

2015 GDLA

Law Journal



**Georgia Defense
Lawyers Association**
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PRESIDENT'S MESSAGE



Kirby Mason is a partner in HunterMaclean's litigation practice group, contributing over 20 years of experience to the Savannah firm. A tough litigator, Kirby is at home in the courtroom where she presents the facts and law in a straightforward manner. She is equally effective in front of a jury as in a bench trial or in mediation/arbitration proceedings.

As I wrote several years ago when I served as Editor of the *Law Journal*, this publication does not just happen. It exists only because of the dedication and hard work of many.

It starts, of course, with the Editor. The Editor must first identify for publication the timeliest articles on topics which will have the broadest appeal to the members and judges to whom they are sent. The Editor must then recruit the authors, make sure the articles are submitted by the deadlines, appropriately edit them, and otherwise ensure that the entire publication is worthy to bear the name Georgia Defense Lawyers Association *Law Journal*. It is a huge undertaking. This year, Craig Avery has done an outstanding job as our Editor, and I want to personally thank him on behalf of the entire Association for his considerable efforts. It certainly shows in the quality of this year's *Journal*.

But without the authors, there would be nothing for Craig to edit. This year, 23 talented attorneys have taken time away from their busy practices to prepare 13 insightful and practical articles to benefit us all. We all owe them a debt of gratitude for their hard work in making the *Journal* the absolutely first-rate publication that it is.

Finally, I would be remiss if I did not take a moment to recognize the superhuman efforts of our Executive Director, Jennifer Davis, not only in getting the *Journal* out the door, but in everything she does to make the GDLA better. One cannot truly appreciate how good Jennifer is until you have served as an officer of the Association and had her watch your back. Jennifer is simply the best at what she does, period, and we are so incredibly fortunate to have her as a member of the team.

As my term in office draws to a close, I want to thank you for the privilege of serving as your president for the past year. With the support of the Board, it has truly been an honor.

I hope you enjoy this year's *Law Journal*.

For the defense,

Kirby G. Mason
GDLA President
Hunter Maclean

EDITOR'S ACKNOWLEDGEMENT



Craig C. Avery, is a partner at Cowsert & Avery, LLP in Athens, Georgia. He has 30 years experience in civil trial practice; for the past 26 years he has focused on insurance defense. Craig represents insurers and their policy holders in the areas of automobile liability, premises liability, and insurance coverage. He has defended personal injury and wrongful death cases throughout Northeast Georgia, having tried more than 275 jury trials in 20 Georgia counties.

The origination of the 2015 edition of the GDLA *Law Journal* began when I received a telephone call from our president, Kirby Mason. Kirby politely inquired if I would accept the role as editor of this year's *Journal*. The formation of the *Journal* began when I made a polite phone call to Hall McKinley, last year's editor, for inspiration and advice. The culmination of the *Journal* resulted from the effort and dedication of 23 scholarly lawyers who responded without question or hesitation to the call for articles. Therefore, I am proud to present the 2015 edition of the GDLA *Law Journal*.

The authors for this publication are: Alycen A. Moss, Lynnette D. Espy-Williams, Martin A. Levinson, Jennifer Kennedy-Coggins, Morgan Carroll, Joseph H. Wieseman, Alex M. Barfield, Scott R. Grubman, Douglas A. Wilde, James Dartlin Meadows, James L. Hollis, Lorna McGilvray Norton, Kyle Evans Smith, Ryan V. Klee, W. Melvin Haas, III, W. Jonathan Martin, II, Jason C. Logan, Sarah M. Phaff, Michael S. Broun, Susan S. Elder, Alexander V. Salzillo, Thomas W. Curvin, and Tracey K. Ledbetter.

My eternal thanks and gratitude are extended to these fine lawyers for their time, work, and contribution. Additionally, the dedication and effort of my legal assistant, Kristen Palsson cannot be overstated. Kristen worked countless hours and sacrificed weekends to bring the *Journal* together. Also, a special thanks to my partner, Susan Elder, for her assistance with the editing process. Finally, Ryan Moore and Jennifer Davis were my constant companions during my editorial journey and I thank you both for your support and guidance.

I trust you will find the articles in the 2015 *Law Journal* interesting and informative. Please take the time to thank the authors individually if you have the opportunity.

For The Defense,

Craig C. Avery
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Rescission: An Underutilized Tool

By: Alycen A. Moss and Lynnette D. Espy-Williams
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Alycen A. Moss and **Lynnette D. Espy-Williams** are partners with the Atlanta office of Cozen O'Connor. A significant part of their practice focuses on defending life, health and disability insurance carriers. Alycen and Lynne routinely litigate issues related to rescission and bad faith. Cozen O'Connor is a full service law firm with 575 attorneys in over 21 offices spanning two continents.



The rescission of an insurance policy is one of the most underutilized tools in handling insurance claims. If used properly, it unwinds the insurance transaction and the parties are restored to their position prior to the contract; it is as if the insurance contract never existed.¹ Although rescission is primarily an equitable device, its use and scope is authorized by Georgia statute. In situations where the insured has made material misrepresentations or fraudulently applied for a policy, it shields the insurer from unwarranted claims and unjust liability.

What follows is a discussion of the statutory requirements regarding rescission, the contestable period, rescission methods, waiver considerations, the most common defenses to rescission, and a closing note on a likely claim from the insured—bad faith.

I. The Statute

Georgia explicitly authorizes rescission of an insurance contract via statute.² To prevail, the insurer need only prove that the misrepresentation, omission, concealment of fact, or incorrect statement is either (1) fraudulent; (2) material either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) the insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract in as large an amount or at the premium rate as applied for, or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.³ For rescission purposes, the insurer is required to prove only that one of these three conditions is met.⁴

A. Fraud by the Applicant

The first ground for rescission is fraudulent misrepresentation by the

applicant in the application for insurance. For the purpose of rescinding the contract, false statements in an insurance application are fraudulent if they “have been knowingly or intentionally made by the insured.”⁵ Fraudulent intent consists of making a misstatement with knowledge of its falsity and for [the] purpose of procuring insurance.”⁶ Knowingly making a false statement in an application constitutes actual fraud, even if the insured may not have intended to prejudice the insurer’s rights.⁷

B. Material Misrepresentations by the Applicant

The second ground for rescission is that material misrepresentations were made in the application for the policy. For a policy to be rescinded on this ground, both (1) false statements, concealment of facts, omissions, or misrepresentations must have been made in the application, and (2) the statements, omissions, concealment, or misrepresentations must be material.

Georgia law is clear that a material misrepresentation in an insurance application prevents recovery under the insurance policy.⁸ Thus, if an applicant has made a false statement, concealment of fact, omission, or misrepresentation on the insurance application, the misrepresentation must also be material in order to rescind the contract.

A misrepresentation is considered material if it would influence a prudent insurer “in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance.”⁹ Demonstrating materiality requires the insurer to prove that, per its underwriting guidelines, the policy would either not have been issued or would have been rated differently had the truth been known.¹⁰ Rescission is authorized even if the incorrect answer was innocently given to the insured’s “best ... knowledge and belief.”¹¹

One approach to prove materiality is an uncontradicted affidavit by the insurer’s underwriter stating that the insurer would not have issued the policy in question had the insured’s true health been known.¹² Where an underwriter provides an affidavit that the insurance company would not have issued the policy as applied for, the burden shifts to the plaintiff to show that the misrepresentation was not material.¹³

To counter such evidence, the insured must demonstrate that (i) the misrepresentation was not relied upon;¹⁴ (ii) the underwriter’s statement is unsupported by the insurer’s guidelines;¹⁵ or (iii) a prudent insurer would have issued the policy regardless of the misrepresentations.¹⁶ The last prong must be supported by competent expert testimony.¹⁷

If the insurer presents an uncontradicted statement by its underwriter that the company would not have issued the policy as applied

for based on its policy regarding the specific risk, and the insured fails to proffer evidence, the misrepresentation was not material, summary judgment for the insurer is appropriate.¹⁸

C. Insurer in Good Faith Would Not Have Issued the Policy

In addition to allowing rescission for fraudulent or material misrepresentations, Georgia law also permits rescission if “the insurer in good faith would either not have issued a policy or contract or would not have issued the policy or contract in as large an amount ... if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.”¹⁹

As with the materiality prong, an uncontradicted affidavit of the insurer’s underwriter stating that the insurer would not have issued an insurance policy had it known of the insured’s medical condition establishes both the materiality of the insured’s misrepresentation about his health on the insurance application, and that the insurer in good faith would not have issued the policy. This is sufficient to bar recovery of benefits under the policy.²⁰

II. Contestable Period

Under Georgia law, life and individual accident and sickness insurance policies must contain a contestable clause which may bar the insurer from taking advantage of a misstatement as to health.²¹ A contestable clause is a provision in the policy stating, “the policy ... shall be incontestable, except for nonpayment

of premiums, after it has been in force during the lifetime of the insured for a period of two years from its date of issue.”²²

“[I]f a policy of insurance provides that it shall be incontestable after a certain time, except for nonpayment of premium, it cannot be avoided on account of fraudulent misstatements of the insured respecting his or her health.”²³ Note, however, that the contestable clause only precludes a contest of the validity of the policy—it does not preclude the assertion of defenses based upon provisions in the policy which exclude or restrict coverage.²⁴

Of course, the insured has discretion as to when a claim is filed, and they can simply wait until the contestable period has run before filing a claim for a loss suffered during the contestable period. Not surprisingly, courts are unsympathetic to these maneuvers.²⁵

III. How to Rescind

In Georgia, an insurer must proceed in equity to cancel the policy.²⁶ Insurance carriers rescinding policies in Georgia have two options: (1) they may refund the premium and then file a declaratory judgment action seeking rescission; or (2) they may refund the premium and notify the insured that the policy is no longer in force. The latter functions as a voluntary rescission, provided the insured accepts the refund with the understanding that the policy is null and void.

A. Legal Contest

Absent voluntary rescission, most jurisdictions require some type of legal “contest” to rescind the policy. In Georgia, repudiation of the policy and tender of the repayment of the premium is not a “contest.”

Instead, the insurer must formally challenge the policy by filing a declaratory judgment action.²⁷ Additionally, if an insurer files an answer to an insured’s lawsuit before the contestability period ends, that constitutes a contest.²⁸ Although Georgia recognizes that merely answering a lawsuit is sufficient, most states do not. As a result, the most prudent course of action is to file a declaratory judgment action, especially if the policy is within the contestable period.

B. Voluntary Rescission

As with any contract, the parties may rescind an insurance contract by mutual agreement.²⁹ Though advisable, a voluntary rescission need not be formalized in writing to be effective.³⁰ An offer of rescission can be accepted implicitly or explicitly.³¹ Generally, a voluntary rescission will be found to exist where the policy owner, insured, or beneficiary knowingly accepts refund of the premiums with the understanding that the policy is null and void.³²

Without question, the best practice is to have the insured execute a policy release which has explicit language stating that the policy is being rescinded, the premiums have been refunded, and the policy is void

ab initio. A policy release can protect the insurer if there is ever a challenge regarding the rescission.

IV. Waiver of Right to Rescind

When the decision to rescind is reached, the insurer must announce its intent to rescind, refund the premium, and act consistently with an intent to repudiate the insurance policy. If the insurer fails to announce its intent to rescind or acts contrary to that intent, Georgia recognizes a waiver of the right to rescind.

As noted above, to proceed with rescission, the party seeking rescission must offer to give back all benefits it received under the contract. This is called an offer of tender. Under Georgia law, “[t]he tender rule is that neither party may retain an unfair advantage” over the other.³³ In determining whether an offer of tender was appropriately made, courts take a “flexible and pragmatic approach ... toward the tender requirement.”³⁴

To effectuate a rescission, the insurer need only announce its intent to rescind in a timely fashion, as soon as the facts supporting rescission are known.³⁵ Waiver of the right to rescind is generally found only where the intent to rescind is not timely asserted or where the rescinding party takes some action inconsistent with that intent.³⁶ The failure to return a premium is only a factor to consider in determining whether the right to rescind has been waived. However, as part of rescinding the contract, the insurer must ultimately return paid

premiums to the insured or beneficiaries.

While there is case law to suggest that strict compliance with the tender rule is not an absolute condition precedent to filing suit for rescission,³⁷ the safer course is to return, or attempt to return, the premium *prior to* filing suit for rescission.

Though it is usually relatively easy to refund premiums prior to instituting an action, this is not always the case. For example, occasionally the correct party to receive the tender is unclear. In cases where the insurer is not clear who the correct party is to return the premiums to, failure to tender premiums to the correct party will not preclude a rescission suit. Attempts to return premiums are consistent with a rescissionary intent.

The focus of a rescission waiver analysis is whether the insurer timely announced its intent to rescind and acted consistently with that intent, not to whom the premium was returned.³⁸ Notwithstanding some older case law,³⁹ modern decisions do not require mechanical compliance with a strict tender rule.⁴⁰

V. Common Defenses Raised by the Insured or Beneficiary

When the insurer rescinds a life insurance policy, the insured or beneficiary often raise the following defenses: (1) insurer had knowledge of the false nature of the statements; (2) there is not a nexus between the statements and the loss; and (3) the application was not attached to and,

therefore, not a part of the policy.⁴¹ These defenses are discussed below.

A. The Agent or Medical Professional's Alleged Knowledge of the Insured's Condition

A frequently raised defense to rescission is that an agent or medical professional who assisted with the medical portion of the application was aware of the insured's conditions, and the agent or medical professional's knowledge is imputed to the insurer.⁴² There are two ways to address this argument. First, the insurer can argue the policy language requires the insured to attest that "all statements and answers in this application are complete and true to the best of my knowledge and belief." Because the insured attests to the truthfulness of his statements in the application, he is bound by his answers. Second, if applicable, the insurer may be able to argue that the agent or medical professional is an independent contractor such that the alleged knowledge should not be imputed to the insurer.

Under Georgia law, if the application the insured signs includes language where the insured affirms that "all statements and answers ... are complete and true" (or some form of this language), the insured is bound by the answers, whether written by him, the agent, or medical professional.⁴³ Likewise, declarations such as "I have read the above statements and my answers to the questions are true and correct to the best of my knowledge and belief" ... [are] "formulated to prevent an

applicant from asserting that he relied upon someone else, and to ensure that the declaration of truth is not the act of one whose insertion of material misrepresentations would be binding upon the company.”⁴⁴ Where there is no evidence of, or even the allegation, that the agent perpetrated any fraud upon the applicant or otherwise prevented the applicant from discovering the false answers, the “agent knowledge” argument fails as a matter of law.⁴⁵

As an alternative, insurers may also be able to assert that the agent and medical professional, although compensated by the insurer, are independent contractors. If the insurer uses an independent contractor to conduct the medical examination, then the insurer can also assert that it is not bound by the independent contractor’s actions. To the extent the insurer did not control the means, method and manner of the independent contractor’s work, direct the independent contractor of the hours she needed to work, nor advised her as to how to perform her job, then it should be able to prove an independent contractor relationship existed.⁴⁶ If the agent or medical professional is an independent contractor, then her alleged fraudulent conduct in recording incorrect answers cannot be imputed to the insurer.⁴⁷

B. Nexus Between the Misrepresentation and the Loss

As discussed above, any material misrepresentation is sufficient grounds for rescission.⁴⁸

Notwithstanding claims otherwise, Georgia law is clear that, if the misrepresentation would influence a prudent insurer “in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance,”⁴⁹ then it is material. Georgia law is similarly clear that the false statement or misrepresentation as to health need not cause or contribute to the insured’s death as long as “it affected the risk and probably influenced the insurer’s acceptance of the risk.”⁵⁰

C. Proving the Application Was Attached to the Policy

Under Georgia law, non-fraudulent misrepresentations are only grounds for rescission if the application containing the statements is part of the policy.⁵¹ If the application is not part of the policy, the misrepresentations are only grounds for rescission if they were made fraudulently.⁵²

While most modern policies and applications contain the requisite wording, an examination of the policy and application is warranted. Words such as, “[t]he policy and the application therefore (and any supplemental applications ...) constitute the entire contract” are more than sufficient to incorporate the application into the policy.⁵³ Thus, where the application is attached to the policy, any misrepresentations in the application preclude coverage.⁵⁴

VI. Insured's Bad Faith Counterclaim

Georgia law allows for an insured to recover punitive damages and attorney's fees if an insurer denies coverage in bad faith.⁵⁵ Bad faith is defined as any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy.⁵⁶ The insured bears the burden of proving bad faith.⁵⁷

Georgia courts have recognized that an insurer has a right to pursue any defense for which it has reasonable and probable cause.⁵⁸ A finding of bad faith is, therefore, not appropriate if the carrier had any reasonable grounds to contest coverage⁵⁹ and "[p]enalties for bad faith are not authorized"⁶⁰

Whether bad faith exists is an appropriate topic for summary judgment.⁶¹ As a result, where there is evidence that the insurer's refusal to pay life insurance benefits was in good faith based on the belief that there was no coverage and/or the insured falsely represented her health condition, a bad faith claim should be dismissed as a matter of law.⁶²

VII. Conclusion

Rescission is a very effective tool to limit the insurer's liability. While occasionally perceived as harsh, the continued existence of workable insurance markets requires sound and predictable risk underwriting. Where the insured has made material misrepresentations, the absence of which would have resulted in the

insurer not underwriting the risk at the rate it did or not issuing the policy at all, it is counsel's duty to seek rescission of the policy on behalf of her clients.

Above, we have outlined Georgia's rescission statute, contestability considerations, rescission methods, the insured's most frequent defenses, and bad faith concerns. So armed, diligent counsel should be well prepared and on the lookout for situations lending themselves to the unwinding of the insurance relationship through rescission of the insurance policy.

Authors' Note: A special thanks to Thomas Ingalls, an Associate at Cozen O'Connor, for his assistance in preparing this article.

End Notes

¹ See *Champion Windows of Chattanooga, LLC v. Edwards*, 326 Ga. App. 232, 756 S.E.2d

314, 320 (Ga. Ct. App. 2014).

² GA. CODE ANN. § 33-24-7(b).

³ *Id.*

⁴ See, e.g., *Graphic Arts Mut. Ins. Co. v. Pritchett*, 220 Ga. App. 430, 469 S.E.2d 199, 202 (Ga. Ct. App. 1995).

⁵ *National Life Accident Ins. Co. of Tenn. v. Camp*, 77 Ga. App. 667, 49 S.E.2d 670, 672-73 (Ga. Ct. App. 1948).

⁶ *Id.*

⁷ *Lee v. All States Life Ins. Co.*, 49 Ga. App. 718, 176 S.E. 811 (Ga. Ct. App. 1934).

⁸ *Dracz v. Am. Gen. Life Ins. Co.*, 427 F. Supp. 2d 1165, 1169-70 (M.D. Ga. 2006).

⁹ *Lively v. Southern Heritage Ins. Co.*, 256 Ga. App. 195, 568 S.E.2d 98, 100 (Ga. Ct. App. 2002).

¹⁰ *See Hopkins v. Life Ins. Co. of Ga.*, 218 Ga. App. 591, 462 S.E.2d 467, 469 (Ga. Ct. App. 1995).

¹¹ *Jennings v. Life Ins. Co. of Ga.*, 212 Ga. App. 140, 441 S.E.2d 479, 480 (Ga. Ct. App. 1994).

¹² *Graphic Arts. Mut. Ins. Co. v. Pritchett*, 20 Ga. App. 430, 469 S.E.2d 199, 202 (Ga. Ct. App. 1996).

¹³ *See Davis v. John Hancock Mut. Life Ins. Co.*, 413 S.E.2d 224, 226 (Ga. Ct. App. 1991) (uncontradicted evidence warrants summary judgment); *see also Lively v. Southern Heritage Ins. Co.*, 256 Ga. App. 195, 568 S.E.2d 98, 100 (Ga. Ct. App. 2002) (conflicting affidavits create jury question).

¹⁴ *See Case v. RGA Ins. Services*, 239 Ga. App. 1, 521 S.E.2d 32, 34 (Ga. Ct. App. 1999).

¹⁵ *See Lively*, 568 S.E.2d at 100.

¹⁶ *See Jackson Nat'l Life Ins. Co. v. Snead*, 231 Ga. App. 406, 499 S.E.2d 173, 175-76 (Ga. Ct. App. 1998).

¹⁷ *See Id.*

¹⁸ *See Davis*, 413 S.E.2d at 226.

¹⁹ GA. CODE ANN. § 33-24-7(b)(3).

²⁰ *Burkholder v. Ford Life Ins. Co.*, 207 Ga. App. 908, 429 S.E.2d 344, 346 (Ga. Ct. App. 1993).

²¹ *See 6 Couch on Ins.* § 87-'3 (2014).

²² GA. CODE ANN. § 33-25-3; *see also* GA. CODE ANN. § 33-29-3.

²³ *See 6 Couch on Ins.* § 87-'3 (2014).

²⁴ GA. CODE ANN. § 33-25-7.

²⁵ *See 6 Couch on Ins.* § 87-3 (2014).

²⁶ *See Torrence v. Am. Home Mut. Life Ins. Co.*, 78 Ga. App. 648, 52 S.E.2d 25, 27 (1949).

²⁷ *See id.*

²⁸ *See Lee v. All States Life Ins. Co.*, 49 Ga. App. 718, 176 S.E. 811, 812 (1934) (attacking

enforceability through answer constitutes a contest).

²⁹ *Nationwide Mut. Ins. Co. v. McCollum*, 179 Ga. App. 500, 502, 347 S.E.2d 231, 233 (1986).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Kobatake v. E.I. du Pont de Nemours and Co.*, 162 F.3d 619, 626-27 (11th Cir. 1998).

³⁴ *Id.*

³⁵ *Conway v. Romarion*, 252 Ga. App. 528, 557 S.E.2d 54, 57 (Ga. Ct. App. 2001).

³⁶ *Id.* at 57.

³⁷ *Id.* (interpleading premiums constituted offer to restore consideration in absence of formal tender offer).

³⁸ *See Dracz v. Am.Gen. Life and Accident Ins. Co.*, 427 F. Supp. 2d 1165, 1168 (M.D. Ga. 2006) (insured's refusal to accept refund not a bar); *see also Schoenthal*, 555 F.3d at 1342 (interpleader sufficient).

³⁹ *See Weems v. Am.Nat'l Ins. Co.*, 197 Ga. 493, 29 S.E.2d 500, 502-03 (Ga. 1944). The Georgia Court of Appeals has stated that "the rule is equitable, not technical, and does not require more than such restoration be made as is reasonably possible and such as the merits of the case demand." *Int'l Software Solutions v. Atlanta Pressure Treated Lumber Co.*, 194 Ga. App. 441, 390 S.E. 2d 659, 661 (Ga. Ct. App. 1990).

⁴⁰ *See supra* note 39.

⁴¹ Under Georgia law, non-fraudulent misrepresentations are only grounds to void a policy if they are part of the insurance contract. *Life Ins. Co. of Ga. v. Blanton*, 109 Ga. App. 116135 S.E.2d 437, 439-40 (Ga. Ct. App. 1964).

⁴² For example, sometimes the claimant will premise his argument upon *Atha v. Mid-South Ins. Co.*, 173 Ga. App. 489, 326 S.E.2d 853 (Ga. Ct. App. 1985) and assert that *Atha* holds that an insurer cannot rescind a policy unless it "had no knowledge, actual or constructive,

of the statement's falsity." *Atha*, however, focused only on whether an agency relationship existed between the agent and the carrier. *Id.* at 855.

⁴³ See *Prudential Ins. Co. of Am. v. Perry*, 121 Ga. App. (1970).

⁴⁴ *James, Hereford, etc. v. Powell*, 198 Ga. App. 604, 402 S.E.2d 348, 351 (Ga. Ct. App. 1991).

⁴⁵ See *Jennings v. Life Ins. Co. of Ga.*, 212 Ga. App. 140, 441 S.E.2d 479, 481.

⁴⁶ See *Cooper v. Olivent*, 271 Ga. App. 563, 610 S.E.2d 106, 108 (Ga. Ct. App. 2005); *Scott 7 v. McDonald*, 218 Ga. App. 810, 811, 463 S.E.2d 379, 381 (1995).

⁴⁷ *Hicks v. Sumpter Bank & Trust*, 269 Ga. App. 524, 604 S.E.2d 594, 597 (Ga. Ct. App. 2004).

⁴⁸ See *supra* notes 8-18 and accompanying text.

⁴⁹ *Lively v. Southern Heritage Ins. Co.*, 568 S.E.2d 98, 100 (Ga. Ct. App. 2002).

⁵⁰ *Martin v. Metropolitan Life Ins. Co.*, 192 F.2d 167, 169 (5th Cir. 1959).

⁵¹ See *Life Ins. Co. of Ga. v. Blanton*, 135 S.E.2d 437, 439-40.

⁵² *Id.*

⁵³ *Life Ins. Co. of Va. v. Conley*, 181 Ga. App. 152 (Ga. Ct. App. 1986)

⁵⁴ See *Marchant v. Travelers Indem. Co. of Ill.*, 650 S.E.2d 316, 319 (Ga. Ct. App. 2007).

⁵⁵ GA. CODE ANN. § 33-4-6.

⁵⁶ *Georgia Farm Bureau Mut. Ins. Co. v. Williams*, 266 Ga. App. 540, 597 S.E.2d 430, 432 (2004)

⁵⁷ See *Fountain v. Unum Life Ins. Co. of Am.*, 297 Ga. App. 458, 677 S.E.2d 334, 338 (Ga. Ct. App. 2009).

⁵⁸ *BBBServ. Co., Inc.*, 576 S.E.2d at 41-42.

⁵⁹ See *Assurance Co. of Am. v. BBB Serv. Co., Inc.*, 259 Ga. App. 54, 576 S.E.2d 38, 41-42 (2002).

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² *United Ins. Co. of Am. v. Dixon*, 143 Ga. App. 133, 237 S.E.2d 661, 662 (1977), *overruled on other grounds*, 242 Ga. 235, 248 S.E.2d 635 (1978); see also *Williams*, 597 S.E.2d at 432.

Money for Nothing: Problems with Holding Franchisors Liable for the Negligence of Franchisees

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In recent years, courts in Georgia and elsewhere have been faced with increasingly creative attempts to impose liability on franchisors for negligent acts by their franchisees. To someone who misunderstands the purposes and realities of the modern franchise model, this would seem to make sense. After all, the franchisor shares in the revenue earned by the franchisee, so why should the franchisor not share in the risk?

While there are some situations in which franchisors undoubtedly should be subjected to liability for franchisees' acts, the tests applied by courts in many jurisdictions cast too wide a net. As a result, franchisors may be subjected to potential liability for requiring a certain level or type of decor, service, or product, or for assisting or advising their franchisees in making decisions on how to operate their businesses. This makes little sense and is counterproductive, as it actually *disincentivizes* franchisors from attempting to ensure a higher quality of service, product, or experience to those patronizing or interacting with franchisees. Georgia courts' approach to potential franchisor liability in this context is more well-reasoned, but any test, if abused or applied mechanically, has the potential to result in unreasonable or inequitable results. Regardless of the specific rule, test, or standard applied, however, courts in Georgia and elsewhere should be careful to analyze the facts of the applicable relationship and render a decision in keeping with the realities of modern franchise relationships. If the relationship is truly one of franchisor and franchisee, it should be difficult to impose liability on the franchisor for the negligence of the franchisee.

I. History and Purposes of the Franchisor-Franchisee Relationship

“[A] franchise is a commercial arrangement between two businesses which authorizes the franchisee to use the franchisor’s intellectual property and brand identity, marketing experience, and operational methods.”¹ Stated another way, “[f]ranchising is a system for the selective distribution of goods and/or services under a brand name through outlets owned by independent businessmen, called franchisees.”² “The franchisor provides the knowhow and brand identification, and the franchisee enjoys the right to profit and runs the risk of loss.”³ “The franchisor controls the distribution of his goods and/or services through a contract,” commonly called a franchise agreement, “which regulates the activities of the franchisee, in order to achieve standardization.”⁴

As one court explained, “[a] franchise relationship is a marriage of convenience.”⁵ The relationship benefits the franchisor by enabling it “to spread the capital cost of enlarging the market for its goods and services by transferring most of those costs to local franchisees.”⁶ In addition, the franchisor gains the ability “to reach new, far-flung markets without having to directly manage a vast network of individual outlets.”⁷ The franchisee benefits from the arrangement in that it “mitigates the risks of starting a new business by enabling [the franchisee] to capitalize on the good will and established market associated with the franchisor’s trademark or trade name.”⁸ Moreover, “[t]he

burdens of starting and operating a business are eased considerably by the franchisor, which provides quality and operational methods and standards, and may offer management training programs to the franchisee.”⁹

Largely for those reasons, the popularity of the franchise model has increased significantly in recent decades in the United States.¹⁰ Although the franchisor can realize significant benefits from the franchise model, it also presents significant challenges. Two of the most prevalent and significant challenges faced by franchisors are protecting their brand and trademark, and avoiding potential vicarious liability for the acts or omissions of franchisees. “Franchisors are in a unique position regarding potential vicarious liability, because the Lanham Act¹¹ places an affirmative duty upon a licensor of a registered trademark to take reasonable measures to detect and prevent misleading uses of its mark by its licensees or suffer cancellation of its federal registration.”¹² Essentially, to avoid running afoul of the Lanham Act, franchisors must exercise control over their franchisees sufficient to “guarantee that third parties dealing with the franchisee will receive goods or services of the quality which they have learned to associate with the trademark.”¹³ As a result, a franchisor is in the difficult position of having to exercise enough control to protect its trademark and brand while not exercising so much control that the franchisor will be deemed vicariously liable for the torts of its franchisees or licensees.¹⁴

Georgia's state and federal courts long have recognized "the need for controls over the use of a trade name, in a franchise agreement authorizing such use."¹⁵ Apart from being required by federal law to protect its trademark, the purpose of imposing rules and regulations on franchisees is to enable the franchisor to ensure a similar experience at all franchised locations, to maintain uniform service within all locations bearing the franchisor's brand, and to ensure continuing customer goodwill toward the franchisor's brand.¹⁶ As the Georgia Court of Appeals has explained, courts "must be mindful of the special relationship created by [franchise] agreement[s], for a franchisor is faced with the problem of exercising sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time foregoing such a degree of control that would make it vicariously liable for the acts of the franchisee and its employees."¹⁷

II. Georgia Law Regarding Franchisors' Potential Liability for Acts of Franchisees

In Georgia, it is generally difficult to hold a franchisor liable for the acts of its franchisee. "It is well settled that to impose liability on a franchisor for the acts of a franchisee, a plaintiff must show that the franchisor has obligated itself to pay the franchisee's debts or that the franchisee is not a franchisee in fact but a mere agent or alter ego of the franchisor."¹⁸ In this context, "[t]he

test to determine whether an agency relationship exists is whether the contract gives, or the [franchisor] assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract."¹⁹ As a practical matter, that sets a high bar, as "[t]he franchisor is permitted to exercise sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time forgoing such a degree of control that would make it vicariously liable for the acts of the franchisee."²⁰ Moreover, Georgia courts will look to the language of the applicable franchise agreement, and where it expressly provides that the franchisee is not the agent or legal representative of the franchisor and does not have authority to act in that capacity, that contractual intent will be enforced as long as the parties have not acted to the contrary.²¹

The Georgia Court of Appeals has specifically rejected arguments that "specific and even strict requirements concerning operation of the franchise" in a franchise agreement were sufficient to create an agency relationship between franchisor and franchisee.²² Such strict franchise agreements are permissible for the purposes of "ensuring conformance with a certain level of quality and protecting [the franchisor's] professional reputation," and do not result in an agency relationship.²³

Thus, for example, setting "general standards to maintain the

franchise and provide for evaluations to ensure compliance, and reserving the right to inspect or evaluate a franchisee's compliance with the franchisor's standards and to terminate the franchise for noncompliance is not the equivalent of retaining day-to-day supervisory control of the franchisee's business operations as a matter of law."²⁴ Similarly, the Georgia Court of Appeals has rejected the argument that retaining "authority to require the use of certain bookkeeping forms, to conduct monthly inspections, and to require termination of employees causing the facility to fail the inspections amount[s] to day today supervisory control over [a franchisee], for it seems clear that this authority simply serve[s] as a means of achieving a desired level of uniformity and quality within the system of [the franchisor's] franchises."²⁵ The same is true of "reserving the right to inspect or evaluate a franchisee's compliance with the franchisor's standards and to terminate the franchise for noncompliance"²⁶ or requiring franchisees to purchase from certain suppliers.²⁷ The fact that a franchisor responds or reacts to an incident involving negligence on the part of its franchisee also cannot be used to establish supervisory control by the franchisor of the franchisee.²⁸

The Georgia Court of Appeals recently reaffirmed some of the general principles of Georgia law regarding franchisor liability. In *Kids R Kids International, Inc. v. Cope*,²⁹ the plaintiff sought to hold a daycare franchisor liable for injuries suffered by the plaintiff's minor child at the

"Kids R Kids" branded daycare center operated by a franchisee. The trial court denied the franchisor's motion for summary judgment, but on appeal, the Court of Appeals reversed.

The franchise agreement at issue in *Cope* imposed detailed standards as to advertising, operating hours, decor (including furniture and equipment), employee training and hiring, and record retention. The agreement also gave the franchisor the right to inspect the franchisee's school for compliance with the requirements. But the agreement specifically provided that the franchisee would "assume responsibility for the day today management and operation of the [school] and supervision of personnel." The Court of Appeals held that since the franchisor had not reserved the right to control the time, manner, or method in which the franchisee's own employees "actually executed the standards required in the Franchise Agreement, there was no evidence that [the franchisee] was an actual agent of [the franchisor] for purposes of vicarious liability."³⁰

Georgia law makes it even more difficult for a plaintiff to hold a franchisor liable under a theory of apparent agency. In *Cope*, the plaintiff argued that the franchisee was the franchisor's "apparent agent" because "all signage and documentation" at the franchisee's daycare center, as well as shirts worn by the franchisee's employees, bore the franchisor's name and trademarks. The plaintiff also presented evidence that there was no sign or plaque present and visible at

the daycare center indicating that it was independently owned by the franchisee or by anyone other than the franchisor.

The Court of Appeals reaffirmed that under Georgia law, “merely displaying signs or a trademark may be insufficient to establish an apparent agency relationship.”³¹ Similarly, “a failure to post a sign stating that someone other than the franchisor owns and operates a business is insufficient, standing alone, to show apparent agency” under Georgia law.³² Indeed, as the Court of Appeals reiterated in *Cope*:

To establish the required elements of apparent agency, it is not enough that the plaintiff believe that an agency relationship exists. Neither is it sufficient that the agent represent his status as agent. It must be established that the principal held out the agent as its agent.”³³

The Court of Appeals held that the plaintiff’s “apparent agency” argument was foreclosed by the plain language of the enrollment agreement between the franchisee and the plaintiff. Specifically, the enrollment agreement stated that the plaintiff acknowledged that the daycare center, “while a [Kids R Kids] franchise, is independently owned and operated and that neither [Kids R Kids] nor any [Kids R Kids] center other than the one whose name appears at the heading of this form is responsible for the actions or obligations of this

[c]enter.”³⁴ In light of that language, the court held that the plaintiff could not have justifiably relied on any alleged agency relationship between the franchisor and franchisee, and the court declined to reach the merits of the plaintiff’s “apparent agency” claim.³⁵

It is not entirely clear whether, given different facts, Georgia law would permit a franchisor to be held liable under a theory of apparent agency. *Cope* suggests as much, in that before rejecting the plaintiff’s apparent agency claim, the Georgia Court of Appeals analyzed the claim as if it could be viable. In any event, however, it appears that under Georgia law, a franchisor can insulate itself from any such potential liability in most instances by requiring franchisees to provide an appropriate notice to customers and invitees to the effect that they are patronizing a franchised location.

III. The Law of Franchisor Liability for Acts of a Franchisee in Other U.S. Jurisdictions

A. The “Control Test”

Traditionally, in determining whether a franchisor could be held liable for the negligent acts of its franchisee, courts typically looked to the degree of control exercised by the franchisor over its franchisee’s business.³⁶ Under what is sometimes dubbed the “control test,” the question of “[w]hether a franchisor owes a duty of care to its franchisee’s employee...turns on the extent of the franchisor’s retained control over the

property and the daily operation of the restaurant, respectively.”³⁷ Generally, a duty on the part of the franchisor to the franchisee’s customers, employees, or invitees would arise only when the franchisor “retain[ed] control of day-to-day operations” of the franchisee and not where the franchisor merely retained “the right to inspect the quality of the operation and control over the work to the extent necessary to implement that right.”³⁸

In *Hoffnagle v. McDonald's Corp.*, the plaintiff sued the franchisor of the fast food restaurant in which she worked after she was the victim of an assault and attempted kidnapping on the restaurant’s premises. The plaintiff, an employee of the franchisee who worked at the restaurant, sued the franchisor, which in turn moved for and was granted summary judgment. The plaintiff appealed, contending that the terms of the applicable franchise agreement created a duty on the part of the franchisor to the franchisee’s employees.

Considering the specific franchisor-franchisee relationship at issue in that case, the Supreme Court of Iowa held that the franchisor had not retained sufficient control over the day-to-day operations of the franchisee’s business to render the franchisor liable for injuries to the franchisee’s employees on the franchisee’s premises.³⁹ In reaching that conclusion, the court noted that the franchisee owned the business’s equipment, operated the business, held the operating licenses and permits, determined employees’

wages, provided basic daily training and insurance for employees, and was responsible for hiring, firing, supervision, and discipline of employees at the restaurant. The franchisor, by contrast, retained only the authority to require the franchisee to adhere to the “McDonald’s system,” to adopt and use the franchisor’s business manuals, and to follow “other general guidelines” outlined by the franchisor. The court concluded that the franchisor’s “authority is no more than the authority to insure the uniformity and standardization of products and services offered by a franchisor’s restaurant,” which did “not affect the control of daily operations.”⁴⁰ Accordingly, the court held, the franchisor had no duty to the franchisee’s employees, and the franchisor was entitled to summary judgment.⁴¹

Similarly, the Supreme Court of Arkansas has recognized that a franchisor cannot be held liable for its franchisee’s negligent acts absent a sufficient showing of control by the franchisor over the franchisee’s business. In *Franco v. Bunyard*,⁴² the plaintiff sought to sue the franchisor of a retail store that sold a pistol to an escaped state prisoner. Apparently, the store sold a firearm to a convicted kidnapper who was serving a life sentence in prison, without requiring the purchaser to present identification of any kind or to sign the required federal form. The escaped convict used the gun to rob a grocery store, and in doing so, he took and shot three hostages. In addition to suing the owner and operator of the store where the escaped prisoner bought the gun,

the plaintiff also sued the franchisor. On appeal, the Supreme Court of Arkansas affirmed the grant of summary judgment to the franchisor, holding that since the franchisee “was home-owned and so identified to the public,” the franchisee “reserved to itself the ownership, management, and control of the store” in the franchise agreement, and “the vital power of control remained with” the franchisee, the franchisee could not be said to be an agent of the franchisor.⁴³

Some jurisdictions apply general principles of agency law without calling it the “control test” but with essentially the same results. North Carolina’s Court of Appeals, for example, has held that a franchisor’s liability for its franchisee’s acts “depends upon the existence of an agency relationship, which is determined by the nature and extent of control and supervision retained and exercised by the franchisor over the methods or details of conducting the day-to-day operation” of the franchisee’s business.⁴⁴ Ohio courts have held that to determine whether an agency relationship exists between a franchisor and its franchisee, the court “must scrutinize the relationship between persons who are franchisor-franchisee just as it would scrutinize any relationship in determining whether an agency relationship exists,” and “[t]he central factor under Ohio law in determining whether an agency relationship exists is the right of control vested in the [franchisor].”⁴⁵

Similarly, the Supreme Court of Alabama have mandated application of general *respondeat superior* law to

determine whether a franchisor can be held liable for the acts of its franchisee, meaning that Alabama courts examine whether the franchisor “reserved a right of control over the manner of the [franchisee’s] performance” sufficient to create an agency relationship⁴⁶ Much like Georgia’s appellate courts, however, the Supreme Court of Alabama has held that retaining the “right to supervise the alleged agent to determine if that person conforms to the performance required by a contract with the asserted principal does not, itself, establish control.”⁴⁷ Likewise, retaining the right to ensure that a franchisee complies with the franchise agreement and the franchisor’s operations manual, and even providing training to the franchisee’s employees, will not create an agency relationship between franchisor and franchisee under Alabama law, because such steps are “designed to ensure uniformity in service among franchises” and “to encourage compliance with the [franchisor’s] operations manual.”⁴⁸

While the “control test” sounds similar to the rule applied in Georgia, its application can subject franchisors to greater potential liability. In one case, for example, a Missouri federal district court declined to grant summary judgment to a national restaurant franchisor on the claims of a franchisee’s employee for unpaid work time.⁴⁹ The only evidence as to the relationship between the franchisor and franchisee apparently was the fact that the franchisor “approved the printing of the [franchisee’s] employee handbook

before [the franchisee] was allowed to have the manual printed.”⁵⁰ The district court held that fact sufficient to render the franchisor’s relationship with the franchisee “a disputed issue of fact.”⁵¹

B. The “Right to Control” Test

Some courts have held that merely retaining the **right** to control the franchisee’s daily operations will establish the level of control necessary to render a franchisor vicariously liable for its franchisee’s negligence.⁵² Under this “right to control” test, “[i]f, in practical effect, the franchise agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists” between franchisor and franchisee.⁵³ It appears that in those courts, “[t]he degree of control giving rise to liability depends on the particular facts of each case.”⁵⁴ As a practical matter, in addition to providing a much lower bar for vicarious liability, this makes it very difficult for a franchisor to obtain summary judgment.⁵⁵

Thus, for example, in *Miller v. McDonald’s Corp.*,⁵⁶ the Oregon Court of Appeals reversed the grant of summary judgment to a restaurant franchisor in a case brought by a customer injured when she bit into a sapphire inside a Big Mac sandwich purchased at a franchisee’s restaurant. The franchisor, McDonald’s, had entered into a detailed franchise agreement with its franchisee, 3K Restaurants (“3K”), providing specific

standards and requirements for operation of the franchised restaurant but also providing that 3K was not an agent of McDonald’s. The Oregon Court of Appeals rejected McDonald’s argument that 3K was not its agent:

[W]e believe that a jury could find that defendant retained sufficient control over 3K’s daily operations that an actual agency relationship existed. The Agreement did not simply set standards that 3K had to meet. Rather, it required 3K to use the precise methods that defendant established, both in the Agreement and in the detailed manuals that the Agreement incorporated. Those methods included the ways in which 3K was to handle and prepare food. Defendant enforced the use of those methods by regularly sending inspectors and by its retained power to cancel the Agreement. That evidence would support a finding that defendant had the right to control the way in which 3K performed at least food handling and preparation.⁵⁷

The Oregon Court of Appeals’ decision in *Miller* demonstrates the perverseness of the “right to control” test. In *Miller*, McDonald’s essentially was subjected to potential liability for

the negligence of its franchisee solely because McDonald's imposed standards on its franchisee for food handling and preparation and reserved the right to terminate the franchise for noncompliance with those requirements. There was no evidence that McDonald's knew of some deficiency in those functions by the franchisee or that there was actually something deficient about the standards imposed by McDonald's. Rather, McDonald's was held liable simply because it imposed standards designed specifically to maintain a level of quality and safety in the food served by its franchisees.

In other words, McDonald's could have avoided liability in *Miller* or any other case like it by simply declining to impose any standards whatsoever regarding food handling and preparation. Of course, that could endanger the health of the general public, since franchisees might not have the benefit of a national restaurant franchisor's knowledge and experience regarding food handling and preparation, along with related safety and health issues (or the franchisee simply might not care). Thus, the perverse and unsatisfying result of the "right to control" test is often that a conscientious franchisor who actually imposes standards designed to maintain the quality of its franchisees' products and the safety of its franchisees' customers is subjected to a higher degree of liability than a franchisor that imposes no such controls or standards.

C. The Modern Majority Rule: The "Instrumentality" Test

The all-or-nothing nature of the control test is out of touch with the realities of modern franchise relationships and, thus, can result in absurd results. Depending on the industry and the specific markets in which a particular franchise is operated, the applicable franchise agreement may give a franchisor far greater "control" in certain areas of the business and no control whatsoever in all or most others. Recognizing the limitations and unfairness involved in the control test, an increasing number of courts have adopted a different analysis: the "instrumentality" test.

Under the instrumentality test, "a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the **specific aspect of the franchisee's business** that is alleged to have caused the harm."⁵⁸ Stated another way, unless the franchisor imposes mandatory policies on the franchisee with respect to the specific "instrumentality" that allegedly caused the harm at issue, there is no potential liability on the part of the franchisor.⁵⁹ Thus, for example, where the manager of a franchised fast food restaurant physically assaulted another of the franchisee's employees, whether the franchisor could be held liable would depend on whether the franchisor controlled the essential terms of the

manager's employment (i.e., the right to hire, fire, and discipline him).⁶⁰

State or federal courts in at least 16 states and the U.S. Circuit Court of Appeals for the Fourth Circuit have adopted the instrumentality test for deciding cases involving potential franchisor liability for franchisees' acts, over traditional agency principles or the control or "right to control" tests.⁶¹ Like most courts following the control test, courts adopting the instrumentality test embrace "the clear trend in the case law in [most] jurisdictions ... that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability."⁶²

As a practical matter, however, the instrumentality test generally is much more favorable to franchisors than the control test. For example, courts applying the instrumentality test generally hold that "the standardized provisions commonly included in franchise agreements specifying uniform quality, marketing, and operational requirements and a right of inspection do not establish a franchisor's control or right to control the daily operations of the franchisee sufficient to give rise to vicarious liability for all purposes or as a general matter."⁶³ Similarly, courts applying the instrumentality test have held that retaining the right to enforce standards, the right to terminate the franchise agreement for failure to meet standards, and the right to

require franchisees' employees to undergo specific training will not render a franchisor vicariously liable for the negligence of the franchisee or its employees.⁶⁴ And "the mere making of suggestions and recommendations" to the franchisee does not constitute a sufficient exercise of control by the franchisor to create an agency relationship under the instrumentality test.⁶⁵ Nor will requiring payment of a franchise fee, controlling the locations of franchises, providing a training manual, setting business hours of franchised stores, retaining access to each franchised store's electronic point-of-sale system, overseeing operations such as construction, development, marketing, and advertising, and imposing other "uniformity requirements and inspection rights" to the franchised stores and premises result in liability for the franchisor.⁶⁶ These are "precisely the types of controls that a franchisor may legitimately exercise over its franchisee without incurring vicarious liability."⁶⁷

In *Allen v. Choice Hotels Int'l, Inc.*,⁶⁸ decided under South Carolina law, the Fourth Circuit Court of Appeals applied the instrumentality test to affirm the grant of summary judgment to a hotel franchisor. *Allen* concerned a fire at a Comfort Inn and Suites-branded hotel in which six guests were killed and twelve others were injured. The plaintiffs sought to hold the hotel franchisor liable for the fire for failing to require the franchisee to retrofit the hotel with sprinklers. The franchisor's rules and regulations required the franchised hotel to have life safety systems,

including smoke and fire detection, fire extinguishing equipment, emergency exits, and emergency lighting that met or exceeded applicable law or regulations. The franchisor's rules and regulations also recommended installation of an emergency power generator and sprinkler system. But the franchisor did not participate in selection of fire or life safety equipment actually installed at the franchised hotel, specifically including any decision made by the franchisee regarding installation of fire sprinklers.

Considering the evidence, the Fourth Circuit rejected the plaintiffs' contention that the franchisor exercised sufficient control over the hotel's life safety systems to render the franchisor vicariously liable. Rather, the court held:

[T]he [franchisor's] Rules and Regulations simply ensure[d] uniformity at all Comfort Inn franchise locations. At best, taken together, the Franchise Agreement and Rules and Regulations show that [the franchisee] operated and controlled the Comfort Inn under general guidelines intended to foster consistency throughout the Choice system. Therefore, Appellants have failed to establish that [the franchisor] owed a duty to Comfort Inn guests under this theory.⁶⁹

The Fourth Circuit rejected the plaintiffs' argument that the franchisor's acts of requiring the franchisee to install fire safety systems and making recommendations to the franchisee amounted to a voluntary undertaking to control or regulate the hotel's life safety systems.⁷⁰ "Simply providing a list of suggested—but not required—[safety] items does not support [a] contention that [the] franchisor retained or assumed control of the security of its franchisees."⁷¹ Similarly, the court held that "requiring renovations to the hotel and accepting and forwarding hotel-guest complaints to the franchisee does not indicate that [the franchisor] voluntarily undertook to regulate safety systems or make repairs to the hotel."⁷²

Not all courts have interpreted the instrumentality test as favorably to franchisors. Massachusetts' Supreme Court, for example, has held that the concept of an "instrumentality" must be "understood broadly, as the particular practice of the franchisee that led to the plaintiff's injury."⁷³ And in some jurisdictions, the degree of control exercised by the franchisor over the franchisee's operations is *always* deemed to be a question of fact.⁷⁴ Depending on how broadly the concepts of "control" and "instrumentality" are defined, the instrumentality test can lead to at least as great a chance for liability on the part of a franchisor for the negligence of its franchisees.

