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"Other Claims or Otherwise" – When Does a Third Party Reimbursement Make An Insured Underinsured?

By: A. Paul Moore, Jr.

In 2004, the Georgia Supreme Court opened up a potential pandora's box for UM claims. In its holding in *Thurman v. State Farm*, 278 Ga. 162 (2004), the Supreme Court held that an insured not otherwise underinsured could become underinsured when their insurance recovery was burdened by a mandatory reimbursement to a federal health benefit plan. In a recent decision, *Adams v. State Farm*, 2009 WL 368503 (Ga. App., Feb. 17, 2009), the Georgia Court of Appeals opened the box further, **holding that a state hospital lien also reduces a UM insured's available liability coverage, and entitles the insured to that much more UM coverage**.

In *Thurman*, the Georgia Supreme Court ruled that the injured party was underinsured because they had received benefits pursuant to the Federal Employee Compensation Act § 8101 and the Federal Employee Health Benefit Act § 8901. Those federal statutes gave the federal government a mandatory right of reimbursement for any medical benefits paid out to the injured party, regardless of whether they had been fully compensated.

At issue in *Thurman* was whether these mandatory reimbursements to the federal government for health benefits reduced the insurance coverage available to the insured, making them underinsured. The question in *Thurman* was whether the mandatory reimbursement should be counted against the insured's available coverages. "Available coverages" is defined in the Georgia UM statute (O.C.G.A. § 33-7-11(B)(1)(d)(ii)) as the policy limits "less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage."

The Georgia Supreme Court in *Thurman* held that the federal medical benefit reimbursement **did** constitute a "payment of other claims or otherwise" because it was a mandatory reimbursement. Since Georgia public policy favors complete compensation of the injured party, the Court ruled that the mandatory federal reimbursement reduced the amount of coverage available from the tortfeasor, entitling the insured to that same amount in UM benefits.

Last year, the Georgia Court of Appeals expanded the *Thurman* rationale to include mandatory reimbursements to Medicare. In *Toomer v. Allstate*, 292 Ga.App. 60 (2008), the Court of Appeals held that payment of a Medicare lien also reduced the insured's available coverages. The Court again ruled that this federal statute compelled repayment of the lien without regard for whether the insured had been fully compensated. Georgia's public policy of complete compensation could only be furthered by allowing the insured to recover UM benefits for the amount by which the tortfeasor's coverage had been reduced by payment of the Medicare lien.

Thurman and *Toomer* left many wondering how far the Georgia courts would go to apply the "payment of other claims or otherwise" language so as to make additional UM coverage available to insureds. If an insured was not fully compensated because of a hospital lien for his medical care, would that reduce his available coverages? *In Adams v. State Farm*, *supra.*, the Court of Appeals also appears to have struggled with this question, issuing an opinion but

then reversing itself on a motion for reconsideration.

In *Adams*, *supra*., the liability insurer paid off the hospital lien ($9,217.66) and paid the remainder of the $25,000 liability policy limits ($15,782.34) to the injured party, Randolph Adams. Mr. Adams sought UM benefits for the $9,217.66 paid to satisfy his hospital lien. He contended that the hospital lien payment was a "payment of other claims or otherwise" analogous to the medical reimbursements in *Thurman* and *Toomer*. However, the trial court granted summary judgment to State Farm, holding that the insurer was entitled to the full $25,000 setoff for the underlying liability limits.

Originally, on February 17, 2009, the Court in *Adams* refused to extend the *Thurman* holding to payment of a state hospital lien claim. 2009 WL 368503 (Ga. App., Feb. 17, 2009), In the February decision, the Court of Appeals held that the hospital lien did not reduce Mr. Adams available coverage because "neither federal nor state law required payment to the benefits provider." Id. at 3. In Georgia, a hospital lien is against the cause of action, and not against the injured party. Thus, the Court of Appeals originally did not consider a Georgia hospital lien equivalent to the mandatory reimbursements required by the federal laws addressed in *Thurman* and *Toomer*. The Court considered the payment of the lien voluntary, and not mandatory like under the federal health laws.

However, on April 14, 2009, a seven judge panel of the Court of Appeals vacated the original opinion in *Adams*, *supra*. 2009 WL 987457 (Ga. App., April 14, 2009), holding that state hospital liens do reduce the amount of liability coverage available to the plaintiff under O.C.G.A. § 33-7-11 (b)(1)(d)(ii). The full panel considered the mandatory/ voluntary distinction to be a distinction without a difference because the hospital lien was still a payment that reduced the amount of liability coverage recoverable by the plaintiff.

The *Adams* majority emphasized that, under a plain reading of the statute, it is not limited only to payments for "other claims." Instead, the statute also includes any "otherwise" payments. The Court looked to the dictionary definition of "otherwise" and determined that the applicable payments could include payments simply made "[i]n another way; differently; under the circumstances; in other respects; other than supposed; different…" The Court held that under the common usage of these terms, the hospital lien constituted an "other claim or otherwise" under the UM statute.

