swift/currie

Playing to Win!

November 9, 2018

Cobb Energy Performing Arts Centre

Based on more than 50 years of representing clients in Georgia, Alabama and throughout the country, Swift, Currie, McGhee & Hiers, LLP, has evolved into a law firm capable of handling all areas of civil law and litigation. With more than 140 attorneys, Swift Currie possesses the resources and abilities to tackle the most complex legal problems, while at the same time providing our clients with individualized, prompt and cost-effective service. Our law firm has a wealth of experience across numerous practice areas, and our depth of legal talent allows us to tailor such strengths to individual cases. Our firm's philosophy is to provide our clients with creative, aggressive and professional representation of their interests. We also strive to conduct ourselves in a manner consistent with the legacy of our four founding partners. No matter the issue in dispute, Swift Currie has attorneys ready to assist you. We believe we have a well-deserved reputation for high-quality legal services and dedicated attorneys. Finding creative solutions to complex problems — that is our commitment to our clients.

Seminar Agenda

Friday, November 9, 2018

9:00 a.m. – 9:15 a.m.	**Welcome and Announcements** *Mark T. Dietrichs*
9:15 a.m. – 9:40 a.m.	**ALI Restatement: A Torpedo to the Insurance *Battleship*** *F. Lane Finch, Jr. and Brandon J. Clapp*
9:40 a.m. – 10:05 a.m.	***Scene It,* Done That: Property and Coverage Case Updates** *Thomas D. Martin and Kori E. Eskridge*
10:05 a.m. – 10:30 a.m.	***Truth or Consequences*: Surviving a 30(b)(6) Deposition** *K. Martine Cumbermack*
10:30 a.m. – 10:45 a.m.	**Break**
10:45 a.m. – 11:05 a.m.	**Get a *Clue* and Don't Be *Sorry*: Liability Case Updates** *Steven J. DeFrank and Thomas B. Ward*
11:05 a.m. – 11:35 a.m.	***Monopoly*: A Game of Chance with Georgia Jury Verdicts** *Melissa A. Segel and Kelly G. Chartash*
11:35 a.m. – 12:05 p.m.	***Twister* — Effectively Using Biomechanics in Claims Investigations** *Torrence D.J. Welch, Rimkus Consulting Group*
12:05 p.m. – 1:10 p.m.	**Complimentary Lunch**
1:10 p.m. – 1:30 p.m.	**Not So "Trivial Pre-suit" — Finessing the Early Stages of a Trucking Claim** *Michael O. Crawford, IV and Gillian S. Crowl*
1:30 p.m. – 1:50 p.m.	**The Non-Assignability Provision — *Guess Who* Can Assert a Claim, Pursue a Claim and Is Entitled to a Claim** *Jessica M. Phillips*
1:50 p.m. – 2:10 p.m.	**Queen's Gambit and Other Classic Strategies in *Chess* and Claims Investigations** *Rebecca E. Strickland*
2:10 p.m. – 2:30 p.m.	**Avoiding the Triple Word Score — An Overview of Negligent Security Claims** *Marcus L. Dean*
2:30 p.m. – 2:50 p.m.	**Interpreting Additional Insured and Indemnification Clauses — As Confusing as the *Jumanji* Instructions** *Brian C. Richardson*
2:50 p.m. – 3:00 p.m.	**Town Hall Q&A/Seminar Wrap-Up/Door Prizes**

Table of Contents

ALI Restatement: A Torpedo to the Insurance *Battleship*

By F. Lane Finch, Jr. and Brandon J. Clapp

F. Lane Finch, Jr.

Partner

Lane Finch has advised on insurance coverage, defended bad faith claims and litigated first-party and third-party insurance claims in Alabama and California for more than 30 years. He has handled insurance coverage claims involving up to $500 million, as well as class action and other liability claims exceeding $100 million.

Mr. Finch is recognized by Best Lawyers for his insurance law practice. He is currently vice chair of the Defense Research Institute's (DRI) Insurance Law Committee and holds various other leadership positions with DRI.

Mr. Finch has chaired many of DRI's largest insurance seminars over the years and is a frequent speaker at national insurance law conferences. He authored "Automobile Liability Insurance," New Appleman on Insurance Law Library Edition, Chapter 63, as well as numerous other articles on insurance coverage and bad faith.

He was also a visiting professor at Anshan Normal University in Anshan, People's Republic of China, where he taught American business law and intellectual property rights.

Brandon J. Clapp

Associate

Brandon J. Clapp is an associate in the firm's coverage and commercial litigation section. He has experience in a broad variety of litigation matters representing businesses and individuals in insurance coverage, construction, employment, premises liability, products liability, transportation and wrongful death litigation.

Mr. Clapp is admitted to practice law in the state of Alabama and in the U.S. District Court for the Northern, Middle and Southern Districts of Alabama. He attended Hampden-Sydney College in Virginia where he played on the varsity golf team. Mr. Clapp graduated, *cum laude*, with a Bachelor of Arts degree in political science and a minor in public service in 2009. He then attended Cumberland School of Law at Samford University and graduated in 2012. During law school, Mr. Clapp served as the associate chief justice of the Honor Court and received Scholar of Merit Awards in constitutional law and state and local tax law.

ALI Restatement: A Torpedo To The Insurance *Battleship*

Plaintiffs, policyholders and trial courts often look for new ways to sink the insurance carrier's battleship. A new torpedo comes in the form of the Restatement of Liability Insurance, which was adopted at the American Law Institute's (ALI) annual meeting in May 2018. This paper discusses the background of the Restatement of Liability Insurance, the controversial nature of the Restatement, important provisions of the Restatement and measures insurers and the defense bar are taking to ensure the insurance industry's battleship does not sink.

WHAT IS THE RESTATEMENT OF LIABILITY INSURANCE?

The ALI is an independent legal organization in the United States "producing scholarly work to clarify, modernize and otherwise improve the law."[1] The ALI's elected membership consists of judges, lawyers and law professors. Its first project was to develop a restatement of basic legal subjects that "would tell judges and lawyers what the law was."[2] The original ALI Restatement projects included Restatements of the Law of Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts and Trusts.[3]

In 2010, the ALI began the process of drafting a restatement of insurance law and appointed Tom Baker, law school professor at the University of Pennsylvania, as reporter and Kyle Logue, law school professor at the University of Michigan, as associate reporter. The reporters worked with a diverse group of advisers in compiling drafts of the Restatement. However, the reporters and advisers had a definite bias against insurers.

The adopted draft has four chapters covering a range of liability insurance law topics. Chapter 1 addresses basic contract law doctrines that have special application in the insurance-law context: interpretation, waiver, estoppel and misrepresentation. Chapter 2 addresses insurance law doctrines relating to duties of insurers and insureds in the management of potentially insured liability actions: defense, settlement and cooperation. Chapter 3 addresses general principles relating to the risks that are common to most forms of liability insurance, including coverage provisions, conditions and the application of limits, retentions and deductibles. Chapter 4 addresses enforceability and remedies.

Each section of the Restatement contains a "black letter" statement of the governing rule, followed by "comments" and "illustrations" explaining the rule and the reasoning supporting it. Both the black letter and the comments/illustrations are considered the work of the ALI.[4] Each section also includes a reporters' note discussing the authority supporting or opposing the rules stated in the black letter statement of the law and comments. The reporters' notes offer only the reporters' opinions of the law and the reporters' notes are not considered the work of the ALI.[5]

This Restatement applies to all forms of liability insurance, including the liability-insurance-coverage portions of multiline package policies, such as homeowner's insurance and automobile insurance.[6]

WHY DOES THE RESTATEMENT OF LIABILITY INSURANCE MATTER?

The ALI's restatements are frequently cited in court briefs and opinions. One observer noted the United States Supreme Court cites the ALI every few weeks, on average, in its decisions.[7] Attorneys and judges often look to the ALI's restatements as a guide for what the law is in many areas. The restatements are also responsible

1 *See* "About ALI," https://www.ali.org/about-ali/.

2 *Id.*

3 *Id*.

4 Restatement of Liability Insurance: Final Draft No. 2, at p. ix.

5 *Id*.

6 *Id.* at § 1 cmt. e.

7 John Fund, *A Powerful Legal Group Changes the Law While Nobody's Looking*, Nat'l Rev. (May 13, 2018).

for many growing legal trends and advancements in the law. For example, the Restatement (Second) of Torts is often credited with responsibility for the adoption of strict liability in products liability law by a majority of jurisdictions.[8] Given the influence of the ALI restatements, the insurance industry, attorneys and the courts should be aware of the provisions set forth in the Restatement of Liability Insurance.

Courts are already citing to the adopted draft of the Restatement. On Aug. 9, 2018, the Delaware Superior Court issued what observers believe to be the first court opinion citing to the Restatement post-adoption.[9] Although the Delaware court ultimately rejected the view of the Restatement because more applicable case law existed, the court noted the persuasive nature of the Restatement.[10] This case serves as a reminder of the Restatement's influence. Additionally, it serves as a reminder the Restatement will often be cited when there is little or no controlling case law on an issue or a party seeks to overturn existing case law in the area of insurance law.

BACKGROUND OF CONTROVERSY CONCERNING ADOPTION OF THE RESTATEMENT

Throughout the drafting process, the insurance industry and other stakeholders voiced concerns the Restatement did not reflect existing insurance law and therefore should not be afforded recognition by courts as an authoritative reference regarding majority rules and principles of insurance law. Additionally, insurers viewed many of the provisions of the Restatement as prejudicial to insurers and inconsistent with a number of established common law rules of insurance.

Since the project's inception, advocates for both insurers and policyholders took issue with the Restatement and its various provisions. These controversies resulted in numerous drafts and revisions of the final product, causing several years of delay in its adoption.

The Restatement of Liability Insurance was approved during the ALI annual meeting held on May 22, 2018. The Restatement will be formally published in late 2018 or early 2019.

EXAMPLES OF CONTROVERSIAL RULES ADOPTED BY THE RESTATEMENT

Sailing Away from Traditional Policy Interpretation Rules

Section 3, one of the most controversial sections of the Restatement, addresses basic principles of insurance policy interpretation. While Section 3 identifies the "plain meaning rule" as the black letter law, the comments and reporters' note propose a departure from the "plain meaning rule" of policy interpretation, in favor of the "contextual approach," which is not the majority rule.[11] Under the "plain meaning rule," courts interpret an insurance policy term on the basis of its plain and ordinary meaning when applied to the facts of the claim at issue in the context of the entire insurance policy.[12] Under the "contextual approach," courts interpret an insurance policy term in light of all of the circumstances surrounding the drafting, negotiation and performance of the insurance policy, even if the policy term is not ambiguous on its face.[13] Undoubtedly, the comments and reporters' note will be cited by policyholders in an effort to obtain coverage when their "expectations" of the meaning of the policy differ from the plain meaning of the policy.

---

8 *See* James A. Henderson & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 Cornell L. Rev. 1512, 1526-28 (1992).

9 Randy Maniloff, *First Court Decision Post-ALI Restatement Adoption,* The ALI Adviser (Aug. 22, 2018); and *Catlin Specialty Ins. Co. v. CBL & Assocs. Props.*, 2018 Del. Super. LEXIS 342 (Del. Super. Ct. Aug. 9, 2018).

10 *Catlin Specialty Ins. Co., 2018 Del. Super LEXIS 342,* at *7.

11 *See gen.* Restatement of Liability Insurance: Final Draft No. 2, § 3.

12 *Id*. at § 3 cmt. a.

13 *Id.*

Addressing ambiguities, Section 4 of the Restatement provides:

> [w]hen an insurance policy term is ambiguous . . . , the term is interpreted against the party that supplied that term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.[14]

Thus, the Restatement's ambiguity rule contains a novel burden-shifting rule to be applied against insurers using an objective reasonableness standard as opposed to subjective standard, which is more consistent with the majority rule.

Of notable concern, the Restatement does not endorse any exception to the *contra proferentum* rule (construing a provision against the drafter) for sophisticated policyholders. Under the Restatement:

> In determining the meaning of an ambiguous term, it is appropriate to consider the difficulty of redrafting the insurance policy to more plainly express the meaning urged by the drafting party, ordinarily the insurer, taking into account that some residual risk of ambiguity is to be expected. The easier it would be for the drafter to state that meaning more plainly, the more likely it is that the other party's proposed meaning is the meaning that a reasonable policyholder would give to the term. Like the presumption in favor of plain meaning, this approach creates an incentive for insurers to draft insurance policy terms that provide clear guidance regarding the scope of the risks insured under their policies. This approach does not apply to language of a term that is legally mandated to appear in an insurance policy, however, because the insurer does not have the option of redrafting such a term.[15]

This is a departure from the case law in most jurisdictions, which affords substantially similar treatment to sophisticated insureds as compared to unsophisticated individuals when addressing policy interpretation.

Targeting Waiver and Estoppel

Sections 5 and 6 of the Restatement address issues relative to waiver and estoppel. Controversially, the comments seek to alter the majority rule that coverage cannot be expanded by waiver or estoppel. Specifically, the comments state:

> In the context of first-party insurance, the general rule is that, although the words or actions of an insurance company representative that take place at the time of contracting (and before an insured loss has occurred) may, under the right circumstances, effect a waiver of a condition or exclusion in the policy no such waiver can occur after the loss has occurred. This rule does not, however, generally apply in the context of liability insurance. Statements or actions of a liability insurer that take place after the loss occurs can provide a basis for waiver. One example is when an insurer waives a ground for contesting coverage by undertaking the defense of a legal action without reserving the right to contest coverage.[16]

Sinking Defenses to Misrepresentations

Sections 7 through 9 address the effect of misrepresentations by an insured in applying for or renewing a liability insurance policy. Section 9, addressing reasonable reliance requirements, is the most controversial of these sections. According to Section 9, a necessary prerequisite to the rescission or denial of a claim on the basis of misrepresentation is materiality. Materiality requires "a reasonable insurer in this insurer's position would not have issued the policy or would have issued the policy only under substantially different terms."[17] This language is concerning because it applies an objective test for insurers and seems to require some discovery on what "a reasonable insurer in this insurer's position" would do. Further, it uses the phrase "substantially different terms," which is not based on any majority rule and subject to wide debate. In an effort to clarify, the illustrations suggest a policy premium difference of $25 is not substantially different, but it does not provide any further guidance.[18]

[14] *Id.* at § 4(2).

[15] *Id.* at § 4 cmt. n.

[16] *Id.* at § 5 cmt. d.

[17] Restatement of Liability Insurance: Final Draft No. 2, § 9(1).

[18] *Id*. at § 9 cmt. c, illus. 1 and 2.

Puzzling an Insurer's Duty to Defend

The Restatement reflects the majority view of the duty to defend:

> An insurer that has issued a liability insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or part on any allegations that, if proved, would be covered by the policy, without regard to the merits of those allegations.[19]

Under the Restatement, a defense must be provided, not only when a potentially covered claim appears from the face of the complaint, but also when such a claim appears based upon "[a]ny additional allegation known to the insurer, not contained in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as an actual or potential basis for all or part of the action."[20] Thus, the Restatement suggests an insurer has a duty to examine extrinsic evidence to determine the duty to defend. However, an insurer cannot use extrinsic evidence as a basis for denial of a defense, with some limited exceptions to this general rule.[21] The rule set forth in the Restatement — while adopted by many jurisdictions — is problematic for insurers because it is unclear what extrinsic evidence an insurer must reasonably obtain to comply therewith.

Altering the Rules of Policy Exclusions

Section 32 governs insurance policy exclusions and defines an "exclusion" as "a term in an insurance policy that identifies a category of claims that are not covered by the policy."[22] Section 32 further provides "[w]hether a term in an insurance policy is an exclusion does not depend on where the term is in the policy or the label associated with the term in the policy."[23] The Restatement also adopts the familiar rule that exclusions are interpreted narrowly and the insurer bears the burden of proving a claim falls within an exclusion.[24] Although these rules seem innocuous and familiar, the illustrations suggest otherwise. For example, it suggests an "occurrence" in a commercial general liability (CGL) policy could operate as an exclusion.[25] This new approach would relieve the insured from the burden of proving an occurrence. Rather, the insurer would have the burden of proving the claim is not an occurrence.

Sinking Recoupment of Noncovered Defense and Indemnity Costs

Section 21 provides the general rule that an insurer cannot recoup defense costs from the insured, even when it is subsequently determined the insurer did not have a duty to defend or pay defense costs, unless otherwise stated in the insurance policy or agreed to by the insured.[26] In this regard, the Restatement may be consistent with some jurisdictions, however commentators note the majority of jurisdictions permit an insurer to recoup defense costs if it is subsequently determined the insurer did not have an obligation to defend.[27] This majority view is more consistent with the Restatement (Third) of Restitution and Unjust Enrichment, which permits recoupment under general contract law and equity principles.[28] Accordingly, Section 21 reflects the aspirational nature of the Restatement, rather than restating the majority rule.

---

19 *Id.* at § 14(1).

20 *Id*. at § 14(2)(b).

21 *Id*. at § 14 cmt. c.

22 *Id*. at § 32(1).

23 Restatement of Liability Insurance: Final Draft No. 2 § 32(2).

24 *Id*. at § 32(3) cmt. e.

25 *Id*. at § 32 cmt. a, illus. 1.

26 *Id*. at § 21.

27 *See, e.g., Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.,* 828 N.E.2d 1092, 1104 (Ill. 2005) ("We choose, however, to follow the ***minority rule*** and refuse to permit an insurer to recover defense costs pursuant to a reservation of rights absent an express provision to that effect in the insurance contract between the parties.")

28 Restatement (Third) of Restitution and Unjust Enrichment § 35(1).

Insurer's Liability for Defense Counsel's Carrier

One of the most controversial provisions of the Restatement, Section 12, calls for an insurer to be held liable for negligent selection and supervision of the defense counsel it hires to represent an insured.[29] Under the Restatement's formulation, an insurer may be liable for any claimed harm caused to its insured by a defense attorney's negligence if the insurer took steps to "override" the lawyer's "independent professional judgment."[30]

The comments to Section 12(1) state:

> [w]hat constitutes negligence in the selection of defense counsel is a fact-specific question that turns on the insurer's efforts to assure that the lawyer has adequate skill and experience in relation to the claim in question, as well as adequate professional liability insurance.[31]

However, there is no existing case law or majority rule to provide support for these comments. Thus, the Restatement purports to transform insurers into *de-facto* professional licensing boards and regulators of attorney malpractice insurance coverage.

"House Rules" for Making Reasonable Settlement Decisions

Section 24 seeks to expand an insurer's duties in the context of settlement decisions by suggesting an insurer has an affirmative duty to make settlement offers and counteroffers under certain circumstances. In general, Section 24 provides rules relating to an insurer's settlement decisions in situations where the insurer controls settlement decisions, but only "if there is a potential for judgment in excess of the policy limits."[32] Section 24 defines "a reasonable settlement decision" as "one that would be made by a reasonable person that bears sole responsibility for the full amount of the potential judgment."[33] The comments suggest an insurer may be held liable for negligent failure to settle by failing to make a settlement offer or counteroffer.[34] This expansion is generally inconsistent with the majority of jurisdictions, which require some additional misconduct on the part of the insurer before a negligent failure to settle claim can be made.

Settling the Game Without the Insurer's Consent

Section 25 provides an insured may unilaterally settle an action without violating its duty to cooperate or other policy restrictions if certain conditions are met. Specifically, it provides:

> When an insurer has reserved the right to contest coverage for a legal action, the insured may settle the action without the insurer's consent and without violating the duty to cooperate or other restrictions on the insured's settlement rights contained in the policy if:
>
> a. The insurer receives all information reasonably necessary to evaluate the legal action and has a reasonable amount of time to do so;
>
> b. The insurer is given a reasonable opportunity to participate, and is kept reasonably informed of developments, in the settlement process;
>
> c. The insured makes a reasonable effort to obtain the insurer's consent or approval of the settlement, including by providing the insurer with a reasonable amount of time to evaluate all the terms of the settlement agreement;
>
> d. The insurer declines to withdraw its reservation of rights after receiving prior notice of the proposed settlement; and
>
> e. The settlement agreed to by the insured is one that a reasonable person who bears the sole financial responsibility for the full amount of the potential covered judgment would make.[35]

29 *Id.* at § 12.

30 *Id.* at § 12(2).

31 *Id.* at § 12 cmt. b.

32 *Id.* at § 24(1).

33 *Id.* at § 24(2).

34 Restatement (Third) of Restitution and Unjust Enrichment § 24 cmt. g.

35 *Id*. at § 25(3).

Many jurisdictions reject this approach by holding that a reservation of rights does not, without some breach, free the insured to settle without the insurer's consent.[36] Further, this rule has the potential to increase litigation among insurers and insureds because of reasonableness standards, which are, in many instances, questions of fact.

"It's a Hit" to the "American Rule"

Notably, the Restatement seeks to depart from the traditional "American rule," which provides each party is responsible for its own attorney's fees, codifying a one-way fee-shifting provision. Specifically, Section 47 provides: "[w]hen the insured substantially prevails in a declaratory judgment action . . . an award of a sum of money to the insured for the reasonable attorneys' fees and other costs incurred in that action" shall be provided.[37] While some states allow an insured to recover the costs of defense when it is determined coverage was improperly denied, the Restatement proposes to shift attorneys' fees in the event a declaratory judgment action or breach of contract action establishes a duty to defend.

HOW ARE INSURERS AND THE DEFENSE BAR BATTLING THE RESTATEMENT?

The insurance industry, lawyers and other thought leaders continue to inform the public, the courts and governmental officials regarding the aspirational nature of the Restatement. Additionally, many stakeholders have asked their states to adopt legislation, regulations or resolutions to specifically reject the Restatement. The state insurance commissioners in Michigan, Idaho and Illinois wrote to the ALI expressing concerns the Restatement goes beyond restating the law and could adversely impact the insurance systems they oversee. In a similar fashion, governors of several states, including South Carolina, Maine, Texas, Iowa, Nebraska and Utah, jointly wrote to the ALI to advocate their concerns about the Restatement. Further, the legislatures in Tennessee[38] and Ohio[39] enacted legislation questioning the rules set forth in the Restatement in those states.

Insurance and defense bar organizations have devoted substantial efforts to raise awareness for their position regarding the adoption of the Restatement and its lack of value as persuasive authority in courts. Many courts, however, are not aware this Restatement is the subject of such debate and not regarded as the faithful report of the majority rules of insurance law like prior Restatements. Thus, these organizations seek to educate the public and the courts regarding the controversial nature of this Restatement in an effort to limit its potential effect.

---

36 *See, e.g., Central Bank v. St. Paul Fire & Marine Ins. Co.*, 929 F.2d 431, 434 (8th Cir. 1991) ("The failure of Central Bank to obtain [the insurer's] consent, by itself, precludes recovery."); *Jones v. Southern Marine & Aviation Underwriters, Inc.*, 888 F.2d 358, 361 (5th Cir. 1989) ("Generally, when an insured makes a settlement without the insurer's previous consent as required by the policy, the insured is not entitled to reimbursement from the insurer because the insured has breached a condition of coverage."); *Continental Cas. Co. v. City of Jacksonville*, 283 F. App'x 686, 692 (11th Cir. 2008) (stating that insured materially breached policy by settling case without insurer's consent as would support release of insurer's obligations under settled law).

37 Restatement (Third) Restitution and Unjust Enrichment § 47 cmt. c.

38 *See* Tennessee H.B. 1977/S.B. 1862.

39 *See* Ohio S.B. 239 § 3901.82 ("The Restatement of the Law, Liability Insurance that approved at the 2018 annual meeting of the [ALI] does not constitute the public policy of this state and is not an appropriate subject of notice.")

Scene It, Done That: Property and Coverage Case Updates

By Thomas D. Martin and Kori E. Eskridge

Thomas D. Martin
Partner

Thomas D. Martin practices civil litigation emphasizing first-party insurance defense. His practice includes arson and fraud insurance defense, where he has extensive experience defending carriers with claims involving homeowners, auto, life, disability and health insurance fraud. His practice also includes insurance coverage defense in the context of both first-party and third-party property losses. He joined Swift Currie in 1987.

A member of the American Bar Association and the State and Federal Bars of Georgia, Mr. Martin has participated as a guest speaker on topics relating to insurance fraud defense and insurance coverage issues. He has also acted as an instructor for insurance industry personnel in courses sponsored by Georgia State University, the American Institute for Chartered Property Casualty Underwriters and the Insurance Institute of America. He is also a member of the Metro and Georgia Associations of Fire Investigators.

Mr. Martin graduated, *summa cum laude*, from the University of Georgia in 1984. He then attended the University of Georgia School of Law where he received his J.D., *cum laude*, in 1987.

Kori E. Eskridge
Associate

Kori E. Eskridge practices primarily in the areas of insurance coverage and commercial litigation.

She received her J.D. from Georgia State University College of Law. While in law school, Ms. Eskridge was a summer associate with Swift Currie and completed a year-long internship in the Fulton County Magistrate Court Landlord/Tenant Program. She served as a graduate research assistant for the Atlanta Center for International Arbitration and Mediation (ACIAM) and the Summer Academy in International Commercial Arbitration and Mediation in Europe. She also was named GSU's team captain for the inaugural CDRC Vienna Mediation and Negotiation Competition in Vienna, Austria.

Prior to law school, Ms. Eskridge graduated from Ball State University's Honors College with a bachelor's degree in public relations and minors in sociology and marketing. She gained valuable experience working in sales and business development before attending law school.

Scene It, Done That: Property and Coverage Case Updates

The last year saw a number of developments in the areas of property and casualty insurance law in Georgia. Some of the more important developments are summarized below.

PROPERTY CASES

Application Misrepresentations

Ronald Lee lived in South Carolina but frequently traveled during the week for his job months at a time.[1] In 2007, Lee traveled between two projects: one in Winder, Georgia and the other in Crestview, Florida.[2] During this time, Lee's childhood friend Constable was facing a significant financial crisis.[3] To help Constable and create a stopover during his travels, Lee purchased Constable's home near Atlanta and allowed Constable's family to remain in the home.[4] When Lee first purchased the home in 2007, he spent enough time there that his mortgage company considered it his primary residence.[5] Later, however, Lee stayed in the Atlanta home for only a few nights a month.[6]

In 2010, Lee's insurance premiums were set to increase due to a claim unrelated to this action.[7] Constable told Lee that he had a friend who was an insurance agent and could assist in obtaining insurance for the home.[8] Because Lee traveled, he asked the agent if Constable could sign his name on an application.[9] The agent agreed.[10] The agent was aware Lee was not residing in the home full time.[11] The application was typed out, consistent with Lee's testimony that he did not personally complete the application.[12] The application indicated Lee occupied the home as his primary residence and Constable and his two children resided in the home as "Rel. to Ins." [13]

In 2012, the property was destroyed by an accidental fire.[14] Constable was killed and one of his children was seriously injured in the fire.[15] Mercury Insurance Company denied Lee's claim for damage to the home and Lee filed a complaint alleging breach of the contract and bad faith.[16] Mercury moved for summary judgment alleging material misrepresentations in the application for coverage that voided the policy.[17] Mercury also alleged the policy did not cover the loss because Lee did not reside in the home.[18] The trial court found in favor of Mercury on all issues including coverage, rescission, breach and bad faith.[19] An appeal followed.[20]

1 *Lee v. Mercury Ins. Co.*, 343 Ga. App. 729, 730, 808 S.E.2d 116, 121 (2017).
2 *Id.* at 729-30.
3 *Id.* at 730.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Lee*, 343 Ga. App. at 730.
8 *Id.*
9 *Id.*
10 *Id*.
11 *Id.*
12 *Id.*
13 *Lee*, 343 Ga. App. at 730.
14 *Id.* at 731.
15 *Id.*
16 *Id*.
17 *Id.*
18 *Id*.
19 *Lee*, 343 Ga. App. at 729-30.
20 *Id.* at 729.

