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Professionals: Don't Knuckle Under When a Trustee Wants To Claw Back Your Fees

By: Johannes S. Kingma and John L. Bunyan

The landscape is littered with bankrupt clients and those who may be about to become bankrupt. These are dangerous clients who pose special risks for professionals, especially lawyers and accountants. However, you do not want to abandon a client just because they may have been mortally wounded. Thus, many professionals end up doing work for clients who ultimately become insolvent.

Professionals with failing clients must keep in mind:

(1) You don't want to facilitate or participate in any fraudulent conveyances;
(2) You may not get paid for your work; and
(3) Your litigation risk is growing dramatically and you may want to terminate your engagement to avoid further risk.

Often, professionals actually are paid at least some of what they are owed shortly before a bankruptcy filing. Once a bankruptcy is filed, you face an unusual decision tree. If you are owed money, you have to decide whether or not to file a proof of claim in the bankruptcy court. The debtor's schedule of liabilities and assets is often available online and you may be able to evaluate your chances of recovery while sitting at your desk. Filing a proof of claim may have the effect of ensuring that any malpractice claims brought against you will be brought in the bankruptcy court and not in a state or federal district court. Many defense lawyers would tell you that you are better off in a "regular" court than a bankruptcy court if you are defending malpractice claims. This is obviously a consideration you should take up with your lawyer. You need to evaluate your claim for fees, as well as your risk for a malpractice claim.

Even if you decide not to pursue recovery of unpaid fees, and even if no malpractice claim is brought by the trustee, you are not yet out of the woods. Trustees must recover assets of the debtor to repay creditors, and many are very aggressive in their attempts to do so. Professionals, and others who have been paid by the debtor prior to bankruptcy, need to be concerned about actions claiming that:

(1) Payment to the professional was an avoidable preference; or
(2) Payment to the professional constituted a fraudulent transfer.

Avoidable Preferences

The rule against preferential payments is intended to keep debtors on the verge of bankruptcy from paying off favored creditors at the expense of other, usually unsecured, creditors. The trustee's burden of proving that a payment to a professional was an avoidable preference[1] requires a showing that:

(1) The payment was made to or for the benefit of the professional;
(2) The payment was made on account of a previous debt;
(3) The payment was made while the debtor was insolvent;
(4) The payment was made within 90 days of the filing of the bankruptcy petition (or within one year if the creditor was an insider); and
(5) The payment allowed the professional to receive more than he would have if the debtor's estate was liquidated in Chapter 7 bankruptcy.[2]

The trustee does not have to prove the specific date when the debtor became insolvent because the debtor is presumed to be insolvent for the 90 days preceding the filing of a bankruptcy petition.[3] This allows a trustee to make a broad claim that any payment from a debtor to a professional, for services made in the 90 days before a bankruptcy petition is filed, was a preference payment that belongs to the bankruptcy estate.

If the trustee makes this initial showing, he does not automatically recover the payments. The burden then shifts to the professional to prove that the payments were not avoidable preferences. The most common defense for professionals who are trying to keep payments for services provided is to show that either:

(1) The payment was made in the ordinary course of business; or
(2) The payment was made according to ordinary business terms.

The "ordinary course of business" defense requires the professional to show that the alleged preference payments were no different than other payments received from the debtor.[4] This is easier to show when the parties have an extensive history of dealing with each other. For example, imagine that the debtor and professional had been doing business with each other for 10 years and that the debtor paid every invoice from the professional within 30 days. If the debtor similarly made the alleged preferential payments within 30 days, then the professional has a strong defense that these payments were made in the ordinary course of business. But if the debtor waited 90 days to make these alleged preferential payments, then this argument is much tougher to make.[5] As the Eleventh Circuit has explained, "[a] creditor who tolerates unusual delays in payment from a debtor on the verge of bankruptcy may be dependent on the debtor and aiding the debtor in forestalling the inevitable to the detriment of less dependent creditors."[6]

The "ordinary course of business" defense can be used even where the parties do not have an extensive history of transactions together. The parties' engagement agreement is the best evidence of what they intended an ordinary transaction to be.[7] So if a professional can show that the parties agreed that invoices would be paid within 30 days and the alleged preferential payments complied with this agreement, then the professional may still prevail on the "ordinary course of business" defense.

The other common defense for a professional is to show that the payments were made according to "ordinary business terms." For this defense, the professional must show that its transactions with the debtor were consistent with the way things are done in the industry.[8] Instead of focusing exclusively on the history of dealings between the parties, this defense requires specific, objective data on payment practices in the industry.[9] This often results in a battle of the experts on industry standards that creates a question of fact for the bankruptcy court to decide.

Fraudulent Transfers

If a trustee cannot show that a payment to a professional was an avoidable preference, it can also claim that a payment or debt is avoidable as fraudulent. Payments made or debts incurred within two years of filing for bankruptcy may be recovered by the Estate as fraudulent.[10]

There are two ways for a trustee to make this claim. He can argue that the debtor made the payment or incurred the debt with an actual intent to defraud its creditors.[11] This type of claim can succeed only where the trustee has evidence of a fraudulent intent. In most situations, it is unlikely that the trustee will have this "smoking gun."

Professionals are more likely to face a claim of "constructive" fraud, which means that a payment made or debt incurred is assumed to be fraudulent under certain circumstances.[12] A payment to a professional can be constructively fraudulent if the debtor is, or is about to be, insolvent and the value the debtor received in the exchange is too low.[13]

This burden is not quite as easy for a trustee to meet as the initial burden for preferences. There is no presumption that a debtor was insolvent for a certain time period for a fraudulent payment claim, so the trustee must actually show that the debtor paid after the debtor became insolvent. Also, the trustee must show that the debtor did not get its money's worth out of the transaction. This may be easy if the debtor paid an accountant $50,000 to print a tax document from the IRS's website and mail it to him. While most transactions are not so obviously fraudulent, a trustee often can present enough evidence on this ground to create a question of fact that will survive summary judgment.[14]

If a trustee cannot show that a payment to a professional was an avoidable preference, it can also claim that a payment or debt is avoidable as fraudulent.

If the trustee can show insolvency and inadequate value, the professional has the burden of showing that a payment received or debt owed is not fraudulent. The most common defense is that the professional (1) received the payment or obligation to pay, (2) for value and in good faith, and (3) in exchange for value it gave to the debtor. Again, this defense centers around the question of "value." For purposes of these types of fraud claims, "value" means property or satisfaction of a present or existing debt of the debtor.[15] In simple terms, a professional should be able to succeed in defeating a fraudulent transfer claim if he received the payment in exchange for services provided to the debtor at a reasonable price. Professionals should try to show a lengthy history of similar payments for similar services before the debtor became insolvent. They might also show similar charges to other clients who were not insolvent.

Conclusion

Professionals must be wary of clients in failing financial circumstances. Once a client goes into bankruptcy, you are unlikely to receive payments for fees that were owed at the time the Petition was filed. That does not mean, however, that you must give in to a trustee who would like to assert claims for avoidable preference or fraudulent transfer. Just because a trustee asserts the claim does not mean that he or she will prevail. Particularly if the amount of fees sought in the claw back is substantial, you should consider fighting back to protect the fees that you have earned.

