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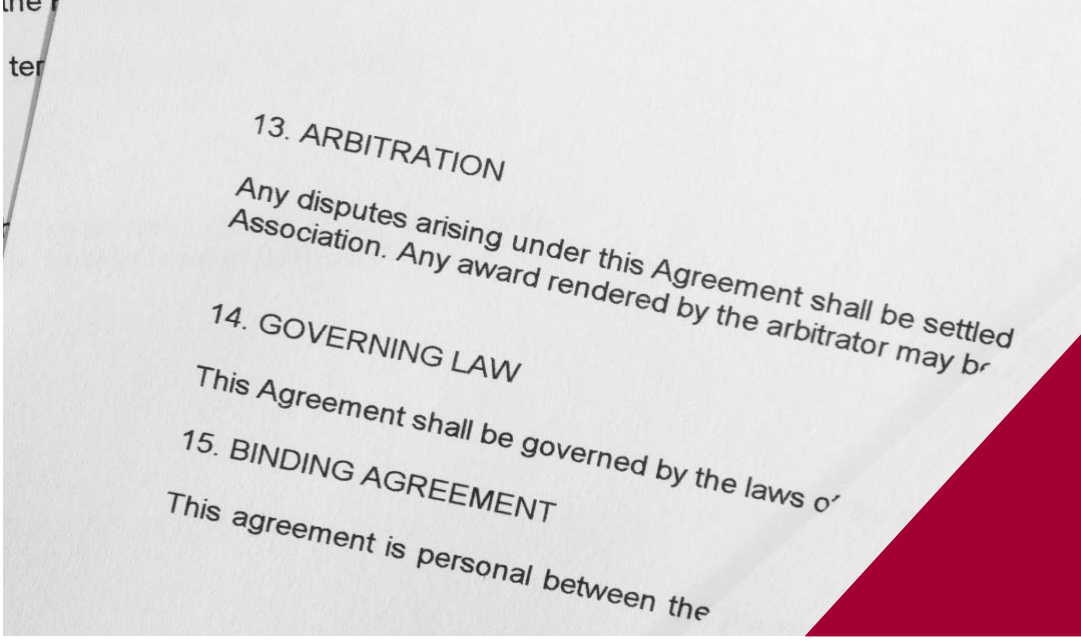

Nursing Home Arbitration Provisions
A Glimmer of Hope in Cases Fraught with Bias?

By: Adam L. Appel, Andrew W. Countryman and Kim Ruder

Over the years, lawsuits against nursing homes have proven to be some of the more difficult and unpredictable cases to try. While the perception is that such cases should yield lower verdicts due to the age of the patient, because of their condition at the time of the injury, including chronic illness and/or life-altering "comorbid" conditions that prevent independent living, juries continue to return staggering verdicts for millions of dollars. These verdicts, representing either "the full value of the life of the decedent" or the pain and suffering of the patient, are often driven by allegations of poor bed sore care and related infections. Family members often paint a gruesome picture with vivid photographs of a progressing bed sore.

Verdicts are often affected by emotional testimony about weight loss and deterioration of the patient's condition designed to elicit sympathy from jurors. In an effort to stem the tide of sizeable jury verdicts, nursing homes and other facilities across the country have been offering arbitration as an alternative in admission documents, seeking to avoid the unpredictability that comes with twelve men and women in the jury box, who bring their personal opinions, experiences and biases against the industry. Unfortunately, state court judges frequently circumvent arbitration provisions by declaring them unconscionable, against public policy, or in violation of state contract law.

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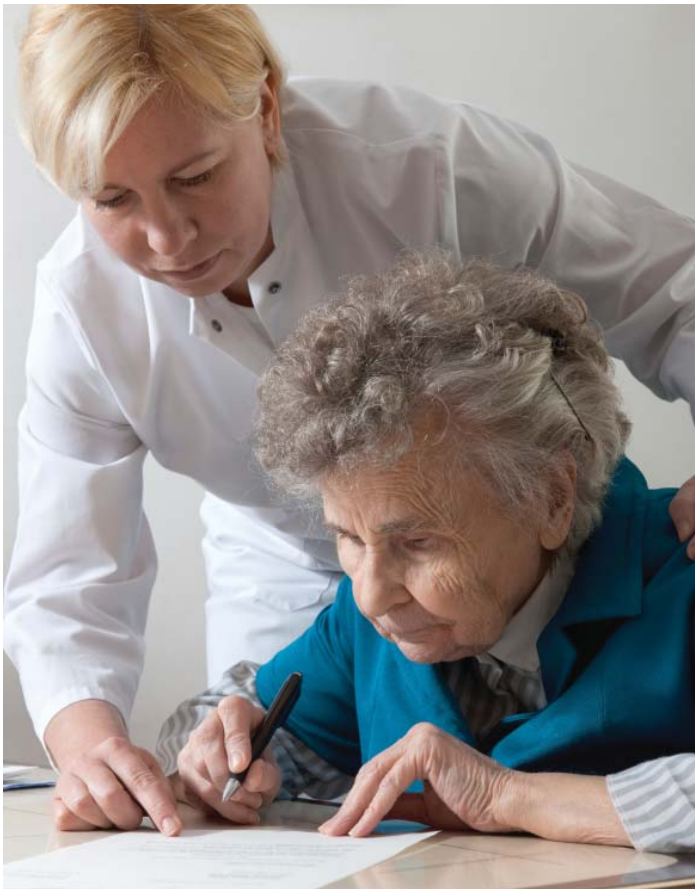
Likewise, many states, including Georgia, California, Illinois, New Jersey, New York, Oklahoma and West Virginia, have enacted statutes that undermine the arbitration effort and protect the right of a nursing home resident to a jury trial. However, these statutes often conflict with the Federal Arbitration Act (FAA). Enacted in 1925, the FAA favors the liberal application of pre-dispute arbitration clauses and preempts state law under certain circumstances.[1] The U.S. Supreme Court addressed this issue generally in 2011 in the case of *AT&T Mobility, LLC v. Concepcion*[2] and more recently in the case of *Marmet Healthcare Ctr., Inc. v. Brown, et al.*[3] In these cases, the Supreme Court held that the FAA preempts state law that outright prohibits the arbitration of a particular type of claim. In the wake of these two opinions, renewed hope exists regarding the enforceability of arbitration provisions.

