power, speaks with **Judge John H. Ruffin, Jr.**; **Judge Janis C. Gordon** with **Lynn Roberson**, Swift, Currie, McGhee & Hiers, and **Kelly Amanda Lee**, Womble, Carlyle, Sandridge & Rice.

Clockwise from top left: **Judge Tom Thrash** with Steve Kyle; **Judge Wendy Shoob** with **Eric Frisch** of Carlock, Copeland, Semler, & Stair; **Judge Herbert Phipps** with **Walter McClleland**, Mabry & McClelland, Atlanta; **Judge Harris Hines** and Kelly Amanda Lee

GDLA past presidents from left to right: J. Bruce Welch, Richard Rominger, Wilbur Brooks, Frank Love, Davison Burch, Steve Kyle, Morton "Salty" Forbes, Walter McClelland.

GDLA Winter Board Meeting Highlights

GDLA Winter 2005 Board of Directors Meeting Highlights
Atlanta, Georgia,
February 10, 2005

1. Call to Order – The meeting was called to order by Grant Smith at 2:10 p.m. In attendance were: **Grant Smith**, **Steve Kyle**, **Rick Rominger**, **Jimmy Singer**, **Salty Forbes**, **Bruce Welch**, **Johnny Foster**, **Bob Travis**, **Lynn Roberson**, **Jo Jagor**, **Steve Milano**, **Wilbur Brooks**, **Luanne Clarke** and **Walter McClelland**.

2. Recognition of Board Members – All board members and past presidents in attendance were recognized.

3. Approval of Minutes – Minutes of the October 16, 2004 board meeting at Lake Oconee were previously distributed by e-mail and hard copies were available for those in attendance. The minutes were approved with the following comments: (a) John A. Foster should be listed as Executive Vice President; (b) Steve Kyle and George Duncan should be listed as Past Presidents; and (c) David Whitworth should be listed as a Past President.

4. Treasurers Report – Johnny Foster reported the association's current cash on hand and receivables. Steve Milano's hand-out indicated that the Trial Academy yielded net income of positive $1,898.52 and there were 36 attendees.

Johnny Foster also reported that the fund balance in the Willis "Dick" J. Richardson, Jr. Student Award is currently $14,030.27. The award will be presented April 8, 2005 at 3:30 p.m. and is currently scheduled for the Hatton Lovejoy Courtroom at the University of Georgia School of Law. Bob Travis and Jo Jagor volunteered to attend and present the award. Johnny Foster reported that this year's spending limit based on the current fund balance is $333.00. Accordingly, in order to enable a $500.00 scholarship to be presented, the Foundation has requested $167.00 from the Association to make up the difference. A motion was made, seconded, and passed to fund the additional $167.00.

Johnny Foster also reported that when the scholarship was first set up, it was structured such that the award would be presented to a student selected by the Civil Practice professor who would select the best all-round civil practice student. This continues to be the case. However, subsequent to when the scholarship was originally set up, the civil practice class from which the award recipient is selected was changed from a second-year class to a third-year class. As a result, it is necessary that the award now be presented in the spring to a student who graduated the previous spring. Discussions with Phyllis Cooke, Director of Annual Giving for the University of Georgia School of Law, have suggested that the best approach to remedy this would be to restructure the award so that it will be presented to the student selected to chair the Mock Trial Board. A motion was made, seconded, and passed to restructure the award accordingly.

Salty Forbes suggested that the GDLA create a foundation to build up the Richardson Scholarship Fund. After discussion, Mr. Forbes moved that $5.00 for each member who has paid the dues which became due July 1, 2004 be transferred from GDLA to the Richardson Scholarship Fund. The motion was seconded and passed.

Jo Jagor suggested that donations be solicited on the Web site. In connection with this, Steve Kyle suggested that someone be designated as officially responsible for updating the Web site periodically. Steve Milano will look into this.

5. Amicus Committee Report – Steve Milano said that the Amicus guidelines were posted in the last edition of the newsletter.