RESOURCES

1. 11 U.S.C. § 547(g).
2. Id. § 547(b); In re Globe Mfg. Corp., 567 F.3d 1291, 1296 (11th Cir. 2009).
3. 11 U.S.C. § 547(f).
4. In re Globe Mfg. Corp., 567 F.3d at 1298.
5. Id. ("'[U]ntimely payments are more likely to be considered outside the ordinary course of business and avoidable as preferences.'" (quoting In re Craig Oil, 785 F.2d 1563, 1567-68 (11th Cir. 1986)) (alteration in original)).
6. In re Issac Leaseco, Inc., 389 F.3d 1205, 1212 (11th Cir. 2004).
7. In re Globe Mfg. Corp., 567 F.3d at 1298.
8. Id.; In re Issac Leaseco, Inc., 389 F.3d at 1210.
9. In re Globe Mfg. Corp., 567 F.3d at 1298.
10. 11 U.S.C. § 548(a).
11. Id. § 548(a)(1)(A).
12. In re Chase & Sanborn Corp., 813 F.2d 1177, 1180 n.2 (11th Cir. 1987).
13. 11 U.S.C. § 548(B).
14. In re Chase & Sanborn Corp., 904 F.2d 588, 593 (11th Cir. 1990).
15. 11 U.S.C. § 548(d)(2)(A).

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Employment Discrimination Law: Looking Back at 2009 and Forward to 2010

By: Marquetta J. Bryan and Adam L. Appel

Employers and business owners may easily become besieged in balancing their legitimate business practices with a conscious effort to avoid violating federal and state discrimination laws. Determining whether requests for information from employees, employee discipline, employee testing, and other personnel decisions will be construed as discriminatory can be overwhelming. If you are an employer, or handle employment claims on the behalf of your insureds, you are likely aware of the developments in employment discrimination litigation and legislation that occurred in 2009, and that continues in 2010. While many of the developments of 2009 may be considered refinements to established law, the responsibility of employers to ensure compliance with these refinements may seem drastic. As we approach the second quarter of 2010, a brief overview of important employment discrimination legislation made effective in 2009 will serve as a beneficial reminder of areas to watch in 2010.

Legislation

In January 2009, the **Americans with Disabilities Act Amendments Act (ADAAA)** went into effect, expanding the definition of "disability" and negating the holdings of several pro-employer U.S. Supreme Court decisions. On November 21, 2009, the **Genetic Information Non-Disclosure Act (GINA)** became effective prohibiting discrimination against employees based on genetic information.

Court Opinions

In 2009, both the Supreme Court and the Eleventh Circuit Court of Appeals issued important opinions regarding employment discrimination. In ***Crawford v. Metropolitan Government of Nashville and Davidson County,* 129 S.Ct. 846 (January 26, 2009)**, the Supreme Court of the United States unanimously ruled that the anti-retaliation provisions of Title VII of the 1964 Civil Rights Act protect employees who oppose unlawful sexual harassment (i.e. here as a participant in an internal investigation about discrimination) but do not personally report the harassment. In ***14 Penn Plaza v. Pyett,* 129 S. Ct. 1456 (April 1, 2009),** the Supreme Court held that an arbitration clause in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act (ADEA) claims is enforceable as a matter of federal law. In ***Gross v. FBL Financial Services*, 129 S.Ct. 2343 (June 18, 2009),** the Supreme Court ruled that a "mixed-motive" jury instruction is "*never proper*" in a suit brought under the Age Discrimination in Employment Act (ADEA), and that a plaintiff asserting a claim under the ADEA must prove age discrimination was the "but-for" cause of an adverse employment action. In ***Ricci v. DeStefano*, 129 S.Ct. 2658 (June 29, 2009),** the Supreme Court held that an employer cannot engage in disparate treatment under Title VII simply to avoid possible disparate impact liability. "Before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."

In ***Allmond v. AKAL Security, Inc.,* 558 F.3d 1312 (11th Cir. 2009)**, the Eleventh Circuit Court of Appeals upheld a grant of summary judgment to defendants, who were sued under the ADA, for denying employment to the plaintiff based on the plaintiff's inability to pass a hearing test. The Court found that the requirement that a job applicant, for this position, have the ability to hear without assistive devices to be job-related and consistent with business necessity in light of the

safety risks at stake in the job position. In an unpublished opinion, ***Chang v. Alabama Agric. and Mech. University*, 2009 WL 3403180 (11th Cir. 2009),** the Court of Appeals affirmed a district court's dismissal of a Taiwanese plaintiff's race/national-origin discrimination case, on the grounds that the defendant gave a legitimate, non-retaliatory reason for its actions - insubordination. As background, the plaintiff, a professor of Taiwanese origin, had been discharged and replaced by a person of Asian Indian origin. The district court ruled that since his replacement was in the EEO category of "Asian-Pacific Islander," he failed to make a prima facie case of discrimination. Notwithstanding the upholding of the district court's decision, the Eleventh Circuit determined that the dispositive issue was whether the plaintiff was replaced by someone outside his protected class or whether a similarly-situated employee outside his class was treated more favorably. The Court determined that the district court erred in finding that the plaintiff failed to establish a *prima facie* case of discriminatory retaliation, finding that he was in fact replaced by someone with a different national origin, and thus, contrary to the district court's conclusion, was replaced by someone outside his protected class. Finally, in the unpublished decision, ***Gaillard v. Shinseki*, 2009 WL 3287524 (11th Cir. 10/14/09)** the Eleventh Circuit held that an employee who sees a poster in the workplace providing information on how to file an EEO complaint is on constructive notice of the deadline for filing such a complaint.

Practice Points

The above decisions offer guidance to employers with respect to proactive steps that can be taken to avoid discrimination litigation, as well as insight into the trend that is being followed by the courts in the continuing development of discrimination law. The changes in the law don't require employers to be fortune tellers regarding compliance, but rather strengthen the benefit of using common sense and literal interpretation of statutes and cases in addressing possible issues.

As we move forward in 2010, employers must assess their employment practices, written and unwritten, that may be affected by the legislative and court developments related to employment discrimination. Accordingly, there are basic principles that employers can continue to follow to avoid the appearance of discrimination in managing employees.

- First, prudent employers will continue to document personnel actions taken with respect to employees that may later be questioned as discriminatory, retaliatory, and generally illegitimate.
- Second, employers should review their current handbooks, employee manuals, and other policies to ensure that they are compliant with current law.
- Third, with respect to health and medical information, employers should not request more medical information about an employee than the law allows. In addition, any information that is collected should be held in confidence, and used only for purposes allowable under applicable law.
- Fourth, employers should consistently apply leave and documentation policies to avoid the appearance of discrimination.

Unfortunately, regardless of the efforts at compliance, an employer cannot completely avoid discrimination lawsuits. In reality, we expect employment discrimination suits to increase in 2010, as new law continues to emerge and develop, and the job market is plagued with job losses and employers are forced to make difficult employment decisions. The above is only a summary of the legal updates and developments in this area, but we are available to keep you updated on the above and other employment issues. For additional information, please contact Adam L. Appel or Marquetta Bryan.