In *Wise v. Kentucky Fried Chicken Corp.*,⁷⁵ for example, a New

Hampshire federal district court held that a restaurant franchisor could be held liable in connection with injuries suffered by a franchisee's employee while using a deep fryer at the franchisee's restaurant. The franchise agreement in that case contained a "sophisticated system for selecting, approving, testing, recommending, and maintaining quality control over certain equipment" and also provided that the franchisor would "inform franchisees of proven methods of quality control." The franchisee also was required to follow the procedures set out in a manual provided by the franchisor. Since "the instrumentality alleged to have caused the injury ... [was] purchased with the approval, if not at the direction, of" the franchisor, the district court held that there was evidence from which a jury could find the franchisor liable for the plaintiffs injury.⁷⁶

Similarly, in *Lawson v. Schmitt Boulder Hill, Inc.*,⁷⁷ the Illinois Court of Appeals reversed the trial court's grant of a franchisor's motion to dismiss in a case brought by a franchisee's employee arising from an incident in the franchisee's parking lot. The plaintiff in that case apparently was abducted, assaulted, and robbed as she tried to walk into the restaurant after arriving for work one morning. She subsequently sued McDonald's Corporation, alleging that the franchisor's negligence caused the incident. On appeal, the court held that because the franchisor "mandated compliance with [specific] security procedures" and standards regarding parking lot lighting by the franchisee, the franchisor had voluntarily

undertaken a duty of care toward the franchisee's employees.⁷⁸ Although the court did not specifically say that it was applying the instrumentality test, the only discussion of "control" concerned security procedures and lighting in the restaurant's parking lot, so, as a practical matter, the court followed the instrumentality test.

D. Apparent Agency

Some courts permit the imposition of liability against a franchisor for its franchisee's acts under a theory of apparent agency. Such courts generally base their reasoning on the idea that uniformity between franchised stores, signs, and methods of operation give the impression to customers that they are dealing with a standardized business operation.⁷⁹ Stated another way, the franchise model "relies upon a public perception of a national system of restaurants [or stores] with common products and common standards of quality."⁸⁰ The franchisor is said to benefit from this impression through an increase in value of its trademark and franchised operations.⁸¹ Moreover, some commentators characterize franchise agreements as "typically requir[ing] franchisees to join in the franchisor's efforts to fool the customer" by "maintain[ing] the illusion that the business consists of uniform, wholly integrated outlets when, at least according to law, the 'chain' actually consists of separate, independent businesses."⁸² Thus, the argument goes, "franchisors should not enjoy the benefits of chain-store marketing methods and national identification with their franchisees

without assuming concomitant social responsibilities.”⁸³

The Florida Supreme Court, for example, has held that “[f]ranchisors may well enter into an agency relationship with a franchisee if, by contract or action or representation, the franchisor has directly or apparently participated in some substantial way in directing or managing acts of the franchisee.”⁸⁴ One Florida federal district court held recently that a franchisor could be subject to tort liability under a theory of apparent agency “if the franchisor ... make[s] a representation that goes beyond the basic franchise relationship by indicating that the franchisor was in substantial control of the business.”⁸⁵ The Alaska Supreme Court has held apparent authority to be a viable theory of franchisor liability.⁸⁶ In that court’s view, simply “acquiesc[ing] in a franchisee’s use of a corporate logo or a name incorporating a trade name” may create apparent authority in the franchisee on behalf of the franchisor.⁸⁷

Likewise, Hawaii’s Intermediate Court of Appeals has held that evidence that a franchisor exercised “actual control” over a franchisee and “manifestations of control” that are apparent to others may be sufficient to create an issue of fact for a claim of actual or apparent agency against a franchisor.⁸⁸ And according to Hawaii’s federal district court, “a franchisor may also be liable for the tortious acts of the franchisee if an apparent agency relationship exists” through the “franchisor represent[ing] to

consumers that a franchisee is the agent of the franchisor causing a consumer to justifiably rely upon the apparent agency.”⁸⁹

Generally, those courts that have authorized the potential liability of a franchisor under a theory of apparent agency have held that whether such a relationship exists is a question for the jury.⁹⁰ However, if the sole basis for alleged agency is interpretation of the franchise agreement, the issue may be decided by the court as a question of law.⁹¹

Apart from the paternalistic nature of the rationale relied upon by courts entertaining “apparent authority” claims against franchisors—i.e., that consumers essentially are too naive or too stupid to tell a franchised store from a company-owned store—such a claim is antithetical to the very concept of franchising. If a franchisor is going to be subjected to potential liability for the actions of those employed at a franchised location anyway, there is no reason for a franchisor to permit someone else to benefit from the use of the franchisor’s brand or mark. As such, other courts have rejected this argument, or at least have imposed a very high standard of proof on the plaintiff asserting it. The Alabama Supreme Court, for example, rejected the argument that a franchisee was the apparent agent of its franchisor where there was no specific evidence that the franchisor authorized the franchisee’s employee to hold himself out as the franchisor’s agent.⁹² To the contrary, the court found compelling in that case language in the franchise

agreement specifically prohibiting the franchisee from acting as the franchisor's agent or binding the franchisor for any purpose.⁹³

IV. Comparing Georgia Law on Franchisor Liability to the Test Followed in Other Jurisdictions

In considering potential franchisor liability for acts of franchisees, Georgia has neither adopted nor precisely followed the "control" test, the "right of control" test, or the "instrumentality" test. While the principles espoused by Georgia's appellate courts in such cases are quite similar to those quoted by courts in other jurisdictions following one of the other three tests, Georgia courts have been far more favorable to franchisors than courts in many other jurisdictions. This is exhibited, for example, in the Georgia Court of Appeals' willingness to rely in large part on language contained in a franchise agreement regarding whether the franchisee is the "agent" of the franchisor.⁹⁴

Ultimately, it is arguable that no one approach to deciding franchisor liability is necessarily "correct." As one federal district court recently observed when faced with these issues:

In the end ... [both] the traditional control test and instrumentality test are largely intellectually bankrupt. The courts probably should have bright-line rules: either all franchisors should be vicariously liable or none

should. Either rule is defensible, and would produce certainty to the franchise industry and to the insurance industry that insures the participants. The tests that most jurisdictions are employing, however, are so malleable and manipulable that they create confusion, litigation, and uncertainty, and, worse, any result from the tests looks result oriented, either pro-plaintiff or pro-industry, thus undermining the integrity of the court process. In the end, it would be best to just pick a rule for franchisors, and let indemnification clauses and/or insurance determine who will pay any judgment. In any case, the franchisors can largely avoid liability and attorney's fees with these devices, by insisting that the franchisees secure insurance policies with the franchisor as an additional insured or through hold-harmless provisions.⁹⁵

While both the control test and the instrumentality test make sense in theory, both tests can produce unpredictable and unreliable results. The rules applied by Georgia's appellate courts seem to make more sense in the context of modern

franchise relationships. As outlined above, a well-run franchise will benefit both franchisor and franchisee. Of course, the franchisor benefits by expanding the reach of its brand and reputation, as well as collecting franchise fees or royalties. Franchisees may actually realize an even greater benefit, however, both financially and in a less tangible sense, since franchises allow local ownership and operation of what would otherwise be “national” businesses. Rather than having to compete with McDonald’s, franchising allows an individual to open and operate his own McDonald’s restaurant. The public benefits, too, by being able to patronize and purchase from brands they know and have come to trust.

The only real way for a franchisor to ensure that trust continues to be well-founded and to ensure that its franchised locations or operations are being conducted properly is through a properly crafted and enforced franchise agreement. A successful franchise arrangement depends on the franchisor’s ability to impose detailed requirements and standards on franchisees in dealing with customers and the general public, as well as the right to enforce them. Otherwise, not only is the franchisor’s brand or mark and its associated goodwill likely to be damaged, but the public also loses the ability to depend on a particular brand or mark’s quality and uniformity of products and/or services offered. By deeming franchisors potentially liable for imposing detailed requirements on their franchisees’ operations, courts actually limit the ability of franchisors

to ensure that the general public will receive better, safer, and higher-quality products and services from franchisees.

Furthermore, any hard-and-fast rule—whether considering the general degree of control of the franchisee’s operations or focusing on a particular “instrumentality”—that would impose liability on a franchisor for purported negligence in attempting to ensure a uniform product or experience completely misses the point. Certainly there are situations in which a **requirement** imposed by a franchisor should result in potential liability—such as if a franchisor actually required franchisees to violate local life safety codes or to use a product known to be dangerous. But deeming a franchisor liable for suggesting or authorizing the use of such things, much less for imposing innocuous, though pervasive, requirements regarding the appearance, level of service, and accoutrements at a franchised location, does not benefit anyone but attorneys who get paid to litigate the lawsuits that follow.

However pervasive the purported “control” of the franchisee’s operations, products, services, or appearance, courts should remember and consider the nature and purpose of the franchise relationship, which belies the mechanical imposition of a set “rule” to determine when or whether a franchisor should be held liable for its franchisee’s negligence. Rather, each such case should be decided on its own peculiar facts, while keeping in mind the realities of modern franchise relationships and

agreements, as well as the degree to which all parties involved benefit from the arrangement.

End Notes

¹ *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 337 (Wisc. 2004).

² *Anderson v. Denny's Inc.*, 987 F. Supp. 2d 1113, 1141 (D.N.M. Nov. 13, 2013), quoting *Murphy v. Holiday Inns, Inc.*, 219 S.E.2d 874, 877 (Va. 1975) (citing R. Rosenberg, Profits From Franchising 41 (1969)).

³ *Id.* (internal quotes omitted).

⁴ *Id.*

⁵ *Kerl*, 682 N.W.2d at 337, citing 1 W. Michael Garner, Franchise Distribution Law and Practice. §§ 1:3-1:4 (2003).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Kerl*, 682 N.W.2d at 337, citing Garner, supra. §§ 1:8-1:9.

¹¹ 15 U.S.C. § 1501. et seq.

¹² *Id.*, quoting *Rainey v. Langen*, 998 A.2d 342, 348 (Me. 2010) (quoting *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959)).

¹³ *Anderson*, 987 F. Supp 2d at 1141, citing *Greil v. Travelodge Int'l Inc.*, 541 N.E.2d 1288, 1292 (Ill. App. Ct. 1989).

¹⁴ *Id.* at 1141-42. See also *People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219, 2013 Cal. App. LEXIS 37 (Cal. Ct. App. 2013).

¹⁵ *McGuire v. Radisson Hotels Int'l*, 209 Ga. App. 740, 742 (1) (1993) (physical precedent); *Buchanan v. Canada Dry Corp.*, 138 Ga. App. 588, 591 (1976), citing *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 409 (5th Cir. 1962); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2nd Cir. 1959); *E. I. DuPont de Nemours & Co. v.*

Celanese Corp. of Am., 167 F.2d 484 (U.S. Ct. Oust. & Pat. App. 1948); *Morse-Starrett Prods. Co. v. Steccone*, 86 F. Supp. 796 (N.D. Cal. 1949)

¹⁶ *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 677 (D.S.C. 2006), aff'd. *Allen v. Choice Hotels Int'l*, 2008 U.S. App. LEXIS 9461 (4th Cir. May 1, 2008); *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987).

¹⁷ *Kids R Kids Int'l, Inc. v. Cope*, 2015 Ga. App. LEXIS 80, *4 (Mar. 4, 2015), quoting *Pizza K, Inc. v. Santagata*, 249 Ga. App. 36, 37 (2001).

¹⁸ *Ellison v. Burger King Corp.*, 294 Ga. App. 814, 820-821 (4) (2008); *Summit Auto. Group, LLC, Clark Kia Motors Amer., Inc.*, 298 Ga. App. 875, 882-83 (4)(2009).

¹⁹ *Summit Auto. Group*, 298 Ga. App. at 883 (4) (internal citations omitted). See also *Ellison*, 294 Ga. App. at 821 (4).

²⁰ *Summit Auto Group*, 298 Ga. App. at 883 (4).

²¹ *Id.*

²² See *Pizza K, Inc. v. Santagata*, 249 Ga. App. 36, 38 (2001).

²³ *Id.*

²⁴ *Summit Auto Group*, 298 Ga. App. at 883 (4) (internal citations omitted), quoting *Santagata*, 249 Ga. App. 36, 39 (2001).

²⁵ *Id.* at 38-39.

²⁶ *Santagata*, 249 Ga. App. at 39; *Schlotzsky's, Inc. v. Hyde*, 245 Ga. App. 888, 890 (2000).

²⁷ *Santagata*, 249 Ga. App. at 39.

²⁸ *Hyde*, 245 Ga. App. at 890.

²⁹ 2015 Ga. App. LEXIS 80 (Mar. 4, 2015).

³⁰ *Id.* at *5.

³¹ *Id.* at *8.

³² *Id.* at *8-9.

³³ *Id.* at *9, citing *Butkus v. Putting Greens Int'l Corp.*, 222 Ga. App. 661, 663 (1996); *Fortune v. Principal Fin. Group, Inc.*, 219 Ga.

App. 367, 370 (1995); *Watson v. Howard Johnson Franchise Sys.*, 216 Ga. App. 237, 238 (1995). See also *Richmond County Hosp. Auth. v. Brown*, 257 Ga. 507, 507-08 (1987), citing RESTATEMENT, AGENCY, § 267.

³⁴ *Cope*, 2015 Ga. App. LEXIS 80 at *7-8 (brackets in original).

³⁵ *Id.* at *8.

³⁶ See, e.g. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813 (Iowa 1994); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990); *Franco v. Bunyard*, 547 S.W.2d 91 (Ark. 1977); *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 120 (Fla. 1995); *Ottensmeyer v. Baskin*, 625 P.2d 1069, 1071 (Haw. Ct. App. 1981); *Taylor v. Checkrite, Ltd.*, 627 F. Supp. 415, 416-17 (S.D. Ohio 1986); *Myers v. Garfield & Johnson Enters., Inc.*, 679 F. Supp. 2d 598, 61M2 (E.D. Pa. 2010)

³⁷ *Hoffnagle*, 522 N.W.2d at 813

³⁸ *Id.*

³⁹ *Id.* at 814-15.

⁴⁰ *Id.* at 814.

⁴¹ *Id.*

⁴² 547 S.W.2d 91 (Ark. 1977).

⁴³ *Id.* at 93.

⁴⁴ *Hayman v. Ramada Inn, Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987). See also *Miller v. Piedmont Steam Co.*, 528 S.E.2d 923, 926 (N.C. Ct. App. 2000) (“A franchisor is vicariously liable for the tortious acts of its franchisee when an agency relationship exists and the acts are committed within the scope of the agent's authority.”).

⁴⁵ *Barrett-O'Neill v. LALO, LLC*, 2014 U.S. Dist. LEXIS 109830, *7-8 (S.D. Ohio Aug. 8, 2014), quoting *Taylor v. Checkrite, Ltd.*, 627 F. Supp. 415, 416-17 (S.D. Ohio 1986).

⁴⁶ *Kennedy v. Western Sizzlin Corp.*, 857 So. 2d 71, 77 (Ala. 2003); *Carlton v. Ala. Dairy Queen, Inc.*, 529 So. 2d 921, 924 (Ala. 1988).

⁴⁷ *Kennedy*, 857 So. 2d at IT, see also *Carlton*, 529 So. 2d at 923.

⁴⁸ *Kennedy*, 857 So. 2d at 77.

⁴⁹ *Fast v. Applebee's Int'l, Inc.*, 502 F. Supp. 2d 996, 1004 (W.D. Mo. 2007).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., *Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 785-90 (3rd Cir. 1978).¹ *Anderson v. Denny's Inc.*, 987 F. Supp. 2d 1113, 1142 (D.N.M. Nov. 13, 2013) (internal quotations and citations omitted), citing *Ciup v. Chevron U.S.A., Inc.*, 928 P.2d 263, 267 (N.M. 1996); *Miller v. McDonald's Corp.*, 945 P.2d 1107 (Ore. Ct. App. 1997); *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 66-68 (D.R.I. 2000); *Rainey v. Langen*, 998 A.2d 342, 348-49 (Me. 2010).

⁵³ *Viado v. Domino's Pizza, LLC*, 217 P.3d 199, 202 (Ore. Ct. App. 2009).

⁵⁴ *Anderson*, 987 F. Supp. 2d at 1142

⁵⁵ See, e.g., *Anderson*, 987 F. Supp. 2d 1158-60.

⁵⁶ 945 P.2d 1107 (Ore. Ct. App. 1997).

⁵⁷ *Id.* at 1111.

⁵⁸ *Kerl v. Rasmussen, Inc.*, 682 N.W.2d 328, 341 (Wis. 2004) (emphasis supplied).

⁵⁹ *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180 (Ind. Ct. App. 1997).

⁶⁰ *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d 743 (W.D. Tenn. May 30, 2012)

⁶¹ See, e.g. *Papastathis v. Beall*, 723 P.2d 97, 100 (Ariz. 1986); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014); *Bartholomew v. Burger King Corp.*, 2014 U.S. Dist. LEXIS 51158, *9 (D. Haw. Apr. 14, 2014); *Ketterling v. Burger King Corp.*, 272 P.3d 527, 533 (Idaho 2012); *Helmchen*, 685 N.E.2d 180 (Ind. Ct. App. 1997); *In re Motor Fuel Temp. Sales Prac. Lit.*, 2012 U.S. Dist. LEXIS 60879 (D. Kan. Apr. 30, 2012); *Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44, 47 (Ky. 2008); *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 990 N.E.2d 1054, 1064 (Mass. 2013); *Allen v. Choice Hotels Int'l*, 942 So. 2d 817, 825-27 (Miss. Ct. App. 2006); *Wise v. Kentucky Fried Chicken*

Corp., 555 F Supp. 991, 995 (D.N.H. 1983); *Capriglione v. Radisson Hotels Int'l, Inc.*, 2011 U.S. Dist. LEXIS 115145, *6-8 (D.N.J. Oct. 5, 2011); *Hong Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 87-88 (E.D.N.Y. 2000); *Martinez v. Higher Powered Pizza, Inc.*, 43 A.D.3d 670, 671 (N.Y. Ct. App. 2007); *Bass v. Gopal, Inc.*, 680 S.E.2d 917, 922-23 (S.C. Ct. App. 2009), citing *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 676-78 (D.S.C. 2006); *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d 743 (W.D. Tenn. May 30, 2012); *Plunkett v. Crossroads of Lynchburg, Inc.*, 2015 U.S. Dist. LEXIS 1409 (W.D. Va. Jan. 7, 2015); Kerl, 682 N.W.2d at 341; *Allen v. Choice Hotels, Int'l, Inc.*, 276 Fed. Appx. 339, 342 (4th Cir. 2008). See also 62B Am. Jur. 2d, *Private Franchise Contracts* §298 (2011).

⁶² *Id.* at 338. See also *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 677 (D.S.C. 2006).

⁶³ Kerl, 682 N.W.2d at 341.

⁶⁴ See, e.g., *In re Motor Fuel Temp. Sales Prac. Lit.*, 2012 U.S. Dist. LEXIS 60879, *67-68 (D. Kan. Apr. 30, 2012); *Thompson v. Jiffy Lube Int'l Inc.*, 2006 U.S. Dist. LEXIS 39113, *42 (D. Kan. June 13, 2006).

⁶⁵ See, e.g., *Thompson v. Jiffy Lube Int'l, Inc.*, 2006 U.S. Dist. LEXIS 39113, *41 (D. Kan. June 13, 2006); *Miles v. Century21 Real Estate LLC*, 2007 U.S. Dist. LEXIS 2334, *12 (E.D. Ark. Jan. 11, 2007); *Conrad v. Waffle House, Inc.*, 351 S.W.3d 813, 821 (Mo. Ct. App. 2011).

⁶⁶ *In re Motor Fuel Temp. Sales*, 2012 U.S. Dist. LEXIS 60879 at *68-69.

⁶⁷ *Id.*

⁶⁸ 276 Fed. Appx. 339 (4th Cir. 2008).

⁶⁹ *Id.* at 343 (1) (internal citations omitted).

⁷⁰ *Id.* at 344 (3), citing *Hong Wu*, 105 F. Supp. 2d at 93-94.

⁷¹ *Id.*, quoting *Hong Wu*, 105 F. Supp. 2d at 93-94 (internal brackets and punctuation omitted).

⁷² *Id.*

⁷³ *Depianti*, 990 N.E.2d at 1064, n.11.

⁷⁴ *Helmchen*, 685 N.E.2d at 181 (internal quotations and citations omitted).

⁷⁵ 555 F. Supp. 991, 995-96 (D.N.H. 1983).

⁷⁶ *Id.* at 995.

⁷⁷ 924 N.E.2d 503, 509 (Ill. Ct. App. 2010).

⁷⁸ *Id.* at 509-10.

⁷⁹ Robert W. Emerson, "Franchisors' Liability When Franchisees are Apparent Agents: An Empirical and Policy Analysis of 'Common Knowledge' About Franchising," 20 Hofstra L. Rev. 609, 630 (Spring 1992).

⁸⁰ *Bartholomew v. Burger King Corp.*, 15 F. Supp. 3d 1043, 1050 (D. Haw. 2014).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 630-31 (internal quotation and brackets omitted); Charles R. Britt, "Note: Agency—Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators," 50 N.C. L. Rev. 647, 653 (1972).

⁸⁴ *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 120 (Fla. 1995).

⁸⁵ *Miller v. Thrifty Rent-A-Car Sys., Inc.*, 637 F. Supp. 2d 1029, 1039 (M.D. Fla. 2009) (internal citations and quotations omitted).

⁸⁶ *Delta Junction v. Mack Trucks, Inc.*, 670 P.2d 1128, 1130 (Alaska 1983).

⁸⁷ *Id.*

⁸⁸ See *Ottensmeyer v. Baskin*, 625 P.2d 1069, 1071 (Haw. Ct. App. 1981).

⁸⁹ *Bartholomew v. Burger King Corp.*, 2014 U.S. Dist. LEXIS 51158, *12-13 (D. Haw. Apr. 14, 2014), citing *Restatement (Second) of Agency* § 267 (1958); *Cho Mark Oriental Food, Ltd. v. K&KInt'l*, 836 P.2d 1057, 1062 (Haw. 1992).

⁹⁰ *Cain v. Shell Oil Co.*, 994 F. Supp. 2d 1251, *2 (N.D. Fla. Jan. 10, 2014), citing *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003), *Banco Espirito Santo*

Inti, Ltd. v. BDO Int'l, B.V., 979 So. 2d 1030, 1032 (Fla. Ct. App. 2008); *Delta Junction*, 670 P.2d at 1130.

⁹¹ *Cain*, 994 F. Supp. 2d 1251, *2.

⁹² *Kennedy v. Western Sizzlin Corp.*, 857 So. 2d 71, 77-78 (Ala. 2003).

⁹³ *Id.* at 78.

⁹⁴ See pp. 3-4, *supra*.

⁹⁵ *Anderson*, 987 F. Supp. 2d 1113, 1159- 60 (D.N.M. Nov. 13, 2013).

The Northern District of Georgia May Change Legal Landscape of the Fair and Accurate Credit Transaction Act Claims

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Identity theft is pervasive in today's day and age and can be devastating to an individual's credit. In fact, in 2014, identity theft topped the Federal Trade Commission's reported complaints for the fifteenth year in a row.¹ Common sources of identity theft center on the theft of consumers' credit card numbers.

Most recently, the news headlines have been flooded with accounts of cyber-attacks on companies, with consumers' credit card numbers being stolen. Over the last twelve months, hacking was responsible for the largest number of compromised personal records, involving nearly 43 million Americans.² Recent retailers falling victim to these cyber-attacks have included the likes of Target, Home Depot, DSW Shoes, Polo Ralph Lauren, and BJs Wholesale.

Less commonly seen in the news, but equally devastating to consumer's identities, are violations of the Fair and Accurate Credit Transactions Act ("FACTA"). FACTA is a federal law passed in 2003 and is an amendment to the Fair Credit Reporting Act. FACTA generally prohibits the printing of more than the last five digits of a credit card number or a card's expiration date. FACTA is designed to prevent "dumpster divers" from pulling consumers' credit card numbers off of discarded receipts and using the numbers to steal the person's identity and rack up endless amounts of credit card bills at the consumers' expense.

The Fair and Accurate Credit Transaction Act is codified at 15 U.S.C. § 1681 et seq. The provision pertaining to credit card receipts is found at 15 U.S.C. § 1681c(g) and provides:

(g) Truncation of credit card and debit card numbers

(1) In general

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

(2) Limitation

This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

Since the Act's inception, many retailers have faced lawsuits for violating the FACTA. Most recently, in January 2015, the popular clothing retailer, J. Crew Group Inc., was named in a class action lawsuit for purportedly issuing credit card receipts displaying more than the last five digits of the consumer's credit and debit cards.³ Airgas Inc., an industrial gas distributor, was also sued in a class action lawsuit in December 2014 for printing the expiration date in addition to the last five digits of the

credit or debit card number on receipts.⁴

The results for violating this Act can be costly and reach fines in the millions of dollars, with each willful violation carrying a potential fine of \$100 up to \$1,000 per transaction in addition to an allowance for punitive damages and attorneys' fees.⁵ The penalties for negligent noncompliance with the Act are the actual damages sustained by the consumer, with additional awards again permitted for attorneys' fees and the costs of the action.⁶

With such high dollar values at stake, the question then becomes: "Who is going to pay for all of this?" As is easy to imagine, retailers are turning to their insurers for any coverage that they can find. One common source of corporate insurance coverage is a commercial general liability ("CGL") insurance policy. These policies typically provide two types of coverage that are implicated in mass credit card theft cases: Coverage A (for bodily injury and property damage claims) and Coverage B (for advertising and personal injury claims). At the beginning of 2015, the Eleventh Circuit Court of Appeals weighed in on the issue of potential insurance coverage under a CGL policy for violations of the FACTA.

This article will first examine the potential coverage available for FACTA violations under Georgia law, with a focus on the Eleventh Circuit Court of Appeal's recent decision in *Travelers Property Casualty Company of America v. The Kansas City*

*Landsmen, L.L.C. d.b.a. Budget Rent a Car.*⁷ The article concludes by providing an overview of other states' views on the issue.

I. Coverage for FACTA Violations under Georgia Law

Commercial General Liability Insurance policies typically provide coverage under two general provisions, Coverage A and Coverage B. Coverage A provides that an insurer, Insurance Service Office, or ISO, develops standard insurance forms that are widely used by many insurers in their policies. The main ISO form used in CGL policies is the Commercial General Liability Coverage Form CG 00 01 12 07. Under this form, Coverage A provides:

**SECTION I –
COVERAGES
COVERAGE A BODILY
INJURY AND
PROPERTY DAMAGE
LIABILITY**

1. Insuring Agreement
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured

against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

- b. This insurance applies to "bodily injury" and "property damage" only if:
 - i. The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";⁸

Thus, in order for a loss or claim to be covered under Coverage A, there must first be "a bodily injury or property damage" caused by an occurrence.

Coverage B generally provides:

**COVERAGE B
PERSONAL AND
ADVERTISING INJURY
LIABILITY**

1. Insurance Agreement
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those

damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply.⁹

II. Coverage B—"Personal and Advertising Injury"

When courts look at whether coverage is provided for violations of FACTA, the analysis most always involves looking at Coverage B, which provides coverage for "personal and advertising injury." "Personal and advertising injury" coverage only applies to injury arising out of the offenses specifically listed in the policy. In the most recent ISO version of the Commercial General Liability Coverage Form, "personal and advertising injury" includes:

... injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trademark or slogan in your "advertisement".¹⁰

Most relevant to the identity theft and use of credit card numbers is the offense of "oral or written publications, in any manner, of material that violates a person's right of privacy." In fact, Coverage B is where the Eleventh Circuit Court of Appeals' analysis focused in the *Budget Rent a Car* case.¹¹

In *Budget Rent a Car*, the Eleventh Circuit examined the availability of insurance coverage for a consumer's class action lawsuit filed against The Kansas City Landsmen, LLC, d/b/a Budget Rent A Car, and A Betterway Rentacar, Inc. (collectively "Budget Rent A Car").¹² In this lawsuit, the plaintiff alleged that Budget Rent A Car violated FACTA by printing credit card receipts that included more than the last five digits of the consumer's credit card number

and also listed the card's expiration date. The plaintiff sought to recover statutory and punitive damages on behalf of himself and others similarly situated under 15 U.S.C. Section 1681n(a), which provides for the willful violation of FACTA.¹³

Travelers Property Casualty Company of America ("Travelers") and St. Paul Fire and Marine Insurance Company ("St. Paul") (collectively referred to as the "insurers") both issued CGL policies to Budget Rent A Car. Travelers issued two consecutive primary insurance policies, and St. Paul issued corresponding excess insurance policies. The two insurers filed a declaratory judgment action in the United States District Court for the Northern District of Georgia seeking a declaration that they had no duty to defend or indemnify Budget Rent A Car for the lawsuit asserting FACTA violations.¹⁴

In an unconventional approach¹⁵, the court first began with an analysis of relevant policy exclusions. All policies contained a knowing-conduct exclusion. This exclusion precluded coverage for "personal and advertising injury" caused by or at the direction of the insured with knowledge that the act would violate another's rights and would cause "personal and advertising injury."¹⁶

As referenced above, the plaintiff only brought his cause of action under 15 U.S.C. § 1681n, which provides the damages for *willful* violations of FACTA. Section 1681o allows for damages for negligent violations of the Act. Since the

plaintiff chose to file his action only under the section for willful violations, the knowing-conduct exclusion would appear, at first glance, to preclude coverage for the plaintiff's claims. The Eleventh Circuit disagreed.¹⁷

In reaching this conclusion, the Eleventh Circuit looked to the meaning of willful within FACTA. The court noted that the United States Supreme Court has held that willfulness, within the meaning of Section 1681n, includes not only knowing violations of the Act but also a reckless disregard" of the Act.¹⁸ The distinction between knowing and reckless disregard of the Act were critical to the court's conclusion because the parties all agreed that knowing violations were precluded by the knowing-conduct exclusion, whereas reckless disregard violations were not.¹⁹

The district court concluded that the knowing-conduct exclusion applied to preclude coverage because the only allegations in the underlying complaint were for "knowing" "willful" violations rather than "reckless disregard" "willful" violations.²⁰ The Eleventh Circuit disagreed, concluding that the knowledge allegations in the complaint only referred to Budget Rent A Car's "alleged knowledge of FACTA's requirements, not their knowledge of any alleged *violations* of its requirements."²¹ The court, however, noted that Section 1681n's requirements "concerns itself with the mental state as it relates to alleged noncompliance—*i.e.*, violations—only, not with the defendant's mental state

with regard to the statute's requirements."²²

Since there were no allegations in the underlying complaint that Budget Rent A Car's actions in actually violating the statute rose to a level of "knowing" willfulness, rather than just "reckless disregard" willfulness, and the underlying plaintiff could succeed on his claim under either theory, the court held that the knowing-conduct exclusion did not apply to preclude coverage.²³

After finding the knowing-conduct exclusion did not apply to preclude coverage, the court then returned to the main provisions of coverage to evaluate whether the alleged violations of the FACTA was generally covered under Coverage B.²⁴ The primary and excess policies each contained a slightly different definition of "personal injury" or "advertising injury." The offense most related to FACTA violations under all policies related to oral, written or electronic publication of material that violates a person's privacy rights.²⁵

The parties all agreed that there would be no coverage under the policies if the credit card receipts were only provided to the credit card users.²⁶ This is because for coverage to be provided, the policies required that the information be published. The parties agreed "that the term 'publication' contemplates dissemination to at least someone other than the person who provided the credit card information at issue to" Budget Rent a Car.²⁷ Because the parties all agreed on this issue, the court did not consider whether "publication" could

result when a nonconforming credit card receipt is returned to the paying cardholder.²⁸

The issue in this case with respect to coverage provided under Coverage B was whether "publication" could occur in the unique business of rental cars. Budget Rent A Car contended that under its business model, payment is taken at the time of the initial rental of the car but the credit card receipt for payment of the rental is not provided until the car is returned. As a result, the person who receives the credit card receipt for the rental may not be the same person who rented the car or owned the credit card paying for the rental.²⁹ Budget Rent A Car claimed that it considered the person returning the rental car to be a customer, regardless of whether they owned the credit card, and argued that it could be held liable in the underlying complaint for furnishing the receipts to such persons.³⁰

The court determined that before it could evaluate whether the underlying complaint involved a "personal or advertising injury," an ambiguity in FACTA must be resolved.³¹ The court found an issue as to whether the statute prohibited vendors from providing credit card receipts to their customers who did not actually own the credit card accounts.³² This is because § 1681c(g)(1) only prohibited the printing of receipts with more than the last five digits of the credit card or the expiration date when they were "provided to the cardholder."³³ Because § 1681c(g)(1) does not define the term

“cardholder,” and because the issue was one of first impression, the court ultimately elected to remand the question to the lower court for further proceedings and suggested that the Federal Trade Commission, agency charged with administering FACTA, may also wish to intervene and provide guidance.³⁴

As of the publishing of this article, we were unaware of any action taken by the United States District Court for the Northern District of Georgia on remand. The Eleventh Circuit, however, makes an interesting point that other courts have not recognized in that the act read literally may only apply when the receipt is provided directly to the cardholder but not when it is provided to a third-party. As the Eleventh Circuit mentioned,

Some might suggest that such an interpretation would create plainly absurd results, ... , that fly in the face of FACTA’s stated purpose of preventing identity theft, “... particularly because FACTA has been described as a remedial statute that should be construed broadly... . On the other hand, some might disagree that the results are absurd, since Congress is not required to address every aspect of a problem whenever it decides to act.”³⁵

If FACTA is read literally and only applies when a nonconforming

receipt is provided directly to the cardholder, this creates an issue for companies seeking coverage for such violations under their CGL policies. As discussed below, other courts around the country addressing this issue refuse to find coverage under Coverage B where the receipt was only provided to the cardholder because no “publication” occurred. If FACTA is so limited, it appears that insureds will never have coverage for such violations under Coverage B of their CGL policies.

III. Coverage A—“Bodily Injury” and “Property Damage”

We have not seen many cases around the country addressing whether violations of the FACTA might fall within the parameters of Coverage A of a CGL Policy. Coverage A generally provides coverage for “bodily injury” or “property damage” caused by an “occurrence.” Before coverage can be found, there must necessarily first be a “bodily injury” or “property damage.”

FACTA generally permits recovery of “actual damages” under 15 U.S.C. Section 1861n and o. Courts around the country have found that “actual damages” within the meaning of the Fair Credit Reporting Act, of which FACTA is a part, includes damages for mental or emotional injuries under certain circumstances.³⁶

Georgia courts follow the majority of jurisdictions throughout the country and interpret “bodily injury” to only include coverage for nonphysical, emotional, or mental harm where the nonphysical harm has

in some way physically manifested.³⁷ Thus, a plaintiff's claim for mental or emotional injury under FACTA would only constitute a covered "bodily injury" within the meaning of Coverage A where that nonphysical harm caused the plaintiff some physical ailment.

The second component of coverage under Coverage A is for "property damage." In Georgia, money and financial accounts are intangible property not generally covered by commercial general liability policies.³⁸ Therefore, a plaintiff's financial losses as a result of his or her credit card information being stolen off of a receipt, which violated the FACTA, is unlikely to amount to "property damage" within the meaning of Coverage A.

Should "bodily injury" or "property damage" be found, there must also be an occurrence for Coverage A to apply. The typical CGL policy defines occurrence as, "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."³⁹ The policies do not generally define accident, but Georgia statute generally defines "accident" as "an event which takes place without one's foresight or expectation or design."⁴⁰ When used in an insurance policy, the definition of accident "has a further meaning limited by the occurrence or event as to causation of injury or damage; '[a]n accident is an unexpected happening rather than one occurring through intention or design.'"⁴¹ More specifically, if an insured performs a deliberate act

negligently, an accident can result, "if the effect is not the intended or expected result."⁴² Thus, an "occurrence" is likely in FACTA cases, because, while an insured may act intentionally in printing a receipt with more than the last five digits of a credit card and an expiration date, presumably, most insureds would not also have intended to harm the credit cardholder and desired to put their personal information at risk.

While there could be an "occurrence" to result in FACTA cases, coverage under Georgia law would only possibly result in the very narrow of circumstances where the consumer alleges "bodily injury" by suffering such an emotional or mental distress that it resulted in a physical manifestation and injury.

IV. Coverage for FACTA Violations in Other Jurisdictions

A few other courts across the country have evaluated coverage for violations of the Fair and Accurate Credit Transactions Act ("FACTA") under CGL policies. These cases focus on the basic requirements to trigger coverage under a general liability policy and shed light on some of the issues to be considered when evaluating coverage for FACTA claims.

A. *Whole Enchilada, Inc. v. Travelers Property and Casualty Company of America*

One of the earliest cases discussing liability insurance coverage for violations of the Fair and Accurate

Credit Transactions Act in depth is *Whole Enchilada, Inc. v. Travelers Property Casualty Company of America*.⁴³ In *Whole Enchilada*, the policy holder filed a declaratory judgment action against Travelers Property and Casualty Company of America (“Travelers”) seeking coverage for a class action lawsuit brought against it for allegedly violating the FACTA.⁴⁴ Specifically, the underlying class action alleged that Whole Enchilada violated the FACTA by printing more information than the last five digits of consumers credit and debit cards on customer receipts, thus violating 15 U.S.C. Section 1681(c).⁴⁵ The class action plaintiffs alleged that Whole Enchilada printed the expiration dates of their credit cards on receipts, along with the last five digits of the applicable credit card number.⁴⁶

The underlying litigation was ultimately resolved by settlement, which was approved by the court and with judgment entered accordingly.⁴⁷ Whole Enchilada then filed suit against Travelers seeking a declaration that Travelers was required to defend and indemnify it for the underlying class action under two policies.⁴⁸

The policies at issue in *Whole Enchilada* were CGL policies issued by Travelers, providing liability coverage for personal and advertising injuries under Coverage B.⁴⁹ Under Coverage B, the policies provided coverage for “personal and advertising injury” arising out of “[o]ral or written publication, in any manner, or

material that violates a person's right of privacy.”⁵⁰

The policies at issue contained a WEB XTEND endorsement that modified Coverage B by deleting and replacing the standard Coverage B insuring agreement with one that provided coverage for “personal injury’, ‘advertising injury’ or ‘web site injury’”.⁵¹ Under the WEB XTEND endorsement, “advertising injury” included injury arising out of “oral, written or electronic publication of material that appropriates a person’s likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person’s private life...”.⁵² “Personal Injury” was defined by the endorsement as “injury, other than ‘bodily injury’ arising out of...oral, written or electronic publication of material that appropriates a person’s likeness, unreasonably places a person in a false light or gives publicity to a person’s private life.”⁵³

In the declaratory judgment action, Whole Enchilada argued that the WEB XTEND endorsement was represented to be an extension of coverage, and instead, improperly narrowed coverage.⁵⁴ Whole Enchilada argued that the underlying complaint alleged publication as defined by the WEB XTEND endorsement, that it alleged unreasonable publicity and appropriation of likeness, and sought damages covered by the policies.⁵⁵

Travelers argued that the plain language of the WEB XTEND endorsement indicated that it replaced the traditional Coverage B language in its entirety. Travelers argued that there was no coverage for the

underlying complaint, as (1) it did not allege publication, nor did it allege “publicity to private life”; (2) it did not allege publication or appropriation of plaintiffs’ likeness; and (3) it did not allege injury or damage potentially within the personal injury coverage.⁵⁶ Further, Travelers argued that the underlying complaint only sought statutory penalties, punitive damages, costs of the suit, and injunctive relief, none of which were covered under the policy.⁵⁷

1. THE WEB XTEND Endorsement Replaced the Terms of Coverage B

The court rejected Whole Enchilada’s first argument that the WEB XTEND Endorsement could not limit coverage, as it was represented to be an extension of coverage.⁵⁸ Where the WEB XTEND Endorsement unambiguously stated that it changed the policy, based on the plain language therein, the endorsement language modified that in the standard policy form.⁵⁹ The court noted that, under Pennsylvania law, where an endorsement conflicts with the standard insuring agreement, the terms of the endorsement prevail.⁶⁰

2. Printing a Receipt Does Not Constitute Publication Under Pennsylvania Law

The court next examined whether the underlying class action lawsuit sufficiently alleged “publication”, as necessary to trigger coverage under the policies.⁶¹ The policies did not define “publication.”⁶² The court looked

to the Webster’s Dictionary definition of “publish” to evaluate coverage, noting that it required facts to either be made known generally, made public, disseminated to the public, or released for distribution.⁶³ As the receipts that were printed in violation of the FACTA were only given to the cardholder, the information on the receipts was not made generally known, publically announced, or disseminated to the public.⁶⁴

3. Private Financial Information is not Part of a Person’s Likeness

Whole Enchilada further argued that publication of material that appropriates a person’s likeness was covered.⁶⁵ It argued that financial information is part of a person’s identity, and thus, a person’s likeness.⁶⁶ The court rejected this argument as well, noting that such a characterization of financial information was too far beyond the language of the policies and Pennsylvania law.⁶⁷ The court reasoned that “appropriation of a person’s likeness ... is use of a person’s actual physical likeness ... without permission.”⁶⁸

Nonetheless, the underlying class action lawsuit merely alleged the failure to truncate credit card numbers, thus exposing cardholders to potential fraud.⁶⁹ There were no allegations that Whole Enchilada wrongfully utilized the financial information in any way, and thus, there was no allegation of appropriation.⁷⁰

4. The FACTA Complaint Did Not Allege Unreasonable Publicity to the Cardholders' Private Lives

The court noted that under Pennsylvania law, “publicity” requires that a matter be made public, communicated to the public at large, or communicated to so many people that the information is substantially certain to become public.⁷¹ The receipts at issue in the underlying litigation were only provided to the cardholders.⁷² Because there was no allegation of communication of the card numbers publically, the court held that there was no disclosure causing publicity to a person’s private life.⁷³

B. *Creative Hospitality Ventures, Inc. v. U.S. Liability Insurance Company*

Courts have also found a lack of publication sufficient to trigger Coverage B in policies containing a standard commercial general liability form without a similar WEB XTEND endorsement.⁷⁴

In *Creative Hospitality Ventures, Inc. v. U.S. Liability Insurance Company*, the Eleventh Circuit examined, under Florida law, coverage under a commercial general liability policy for a class action lawsuit brought against restaurant operator Creative Hospitality.⁷⁵ The underlying class action alleged that Creative Hospitality violated the FACTA by printing more than the last

five digits of cardholders’ credit card numbers and/or expiration dates on receipts.⁷⁶

U.S. Liability Insurance Company (“U.S. Liability”) and Essex Insurance Company (“Essex”) issued CGL coverage to Creative Hospitality, providing, in part, coverage for damages because of “personal and advertising injury”, defined to include “[o]ral or written publication, in any manner, of material that slanders or libels a person ...” and “[o]ral or written publication, in any manner, or material that violates a person’s right of privacy ...”⁷⁷

The *Creative* declaratory judgment action involved claims against both U.S. Liability and Essex pertaining to claims for coverage under the FACTA.⁷⁸ Both Essex and U.S. Liability filed Motions to Dismiss at the district court, arguing that printing credit card receipts did not constitute publication necessary to trigger coverage.⁷⁹ The district court referred the motions to the magistrate judge, who concluded that the language “publication, in any manner” included the FACTA violation claims.⁸⁰

Essex appealed the magistrate court ruling, and the district court came to the opposite conclusion, finding that “publication” did not cover FACTA violations.⁸¹ In doing so, the district court relied on the Florida Supreme Court’s definition of “publication” as “communication (of news or information) to the public: public announcement”, based on the holding in *Penzer v. Transportation Insurance Company*.⁸²

The policyholders appealed to the Eleventh Circuit, arguing that the phrase “in any manner” contained in the policies broadened the scope of publication under the policy.⁸³ In the alternative, the policyholders argued that the term “publication” was ambiguous, and should be construed against the insurer.⁸⁴

The Eleventh Circuit cited to *Penzer*, noting that the Florida Supreme Court looked to the dictionary definition of “publication”, finding it to mean communication or information disseminated to the public.⁸⁵ The court held that providing a receipt to a customer who already had the credit card number and expiration date, did not constitute publication sufficient to trigger coverage under the policy.⁸⁶ The court further rejected the argument that “the phrase ‘in any manner’ expands the definition of ‘publication’ to include the provision of a written receipt,” but instead “merely expands the categories of publication (such as email, handwritten letters, and, perhaps, “blast-faxes”) covered by the Policy.”⁸⁷

C. *Ticknor v. Rouse’s Enterprises, LLC*

The United States District Court for the Eastern District of Louisiana has also found that FACTA violations are not covered under general liability Coverage B for lack of publication.⁸⁸ In *Ticknor v. Rouse’s Enterprises, LLC*, a consumer class action was brought against an insured grocery store operator, Rouse, alleging it failed to truncate expiration dates on receipts.⁸⁹ The class action

plaintiffs did not allege actual damages, instead claiming that the grocer “knowingly, willfully, intentionally, and reckless[ly] violated ...” the FACTA.⁹⁰ The underlying plaintiffs sought statutory damages, punitive damages, costs, attorneys’ fees, and an injunction.⁹¹

The policy at issue was provided to Rouse by Evanston Insurance Company (“Evanston”). The policy provided coverage for Personal and Advertising Injury Liability under Coverage B, for damages because of “personal and advertising injury” ... arising out of the “oral or written publication, in any manner, of material that violates a person’s right of privacy.”⁹² The policy did not include a WEB XTEND or similar endorsement, but instead contained the standard Coverage B form.

The main issue presented in *Ticknor* was whether providing non-truncated receipts to cardholders was “publication” sufficient to trigger Coverage B.⁹³ Evanston relied on *Whole Enchilada* and *Creative Hospitality* to support its argument that the FACTA violation did not constitute a publication.⁹⁴ Rouse argued that publication means “to produce or release for publication; specifically: print”, and thus, printing the receipt was sufficient to establish publication.⁹⁵

The *Ticknor* court rejected the argument that publication did not require transmission of information to a third-party.⁹⁶ The court adopted the reasoning set forth in *Creative Hospitality* differentiating between mass facsimiles and FACTA receipt

violations.⁹⁷ Like in *Whole Enchilada*, the *Ticknor* court looked to the dictionary definition, finding no publication where the receipts at issue were only provided to the cardholders for their own personal transactions.⁹⁸

The Evanston policy also contained exclusions for “personal and advertising injury” (1) “caused by or at the direction of the insured with knowledge that the act would violate the rights of another ...”; and (2) “arising...out of any action or omission that violates or is alleged to violate ... [a]ny statute, ordinance or regulation ... that prohibits or limits the sending, transmitting, communicating or distribution of material or information.”⁹⁹ Because the court found that coverage was not triggered under Coverage B, it did not evaluate whether these exclusions applied to preclude coverage.¹⁰⁰ Though it is unclear whether these exclusions would have been applicable to the FACTA claims in the *Ticknor* case, the court’s approach in *Budget Rent a Car* makes it clear that such exclusions should be examined closely when determining coverage for FACTA claims.

V. Conclusion

Under the current legal landscape, insureds have little hope of coverage for FACTA claims under the traditional commercial general liability policy. The United States District Court for the Northern District of Georgia’s response to the issues in *Budget Rent a Car* could have a profound effect on the future of coverage for FACTA violations and the

interpretation of the FACTA statute as a whole going forward.

End Notes

¹www.ftc.gov/news-events/press-releases/2015/02/identitytheft-tops-ftcs-consumer-complaint-categories-again-2014 (last visited April 13, 2015).

²www.privacymatters.com/identity-theft-information/identity-theft-computer-hacking.aspx (last visited April 13, 2015).

³www.law.com/sites/articles/2015/01/15/j-crew-sued-over-alleged-violations-of-credit-transactions-act/ (last visited April 13, 2015).

⁴www.law360.com/articles/605654/airgas-credit-card-receipts-violate-fcra-class-says (last visited April 13, 2015).

⁵ 15 U.S.C. § 1681n.

⁶ 15 U.S.C. § 16810.

⁷ No. 14-11006, 2015 WL 137816 (11th Cir. Jan. 12, 2015).

⁸ CG 00 01 12 07, Section I, Coverage A, Paragraphs 1(a) and (b).

⁹ CG 00 01 12 07, Section I, Coverage B, Paragraph 1(a).

¹⁰ CG 00 01 12 07, Section V, Paragraph 14.

¹¹ *Travelers Property Casualty Company of America v. The Kansas City Landmen, L.L.C. d.b.a. Budget Rent a Car*, No. 14-11006, 2015 WL 137816 (11th Cir. Jan. 12, 2015).

¹² *Id.*

¹³ *Id.* at *1-2.