In *Marmet*, the Court held that the FAA preempted West Virginia's prohibition of arbitration provisions in nursing home contracts, calling the West Virginia law a "categorical rule" prohibiting arbitration. The Court went on to hold that the law not only violated the FAA, but also was in conflict with the *Concepcion* decision. *Marmet* was a step in the right direction to breathe life back into the power of nursing home arbitration provisions. However, the decision left open the possibility of challenging the enforceability of arbitration based on unconscionability and common law principles germane to arbitration provisions specifically, including general contract defenses like duress in the execution of the agreement.

There is no Supreme Court case defining unconscionability in the context of nursing home arbitration provisions. The West Virginia Supreme Court of Appeals discussed the issue in *Brown v. Genesis Healthcare Corp.*[4] The *Brown* Court held that the doctrine of unconscionability includes both procedural and substantive fairness. To this end, the *Brown* Court used a sliding scale to determine whether an arbitration provision is conscionable. Essentially, the more substantively oppressive the arbitration provision, the less evidence of procedural unfairness is required to consider the provision unconscionable and thus, unenforceable, and vice-versa. The Court listed a number of factors to determine substantive unconscionability, including the reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns. According to the decision, procedural unconscionability involves the circumstances surrounding the bargaining process and formation of the contract itself. This takes into account the age, literacy, sophistication levels of the party, unduly complex contract terms, the adhesive nature of the contract, and the manner in which the contract was formed, as well as whether each party had a reasonable opportunity to understand the terms of the contract.



"...it may be wise to have an employee specifically discuss the arbitration arrangement with the resident and their family, to point out the existence of the provision and to explain that signing on to it will result in a waiver of the right to a jury trial. It is also recommended to have a sentence signed by the individual acknowledging that they discussed and agreed to the arbitration provision."

Appellate courts in Georgia and South Carolina have provided some guidance on the enforceability of nursing home arbitration clauses. In *Grant v. Magnolia Manor-Greenwood, Inc.*[5], the South Carolina Supreme Court found that an arbitration agreement was unenforceable because the arbitration association designated in the contract was unavailable to act as arbitrator. The Court held that the parties agreed to use a specific arbitral forum and that this

was a substantive requirement in the contract as opposed to being merely ancillary. Under general principles of contract law, the provision was unenforceable.

The Georgia Court of Appeals in *Triad Health Management of Georgia, III, LLC v. Johnson*[6], addressed whether a resident's power of attorney could waive the right to a jury trial for the resident. The Court enforced the provision, holding that a "general power of attorney" delegates the power to act on behalf of a resident. As a result, the holder of the power of attorney may enter into an arbitration agreement on behalf of a resident. By comparison, the Court of Appeals has invalidated arbitration provisions executed by individuals holding only a "health care power of attorney" because the power was limited to making health care decisions and did not encompass the ability to contract.[7]

In light of these decisions, there are some tactics and guidelines to consider employing to maximize the chances of enforcing arbitration provisions. First, the individual signing the arbitration agreement must have the capacity to sign the agreement. Family relation alone (including being the spouse of a resident) is insufficient to bind a resident to arbitration. To this end, it may be wise to have an employee specifically discuss the arbitration arrangement with the resident and their family, to point out the existence of the provision and to explain that signing on to it will result in a waiver of the right to a jury trial. It is also recommended to have a sentence signed by the individual acknowledging that they discussed and agreed to the arbitration provision. Similarly, it may also help to indicate that the parties exchanged specific consideration for the agreement to waive the right to a jury trial.

Next, the arbitration provision should not be 'buried' among boilerplate language in the contract. Rather, the provision should be labeled and set off in its own paragraph. Admission should also not be made contingent on signing the arbitration agreement, and the contract should state as much. This will help dispel the notion that the contract was entered into under circumstances of "duress," which is frequently raised to invalidate such provisions.

Another suggestion is to provide for a limited opt-out provision, which would permit the resident to revoke the agreement within a certain number of days. Importantly, neither the admission agreement nor the arbitration agreement should contain limitations or caps on emotional, consequential, or punitive damages, as multiple courts have invalidated arbitration agreements because of such language. Lastly, arbitration provisions should contain the basic elements of a contract (offer, acceptance and consideration) and be labeled and identified in a conspicuous manner as opposed to appearing in the middle of contract provisions, or as mentioned earlier, in boilerplate. Many states, including South Carolina, have statutes requiring certain features such as bolded language and titles in all capitalized letters.[8]

In light of recent trends and decisions detailed above, following these basic guidelines should increase the likelihood that arbitration provisions will be enforceable as to nursing home negligence claims. In establishing its enforceability, nursing homes can use arbitration to remove the severe and costly bias against nursing homes in general, as well as limit the potential for enormous verdicts that juries sometimes render based on sympathetic facts and gruesome photographs. By preventing claims from going to the jury and including arbitration agreements, nursing home litigants have the best chance for the dispute to be resolved before a panel of neutral, impartial, and educated people who may have knowledge of nursing homes and the types of issues facing such facilities. Financial savings can be significant and could include decreased litigation expenses in addition to limiting recovery of punitive damages and other general damages. It could also result in streamlined and simplified litigation of such claims. With renewed pronouncements by the Supreme Court favoring arbitration, it is wise to consider including arbitration provisions in nursing home admission paperwork, and to make sure the documents are properly drafted and executed in order to ensure their enforceability.