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Medicare Flexes Muscle on Recovery of Conditional Payments

By: Christopher A. Whitlock and ReShea J. Balams

On December 1, 2009, the United States Federal Government, on behalf of the Secretary of Health and Human Services, the entity that is charged with overseeing the administration of the Medicare program through the Centers for Medicare & Medicaid Services ("CMS"), filed a complaint in the Northern District of Alabama against numerous Defendants, several individuals, Monsanto Company ("Monsanto"), Pharmacia Corporation ("Pharmacia") and Solutia, Inc. ("Solutia"), the Plaintiff's attorneys and their respective law firms, as well as Traveler's Insurance Company ("Traveler's") and American International Group, Inc. ("AIG"). United States v. Stricker, et. al., CV-09-PT-2423-E (N.D. Ala. Dec. 1, 2009). All of these Defendants were parties to a $300 million personal injury settlement in a mass tort claim of Abernathy v. Monsanto Company.[1] In Abernathy, the Plaintiffs filed a class action lawsuit, alleging that they suffered personal injuries due to their exposure to polychlorinated biphenyls (PCB's), which caused substantial health problems, including cancer, and that Monsanto, Pharmacia and Solutia were jointly and severably liable for their injuries.

On December 2, 2003, the parties, including Monsanto, Pharmacia and Solutia entered into a settlement agreement for the payment of $300 million and as a

contingency of the settlement agreement, each Plaintiff signed a release of all future PCB-related claims. Also, pursuant to the settlement agreement, Traveler's and AIG paid a portion of the $300 million settlement to the Plaintiffs and $129 million to the Plaintiffs' attorneys in attorney fees. The United States filed a Motion for Partial Summary Judgment on the issue of liability on January 28, 2009 and the decision is pending.

Through their investigation of the Abernathy settlement, CMS found that 907 of the Plaintiffs that signed releases, which included the claims released in the 2003 Abernathy settlement, received Medicare conditional payments for their medical treatment and expenses. CMS contends that the Medicare Secondary Payer Act ("MSP") [2] provides a right of action against Monsanto, Solutia and Pharmacia and that these companies are responsible primary plans who are required to reimburse Medicare for its conditional payments to the Plaintiffs in Abernathy. CMS further asserts that the Plaintiff's attorneys are also liable under the theory that the attorneys are entities that received payment from a primary plan, and that they are responsible for reimbursing Medicare for its conditional payments as well. In essence, the Federal Government claims that neither side considered Medicare's interest in settling these claims.

Pursuant to 42 U.S.C. § 1395y(b)(2), Medicare is the secondary payer to certain primary plans. The purpose of this statute is to allow Medicare to make conditional payments for covered services if the primary plan is not expected to pay promptly or in situations where the provider and the beneficiary have no knowledge of whether the primary plan will eventually cover the medical costs. See Cochran v. U.S. Health Care Fin. Admin., 291 F.3d 775, 777 (11th Cir. 2002). If it is demonstrated that a primary plan had responsibility to pay for those medical expenses, then Medicare must be reimbursed within 60 days. 42 U.S.C. § 1395y(b)(2)(B); 42 C.F.R. § 411.24; See also 42 C.F.R. § 411.23 (g) and (h). Furthermore, the Eleventh Circuit has held that "courts have uniformly concluded that a settlement agreement that includes a non-itemized element of compensation for a plaintiff's medical care is 'for' medical expenses, even if the exact share or amount is indeterminate." United States v. Baxter Int'l, Inc;. 345 F.3d 866, 899 (11th Cir. 2003).

In order to establish liability under the Medicare Secondary Payer Act, the United States must establish three elements. First, the U.S. must establish that the Plaintiffs asserted and released medical claims in an action. The United States contends that in Abernathy, the Plaintiffs, including the 907 Medicare beneficiaries, asserted several medical claims and that they released those claims as a part of the settlement agreement.

The second element that the United States must establish is that Medicare made conditional payments related to claims asserted and released in Abernathy. In order to satisfy this element, the United States presents an Affidavit from a CMS employee that alleges that CMS made conditional payments on behalf of the identified Medicare beneficiaries in the amount of $67,156,770.01, and that those Medicare payments were conditional to the extent that there was a private primary plan that was responsible for paying same. The United States argues that Monsanto, Pharmacia and Solutia are responsible for reimbursing CMS for these payments.

Regarding the third element, the United States maintains that Monsanto, Pharmacia and Solutia as are "primary plans" under MSP, as these companies are "entit[ies] that engage[d] in a business, trade, or profession…and carrie[d] their own risk…in whole or in part by virtue of their payment of $300 million under the Settlement agreement." 42 U.S.C. § 1395y(b)(2)(B)(ii). Furthermore, the United States argues that Monsanto, Pharmacia and Solutia became responsible for making primary payment for the Medicare beneficiaries' medical claims when they paid $300 million that was conditioned upon a release of the Plaintiffs' medical claims. Id.

Regarding CMS's action against the Plaintiff's attorneys, the United States alleges that they are responsible for payment to CMS on the theory that they received payment or proceeds of payments from a primary plan, and thus, they are responsible for also reimbursing Medicare within 60 days of receiving a conditional payment. Pursuant to 42 U.S.C. § 1395y(b)(2)(B)(ii), "A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund." Therefore, the United States contends that due to the fact that Monsanto, Pharmacia and Solutia paid the Abernathy attorneys instead of Medicare, the attorneys are liable to reimburse Medicare for its conditional payments within 60 days. 42 C.F.R. § 411.24(g) and (h).

It is possible that the United States' Partial Motion for Summary Judgment may be granted, for this case is quite analogous to United States v. Paul J. Harris, WL 891931 W.D.W.Va. 2009. Aside from the fact that the Stricker case involves a class action lawsuit, the case in Harris involves a Medicare beneficiary that fell from a ladder and received conditional Medicare payments for his medical care in the amount of $22,549.67. The Defendant in Harris settled his personal injury claim for $25,000.00 and Medicare claimed $10,253.59 of the settlement and notified the Defendant via letter. Due to the fact that the debt was not paid within the statutory time limit of 60 days, CMS brought suit against the Defendant's attorney. The Court in Harris granted the U.S.'s motion for summary judgment, in part, due to the fact that statute and CFR allowed the government to recover directly from the Defendant since he was "an entity" that received a payment

(settlement payment) from a primary plan and the Court allowed CMS to recover the amount owed plus interest. The Defendant was ordered to pay the government $11,367.78 plus interest.

The case of U.S. v. Stricker has significant implications for employers and insurance companies. By filing this complaint, CMS has demonstrated that they are serious with regard to their right to recover money for conditional payments made on behalf of Medicare beneficiaries. For this reason, it is strongly recommended to take a proactive approach when dealing with cases with possible Medicare beneficiaries. Aside from gathering information early on in the case by incorporating inquiries regarding Medicare/Medicaid and Social Security status into your discovery requests, it is also recommended that attorneys send Social Security releases to the Plaintiffs and request information from CMS regarding the Plaintiff's status and whether any conditional payments have been made on their behalf. The government has shown that they will go after Plaintiffs, Defendants, Insurance Companies and lawyers in order to recover their conditional payments and, for that reason it is imperative that we approach all cases with careful consideration of Medicare's interests.