¹⁴ *Id.* at *2.

¹⁵ The approach of analyzing policy exclusions first is unconventional because an analysis of the application of an insurance policy’s exclusions are only necessary if the court first finds that there is generally coverage under the coverage granting provisions of the policy. If the claim does not fall within the general coverage grant, there is no reason to then analyze policy exclusions.

¹⁶ *Budget Rent a Car*, 2015 WL 137816, at *2.

¹⁷ *Id.* at *7.

¹⁸ *Id. citing Safeco Ins. Co. v. Burr*, 551 U.S. 47, 71, 127 S.Ct.2201, 2216, 167 L.Ed.2d 1045 (2007).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id. citing* 15 U.S.C. § 1681n (“Civil liability for *willful noncompliance*. (a) In general[:] Any person who *willfully fails to comply* with any [FACTA] requirement ... is liable...”).

²³ *Id.* at *6.

²⁴ *Id.* at *7-11.

²⁵ *Id.* at *3.

²⁶ *Id.* at *7.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *8.

³⁰ *Id.*

³¹ *Id.* at *8-9.

³² *Id.* at *9.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Taylor v. Tenant Tracker, Inc.*, 710 F.3d 824 (8th Cir. 2013) (mental pain and anxiety can constitute “actual damages” under the Fair Credit Reporting Act); *Edeh v. Equifax Info. Svs., LLC*, 974 F. Supp. 2d 1220 (D. Minn. 2013) (emotional damages can constitute “actual damages” under the Fair Credit Reporting Act); *Neclerio v. Trans Union, LLC*, 983 F. Supp. 2d 199 (D. Conn. 2013) (in order to recover mental damages under the Fair Credit Reporting Act, plaintiff must prove an actual injury, supported by more than his or her own testimony); *Van Veen v. Equifax Info.*, 844 F. Supp. 2d 599, 610 (E.D. Pa. 2012) (“The FCRA permits

recovery for emotional harm stemming from erroneous credit reporting.”); *Konter v. CSC Credit Svs., Inc.*, 606 F. Supp. 2d 960 (W.D. Wis. 2009) (emotional distress damages were not recoverable under the Fair Credit Reporting Act where the plaintiff, not the defendant, told others about problems with information on his credit report); *Tilley v. Global Payments, Inc.*, 603 F. Supp. 2d 1314 (D. Kas. 2009) (humiliation and mental distress can constitute actual damaged under the Fair Credit Reporting Act even where the consumer did not incur any out of pocket losses); *Whiting v. Harley-Davidson Fin. Svs.*, 534 F. Supp. 2d 823 (N.D. 111. 2008) (emotional distress can, in certain circumstances, constitute actual damages within the meaning of the Fair Credit Reporting Act); *Garrett v. Trans Union, LLC*, No. 2:04-CV-00582, 2006 WL 2850499 (S.D. Ohio Sept. 29, 2006) (holding that “[w]hile ‘actual damages’ may include emotional distress, because emotional distress damages are so easy to manufacture, courts have imposed a strict standard to be applied for them to be recoverable”); *Schaffhausen v. Bank of Am., N.A.*, 393 F. Supp. 2d 853 (D. Minn. 2005) (plaintiff must prove genuine injury before emotional damages are recoverable under the Fair Credit Reporting Act); *Sampson v. Equifax Info. Svs., LLC*, No. CV204-187, 2005 WL 2095092, at *4 (S.D. Ga. Aug. 29, 2005) (“Mental anguish constitutes a compensable harm under the FCRA, and emotional distress damages may be recovered even absent a denial of credit.”); *Spector v. Equifax Info. Svs.*, 338 F. Supp. 2d 378 (D. Conn. 2004) (plaintiff must prove causal link between the violation of the Fair Credit Reporting Act and the emotional injury); *McKeown v. Sears Roebuck & Co.*, 335 F. Supp. 2d 917 (W.D. Wis. 2004) (emotional distress damages permitted and survived summary judgment); *Boris v. Choicepoint Svs., Inc.*, 249 F. Supp. 2d 851 (W.D. Ky. 2003); *Lewis v. Ohio Prof1 Elec.Network, LLC*, 248 F. Supp. 2d 693 (S.D. Ohio 2003).

³⁷ *Nationwide Mut. Fire Ins. Co. v. Somers*, 261 Ga. App. 421, 427, 591 S.E.2d 430, 435 (2003); *Bates v. Guar. Natl Ins. Co.*, 223 Ga. App. 11, 13, 476 S.E.2d 797, 799 (1996).

³⁸ See e.g., *Nationwide Mut. Fire Ins. Co. v. City of Rome*, 268 Ga. App. 320, 321, 601 S.E.2d 810, 812 (2004) (holding that loss of grant money as result of failure to timely submit application was not “property damage” within meaning of policy); *Mack v. Nationwide Mut. Fire Ins. Co.*, 238 Ga. App. 149, 517 S.E.2d 839 (1999) (concluding that loss of money as result of alleged usury in retail installment contract was not “property damage”).

³⁹ CG 00 01 12 07, Section V, Paragraph 13.

⁴⁰ O.C.G.A. § 1-3-3(2).

⁴¹ *Custom Planning & Dev., Inc., v. Am. Nat’l Fire Ins. Co.*, 270 Ga. App. 8, 9-10, 606 S.E.2d 39, 41 (2004) quoting *City of Atlanta v. St. Paul Fire & Ins. Co.*, 231 Ga. App. 206, 498 S.E.2d 782 (1998).

⁴² *HDI-Gerling Am. Ins. Co. v. Morrison Homes, Inc.*, 701 F.3d 662, 668 (11th Cir. 2012) quoting *Am. Empire Surplus Lines Ins. Co. v. Hathaway Devi. Co, Inc.*, 288 Ga. 749, 752, 707 S.E.2d 369, 372 (2011).

⁴³ 581 F. Supp. 2d 677 (W.D. Pa. 2008).

⁴⁴ *Id.* at 681-682.

⁴⁵ *Id.* at 682.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 681.

⁴⁹ *Id.* at 683.

⁵⁰ *Id.* at 685.

⁵¹ *Id.* at 685.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 691.

⁵⁵ *Id.* at 688.

⁵⁶ *Id.*

⁵⁷ *Id.* at 686.

⁵⁸ *Id.* at 692.

⁵⁹ *Id.*

⁶⁰ *Id.* at 693.

⁶¹ *Id.* at 696.

⁶² *Id.* at 697.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 698.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 699.

⁷² *Id.* at 700.

⁷³ *Id.* at 701.

⁷⁴ *Creative Hospitality Ventures, Inc. v. U.S. Liability Ins. Co.*, 444 Fed. Appx. 370 (11th Cir. 2011).

⁷⁵ *Id.*

⁷⁶ *Id.* at 371-372.

⁷⁷ *Id.* at 371.

⁷⁸ *Id.* at 372.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 373 quoting Penzer, 29 So.3d 1000, 1005 (Fla. 2010) (evaluating definition of publication under insurance policy in case involving mass facsimiles sent to customers in violation of the Telephone Consumer Protection Act).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 375.

⁸⁶ *Id.* at 376.

⁸⁷ *Id.*

⁸⁸ *Ticknor v. Rouse’s Enterprises, LLC*, 2 F.Supp.3d 882 (E.D. La. 2014).

⁸⁹ 2 F.Supp.3d 882 (E.D. La. 2014).

⁹⁰ *Id.* at 887.

⁹¹ *Id.*

⁹² *Id.* at 889.

⁹³ *Id.* at 893.

⁹⁴ *Id.*

⁹⁵ *Id.* at 894.

⁹⁶ *Id.* at 896.

⁹⁷ *Id.* at 895.

⁹⁸ *Id.* at 896.

⁹⁹ *Id.* at 890.

¹⁰⁰ *Id.* at 896-897.

What Happens to Information Stolen in a Data Breach and Why It Matters in Litigation

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Within weeks of Sony's data breach in November 2014, multiple class actions had been filed.¹ With Home Depot's breach, the first class action lawsuit only took days.² While there are various incentives for attorneys and their clients to immediately file an action in the wake of a data breach, such hasty filings can illuminate a fundamental problem with their lawsuits. A defining factual issue in data breach lawsuits involves whether the breach resulted in the actual theft of an individual plaintiffs identity or simply an increased risk of identity theft in the future. In other words, a question exists as to whether the mere occurrence of a data breach, without more, can confer upon a plaintiff a cognizable injury, and thus the standing necessary to file a lawsuit. Absent that standing, a plaintiff simply cannot proceed.

This article will discuss how the *misuse* of stolen personal information from a data breach impacts subsequent litigation. As shown herein, federal courts have split on whether a future risk of identity theft constitutes a compensable injury for purposes of standing. Georgia courts have not expressly addressed this split in authority, but the present legal landscape tracks the existing majority view that an increased risk of harm

resulting from a data breach is not, in and of itself, a compensable injury.

I. The Business of Stolen Data and Notification Requirements

Experienced hackers have little problem monetizing stolen data. An obvious benefit to data as opposed to physical property is the speed and ease at which it can be exchanged over the internet. Whether the information is a name, address, date of birth, social security number, credit card number, or even a mother's maiden name, there is a thriving internet black market to buy and sell stolen data. Once purchased or otherwise transferred, the stolen data can then be used for its ultimate purpose: to commit identity theft. Fraudsters can clone credit and debit cards to purchase goods or prepaid credit cards. With a social security number and related personally identifiable information (PII), fraudsters can open lines of credit, take out loans, or even submit false tax returns.

Given the manner in which most high-profile identity theft is carried out, it is critical that affected individuals know their information has been compromised in a data breach. Only then will they know to take steps to protect themselves by reviewing bank statements and credit reports for suspicious activity.³ As a result, the vast majority of states have breach notification laws requiring covered entities to notify affected individuals of a data breach.⁴ The types of information and the entities required to comply vary from one state to the next. In an effort to address and

preempt the patchwork coverage, the latest incarnation of uniform federal legislation for reporting data breaches, the Data Security and Breach Notification Act of 2015, is currently pending before Congress. Still, federal notification laws already exist for breaches concerning certain types of information—most notably protected health information (PHI).⁵

In Georgia, only certain entities are required by statute to notify impacted persons of a data breach.⁶ The first is “data collector,” which is defined as essentially any governmental agency.⁷ The second is “information broker,” which is defined as “any person or entity who, for monetary fees or dues, engages in whole or in part in the business of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning individuals for the primary purpose of furnishing personal information to nonaffiliated third parties”⁸ The plain language of the statute indicates it does not apply to most businesses, including those often associated with high-profile data breaches—retailers.⁹

Whether they are required to do so or not, businesses that notify customers of a data breach customarily have offered free identity theft protection services for a period of time (usually a year) following the breach.¹⁰ The point of such notifications and monitoring services is to limit the chances of a fraudster using the stolen data to actually commit identity theft.

The notification and monitoring services result in a substantial number of individuals that have their information stolen in a data breach but do not actually suffer identity theft. An additional variable to consider is the unpredictability of the criminal underworld. For some unknown reason, a person's stolen credentials may not filter through the black market to someone with the skill, motivation, or opportunity to misuse it.

So where does that leave an individual whose information has been stolen in a data breach, but who has not been a victim of identity theft? This is an issue facing many litigants who hastily file lawsuits immediately following notice of a data breach. They are unable to allege they have actually suffered some cognizable form of identity theft. They instead allege the data breach has made them more likely to suffer identity theft in the future. In other words, they allege they have been injured through an elevated risk of future harm.

As demonstrated in the next section, the majority of courts that have considered this issue have held that an elevated risk of identity theft following a data breach does not constitute a sufficient injury to sustain a claim for relief. A minority position exists finding that an individual need not actually suffer identity theft before bringing a cognizable claim. So far, this issue primarily has played out in the context of standing in federal courts. Georgia courts have not generated significant authority on the

issue, but, at present, appear to follow the majority view, as set forth below.

II. Article III Standing

Article III of the United States Constitution limits jurisdiction of federal courts to *cases* or *controversies*.¹¹ It is a threshold question in every federal case that must be determined at the time when the plaintiff files his complaint.¹² To establish Article III standing, a plaintiff must first demonstrate an injury in fact.¹³ The injury in fact is an invasion of a legally-protected interest that is concrete and particularized.¹⁴ The injury must be actual or imminent at the time the suit is filed and cannot be conjectural or hypothetical.¹⁵ In addition to injury in fact, a plaintiff also must show a causal connection between the injury and the conduct complained of, as well as a likelihood that the injury will be redressed by a favorable decision.¹⁶

The seminal case on whether an increased risk of harm of identity theft is a cognizable injury is *Clapper v. Amnesty International USA*.¹⁷ Prior to *Clapper*, various courts, including the Northern District of Georgia, found that the future risk of identity theft following a data breach was insufficient to prove injury in fact.¹⁸ In siding with defendants, courts generally found the threat of future harm too speculative when it relied upon future acts of unknown third parties (i.e. hackers and fraudsters) to misuse the data to a plaintiffs' detriment.¹⁹ Courts also have held that plaintiffs cannot claim mitigation expenses (e.g. out-of-pocket payments for credit monitoring) as an injury

absent some cognizable allegation of identity theft to show that such expenses were necessary.²⁰ On the other hand, the United States Courts of Appeals for the Seventh and the Ninth Circuits held that the risk of future identity theft was sufficient to establish an injury in fact.²¹ In *Krottner v. Starbucks Corporation*, the Ninth Circuit found a “credible threat of real and immediate harm” after a company laptop with unencrypted PII had been stolen despite there being no allegation that any PII had been misused.²² The *Krottner* court made no findings with respect to the role of third parties actually misusing the stolen data. The mere fact that the laptop had been stolen was sufficient in and of itself to constitute an imminent risk of harm.²³

Clapper was actually not a data breach case and did not involve issues of identity theft. Instead, *Clapper* concerned an amendment to the Foreign Intelligence Surveillance Act (FISA).²⁴ The amendment authorized government surveillance of individuals who were not “United States persons” and believed to be located outside the United States.²⁵ Respondents, who engaged in communications with potential targets, filed suit on the day FISA was amended (i.e. before any communications were intercepted) challenging its constitutionality.²⁶ They alleged injury in fact based on the objectively reasonable likelihood that their communications with potential targets would be intercepted at some point in the future.²⁷ They also claimed injury because they had already taken costly and burdensome

measures to protect the confidentiality of their communications.²⁸

In rejecting the first ground, the Court stated that the threatened injury must be “certainly impending to constitute injury in fact” and “allegations of possible future injury are not sufficient.”²⁹ The Court found the respondents’ “speculative chain of possibilities d[id] not establish that injury based on a potential future surveillance is certainly impending ...”³⁰ In reaching its decision, the Court highlighted its reluctance to endorse standing theories that rely on speculation about the decisions of independent actors.³¹ With respect to the second ground, costs incurred to protect their communications, the Court rejected the respondents’ attempt to “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”³²

Echoing many of the points raised in the majority of courts finding no injury in data breach cases, the *Clapper* decision seemed destined to end the debate on whether an increased risk of identity theft could constitute an injury in fact. In *Strautins v. Trustwave Holdings, Inc.*, for instance, the district court reasoned that identity theft concerns depend on a number of variables involving third parties.³³ Like the Supreme Court’s assessment in *Clapper*, the district court noted that identity theft depends on whether the stolen data was subsequently sold or transferred, whether anyone who obtained the data attempted to use it,

and whether or not he succeeded.³⁴ According to the district court, the plaintiffs' complaint in that case, which was "filed less than three weeks after the data breach ... provide[d] no basis to believe that any of these events have come to pass or are imminent."³⁵ Likewise, in *Peters v. St. Joseph Services Corp.*, the district court rejected the plaintiff's claims while pointing out that she could not describe her purported injury without beginning the explanation with the word "if".³⁶ She would be harmed in the future *if* third parties formed an intent misuse the stolen data and *if* they actually misused the data to commit identity theft.³⁷ Such threatened injury was not "certainly impending" as required to constitute an injury in fact.³⁸

Notwithstanding *Clapper*, a minority number of courts has continued to recognize that an increased risk of identity theft following a data breach is sufficient to demonstrate an injury for purposes of standing.³⁹ The case of *In re Adobe Systems, Inc. Privacy Litigation* provides perhaps the most illuminating rationale for this conclusion.⁴⁰ In *Adobe*, hackers targeted Adobe's servers and spent weeks collecting customers' PII and personal financial information (PFI) as well as the company's proprietary source code. The district court stated there was no "need to speculate as to whether the hackers intend to misuse the personal information ...or whether they will be able to do so."⁴¹ In support, the district court noted hackers intentionally targeted Adobe, and the stolen source code (but not customer

PII or PFI) had already surfaced on the internet.⁴² More tellingly, the district court highlighted the inherent difficulty for plaintiffs bringing suits under a future risk of identity theft. "[T]o require Plaintiffs to wait until they actually suffer identity theft ...in order to have standing would run counter to the well-established principle that harm need not have already occurred or be literally certain in order to constitute injury-in-fact."⁴³

III. Georgia

Many high-profile data breach cases end up in federal court not because they involve federal questions.⁴⁴ Instead, jurisdiction is typically based upon the Class Action Fairness Act of 2005, which relaxed diversity requirements for class actions involving more than \$5,000,000.⁴⁵ As a result, cases involving data breaches and future risk of harm should not be considered issues reserved solely for federal courts as they are based primarily on state law claims. Still, not too many data breach and identity theft cases have been addressed by Georgia's appellate courts. To date, no Georgia appellate court has expressly addressed the split in authority on the issue of increased risk of future identity theft in data breach cases. In fact, the issue of standing in Georgia state courts typically applies to constitutional challenges.⁴⁶ Still, as in Article III courts, Georgia law requires that a plaintiff suffer a cognizable injury in order to bring a claim.

The few cases that have dealt with the issue of future harm indicate that Georgia courts are more likely to

align with the majority view that increased risk of harm is not a sufficient injury to support a claim for relief. In *Finnerty v. State Bank & Trust Company*, a bank sued Finnerty for defaulting on a note.⁴⁷ Finnerty counterclaimed alleging, inter alia, negligence and invasion of privacy based on the bank's inclusion of his social security number in an exhibit to the complaint. He alleged that he suffered an increased risk of identity theft as a result of the public disclosure.⁴⁸ Based on Georgia law, the Georgia Court of Appeals reiterated that "a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience."⁴⁹ Finnerty failed to show the disclosure made it probable that he would suffer any identity theft or that any specific persons actually accessed his personal information and the Court of Appeals concluded that a "fear of future damages [was] too speculative to form the basis for recovery."⁵⁰

In *Rite Aid v. Peacock*, a detective sued his former pharmacist for selling his information to a neighboring Walgreens pharmacy.⁵¹ The Court of Appeals held that the detective had failed to prove any physical or financial injury, nominal or otherwise, flowing from the allegedly illegal sale of his information. In dicta, the Court of Appeals noted that "Peacock can only speculate that criminals he has had a hand in apprehending may associate with a Walgreens employee having access to his prescription information,

given the absence of evidence that a Walgreens employee has harmed him ... by misuse of that information."⁵² In line with the majority of federal courts, Rite Aid suggests not only is some actual injury required, but also speculation on the conduct of third-party criminals will not suffice.

Georgia cases not involving allegations of identity theft also may be helpful to an analysis of future harm in this context. For instance, the Supreme Court of Georgia affirmed a finding for the American Red Cross after the plaintiff failed to prove actual exposure to HIV following a blood transfusion.⁵³ Plaintiff's fear of exposure to the virus was insufficient to establish actionable damages suffered by the plaintiff.⁵⁴ In another case involving exposure to insecticide, the Court of Appeals held that the plaintiff was required to show an increased risk of developing cancer to a degree of "reasonable medical certainty."⁵⁵ Evidence that exposed children would require monitoring in the future was not sufficient to permit recovery of damages.⁵⁶

IV. Conclusion

Outside of a minority of courts, litigants racing to the courthouse following a data breach will continue to face major obstacles in attempting to litigate their claims. While it may seem somewhat perverse to insulate businesses from accountability based on what hackers and fraudsters are able to do with stolen data, it would appear equally perverse to hold businesses accountable for a harm that may never materialize.

End Notes

¹ See, e.g., *Corona v. Sony Pictures Entm't, Inc.*, No. 2:14-CV-09600-RGK-SH (C.D. Cal. filed Dec. 15, 2014).

² *Solakv. The Home Depot, Inc.*, No. 1:14-CV-02856-TWT (N.D. Ga. filed Sept. 4, 2014).

³ With the increasing number of data breaches reported, a phenomenon known as data breach fatigue has set in. At least one report indicates about a third of consumers notified that their information had been compromised in a breach took no action to protect themselves from fraud thereafter. Experian, 2015 Second Annual Data Breach Industry Forecast 3 (2015), available at <http://www.experian.com/assets/data-breach/white-papers/2015-industryforecast-experian.pdf?ga=l.172114915.1943093614.1418003182>.

⁴ At the time of drafting this article, Alabama, New Mexico, and South Dakota were the only states without a breach notification law.

⁵ Health Information Technology for Economic and Clinical Health Act, 42 U.S.C. § 17932.

⁶ O.C.G.A. § 10-1-912.

⁷ O.C.G.A. § 10-1-911(2).

⁸ O.C.G.A. § 10-1-911(3).

⁹ See *id.*

¹⁰ California recently amended its privacy laws to seemingly require monitoring services. Cal. Civ. Code § 1798.82(d)(2)(G) (Deering 2015). The section reads, “[i]f the person or business providing the notification was the source of the breach, an offer to provide appropriate identity theft prevention and mitigation services, if any, shall be provided at no cost to the affected person for not less than 12 months, along with all information necessary to take advantage of the offer to any person whose information was or may have been breached...” *Id.* The “if any” language, however, arguably only mandates that such services be provided at no cost *if* offered rather than requiring an entity to provide identity theft protection services after every breach.

¹¹ *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264 (11th Cir. 2011) (citing U.S. Const.art. III, § 2).

¹² *Worth v. Seldin*, 422 U.S. 490, 498 (1975); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003).

¹³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 560-61.

¹⁷ 133 S. Ct. 1138 (2013).

¹⁸ See, e.g., *Irwin v. RBS Worldpay, Inc.*, 1:09-CV-0033-CAP, 2010 U.S. Dist. LEXIS 145301, at *13-15 (N.D. Ga.2010).

¹⁹ See, e.g., *Willingham v. Global Payments, Inc.*, L12-CV-01157-RWS-JFK, 2013 U.S. Dist. LEXIS 27764, at *20 (N.D. Ga. 2013).

²⁰ See, e.g., *Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011).

²¹ *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007).

²² *Krottner*, 628 F.3d at 1143.

²³ *Id.*

²⁴ 50 U.S.C. § 1881a.

²⁵ *Clapper*, 133 S. Ct. at 1142.

²⁶ *Id.* at 1140.

²⁷ *Id.* at 1143.

²⁸ *Id.*

²⁹ *Id.* at 1147.

³⁰ *Id.* at 1150.

³¹ *Id.*

³² *Id.* at 1151.

³³ 27 F. Supp. 3d 871, 876 (N.D. 111. 2014).

³⁴ *Id.*

³⁵ *Id.*

³⁶ 4:14-CV-2872, 2015 U.S. Dist. LEXIS 16451, at *14 (S.D. Tex. February 11, 2015).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, e.g., *In re Sony Gaming Network & Customer Data Sec. Breach Litig*, 996 F. Supp. 2d 942, 961-62 (S.D. Cal. 2014); *Moyer v. Michaels Stores, Inc.*, 14-C-561, 2014 U.S. Dist. LEXIS 96588, at *13-19 (N.D. 111. 2014).

⁴⁰ 13-CV-05226-LHK, 2014 U.S. Dist. LEXIS 124126 (N.D. Cal. 2014).

⁴¹ *Adobe*, 2014 U.S. Dist. LEXIS 124126, at *28.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 28 U.S.C. § 1331.

⁴⁵ 28 U.S.C. § 1332(d)(2). See, e.g., *Corona v. Sony Pictures Entm't, Inc.*, 2:14-CV-09600-RGK-SH (C.D. Cal. filed Dec. 15, 2014).

⁴⁶ See, e.g., *Manlove v. Unified Gov't of Athens*, 285 Ga. 637, 638 (2009).

⁴⁷ 301 Ga. App. 569, 572 (2009), *overruled on other grounds* by *Cumberland Contractors, Inc. v. State Bank & Trust Co.*, 327 Ga. App. 121, 126 (2014).

⁴⁸ *Id.*

⁴⁹ *Id.* (citing *Dry Storage Corp. v. Piscopo*, 249 Ga. App. 898, 900 (2001)).

⁵⁰ *Id.* (citing *Killian v. Green Tree Servicing, LLC (In re Killian)*, 05-14629-HB, 2009 Bankr. LEXIS 2030, at *27-29 (Bankr. D.S.C. 2009)).

⁵¹ 315 Ga. App. 573,576(2012).

⁵² *Id.* at 576-77.

⁵³ *Johnson v. Am. Nat'l Red Cross*, 276 Ga. 270 (2003).

⁵⁴ *Id.* at 275.

⁵⁵ *Boyd v. Orkin Exterminating Co., Inc.*, 381 S.E.2d 295, 298 (1989), *overruled on other grounds* by *Hanna v. McWilliams*, 213 Ga. App. 648 (1994).

⁵⁶ *Id.*

The False Claims Act: It's More Than Just Healthcare

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entities and individuals in various other industries, including technology and software companies, and defense and highway contractors. Even professional cyclist Lance Armstrong is a defendant in a pending FCA *qui tam* brought by his former teammate Floyd Landis, based on allegations that Armstrong used performance-enhancing drugs while accepting sponsorship money from the U.S. Postal Service.⁴

I. Introduction

In the fiscal year ending September 30, 2014, the United States Department of Justice (“DOJ”) collected \$5.69 billion in settlements and judgments under the federal False Claims Act (“FCA”), the majority of which was the result of actions filed under the FCA’s whistleblower (or *qui tam*) provisions.¹ Despite popular belief that FCA investigations and litigation are confined to the healthcare industry, less than half of the DOJ’s total FCA recoveries in 2014 were obtained in healthcare matters.²

The largest portion of FCA recoveries in 2014—\$3.1 billion—were in housing and mortgage fraud matters.³ Another nearly \$300 million came from settlements and judgments against

Because the FCA can be used as a tool against any person or entity that receives money from the federal government, it is important that all defense lawyers—not just healthcare lawyers—have a general understanding of the FCA, including what type of conduct could lead to FCA liability and what to do when a client becomes the target of an FCA investigation.

II. The FCA Today: A Brief Overview

The current version of the FCA provides for the imposition of per-claim penalties of between \$5,500 and \$11,000, as well as treble damages, against any person who:

- Knowingly presents, or causes to be presented, a

- false or fraudulent claim for payment or approval;⁵
- Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;⁶
- Has possession, custody, or control of property or money used, or to be used, by the government and knowingly delivers, or causes to be delivered, less than all of that money or property;⁷
- Makes or delivers a document certifying the receipt of property used, or to be used, by the government without completely knowing that the information on the receipt is true;⁸
- Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge property;⁹
- Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money to the government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government;¹⁰ or

- Conspires to do any of the foregoing.¹¹

Although the FCA is often described as a “fraud” statute, the FCA expressly provides that no proof of specific intent to defraud is required to prove an FCA violation.¹² Instead, an FCA defendant must only act “knowingly,” which the FCA defines as acting with actual knowledge, reckless disregard, or deliberate ignorance.¹³

An FCA action may either be brought directly by the DOJ or by a private person, known as a “relator.”¹⁴ A relator in a *qui tam* action under the FCA is typically entitled to an award equal to 15% and 25% of the government’s recovery if the government proceeds with (or “intervenes in”) the action, and between 25% and 30% if the government declines to intervene.¹⁵ The FCA also provides for relief from retaliation against an FCA relator including reinstatement, two-times back pay plus interest, compensation for any special damages, costs and attorneys’ fees.¹⁶

The FCA has a broad venue provision, permitting an FCA action to be brought in any judicial district in which the defendant, or in the case of multiple defendants, any one defendant, can be found, resides, transacts business, or in which the prohibited conduct in question occurred.¹⁷ The FCA’s statute of limitations is the later of six years from the date of the violation or three years from the

date the material facts are known or reasonably should be known to a responsible federal government official, not to exceed ten years from the date of the violation.¹⁸

III. History of *Qui Tam* Provisions and the FCA

A. *Qui Tam* Provisions Under English and Colonial Law

The term “*qui tam*” is short for “*qui tam pro domino rege quam pro se ispo in hac parte sequituri*,” which means “who pursues this action on our Lord the King’s behalf as well as his own.”¹⁹ According to the Congressional Research Service, the earliest known example of a *qui tam* provision was in 695 when King Wihtred of Kent issued a declaration which stated that “[i]f a freeman works during the forbidden time [i.e., the Sabbath], he shall forfeit his healsfang, and the man who informs against him shall have half the fine, and [the profits arising] from the labour.”²⁰ By the sixteenth century, statutes containing *qui tam* provisions were common under English law.²¹ The proliferation of *qui tam* provisions in England led to the rise of professional informers (often referred to today as “serial relators”), who developed an unsavory reputation as “varlets.”²² Sir Edward Coke, in his *Institutes of Laws of England*, described these professional informers as “viperous Vermin’ preying upon the

Chinch and the Commonwealth.”²³ According to Coke, the professional informers were “a class of unruly men.”²⁴

In colonial America, several colonial legislatures passed laws containing *qui tam* provisions. For example, a 1686 law from the Colony of Massachusetts imposed penalties for fraud in the sale of bread and provided that the inspector who discovered the fraud would be entitled to one-third of the recovery.²⁵ The Colony of New York passed legislation in 1715 which imposed penalties for taking oysters out of season and provided that half of the recovery go to the informer.²⁶ *Qui tam* statutes were also passed in colonial Connecticut and Virginia.²⁷

B. Birth of the FCA

The FCA was originally enacted in 1863 as a result of contractors selling subpar goods to the Union Army during the Civil War.²⁸ In the beginning, “the law was used to recover monies from unscrupulous contractors who sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunitions, and rancid rations and provisions.”²⁹ The original FCA was often referred to as the “Lincoln Law”, nicknamed after President Lincoln, who once said: “Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the south and their countrymen are moldering in the

dust.”³⁰ Originally, relators were entitled to half of the government’s recovery.³¹

C. The FCA’s Near Death Experience

During World War II, Attorney General Francis Biddle asked Congress to repeal the *qui tam* provisions of the FCA, explaining that *qui tam* actions had “become mere parasitical actions, occasionally brought only after law-enforcement offices have investigated and prosecuted persons guilty of a violation of law and solely because of the hope of a large reward.”³² Although both Houses of Congress actually voted to repeal the FCA’s *qui tam* provisions, Congress ultimately softened its stance and instead passed legislation that kept—but severely curtailed—the FCA’s *qui tam* provisions.³³ Among the major amendments were the “government knowledge bar”—precluding *qui tam* suits based on information already in the government’s possession—and a reduction of the relator’s share from 50% to no more than 25% (or 10% if the government litigated the case).³⁴

D. The FCA’s Rebirth

In 1986, President Reagan signed into law several major amendments to the FCA, which were crafted by Iowa Senator Chuck Grassley.³⁵ Senator Grassley drafted the amendments in response to instances of fraud, waste, and abuse, including reports of \$900 toilet seats and \$500

hammers being sold to the federal government, including the Department of Defense.³⁶ According to Senator Grassley, his 1986 amendments “restored the teeth and breathed new life into a law that was designed to do nothing but to protect all American taxpayers.”³⁷ Among the 1986 amendments were provisions protecting FCA relators from retaliation, increasing FCA damages and penalties, adding a “reverse false claims” provision (discussed more below), increasing the relator’s award, eliminating the government knowledge bar, and expanding the statute of limitations.³⁸ Since Senator Grassley’s 1986 amendments, the federal government has recovered over \$30 billion under the FCA.³⁹

E. 2009 Amendments

The next significant date in the life of the FCA was 2009, when the Fraud Enforcement and Recovery Act (“FERA”) was signed into law. FERA contained several important amendments to the FCA, including clarifying that a false claim need not be submitted directly to a federal officer or employee, defining materiality to encompass false statements having a “natural tendency” to influence payment, expansion of the conspiracy provision to apply to all substantive FCA violations, and – perhaps most significantly—expansion of the “reverse false claims” provision to expand FCA liability for knowingly and improperly avoiding or decreasing

an obligation to pay or transmit money or property to the government, including the retention of an overpayment.⁴⁰ These amendments reinforced Senator Grassley's 1986 amendments and solidified the FCA as the government's fraud-fighting statute of choice.

F. The Affordable Care Act and the FCA

In 2010, President Obama signed into law the Patient Protection and Affordable Care Act. Although better known for its provisions regarding access to health insurance, the Affordable Care Act also contained a number of provisions amending, or otherwise affecting, the FCA. Among these provisions were amendments to the FCA's public disclosure bar and original source rule (discussed in more detail below).⁴¹

IV. The Nuts and Bolts of an FCA Investigation

A. The Seal Period in *Qui Tam* Actions

Although the DOJ can initiate an FCA investigation on its own accord (these investigations are often triggered by a referral from a federal agency or a civilian tip), most FCA investigations begin with the filing of a qui tam complaint by a relator.⁴² *Qui tam* complaints are brought in the name of the government and are filed in federal district court in camera and under seal.⁴³ The

complaint remains under seal for at least 60 days while the government investigates, and is not served on the defendant until the court orders.⁴⁴

Once the relator serves the government with a copy of the complaint and a written disclosure statement, the clock begins for the government to investigate and determine whether it wants to proceed with and conduct ("intervene in") the action, or decline to take over the action, in which case the relator has the right to conduct the action unless the government moves to dismiss.⁴⁵ Although the FCA gives the government only 60 days to investigate and make its intervention decision, the government almost always avails itself of its statutory right to ask the court for extensions of that deadline.⁴⁶ Although DOJ attorneys are encouraged to make an intervention decision in less than a year, the average length of an FCA investigation was around two years in 2011 (the last year this statistic is publicly available), and FCA investigations often last considerably longer.⁴⁷

In recent years, however, federal district court judges have begun to express frustration with the amount of time FCA investigations are taking. In 2012, for example, Judge Harry Mattice of the Eastern District of Tennessee issued a scathing opinion in which he stated that the government in that case had

stretched the FCA’s “under seal” requirement “to its breaking point.”⁴⁸ Judge Mattice stated that the government had used the seal period as a means to conduct “unchecked” and “one-sided” discovery, a practice that he noted was neither contemplated by Congress nor authorized by the FCA.⁴⁹

B. Document Production

In most FCA investigations, the defendant’s first indication that the government is conducting such an investigation is when it receives a request for documents. Although such requests sometimes come in the form of an informal request such as a letter from the Department of Justice or the local U.S. Attorney’s Office, most of the time the request is in the form of an inspector general (“IG”) subpoena or Civil Investigative Demand (“CID”). The Inspector General Act of 1978 gives the Offices of Inspector General of the various federal agencies the authority to issue subpoenas for documents.⁵⁰ So, for example, where the Department of Defense (“DoD”) Office of Inspector General is investigating a potential FCA violation affecting the DoD, it may issue a DoD IG subpoena for documents.

In addition to an IG subpoena, an FCA defendant—or any other person who might have custody of relevant documents—might receive a CID for documents. The FCA permits the DOJ to issue

a CID to any person who “may be in possession, custody, or control of any documentary material or information relevant to” an FCA investigation.⁵¹ Prior to 2009, only the Attorney General had the authority to issue a CID, obviously limiting the number of CIDs that were issued every year.⁵² The 2009 FERA amendments, however, allowed the Attorney General to delegate this authority, and the DOJ did just that in 2010, delegating the FCA’s CID authority to each United States Attorney.⁵³

Similar to a subpoena, a CID must contain a sufficient description of the documents it seeks and a deadline for production of those documents, which cannot be less than twenty days after the date of service.⁵⁴ A CID can be served anywhere in the country,⁵⁵ and the DOJ can seek to enforce a CID in the district court in the district in which the recipient is located.⁵⁶ Although both IG subpoenas and CIDs contain a production deadline, as with document requests under the Federal Rules of Civil Procedure, in most FCA investigations, the recipient can negotiate an extension of the production deadline, a “rolling” production of documents, or a limitation of the documents requested.

C. Witness Interviews

In almost every FCA investigation, the government also conducts witness interviews, both formally and informally. An informal interview is typically

accomplished by a federal law enforcement agent, DOJ investigator, DOJ attorney, or a combination thereof, either calling the witness or showing up at the witness' home or place of business unannounced. Frequently, such informal interviews will be of former employees of the defendant or other individuals with potentially relevant information.

The DOJ also often requests an interview of the defendant or—in the case of an entity—a current employee of the defendant. Although the government should typically not contact a witness once the government lawyer knows that the witness is represented by counsel,⁵⁷ or knows that the witness is employed by an organization that is represented by counsel,⁵⁸ the government may request an informal interview of a current employee through the organization's counsel, or by serving a CID for testimony. Like a CID for documents, a CID for testimony can be served nationwide on anyone with potentially relevant information.⁵⁹ Although a CID for testimony is not subject to Federal Rule of Civil Procedure 30, it is very similar to a deposition taken under that rule. The testifying witness has the right to the presence of an attorney who may advise the witness and object when appropriate, and the testimony is under oath and taken before a court reporter.⁶⁰ Also similar to a deposition conducted under the Federal Rules, the witness has the right to read the

transcript and make any appropriate changes.⁶¹

D. Other Investigative Tools and Techniques

Other tools and techniques that the government uses in FCA investigations include CIDs for answers to written interrogatories,⁶² the use of undercover agents and hidden recording devices, and various types of data analysis. As technology advances and fraud schemes become more sophisticated, so do the tools the government uses to investigate allegations of fraud or other wrongdoing.

V. Recent FCA Activity Outside of the Healthcare Industry

Although the majority of FCA activity involves healthcare providers, as discussed, the FCA is potentially implicated any time a person or entity receives federal money or property. Recent examples of FCA investigations and resolutions outside of the healthcare industry include:

A. Mortgage/Banking Fraud

In 2012, the DOJ (led by U.S. Attorney for the Eastern District of New York Loretta Lynch) announced a \$1 billion FCA settlement with Bank of America ("BoA") and Countrywide Financial Corporation (a BoA subsidiary) to resolve claims that BoA and

Countrywide violated the FCA by knowingly making loans insured by the Federal Housing Administration (“FHA”) to unqualified homebuyers.⁶³ According to the DOJ press release, the FHA incurred hundreds of millions of dollars in damages as a result of BoA and Countrywide’s submission of inflated appraisals to the FHA.⁶⁴

On December 31, 2014, the U.S. Attorney’s Office for the Southern District of New York announced a similar settlement with Golden First Mortgage Company and its owner/President, who paid \$36 million and \$300,000, respectively, to resolve allegations that they fraudulently certified compliance with FHA regulations and violated the FCA by originating and underwriting FHA loans that should not have been approved.⁶⁵ Earlier this year, MetLife Home Loans agreed to pay nearly \$125 million to resolve an FCA case with similar allegations.⁶⁶

B. Defense and Other Government Contractor Fraud

As discussed, the FCA was signed into law during the Civil War to fight defense contractor fraud against the Union Army. The government continues to use the FCA to investigate allegations of fraud by defense contractors. For example, in December 2014, Lockheed Martin agreed to pay \$27.5 million to resolve allegations that it violated the FCA by knowingly overbilling the

government for work performed by Lockheed employees who lacked job qualifications.⁶⁷ According to the DOJ’s press release, Lockheed violated the terms of their contracts with the DoD by using under-qualified employees who were billed to the government at the rates of more qualified employees.⁶⁸

In October 2014, a ship repair company paid \$1 million to resolve allegations that it violated the FCA by establishing a “front company” in order to be awarded Coast Guard contracts that were designated for Service Disabled Veteran Owned Small Businesses.⁶⁹ That same month, an antenna and radio system company paid \$10 million to resolve an FCA case alleging that it misrepresented certain facts during contract negotiations with the Army.⁷⁰ In March 2014, a California company paid \$500,000 to resolve allegations that it violated the FCA by falsely certifying that products it sold to the U.S. Army were manufactured in the United States as required by the Buy American Act.⁷¹

Government contractors outside of the defense industry have also found themselves on the wrong side of FCA investigations. Late last year, for example, Iron Mountain paid over \$44 million to settle allegations that it overcharged federal agencies for record storage services under General Services Administration (“GSA”) contracts.⁷² In May 2014,

two highway contracting companies—one based in Georgia—paid \$400,000 to settle allegations of false certification related to the Department of Transportation’s Disadvantaged Business Enterprise (“DBE”) program.⁷³

C. Evasion of Customs Duties

The government has used the FCA on a number of recent occasions to investigate companies for improperly evading customs duties. In February 2015, for example, the DOJ collected over \$3 million from three companies accused of evading customs duties on imports of aluminum extrusions from China by misrepresenting the country of origin of the imported products.⁷⁴ In 2014, an importer of computer cable assemblies paid over \$1 million to settle an FCA investigation related to allegations that it submitted deflated invoices in order to underpay custom duties.⁷⁵

D. Bid-Rigging and Kickbacks

Engaging in anticompetitive behavior such as bid-rigging and paying kickbacks in relation to government contracts can also lead to FCA liability. In late 2014, for example, a New York-based environmental remediation firm paid nearly \$3 million to resolve an FCA suit alleging that it accepted kickbacks and rigged bids, and passed inflated charges on to the EPA in connection with work

performed at a federal Superfund site.⁷⁶ In 2012, the DOJ announced a \$47 million FCA settlement with Harbert Corporation and other companies resulting from allegations that they violated the FCA by rigging bids on government contracts.⁷⁷

E. Other Non-Healthcare-Related FCA Settlements

There have been dozens of other non-healthcare-related FCA settlements in the last several years. In April 2015, a Florida company and its owner agreed to pay \$250,000 plus a percentage of future revenues to resolve allegations that they falsely certified that an office was located in a Small Business Administration-designated Historically Underutilized Business Zone by setting up an unmanned “virtual office” in that location.⁷⁸ The previous month, Fireman’s Fund Insurance Company paid \$44 million to settle FCA allegations that it knowingly issued federally reinsured crop insurance policies that were ineligible for federal reinsurance.⁷⁹ The same month, a panel of the Eleventh Circuit partially revived an FCA *qui tam* against Kaplan University for allegedly violating the Higher Education Act’s ban on universities paying bonuses to recruiters based on the number of students enrolled.⁸⁰

VI. FCA Litigation and Common Defenses

A. Government Intervention

Although the vast majority of FCA investigations result in a resolution without the necessity of litigation—largely because of the potentially devastating consequences of losing, including treble damages, per-claim penalties, attorneys’ fees, and the potential for program exclusion/debarment—if the government, the relator, and the defendant cannot reach a settlement prior to the intervention deadline,⁸¹ the government must either decide to proceed with the case in district court, or decline to do so and allow the relator to move forward with the case on its behalf.⁸² If the government does intervene in the action, it may file its own complaint or amend the relator’s *qui tam* complaint.⁸³

B. Common Defenses

Rule 9(b): In the vast majority of FCA cases that result in litigation, the defendant files a motion to dismiss for failure to allege fraud with particularity under Federal Rule of Civil Procedure 9(b). Federal courts in all circuits require *qui tam* complaints to satisfy Rule 9(b), although circuit courts disagree on how to apply Rule 9(b) to FCA complaints.⁸⁴ The Eleventh Circuit has held that an FCA complaint must plead “facts as to time, place and substance of the defendant’s

alleged fraud,” specifically “the details of the defendant’s allegedly fraudulent acts, when they occurred, and who engaged in them.”⁸⁵

C. Public Disclosure

The public disclosure requires a court to dismiss an FCA *qui tam* action if “substantially the same allegations or transactions” alleged in the action were publicly disclosed in a federal criminal, civil, or administrative hearing which the government or its agent is a party; in a congressional, Government Accountability Office, or other federal report, hearing, audit, or investigation; or from the news media.⁸⁶ Courts have applied the public disclosure bar broadly. For example, the Supreme Court has held that the word “report” in the public disclosure bar means “something that gives information” or a “notification.”⁸⁷ The Eleventh Circuit has held that a publicly available website qualifies as “news media” for purposes of the public disclosure bar.⁸⁸

Importantly, the public disclosure bar does not apply to actions brought directly by the DOJ, and the government can veto the use of the public disclosure bar in a *qui tam* action.⁸⁹ Finally, the public disclosure bar does not apply where the relator is the “original source” of the information, meaning that the relator either voluntarily disclosed the information to the government prior to a public disclosure, or has knowledge that is “independent of

and materially adds to” the publicly disclosed information and voluntarily provided the information to the government before filing the action.⁹⁰

D. First to File

Another defense available to FCA defendants in a *qui tam* action is the FCA’s first to file bar. That bar provides that “[w]hen a person brings a [*qui tam* action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”⁹¹ Like the public disclosure bar, the first to file bar applies only to *qui tam* actions, not direct government actions.⁹²

VII. Conclusion

The government’s continued success in collecting billions of dollars in so-called “fraud” recoveries in industries other than healthcare means that non-healthcare attorneys are now learning what healthcare attorneys have known for quite some time: that the FCA remains, and will remain, one of the government’s most powerful tools to go after those who accept money from the government—whether in exchange for decrepit horses, \$900 toilet seats, or lucrative defense contracts—without following the myriad of government rules and regulations.

End Notes

¹<http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>

² *Id.*

³ *Id.*

⁴<http://www.justice.gov/opa/pr/united-states-joins-lawsuit-alleging-lance-armstrong-and-others-caused-submission-false>.

⁵ 31 U.S.C. § 3729(a)(1)(A).

⁶ 31 U.S.C. §3729(a)(1)(B).

⁷ *Id.* §3729(a)(1)(D).

⁸ *Id.* § 3729(a)(1)(E).

⁹ *Id.* §3729(a)(1)(F).

¹⁰ *Id.* § 3729(a)(1)(G).

¹¹ *Id.* § 3729(a)(1)(G).

¹² *Id.* § 3729(a)(1)(C).

¹³ *Id.* § 3729(b)(1)(A).

¹⁴ *Id.* §3730(a), (b).

¹⁵ *Id.* §3730(d)(1), (2).

¹⁶ *Id.* §3732(h)

¹⁷ *Id.* §3732(a)

¹⁸ *Id.* §3731(b)

¹⁹ *Vt. Agency Natural Res.V.United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000).

²⁰ Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, Congressional Research Service (Aug. 6, 2009), at p. 2.

²¹ *Id.*

²² Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 North Carolina Law Review 539, 577-78 (2000).

²³ *Id.* at 578 (quoting Edward Coke, the Third Part of the Institutes of the Laws of England, at 194).

²⁴ Doyle, *supra*, at p. 2.

²⁵ *Id.* at n.14 (citing Colonial Laws of Massachusetts 8 (1686)).

²⁶ *Id.* (citing 1 Collnial Laws of New York, 1664-1719, 845 (1715)).

²⁷ *Id.*

²⁸<http://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986>.

²⁹ *Id.*

³⁰<http://www.michbar.org/journal/pdf/pdf4article1590.pdf>

³¹ Section 6, Act of March 2, 1863, 12 Stat. at 698.

³² Doyle, *supra*, at p. 6 (quoting S. Rept. No. 77-1708, at 2; H. Rept. No. 78-263 at 2).

³³ *Id.* at 6-7.

³⁴ *Id.* at 7.

³⁵<http://www.okbar.org/members/BarJournal/archive2005/Aprarchive05/obj7612fal.aspx>

³⁶ *Id.*

³⁷ Congressional Record—Senate, Vol. 155, Pt. 4, at 5458 (Feb. 24, 2009).

³⁸ Doyle, *supra*, at pp. 7-8.

³⁹<http://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986>.

⁴⁰ Doyle, *supra*, at p. 8

⁴¹<http://www.greenellp.com/wp-content/uploads/2011/04/Michael-Tabb-PPACA-Amendments.pdf>.

⁴² In addition to collecting nearly \$6 billion in FCA recoveries in 2014, the DOJ reported that over 700 new qui tarn complaints were filed last year alone. [http://www.justice.gov/opa/pr/justice-](http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014)

department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

⁴³ 31 U.S.C. § 3730(b).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷<http://www.mainjustice.com/2011/07/27/length-of-fraud-probes-frustrating-congress-judges-and-attorneys/>

⁴⁸ *United States ex rel. Martin v. Life Care Centers of America, Inc.*, 912 F. Supp. 2d 617, 623 (E.D. Tenn. 2012).

⁴⁹ *Id.* at 623-24.

⁵⁰ 5a U.S.C. App. § 6.

⁵¹ 31 U.S.C. §3733(a)(1).

⁵² 31 U.S.C. §3733(a)(1) (2008).

⁵³ 75 Fed. Reg. 14070, 14072 (Final Rule March 24, 2010).

⁵⁴ 31 U.S.C. §3733(a)(2)(B),(E).

⁵⁵ 31 U.S.C. §3733(c)(1).

⁵⁶ 31 U.S.C. §3733(j).