6. Membership Report – Salty Forbes indicated that 48 prospective new members had been approved by the Membership Committee. The all-time record for a one-year period is 63 and the GDLA is on pace to welcome more than 100 new members this year. Of the 48, 24 were as a result of the Trial Academy and 21 were non-Trial Academy attendees. Six Trial Academy attendees did not apply. Jo Jagor volunteered to call them.

Salty Forbes made a motion to approve the 48 prospective applicants. The motion was seconded and passed unanimously.

Salty Forbes said that Kirk McAlpin requests to be made an honorary member. A motion was made, seconded, and passed to do that and Grant Smith will notify him.

Salty Forbes reported that 29 applicants became members as a result of the free membership program at the 2003 Trial Academy. Of those 29, 13 renewed in 2004 and 16 did not. Lynn Roberson suggested that an effort should be made to encourage the 16 who did not renew to do so and to find out why they did not. Salty Forbes suggested that the free membership issue be revisited by analyzing how many of the applicants who resulted from the 2004 Trial Academy free membership program renew in fiscal 2005 – 2006, and with that information, the free membership program should be re-evaluated.

There was then a discussion regarding the 25 members who

have not paid their dues which became due July 1, 2004. Salty Forbes pointed out that the fall 2004 board meeting minutes provided that, of the 33 members who were delinquent at that time, Steve Milano was to divide those names among the board members and that each board member would call the delinquent members assigned to him/her and try to convince them to return to good standing within the organization, and that Steve Milano would also divide the individuals who have been removed or have resigned for calls from the board members as well. Salty Forbes pointed out that this has not been done. A motion was made, seconded, and passed that Steve Milano will distribute to the board the list of all of the names of the members who have become delinquent or removed or resigned this fiscal year and the board members will select from that list those that they know and whom they will agree to call and provide those names to Steve Milano. Steve Milano will then divide those names that have not been selected among the board members.

7. Membership Recruitment and Retention Report – See Item 6 above.

8. Sponsorship and Exhibitors – Jo Jagor said that she had a potential new exhibitor, Summit Documents.

9. Workers' Compensation Academy – Luanne Clarke said that the Workers' Compensation Academy scheduled for February 10, 2005 was going to proceed as scheduled and that 21 attendees had signed up. A motion was made, seconded, and passed to offer free membership to Workers' Compensation Academy attendees who were not already members. Salty Forbes suggested that a certificate be forwarded to all those who attended the Trial Academy and the Workers' Compensation Academy.

10. Trial Academy – A motion was made, seconded, and passed that the Association would reimburse the faculty their mileage.

11. Annual Meeting – In connection with plans for the spring 2005

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Benedict Engineering Ad

Winter Board Meeting Highlights

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board meeting and the 2006 annual meeting, Steve Kyle presented a slide show of the accommodations at the Fairmont South Hampton Princess in Bermuda. For the 2006 annual meeting, Steve recommends Wednesday, June 7 through Sunday June 11, 2006.

The 2005 annual meeting will be June 16 through 19 at Ponte Vedra. The room rate will be $250.00. The goal is to get brochures in the mail by April 1, 2005. The golf tournament will be Friday afternoon. The business meeting will be Saturday morning. The tennis tournament and sand castle building contest will be Saturday afternoon. The schedule will include 30 minutes for the nominating committee to meet. There was discussion but no consensus regarding the idea of putting on a separate program for younger lawyers. It was decided that Jo Jagor and Greg Ellington would report back to the board with a recommendation as to whether to attempt a separate younger lawyers program and how to establish a younger lawyers section.

Johnny Foster reported that there are currently six speakers lined up: five judges and a 30 minute law update to be presented by Scot Pool. In addition, a sixth judge has been invited to speak.

Steve Kyle reported that we are shooting for a fall meeting in the Asheville area.

Salty Forbes suggested that, in the future, when the winter board meeting is scheduled in Atlanta in conjunction with the judges' reception, that the board meeting be held the morning after the judges' reception rather than earlier the same day as the judges' reception.

12. Newsletter – Salty Forbes made a motion which was seconded and passed that the newsletter budget be changed from $1,500.00 per issue to $7,500.00 per year.