Lee argued the trial court erred in finding the policy did not cover the loss and he should have received summary judgment on coverage for the home.[21] Mercury argued the policy did not cover the home because the dwelling did not qualify as the "residence premises" as defined in the agreement.[22] "Residence premises" was defined by the policy as the "one, two, . . . family dwelling . . . , used principally as a private residence; where you reside and which is shown in the Declarations."[23]

Reversing the trial court, the Court of Appeals held the definition of residence premises was ambiguous because the placement of the semicolon, without more, could lead a person to reasonably understand "residence premises" to mean "[the dwelling] . . . , used principally as a private residence [or] where you reside and which is shown in the declarations."[24] Citing from an earlier decision in *Georgia International Life Insurance Co. v. Bear's Den*,[25] the court ruled "it was not possible to determine . . . whether the conditions to enforceability . . . [were] disjunctive or conjunctive" because neither "and" nor "or" appeared in the provision.[26] As the provision contained neither a conjunctive nor disjunctive connective, it was determined "inherently ambiguous." [27] Therefore, the court reversed the trial court's judgment in favor of Mercury and granted judgment to Lee.[28]

Lee also argued Mercury's rescission was invalid.[29] Mercury argued its uncontradicted affidavit was sufficient to support judgment in its favor.[30] The court took the opportunity to "clarify" a line of cases holding an uncontradicted affidavit from an underwriter could authorize summary judgment under the rescission statute, O.C.G.A. § 33-24-7.[31] The court overruled these cases based upon the whole-court decision in *Case v. RGA Insurance Services.*,[32] in which the court applied the rule "that summary judgment can never issue based upon opinion evidence alone."[33] The court concluded the affidavit of the Mercury underwriter, without more, was mere opinion evidence alone andtherefore insufficient to support an award of summary judgment.[34] Mercury relied solely upon its affidavit and did not include details regarding how the misrepresentation changed the nature, extent or character of its risk.[35] Thus, the court determined a genuine issue of material fact remained regarding whether Mercury asserted in good faith that it would not have issued the policy in the first place or whether it would have charged a higher rate if it had known the true facts regarding the property.[36]

The court also found summary judgment on the basis of rescission was improper because genuine issues of material fact existed regarding agency and estoppel.[37] First, regarding agency, there was some evidence indicating that the agent who completed the application was Lee's agent.[38] However, the court also found evidence indicating the agent may have been a dual agent because he signed his name as a representative of Mercury and was authorized to bind coverage with Mercury.[39] The agent routinely created obligations on Mercury's behalf.[40] As such, the court concluded a genuine issue of fact existed regarding whether Mercury was estopped from voiding the policy based upon its knowledge — actual or imputed from the agent — of the true facts misstated in the application.[41]

---

21 *Id.*

22 *Id.* at 733.

23 *Id.*

24 *Id.* at 734.

25 162 Ga. App. 833, 835, 292 S.E.2d 502, 505 (1982).

26 *Lee,* 343 Ga. App. at 733.

27 *Id.* at 735 (citing *Bear's Den,* 162 Ga. App. at 835.

28 *Lee, 343 Ga. App. at 729.*

29 *Id.*

30 *Id.* at 741.

31 *Id.* at 740.

32 *Case v. RGA Ins. Servs.*, 239 Ga. App. 1, 2-3, 521 S.E.2d 32 (1999).

33 *Lee*, 343 Ga. App. at 740.

34 *Id.* at 741 (citing *Builders Transport v. Hall*, 183 Ga. App. 812, 816, 360 S.E.2d 60 (1987) ("[G]ood faith is always a question for the jury. Even though the party may swear he acted in good faith, the jury may decide he acted in bad faith from consideration of facts and circumstances in the case.") (citations and punctuation omitted, emphasis added)).

35 *Lee, 343* Ga. App. at 744.

36 *Id.*

37 *Id.* at 744-47.

38 *Bowen Tree Surgeons v. Canal Indem. Com.*, 264 Ga. App. 520, 522, 591 S.E.2d 415 (2003).

39 *Lee*, 343 Ga. App. at 744-45.

40 *Id.*

41 *Id.*

Finally, the also found fact questions existed concerning the rescission based Mercury's alleged delay in voiding the policy following discovery of the falsified application.[42] The court held Mercury continued to send form letters indicating its investigation was continuing even after Mercury confirmed the application misrepresentations through Lee's examination under oath.[43] The court concluded genuine issues of fact existed regarding whether Mercury failed to timely rescind the policy once it learned of the application misrepresentations.[44]

Diminution in Value

The plaintiffs in *Thompson v. State Farm* brought a class action lawsuit alleging State Farm refused to assess and pay for diminished value of real property following covered losses under State Farm's homeowner policies.[45] The plaintiffs in *Thompson* suffered water damage in September 2013 when a pipe burst.[46] The plaintiffs asked whether State Farm would pay for diminished value to their townhome. State Farm responded it did not provide such coverage.[47] The Thompsons filed a lawsuit and a class action was later certified representing similarly situated individuals.[48]

State Farm, in its motion for summary judgment, asserted its policies did not cover diminished value because diminished value involved "intangible, economic damages" and State Farm's policies only covered "direct physical loss."[49] Moreover, State Farm alleged it was not obligated to pay diminished value because its policies only required payment of the cost to repair or replace the damaged property.[50]

The district court, however, rejected State Farm's arguments. According to the district court, the issue of whether diminished value was covered as a measure of damages had been decided in 2001 by the Supreme Court of Georgia in *Mabry*.[51] In *Mabry*, as in this case, the policy did not define "loss" with specific detail, including or excluding diminished value. As such, diminished value would be an element of a "loss."[52] The district court ruled State Farm's arguments were, at best, variations on the arguments previously rejected by the Georgia Supreme Court.[53]

After *Mabry* and its successor, *Royal Capital*,[54] State Farm altered its homeowner policies to exclude coverage for diminished value.[55] Beginning on or after Nov. 1, 2013, all new homeowners' policies explicitly excluded coverage for diminished value.[56] However, according to the district court, the endorsement issued by State Farm was not effective for renewal policies because the endorsement, which specifically excluded diminished value coverage, provided less coverage than the existing policy, which implicitly covered diminished value.[57] In such a case, the district court held State Farm was required, by statute, not to renew the policies and issue new ones, rather than simply endorsing existing policies.[58] Absent the nonrenewal, the endorsements were ineffective, effectively returning the renewal policies to their prerenewal state.[59] The district court held, absent the endorsement, State Farm had a duty to assess diminished value, whether or not specifically claimed by the insured.[60] State Farm breached this duty when in failing to assess diminished value.[61]

42 *Id.* at 745.

43 *Id.* at 747.

44 *Id*.

45 *Thompson v. State Farm Fire & Cas. Co.*, 264 F. Supp. 3d 1302, 1306 (M.D. Ga. 2017).

46 *Id.*

47 *Id.* at 1306.

48 *Id.*

49 *Id.* at 1309.

50 *Id*.

51 *Thomas*, 264 F. Supp. 3d at 1309 (citing *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001)).

52 *Id.* The Georgia Supreme Court in *Mabry* held the ruling *Mabry* was not limited by the type of property insured, but rather spoke generally to the measure of damages an insurer is obligated to pay.

53 *Id.* at 1309.

54 *Royal Capital Dev. LLC v. Md. Cas. Co.*, 291 Ga. 262, 728 S.E.2d 234 (2012).

55 *Thompson*, 264 F. Supp. 3d at 1310.

56 *Id.*

57 *Id.* at 1312.

58 *Id.* (citing O.C.G.A. § 33-24-46).

59 *Id.*

60 *Id.* at 1319.

61 *Thompson*, 264 F. Supp. 3d at 1319-20.

Because State Farm breached its duty to assess diminished value, the district court found the plaintiffs were entitled to an assessment, but nothing more.[62] The plaintiffs argued they had a right to monetary damages based upon the cost of an appraisal.[63] The district court rejected the plaintiffs' argument because nothing in *Mabry* established a specific mode or method by which to assess diminished value.[64] Moreover, nothing in *Mabry* created a right to recover monetary damages.[65] Rather, *Mabry* created a duty to assess the loss.[66]

Finally, the district court held there were genuine issues of material fact as to whether State Farm waived the contractual requirement to file suit within one year.[67] According to the district court, a jury might find that State Farm had a "practice and procedure of declining to mention, deny, or reserve its rights as to diminished value."[68] As such, it was necessary for a jury to determine whether State Farm acted to avoid the consequences of *Mabry* and *Royal Capital*, thereby waiving the time limit in the policy.[69] These facts were disputed and, as such, the district court could not say as a matter of law whether State Farm waived the one-year limitation provision.[70]

Possible Waiver of Suit Limitation Period

As in *Thompson,* the district court in *Long v. State Farm* addressed waiver of the suit limitation period in a diminished value case. The plaintiffs in *Long* brought suit alleging State Farm refused to assess and pay the diminished value of their home following a covered loss.[71] State Farm moved to dismiss, arguing the suit was time barred by the policy's one-year limitation period.[72] The plaintiffs moved for leave to file an amended complaint, alleging State Farm waived the one-year limitation by accepting liability on the plaintiffs' real property claims without mentioning or adjusting for diminished value.[73] State Farm argued the amended complaint would be futile because, if amended, the complaint would still be subject to the one-year limit in the policy.[74]

The district court began its evaluation of the motions with a discussion of diminished value coverage.[75] The court noted in *State Farm v. Mabry*, the Supreme Court of Georgia held when the term "loss" was not defined in an automobile policy of insurance, diminished value would be an element of the "loss" and insurers were required to assess the damaged property for purposes of determining diminished value.[76] In *Royal Capital Development, LLC v. Maryland Casualty Co.,* the Supreme Court of Georgia held "loss" could have a similar meaning in policies covering real property.[77]

The plaintiffs argued State Farm waived any time limit in the policy when it paid their property loss without addressing diminished value created by *Mabry* and *Royal Capital*.[78] Specifically, the Longs argued State Farm's policy of remaining silent on the issue of diminished value, unless affirmatively raised by the insured, was calculated to lull the them into believing their claim would be paid in full without the need to bring suit.[79] The Longs alleged in their amended complaint:

> State Farm has an internal policy . . . which requires claims handlers to put an insured on notice if there is a question regarding coverage, which is done through a non-waiver agreement or reservation-of-rights letter. However, State Farm has never entered a non-waiver agreement or sent a reservation-of-rights letter regarding diminished value.[80]

62 *Id.* at 1320.

63 *Id.* Plaintiffs noted that such an appraisal costs approximately $2,500.

64 *Id.* at 1319-20.

65 *Id.* at 1320. The question of the monetary value of the diminution claim was not before the court because any diminution had yet to be assessed.

66 *Id*.

67 *Thompson*, 264 F. Supp. 3d at 1320.

68 *Id.* at 1321.

69 *Id.* (citing *Forsyth Cnty. V. Waterscape Servs., LLC*, 303 Ga. App. 623, 694 S.E.2d 102 (2010)).

70 *Id.* at 1324.

71 *Long v. State Farm Fire & Cas. Co.*, 272 F. Supp. 3d 1344 (M.D. Ga. 2017).

72 *Id.*

73 *Id.* at 1347-48.

74 *Id.* at 1348.

75 *Id.* at 1346.

76 *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001).

77 291 Ga. 262, 728 S.E.2d 234 (2012).

78 *Long*, 272 F. Supp. 3d at 1346.

79 *Id.* at 1348.

80 *Id.*

The district court concluded, if true, State Farm's actions might amount to a waiver of the time limits under the policy.[81] Consequently, the plaintiffs were granted leave to amend their complaint and State Farm's motion to dismiss was denied.[82]

Bad Faith

In April 2011, Tara Thompson's home was damaged when a tree fell during a storm.[83] Repairs not only included Thompson's home, but also included the removal of the trees and other debris resulting from the storm.[84] Homesite insured Thompson's property, including coverage for tree and debris removal.[85] Thompson notified Homesite of the damage and an adjuster completed an estimate.[86] Homesite issued an initial payment of $1,812.33 to Thompson.[87]

Thompson and Homesite disagreed about the cost for debris removal.[88] Thompson made a number of complaints to and about Homesite regarding the handling of her claim, including a formal complaint with the Georgia Insurance Commissioner.[89] Eventually, Homesite requested documents from Thompson substantiating her debris removal claim.[90] Thompson submitted the documentation on June 9, 2011.[91] Homesite issued payment on Oct. 6, 2011.[92] Homesite did not contest the amount submitted by Thompson and did not assert the claims were not covered by Thompson's policy.[93]

Thompson's attorney sent a demand letter on Oct. 12, 2011. In the letter, Thompson demanded reimbursement of her tree and debris removal expenses.[94] In the same letter, Thompson questioned the payment on the home and demanded appraisal.[95] After the appraisal was complete, Homesite issued an additional payment of $47,101.36 representing the appraisal award ($50,713.69) less the amount previously paid to Thompson ($3,612.33).[96] Homesite never made additional payments to Thompson and asserted the umpire's award was comprehensive of all covered losses under the policy including expenses incurred for tree and debris removal.[97]

Thompson brought suit in 2014, stating Homesite unreasonably delayed reimbursement for the tree and debris removal and that it underpaid the umpire's award, creating liability in bad faith.[98] Homesite moved for summary judgment on all issues.[99] The trial court granted Homesite's motion on bad faith but denied the motion on the other defenses.[100] Cross appeals followed.[101]

Regarding bad faith, the issue was whether Thompson made a proper demand under the bad faith statute.[102] Thompson asserted that her communications were sufficient because she complained several times to Homesite and even lodged a complaint with the Department of Insurance.[103] Thompson further alleged the volume of communications should have alerted Homesite she was contemplating a bad faith

81 *Id.* at 1350 (citing *Forsyth Cnty. V. Waterscape Servs., LLC,* 303 Ga. App. 623, 694 S.E.2d 102 (2010)).
82 *Id.* at 1350.
83 *Thompson v. Homesite Ins. Co. of Ga.,* 345 Ga. App. 183, 184, 812 S.E.2d 541, 543 (2018).
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.* at 184.
88 *Id.*
89 *Thompson*, 345 Ga. App. at 184.
90 *Id.*
91 *Id.*
92 *Id*.
93 *Id.* at 185.
94 *Id.*
95 *Thompson*, 345 Ga. App. at 185.
96 *Id.*
97 *Id.*
98 *Id.* at 185-86.
99 *Id.* at 186.
100 O.C.G.A. § 33-4-6(a).
101 *Thompson*, 345 Ga. App. at 186.
102 *Id.* at 186.
103 *Id.* at 187.

claim.[104] The Court of Appeals was not persuaded, however, holding a demand must give the insurer notice it is facing a bad faith claim for a specific refusal to pay.[105] The court reiterated, because O.C.G.A. § 33-4-6(a) imposes a penalty, its requirements are to be strictly construed and a proper demand for payment is essential.[106] The demand must "actually alert the insurer that the insured plans to take legal action for bad faith if the claim is not paid."[107]

Thompson's pre-suit communications with Homesite failed to alert Homesite she planned to bring legal action if her claim was not paid.[108] The only pre-suit communication in which she threatened litigation was the letter sent by her attorney.[109] However, the letter from her attorney pertained only to Homesite's alleged failure to reimburse Thompson for tree and debris removal.[110] Thus, when Homesite paid $1,800 for the full amount of Thompson's tree and debris removal expenses, it satisfied the specific demand by Thompson.[111]

Other Insurance

In *Southern Trust Insurance Co. v. Cravey*, the issue was the extent of liability for contribution as between two carriers on a rent-to-own home.[112] The case arose out of a 2013 house fire in a home that Cravey owned, but did not occupy.[113] The home was no longer Cravey's primary residence and Cravey had entered into a rent-to-own agreement with Kim Clark and Jim Floyd.[114] Under the agreement, Cravey would transfer ownership of the property to Clark and Floyd upon receipt of the full purchase price, $92,500.[115] Until that time, Cravey maintained homeowners insurance through Auto-Owners with a policy limit of $104,000.[116] Cravey instructed Clark and Floyd to obtain renter's insurance.[117] Instead, and unknown to Cravey, Clark and Floyd purchased a homeowner's policy from Southern Trust with a limit of $175,000.[118] Cravey was named in the Southern Trust policy as an additional insured.

After the fire destroyed the home, Cravey submitted a claim with Auto-Owners for which he was paid.[119] Auto-Owners then sought contribution from Southern Trust because Cravey was an "additional insured" on the Southern Trust policy.[120] Southern Trust refused.[121] Auto-Owners, as subrogee of Cravey, initiated litigation against Southern Trust.[122] Cravey and Southern Trust filed cross-motions for summary judgment.[123] The trial court granted the motion filed by Cravey and Auto-Owners. Southern Trust appealed.[124]

On appeal, Southern Trust argued that no valid policy existed with Cravey because Clark and Floyd did not have authority to procure coverage on Cravey's behalf since Cravey never ratified the Southern Trust policy and since Cravey was not a third-party beneficiary under the Southern Trust policy.[125] The Court of Appeals rejected Southern Trust's arguments.

---

104 *Id.*
105 *Id.*
106 *Id.* at 186-87.
107 *Thompson*, 345 Ga. App. at 187 (citing *BayRock Mortg. Corp. v. Chi. Title Inc. Co.*, 286 Ga. App. 18, 19, 648 S.E.2d 433, 435 (2007)).
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 No. A18A0301, 2018 Ga. App. LEXIS 268 (Ct. App. May 14, 2018).
113 *Id.* at *3.
114 *Id.* at *2.
115 *Id.*
116 *Id.*
117 *Id.*
118 *Southern Trust*, No. A18A0301, 2018 Ga. App. LEXIS 268, at *2.
119 *Id.*
120 *Id.* at *3.
121 *Id.*
122 *Id.* at *4.
123 *Id.*
124 *Southern Trust*, No. A18A0301, 2018 Ga. App. LEXIS 268, at *4.
125 *Id*.

First, the court concluded the policy clearly was intended to benefit Cravey because Cravey was specifically named in the Southern Trust policy.[126] As such, Cravey had standing to bring suit under the policy.[127] Because Cravey was named as an additional insured, the question of whether Clark had actual or apparent authority to obtain a policy on Cravey's behalf was irrelevant.[128]

Given Cravey's status under the Southern Trust policy, the court found the doctrine of contribution applied.[129] According to the Court, the doctrine of contribution between co-insurers:

> is based upon the ground that where several policies in different officers insure the same party upon the same subject-matter against the same risk, as there can be but one loss and one indemnity, the several offices, as between themselves, must contribute proportional to the loss, though each is liable to the insured for the entire loss, unless there is a special agreement that each shall be liable only for its proportional part.[130]

Both policies insured the same residence against the same loss and both listed Cravey as an insured.[131] Additionally, both policies included nearly identical "other insurance" clauses requiring pro-rata contribution.[132] As such, Auto-Owners was entitled to contribution from Southern Trust.[133]

CASUALTY CASES

Late Notice

The plaintiff brokered a policy of commercial property insurance for Ellen and Joseph Brooks with Hanover Insurance (Hanover).[134] In March 2012, the Brooks' property was vandalized and Mr. and Mrs. Brooks reported the vandalism to the plaintiff.[135] The plaintiff, in turn, submitted a claim on the Brooks' behalf with Hanover, which Hanover subsequently denied.[136] On June 22, 2015, the plaintiff received a demand letter from the Brooks' attorney asserting the plaintiff was negligent in not transmitting a copy of the Hanover policy to the Brooks or otherwise making them aware of a fencing requirement in the Hanover policy (that was the basis for the Hanover denial).[137] Employees in the plaintiff's mailroom misunderstood the nature of the demand letter.[138] The mailroom staff mistook the letter as a demand against Hanover, rather than a demand against the plaintiff and forwarded the letter to Hanover.[139]

On Aug. 5, 2015, the Brooks filed suit against the plaintiff and Hanover, alleging, among other things, the plaintiff breached its duty to transmit the Hanover policy to the Brooks or inform them of the fencing condition in their policy.[140] The plaintiff stated it was not aware of the lawsuit until Aug. 31, 2015, when an attorney notified the plaintiff's chief financial officer about the lawsuit.[141] Once aware of the lawsuit, the plaintiff submitted a claim with its commercial general liability insurer, Republic-Franklin Insurance Company (Republic).[142] Republic denied the claim for failure to promptly notify it of the Brooks' demand letter.[143]

---

126 *Id.; see also Hicks v. Continental Ins. Co.*, 146 Ga. App. 124, 125 (1978) (stating a party entitled to be an insured or additional insured under an automobile policy is a third-party beneficiary).

127 *Id.* at *2. The Southern Trust policy was cancelled before the fire as to Clark and Floyd but no cancellation was sent to Cravey.

128 *Southern Trust*, No. A18A0301, 2018 Ga. App. LEXIS 268.

129 *Id. (*citing *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 11 31 S.E. 779 (1891)).

130 *Fireman's Fund*, 106 Ga. at 11. *See also* COUCH ON INSURANCE § 218:3 (3d ed. 2017) ("in the context of multiple concurrent insurance, contribution is only appropriate where the policies insure the same entities, the same interests in the same property, and the same risks.").

131 *Southern Trust,* No. A18A0301, 2018 Ga. App. LEXIS 268 (Ct. App. May 14, 2018).

132 *Id.* at *7.

133 *Id.*

134 *Johnson & Bryan, Inc. v. Republic-Franklin Ins. Co.*, No. 1:17-CV-02609-LMM, 2017 U.S. Dist. LEXIS 217651 (N.D. Ga. Nov. 20, 2017).

135 *Id.* at *1-2.

136 *Id.* at *2.

137 *Id.*

138 *Id.* at *2.

139 *Id.* at *2-3.

140 *Johnson & Bryan*, No. 1:17-CV-02609-LMM, 2017 U.S. Dist. LEXIS 217651, at *3.

141 *Id.*

142 *Id.*

143 *Id.*

The plaintiff hired its own attorney to defend the Brooks' lawsuit and incurred direct costs of about $278,000 to defend and settle the case.[144] The plaintiff then brought suit against Republic alleging breach of contract, negligence and bad faith.[145] Republic moved to dismiss the plaintiff's lawsuit.[146] At issue was whether the plaintiff provided "immediate" notice in compliance with terms of the Republic policy.[147]

Republic argued the plaintiff's claims were precluded by the plain language of the policy requiring the plaintiff to "[i]mmediately send us copies of any demands . . . received in connection with the 'claim' or 'suit.'"[148] The plaintiff did not dispute that notice was a valid condition precedent to coverage.[149] Instead, the parties disputed the meaning of the term "immediate."[150] The plaintiff argued there was a question of fact concerning whether it provided "immediate" notice to Republic.[151] Republic offered examples in the law where "immediately" was interpreted to mean "quickly" or "presently."[152]

The district court, however, relied upon an interpretation of the word "immediate" from a 2007 Court of Appeals decision where the language in the applicable policy was identical to the language in the Republic policy.[153] In *Advocate Networks*, the Court of Appeals held the term "immediately" meant "with reasonable diligence and within a reasonable length of time in view of attending circumstance of each particular case."[154] Relying upon this decision, the district court held it was obligated to examine the reasons provided by the insured for the delay to determine whether the insured was in compliance with the notice provision.[155]

The district court then examined whether the plaintiff acted with reasonable diligence in failing to remit the demand letter to Republic for 72 days.[156] The plaintiff argued the 72-day delay was reasonable because the letter was vague, which caused its mailroom employees to mistakenly route the letter to Hanover.[157] Republic argued that the law required "more than just ignorance, or even misplaced confidence, to avoid the terms of a valid contract."[158] Republic argued a vague letter was insufficient to create a fact issue for the jury.[159]

The district court agreed with Republic, finding a vague letter and an alleged clerical error by mailroom employees were not sufficient to create an issue of material fact for a jury to decide.[160] Additionally, the district court was not persuaded by the fact the plaintiff's higher-level employees did not know about the letter and it was outside the scope of the mailroom employees' job duties to handle an E&O demand or forward such letters to Republic.[161] Allowing such exceptions to policy notice obligations would undermine the *Advocate Networks'* position that reasonable diligence was required.[162] The district court therefore concluded the plaintiff did not allege any reasonable excuse as a matter of law and, as a result, granted Republic's motion to dismiss.[163]

144 *Id.* at *3-4.

145 *Id.* at *4.

146 *Johnson & Bryan*, No. 1:17-CV-02609-LMM, 2017 U.S. Dist. LEXIS 217651, at *4.

147 *Id.* at *6.

148 *Id.*

149 *Id.* at *6.

150 *Id.*

151 *Id.* at *6.

152 *Id.* at *7 (citing *Liberty Mutual Insurance Co. v. Blackshear*, 197 Ga. 334, 28 S.E.2d 860 (Ga. 1944) (considering whether a hernia occurred "immediately" following an accident and could therefore rightly be covered by workers' compensation).

153 *Advocate Networks, LLC v. Hartford Fire Ins. Co.*, 296 Ga. App. 338, 674 S.E.2d 617, 618-19 (2009). The notice requirement in both the Advocate Networks' case and this contained identical language.

154 *Id.*

155 *Id.*

156 *Johnson & Bryan*, No. 1:17-CV-02609-LMM, 2017 U.S. Dist. LEXIS 217651, at *8.

157 *Id.* at *9.

158 *Id.* (quoting *Protective Ins. Co. v. Johnson*, 256 Ga. 713, 352 S.E.2d 760, 761 (Ga. 1987)).

159 *Johnson & Bryan*, No. 1:17-CV-02609-LMM, 2017 U.S. Dist. LEXIS 217651, at *9-10.

160 *Id.* at *11.