Resources

1. 9 U.S.C. § 1, et seq.
2. 131 S.Ct. 1740 (2011).
3. 132 S.Ct. 1201 (2012).
4. 229 W.Va. 382, 729 S.E.2d 217 (2912).
5. 383 S.C. 125, 678 S.E.2d 435 (2009).
6. 298 Ga. App. 204, 679 S.E.2d 785 (2009).
7. Life Care Centers of America v. Poole, 298 Ga.App. 739, 681 S.E.2d 182 (2009).
8. E.g., S.C. Code Ann. § 15-48-10(a).

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South Carolina Supreme Court Addresses Multiple Malpractice Issues for Real Estate Lawyers

By: David Overstreet and Mike McCall

A recent decision by the South Carolina Supreme Court addressed several issues frequently encountered in professional negligence claims against attorneys and highlighted the importance of a carefully drafted engagement letter. In *RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.*[1], the claims against the law firm arose out of a simultaneous real estate closing that occurred during the height of the real estate boom. The underlying transaction involved circumstances that were not uncommon during this time in coastal developments marketed as investment opportunities.

To attract buyers, developers would typically offer sales incentives, such as 100% financing, 12 months of mortgage payments and buy-back agreements. The pitch was that these incentives provided a risk-free short term investment. If a buyer was unable to resell the property for a quick profit, the developer would buy it back for at or above the purchase price, then sell it to another investor at an even higher price. The repurchase and sale was often structured as a simultaneous transaction; the first buyer would deed the property back to the developer immediately before the developer deeded it to the second buyer, with the developer using funds received from the second buyer to close the repurchase. When the real estate market crashed, many of the buyers found themselves unable to service the hefty mortgages and defaulted on their loans, which prompted foreclosure actions and spawned litigation against the developers, appraisers, real estate agents and attorneys associated with the transaction.

While the *Tinsley* case may not have involved all of these elements, some were certainly present. The plaintiff in *Tinsley* was a real estate investment entity that purchased two lots for a combined price of $570,000. The transaction was closed in 2007. Two years later, the combined appraised value was less than $100,000. At the time the plaintiff entered into the purchase contract with the developer, the lots were still owned by the initial purchasers, who had exercised their buy-back agreements with the developer. The developer did not have the funds to repurchase the lots, so a simultaneous closing was used to facilitate the transaction.[2]

After the market crashed, the plaintiff filed suit against the law firm that handled the closing. The plaintiff alleged it was unaware of the status of the lots and was deceived by the law firm regarding the true owners of the property and the simultaneous nature of the transaction.[3] The plaintiff asserted claims for legal malpractice, breach of fiduciary duty, and violations of the Unfair Trade Practices Act (UTPA) and the Uniform Securities Act (USA).[4] At trial, the court directed verdicts on the UTPA and USA claims and merged the breach of fiduciary claim with the legal malpractice claim. The jury returned a defense verdict on the legal malpractice claim. Post-trial motions were denied, and an appeal followed.

While many of the issues in *Tinsley* involved procedural matters, the opinion includes substantive decisions on two issues that frequently arise in professional negligence litigation. First, the court found that merging the breach of fiduciary claim with the legal malpractice claim was proper because the claims arose from the same factual allegations and the duty inherent in the attorney-client relationship.[5] This holding will provide a clear basis to dispose of duplicative breach of fiduciary claims in future litigation.

Second, the court addressed whether South Carolina's Unfair Trade Practices Act (UTPA) is applicable to attorneys. It has been argued in the past that attorneys are not subject to the UTPA because the practice of law is independently regulated. The *Tinsley* court rejected this argument and held that the regulated industries exception is not applicable to UTPA claims against attorneys.[6] This is significant because the UTPA provides for the recovery of treble damages and attorneys' fees in certain cases involving willful conduct.[7] It is worth noting, however, that UTPA claims are limited to unfair or deceptive acts that affect the public interest, which is not typically the case when professional negligence is alleged.

The other notable aspect of *Tinsley* is the court's discussion of the law firm's representation agreement. A common theme in many professional negligence claims asserted against closing attorneys is that the scope of representation was much broader than what is considered customary in a residential transaction, including not only closing the transaction pursuant to the contract and delivering a marketable title, but also providing substantive advice about the wisdom of the purchase and the terms of the contract.

These allegations were made by the plaintiff in *Tinsley*, but language in the firm's representation agreement provided a viable defense. The *Tinsley* court affirmed the defense verdict on the legal malpractice claim in part based on the following language, which the court found strictly limited the scope of representation:

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The undersigned acknowledge that they have not retained the law firm to negotiate the terms of their contract nor are they relying on the law firm to provide substantive advice about how or whether to proceed with this transaction. Rather, the undersigned acknowledge that the law firm has been retained to close the transaction, prepare a deed of conveyance and perform the ministerial act[s] associated with real estate closings.[8]

Scope of representation issues are much more common in legal malpractice cases than they should be. In most situations, an attorney is required to communicate the scope of representation to the client, and the rules encourage this to be done in writing.[9] The rules also provide the attorney and client substantial latitude to limit the representation, so long as the limitation is reasonable under the circumstances and the client gives informed consent.[10] As demonstrated in *Tinsley*, a carefully drafted engagement letter or representation agreement that limits the scope of representation can be particularly effective as a risk management tool by not only preventing misunderstandings from the outset, but also by providing vital evidence should a dispute subsequently arise.

Resources

1. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (S.C. 2012).
2. Id. at 169.
3. Id. at 169-70.
4. Id. at 169; see also S.C. Code § 39-5-10, et seq. (UTPA); S.C. Code § 35-1-101, et seq. (USA).
5. Id. at 173-74.
6. Id. at 174.
7. S.C. Code § 39-5-140.
8. 732 S.E.2d at 169.
9. Rule 1.5, RPC, Rule 407, SCACR.
10. Rule 1.2, RPC, Rule 407, SCACR.