⁵⁷ See Model R. Prof. Cond. 4.2. Georgia Rule of Professional Conduct 4.2(b) expressly makes this rule applicable to attorneys for the state and federal governments.

⁵⁸ Comment 7 of Model Rule 4.2, *supra*, states that in the case of a represented organization, the Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Comment 4A to the Georgia Rule contains similar language. Although the Rules permit a government lawyer to interview a former employee of a represented organization, in Georgia there are

limitations, including that the information sought must not be privileged, the lawyer must make full disclosure as to the identify of his/her client, and the former employee must consent. See Georgia Formal Advisory Opinion No. 94-3.

⁵⁹ 31 U.S.C. § 3733(a)(c).

⁶⁰ 31 U.S.C. § 3733(h).

⁶¹ *Id.*

⁶² *Id.* § 3733(a)(1)(B)

⁶³<http://www.justice.gov/usao/nye/pr/2012/2012feb09.html>.

⁶⁴ *Id.*

⁶⁵<http://www.justice.gov/usao/nys/pressreleases/December14/GoldenFirstSettlementPR.php>.

⁶⁶<http://www.justice.gov/opa/pr/metlife-home-loans-llc-successor-metlife-bank-na-pay-1235-million-resolve-alleged-federal>.

⁶⁷<http://www.justice.gov/opa/pr/defense-contractor-agrees-pay-275-million-settle-overbilling-allegations>.

⁶⁸ *Id.*

⁶⁹<http://www.justice.gov/opa/pr/north-florida-shipyards-pay-1-million-resolve-false-claims-allegations>.

⁷⁰<http://www.justice.gov/opa/pr/first-rf-corporation-agrees-pay-10-million-resolve-false-claims-act-allegations>.

⁷¹<http://www.justice.gov/usao/cac/Pressroom/2014/033a.html>.

⁷²<http://www.justice.gov/opa/pr/iron-mountain-companies-pay-445-million-settle-alleged-false-billings-storing-government>.

⁷³<http://www.justice.gov/usao-sc/pr/construction-firms-pay-settle-alleged-false-claims-connection-colleton-county-road/>

⁷⁴<http://www.justice.gov/opa/pr/three-importers-pay-over-3-million-settle-false-claims-act-suit-alleging-evaded-customs>

⁷⁵<http://www.justice.gov/usao-ndca/pr/united-states-settles-false-claims-act-allegations-against-importer>.

⁷⁶<http://www.justice.gov/opa/pr/sevenson-environmental-services-inc-agrees-pay-272-million-settle-claims-alleged-bid-rigging>.

⁷⁷<http://www.justice.gov/opa/pr/harbert-companies-agree-pay-47-million-resolve-false-claims-act-allegations>.

⁷⁸<http://www.justice.gov/opa/pr/florida-company-and-owner-agree-resolve-alleged-false-claims-act-violations-regarding>.

⁷⁹<http://www.justice.gov/opa/pr/firemans-fund-insurance-company-pay-44-million-settle-false-claims-act-allegations>.

⁸⁰ *Urquilla-Diaz v. Kaplan University*, 780 F.3d 1039 (11th Cir. 2015).

⁸¹ The FCA permits the government to settle the action with the defendant notwithstanding any objections by the relator if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. *Id.* § 3730(c)(2)(B).

⁸² The government can also move to dismiss the action upon notification to the relator. *Id.* §3730(c)(2)(A).

⁸³ *Id.* § 3731(c). For statute of limitations purposes, such complaint relates back to the filing date of the original qui tam complaint so long as the government's claim arises out of the conduct, transactions, or occurrences set forth in the original complaint. *Id.*

⁸⁴ See *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, No 12-1349, Supplemental Brief For Petitioner, 2014 WL 975915 (March 12, 2014); *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1308-09 (11th Cir. 2002).

⁸⁵ *United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562, 567-68 (11th Cir. 1994).

⁸⁶ 31 U.S.C. § 3730(e)(4)(A).

⁸⁷ *Schindler Elevator Corp. v. US. ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011).

⁸⁸ *United States ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 813 (11th Cir. 2015).

⁸⁹ 31 U.S.C. § 3730(e)(4)(A).

⁹⁰ 31 U.S.C. § 3730(e)(4)(B).

⁹¹ *Id.* § 3730(b)(5).

⁹² *Id.*

Defending Against Spoliation Claims

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I. Spoliation of Evidence

Although spoliation of evidence, and the negative presumption that arises from it, has been around since the 19th century, the past few years have seen a proliferation of motions seeking sanctions for the spoliation of evidence in premises liability cases, particularly as it relates to the failure to preserve security camera video footage. This paper will examine this trend and, based upon an analysis of recent appellate decisions, try to provide some guidance for practitioners moving forward.

The definition of spoliation of evidence is, by now, well known to the trial attorney. “Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.”¹ From this definition, there are three main elements that must be shown in order to establish a spoliation of evidence. The first, and most obvious, is the existence of *evidence* that was either destroyed or not preserved. The second is a finding that the evidence that was either destroyed or not preserved was necessary to the litigation process. The third, and most discussed, element is that the loss of the evidence occurs at a time when

litigation is either *pending* or *contemplated*. Each of these three elements will be examined in turn.

A. Existence of Evidence

Although it seems obvious on its face, it must be shown that evidence existed, in some form or fashion that was subsequently destroyed or not preserved before there can be any finding of spoliation. It necessarily follows that, if the evidence never existed, there can be no spoliation. This was, in part, the basis for the decision in the case of *Clayton County v. Austin-Powell*,² where the plaintiffs filed separate wrongful death actions against Clayton County for the deaths of their sons who were passengers in a vehicle that was involved in, and which crashed at the end of, a high-speed police chase. Both plaintiffs alleged in their respective suits that the failure of the pursuing police officer to have a working dashboard camera in his patrol car, and the corresponding failure to have recorded the chase, constituted spoliation. In concluding that there had been no spoliation, the Court stated that “[i]t is axiomatic that in order for there to be spoliation, the evidence in question must have existed and been in the control of a party.”³ Finding that the

evidence in question never existed as the pursuit was not recorded, the Court concluded that it could not have been spoliated.

A similar conclusion was reached in the case of *Lustre-Diaz v. Etheridge*.⁴ In that case, the plaintiff filed suit to recover damages for injuries sustained in an automobile collision. During discovery, the defendant produced black and white photocopies of photographs of its truck that was involved in the collision. The original color photographs were never located and, at trial, the plaintiff argued that the defendant had spoliated evidence and sought an appropriate remedy. The trial court declined to find that there had been a spoliation, concluding that neither the defendants nor their agents were ever in possession of the original photographs. On appeal, the trial court's finding of no spoliation was affirmed, with the Court stating that "we can only speculate as to the origin of the photographs at issue and whether they were ever in the control of the defendants or their agent. Such speculation is not a basis for reversing a trial court's explicit factual finding."⁵

B. Necessity of Evidence

Even if evidence is wrongfully destroyed or not preserved, it must be shown that the destroyed or lost evidence was necessary to the plaintiff's claim in order for there to have been sanctionable spoliation. Thus, without a causal link between the lost evidence and the plaintiff's claim, a finding of spoliation would not be authorized. This, in part, formed the basis for the holding in the case of

*Craig v. Bailey Brothers Realty, Inc.*⁶ In that case, the plaintiffs' 10 year old daughter was injured when she stepped on a spike protruding from a railroad crosstie while trespassing at an apartment complex owned by the defendant. At the time of the incident, the emergency responders had to cut and remove the crosstie in order to dislodge the child's foot as well as the spike, which was subsequently removed from her foot during surgery. Shortly after the accident, and months before the father filed his lawsuit, the defendant cleared away overgrown vegetation around the crossties and either hammered down or removed any remaining protruding spikes. In the father's action against the apartment complex, based on claims of premises liability and attractive nuisance, the trial court granted the defendant's motion for summary judgment. The plaintiff appealed that ruling, contending it was error because there was evidence of spoliation by virtue of the defendant's actions in hammering down or removing any remaining protruding spikes. In affirming the grant of summary judgment to the apartment complex, the Court pointed out that there was no prejudice to the father by virtue of the fact that the accident site had already been altered by the emergency responders in their efforts to dislodge the child's foot and the protruding spike. The Court also held that the father could not "establish any causal link between failure of his premises liability and attractive nuisance claims and the alleged misconduct by the owners. The dismissal of those claims was

warranted for separate and independent reasons relating to [defendant's] lack of actual or constructive knowledge" of the child's presence on the property.⁷

This same rationale was utilized by the Court in reversing the denial of the defendant's motion for summary judgment in the case of *Fred's Stores of Tennessee, Inc. v. Davenport*.⁸ There, the plaintiff slipped and fell after stepping on a paper clip that was on the floor in the aisle of one of defendant's stores. The defendant moved for summary judgment on the ground that it had no actual or constructive knowledge of the paper clip which caused the fall. The trial court denied the motion based on its conclusion that defendant's employee had engaged in spoliation since, according to the plaintiff's testimony, the employee picked up the paper clip after the fall and placed it in his pocket. The trial court utilized this spoliation presumption to overcome testimony by another employee of the defendant that she had inspected the precise location of the plaintiff's fall two minutes before it occurred and that there was no paper clip on the floor at that time. In reversing the denial of the defendant's motion for summary judgment, the Court held that the alleged spoliation was not relevant to the question of the store's constructive knowledge of the presence of the paper clip prior to the plaintiff's fall. Finding that the situation was identical to that presented in *Craig v. Bailey Brothers Realty, Inc.*, the Court reiterated the fact that, even if evidence is wrongfully destroyed, the grant of a

motion for summary judgment is appropriate if the plaintiff cannot establish any causal link between the failure of the underlying claim and the alleged misconduct of the defendant. The Court concluded that the only inference that could be drawn from [the employee's] alleged destruction of evidence would be that a paper clip was on the floor when [the employee] came to the scene after Davenport's fall, not that it was on the floor when the area was inspected earlier. The alleged spoliation therefore has no effect on Davenport's underlying claim or on Fred's defense to that claim."⁹

Although not as recent, the decision by the Court of Appeals in *Sharpnack v. Hoffinger Industries, Inc.*¹⁰ was based on this same rationale. In that case, the plaintiff sustained significant spinal cord injuries after jumping from a mini-trampoline into an aboveground pool. In affirming the grant of summary judgment to the pool manufacturer on the plaintiff's claim based on negligence and strict liability, the Court found that it was abundantly clear that the plaintiff assumed the risk of his injuries so that his own conduct was the sole proximate cause of his injuries. In an amended Complaint, the plaintiff alleged that he was entitled to recover damages due to the defendant's alleged spoliation of evidence. Although the Court did not reach the decision of whether a claim of spoliation constituted a separate tort for which damages could be awarded, it held that the evidence which was allegedly spoliated would not have affected the outcome of the negligence or strict

liability claims. “As plaintiff cannot establish any causal link between the failure of his underlying claims and the alleged misconduct by defendant, the grant of summary judgment in favor of defendant was not error.”¹¹

C. Pending or Contemplated Litigation

By far, the vast majority of the recent decisions addressing spoliation pertain to the requirement that the destruction or loss of evidence occur at a time when litigation is either pending or contemplated. While the pendency of litigation provides a straightforward and relatively easy-to-apply guideline for determining if spoliation has occurred, the question of whether litigation is or should be contemplated has been much more problematic, both for the courts as well as for litigants. “The simple fact that someone is injured in an accident, without more, is not notice that the injured party is contemplating litigation sufficient to automatically trigger the rules of spoliation.”¹² “To meet the standard for proving spoliation, the injured party must show that the alleged tortfeasor was put on notice that the party was contemplating litigation.”¹³ In the following cases, spoliation sanctions were upheld based on a finding that the defendant was on notice that litigation was being contemplated.

In *Wal-Mart Stores, Inc. v. Lee*,¹⁴ the plaintiff filed suit against Wal-Mart after she was robbed and shot in the parking lot of a Riverdale Wal-Mart store. The incident was recorded by a video camera and the videotape

was turned over to the police shortly after the incident occurred. After the perpetrators had been captured and prosecuted, but before the plaintiff had filed suit against Wal-Mart, the district attorney’s office delivered the videotape to a manager of the Wal-Mart store. After filing suit and discovering that the videotape had been reused and recorded over, the plaintiff moved for spoliation sanctions. In awarding sanctions to the plaintiff, the trial court found that Wal-Mart was on notice of contemplated litigation due to the fact that the plaintiff’s previous counsel had written to Wal-Mart’s CEO less than two months after the shooting in an attempt to settle the claim and to “avoid costly litigation.” Although Wal-Mart interpreted the letter simply as a request for payment of the plaintiff’s medical expenses, it was clear, at least to the trial court, that the letter was adequate notice to Wal-Mart that the plaintiff was contemplating litigation. Finding no abuse of discretion, the finding of spoliation as well as the corresponding sanctions imposed were affirmed.

Similarly, an investigation by an attorney, including a request to review certain documents or materials, was determined to be sufficient to put a doctor on notice that litigation was being contemplated on behalf of a former patient.¹⁵ Even in the absence of a formal demand letter, the Court of Appeals, in concluding that the trial court abused its discretion by barring evidence of spoliation, found that the attorney’s pre suit investigation was “sufficient to put a reasonable doctor on notice

that Mr. Kitchens had litigation in mind as a possibility or plan in connection with his wife's care at SRMC. This is especially true given the tone of the discourse regarding medical malpractice cases in this country in recent years."¹⁶

An attorney's letter of representation sent to a trucking company's insurance carrier shortly after a collision involving one of its trucks was found to be, at least in part, notice that motorists injured in the collision were contemplating litigation sufficient to authorize spoliation sanctions for failing to preserve certain evidence.¹⁷ In addition to the letter of representation, the trucking company's vice-president testified at his deposition that, "based upon his extensive experience in the trucking industry, every highway trucking accident does involve a claim." In addition, the claims adjuster retained to investigate the collision recognized early on that he was dealing with "a very adversarial claimant initially." In upholding the trial court's finding of spoliation, the Court noted that, rather than being aware of simply an injured motorist, "there is ample evidence showing that shortly after the collision occurred the appellants were aware of contemplated litigation based on the letter from the [claimant's] attorney, their own investigation, their knowledge that every such highway collision results in claims, and their information that these particular claimants were very adversarial."¹⁸

In the absence of actual notice that an injured person is

contemplating litigation, such as a demand letter or spoliation letter from an attorney, it is being argued that, under some circumstances, notice of contemplated litigation can be constructive. This contention is discussed by Judge Wayne Purdom of the DeKalb County State Court in Georgia Civil Discovery with Forms,¹⁹ Judge Purdom cites to two factors in support of his position that notice of contemplated litigation can be constructive. The first factor is the level of investigation conducted by the defendant as showing circumstantially an awareness that litigation is contemplated, while the second factor is whether there is notice of both injury and possible liability. In support of this position, Judge Purdom cites to the decision of the Georgia Supreme Court in the case of *Baxley v. Hakiel Industries, Inc.*²⁰ In *Baxley*, the manager of a bar undertook an investigation following an automobile accident involving one of the bar's regular customers that occurred shortly after the customer left the bar, which included reviewing video footage from the bar's security camera system. The manager, however, did not preserve any video footage from the bar's security cameras from the night of the accident, ostensibly because there were no cameras covering the area in the bar where the customer had been sitting. In reversing the grant of summary judgment to the bar in the dram shop action brought against it by the injured motorist, the Georgia Supreme Court determined that the manager's failure to have preserved the video footage from the night of the accident

amounted to a spoliation of evidence. The Court held that a “meaningful link” existed between the plaintiff’s claim against the bar and the failure to have preserved the video footage since the footage could have contained evidence relevant to the issue of whether the customer would soon be driving. Although the bar had not received any actual notification that the injured motorist was contemplating legal action against it, Judge Purdom’s constructive notification premise is apparently based solely on the fact that the bar manager undertook an investigation of an automobile accident that took place some distance from the bar. Apart from the prospect of litigation being brought against it by the other party involved in the accident, there would not appear to be any other rational reason for the bar manager to undertake an investigation of an automobile accident. Under this analysis, the decision to investigate was circumstantial evidence that the bar was contemplating litigation sufficient to create the concomitant duty to preserve evidence.

The *Baxley* decision has been widely cited in motions seeking spoliation sanctions for its use of the phrase “potential for litigation” as the threshold factor in requiring the preservation of necessary evidence. Since just about every incident giving rise to an injury has the “potential for litigation,” it was argued that it was no longer necessary to show that the defendant had been put on notice that legal action against it was being contemplated. Clarifying this language, the Georgia Supreme Court,

in its decision in *Silman v. Associates Bellmeade*²¹ expressly stated that the expansive interpretation alleged in *Baxley* was incorrect. Holding that the phrase “potential for litigation” did not change or expand prior case law relating to spoliation of evidence, the Court reiterated that the phrase from *Baxley* “refers to litigation that is actually ‘contemplated or pending,’ and nothing more.”²²

In his treatise, Judge Purdom likens the standard of “contemplation of litigation” for requiring evidence preservation to the standard of “anticipation of litigation” in protecting investigation materials as work product. In drawing that analogy, he suggests that “work product case law may be persuasive in dealing with issues involving spoliation.” Utilizing such an analysis, the law in Georgia provides that, in order to come within the work product exception to discovery, the documents and tangible things must have been prepared in anticipation of litigation or for trial by or for a party or by or for that party’s representative and the materials must contain the mental impressions, conclusions, opinions or legal theories of the person preparing them. If the items sought do not satisfy both requirements, they “do not constitute work product and may be freely discovered.”²³ Other than in those obvious situations where the materials to be protected from discovery were prepared by or at the direction of counsel, the successful assertion of this qualified privilege requires some express, or at least fairly obvious, representation that litigation is being contemplated.²⁴ As

Judge Purdom points out, before seeking to shield reports or statements as pre-litigation work product, it should first be determined that no evidence which may later be deemed to have been necessary has been lost or destroyed subsequent to the time when it is claimed that litigation was anticipated.

As a general rule, however, a routine investigation undertaken following an injury to an invitee is not sufficient, in and of itself, to provide the notice that litigation is being contemplated. In *Paggett v. The Kroger Co.*,²⁵ the store manager undertook an investigation of a customer's fall that occurred at the store's fuel center. In connection with that investigation, he prepared a standardized incident report in which he noted that the customer's fall occurred as a result of slipping on rainwater. Although the fuel center was equipped with security cameras that may have captured the customer's fall, the manager did not review the video footage and did not save any of it before it was recorded over. Although the standardized incident report form contained pre printed language indicating that it "was being prepared in anticipation of litigation under the direction of legal counsel," the manager who completed the report testified that he had no reason to believe that the fall would lead to litigation. The trial court refused to find that there had been a spoliation and granted the defendant's motion for summary judgment. In affirming these rulings on appeal, the Court held that the trial court did not abuse its discretion in finding that the

plaintiff had not shown that he was entitled to spoliation sanctions. Distinguishing the *Baxley* decision, on which the plaintiff relied, the Court stated that the cases cited by the plaintiff "are inapposite because the defendants in those cases took more action to investigate potential litigation than incompletely filling out a standardized slip and fall incident form."²⁶

A similar conclusion was reached in the recent decision of *Powers v. Southern Family Markets of Eastman, LLC d/b/a Piggly Wiggly*.²⁷ In that case, a customer's fall was investigated by the store manager, which included the preparation of a routine customer incident report, the creation of a diagram and the taking of several photographs. However, the manager did not take any steps to preserve any video footage from the day of the incident, and the footage was subsequently recorded over. In connection with her lawsuit against the store, which was filed approximately nine months after the accident, the plaintiff filed a motion for sanctions for spoliation of evidence based on the store's failure to have retained or preserved the video footage from that day. Relying on the *Baxley* decision, and attempting to distinguish the *Paggett* decision, the plaintiff contended that the manager's actions in completing the incident report, the taking of photographs and the drawing of a diagram of the incident scene were evidence that the store was anticipating litigation. The trial court denied the motion based on the manager's testimony that he did not believe that the plaintiff was

injured as a result of her fall and did not believe that the fall would lead to litigation. Despite preprinted language on the report that it was prepared “in anticipation of litigation,” the manager testified that his actions in investigating the incident and completing the incident report were matters of routine practice that he was required to follow when any customer accident occurred on the premises. Finding no abuse of discretion, the trial court’s denial of the motion for spoliation sanctions was affirmed on appeal.

An unsuccessful attempt at preserving evidence was not sufficient to authorize a spoliation finding when it was not shown when the evidence was lost in the case of *Watts & Colwell Builders, Inc. v. Martin*,²⁸ In that case, the plaintiff was injured when a bathroom stall door hinge broke, causing the door to fall and strike her. The building’s maintenance supervisor repaired the door the following day by putting a new hinge on the door. He placed the broken hinge in the console of his truck after he removed it, thinking he should hold onto it since an accident took place. However, he was unable to locate the hinge when he went to look for it after the plaintiff filed her lawsuit. In response to the motion for summary judgment filed by the building owner, the plaintiff argued that an issue of fact was created by the spoliation of evidence created by the loss of the door hinge. Following the denial of its motion for summary judgment, the building owner sought and received an interlocutory review by the Court of Appeals. In reversing the denial of the

summary judgment motion, the Court held that a finding of spoliation is authorized if the loss of the evidence occurs at a time when there is contemplated or pending litigation. In this case, “the record shows only the mere contemplation of potential liability at the time the hinge was lost. The completion of the accident report, the failed attempt to retain the hinge based upon the happening of an accident alone, and the inability to locate the hinge immediately after the lawsuit was filed do not demonstrate contemplated or pending litigation at the time of the loss.”²⁹

The failure to preserve the specific item causing an injury was, in the case of *Aubain-Gray v. Hobby Lobby Stores, Inc.*,³⁰ held not to be a spoliation of evidence in the absence of notice of contemplated or pending litigation. In that case, the plaintiff was injured when, while picking up a glass candleholder to check the price, the top portion of it fell off and struck her wrist and shattered, causing a laceration and nerve damage. She filed suit and, following the grant of Hobby Lobby’s motion for summary judgment and the denial of her motion for spoliation sanctions, the plaintiff appealed. With respect to the spoliation motion, she contended that Hobby Lobby spoliated evidence by destroying both the item that caused her injury as well as the store’s surveillance video from the date of the incident. Although Hobby Lobby conceded that it had discarded the broken pieces of the candleholder several days after the accident and that the video footage recorded over itself after thirty days, it did not

receive notice that the plaintiff was contemplating litigation until it received a letter of representation from plaintiff's counsel approximately two months after the accident. Finding that the investigation into the plaintiff's accident was a matter of routine procedure as would be performed for any customer incident, and that it did not receive notice of possible litigation until after the remnants of the candleholder had been discarded and the video recorded over, the Court found no abuse of discretion in the denial of the plaintiff's motion for spoliation sanctions.

In another dram shop action, *Flores v. Expreztl! Stores 98-Georgia, LLC*,³¹ the trial court did not abuse its discretion in finding that there had been no spoliation of evidence. In that case, a convenience store was sued for injuries sustained by a child following an automobile collision between a van in which the child was a passenger and a car driven by a man with a blood alcohol content in excess of 0.18. In their complaint, the parents of the child alleged that the defendant convenience store sold beer to the driver of the car approximately four hours prior to the collision, which he subsequently consumed prior to causing the collision. In reversing the trial court's grant of summary judgment to the convenience store, the Court held that there were questions of fact as to whether the convenience store sold beer to the driver of the car and whether his purchase, and subsequent consumption, of the beer was a proximate cause of the collision and resulting injuries. However, the

Court affirmed the trial court's denial of the plaintiffs' motion for sanctions for spoliation based upon the convenience store's failure to preserve the video footage and sales receipts from the time of the purchase. The Court noted that the video footage recorded over itself after seven days and the sales receipts were discarded in the ordinary course of business within two to three weeks. Since this was approximately eleven months prior to the filing of the lawsuit, the Court held that the trial court did not abuse its discretion in concluding that the convenience store was not on notice that the plaintiffs were contemplating litigation when the evidence was discarded.

Lastly, the decision in *The Kroger Co. v. Walters*³² deserves some discussion. Following the slip and fall in that case, the manager began a routine investigation into the incident, which included the preparation of a standardized incident report form. However, because the plaintiff indicated at the time that he did not believe he was injured and refused to provide his name, the report was only partially completed. Although the report form was identical to that utilized by the Kroger manager in the *Paggett* case, containing preprinted language stating that it was being prepared "in anticipation of litigation," the manager testified that he had no reason to believe that the plaintiff was contemplating legal action against Kroger at the time he completed the report. He also did not preserve any video footage from the date of the incident, which recorded over itself after approximately seventeen days.

Although the plaintiff testified that he had to return to the Kroger store within two weeks of the fall to inform the manager that he was scheduled to see a doctor, there still was no mention of potential litigation. After the lawsuit was filed less than one year after the fall, and during discovery, the defendant produced exemplar images from each of the store's security cameras. Thereafter, during the store manager's deposition, it was discovered that the positioning of one of the cameras that was closest to the area of the plaintiff's fall had been moved slightly and was aiming at the area of the fall. Because the store manager did not, at that time, have an explanation for why the camera positioning had been changed, the plaintiff argued in his motion for spoliation sanctions that the exemplar produced previously was an effort at manipulating evidence. The trial court granted the motion finding that Kroger had "spoliated evidence by failing to preserve the video footage from the date of the fall and that it had acted in bad faith" in subsequently manipulating evidence to excuse its actions. In affirming that ruling, the Court of Appeals found that the evidence was similar to that produced in the *Baxley* case and supported the finding that the store was on notice of contemplated litigation at the time the video footage was recorded over. While it can be argued that this holding comes within Judge Purdom's "constructive knowledge" analysis, this case would seem to have minimal precedential value given the unique set of facts presented.

End Notes

¹ *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762, 618 S.E.2d 650 (2005).

² *Clayton County v. Austin-Powell*, 321 Ga. App. 12, 740 S.E.2d 831 (2013)

³ *Clayton County*, 321 Ga. App. at 16.

⁴ *Lustre-Diaz v. Etheridge*, 309 Ga. App. 104, 709 S.E.2d 309 (2011).

⁵ *Lustre-Diaz*, 309 Ga. App. at 107.

⁶ *Craig v. Bailey Brothers Realty, Inc.*, 304 Ga. App. 794, 697 S.E.2d 888 (2010)

⁷ *Craig*, 304 Ga. App. at 797, 798.

⁸ *Fred's Stores of Tennessee, Inc. v. Davenport*, 307 Ga. App. 58, 703 S.E.2d 700 (2010).

⁹ *Fred's Stores of Tennessee, Inc.*, 307 Ga. App. at 60.

¹⁰ *Sharpnack v. Hoffinger Industries, Inc.*, 231 Ga. App. 829, 499 S.E.2d 363 (1998).

¹¹ *Sharpnack*, 231 Ga. App. at 830.

¹² *Kitchens v. Brusman*, 303 Ga. App. 703, 707, 694 S.E.2d 667 (2010).

¹³ *Craig*, 304 Ga. App. at 796.

¹⁴ *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 659 S.E.2d 905 (2008).

¹⁵ *Kitchens v. Brusman*, 303 Ga. App. 703, 694 S.E.2d 667 (2010).

¹⁶ *Kitchens*, 303 Ga. App. at 708

¹⁷ *SentrySelect Insurance Co. v. Treadwell*, 318 Ga. App. 844, 734 S.E.2d 818 (2012).

¹⁸ *SentrySelect Insurance Co.*, 318 Ga. App. at 846.

¹⁹ *Georgia Civil Discovery With Forms*, Wayne M. Purdom, §16.16 (updated November, 2012).

²⁰ *Baxley v. Hakiel Industries, Inc.*, 282 Ga. 312, 647 S.E.2d 29 (2007).

²¹ *Silman v. Associates Bellemeade*, 286 Ga. 27, 685 S.E.2d 277 (2009).

²² *Silman*, 286 Ga. at 28.

²³ *Clarkson Industries, Inc. v. W.T. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975).

²⁴ *Warmack v. MiniSkools, Ltd.*, 164 Ga. App. 737, 297 S.E.2d 365 (1982)(statements of school employees obtained by a claims representative following the death of appellant's son at the school constituted work product when they were obtained following appellant's husband's contact with the school concerning insurance coverage),⁷ *Lowe's of Georgia, Inc. v. Webb*, 180 Ga. App. 755, 350 S.E.2d 292 (1986)(incident report prepared following customer inquiry constituted work product when, on date of incident, plaintiffs son told Lowe's employees that they have not heard "the last of the matter" and that Lowe's was "going to pay" for the injuries and expenses).

²⁵ *Paggett v. The Kroger Company*, 311 Ga. App. 690, 716 S.E.2d 792 (2011).

²⁶ *Paggett*, 311 Ga. App. at 693.

²⁷ *Powers v. Southern Family Markets of Eastman d/b/a Piggly Wiggly*, 320 Ga. App. 478, 740 S.E.2d 214 (2013).

²⁸ *Watts & Colwell Builders, Inc. v. Martin*, 313 Ga. App. 1, 720 S.E.2d 329 (2011).

²⁹ *Watts & Colwell Builders, Inc.*, 313 Ga. At 5.

³⁰ *Aubain-Gray v. Hobby Lobby Stores, Inc.*, 2013 WL4017362 (August 8, 2013).

³¹ *Flores v. Expreztl! Stores 98-Georgia, LLC*, 314 Ga. App. 570, 724 S.E.2d 870 (2012).

³² *The Kroger Co. v. Walters*, 319 Ga. App. 52, 735 S.E.2d 99, (2012).

The Value of Well-Developed Industry Standards in Products Liability Litigation

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I. Introduction

In products liability cases, defendant manufacturers usually introduce evidence of compliance with industry standards to prove their product designs are reasonable and not defective. Courts in Georgia and elsewhere routinely hold such evidence to be admissible, but not conclusive, on the issue of whether a product is defective. Georgia law is consistent with this analysis.

Plaintiffs’ lawyers often argue industry standards are only “minimum standards,” and the manufacturer should have done more. There are several cases from other jurisdictions, however, suggesting a defendant-manufacturer’s compliance with

well-drafted industry standards can in some circumstances preclude a defective design claim when plaintiff lacks sufficiently credible evidence establishing a defect. This is particularly true for negligent design claims, where the reasonableness of the manufacturer's design choice is a central issue. Where a well-developed industry standard represents the state-of-the-art and there is no safer alternative design, compliance with industry standards should be dispositive. Compliance with industry standards in strict liability cases is less likely to be dispositive because a safer alternative design choice than the industry standard might still constitute evidence of design defect.

II. Georgia Law on Industry Standards

In *Banks v. ICI Americas, Inc.*,¹ the Georgia Supreme Court adopted the risk-utility balancing test to evaluate the sufficiency of a product's design.² *Banks* sets forth a nonexclusive list of considerations that form this balancing test, including the state of the art, a product's usefulness, severity of danger raised by the product and whether that danger can be avoided, the ability to eliminate the danger without impairing the usefulness of the product, etc. In laying out these factors, the Georgia Supreme Court noted that "[a] manufacturer's proof of compliance with industry-wide practices, state of the art or

federal regulations does not eliminate conclusively its liability for its design of allegedly defective products."³ Georgia's pattern jury charge on this issue provides as follows:

"In determining whether a product was defective, you may consider proof of a manufacturer's compliance with federal or state safety standards or regulations and industry-wide customs, practices, or design standards. Compliance with such standards or regulations is a factor to consider in deciding whether the product design selected was reasonable considering the feasible choices of which the manufacturer knew or should have known. However, a product may comply with such standards or regulations and still contain a design defect."⁴

While compliance with federal law can give rise to preemption defenses in some circumstances, absent a federal preemption defense the law in Georgia is relatively clear that compliance with industry

standards is an important, but non-dispositive factor in the *Banks* analysis. Nevertheless, other courts have ruled that compliance with industry standards is conclusive, particularly when coupled with weak or no evidence of a defect. Those cases, discussed below, provide a mechanism for Georgia defense lawyers to persuade courts to extend *Banks* beyond its current parameters, at least in negligence cases.

III. Negligence Cases

A product's compliance with well-developed industry standards is most likely to preclude a manufacturer's liability in design defect cases based on negligence. In *Vermett v. Fred Christen & Sons Co.*,⁵ for instance, the plaintiff's hand was crushed while he was operating a press brake machine, and he sued the manufacturer for negligence alleging the machine was defectively designed. The court held the machine's compliance with industry and safety standards, specifically ANSI, was "a compelling factor" in considering the reasonableness of the manufacturer's design choice and precluded the manufacturer's liability for negligent design as a matter of law.⁶ In *Howard v. Omni Hotels Management Corp.*, a bathtub manufacturer that complied with industry standards met the applicable duty of care to the plaintiff hotel guest regarding slipperiness of the tub and was thus entitled to summary judgment

on the plaintiff's negligence claim based on design defect.⁷

In two cases applying Virginia law, the Fourth Circuit held that while compliance with industry custom and usage does not automatically absolve a manufacturer or seller of a product from negligence liability, such compliance "may be conclusive" when there is no evidence to show the product was not reasonably safe or the relevant industry custom or standard was not reasonably safe.⁸

In *Alevromagiros v. Hechinger Co.*, the plaintiff was injured when a ladder on which he was standing fell. He sued the manufacturer of the ladder alleging it was negligent in defectively designing the ladder. In determining whether the ladder was unreasonably dangerous, the court considered industry safety standards and the reasonable expectations of consumers, which could be established through evidence of actual industry practices.⁹ The court "recognize[d] that conformity with industry custom does not automatically absolve a manufacturer or seller of a product from liability. Nevertheless, a product's compliance with industry custom 'may be conclusive when there is no evidence to show that it was not reasonably safe.'"¹⁰ The Fourth Circuit affirmed the lower court's grant of a directed verdict for the manufacturer because the plaintiff failed to present any evidence the

ladder did not meet industry standards. The plaintiff's expert never performed recommended tests to determine whether the ladder conformed to industry standards, testified to no customs of the trade, referred to no literature in the field, and did not identify the reasonable expectations of consumers.¹¹

In *Wilder v. Toyota Motor Sales, U.S.A., Inc.*, the plaintiff sued Toyota for negligence, claiming he was injured when his truck's airbag deployed several minutes after the truck was involved in a collision. Since the collision was of sufficient force to cause the airbag to deploy immediately, the plaintiff claimed there was a defect in the airbag system. The Fourth Circuit affirmed summary judgment for Toyota, finding the plaintiff failed to offer any evidence to prove there was a defect, what the defect was, or how the defect occurred.¹² By contrast, Toyota presented expert testimony that the airbag system on the truck was well designed, well tested, complied with industry standards, and not defective.¹³ Citing its similar decision in *Alevromagiros*, the court stated, "While conformity with industry custom does not absolve a manufacturer or seller of a product from liability, such compliance may be conclusive when there is no evidence to show that the product was not reasonably safe."¹⁴ To rebut Toyota's evidence of compliance with industry standards, the plaintiff must have

offered evidence as to "actual industry practices, knowledge at the time of other injuries, knowledge of dangers, published literature, and ... direct evidence of what reasonable purchasers consider defective."¹⁵ Because the plaintiff failed to present such evidence, there was no evidence the airbag system contained a defect that rendered it unreasonably dangerous.¹⁶

In *Mears v. General Motors Corp.*, the court held that while compliance with industry practices does not conclusively establish a product's safety, a manufacturer seldom will be liable for failing to adopt safety measures no other member of industry employs.¹⁷ The court in *Brobhey v. Enterprise Leasing Co. of Chicago* held, "[i]n a negligence action, a defendant may rebut plaintiff's proof by showing its exercise of reasonable care through evidence of its testing and inspection procedures, or evidence that it complied with industry custom and practice."¹⁸

In *Blue v. Environmental Engineering, Inc.*,¹⁹ the plaintiff worker was injured when he stuck his foot into a trash compactor and sued the trash compactor's manufacturer alleging negligence. In generally considering whether the risk-utility analysis applies to negligence claims, the Illinois Supreme Court suggested compliance with industry standards may be an absolute defense to a claim of negligence. "[A] plaintiff raising a negligence

claim must do more than simply allege a better design for the product; he must plead and prove evidence of a standard of care by which to measure a defendant's design and establish a deviation from that standard."²⁰ Thus, in a negligence action a plaintiff must prove an alternative design that was the standard in the industry at the time the product was manufactured and that the defendant's product design deviated from that standard. Under the court's reasoning, therefore, a defendant can defend against a negligent design claim by showing its product design conformed to the standard in the industry. Because the plaintiff in *Blue* presented no evidence of the industry standard or that the defendant's product breached it, he failed to prove his negligence claim.²¹

IV. Cases Alleging Both Negligence and Strict Liability

Several other cases give considerable weight to evidence of a product's compliance with industry standards in analyzing claims for both negligence and strict liability. In *Lamb v. Kysor Indus. Corp.*,²² for instance, the plaintiff was injured while using a bridge saw and sued the manufacturer for strict liability and negligence, alleging a lack of adequate guarding on the saw. The court held the defendants established as a matter of law the saw was not defectively designed,

through expert testimony that the saw guard met industry standards at the time of its manufacture and that a larger guard would have defeated the functional utility of the saw.²³ Because the plaintiff failed to rebut that evidence, the court granted summary judgment to the defendants on the plaintiff's strict liability and negligent design claims.²⁴

In *Holst v. KCI Konecranes Int'l Corp.*,²⁵ the court affirmed the lower court's grant of summary judgment to a crane manufacturer on the plaintiff's negligence and strict liability claims, finding the crane's design complied with applicable industry safety standards and, for that reason, the crane was not defective or unreasonably dangerous.²⁶ While the court recognized that a product's conformity with industry standards is not conclusive of the product's safety, as a practical matter "the cases where a member of industry will be held liable for failing to do what no one in his position has ever done before will be infrequent."²⁷

In *Wesp v. Carl Zeiss, Inc.*,²⁸ the court reversed the lower court's denial of summary judgment to the manufacturer of a surgical microscope on the plaintiffs' negligence and strict products liability design defect claims. The defendants had met their initial burden on summary judgment by presenting expert testimony that the microscope's floor stand was state of the art at the time of its

design and complied with all applicable industry standards.²⁹ Because the plaintiffs failed to present opposing evidence showing the product was not reasonably safe, the manufacturer was entitled to summary judgment on the negligence and strict products liability claims.³⁰

V. Strict Liability Cases

As in *McCoy v. Whirlpool Corp.*³¹ and *Minter v. Prime Equip. Co.*,³² products liability cases based solely on strict liability, some courts hold that a manufacturer's compliance with industry standards is irrelevant, because the determinative question is whether the product itself is unreasonably dangerous, and industry standards are relevant only in determining whether a manufacturer met its duty of care under a negligence theory. In strict liability cases, plaintiffs are often required under state products liability laws to introduce evidence of a feasible alternative design for the product. Where a plaintiff does so, the challenged product could be found to be defective even if the proposed alternative design was not standard in the industry and no other manufacturer had adopted the alternative design at the time of the product's sale.³³

On the other hand, federal courts in New York have held compliance with industry standards may be relevant in a strict liability case to the question whether a product was reasonably safe as designed and with respect

to the feasibility of alternative designs.³⁴ In addition, in *Surles ex rel. Johnson v. Greyhound Lines, Inc.*,³⁵ the plaintiff sued the manufacturer of a bus for strict products liability alleging it should have equipped its busses with passenger seatbelts. The Sixth Circuit affirmed the district court's grant of summary judgment to the manufacturer on the basis that it "complied with all industry and governmental standards in the manufacture and equipping of the bus," and on the basis that "Tennessee common law imposes no duty on a bus manufacturer to equip a bus with passenger seat belts."³⁶ Thus, while the general rule is against the relevance of industry standards in strict liability cases, there are exceptions, and well-developed standards can be strong and persuasive evidence that a particular product is not unreasonably dangerous.

VI. Statutory Presumptions of No Defect

Some states have enacted statutes expressly providing that compliance with customary industry standards results in a rebuttable presumption that the product was not defectively designed or manufactured.³⁷ In North Dakota,

"it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design,

methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.”³⁸

The court in *Coleman v. Rust-Oleum Corp.*³⁹ applied Kentucky’s statutory presumption to grant summary judgment to the defendant manufacturer of a spray paint can that exploded, injuring the plaintiff. The court held the spray paint can was not defective because it was manufactured and designed in accordance with industry standards and met the state of the art and because the most probable explanation for the explosion was that the can failed because of repeated impacts on the bottom of the can.⁴⁰ In states having such statutory presumptions, therefore, un rebutted proof of a product’s compliance with clear industry standards likely will be a proper basis for dispositive determination of a product’s defectiveness.

VII. Punitive Damages Claims

As with evidence of industry custom and standards in general, compliance with industry guidelines is relevant and admissible, but not conclusive, as to the issue of punitive damages. In *Stone Man, Inc. v. Green*,⁴¹ the

Georgia Supreme Court held the defendant’s compliance with the law and industry standards tended to show there was no clear and convincing evidence of “willful misconduct, malice, fraud, wantonness, oppression, without entire want of care which would raise the presumption of conscious indifference to the consequences.” In *Barger v. Garden Way, Inc.*,⁴² the Georgia Court of Appeals reviewed the trial court’s jury charge on compliance with applicable industry standards involving a punitive damages claim. The jury charge correctly noted the important distinction between tort liability for compensatory damages for defective design despite compliance with industry standards, and the general rule of non-liability for punitive damages.

In *Lane v. Amsted Indus., Inc.*,⁴³ evidence of compliance with standards was admissible where the plaintiff asserted a claim for punitive damages. Also, in *American Cyanamid Co. v. Roy*,⁴⁴ while,

“compliance with industry guidelines should not be taken as conclusive evidence bearing on the question of a corporation’s negligence, such information may certainly bear on whether a party’s behavior represents such an extreme

departure from accepted standards of care as to justify punitive damages.”

In *Colombini v. Westchester County Healthcare Corp.*,⁴⁵ the plaintiffs sued the manufacturer of an MRI machine, among others, for the death of their child, who was killed when he was struck by a metal oxygen tank that was drawn into the machine’s magnet. The court granted summary judgment to the manufacturer on the plaintiffs claim for punitive damages, finding the manufacturer complied with all applicable industry and regulatory standards by supplying an instruction manual containing warnings regarding keeping ferrous materials away from the MRI magnet and suggesting warning signs to use at the MRI facility.⁴⁶ The plaintiffs’ evidence, which showed only that the manufacturer was responsible for servicing the MRI machine, did not support a claim for punitive damages against the manufacturer.⁴⁷

As one court has stated, “[c]ompliance with industry standards and custom tends to support the defense the [defendant manufacturer] acted with a nonculpable state of mind, and would negate an inference of wanton indifference to the rights of others.”⁴⁸

VIII. Conclusion

Compliance with industry standards can be compelling evidence and may be a manufacturer’s strongest defense in a product liability case. When those standards are well developed, the arguments are even stronger and more persuasive. In some situations, compliance with industry standards should be dispositive as a matter of law.

End Notes

¹ *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994).

² See 264 Ga. at 735.

³ *Id.* at 736. See also *Doyle v. Volkswagenwerk Aktiengesellschaft*, 267 Ga. 574, 577, 481 S.E.2d 518, 521 (1997) (compliance with federal standard is a significant factor in *Banks* test, but is not conclusive).

⁴ 62.670, *Suggested Pattern Jury Instructions*, Vol. I: Civil Cases, 5th ed. (2014).

⁵ *Vermett v. Fred Christen & Sons Co.*, 138 Ohio App. 3d 586, 741 N.E.2d 954 (6th Dist. Lucas County 2000).

⁶ 138 Ohio App. 3d at 609.

⁷ *Howard v. Omni Hotels Mgmt. Corp.*, 203 Cal. App. 4th 403, 136 Cal. Rptr. 3d 739 (2012).

⁸ See *Alevromagiros v. Hechinger Co.*, 993 F.2d 417 (4th Cir. 1993); *Wilder v. Toyota Motor Sales, U.S.A., Inc.*, 23 Fed. Appx. 155 (4th Cir. 2001).

⁹ See 993 F.2d at 420.

¹⁰ *Id.* at 420 n.6 (quoting *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975)).

¹¹ See *id.* at 421.

¹² See 23 Fed. Appx. at 156.

¹³ See *id.* at 157.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *id.*

¹⁷ *Mears v. General Motors Corp.*, 896 F. Supp. 548, 552 (E.D. Va. 1995).

¹⁸ *Brobbey v. Enter. Leasing Co. of Chicago*, 404 111. App. 3d 420, 935 N.E.2d 1084, 1093 (2010).

¹⁹ *Blue v. Environmental Engineering, Inc.*, 215 111. 2d 78, 293 111. Dec. 630, 828 N.E.2d 1128 (2005).

²⁰ 828 N.E.2d at 1141.

²¹ See *id.* at 1143.

²² *Lamb v. Kysor Indus. Corp.*, 305 A.D.2d 1083, 759 N.Y.S.2d 266 (4th Dept. 2003).

²³ See 305 A.D.2d at 1084.

²⁴ See *id.*

²⁵ *Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 699 S.E.2d 715 (Ct. App. 2010).

²⁶ See 699 S.E.2d at 720.

²⁷ *Id.* at 721 (quoting *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 544, 462 S.E.2d 321, 329 (Ct. App. 1995)).

²⁸ *Wesp v. Carl Zeiss, Inc.*, 11A.D.3d 965, 783 N.Y.S.2d 439 (4th Dept. 2004).

²⁹ See 783 N.Y.S.2d at 441.

³⁰ See *id.*

³¹ *McCoy v. Whirlpool Corp., No. CIV.A. 02-2064-KHV*, 2003 WL 21554950, *8 (D. Kan. July 8, 2003).

³² *Minter v. Prime Equip. Co.*, 356 Fed. Appx. 154, 158 (10th Cir. 2009) (applying Oklahoma law).

³³ See *Blue*, 828 N.E.2d at 1142.

³⁴ See *Rogers v. West/Alia Associated Technologies, Inc.*, 485 F. Supp. 2d 121, 130 n.15 (N.D.N.Y. 2007); *Mustafa v. He1kin Tool, Ltd.*, No. 00-CV-4851(DGT), 2007 WL 959704, *8 (E.D.N.Y. Mar. 29, 2007); *Church Ins. Co. v. Trippe Mfg. Co.*, No. 04 CIV. 6111(HB), 2005 WL 2649332, *2 (S.D.N.Y. Oct. 17, 2005).

³⁵ *Surles exrel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288 (6th Cir. 2007) (applying Tennessee law).

³⁶ 474 F.3d at 301.

³⁷ See Ky. Rev. Stat. Ann. § 411.310(2).

³⁸ N.D. Cent. Code § 28-01.3-09

(rebuttable presumption of no defect if the product is in conformity “with applicable industry standards” regarding the “plans, designs, warnings, or instructions for the product or the methods and techniques of manufacturing, inspecting, and testing the product”).

³⁹ *Coleman v. Rust-Oleum Corp.*, 405 F. Supp. 2d 806 (W.D. Ky. 2005).

⁴⁰ See 405 F. Supp. 2d at 810.

⁴¹ *Stone Man, Inc. v. Green*, 263 Ga. 470, 435 S.E.2d 205 (1993).

⁴² *Barger v. Garden Way, Inc.*, 231 Ga. App. 723, 499 S.E.2d 737 (1998).

⁴³ *Lane v. Amsted Indus., Inc., lid* S.W.2d 754, 759 (Mo. App. 1989).

⁴⁴ *American Cyanamid Co. v. Roy*, 498 So. 2d 859, 862-63 (Fla. 1986).

⁴⁵ *Colombini v. Westchester County Healthcare Corp.*, 24 A.D.3d 712, 808 N.Y.S.2d 705 (2d Dept. 2005).

⁴⁶ 24 A.D.3d at 715.

⁴⁷ See *id.* at 715-16.

⁴⁸ *Nigro v. Remington Arms Co., Inc.*, 432 Pa. Super. 60, 637 A.2d 983, 989 (1993).

Workers' Compensation Update: Has the Court of Appeals Extended the Ingress/Egress Exception?

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The Georgia Court of Appeals recently issued an important opinion regarding the ingress/egress exception to the general rule of workers' compensation law that injuries

sustained going to or coming from work are not compensable.

Following is a discussion of the evolution of the ingress/egress exception, the Court of Appeals' recent holding in *Bonner-Hill v. Southland Waste Systems, Inc.*, and the potential effects of this decision.