161 *Id.*

162 *Id.*

163 *Johnson & Bryan*, No. 1:17-CV-02609-LMM, 2017 U.S. Dist. LEXIS 217651, at *11.

Injury-to-Worker Exclusion

In *Tyson v. Scottsdale Indemnity Co.*, Tyson worked occasionally for Hank Rowe d.b.a. Shellmar Tree Service (Shellmar).[164] In September 2014, Tyson traveled to Sea Island with Shellmar to remove several trees and debris from a residential construction site.[165] Tyson was standing a safe distance from the tree cutting, talking on his phone, when he was struck in the neck by a large tree limb.[166] Tyson became quadriplegic as a result of the accident.[167]

Shellmar's general commercial liability insurer was Scottsdale Indemnity Company (Scottsdale). After the incident, Tyson submitted a claim with Scottsdale.[168] Scottsdale denied the claim under the injury-to-worker exclusion of the Scottsdale policy.[169] The provision excluded liability for injuries to "[a]ny contractor, subcontractor, sub-subcontractor or anyone hired or retained by or for any insured" if the injury "arises out of and in the course of their employment or retention."[170] Following the denial, Tyson filed suit against Rowe for negligence, strict liability and loss of consortium.[171] Rowe responded by filing a third-party complaint against Scottsdale on the grounds Scottsdale improperly denied Tyson's claim.[172] Scottsdale moved for summary judgment, which the trial court granted.[173] Tyson and Rowe appealed to the Court of Appeals.[174]

On appeal, Tyson and Rowe asserted the injury-to-worker exclusion did not apply because Tyson was not an employee of Shellmar and not engaged in any work-related task at the time of the accident.[175] Rather, Tyson was standing some distance from the jobsite speaking on his phone.[176]

The Court of Appeals disagreed, however, finding the exclusion plainly applied to Tyson as a person "hired or retained" by Shellmar for an incident that arose "out of and in the course of [his] employment."[177] The court noted it could rely upon workers' compensation cases to construe the terms "in the course of" and "arising out of" employment.[178] Although Tyson was on his phone and on break at the time of the incident, under workers' compensation law, injury during working hours and on the employer's premises presumptively would be considered "arising out of and in the course of employment."[179]

The court, moreover, distinguished the exception for injuries occurring during a regularly scheduled lunch break or rest break.[180] Though Tyson was on a break, there was no evidence the break was regularly scheduled or Tyson was free do what he wanted during the break.[181] Tyson was injured in the yard where he and others were working during working hours and while he was waiting to complete his clean-up duties.[182] Thus, Tyson's injuries occurred "in the course of his employment or retention."[183]

The court rejected Tyson's argument he was not an employee as he did not receive a 1099 tax form, did not have any withholding from his pay, was regularly paid in cash and was never provided with any tax documents.[184] Instead, the court held that evidence regarding how Tyson was paid or what was withheld

164 *Tyson v. Scottsdale Indem. Co.*, 343 Ga. App. 370, 371, 805 S.E.2d 138, 139 (2017).
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.*
170 *Tyson,* 343 Ga. App. at 372.
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.*
176 *Tyson*, 343 Ga. App. at 372.
177 *Id.* at 372-73 (relying on *Royal v. Ga. Farm Bureau Mut. Ins. Co.*, 333 Ga. App. 881, 882, 777 S.E.2d 713 (2015) (stating that "in construing an insurance policy, we begin, as with any contract, with the text of the contract itself")).
178 *Tyson,* 343 Ga. App. at 373.
179 *Id.*
180 *Id*.
181 *Id*.
182 *Id.* at 374.
183 *Id.*
184 *Tyson*, 343 Ga. App. at 374.

typically would not be dispositive of Tyson's employment status,[185] but in any case was immaterial because Tyson's injuries "arose out of and in the course of" Tyson's retention with Shellmar.[186]

The court also rejected Rowe's contention the policy exclusion was unenforceable because the policy was not given to him.[187] Even if Rowe never received a copy of the policy, he still was bound by the exclusion because the policy was delivered to his agent.[188] Rowe was chargeable with knowledge of the contents of his policy[189] even if he did not have physical possession of it.[190] Also, Rowe could not justifiably rely upon the agent's alleged misrepresentations about coverage for injuries to Tyson or other Shellmar employees[191] given the agent was Rowe's agent and there was no evidence indicating that Scottsdale held out the agent as its own.[192] This decision is in line with Georgia law establishing the Workers' Compensation Act as the exclusive remedy for injuries arising out of and in the course of employment.[193]

Pollution Exclusion — Storm Water

In a *per curiam* decision from the Eleventh Circuit, the court in *Centro Development Corp. v. Central Mutual Inurance. Co*[194] found storm water qualified as a pollutant, affirming a previously unpublished opinion from the same court.[195] Centro filed suit against its insurer, Central Mutual, for a defense from a lawsuit brought against it for damage resulting from storm water runoff.[196] Central Mutual denied the claim under the pollution exclusion after which Centro filed suit alleging Central Mutual wrongly denied coverage.[197] The district court dismissed the complaint, finding the pollution exclusion was unambiguous and applied to storm water.[198]

On appeal, Centro argued storm water, uncontaminated, could not be considered a pollutant.[199] Under Georgia law, "[a]n insurer's duty to defend turns on the language of the insurance contact."[200] The policy at issue defined pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, soot, fumes, acids, alkalis, chemicals and waste."[201] The Eleventh Circuit affirmed the district court ruling storm water unambiguously satisfied the definition of pollutant regardless of whether storm water was explicitly named in the policy.[202] Additionally, the court noted its holding was supported by previous decisions under the Clean Water Act, in which the court held "when rain water flows from a site where land disturbing activities have been conducted, such as grading and clearing," it qualifies as a pollutant.[203] The court also noted the underlying suit brought against Centro did not contain allegations pertaining to the uncontaminated storm water.[204]

Pollution Exclusion — Noxious Odors

Homeowners near a stinky holding pond, maintained by Recyc Systems Southeast, LLC (Recyc), sued Recyc in Alabama state court, alleging the company was liable for property damage caused by the noxious odors coming from the pond.[205] Specifically, the homeowners claimed Recyc allowed the odors to "emanate from

185 *Id. (*citing *Royal v. Ga. Farm Bureau Mut. Ins. Co.,* 333 Ga. App. 881, 883, 777 S.E. 2d 713, 714 (2015)).

186 *Id*.

187 *Id.*

188 *Id.* at 374 (citing *Gustafson v. Cotton States Mut. Ins. Co.,* 230 G.a app. 310, 496 S.E.2d 346 (1998) and O.C.G.A. § 10-6-58).

189 *Id*. (citing *Southeastern Security Ins. Co. v. Empire Banking Co.,* 230 Ga. App. 755, 756, 398 S.E.2d 718 (1990)).

190 *Id.*

191 *Id*. 375.

192 *Id.*

193 O.C.G.A. § 34-9-11 establishes the rights and remedies under the Workers' Compensation Act shall exclude all other rights and remedies at common law.

194 *Centro Dev. Corp. v. Cent. Mut. Ins. Co.*, 720 F. App'x 1004 (11th Cir. 2018).

195 *Id.* at 1005 (citing *Owners Ins. Co. v. Lake Hills Home Owners Ass'n, Inc.,* 57 F. App'x 415 (11th Cir. 2002)).

196 *Id.* at 1004, n.1.

197 *Id.*

198 *Id.*

199 *Id.* at n.1.

200 *Centro Dev. Corp.*, 720 F. App'x at n.1 (citing *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, 231 Ga. App. 206, 498 S.E.2d 782, 784 (1998).

201 *Id.* at 1005.

202 *Id.; see Ga. Farm Bureau Mut. Ins. Co. v. Smith,* 298 Ga. 716, 720, 784 S.E.2d 422 (2016).

203 *Id. (*citing *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1525 n.1 (11th Cir. 1996).

204 *Id.*, 1004, n.1.

205 *Recyc Sys. Se., LLC v. Farmland Mut. Ins. Co.*, No. 4:17-CV-225 (CDL), 2018 U.S. Dist. LEXIS 82248 (M.D. Ga. May 16, 2018).

the waste pond and travel" onto their property, thus interfering with their use and enjoyment of the property.[206] Recyc asked its insurer, Farmland Mutual (Farmland), to defend and indemnify Recyc in the Alabama lawsuit.[207] Farmland refused coverage under the pollution exclusion in the policy, after which Recyc sued Farmland in Georgia for breach of contract.[208]

The pollution exclusion in the policy stated no coverage would be afforded to "property damages arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'"[209] The policy defined "pollutants" as "[a]ny organic or inorganic substance or material that is a solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to: smoke, vapor, soot, dust, fumes, acids, alkalis, chemicals, fibers particles, sludge, by-products, biofuels, herbicides, pesticides, insecticides, fertilizers, and all other similar chemicals, and waste."[210] The policy further stated the pollution exclusion applied "even if the 'pollutants' have a function in the [insured's] business, operations, premises, site or location."[211]

The court concluded the noxious odors plainly fell within the policy's unambiguous definition of "pollutants" and noted a Supreme Court of Georgia decision, which held pollutants included "matter, in any state, acting as an 'irritant or contaminant.'"[212] As such, it was unnecessary for the exact pollutant to be explicitly named by the policy in order for the pollution exclusion to apply.[213] Because the noxious odors fit squarely within the policy's pollution exclusion, Farmland had no duty to defend or indemnify Recyc.[214]

Necessary and Incidental To . . .

In *Blue Ridge Auto Auction v. Acceptance Indemnity Insurance Co., Inc.,*[215] the Court of Appeals repeated its popular refrain that ambiguities in a policy will be construed against the carrier. Acceptance issued a garage policy to the Tommy Nobis Foundation, which auctioned off donated cars to raise money.[216] The Foundation hired an auctioneer to help sell the vehicles and an employee of the auctioneer lost control of a vehicle, injuring several auction attendees.[217] The auctioneer sought coverage with Acceptance under the Foundation's garage policy, but Acceptance denied coverage.[218] Acceptance obtained summary judgment and the auctioneer appealed.

The garage policy defined an "insured" to include someone who was using a "covered auto," but excluded someone "working in the business of selling the car" unless "that business is your [the Foundation's] garage operations."[219] The policy defined "garage operations" to include "all operations necessary or incidental to a garage business."[220] The court concluded that, because the phrase "garage business" reasonably included the Foundation's business in selling donated vehicles, the use of an auctioneer was "necessary, or at least incidental, to this business" and any ambiguity in coverage would be construed against Acceptance.[221]

Reservation of Rights Letters

In two separate decisions, courts once again addressed the proper and effective way for an insurer to issue a reservation of rights (ROR) letter and avoid claims of estoppel. In *North American Specialty Insurance Co. v. Bull*

206 *Id.* at *5.
207 *Id.* at *1-2.
208 *Id.*
209 *Id.* at *3.
210 *Id.* at *3-4.
211 *Recyc Sys. Se.*, No. 4:17-CV-225 (CDL), 2018 U.S. Dist. LEXIS 82248, at *4 (M.D. Ga. May 16, 2018).
212 *Id.* at *8 (citing *Reed v. Auto-Owners Ins. Co.*, 284 Ga. 286, 288, 667 S.E.2d 90, 92 (2008)).
213 *Id.; see also Centro Dev. Corp. v. Cent. Mut. Ins. Co.*, 720 F. App'x 1004 (11th Cir. 2018).
214 *Recyc Sys. Se.*, No. 4:17-CV-225 (CDL), 2018 U.S. Dist. LEXIS 82248, at *11 (M.D. Ga. May 16, 2018) *11.
215 343 Ga. App. 319, 807 S.E.2d 51 (2017).
216 *Id.* at 319, 807 S.E.2d at 53.
217 *Id.*
218 *Id.*
219 *Id*. at 321, 807 S.E.2d at 54.
220 *Id.*
221 *Blue Ridge*, 343 Ga. App. at 322.

River Marina, LLC,[222] the Eleventh Circuit, in a *per curiam* opinion, found that a carrier was not estopped from raising coverage defenses because of the language in its ROR letters.[223] Bull River, through North American, held two insurance policies: a commercial general liability policy (CGL) and a marina operators policy.[224] Two fishermen sued Bull River (in four different lawsuits) for injuries sustained in a boating accident.[225] North American sent Bull River its first ROR letter, which listed only the CGL policy on the subject line and did not reference the marina policy, informing Bull River it had assigned counsel for a defense and would review coverage subject to a "complete" ROR.[226] One year later, North American sent Bull River a second ROR letter, which listed both policies on the subject line, stating both policies barred coverage for the allegations made in the complaint, but acknowledged it would continue to defend the matter, subject to the right to deny coverage.[227]

North American filed for declaratory relief, claiming neither policy required it to defend or indemnify Bull River.[228] The district court granted partial summary judgment to North American and held the two policies did not cover the accident.[229] However, the district court also concluded North American was estopped from denying coverage under the marina policy based upon the Supreme Court of Georgia's decision in *Hoover v. Maxum Indemnity Co.*,[230] as the company stating in its second letter there was no coverage for the accident, but purported to "reserve the right to assert other defenses under that policy."[231]

The Eleventh Circuit reversed.[232] Distinguishing *Hoover*, the court acknowledged North American did not reference the marina policy in the first letter but "fail[ed] to see how *Hoover* mandates . . . that North American be estopped from denying coverage altogether."[233] *Hoover* would "only prohibit North American from asserting a policy defense" under the marina policy "it should have raised the first time around."[234]

In *American Safety Indemnity Co. v. Sto Corp.*,[235] Sto notified its insurer, American Safety, of a claim made against it related to its stucco products and American Safety responded by letter indicating an "investigation and evaluation" would be conducted pursuant to an ROR.[236] However, after Sto notified American Safety that a lawsuit was filed, American Safety denied coverage, providing a detailed letter containing the reasons for its denial.[237] Four months later, American Safety "re-evaluated its position" and agreed to defend Sto, though no new ROR was located.[238] American Safety continued to defend this suit for almost two years before withdrawing coverage, claiming Sto misrepresented notice of the claim.[239]

Sto also tendered another claim related to its stucco operations for which American Safety sent a similar ROR. Again, after suit was filed on this second claim, American Safety sent a letter denying coverage on the basis that Sto was on notice before the applicable policy period.[240] Then American Safety "reversed its denial" and took over the defense of Sto through trial though it later denied coverage for the verdict.[241] Sto filed suit against American Safety for breach of contract and bad faith.[242] American Safety lost on summary judgment and an appeal ensued.[243]

---

222 709 Fed. Appx. 623 (11th Cir. 2017).
223 *Id.* at 630.
224 *Id.* at 625.
225 *Id.* at 626.
226 *Id.*
227 *Id.*
228 *Bull River Marina,* 709 Fed. App'x 623.
229 *Id.* at 630.
230 291 Ga. 402, 730 S.E.2d 413 (2012).
231 *Bull River Marina,* 709 Fed. Appx. at 630.
232 *Id.* at 625.
233 *Id.* at 631.
234 *Id.*
235 342 Ga. App. 263 (2017).
236 *Id.* at 264.
237 *Id.*
238 *Id.* at 265.
239 *Id.*
240 *Id.*
241 *American Safety,* 342 Ga. App. at 266.
242 *Id.*
243 *Id.*

The Court of Appeals held American Safety's initial ROR letters were ineffective because American Safety later denied coverage.[244] The court concluded American Safety denied coverage for both lawsuits, noting that an insurer cannot "both deny a claim and reserve its right to assert other defenses later."[245] The court failed "to see how a previous reservation of rights issued" by American Safety "would remain post-denial."[246]

244 *Id*. at 267.

245 *Id.* (quoting *Hoover v. Maxum Indem. Co*., 291 Ga. 402, 406, 730 S.E.2d 413 (2012)).

246 *Id.*

Truth or Consequences: Surviving a 30(b)(6) Deposition

By Frederick Owen Ferrand and Nelofar Agharahimi

Frederick Owen Ferrand

Partner

Frederick Owen Ferrand focuses on complex litigation claims relating to commercial and insurance disputes, property damage claims, products liability actions and negligence causes of action, both from plaintiff and defense perspectives. Having gained his experience in trial and appellate courts throughout the United States, the Caribbean and Europe, he has successfully litigated and arbitrated cases around the world and is fluent in French and Spanish.

Mr. Ferrand is admitted to practice in state, territorial and federal courts in Georgia, Pennsylvania and the Virgin Islands. He is also admitted in the Supreme Court of the United States and United States Courts of Appeals for the Third and Eleventh Circuits. As a member of the Georgia, Pennsylvania and Virgin Islands Bar Associations, he participates in their insurance, litigation and products liability committees.

After receiving his undergraduate and law degrees from the University of Virginia in 1981 and University of Pittsburgh in 1984, respectively, Mr. Ferrand started his practice of law in the Virgin Islands. Within his first five years of practice, his appellate work there, which helped lower then-existing high jury awards, was published in the *American Bar Association Journal*. During that same period, Mr. Ferrand was included in the *Who's Who in American Law* listings as a result of his litigation experience, position as treasurer of the Virgin Islands Bar Association and creating its Attorney Referral Program. Additionally, Mr. Ferrand has spoken on litigation matters in many national forums.

Nelofar Agharahimi

Associate

Nelofar Agharahimi's legal career has allowed her to gain extensive litigation and jury trial experience handling automobile litigation, commercial litigation and insurance coverage matters. While she started her career in the public sector, she also worked in the private sector as an insurance defense lawyer for an automobile insurance company. After six years in South Florida, she relocated to Atlanta to be closer to her family. Prior to joining Swift Currie, Ms. Agharahimi had the opportunity to represent employers, insurers and third-party administrators in workers' compensation matters, expanding her legal knowledge in insurance coverage issues.

Ms. Agharahimi was born and raised in the Midwest, growing up in Holland, Michigan. She attended the University of Michigan and received her B.A. in English literature in 2005 and her J.D. from the University of Toledo in 2008. During law school, she participated in Moot Court and represented Toledo in the Herbert Wechsler National Criminal Moot Court Competition. She spent a summer clerking in Washington, D.C. and stayed through the fall semester to attend American University Washington College of Law, where she was recruited by the Miami-Dade State Attorney's Office. She was admitted to the Florida Bar in 2008 and began her legal career as an assistant state attorney in Miami. Ms. Agharahimi is fluent in Farsi and has a working knowledge of Spanish.

Truth or Consequences: Surviving a 30(b)(6) Deposition

When allegations of bad faith are made against an insurer in either first- or third-party claims, the plaintiff will demand the corporate deposition of an insurance carrier as a matter of course. In first-party claims, these corporate depositions may be demanded even where bad faith is not alleged. The testimony of the corporate representatives in these matters can make or break a case. How do you deal with being designated as a corporate representative? As the Boy Scouts wisely proclaim, "Be prepared." Working with counsel and allocating sufficient time to prepare yourself are important factors in how you can best and truthfully state your company's position, without falling into traps the insured's counsel will gladly set for you. We have outlined key preparation steps below.

EVALUATING THE DEPOSITION NOTICE

Applicable Rules

In the federal courts, Rule 30(b)(6) of the Federal Rules of Civil Procedure (FRCP) deals with corporate depositions. State courts have different rule numbers dealing with corporate depositions, but the federal rule language is identical or similar in most cases. When an insurance carrier or other business entity is being deposed, Fed. R. Civ. P. 30(b)(6) allows the party organization to designate one or more officers, directors, managing agents or other consenting persons to testify on behalf of the organization. What is important here is the carrier can choose which individuals it wishes to have speak on its behalf, provided the following provisos are met: (1) the persons designated must testify about information "known or reasonably available" to the organization; and (2) the person selected is then considered the face and voice of the organization as to those areas of inquiry listed on the notice. Therefore, it is important the carrier carfully reviews the topics of the notice and selects the appropriate witness or witnesses to testify on its behalf.

The Topic Areas

First, consider whether the topics are specific enough to allow you to identify the scope of the testimony requested in order to meaningfully prepare. Notices containing language that the areas of inquiry will "include, but not be limited to," state that the inquiries may extend beyond the enumerated topics or seek testimony on "any matters relevant to the case" are overly broad and do not comply with the rules. While your attorney will address these issues with opposing counsel, it is important to carefully review the notice and the topics to ensure you either have personal knowledge of or can be fully educated on the topics for the deposition.

Many of the topics listed on the deposition notice may be objectionable. For instance, the notice may ask for the net worth of the carrier or include topics that are only potentially allowed after a bad faith finding has been made. Your counsel will work with opposing counsel to deal with these potentially objectionable topic areas. If no resolution is reached, your counsel may have to file a motion for a protective order to have the court rule on the issues at bar.

Selecting the Corporate Witness(es)

From experience, we see most carriers will designate as corporate deponents those individuals who worked on the claim at issue. Carriers reasonably assume this person has the most knowledge about the claim. However, what happens if several claims representatives worked on the file or the claims representative who was assigned to the file has left the carrier? What if the deposition notice asks for someone who can testify about company policies and practices that the adjuster may not be comfortable in addressing?

The corporate deposition rules give the carrier flexibility in selecting its corporate witness. The insurer can select several representatives to testify and each representative can address a specific topic area. It is important to note it is not necessary for the representative to have personal knowledge of the topics identified

in the requesting party's notice of taking deposition.[1] What matters is whether the witness is capable of being educated on the pertinent topic areas and can be credible, articulate and confident in addressing each designated topic.

The Demand for Documents

The corporate deposition notice will almost always include a demand for documents. It is axiomatic that these document demands will include requests for objectionable items. Frequently these demands include an insurer's entire claim file and notes. Should this be produced? What if the claims file contains coverage opinions from counsel or materials derived after the carrier reasonably anticipates litigation? As noted below, the entire claim file is not always discoverable. Many objections to such production may apply, which is why it is important to identify objectionable requests immediately and resolve these issues with opposing counsel and/or the court promptly.

In dealing with anticipation of litigation defenses to the production of certain claims materials, it is important to know under the FRCP, "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative."[2] The general rule for determining whether a document is "prepared in anticipation of litigation" is whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation, . . . (and not) in the regular course of business."[3] The courts have recognized insurance company investigative documents may fall into both categories because the regular course of business for an insurance company is to "investigate claims with an eye toward litigation."[4] When the insured or the insured's counsel threatens suit or submits a demand pursuant to the bad faith statutes and laws, it is relatively safe to anticipate litigation. As with topic area disputes, it is important to resolve all issues regarding document production with opposing counsel and/or the court prior to the corporate deposition date.

PREPARING FOR THE DEPOSITION

Because the corporate representative must be informed of all matters within the reasonable knowledge of the insurer, it is important to first review the topics you will cover during the deposition and confirm you are able to testify about them on the carrier's behalf. A corporate deponent must always remember that their testimony represents the testimony of the insurer and is not a personal position on the topic.

The corporate deposition representative must be fully aware any items reviewed in preparation for the deposition, even those that would otherwise be privileged, are now fair game and can be obtained by opposing counsel. Accordingly, the deponent(s) and counsel need to fully discuss what precautions need to be taken in the review of corporate records in preparation for the deposition.

TESTIFYING AT THE DEPOSITION

The most important rule for testifying at a deposition is to listen before responding. It is very natural to answer questions with information not asked. For example, a question about when the claim was reported, simply asks for a date as a response. However, a witness who is unprepared or answers without listening to the question will respond with the who, what, when, where and why that was not asked. While providing additional details is not harmful in some circumstances, volunteering more information than asked could open the door to questions beyond the scope of the deposition topics, which you may not be prepared to answer.

When testifying, do not be afraid to respond with "I do not know" or use conditionals, such as "I can only testify about what occurred in this matter." No matter your level of experience in handling claims or testifying, you are not going to know the answer to every question asked, even if you are familiar with the topic. The

1 *Reed v. Nellcor Puritan Bennett & Mallinckrodt*, 193 F.R.D. 689, 692 (D. Kan. 2000) (concluding that a defendant is not required to designate someone with "personal knowledge" to appear on its behalf at the Rule 30(b)(6) deposition, and is only required to designate a person to testify as to matters "known or reasonably available to the organization").

2 Fed. R. Civ. P. 26(b)(3)(A).

3 *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982).

4 *Id.*

examiner may change his tone and infer that the insurer has produced an insufficient witness, but do not let the tone of the examiner influence your response. Some questions simply cannot be answered. While it is best to be direct and responsive, be careful about making blanket statements. An open-ended response that does not tie you to an "always" or "never" scenario will help you avoid impeachment in the event a behavior or action you are admitting or denying is contrary to your testimony.

Listen for objections from your counsel. If you see your counsel signal they are about to make an objection, do not respond until the objection issue is resolved or concluded. Your counsel will usually follow the objection with an instruction to proceed, proceed if you understand the question or to not answer that question.

CONCLUSION

For corporate witnesses, preparation is key to a successful deposition. While the witness is expected to do all of the talking, depositions are almost always more about listening. The listening process starts during the preparation sessions and continues through the close of deposition. If a witness is truthful, well prepared, understands the rules and can keep things simple, the deposition will proceed as smoothly as possible.

Get a *Clue* and Don't Be *Sorry*: Liability Case Updates

By Steven J. DeFrank and Thomas B. Ward

Steven J. DeFrank

Partner

Steven J. DeFrank practices in the coverage, bad faith and commercial litigation sections of the firm. His practice focuses on damage to real and personal property, first-party coverage, products liability construction litigation, arson and fraud. Before joining the firm, his practice centered on premises liability, personal injury and construction law, encompassing primarily litigation concerns.

Mr. DeFrank received his B.S. at the University of Virginia in 1985. He received his master's degree (M.Ed.) in biomechanics from the University of Virginia in 1986. Mr. DeFrank earned his J.D. in 2000 from the Georgia State University College of Law.

Thomas B. Ward

Partner

Thomas B. Ward practices in a wide variety of litigated matters dealing primarily with insurance coverage and damage to real and personal property, including construction defect claims, where he calls on prior contracting experience. His practice focuses on first- and third-party coverage litigation, property claims, extracontractual claims and bad faith, in which he has taken coverage disputes and first-party claims from initial coverage opinions through judgment following jury and bench trials. Mr. Ward also routinely handles environmental cases in the federal, state and administrative courts, ranging from mold and lead cases, CERCLA liability and water runoff litigation. In addition, he has extensive experience advising clients in coverage matters, bond and surety claims, collections and contract disputes.

Mr. Ward joined Swift Currie in 2008 after gaining experience at another Atlanta firm in a broad range of litigated matters, including those involving construction law, environmental law, premises liability, ERISA and insurance coverage disputes. He practices in the property insurance litigation section of the firm. Mr. Ward graduated from Mercer University School of Law, where he served as the articles editor for the *Mercer Law Review*. Mr. Ward graduated, *magna cum laude*, from Georgia State University with a B.B.A. in finance.