RESOURCES

1.Matter is consolidated and is composed of Abernathy v. Monsanto, CV-96-269, Circuit Court of Calhoun County, Alabama; Abbott v. Monsanto Company, CV-97-967, Circuit Court of Calhoun County, Alabama; Nelson v. Monsanto Company, CV-99-502, Circuit Court of Calhoun County, Alabama; Long v. Monsanto Company, CV-96-268, Circuit Court of Calhoun County, Alabama; Margie Suggs v. Monsanto Company¸CV-01-0874, Circuit Court of Calhoun County, Alabama, and Brown v. Monsanto Company, CIV97-ERC-1618-E (N.D. Ala).

2. 42 U.S.C. § 1395y(b)(2)

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The Roller Coaster Ride for Limitation of Liability Clauses in Construction Contracts

By: Gregory H. Wheeler and Brent A. Meyer

The last two years have provided a roller coaster ride for limitation of liability clauses in construction contracts in Georgia. The state had been without any binding authority governing these clauses until 2008 and since then there have been three appellate decisions in eighteen months addressing the enforceability of these clauses. The courts seem to have settled on which clauses are enforceable and which are not. We will examine the journey through the courts with the goal of showing which clauses are enforceable and which will not be enforced. Since we were involved in two of the three cases, we have some decent insight into what works and what does not. We will also provide some practice pointers for use of these clauses by design professionals.

A limitation of liability clause is a contractual provision that limits the potential liability of one of the parties to the contract. When we look at these provisions being used in construction contracts, we must always be mindful of the public policy limitations applicable to all construction contracts. Since 1970, Georgia, like many other states, has had a statute that limits the ability of parties to contract away their potential liability with respect to a construction project. It is clear that an indemnity or hold harmless provision that attempts to shield a party from all liability associated with that party's work on a construction project is unenforceable. What was not clear until recently is whether a contractual provision that limits, but does not completely eliminate, a party's liability, would be enforceable.

Georgia enacted O.C.G.A. § 13-8-2(b) (formerly Ga. Code Ann. § 20-504) in 1970. In its current form, the statute provides in relevant part that:

> A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. . .

Id. Essentially, the statute provides that it is against public policy for a party to enter into an agreement (related to construction, alteration or maintenance of a building) in which the party is held completely harmless from liability caused by that party's sole negligence. The rationale for the statute is that if a party can contract away all liability for it's own sole negligence, the contracting party will have no incentive to act responsibly in performing its work or services with respect to the construction, to the detriment of the protection and the safety of the public.

When discussing limitation of liability provisions, the competing interest is the freedom to contract. The courts have held that parties to construction contracts are generally free to contract so long as the contract does not contravene the law or public policy. Limitation of liability provisions have forced the courts to look at the debate between the freedom to contract and the public policy interests outlined in O.C.G.A. § 13-8-2(b).

The Georgia Court of Appeals first discussed these competing policies with respect to a limitation of liability clause in Brainard v. McKinney, 220 Ga. App. 329, 469 S.E.2d 441 (1996). In Brainard, a home inspector had included a limitation of liability clause in his contract with a prospective condominium buyer. Under that agreement, the inspector's liability to the client was to be limited to the cost of the inspection. The damages at issue were relatively minor, consisting of $23,700. Under those circumstances, the Court of Appeals held that the contract, including the limitation of liability clause, was enforceable. The condo owner argued that the clause was unenforceable as violating the public policy set forth in O.C.G.A. § 13-8-2(b). The inspector argued that the provision did not eliminate all of his potential liability, but instead only limited potential liability to the condo owner, and it did not, therefore, violate O.C.G.A. § 13-8-2(b). The Court concluded that the limitation of liability clause was enforceable, although one judge concurred only with the result making the case non-binding precedent. The Court held the parties were free to agree to such provision and that there was no public policy reason for holding the provision unenforceable. The Court also noted that the provision did not relate to the construction, alteration or maintenance of a building as specified in O.C.G.A. § 13-8-2(b).

After Brainard, the question remained as to whether the Georgia appellate courts would enforce a limitation of liability clause if applied to a "traditional" construction project. The question was not addressed until 2008, when the Georgia Supreme Court took up the issue in Lanier at McEver, L.P. v. Planners & Engineers Collaborative, Inc., 284 Ga. 204, 663 S.E.2d 240 (2008). In Lanier, the developer ("Lanier") entered into a contractual agreement with a civil engineering firm, containing the following limitation of liability provision:

> In recognition of these relative risks and benefits of the project, both to Lanier and PEC, the risks have been allocated such that Lanier agrees, to the fullest extent permitted by law, to limit the liability of PEC and its sub consultants to Lanier and to all construction contractors and subcontractors on the project or any third parties for any and all claims, losses, costs, damages of any nature whatsoever, or claims, expenses from any cause or causes, including attorneys' fees and costs and expert witness fees and costs, so that the total aggregate liability of PEC and its sub-consultants to all those named shall not exceed PEC's total fee for services rendered on this project. It is intended that this limitation applies to any and all liability or cause of action however allegedly arising, unless otherwise prohibited by law.

Id. at 205 (emphasis added). Like the plaintiff in Brainard, Lanier challenged the provision as being in violation of public policy and O.C.G.A. § 13-8-2(b). The engineer and representatives of the design industry argued that the parties freely negotiated the contract and the provision should be enforced to limit the engineer's potential liability to Lanier.

The Court held the provision to be unenforceable in violation of the public policy provisions of O.C.G.A. § 13-8-2(b). The problem with the Lanier clause, as noted by the Court, was that: "The clause applies to 'any and all claims' by third parties and shifts all liability above the fee for services to Lanier no matter the origin of the claim or who is at fault." Lanier, 284 Ga. at 207. The Court added "While a third party is not precluded from suing [engineer] for any negligent actions in constructing the storm-water drainage system, the clause at issue here allows [engineer] to recover any amount entered against it from Lanier once the $80,514 threshold has been surpassed, including judgment amounts on third-party claims for which [engineer] is solely negligent." Id. The Court then concluded that: "the complete avoidance of liability to third parties for sole negligence in a building contract is exactly what [Georgia statutory law] prohibits." Id. Because the provision in Lanier was found to act as a complete limit or cap on the engineer's liability to any party, it was unenforceable under O.C.G.A. § 13-8-2(b).

In a dissenting opinion, Justice Melton was joined by Justice Hines in disagreeing with the analysis and the conclusion reached by the majority of the Court. Justice Melton pointed out that the provision was not a "hold harmless" agreement but merely limited the liability to pay damages. Lanier would not have been required to completely indemnify the engineer for liability to third parties. Instead, the engineer would always have had to pay up to the amount of its fee. The provision was not a true "hold harmless" clause. He stated that: "The majority overlooks the differences between indemnity and hold harmless provisions on the one hand and limitation of liability clauses on the other hand." Id. at 212 (Melton, J., dissenting).