CARLOCK SELECTED AS 2013 "LAWYER OF THE YEAR"

Firm founder **Thomas S. Carlock** was recently named a Best Lawyer® for the eleventh year in a row as well as the 2013 "Lawyer of the Year" in the Atlanta Personal Injury Litigation category.

Carlock has practiced in the civil trial arena in Georgia for 46 years and has tried more than 500 jury trials. Throughout his career, Tom has handled a wide variety of civil litigation including medical malpractice, catastrophic injury including wrongful death, coverage disputes, and every other type of civil lawsuit imaginable. He has tried, to verdict, in excess of 75 wrongful death cases and more than 150 catastrophic injury cases. His skill and leadership have helped the firm to continue to grow from five attorneys to 89, many of which have been honored as well for their expertise and commitment to the legal profession.

Only a single lawyer in each practice area and designated metropolitan area is honored as a Best Lawyers' "Lawyer of the Year." Receiving this designation reflects the high level of respect a lawyer has earned among his peers for his abilities, professionalism, and integrity.

Firm Honors

ATTORNEYS SELECTED AS GEORGIA TREND LEGAL ELITE

Partners **Wade K. Copeland** and **Peter Werdesheim** were recognized as two of Georgia's top attorneys in Georgia Trend's annual Legal Elite list, which appeared in the magazine's December 2012 issue. Georgia Trend compiles the Legal Elite list by tallying ballots that are sent to every practicing lawyer in the state. Copeland was selected by his peers as a top attorney in Healthcare Law, while Werdesheim was recognized in the General Practice/Trial Law area.

CARLOCK, COPELAND & STAIR NAMED BEST LAWYERS

Best Lawyers is based on an exhaustive peer-review survey in which more than 36,000 leading attorneys cast almost 4.4 million votes on the legal abilities of other lawyers in their practice areas. The following CCS attorneys are to be congratulated for their Best Lawyer® recognition:

Thomas S. Carlock, Best Lawyer® Since 1991
Commercial Litigation, Medical Malpractice Law, Personal Injury Litigation (Atlanta, GA)

Kent T. Stair, Best Lawyer® Since 2006
Construction Law, Legal Malpractice Law (Atlanta, GA and Charleston, SC)

Wayne D. McGrew, III, Best Lawyer® Since 2008
Personal Injury Litigation (Atlanta, GA)

Fred M. Valz, III, Best Lawyer® Since 2013
Insurance Law (Atlanta, GA)

Johannes S. Kingma, Best Lawyer® Since 2009
Legal Malpractice Law (Atlanta, GA)

D. Gary Lovell, Jr., Best Lawyer® Since 2013
Personal Injury Litigation (Atlanta, GA and Charleston, SC)

Scott D. Huray, Best Lawyer® Since 2013
Insurance Law (Atlanta, GA)

BOARD APPOINTMENTS

Mary Katherine Greene has been appointed to serve on the 2013 Board of Trustees for the Atlanta History Center.

Jeffrey Crudup has been appointed to the Charleston County Procurement Appeals Board for a two-year term.

Who is Roger Flower?

About one year ago, Roger Flower joined Carlock Copeland as its new Executive Director. We gave him some time to settle in, and now we want to share a little about him and his perspective on law firm management.

CCS: Roger, tell our clients and friends a little about your background. How long have you been in legal administration? How did you end up where you are today?

Roger: Upon graduating from college in Utah, my wife Linda received an offer to teach math at Lithonia High School in Lithonia, Georgia. I applied to the MBA program at Georgia State University and, upon my acceptance, we moved to Atlanta. After a year of going to school full-time, I decided to work full-time and go to school in the evenings. I got a job as a business manager in a law firm and had the opportunity to meet the Executive Director of the firm and observe/learn what he did. As a result, I determined that working in the area of professional services management, and specifically the management of law firms, would be something that interested me. At the time, the characteristics of the profession that I found attractive, and frankly still do, were: a) variety – the ability to be involved in many different facets of a business (finance, technology, human resources, facilities, etc.) as opposed to doing the same thing each day; b) working with intelligent professionals in a professional environment; and c) the belief that the profession would offer a satisfying career opportunity for the foreseeable future. When I have considered other opportunities over the years, opportunities outside the professional services industry, it is these characteristics that have been the determining factors in my decision to remain in the profession of legal management. There have been three states, six firms, and 23 years since that first position, and it's interesting that I have ended back in Atlanta where I began.

CCS: Managing a law firm is no easy task. I am sure you have faced many a challenge over your years of experience in management. What exactly do you do to help a firm succeed?

Roger: In my view, helping a firm to be successful comes down to finding ways to help the firm run efficiently, to understand its business model and, through this understanding, make decisions to improve both its operations and service to clients. Just as important, and often overlooked, is helping the firm to be an enjoyable place to work and earn a living.

CCS: The economy has put a strain on all businesses in the past few years. In response, law firms appear to be doing more than ever to streamline and increase efficiency in an effort to provide better value to their clients. What have you seen or experienced as a result of the economy in the management of law firms?

Roger: The legal industry has become increasingly more competitive over the past 10 years and in particular since the "economic crisis" of late 2008 / early 2009. However, in my view, the legal industry has simply been forced to deal with the competitive issues businesses (i.e., our clients) have been dealing with for many years. I believe that the firms working to uncover opportunities to become more efficient, and therefore provide improved value to their clients, will be the ones that thrive in the future. Carlock Copeland is already, and will continue to be, focused on running a very efficient and cost effective operation.

CCS: How do you approach the management of a firm?