I. The Ingress/Egress Exception in Workers' Compensation Law

As a fundamental rule in workers' compensation law, work injuries are only compensable when they "arise out of and in the course of the employment."¹ Arising out of and in the course of employment are two independent criteria that must be satisfied for a compensable work injury.² The "arising out of employment" component refers to the causal connection between employment and the work injury. "In the course of employment" refers to when, where, and how the injury took place.³

Generally speaking, a work injury is said to be "in the course of employment" when it occurs on the Employer's premises, during the employee's work hours, and while the employee is fulfilling her job duties. An injury sustained by an employee going to or coming from

work is typically not compensable because she has not started her work shift or arrived at the worksite.⁴ Therefore, she is not yet “in the course of employment.” However, there are several exceptions to this general rule. A major exception discussed in this article provides compensability for injuries sustained during a reasonable time of ingress or egress from work.⁵ If the injury is close in time to the start or end of a work shift and within an area controlled by the Employer, the ingress/egress exception typically applies to afford compensability.⁶ Courts have addressed the issue of where an injury occurs, for the purpose of applying the exception, multiple times over the years. As discussed below, prior to the *Bonner-Hill* decision, courts consistently analyzed the amount of control the Employer had over the area where the injury occurred.

A. Injury on the Employer’s Premises

Generally, the ingress/egress exception allows for compensability of work injuries sustained within a reasonable time of going to or leaving work where the injury occurs on the Employer’s premises.⁷

In *Connell v. Head*, Laura Head, a cafeteria worker for City of Cartersville schools, clocked out of work and left the school building to drive home for the day.⁸ As Head drove out of the Employer’s premises, she was hit by Evelyn

Connell, a school bus driver for City of Cartersville schools.⁹ The accident occurred on School Drive, a road within the Employer’s premises which was owned, controlled, and maintained by City of Cartersville schools.¹⁰

Head sued Connell in tort for negligence.¹¹ Connell moved for summary judgment, arguing the suit was barred by the exclusive remedy provision of the Workers’ Compensation Act.¹² The trial court found Head’s injury did not arise out of and in the course of her employment.¹³ Significant to the trial court’s decision was that the road where the accident occurred was open to public use, and Head had signed out of work, left the parking lot, and was in the process of leaving the Employer’s premises when the accident occurred.¹⁴ Therefore, the court found the injury was not in the course of employment.¹⁵

The Court of Appeals reversed and held Head’s injury arose out of and in the course of her employment.¹⁶ The Court noted it was undisputed that the road the injury occurred on was owned by City of Cartersville and controlled by the Cartersville School System.¹⁷ The Court stated the ingress/egress exception applied where “the employee is still on her employer’s premises in the act of egressing those premises [...] Moreover, for the purposes of the ingress and egress rule, an employer’s premises is the real property owned, maintained, or

controlled by the employer.”¹⁸ The fact that the road was open to public use had no bearing on whether the injury was in the course of employment, given that the Employer controlled the road.¹⁹

A similar situation arose in *Peoples v. Emory University*.²⁰ Darrell Peoples, a janitor employed by Emory University, was hit by a car while riding his bicycle on a street owned and patrolled by the Employer, but open to public use as well.²¹ Peoples had not yet begun his work shift when his injury occurred; however, he was on his way to sign in for work.²² The Court of Appeals found his injury compensable because it occurred during a reasonable time for ingress and egress to work and was on the Employer’s premises. The Court held “[f]or the purposes of the ingress and egress rule, an employer’s premises is real property owned, maintained, or controlled by the employer.”²³

B. Injury in an Off-Site Parking Lot

An extension of the ingress/egress exception, the “parking lot exception,” allows compensation for injuries in an off-site parking lot owned, maintained, or controlled by the employer.²⁴

In *Tate v. Bruno’s Inc./Food Max*, the employee clocked out of work and walked directly to her car parked in a public lot next to the Employer’s premises.²⁵ The public parking lot was shared by the Employer and other businesses

within the complex.²⁶ It was undisputed that the Employer did not own the parking lot and had no responsibility for maintaining or controlling it.²⁷ While driving out of the parking lot, the employee was hit by another vehicle and sustained injuries.²⁸

At the hearing level, the ALJ found the injury was not in the course of employment and denied the claim.²⁹ On appeal, the Board reversed the ALJ’s award.³⁰ The superior court then reversed the Board and denied compensation.³¹

On appeal filed by the employee, the Court of Appeals affirmed the trial court’s denial of benefits.³² Crucial to the Court’s holding was the Employer’s lack of control over the parking lot where the injury occurred.³³ The Court noted injuries sustained in offsite parking lots are only compensable where the Employer owns, maintains, or controls the parking lot, such that the lot can be said to be within the “Employer’s premises.”³⁴ Where the employee’s injury occurred in a public parking lot the Employer had no control over, it cannot be said to have been in the course of employment.³⁵

C. Injury Between Employer Controlled Areas

The ingress/egress exception also applies to injuries sustained by an employee traveling between the employment site and an Employer-controlled parking lot, even if the injury is not in an area

directly controlled by the Employer.³⁶ In *Knight-Ridder Newspaper Sales, Inc. v. Desselle*, a sports writer employed by a newspaper left the Employer's building and crossed a public street en route to a parking lot leased by the Employer for staff use.³⁷ While crossing the public street, the employee was struck by a car driven by another employee and was injured.³⁸

The injured employee brought a tort action against the co-worker who hit him; however, the co-worker denied liability by way of the exclusive remedy provision of the Workers' Compensation Act.³⁹ The employee moved for partial summary judgment, asking the trial court to find his injury did not arise out of or in the course of employment.⁴⁰ The trial court granted the employee's motion and found the co-worker did not have immunity from the tort suit under the exclusive remedy provision of the Act.⁴¹

On appeal, the Court of Appeals reversed the trial court's decision and held the employee's injury arose out of and in the course of his employment, such that his only means of recovery was a workers' compensation claim against his Employer.⁴²

Although the parking lot the employee was walking towards when his injury occurred was leased, not owned, by the Employer, it was under the direction and control of the

Employer.⁴³ Thus, the lot came within the "Employer's premises" by way of the parking lot exception because it was controlled by the Employer.⁴⁴ The Court found it irrelevant that the injury occurred on a public street, which the Employer clearly did not control, because the employee was taking a direct route from one part of the Employer's premises to another.⁴⁵ As such, the employee's injury was compensable, despite it not having occurred directly on the Employer's premises.⁴⁶

The key to the Court's holding in *Desselle* seems to be that the Employer retained control over where the employee was when his injury occurred. It was undisputed that the employee had just left the Employer's office building, clearly part of the "Employer's premises."⁴⁷ Moreover, he was taking a direct route to a parking lot under the Employer's direction and control.⁴⁸ Thus, *Desselle* extended the ingress/egress exception to apply to injuries sustained on a direct route between two Employer-controlled areas.

D. Injury in a Multi-Tenant Business Complex

Several cases have addressed whether the ingress/egress exception allows compensation for injuries sustained within the Employer's building or complex, but not yet on the Employer's premises.⁴⁹

In *De Howitt v. Hartford Fire Ins. Co.*, the Employer shared a building with two other businesses. There were two means of ingress and egress to the building and the Employer did not designate a specific route to be taken by its employees.⁵⁰ An employee sustained an injury while entering the building, en route to work; however he had not yet reached his specific employment site.⁵¹ Nevertheless, the Court of Appeals found the employee sustained a compensable work injury, reasoning “[w]here the employer’s business is located in a building of which it occupies only a part, and two ways through the building are the only means of ingress and egress to and from such place of business, both ways are parts of the employer’s premises.”⁵²

Forty-five years later, the Court of Appeals clarified the *De Howitt* holding with its opinion in *Hill v. Omni Hotel at CNN Center*.⁵³ In *Hill*, an employee, Joyce Hill, was injured while en route to her job with the Employer, the Omni Hotel.⁵⁴ The Employer was located within the CNN Center, a large complex with multiple buildings and businesses.⁵⁵ Upon arriving at the CNN Center facilities via MARTA, Hill entered the complex at the entrance closest to the MARTA station and was on the most direct route to her Employer when she tripped over a carpet in a food court and suffered injuries.⁵⁶ The injury occurred only several

hundred yards from an escalator that provided direct access to the Employer’s premises.⁵⁷

The ALJ relied on *De Howitt* in finding Hill sustained a compensable work injury.⁵⁸ The ALJ interpreted *De Howitt* as holding “an employee’s injury sustained while ingressing into the employer’s office is compensable, even if the employer occupies only a part of the building and there is more than one way through the building to the employer’s location.”⁵⁹ Thus, the ALJ found Hill’s injury was compensable because, like in *De Howitt*, it occurred while she was proceeding to work through one of several entrances.⁶⁰

The Board reversed the ALJ’s award and found several significant differences between *De Howitt* and *Hill*.⁶¹ Important distinguishing factors noted by the Board included: (1) The building in *De Howitt* housed only two employers, whereas the CNN Center housed many; (2) The building in *De Howitt* had only two entrances; whereas the CNN Center had many and the Employer had a main entrance; (3) In *Hill*, it was undisputed that the Employer did not own, maintain, or control the area where Hill’s injury occurred.⁶² The Board concluded that because Hill’s injury did not occur on the Employer’s premises, or in an area controlled by the Employer, it was not compensable.⁶³ The Superior Court affirmed.⁶⁴

The Court of Appeals found *Hill* more analogous to *Tate* than *De Howitt*.⁶⁵ Specifically, the Court noted the area where Hill fell was similar to the parking lot in *Tate* because it was accessed by employees of several businesses, as well as the general public.⁶⁶ Moreover, Hill was not required to traverse this area to access her Employer, as the Employer had a more direct street entrance through its motor lobby.⁶⁷ Most importantly, *De Howitt* did not discuss whether the Employer exercised any control over the place of injury. However, in *Hill* it was undisputed that the Employer did not have control over the area where Hill fell.⁶⁸ Therefore, the Court held Hill's injury was not compensable and denied benefits.⁶⁹

E. Reconciling the Decisions

The Court's holdings in *Head*, *Peoples*, *Tate*, *Desselle*, and *Hill* are all reconciled by one consistent factor—control. The injuries in *Head* and *Peoples* were compensable because they occurred on the Employer's premises; clearly areas the Employer had control over.⁷⁰ As *Tate* exemplified, injuries in an offsite parking facility are still compensable, as long as the Employer controls the facility.⁷¹ *Desselle* afforded compensability for an injury on a direct route between two Employer-controlled areas.⁷² Finally, *Hill* clarified that an injury in an area within close proximity to the Employer's

premises, but not controlled by the Employer, was not compensable.⁷³

As discussed below, the *Bonner-Hill* decision seems to abandon the control analysis the courts previously applied in determining whether the ingress/egress exception arose.

II. A New Standard for Applying the Ingress/Egress Exception?

A. *Bonner-Hill v. Southland Waste Systems, Inc.*

The Court of Appeals' recent opinion in *Bonner-Hill v. Southland Waste Systems, Inc.* seems to advance a new, inconsistent standard for the ingress/egress exception by extending the definition of an "Employer's premises."⁷⁴ Now, the ingress/egress exception "will apply if the area where the claimant is injured is an area (1) limited (or very nearly so) to the [Employer] business, even if the business's right to the area is merely a leasehold interest or some other nonexclusive access."⁷⁵

In *Bonner-Hill*, the employee was traveling to work over the only road that provided access to the employment premises.⁷⁶ The Employer's lease agreement for the premises included a nonexclusive right to use the access road to reach the employment site.⁷⁷ The Employer shared the access road with other businesses.⁷⁸ The access road crossed over railroad tracks prior to reaching the employment

site.⁷⁹ While crossing these railroad tracks on his way to work, the employee was struck by a train and killed.⁸⁰ The employee's widow, Latoya Bonner-Hill, sought workers' compensation benefits for her husband's death.⁸¹

The ALJ held the employee's death compensable based on its findings that there was no alternative access to the employment site, the access road was part of the building's premises, the employee's arrival was during a reasonable time before his shift, and the Employer had control over the entrance road pursuant to the lease.⁸²

The Appellate Division reversed, holding the ingress/egress exception applied only to accidents occurring on an Employer's premises.⁸³ Because the Employer did not own, maintain, or control the access road where the employee's death occurred, the death did not occur on the Employer's premises.⁸⁴ After her petition was denied by the Superior Court, Bonner-Hill appealed her claim to the Court of Appeals.⁸⁵

The Court of Appeals reversed the Appellate Division, finding the injury occurred on the Employer's premises because the lease agreement included a nonexclusive right to use the access road.⁸⁶ In coming to its conclusion, the Court reasoned that because the Employer's lease specifically allowed for access to the premises over the entrance road, the employee had arrived on the

Employer's premises once he turned onto the road.⁸⁷

B. Potential Effects of *Bonner-Hill*

Bonner-Hill significantly extends an Employer's premises to include areas used by the Employer, even if the right of use is merely a leasehold or non-exclusive right of access.⁸⁸ Moreover, the area's use need only be *nearly* limited to the Employer's business.⁸⁹ The area is still part of the Employer's premises even where other businesses use the area. Whereas *De Howitt* held an Employer's premises included shared building entrances, *Bonner-Hill* extends an Employer's premises to include shared areas outside of the building within close proximity to the workplace.⁹⁰ In doing so, it defines an entirely new area in which an employee can sustain a compensable injury while going to or coming from work.

Consequently, *Bonner-Hill* seems to overturn the *Tate* and *Hill* decisions.⁹¹ Under *Bonner-Hill*, if the Employers leases included nonexclusive rights to use the public parking lot (in *Tate*) and the food court area (in *Hill*), injuries sustained in these areas are now compensable, despite the Employers lack of control over the locations.

Bonner-Hill essentially abolishes the "owned, maintained, or controlled" provision of the parking lot exception for Employers with rights to use areas

in close proximity to the work site. This is particularly problematic for Employers in multitenant complexes with leaseholds that grant rights to use the shared access roads or parking facilities. Under *Bonner-Hill*, it appears these areas are now part of the Employer's premises, despite the fact the Employer may have no control over or responsibility for maintaining these areas.

The Court's decision also raises the question of the distance required before the parking lot exception analysis is triggered. Under *Bonner-Hill*, it seems an Employer's premises would include a parking lot adjacent to the workplace as long as the Employer retained a non-exclusive right to access the lot. Because it is part of the Employer's premises, it is unnecessary to show the employer owned, maintained, or controlled the lot. However, what about an Employer with a nonexclusive right to use an entrance road a mile away from the employment site? Would this area be deemed part of the Employer's premises given the right of access, or would the distance trigger a control analysis under the parking lot exception? *Bonner-Hill* does not provide clear answers to these questions.

Ultimately, *Bonner-Hill* throws a wrench in the ingress/egress exception analysis. It raises many questions and answers few. The only certainty is the courts must conduct fact-specific analyses in coming to their

holdings in these cases. It is easy to see how one or two slightly varied facts could have resulted in an opposite holding in *Bonner-Hill*. For example, the access road in *Bonner-Hill* was described only as "short."⁹² Perhaps a longer road would remove the area from the "Employer's premises;" but how long is long enough? Furthermore, the Court noted the access road provided the only entry to the Employer's facility.⁹³ However, it is uncertain what, if any, affect this fact had on the Court's holding. What if the access road was several miles long, but was the only point of entry? What if it was only several feet long, but was one of many entrances? Only time will tell which facts are most important in determining whether an injury sustained in an area the Employer has a mere right to use will be compensable.

End Notes

¹ O.C.G.A. §34-9-1(4) (2014).

² See *St. Joseph's Hosp. v. Ward*, 300 Ga. App. 845, 686 S.E.2d 443 (2009).

³ See *Chapparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 606 S.E.2d 567 (2004).

⁴ See *Corbin v. Liberty Mut. Ins. Co.* 117 Ga. App. 823, 162 S.E.2d 226 (1968).

⁵ See *Peoples v. Emory University*, 206 Ga. App. 213, 424 S.E.2d 874 (1992).

⁶ See *Id.*

⁷ See *Collie Concessions, Inc. v. Bruce*, 272 Ga. App. 578, 612 S.E.2d 900 (2005); *Hill v. Omni Hotel at CNN Ctr.*, 268 Ga. App. 144, 601 S.E.2d 472 (2004); *Tate v. Bruno's Inc./Food Max*, 200 Ga. App. 395, 408 S.E.2d 456 (1991).

⁸ *Connell v. Head*, 253 Ga. App. 443, 559 S.E.2d 73 (2002).

⁹ *Id.* at 443, 559 S.E.2d at 74.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 444, 559 S.E.2d at 74.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (citing *Peoples v. Emory University*, 206 Ga. App. 213, 424 S.E.2d 874 (1992)).

¹⁹ *Id.* at 444, 559 S.E.2d at 74.

²⁰ *Peoples v. Emory University*, 206 Ga. App. 213, 424 S.E.2d 874 (1992).

²¹ *Id.* at 214, 424 S.E.2d at 876 (1992).

²² *Id.*

²³ *Id.*

²⁴ *See Tate v. Bruno's Inc./Food Max*, 200 Ga. App. 395, 408 S.E.2d 456 (1991).

²⁵ *Id.* at 396, 408 S.E.2d at 457.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 397, 408 S.E.2d at 458.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See Knight-Ridder Newspaper Sales, Inc. v. Desselle*, 176 Ga. App. 174, 335 S.E.2d 458 (1985).

³⁷ *Id.* at 174, 335 S.E.2d at 458.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 174, 335 S.E.2d at 459.

⁴¹ *Id.*

⁴² *Id.* at 175, 335 S.E.2d at 459.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *West-Point Pepperell v. McEntire*, 150 Ga. App. 728, 258 S.E.2d 530 (1979))(An employee was held to be in the course of her employment when struck by a car on a public street while going from her place of work to a company-owned parking lot).

⁴⁶ *Id.* at 175, 335 S.E.2d at 459.

⁴⁷ *Id.* at 174, 335 S.E.2d at 458.

⁴⁸ *Id.* at 175, 335 S.E.2d at 459.

⁴⁹ *See Hill v. Omni Hotel at CNN Ctr.*, 268 Ga. App. 144, 601 S.E.2d 472 (2004); *De Howitt v. Hartford Fire Ins. Co.*, 99 Ga. App. 147, 108 S.E.2d 280 (1959).

⁵⁰ *De Howitt*, 99 Ga. App. at 148, 108 S.E.2d at 282.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Hill*, 268 Ga. App. 144, 601 S.E.2d 472.

⁵⁴ *Id.* at 144, 601 S.E.2d at 473.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 145, 601 S.E.2d at 473.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 146, 601 S.E.2d at 474.

⁶² *Id.* at 145, 601 S.E.2d at 473.

⁶³ *Id.* at 146, 601 S.E.2d at 474.

⁶⁴ *Id.* at 144, 601 S.E.2d at 472.

⁶⁵ *Id.* at 147, 601 S.E.2d at 475.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *Connell v. Head*, 253 Ga. App. 443, 559 S.E.2d 73 (2002); *Peoples v. Emory University*, 206 Ga. App. 213, 424 S.E.2d 874 (1992).

⁷¹ See *Tate v. Bruno's Inc./Food Max*, 200 Ga. App. 395, 408 S.E.2d 456 (1991).

⁷² See *Knight-Ridder Newspaper Sales, Inc. v. Desselle*, 176 Ga. App. 174, 335 S.E.2d 458 (1985).

⁷³ See *Hill v. Omni Hotel at CNN Ctr.*, 268 Ga. App. 144, 601 S.E.2d 472 (2004).

⁷⁴ See *Bonner-Hill v. Southland Waste Systems, Inc.*, 330 Ga. App. 151, 767 S.E.2d 803 (2014).

⁷⁵ *Id.* at 155, 767 S.E.2d at 806-807.

⁷⁶ *Id.* at 152, 767 S.E.2d at 805.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 151, 767 S.E.2d at 804.

⁸⁶ *Id.* at 155, 767 S.E.2d at 807.

⁸⁷ *Id.*

⁸⁸ *Id.* at 152, 767 S.E.2d at 804-805.

⁸⁹ *Id.* at 155, 767 S.E.2d at 806.

⁹⁰ See *Bonner-Hill*, 330 Ga. App. 151, 767 S.E.2d 803; *De Howitt*, 99 Ga. App. 147, 108 S.E.2d 280.

⁹¹ See *Tate*, 200 Ga. App. 395, 408 S.E.2d 456; *Hill*, 268 Ga. App. 144, 601 S.E.2d 472.

⁹² *Bonner-Hill*, 330 Ga. App. at 151, 767 S.E.2d at 804.

⁹³ *Id.*

Changes to Your Itinerary: Recent Developments in Employment Law

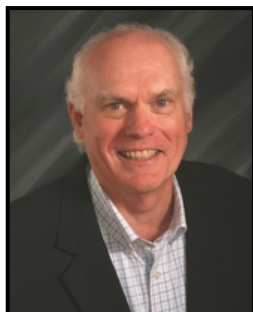
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I. Introduction

For any employer, keeping abreast of legal developments impacting the field of human resources is a never ending journey. New employment laws, regulations, guidance, and court decisions are handed down on virtually a daily basis. Employers are required to digest and learn to cope with these developing legal rules, for failure to do so can potentially be disastrous. This Article covers some of the most significant legislative, regulatory, and judicial developments in the area of labor and employment law in the last year.¹

II. TITLE VII AND AGE DISCRIMINATION IN EMPLOYMENT ACT (“ADEA”)

A. EEOC’s Fiscal Year 2014

The U.S. Equal Employment Opportunity Commission’s (“EEOC”) fiscal year 2014 was another roller coaster journey. The EEOC’s strategic mission and tactics continue to evolve, and employers who interact with the EEOC are well-served to understand where the EEOC currently stands on key issues, where it is headed, and how it is attempting to get there.

According to its fiscal year 2014 Performance Report, the agency received 88,778 private sector charges of discrimination

during the period October 1, 2013, through September 30, 2014.² This represents a decrease of about 5,000 charges from the previous fiscal year.³ In addition, the agency reported that a total of 87,442 charges of discrimination were resolved, which is 9,810 fewer than in fiscal year 2013.⁴ The EEOC explained that this is likely due to the government shutdown and the effects of sequestration.⁵ The agency hired more than 300 staff at the end of fiscal year 2014.⁶ According to the Performance Report, out of 10,221 mediations conducted to resolve discrimination charges, 7,846 resulted in a settlement of the claims.⁷

The EEOC’s fiscal year 2014 marked another important year in the life span of its 2013-2016 Strategic Enforcement Plan (“SEP”).⁸ The EEOC approved the SEP on December 17, 2012, to guide its enforcement activity, including setting specific goals, metrics, and priorities for its enforcement activity.⁹ We continue to see the enduring stamp that the SEP has on the types of cases that the EEOC is pursuing and how it is litigating those cases, such as an increased focus on pursuing “systemic cases.” As will be seen below, the EEOC has staked out new ground in the substantive areas covered by the antidiscrimination laws. These new theories highlight the agency’s intent not just to enforce the law, but also to shape it.

B. Religious Bias Claims on the Rise

During the survey period, we continued to experience a rise in religious bias claims. In *Yeager v. Firstenergy Generation Corp.*,¹⁰ the United States Court of Appeals for the Sixth Circuit held that a fundamentalist Christian who had been rejected for work by the employer after failing to provide his social security number had not been discriminated against on the basis of religion, contrary to his Title VII claim.¹¹ The plaintiff “alleged that he had no social security number because he had disclaimed and disavowed it on account of his sincerely held religious beliefs.”¹² The court found that the federal tax law requires all U.S. employers to collect the social security information on their employees.¹³ According to the Sixth Circuit, the tax law was not trumped by Title VII’s prohibition against religious discrimination.¹⁴ Joining other federal courts who have addressed the issue, the court reasoned that, “Title VII does not require an employer to reasonably accommodate an employee’s religious beliefs if such accommodation would violate a federal statute.”¹⁵

Telfair v. Federal Express Corp.,¹⁶ addressed the issue of whether or not the employer had satisfied its religious accommodation obligation under Title VII.¹⁷ Garrett and Travis Telfair, African-American males, professed to be practicing

Jehovah’s Witnesses.¹⁸ While working as part-time couriers for FedEx in Palm Beach, Florida, the Telfairs learned they would be “redeployed” from a Monday-through-Friday work schedule to “a Tuesday-through-Sunday schedule, resulting from a decrease in workloads on Mondays.”¹⁹ “Under FedEx’s redeployment policy, affected employees could, in order of seniority, select from other available positions or elect to take 90 days of unpaid leave. Employees, who took the 90-day leave and did not find another position with FedEx, would be considered to have resigned voluntarily at the end of the 90-day period.”²⁰

“Before the effective date of the redeployment, the Telfairs informed FedEx they could not work on Saturdays because of religious obligations,” but both offered to work only Tuesday through Friday.²¹ FedEx denied this request, but offered the Telfairs “handler” positions.²² Handler positions would have allowed the Telfairs to work Monday-through-Friday schedules, but would have resulted in pay cuts of approximately five dollars per hour.²³ The Telfairs declined the handler-position offers, and as a result, they were placed on 90-day leaves of absence, following which they were given additional extensions of several weeks to seek open positions.²⁴ During this 90-day period, at least 56 part-time positions were open at FedEx facilities throughout the state.²⁵

“The Telfairs did not apply for any of these open positions,” and so “[b]oth men were deemed to have resigned voluntarily.”²⁶

The Telfairs sued, claiming that FedEx had discriminated against them on the basis of their race and religion.²⁷ “They argued FedEx's actions resulted in their constructive discharge and discriminated against them based on their religious beliefs, while similarly situated individuals outside of their class were provided with accommodations.”²⁸ The district court granted FedEx's motion for summary judgment and the Telfairs appealed.²⁹

On appeal, the United States Court of Appeals for the Eleventh Circuit held that FedEx had provided a reasonable accommodation to the Telfairs when it offered them different positions that satisfied their scheduling criteria and provided them with a 90day period and an additional extension of several weeks in which to secure other employment with the company.³⁰ The court held that FedEx was not required to accept any of the Telfairs' alternative accommodation requests, or show those requests would result in undue hardship.³¹ Notably, the appellate court rejected the Telfairs' arguments that FedEx's accommodation proposals were unreasonable because they entailed a pay cut of approximately 23% and a longer commute associated with the open positions.³²

C. New EEOC Guide to Religious Garb and Grooming

On March 6, 2014, the EEOC published its Guide to Religious Garb and Grooming.³³ That publication supports the EEOC's position that any affectation, behavior, or mode of dress that can be tied to religious practice must be accommodated, so long as it does not cause “undue hardship” for the employer.³⁴ Accommodation is required regardless of how sincere an employee's religious practice may seem, how recently adopted that practice is, or how that practice affects business.³⁵

Because the EEOC typically requires accommodation of religious garb or grooming, an employer must be cautious when enforcing a dress code or uniform policy.³⁶ Garb and grooming may take the form of religious symbols worn, restrictions on shaving or hair length, tattoos that must be displayed openly, and specific items of clothing required by a religion as well as many other expressions of religious identity.³⁷ Similarly, an employer should be careful not to assign employees to specific areas, tasks, or positions based upon their garb or grooming.³⁸

According to the EEOC Guide, an employer does not necessarily have to have specific knowledge of an employee's religious practice in order to be liable under Title VII for

discrimination.³⁹ If an employer believes, or should have known, that an employee's garb or grooming is religious in nature, the EEOC may still treat that employer as liable for restricting the employee's freedom of religion whether or not the employer actually had knowledge of the religious restriction.⁴⁰ The legal question of whether or not an employer that is without direct knowledge of an employee's religious practice can be liable under Title VII for religious discrimination is currently pending before the U.S. Supreme Court to be answered soon in the case of *EEOC v. Abercrombie & Fitch*.⁴¹

D. Hiring Barriers

In April, 2012, the EEOC announced new Enforcement Guidance on employers' use of criminal background information in making employment decisions.⁴² The new Enforcement Guidance assumes that a broad exclusion from employment because of a conviction is unlawful, and requires the employer to demonstrate that the disqualification of an applicant because of a conviction is job-related and consistent with business necessity.⁴³ According to the Enforcement Guidance, an employer may do this through an individualized assessment.⁴⁴

In 2014, the EEOC received a stunning defeat in *EEOC v. Kaplan Higher Education Corp.*,⁴⁵ In that case, the EEOC filed suit against Kaplan alleging that its

use of credit checks caused it to screen out more African-American applicants than white applicants, creating a disparate impact in violation of Title VII.⁴⁶ The EEOC attempted to prove its case through the use of statistical data compiled by its expert.⁴⁷ Because Kaplan's credit check process was race-blind, the EEOC subpoenaed records regarding Kaplan's applicants from state departments of motor vehicles.⁴⁸ As a result of those subpoenas, the EEOC obtained approximately 900 drivers' license photos from thirty-six states and the District of Columbia.⁴⁹ These photos were reviewed by the EEOC's "expert" who classified them as "African-American," "Asian," "Hispanic," "White," or "Other."⁵⁰ Those designations became the basis for the EEOC's finding of disparate impact, but "[t]he district court thereafter excluded [the expert's] testimony in a meticulously reasoned opinion."⁵¹ The issue on appeal was whether or not the EEOC's statistical evidence of disparate impact was reliable.⁵² The United States Court of Appeals for the Sixth Circuit found that the EEOC's "homemade" methodology for determining race by labeling photographs was crafted by a witness "with no particular expertise to craft it."⁵³ Comically, the Sixth Circuit also criticized the EEOC for attacking the same type of background check that the agency itself uses, and for relying on a method for determining race – visual identification that the

agency itself discourages.⁵⁴ Despite this decision, employers should continue to monitor this issue closely, as the EEOC will likely continue to bring similar cases.

E. Increase in LGBT Claims

Title VII prohibits employers from discriminating on the basis of sex. A growing debate concerns whether or not this federal law provides protection for lesbian, gay, bisexual, and transgender (“LGBT”) individuals. Driving much of this debate is the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*,⁵⁵ where the Court found that individuals can establish violations of Title VII based on evidence that an employer discriminated against them for failure to conform to gender stereotypes such as traditional notions of masculinity or femininity.⁵⁶ Since *Price Waterhouse* was decided, several federal circuit courts of appeal have concluded that discrimination on the basis of gender identity is a form of impermissible gender stereotyping. A trend that is clearly developing in the EEOC’s enforcement strategy is attempting to push the boundaries of Title VII so that its protections extend to cover LGBT people. Accordingly, in 2014, the EEOC’s general counsel formed an “LGBT working group that provides advice and input to the Agency’s litigators on developing related litigation vehicles. This work group also coordinates internal initiatives and

policies, trains internal staff, and conducts outreach with external stakeholders.”⁵⁷

In its Fact on Recent Litigation related to LGBT claims, the EEOC noted that it had brought two new filings alleging transgender discrimination. In *EEOC v. Lakeland Eye Clinic*, the EEOC claims that the organization of healthcare professionals fired an employee “because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer’s gender-based expectations, preferences, or stereotypes.”⁵⁸ “According to the EEOC’s lawsuit, the defendant’s employee had performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her.”⁵⁹

Similarly, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the EEOC alleged that a Detroit-based funeral home discriminated against an employee “because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer’s gender-based expectations, preferences, or stereotypes.”⁶⁰ The agency alleges that the employee gave her employer a letter explaining that she was transgender and would soon start presenting as female in appropriate work attire.⁶¹ Allegedly, she was fired two weeks later by the funeral home’s owner,

after he told her what she was proposing to do was unacceptable.⁶²

While the EEOC's new filings are still in their infancy, they are being watched closely by practitioners and employers around the country. One possible criticism of the EEOC's theory is that Title VII does not explicitly mention gender identity as a protected classification. In *Eure v. Vesage Corp.*,⁶³ the United States District Court for the Western District of Texas held the following: "This is a difficult case because, although *Price Waterhouse* provides a vehicle for transgender persons to seek recovery under Title VII, neither the Supreme Court nor the Fifth Circuit have held that discrimination based on transgender status is per se gender stereotyping actionable under Title VII. Without any briefing from the parties on the issue, this Court declines to hold otherwise."⁶⁴ The court noted that a different result would have emanated had the plaintiff alleged that she had been the victim of gender stereotyping.⁶⁵

F. New Executive Order on Sexual Orientation and Gender Identity

On July 21, 2014, President Obama issued an Executive Order, effective immediately, which amended Executive Orders 11478 and 11246 by adding "sexual orientation" and "gender identity" to the list of protected categories in the Executive Orders.⁶⁶ In conformance with the President's

action, DOL's Office of Federal Contract Compliance Programs published a Final Rule on December 3, 2014, prohibiting federal contractors from discriminating in employment on the basis of sexual orientation or gender identity.⁶⁷

G. Harassment

In *Adams v. Austal, U.S.A., LLC*,⁶⁸ the issue was whether an employee could rely on evidence that that he or she did not personally observe that the workplace was objectively hostile.⁶⁹ Among other elements, when an employee brings a claim of unlawful harassment or a hostile work environment under race, sex, or another unlawful basis, the employee must show the workplace is both subjectively **and** objectively offensive.⁷⁰ A workplace is subjectively offensive when the employee himself or herself found the workplace offensive.⁷¹ A workplace is objectively offensive when a reasonable person would be offended by the same environment.⁷²

It is usually easier to prove that a random, reasonable person would not be offended by the workplace than try to disprove the employee's assertion that he or she was offended. It is easier for the employer to prevail on the objective test for a couple of reasons. First, the reasonable person is a mythological identity. No juror really knows what that means, and it allows jurors to substitute their own judgment for that of the

plaintiff. Second, the reasonable person standard permits courts to create legal rules about what a reasonable person would find reasonable. That allows employers to attack the objective standard as a legal question rather than a factual question and defeat plaintiffs' claims before trial.

In the *Adams* case, the employer operated a shipyard.⁷³ Alleged racist graffiti appeared in the men's restrooms in the shipyard directed towards African-American employees.⁷⁴ The plaintiff employees in the case also alleged that several nooses were found around the workplace.⁷⁵ A key issue in the case was whether each of the multiple African-American employees had experienced the same degree and frequency of racism in the workplace.⁷⁶ They worked in different departments for different supervisors and some were even employed at different times.⁷⁷ The trial court held that a reasonable jury would not find the conduct sufficiently offensive, nor would a reasonable person have found the worksite hostile.⁷⁸ The court also ruled that the employees could not present evidence of a hostile work environment that the employees did not personally observe as evidence under the objective test.⁷⁹ An appeal ensued.⁸⁰

On appeal, the United States Court of Appeals for the Eleventh Circuit agreed with the trial court that evidence of hostility that the employees did not personally know about at the time of their

employment should be excluded at trial.⁸¹ The court held that the objective test requires the jury to look at what information the plaintiff knew at the time the claims arose and whether a reasonable person standing in the plaintiff's shoes at the time would have been offended.⁸² The employee could not have found the environment hostile on the basis of information he or she did not know at the time, therefore, neither could a reasonable jury.⁸³ This case illustrates yet another hurdle that employees must overcome in proving a hostile work environment or harassment claim.

H. Sex and Pregnancy Discrimination

Sex and pregnancy issues continued to be the dominant discrimination theories alleged in Title VII cases in 2014. *Clark v. Cache Valley Electric Co.*,⁸⁴ concerned the issue of whether or not paramour favoritism is "based on sex" for Title VII sex discrimination purposes.⁸⁵ Clark, a male project manager, and a female employee who had project manager duties, were supervised by a male supervisor.⁸⁶ Clark alleged that the male supervisor favored the female employee with respect to job assignments, bonuses, and other working conditions because the supervisor was or had been romantically involved with the female.⁸⁷ In affirming the dismissal of Clark's claims of sex discrimination under Title VII, the United States Court

of Appeals for the Tenth Circuit held that “[favoritism of a paramour is not gender discrimination.”⁸⁸ The court further discussed that motives such as friendship, cronyism, or nepotism do not constitute actionable sex discrimination even when they benefit the nonprotected friend or relative at the expense of a more qualified, protected person.⁸⁹

In a case of first impression, the United States Court of Appeals for the First Circuit held in *Velazquez-Perez v. Developers Diversified Realty Corp.*,⁹⁰ that an employer could be liable under Title VII for negligently permitting a female coworker’s discriminatory efforts to cause a male plaintiff’s termination.⁹¹ Velazquez was employed as a regional general manager.⁹² In that role, he oversaw several properties and managed a number of subordinates.⁹³ Velazquez was supervised by two male managers.⁹⁴ Velazquez interacted extensively at work with Developers’ human resources representative, Rosa Martinez.⁹⁵ This representative provided advice to management on human resources issues, including employee discipline.⁹⁶ After Velazquez resisted the human resource representative’s romantic overtures, the representative began making false allegations against Velazquez.⁹⁷ Velazquez then complained to one of his supervisors about the representative’s (Martinez) behavior.⁹⁸ The supervisor advised Velazquez to send the female HR

representative a conciliatory email and allegedly joked that Velazquez should have sex with the representative to avoid termination.⁹⁹ The representative continued to malign Velazquez, discussing with Velazquez’s supervisors that Velazquez’s job performance had deteriorated.¹⁰⁰ The representative went so far as to suggest that Velazquez be terminated from employment.¹⁰¹ She sent an email to the company’s senior vice president of human resources recommending Velazquez’s termination.¹⁰² This ultimately resulted in Velazquez’s termination.¹⁰³

Velazquez sued his employer, claiming that his termination was a result of him rebuffing his coworker’s sexual advances.¹⁰⁴ In essence, Velazquez’s claim was that of “quid pro quo” sexual harassment.¹⁰⁵ Such harassment occurs when a supervisor conditions the granting of an economic or other job benefit upon receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply.¹⁰⁶ While the court acknowledged that the Supreme Court had not yet ruled on the question of whether employer liability premised on a finding of negligence is limited to cases of “hostile workplace harassment,” the court held that there was no basis for applying a distinction to permit a negligent employer to escape “or incur” liability on one type of claim but not the other.¹⁰⁷ Therefore, the court held that an

employer could be held liable under Title VII if: “the plaintiff’s coworker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff’s firing; the coworker’s discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the coworker’s acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.”¹⁰⁸ In so holding, the First Circuit reversed the trial court’s dismissal of Velazquez’s claim and remanded the claim to the trial court for further proceedings.¹⁰⁹

In *Cadenas v. Butterfield Healthcare II, Inc.*,¹¹⁰ the United States District Court for the Northern District of Illinois held that a pregnant employee who was terminated on the same day that she informed her employer of expected future restrictions on lifting could sue for pregnancy discrimination.¹¹¹ The Court held that “even though an anticipatory discharge may be appropriate in some cases, Meadowbrook has not established based on the summary judgment record that this is such a case. Cadenas was fully able to work until her 20th week of pregnancy, and, therefore, a jury could reasonably conclude that she was terminated in her 15th week for a reason other than physical limitations namely, discrimination based upon her pregnancy.”¹¹²

In *Albin v. LVMH Moet Louis Vuitton, Inc.*,¹¹³ the United States District Court for the Southern District of New York ruled that a store employee allegedly denied promotion less than four months after giving birth was still in the PDA’s protected class.¹¹⁴ The court cited an emerging pattern in the Second Circuit drawing “a loose line” at roughly four months from the baby’s date of birth as the coverage cutoff point.¹¹⁵

I. New EEOC Enforcement Guidance on Pregnancy and Related Issues

Extending the coverage of the federal antidiscrimination laws to include transgender employees is not the only area where the EEOC has tried to extend its reach. The EEOC has also sought to extend the reach of the Americans with Disability Act’s (“ADA”) reasonable accommodation provisions to cover pregnant employees who are experiencing normal pregnancies.¹¹⁶ This is an issue that was directly before the U.S. Supreme Court this term. In the case of *Young v. United Parcel Services, Inc.*,¹¹⁷ a divided U.S. Supreme Court decided that employers may be required to make reasonable accommodations for work restrictions cause by pregnancy related conditions. Essentially, the majority opinion in *Young* says that failure to make pregnancy accommodations may be

a form of unlawful sex discrimination.¹¹⁸

In *Young*, the essential functions of the plaintiff's job required her to lift, lower, push, pull, leverage, and manipulate packages weighing up to 70 pounds.¹¹⁹ Per United Parcel's policy, light duty work was offered only to those employees injured while on the job or suffering from a permanent impairment cognizable under the ADA.¹²⁰ Young sued after United Parcel placed her on an extended unpaid leave of absence because Young's doctor imposed a 20pound lifting restriction.¹²¹ Young sued United Parcel for sex discrimination under Title VII and disability discrimination under the ADA.¹²² The United States Court of Appeals for the Fourth Circuit, which agreed with the trial court, ruled in favor of United Parcel, holding that if an employer has a policy restricting work limitations that treats both pregnant workers and non-pregnant workers alike, an employer has complied with the Pregnancy Discrimination Act ("PDA") which amended Title VII to state that it included discrimination in employment on the basis of pregnancy.¹²³ The plaintiff petitioned for certiorari, which was granted on July 1, 2014.¹²⁴

The Supreme Court vacated the Fourth Circuit decision and sent the case back for resolution.¹²⁵ The majority opinion, written by Justices Breyer and joined by Justices Roberts, Ginsberg, Kagan,

and Sotomayor, stated that a woman claiming discrimination based on a failure to accommodate pregnancy would be required to establish the following: "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work."¹²⁶ The employer can then articulate a legitimate, nondiscriminatory reason for treating the pregnant employee differently.¹²⁷ However, the Court does state that "consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates."¹²⁸ Finally, once the employer has proffered a legitimate, nondiscriminatory reason, the employee could prevail if they then can show pretext for discrimination. The Court stated the following: "We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination. The plaintiff can create a genuine issue

of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.”¹²⁹ The problem with much of this guidance is that it does not provide employers with a clear, or bright line test.

Employers should carefully monitor the case law that follows the *Young* decision. The standard set by the majority is vague, and will likely take years to develop as Courts interpret the law. Additionally, it is unclear how the EEOC’s stance will be affected by the *Young* decision. The EEOC may modify its guidance, or continue on its aggressive stance. However, here are a couple of basic principles to follow: Employers in states or localities that already have pregnancy accommodation laws should comply with their state or local laws. Employer not governed by local laws should consider taking a conservative approach when faced with such requests to avoid becoming a “test case” for the boundaries of the Supreme Court’s decision.

III. AMERICANS WITH DISABILITIES ACT (“ADA”) AND REHABILITATION ACT

A. What is Disability

When the Americans with Disabilities Act Amendments Act (“ADAAA”) was enacted in 2009,

the landscape of what conditions are protected was dramatically expanded. The ADAAA broadened the definition of a disability considerably, and, as a result, a greater emphasis on accommodation and discrimination issues has now ensued. However, in order to prevail in an ADA discrimination case, a plaintiff still has to prove that he or she has a disability within the meaning of the statute. In *City of Houston v. Proler*,¹³⁰ the court was asked to determine whether fear of entering a burning building was a disability.¹³¹ Plaintiff was a firefighter captain who was assigned to lead a fire suppression crew.¹³² When he arrived at a house fire and was unable to put on his firefighting gear, take orders, or had difficulty walking, someone had to escort him to a house next door.¹³³ He was eventually transported to a hospital and diagnosed with “global transient amnesia.”¹³⁴ When the City of Houston refused to reassign him to the fire suppression crew based upon his condition, he sued claiming disability discrimination.¹³⁵ The case eventually ended up before the Supreme Court of Texas.¹³⁶ The court agreed with the city that the fire captain did not suffer from a “disability” because, according to the court, being unable to set aside the normal fear of entering a burning building is not a mental impairment that substantially limits a major life activity.¹³⁷ The court analogized plaintiff’s fact

pattern with the National Basketball Association, and reasoned that the capacity to play professional basketball is an ability, and that just because the vast majority of the population cannot play at the professional basketball level does not mean that such population suffers from a disability.¹³⁸ A job skill required for a specific job is not a disability if most people lack that skill.¹³⁹ Moreover, fighting fires is not a major life activity, said the court.¹⁴⁰ The court reasoned that “[a] reluctance to charge into a burning building is not a mental impairment at all; it is the normal human response.”¹⁴¹

In *Mazzeo v. Color Resolutions, Intl.*,¹⁴² the Eleventh Circuit held that under the ADAAA, the employee’s condition which caused pain with prolonged sitting and standing and required surgery, but which was transitory, was a disability protected under the ADAAA.¹⁴³

B. ADA Accommodation Issues

Since the enactment of the ADAAA, disability-based litigation has clearly shifted to much more of an emphasis on accommodations and determining whether an adverse employment decision was motivated by disability or perceived disability. We continue to see a large increase in the number of accommodation cases. In the fiscal year of 2014, the EEOC received about 25,369 claims

related to disability discrimination.¹⁴⁴

In *Assaturian v. Hertz Corp.*,¹⁴⁵ the court concluded that there were questions of fact that precluded summary judgment as to whether bringing a dog to work to help cope with depression may be a reasonable accommodation under the ADA.¹⁴⁶ In *Reeves v. Jewel Food Stores*,¹⁴⁷ the issue was whether or not the employer had to provide a “job coach” as a form of reasonable accommodation for an employee that had a propensity to swear in front of customers due to his down syndrome.¹⁴⁸ The court found that such a requirement was not reasonable.¹⁴⁹

In 2014, Walgreens settled a case in which the plaintiff alleged that the company failed to accommodate her when it terminated her for “grazing.”¹⁵⁰ In *EEOC v. Walgreens Co.*,¹⁵¹ the EEOC had sued the drug store giant, charging that a former cashier who had type II diabetes was fired by the company because of her disability after she ate a \$1.39 bag of chips during what she claimed was a hypoglycemic attack in order to stabilize her blood sugar level.¹⁵² Walgreens knew of her diabetes.¹⁵³ Yet the company’s loss control supervisor testified that he did not understand nor did he seek clarification when the employee wrote, “My sugar low. Not have time,” in reply to his request for an explanation of why she took the chips before paying.¹⁵⁴ The EEOC alleged that Walgreens was

required to provide reasonable accommodation to the employee.¹⁵⁵

It is now well-settled that leave can be a reasonable accommodation under the ADA. Many of the ADA cases in 2014 concerned allegations that employers had not reasonably accommodated a disability by extending more leave or flexible schedules to employees.

In *Silva v. City of Hidalgo*,¹⁵⁶ an employee went out on FMLA leave after she broke her leg.¹⁵⁷ Prior to the termination of her FMLA leave, the Plaintiff requested a light duty position. At the end of her FMLA leave, Plaintiff sent an email “renewing her appeal for light or desk duty” or, in the alternative, “requesting ‘FMLA leave and any other available medical or other available leave’ because she ‘did not expect to be able to return to work for at least [sic] another month.’ Two days later, Silva visited her doctor for an evaluation and medical treatment. The assessment letter, which was faxed to [Rosser]—her employer, contained the prognosis that Silva would require ‘at least one to two more months of physical therapy’ and advised that she would ‘not be able to participate on full duty as a peace officer especially when she is involved on a swat team.’” The letter also stated that her doctor was “willing to sign for her to continue to be off work for at least another three months if necessary.”¹⁵⁸ In ruling for the

employer, and concluding that the extended leave request was not reasonable, the United States Court of Appeals for the Fifth Circuit held that reasonable accommodation does not require an employer to wait indefinitely for the employee’s medical conditions to be corrected.¹⁵⁹ According to the Fifth Circuit, plaintiff’s claims that her employer had an obligation to keep her position open for an unspecified amount of time until she was able to return, could not be squared with the ADA’s entitlement to a “reasonable” accommodation.¹⁶⁰

In *Hwang v. Kansas State University*,¹⁶¹ the issue, as phrased by the United States Court of Appeals for the Tenth Circuit, was “[m]ust an employer allow employees more than six months’ sick leave or face liability under the Rehabilitation Act?”¹⁶² According to the court, the answer is “almost always no.”¹⁶³ Initially, plaintiff sought, and was granted, a six-month paid leave of absence for cancer treatment.¹⁶⁴ As that period drew to a close, upon her doctor’s advice, plaintiff asked the University to extend her leave but the University refused, explaining that it had an inflexible policy allowing no more than six months’ sick leave.¹⁶⁵ In response, plaintiff filed a lawsuit contending that by denying her more than six months’ sick leave the University violated the Rehabilitation Act.¹⁶⁶ The trial court dismissed plaintiff’s claim and she appealed.¹⁶⁷

On appeal, the Tenth Circuit noted the reasonable accommodation requirements contained in the Rehabilitation Act (which are similar to those found in the ADA).¹⁶⁸ The court concluded that an employee who is not capable of working for more than six months is not an employee capable of performing a job's essential functions, and that requiring an employer to keep a job open for a longer period does not qualify as a reasonable accommodation.¹⁶⁹

On the other hand, in *Casteel v. Charter Communications*,¹⁷⁰ the United States District Court for the Western District of Washington denied summary judgment to an employer determining that an employer may be required, as a form of ADA accommodation, to extend leave six months beyond the exhaustion of FMLA leave.¹⁷¹ In *Casteel*, the employee who suffered from a form of cancer, was first granted two 30 day extensions beyond FMLA leave.¹⁷² When she requested a third extension based upon a physician's statement with an expected date of return within six months of the date she exhausted her FMLA leave, her request was denied.¹⁷³ Part of the justification for the denial by the employer was that her repeated request for extension indicated her expected date of return was actually uncertain.¹⁷⁴ Moreover, during the course of the lawsuit, the employer pointed to the fact that as of the date the employee

filed her lawsuit, she had still not been released by her physician to work.¹⁷⁵ In refusing to dismiss the case, the court held that despite having received two extensions of leave, a third extension was not necessarily unreasonable, given the fact that the physician had specified an expected return date.¹⁷⁶ Moreover, the court held that the determination as to whether an individual is a qualified individual with a disability must be made as of the time of the employment decision, not at some subsequent date (such as when the litigation commenced).¹⁷⁷ If at the time of termination there are plausible reasons to believe that the disability can be accommodated by a leave of absence, the employer is responsible for its failure to offer such a leave.¹⁷⁸

C. "Counseling" Requirement May be Impermissible ADA Medical Examination

The ADA prohibits an employer from requiring a medical examination of an employee unless such examination or inquiry is shown to be job-related and consistent with business necessity. In *Kroll v. White Lake Ambulance Authority*¹⁷⁹, plaintiff, an EMT, was ordered by her employer to undergo psychological counseling as a condition of employment.¹⁸⁰ The supervisor who required the counseling knew of only one incident during plaintiff's employment when she provided substandard patient care (despite

the fact that coworkers had complained to other supervisors about plaintiff's performance issues).¹⁸¹ Instead, the supervisor told plaintiff she needed to attend counseling because of her personal behavior.¹⁸² In reversing summary judgment in favor of the employer, the trial court noted that the employer bears the burden of proving that a medical examination is job-related and consistent with business necessity.¹⁸³ The business-necessity standard cannot be satisfied by an employer's bare assertion that a medical examination was "merely convenient or expedient."¹⁸⁴ "Rather, the individual who decides to require a medical examination must have a reasonable belief that based on objective evidence, the employee's behavior threatens a vital function of the business."¹⁸⁵ Because the supervisor who required the psychological examination as a condition of employment had only limited information regarding plaintiff's work-related issues, a jury could conclude that a psychological examination requirement was not job-related and consistent with business necessity.¹⁸⁶

IV. FAMILY AND MEDICAL LEAVE ACT ("FMLA")

A. DOL Proposes New Rule to Revise Definition of "Spouse" Under FMLA

The FMLA entitles eligible employees of covered employers to

take unpaid, job-protected leave for specified family, medical, and military-based reasons. On June 27, 2014, the Department of Labor ("DOL") published a notice of proposed rulemaking in the Federal Register.¹⁸⁷ The Department of Labor issued a final rule on February 25, 2015, revising the definition of Spouse.¹⁸⁸ The DOL identified two major features of the new final rule: (1) "The Department has moved from a state of residence" rule to a "place of celebration" rule for the definition of spouse under the FMLA regulations. The Final Rule changes the regulatory definition of spouse in 29 CFR §§ 825.102 and 825.122(b) to look to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. A place of celebration rule allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live," and (2) "The Final Rule's definition of spouse expressly includes individuals in lawfully recognized same-sex and common law marriages and marriages that were validly entered into outside of the United States if they could have been entered into in at least one state."¹⁸⁹

"On March 26, 2015, the United States District Court for the Northern District of Texas, *Texas v. United States* Civil Action No. 7:15cv00056 (N.D. Tex.), granted a request made by the

states of Texas, Arkansas, Louisiana, and Nebraska for a preliminary injunction with respect to the Department's Final Rule revising the regulatory definition of spouse under the Family and Medical Leave Act (FMLA). The Government informed the Court of how the Government is complying with the injunction and the Government's understanding of the scope of the injunction in a March 31 filing. A hearing date has been set for April 10th.¹⁹⁰ Employers will need to closely monitor this case in order to see how it progresses.