After Lanier, the question raised by many in the industry was whether any limitation of liability clause in a construction contract would be enforceable in Georgia. The Court did signal that a narrower provision could be enforceable. It pointed to a few opinions in other jurisdictions where limitation of liability provisions were upheld, finding that those opinions were distinguishable because unlike the Lanier provision, they did not extend to third-party claims.

At the time, we had two pending cases involving limitation of liability provisions that would prove to be important. The clauses in those two cases were more narrowly drafted than the clause in Lanier. First, in the case of Richmark Communities, Inc. v. Precision Planning, Inc., which was pending in the Superior Court of Gwinnett County, the parties and the court had watched as the appellate courts handled the Lanier

clause. The process had been started before any decisions had been issued in Lanier, with motions for partial summary judgment filed by the plaintiffs (arguing that the limitation of liability clause was unenforceable) and by us on behalf of our client (trying to enforce the provision). Before any decision was issued in Lanier, the trial court denied our motion and granted the plaintiffs' motion. When the Court of Appeals upheld the provision in Lanier, we asked the trial court to look at our motion again. By the time the motion was re-briefed, the Supreme Court had accepted the Petition for Certiorari in Lanier and our judge held off ruling on the motion until the Supreme Court opinion was issued. In light of the ruling in Lanier, the trial court denied our motion. She did issue a Certificate of Immediate Review, however, so that we could petition the Court of Appeals to take the case. We saw that as a long shot, but we accepted and filed our Petition for Interlocutory Appeal with the Court of Appeals. It was immediately accepted (by the same panel of the Court of Appeals that had issued the decision in Lanier).

At the same time, we were handling the case of RSN Properties, Inc. v. Engineering Consulting Services, Inc., in the Cobb County Superior Court. There, our motion for partial summary judgment on the limitation of liability clause had been granted by the trial court. The trial court ruling predated the Supreme Court decision in Lanier, but the appeal filed by the plaintiff was pending while the record was being prepared for the appeal. By the time that the record was finally prepared and the appeal was docketed in the Court of Appeals, the Supreme Court had issued its decision in Lanier.

With these two cases, it seemed certain that the decision in Lanier would either be limited to the provision in that case (and other similar provisions) or that limitation of liability provisions would be held to be completely unenforceable in Georgia. We felt that we had strong arguments, but so did our opposition.

The first case to be decided was Precision Planning, Inc. v. Richmark Communities, Inc., 298 Ga. App. 78, 679 S.E.2d 43 (2009). In that case, the design professional entered into a contractual agreement with the developer, Richmark Communities, Inc. ("Richmark"), which contained the following provisions:

D) It is agreed that the [Developer] will limit any and all liability for any damage on account of any error, omission or other professional negligence to a sum not to exceed $50,000 or the amount of the fee whichever is greater.

E) The [Developer] agrees to defend, indemnify and hold the [Architect] harmless from any claim, liability or defense cost in excess of the limits determined above for injury or loss sustained by any party from exposure allegedly caused by [the Architect's] performance of services hereunder, except for injury or loss caused by the sole negligence or willful misconduct of [the Architect].

Id. at 45-47. The Court of Appeals began its analysis by stating "No statute prohibits a professional architect from contracting with a developer to limit the architect's liability to that developer." Id. at 46. Richmark had argued that Paragraph D violated O.C.G.A. § 13-8-2(b). The Court of Appeals disagreed and determined that Paragraph D was simply a limitation of liability clause that was not in contravention of O.C.G.A. § 13-8-2(b). The Court noted that "Paragraph D did not purport to indemnify or hold the architect harmless from damages but simply establish a bargained-for cap on the liability of the architect to the developer for the architect's breach or negligence." Id. Therefore, Paragraph D was not prohibited by O.C.G.A. § 13-8-2(b).

The Court of Appeals also concluded that Paragraph E did not violate O.C.G.A. § 13-8-2(b). The Court explained "[§13-8-2(b)] declares void construction-related contracts that purported to 'indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damages to property *caused by or resulting from the sole negligence of the promisee…*'" Richmark, 298 Ga. App. 78, 81 (emphasis added). The Court pointed out that "Here, the indemnity in Paragraph E expressly excluded from its coverage 'injury or loss caused by the sole negligence or willful misconduct of' the architect." Id. Thus, the architect remained potentially liable to third parties for any injury caused by the architect's sole negligence. The Court concluded these provisions were enforceable under Georgia law.

Richmark petitioned the Georgia Supreme Court to review the decision by the Court of Appeals. The Supreme Court unanimously denied the petition on November 2, 2009, establishing the Court of Appeals decision as binding law.

Shortly after the Supreme Court denied Richmark's Petition, a different panel of the Court of Appeals issued the decision in RSN Properties, Inc. v. Engineering Consulting Services, Inc., 301 Ga. App. 52, 686 S.E.2d 853 (2009). The provision between RSN Properties, Inc. ("RSN"), the owner, and the civil engineering firm was as follows:

[Owner] agrees to limit [Design Professional's] liability to [Owner] arising from [Design Professional's] professional acts, errors or omissions in performing this Agreement, such that the total aggregate liability of [Design Professional] to [Owner] shall not exceed $50,000 or the value of services rendered, whichever is greater.

Id. at 52-53. RSN argued that the provision was unenforceable because it was contrary to the public policy underlying the statutory regulation of engineers, not because the provision violated O.C.G.A.

§ 13-8-2(b). It claimed that if such provisions were deemed enforceable, engineers would have no incentive to adhere to the rules of professional conduct and practice designed to protect the safety, health and welfare of the public under O.C.G.A.§ 43-15-1 *et seq*..

The Court of Appeals followed the holding in Richmark, ruling that: "Nothing in the contract exculpates, holds harmless, or otherwise limits [the design professional's] liability to third parties." Id. at 54. The Court disagreed with RSN that the limitation of liability provision would remove the incentive for the design professional to act responsibly, stating that: "Although the limitation of liability provision capped the [design professional's] liability to the [owner], [the design professional] remained substantially responsible for its professional errors and retained the incentive to perform engineering services with due regard for the safety, health and welfare of the public." Id. The Court held that the provision was enforceable.

Again, RSN petitioned the Georgia Supreme Court for review of the decision of the Court of Appeals. The Supreme Court denied the petition on March 15, 2010, making the Court of Appeals' decision in RSN binding law.

With these three cases, the law seems relatively straight-forward in Georgia. Properly drafted limitation of liability provisions will be enforceable. The key is that the design professional cannot abdicate or even limit all potential liability to all parties. As long as the design professional continues to have potential liability to third parties, the design professional retains the public policy incentives to perform the services properly. If these public policy interests are met, the design professional and its client are free to enter into such agreements to limit the liability of the design professional to the client.

So how can these provisions be used effectively? Many clients will not agree to limit the liability of the design professional to some small amount under most circumstances. Limitation of liability clauses which limit the design professional's liability to the available professional liability insurance proceeds can be very effective in providing the design professional with protection from exposure over the available insurance. Clients will often agree to such provisions when the appropriate levels of insurance are purchased and maintained by the design professional. These provisions can also be used to limit the personal exposure of the individuals working on the project, leaving the company or firm to shoulder the responsibility for any professional liability. Again, these can be particularly effective when limited to the available professional liability insurance. Finally, these provisions can be used as a negotiating tool when a client has asked the design professional to assume an inordinate amount of potential exposure for a nominal fee. These situations often arise where the design professional is asked to perform partial services, become engaged to remedy existing problems or other situations where the risk outweighs the reward.