13. *Law Journal* – Jimmy Singer said that there were six articles already written which would be ready for publication after the authors have an opportunity to update them. Jimmy suggested, and the consensus was in favor of his suggestion, that we get the journal out by May 1, that it include the six articles previously mentioned, and a seventh to be written on the subject of Senate Bill 3 regarding tort reform which had, as of the time of the meeting, passed both the House and the Senate. The journal will not include by-laws or a membership list. It will include a section providing information about the Association and a table of contents. The journal will be distributed to the following judges: State Court, Superior Court, Georgia Supreme Court, Georgia Court of Appeals, United States District Court Judges sitting in Georgia, and all senior judges with all of those courts. Members will receive the *Law Journal* in the format of a compact disc and it will be posted on the members only portion of the Web site. Judges will receive a hard copy and a disc. The *Law Journal* committee and Steve Milano will report back to the board or the executive committee as to the cost of providing the *Law Journal* on disc versus book format and the executive committee will take further action as it deems appropriate.

14. Web site Committee – There was discussion regarding whether to add to our Web site package the ability for members to send blast emails to the board and past presidents. The cost would be $70.00 per month. The consensus was to not do this.

15. Y.L.S. Membership Recruitment Committee – See Items 6, 7, and 11 above and Item 16 below.

16. Younger Lawyers Section of GDLA – Regarding prior discussion of how to encourage newer members and younger lawyers to attend the annual meeting, Wilbur Brooks suggested that we ask the large firms to put into their budget funds sufficient to send two associates each year to the annual meeting. A motion was made, seconded, and passed that we will put into effect Wilbur's suggestion. Grant Smith will draft the letter with Wilbur's assistance and it will be signed by or have the names of each past president.

17. Legislative Liaison – Barry Fleming is a member who is in the legislature but he is not currently a member of our board.

18. DRI Report – Salty Forbes reported that the Southeast Regional meeting will be held May 21 near Birmingham, Alabama. Salty Forbes will attend on behalf of GDLA.

19. Old Business – None

20. New Business - There was discussion of whether the Association needs liability insurance and/or directors and officers liability insurance. Steve Milano indicated that we have four sponsors who are insurance brokers. Salty Forbes will contact them to get quotes for D&O coverage, general liability coverage, and both. We will purchase liability coverage prior to the annual meeting and will discuss further the necessity of D&O coverage once we have the quotes.

Salty Forbes made a motion that we reaffirm Steve Kyle's authority to sign on behalf of the Association contracts which Steve Kyle has made the board aware that he was

Continued on page 26

Thank You!

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Winter Board Meeting Highlights

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signing prior to signing them. The motion was seconded and passed.

Lynn Roberson made a motion that we co-sponsor the Atlanta Continuing Legal Education program "Jury Summit." The motion was seconded and passed.

Following this, there was discussion regarding use of the GDLA logo. Salty Forbes pointed out that we have only one official logo and that it has not been changed since it was first adopted during Wilbur Brooks' presidency. Walter McClelland expressed his view that when anyone uses something that purports to be our logo, that they should use the official correct logo.

Tort reform was discussed. It was decided that no action would be taken by the Association other than keeping the members informed.

The subject of co-defendant case information sharing was discussed. It was decided that no action would be taken and that Grant Smith would respond regarding this issue.

There was discussion regarding the Judicial Nominating Committee. It was decided that Walter McClelland, Lynn Roberson, and Luanne Clarke would follow up with the Judicial Nominating Committee by expressing to the committee our interest in participating in their activities to the extent such participation would not be inconsistent with our by-laws or tax exempt status.

Executive Director compensation – Mr. Milano was excused from the meeting. A motion was made and seconded to increase Mr. Milano's compensation. After discussion, the motion passed unanimously.

Salty Forbes reported that the GDLA had, erroneously, exempted from dues payment certain members who had attained the age of 70. Salty made a motion that was seconded and passed that those who had previously been erroneously exempted would remain exempted but that, in the future, there would be no new exemptions granted except in accordance with the by-laws. The motion was seconded and passed.

Salty Forbes suggested that photographs from the judges' reception and from the upcoming annual meeting be sent to DRI's *For the Defense* magazine for publication therein.