Roger: When I work with a firm, I have a few key tenets that guide my strategy and management style:

A) **A law firm is both a business as well as a profession.** Practicing law is typically described as a "profession", but it's also a highly competitive business. As a result, firms need to create a culture in which the business provides a context for decisions to be made in an informed manner that account for both the impact on the firm's business and its ability to serve clients effectively and efficiently;

B) **Technology awareness and utilization is key.** Firms must leverage technology to create the aforementioned business culture, drive efficiency, and help provide increased value to clients; and

C) **Risk and innovation are necessary for health and growth.** Law firms should not be afraid to innovate and take chances. The law industry has historically been very risk averse. This is not surprising given that firms spend their time helping clients identify and mitigate risk each and every day. However, today's competitive environment requires that firms be more open to new ways of doing business and that they think more aggressively about how to provide both greater value and cost predictability to clients.

CCS: Developments in technology are moving faster than most industries can keep up. The legal industry, with its historical love affair with paper trails, typically struggles with technological advances. What has been your experience with technology improvements within firms?

Roger: I am passionate about technology and believe that it remains an opportunity for firms to gain a competitive advantage – if they are able and willing to embrace it. Technology offers the opportunity for firms to positively impact their business model and client service capabilities. The opportunities are too numerous to detail, but here are a few that jump to mind. Technology can be used to:

Improve understanding of the profitability of the firm's various lines of business and business units;

Reduce operating costs by improving inefficient systems and processes traditionally performed by staff; and

Increase value provided to clients. For example, virtual client portals enable better collaboration and sharing of information and contact relationship management systems ensure that the right people receive the right information at the right time throughout the life cycle of a single matter and the overarching relationship with a client.

CCS: Okay, the big one – pricing/cost structure. Clients are looking for prices to come down, firms are looking to increase revenue. You've worked with several firms. How do you make everyone happy?

Roger: I think Abe Lincoln's adaptation of poet John Lydgate's words say it best: "You can please some of the people some of the time... but you can't please all of the people all of the time." Attempting to make everyone happy is probably not going to happen. Having said that, I think firms can develop pricing structures that will provide cost predictability and certainty for clients and still provide an appropriate profit for firms. In my view, the key to reaching this goal is for firms and their clients to have frank, open conversations about developing pricing structures that are acceptable to both parties. CCS for example utilizes a variety of pricing formats for clients to meet a variety of legal needs.

CCS: Okay, so we can't make everyone happy. Let me turn it around and ask you. What makes you happy? What do you do when you are not at the Firm and need to recharge?

Roger: In my spare time, I enjoy sports of all kinds but I particularly enjoy tennis, basketball, racquetball and water skiing from time-to-time. In addition, I enjoy the outdoors. My wife, daughter and I frequently find the opportunity to take a walk in the woods. I enjoy reading and frequently find the time to escape into a great novel. Finally, I come from a very close family (a result of our growing up in the Navy during my Dad's 30-year career as a naval aviator) and enjoy getting together with my family to laugh, play cards, and enjoy each other's company.

APPELLATE PRACTICE

Carlock Copeland has always handled appeals for its clients, but recently decided to identify a specific group of attorneys for the convenience of clients and prospective clients as to the special skills of our appeals team. Our Appellate Practice team has specialized knowledge of the procedures unique to appellate advocacy, a skill-set that often falls outside the traditional trial litigation tool-kit. Through focused experience and practice, we are able to craft thoughtful and cost-effective appellate strategies through a careful assessment of potential trial court errors, enabling clients to weigh the risks and rewards of an appeal. We then execute those plans by framing issues on appeal in briefing and at oral argument in a way that allows our clients either to preserve a judgment or to get a second chance in the trial court. For example, appeals for current clients' matters have resulted in:

- The affirmance of a dismissal of a class action claiming that several ophthalmologist eye surgeons and their employer conspired to violate federal racketeering laws.

- The affirmance of summary judgment for an accounting firm in a fraud and racketeering case alleging over $100M in damages.

We are also often called in during post-trial proceedings or on appeal in complex, high-dollar cases where proceedings in the trial court have gone awry for trial counsel, which have resulted in:

- The reversal of summary judgment against a client on insurance coverage and indemnity claims and the negotiation of a settlement that recovered nearly $2M for the client.

Our team draws on additional expertise gained through serving as appellate law clerks and as editors for law reviews. Recognized as authorities on appellate practice and legal writing, our attorneys teach legal writing at local law schools and have written and contributed to amicus curiae for several key appellate decisions in federal and state courts. Team members are admitted in the U.S. Supreme Court, the U.S. Court of Appeals for the Third, Sixth, Tenth, and Eleventh Circuits, and the state appellate courts of Georgia, South Carolina and Alabama.

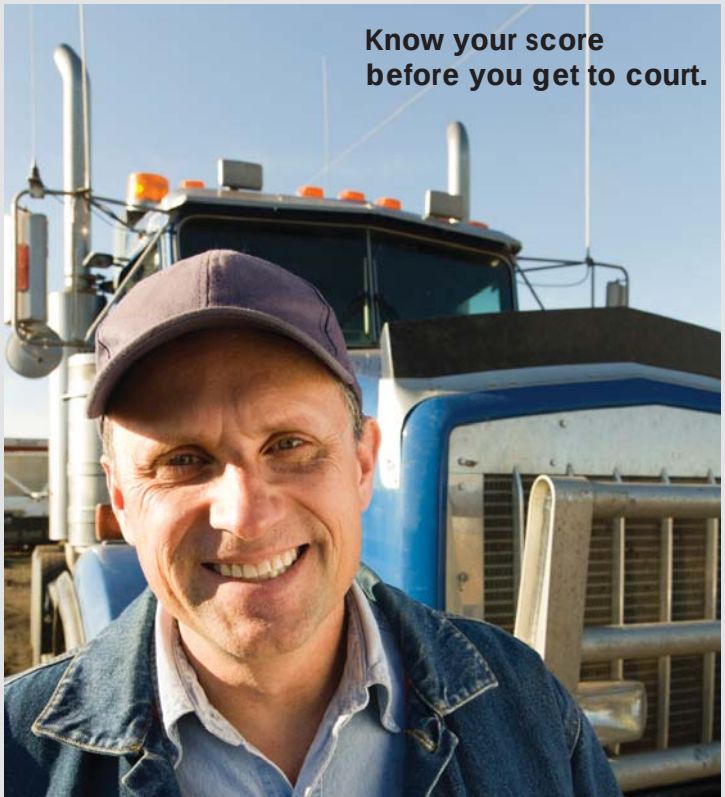
If you'd like to learn more, contact John Bunyan at 404.221.2305 or jbunyan@carlockcopeland.com.