After a roller coaster ride, contractual provisions that limit the liability of the design professional to the client are enforceable in Georgia and they can be an effective tool, which if used properly, can help design professionals manage the exposure to their clients. Any provision should be tailored to the specific situation and counsel should be consulted to assist in drafting and negotiating a provision that works to serve the intended purpose.

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South Carolina Decision Seeks to Limit Punitive Damages Awards

By: Lee C. Weatherly and J. Patrick Norris

The United States Supreme Court first considered whether a punitive damages award could be so excessive as to violate due process in 1991 in the case of Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991). In Haslip, the Court upheld a punitive damages award of more than four times the amount of compensatory damages, concluding that the defendant's due process rights were not violated; however, the Court noted that "'general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.'" This was the first sign that the Court could limit punitive damages awards based on due process rights.

Other punitive damages cases followed, including BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), which set forth three "guideposts" for constitutional review of punitive damages awards: "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." In the cases since Gore, the Court "has continued to uphold Haslip and further delineate the contours of punitive damages awards that 'run wild,'" while refusing to "'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.'" Mitchell v. Fortis Ins. Co., 385 S.C. 570, 586, 686 S.E.2d 176, 184 (2009).

The Supreme Court of South Carolina got into the act when it handed down the

opinion in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). That case, which was in response to Haslip, set forth eight factors for South Carolina trial courts to consider in post-judgment due process reviews of punitive damages awards:
(1) the defendant's degree of culpability
(2) the duration of the conduct;
(3) the defendant's awareness or concealment;
(4) the existence of similar past conduct;
(5) the likelihood the award will deter the defendant or others from like conduct;
(6) whether the award is reasonably related to the harm likely to result from such conduct;
(7) the defendant's ability to pay; and
(8) any other factors deemed appropriate.

Beginning in 1991, South Carolina trial courts were required to apply both the Gamble and Gore factors when determining the excessiveness of punitive damages. However, the approach was often burdensome and led to duplicative analysis. Enter Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009), in which the Supreme Court of South Carolina recently re-examined the issue of excessive punitive damages awards. In Mitchell, the court reviewed a punitive damages award in a bad faith action by an insured against his insurer, establishing a new test for the review of punitive damage awards in the process.

The plaintiff indicated on his health insurance application that he had not been previously diagnosed with or treated for an immune deficiency disorder. The insurer issued the policy. A year later, the plaintiff attempted to donate blood to the Red Cross and was informed that his blood screened positive for HIV. The plaintiff went to his personal doctor for confirmation. One of the doctor's assistants noted on his intake form that he had given blood to the Red Cross and had been told that he tested positive for HIV. Unfortunately, the assistant listed the wrong date on that notation, such that the form appeared to have been drawn up prior to when the plaintiff had applied for the health insurance policy. The doctor confirmed that the plaintiff was in fact HIV-positive. After the plaintiff began receiving treatment for HIV, the insurer began receiving claims on his policy. It investigated the claims and eventually found the erroneously-dated intake chart. One of the insured's senior underwriters recommended that the policy be rescinded based on misrepresentation. The rescission committee voted to rescind the policy during a two-hour meeting in which they considered forty-six separate cases, including the plaintiff's.

When the plaintiff was informed of the rescission of his policy, he repeatedly tried to resolve the situation. He personally contacted the insurer, and had numerous other parties do so on his behalf. They were all told that there was nothing that could be done. The plaintiff eventually retained an attorney, who persuaded the insurer to hear an appeal of the plaintiff's case; however, the appeal was denied. The policy was eventually reinstated almost two years later.

The plaintiff sued the insurer for breach of contract and bad faith rescission of his policy. Numerous pieces of damaging evidence surfaced at trial, including testimony that the insurer's practice was to halt investigations when a single piece of evidence was discovered that would support rescission. Additionally, evidence came out that suggested that the review of his case lasted no longer than three minutes of the rescission committee's two-hour meeting. There was also an addendum from the senior underwriter that had been forwarded to the rescission committee just prior to the first meeting stating that the insurer technically did not have actual test results confirming an HIV diagnosis, and inquiring whether the notation on the doctor's office's intake form was sufficient for rescission. The plaintiff also argued that the insurer tried to conceal evidence of its bad faith, noting that the insurer had twice sent illegible copies of the addendum in discovery, and that the insurer's phone logs did not reflect the calls made on the plaintiff's behalf to try and resolve the situation.

As to damages, the plaintiff presented testimony from a medical expert who testified that without medical treatment, the plaintiff would contract AIDS in two years and likely die two years after that. He also introduced testimony from a health care expert who testified to the minimum expected costs that it would take to care for the plaintiff throughout his life, not including complications from HIV and AIDS. An economist projected a present value of $1,081,189.40 for the plaintiff's treatment and costs. The jury awarded him $186,000 in compensatory damages, including $36,000 on the breach of contract claim and $150,000 on the bad faith rescission claim, and $15 million in punitive damages for the bad faith rescission claim. The insurer appealed, arguing that the $15 million in punitive damages violated its due process rights. The South Carolina Supreme Court agreed.

Mitchell streamlined the process for reviewing punitive damages awards. With a nod to the United States Supreme Court's guidelines set forth in Gore, South Carolina courts will now consider three guideposts in determining whether an award of punitive damages violates due process:

(1) the reprehensibility of the defendant's conduct;
(2) the ratio of actual or potential harm to the punitive damages award; and
(3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Although the process has been streamlined, each guidepost has factors to consider that are very similar to the prior factors that were reviewed in South Carolina punitive damages awards. With the first guidepost

(reprehensibility), the court may consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. With the second guidepost (ratio), the court may consider: (i) the likelihood that the award will deter the defendant from like conduct; (ii) whether the award is reasonably related to the harm likely to result from such conduct; and (iii) the defendant's ability to pay. With the third guidepost (comparability), the court may consider: (i) the type of harm suffered by the plaintiff or plaintiffs; (ii) the reprehensibility of the defendant's conduct; (iii) the ratio of actual or potential harm to the punitive damages award; (iv) the size of the award; and (v) any other factors the court deems relevant.

In Mitchell, as to the first guidepost, the court found that the insurer's conduct was "highly reprehensible," as it demonstrated an indifference to the plaintiff's life and a reckless disregard to his health and safety. Additionally, the court pointed to the fact that the insurer engaged in intentional deceit to try and cover up its bad faith actions, as evidenced by its lack of written rescission policies, the lack of information available regarding appeal rights or procedures, the separate retention policies for rescission documents, and the mysterious omission of certain phone calls from the insurer's phone log. As to the second guidepost, the court concluded that a 13:9 ratio was excessive and exceeded due process limits. As to the third guidepost, the court looked to other similar cases and concluded that a single-digit ratio would have been more appropriate. The court ultimately remitted the punitive damages award to $10 million—a 9:2 ratio—to comport with due process. See also Austin v. Stokes-Craven Holding Corp., No. 26784, 2010 WL 760410, at *15 (S.C. Mar. 8, 2010) (applying Mitchell factors and upholding a single-digit ratio punitive damages award).