Get a *Clue* and Don't Be *Sorry*: Liability Case Updates

STEAGALD V. EASON

Dog bite cases in Georgia have historically been viewed as requiring a plaintiff to prove the dog was dangerous and the owner knew the dog was dangerous. This rule came to be referred to as the "one bite rule." In *Steagald v. Eason*, the Supreme Court of Georgia characterized the one bite rule as "more than a bit misleading" and explained the rule "does not literally require a first bite."[1]

In *Steagald*, Joshua Eason moved in with his parents and brought along his pit bull, known as "Rocks." On the first day Rocks was at the home, the dog growled and snapped at Joshua's mother, later snapping at Joshua's father as well. About a week later, a neighbor (Lori Steagald) came over to visit the Easons. At the time of Steagald's visit Joshua was playing in the backyard with Rocks. When Steagald approached Rocks, the dog jumped at her and bit her arm. Steagald sued the Easons, alleging they failed to keep Joshua's dog properly restrained.

The Easons moved for summary judgment on the basis they did not know Rocks had a propensity to bite people without provocation, as the dog had never previously bitten anyone. Pursuant to long-standing Georgia law, the trial court granted summary judgment in favor of the Easons. The Court of Appeals affirmed, noting there was no evidence of a prior attack by Rocks. Rather, the previously snapping incidents were characterized as "merely menacing behavior."

However, the Supreme Court of Georgia unanimously overturned the decision of the Court of Appeals, holding a jury could infer the prior snapping incidents were sufficient to establish knowledge of a propensity to bite. In the Supreme Court's view, the snapping incidents amounted to "attempts to bite," which "most certainly may be proof of a propensity to bite."

In reaching its decision, the Supreme Court expressly overruled *Hamilton v. Walker*, which held a "dog must have, on a prior occasion, done the same act which resulted in the injury" to the plaintiff.[2] The Supreme Court clarified for a dog owner to be liable for failing to restrain his dog, "there must be at least one incident that would cause a prudent person to anticipate the actual incident that caused the injury." In labeling the "one bite rule" a misnomer, the *Steagald* decision serves as a cautionary reminder that legal concepts cannot easily be reduced to catchy phrases.

NAVAL STORE SUPPLIERS, INC. V. CROFT

Georgia slip and fall cases are all about knowledge. In *Croft*, the plaintiff was running an errand for her employer, which required her to pick up an item at the defendant's shop.[3] It was a cold day and she noticed there was a patch of partially frozen water at the base of the steps leading up to the front door of the shop when she arrived. Upon closer inspection, the plaintiff realized the water was coming from a spigot left open so that it would not freeze in the cold weather.

The plaintiff made her way around the ice and up the stairs into the shop where she encountered an employee. She notified the employee of the ice and he suggested she leave out of a different door. However, the employee told the plaintiff not to let anyone else know he had given her permission to exit through the alternate door because it could get him fired.

The plaintiff left the employee to search for the alternate exit. Upon finding it, however, she realized it was locked. The plaintiff searched for a nearby employee to unlock the door, but she could not find anyone. When the plaintiff went back to the employee, he had people in his office. The plaintiff decided not to ask the employee to unlock the door in front of other people because she did not want him to get fired.

1 300 Ga. 717 (2017).

2 235 Ga. App. 635 (1998).

3 346 Ga. App. 773, 816 S.E.2d 301 (2018).

The plaintiff then left out of the same door she entered. As she descended the steps, she slipped on the patch of ice she had previously pointed out to the employee and sustained injuries. The plaintiff then filed a premises liability lawsuit against the defendant. The court held the plaintiff's equal (or superior) knowledge of the hazard was fatal to her claim and dismissed her case against the defendant. In so holding, the court rejected the plaintiff's argument she had no other choice but to use the front door because she did not want to risk getting the employee fired. The court disagreed the plaintiff was "forced" or "coerced" to leave out of the front door, explaining that the plaintiff's fear of the employee losing his job did not rise to the level necessary to establish that the plaintiff had no other viable option.

MASSEY V. ALLSTATE INSURANCE COMPANY[4]

The Court of Appeals reversed the trial court's order granting summary judgment to Allstate on the issues of whether the plaintiff/appellant's umbrella policy included uninsured motorist (UM) coverage. The plaintiff/appellant Massey was involved in an automobile accident on June 11, 2012. The plaintiff settled with the named defendant for the policy limits. The plaintiff then amended her complaint to add a declaratory judgment action to establish her UM and umbrella coverages, both with Allstate. The plaintiff settled the UM claim, also for the policy limits. At that time, Allstate moved for summary judgment, arguing the umbrella policy no longer had UM coverage. The trial court granted Allstate's motion.

The plaintiff had insurance coverage with Allstate starting around 2009. At that time, the policies were a primary automobile policy and an umbrella policy, which included excess liability and UM coverage. Allstate collected separate premiums. In 2010, Allstate sent a renewal notice and indicated UM coverage was not included. Allstate did not assess a premium for the UM coverage. Later that same year, Allstate provided notice that the plaintiff's limits had been reduced and, again, there was no UM coverage. The 2011 renewal documents also reflected the reduced limits rate and did not include UM coverage.

Allstate argued that O.C.G.A. § 33-24-45 only applied to primary automobile policies and, therefore, did not extend to umbrella policies. The court examined the language of O.C.G.A. § 33-24-45 and held nothing in the language limited its scope to primary automobile policies at the exclusion of umbrella policies that afforded automobile coverage. Therefore, Allstate should have followed the provisions of O.C.G.A. § 33-24-45 upon non-renewal. The court then examined whether Allstate's written notice in 2010 was effective. Pursuant to O.C.G.A. § 33-24-45, an insurer must: (1) personally deliver the notice to the insured; or (2) mail the notice via first-class mail and obtain "the receipt provided by the United States Postal Service or such other evidence of mailing as prescribed or accepted" by the same. The court noted that the provisions of O.C.G.A. § 33-24-45 must be strictly followed and, if they are not followed, then the policy automatically renews. Allstate could not produce any evidence showing Massey actually received the nonrenewal notice. Allstate made further arguments the excess liability and UM coverage were similar and therefore it was not required to follow O.C.G.A. § 33-24-45. The court declined to follow this reasoning and reversed the trial court's summary judgment ruling in favor of Allstate/appellee.

GRANGE MUTUAL CASUALTY COMPANY V. WOODARD

Responding to certified questions from the Eleventh Circuit, in *Grange Mutual Casualty Company v. Woodard*, the Supreme Court of Georgia held O.C.G.A. § 9-11-67.1 allows for contracts where prompt payment may function as both a condition of acceptance and a form of performance.[5] In 2014, Thomas Dempsey struck another vehicle driven by Boris Woodard and his daughter, Anna. Ultimately, Anna Woodard died from her injuries. Mr. Woodard's attorney sent Mr. Dempsey's insurer, Grange Mutual Casualty Company (Grange) an O.C.G.A. § 9-11-67.1 demand letter, which, among other terms, specified payment must be received within 10 days of written acceptance and receipt of payment was an essential element of acceptance. Grange timely provided written acceptance, however an error occurred in issuing the payment.

4 341 Ga. App. 462, 800 S.E.2d 629 (2017).

5 300 Ga. 848, 797 S.E.2d 814 (2017).

Counsel for the Woodards asserted the parties had not reached a settlement agreement. Grange filed suit in the Northern District of Georgia alleging breach of contract and sought relief, including specific performance. Grange argued O.C.G.A. § 9-11-67.1 did not contain a prompt payment requirement and was therefore "void" and not permitted to be included in demands pursuant to O.C.G.A. § 9-11-67.1. The Woodards argued the payment term was a condition of acceptance, as specified in the demand itself, and they had the right as the offeror to specify conditions of acceptance. Both parties filed motions for summary judgment and the Northern District of Georgia held in favor of the Woodards. Grange appealed to the Eleventh Circuit and the Eleventh Circuit certified four questions to the Supreme Court of Georgia. Those questions were:

1) Under Georgia law and the facts of this case, did the parties enter a binding settlement agreement when the insurer Grange accepted the Woodards' offer in writing?
2) Under Georgia law, does O.C.G.A § 9-11-67.1 permit unilateral contracts whereby offerors may demand acceptance in the form of performance before there is a binding, enforceable settlement contract?
3) Under Georgia law and the facts of this case, did O.C.G.A § 9-11-67.1 permit the Woodards to demand timely payment as a condition of accepting their offer?
4) Under Georgia law and the facts of this case, if there was a binding settlement agreement, did the insurer Grange breach that agreement as to payment, and what is the remedy under Georgia law?[6]

Drawing from common law principles and contract law, the Supreme Court of Georgia articulated two long-standing principles: (1) all statutes are drafted in contemplation of other existing law and should be read "in harmony" with that law; and (2) an "offeror is the master of the offer and free to set the terms." The Supreme Court of Georgia examined O.C.G.A. § 9-11-67.1, finding the statute does not preclude additional terms, but merely indicates what terms must be present. The court held O.C.G.A. § 9-11-67.1 allows for unilateral contracts, such as the Woodard's, where acceptance can be conditioned on performance, such as payment within a specified time period. The court, however, declined to answer the first and fourth questions insofar as they dealt with the ultimate issue of the case.

VININGS RUN CONDOMINIUM ASS'N V. LINDA STUART-JONES[7]

On June 27, 2017, the Georgia Court of Appeals reversed the denial of summary judgment to the appellants/defendants (Vinings Run Condominium Association Inc. and Access Management Group LP) in the plaintiff's premises liability suit, which sought to recover for injuries she sustained when she fell on some exterior stairs at her condominium community, because the court determined she had equal, if not superior, knowledge of the allegedly unsafe conditions. The Georgia Court of Appeals also reaffirmed the position that the "necessity" exception to equal/superior knowledge is limited to the context of a landlord-tenant relationship that did not exist between the plaintiff resident/occupant of a condominium and the defendant condominium association and defendant property management company.

After returning home one evening, the plaintiff claimed she fell while ascending concrete stairs outside of the condo unit she occupied for more than five years. The plaintiff claimed injuries from the fall and filed suit. She argued the defendants were responsible because they failed to install adequate lighting and other features necessary to keep the stairway safe. The plaintiff also argued the necessity exception applied to circumnavigate the equal/superior knowledge of conditions.

The evidence showed the plaintiff had a verbal agreement with the owner of a condominium unit to lease/purchase the residence. In her deposition, the plaintiff claimed she had previously made requests to maintenance regarding the need for lighting and an additional handrail on the concrete stairs leading from the parking lot to her condominium. However, she claimed her requests were ignored. The appellants denied such requests were made and submitted affidavits from the other residents in the condominium stating the lighting was sufficient and the concrete steps were hazard free. The evidence also showed the plaintiff had successfully traversed the subject steps at day and night on multiple occasions both before and after the alleged incident and the subject steps were not the sole means of ingress and egress to the plaintiff 's unit.

6 *Grange Mut. Cas. Co. v. Woodward*, 826 F.3d 1289, 1300-01 (11th Cir. 2016).

7 342 Ga. App. 434, 802 S.E.2d 393 (2017).

The defendants moved for summary judgment, arguing the plaintiff could not recover for her injuries because she had equal, if not superior, knowledge of the allegedly unsafe conditions and successfully traversed the conditions on multiple occasions before and after the alleged incident. In response, the plaintiff argued that she could still recover because the necessity exception applied, meaning it was necessary for her to traverse the allegedly unsafe conditions to enter her residence. The defendants argued the exception only applied in the context of a landlord-tenant relationship, which did not exist between them and plaintiff. The trial court denied the defendants motion for summary judgment, finding that the necessity rule applied.

In reversing the denial of defendants' motion for summary judgment, the Georgia Court of Appeals noted that the necessity rule exception only applies to situations involving landlords and tenants and a landlord-tenant relationship did not exist between the parties in this case. Accordingly, because the plaintiff had equal knowledge of the allegedly unsafe conditions and because the necessity rule did not apply, the trial court erred in denying summary judgment.

The court held "[i]t has often been held that the true basis for a landlord's liability to a tenant for injuries resulting from a defective or hazardous condition existing on the premises is the landlord's superior knowledge of the condition and of the danger resulting from it." [8] "In accordance with the superior knowledge principle, it has been held that where a portion of leased premises is dangerously out of repair and such condition is patent and known to the tenant, who continues to use that area, the tenant cannot recover from the landlord for damages resulting from the condition."[9] A tenant is presumed to have knowledge of allegedly dangerous, but static, conditions they have successfully negotiated on a previous occasion.[10]

The court explained the necessity rule as follows:

> The necessity rule applies in the context of a landlord-tenant relationship where the tenant is required to traverse a known hazard in order to enter or leave his home. Under that exception, when the dangerous area is a tenant's only access or only safe and reasonable access to his home, the tenant's equal knowledge of the danger does not excuse the landlord from liability for damages caused by a failure to keep the premises in repair. Thus, the necessity rule exception tempers the equal or superior knowledge rule when there is no other means of safe ingress and egress to the leased premises.

However, the court held the necessity rule did not apply because the plaintiff could not demonstrate a landlord-tenant relationship with the defendants. The court further held the necessity rule exception only applies to situations involving landlords and tenants. Accordingly, because the plaintiff had equal knowledge of the allegedly unsafe conditions of which she complained and the necessity rule did not apply, the Georgia Court of Appeals held the trial court erred in denying summary judgment to the defendants.

KAKU V. ALPHATEC SPINE, INC.[11]

Jessica Kaku, the plaintiff, and her husband, Emilliano Kaku, sued defendant Alphatec Spine, Inc., manufacturer of four Zodiac® polyaxial pedicle screws implanted into Ms. Kaku's vertebrae during a transforaminal lumbar interbody fusion (TLIF). Ms. Kaku underwent the spinal fusion surgery as treatment for lower back and sciatic pain. The pedicle screws were meant to hold her spine in place during the period of post-surgery vertebral fusion. The plaintiffs alleged two screws broke within six weeks of Ms. Kaku's surgery when she turned in her office chair to pitch debris into a trash can. Ms. Kaku had a second surgery approximately three months later to remove the three screws.

The plaintiffs sued Alphatec under a strict products liability theory. The plaintiffs' amended complaint also asserted claims for loss of consortium, punitive damages and attorneys' fees. Alphatec moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), asserting three grounds for dismissal: (1) failure to state a claim for strict products liability; (2) implied pre-emption; and, as the remaining claims were derivative of the underlying tort claim, (3) failure to state a claim for loss of consortium, punitive damages and attorneys' fees.

8 *Richardson v. Palmour Court Apartments,* 170 Ga. App. 204, 205, 316 S.E.2d 770 (1984).

9 *Id.*

10 *Amerson v. Kelly*, 219 Ga. App. 377, 378, 465 S.E.2d 470 (1995).

11 Civil Action No. 7:16-CV-9 (HL), 2017 U.S. Dist. LEXIS 45118 (M.D. Ga. Mar. 28, 2017).

The Honorable Hugh Lawson, U.S. district judge for the Middle District of Georgia, denied Alphatec's motion to dismiss. First, the court held the plaintiffs adequately stated a claim for strict products liability. To state a claim for strict liability, the plaintiff must allege: (1) the defendant manufactured the allegedly defective product; (2) the product was not merchantable and reasonably suited for its intended use when the defendant sold it; and (3) causation. Georgia law recognizes three types of product defects: manufacturing defects, design defects and marketing or packaging defects. Alphatec claimed the plaintiff failed to identify which type of product defect allegedly formed the basis of its claim, forcing Alphatec to guess at potential claims and address them piecemeal. Alphatec further claimed this failure fell short of the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*[12] and *Ashcroft v. Iqbal*.[13]

The court disagreed. First, the court noted the plaintiffs' amended complaint alleged the pedicle screws were designed to hold vertebrae together during the fusion process, two of the screws implanted in Ms. Kaku failed to do so and "were incapable of serving their intended purpose." Next, the court also noted while "bald assertions" of defective design and unreasonable danger would not meet the *Twombly/Iqbal* standard, the plaintiffs' specific allegations the defect rendered the screws "incapable of serving their intended purpose" allowed the court to draw the reasonable inference that either a manufacturing defect or a design defect caused the harm. Thus, the court held the plaintiffs' strict liability claim satisfied the *Twombly/Iqbal* plausibility standard and declined to dismiss on this ground.

Alphatec also claimed the strict liability claim failed because it relied on the theory of *res ipsa loquitur*. The court again disagreed, noting the inferences which form the core of the res ipsa loquitur doctrine are applicable in that the "plaintiff is not required to eliminate all other possibilities or prove the case beyond a reasonable doubt." The court held while the plaintiffs would be required to prove the screws were implanted in Ms. Kaku without being substantially altered, the fact Alphatec did not have exclusive control of the screws before the alleged defect became apparent did not bar the plaintiff's recovery. Therefore, the court also declined to dismiss on this ground.

Second, the court held the plaintiffs' strict liability claim was not pre-empted by implication. The pedicle screws were subject to regulation under the Medical Device Amendments of 1976 (MDA). The MDA classifies devices into one of three categories based on the device's risk of harm to the public. The pedicle screws are designated as "Class II" devices and are therefore subject to regulation under 21 U.S.C. § 360(k). 21 U.S.C. § 360(k) imposes a limited form of regulation upon Class II devices by requiring manufacturers of new products to submit a "premarket notification" to the Federal Food and Drug Administration (FDA) prior to marketing the product. The focus of the premarket notification is to ascertain the proposed device's equivalency to a preexisting device. If the FDA concludes on the basis of the [premarket] notification that the device is "substantially equivalent" to a pre-existing device, it can be marketed without further regulatory analysis.[14]

The MDA also includes an express preemption clause. The MDA pre-empts any state law "which is different from, or in addition to, any requirement applicable under [federal law] to the device, and . . . which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device."[15] The FDA interprets Section 360k to mean state or local requirements are only pre-empted when the [FDA] has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the act, thereby making any existing divergent State or local requirements applicable to the device different from, or in addition to, the specific [FDA] requirements.[16]

Alphatec argued the plaintiffs' strict liability claim was pre-empted because it would impose duties inconsistent with the MDA. Specifically, Alphatec claimed the plaintiffs' strict liability claim was pre-empted because it imposes a duty to "create an 'indestructible' pedicle screw that could not fracture or cause injury" and this duty imposed requirements different from, and in addition to, the federal regulation of the screws as Class II medical devices. The court disagreed, citing U.S. Supreme Court precedent *Medtronic, Inc. v. Lohr*, on appeal from the U.S. Court of Appeals for the Eleventh Circuit. *Lohr* held the federal premarket notification requirements were not sufficiently concrete to trigger pre-emption. The court also disagreed the plaintiffs'

12 550 U.S. 544 (2007).

13 566 U.S. 622 (2009).

14 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 478 (1996).

15 21 U.S.C. § 360(k)(a).

16 21 C.F.R. § 808.1(d).

claims would impose a duty to create an "indestructible" pedicle screw. Alphatec attempted to distinguish *Lohr*, arguing it was an express pre-emption case. Alphatec claimed the facts before the court more closely resembled *PLIVA v. Mensing*[17] and *Mutual Pharmaceutical Co. v. Bartlett*.[18] *PLIVA* concerned whether and to what extent generic drug manufacturers could change their labels after FDA approval to comply with state law requiring "stronger" labeling. The court in *PLIVA* held the state law labeling requirements were pre-empted because they imposed a duty on manufacturers to take certain actions prohibited by federal law.

Alphatec further reasoned the plaintiffs' strict liability claim was pre-empted by 21 C.F.R. § 807.81(a)(3). 21 C.F.R. § 807.81(a)(3) requires a premarket notification to the FDA 90 days before a manufacturer introduces an altered market into the market if, among other things, the change would significantly affect the safety of the device. Alphatec argued the changes necessary to bring the pedicle screws in compliance with state law under the plaintiffs' claim would force Alphatec to make unilateral design alterations to improve safety which were disallowed under federal law outside of 21 C.F.R. § 807.81(a)(3)'s 90-day premarket notification period.

First, the court held the plaintiffs' claim did not require Alphatec to design an indestructible screw. Second, the court held *Lohr* clearly established the premarket notification requirements did not trigger preemption. Additionally, the court noted while 21 C.F.R. § 807.81(a)(3) "concerns a situation where safety is inherently at issue, unlike the premarket notification submission," whether any changes to the pedicle screws would affect their safety is a question of fact improperly resolved by a motion to dismiss. Thus, the court could not "say it was impossible for [Alphatec] to comply with both state and federal law" and declined to dismiss the plaintiffs' complaint on pre-emption grounds. As the court did not dismiss the plaintiffs' strict products liability claims, it also declined to dismiss the paintiffs' derivative claims for loss of consortium, punitive damages and attorneys' fees.

17 564 U.S. 604 (2011).

18 133 S. Ct. 2466 (2013).

Monopoly: A Game of Chance with Georgia Jury Verdicts

By Melissa A. Segel and Kelly G. Chartash

Melissa A. Segel
Partner

Melissa A. Segel joined Swift Currie in 2010 and practices commercial litigation and insurance coverage with an emphasis on bad faith and arson and fraud. She has extensive experience defending insurance carriers in Georgia with claims involving homeowners and auto insurance fraud in the context of both first- and third-party property and bodily injury liability losses.

Prior to joining the firm, she worked in the insurance industry for over a decade, specializing in property and special investigations. She is a member of the Chartered Property and Casualty Underwriters Society. Ms. Segel was named a Georgia Super Lawyers Rising Star by *Atlanta Magazine* from 2013 to 2016.

She received her J.D., *magna cum laude*, from Georgia State University College of Law in 2006. While at Georgia State, she served as the associate notes and comments editor for the *Georgia State Law Review*. In 2005, she was awarded Professor David J. Maleski Prize for Excellence in Torts.

Kelly G. Chartash
Associate

Kelly G. Chartash practices in the areas of insurance coverage and commercial litigation. Prior to joining Swift Currie, Ms. Chartash practiced at an insurance defense firm in Miami, Florida.

In 2012, Ms. Chartash graduated, *cum laude*, from the University of Florida Fredric G. Levin College of Law. While in law school, Ms. Chartash was a member and associate editor of the *Florida Law Review*. Additionally, Ms. Chartash represented clients as a certified legal intern at the Virgil D. Hawkins Full Representation Civil Clinic. Ms. Chartash graduated, *cum laude*, from the University of Florida with a Bachelor of Arts degree in political science and a Bachelor of Science degree in psychology.

Monopoly: A Game of Chance with Georgia Jury Verdicts

As Robert Frost once said, "A jury consists of twelve persons chosen to decide who has the better lawyer." Since the 1930s, the percentage of civil jury trials has steadily declined. Currently, less than 2 percent of federal court civil cases are resolved by a jury.[1] At the state level, this percentage is even lower as less than 1 percent of civil lawsuits are decided by a jury.[2] Legal scholars have described this trend as the "vanishing trial" in the United States. Have civil litigants been scared away from "rolling the dice" before a jury and prefer to resolve cases through a more controlled method at mediation and settlement? Recent Georgia jury verdicts ranging from complete defense verdicts to multimillion-dollar verdicts certainly cause both plaintiffs and defendants to stop and question if it is worthwhile to play the "game of chance" at a jury trial.

REPTILIAN TACTICS

With regard to the small percentage of civil cases that proceed to trial, the question remains: how do attorneys try to achieve these high jury verdicts? Instead of using logic to guide jurors to a reasoned verdict, attorneys use reptilian tactics to appeal to emotion by crafting a prism through which all other case evidence seemingly must be viewed. First developed as a brain theory, the reptilian theory focuses on the awakening of thoughts of safety and security within the r-complex in the human brain, which in turn controls other thoughts.[3] Reptilian tactics are intended to manipulate jurors into finding in favor of a plaintiff or increasing the award because the juror himself feels threatened by the defendant's allegedly unsafe conduct.[4]

Reptilian tactics have been described as the "the greatest development in litigation theory in the past 100 years."[5] The theory was originally developed in medical malpractice litigation, but has now spread to cover a large number of tort lawsuits. When used, these reptilian tactics can cause juries to return high verdicts to prevent danger to their families and communities at large. Jurors become captive to the plaintiff's crafting of a safety rule, which has *assuredly* been violated. An attorney using reptilian tactics might assert *any violation* of the safety rule by *any community member* places the jury and their families in danger.[6] In order to thwart the potential danger, jurors are then compelled to return a high verdict.

An attorney using reptilian tactics employs four primary "rule" questions to lure the defendant-witness into the psychological trap, with each rule question corresponding, respectively, to each of the above-noted weapons as follows:

1. General safety rules (broad safety promotion)
2. General danger rules (broad danger/risk avoidance)
3. Specific safety rules (safe conduct, decisions and interpretations)
4. Specific danger rules (dangerous/risky conduct, decisions and interpretations)[7]

Manipulating defendant-witnesses into agreeing with these four types of questions is the crux of the plaintiff attorney's cross-examination, ultimately becoming the basis for counsel to request a multimillion-dollar verdict from the jury.

---

1 *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 462-63 tbl.1 (2004); *see also* Ellen E. Sward, The Decline of the Civil Jury 12-13 (2001).

2 Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. Empirical Legal Stud. 755, 768 (2004) (finding that in 2002, jury trials were 0.6 percent of all state court dispositions).

3 *See generally* Ryan A. Malphurs and Bill Kanasky, Jr., *Derailing the Reptile Safety Rule Attack*, Georgia Defense Lawyer, Spring 2015, at 15-37.

4 *Id.*

5 Introductory Remarks, Georgia Motor and Trucking Association 2014 Annual Meeting, Atlanta GA, 9/23-25.

6 *Id.*

7 Malphurs & Kanasky, *supra*, at 15.

RECENT PLAINTIFF VERDICTS

The following Georgia jury verdicts have caused defense attorneys to question whether reptilian tactics prevailed and be weary of the "game of chance" at trial.

$1,500 Bumper Scratch Results in a $700,000 Verdict

In Gwinnett County, a plaintiff's vehicle had less than $1,500 in property damage from what the plaintiff's own attorneys described as "nothing but a scratch on the back bumper" from an automobile accident. At trial, the plaintiff's counsel was able to get the defendant's expert to admit even if it was not likely, the expert had many patients in his own practice who sustained serious back injuries from low-impact collisions. Despite the low impact and low property damage, as well as the plaintiff's pre-existing conditions and health problems, the jury returned a $734,563 verdict.[8]

Drive-by Shooting Verdict of $2.4 Million Against Nightclub

In 2017, a DeKalb County jury returned a $3.5 million verdict to two women who were shot outside of a Stone Mountain nightclub. The club was held liable for $2.4 million of that award after apportionment. The women had been patrons of the club on the evening in which the incident occurred, but, along with all other patrons, were forced outside after a fight involving two other patrons broke out inside. As the women made their way back inside, they were shot in a drive-by shooting. The plaintiffs' attorneys argued the women were shot on account of the club's violation of its own security protocol. In forcing patrons outside, the argument went, the club "did not follow its own policies and, because of that, a shooting occurred."[9]

Despite critical legal questions regarding proximate cause and foreseeability, the jury felt compelled to hold the club more responsible than the shooter-perpetrator for the women's injuries. The jury essentially could not dissociate the random traumatizing incident that occurred outside the club from the preferred — yet unrealistic — ideal of 100-percent safety at all times on and around the club's premises.