Beware CSA Scores in Trucking Litigation

By: Charles M. McDaniel, Jr.

In December of 2010, the Federal Motor Carrier Safety Administration launched its Compliance, Safety, Accountability Program (CSA). According to Ray LaHood, the U.S. Secretary of Transportation, "the heart of the CSA is the Safety Measurement System (SMS), which collects safety data from inspections and crash reports, then weighs the severity of violations within seven different categories."[1] The SMS quantifies the on-road safety performance and compliance history of motor carriers to prioritize enforcement resources, determine the safety and compliance problems that a motor carrier may exhibit, and track each motor carrier's safety. As further noted by Mr. LaHood, "the aspect of the Compliance, Safety, Accountability Program that gives me greatest confidence is its transparency. The data and calculations used by SMS are public. So, if there are problems or errors, carriers and drivers can request a review."[2] However, in the process of publicizing SMS data, the CSA program has created a vast depository of evidence for plaintiffs to potentially exploit in trucking litigation. Anyone involved in handling claims and defending the trucking industry must be aware of and familiar with CSA.

The CSA operational model accumulates data from roadside inspections and crashes. The data is then used to evaluate the overall safety performance of the carrier through the SMS. The cornerstone of the SMS is the Behavioral Analysis and Safety Improvement Categories (BASICS), which are used to measure the collected data, determine a CSA score for the motor carrier, and assess appropriate interventions.



The seven categories into which the safety data is divided are as follows:

- Unsafe driving (FMCSR Parts 392 and 397);
- Fatigued driving (hours of service) (FMCSR Parts 392 and 395);
- Driver fitness (FMCSR Parts 383 and 391);
- Controlled substances/alcohol (FMCSR Parts 382 and 392);
- Vehicle maintenance (FMCSR Parts 393 and 396);
- Cargo-related (FMCSR Parts 392, 393, 397 and HM violations); and
- Crash indicator – a motor carrier's history or pattern of high crash involvement, including frequency and severity, based on information from state reported crashes.

The overall purpose of the SMS is to allow the FMCSA to evaluate more effectively the safety performance of the motor carrier and determine what interventions are most useful to improve the safety performance of the carrier.[3] To quantify the safety performance of the carrier, the CSA uses the number of adverse safety events within the particular BASIC and the severity of a FMSCA violation or crash within each BASIC - scored between 1 and 10 – to achieve a score within each BASIC. These scores are then normalized by weighting the more recent events more heavily. An event within the last six months is given a time weight of 3 and an event over 12 months is weighted with 1. Once a carrier receives a measured score, the carrier is placed in a peer group based upon other carriers with a similar number of inspections, and that carrier then receives a percentile ranking depending upon the measurements of the other carriers in its peer group. A percentile ranking of 100 indicates the worst performance.

Through this safety evaluation, the FMCSA can identify more easily those carriers requiring intervention, but also determine the carriers that should be deemed "unfit" to operate pursuant to a regulatory process called Safety Fitness Determination (SFD). The purpose of SFD is to identify specific safety problems, analyze and evaluate why the safety problems are occurring, recommend remedies, encourage corrective actions and, where corrective action is inadequate, invoke strong penalties. The intervention component of the CSA offers an expanded range of tools ranging from warning letters to on site comprehensive investigations. While the goal of highway safety is unquestioned[4], and this operational model is a useful tool for promoting highway safety, evidence shows that CSA-based data has begun to surface in trucking litigation – an unintentional side effect of the program. A quick Google search utilizing CSA triggers a number of blogs and website publications from plaintiffs' attorneys promoting the accumulation of and use of CSA data in trucking litigation.

Because the CSA is in its infancy, only one court decision was located where the admissibility of the evidence was discussed. In *McLane v. Rich Transport, Inc.*[5], the United States District Court held that Plaintiff's expert "may testify about Rich Transport's [CSA] Score and its on-road performance overview percentile at the time of the collision." Unfortunately, the opinion

provided no analysis and offers no guidance with respect to arguments against the inadmissibility of this evidence. However, more likely than not, the CSA evidence, or at least some portion of it, will be admissible.

Consequently, in order to defend effectively and ultimately resolve a claim arising against a commercial vehicle regulated by the FMCSA, it is imperative to be proactive in obtaining CSA data, and to understand its potential impact on litigation. The data is obtainable via an online search, http://ai.fmcsa.dot.gov/sms/ or a Federal Freedom of Information Act request. Once the data from the CSA is obtained and the underlying violations and crash data are understood, the challenge to its admissibility and effectiveness before a jury can begin.

Some of the issues to challenge are as follows:

• Do the allegations in the complaint match the evidence related to the CSA?
• What are the specific violations leading to the BASIC score? For example, are the violations related to unsafe driving due to reckless driving, improper passing or failing to use a seat belt, or having an unauthorized passenger on board? The foundation of the score must be examined and challenged.
• Similarly, the CSA subjectively assigned a severity weight to certain violations[6] and thus, the foundation of the score must be examined. The actual score is not necessarily probative and relevant to the issues in the litigation.
• The CSA includes all reportable accidents, and thus the CSA rating may be skewed as it incorporates all crashes, including those caused solely by a third party.