20. <u>Adjourned</u> – The meeting was adjourned at 5:00 p.m.

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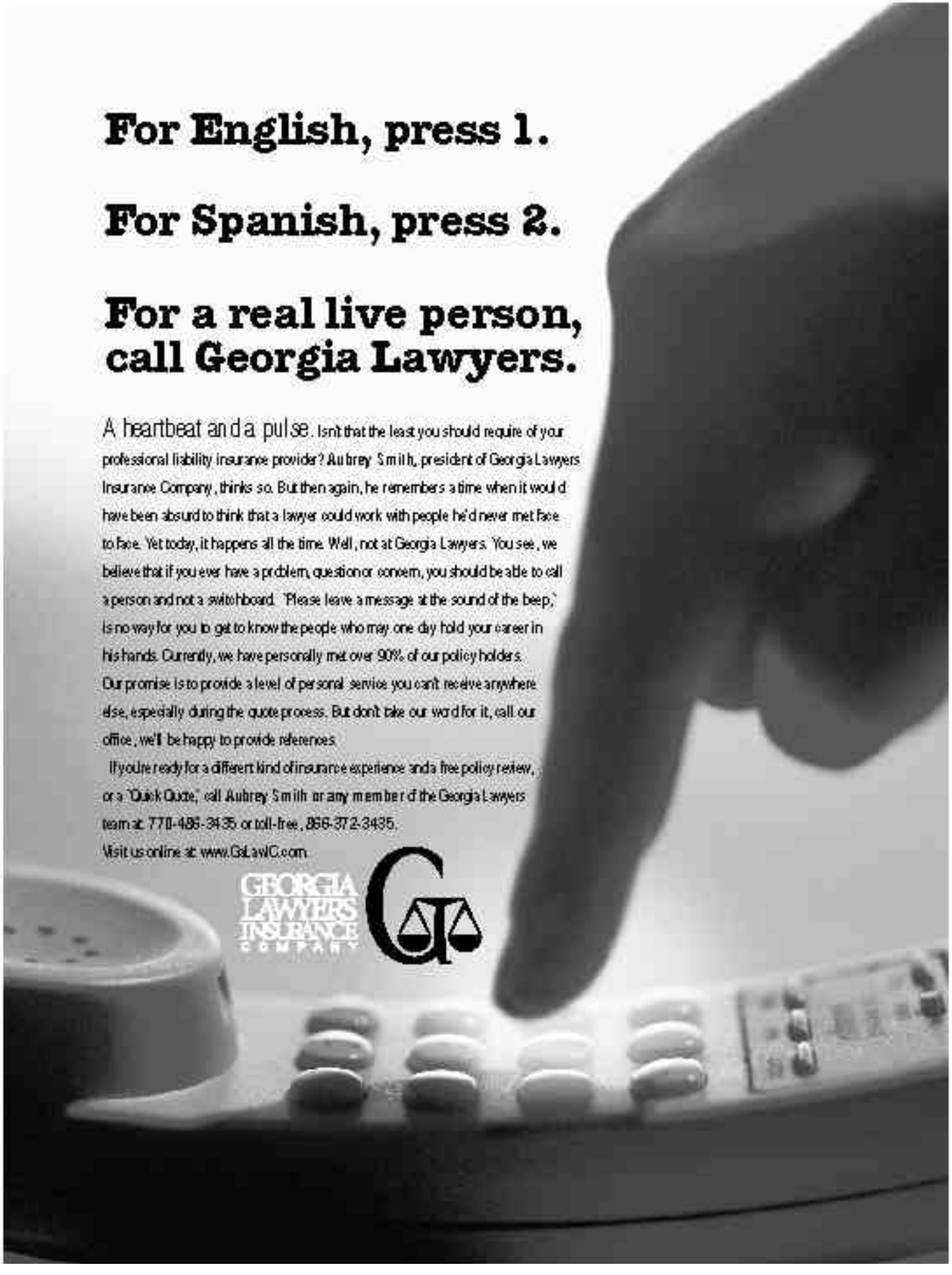
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