B. No Harm in Employer's Failure to Provide Adequate and Timely FMLA Notices

In another interesting case involving FMLA notice requirements, *Bellone v. Southwick-Tolland Regional School District*,¹⁹¹ the court held that because the employer's failure to provide timely and adequate notice of FMLA rights did not harm the employee, the employer was not liable under the FMLA.¹⁹² Plaintiff began working for the school system as a fourth grade teacher.¹⁹³ On March 4, 2010, he informed the school system that he needed to take a two-week leave of absence for medical reasons.¹⁹⁴ The physician's note which accompanied the request stated that Bellone would be unable to work from March 3, 2010, to March

23, 2010.¹⁹⁵ On March 23, 2010, Bellone provided a second note from his physician stating that Bellone would be unable to work from March 23, 2010, to April 15, 2010.¹⁹⁶

On March 24, 2010, the school system sent Bellone the FMLA medical certification form and instructed Bellone to return the form within 15 days.¹⁹⁷ Bellone's physician completed the form and submitted it to the school system on April 10, 2010.¹⁹⁸ In his certification, the physician opined that Bellone was unable to perform his job functions for an "uncertain" period of time.¹⁹⁹ Thereafter, on May 3, 2010, the school system notified Bellone that the form did not provide enough specificity about his medical condition.²⁰⁰ On May 10, 2010, Bellone gave the school system permission to communicate directly with his physician for more details.²⁰¹ For the remainder of the academic year, which ended on June 21, 2010, the school system continued to receive correspondence from Bellone's physician stating that Bellone was unable to work.²⁰²

On July 9, 2010 (approximately two weeks following the end of the academic year), the school district sent Bellone an FMLA designation notice, informing him that he had been approved for FMLA leave, that the school system had designated his twelve-week leave period as March 4, 2010, through June 4, 2010, and that he had

exhausted his FMLA entitlement during that time.²⁰³ Bellone was further advised that he was required to provide medical documentation regarding his ability to come back to work for the next academic year.²⁰⁴

Bellone did not respond to the FMLA notice, and thus he was sent another letter on August 25, 2010, informing him that his position remained open and that he had seven days to provide evidence of his fitness for duty.²⁰⁵ Thereafter, Bellone provided a letter from a psychologist dated August 30, 2010, stating that he could see no psychological reasons why Bellone should not return to work at the beginning of the next academic year.²⁰⁶ That year began on September 1, 2010. On September 9, 2010, the school system sent Bellone a letter informing him that he was being placed on unpaid administrative leave as of August 30, 2010, what his salary would be for the coming academic year, and that the school system expected him to return to work on September 22, 2010.²⁰⁷ When he received his new assignment, Bellone contended that it was a demotion and thus he did not report to work on September 22, 2010.²⁰⁸ As a result, Bellone was suspended without pay and then officially terminated in October, 2010.²⁰⁹

Bellone sued, claiming that his FMLA rights had been interfered with by the employer's failure to provide proper and

timely FMLA eligibility and designation notices.²¹⁰ The district court granted summary judgment in favor of the school system and Bellone appealed.²¹¹ On appeal, the United States Court of Appeals for the First Circuit first analyzed the notice requirements found in the FMLA regulations.²¹² According to the regulations, when an employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.²¹³ This is known as the eligibility notice.²¹⁴ Thereafter, once the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason (e.g., after receiving a medical certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances.²¹⁵ This is known as the designation notice.²¹⁶ The Court of Appeals agreed with the district court that the March 24, 2010, letter which contained the medical certification form, and the July 9, 2010, designation notice were both untimely, and that the eligibility notice was also inadequate, as it did not contain any of the information required by the regulations.²¹⁷ But the Court of Appeals concluded, in agreement with the trial court, that the late or inadequate notices were not

actionable because they did not harm Bellone.²¹⁸ In fact, Bellone had gone out on leave from March 4, 2010, to June 21, 2010.²¹⁹ The record did not show any evidence that Bellone was fit to return to work until August 30, 2010.²²⁰ Significantly, in this case, the plaintiff did not meet his burden to present any evidence that he had been harmed by the inadequate notice provided by his employer.²²¹ Other employers might not be as lucky as Southwick. It is recommended that the FMLA notice requirements be carefully followed.

V. FAIR LABOR STANDARDS ACT (“FLSA”)

A. President Directs DOL to Revise FLSA Overtime Exemptions

President Barack Obama has made it clear that one of his top priorities is to address what he describes as “stagnant wages.”²²² In furtherance of this agenda, the President sent a memorandum to Secretary of Labor Thomas Perez on March 13, 2014, directing the DOL to reform the current white collar exemptions under the FLSA to attempt to increase the number of persons entitled to overtime compensation.²²³ In his memorandum, entitled “Updating and Modernizing Overtime Regulations,” the President indicated that the white collar exemptions “have not kept up with our modern economy” and that,

“[b]ecause these regulations are outdated, millions of Americans lack the protections of overtime and even the right to minimum wage.”²²⁴ Accordingly, President Obama directed Secretary Perez to “propose revisions to modernize and streamline the existing overtime regulations.”²²⁵

Though President Obama did not indicate what specific revisions he wanted the DOL to make, it seems likely that the DOL will target three key areas.²²⁶ First, the DOL will likely seek to increase the current \$455 minimum salary requirement. This minimum salary amount has been in effect since 2004, and it has not been adjusted for inflation or today’s cost of living statistics. Second, the DOL’s proposed revisions to the salary basis test may include a requirement that the salary be sufficiently large to ensure that the employee’s salary provides at least minimum wage (or some other minimum regular rate of pay) for all hours worked in a workweek. The third anticipated change is likely to include more of a bright-line test for the duties portion of the white collar exemptions, especially the executive exemption that applies to managers and supervisors. All of these anticipated changes are likely to have a significant impact on employers across all industries, particularly those employers with a lot of frontline managers and assistant managers classified as exempt, and those employers that use the professional and

administrative exemption for many of their entry-level positions.

B. DOL Publishes Final Rule on Federal Contractor Minimum Wage Provisions

On February 12, 2014, the White House issued Executive Order 13658, which raises the minimum wage for covered employees working directly on, or contributing to, covered federal contracts and subcontracts to \$10.10 per hour.²²⁷ On October 7, 2014, the DOL published its Final Rule implementing EO 13658.²²⁸ The Final Rule limits its application to contracts that are awarded pursuant to solicitations issued on or after January 1, 2015, or awarded outside the solicitation process if the contract is issued on or after January 1, 2015.²²⁹ Under certain circumstances, certain contracts entered into prior to January 1, 2015, can constitute a “new contract” covered by the Rule.²³⁰ The Final Rule also clarifies which federal contracts and subcontracts are covered. Beginning January 1, 2016, and annually thereafter, the minimum-wage for federal contractors may be increased by the Secretary of Labor in correlation with the annual percentage increase in the consumer price index for Urban Wage Earners and Clerical Workers.²³¹ If applicable, the Secretary must publish the new minimum wage at least 90 days before it is scheduled to take

effect.²³² New recordkeeping and notice requirements are also implemented by the Final Rule.²³³ Finally, the Final Rule articulates the potential remedies and sanctions for failing to comply.²³⁴ Such include requiring payment of back wages owed to workers, withholding amounts due to the contractor in order to satisfy the contractor’s wage obligations, and/or debarment for a period of up to three years.²³⁵

C. DOL’s Homecare Workers Rule in Limbo

On October 1, 2013, the DOL issued its Final Rule pertaining to homecare workers.²³⁶ The Final Rule narrows the types of companionship service duties for which workers are exempt from the minimum wage and overtime requirements of the FLSA, and eliminates the exemption for employees of third-party businesses.²³⁷ On December 22, 2014, United States District Judge Richard J. Leon invalidated the part of the rule that excluded third-party employers from taking advantage of the companionship exemption.²³⁸ Thereafter, on January 14, 2015, the judge vacated the Rule’s narrowed definition of companionship services.²³⁹ The DOL has filed a notice of appeal with the United States Court of Appeals for the District of Columbia Circuit on January 23, 2015.²⁴⁰

VI. On the Horizon

More of the same is expected from federal administrative agencies during the remainder of the Obama Administration. At the direction of the President, the DOL is expected to limit the application of the white collar exemptions so as to pave the way for more employees to receive overtime pay. The EEOC is expected to continue to flex its muscles in order to justify its existence and stay relevant. Pushing novel legal theories and aggressive new tactics is one way it has historically attempted to demonstrate its value. The commitment to being unpredictable makes identifying the road ahead challenging. Indeed, 2015 may prove to be a very interesting year for employers.

End Notes

¹ This survey covers the period February 1, 2014 through April 1, 2015. However, because these laws and regulations are constantly subject to change, we encourage employers with questions to seek legal counsel.

² EEOC ISSUES FY 2014 PERFORMANCE REPORT, <http://www.eeoc.gov/eeoc/newsroom/releases/11-18-14> cfm (last visited on April 1, 2015).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013-2016, <http://www.eeoc.gov/eeoc/plan/sep.cfm> (last visited on April 1, 2015).

⁹ *Id.*

¹⁰ 777 F.3d 362 (6th Cir. 2015).

¹¹ *Id.* at 363-64.

¹² *Id.* at 362-63.

¹³ *Id.* at 263-64.

¹⁴ *Id.* at 363.

¹⁵ *Id.*

¹⁶ 567 Fed. App'x 681 (11th Cir. 2014).

¹⁷ *Id.* at 682.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 682-83.

³⁰ *Id.* at 684.

³¹ *Id.*

³² *Id.*

³³ EEOC ISSUES NEW PUBLICATIONS ON RELIGIOUS GARB AND GROOMING IN THE WORKPLACE, <http://www.eeoc.gov/eeoc/newsroom/releases/3-6-M.cfm> (last visited April 6, 2015).

³⁴ RELIGIOUS GARB AND GROOMING THE WORKPLACE: RIGHTS AND RESPONSIBILITIES,

http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited April 6, 2015).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 731 F.3d 110 (10th Cir. 2013), cert. granted 135 S. Ct. 44 (2014).

⁴² CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited on April 1, 2015)

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 748 F.3d 749 (6th Cir. 2014).

⁴⁶ *Id.* at 750.

⁴⁷ *Id.*

⁴⁸ *Id.* at 751.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 752.

⁵² *Id.*

⁵³ *Id.* at 754.

⁵⁴ *Id.* at 750, 753.

⁵⁵ 490 U.S. 228 (1989), overruled on other grounds by *Burrage v. US.*, 134 S. Ct. 881, 889 n.4 (2014) (*Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), is not to the contrary. The three opinions of six Justices in that case did not eliminate the but-for-cause requirement imposed by the “because of” provision of 42 U.S.C. § 2000e-2(a), but allowed a showing that

discrimination was a motivating or substantial factor to shift the burden of persuasion to the employer to establish the absence of but-for cause. See *University of Tex. Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2525-2527 (2013). Congress later amended the statute to dispense with but-for causality. Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m)).

⁵⁶ *Id.* at 257-58.

⁵⁷ FACT SHEET ON EEOC RECENT LITIGATION REGARDING TITLE VII AND LGBT-RELATED DISCRIMINATION

http://www.eeoc.gov/eeoc/litigation/selecte_d/lgbt_facts.cfm (Last visited April 6, 2015).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ No. 5:12— CV— 1119-DAE, 2014 WL 6611997 (W.D. Tex. Nov. 19, 2014).

⁶⁴ *Id.* at *7.

⁶⁵ *Id.* at *1.

⁶⁶ OFCCP ANNOUNCES A FINAL RULE PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, <http://www.dol.gov/ofccp/LGBT.html> (last visited April 6, 2015).

⁶⁷ *Id.*

⁶⁸ 754 F.3d 1240 (11th Cir. 2014).

⁶⁹ *Id.* at 1245.

⁷⁰ *Id.* at 1249.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1245.

⁷⁴ *Id.* at 1246.
⁷⁵ *Id.*
⁷⁶ *Id.*
⁷⁷ *Id.*
⁷⁸ *Id.*
⁷⁹ *Id.* at 1247.
⁸⁰ *Id.* at 1248.
⁸¹ *Id.* at 1245.
⁸² *Id.* at 1250.
⁸³ *Id.* at 1245, 1250.
⁸⁴ 573 Fed. App'x 693 (10th Cir. 2014).
⁸⁵ *Id.* at 695.
⁸⁶ *Id.*
⁸⁷ *Id.*
⁸⁸ *Id.* at 697.
⁸⁹ *Id.* at 697-98.
⁹⁰ 753 F.3d 265 (1st Cir. 2014).
⁹¹ *Id.* at 270-71.
⁹² *Id.* at 267.
⁹³ *Id.*
⁹⁴ *Id.*
⁹⁵ *Id.*
⁹⁶ *Id.* at 267-68.
⁹⁷ *Id.* at 268.
⁹⁸ *Id.*
⁹⁹ *Id.*
¹⁰⁰ *Id.* at 269.
¹⁰¹ *Id.*
¹⁰² *Id.*
¹⁰³ *Id.*
¹⁰⁴ *Id.* at 270.
¹⁰⁵ *Id.*
¹⁰⁶ See *id.* (citing *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir.1988) (explaining that quid pro quo harassment

occurs “when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply”).
¹⁰⁷ *Id.* at 273-74.
¹⁰⁸ *Id.* at 274.
¹⁰⁹ *Id.* at 279.
¹¹⁰ No. 12 C 07750, 2014 WL 3509719 (N.D. 111. July 15, 2014).
¹¹¹ *Id.* *5-6.
¹¹² *Id.* at *6.
¹¹³ No. 13-CV-4356 (JPO), 2014 WL 3585492 (S.D. N.Y. July 8, 2014).
¹¹⁴ *Id.* at *4 (discussing that the date of the adverse action is critical to determining temporal proximity).
¹¹⁵ *Id.* (citing *Helmes v. S. Colonie Cent. Sch. Dist.*, 564 F.Supp.2d 137, 147 (N.D.N.Y.2008) (protected at nine weeks); *Briggs v. Women in Need, Inc.*, 819 F.Supp. 2d 119, 127 (E.D.N.Y. 2011)(protected at three months); *Koppental v. Nepera, Inc.*, 74 F.Supp.2d 409, 410 (S.D.N.Y. 1999) (protected at three to four months); *Quarantino*, 71 F.3d at 64 (protected at less than four months); *Shafrir v. Ass'n of Reform Zionists of Am.*, 998 F.Supp. 355, 357 (S.D.N.Y.1998) (protected at less than four months); *Pellegrino v. Cnty. of Orange*, 313 F.Supp.2d 303, 317 (S.D.N.Y.2004) (four months deemed weak correlation); *Keller v. Great Lakes Collection Bureau, Inc.*, 2005 WL 2406002, at *5 (W.D.N.Y. Sept.29, 2005) (not protected at two and a half years).
¹¹⁶ EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES,
http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited April 6, 2015).
¹¹⁷ No. 12-1226,2015 WL 1310745 (U.S. March 25, 2015)

¹¹⁸ PREGNANCY: EMPLOYER'S NEWEST "ACCOMODATION OBLIGATION," <http://www.constangy.com/communication-s-574.html> (last visited April 6, 2015).

¹¹⁹ *Id.* at *4

¹²⁰ *Id.* at *5.

¹²¹ *Id.* at *4.

¹²² See *id.* at *4-5.

¹²³ *Young v. United Parcel Service*, 707 F.3d 437, 449.451 (4th Cir. 2013).

¹²⁴ *Young v. United Parcel Service*, 134 S.Ct. 2898 (2014).

¹²⁵ 2015 WL 1310745, *17.

¹²⁶ *Id.* at *15.

¹²⁷ *Id.* at *16.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 437 S.W.3d 529 (Tex. 2014).

¹³¹ See *id.* at 531-532.

¹³² *Id.* at 530-31

¹³³ *Id.* at 531.

¹³⁴ *Id.*

¹³⁵ *Id.* (noting that there was also an underlying administrative grievance).

¹³⁶ *Id.* at 530-31.

¹³⁷ *Id.* at 533-34.

¹³⁸ *Id.*

¹³⁹ *Id.* at 534

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 746 F.3d 1264 (11th Cir. 2014).

¹⁴³ *Id.* at 1269-1270.

¹⁴⁴ CHARGE STATISTICS: FY 1997 THROUGH FY 2014, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited April 6, 2015).

¹⁴⁵ No. 13-00299 DKW KSC, 2014 WL 4374430 (D. Haw. Sept. 2, 2014).

¹⁴⁶ *Id.* at *8.

¹⁴⁷ 759 F.3d 698 (7th Cir. 2014).

¹⁴⁸ *Id.* at 701-702.

¹⁴⁹ *Id.*

¹⁵⁰ FACT SHEET ON RECENT EEOC LITIGATION-RELATED DEVELOPMENTS UNDER THE AMERICANS WITH DISABILITIES ACT (INCLUDING THE ADA), http://www.eeoc.gov/eeoc/litigation/select/d/ada_litigation_facts.cfm (last visited on April 6, 2015); see also, *EEOC v. Walgreen Co.*, 34 F. Supp. 3d 1049 (N.D. Cal. Apr. 11, 2014).

¹⁵¹ 34 F. Supp. 3d 1049 (N.D. Cal. Apr. 11, 2014).

¹⁵² *Id.* at 1050-51.

¹⁵³ *Id.* at 1050.

¹⁵⁴ *Id.* at 1051.

¹⁵⁵ See FACT SHEET ON RECENT EEOC LITIGATION-RELATED DEVELOPMENTS UNDER THE AMERICANS WITH DISABILITIES ACT (INCLUDING THE ADA), http://www.eeoc.gov/eeoc/litigation/select/d/ada_litigationfacts.cfm (last visited on April 6, 2015);

¹⁵⁶ 575 Fed.Appx. 419 (5th Cir. 2014).

¹⁵⁷ *Id.* at 422.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 423-24 (citing *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 760 (5th Cir. 1996) (quoting *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995)); *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477, 481 (5th Cir. 2000)).

¹⁶⁰ See *id.*

¹⁶¹ 753 F.3d 1159 (10th Cir. 2014).

¹⁶² *Id.* at 1161.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1161-62.

¹⁷⁰ No. Cl3-5520 RJB, 2014 WL 5421258 (W.D. Wash. Oct. 23, 2014).

¹⁷¹ *Id.* at *5-7.

¹⁷² *Id.* at *2.

¹⁷³ *Id.* at *2-3.

¹⁷⁴ *Id.* at *3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at *5-6.

¹⁷⁷ *Id.* at *5.

¹⁷⁸ *Id.* (citing *Kimbrow v. Atl. Richfield Co.*, 889 F.2d 869, 878 (9th Cir.1989)).

¹⁷⁹ 763 F.3d 619 (6th Cir. 2014).

¹⁸⁰ *Id.* at 620.

¹⁸¹ *Id.* at 621-22

¹⁸² *Id.*

¹⁸³ *Id.* at 623, 627.

¹⁸⁴ *Id.* at 623 (citing *Conroy v. New York Dep't of Corr. Servs.*, 333 F.3d 88, 97 (2d Cir. 2003)).

¹⁸⁵ *Id.* (citing *Wurzel v. Whirlpool Corp.*, 482 Fed.Appx. 1, 12 (6th Cir.2012); *Pence v. Tenneco Auto. Operating Co.*, 169 Fed.Appx. 808, 812 (4th Cir.2006) (“[W]e note that whether a mental examination was job-related and consistent with business necessity is an objective inquiry.”)).

¹⁸⁶ *Id.* at 623-24.

¹⁸⁷NOTICE OF PROPOSED RULEMAKING TO REVISE THE DEFINITION OF SPOUSE UNDER THE FMLA,

<http://www.dol.gov/whd/finla/nprm-spouse/> (last visited April 6, 2015).

¹⁸⁸ FINAL RULE TO REVISE THE DEFINITION OF SPOUSE UNDER THE FMLA,
<http://www.dol.gov/whd/finla/spouse/index.htm> (last visited April 6, 2015).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 748 F.3d 418 (1st Cir. 2014).

¹⁹² *Id.* at 423-24.

¹⁹³ *Id.* at 420.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 420-21.

²⁰¹ *Id.* at 421.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 422.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 422-23.

²¹³ *Id.* at 422.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 423-24.

²¹⁸ *Id.* at 424.

²¹⁹ *Id.* at 425.

²²⁰ *Id.*

²²¹ *Id.* at 424.

²²² REMARKS BY THE PRESIDENT ON OVERTIME PAY, <https://www.whitehouse.gov/the-press-office/2014/03/13/remarks-president-overtime-pay> (last visited April 6, 2015).

²²³ UPDATING AND MODERNIZING OVERTIME REGULATIONS, <https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations> (last visited).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See REMARKS BY THE PRESIDENT ON OVERTIME PAY, <https://www.whitehouse.gov/the-press-office/2014/03/13/remarks-president-overtime-pay> (last visited April 6, 2015); UPDATING AND MODERNIZING OVERTIME REGULATIONS, <https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations> (last visited).

²²⁷ EXECUTIVE ORDER- MINIMUM WAGE FOR CONTRACTORS, <https://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors> (last visited April 6, 2015).

²²⁸ FACT SHEET: FINAL RULE TO IMPLEMENT EXECUTIVE ORDER 13658, ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS,

<http://www.dol.gov/whd/flsa/eo13658/fr-factsheet.htm> (last visited).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ FACT SHEET #25: HOME HEALTH CARE AND COMPANIOSHIP SERVICES EXEMPTION UNDER THE FAIR LABOR STANDARDS ACT (FLSA),

<http://www.dol.gov/whd/regs/compliance/w hdfs25.pdf> (last visited April 6, 2015).

²³⁷ *Id.*

²³⁸ *Homecare Ass'n of American v. Weil*, No. 14-cv—967 (RJL), 2014 WL 7272406, (D.D.C. Dec. 22, 2014).

²³⁹ *Homecare Ass'n of American v. Weil*, No. 14-cv—967 (RJL), 2015 WL 181712 (D.D.C. Jan. 14, 2015).

²⁴⁰ See *id.*

Recent Developments in Automobile Liability Defense Case Law

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In 2014, the Court of Appeals issued several decisions which favor plaintiffs and claimants in automobile liability litigation. Though many of these matters are now pending before the Supreme Court for further evaluation, the Court of Appeals has endeavored to expand the scope of emotional distress damages available to plaintiffs (*Oliver v. McDade*), somewhat lessened the plaintiff's burden of diligent service of process following the expiration of the statute of limitations (*Giles v. State Farm*), required named driver exclusions in UM policies to be made in writing by the insured (*Roberson v. 21st Century*), limited the application of the defendant's ability to apportion fault to a nonparty (*Zaldivar v. Prickett*), and placed the burden of proving an illegal denial of coverage by a liability carrier on a presumptive uninsured motorist carrier (*Castellanos v. Travelers*). On the other hand, the Georgia Supreme Court has definitely addressed the nature and amount of attorney's fees permitted under an Offer of

Judgment in a way that positively affects the defense bar (*Couch v. Georgia Department of Corrections*).

I. *Oliver v. McDade*

The "impact rule" has long been the accepted standard when considering a plaintiff's claims for negligent infliction of emotional distress. However, in *Oliver*, the Court of Appeals has seemingly expanded the pecuniary loss rule to such an extent that the "impact rule" is somewhat obviated, opening the door for increased claims for negligent infliction of emotional distress.

The underlying civil action arose from a motor-vehicle accident that occurred on Interstate 16 in Dublin, Georgia.¹ Just prior to the accident, the plaintiff, John McDade, had been riding as a passenger in a truck being driven by Matthew Wood.² Just after Wood merged onto the interstate, he determined that there was a problem with the trailer being towed by his truck, therefore, he pulled the truck and trailer to the shoulder of the highway.³ Wood then exited the truck and walked

back towards the trailer.⁴ At the same time, a tractor-trailer driven by Defendant Jerome Oliver left the roadway and collided with the truck and trailer, crushing and killing Wood.⁵ McDade, still in the cab of the truck, suffered bodily injuries in the accident.⁶ Additionally, the force of the impact “propelled blood and tissue from Wood’s body onto McDade.”⁷ Nevertheless, following the impact, McDade exited his vehicle, found Wood’s body and protected it until emergency personnel arrived at the scene.⁸ In addition to his bodily injuries, McDade contended that he also suffered from insomnia, flashbacks, anxiety, depression and suicidal thoughts following the accident.⁹ He ultimately sought psychiatric help, was diagnosed as suffering from major depression, and was prescribed various medications for his conditions.¹⁰

McDade ultimately brought suit against Oliver and Oliver’s employer, and a direct action against Oliver’s liability carrier for negligence.¹¹ The Defendants moved for partial summary judgment as to the plaintiff’s claims for emotional distress arising from having witnessed the injuries to Wood.¹² The trial court originally granted Defendants’ motion, but upon Plaintiff’s Motion for Reconsideration, reversed course and found that McDade could present a claim for emotional distress under the pecuniary loss rule.¹³

On appeal, the Court of Appeals affirmed the trial court’s decision, finding that McDade had suffered non-physical injuries (depression), as well as pecuniary loss associated with the injuries (the cost of psychiatric care), satisfying the requirements of the pecuniary loss rule.¹⁴ The Court of Appeals found that there was no distinction made by the plaintiff between his claims for emotional distress arising from his own injuries and the emotional distress arising from witnessing the injuries to Wood, but that even if there had been such a distinction, recovery for such emotional distress would be appropriate.¹⁵

In reaching its decision, the majority was careful to distinguish the instant case from the case of *Owens v. Gateway Management Co.*¹⁶ In *Owens*, an apartment tenant brought suit for negligent security after she had been held at gunpoint in her apartment by two intruders.¹⁷ The plaintiff did not suffer any bodily injury during the home invasion, but claimed that she suffered from emotional distress thereafter.¹⁸ The trial court granted summary judgment in favor of the defendants and the Court of Appeals affirmed, holding that in order to recover for emotional distress, the plaintiff must suffer from an actual physical injury resulting from an impact, and finding that the pecuniary loss rule is not applicable where the only monetary losses suffered by the plaintiff were “due to medical bills and lost time from work she

allegedly incurred because of emotional distress following the incident in question.”¹⁹ The Court found that the *Oliver* case differed from *Owens* because Owens’ fear alone was not a sufficient physical or nonphysical injury to the person.²⁰

The pecuniary loss rule, relied upon by the majority, as defined in *Kuhr Bros. v. Spahos*, provides that:

In cases where mere negligence is relied on, before damages for mental pain and suffering are allowable, there must also be an actual physical injury to the person, or a pecuniary loss resulting from an injury to the person which is not physical; such an injury to a person's reputation, or the mental pain and suffering must cause a physical injury to the person.²¹

Since the decision in *Kuhr Bros.*, the pecuniary loss rule has been further defined in *OB-GYN Assoc. of Albany v. Littleton* and then somewhat expanded in *Nationwide Mutual Fire Ins. Co. v. Lam*. In 1989, the Georgia Supreme Court decided *Littleton*, wherein the plaintiff sought to recover for emotional distress arising from the death of her infant daughter.²² The Georgia Supreme Court held that

the mother could not recover for emotional distress arising from the death of her daughter under the pecuniary loss rule, opining that in order for the plaintiff to recover for emotional distress, the pecuniary loss associated therewith must have arisen from a tort involving injury to the plaintiff.²³ “[F]or a pecuniary loss to support a claim for damages for emotional distress, the pecuniary loss must occur as a result of a tort involving an injury to the person even though this injury may not be physical. An injury to the reputation is such an injury.”²⁴

Then in 2001, the Court of Appeals, decided *Lam*, apparently furthering the application of the pecuniary loss rule. In *Lam*, a plaintiff who was not physically injured in a motor-vehicle accident filed suit contending that her pre-existing mental illness had been aggravated by the accident.²⁵ Nationwide’s Motion for Summary Judgment was denied by the trial court and the trial court’s decision was affirmed by the Court of Appeals, which held that the plaintiff had suffered an injury to her person, in the context of aggravated mental illness, and monetary loss related thereto.²⁶ Therefore, the Court held that Lam was entitled to recover damages related to emotional distress arising from the defendant’s negligence.²⁷

Conversely, and seemingly antithetical to the pecuniary loss rule, the impact rule requires that

in order to recover for emotional distress in a negligence action, there must be a physical impact to the plaintiff, the physical impact must have caused an injury to the plaintiff, and the physical injury must have caused mental suffering or emotional distress.²⁸ In *Lee v. State Farm*, the Georgia Supreme Court examined the history and rationale of the impact rule and reaffirmed the application thereof, with only a small window of exception.²⁹ In that case, the plaintiff, Bridget Lee, was permitted to recover damages for emotional pain and suffering due to the death of her daughter arising from injuries that she had sustained in an accident in which both Mrs. Lee and her daughter had been involved.³⁰

While the majority deciding *Oliver* held that the plaintiff could recover damages for emotional distress due to the death of Wood under the pecuniary loss rule, Judge Andrews, in dissent, focused on the juxtaposition of the pecuniary loss rule and the impact rule, and determined that the majority's opinion effectively "eviscerate[d] the impact rule."³¹ In authoring his dissent, Judge Andrews found the instant case to be controlled by the Court's decision in *Owens*, arguing that "the plaintiff cannot show the nonphysical injury that he suffered as a result of the defendants' negligence is anything more than the same emotional distress for which he seeks to recover ... Absent any separate tort involving injuries

to his person, he may not seek damages for emotional distress from witnessing the death of his friend[.]"³² The dissent was further grounded in the argument that the Court of Appeals had previously wrongly decided *Lam* and that the Court of Appeals lacked the authority to create a new remedy at law.³³ Finally, Judge Andrews cites to the Supreme Court's decision in *Lee* and its progeny to illustrate that the majority's opinion far exceeds the scope of the impact rule and pecuniary loss rule as provided in that line of cases.³⁴

On May 11, 2015, after the initial preparation of this article, the Georgia Supreme Court affirmed the Court of Appeals' decision in this case.³⁵ The Supreme Court's opinion is not nearly as broad as that of the Court of Appeals and simply upholds the decision based on the rationale that the plaintiff's testimony cited various reasons for his emotional distress, including, but not limited to the death of Matthew Wood.³⁶ Therefore, the Court held that the trial court's denial of the Motion for Summary Judgment was appropriate, as it was "not possible to determine, as a question of fact, whether any portion of McDade's emotional distress arises solely from witnessing the injuries to his friend." The Supreme Court then continued on to narrow the holding of the Court of Appeals by vacating Division 2 of the Court of Appeals' decision, which dealt with the

potentially troubling expansion of the pecuniary loss rule.³⁷

II. *Giles v. State Farm Mutual Automobile Insurance Company*

In *Giles* the Court of Appeals reexamined the time calculation associated with the five day grace period to perfect service under O.C.G.A. § 9114, clarifying that the date of filing is not necessarily the start date for the five day grace period.

Pursuant to O.C.G.A. § 9114, “[w]hen service is to be made within this state, the person making such service shall make the service within five days from the time of receiving the summons and complaint; but failure to make service within the five-day period will not invalidate a later service.”³⁸ This subparagraph represents the current codification of the common law grace period for service of process in instances where a complaint is filed prior to the expiration of the statute of limitations, but the statute has expired prior to service of process: “If the filing of the petition is followed by timely service perfected as required by law, although the statute of limitation runs between the date of filing of the petition and the date of service, the service will relate back to the time of filing so as to avoid the limitation.”³⁹ Therefore, under the plain language current statutory structure, the “person making such service,” is required to serve the defendant within five days from

the time the summons and complaint are received by the person effecting service.

On June 3, 2005, James Giles was injured in a motor-vehicle accident.⁴⁰ He filed suit in the Superior Court of Fulton County on May 30, 2007 and perfected service in a timely manner.⁴¹ During that litigation, Giles voluntarily dismissed his suit without prejudice on November 7, 2011, well after the expiration of the two year statute of limitations for personal injuries.⁴² On April 30, 2012, Giles filed a timely renewal action.⁴³ The clerk issued a summons the same day, but the Cobb County Sheriff’s Office did not receive a copy of the summons and complaint until May 7, 2012.⁴⁴ State Farm Mutual Automobile Insurance Company, the plaintiff’s UM carrier, was then served with process on May 9, 2012, after the expiration of the six month period for filing a renewal complaint allowed under O.C.G.A. § 9261.⁴⁵ As a result, State Farm filed a Motion to Dismiss due to the fact that it had been served with process after the expiration of the six month renewal period.⁴⁶ The trial court granted State Farm’s motion, holding that the five day grace period for service begins to run upon the filing of the complaint, reasoning that the “person making such service” pursuant to O.C.G.A. 9114(c) refers to the plaintiff as opposed to the person who actually makes or performs service of the summons and complaint upon the

defendant.⁴⁷ The Court of Appeals disagreed with the trial court's interpretation of O.C.G.A. § 9114(c) and the litany of cases calculating the five day grace period from the date of the filing of the law suit.⁴⁸ Instead, the Court of Appeals held that "the person making such service" should not be deemed, as a matter of law, to be the plaintiff.⁴⁹ The plain meaning of the statute dictates that "the person making such service" is not necessarily the plaintiff, as the legislature could have easily worded O.C.G.A. § 9114 to begin the running of the five day period upon the date the complaint and summons are issued, rather than when they are received by "the person making such service."⁵⁰ This decision overrules a prior appellate decision that incorrectly stated that the plaintiff must make service within five days of the filing of the complaint.⁵¹ While the five day grace period provided for in O.C.G.A. § 9114 may begin to run on the same day that a complaint is filed, such date is not determinative. Therefore, based on this reexamined interpretation of O.C.G.A. § 9114, the trial court's Order was reversed.⁵²

III. *Roberson v. 21st Century National Insurance Company*

The Court of Appeals in *Roberson* examined the interplay of named-driver exclusions and the requirement that a rejection of uninsured/underinsured motorist coverage, pursuant to O.C.G.A. § 33711(a)(3), must be in writing,

and determined that such an exclusion was invalid within a UM policy where an insured had not made such a request for excluded coverage in writing.

Danny Roberson filed suit due to injuries he sustained in a motor-vehicle accident.⁵³ In addition to serving Defendants Larry Booker and Michael Snipes, the plaintiff also served 21st Century National Insurance Company, his wife's UM carrier, alleging that the defendants were uninsured or underinsured as defined by law.⁵⁴ The 21st Century policy at issue contained a named-driver exclusion which specifically excluded Roberson from all coverages under the policy, including UM coverage.⁵⁵ Therefore, 21st Century filed a Motion for Summary Judgment based on the policy language and the named-driver exclusion, arguing that Roberson was not entitled to UM coverage as a specifically excluded driver under the terms of the policy.⁵⁶ The trial court agreed and granted summary judgment to 21st Century.⁵⁷

As a general rule, named driver exclusions are valid and are not against public policy when they are clear, unambiguous and supported by consideration.⁵⁸ However, Roberson contended that the named-driver exclusion contained within his wife's policy violated public policy because it was not in writing and violated the requirements of O.C.G.A. § 33711.⁵⁹

Specifically, O.C.G.A. § 33711(a)(1) provides:

No automobile liability policy or motor vehicle liability policy shall be issued or delivered in this state to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle then principally garaged or principally used in this state unless it contains an endorsement or provisions undertaking to pay the insured damages for bodily injury ... of an insured under the named insured's policy sustained from the owner or operator of an uninsured motor vehicle[.]⁶⁰

However, such coverage shall not be required when any insured rejects the coverage in writing.⁶¹ In the case at hand, Tera Roberson was the sole named insured, but there was no evidence in the record that she had rejected UM coverage in writing to any extent.⁶² Therefore, the Court of Appeals held that, without evidence of a waiver of UM coverage in writing, the exclusion violated public policy and was unenforceable.⁶³

In reaching this decision, the Court was careful to distinguish the facts of this case from those of *Fountain v. Atlanta Cas. Co.*, *Fountain I* and *Fountain II*.⁶⁴ In *Fountain I* and *Fountain II*, the Court of Appeals found that a named-driver exclusion found in a UM policy was valid, but in those cases, the named insureds and the excluded driver herself had all rejected UM coverage in writing.⁶⁵

Finally, though the Court of Appeals reached a decisive ruling regarding the requirement that a named-driver exclusion in a UM policy be in writing, or accompanied by a written rejection of UM coverage, two related issues remain unaddressed. First, the Court of Appeals explicitly avoided discussion of whether both Danny Roberson and Tera Roberson would have been required to execute a rejection of coverage for the named-driver exclusion to have been applicable, or whether Tera Roberson, as the sole named insured, could have accomplished the exclusion on her own.⁶⁶ Second, the Court of Appeals took no position on what manner of “writing” would be needed or acceptable to satisfy the written rejection requirement of O.C.G.A. § 33711.⁶⁷

IV. Castellanos v. Travelers Home & Marine Insurance Company

This case presented a matter of first impression in which the Court of Appeals addressed the burden of proof at a trial between

an insured and his uninsured motorist carrier where the insured sued his insurer for bad faith after a liability carrier denied coverage due to the defendant's failure to appear and cooperate. The Court of Appeals sided with the insured and found that the insurer bore the burden of proving that the tortfeasor may not be uninsured.

On September 22, 2009, Luis Castellanos was injured in an accident caused by the negligence of Jose Santiago.⁶⁸ At the time of the accident, Castellanos was a named insured under a policy of automobile insurance through Travelers which provided for uninsured/underinsured motorist coverage.⁶⁹ The alleged tortfeasor, Santiago, was covered by a policy of automobile liability insurance provided by United Automobile Insurance Company.⁷⁰ Santiago failed to attend trial and a jury returned a verdict in favor of Castellanos. Once a judgment was entered in favor of Castellanos,⁷¹ United formally denied coverage, contending that Santiago's failure to attend trial had prejudiced the defense of the case.⁷² Thereafter, Castellanos demanded payment of the judgment from Travelers under the theory that Santiago was uninsured as a matter of law.⁷³ After Travelers rejected the demand, Castellanos filed suit, alleging that the refusal to pay UM benefits was made in bad faith.⁷⁴ Once suit was filed, Castellanos and Travelers filed cross motions for Summary Judgment, in which Travelers argued that there was no

evidence that United's denial of coverage was a legal denial of coverage.⁷⁵ The trial court found that "there was 'no evidence that United reasonably requested Santiago's cooperation, that Santiago willfully and intentionally failed to cooperate, that his failure to cooperate was prejudicial to United, and that [his] justification for failing to respond was insufficient.'"⁷⁶ Based on that rationale, the trial court granted Travelers' Motion for Summary Judgment.⁷⁷

On appeal, Castellanos argued that the trial court improperly shifted to him the burden of providing evidence supporting United's denial of coverage.⁷⁸ The Court of Appeals agreed, finding that the trial court had improperly cast a burden upon Castellanos to provide evidence to rebut Travelers' affirmative defense that Santiago was insured as defined by law.⁷⁹ The Court opined that in order to survive summary judgment, the plaintiff simply had to meet a "threshold burden of showing that he was entitled to UM benefits," and that Travelers bore the burden of justifying its denial of coverage.⁸⁰ This prima facie case was established by showing that the plaintiff was entitled to recover damages from the defendant, that Travelers provided UM coverage, that the liability carrier *legally denied coverage*, that the liability insurance policy allowed for withdrawal of coverage based on lack of cooperation, and that such

coverage was withdrawn.⁸¹ The Court's rationale is clearly grounded in the logic that the legality of United's denial of coverage and the availability of liability coverage is an affirmative defense offered by the UM carrier, rather than an evidentiary burden to be shouldered by a plaintiff seeking UM protection.⁸² Furthermore, the holding of the Court is guided by the public policy purpose of uninsured motorist coverage, the protection of "innocent victims from the negligence of irresponsible drivers."⁸³

However, it appears that in the majority's efforts to protect "innocent victims" it presupposed the prima facie case that the plaintiff is required to prove, even by the majority's own standards. In a dissenting opinion, Judge McMillan disputes the majority's finding that the denial of liability coverage is an affirmative defense and opines that the plaintiff bears the burden of showing that coverage was legally denied before a prima facie case can be made.⁸⁴ In dissent, Judge McMillan states that in order to present a prima facie case, the plaintiff must show that the defendant was uninsured by offering evidence that United not only denied coverage, but *legally* denied coverage.⁸⁵ Generally speaking, cooperation clauses in insurance contracts are valid and enforceable,⁸⁶ but in order for the liability insurer to rely upon such a clause, it must show that it reasonably requested the insured's

cooperation, that cooperation was willfully and intentionally withheld, and that the lack of cooperation prejudiced the defense of the case.⁸⁷ This burden is not met by simply showing that the insured failed to appear for trial.⁸⁸ Nevertheless, Castellano failed to present any evidence of efforts made by United to "locate Castellano, obtain his cooperation, or to secure his attendance at trial."⁸⁹ Furthermore, Judge McMillan found that there was no evidence in the record to raise an inference that Santiago's failure to attend trial was willful or intentional.⁹⁰ Based on this belief that the plaintiff failed to present evidence to satisfy the first two elements of a prima facie case for a legal denial of coverage, he opined that Castellanos had failed to meet his burden at trial and that the trial court's Order granting summary judgment should have been affirmed.⁹¹

V. *Georgia Department of Corrections v. Couch*

In *Couch*, The Georgia Supreme Court addressed the apparent inequity that arises when the Offer of Judgment Statute, O.C.G.A. § 91168, is utilized by a plaintiff who has employed his counsel through a contingency agreement. In reaching its decision, the Supreme Court reversed the decision of the Court of Appeals, providing defense counsel with some protection against attorney's fees arising from

Offers of Judgment made at or near the time of trial.

This case is premised on a suit for personal injuries brought by an inmate, David Lee Couch, against the department of corrections for injuries he sustained while participating in a prison work crew.⁹² Prior to trial, on November 14, 2007, Couch presented an Offer of Judgment pursuant to O.C.G.A. § 91168 for \$24,000, which was rejected by the Department's lack of response.⁹³ A jury ultimately returned a verdict in favor of Couch in the amount of \$105,417, an amount over 125% of the previously submitted Offer of Judgment.⁹⁴ Following the entry of the verdict, the plaintiff moved for an award of attorney's fees of \$104,158.79, based on an hourly rate fee calculation.⁹⁵ The trial court relied upon the 40% contingency fee agreement between Couch and his counsel and awarded Couch \$49,542 in attorney's fees and \$4,782 in expenses of litigation for a total award of \$54,324.⁹⁶ The total for attorney's fees was reached by finding 40% of the plaintiff's "total recovery" considering the verdict, post judgment interests and court costs.⁹⁷

The Department appealed, predominantly on the theory that the claim for attorney's fees pursuant to O.C.G.A. § 91168 was barred by the doctrine of sovereign immunity.⁹⁸ The Department also contested the manner in which the attorney's fees were calculated by

the trial court.⁹⁹ Initially, the Court of Appeals affirmed the trial court's calculation of attorney's fees, finding that "the right to the 40 percent contingency fee was fixed by the judgment entered on the verdict, and the fee awarded by the trial court reflected that percentage."¹⁰⁰ The Court of Appeals further supported its decision by citing to the fact that Couch had presented "evidence of the hours worked and rates charged, substantiating the value and reasonableness of the services thereof."¹⁰¹ However, in reaching its decision, the trial court did not rely on this evidence presented, but exclusively relied upon the 40% contingency fee agreement.¹⁰²

While a trial court may consider a contingency fee agreement when determining an award of attorney's fees, such an agreement must also be accompanied by evidence of hours, rates, or some other value of the professional services rendered.¹⁰³ Given this standard, the Supreme Court found that the trial court erred in two respects when determining Couch's award of attorney's fees.¹⁰⁴ First, the trial court erred in its exclusive reliance upon the contingency fee contract and its failure to consider the attorneys' "hours, rates, or other indications regarding the value of the attorneys' professional services actually rendered."¹⁰⁵ Second, the trial court erred in awarding the plaintiff the complete amount of his attorney's fees incurred in the case.¹⁰⁶ Pursuant to the plain

language of O.C.G.A. § 91168(b)(2), the plaintiff was only entitled to recover his reasonable attorney's fees and expenses of litigation incurred after the rejection of the Offer of Settlement.¹⁰⁷

In reaching this decision, the Supreme Court rejected the argument that, under a contingency fee agreement, no attorney's fees are incurred until the entry of the verdict and judgment.¹⁰⁸ The Court opined that though Couch may not have been obligated to pay any attorney's fees under the contingency agreement until there had been a judgment in his favor, his attorneys were nevertheless performing services and incurring fees on his behalf during the pendency of the litigation. For these reasons, the Supreme Court reversed the decision of the Court of Appeals regarding the calculation of attorney's fees to be awarded to Couch and remanded the case to the trial court for recalculation.¹⁰⁹

VI. *Zaldivar v. Prickett et. al.*

In an en banc decision, the Court of Appeals addressed certain limitations regarding the apportionment statute, O.C.G.A. § 511233(c) and parties that cannot be considered to have contributed to an accident.