The CSA devised a comprehensive and complex system to improve safety on the nation's highways, but potentially provides a wealth of information for plaintiff's counsel prosecuting a cause of action against a motor carrier subject to the FMCSA. The use of CSA information in litigation is highly suspect -- and highly prejudicial -- if not understood and/or improperly admitted. Time must be taken to not only gather the data but to also understand its methodology and be prepared to argue against its use in Court, or properly explain its meaning to the jury.

Resources

1. The Official Blog of Ray LaHood, the U.S. Secretary of Transportation, January 5, 2011.
2. Id.
3. This analysis does not provide a comprehensive review of the SMS, but is illustrated for purposes of discussing the admissibility issues.
4. The American Transportation Research Institute evaluated the relationship of scores to crash risk through a study published in October of 2012. ATRI overall supports the CSA in its efforts to reduce crash risk and its study validated that portions of the CSA are working and provided recommendations for other areas.
5. 2012 WL 3996832 (E.D. Ark)
6. Carrier Safety Measurement System Methodology utilized by the CSA: http://csa.fmcsa.dot.gov/Documents/SMSMethodology.pdf

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Firm News & Notes

2013 NEW PARTNERS ELECTED

Carlock Copeland congratulates **John Bunyan** and **Jason Hammer** on being selected to join the Firm's partnership.

JONES NAMED GENERAL COUNSEL

Carlock, Copeland & Stair congratulates **William Jones** on being selected to serve as the Firm's General Counsel.

As General Counsel, Bill will be responsible for the overall management of legal concerns and services for the firm. Specifically, he has primary responsibility for management of the firm's professional liability processes and risk management and will advise the firm on a wide variety of issues.

CARLOCK, COPELAND & STAIR WELCOMES NEW ATTORNEYS TO ATLANTA OFFICES

We are please to announce that we have added several new attorneys to the firm.

Allison Faust has joined the Atlanta office as an Associate, where she focuses her practice on representing employers and insurers in workers' compensation matters. With more than eight years of experience representing insurance companies and their insureds, Allison has successfully tried and appealed numerous workers' compensation cases.

Carrie Steifel has also joined the Worker's Compensation team in the Atlanta Office as an Associate. Carrie most recently practiced at a Plantiff's firm where she represented clients in Personal Injury, Worker's Compensation, and Social Security Disability cases. Carrie received her J.D. from the Florida Coastal School of Law in Jacksonville, Florida. She received her Bachelor of Arts in Communications from Valdosta State University.

Tyler Wetzel has joined the Commercial Litigation team in the Atlanta Office as an Associate. Before coming to Carlock Copeland, Tyler was a staff attorney for the U.S. Court of Appeals for the Eleventh Circuit in Atlanta. He received his J.D. from the Washington University School of Law, and his Bachelor of Arts in History from Macalester College in St. Paul, Minnesota.

Jefferson Starr has joined the General Liability team in the Atlanta Office as an Associate. Before coming to Carlock Copeland, Jeff worked as an associate for another firm, focusing on a variety of cases for municipalities and other clients. He received his J.D. from the University of Georgia School of Law, and his Bachelor of Business Administration in Finance also from the University of Georgia.

We're in this to win.

Judgment Entered in Favor of General Contractor and Trial Avoided in High Profile $16M Construction Case

Mike Ethridge and Katie Sullivan represented a nationally prominent developer and builder of apartment buildings in a case related to alleged construction defects brought by a class of homeowners after the apartments were converted to condominiums. The homeowners (along with the Convertor and the Property Owners Association) sued Mike and Katie's client for construction defects allegedly totaling over $16M.

Mike and Katie filed a motion for summary judgment arguing that there is no duty that flows from a builder of commercial income generating apartments to a downstream condominium purchaser. The case (which was projected to take from two to three weeks to try) had been specially set for trial for a full year. It involved numerous parties and had spawned several ancillary declaratory judgment actions relating to coverage.

Mike and Katie argued the motion for summary judgment a month before trial was set to begin. On the eve of trial, the judge granted the motion for summary judgment and dismissed all claims against their client. Depending on the appeal, this ruling could have far-reaching implications for cases involving actions against apartment builders when their apartments are later converted to condominiums.

Negligence Case Results in Mere Two Percent of Plaintiff's Original $900,000 Demand

Dan McGrew and Neil Edwards defended a case of negligence filed against a regional building maintenance and operations service provider. Plaintiff claimed that an improperly secured ladder fell and struck her, thereby causing significant shoulder injuries.

Plaintiff's counsel argued and presented evidence to the jury that Plaintiff was permanently disabled, unable to work, and had undergone three painful surgeries as a result of the accident. Further, Plaintiff argued that this was a case of clear liability because the ladder was placed near a doorway and should have been placed on the ground while it was unattended. Dan and Neil presented evidence that the incident was nothing more than an "unanticipated, unforeseeable accident" and asked the jury to find in favor of the Defendants. As an alternative, they requested a damage award related only to an AC Joint Sprain and inflammation that resolved within a year of the accident. Finally, Defense argued that the evidence showed that Plaintiff's rotator cuff tear and extensive subsequent medical treatment was not related to the subject accident.

Plaintiff's lowest pre-trial demand was $900,000; halfway through the trial the Plaintiff lowered demand to $550,000. However, the jury deliberated for approximately eight hours and reached a verdict for the Plaintiff in the amount of only $17,000.