The panel in *Adams*, split 4-3, with Presiding Judges Johnson, Blackburn, and Smith dissenting. The dissent continued to maintain that *Thurman* and *Toomer* do not control because they were mandatory payments and the hospital lien payment was voluntary. The dissent also made a further argument about the purpose of the UM statute. Judge Johnson argued that the purpose of the UM statute is not to make the insured whole, but rather only to place an insured in the same position they would have been if the tortfeasor had obtained sufficient insurance to cover the injuries.

With a split Court of Appeals on a motion to reconsider, one would expect the Georgia Supreme Court to at least review the *Adams* decision. For now though, *Adams* is controlling law and has significantly opened the door for plaintiffs to make larger claims against their UM insurance. Now, any hospital lien paid by the liability insurer from the liability coverage reduces the amount of "available coverage" under the UM statute, and entitles a plaintiff to that amount from his UM carrier, up to the UM limits.
The decision also appears to have thrown the door open as to what other kinds of reimbursements might be found to be "payments for other claims or otherwise." The *Adams* majority opinion suggests that "otherwise" payments could mean almost any payment from the liability coverage not made to the insured. The *Adams* dissent points out that this could apply in almost every instance where an insured receives hospital treatment. For instance, it is conceivable that if an ERISA insurer were reimbursed from the liability proceeds, then that too could be a payment that reduced the insured's "available coverage" and entitled him to the amount of that payment from his UM carrier.

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Spoliation In A Medical Malpractice Case: *Thoughts To Ponder And Some Words To The Wise*

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By: Kim M. Ruder

By definition, spoliation refers to the "destruction or failure to preserve evidence that is necessary to contemplated or pending litigation." *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762 (2005). Spoliation in the context of a medical malpractice case can raise many issues for lawyers representing doctors and hospitals. These issues can often be overlooked until it is too late to repair the damage done.

While most attorneys have heard of the concept of spoliation and have a general or basic understanding of what it means, few appear to have had the opportunity or necessity of litigating the issue before a trial court or on appeal. Due to its

less-than-pervasive appearance in litigation - and more particularly in medical malpractice actions - the subject needs some light thrown upon it. This article shows how medical malpractice attorneys need to "think outside the box" in their defense of their medical practitioner clients.

A CASE TO PONDER

Consider the following hypothetical: Dr. Smith is a pathologist in a community based hospital. As has become routine in hospital settings, Dr. Smith's professional group maintains a contract with the hospital. The physicians are considered to be independent contractors at the hospital as opposed to being hospital employees.

Dr. Smith interprets a pathology sample on a patient as completely benign and signs out his report. A few years later, Dr. Smith is sued for wrongful death/ medical malpractice and the plaintiff contends that Dr. Smith misread the pathology on his deceased spouse. As a result, he says, the spouse's cancer went undiagnosed and untreated.

Just months before Dr. Smith was served with the lawsuit, the paraffin wax "block" containing the remaining portions of un-reviewed tissue was discarded by employees of the hospital in accordance with a written retention policy. When suit was filed, the plaintiff requested the block from both the pathologist and the hospital (also a named defendant). Clearly neither could produce it.

IS THERE SPOLIATION AND WHO IS RESPONSIBLE?

How does a court analyze whether spoliation occurred in the first place? As stated above, spoliation occurs when there is a destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Clearly, the concept of "pending" litigation is self-explanatory. However, the concept of contemplated litigation necessarily involves a case-by-case analysis of facts. For example, in the case of *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541 (2008), Wal-Mart was alleged to have spoliated videotape evidence that depicted surveillance of a Wal-Mart parking lot at the time when the plaintiff was shot. Once a suit was filed, the plaintiff learned that the footage had been destroyed. The plaintiff therefore moved for spoliation sanctions. Wal-Mart argued that it merely re-used the tape in its ordinary course of business and that it did not destroy the tape during litigation. In determining whether the tape had been destroyed in anticipation of litigation, the court seized upon the notion that the plaintiff's former attorney had sent Wal-Mart's CEO a pre-suit demand letter and found this fact sufficient to place Wal-Mart on notice of contemplated litigation. See also *Gilmore v. SCI Texas Funeral Services, Inc.*, 234 S.W.3d 251 (Tex. App. 2007) (duty to avoid spoliation "arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim."); *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill.App.3d 605 (Ill. App. 2007) ("a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."); *Robertson v. Dept. of Public Safety*, 2005 WL 2364817 (Ohio Ct. Cl. 2005) ("pending or probable litigation"). Simply stated, it is incumbent upon a plaintiff to place a defendant on notice that litigation is being contemplated.

Returning to our hypothetical, is there spoliation of the tissue block that was discarded in accordance with the hospital's policies? Absent additional information that would place the doctor and hospital on notice of a potential claim, the answer would seem to be a resounding "no."