Perhaps the most intriguing part of the Mitchell decision was the court's willingness to look to punitive damages awards in past cases for comparison purposes. The obvious impact of this part of the analysis is that the amount of punitive damages likely to be awarded in any given case may not have as much to do with how bad the Defendant's conduct was, but how bad it was compared to those who came before him.

Based upon the ruling in Mitchell, it appears that South Carolina courts are interested in limiting punitive damages awards. Interestingly, the South Carolina legislature appears to be on a similar mission. Lawmakers are currently considering a bill that would cap punitive damages awards at three times the amount of the compensatory damages or $350,000—whichever is greater. Proponents of the legislation contend that capping punitive damages awards is necessary to attract businesses to South Carolina in that they would be shielded from being put out of business by a single lawsuit. Detractors argue that the rarity of substantial punitive damages awards in South Carolina renders the cap unnecessary. See Gina Smith, House May Cap Damages Awards, The State, Mar. 3, 2010. Whether or not the bill ultimately passes, these developments regarding punitive damages awards are significant and could substantially affect the legal community in South Carolina.

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ANNOUNCEMENTS

Thomas S. Carlock Named to the Georgia *Super Lawyers*® Top Ten List

Thomas S. Carlock has been named to the Georgia *Super Lawyers* Top Ten List for the fifth consecutive year. He was among ten attorneys who received the highest point totals in the Georgia nomination, research and blue ribbon review process.

2010 Georgia *Super Lawyers*® and *Rising Stars* Honorees

We are proud to announce that 19 of our attorneys have been selected for inclusion on the Georgia *Super Lawyers* and *Rising Stars* lists for 2010.

***Super Lawyers* Honorees:**

- Thomas S. Carlock
- Wade K. Copeland
- Kent T. Stair
- Douglas W. Smith
- David F. Root
- W. Dan McGrew
- Fred M. Valz, III
- Johannes S. Kingma
- D. Gary Lovell, Jr.
- Adam L. Appel
- Gregory H. Wheeler
- Eric J. Frisch

***Rising Stars* Honorees:**

- Ashley E. Sexton
- Shannon M. Sprinkle
- John C. Rogers
- Asha F. Jackson
- Renee Y. Little
- Pete Werdesheim
- Marquetta J. Bryan
- Ryan B. Wilhelm

Only five percent of the lawyers in the state are named by *Super Lawyers*. The selections for this esteemed list are made by the research team at *Super Lawyers*, which is a service of the Thomson Reuters, Legal division based in Eagan, MN. *Rising Stars* is a listing of exceptional lawyers who are 40 years or under, or who have been practicing for 10 years or less and have attained a high degree of peer recognition and professional achievement. Only 2.5 percent of the total lawyers in the state are honored on the Rising Stars list.

2nd Annual General Liability & Workers' Compensation Seminar

Please join us on June 17th, from 12:30 p.m. - 4:30 p.m., at the 755 Club at Turner Field, for our second annual General Liability and Workers' Compensation seminar. Dinner and tickets to the Braves game will be available immediately following the seminar. Please contact our Marketing Coordinator, Christina Walsh, to reserve your space today at cwalsh@carlockcopeland.com. Approval for four CEU and CLE credits are pending.

Carlock Copeland Launches New Web Site

Our new interactive web site was launched last month, and provides our users with a fresh look and new tools to enhance the overall user experience. Information on our capabilities, attorney profiles, recent matters, Firm news and events, and upcoming presentations and seminars are readily accessible and easy to locate throughout the site. You can also subscribe to our RSS Feeds to receive alerts on the latest Firm and industry news. Please visit our site at www.CarlockCopeland.com

Carlock Copeland Named Top 25 Law Firm in Atlanta

For the sixth consecutive year, Carlock, Copeland has been named by the Atlanta Business Chronicle as a "Top 25 Law Firm" in Atlanta. The rankings are determined by number of attorneys practicing in Atlanta, and Carlock Copeland currently has 65. The Firm has 85 attorneys practicing in two offices in the Southeast.

Annual Atlanta Claims Convention

Carlock Copeland was proud to support the 88th annual Atlanta Claims Convention on April 15th at the Gwinnett Center. Our casino themed hospitality suite was enjoyed by clients, friends and employees. We look forward to supporting our friends at the Atlanta Claims Association in 2011.

RECENT VICTORIES

Medical Malpractice Defense Verdict in Newton County

On April 30, 2010 a pediatrician represented by Wade Copeland and Ashley Sexton received a defendant's verdict after a week long medical malpractice trial in Newton County. The plaintiffs were claiming the wrongful death of their 14 year old son who died of MRSA pneumonia 2 days after being seen in the doctors office where he had been diagnosed with a sinus problem. The defense contended that the original diagnosis was correct and that the pneumonia was not detectable at that time. The jury also agreed that the parents were responsible for failing to call the doctor or going to the emergency room when the boy's condition worsened. The young man was an outstanding athlete and an honors student, and the courtroom was filled with supporters of the family throughout the trial. The jury returned the verdict for the doctor following 8 hours of deliberation despite stating earlier that they were unable to reach a unanimous decision.

Georgia Supreme Court Upholds Major Tort Reform Issue Concerning ER Standards

Wade Copeland delivered the winning argument to the Supreme Court of Georgia in a case upholding major tort reform issue concerning ER standards. The court split 4-3 to uphold a rule that demanded evidence of "gross negligence" on the part of emergency room doctors in order to sustain a medical malpractice claim.

Medical Malpractice Defense Verdict in Fulton County

Partner Gary Lovell and Associate Michelle Stock were successful in obtaining a defense verdict in Fulton County for a local General Surgeon accused of medical malpractice. The State Court jury returned a defense verdict after several hours of deliberation on April 1st. The plaintiff alleged that our client negligently removed a healthy kidney and adrenal gland during a routine laparoscopic gallbladder removal surgery. The defense team, led by Gary, convinced the jury that our surgeon client properly removed all abnormal appearing tissue, including the adrenal gland and kidney, in connection with surgery for removal of a suspected cancerous mass. The mass was determined to be benign on subsequent pathological study. The case has not been appealed and the judgment in favor of our client is final. Contact Gary at glovell@carlockcopeland.com for more information.

Federal Court Case Dismissed in a Matter of First Impression

John Bunyan and Shannon Sprinkle obtained Judgment on the Pleadings in Federal Court for their lawyer-client, a well respected Guardian Ad Litem. In a case of first impression, the Northern District of Georgia found that the Guardian Ad Litem was not subject to Plaintiff's claims for alleged violations of his constitutional rights, holding that the Guardian was not a state actor.

Bar Grievance Dismissed

Joe Kingma and Billy Newcomb were retained to represent an attorney being investigated by the Georgia Bar for possible ethical violations in connection with his legal representation of a client in a divorce proceeding. The Office of the General Counsel ultimately found no evidence that the attorney acted unethically, and dismissed the grievance filed by his client.