Defense Prevails in $10M Paralysis Claim

Dan McGrew and Christina Wall secured a defense verdict for their clients in a medical malpractice action. Plaintiff sustained an injury to his back after flipping over a riding lawn mower, such that it landed on him. While in the hospital following the accident, he experienced numbness and a loss of sensation in his legs and, ultimately, became paralyzed. Plaintiff claimed this was the result of improper treatment, but we were able to show that the change in condition was the result of a medical event unrelated to treatment. Plaintiff sought $10M at trial. However, the jury returned with a defense verdict in just under an hour.

Motion to Dismiss Granted in Trip and Fall Incident

Heather Miller and Ana Calleja recently secured a dismissal with prejudice and an award for attorneys' fees on behalf of a shopping center and a parking contractor. Plaintiff alleged that both the shopping center and the parking contractor were negligent following a trip and fall incident involving a minor. After Plaintiff failed to cooperate in discovery, Heather and Ana filed a motion to dismiss and argued that a dismissal with prejudice was the appropriate sanction. The Court agreed and found that Plaintiff's repeated failure to cooperate was willful and caused unnecessary delay. The Court granted the motion to dismiss with prejudice and also granted the requested amount of attorney's fees for both clients.

Successful Appeal Finds No Duty on Behalf of Insurer to Defend or Indemnify in Underlying Construction Case

Mike Ethridge and Katie Sullivan appealed a summary judgment in favor of an insured and against Carlock Copeland's client, an insurance company. The Defendant had denied coverage for a claim arising from the insured's construction of a horse barn. Mike and Katie contended that the claim was essentially one for defective work, and as such there was no coverage available. The insured filed a declaratory judgment action against the client alleging that they had

wrongfully denied defending and indemnifying the insured in the underlying lawsuit. Mike and Katie filed cross motions for summary judgment. The trial court granted the insured's motion and found that the Defendant did have a duty to defend the insured in the underlying case, and had failed to fulfill its contractual obligations to the insured. Therefore the insured was entitled to collect costs and attorney's fees from the client. Mike and Katie appealed the trial court's finding. The Court of Appeals agreed and ruled that the "Your Work" exclusion applied to preclude coverage, and there was no duty to defend. The decision also included discussion regarding what constitutes an "occurrence" and what constitutes "property damage" in CGL policies for general contractors—topics of significant interest in South Carolina insurance and construction law.

Court of Appeals Affirms Dismissal of Developer's Claims

Developer's claims arose from a failed multi-million dollar sale. The Court of Appeals decision affirmed that the alleged tortious interference was instead protected speech. The Court also held that a confidentiality agreement plaintiffs sought to rely on could not be enforced by third parties. In addition, the court held that the statements made were privileged.

The plaintiff LLC had as investors some politically powerful local residents who won a verdict of $1.8M dollars on the same facts against the City of Suwanee. Joe Hoffman, Bill Jones, and Joe Kingma developed the legal theories, and drafted and argued the winning motion.

Summary Judgment for Litigation Firm Accused of FDCPA Violations

John Bunyan and Shannon Sprinkle won summary judgment on behalf of their client, a well known litigation firm specializing in lender services. The firm had been accused of Fair Debt Collection Practices Act (FDCPA) violations. The District Court rejected Plaintiff's claims that the law firm had proceeded with a foreclosure before its client had a proper security interest.

The other claims in Plaintiff's Complaint had been dismissed in an earlier motion filed by John and Shannon, and that ruling was upheld by the Eleventh Circuit.

Publications & Presentations

Carlock Copeland attorneys frequently write and present on topics and trends for a variety of clients, organizations and publications. To request a presentation or article for your organization, contact Director of Marketing, Michelle Fry, at 404.221.2268 or mfry@carlockcopeland.com

- Charleston's Doug Mackelcan spoke on **"Ethical Dilemmas in Disability Insurance Cases"** while Charlie McDaniel, Erica Parsons and Jason Hammer presented **"Litigating the Uninsured & Underinsured Motorist Claim"** at a December National Business Institute seminar.

- Tom Cox was interviewed by Maura Watz for **GPB's Southern Education Desk article and radio special, "Ga. Charter Supporters, Foes Clash Over Need For Constitutional Amendment."** He was also featured in **The Daily Report** and the **Atlanta Journal-Constitution**.

- Michele Jones presented on **risk management issues** at The Adaptable Lawyer seminar in Mobile, Alabama. Topics included keeping clients informed, handling mistakes, conflicts of interest, deciding whether to represent a client, engagement agreements, and closing letters.

Pete Werdesheim also presented, alongside Theresa Garthwaite of CNA, providing **a defense and insurer perspective on topics**.

- Lee Weatherly and Kristen Kelley presented **"Tips on Handling South Carolina Claims"** to in-house claims adjusters in Macon, GA. The presentation included: (1) How to Avoid Default Judgments; (2) Attacking Excessive Medical Specials; and (3) Social Media: A Powerful Tool.

- Joe Kingma gave an **in-house risk management** presentation to partners at FordHarrison, a labor and employment firm with 24 offices from Los Angeles to Boston to Miami.

- Eric Frisch presented on **the current state of the law of apportionment in Georgia** at the annual Medical Malpractice Liability Institute in November.

CARLOCK COPELAND
CIVIL LITIGATION

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At a glance...

Defense Prevails in $10M Paralysis Claim
Dan McGrew and Christina Wall secured a defense verdict for their clients in this medical malpractice action. Plaintiff sustained an injury to his back after flipping over a riding lawn mower.
More on page 10.

Tom Cox Featured on Georgia Public Broadcasting
Tom Cox was interviewed and provided legal insight on the hot topic of Georgia's charter school constitutional amendment for GPB. He was also featured in The Daily Report and the Atlanta Journal-Constitution.
More on page 11.

Carlock, Copeland & Stair Introduces Formal Appellate Practice Group
Led by Attorney John Bunyan, the group was formed to highlight the unique services and skills of the Firm's successfull appellate team.
More on page 7.