Let's change the hypothetical around to assume that the tissue block was spoliated. Who is responsible for the spoliation? Is it the doctor, the hospital, or both? This much more complicated question poses what could be the single largest puzzle for medical malpractice attorneys in the context of representing a hospital, a physician or a practice operating in a hospital setting. Without truly understanding the intricate division of labor between the hospital and the physician's group, what may seem to be an easy answer does not turn out the way expected. It is virtually impossible to determine where the responsibility lies for the spoliation without delving into the mundane terms and conditions in the agreement governing the relationship between the physician's group and the hospital. Unlike in other med-mal cases, intense scrutiny of the agreement is required in these situations, not just a focus on the medicine.

THE QUESTION OF RESPONSIBILITY

In answering the question of responsibility for the spoliated tissue block, it is important to look at the following: Does the agreement state who is the custodian of the tissue block? Do the physicians "own" anything in the laboratory? Who is responsible for the running or oversight of the pathology laboratory? Who is responsible for authoring and enforcing the rule regarding the discarding of tissue blocks? Do the physicians have the right to direct the activity of hospital employees? Each agreement is different, so this list is not meant to be exhaustive in terms of the questions the attorney must ask. But, ultimately, this factual inquiry will be resolved by a trial judge who will also be interpreting the facts surrounding the division of labor between the hospital and the physician's practice group. The attorneys for both sides must be prepared.

After the contractual interpretation of

the agreement has been done, there is yet one more thought to consider. There is a line of case law authority that would impose responsibility for spoliation under an "agency" theory. *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762 (2005); *see also Boswell v. Overhead Door Corp.*, 292 Ga. App. 234 (2008) (finding no spoliation sanctions against Overhead Door when City of Atlanta discarded door on its own and not at the request of Overhead Door). In *Bouve & Mohr,* a defendant was held liable for spoliation sanctions despite the fact that the defendant had no personal involvement in actually destroying evidence. More specifically, in a premises liability case, a plaintiff filed suit against an apartment complex following her alleged rape at the apartment complex. A police officer who acted as security for the apartment was assigned to the criminal rape case. Through a series of factual circumstances, the police officer disposed of the rape kit. The court found there to be circumstantial evidence of agency between the police officer and the apartment complex.

In applying the theory of agency to our hypothetical, it is important to be careful to investigate not only the contractual relationship between the hospital and the physician's practice, but also the actual day-to-day operation of the laboratory. If the physician directs or is consulted by laboratory personnel in reference to the storage or discarding of tissue blocks, the physician's group as the hospital could find themselves on the hook for spoliation. However, if the hospital employees are alone responsible for carrying out the discarding of the tissue blocks, the hospital is most likely solely responsible for the alleged spoliation.

THE CONSEQUENCES OF SPOLIATION

In determining the appropriate remedy for spoliation, Georgia's courts, for example, review the following factors: "1) whether the [party seeking sanctions] was prejudiced as a result of the destruction of the evidence; 2) whether the prejudice could be cured; 3) the practical importance of the evidence; 4) whether the [party who destroyed the evidence] acted in good or bad faith; and 5) the potential for abuse." *R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177, 180 (2000). Other states generally look at the same general factors. *See Joyner v. B&P Pest Control, Inc.*, 852 So. 991 (Ala. Civ. App. 2002); *Whirlpool Corp. v. Camacho*, 251 S.W.3d 88 (Tex. App. 2008). *See also Barnett v. Simmons*, 2008 WL 4853360 (Okla. 2008); *Wilson v. Frye*, 2008 WL 4561505 (Wash. App. Div. 2008) *State v. Hay*, 756 N.W.2d 480 (Iowa App. 2008); *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wash. App. 81 (2007).

WHAT IS THE REMEDY?

Assuming spoliation has occurred, what is the remedy? First and foremost, most attorneys are aware of the dreaded "adverse inference" charge. The jury can be charged that there is a rebuttable presumption that the lost or destroyed evidence contained information adverse to the spoliator. In the hypothetical identified above, the trial court could instruct the jury that the missing tissue block contained something harmful to the doctor's and the hospital's defense. This could result in the jury forming the impression or presumption that the tissue block contained evidence of malignancy. Simply the giving of an adverse inference charge in the hypothetical could have dire consequences and turn a seemingly defensible case into one that poses serious risks in being tried to verdict. Even more so than the giving of the adverse inference charge, trial courts are vested with discretion to fashion even more damaging remedies for alleged spoliation. For example, a trial court could dismiss the case or could exclude testimony concerning the destroyed or lost evidence. *See, e.g., R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177, 180 (2000); *Covucci v. Keane Consulting Group, Inc.*, 21 Mass. L. Rptr. 228 (Mass. Super. 2006); *Harborview Office Center, LLC v. Camosy Inc.*, 290 Wis.2d 511 (2006); *Farr v. Evenflo Co., Inc.,* 287 Wis.2d 827 (Wis .App., 2005). Additionally, a trial court could even enter findings of fact pertaining to the lost or destroyed evidence, thus removing certain issues from consideration from the jury's purview. See, e.g., *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762 (2005) (where spoliated evidence was a rape kit performed on the plaintiff after the alleged rape, court entered a finding of fact that the plaintiff was raped in the apartment complex run by the defendant).