Go-Kart Accident Results in $1.3 Million Jury Verdict

In 2017, a Fulton County jury awarded $1.3 million to a woman who fractured both of her ankles when the go-kart she was driving at an indoor karting and gaming center hit a concrete wall after being bumped by another driver. Although the defendant raised waiver and assumption of risk as defenses to the plaintiff's negligence claim, the plaintiff prevailed on her gross negligence claims. The plaintiff's counsel admitted one expects to be bumped on a go-kart course, but Georgia law and industry standards provide for safety barriers for the public at large.[10]

RECENT DEFENSE VERDICTS

In turn, the following defense verdicts have caused plaintiffs' attorneys to scratch their heads:

Plaintiff Struck by Motorist in Crosswalk

A 2018 Gwinnett County jury found no liability on the part of a motorist who struck a women in a designated crosswalk. A majority of the jury came from Latin American countries and explained when crossing the street, even in a crosswalk, they constantly check both ways. The jury thus found the plaintiff was negligent because she only looked left once before crossing the street in the crosswalk.[11]

8 Katheryn Tucker, *How a $1,500 Bumper Scratch Became a $700K Verdict*, Daily Report, Jan. 19, 2018, www.dailyreportonline.com.

9 Greg Land, *Jury Awards $2.4M to Women Shot at DeKalb Bar*, Daily Report, Aug. 20, 2017, www.dailyreportonline.com.

10 Greg Land, *Go-Kart Wreck Case Crosses Finish Line with $1.3M Post-Apportion Award*, Daily Report, Dec. 21, 2017, www.dailyreportonline.com.

11 Greg Land, *Auto-Pedestrian Accident Case Yields Verdict & Cultural Lesson for Defense Lawyer*, Daily Report, Aug. 10, 2018, www.dailyreportonline.com.

Causation Disputed Against Retired Police Officer Plaintiff in Rear-End Accident

A DeKalb County jury returned a defense verdict in favor of a motorist in a low-impact collision involving a retired police officer plaintiff. The defendant-motorist admitted liability for the rear-end accident, but causation was disputed based on the plaintiff's pre-existing neck condition stemming from the physical nature of his prior employment. The plaintiff claimed $18,000 in past medical expenses and testified he could no longer camp with his children, who were Boy Scouts.[12]

CONCLUSION

In sum, litigants and attorneys must weigh their odds and determine whether it is worthwhile to play the game of chance before advancing a civil lawsuit to trial in Georgia. While the fact remains jury verdicts are often unpredictable, and outlier verdicts can certainly be frightening, we must not lose sight of the fact that requiring a jury of 12 individuals to reach a unanimous decision will often result in a collective voice of reason. The key to avoiding a reptilian, lottery-sized verdict is to prepare properly to ensure the jury remains focused on the actual facts of the case and the plaintiff does not argue things out of context or oversimplify the issues.

[12] *Bruce Bochicchio v. Jessica Scott*, 2017 Jury Verdicts LEXIS 15140 (Oct. 23. 2017).

Not So "Trivial Pre-suit" — Finessing the Early Stages of a Trucking Claim

By Mike O. Crawford, IV and Gillian S. Crowl

Michael O. Crawford, IV
Partner

Michael O. Crawford, IV, litigates commercial general liability, premises liability, trucking/transportation, excess coverage, automobile, fire, explosion, contract, toxic tort and construction defect claims, as well as a variety of subrogation claims. Throughout his career, Mr. Crawford has represented insurance carriers and their insureds, including trucking companies, transportation companies and hotels, along with various other corporations and individuals. He has extensive experience in the resolution of claims through negotiations, mediations, jury trials and bench trials. Mr. Crawford has personally appeared as lead counsel in 139 of the 159 counties within the state of Georgia.

Mr. Crawford attended Georgia State University College of Law. While there, he served as an intern for the Honorable Marion Pope at the Georgia Court of Appeals. He graduated with honors in 2000.

Gillian S. Crowl
Associate

Gillian S. Crowl focuses her practice on complex litigation matters, including matters related to insurance coverage, commercial litigation, transportation litigation and catastrophic injury. In representing her clients, she brings a strong, calm and focused demeanor to her work that allows her to focus on the critical issues and provide her clients with effective and responsive service.

Ms. Crowl received her Bachelor of Arts in 2006 from Cornell University with a double major in history and sociology. While at Cornell, she served as the president of many organizations, including the pre-law society. She was a finalist in the undergraduate moot court competition and inducted into the student honor society. She received her Juris Doctor from Indiana University Maurer School of Law in 2010. There, she served as an executive member of the Moot Court Board, president of the university's Black Law Students Association (BLSA) and a member of the university's trial team, representing Indiana University at the ABA National Appellate Advocacy Competition and the American Association for Justice (AAJ) Student Trial Advocacy Competition. While in law school, she also served as a student practitioner with the Community Legal Clinic and the Indiana University Student Legal Services, representing indigent members of the community and Indiana University students in various civil and criminal matters. She was also awarded the honor of Order of the Barristers.

After graduation, Ms. Crowl worked for a boutique civil litigation firm in Dayton, Ohio. She then spent five years in a Charlotte, North Carolina firm, where her practice was focused on insurance coverage, healthcare, ERISA, transportation and general personal injury defense. She is admitted to practice in Georgia and North Carolina and has represented clients in matters before state and federal courts.

Outside of the office, Ms. Crowl enjoys spending time with her family, traveling and volunteering with community and civic organizations.

Not So "Trivial Pre-suit" — Finessing the Early Stages of a Trucking Claim

THE DANGERS OF TRUCKING CASES AND THE GOAL OF PRE-SUIT ACTIVITY

All motor vehicle accidents are not created equal. Trucking cases present particularly unique issues that can result in increased exposure in comparison to typical automobile cases. These issues include:

- the usual "dollar signs" that appear in many claimant's (and claimant's attorney's) eyes as a result of the mandatory higher insurance limits for commercial motor vehicles required by state and federal law[1]
- the ease with which an attorney can manipulate the fears most jurors have of commercial motor vehicles to garner sympathy for their client or taint the insured
- the numerous regulations a motor carrier can easily neglect to follow — prior to and after an accident — that can jeopardize the defenses of the insured
- the ease with which a motor carrier can inadvertently discard evidence, particularly under the guise of compliance with the Federal Motor Carrier Safety Administration (FMCSA) regulations, giving rise to a spoliation claim
- the ability to bring a direct action against the insurer as a named party, further increasing the potential exposure of the claim[2]

With these many issues to consider and navigate, proper pre-suit handling of trucking cases can assist in minimizing the exposure by allowing carriers, insureds and counsel to adequately prepare for navigating the risks associated with the claim and strategizing for the future. Prompt and effective pre-suit handling of trucking cases can result in avoiding accidental spoliation of evidence, identifying problematic claims that warrant early resolution, limiting needless discovery disputes during litigation and, ultimately, resolving claims based on their merits, as opposed to encountering preventable lapses in evidence gathering or premature assessment. However, to meet these goals, insurance carriers, outside counsel and the insured motor carriers have to work collaboratively with these goals in mind.

Spoliation — The Importance of Early Notice to the Insured and Active Participation in Preserving Documents

"Spoliation refers to the destruction of or failure to preserve evidence that is critical in contemplated or pending litigation. When key evidence has been destroyed, exclusion of evidence or dismissal of a case may be warranted."[3] Although courts have held dismissal of a case or defense is reserved for extreme cases of purposeful destruction, "malice may not always be required before a trial court determines that dismissal is appropriate [as] dismissal may be necessary if the prejudice to the [opposing party] is extraordinary."[4] The equivalent penalty for a defendant is the striking of an answer. Because of the harsh penalties that can result from even the accidental spoliation of evidence, preservation of evidence should be a key focus of the pre-suit process.

---

1 *See* 49 CFR § 387.7; O.C.G.A. § 40-1-102.

2 *See* O.C.G.A. § 40-1-112(c).

3 *Bridgestone/Firestone N. Am. Tire v. Campbell Nissan N. Am.*, 258 Ga. App. 767, 768, 574 S.E.2d 923, 926 (2002).

4 *Id.* at 770, 927.

INSURER

The insurer is the first point of contact with the insured. Accordingly, when an insurance carrier receives notice of claim related to a commercial motor vehicle accident, the insurance carrier should promptly notify the insured to gather and preserve documents and materials that the motor carrier would be expected to have in its possession at the time of the accident, in accordance with FMCSA regulations, in addition to records typically requested of claimant's counsel, including the hours of service records for the driver of the vehicle, the results of any post-accident drug screen obtained by the motor carrier, the driver qualification file/ employment file for the driver and maintenance records for the vehicle involved in the accident.[5] Obviously, if the FMCSA regulations require particular documents be maintained by a motor carrier for a certain period of time, then it should be relatively easy for the insured motor carrier to gather these records.

Most motor carriers follow the document preservation procedures set out in the FMCSA regulations. However, by the time suit is filed, documents may have been discarded in accordance with these same procedures. This is particularly true of the hours of service records. Hours of service records are only required to be maintained by a motor carrier for six months.[6] Motor carriers often discard these records monthly, only keeping the last six months of records. Since many claimants do not file suit until over a year after an accident, the motor carrier's compliance with the FMCSA regulations can result in the inadvertent destruction of relevant evidence. Despite the late notice of a potential claim, motor carriers can still be penalized for failing to maintain documents, because the fact that an accident occurred can be considered notice of a potential claim. The Supreme Court of Georgia recently reiterated "a defendant might derive constructive notice that a plaintiff is contemplating litigation, [from facts] such as the type and extent of the injury [or] the extent to which fault for the injury is clear."[7] Therefore, providing prompt notice to the insurer that all documents need to be gathered *and* maintained can result in avoiding the inadvertent discarding of relevant evidence. This is particularly important when counsel has not been retained to assist with the document preservation process. Moreover, motor carriers frequently miss important documents in their retention protocols, so the earlier they are put on notice, the better.

As a final issue regarding pre-suit handling of a trucking claim, the insurer should contact the driver as usual, but should not take a recorded statement from the driver. If done, it will be admissible and discoverable.

OUTSIDE COUNSEL

Insurers should consider retaining counsel as early as possible after being put on notice of a trucking accident by the insured. Retention of counsel creates attorney-client privilege, which may be useful in limiting the information a plaintiff can gather from the insurers during litigation. It also allows the retained attorney to take the driver's recorded statement without fear of exposing it to the claimant.

If outside counsel is retained, the attorney should supplement the insurance carrier's notice to the insured to preserve documents. They should also take efforts to preserve any documents themselves, including going to the motor carrier's place of business, viewing first hand their document management/filing system and reviewing documents provided by motor carriers in real time with an eye to gaps in records. Also important is a detailed assessment and understanding of the insured's operations, as well as details surrounding the accident, in order to determine the information required, what the insured should have and whether the presence or absence of any records/information may pose a threat for additional exposure. As illustration, a driver's daily logs are not required for all commercial motor vehicle operators because the FMCSA regulations contain exemptions for certain drivers, such as short-haul drivers.[8] Therefore, there may be legitimate reasons why traditional driver logs may not have been prepared. In this case, outside counsel needs to understand the motor carrier's operations, the driver's schedule and route and the methods used to track the driver's hours of service to determine whether an exception applies and whether the motor carrier is conforming to the federal regulations. This kind of analysis should be applied to each carrier and each document request.

---

5 *See* 49 C.F.R. § 395.8; 49 C.F.R. § 382.303; 49 C.F.R. § 391.51; 49 C.F.R. § 396.3.

6 *See* 49 C.F.R. § 395.8(k).

7 *See Cooper Tire & Rubber Co. v. Koch*, 303 Ga. 336, 340-341, 812 S.E.2d 256, 261 (2018).

8 *See* 49 C.F.R. § 395.8(e).

It is advisable outside counsel responds to spoliation letters from claimants. Oftentimes, claimants' attorneys send boilerplate letters to motor carriers or insurers, requesting the preservation of any and all documents encompassed in the federal regulations. The letters are not usually tailored to the accident or the motor carrier. Outside counsel should send written responses to these letters, reframing the issues (as necessary) and narrowing the focus of the document requests. Outside counsel send their own spoliation letter to the claimant's, as spoliation rules apply equally to both parties. Preservation notices can often be used to trigger the timing for production and may provide a basis for an attorney to argue the claimant was on notice of the need to preserve certain information, such that the later destruction of these records can be used as a basis to support a spoliation claim.

INSURED

Failure to preserve records required by FMCSA regulations not only presents an issue as it relates to spoliation, but may be used by the claimant's counsel to create an inference the motor carrier demonstrates a pattern and practice of failing to follow the federal regulations, regardless of whether there is any relationship between the regulation that was not followed (or the records that were not preserved) and the accident. While outside counsel is focused on areas where the motor carrier has failed to follow the federal regulations and/or maintain records consistent with the FMCSA regulations, it is imporant the insured work with outside counsel to identify these issues and create solutions. Because of the time-sensitive nature of many issues, the insured's prompt cooperation is key. Counsel's knowledge of the federal regulations and willingness to work closely with the insured motor carrier to gather context for its processes and procedures (and potential ways to cure deficiencies in record retention) is critical for the adequate assessment of any additional exposure and identification of any deficiencies so severe as to require pre-suit resolution.

Investigation — The Benefits of a Prompt Investigation of Commercial Motor Vehicle Accidents

Like any motor vehicle accident, evidence regarding the mechanics of the accident fades over time. Sometimes, gaps in evidence can be filled with testimony from drivers or records from investigating officers. However, certain claims require pre-suit investigation, not only to preserve evidence, but to properly assess liability.

Again, insurers should avoid obtaining recorded statements from the insureds. Issues of attorney-client privilege and work-product protection may not extend to recorded statements taken by the insurance carrier during its investigation of the claim. If you feel a recorded statement is necessary, it is advisable to retain outside counsel to obtain the statement.

ACCIDENT RECONSTRUCTION EXPERTS

Not all claims require an accident reconstruction expert be retained to document and investigate the accident. However, where claims involve significant injury and/or fatality and there exists a question as to liability, the prompt retention of an accident reconstruction expert may be valuable. The earlier an accident reconstruction expert is retained, the better. Accident reconstruction experts often use details recorded by police during investigations to form their opinions regarding the mechanics of the accidents and the respective liability of the parties. Markings on the roadway identifying where vehicles were located prior to and after collisions and points of impact fade over time. Therefore, the earlier accident reconstruction experts can visit scenes and document these markings, the better the experts are able to understand the actions of the drivers prior to the collisions and the potential liability of the insureds. Further, considering the level of detail contained in onboard computers of commercial motor vehicles, retaining an accident reconstruction expert to download, interpret and preserve the information is an important step in the investigation and ultimate evaluation of a claim. Oftentimes, details from onboard computers can refute or corroborate statements from a claimant or insured. Thus, an accident reconstruction expert can assist an insured in determining whether early resolution of its case is warranted.

Importantly, accident reconstruction experts should work with counsel when conducting investigations. First, requiring communication between the expert and the insured occurs through counsel ensures certain attorney-client or work-product protections may be afforded to the expert's investigation. This is particularly important when the expert's investigation notes and reports are not used during litigation as parties are only required to produce information from testifying experts. Information from consulting experts, on the other hand, is shielded from production.[9] Second, depending on the nature of the claim, inspections or investigations require coordination with counsel for the claimants. Claimant's attorneys often require inspection of the insured vehicles. Counsel should be the point of contact between claimant's counsel and the expert. Finally, having counsel present while the accident reconstruction expert conducts its inspection of the scene or vehicle can ultimately result in counsel having a deeper understanding of the exposure and potential defenses, and help set the tone for later litigation.

Analysis — The Balance Between Assessing Exposure and Early Disposition of Claims

Not all claims involving commercial motor vehicles require counsel pre-suit. However, in cases involving significant injury, and certainly in cases involving fatality, early retention of an attorney is preferable. Once an attorney is retained to assist with the claim, they should focus on preserving evidence to avoid spoliation, analyzing risks associated with the claim and early resolution of the claim when appropriate. The attorney should communicate with claimant's counsel early on to assess potential exposure and facilitate pre-suit compilation of medical records. In some cases, early resolution can "stop the bleeding" as claims do not have the opportunity to incur two years' worth of medical bills they later pass on to the insurer as related to the accident. Obviously, this strategy should only be utilized in cases of clear liability.

Other Challenges — Decisions that Could Impact the Later Defenses of the Claim

Traffic citations are often issued at the scene. Drivers then pay their citations and claimants' attorneys use this as an admission of guilt during litigation. In cases of severe injury, fatality or when liability is in dispute, the insurer, counsel and the insured driver should discuss strategy relevant to the handling of traffic citations. Georgia courts have held no "'explicit voluntary admission' of guilt occur[s] when a defendant simply [pays] his fine after pleading not guilty on a citation, [pleading] nolo contendere, or [being adjudicated] guilty by a traffic court after pleading not guilty."[10] If there is a possible denial of liability, the admission of guilt associated with paying a traffic citation could impact later defenses during litigation. It could also open the door to a claim that the defendants acted in bad faith by failing to settle claims pre-suit, exposing the defendants to damages for attorneys' fees and expenses of litigation.[11] Based on the exposure of the claim, it may be prudent to retain a criminal attorney to defend the insured driver or advise the driver to plead nolo contendere.

Another important consideration is whether to terminate a driver after an accident. There are many implications that can result in the decision to keep or terminate an employee, including claims of ratification of improper conduct on the part of the insured. On the other hand, the decision to terminate a driver can be twisted to be presented as the employer believing the driver was at fault for the accident. If the insured is determining whether to terminate an employee, the insured should discuss this issue with counsel and the insurer, as it could impact whether a matter should be resolved pre-suit and impact later defenses during litigation.

Finally, as the commercial motor vehicle is the revenue generator for motor carriers, motor carriers generally want to repair the vehicle as quickly as possible ato return the vehicle back to service. Repairing the vehicle can sometimes destroy evidence relevant to the accident. For minor accidents, it is possible to simply document the damage to the vehicle caused by the accident and place the vehicle back in service. However, for significant accidents — especially when the insured receives a letter of representation putting it on notice of a potential claim — any decision to either repair the vehicle or put the vehicle back in service should be approved by the insurer or outside counsel (if one has been retained).

---

9 *See* O.C.G.A. § 9-11-26(a)(4).

10 *Howard v. Lay*, 259 Ga. App. 391, 392, 577 S.E.2d 75, 76-77 (2003).

11 *See* O.C.G.A. § 13-6-11.

Once a letter of representation is received, the insurer or outside counsel should notify the claimant's counsel of the intent to make repairs to the vehicle and allow claimant's counsel a reasonable time (typically 10 days) to coordinate an inspection of the vehicle. If no response is received or if the claimant's counsel reports they do not want to inspect the vehicle, the insurer or outside counsel should then document the claimant's counsel's failure to respond or their preference not to perform an inspection. This confirmation letter will be critical to later responses to spoliation claims from the claimant or their attorney.

The Non-Assignability Provision — *Guess Who* Can Assert a Claim, Pursue a Claim and Is Entitled to a Claim

By Jessica M. Phillips

Jessica M. Phillips

Associate

Jessica M. Phillips is a member of the firm's coverage and commercial litigation team. Since 2010, Ms. Phillips has assisted her clients in evaluating a variety of coverage issues ranging from policy exclusions and sources of loss to arson, application fraud and claim fraud. She is well versed on Georgia law regarding contractual defenses, mortgagee rights, suit limitation defenses, non-cooperation defenses and first-party bad faith claims.

Ms. Phillips evaluates coverage issues under a variety of policies, including traditional home owners policies, inland marine policies, builders risk policies, renters policies and valuable articles policies. She has taken numerous examinations under oath and depositions and she defends her clients in litigation relating to a variety of policy provisions, including appraisal provisions and "suit against us" provisions. In conjunction with her defense of these matters, Ms. Phillips has prepared and successfully defended dispositive motions, including motions to dismiss and motions for summary judgment. She also assists her clients in evaluating the value of losses, including replacement cost value, actual cash value and additional living expenses. Ms. Phillips also defends numerous third-party claims, such as auto accidents, dog bite claims and first amendment claims.

Ms. Phillips graduated, *cum laude*, from Mercer University School of Law in 2010. While in law school, Ms. Phillips was an active member of the *Mercer Law Review*, where she was published on two separate occasions. She was also an active member of the Mercer Advocacy Board and was inducted into the Order of the Barristers. Ms. Phillips graduated, *cum laude*, from the College of Charleston in 2004 with a degree in psychology and a minor in biology.

The Non-Assignability Provision — *Guess Who* Can Assert a Claim, Pursue a Claim and Is Entitled to a Claim

INTRODUCTION

Georgia insurers have seen a recent trend of contractors pursuing lawsuits directly against carriers based upon purported assignments of claims and/or rights to recover benefits from insureds to contractors. The contractor sets the value of its claim (i.e., the value of the work the contractor will perform) and seeks payment directly from the carrier. In the event the contractor does not agree with the amount of payment issued by the carrier, the contractor files suit directly against the carrier based upon the purported assignment of the claim. Most policies contain a provision expressly prohibiting the assignment of the policy or the transfer of the rights and duties under the policy to someone other than the insured without the carrier's express written consent. However, many states strictly limit this "non-assignablity provision" to prohibit transfer of the policy, but not the claim. Other states simply refuse to enforce this provision based on matters of public policy. In these scenarios, the proverbial "rooster" is left "guarding the hen house". To date, Georgia law on this issue is unsettled. For the following reasons, these non-assignability provisions should be enforced to prohibit assignment of both the claim and the right to assert rights and duties under the policy to third-party contractors.

CURRENT STATUS OF THE LAW

It is important to distinguish from these scenarios those instances where, as in a third-party liability or bodily injury context, the insured has assigned a "chose in action," which is ripe to be adjudicated to an injured party who is a stranger to the insurance contract. Georgia courts permit assignment to an injured party of a claim against a tortfeasor's insurance carrier for its bad faith failure to settle or defend a liability claim. In so doing, Georgia courts acknowledge the assignment of the right to pursue damages against the tortfeasors' insurance carrier arises from a tort claim that the insurance carrier's conduct exposed the insured's personal property to the risk of loss.[1] In these instances, the right assigned is not a statutory or policy-based right, but rather, a choice in action that rests in tort.[2] In fact, O.C.G.A. § 44-12-24 permits assignment when it "involves, directly or indirectly, a right of property" that exists at the time of the assignment. However, personal torts, such as trespass, are not assignable. O.C.G.A. § 44-12-24.

Unlike in the third-party liability or bodily injury context, assignment of a claim at the onset of the adjustment of a first-party property case does not involve the transfer of a chose in action, which is ripe to be adjudicated. In the first-party context, a claim is not ripe to be adjudicated at the time it first arises. The theory is there is no chose in action at the onset of the claim because there has been no breach of the policy at the time of the assignment. Moreover, the insured still has duties under the contract, which must be performed before the claim becomes payable and before the insured can bring suit against the insurer. The rights are personal to the insured and cannot be assigned.[3] An insurer has the right to rely on the conditions and provisions of the policy, which provide it the resources to enable it to investigate and/or adjust a loss.[4] These investigatory avenues are purposely included in the insurance contract to protect the insurer and are part of the consideration forming the basis for the contract.[5] The insurance contract and the terms and provisions contained therein are personal to the insured and the performance of these duties by the insured is part of the consideration upon which the contract is founded.[6] Unlike in instances where a tort claim or other chose of action is transferred, at the onset of the claim adjustment in a first-party property claim, the insured still has

1 *See, e.g., Canal Indem. Co. v. Greene*, 256 Ga. App. 97 (2003); *S. Gen. Ins. Co. v. Ross*, 227 Ga. App. 191 (1997); *Henning v. Continental Cas.,* 254 F.3d 1291 (11th Cir. 2001).

2 *Canal Indem. Co.*, 256 Ga. App. at 97 (2003); *S. Gen. Ins. Co. v. Ross*, 227 Ga. App. 191 (1997).

3 *See* O.C.G.A. § 44-12-24, *Langley v. Pacific Indemnity Co.,* 135 Ga. App. 29, 30-31 (1975).

4 *Lucas v. State Farm Fire & Cas. Co.*, 864 F. Supp. 1346 (M.D. Ga. 2012); *Roberts v. State Farm Fire & Cas. Co*., 479 Fed. App'x 223 (2012).

5 *Lucas,* 864 F. Supp. at 1346; *Roberts*, 479 Fed. App'x at 223.

6 *Langley*, 135 Ga. App. at 30-31.

personal and specific duties it must perform before the claim is payable and suit against the insurance carrier can be initiated.[7] For example, if requested, an insured must submit a signed sworn proof of loss, submit to an examination under oath, produce documents related to the history of the property (including repair history and claim history), mitigate his or her damages and protect the property from further loss or damage. These obligations can only be satisfied by an entity or individual with uninhibited rights and unfettered access to the insured property, knowledge of the history of the insured property and a desire and interest to protect and preserve the insured property. A contractor has no ability to preserve the property before it is retained. A contractor has no ability to permit inspections. A contractor does not have control of relevant information regarding the pre-loss condition of the property or the cause of the loss. An entity with no involvement with the property until the onset of the claim simply would not have the ability to satisfy these requirements. Permitting an insured to assign the right to pursue a claim to such an entity would unilaterally abrogate or at least abbreviate the insurer's ability to investigate the loss and to rely upon the investigatory provisions contained in the Policy.