O.C.G.A. § 511233(c) permits a defendant to ask a jury to assign a percentage or portion of the fault for an accident to a nonparty.¹¹⁰ Specifically, the code section provides:

In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.¹¹¹

While the statute does not permit a jury to apportion damages to a nonparty, or create a cause of action for the apportionment of damages, it allows the party-defendant to shift the burden of the total damages awarded to the proper actors.¹¹² In *Zaldivar*, the plaintiff, Daniel Prickett, and the defendant, Imelda Zaldivar, were involved in a motor-vehicle accident on October 9, 2009.¹¹³ Prickett contended that the accident occurred as he was clearing an intersection by turning left after the light had turned red, and that the defendant ran the red light, traveling straight through the intersection.¹¹⁴ Defendant, on the other hand, contended that she entered the intersection under a yellow light and the plaintiff failed to yield the right of way when making his left turn.¹¹⁵ During the course of the litigation, Zaldivar filed a "Notice of Fault of Non-Party" pursuant to O.C.G.A. § 511233(d)(1), asserting that the plaintiff's employer, Overhead Door Company, was at fault for the accident for negligently entrusting a vehicle to the plaintiff.¹¹⁶

Thereafter, plaintiff moved for, and was granted summary judgment on this issue.¹¹⁷

In affirming the decision, the Court of Appeals found that fault could not be assigned to the plaintiff's employer because there was not a causal connection between any act or omission of Overhead Door Company and the plaintiff's injuries because the plaintiff's own negligence, if any, breaks the causal connection.¹¹⁸ The majority relied, at least in part, upon the decision of *Ridgeway v. Whisman* in reaching its decision.¹¹⁹ In *Ridgeway*, the parents of a deceased driver who had been involved in a single-vehicle accident, sued the owner of the vehicle that the decedent had been driving at the time of the accident.¹²⁰ At the time of the accident, the vehicle's owner knew that the decedent was intoxicated and unsafe to drive, yet allowed her to drive.¹²¹ The Court of Appeals held that:

[A]s a matter of law that either Whisman's negligent operation of the automobile, or the negligent driving of the "John Doe" driver who allegedly forced Whisman off the road, or the concurrent negligence of both, was the proximate cause of Whisman's death. In other words, any negligence of Ridgeway in

entrusting her car to Whisman while she was intoxicated was neither the sole proximate cause nor a concurrent proximate cause of the accident which caused Whisman's death.¹²²

The Court of Appeals applied its prior analysis from *Ridgeway* to determine that the causal link between any negligence of the plaintiff's employer had been broken by the plaintiff's own negligence.¹²³

In dissent, Judge Branch approached the analysis of the case from a different angle. He opined that if Zaldivar had sued Prickett for injuries, she clearly would have been authorized to assert a claim against Overhead Door Company for negligent entrustment.¹²⁴ Furthermore, if Zaldivar had brought a suit only against Prickett, Prickett would have been able to move to assert fault against his employer pursuant to O.C.G.A. § 511233.¹²⁵ Judge Branch argued that because negligent entrustment is not a form of vicarious liability, but an independent tort, the fact that Overhead Door Company may have improperly entrusted a vehicle to Prickett creates an issue as to whether it could be said that Overhead Door Company was at fault.¹²⁶ In reaching his conclusion, Judge Branch relied upon the Supreme Court's interpretation of O.C.G.A. § 511233 in *Couch v. Red*

Roof Inns, a case distinguished by the majority.¹²⁷ In *Couch*, the Supreme Court found that the word “fault” used in the statute was not a term of art, but should be given its ordinary meaning.¹²⁸ “Thus ‘fault is not meant to be synonymous with negligence, but instead includes other types of wrongdoing.’”¹²⁹ Based on the Supreme Court’s rationale and interpretation of O.C.G.A. § 511233 in *Couch*, Judge Branch concluded that “in addition to the concept of legal liability, the ‘fault’ that is to be considered [pursuant to O.C.G.A. § 511233] is sufficiently broad to include the degree to which Overhead Door can be said to have caused the accident that resulted in Prickett’s injuries, even though Overhead Door could have no liability to Prickett himself.”¹³⁰

VII. Conclusion

At this point, the ultimate effect of these decisions from the Court of Appeals is largely uncertain. While the ruling in *Giles* clearly comports with the language of the statute, the issues addressed by the remaining cases are hotly contested. Fortunately, the Georgia Supreme Court has granted writs of certiorari for *McDade*, *Castellanos* and *Zaldivar*. Most important could be the Supreme Court’s ruling in *McDade*, as this Court of Appeals decision seems to open up an untapped avenue of damages for emotional distress if any mental injury and related treatment can be shown. Fortunately, the Supreme Court’s

decision in *Couch* further swings the pendulum away from the imposition of extraordinary legal fees for simply defending a case.

End Notes

¹ *Oliver et. al. v. McDade et. al.*, 328 Ga. App. 368, 762 S.E.2d 96, 98 (2014).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 368-369, 762 S.E.2d at 98.

¹¹ *Id.* at 369, 762 S.E.2d at 98.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 370, 762 S.E.2d at 99.

¹⁵ *Id.* at 369-370, 762 S.E.2d at 98-99 citing *Nationwide Mut. Fire Ins. Co. v. Lam*, 248 Ga. App. 134 (2001).

¹⁶ *Id.* at 370(5), 762 S.E.2d at 99.

¹⁷ *Owens v. Gateway Mgmt. Co.*, 227 Ga. App. 815, 490 S.E.2d 501 (1997).

¹⁸ *Id.* at 816, 490 S.E.2d at 502.

¹⁹ *Id.*

²⁰ *McDade*, 328 Ga App. at 370(5), 762 S.E.2d at 99.

²¹ *Ruhr Bros. v. Phahos*, 89 Ga. App. 885, 890, 81S.E.2d 491, 495-496 (1954, overruled other grounds).

²² *OB-GYN Assoc, of Albany v. Littleton*, 259 Ga. 663, 386 S.E.2d 146, 147 (1989).

²³ *Id.* at 667, 386 S.E.2d at 149.

Furthermore, the *Littleton* Court addressed both the pecuniary loss

rule and the impact rule in reaching its conclusion. The Court clarified the impact rule, holding that the impact must result in physical injuries to the plaintiff, and stating that fright shock or mental suffering, attended with actual physical injury, will authorize a recover for emotional distress. *Id.* at 665-666, 386 S.E.2d at 148-149 quoting *Candler v. Smith*, 50 Ga. App. 667, 763, 179 S.E. 395 (1934) citing *Christy Brothers Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928).

²⁴ *Littleton*, 259 Ga. at 667, 386 S.E.2d at 149.

²⁵ *Lam*, 248 Ga. App. at 135, 546 S.E.2d at 283.

²⁶ *Id.* at 238, 546 S.E.2d at 285.

²⁷ *Id.*

²⁸ *Lee v. State Farm Mut. Auto. Ins. Co.*, 272 Ga. 583, 585, 533 S.E.2d 82, 85 (2000).

²⁹ *Id.* at 584-588, 533 S.E.2d 84-87.

³⁰ *Id.* at 584, 533 S.E.2d at 83.

³¹ *Id.* at 374, 762 S.E.2d at 102 (Andrews, PJ, dissent).

³² *Id.* at 376, 762 S.E. 2d at 103.

³³ *Id.* at 377-379, 762 S.E.2d 103-105.

³⁴ *Id.* at 379-380, 762 S.E.2d at 105.

³⁵ *Oliver v. McDade*, WL 2168075, Ga. 2015.

³⁶ *Id.* at *1.

³⁷ *Id.* at *2, *Oliver*, 328 Ga App. at 369-370.

³⁸ O.C.G.A. § 9-11-4(c)(2013).

³⁹ *Hilton v. Maddox & Co. Contractors, Inc.*, 125 Ga. App. 423, 425, 188 S.E.2d 167, 199 (1972).

⁴⁰ *Giles v. State Farm Mutual Automobile Insurance Company*, 330 Ga. App. 314, 315, 765 S.E.2d 413, 415 (2014).

⁴¹ *Id.* at 315. 765 S.E.2d at 415.

⁴² *Id.* See also O.C.G.A. § 9-3-33; see generally *Lewis v. Waller*, 282 Ga. App. 8, 12, 637 S.E.2d 505, 510 (2006).

⁴³ *Giles*, 330 Ga. App. at 315, 765 S.E.2d at 415.

⁴⁴ *Id.*

⁴⁵ *Id.* See also § O.C.G.A. 9-2-61 (1998).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Giles*, 330 Ga. App. at 316-317, 765 S.E.2d at 416.

⁴⁹ *Id.* at 317, 765 S.E.2d at 416.

⁵⁰ *Id.*

⁵¹ *Id.* at 320-321, 765 S.E.2d at 418-419.

⁵² *Id.* at 322, 765 S.E.2d at 419.

⁵³ *Roberson v. 21st Century National Ins. Co.*, 327 Ga. App. 545, 759 S.E.2d 614, 615 (2014).

⁵⁴ *Id.* at 545, 759 S.E.2d at 615.

⁵⁵ *Id.* at 545-46, 759 S.E.2d at 615.

⁵⁶ *Id.* at 545, 759 S.E.2d at 615.

⁵⁷ *Id.*

⁵⁸ See *Ison v. State Farm Fire & Casualty Company*, 230 Ga. App. 554, 555, 496 S.E.2d 478, 479 (1998).

⁵⁹ *Roberson*, 327 Ga. App. at 547, 759 S.E.2d at 616.

⁶⁰ O.C.G.A. § 33-7-11(a)(1) (2009).

⁶¹ O.C.G.A. § 33-7-1100(3) (2009).

⁶² *Roberson*, 327 Ga. App. at 548, 759 S.E.2d at 616.

⁶³ *Id.*

⁶⁴ *Id.* at 549, 759 S.E.2d at 617.

⁶⁵ *Id.*

⁶⁶ *Id.* at 548, 759 S.E.2d at 616(3).

⁶⁷ *Id.* at 549, 759 S.E.2d at 617(5).

⁶⁸ *Castellanos v. Travelers Home & Maxine Insurance Company*, 328 Ga. App. 674, 675, 760 S.E.2d

226, 227 (2014).

⁶⁹ *Id.* at 674, 760 S.E.2d at 227.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 675, 760 S.E.2d at 228.

⁷⁴ *Id.*

⁷⁵ *Id.* at 676, 760 S.E.2d at 228.

⁷⁶ *Id.*

⁷⁷ *Id.* at 675-676, 760 S.E.2d at 228.

⁷⁸ *Id.* at 676, 760 S.E.2d at 228.

⁷⁹ *Id.* at 679, 760 S.E.2d at 230-231.

⁸⁰ *Id.*

⁸¹ *Id.* at 680, 760 S.E.2d at 231(13) (emphasis added).

⁸² *Id.* (15) citing *Willis v. Kemp*, 130 Ga. App. 758, 759(2), 204 S.E.2d 486, 489 (1974).

⁸³ *Id.* (14) quoting *Hinton v. Interstate Guar. Ins. Co.*, 267 Ga. 516, 517, 480 S.E.2d 842, 844 (1997).

⁸⁴ *Id.* at 680-686, 760 S.E.2d at 231-235 (McMillan, J., dissenting).

⁸⁵ *Id.* at 681, 760 S.E.2d at 232 (emphasis in original).

⁸⁶ *H.Y. Akers & Sons. Inc. v. St. Louis Fire & Marine Ins. Co.*, 120 Ga App. 800, 801(1), 172 S.E.2d 355 (1969).

⁸⁷ *Vaughan v. ACCC Ins. Co.*, 314 Ga. App. 741, 742-743(2), 725 S.E.2d 855, 858 (2012).

⁸⁸ *Liberty Mutual Ins. Co. v. Coburn*, 129 Ga. App. 520, 525(3), 200 S.E.2d 146, 150-151 (1973).

⁸⁹ *Castellanos*, 328 Ga. App. at 683, 760 S.E.2d at 233 (McMillan, J., Dissent).

⁹⁰ *Id.* at 684, 760 S.E.2d at 233.

⁹¹ *Id.* at 684, 686, 760 S.E.2d at 234.

⁹² *Georgia Department of Corrections v. Couch*, 295 Ga. 469, 759 S.E.2d 804, 806-807 (2014).

⁹³ *Id.* at 470, 472, 759 S.E.2d at 807, 808.

⁹⁴ *Id.* at 469, 759 S.E.2d at 807. See O.C.G.A. § 9-11-68(b)(2) (2006).

⁹⁵ *Id.* at 470, 759 S.E.2d at 807.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 472-482, 759 S.E.2d at 808-815.

⁹⁹ *Id.* at 469, 482-86, 759 S.E.2d at 806, 815-818.

¹⁰⁰ *Georgia Department of Corrections v. Couch*, 322 Ga. App. 234, 239, 744 S.E.2d 432, 436 (2013).

¹⁰¹ *Id.*

¹⁰² *Couch*, 295 Ga. at 483, 759 S.E.2d at 815.

¹⁰³ *Brock Built, LLC v. Blake*, 316 Ga. App. 710, 714-15, 730 S.E.2d 180, 184-185 (2012).

¹⁰⁴ *Couch*, 295 Ga. at 484-85, 759 S.E.2d at 816-817.

¹⁰⁵ *Id.* at 484, S.E.2d at 816 citing *Brock Built, LLC*, 316 Ga. App. at 714-15.

¹⁰⁶ *Id.* at 485, S.E.2d at 816-817.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 486, 759 S.E.2d at 817.

¹¹⁰ O.C.G.A. § 51-12-33 (2005).

¹¹¹ *Id.*

¹¹² See generally *Fraker v. C.W. Matthews Contracting Co., Inc.*, 272 Ga. App. 807, 614 S.E.2d 94 (2005); *District Owners Ass'n, Inc. v. AMEC Environmental & Infrastructure, Inc.*, 322 Ga. App. 713, 747 S.E.2d 10 (2013).

¹¹³ *Zaldivar v. Prickett*, 328 Ga App. 359, 762 S.E.2d 166, 167 (2014).

¹¹⁴ *Id.* at 360, 762 S.E.2d at 167.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 359, 762 S.E.2d at 167.

¹¹⁸ *Id.* at 361-362, 762 S.E.2d at 168.

¹¹⁹ *Id.* at 362, 762 S.E.2d at 168.

¹²⁰ *Ridgeway v. Whisman*, 210 Ga. App. 169, 435 S.E.2d 624, 625-626 (1993).

¹²¹ *Id.* at 169, 435 S.E.2d at 626.

¹²² *Id.* at 170, 435 S.E.2d at 627.

¹²³ *Zaldivar*, 328 Ga. App. at 362, 762 S.E.2d at 168.

¹²⁴ *Id.* at 363, 762 S.E.2d at 169 (Branch, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *Id.* at 365-366, 762 S.E.2d at 170-171.

¹²⁷ *Id.* at 364-365, 752 S.E.2d at 170, *Id.* at 362, 762 S.E.2d at 168-169.

¹²⁸ *Couch v. Red Roof Inns*, 291 Ga. 359, 361-362, 729 S.E.2d 378, 381-382 (2012).

¹²⁹ *Zaldivar*, 328 Ga. App. at 365, 762 S.E.2d at 170 *quoting Couch*, 291 Ga. at 361, 362, 729 S.E.2d 378.

¹³⁰ *Id.* at 365, 762 S.E.2d at 170.

Update on Selected Lien and Settlement Difficulties in Automobile Personal Injury Cases

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The last step in resolving a personal injury claim can often be the most frustrating. If the case has been pending for a long time and is finally resolved through settlement, a lien problem can hold up a long-awaited final resolution. Or, a defense attorney may be faced with a *Holt* demand on a claim that is clearly worth more than the available policy limits, and be in the dangerous position of trying to protect the insured and resolve the claim, while making sure that the insurer's obligation on any outstanding lien or reimbursement claim is satisfied. In the latter situation it is particularly important to know what our obligations are as defense attorneys and which types of liens or reimbursement claims are enforceable against our clients if we fail to protect them at the time of settlement.

Several cases decided in recent years have provided some clarification with regard to handling medical provider liens filed pursuant to O.C.G.A. § 4414471. We have also received further guidance on what conduct on the part of an insurer or

defense counsel—when attempting to address a potential lien issue—will be considered a rejection of a *Holt* demand, or can result in a successful claim of bad faith refusal to settle the claim against an insurer. The U.S. Supreme Court has granted certiorari to a case from the 11th Circuit regarding when an ERISA plan can pursue equitable reimbursement against an ERISA beneficiary. Finally, a recent lower court decision applied the *Thurman* and *Toomer* line of cases to find that satisfaction of an ERISA lien can reduce the “available liability coverage” so as to increase an uninsured motorist carrier's exposure under O.C.G.A. §33711(b)(I)(D)(ii)(II). All of these decisions could impact defense counsel's handling of the resolution of claims when liens or reimbursement claims exist against the claimant.

I. Medical Provider Liens

The medical provider lien statute, O.C.G.A. §4414470, et seq., grants to any person, firm, hospital authority, or corporation operating a hospital, nursing home, or physician practice or providing traumatic burn care, a lien for the reasonable charge for care or treatment of an injured person.¹ The lien does not attach against the patient directly, but instead is enforceable against any cause of action accruing to the patient for the injuries that gave rise to the

treatment.² The statute explicitly states the steps that must be taken by a medical provider in order to perfect a lien, including the filing of a verified statement with the Clerk of Court of the county of residence of the patient and of the facility.³ The statement must be filed within a specified time period, and must contain certain required information.⁴ The medical provider must also provide to the patient and, to the best of the provider's knowledge, persons, firms, corporations, and their insurers claimed to be liable for the patient's injuries and damages, written notice of the lien at least fifteen days before the filing of the verified statement of the lien.⁵

Subsection (b) of O.C.G.A. §4414471 provides that failure to perfect the lien or to provide timely written notice will not invalidate the lien as to any person, corporation, or firm liable for the damages who receives "actual notice" of the lien prior to entering into a settlement. The Court of Appeals recently addressed this issue in *Kennestone Hospital, Inc. v. The Travelers Home and Marine Insurance Co.*⁶ The facts of this case, as determined by the Court of Appeals, were as follows: Kennestone Hospital provided treatment to claimant Wanderson B. Silva following a motor vehicle accident, and sent Silva a timely notice pursuant to O.C.G.A. §4414471(a), of its intent to file a hospital lien.⁷ Kennestone sent the notice via certified mail, return receipt requested, but the return receipt was returned with a notation that it had been unclaimed.⁸ Kennestone also

sent a timely notice to the insurer, but misidentified the insurer—the notice simply said "Travelers" rather than Travelers Home & Marine Insurance (TH & M).⁹ The notice also gave an incorrect address for TH & M, and did not contain any information regarding the insured or the full name of the claims adjuster handling the claim.¹⁰ The Notice of Intent to file a lien was not uploaded into TH & M's computer system and the claim's adjuster testified that she had no documentation or other information regarding the existence of Kennestone's hospital lien.¹¹ When she received a *Holt* demand from the plaintiff's attorney, she issued payment in exchange for a limited release which contained language obligating the plaintiff to satisfy any outstanding medical expenses.¹²

The Court of Appeals refused to enforce Kennestone's lien against the insurer, finding that it had failed to satisfy several of the specific requirements of O.C.G.A. §4414471(a), including failure to provide notice to the insurer to the best of claimant's knowledge, and failure to provide any notice at all to the alleged tortfeasor.¹³ Kennestone argued that any such failures did not invalidate its lien because, even if Kennestone did not use its "best knowledge" to notify the insurer in accordance with the requirements of subsection (a)(1), the insurer did receive actual notice of the lien prior to the settlement.¹⁴ The Court held that the actual notice exception to subsection (a)'s lien perfection requirements applies only to "the person, firm, or corporation liable for the damages, and does not,

by its terms, apply to insurers”.¹⁵ Because the term “insurers” had been specifically included in subsection (a) of O.C.G.A. §4414471, and was omitted from subsection (b), the Court reasoned that this omission was intentional by the legislature and that the actual notice exception does not apply to insurers.¹⁶ Therefore, the failure to comply with subsection (a)’s requirements invalidated Kennestone’s lien and it could not be enforced against the insurer, Travelers Home and Marine Insurance Co.¹⁷

From a defense practice perspective the *Kennestone* decision indicates that defense counsel should carefully examine the notice provided to insurers by medical providers to make sure that the notice complies with the statute’s requirement that it be sent to the best of the lien claimant’s knowledge. Failure to properly identify the insurer, to include the claims adjuster’s full name, and to send the notice to the claims adjuster’s proper mailing address, are all failures that the Court of Appeals indicates in *Kennestone* might show a failure of the medical provider to send notice to the best of its knowledge.¹⁸ However, *Kennestone* involved the unusual situation in which settlement was reached after the hospital had sent its purported notice, but before its lien had been filed. The Court would likely have enforced the lien against the insured tortfeasor if Kennestone had been able to show that the insured tortfeasor had received actual notice of the lien. It also might have reached a different result if Kennestone’s lien had been

filed prior to the claims adjuster sending the release and check to the claimant.

Assuming the unusual circumstances of the *Kennestone* case don’t apply, O.C.G.A. §4414473 provides a mechanism for insurers and defense counsel to protect against potential liability on a medical provider lien. The statute states that any person, firm, or corporation that enters into a settlement agreement with an injured person shall not be bound by any medical provider lien if: 1) there is no lien on file in the appropriate Clerk of Court at the time that the settlement agreement is entered into; and 2) the person, firm, or corporation obtains an affidavit from the injured person affirming the county of residence of the injured person, and affirming that all medical provider bills incurred for treatment of the injuries for which settlement is being made, have been fully paid.¹⁹ A medical provider lien, if perfected in accordance with the statute, may be enforced through an action against the tortfeasor or against the tortfeasor’s insurer.²⁰ The statute provides that the medical provider has one year after finalization of any settlement in which to bring an action for recovery on its lien.²¹ A recent Georgia Supreme Court case clarified that the one year limitations period began to run on the date that the release was signed, rather than on the date the settlement offer was accepted.²² Finally, any such lien cannot be enforced against wrongful death proceeds and the Georgia Court of Appeals has upheld the plaintiff’s right to determine how to allocate any available settlement

funds between the wrongful death claim and the estate claim.²³

A recent Court of Appeals case also made it clear that defense counsel or insurers cannot safely rely upon knowledge that a plaintiff has a health insurer and that the health insurer paid a negotiated amount on the hospital bill in order to avoid liability on a hospital lien. In *MCG Health, Inc. v. Kight*, the Georgia Court of Appeals held that O.C.G.A. §4414470(b) provides a hospital with a lien for the full amount of the reasonable charges for furnishing care to an injured person.²⁴ Thus, a hospital can assert a lien against a tortfeasor and/or an insurer for the difference in the amount recovered from the patient's health insurer and the full charge for the services.²⁵ This ruling is in line with the general principle that the medical lien statute permits the medical provider to stand in the plaintiff's shoes and assert the claims for medical expenses that the injured person could assert.²⁶ Since the collateral source rule permits a plaintiff to pursue the full value of all medical expense charges undiminished by any payments or write-offs that might exist pursuant to the hospital's contract with a health insurer, the medical provider can do the same.²⁷ This is not true, however, if the hospital's contract with a health insurer contains a "no recourse" clause limiting the hospital's ability to pursue a claim for the full value of the services provided.²⁸

II. Further Developments after *Wellstar* and *Krebs*

If the insurer or defense counsel has determined that there is a hospital or medical provider lien that was properly perfected under O.C.G.A. §4414471 and is valid and enforceable against the claimant's recovery, the insurer and tortfeasor face potential liability if the lien is not resolved. Therefore, defense counsel and/or insurers are in a difficult position if presented with a time-limited settlement demand when a valid medical provider lien exists. In *Southern General Insurance Company v. Holt*, the Georgia Supreme Court held that, when presented with a settlement demand within the policy limits, the insurance company may be found to have acted in bad faith if it fails to respond to that demand despite having knowledge of clear liability and special damages exceeding the policy limits.²⁹ Therefore, if the demand insists that no lien indemnification language be included in a release and insists that no other payee be included on the settlement check, defense counsel has to choose whether to face the potential liability on the lien, or whether to risk a claim of bad faith failure to resolve a claim by insisting on satisfaction of the lien.

The Georgia Court of Appeals appeared to have given some guidance on how to safely navigate this dilemma in the case of *Southern General Insurance Company v. Wellstar Health Systems, Inc.*³⁰ In *Wellstar*, Southern General agreed to payment of its insured's \$25,000 policy

limits in response to a settlement demand from the claimant. The claimant refused to sign a release containing lien indemnification language, and when presented with a five day time-limited demand, Southern General agreed to resolve the claim in exchange for a release that made no mention of the hospital lien.³¹ Wellstar Health Systems then sued Southern General on its \$22,047.50 hospital lien. The Court of Appeals upheld the trial court's ruling in favor of Wellstar stating that an insurer's competing duties to resolve claims against its insured in good faith and to protect a properly filed hospital lien, are not irreconcilable duties.³² The Court held that an insurer may create a "safe harbor" from liability for negligently failing to accept a claimant's time-limited demand to settle for policy limits if it promptly responds to the demand and if the "sole reason for the parties' inability to reach a settlement is the claimant's unreasonable refusal to assure the satisfaction of any outstanding hospital liens."³³

The Court goes on to illustrate how an insurer can create a safe harbor from a bad faith claim by offering to tender policy limits in response to a demand, but including a "narrowly tailored" provision assuring that the hospital lien will be satisfied from the payment.³⁴ The Court indicates that it would be reasonable for an insurer to request that the settlement funds be held in escrow until the claimant's attorney has had an opportunity to investigate the lien and negotiate with the hospital.³⁵ If the claimant's attorney refuses this

request, then the insurer would be justified in paying the hospital lien directly after verifying its validity.³⁶ The Court notes, however, that it is not stating that an insurer should make payment on a hospital lien without first giving the claimant an opportunity to negotiate and resolve the lien and implies that such an action might result in a successful bad faith claim.³⁷

Unfortunately, the waters were almost immediately muddied again by the Georgia Supreme Court's decision in the *McReynolds v. Krebs* case.³⁸ The case arose from an automobile accident in which Lisa Krebs was a passenger in a vehicle driven by Carmen McReynolds which was involved in a collision with another vehicle.³⁹ Krebs sustained injuries and made a policy limits demand to McReynolds' insurer.⁴⁰ The insurer responded by tendering the \$25,000 limits, but also asking that the plaintiff's attorney, "Please call me in order to discuss how the lien(s) (Specifically, but not limited to the \$273,435.35 lien from Grady Memorial Hospital) will be resolved as part of this settlement."⁴¹ The Court of Appeals affirmed the trial court's ruling that the insurer's response was not an acceptance of the settlement offer because it contained an additional condition that the hospital lien be resolved.⁴² The Court of Appeals cited *Frickey v. Jones* and found that the response of McReynolds' insurer "constituted a counteroffer and no binding agreement was formed."⁴³

The Georgia Supreme Court granted certiorari and affirmed the Court of Appeals' ruling. The Court noted that a requirement that a lien be resolved transforms an acceptance into a counteroffer by adding a condition to the settlement.⁴⁴ The Court explained, however, that a "mere request for confirmation that no liens exist" would not be construed as a counteroffer.⁴⁵ The Supreme Court's ruling in *McReynolds v. Krebs* was released very shortly after the *Wellstar* decision and does not mention the *Wellstar* decision, likely because bad faith failure to settle was not an issue in *McReynolds*. Instead, the case was before the Court in the posture of an attempt to enforce a settlement agreement.

Whether or not the lack of a binding settlement agreement would support a claim for bad faith failure to settle against Patriot General in the *McReynolds* case was later litigated in a declaratory judgment action filed by Patriot General against Krebs and McReynolds.⁴⁶ McReynolds filed a counterclaim against Patriot General for bad faith, negligent failure to settle, and breach of contract.⁴⁷ The District Court initially ruled in Patriot General's favor on the bad faith claim based on the holding in *Wellstar*.⁴⁸ However, on a Motion for Reconsideration, McReynolds argued that Patriot General had failed to show that Krebs acted unreasonably when asked to resolve the hospital lien.⁴⁹ The District Court agreed with this argument, finding that there was a question of fact as to what transpired between the parties following Patriot General's inquiry

about the hospital lien.⁵⁰ Therefore, the *Wellstar* safe harbor did not apply and McReynolds' claim for bad faith refusal to settle was reinstated.⁵¹

Again, *Wellstar* involved enforcement of a hospital lien against an insurer in which the Court of Appeals addressed how an insurer might avoid a bad faith failure to settle claim, while *McReynolds* arose from an action to enforce a settlement agreement. There have been a few settlement enforcement cases since *McReynolds* which shed additional light on what conduct on the part of defense counsel or insurers will be interpreted as a counteroffer and a rejection of a demand. In *Turner v. Williamson*, the Court of Appeals found that a binding settlement agreement had been reached when a claims handler responded to a demand for payment of \$25,000 policy limits in exchange for a limited liability release pursuant to O.C.G.A. §332441.1.⁵² The claims handler responded in writing agreeing to those terms, and enclosed a proposed limited release form.⁵³ The limited release provided by the claims handler contained a provision stating that the insured did not admit liability, and a lien indemnification provision.⁵⁴ The claimant argued that the additional language in the limited release constituted a counteroffer and a rejection of the demand and the trial court agreed finding that there was no binding settlement agreement.⁵⁵ The Court of Appeals reversed, finding that nothing in the claims handler's responses to the demand contained any language conditioning acceptance upon execution of the particular release form she enclosed.⁵⁶ The Court

found that the provision of an improper release form was not a rejection of the previously accepted offer.⁵⁷ In particular, the Court focused on the claims handler's wording when providing the release. She asked that the claimant "please" sign the enclosed release, language that the Court of Appeals found to be precatory rather than mandatory direction.⁵⁸

In *Hansen v. Doan*, the Court of Appeals again found that a settlement agreement was enforceable even though a limited release had been provided by an insurer that contained indemnification language which had been specifically forbidden in the demand letter.⁵⁹ The evidence showed that the claim handler had spoken with the plaintiff's attorney, told him the insurer was fine with using whatever form limited release he wanted, and asked if he had a form limited release to provide that they could use.⁶⁰ The attorney replied that he did not and then cut the conversation short when the claims handler began to explain that she would send the form she had, but that it might contain language he didn't want.⁶¹ She faxed that release to the attorney with a letter confirming their conversation and stating that the insurer would, "tailor it to fit your needs".⁶² The plaintiff's attorney subsequently notified the insurer that it had failed to accept the offer to settle because its proposed release contained indemnification language.⁶³ Suit was filed and the insurer filed a Motion to Enforce Settlement which was granted by the trial court.⁶⁴

In affirming the lower court's decision to enforce the settlement agreement, the Court of Appeals examined all of the communications between the plaintiff's attorney and the claims handler and noted the claims handler's actions indicating a willingness to make changes to the proposed release.⁶⁵ The Court emphasized that the claims handler did not condition the settlement upon the execution of a particular release, and instead clearly intended for the plaintiff's attorney to alter the release as needed and that she made that intention clear.⁶⁶ Three Judges dissented, however, finding that the provision of a release that contained indemnity language when the demand specified that the limited release must not contain indemnity language did not qualify as an unequivocal, unvarying acceptance.⁶⁷

In *Sherman v. Dickey*, the Court of Appeals again addressed an appeal from a lower court decision enforcing a settlement agreement.⁶⁸ In this case, the demand from the plaintiffs specifically requested a limited liability release that could not contain indemnification language or the release of any property damage claim.⁶⁹ The defense attorney responded with a correspondence enclosing what was described as a "sample" limited release and asking the plaintiffs' attorney to let him know "if you see anything in this limited liability release which causes you concern."⁷⁰ The plaintiffs' attorney subsequently provided his own draft of a limited liability release and the defense attorney responded with "proposed revisions", including an

affidavit regarding medical provider liens in accordance with O.C.G.A. §4414473(c).⁷¹ The defense attorney further stated, “If you do not want your client to sign a release with my proposed changes, please let me know and let’s discuss.”⁷² The plaintiffs’ attorney responded that he would take a look at them and get back to the defense counsel. The plaintiffs’ counsel did not respond further, therefore, defense counsel sent a settlement package to the plaintiff attorney’s office the next day containing a \$25,000 check for the policy limits, affidavits from the insured regarding the available coverage, and the last revision of the limited liability release that had been emailed to the plaintiffs’ attorney the previous day and contained statutory lien affidavit language.⁷³

The claimants ultimately returned the settlement check, indicating that they rejected what they considered the insurer’s counteroffer.⁷⁴ The insurer then filed suit seeking specific performance of the settlement contract and the trial court granted the insurer summary judgment and denied the claimants’ cross-motion.⁷⁵ The trial court also awarded the insurer attorney fees pursuant to O.C.G.A. §13611, finding that the claimants had acted in bad faith and been stubbornly litigious.⁷⁶ The Court of Appeals affirmed the trial court’s ruling that a binding settlement agreement had been reached between the parties.⁷⁷ Again, the Court focused on defense counsel’s intent in providing the release language and noted the repeated invitations by defense counsel for the

plaintiffs’ attorney to make changes to the proposed release.⁷⁸ The Court found that defense counsel’s actions did not indicate an insistence that the plaintiffs sign the particular release provided in order to conclude the settlement.⁷⁹ The Court also noted that the claimants’ attorney had previously indicated that there were no known medical provider liens, therefore, the statutory lien affidavit language merely sought to confirm what had been asserted by the claimants’ attorney.⁸⁰ The Court found that a binding settlement had been reached and upheld the trial court’s award for summary judgment.⁸¹ The Court of Appeals did not, however, uphold the lower court’s award of attorney’s fees under O.C.G.A. §13611, finding that the trial court did not have the power to make that award on summary judgment.⁸²

Considering all of these cases, it appears that the Court of Appeals is allowing slightly more room for defense counsel and insurers to attempt to obtain additional information and to attempt to craft releases and lien affidavits that will fulfill their obligations to lien holders. However, the dissent opinion in *Hansen* shows that defense counsel and insurers continue to walk a dangerous tightrope when attempting to respond to time-limited settlement demands when the claim’s value exceeds the policy limits and valid liens exist. Attempts to obtain additional information regarding any outstanding liens are permissible according to *Frickey v. Jones*, and under the line of cases discussed in this section, it appears that requests

that plaintiff counsel consider lien indemnification or lien assurance language will not necessarily be considered a rejection of a demand. However, the recent decisions also indicate that defense counsel or an insurer's insistence upon lien indemnification language or insistence that a lien be satisfied would be considered a rejection of a demand. Therefore, if defense counsel knows that a lien exists and plaintiff's counsel refuses to give any form of assurance that it will be satisfied, it is unlikely that a binding settlement agreement could be reached. Instead, defendants and insurers will have to attempt to conclude the settlement within the "safe harbor" of *Wellstar* and argue that, even though a settlement agreement could not be reached, it was not bad faith on the part of the insurer to fail to reach that agreement.

III. ERISA Health Plan Claims

The complete compensation doctrine is the longstanding common law rule in Georgia which holds that an insured must be fully compensated for economic and noneconomic losses before an insurer can pursue a subrogation or reimbursement claim against the insured.⁸³ The rule was codified on July 1, 1997 in O.C.G.A. §332456.1. Health plans that fall under the Employee Retirement Income Security Act of 1974 and are "self-funded or self-insured" plans, however, are not subject to Georgia's Complete Compensation Doctrine.⁸⁴ Instead, those plans fall under federal subject matter jurisdiction and the Eleventh Circuit has upheld such

ERISA plans' right to pursue subrogation against their insureds if the plan contains language stating that the plan's subrogation rights exist even if the beneficiary has not been made whole.⁸⁵ A plaintiff's attorney must, therefore, carefully examine the language in a client's health insurance plan to determine if it is a self-funded or self-insured plan and examine the plan's language regarding the right to subrogation.

In the case of *GreatWest Life & Annuity Insurance Company v. Knudson*, the Supreme Court held that the civil enforcement provision granted to fiduciaries of ERISA plans permits only equitable relief.⁸⁶ Therefore, the attempt by the GreatWest Life & Annuity fiduciaries to impose legal relief in the form of personal liability for a contractual obligation was not authorized.⁸⁷ The relief sought by Great West was considered a contractual, or legal, relief despite Great West's characterization of the claim as one for restitution because the funds received by the beneficiary were no longer in the beneficiary's possession.⁸⁸

The Supreme Court further explained its reasoning and defined the type of equitable claim that would be permissible under ERISA in *Sereboff v. Mid Atlantic Medical Services Inc.*⁸⁹ In *Sereboff*, the plan beneficiary had received a specific amount in settlement and had retained an amount equal to the claimed reimbursement amount in a specific investment account.⁹⁰ The Supreme Court found that difference from the facts in *Knudson* to be crucial

and held that the ERISA plan must be able to identify a fund, distinct from the beneficiary's other assets, from which it seeks reimbursement, and must identify the percentage of the fund to which it is entitled.⁹¹ In *Sereboff*, those conditions were met and the ERISA claim was permissible.⁹²

Following the *Sereboff* decision, ERISA plan administrators have been successful in pursuing claims against settlement funds of plan beneficiaries in situations where those funds have been disbursed to special needs trusts, and where the funds have been disbursed to a Conservator.⁹³ ERISA plan administrators have become aggressive in identifying funds early and have taken the lesson from *Knudson* to insure that the party in possession of any such settlement funds is the party pursued for the equitable reimbursement claim.

A recent decision by the United States District Court for the Northern District of Georgia, *Airtran Airways, Inc. v. Elem*, demonstrates how ERISA plans have been successful in the Eleventh Circuit at expanding the *Sereboff* holding.⁹⁴ In *Airtran Airways, Inc.*, an ERISA plan was permitted to recover the full amount of its reimbursement claim against a plan beneficiary, despite the fact that the settlement funds had been divided between the beneficiary and her attorney and were no longer a single, identifiable fund.⁹⁵ The facts of that case involved an attempt by the plaintiff's attorney to deceive the ERISA plan regarding the amount of the settlement, which might have

played a role in the Court's ruling.⁹⁶ But, other circuit courts have reached similar decisions and have held that a fund became identifiable once it was in the possession of the beneficiary, even if it was immediately disbursed.⁹⁷ The Court in *Airtran Airways* distinguished *Knudson* as a case in which the plan beneficiary never had possession of the funds.⁹⁸ Other circuits, however, had more strictly construed *Sereboff* as holding that an equitable lien could no longer be enforced against a beneficiary's "general assets" once the settlement funds were no longer in one identifiable location.⁹⁹

A case recently granted Certiorari by the U.S. Supreme Court may bring clarification to the Supreme Court's definition of "identifiable fund". *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Montanile* arose in Florida and was appealed to the Eleventh Circuit Court of Appeals.¹⁰⁰ The Court held that it was bound by the decision in *Airtran Airways* and enforced an ERISA plan's right to pursue an equitable lien against settlement funds that had been distributed to Montanile and had been largely disbursed on living expenses.¹⁰¹ Unlike *Airtran Airways*, there was no deception on the part of Montanile's attorneys and the ERISA plan was given notice of the anticipated settlement and did not immediately intervene or seek an injunction against disbursement of the funds.¹⁰² The U.S. Supreme Court's ruling on this case, therefore, should provide guidance as to when settlement funds remain identifiable so as to subject

them to an equitable reimbursement claim by an ERISA plan.

This discussion reflects the difficulty that plaintiff attorneys face in attempting to resolve cases for their clients and assist them in retaining settlement funds when the total value of the claim far exceeds the available settlement funds and the plaintiff cannot be completely compensated. From the defense perspective, however, ERISA liens do not currently present the liability risk that other types of liens do in terms of potential excess liability for insured tortfeasors or for insurers. A case from the U.S. District Court for the Middle District of Georgia, *HCA—The Healthcare Company v. Mattie Clemmons, et al.*, held that defendant insurers Dairyland Insurance Company and Sentry Insurance were not fiduciaries as to HCA, the ERISA plan, and the insurers had “preexisting duties owed to its insured that would have conflicted with any duties purportedly owed to the Plan in this case”.¹⁰³ The Court further refused to impose a constructive trust on the settlement proceeds issued by the defendant insurers, finding that they no longer retained any control over the funds.¹⁰⁴ There have not been any decisions that would undermine that position in the more than thirteen years since the *HCA* decision. Nevertheless, the continuing evolution in the law regarding ERISA reimbursement claims requires that defense counsel continue to monitor the law in this area.

IV. The Evolution of *Thurman*

One area where an ERISA lien can be of importance to defense counsel arises from the *Thurman v. State Farm* line of cases. O.C.G.A. §33711(b)(1)(D)(ii)(II), sets forth the rule governing the offset from uninsured motorist coverage to which an insurer is entitled if its insured has elected to maintain traditional, “reduced” coverage rather than excess uninsured motorist coverage.¹⁰⁵ If it has been determined that the insured elected to maintain reduced UM coverage, then the uninsured motorist carrier is entitled to an offset from its UM exposure equal to the amount of “available coverage” available to the claimant insured from the tortfeasor’s liability coverage.¹⁰⁶ Beginning with the case of *Thurman v. State Farm*, creative plaintiff’s attorneys put forth the argument that mandatory payments to lienholders or reimbursement claimants could effectively reduce the amount of liability coverage available to the plaintiff, and therefore, should increase the UM carrier’s exposure under O.C.G.A. §33711(b).¹⁰⁷

In *Thurman*, the Georgia Court of Appeals held that the existence of subrogation claims against the settlement proceeds pursuant to the Federal Employees Compensation Act and the Federal Employees Health Benefits Act, reduced the amount of “available coverage” as then defined in O.C.G.A. §33711(b)(1)(D)(ii).¹⁰⁸ This principle was expanded upon in *Toomer v. Allstate Insurance Company*, to apply to the satisfaction of a Medicare lien.¹⁰⁹ In *State Farm*

Mutual Automobile Insurance Company v. Adams, however, the Georgia Supreme Court ruled that a hospital lien could be distinguished from the Medicare and federal provider reimbursement claims discussed in *Thurman* and *Toomer*.¹¹⁰ The Court found that satisfaction of a hospital lien was a partial satisfaction of the plaintiff's claim against the tortfeasor rather than satisfaction of a separate obligation that the tortfeasor or insurer owed to the lienholder.¹¹¹ Accordingly, the Court found that the hospital lien did not reduce the amount of available coverage under O.C.G.A. §33711(b)(1)(D)(ii) so as to increase the amount of UM exposure under a reduced coverage UM policy.¹¹²

Because an ERISA plan does not have a right to pursue a direct action against a third party tortfeasor or insurer, it appeared likely that the *Thurman* and *Toomer* reasoning would not be expanded to ERISA reimbursement claims.¹¹³ However, in *Reece v. Daniel*, Judge David J. Blevins of the Superior Court of Whitfield County ruled that payment of an ERISA lien effectively reduced the amount of liability coverage available to the plaintiff.¹¹⁴ State Farm, the UM carrier, had issued three excess UM policies and one \$25,000/\$50,000 UM policy which was a reduced coverage policy allowing for an offset for the amount of any liability coverage available to the plaintiff.¹¹⁵ There was no dispute as to the applicability of the three excess UM policies and those policies were tendered to the plaintiff. However, State Farm contended that it had no exposure under the reduced coverage

policy because the plaintiff had received \$25,000 in liability coverage from the tortfeasor's insurer.¹¹⁶ However, the plaintiff had been required to satisfy a \$17,000 ERISA lien from that amount and alleged that she was entitled to recover that additional \$17,000 amount from State Farm.¹¹⁷

Judge Blevins ruled that State Farm was not entitled to take an offset for the \$17,000 of liability coverage that went to the ERISA lienholder rather than to the plaintiff.¹¹⁸ State Farm argued that the ERISA lien was not a mandatory payment such as a Medicare reimbursement claim, but was instead analogous to a voluntary payment made by the tortfeasor's insurer on behalf of the plaintiff, such as the hospital lien payment at issue in *Adams*.¹¹⁹ But Judge Blevins rejected that argument, finding instead that satisfaction of an ERISA reimbursement claim is analogous to the Medicare and federal benefit plan claims in *Thurman* and *Toomer*.¹²⁰ He held that the distinction in *Adams* arose from the fact that the hospital claiming the lien in *Adams* had not been paid a premium to assume the risk of loss for the plaintiff. Because the ERISA claimant in *Reece v. Daniel* had been paid a premium by the plaintiff, the plaintiff's obligation to reimburse the ERISA plan fell within the exception to the complete compensation rule created by the *Thurman* cases and qualified as a payment that reduced the amount of available coverage under §33711(b).¹²¹ It is not clear how the Georgia Court of Appeals or Georgia Supreme Court

would rule on this issue, but the *Reece* decision is an interesting indication of how such a case might be decided.

V. Conclusion

Handling of liens when attempting to resolve a claim, and determination of whether any liens or reimbursement claims that exist will affect the amount of UM coverage available to a claimant, remain areas of defense practice that are continuing to evolve. Georgia courts have not yet provided a definitive answer to defense counsel's dilemma when faced with a *Holt* demand and a properly perfected lien or reimbursement claim other than the potential safe harbor in *Wellstar*. Hopefully, cases will continue to reach the Court of Appeals and Georgia Supreme Court that will provide further guidance in this area.

End Notes

¹ O.C.G.A. §44-14-470, et seq. (2006).

² O.C.G.A. §44-14-470(b) (2006).

³ O.C.G.A. §44-14-471 (2006).

⁴ *Id.*

⁵ *Id.*

⁶ *Kennestone Hospital, Inc. v. The Travelers Home and Marine Insurance Co.*, 330 Ga.App. 541, 768 S.E.2d 519 (2015).

⁷ *Id.* at 542, 768 S.E.2d at 521.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 543, 768 S.E. 2d at 521.

¹² *Id.*

¹³ *Id.* at 544, 768 S.E.2d at 522.

¹⁴ *Id.* at 545, 768 S.E.2d at 523.

¹⁵ *Id.* at 546. 768 S.E.2d at 523.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 544, 768 S.E.2d at 522.

¹⁹ O.C.G.A. §44-14-473 (2006).

²⁰ O.C.G.A. §44-14-473(a) (2006).

²¹ *Id.*

²² *Hospital Authority of Clarke County et al. v. GEICO General Insurance Company*, 294 Ga. 477, 754 S.E.2d 358 (2014).

²³ *Nash, et al, v. Allstate Insurance Company, et al.*, 256 Ga.App. 143, 145, 567 S.E.2d 748, 750 (2002).

²⁴ *MCG Health, Inc. v. Right*, 325 Ga.App. 349, 750 S.E.2d 813 (2013).

²⁵ *Id.* at 354, 750 S.E.2d 813, 818.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 358, 750 S.E.2d 813, 820 (Barnes, P.J., specially concurring).

²⁹ *Southern General Insurance Company v. Holt*, 262 Ga. 267, 269, 416 S.E. 2d 274, 276 (1992).

³⁰ *Southern General Insurance Company v. Wellstar*

Health Systems, Inc., 315 Ga.App. 26, 726 S.E.2d 488 (2012).

³¹ *Id.* at 27, 726 S.E.2d 488, 490.

³² *Id.* at 31, 726 S.E.2d 488, 493.

³³ *Id.*, emphasis in original.

³⁴ *Id.* at 31-32, 726 S.E.2d 488, 493.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at FN21.

³⁸ *McReynolds v. Krebs*, 290 Ga. 850, 725 S.E.2d 584 (2012).

³⁹ *Id.* at 850, 725 S.E.2d 584, 586.

⁴⁰ *Id.* at 853(2), 725 S.E.2d 584, 588.

⁴¹ *Id.*

⁴² *McReynolds v. Krebs*, 307 Ga.App. 330, 337, 705 S.E.2d 214, 219 (2010).

⁴³ *Id.*, citing *Frickey v. Jones*, 280 Ga. 573, 576, 630 S.E.2d 374 (2006).

⁴⁴ *McReynolds v. Krebs*, 290 Ga. 850, 854, 725 S.E.2d 588 (2012).

⁴⁵ *Id.*, quoting *Frickey*.

⁴⁶ *Patriot General Insurance Company v. Krebs*, 2013 WL 870444 (N.D.Ga.).

⁴⁷ *Id.*

⁴⁸ *Patriot General Insurance Company v. Krebs*, 2012 WL2990067 (N.D.Ga.).

⁴⁹ *Patriot General Insurance Company v. Krebs*, 2013 WL 870444 (N.D.Ga.).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Turner v. Williamson*, 321 Ga.App. 209, 738 S.E.2d 712 (2013).

⁵³ *Id.* at 211, 738 S.E.2d 712, 714.

⁵⁴ *Id.* at 210, 738 S.E.2d 712, 713.

⁵⁵ *Id.* at 211, 738 S.E.2d 712, 714.

⁵⁶ *Id.* at 213, 738 S.E.2d 712, 715.

⁵⁷ *Id.*

⁵⁸ *Id.* at 214, 738 S.E.2d 712, 716.

⁵⁹ *Hansen v. Doan*, 320 Ga.App. 609, 740 S.E.2d 338 (2013).

⁶⁰ *Id.* at 610, 740 S.E.2d 338, 340.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 611, 740 S.E.2d 338, 341.

⁶⁴ *Id.*

⁶⁵ *Id.* at 613, 740 S.E.2d 338, 342.

⁶⁶ *Id.* at 614, 740 S.E.2d 338, 342.

⁶⁷ *Id.* at 616, 740 S.E.2d 338, 344 (Barnes, P.J., Dissent).

⁶⁸ *Sherman v. Dickey*, 322 Ga.App. 228, 744 S.E.2d 408 (2013).

⁶⁹ *Id.* at 229, 744 S.E.2d 408, 409.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 230, 244 S.E.2d 408, 410.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 231, 244 S.E.2d 408, 410.

⁷⁶ *Id.*

⁷⁷ *Id.* at 233, 244 S.E.2d 408, 412.

⁷⁸ *Id.* at 232, 244 S.E.2d 408, 411.