As you can see, depending on how a trial court perceives an alleged spoliation, the merits of the case could be vastly affected. Importantly, assuming a litigant wishes to appeal the entry of spoliation sanction, that decision is generally reviewed under the deferential abuse of discretion standard.

CONCLUSION

What is the lesson to be learned by the prudent medical malpractice attorney? First and foremost, it is not just about the medicine and the patient's medical record. When you are representing physicians or their practices in the setting of a community hospital, you must determine all the parties' involvements in the everyday operation of the physician's practice, and establish who is responsible for what. Once you have resolved this one very important fact, you will be in the best possible position to properly represent your client's interest and prevent the blunders that lead to a claim of spoliation. Even absent a claim of spoliation, this inquiry should occur as early as possible in litigation in order to determine which party will be responsible for preserving relevant evidence during suit. Absent such an early investigation, you could find your client on the receiving end of a motion for spoliation sanctions.

Finally, if you have a co-defendant, keep the lines of communication open in order to ensure that all relevant documentary evidence is being maintained and preserved, even if it's not your client's documents. This will help in avoiding the issues of who had the responsibility to preserve each item of relevant evidence during discovery

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RECENT VICTORIES

DEFENSE VERDICT IN DENTAL MALPRACTICE CASE

Doug Smith obtained a defense verdict in a dental malpractice case on April 29, 2009. Doug represented a dental group in Kennesaw, GA which had been sued by a patient via respondeat superior. The patient alleged one of the Group's dentists had improperly diagnosed and treatment planned her diseased mouth and that as a result of poor treatment, she underwent months and months of pain and eventually lost her front seven teeth. The jury found in favor of the Group believing that although the treatment plan was not the best option, the plaintiff had been fully informed of the risks of the plan and minimal potential for success and had assumed the risks involved.

DEFENSE VERDICT IN MEDICAL MALPRACTICE WRONGFUL DEATH CASE

Dan McGrew and Christina Wall recently obtained a defense verdict on behalf of their client, a general surgeon, in a medical malpractice/wrongful death case in Gwinnett County. Plaintiffs in the case alleged a failure to diagnose and properly treat an infected pancreatic pseudocyst. Dan and Chris demonstrated to the jury that the patient had severe pancreatitis and that their client properly assessed and treated the patient during each of her five hospital admissions for pancreatitis and related complications. After a week of testimony and evidence from renowned experts presented by the defense on appropriate surgical treatments for pancreatitis and related complications, the jury returned a defense verdict for Dan and Chris' client.

DEFENSE VERDICT IN MEDICAL MALPRACTICE WRONGFUL DEATH CASE

Wade Copeland and Ashley Sexton represented two nephrologists in a week long wrongful death case tried in Cobb County the week of March 30. The 64 year old decedent entered the hospital due to problems with congestive heart failure. She also had Type II diabetes which was treated with oral medication. Lab tests in the hospital ordered by the doctors revealed severe low blood sugar which eventually led to her death, but the nursing staff failed to notify the doctors. The plaintiff's claimed that the doctors should have ordered more frequent testing and that the doctors failed to take steps to personally review the lab results. The defense was supported by testimony from experts in internal medicine, endocrinology and nursing with the basic defense being that the appropriate tests were ordered and that the failure to follow up was not the responsibility of the doctors. The nurses and hospital were not named in the case and the Statute of Limitations had run as to them. The jury deliberated for 6 hours before returning a verdict in favor of both doctors.

COURT OF APPEALS AFFIRMS SUMMARY JUDGEMENT IN TORTIOUS INTERFERENCE CLAIMS

Michele Jones and Joe Kingma represented three defendants sued for allegedly interfering with a psychologist's business. The Psychologist alleged that the defendant's wrongful actions had forced him from private practice and caused his discipline by the Georgia Psychological Association and the State Board of Examiners. The trial court granted summary judgment and the Georgia Court of Appeals affirmed finding that the defendants were protected by immunity and that the plaintiffs had failed to show harm arising from the alleged interference. (Case No. A09A0103 Georgia Court of Appeals, March 30, 2009)

FAVORABLE VERDICT IN RICO CASE

Chip Emge and David Harmon obtained a verdict totaling $7,757,776 against a large Charleston based financial organization for fraud and racketeering under the Racketeer Influenced and Corrupt Organizations Acts ("RICO"). In the lawsuit, the plaintiff alleged that the defendants, who offered "90% Stock Loans" to clients, did not insure its ability to return the stock at the end of the loan term as promised. It was also alleged that the defendant paid themselves exorbitant fees and commissions, invested the funds in local companies they owned, and created an elaborate network of offshore shell companies to launder and hide the funds. When the defendant's clients attempted to retrieve their collateral, they discovered that the defendant could not return the stock.