As of now, Georgia courts have reached inconsistent results regarding the enforceability of the non-assignability provisions contained in policies. For example in 2005, the U.S. District Court of the Northern District of Georgia held the non-assignment provision was not enforceable and permitted assignment of the claim to a third party.[8] However, in 2011, the same court held the same non-assignment provision analyzed in 2005 actually was enforceable and an insured was contractually prohibited from transferring rights under the policy to a third person.[9] The Georgia Court of Appeals has also recognized that assignment of a claim to a contractor changes the nature of the claim and held the non-assignability provision should be enforced.[10] State trial courts have also held that the anti-assignment provision is enforceable to prohibit assignments of a first-party property claim to a contractor.[11]

The plaintiff's attorneys will likely cite to the cases of *Santiago v. Safeway Insurance Co.* as support for their position.[12] In *Santiago*, Safeway Insurance Company was the no-fault carrier for the three parties injured in an automobile accident. The three parties executed an agreement assigning their rights to insurance proceeds to their treating physician, Dr. Santiago. Despite receiving notification of the agreement, Safeway issued payment for the medical treatment provided by Dr. Santiago directly to the injured parties. The Georgia Court of Appeals reversed, holding the "anti-assignment" provision in the policy was null and void.[13] In so holding, the Georgia Court of Appeals concluded assignment of the claim did not affect the risk of the insurer because the assignment was post-loss.[14]

In *Henning*, the plaintiff was injured when she was struck by a motorized cart being driven by Audra Baty, a resident of the insured location, Mt. Vernon. At the time of the accident, Mt. Vernon had two insurance policies. St. Paul provided Mt. Vernon with general liability insurance. Continental was Mt. Vernon's professional liability carrier. Henning sued Baty and Mt. Vernon for negligence and failure to obtain proper insurance. Baty failed to answer and a default judgment was entered against her. Mt. Vernon won summary judgment on Henning's negligence claims. Henning then filed a second lawsuit against Mt. Vernon and St. Paul, claiming St. Paul should compensate her for the default judgment she obtained against Baty in the initial action. Henning and Mt. Vernon settled her claim for negligent failure to obtain proper insurance and Mt. Vernon consented to a judgment against it of $225,000. In exchange, Henning agreed that she would not seek to execute the judgment against Mt. Vernon, but rather would pursue any rights Mt. Vernon might have against its insurers under the liability coverage. Mt. Vernon assigned those rights to Henning. Neither insurance company participated in the settlement. Henning filed a third lawsuit against St. Paul and Continental and claimed one or both carriers were liable for the $225,000 judgment against Mt. Vernon for negligent failure to obtain proper insurance. The Eleventh Circuit Court of Appeals addressed the question of whether Henning had standing

7 *Lucas*, 864 F. Supp. at 1346; *Roberts*, 479 Fed. App'x at 223.

8 *Sawtell Partners, LLC v. Admiral Ins. Co.*, 2005 WL 8154806 (2005).

9 *State Farm Fire & Cas. Co. v. King Sports, Inc.,* 827 F. Supp. 2d 1364 (N.D. Ga. 2011).

10 *Williams v. Mayflower*, 238 Ga. App. 581 (1999).

11 *Emergency Servs. 24, Inc. (as assignee of Charles Johnson, the Assignor) v. Ga. Farm Bureau Mut. Ins. Co.*, Superior Court of Bibb County, Civ. Action No.: 11-CV-55516; *Order on Motion for Summary Judgment* (Apr. 9, 2013).

12 196 Ga. App. 480 (1990) and *Henning v. Continental Cas.,* 254 F.3d 1291 (11th Cir. 2001).

13 *Id.*

14 *Id.* (citing *James v. Pa. Gen. Ins. Co.*, 167 Ga. App. 427 (1983)).

to suit Mt. Vernon's insurers directly. St. Paul's policy contained an anti-assignment provision which precluded assignment by Mt. Vernon of its rights under the policy. Citing *Santiago v. Safeway,*[15] the Eleventh Circuit concluded the anti-assignment provision would not be enforced and Mt. Vernon could assign its "failure to obtain proper insurance" claim to Henning as an injured third party.[16]

Henning and *Safeway* both involve assignments of liability coverage under liability portions of the policies. These circumstances are distinguishable from circumstances where an insured assigns the claim and/or the right to recovery thereunder to a contactor in a first-party property claim.

PUBLIC POLICY DOES NOT FAVOR PERMITTING ASSIGNMENT TO A THIRD-PARTY CONTRACTOR

Moreover, while public policy may favor permitting assignments of a chose of action against an insurer in the bodily injury and third-party liability context, public policy does not favor permitting an assignment of the right to pursue a claim by an insured to a contractor in a first-party property context. First, permitting an insured to assign his claim to a contractor is in conflict with the insurable interest requirement of the policy and the Georgia insurable interest statute. Typically, insurance policies require the insured maintain an insurable interest in the covered property in order to recover under the policy. Moreover, Georgia's insurable interest statute provides "no insurance contract on property or of any interest therein or arising therefrom shall be enforceable except for the benefit of persons having, at the time of the loss, an insurable interest in the things insured."[17] This statute is contained in a section of the insurance code specifically addressing property insurance. In Georgia, the rights of the parties are fixed as of the date of loss. As the assignee contractor was not retained until after the loss, the assignee contractor has no insurable interest in the subject of the property as of the time of the loss, when insurable interest is measured. Thus, the contractor would be barred from pursuing a claim under the policy in accordance with the insurable interest provision of the policy and O.C.G.A. § 33-24-4. Under Georgia law, an "assignment" is the "absolute, unconditional, and completed transfer of all right, title and interest in the property that is the subject of the assignment."[18] In addition, given the legal effect of an assignment, Georgia courts will not likely conclude an insured transferred its insurable interest in the property when it executed an assignment of the claim in favor of the contractor. Holding as such would mean the insured would never be able to recover any amount under the policy, even for portions of the claim unrelated to the contractors work and even for future claims.

Furthermore, a contractor does not acquire an insurable interest in the property by virtue of his work on the property. Georgia law defines insurable interest as the "actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance."[19] A contractor does not acquire an interest in the safety or preservation of the subject of the insurance simply by virtue of completing repairs to the property. If an insurable interest was acquired in such a manner, then every plumber, landscaper, handyman and other individual who effectuated any such repairs on the property would have an insurable interest in the property and could arguably purchase an insurance policy to protect this interest. Furthermore, Georgia's legislature has already created a mechanism by which a contractor may protect its ability to recover payment for work completed on the property — the mechanics and materialmen's lien statute set forth in O.C.G.A. § 44-14-361, et seq.

Second, permitting an insured to unilaterally assign the claim to a contractor would prevent other entities with an interest in the claim and the insurance proceeds from asserting their rights under the policy. Most property policies contain a standard mortgage provision creating a separate and distinct contract with a mortgagee identified on the policy. Thus, the mortgagee also has an interest in the policy and the proceeds of the claim separate from and existing simultaneously with an insured's interest. An insured's unilateral transfer of the claim would affect the mortgagee's interest in the policy and the proceeds of the claim. Under Georgia

15 196 Ga. App. 480, 396 S.E.2d 506 (1990).

16 254 F.3d at 1294.

17 O.C.G.A. § 33-24-4.

18 *Allianz Life Ins. Co. of N. Am. v. Riedl*, 264 Ga. 395, 397, 444 S.E.2d 736, 737 (1994).

19 O.C.G.A. § 33-24-4.

law, a mortgagee has the ability to choose whether to apply the payment of claim proceeds to reduce the underlying mortgage debt or to effectuate repairs. If the insured is able to assign the claim to a contractor, then the contractor's interest in using the claim proceeds to pay for repairs directly conflicts with the mortgagee's interest and right to use the proceeds to pay down the mortgage debt if it chooses to do so. Permitting an assignment of the insured's claim to the contractor could create an opportunity for the contractor to impinge upon the rights of the mortgagee. In addition, there may be additional insureds who have an interest in and/or right to receive claim proceeds, such as family members of the named insured, and whose rights may be affected by permitting the contract or to assert a claim for and receive claim benefits directly. Thus, if assignments to a contractor were permitted, the insurer would consistently face the quagmire of satisfying its contractual obligations while simultaneously protecting the interests of all parties entitled to recover.

Third, permitting an insured to assign his claim to a contractor may result in an insured inadvertently waiving his right to pursue portions of the claim in which the contractor was not involved. A typical residential claim involves multiple coverages, including coverage for structural damage, coverage for personal property, coverage for additional living expenses and/or coverage for loss of rents (if applicable). These various coverages all form part and parcel of the insured's single claim. However, by virtue of the assignment, the insured transfers this single claim (and thus, multiple coverage afforded thereunder) to the contractor. As discussed above, an assignment is "the absolute, unconditional, and completed transfer of all right, title and interest in the property that is the subject of the assignment."[20] Once an insured assigns his claim to a third party, the insured no longer has the right to pursue any portion of the claim.[21] Thus, permitting an insured to assign its claim to a contractor could have the unintended consequence of the insured forfeiting his right to recover other portions of the claim in which the contractor was not involved, such as personal property and additional living expense.

Fourth, the insurer may not be able to assert the same policy defenses against a contractor as it would be permitted to assert against the insured. Under Georgia law, an insured is under a duty to read the policy and become acquainted with its provisions.[22] Indeed, "an insured who can read is required to read the policy and is presumed to have understood its contents."[23] An insured becomes bound by those conditions with his acceptance of the insurance contract.[24] Thus, in light of the legal presumption an insured read and understands the terms and provisions of his insurance policy, an insurer may enforce those provisions against the insured and assert an insured's failure to comply with these provisions as a defense to coverage, when appropriate. However, where the policy was never provided to the insured, the insurer cannot rely on the provisions of the policy to deny coverage.[25] Thus, the contractor would argue the insurer cannot seek to enforce the provisions of the policy against the contractor as it was not provided with a copy of the policy. Moreover, providing the contractor with a copy of the insured's policy would inadvertently reveal sensitive financial information of the insured to the contractor, such as the insured's mortgagee, insurance agent, premium information, premium rating and underwriting rating. Therefore, an insurer could be prevented from asserting policy defenses against the contractor because the contractor is not presumed to have read and agreed to be bound by the terms and provisions of the insurance contract.

Fifth, routinely permitting assignment of the claim to a contractor would, for all intents and purposes, render the appraisal provision of the policy nugatory. Under Georgia law, as appraisal is a contractual provision, appraisal may only be demanded by a party to the insurance contract.[26] In cases where a contractor is asserting the right to pursue a claim, pursuant to an assignment, the contractor is not asserting the insured has assigned the policy to the contractor, as such an assignment would clearly violate the anti-assignment language contained in the policy. Thus, it is undisputed the contractor does not become a party to the insurance contract. As the contractor is not a party to the insurance contract, the insured is still the only entity (aside from the insurer) who can demand appraisal pursuant to the terms and provisions of the policy. Appraisal could

20 *Riedl*, 264 Ga. at 397.

21 *See, e.g., S. Gen. Ins. Co. v. Holt*, 262 Ga. 267 (1992) (holding that an insured who assigned her bad faith failure to settle claim to the injured party forfeited her other claims against her insurance carrier).

22 *Conklin v. Liberty Mut. Ins. Co.,* 240 Ga. 58 (1977); *Bogard v. Interstate Assurance Co.,* 263 Ga. App. 767 (2003).

23 *Cox v. So. Guar. Ins. Co.*, 254 Ga. App. 776 (2002).

24 *Hill v. Safeco Ins. Co.,* 93 F. Supp. 2d 1375 (M.D. Ga. 1999).

25 *Pa. Millers Mut. Ins. Co. v. Dunlap*, 153 Ga. App. 116 (1980).

26 *See, e.g., Nat'l Fire Ins. Co. v. Shuman*, 44 Ga. App. 819 (1932); *Gov't Employees Ins. Co. v. Hardin*, 108 Ga. App. 230 (1963).

only proceed between the insured and the insurer. However, as the insured no longer has a right to pursue his claim by virtue of the assignment, the insured will never be able to participate in the appraisal process to resolve a disputed claim. Thus, a process once intended to assist parties to inexpensively and expeditiously resolve valuation disputes becomes a vestigial provision with little practical use or functionality.

CONCLUSION

In light of the foregoing, both the policy and public policy favors enforcement of the non-assignability provisions contained in property insurance policies. However, uncertainty regarding this issue will remain until the Georgia Court of Appeals, Eleventh Circuit or Supreme Court of Georgia offers some direction to carriers and their insureds as to the enforcement of assignments to contractors.

Queen's Gambit and Other Classic Strategies in *Chess* and Claims Investigations

By Rebecca E. Strickland

Rebecca E. Strickland

Associate

Rebecca E. Strickland practices in the areas of coverage, commercial litigation, commercial transactions, and intellectual property. Ms. Strickland represents and defends insurance companies in first- and third-party disputes involving fraud, breach of contract, policy construction, bad faith, interpleader, appraisal and coverage disputes. She represents clients in lawsuits involving premises liability, negligence, employee dishonesty, the Fair Business Practices Act, the Fair Debt Credit Reporting Act, copyright and trademark infringement, business torts and agency.

Ms. Strickland also assists corporate clients by forming entities, drafting governing documents and shareholder agreements and providing advice on non-competition agreements, non-disclosure agreements, shareholder disputes, asset and stock purchases, mergers, business disputes, employment issues and intellectual property rights. She represents clients in related litigation.

A registered patent attorney, Ms. Strickland prosecutes trademark applications (including representing clients at the Trademark Trial and Appeal Board) and defends clients against allegations of trademark infringement both before and during litigation. In addition, she has defended copyright lawsuits, where the issues included authorship disputes, the extent of licenses and contractual royalties. Ms. Strickland has assisted clients with issues involving work-for-hire agreements, cyber-squatting, enforcing website terms of use to remove disparaging material and other similar issues.

Before beginning her law practice, Ms. Strickland was a consultant at Accenture. She has programmed in Fortran, COBOL and SQL and worked on Y2K compliance, designed payroll and financial systems for U.S. and Canadian companies and managed a software support team that was based in the U.S. and the Philippines.

Ms. Strickland earned her J.D. in 2006 from Georgia State University School of Law. In 1997, she received her B.S. in chemical engineering with highest honors from the Georgia Institute of Technology. While at Georgia Tech, she worked in an environmental lab performing NPDES soil and water compliance testing and, separately, worked for an air-quality consulting firm drafting Title V air permits.

Queen's Gambit and Other Classic Strategies in *Chess* and Claims Investigations

"It's the first rule of chess: always protect your queen." — J.M. Sullivan, Alice: The Wanderland Chronicle.

Despite an insurer's best efforts, some claims result in litigation. The claim file is essentially a history of every move the insurer made, the facts it gathered and the basis for its claim decision, some of which may be unfavorable to an insurer. Once a claim is in litigation, opposing counsel begins strategizing to obtain as much information as possible from the claim file. In some cases, the extent to which the claim file is protected may significantly affect the litigation strategy. It's the first rule of claim investigation: always protect the claim file.

THE LEGAL GROUNDS FOR PROTECTING A CLAIM FILE

"In life, as in chess, it is always better to analyze one's motives and intentions." — Vladimir Nabokov, Pnin

The Federal Rules of Civil Procedure (FRCP) and the Georgia Civil Practice Act govern litigation. Both the federal rules and the Georgia rules protect documents "prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[1] If a party seeks documents prepared in anticipation of litigation, the party must show it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[2]

Date of Anticipation of Litigation

"The general rule for determining whether a document can be said to have been 'prepared in anticipation of litigation' is whether 'the document can fairly be said to have been prepared or obtained because of the prospect of litigation, . . . (and not) in the regular course of business.'"[3] The point at which the insurer shifts to preparing for litigation turns on the facts of the case and is identified as the point at which "the probability of litigating the claim is substantial and imminent."[4]

When a claim is in litigation, the attorney evaluates the claim file to determine the date of anticipation of litigation. Work product created on or after the date of anticipation of litigation is considered protected. In the first-party context, determining the date of anticipation of litigation is a fact-intensive inquiry into when the claim began to be handled differently than an ordinary claim. Some indicia the insurer has a reasonable anticipation of litigation may include determining a loss is suspicious, referring a claim to the special investigations unit (SIU) or contacting an attorney.[5] These factors are not dispositive, however. For example, if an insurer refers every loss over a certain amount to SIU as a matter of course, then involving SIU on its own may not be sufficient to indicate litigation is anticipated. In that situation, an insurer who anticipates litigation should be able to articulate other indicia regarding when litigation was anticipated. The insurer should document facts tending to illustrate when the claim began to be treated "differently." For instance, even if SIU was involved early as a matter of course, the date of anticipation of litigation may still be very early in the claim investigation if the loss was determined to be suspicious because of the presence of accelerants or if complex coverage questions were raised. Retaining counsel in that case might indicate anticipation of litigation.

However, the mere involvement of an attorney does not render every document the attorney touches privileged. For instance, if a lawyer is employed by the insurer and the lawyer was the primary claim adjuster, the mere involvement of that lawyer may not indicate litigation was anticipated. Rather, the court will consider the substance of the attorney's involvement. When a lawyer is adjusting the claim, indicia the litigation is

1 Fed. R. Civ. P. 26(b)(3)(A); O.C.G.A. § 9-11-26(b)(3) (emphasis added).

2 Fed. R. Civ. P. 26(b)(3)(A)(ii).

3 *Pleasant Grove Missionary Baptist Church of Randolph Cnty., Inc. v. State Farm Fire & Cas. Co.*, No. 4:11-CV-157 (CDL), 2012 U.S. Dist. LEXIS 77066, at *10 (M.D. Ga. June 4, 2012).

4 *Id.* at *11.

5 *Id.* at *11-13.

anticipated may include the lawyer-adjuster requesting a coverage analysis, the lawyer-adjuster seeking in-house legal review or the lawyer-adjuster referring the claim to SIU.

Contacting outside counsel is rarely standard claims handling procedure. Therefore, contacting outside counsel early in the claim process is strong indicia litigation is anticipated. The date appearing on a claim note indicating outside counsel was contacted is likely the latest possible date litigation was anticipated. Because determining the date of anticipation of litigation is fact intensive and often determined in hindsight, it is important to clearly document the claim file with all facts that might indicate a date of anticipation of litigation.

The nature of a liability claim is that the insured may be subject to a lawsuit. Therefore, in the third-party context, litigation is often anticipated from the moment the claim was opened. Indeed, material may be protected as prepared in anticipation of litigation even before a claim is initiated.[6] A potential claimant's inquiry about the existence of insurance coverage may be sufficient to form a belief that litigation is possible.[7]

Work Product Defined

Work product contained in the claim file after the date of anticipation of litigation is generally considered to be protected. Work product contains the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[8] Work product may include memoranda, correspondence, briefs and notes of mental impressions.[9] However, non-privileged portions (i.e., non-work product portions) of the claim file are discoverable after the date of anticipation of litigation. A document that does not contain mental impressions would be non-privileged. Further, documents that have been disclosed outside the privileged relationship would be non-privileged because the privilege has been waived.

Particular Types of Documents in a Claim File

Whether a particular document is privileged is a fact-intensive inquiry depending both on the date of anticipation of litigation and the substance of the document. However, certain categories of documents are generally considered privileged or non-privileged:

Claim File Notes

In general, a claim representative's entries in the claim file after the date of anticipation are considered work product. The notes reflect the insurer's mental impressions of the claim and the process by which a claim decision is reached.

Oral Statements

During a claim investigation, a claim professional often interviews witnesses. Oral statements of witnesses are generally considered to be work product because the questions asked or statements made by the claim professional reflect that person's mental impressions. Thus, an oral statement made by a witness after the date of anticipation of litigation is generally considered work product.[10] Thus, a claim professional generally can conduct interviews as part of the claim investigation.

Written Witness Statements.

A written statement by a witness is not considered to be work product. While an oral statement is a conversation between an insured and the claim professional, a written witness statement contains only the mental impressions of the witness, not the mental impressions of a representative of the party seeking to protect the statement (such as a claim professional or attorney).[11]

6 *Dep't of Transp. v. Hardaway Co.*, 216 Ga. App. 262, 263, 454 S.E.2d 167, 169 (1995).

7 *Id.*

8 O.C.G.A. § 9-11-26(b)(3).

9 *Atl. C. L. R. Co. v. Daugherty*, 111 Ga. App. 144, 152, 141 S.E.2d 112, 117 (1965).

10 *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787, 790, 218 S.E.2d 921, 924 (1975).

11 *Id.*

Statement by the Insured.
A statement by the insured in a first-party claim is not privileged. When an insured provides a statement to the insurer in a first-party claim, the insured and the insurer are adverse. Thus, any privilege that might have applied is waived because the statement was, by its nature, disclosed to the opposing party.

However, in a third-party claim, the insured defendant's statement is privileged. The insured provides the statement to the insurer as part of the insurer's investigation into liability. The statement is often provided to defense counsel to aid in the defense of the insured. Thus, the communication is between the insured and the insured's agent and is made in anticipation of litigation.

Reserves
When an insurer sets reserves on a claim, the amount of the reserves is indicative of the amount of risk the insurer considers the claim to present. In some instances, reserves are calculated using a proprietary formula. Thus, reserve information is generally considered non-discoverable work product.[12]

Photographs and Video Surveillance
The purpose of taking photographs or video surveillance is generally to accurately record a scene. In order for photographs or video to be tendered into evidence, the party tendering the photograph or video does not have to present the photographer, but rather may authenticate the photograph or video through a person who can testify that the photograph or video is a true and accurate representation of the subject of the photograph or video. Thus, in general, photographs and video do not contain mental impressions and are not considered work product.

Coverage Analyses
A coverage opinion may be obtained from in-house counsel or outside counsel. In either circumstance, a claim professional has referred the claim to an attorney for further evaluation. Communications with an attorney are generally covered by a combination of the attorney-client privilege and work-product doctrine.

In third-party claims, the claim file contains materials related to coverage evaluation and claim investigation. An insurer should segregate the coverage evaluation from the investigation materials, as different dates of anticipation of litigation may apply to each portion of the file.

EXPERTS

"In life, as in chess, forethought wins." — Charles Buxton

Whether an expert's opinion is discoverable depends primarily upon whether the expert will testify at trial.[13] When an expert is anticipated to testify at trial, the opposing party may discover the subject matter on which the expert is expected to testify, the substance of the facts and opinions about which the expert is expected to testify and a summary of the grounds for each opinion.[14] In addition, under the federal rules, drafts of an expert's report and certain communications between an attorney and the expert may be privileged.[15]

Whether the opinion of a consulting expert who will not testify at trial is discoverable turns on whether the expert's opinion is considered work product. If the consulting expert is hired after the lawsuit is filed, the consulting expert's opinion is clearly work product and is generally not discoverable.

A more complex question arises when an expert is hired during pre-suit claim investigation in a first-party claim. In that circumstance, the discoverability of the report turns on whether the expert was retained after the date of anticipation of litigation. In a third-party claim, a non-testifying expert hired pre-suit, such as an accident reconstructionist or coding expert, is almost always a consulting expert because litigation is generally

12 *Allstate Ins. Co. v. RSUI Indem. Co.,* No. 1:11-CV-2990-RLV, 2012 U.S. Dist. LEXIS 190218, at *9 (N.D. Ga. June 18, 2012).

13 Fed. R. Civ. P. 26(b)(4); O.C.G.A. § 9-11-26(b)(4).

14 Fed. R. Civ. P. 26(a)(2); O.C.G.A. § 9-11-26(b)(4)(A)(i).

15 Fed. R. Civ. P. 26(b)(4)(B), (C).

anticipated at or before a claim is made. However, in a first-party claim, the date the expert is retained may be critical. Suppose an insurer has not yet made a claim decision. It hires an expert to provide a second opinion on the cost to repair the property damage, but the insurer only wants to disclose the expert if his report is favorable. The insurer is only permitted to protect the expert's report as work product if litigation has been anticipated.

PRACTICAL POINTERS TO PROTECT THE CLAIM FILE

"One doesn't have to play well, it's enough to play better than your opponent." — Siegbert Tarrasch

Even if a claim file is privileged, the claims professional's initial evaluation of the claim may become discoverable if the court finds the insurer acted in bad faith. Therefore, a claim file should always be maintained as if it may one day become discoverable.

Do Not Put it in Writing

While documents prepared in anticipation of litigation are not discoverable, non-privileged documents are discoverable, and disputes arise about when litigation is anticipated. One simple way to avoid a discovery dispute concerning a document's discoverability is to avoid creating a document in the first instance. Sensitive issues should be discussed by telephone rather than resolved via email or letter. Similarly, it is often advisable to discuss a file verbally with an expert, rather than discuss the claim via e-mail or letter.

Document Facts that Evidence Anticipation of Litigation

One of the critical inquiries is determining the date of anticipation of litigation. Often, the claim file is used to determine the date litigation was anticipated. Therefore, it is important to document when a claim is referred to SIU or when an attorney is contacted.

Claim File Do's and Don'ts

The claim file should document the factors supporting the insurer's decision. Therefore, the claim file must clearly document how a decision was reached, as well as interactions with the insured. However, the claim file is a "permanent record." Once a document or note is made a part of the claim file, it cannot be undone. Thus, before making any entry, the claim professional should consider the purpose and tone of the entry and whether the professional would be willing to present the entry to a jury, if necessary.

- Do consider how the claim file would look if it were an exhibit to the claimant's complaint in a lawsuit.
- Do document facts relevant to the claim, including what happened and why.
- Do document how the claimant was treated in each interaction.
- Do make sure the claim file is sufficiently detailed so you can explain your thought process in a claim years later based upon your notes.
- Don't try to influence expert's opinions.
- Do document the basis of the conclusion ultimately reached by the insurer.
- Do diary the claim. This will ensure that anyone touching the file will know what needs to happen next.
- Do maintain objectivity in notes.
- Don't include subjective comments about the insured, claimant's counsel or vendors.
- Don't make conclusory statements prematurely.
- Don't ignore claim handling procedures.
- Don't express claim notes as "us v. them."
- Do involve an attorney early if you believe there is a need to protect the file.

CONFIDENTIALITY AGREEMENTS

"When you see a good move, look for a better one." — Emanuel Lasker

While the work-product doctrine is critical in protecting a claim file, it does not protect all sensitive information. For instance, in first-party claims, an insured may seek underwriting materials, such as inspections conducted before a policy was issued, loss-run reports and negotiations of premiums and surcharges. The first analysis is whether such documents are relevant to the lawsuit. If the case involves what the insurer knew about the risk, whether a policy change was made in accordance with the insured's request or what the insurer intended to cover, the underwriting materials are likely relevant. If the issue in litigation is whether the insured presented a fraudulent claim, the underwriting materials are less likely to be relevant.

For underwriting materials to be relevant, those materials were likely created before the date of anticipation of litigation — perhaps even before the date the loss occurred. Thus, the insurer cannot protect the documents as work product. However, underwriting materials reflect how an insurer determined to accept a certain risk and for what amount. Underwriting materials provide insight into an insurer's proprietary risk assessment evaluation.

Similarly, in first-party claims, an insured may attempt to discover information about claims handling guidelines. This happens most often when policy language is at issue. The insurer often raises trade secret objections, arguing its internal procedures and guidelines are confidential and disclosure to the public at large would be harmful.

The insurer has an interest in ensuring that underwriting materials, underwriting guidelines and claims handling guidelines will only be used in the case at hand and will not be used as evidence in other cases. To accomplish this, the insurer should change strategies and require a confidentiality agreement before disclosing the information. The confidentiality agreement should clearly outline documents subject to the agreement, how disputes about confidentiality are resolved, how documents will be handled during motion practice or trial and whether documents will be returned or destroyed at the conclusion of litigation.