Legal Malpractice Defense Verdict in South Carolina

Partner David Overstreet and Associate Mandi Dudgeon obtained a defense verdict for a real estate attorney following a trial in Columbia, SC. Plaintiffs alleged that the attorney improperly took a commission on a real estate transaction for which he was also the closing attorney, failed to disclose that he was receiving that commission, failed to disclose other

interests, and failed to disclose his ongoing professional relationship with the seller. The jury rendered a defense verdict for the attorney on the legal malpractice claim. The jury returned a verdict of $4,350 on the breach of fiduciary duty claim, but that award was then reduced by the court to zero following post trial motions on the issue of set off for settlement funds already tendered by the codefendant

Defense Verdict Obtained Under Georgia's Equine Activities Act

Partner Doug Smith obtained a defense verdict under Georgia's Equine Activities Act. The plaintiff was thrown from a horse prior to her riding lesson from the defendant and sustained serious shoulder and arm injuries. The defense successfully argued that the Equine Activities Act provided immunity to the defendant and that the plaintiff assumed the risk of injury to herself.

Tort Reform Win in South Carolina

Partner Gary Lovell and Associate Lee Weatherly recently prevailed for our physician client in a case of first impression relating to South Carolina's "Expert Affidavit" requirement under the 2005 Tort Reform Legislation. The defense team obtained a favorable ruling from the trial judge, finding that the Notice of Intent Statute, and South Carolina Law, require and mandate the filing of an expert affidavit alleging one act of negligence at the time Plaintiff files a Notice of Intent to sue a medical professional. Plaintiff argued, in opposition, that the general provisions of the "Expert Witness" laws in South Carolina automatically grant a Plaintiff an additional 45 days to obtain and file an expert affidavit in the Notice of Intent phase of the litigation. The case is currently on appeal to the Court of Appeals of South Carolina. A ruling is expected in summer 2010. Contact Gary at glovell@carlockcopeland.com for more information.

PUBLICATIONS & PRESENTATIONS

- Associate David J. Harmon presented "Construction Insurance Fundamentals" at the National Business Institute on Construction Insurance in Charleston, South Carolina on May 3, 2010.

- Partner Shannon M. Sprinkle presented "E&O Topics for Foreclosure Practitioners" at the 2010 Real Property Foreclosure ICLE seminar in Atlanta, Georgia on April 1, 2010.

- Partner Amy J. Urban presented "Professionalism: A Primer For Practicing Before The State Board of Workers' Compensation" at the ICLE seminar on Workers' Compensation Law for the General Practitioner in Atlanta, Georgia on March 18, 2010. Partner Lynn Blasingame Olmert was the Program Chair for this seminar.

- Partner Katherine H. Hughes' article "Georgias Tort Reform War…who is winning?" was featured in the Georgia Society for Healthcare Risk Management's March 2010 issue of the Gazette.

- Associate Marquetta Bryan gave a presentation on the Eleventh Circuit and Supreme Court Case Law Update at an ICLE seminar at the State Bar of Georgia in Atlanta, Georgia on February 26, 2010.

- Partner Joe Kingma presented "Risk Management During an Economic Downturn" to the Atlanta Bar Associations' Sole Practitioner/Small Firm Section on February 25, 2010.

- Partner David Overstreet presented "Litigating the Legal Malpractice Case" to the Charleston Lawyers' Club in Charleston, South Carolina on February 24, 2010.

FEATURED CCS PRACTICE AREA

Non-Profit Directors and Officers Liability Defense

The Non-Profit Directors and Officers Practice Group counsels and represents individuals and entities involved in non-profit activities. We counsel clients on governance and board structure, preparation and interpretation of governing documents, insurance procurement, and liability and risk management issues. We also provide employment law consultation and representation to executives and officers of non-profit organizations. We represent individuals and entities through self insurance and insurance programs. We have years of experience with pre-litigation counseling and post litigation representation of members and directors of non-profit organizations.

Our attorneys emphasize the importance of preventing organizational disputes and litigation through the establishment and review of governing documents, bylaws, policies and handbooks.

Our non-profit clients include directors and officers of community associations, homeowners associations, charitable entities, 501(c) tax-exempt organizations, religious organizations and educational organizations.

For more information on this practice group, please contact Gary Lovell at glovell@carlockcopeland.com

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Please visit www.CarlockCopeland.com to obtain more information on our recent victories, publications and presentations, attorney profiles and practice areas.

SAVE THE DATE

Carlock, Copeland & Stair

General Liability and Workers' Compensation Seminar

(Schedule on Opposite Page)

June 17, 2010

755 Club at Turner Field

12:30 pm - 4:30 pm

Approval for 4 CEU and CLE Credits Pending

Dinner & Ticket to the Braves Game Following Seminar!

Reserve Your Space Today! RSVP to CWalsh@carlockcopeland.com

General Liability and Workers' Compensation Seminar Schedule

REGISTRATION at 755 CLUB
11:30 - 12:30

General Liability Breakout Session

12:30 - 1:20
Assessing Your Case From a Juror's Perspective & Other Important Considerations for Evaluating Your Case Before it Goes to a Jury
Speakers:
Angela L. Abel - Senior Vice President, DecisionQuest
David F. Root - Partner, Carlock Copeland
Ryan B. Wilhelm - Associate, Carlock Copeland

1:30 - 2:20
Who's Really on the Hook? Practical Solutions for Resolving Multi-party and Multi-policy Claims (a Plaintiff and Defense perspective).
Speakers:
John K. Fitzgerald - Plaintiff's Attorney
Charles M. McDaniel, Jr. - Partner, Carlock Copeland
Michael R. Ethridge - Partner, Carlock Copeland
A. Paul Moore, Jr. - Associate, Carlock Copeland

2:30 - 3:20
The Evolution of Litigation Since Tort Reform of 2005
Speakers:
Thomas S. Carlock - Partner, Carlock Copeland
Fred M. Valz - Partner, Carlock Copeland
Adam L. Appel - Partner, Carlock Copeland
Erica L. Parsons - Associate, Carlock Copeland

Workers' Compensation Breakout Session

12:30 - 1:20
Deal or No Deal
Evaluating complicated Workers' Compensation claims for settlement.
Speakers:
Susan J. Sadow - Claimant's Counsel
Charles B. Zirkle, Jr. - Mediator
Christopher A. Whitlock - Partner, Carlock Copeland

1:30 - 2:20
What's Work Got To Do With It?
Compensability of idiopathic injuries.
Speakers:
The Honorable David K. Imahara - Judge, SBWC
Lynn Blasingame Olmert - Partner, Carlock Copeland

2:30 - 3:20
Cumulative Trauma and Repetitive Motion Injuries
Speakers:
Stephen M. McCollam, M.D. - Peachtree Orthopedic Clinic
Amy J. Urban - Partner, Carlock Copeland

JOINT ETHICS SESSION:
3:40 - 4:30
Defining Boundaries: Considerations in Risk Management
Speakers:
Susannah Kinsey - McGriff, Seibels & Williams, Inc.
Boynton Smith - McGriff, Seibels & Williams, Inc.
Asha F. Jackson - Partner, Carlock Copeland

4:30 - 9:00
Dinner and Drinks at 755 Club
Braves v. Tampa Bay
(tickets will be provided at registration)

quarterly newsletter

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