Following an initial arbitration suit in 2005, the defendant filed for bankruptcy, which was quickly converted to a Chapter 7 involuntary bankruptcy. The plaintiff, the Bankruptcy Trustee, and all borrowers filed lawsuits against the defendant and an array of offshore shell companies allegedly created to launder the proceeds of the scheme. These lawsuits were consolidated for trial before The Honorable David C. Norton. The verdict came after a four week trial in the United States District Court for the District of South Carolina, awarding substantial RICO verdicts against the defendants.

RARE DEFENSE VERDICT IN HAMPTON COUNTY, SC

D. Gary Lovell, Jr. and Andrew

Countryman obtained a rare defense verdict in the trial of a motor vehicle accident case in Hampton County, South Carolina. In the case, the Defendant driver "rear-ended" the Plaintiff while operating an employer owned vehicle. Plaintiff was turning right into a narrow private driveway at the time of the collision. Defense counsel argued that the Plaintiff did not give sufficient warning to oncoming traffic of her intent to stop or slow considerably during her turn, resulting in her unexpectedly blocking most of the travel lane.

Plaintiff claimed significant injuries and ongoing medical treatment, including permanent spinal injuries, aggravation of pre-existing bi-polar disorder, with permanent disability and inability to work as a nurse. Plaintiff's vocational expert Dr. Vanderkolk and her economist Dr. Oliver Wood estimated Plaintiff's past and future special damages in excess of $759,000, plus pain and suffering.

After an hour of deliberation, the jury returned a special verdict finding the Plaintiff 70% at fault for the accident and the Defendant 30%. Under South Carolina's comparative negligence laws, that verdict resulted in a Judgment for the Defendants. Judge Wellmaker of Pickens County presided over the trial in Hampton County. This is one of the few reported Defense verdicts in Hampton County. The case has been resolved in post-judgment negotiations.

DEFENSE VERDICT FOR GEORGIA MOTEL

David Root and Clare Michaud obtained a defense verdict for their client, a Georgia based motel, in a recent premises liability case on February 3, 2009. The Plaintiff alleged he suffered injuries at the motel and claimed over $250,000 in damages. The jury returned the favorable verdict after only six minutes of deliberation.

FIRM ANNOUNCEMENTS

DEVELOPMENTS IN ACCOUNTING MALPRACTICE

John C. Rogers and Lindsey P. Hettinger authored "Developments in Accounting Malpractice" in "Recent Developments in Law Governing Professionals', Officers', and Directors' Liability" 44:2 Tort Trial & Insurance Practice Law Journal. Winter 2009.

TOP 100 BLACK WOMEN OF INFLUENCE FOR 2009

Sharese Shields has been been selected as one of the Atlanta's Top 100 Black Women of Influence for 2009 by the Atlanta Business League. The list reflects the names of black women in the Atlanta community who have reached senior level positions within their profession; are leading entrepreneurs in their industry; or have attained the ability to influence large public bodies politically and in government; and have demonstrated their commitment to the citizenry of Atlanta by maintaining significant involvement and participation in community and civic activities.

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ICLE Seminar

Marquetta J. Bryan will be presenting, "Working for your Client and Negotiating for your Client," at an ICLE Seminar for new attorneys at the State Bar of Georgia on May 12, 2009.

For more information or to register, please visit www.iclega.org

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Stimulus Bill Includes Additional HIPAA Privacy Regulations

By: Eric J. Frisch

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009, commonly known as the Stimulus Bill. The Stimulus Bill contains new HIPAA Privacy Regulations, including increased fines, expanded enforcement, and broader coverage. Here are the highlights:

- The term "breach" means the unauthorized acquisition, access, use, or disclosure of Private Health Information ("PHI").
- A "breach" does not include unintentional acquisition, access, use, or disclosure made in good faith by an employee or agent of a covered entity or business associate or an inadvertent disclosure, so long as the PHI is not further used without authorization by the patient.
- Civil and criminal penalties now apply to business associates.
- Covered entities must notify all individuals in writing (or by email, if authorized) of a breach within 60 days of discovery.
- Business associates must notify covered entities in writing (or by email, if authorized) of a breach within 60 days of discovery.
- Violations now include "willful neglect".
- The state attorneys general are now empowered to enforce violations by an injunction or by seeking damages, which includes attorney's fees.
- Individual employees can now be

held liable for violations.

These updates rules require new agreements between covered entities and business associates and between business associates and additional subcontractors. As always, the attorneys of the Healthcare Litigation Practice Group are ready to help you with your regulatory compliance

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Time Limitations Applicable to Construction Claims

By: Gregory H. Wheeler and Broderick H. Harrell

Statutes of limitation and repose are enacted to set outside time limits for the assertion of claims by injured parties. In other words, they provide "a date certain after which potential defendants can no longer be held liable on such actions." *Young v.Williams*, 274 Ga. 845, 560 S.E.2d 690 (2002). No matter how strong the merits of a claim may be, if the claim is filed after the statute of limitations or statute of repose has expired, it is subject to being dismissed by the court. There are a number of reasons for requiring parties to present claims within a reasonable amount of time. For example, some types of evidence are difficult to preserve, while others become more difficult to locate after long periods of time. In addition, certain evidence, such as witness testimony, becomes much less reliable over time. For these, and other, reasons, there is a limitation period that applies to every claim. This article explores the statutes of limitation and repose applicable to construction claims in Georgia.