The confidentiality agreement should not impede the insurer's ability to meet its disclosure obligations to individuals or entities, such as excess insurers, reinsurers or outside counsel. The confidentiality agreement cannot protect information that is or becomes public knowledge. In addition, often the insurer is bound by the confidentiality agreement it proposes. Therefore, the agreement should be consistent with internal procedures. For instance, if the insurer is paperless, it should have the option to destroy, rather than return, confidential documents.

Avoiding the Triple Word Score — An Overview of Negligent Security Claims

By Marcus L. Dean

Marcus L. Dean

Associate

Marcus L. Dean practices primarily in the area of coverage and commercial litigation. Mr. Dean graduated from the University of North Carolina at Chapel Hill in 2010 with a bachelor's degree in management and society. He graduated, *magna cum laude*, from the Charlotte School of Law in 2013, where he was an editor of the *Charlotte Law Review*, a property law teaching assistant and member of the Moot Court Board, Order of the Crown Honor Society and Phi Delta Phi Honor Society. While in law school, Mr. Dean was a summer associate with Swift Currie, a summer intern for the Lord Corporation in Cary, North Carolina, and a judicial intern for the Honorable Kimberly Best-Staton of the Mecklenburg County District Court in Charlotte, North Carolina.

Avoiding the Triple Word Score — An Overview of Negligent Security Claims

Plaintiffs are bringing negligent security lawsuits at an alarming rate. The lawsuits frequently arise from shootings, assaults and robberies at apartment complexes, commercial buildings, gas stations and various other entities. In these cases, plaintiffs argue the property owner/occupier could have prevented their injury if it would have enacted effective safety measures and/or hired security. These claims are difficult to defend as juries often refuse to blame the criminal assailants for their actions.

There are various forms of "negligent" security, including no security, inadequate security and lack of criminal determents. In response to these claims, there are several defenses that have been somewhat successful. This paper will analyze the legal basis for a negligent security claim and some of the prevalent defenses.

LEGAL BASIS FOR A NEGLIGENT SECURITY CLAIM

Georgia law imposes an affirmative duty on a landlord to "exercise ordinary care to keep its premises safe for invitees." Under O.C.G.A. § 51-3-1, "[w]here an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe."

"[A]n intervening criminal act by a third party generally insulates a proprietor from liability unless such criminal act was reasonably foreseeable."[1] Even if the criminal act was foreseeable, "the true ground of liability is the superior knowledge of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm."[2]

Thus, a premises owner's liability in these cases stems from his "superior knowledge."[3] A defendant may prevail on summary judgment if it can demonstrate the plaintiff had either equal or superior knowledge regarding the perpetrator's danger. Ultimately, a plaintiff must prove: (1) the named defendant owed a duty; (2) the criminal action was foreseeable; and (3) the owner/occupier had superior knowledge of the possible danger.

WHO OWES A LEGAL DUTY?

By the plain and express terms of O.C.G.A. § 51-3-1, only an "owner or occupier of land" can be liable for damages to persons invited onto such land.[4] Generally, you can locate the owner of a property via public deed records. A number of counties also provide deed information online. It is important to confirm you identify the person/entity owned the property on the day of the incident as ownership interests often change.

O.C.G.A. § 51-3-1 also creates a duty for occupiers of a property. Georgia courts have broadly interpreted the meaning of "occupier." In one Georgia case, a major building tenant was determined to be an occupier for the purposes of the statute.[5] Moreover, a duty may arise from control of the property or a superior right of possession.[6] Usage of the word "control" in the definition of occupancy usually encompasses the management company involved with running the day-to-day operations of the property. Further, building occupants should be aware of issues with the building as they may be responsible for incidents within their control. As you can see, O.C.G.A. § 51-3-1 is broad and covers a vast group of people and entities.

1 *Walker v. Aderhold Props.*, 303 Ga. App. 710, 712 (2010); *Johnson v. Atlanta Hous. Auth.*, 243 Ga. App. 157, 158 (2000).

2 *Johnson*, 243 Ga. App. at 158.

3 *Howell v. Three Rivers Sec.*, 216 Ga. App. 890, 892, 456 S.E.2d 278, 280 (1995), *cert. denied*.

4 *See Adams v. Sears*, 227 Ga. App. 695, 697 (1997).

5 *See Ga. Bldg. Servs., Inc. v. Perry*, 193 Ga. App. 288 (1989).

6 *Williams v. Nico Indus. Inc.*, 157 Ga. App. 814 (1981).

WAS THE CRIMINAL ACTION FORESEEABLE?

Although landowners are not insurers of safety,[7] they owe a duty to protect against the foreseeable criminal acts of third parties.[8] A foreseeable consequence is "probable, according to ordinary and usual experience," those which, "because they happen so frequently[,] . . . may be expected to happen again."[9] An owner/occupier is not "bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and slightly probable."[10]

One can establish foreseeability by showing the proprietor had notice of substantially similar prior criminal acts.[11] Substantial similarity is based on similar "location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question."[12] This is usually a fact question that survives summary judgment.

In *Norby v. Heritage Bank*,[13] the Georgia Court of Appeals analyzed the foreseeability issue. Ultimately, the court held a robbery/murder at a bank's night deposit box and ATM was reasonably foreseeable as a previous late-night attempt to break into the bank's ATM put the bank on notice of the possibility of a criminal attack. In *Mason v. Chateau Communities, Inc.*,[14] the Georgia Court of Appeals held a prior sexual assault put a trailer park owner on notice of the possibility of similar danger.

In *Baker v. Simon Property Group, Inc.*,[15] the defendant's motion for summary judgment addressed the foreseeability issue. The plaintiff sued the mall manager and security company after he was shot during a carjacking in the mall parking lot. On the night of the incident, Baker "heard a noise on his right side, and saw a man pointing a gun at him through the partially open front passenger's window of his car. The man then said, '[g]ive it up playboy, you know what time it is,' and shot into the car's front windshield."[16] When Baker jumped out to surrender the car, the perpetrators shot him.[17]

In response to the motion for summary judgment, Baker argued the shooting was foreseeable. While Baker introduced a computer printout listing every mall-related crime for the previous 30 months, he failed to show the mall *knew* about the crimes in the reports.[18] "Thus, this evidence could not be used to support Baker's claim his attack was foreseeable."[19] The admissible evidence showed the defendants were aware of five thefts from *unoccupied* vehicles occuring the year prior. Although foreseeability is usually a fact question, the court held the plaintiff's evidence was insufficient as a matter of law.[20]

Notably, a plaintiff must establish foreseeability even if the defendant assumed a duty to provide security. Simply stated, "[t]he fact that [a] particular crime was unforeseeable establishes that there was no duty to protect against this specific attack."[21] Any evidence of security deficiencies, "ignore[s] the fact that there was no duty to protect against this type of attack."[22] Succinctly stated, foreseeability is a prerequisite for recovery. "Undertaking measures to protect patrons does not heighten the standard of care; and taking some measures does not ordinarily constitute evidence that further measures might be required."[23]

---

7 *Lau's Corp., Inc. v. Haskins*, 261 Ga. 491, 492, 405 S.E.2d 474 (1991).

8 *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 482 S.E.2d 339 (1997).

9 *Brown v. All-Tech Inv. Group, Inc.*, 265 Ga. App. 889, 894, 595 S.E.2d 517 (2004), *cert. denied*.

10 *Id.*

11 *Carlock v. Kmart Corp.*, 227 Ga. App. 356, 357 (1997); *Ratliff v. McDonald*, 326 Ga. App. 306, 312, 756 S.E.2d 569 (2014).

12 *Id.*

13 284 Ga. App. 360, 644 S.E.2d 185 (2007), *cert. denied*.

14 280 Ga. App. 106, 633 S.E.2d 426 (2006), *cert. denied*.

15 273 Ga. App. 406, 614 S.E.2d 793 (2005).

16 *Id.* at 406.

17 *Id.*

18 *Id.* at 407.

19 *Id.*

20 *Id.* at 408.

21 *Baker*, 273 Ga. App. at 409.

22 *Id.*

23 *Id.*

DID THE OWNER/OCCUPIER HAVE SUPERIOR KNOWLEDGE?

As noted previously, a plaintiff must establish the defendant had "superior knowledge" of the alleged attack. Often, plaintiffs learn of the possibility of the attack before it happens. Summary judgment is appropriate where "plaintiff's knowledge of the risk is clear and palpable."[24]

In *Cook v. Micro Craft Inc.*,[25] the plaintiffs were not entitled to recover from the decedent's employer, Micro Craft, Inc., because the plaintiffs had superior knowledge of the risk. In *Cook*, Jackson (the decedent's estranged husband) murdered the decedent and injured the decedent's aunt. Both victims were fully aware of Jackson's violent history.[26] Despite this knowledge, just prior to the attack, the decedent had phone conversations with Jackson and told him where she lived and worked. Moreover, Jackson informed the decedent he was coming over to kill her that day.[27] Fearing for their safety, the women fled to Micro Craft. Knowing the danger posed by Jackson, one of the victims made the conscious decision to go to the plant instead of to a police station or sheriff's office.

Micro Craft had no knowledge of the looming threat. Micro Craft was not informed of the decedent's conversations with Jackson. Further, no one warned Micro Craft the women were fleeing a potential killer. At most, the decedent mentioned her husband had "a history of violence."[28] However, Micro Craft was unaware Jackson knew where the decedent worked.[29] Micro Craft also did not know Jackson's name, what he looked like or what kind of car he drove.[30] Once Micro Craft became aware of the situation, it immediately reacted.

The Court of Appeals held even if an intervening criminal act was reasonably foreseeable, "the true ground of liability is the *superior knowledge* of the proprietor" as to the existence of an unreasonable risk of harm.[31] It reasoned:

> This was not a random stranger attack but rather grew out of a specific private relationship which had no connection with employment whatsoever. The place chosen by the boyfriend for the attack just happened to be the employer's parking lot. The employer did not create or allow to exist an environment which placed [plaintiff] at risk any more than if she had been at home or on the street.[32]

Similarly, in *Davis v. Crum*,[33] the plaintiff knew the perpetrators in the defendant's trailer park were violent. The plaintiff approached the group after they beat his cousin. One of the men, brandishing a stick, demanded the plaintiff's money. The men then beat the plaintiff into unconsciousness. As the plaintiff failed to avoid this known danger, the court determined summary judgment was properly granted to the trailer park owner.[34] In *Gateway Atlanta Apartments Inc. v. Harris*,[35] the Georgia Court of Appeals reversed the denial of summary judgment to the apartment complex and its management where the decedent was shot and killed by a bail bondsman who was attempting to apprehend him for bond forfeiture.

Moreover, plaintiffs are generally unable to recover when they have been involved in "mutual combat." This occurs when the plaintiff has voluntarily engaged in a verbal and physical altercation. Simply stated, by voluntarily entering into the fight, the plaintiff selected the person, time, place and date for his altercation and thus had equal knowledge of the potential altercation. Georgia courts have held summary judgment is appropriate where a patron engages in "mutual combat."[36] If proven, the plaintiff is barred from recovering from the defendant.

---

24 *Snellgrove v. Hyatt Corp.*, 277 Ga. App. 119, 124, 625 S.E.2d 517 (2006).

25 262 Ga. App. 434, 585 S.E.2d 628 (2003), *cert. denied*.

26 *Id.* at 439.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* at 439-40.

31 *Snellgrove*, 277 Ga. App. at 438.

32 *Id.* at 439; *see also Griffin v. AAA Auto Club South*, 221 Ga. App. 1, 470 S.E.2d 474 (1996); *Britt v. Kelly & Picerne*, 258 Ga. App. 843, 575 S.E.2d 732 (2002); *Johnson v. Holiday Food*, 238 Ga. App. 822, 520 S.E.2d 502 (1999).

33 263 Ga. App. 682, 588 S.E.2d 849 (2003).

34 *Id.; see also Fernandez v. Ga. Theatre Co., II*, 261 Ga. App. 892, 583 S.E.2d (2003).

35 290 Ga. App. 772, 660 S.E.2d 750 (2008), *cert. denied*.

36 *See Habersham Venture v. Breedlove*, 244 Ga. App. 407, 410, 535 S.E.2d 788 (2000).

IS APPORTIONMENT VIABLE?

Under O.C.G.A. § 51-12-33, a party can seek to apportion fault to a non-party. In negligent security cases, you often encounter defendants seeking to apportion fault to third-party criminal assailants. The named defendant is not legally responsible for any percentage of fault assigned to a non-party. Further, the non-party has no legal responsibility to the plaintiff for the assigned percentage. For example, if a jury awards a verdict of $100,000 and apportions 40 percent fault to the criminal assailant and 60 percent to the property owner, then the property owner is only responsible for $60,000. The plaintiff cannot recover the $40,000 associated with the fault assigned to the criminal assailant. Admittedly, juries are reluctant to apportion fault to non-parties as they are aware that the plaintiff likely cannot recover from a person or entity that is not in the courtroom.

To apportion fault to a non-party criminal assailant at trial, several statutory requirements must be met. First, the defending party must give written notice of the intent to apportion fault at least 120 days prior to trial. Generally, the "notice" is provided in the form of a legal pleading, which is filed with the court. Second, the notice should provide information identifying the offending party. Often, the name and contact information for the criminal assailant may be unknown. Still, the defending party should provide as much information as possible regarding the assailant.

PRACTICAL APPLICATION

Negligent security lawsuits are dangerous claims that should be thoroughly evaluated as soon as possible. As with most crimes, evidence disappears and memory fades as time passes. At trial, plaintiffs use scare tactics to get juries to punish property owners for criminal actions occurring on their properties. Once the jury is upset, it is very difficult to minimize the verdict award.

When defending a negligent security lawsuit/claim, it is imperative you investigate the cause and/or reason behind the criminal attack. Were there prior criminal attacks on the property? Did the plaintiff know the assailant? Did the plaintiff know about the impending attack? Did the plaintiff participate or voluntarily join the altercation? These considerations could change the outcome of the case and/or provide a viable defense.

Moreover, it is imperative you file a notice of intent to apportion fault as early as possible. Apportionment is one of the strongest defenses to a negligent security claim when used correctly. It is undisputed the criminal assailant caused and/or contributed to the plaintiff's injury. As such, juries will occasionally apportion 100 percent of fault to the criminal assailant. However, as noted, juries are sometimes reluctant to apportion much, if any, fault to the criminal assailant. This analysis depends heavily on the venue for the case. More conservative venues tend to apportion more fault to the criminal assailant, while liberal venues tend to assign more fault for the owner.

Interpreting Additional Insured and Indemnification Clauses — As Confusing as the *Jumanji* Instructions

By Brian C. Richardson

Brian C. Richardson

Associate

Brian Richardson joined the firm in 2015 and is an associate in the firm's coverage and commercial litigation section. He has experience representing businesses and individuals in various matters, including insurance coverage claims, first-party and third-party insurance claims, construction defect, employment, premises liability, products liability, transportation, wrongful death, bad faith and class action litigation.

In 2012, Mr. Richardson received his J.D. from Cumberland School of Law at Samford University. He was a senior editor for the *American Journal of Trial Advocacy* and a recipient of the Scholar of Merit Award in Conflicts of Law. He is admitted to practice law in Alabama and the U.S. Courts for the Northern, Southern and Middle Districts of Alabama.

Mr. Richardson is an Alabama native and attended Auburn University where he received a Bachelor of Science in building science. While there, he successfully completed the professional requirements for the Cooperative Education Program and was awarded the Comer Foundation Scholarship. After graduating, Mr. Richardson worked as an estimator and project manager for a large regional general contractor. During his time in this line of work, he helped manage the construction of a multimillion-dollar healthcare facility and participated in several successful bids and estimates related to schools, banks, healthcare facilities and wastewater treatment plants. He was also a member of the Associated General Contractors of Alabama and earned a LEED Accredited Professional certification from the Green Building Certification Institute.

Interpreting Additional Insured and Indemnification Clauses — As Confusing as the *Jumanji* Instructions

In the 1995 movie *Jumanji,* a new message appeared in the form of a riddle telling the players what challenge they would face after each player rolled the dice. The first player to reach the end yells, "Jumanji," and wins. The complexity of Jumanji is perfect for a discussion on the interpretation of indemnity agreements and additional insured clauses, both of which are often similar to riddles.

The rules to the actual board game are complicated, making it a perfect fit for this topic.[1] This paper will explore two particular risk-shifting tools: additional insured clauses and indemnification clauses and how Georgia and Alabama courts enforce them.

Your insured may be an additional insured on another entity's policy or may avail itself of an indemnification clause contained in a contractual agreement with another entity. Applicable insurance policy language often extends coverage to an additional insured for claims "arising out of" acts or omissions of the named insured. This language may extend additional insured coverage to any and all claims that have any relationship to the business transaction between the named insured and the additional insured.

With respect to indemnification clauses, some contracts purport to indemnify one party for "any and all" acts or omissions of another party to the contract. These clauses, though they may appear to encompass the indemnification one seeks, may be void as a matter of public policy within certain contexts depending largely on the applicable law and contractual language.

WHO IS AN ADDITIONAL INSURED

Agreements to obtain additional insured coverage are commonly found in lease agreements, construction contracts and vendor-retail agreements. For instance, construction subcontracts almost always require the subcontractor to procure additional insured coverage for the general contractor and others on a project.[2] This coverage is often added to the subcontractor's existing liability policy in endorsements.[3] The commercial general liability (CGL) policy is one of the most common commercial risk-shifting policies used for construction projects.

Generally speaking, most insurers use the ISO CGL forms for primary layers of coverage, including either CG 00 01 (occurrence) form or CG 00 02 (claims made) form.[4] Many CGL policies, in either the "Who Is an Insured" section or in a specific additional insured endorsement, contain language providing that any person for whom the named insured agrees in a "work contract" or written agreement that such person or organization be made an insured or named as an additional insured on the policy, does in fact qualify as an additional insured.[5] There are four basic types of "insureds" under an ISO CGL policy. Each type of insured has a different "amount" of protection:

- **Named insureds:** They took out the policy. These are the "you" in the policy. They have the greatest protection under the policy.
- **Automatic insureds:** These insureds are "related" to the named insured. The named insured conducts its business through people, so the policy extends certain coverages to

1 The rules can be found online at https://www.hasbro.com/common/instruct/Jumanji.PDF.

2 Jeff Sistrunk, *A General Contractor's Guide to Additional Insured Coverage*, Law360 (Aug. 8, 2017).

3 *Id.*

4 Fred Wilshusen, et al. Construction Checklists: A Guide to Frequently Encountered Construction Issues (2008).

5 The ISO form CG 20 10 Additional Insured-Owners, Lessees or Contractors-Scheduled Person or Organization is an additional insured endorsement that covers the primary named insured's acts or omissions or the acts or omissions of those acting on its behalf "in performance of its ongoing operations for the additional insured." If the contract requires both operations exposure and completed operations coverage to the additional insured, both forms 20 33 and 20 37 must be issued. Form CG 20 33 is entitled Additional Insured-Owners, Lessees or Contractors-Automatic Status When Required in Construction Agreement with You and CG 20 37 is entitled Additional Insured-Owners, Lessees or Contractors-Completed Operations (scheduled entity).

these operators. For example, a CGL provided automatic insureds status to "employees" of the named insured for certain types of claims.

- **Extended insureds:** These insureds are listed in the policy and differ based on the entity type of the named insured ("you") — so the entity types must be correct. Extended insureds are granted the same level of protection as the "you" — for activities related to the business.
- **Additional insureds:** These are third parties added to the insurance policy by an endorsement. These third parties differ from automatic insureds in that they are generally not related to the insured, but have a business relationship with the insured. Additional insureds receive the most limited coverage of all insureds.

A typical "Who Is an Insured" provision defines the insured. For example, ISO Form CG 00 01 04 13 provides:

> SECTION II — WHO IS AN INSURED
>
> 1. If you are designated in the Declarations as:
>
> a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
> b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
>
> . . .
>
> 2. Each of the following is also an insured:
>
> a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees" . . . but only for acts within the scope of their employment by you .
>
> b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
>
> . . .
>
> 3. Any organization you newly acquire or form [subject to described exceptions].[6]

The Who Is an Insured provision is not designed to provide coverage to true third parties. Third parties are added to the insurance policy by an endorsement modifying the Who Is An Insured provision. Such endorsements can be broad or quite narrow in defining who is covered for what.

Most contractors require verification from subcontractors through certificates of insurance indicating the additional insured endorsement. Those same provisions typically contain a limitation, which restricts additional insured coverage to liability "arising out of" or "resulting from" the named insured's (often a subcontractor's) work or operations performed for that additional insured (typically a general contractor, developer or owner).

Many insurers have taken the position that if the named insured was not liable or responsible for the bodily injury or property damage alleged by the claimant against the additional insured, then the additional insured is not entitled to coverage under the policy. Yet, decisions over the last 10 years have continued to underscore the fact insurers should not take that position absent more specific policy language.

Courts interpret the "arising out of" language very broadly and comprehensively, to mean "origination from," "having its origin in," "growing out" or "flowing from."[7] However, courts are split on whether the newer language of ISO Forms 20 10 07 04 and CG 20 10 04 13 covering for liability for injury "caused, in whole or in part" by the

6 *Id.* at 9-10.

7 *See, e.g., Stickovich v. City of Cleveland*, 757 N.E. 2d 50, 69 (8th Cir. 2001) (internal citations omitted); *Murdock v. Dinsmoor*, 892 F.2d 7, 8 (1st Cir. 1989); *Am. Guar. & Liab. Ins. Co. v. Norfolk S. Ry. Co.*, 2017 U.S. Dist. LEXIS 178808 at *19 (E.D. Tenn. Oct. 6, 2017) (citing *First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc.*, 48 F. Supp. 3d 158, 173 (D. Conn. 2014), aff'd 660 F. App'x 30 (2d Cir. 2016)); *McIntosh v. Scottsdale Inc. Co.*, 992 F.2d 251, 255 (10th Cir. 1993); *Burlington Ins. Co. v. NYC Tr. Auth.*, 79 N.E. 3d 477, 483 (N.Y. Ct. App. Jun. 5, 2017) (citing *Aetna Cas. & Sur. Co. v. Liberty Mut. Ins. Co.*, 459 N.Y.S. 2d 158 (App. Div. 1983) (stating that "reasoning that the phrase 'arising out of' is 'ordinarily understood to mean originating from, incident to, or having connection with'"); *see also Taliaferro v. Progressive Specialty Inc. Co.*, 821 So. 2d 976 (Ala. 2001); *State Farm Fire & Cas. Co. v. Erwin*, 393 So. 2d 996 (Ala. 1981) (stating that "arising out of the ownership, maintenance, or use of the owned automobile" is about as general and broad as could be written).

named insured's acts are functionally different from the "arising out of" language in the 1985, 1993 and 2001 versions of the ISO Additional Insured endorsements. The split centers on whether proximate cause is required or whether but-for causation is sufficient. Some courts reason the "caused, in whole or in part" language was intended to prevent coverage when the additional insured was the sole cause of liability and limit the additional insured's coverage to occurrences where the named insured was at least partially at fault for the loss.[8]

The Court of Appeals of New York distinguished "caused, in whole or in part" from "arising out of."[9] In that regard, it held "caused, in whole or in part" required proximate causation, reasoning an event cannot be partially connected to a result.[10] The court identified other jurisdictions applying similar reasoning, including the Texas Supreme Court,[11] the Pennsylvania Supreme Court[12] and several federal courts.[13]

Alabama

Alabama courts interpret the "arising out of" language to ***"simply require that the additional insured's negligent acts are connected to the named insured's operations performed for the additional insured."***[14] However, even with a liberal construction of an additional insured endorsement covering "liability arising out of the named insured's operations," an additional insured (general contractor), for example, has no coverage where the damages did not arise out of the named insured's (subcontractor) work if the additional insured endorsement states:

> Who Is an Insured is amended to include . . . the person or organization shown in the SCHEDULE as an insured ***but only with respects to liability arising out of the Named Insured's operations***. . . . The insurance afforded by this endorsement . . . shall not apply to damages arising out of the negligence of the person(s) or organization(s) added by this endorsement.[15]

In *Regency Club*, the insurer filed a declaratory judgment action to determine its coverage obligations relevant to a lawsuit brought by a homeowners' association against the developer, general contractor and subcontractors. The facts were undisputed the subcontractor did not perform any work for the general contractor, the putative additional insured on the subcontractor's policy on the development. The federal district court held the additional insured provision (cited above) clearly limited additional insured coverage to "liability arising out of the Named Insured's operations." The court held the general contractor's vicarious liability did not arise out of the work actually performed by the named insured. Therefore, the general contractor was not entitled to coverage under the express language of the policy.

There are a wide variety of additional insured endorsements and this specific language of the provision must be taken into account. For example, where the additional insured endorsement states it applies to "liability arising out of the named insured's operations," Alabama courts liberally construed the endorsement.

Furthermore, endorsements such as CGL026 (11 08) (providing additional insured coverage "with respect to your negligent actions, which cause liability to be imposed on such person . . . without fault on the part of said person . . . , caused by 'your work' performed for that insured") and CGL055 (12 05) (providing additional insured coverage "with respect to (1) your negligent actions . . . which cause liability to be imposed on such person . . . without fault on the part of said person . . . and (2) the partial negligence of the additional insured which combines with your partial negligence . . . in causing the accident . . . . This insurance does not cover the sole negligence of the additional insured") may be interpreted differently.

---

8 *Am. Guar. & Liab. Ins. Co. v. Norfolk S. Ry. Co.*, 2017 U.S. Dist. LEXIS 178808 *20-21 (E.D. Tenn. Oct. 6, 2017); *see also Burlington Ins. Co. v. NYC Tr. Auth.*, 79 N.E. 3d 477, 485 (Ct. App. N.Y. June 6, 2017) ("the change intended to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence.").

9 *Burlington Ins. Co. v. NYC Tr. Auth.*, 79 N.E.3d 477 (2017).

10 *Id.*

11 *Utica Nat'l Ins. Co. of Tx. v. Am. Indem. Co.*, 141 S.W. 3d 198 (Tex. Sup. Ct. 2004).

12 *Mfg. Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571 (Pa. Sup. Ct. 1961).

13 *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. XL Ins. Am., Inc.*, 2013 U.S. Dist. LEXIS 68467, 2013 WL 1944468 (SD NY 2013) (held "'caused by' requires a showing that [the named insured]'s operations proximately caused the bodily injury for which" indemnity was sought), *Wausau Underwriters Ins. Co. v. Old Rep. Gen. Ins. Co.*, 122 F. Supp. 3d 44 (S.D.N.Y 2015) ("[W]hether an injury was legally caused by a party's actions is a much more demanding question than whether the injury arose out of those actions.") and (*Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 127126, 2010 WL 4909600 (E.D. Pa. 2010) (held "caused by" required "proximate cause" in order to trigger coverage); *Id.* at 484.