⁷⁹ *Id.*

⁸⁰ *Id.* at 233, 244 S.E.2d 408, 412.

⁸¹ *Id.*

⁸² *Id.* at 234, 244 S.E.2d 408, 413.

⁸³ See generally *Mullenberg v. K.J. Saxon Const. Co.*, 192 Ga.App. 281, 384 S.E.2d 418 (1989); *Duncan v. Integon General Insurance Corp.*, 267 Ga. 646, 482 S.E.2d 325 (1997).

⁸⁴ See *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 11 S.Ct. 403, 407 (1990).

⁸⁵ See *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997).

⁸⁶ *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708 (2002).

⁸⁷ *Id.* at 221, 122 S.Ct. 708, 719.

⁸⁸ *Id.*

⁸⁹ *Serehoff v. Mid Atlantic Medical Services Inc.*, 547 U.S. 356, 126 S.Ct. 1869 (2006).

⁹⁰ *Id.* at 360, 126 S.Ct. 1869, 1873.

⁹¹ *Id.* at 363, 126 S.Ct. 1869, 1874.

⁹² *Id.*

⁹³ See *B.P. Amoco Corp. v. Connell*, 320 F.Supp. 2d 1368 (M.D. Ga. 2004); and *Administrative Committee for Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Horton*, 513 F.3d 1223 (11* Cir. 2008).

⁹⁴ *Airtran Airways, Inc. v. Elem*, 767 F.3d 1192 (11* Cir. 2014).

⁹⁵ *Id.* at 1198

⁹⁶ *Id.* at 1196

⁹⁷ See *Funk v. CIGNA Grp. Ins.*, 648 F.3d 182, 194 (3d Cir. 2011); *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654, 664 (2d Cir. 2013).

⁹⁸ *Airtran Airways* at 1198.

⁹⁹ *Bilyeau v. Morgan Stanley Long Term Disability Plan*, 683 F3d 1083, 1095 (9th Cir. 2012)

¹⁰⁰ *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Montanile*, 2014 WL 8514011 (S.D.Fla.).

¹⁰¹ *Id.*

¹⁰² *Id.* at 3

¹⁰³ *HCA—The Healthcare Company v. Mattie Clemmons, et al.*, 162 F.Supp.2d 1374, 1381 (M.D.Ga. 2001).

¹⁰⁴ *Id.*

¹⁰⁵ Former O.C.G.A. §33-7-11(b)(1)(D)(ii) was amended effective January 1, 2009, to permit the insured to elect excess UM coverage that is not reduced by the amount of any available liability coverage. Current O.C.G.A. §33-7-11(b)(1)(D)(ii)(II) now applies to reduced UM coverage.

¹⁰⁶ O.C.G.A. §33-7-11(b)(1)(D)(ii)(II).

¹⁰⁷ *Thurman v. State Farm Mut. Auto. Ins. Co.*, 278 Ga. 162, 598 S.E.2d 448 (2004).

¹⁰⁸ *Id.* at 164, 598 S.E.2d 448, 451.

¹⁰⁹ *Toomer v. Allstate Insurance Company*, 292 Ga.App. 60, 663 S.E.2d 763 (2008).

¹¹⁰ *State Farm Mutual Automobile Insurance Company v. Adams*, 288 Ga. 315, 702 S.E.2d 898 (2010).

¹¹¹ *Id.* at 320, 702 S.E.2d 898, 903.

¹¹² *Id.*

¹¹³ See Frank E. Jenkins, III and Wallace Miller, III, *Georgia Automobile Insurance Law, Including Tort Law With Forms*, § 32U(h)(5)(2014-2015).

¹¹⁴ *Reece v. Daniel*, 2014 WL 4159933 (Ga.Super.).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

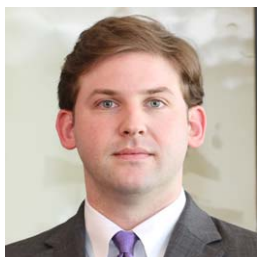
¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

My Car, My Business? Navigating Insurance Issues in a Ride Share World

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In March, 2009, Garrett Camp and Travis Kalanick founded Uber, a wildly successful ride share service that has effectively changed the way that millions of Americans move around in our cities.¹ Since that time, numerous other companies have followed in Uber's tracks, attempting to break free from the traditional taxicab business model.²

The advent of nontraditional ride share services as an alternative to traditional taxicabs, however, has created a number of issues regarding insurance coverage in states across the country.³ Among those issues are policy exclusions for car-for-hire activities, the incentive for ride share drivers to commit insurance fraud, compulsory minimum liability limits, the primacy of any commercial policy over a ride share driver's liability or

collision coverage, and the primary duty to defend the insured.

Several states, including California and Colorado, have already enacted statutes regulating ride share services such as Uber and Lyft.⁴ Other states, including Georgia and Arizona, followed suit by introducing legislation to address the issues presented by ride share services.⁵ After the conclusion of the 153rd General Assembly, Georgia's H.B. 190 was sent for Governor Deal's signature in April and was signed on May 7, 2015.⁶ The new law will go into effect on January 1, 2016, as O.C.G.A. § 33124, a new Code section to Chapter 33, relating to insurance generally.⁷

This article will provide a brief overview of what a ride share service is, outline the current insurance requirements for taxis and ride share vehicles, explain how Georgia's new law addresses ride share services, and inform personal automobile insurers and civil defense attorneys of the potential pitfalls and risks presented by Georgia's new law and the reality of doing business in a ride share world.

I. What Is a Ride Share Service, and How Does It Differ From a Traditional Taxicab or Limousine?

A ride share service is a service provided by a company that connects drivers who are willing to provide transportation with their personal vehicles to prospective riders in exchange for some form of compensation. The fundamental characteristic of a ride share service is that it involves the use of a driver's *personal* vehicle, not a company-owned or fleet vehicle.⁸

A traditional taxicab company provides transportation services through the use of company-owned taxicabs that are used by company-hired drivers, whether independent contractors or actual employees. Prospective riders can hail an available taxicab from the street, or they can prearrange a ride through a central dispatcher. Limousine services, similarly, provide prearranged transportation through the use of company-owned luxury motor vehicles driven by company-hired drivers.

Under the traditional taxicab or limousine business model, the company itself is ultimately responsible for the care, maintenance, and insurance of its vehicles, as well as for the hiring and supervision of its drivers. More importantly, though, state laws regarding the operation of commercial vehicles regulate all aspects of running a taxicab or limousine business. In Georgia, taxicab and limousine companies must comply with, among other laws and

municipal regulations, the laws governing motor carriers.⁹

In contrast, ride share services such as Uber and Lyft operate online networks that allow a prospective rider to hail a ride using GPS location services. In order to use a service such as Uber or Lyft, a rider has to create a member account and store payment information. A driver can connect to Uber or Lyft via an online app, and when connected, a driver can see and pick up prospective riders who have requested a ride. Once a driver picks up a rider, the ride share service tracks the route via GPS and automatically bills the rider for the cost of the ride.

Uber describes itself as a “request tool, not a transportation carrier.”¹⁰ Thus, as opposed to working a traditional shift, a ride share driver can connect to the “request tool” at any time to pick up nearby riders. Lyft operates in largely the same way, connecting drivers that are online to nearby passengers.

Unlike Lyft, Uber also provides different tiers of service based on the types of vehicles used by the drivers. Aside from the vehicle differences, the tiers are also different in the types of insurance that the drivers are required to carry. UberX is the basic, low cost service that allows a driver to use an ordinary personal vehicle to transport riders.¹¹ Other options that provide more specialized, upscale service include UberTAXI, UberBLACK, UberSUV, and UberLUX.¹²

II. What Types of Insurance Are Required For Taxis, Limousines, and Ride Share Vehicles?

Generally, any policy of insurance issued in Georgia to the owner of a vehicle must carry liability coverage of \$25,000 per person for bodily injury, \$50,000 per accident for bodily injury, and \$25,000 per accident for property damage.¹³ These liability limits, however, vary with regard to taxis, limousines, and ride share vehicles.

In Georgia, the Public Service Commission has issued regulations mandating that limousine and intrastate motor carriers carry liability coverage of \$100,000 per person for bodily injury, \$300,000 per accident for bodily injury, and \$50,000 per accident for property damage (excluding cargo).¹⁴ Under current Georgia law, however, taxis that operate within the limits of a municipality are not considered motor carriers and are subject to municipal regulations.¹⁵ In the absence of municipal regulations, taxis are subject to the same liability limits mandated for limousines and intrastate motor carriers. Thus, it is conceivable that a taxi operating within a municipality may only be required to carry the minimum limits of \$25,000/\$50,000/\$25,000 required by O.C.G.A. § 33711.

With the exception of Uber's taxi, limousine, and SUV services, ride share vehicles are not currently subject to Georgia's laws imposing the \$100,000/\$300,000/\$50,000 liability limits on limousines and intrastate

motor carriers. Accordingly, a driver's personal vehicle used in a ride share service such as UberX or Lyft is only subject to Georgia's minimum limits of \$25,000/\$50,000/\$25,000.

Standard personal automobile insurance policies issued in Georgia—and many nonstandard policies—contain an exclusion for any loss that occurs while the insured is operating the insured vehicle as a car-for-hire. Notwithstanding an insurer's contractual basis to deny coverage, Georgia courts may invalidate policy exclusions and provisions that deprive victims of negligence of compensation for their injuries. Georgia courts have stated that the compulsory automobile insurance and financial responsibility laws were enacted for the benefit of the public rather than for the benefit of the insured.¹⁶ That is, these laws are designed to “compensate innocent victims who have been injured by the negligence of financially irresponsible motorists.”¹⁷ In *Cotton States Mut. Ins. Co. v. Neese*, the Georgia Supreme Court stated that the public policy of compulsory insurance laws is that “innocent persons who are injured should have an adequate recourse for the recovery of their damages.”¹⁸

Thus, even if an insured is operating a personal vehicle to transport passengers for a fee, the insurer may still be required to compensate a third party for any bodily injury or property damage up to the state minimum limits. Of course, once an insurer becomes aware that its insured is violating the policy by operating a for-hire business, nothing precludes that insurer from cancelling

the insurance policy. Further, the failure of an insured to disclose for-hire activities on an insurance application constitutes insurance fraud.¹⁹

The application of an insurance policy exclusion for for-hire or livery activities may depend on whether the driver was actively transporting a passenger at the time of loss or simply looking for a passenger while logged in to the ride share network. Clearly, the exclusion would apply during an active route. The outcome is not as clear, however, in the latter scenario.

Recognizing this issue, companies like Uber and Lyft have implemented company policies that afford commercial liability insurance for its drivers. These policies provide liability coverage with a single limit of \$1,000,000 for bodily injury and a single limit of \$1,000,000 for UM/UIM while a driver is actively transporting a passenger, that is, from the time the driver accepts the fare until the time the ride is completed.²⁰ Further, both policies afforded by Uber and Lyft are expressly primary to a driver's personal insurance policy, including the duty to defend.²¹ When a driver is merely logged in to the ride share app but has not been matched with a driver, however, the Uber and Lyft policies only provide contingent coverage with limits of \$50,000/\$100,000/\$25,000.²² It should also be noted that Uber also requires its UberBlack, UberTAXI, and UberSUV drivers to carry their own commercial liability insurance, as required by state law.

Under the Uber and Lyft contingent liability policies, coverage will only apply if and when the driver's personal liability insurer denies coverage for a loss.²³ Although the contingent liability coverage afforded by Uber and Lyft closes the insurance gap for situations where a personal liability insurer denies coverage for a loss, it creates a perverse incentive for a ride share driver to lie to its personal insurer to avoid having the personal insurance policy cancelled.

The fact that Uber and Lyft have voluntarily offered liability coverage to its drivers is laudable. The law, however, should *require* ride share services to provide insurance to its drivers. Further, insurers and insureds should be afforded more clarity in situations where a driver is looking for a passenger but has not yet accepted a fare. The current lack of clarity in this regard creates a situation where an insurer may have to incur the costs of providing a defense to its insured while pursuing declaratory relief in order to hold the ride share insurer responsible for a ride share-related loss. Fortunately, the Georgia Legislature has recently passed legislation that addresses these issues, and the bill is currently awaiting Governor Deal's signature.

III. Georgia's H.B. 190

In Georgia's H.B. 190, a company such as Uber or Lyft is designated as a "transportation network company," which is any entity that uses a digital network or other means to connect customers with drivers for the purpose of providing

transportation for compensation.²⁴ “Compensation” has been given a broad definition, encompassing “donations” and any other thing of value.²⁵

Under the new law, “transportation network company services” are defined twofold: (1) “The period of time a driver is logged on to the transportation network company’s digital network and available to accept a ride request until the driver is logged off, except for [during an active ride];” and (2) “The period of time a driver accepts a ride request on the transportation network company’s digital network until the driver completes the transaction or the ride is complete, whichever is later.”²⁶ Thus, the law contemplates that ride share services include both active fares and the time period during which drivers are actively looking for fares.

O.C.G.A. § 33124, as set forth in H.B. 190, will require transportation network companies to provide *primary* coverage for both ride share scenarios outlined above.²⁷ In the case of a driver with an active fare, the new law will require a minimum combined single limit of \$1,000,000 for bodily injury and property damage, and a minimum of \$1,000,000 for UM/UIM coverage.²⁸ In the case of a logged-in driver seeking a passenger, the new law will require a minimum of \$50,000 per person for bodily injury, \$100,000 per accident for bodily injury, and \$50,000 per accident for property damage, excluding cargo.²⁹

Importantly, the new law will also create a statutory basis for a

driver’s personal insurer to deny any and all coverage for any loss that occurs while a driver is either logged on to the ride share network or is actively transporting a customer.³⁰ Thus, the new law will ostensibly relieve an insurer from bearing the risk and expense of denying coverage and providing a defense to its insured in the event of a non-covered loss. In fact, the new law expressly provides that the transportation network company “shall” assume the costs of defense and indemnification in the event of a ride share-related loss.³¹ The transportation network company’s duty to defend and indemnify applies to both a ride share driver and the driver’s insurer in the event that the insurer is also named as a defendant in a civil action.³²

In short, the new transportation network company law requires primary coverage in the event of a loss that occurs while the driver’s vehicle is available for ride share purposes. That primary coverage includes the duty to defend the driver, and the driver’s insurer has an express right of contribution against the insurer providing transportation network company insurance coverage in the event that the driver’s insurer incurs the costs of defending a ride share-related claim.

IV. What Does Georgia’s H.B. 190 Mean for Insurers?

Georgia’s H.B. 190 provides several advantages and assurances to personal automobile insurers. First, the new law codifies an insurer’s contractual ability to deny coverage for a ride share-related loss. Second,

the new law expressly provides that a transportation network company must provide primary coverage in the event of a rideshare-related loss, whether during an active ride or simply when a driver is logged on to the ride share network. Third, the transportation network company's primary coverage includes the primary duty to defend and indemnify a driver and the driver's insurer. Last, the new law contains specific provisions regarding coverage disputes, claims investigation, and rights of contribution.

With regard to the ability to deny coverage, H.B. 190 provides that insurers may exclude any and all coverage afforded to an insured while logged on to a transportation network company's digital network. Under the current regime, a driver's insurer that decides to deny coverage to a logged-on ride share driver runs the risk of being found to have wrongly denied coverage, depending on the particular language of the policy and the facts of the loss. Further, that driver's insurer will also have to evaluate whether to provide a defense to its insured, regardless of the ultimate decision to deny coverage. Under the new law, those uncertainties are largely resolved. The express provision stating that an insurer may deny any and all coverage for transportation network company services removes any doubt that may expose an insurer to bad faith penalties under O.C.G.A. § 3346.³³ Notably, the new law also specifically contemplates denial of coverage for first-party claims, such as UM/UIM, med-pay, and collision coverage.³⁴

Beyond affording the insurer a statutory right to deny coverage for transportation network company services, H.B. 190 also provides that the transportation network company insurance is primary to any other insurance. Further, and more importantly, H.B. 190 states that nothing in the new Code section shall be construed to require a personal automobile insurer to provide primary or excess coverage for a ride share-related loss.³⁵ Thus, even in the event of excess exposure to a driver involved in a ride share-related loss, the driver's personal insurer may not be required to provide excess coverage—that is, the driver's policy may not stack on the primary transportation network coverage.

The primacy of the transportation network insurance coverage also includes the primary duty to defend and indemnify the ride share driver.³⁶ The new law also provides that the transportation network company's insurer has the duty to defend and indemnify the driver's insurer, in the event that the insurer is also named as a defendant in a civil suit.³⁷

Importantly, H.B. 190 provides guidelines for claims investigation, notice of coverage disputes, and rights of contribution. The new law provides that a transportation network company must, within fifteen (15) days and upon request of a driver's insurer, provide the following: details of any loss involving transportation network company services, the date and time of loss, and the precise times during the twelve (12) hours preceding

and following the loss that the driver logged on and off of the ride share network or otherwise signified availability to provide transportation network services.³⁸ Thus, even if a driver does not report the loss to its insurer but a third party notifies the driver's insurer, the new law provides a way for the personal insurer to obtain the information necessary to investigate the loss and evaluate whether to deny coverage.

Further, the new law provides that a transportation network company "shall" notify the driver and the driver's insurer of any dispute concerning primary coverage within twenty-five (25) days of receiving notice of the loss giving rise to such claim.³⁹ This provision appears to create a deadline for the transportation network company to deny coverage, as the mandatory notice provision implies that any notice beyond the twenty-five (25) day window waives any coverage defenses. Accordingly, personal insurers on notice of a ride share-related loss may find the transportation network company's deadline to deny coverage useful in making their own coverage evaluations. In any event, a personal insurer that assumes any costs of defense or indemnification has an express right of contribution against any insurer providing the mandatory coverage for transportation network company services.⁴⁰

V. Conclusion

How will all of these changes actually work? To use a simple example, imagine that a driver is logged on to his Uber account looking

for a passenger. That driver causes a collision with another vehicle, whose driver sustains bodily injury. Under the current state of the law, Uber's \$50,000/\$100,000 contingent liability policy would only pay its first dollar after the driver's own insurer denied the claim. Further, in the event of a coverage dispute with both the personal insurer and Uber denying coverage, the personal insurer would likely be required to pay up to the state minimum limits of \$25,000/\$50,000, regardless of a possibly valid basis to deny coverage. Under the new law, however, Uber's insurance policy is no longer contingent upon a denial of coverage by the driver's personal insurer. Rather, Uber's policy is primary up to the \$50,000/\$100,000 required limits, and the law does not require the personal insurer to provide any coverage of any kind over the limits of Uber's primary policy. The Uber policy also has the duty to defend and indemnify the driver and the driver's insurer.

Although H.B. 190 ostensibly resolves most of the insurance issues presented by the advent of ride share services, it does not address or solve all of the problems that have been created by companies like Uber and Lyft. Specifically, nothing in the new law provides any protection to a driver who has not notified its insurer of its side job providing ride share services. Currently, nothing prohibits a personal insurer from cancelling a driver's insurance policy for nondisclosure of ride share activity. While cancellation is perfectly reasonable from an insurer's point of

view, that threat creates an incentive for the driver/insured to hide ride share activities from its insurer. Hiding such activities is not good for anyone involved, as it creates unnecessary risk and uncertainty.

To address the growing number of ordinary drivers choosing to use their personal vehicles for Uber or Lyft—Uber now has over 160,000 active drivers—insurance companies are developing “hybrid” policies that afford coverage for ride share-related losses for an additional premium.⁴¹ H.B. 190 provides that the minimum coverage required for transportation network company services may be met as an additional provision or endorsement to the driver’s personal automobile policy. Thus, personal insurers now have the opportunity to expand into the new market created by Georgia’s new insurance requirements for ride share drivers.⁴²

Georgia’s H.B. 190 creates a new framework for how ride share companies such as Uber and Lyft are required to insure their drivers and interact with established automobile insurers in Georgia. While providing for adequate coverage in the event of a ride share-related loss, the new law also expressly requires the ride share company to provide, or cause to be provided, primary insurance including the duty to defend and indemnify a ride share driver and its personal insurer. This new law, though not addressing all possible collateral issues, represents a large step in the right direction for insurance law in Georgia.

End Notes

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² Some examples besides Uber include Lyft, Carma, Sidecar, Ridejoy, and Zimride. Gilpin, Lindsey, 10 Ridesharing Companies That Can Make Your Work Trip More Efficient, TECHREPUBLIC, November 14, 2014, available at <http://www.techrepublic.com/article/10-ridesharing-companies-that-can-make-your-work-trip-more-efficient/>.

³ See, e.g., Huet, Ellen, Rideshare Drivers Still Cornered Into Insurance Secrecy,; FORBES, December 18, 2014, available at <http://www.forbes.com/sites/ellenhuet/2014/12/18/uberTyft-driver-insurance/>.

⁴ See CAL PUB. UTIL. CODE § 5430 et seq. (2015); and COL. STAT. ANN. § 40-10.1-601 et seq. (2014).

⁵ H.B. 190, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015). See also H.B. 2135, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

⁶ Hendrick, Bill, “Gov. Deal signs bills regulating ride hailing in Georgia,” *Athens Banner-Herald*, May 7, 2015, available at <http://onlineathens.com/general-assembly/2015-05-06/gov-deal-signs-bills-regulating-ride-hailing-georgia/> (last visited May 7, 2015)

⁷ *Id.*

⁸ Of note, Uber has recently launched a vehicle financing partnership for its drivers to purchase GM and Toyota vehicles for use on the Uber network. Uber, Safety, available at <https://www.uber.com/safety> (last visited on April 14, 2015).

⁹ See O.C.G.A. § 40-1-100 et seq., and O.C.G.A. § 40-1-151 et seq.

¹⁰¹⁰ Uber, Sign Up To Drive With Uber-Earn Cash With Your Car, available at <https://get.uber.com/drive/> (last visited on April 11, 2015).

¹¹ UberX is billed as the “low cost Uber, employing everyday cars for everyday use.” Uber, *Home Page*, available at <https://www.uber.com> (last visited on April 14, 2015).

¹² *Id.*

¹³ O.C.G.A. § 33-7-11(a)(1)(A) (2009).

¹⁴ GA. ADMIN. CODE § 515-16-U-.03 (2008).

¹⁵ O.C.G.A. § 40-1-100(12)(B)(ii) (2013).

¹⁶ See *Cotton States Mut. Ins. Co. v. Neese*, 254 Ga. 335 (1985).

¹⁷ *Id.* at 338 (citing as persuasive authority *Nationwide Mutual Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654, 659 (1964)).

¹⁸ *Id.*

¹⁹ O.C.G.A. § 33-1-9 (2015).

²⁰ See Hourdajian, Nairi, Insurance for Ridesharing with UberX, UBER BLOG, February 10, 2014, available at <http://blog.uber.com/ridesharinginsurance>; and Lyft, Safety, available at <https://www.lyft.com/safety> (last visited on April 14, 2015).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ H.B. 190, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

²⁵ *Id.* at 33-1-24(a)(2).

²⁶ *Id.* at 33-1-24(a)(5).

²⁷ *Id.* at 33-1-24(b).

²⁸ *Id.* at 33-1-24(b)(3).

²⁹ H.B. 190 at 33-1-24(b)(2) as proposed, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015). Of note, the bill as originally introduced proposed limits of \$100,000/\$300,000 for a logged-on driver seeking a passenger.

³⁰ *Id.* at 33-1-24(g)(2).

³¹ *Id.* at 33-1-24(i).

³² *Id.* at 33-1-24(j).

³³ O.C.G.A. § 33-4-6; see also *Federal Ins. Co. v. National Distributing Co., Inc.*, 203 Ga. App. 763, 768, 417 S.E. 2d 671, 676 (1992) (“Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim” (quoting *Central Nat. Ins. Co. of Omaha v. Dixon*, 188 Ga. App. 680, 683(5), 373 S.E. 2d 849 (1988)).

³⁴ H.B. 190 at 33-1-24(h)(1)(C), 153rd Gen. Assemb., Reg. Sess.(Ga. 2015).

³⁵ *Id.* at 33-1-24(g)(1).

³⁶ *Id.* at 33-1-24(i) and (j).

³⁷ *Id.*

³⁸ *Id.* at 33-1-24(h)(4).

³⁹ H.B. 190 at 33-1-24(0, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015)

⁴⁰ *Id.*

⁴¹ Frizell, Sam, “Uber Just Answered Everything You Want To Know About Your Driver,” TIME, January 22, 2015, available at <http://time.com/3678507/uber-driver-questions/> (last visited April 19, 2015)

⁴² Of note, Uber and its subsidiaries currently insure their drivers through policies issued by James River Insurance Company.

A Sword of Damocles? Georgia's Offer of Settlement Statute, O.C.G.A. § 91168

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Georgia's offer of settlement statute was enacted as part of 2005's major tort reform initiative, was amended in 2006, and was upheld as constitutional by the Supreme Court of Georgia in *Smith v. Baptiste*.¹ In late 2014, the Supreme Court held that the statute may be applied constitutionally even to actions in which the injury occurred prior to the statute's effective date, but the complaint was filed after the effective date.²

The statute, modeled after a similar provision long in effect in Florida, is designed to encourage parties in tort cases to make and accept good faith settlement proposals

to avoid unnecessary litigation.³ The statute allows a prevailing party to recover its attorneys' fees and costs when its good-faith settlement offer is not accepted, and because of this, the statute can be a powerful tool to create settlement leverage. Because the statute is available to both sides in tort cases (unlike O.C.G.A. § 13611), it provides civil defendants in Georgia with their first viable fee-shifting mechanism. This article provides an overview of how the statute works and discusses key issues found in the cases applying the statute.

I. Mechanics of the Statute

The Georgia offer of settlement statute, found at O.C.G.A. § 91168, provides that either party may serve on the other a written offer "to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly."⁴ The statute only applies to tort claims, and tort is defined broadly under Georgia law as "the unlawful violation of a private legal right other than a mere breach of contract, express or implied [or] the violation of a public duty if, as a result of the violation, some special damage accrues to the individual."⁵ Unlike the federal offer of judgment rule, Georgia's offer of settlement statute does not actually require that

judgment be entered against a defendant whose offer is accepted, which may make settlement more palatable for many reasons.⁶

The offer of settlement must be made in writing and state that it is being made pursuant to O.C.G.A. § 91168.⁷ The offer must also meet several procedural requirements: it must

- identify the party or parties making the proposal and the party or parties to whom the proposal is made;
- identify generally the claim or claims the proposal is attempting to resolve;
- state with particularity any relevant conditions;
- state the total amount of the proposal;
- state with particularity the amount proposed to settle a claim for punitive damages (if any);
- state whether the proposal includes attorneys' fees or other expenses and whether those are part of the legal claim; and
- include a certificate of service showing service by "certified mail or statutory overnight delivery."⁸

The offer should not be filed with the court.⁹ The offer may be made any time from 30 days after service of the summons and complaint until 30 days before trial.¹⁰ A counteroffer to an offer of settlement may be made up to 20 days before trial.¹¹

Recent Court of Appeals decisions emphasize that every procedural requirement of the statute must be met, and every required term must be contained in the offer. In *Chadwick v. Brazell*, a prevailing plaintiff's statutory offer of settlement was deemed noncompliant because it did not explicitly state that the amount proposed to settle the claim for punitive damages.¹² The plaintiff attempted to salvage his offer by arguing that he was not seeking punitive damages and that requiring him to state the he was allocating zero dollars to settle such a claim would be a meaningless gesture. The Court rejected those arguments, explaining that because the statute is in derogation of the common law, it must be strictly construed, and it explicitly required the plaintiff to state with particularity the amount proposed to settle for punitive damages, even if that amount is zero.¹³

For similar reasons, the Court ruled unenforceable a statutory offer of settlement in *Tiller v. RJJB Associates, LLP*.¹⁴ In this premises liability case, two out of four codefendants served a statutory settlement offer on the plaintiff. After the plaintiff did not accept the offer, the two offering defendants won summary judgment and then were awarded fees and expenses under § 91168. In the interim, the plaintiff obtained a default judgment against a third defendant.¹⁵

On appeal, the Court held that the statutory settlement offer was deficient for several reasons. First, the offer did not sufficiently identify

which claims were being settled. The offer proposed to settle any and all claims arising of the slip-and-fall. According to the Court, that language could be interpreted to include the claims against the defendant who had defaulted, not just the claims against the defendants who actually made the offer.¹⁶ Second, and related, the offer required dismissal of the complaint with prejudice, instead of specifying that only the offering defendants would be dismissed. Third, the offer requested a release of “Defendant,” singular, which “further muddied” the intent of the offering parties. Given these uncertainties in the language of the offer, the Court held that the requirements of § 91168 were not satisfied, and so the trial court erred in awarding fees and expenses.¹⁷

The Court of Appeals in *Great West Casualty Co. v. Bloomfield* addressed the level of particularity required for settlement conditions contained in a statutory offer.¹⁸ There the defendant conditioned an offer on satisfaction of medical and attorney liens, a release of all claims, and an indemnity agreement. The plaintiff argued that the offer was deficient, because it did not identify the liens to be satisfied, did not attach a proposed release or indemnification agreement, and did not recite the specific indemnification terms. The plaintiff relied on cases applying Florida’s offer of settlement statute, which suggested that a party conditioning an offer upon the acceptance of a release must either attach the proposed release or recite its specific terms. The Court of Appeals declined to follow the more rigid Florida rule and instead held

that conditions in a statutory offer need only be stated with enough detail to evidence a meeting of the minds and thereby render a settlement agreement enforceable. The offer in the *Great West* case passed that test by indicating the categories of liens to be satisfied and by requiring dismissal with prejudice, a release of all claims, and an indemnification agreement.¹⁹

An offer of settlement remains open for 30 days, unless it is withdrawn by the offering party, in writing, before it is accepted.²⁰ An offer that is neither withdrawn nor accepted within 30 days is deemed rejected as a matter of law.²¹ The party receiving the offer must accept or reject the offer in writing and serve its response on the offering party.²² A counteroffer is deemed a rejection, but if it is specifically designated as an offer pursuant to O.C.G.A. § 91168, then it may be a separate offer of settlement.²³ After its offer of settlement is rejected, a party may make a later settlement offer, whether pursuant to O.C.G.A. § 91168 or not, and the subsequent offer will not supersede or negate the earlier offer.²⁴

The party making the offer of settlement may be entitled to recover attorneys’ fees and costs if the offer is rejected or expires and the offering party obtains a favorable judgment. If a defendant makes an offer of settlement, the plaintiff rejects it, and the final judgment is one of no liability or is less than 75% of the offer of settlement, then the defendant is entitled to recover reasonable attorneys’ fees and expenses of litigation from the date of rejection of

the offer through the entry of judgment.²⁵ Similarly, if a plaintiff makes an offer of settlement, the defendant rejects it, and the final judgment is greater than 125% of the offer of settlement, the plaintiff is entitled to recover reasonable attorneys' fees and expenses of litigation from the date of rejection of the offer through the entry of judgment.²⁶

Thus, for example, a defendant who makes an offer of settlement for \$100,000 may recover attorneys' fees and costs under two circumstances: (1) if it is found not liable at all, by way of involuntary dismissal, summary judgment, or trial; or (2) if the defendant suffers a final judgment, but in an amount less than \$75,000.

Conversely, a plaintiff who makes an offer of settlement for \$100,000 may recover attorneys' fees and costs if it obtains a judgment of more than \$125,000. Fees incurred on appeal are not recoverable under the offer of settlement statute.²⁷

An offer of settlement must be open for at least 30 days for the offering party to be entitled to recover attorneys' fees and costs.²⁸ In addition, the case must terminate through a favorable judgment; a voluntary dismissal will be insufficient to support an award under the statute.²⁹ A court may disallow an award of attorneys' fees and costs if it finds that an offer was not made in good faith; in that case, the court must make written findings of fact and conclusions of law.³⁰ A court need not make findings of fact and conclusions

of law when the court deems the offer to have been made in good faith.³¹

Fees and expenses may be awarded to a party under the statute even when that party's fees and expenses have been paid by someone else, such as a liability insurer. In *Gowen Oil Co. v. Abraham*, a federal court, applying O.C.G.A. § 91168, rejected a plaintiff's argument that he was not liable for the defendant's fees and costs that had been reimbursed by the defendant's liability insurer.³² The court focused on statutory language that allows recovery of fees and expenses not only by the defendant (or plaintiff), but also "on the defendant's [or plaintiff's] behalf." The court also explained that the statute's purpose of avoiding unnecessary litigation by encouraging litigants to make and accept good faith settlement proposals would be undermined if the rejecting party had no exposure for fees covered by the offering party's insurance.³³

Evidence of an offer of settlement pursuant to O.C.G.A. § 91168 is not admissible except in proceedings to enforce a settlement or to determine reasonable attorneys' fees and costs.³⁴

II. What is a Good Faith Offer?

If a party follows the statutory procedures for a compliant offer and ultimately prevails under the 75% (for defendants) / 125% (for plaintiffs) rule, that party is entitled to an award of fees and costs *unless* the trial court finds that the offer itself was not made in good faith. Procedurally, if the trial court is disinclined to award fees and costs, the court must set forth in a

written order the basis for the determination that the offer was not made in good faith.³⁵

A key issue under the statute then becomes whether the statutory offer was made in good faith. Several Georgia cases provide guidance on this issue. In *Cohen v. Alfred and Adele Davis Academy, Inc.*, a parent sued her daughter's school for slander, fraud, and other torts.³⁶ Four months after the complaint was filed, the school made a statutory offer of settlement in the amount of \$750. The plaintiff did not respond, and the defendants later won on summary judgment. The plaintiff initially appealed the summary judgment but dismissed that appeal. The trial court then awarded the school \$84,000 in fees and costs pursuant to O.C.G.A. § 91168.³⁷

On appeal, the plaintiff argued that the \$750 offer was not in good faith, for several reasons, including (1) the school had been unwilling to talk settlement and thereby avoid litigation; (2) the amount of the offer itself was so small, especially compared to the \$84,000 in defense fees and costs; (3) defense counsel engaged in a pattern of harassment of the plaintiff throughout the litigation; and (4) the school had maintained throughout that the parent's claims were frivolous. The Court of Appeals affirmed the award of fees and costs. The Court explained that, because the school "reasonably and correctly anticipated that its exposure was minimal, the fact that it was willing to settle [plaintiff's] claim for a nominal value" did not demand a finding of bad

faith, a point that was corroborated by plaintiff's dismissal of her appeal of the summary judgment order. The Court also did not find persuasive plaintiff's comparison of the \$84,000 in defense costs to the \$750 offer as somehow being probative of bad faith.³⁸

The Court of Appeals reached a similar result by affirming a fee award based on a \$1,000 statutory offer in *Eaddy v. Precision Franchising, LLC*.³⁹ In that case, a customer sued an auto repair franchise for personal injuries stemming from an onsite altercation. The defendant made a \$1,000 statutory offer, the offer was rejected, and the defendant later won summary judgment on all claims. The plaintiff challenged the offer as being in bad faith, because it was far below her actual damages and, in her words, nowhere near the defendant's potential liability had the case gone to a jury. The Court of Appeals pointed out that the case never went to a jury, because the defendant won summary judgment, and so the Court affirmed the award of fees and costs.⁴⁰

A finding of bad faith was affirmed in the second appeal in the *Great West Casualty* case.⁴¹ This was a wrongful death case against a truck driver, his employer, and the trucking company's insurer. Before trial, the insurer made a \$25,000 statutory settlement offer, which was rejected. At trial, the driver, his employer, and the insurer received defense verdicts, although the jury awarded \$54 million in compensatory and punitive damages against a second driver. The insurer then moved for an award of

fees and costs, which the trial court denied, finding that the \$25,000 offer had been made in bad faith.

The Court of Appeals affirmed the denial of fees under an abuse of discretion standard. The key evidence in support of that finding of bad faith included the trial court's view that the offer had been made before the insurer had thoroughly investigated the event, the catastrophic nature of the accident, in which, according to the jury's verdict against the other driver, "damages grossly exceeded the value of the offer," and the fact that the insurer increased its statutory \$25,000 offer to a \$1 million policy limits offer during trial.⁴²

These cases illustrate that the good faith inquiry is highly fact-specific, and that appellate courts are reluctant to reverse such findings under an abuse of discretion standard.

III. Calculating the Award of Fees

The Georgia Supreme Court in 2014 reversed an award of attorneys' fees under O.C.G.A. § 91168, because the trial court appeared to have based the amount of the award solely on a contingency fee agreement between the plaintiff and his attorney. In *Georgia Department of Corrections v. Couch*, an inmate prevailed in a premises liability claim against the Department of Corrections.⁴³ The jury returned a plaintiffs verdict of approximately \$123,000, after which the plaintiff moved pursuant to O.C.G.A. § 91168 for an award of \$104,000 in fees and expenses, based on evidence of hours worked

multiplied by an hourly billing rate. Instead of relying on that evidence, however, the trial court awarded, and the Court of Appeals affirmed, \$49,000 in fees and costs, based solely on a 40% contingency fee agreement between the inmate and his attorney.

The Supreme Court reversed the award because the calculation relied exclusively on the 40% contingent fee agreement. The Court, relying on precedent under other fee-shifting statutes, held that the fee award must be based on evidence of hours, rates, or other indicia of the value of the professional services actually rendered. While the trial court was entitled to consider the contingency fee agreement as evidence of usual and customary fees, a court errs if it bases the fee award solely on the amount of the contingent fee calculation.⁴⁴

The calculation of the award may be further complicated by the joining in one action of tort claims (which are subject to the statute), and non-tort claims, such as breach of contract (which are not). The Court of Appeals addressed this scenario in *Canton Plaza, Inc. v. Regions Bank, Inc.*, in which a bank was sued for breach of contract and wrongful foreclosure (a tort claim), and the bank counterclaimed.⁴⁵ At trial, the bank received a directed verdict on the borrower's breach of contract and wrongful foreclosure claims, but the borrower won a directed verdict on the bank's counterclaims. The bank had made a pretrial statutory offer of settlement, which the borrower rejected. This led the trial court to

grant fees and costs to the bank under O.C.G.A. § 91168.

The borrower argued on appeal that the fee award was defective because the bank failed to segregate the fees and costs it incurred in defending against the wrongful foreclosure claim from those incurred in defending the breach of contract claim, and the latter category should not be included in the O.C.G.A. § 91168 award. The Court rejected this argument, however, for two reasons. First, the Court held that the breach of contract claim was premised entirely on the same allegations that supported the wrongful foreclosure claim, and so the case was “for all practical purposes a tort action arising from an alleged attempted wrongful foreclosure.”⁴⁶ Second, the Court concluded that the bank’s counsel was required to perform the same work to prepare for and try the case, regardless of the specific causes of action asserted by the plaintiffs.⁴⁷ The Court did, however, find that the trial court erred in not segregating the fees and expenses associated with the bank’s unsuccessful counterclaim, and the Court remanded for an evidentiary hearing to do just that.⁴⁸

Although generally hours spent on discrete and unsuccessful claims should be excluded from a fee award, that principle does not mean that every unsuccessful motion or unused piece of work product should be excluded from the calculation—the test is reasonableness. In one case, for example, a fee award under O.C.G.A. § 91168 included time spent preparing video clips of depositions that were

never used and a motion to strike that was never filed, and that award was affirmed on appeal.⁴⁹ This is not an uncommon scenario, and the *Canton Plaza* case contains important guidance for documenting and proving a fees claim in cases with both tort and contract claims.

IV. Application of the Statute in Federal Courts

Parties to litigation in federal court should consider taking advantage of the Georgia statute. Although it cannot be used in all cases—because it is limited to tort claims—in the Georgia statute has several advantages over the federal offer of judgment provision, found in Federal Rule of Civil Procedure 68. As noted above, the Georgia offer of settlement statute does not require that judgment be entered against a defendant whose offer is accepted.⁵⁰ Most significantly, Georgia’s statute allows recovery of attorneys’ fees as well as expenses of litigation, such as expert witness fees, whereas Federal Rule 68 only provides for *costs*, which are limited to items such as service and witness fees, copy costs, and compensation of court-appointed experts and interpreters.⁵¹

When state-law claims are before a federal court pursuant to the court’s diversity or supplemental jurisdiction, the court generally should apply state substantive law to those claims.⁵² To determine whether state or federal law applies, the court will first look to whether a conflict exists between the two statutes; that is, whether the scope of the federal rule is so broad as to control the issue.⁵³

Several courts have held that state offer of settlement statutes are substantive laws that do not conflict with the federal rules, and therefore may be applied in federal court. For example, although it has not addressed the Georgia offer of settlement statute, the Eleventh Circuit has held that the Federal Rules of Civil Procedure do not preempt application of Florida's state offer of settlement statute.⁵⁴ The Eleventh Circuit found that the Florida state statute did not directly collide with the federal rule, since the scope of the federal rule was slightly different than that of the state statute.⁵⁵

Similarly, in *Wheatley v. Moe's Southwest Grill, LLC*, a federal court analyzed the applicability of the Georgia offer of settlement statute in a diversity action.⁵⁶ In *Wheatley*, the defendants made an offer of settlement pursuant to O.C.G.A. § 91168; the plaintiff never responded, and so the offer was deemed rejected.⁵⁷ Defendants later obtained summary judgment and sought to recover their fees and expenses.⁵⁸ The court analyzed the applicability of O.C.G.A. § 91168 in federal court, noting that the first step in the analysis is whether state and federal laws conflict.⁵⁹ The court found that the state statute did not conflict with Federal Rule 68 for several reasons: Rule 68 was only available to a party defending a claim, while O.C.G.A. § 91168 was available to parties on both sides of a claim; Rule 68 only allowed the recovery of costs, while O.C.G.A. § 91168 allowed recovery of attorneys' fees as well; Rule 68 applied to any

claim, while O.C.G.A. § 91168 only applied to tort claims; Rule 68 only allowed offers of judgment, while O.C.G.A. § 91168 allowed offers of settlement; and Rule 68 did not allow the offering party to place conditions on its offer, while O.C.G.A. § 91168 did.⁶⁰ The court held that "the statute is at its core a substantive law" that did not conflict with a federal law or procedural rule.⁶¹ It therefore concluded that it was bound to apply O.C.G.A. § 9 1168 in a diversity action.⁶²

Thus, in federal court cases involving tort claims under Georgia law, parties should consider the availability of the Georgia offer of settlement statute. Federal courts should continue to follow *Tanker Management* and *Wheatley* to enforce offers of settlement under O.C.G.A. § 91168 in such cases.

V. Conclusion

Georgia's offer of settlement statute provides litigants in tort cases with a potentially powerful leverage point. This statute supplements earlier fee-shifting laws but is available to defendants and plaintiffs alike. And, although found in the Georgia Civil Practice Act, the weight of federal precedent holds that the statute also applies in federal cases containing state law tort claims. Some courts remain skeptical of this statute, which is in derogation of the common law. Those courts may look to narrowly construe the statute and may insist on rigorous compliance with the statute's many technical features, as has been the case in Florida, for example, under the

statute upon which Georgia's was modeled. Practitioners are cautioned to study all the procedural elements of the statute and make detailed offers that contain each and every required term. Care should be given to the amount and timing of the offer—even in cases that look like strong candidates for dismissal or summary judgment—lest the offer be deemed in bad faith and thus unenforceable.

End Note

¹ 287 Ga. 23, 29, 694 S.E.2d 83, 88 (2010).

² *Crane Composites, Inc. v. Wayne Farms, LLC*, 296 Ga. 271, 271, 765 S.E.2d 921, 922 (2014).

³ Smith, 287 Ga. at 29, 694 S.E.2d at 88; see also *Canton Plaza, Inc. v. Regions Bank, Inc.*, 325 Ga. App. 361, 363, 749 S.E.2d 825, 827 (2013).

⁴ O.C.G.A. § 9-11-68(a).

⁵ O.C.G.A. § 51-1-1.

⁶ Compare O.C.G.A. § 9-11-68(a), with Fed. R. Civ. P. 68(a); see also *Wheatley v. Moe's Sw. Grill, LLC*, 580 F. Supp. 2d 1324, 1328 (N.D. Ga. 2008).

⁷ O.C.G.A. § 9-11-68(a)(1).

⁸ O.C.G.A. § 9-11-68(a)(2)-(8).

⁹ O.C.G.A. § 9-11-68(a).

¹⁰ *Id.*

¹¹ *Id.*

¹² No. A14A2279, 2015 WL 1243887, at *3 (Ga. App. Mar. 19, 2015).

¹³ *Id.*

¹⁴ No. A14A1599, 2015 WL 1380904 (Ga.App. March 27, 2015).

¹⁵ *Id.* at *1-2.

¹⁶ *Id.* at *3.

¹⁷ *Id.* at *3-4.

¹⁸ 303 Ga. App. 26, 28-29, 693 S.E.2d 99, 101 (2010).

¹⁹ *Id.*

²⁰ O.C.G.A. § 9-11-68(c).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Great W. Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 29-30, 693 S.E.2d 99, 102 (2010).

²⁵ O.C.G.A. § 9-11-68(b)(1).

²⁶ O.C.G.A. § 9-11-68(b)(2).

²⁷ *Wheatley v. Moe's Sw. Grill, LLC*, 580 F. Supp. 2d 1324, 1326 (N.D. Ga. 2008).

²⁸ O.C.G.A. § 9-11-68(c).

²⁹ *McKesson Corp. v. Green*, 286 Ga. App. 110, 116, 648 S.E.2d 457, 462 (2007).

³⁰ O.C.G.A. § 9-11-68(d)(2); *Eaddy v. Precision Franchising, LLC*, 320 Ga. App. 667, 670, 739 S.E.2d 410, 413 (2013) (citing *Cohen v. Alfred & Adele Davis Acad.*, 310 Ga. App. 761, 764, 714 S.E.2d 350, 353 (2011)).

³¹ *Eaddy*, 320 Ga. App. at 670, 739 at 413.

³² 511 F. App'x 930, 933 (11th Cir. 2013).

³³ *Id.*

³⁴ O.C.G.A. § 9-11-68(c).

³⁵ *Eaddy*, 320 Ga. App. at 670, 739 at 413.

³⁶ 310 Ga. App. 761, 714 S.E.2d 350 (2011).

³⁷ *Id.* at 761-62, 714 S.E.2d at 351.

³⁸ *Id.* at 762-63, 714 S.E.2d at 352.

³⁹ 320 Ga. App. 667, 739 S.E.2d 410 (2013).

⁴⁰ *Id.* at 670-71, 739 S.E.2d at 413-14.

⁴¹ *Great W. Cas. Co. v. Bloomfield*, 313 Ga. App. 180, 721 S.E.2d 173 (2011).

⁴² *Id.* at 182-83, 721 S.E.2d at 175-76.

⁴³ 295 Ga. 469, 759 S.E.2d 804 (2014)

⁴⁴ *Id.* at 484, 759 S.E.2d at 816.

⁴⁵ 325 Ga. App. 361, 749 S.E.2d 825 (2013).

⁴⁶ *Id.* at 362, 749 S.E.2d at 827.

⁴⁷ *Id.*

⁴⁸ *Id.* at 363-64, 749 S.E.2d at 827-28.

⁴⁹ *Gowen Oil Co. v. Abraham*, 511 F. App'x 930, 936 (11th Cir. 2013).

⁵⁰ Compare O.C.G.A. § 9-11-68(a), with Fed. R. Civ. P. 68(a); see also *Wheatley v. Moe's Sw. Grill, LLC*, 580 F. Supp. 2d 1324, 1328 (N.D. Ga. 2008). Costs recoverable under the federal rule generally are limited to those enumerated in 28 U.S.C. § 1920.

⁵¹ Compare O.C.G.A. § 9-11-68(b), with Fed. R. Civ. P. 68(d); see also *Wheatley*, 580 F. Supp. 2d at 1328.

⁵² *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Jones v. United Space Alliance, L.L.C.*, 494 F.3d 1306, 1309 (11th Cir. 2007).

⁵³ *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980); *Hanna v. Plumer*, 380 U.S. 460, 470-72 (1965).

⁵⁴ *Tanker Mgmt., Inc. v. Brunson*, 918 F.2d 1524, 1528-29 (11th Cir. 1990).

⁵⁵ *Id.*

⁵⁶ 580 F. Supp. 2d 1324 (N.D. Ga. 2008).

⁵⁷ *Id.* at 1325.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1327.

⁶⁰ *Id.* at 1328-29.

⁶¹ *Id.* at 1329.

⁶² *Id.*; see also *Gowen Oil Co. v. Abraham*, No. CV 210-157, 2012 WL 1098568, at *2 n.4 (S.D. Ga. Mar. 30, 2012), *aff'd*, 511 F. App'x 930, 934 (11th Cir. 2013) (“We apply § 9-11-68 here but do not decide whether it should be applied in all diversity cases applying Georgia law.”); *Leonard v. State Farm Mut. Auto. Ins. Co.*, No. D14-CV-1074-AT (N.D. Ga. June 17, 2014) (order denying motion to strike offer of settlement) (following *Wheatley* and holding that offer of settlement statute applies to Georgia tort claims in federal court).