Generally speaking, the statute of limitations that applies to a claim is governed by the type of injury claimed by the plaintiff or claimant. Construction claims can involve a variety of injuries, including personal injury or death, damage to real property and damage to personal property (which includes economic losses). They can also involve tort claims or claims for breach of contract. All of these different types of injury are governed by different statutes of limitation. Therefore, the amount of time allowed to file a claim based on the same set of facts may differ for each type of claim alleged. Also, the different statutes often have differing accrual triggers. In other words, the courts look to different events that start the limitation period, depending on the type of injury.

There is also a statute of repose that works to provide an absolute time limit for most claims arising out of construction. It sets an outside limit for bringing a lawsuit that must also be brought within applicable statutes of limitation. *Colormatch Exteriors, Inc. v. Hickey*, 275 Ga. 249, 569 S.E.2d 495 (2002). The repose period applies regardless of when an injury occurs or whether the claim has accrued before the repose period expires. *Id.* This doctrine is especially important for construction claims because the alleged damage or injury may not occur for several years after completion of the construction activity in dispute.

STATUTES OF LIMITATIONS

Defenses based on the running of the statutes of limitation or repose are asserted by defendants as affirmative defenses to the claim asserted by a plaintiff or claimant. The issues that often arise are 1) which statute applies to the claims; 2) when did the statute begin to run; and 3) did the statutory time expire before the claim was filed. There are a number of appellate court decisions sorting out those basic questions for the various statutes of limitation.

Claims for Personal Injury

Claims involving personal injury are governed by the two year statute of limitations in O.C.G.A. § 9-3-33. The claim accrues, and the limitation period begins to run, at the time of the injury. In many cases, that date is straight forward. If a worker is injured on a construction site, the statute will accrue on the date of the injury. If the injured worker's claim is not filed within two years of that date, it will be barred by the statute of limitations.

Some personal injuries can develop from continuous events over time, such as exposure to harmful chemicals, toxins or materials. Those claims accrue when the claimant discovers or, in the exercise of reasonable diligence, should have discovered the injury and that it may have been caused by the defendant's conduct. *Ambling Mngt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006). Thus, the statute begins to run at the earliest time when the claimant has reason to believe that continued exposure to the harmful materials has caused personal injury. Again, the personal injury claim must be filed within two years of that date or it is barred by O.C.G.A. § 9-3-33.

Construction claims alleging wrongful death are also governed by the two year statute of limitations under O.C.G.A. § 9-3-33. Such claims accrue at the time of death. The exception would be a minor with the right to pursue a wrongful death action on behalf of the decedent. That action accrues for the minor at the time of death, even if the injury that caused the death occurred earlier. *Miles v. Ashland Chem. Co.*, 261 Ga. 726, 410 S.E.2d 290 (1991). However, the running of the two year statute of limitations for the minor's claim does not begin until the person reaches the age of majority. *Dekalb Med. Ctr., Inc. v. Hawkins*, 288 Ga. App. 840, 655 S.E.2d 823 (2007).

Claims for Damage to Real Property

The four year limitation period in O.C.G.A. § 9-3-30 applies to claims for damage to real property. That statute provides as follows: "[a]ll actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues." Construction cases involving damage to real property include claims for defects in design or construction of a facility that result in harm to the building or the real property itself. An example would be a claim for water or moisture intrusion into a building due to alleged deficiencies in the design or construction of the facility. A claim for trespass involving changes in the flow, volume or other characteristics of storm water runoff resulting from construction would also be governed by O.C.G.A. § 9-3-30.

Many construction claims for damage to real property accrue upon substantial completion of the project. *Colormatch Exteriors, Inc.*, supra at 251, 569 S.E.2d at 497; *Travis Pruitt & Assoc. v. Bowling*, 238 Ga. App. 225, 518 S.E.2d 453 (1999). Substantial completion is the date when construction is "sufficiently completed, in accordance with the contract" so that the owner can put the structure to its intended use. O.C.G.A. § 9-3-50. As with most statutes of limitation, the courts look to the time when a claim could first be asserted as a complete claim as the trigger for the accrual of the limitation period. Normally, injury is the final element of a claim. Because the property owner has sustained injury in not receiving a construction project free from defects and can assert a claim based on that injury, the statute of limitations for asserting real property claim begins to run when the property is turned over for its intended use.

There are circumstances where substantial completion is not used as the accrual date. For example, a contractor makes improvements to his own real property for the express purpose of sale and the property actually is sold, the applicable period of limitations for claims of damage to realty does not begin to run until the initial sale of the improved property regardless of the date of "substantial completion." *Scully v. First Magnolia Homes*, 279 Ga. 336, 614 S.E.2d 43 (2005). Similarly, a negligence claim by a person whose real property is harmed by storm water runoff from another site does not accrue until there is an actual event involving increased water runoff. *Travis Pruitt & Assoc.*, supra. The statute begins to run when the first evidence of water damage is apparent, not from the substantial completion of the neighboring project. *Id*. It is clear, however, that the actual discovery of the claim does not govern claims solely for damage to real property. *Mitchell v. Contractors Specialty Supply, Inc.*, 247 Ga. App. 628, 544 S.E.2d 533 (2001).

Claims for continuing trespass can continue to accrue upon the repeated occurrence of an event. In the case of continued flooding, a new claim for trespass can arise out of each flood event. Since there is a four year statute of limitations for damage to real property, a claim cannot be pursued for a flood event that occurred more than four years before the assertion of the claim. However, claims could be pursued for damage arising out of subsequent flood events that occur within that period.

A claim for damage to realty that expired before a subsequent purchaser acquired title cannot be revived by the conveyance. *U-Haul Co. of Western Georgia v. Abreu & Robeson, Inc.*, 247 Ga. 565, 277 S.E.2d 497 (1981). Thus, one who purchases a house from the original owner is barred from pursuing negligent misrepresentation and breach of contract claims against the builder if the applicable statutes of limitation ran for those claims before he purchased the property. *Id.; Bauer v. Weeks*, 267 Ga. App. 617, 600 S.E.2d 700 (2004). Since claims for damage to a building accrue at the time of construction, this rule applies even if the alleged defect is not discovered until after the subsequent sale. *Bauer*, supra. at 618, 600 S.E.2d at 702.

Claims for Damage to Personal Property

Claims for damage to personal property are governed by O.C.G.A. § 9-3-31. It provides as follows: "Actions for injuries to personalty shall be brought within four years after the right of action accrues." Again, claims for damage to personal property accrue when the property is actually damaged. Thus, a claim for damage to personal property damaged as a result of alleged defects in the construction of a building could accrue at a later time than the claim related to the building. The claim for damage to the building could accrue upon substantial completion of construction, but the damage to the property inside the building might not occur until a later date. For example, a claim to repair the defects in the construction of a roof would run from substantial completion of the building, but items stored in the building that were damaged due to rain water intrusion from a subsequent storm would not accrue until the date of the storm.

Economic Losses (the Loss of Money) as Personal Property Claims

Tort Claims

Tort claims for purely economic losses are, to the extent allowed, also subject to the four year limitation period in O.C.G.A. § 9-3-31. The Georgia Supreme Court held that claims for negligent misrepresentation accrue upon actual injury, or economic loss. *Hardaway Co. v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 267 Ga. 424, 479 S.E.2d 727 (1997). These claims accrue when it is certain, not speculative, that an economic loss has occurred. *Id*. In Hardaway, the Court held that the injury occurred when

additional costs were actually incurred. Georgia also recognizes a claim for purely economic losses between parties that do not have a contract, only if there is a negligent misrepresentation that is relied upon to the detriment of the relying party. *Robert & Co. Associates v. Rhodes-Haverty Partn.*, 250 Ga. 680, 300 S.E.2d 503 (1983). Economic loss claims arising out of the breach of a contract are addressed below.

Breach of Contract Claims

Claims for economic, or other, losses arising from a breach of contract are governed by either a four year limitation period or a six year limitation period, depending on whether the contract was written or verbal. Claims for breach of a written agreement are governed by the six year statute of limitations in O.C.G.A. § 9-3-24. Claims for breach of a verbal agreement are governed by the four year statute in O.C.G.A. § 9-3-25. When essential terms of a written contract are derived from the conduct of the parties or must be implied from information outside the written agreement, that contract is subject to the four year statute of limitations applicable to verbal contracts. *Harris v. Baker*, 287 Ga. App. 814, 652 S.E.2d 867 (2007). On the other hand, when contracting parties agree to correct typographical errors in a written contract to facilitate enforcement of the agreement, that does not cause the written contract to become a verbal agreement, and the six year limitation still applies. *King Indus. Realty, Inc. v. Rich*, 224 Ga. App. 629, 481 S.E.2d 861 (1997).

Claims for breach of contract accrue upon the breach of the agreement accompanied by damage. Claims for the negligent performance of a construction agreement accrue upon the substantial completion of the project. *Wilks v. Overall Const. Inc.* Ga. App., WL 72992 (2009).

STATUTE OF REPOSE

While the statute of limitations dictates the time within which suit can be brought once an action accrues, the statute of repose sets a specific deadline for filing suit, unrelated to when the claim accrues. *Wright v. Robinson*, 262 Ga. 844, 426 S.E.2d 870 (1993) (citation omitted). This time limit applies whether or not an injury has occurred or has been discovered. *Id.* The statute of repose for construction claims is governed by O.C.G.A. § 9-3-51. It provides that, with limited exceptions, all claims arising out of improvements to real property must be filed within eight years of substantial completion of the project. The exceptions apply to claims that accrue during the seventh or eighth year after substantial completion. Those claims may be filed within two years of the date of injury. Thus, a person sustaining injury as a result of alleged deficient construction seven years after substantial completion of the project would have a full two years from the injury date to assert the personal injury claim. This exception creates a ten year absolute cut off for any claim arising out of a construction project.

CONCLUSION

The function of the statutes of limitation and repose is to create time limits for bringing certain types of claims. Generally speaking, these rules seem relatively straight forward. For claims arising out of construction activities, the fact that there are a number of applicable statutes, with exceptions and differing accrual triggers makes applying the rules more complicated ◂

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East Meets West And Claims Against Attorney Ensues

By: Johannes S. Kingma and John C. Rogers

Playground executions, failed real estate developments, the last tribe of Israel, bleach bottle silencers, allegations of fraud and conspiracy, and summary judgment - this case has them all. Boris Mallayev and his father Mikhail ("Michael") came from the ancient Bukharian Jewish community. The Bukharian Jews are thought to be descendants of Israelite tribes who never returned from the Babylonian captivity in the sixth century B.C. Instead they migrated eastward and maintain their identity and heritage while being cut off for more than 2000 years. They settled in the Emirate of Bukhara, which is now part of Uzbekistan and Tajikistan. After World War II and with the breakup of the Soviet Union, almost all of the Bukharian Jews left central Asia for Israel and the United States, and that is where our story begins.

Michael Mallayev and his son Boris lived in Atlanta and were part of the second largest Bukharian Jewish community in the United States. Shalom Cohen was an investor from New York City. The Mallayevs were involved in the development of real estate. One of the companies they formed was called Sagdiana, Inc. (named after a Bukharian region in Central Asia). The Mallayevs contemplated developing a 150-unit townhome project known as Sugar Hill Overlook in Gwinnett County. They also planned a one hundred acre assemblage to convert other residential property into a commercial development. They received financing from investors in Georgia and began the construction of the townhomes as well as the assemblage of the real estate.

When money to complete the two

projects grew short, Cohen learned of the projects and traveled to Atlanta to investigate his proposed investment. Cohen was represented by counsel in New York and Sagdiana was represented by Georgia counsel. Most of the negotiations, however, were directly between Mallayev and Cohen and were strictly oral. The negotiations took place over a period of months and the terms of the investment, and the security therefore changed on several occasions. Ultimately Cohen, who had initially contemplated a $4 million investment, put in only $1.5 million.

The townhome development failed after some of the units had been constructed. While some of the assemblage was acquired, that effort was also ultimately unsuccessful. Cohen alleged that Michael Mallayev had improperly misappropriated his investment.

When litigation arose here in Atlanta, Cohen sued the lawyers who had assisted Mallayev with negotiations. That is when the litigation over a failed real estate assemblage and development took a strange turn.

On October 28, 2007, Daniel Malakov, another member of the Bukharian Jewish Community in New York, was gunned down on a playground in front of his ex-wife, Dr. Mazoltuv Borukhova, and his four year old daughter. The shooter used a bleach bottle wrapped in duct tape as a silencer, which was found on the scene. Police said the fingerprints on the silencer were Michael Mallayev's. They also alleged that Mallayev had had hundreds of telephone conversations with Borukhova, to whom he was related, just prior to the shooting. Michael Mallayev fought extradition, but was ultimately taken from Georgia to New York. The prosecution alleged that Mikey Mallayev was paid $20,000 for the murder. Meanwhile, the civil litigation proceeded in Georgia. The claims against Carlock Copeland's clients, the lawyers, included allegations of fraud and conspiracy, negligent misrepresentation, and conversion. Cohen sought recovery of his $1.5 million along with punitive damages, interest, and attorney's fees. He claimed that Michael Mallayev had misapplied the $1.5 million and not actually put it into the developments. He also asserted that he was misled as to the entities which owned the real estate and how the development was designed. The paper trail on all this was murky at best. Cohen maintained that he had borrowed the $1.5 million for his investment from "hard money guys" in New York who were charging him more than 18% interest. Carlock Copeland moved for summary judgment on behalf of the lawyers. The lawyers vehemently denied wrongdoing.

The Carlock Copeland team of Joe Kingma, John Rogers, and Andy Eaton argued that Cohen had no evidence that the lawyers participated in a conversion of the investment, fraud or negligent misrepresentation or that Cohen exercised sufficient due diligence. A federal district judge agreed and granted summary judgment to Carlock Copeland's clients. This was a fitting and happy ending to a truly interesting and unusual case.

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Carlock Copeland is a litigation law firm with offices in Atlanta, Georgia; Charleston, South Carolina and Columbus, Georgia. Our firm is home to more than 85 litigation lawyers specializing in all areas of the law. Carlock Copeland represents the insurance industry, including regional and national clients, and provides counsel on matters in every area of civil liability.

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