14 *Int'l Paper Co., Inc. v. QBE Ins. Corp.*, 2010 U.S. Dist. LEXIS 44048, at *15-16 (M.D. Ala. 2010).

15 *Canal Indem. Co. v. Regency Club Owners Ass'n*, 924 F. Supp. 2d 1304 (M.D. Ala. 2013).

Georgia

Interpretation of Georgia courts' application of additional insured language suggests so long as there is a "business transaction" between the putative additional insured and named insured, which can be formed via contract, then the injuries necessarily "arose out of" the named insured's work.

In *BBL-McCarthy, LLC v. Baldwin Paving Co.*, the general contractor subcontracted with Baldwin Paving and Magnum Development (the subcontractors) separately to construct a traffic "deceleration lane" leading from the project.[16] Magnum performed the grading work and Baldwin completed the paving. Both subcontracts contained an indemnification clause and insurance clause. The indemnification clause required the subcontractors to defend, indemnify and hold the general contractor harmless for all claims arising out of the performance of the subcontractors' work. The insurance clause required the subcontractors to obtain liability insurance to cover claims arising out of the subcontractors' work and for which the general contractor may be liable. The subcontractors obtained CGL policies which named the general contractor as an additional insured, but the policies contained language limiting coverage to the general contractor for liability "arising out of" the subcontractors' work or operations.[17] Following an auto collision near the construction project, claimants brought lawsuits alleging their injuries resulted from the general contractor's negligent management of the project and the general contractor and subcontractors' negligent construction of the road.

The trial court held the general contractor qualified as an additional insured under the subcontractors' policies, regardless whether the injuries were attributable to the general contractor or subcontractors.[18] The court broadly construed the phrase "arising out of" the subcontractors' work or operations as meaning ***arising out of a business transaction with or work performed for the general contractor***.[19] Because the alleged injuries were related to the subcontractors' work, the general contractor qualified as an additional insured, regardless of whether actual liability for the injuries was attributable to the general contractor or the subcontractors.[20]

This decision initially shocked much of the insurance industry in Georgia, as the ruling all but eliminated the requirement of any causal connection between the plaintiff's injury and the work performed by the named insured. In fact, the court suggested as long as there is a "business transaction" between the named insured and purported additional insured, which can be evidenced by a contract between them, then the injuries necessarily "arose out of" the named insured's work.

Insurers whose additional insured provision uses the language "liability resulting from" the named insured's work, may be tempted to argue such language requires a much more direct, causal connection between the named insured's work and the claimant's alleged injuries or damages than is required by an additional insured provision containing the phrase "liability arising out of" the named insured's operations. However, Georgia courts have found no material distinction between the phrases "arose out of" and "caused by."[21]

While Georgia courts have demonstrated a propensity to interpret additional insured provisions in CGL policies very broadly, finding that an entity qualifies as an additional insured, courts are beginning to narrow the extent of coverage provided to an additional insured. In *Auto-Owners Insurance Co. v. Gay Construction Co.*, Gay Construction, a general contractor, qualified as an additional insured under a CGL policy issued by Auto-Owners to named insured Dai-Cole Waterproofing Company, Inc., the waterproofing subcontractor on a project.[22] After completion of the project, the owner complained water was leaking into the space below the terrace when it rained. Gay Construction investigated the complaint and determined the waterproofing

16 285 Ga. App. 494 (2007).

17 *Id*. at 495-96.

18 *Id*. at 499.

19 *Id.* at 498 (noting that the court had similarly construed "arising out of" as meaning "had its origins in," "grew out of" or "flowed from," and, therefore, "almost any causal connection or relationship will do" in satisfying the "arising out of" requirement).

20 *See also Video Warehouse Inc. v. S. Trust Ins. Co.*, 297 Ga. App. 788, 678 S.E.2d 484 (2009) (noting that the Georgia Supreme Court has interpreted the same "arising out of" language as excluding all claims for injuries caused by the excluded acts, regardless of the theory of tort liability) (citing *BBL-McCarthy, LLC v. Baldwin Paving Co*., 285 Ga. App. 494, 646 S.E.2d 682 (2007) ("We have also similarly construed 'arising out of' as meaning "had its origins in,' 'grew out of,' or 'flowed from.'")).

21 *See Jefferson Ins. Co. of N.Y. v. Adrian*, 269 Ga. 213, 496 S.E.2d 696 (1998) (stating that both phrases required the same causal connection between the alleged injuries and the insured's conduct). An additional insured's coverage may be limited to instances where the additional insured is vicariously liable for the wrongs of the named insured. *BP Chemicals, Inc. v. First State Ins. Co*., 226 F.3d 420, 423 (6th Cir. 2000) (finding that additional insured under CGL policy was not provided with coverage for its own negligence. Neither an indemnity agreement nor the additional insured endorsements expressly stated an intention to indemnify the additional insured against its own negligence). However, such language must be specifically and unambiguously stated in the policy. *Id.*

22 285 Ga. App. 494, 646 S.E.2d 682 (2007).

membrane and drainage mat were improperly installed. Dai-Cole either failed and/or refused to properly repair the work and Gay Construction was forced to make the repairs and replace damaged materials and fixtures as a result.

As a prerequisite to performing work on the project, the project and contract documents required Dai-Cole to obtain a CGL policy, which it acquired from Auto-Owners. The policy provided, in part:

> A person or organization is an Additional Insured only with respect to liability arising out of "your work" for that Additional Insured by or for you (1) [i]f required in a written contract or agreement; or (2) [i]f required by an oral contract or agreement only if a Certificate of Insurance was issued prior to the loss indicating that the person or organization was an Additional Insured.

And Auto-Owners would:

> Pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies . . . . This insurance applies to "bodily injury" and "property damage" only if . . . [such] is caused by an "occurrence" that takes place in the "coverage territory."[23]

Following Gay Construction's completion of the repairs and replacement work, Gay Construction sought coverage under the Auto-Owners policy as an additional insured.[24] Auto-Owners denied the claim and Gay Construction sued.[25] Auto-Owners filed a motion for summary judgment arguing that Gay Construction's claim did not seek damages resulting from property damage as defined by the policy and that the damages sought were barred by the policy's business risk exclusion.[26] The trial court denied Auto-Owner's motion and permitted an interlocutory appeal.[27]

On appeal, the Georgia Court of Appeals confirmed Gay Construction qualified as an additional insured and determined the policy's business risk exclusion applied to Dai-Cole's faulty workmanship.[28] Meaning, had Dai-Cole made a request for coverage under the CGL policy, Auto-Owners would have denied the request because of the business risk exclusion. This left the court with a question of first impression as to "which party's scope of work should be considered when determining whether a business risk exclusion applies to a general contractor's claim for first-party coverage as an additional insured under its subcontractor's CGL policy."[29]

The court reasoned Auto-Owners did not contract to guarantee Dai-Cole's scope of work and the business risk exclusion removed Dai-Cole's defective workmanship, which caused damage to the project, from coverage under the policy.[30] Gay Construction was responsible for all work performed within the scope of its contract with the owner.[31] If the business risk exclusion were interpreted as to only apply to work performed by Dai-Cole, then it would permit the additional insured, Gay Construction, to enjoy broader coverage than that which was granted to the policy holder. In essence, Auto-Owners would be required to guarantee Dai-Cole's work.[32]

In *Employers Mutual Casualty Co. v. Shivam Trading, Inc.*, Vicki Thrift allegedly slipped and fell at a convenience store whose landlord was Sidhi Investment Corp.; the store was operated by Shivam Trading Co.

Sidhi was the named insured on an EMC insurance policy covering the convenience store. Shivam was an additional insured. Sidhi was held not liable in a separate action so this case only addressed whether Shivam had coverage for Thrift's claim. The court first analyzed the "Who Is an Insured" provision, which begins, "If you are designated in the Declarations as," and then explains what entities and individuals are covered based on what sort of entity is designated.[33] For example, if a trust is designated, both the trust and its trustees are insureds, but only "with respect to their duties." It then looked at the second potential source of coverage, the Additional Insured Endorsement. That endorsement used the "caused, in whole or in part" language:

---

23 *Jefferson Ins. Co.,* 269 Ga. at 799.

24 *Id.* 799-800.

25 *Id.* at 800.

26 *Id.*

27 *Id.*

28 *Id.* at 800-01.

29 *Jefferson Ins. Co.,* 269 Ga. at 800-01.

30 *Id.*

31 *Id.*

32 *Id.* at 801-02.

33 *Employers Mut. Cas. Co.,* 2017 U.S. Dist. LEXIS 74490, at *2.

> Any person(s) or organization(s) shown in the Schedule is also an additional insured, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf in the performance of your ongoing operations or in connection with your premises owned by or rented to you.

The analysis of that endorsement focused on which party's acts or omissions were the object of the coverage. The endorsement provides coverage, "but only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf in the performance of your ongoing operations."

EMC sought a declaration Shivam was not covered for its own liability; Thrift argued the opposite. EMC won in the duel of cross-motions for summary judgment. The court held the policy only covered wrongdoing by Sidhi as the named insured, not Shivam as an additional insured, and the policy did not broadly extend coverage to all liability relating to Sidhi's premises.

The court answered The Who's question, "Who Are 'You'?" It explained throughout the policy "you" and "your" signified the named insured alone, which was Sidhi. Thus, the additional insured endorsement, like the rest of the policy, only used "you" to refer to the named insured. According to the court, this was the "only construction of the endorsement satisfying both logic and grammar, it [was] the endorsement's unambiguous meaning. The endorsement unambiguously [did] not extend coverage to all liability pertaining to Sidhi's premises. The policy's coverage, then, unambiguously does not reach to whatever liability Shivam may have to Thrift."[34]

The court held the policy "only covers Sidhi's wrongdoing, not Shivam's or all liability relating to Sidhi's premises."[35] Therefore, it granted EMC's motion for summary judgment.

INDEMNIFICATION CLAUSES

Indemnification clauses present another opportunity to shift risk to another party. For instance, many construction contracts contain an indemnification clause requiring one of the parties, typically the subcontractor, to defend, hold harmless and indemnify the other party for claims, injuries and damage arising out of the work on the project.

While the breadth of indemnification clauses vary, there are certain restrictions at play based on the applicable law. In Georgia, it is against public policy to contract away liability to an indemnitor for damages arising from the sole negligence of an indemnitee in construction contracts.[36] Alabama has no such statutory limitation. Alabama law allows parties to enter into "indemnity agreements that allow an indemnitee to recover from the indemnitor even for claims resulting ***solely from the negligence of the indemnitee***" so long as the indemnity contract clearly and unequivocally indicates an intention to indemnify for the indemnitee's own negligence.[37]

Alabama

Generally, Alabama law prohibits contribution or indemnity between joint tortfeasors.[38] Broad indemnification agreements are not looked upon favorably in Alabama. Agreements purporting to indemnify another for the others intentional conduct is void as a matter of [strong] public policy.[39]

Alabama law allows parties to enter into "indemnity agreements that allow an indemnitee to recover from the indemnitor even for claims resulting solely from the negligence of the indemnitee."[40] Strict construction against the indemnitee is appropriate where it seeks indemnification for its own negligence.[41] Furthermore, the burden of proof is on the indemnitee to establish its right to indemnification under such an agreement.[42]

---

34 *Id.* at *5-6.

35 *Id.* at *12-13.

36 O.C.G.A. § 13-8-2 (b).

37 *Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, 38 So. 3d 722, 728 (Ala. 2009); *Indus. Tile, Inc. v. Stewart*, 388 So. 2d 171, 175 (Ala. 1980).

38 *See, e.g., Humana Med. Corp. v. Bagby Elevator Co.*, 653 So. 2d 972, 974 (Ala. 1995).

39 *City of Montgomery v. JYD Int'l, Inc.*, 534 So. 2d 592, 594 (Ala. 1988).

40 *Holcim.*, 38 So. 3d at 728; Industrial Tile, 388 So. 2d at 175 (stating that an indemnity contract must "clearly indicate" an intention to indemnify for the indemnitee's own negligence; that intent must be expressed in "clear and unequivocal language").

41 *Craig Constr. Co. v. Hendrix*, 568 So. 2d 752, 757 (Ala. 1990).

42 *Royal Ins. Co. v. Whitaker Contracting Corp.*, 824 So. 2d 747, 752 (Ala. 2002).

The question of whether an indemnity agreement applies depends on the contract language and the facts surrounding the claim. Whether or not the injured party brought claims against the indemnitor is not controlling. A duty to indemnify may be triggered even when the plaintiff in the underlying action avoided directly naming the indemnitor as a party. Alabama courts have recognized "the fact that a complaint names one possible tortfeasor alone does not resolve whether any resulting damages in that case relate solely to the named tortfeasor's own fault or conduct, because that tortfeasor may be held liable for the entire loss, which may be also attributable to other joint tortfeasors."[43] Thus, "under Alabama law, when determining liability under an indemnity provision, a court may look beyond the complaint in the underlying action to the underlying facts shown by admissible evidence."[44]

The controlling question is usually: What is "clear and unequivocal" language? The following indemnity agreements did not provide for indemnity as to the owner's negligence (i.e., the indemnitee):

> "[Indemnify/defend claims] . . . arising out of the work undertaken by the Subcontractor . . . and arising out of any other operation no matter by whom performed for and on behalf of the Subcontractor, whether or not due in whole or in part to conditions, acts or omissions done or permitted by the Contractor or Owner."[45]
>
> "[Indemnify/defend claims] . . . arising out of or occasioned by [indemnitor], or anyone for whose acts [indemnitor] is or may be liable, provided that such claim . . . is attributable to bodily injury . . . to the extent caused or alleged to be caused in whole or in any part by any act . . . by [indemnitor].[46]
>
> "[Indemnify/defend claims] . . . arising out of or in any manner connected with the performance of this Agreement, whether such injury, loss or damage shall be caused by the negligence of the Contractor, his subcontractor, or any other party for whom the Contractor is responsible."[47]

These indemnity clauses did require indemnification even for the owner's own negligence:

> "[Indemnify/defend claims] . . . attributable to bodily injury . . . alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor . . ., ***regardless of whether it is caused in part by a party indemnified hereunder***.[48]
>
> "[Indemnify/defend claims] . . . arising out of or in any way related to the performance of the Work by [West] . . . , in whatever manner the same may be caused, and ***whether or not the same may be caused, occasioned or contributed to by the negligence, sole or concurrent, of ARP***. "[49]
>
> "[Indemnify/defend claims] . . . arising out of or resulting from the performance of the work, provided that any such claim . . . (1) is attributable to bodily injury . . . , and (2) is caused in whole or in part by any negligent act . . . of the contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, ***regardless of whether or not it is caused in part by a party indemnified hereunder***."[50]

Courts also consider the amount of control over an area or activity in determining whether to enforce an indemnity agreement. In *Montgomery v. JYD, International, Inc.*, JYD employee Lillian Farris was injured when she slipped and fell in the Montgomery Civic Center.[51] At the time of Farris' injury, JYD leased the "River Room" in the Montgomery Civic Center.[52] The facts surrounding her injury were:

---

43 *Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, 38 So. 3d 722, 729-30 (Ala. 2009) (citing *FabArc Steel Supply, Inc. v. Composite Constr. Sys., Inc.*, 914 So. 2d 344, 361 (Ala. 2005)).

44 *Holcim*, 38 So. 3d at 730.

45 *Craig Const. Co. v. Hendrix*, 568 So. 2d 752, 754 (Ala. 1990); *see also Brown Mech. Contractors, Inc. v. Centennial Ins. Co.*, 431 So. 2d 932, 946 (Ala. 1983) ("[T]his provision was insufficient as a matter of law for [the Contractor] to be indemnified for its own negligence."); *U. S. Fid. & Guar. Co. v. Mason & Dulion Co.*, 274 Ala. 202, 145 So. 2d 711 (1962).

46 *McInnis Corp. v. Nichols Concrete Constr., Inc.*, 733 So. 2d 418 (Ala. Civ. App. 1998).

47 *Amerisure Mut. Ins. Co. v. QBE Ins. Corp.*, 2012 WL 3854402 (N.D. Ala. 2012).

48 *FabArc Steel Supply, Inc. v. Composite Constr. Sys., Inc.*, 914 So. 2d 344 (Ala. 2005) (emphasis added).

49 *Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co.*, 480 F.3d 1254 (11th Cir. 2007) (emphasis added).

50 *McBro, Inc. v. M & M Glass Co.*, 611 So. 2d 283, 284 (Ala. 1992).

51 534 So. 2d 592, 592-93 (Ala. 1988).

52 *Id.*

> On the day of the accident, Mrs. Farris entered the civic center, not from the two primary entrances, but from a service entrance at the rear of the civic center. She took a "short-cut" through the grand ballroom, and, as she crossed in front of the stage there, she slipped on an oily substance and fell, fracturing her arm.[53]

Montgomery cross-claimed against JYD, demanding indemnification pursuant to the terms of the indemnity clause.[54] JYD filed a motion for summary judgment as to Montgomery's third-party claims, which was granted.[55] Montgomery appealed.[56] The lease between Montgomery and JYD described "the premises leased [to JYD] as the 'River Room,' to be used for the purpose of rug sale" and contained the following indemnity language:

> G. THE LESSEE HEREBY PROMISES AND AGREES:
>
> . . .
>
> 7. To save the City of Montgomery and the Civic Center harmless and to indemnify them against any claims or liability arising or resulting from any injury to any visitor, spectator or participant in any activity in any part or portion of the Civic Center, regardless of entrance gained to said Civic Center -- by paid admissions, by pass issued by Lessee or Lessor or by any unlawful admission gained without knowledge of Lessor or Lessee.
>
> . . .
>
> I. IT IS FURTHER MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO:
>
> . . .
>
> 3. That the Lessor shall not be responsible for any damages or injury that may happen to Lessee, or the Lessee's agents, servants, employees or property from any cause whatsoever, prior, during or subsequent to the period covered by this lease; and the said Lessee hereby expressly releases said Lessor from, and agrees to indemnify it against any and all claims for such loss, damage or injury.[57]

At issue on appeal was "whether JYD must indemnify [Montgomery] pursuant to the agreement for [Montgomery's] negligence in connection with an accident that took place not within the leased area."[58] A critical factor in the Alabama Supreme Court's analysis was whether, as a matter of public policy, such an agreement was enforceable "with respect to injuries that occur outside of the immediate area of the leased premises. The Alabama Supreme Court assumed, "without deciding, that the language employed unequivocally and unambiguously expressed the intent to indemnify Montgomery against its own negligence."[59] The court ultimately held that the agreement was void as against public policy, stating:

> [T]he degree of control retained by the indemnitee over the activity or property giving rise to liability is a relevant consideration. This is true because the smaller the degree of control retained by the indemnitee, the more reasonable it is for the indemnitor, who has control, to bear the full burden of responsibility for injuries that occur in that area. However, the opposite is also true: The more control the indemnitee retains over the area, the less reasonable it is for the indemnitor to bear the responsibility for injuries that occur in that area. In this case, the mishap took place in an area not within the actual leased area and, for all that appears from the record, an area in which the lessee (the indemnitor) had no right of control. To allow the indemnitee to transfer financial responsibility to the indemnitor under such circumstances would be totally at odds with the tort system's incentives to encourage safety measures. Any argument that the agreement simply shifts the burden to the indemnitor to take such measures is untenable if

53 *Id.* at 593.

54 *Id.*

55 *Id.*

56 *Id.*

57 *JYD Int'l, Inc.,* 534 So. 2d at 593.

58 *Id.*

59 *Id.* at 595.

> the indemnitor has no right to exercise control over the potentially hazardous area or activity. Taken to its extreme, the agreement in this case could cast upon the lessee the responsibility for accidents that occur due to defects in sidewalks or parking lots at the civic center. Arguably, the language in paragraph E is so broad as to encompass injuries resulting from Montgomery's failure to properly maintain the streets by which people traveled to the civic center.[60]

This case often serves as a benchmark in situations where a subcontractor was working in a relatively small work area on a large development and one of its employees was injured in an area outside the work area, not due to the subcontractor's negligence, in an area controlled by another party (such as the contractor) and arising from the other party's negligence.

Georgia

Generally, Georgia law allows a party to contract away liability to another party for consequences of its own negligence without contravening public policy ***except*** when such an agreement is prohibited by statute.[61] In construction contracts, it is against public policy to enter into contracts to transfer liability for one's sole negligence. O.C.G.A. § 13-8-2 (b) provides, in part:

> 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 . . . 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***.[62]

"The apparent purpose of O.C.G.A. § 13-8-2(b) is to prevent a building contractor, subcontractor, or owner from contracting away liability for accidents caused solely by his negligence, whether during the construction of the building or after the structure is completed and occupied. . . . [I]t would seem that construction contracts were singled out because of the possibility of hidden, or latent, defects of an extremely dangerous nature and not ordinarily detectable by a lay person."[63]

The Supreme Court of Georgia has imposed even stricter requirements for indemnification/limitation of liability clauses in design and construction contracts. In *Lanier At McEver, L.P. v. Planners And Engineers Collaborative, Inc.*, Lanier, the construction developer, hired Planners, a civil engineering firm, to design the storm-water drainage system for an apartment complex.[64] In the contract, the parties agreed:

> In recognition of the relative risks and benefits of the project both to [Lanier] and [Planners], the risks have been allocated such that [Lanier] agrees, to the fullest extent permitted by law, to limit the liability of [Planners] 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 [Planners] and its subconsultants to all those named ***shall not exceed [Planners]'s total fee for services rendered on this project.*** It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.[65]

---

60 *Id.* (holding "the indemnity agreement by which the indemnitee attempts to obtain indemnity for its own negligence, under these circumstances, is void as a matter of public policy").

61 *See, e.g., Smith v. Seaboard Coast Line R. Co.*, 639 F.2d 1235, 1239 (5th Cir. 1981).

62 O.C.G.A. § 13-8-2, eff. July 1, 2007 (emphasis added).

63 *Federated Dep't Stores et al. v. Superior Drywall & Acoustical, Inc.*, 264 Ga. App. 857, 862, 592 S.E.2d 485 (2003) (citing *Borg-Warner Ins. Fin. Corp. v. Exec. Park Ventures*, 198 Ga. App. 70, 74, 400 S.E.2d 340 (1990)).

64 285 Ga. App. 411, 646 S.E.2d 505 (2007).

65 *Lanier at McEver, L.P.*, 285 Ga. at 205.

Following completion of the apartment complex and drainage system, Lanier discovered erosion which an expert attributed to the negligent design of the drainage system.[66] Lanier repaired and sued Planners for negligent construction, breach of contractual warranty and litigation expenses.[67] During litigation, Planners filed a partial motion for summary judgment arguing that the parties' agreement applied and limited Planner's liability to its total fee for services.[68] The trial court granted Planners' motion and the court of appeals affirmed. Lanier filed a petition for *certiorari* to determine whether the construction contract violated Georgia's public policy, O.C.G.A. § 13-8-2(b).

The Supreme Court of Georgia reversed the lower courts' decision because the clause violated public policy. The court reasoned the contract violated public policy, as prohibited by O.C.G.A. § 13-8-2(b), particularly regarding claims for which Planners may be solely negligent for injuries to a third party. For instance, the clause applied to "any and all claims" by third parties and, in essence, shifted all liability above Planners' fees for services to the developer, Lanier, no matter who was at fault.[69] In other words, while the clause did not prevent a third party from suing Planners, the clause permitted all liability above its fees for services to be shifted to Lanier, even for damages arising from Planners' sole negligence.[70]

The *Lanier* court indicated the limitation of liability clauses might have been valid had it restricted damages to only those between the contracting parties, opining that removal of third-party language may remove the problem altogether.[71] Moreover, parties may avoid violating O.C.G.A. § 13-8-2 if the agreement includes an insurance clause that shifts the risk of loss to an insurer, no matter who is at fault.[72]

Once the indemnification clause is found to be valid and enforceable, the Court of Appeals has shown a similar propensity to uphold the language as it has done with respect to additional insured language. For example, in *JNJ Foundation Specialists, Inc. v. D.R. Horton, Inc.*, the indemnification clause in the contract between D.R. Horton and JNJ provided JNJ had a duty to defend and indemnify D.R. Horton for any claims "in any way occurring, incident to, arising out of, or in connection with . . . the work performed or to be performed by contractor [JNJ] or contractor's personnel, agents, suppliers or permitted subcontractors."[73] In upholding and enforcing this language, the Court of Appeals undertook the same analysis as it did in finding additional insured coverage under *BBL-McCarthy*:

> Under Georgia law pertaining to indemnity provisions, "arising out of [means] 'had its origins in,' 'grew out of,' or 'followed from.'" Importantly, "the term 'arising out of' does not mean proximate cause in the strict legal sense, nor [does it] require a finding that the injury was directly and proximately caused by the insured's actions. Almost any causal connection or relationship will do."[74]

Thus, it appears the only way an indemnification clause may be upheld in a construction defect claim is if the clause is specific in its application only to claims between the contracting parties or shifts liability only as a result of partial fault of the contracting party (and not its sole liability) or shifts the responsibility to an insurance carrier or carriers (waiver of subrogation clause). Therefore, upon receipt of a construction defect claim, the insurer should obtain a copy of all contracts between its insured and other parties. If the contract contains an indemnification clause, the insurer should analyze its validity. If the clause does not attempt to shift the insured's sole negligence or liability to the other party, then the carrier should tender a defense and indemnification to the other party. As long as the indemnification clause is valid and the other party is at least 1 percent negligent (i.e., the insured is not solely negligent), then many indemnification clauses will require the other party to provide the insured with 100 percent of the defense and indemnification.

---

66 *Id.*

67 *Id.*

68 Lanier spent approximately $250,000 in repairs to the system and expected to spend $500,000 in total. Planner's total fee for services was approximately $80,000.

69 *Lanier at McEver, L.P.*, 285 Ga. at 207.

70 *Id.*

71 *See Id.* at 210 (citing *1800 Ocotillo, LLC v. WLB Group, Inc.*, 217 Ariz. 465, 176 P 3d 33 (2008) (noting the limitation of the liability clause did not reference third-party claims or allow for reimbursement by developer for third-party negligence claims for which the subcontractor was solely liable).

72 *Id. at 204 (*citing *ESI, Inc. of Tennessee v. Westpoint Stevens, Inc.*, 254 Ga. App. 332, 562 S.E.2d 198 (2002)).

73 311 Ga. App. 269, 717 S.E.2d 219 (2011).

74 *Id.* at 270 (citations omitted).

POINTERS AND TAKEAWAYS

Not all additional insured endorsements are the same. Specific terms will determine coverage. Compounding the problem associated with the diversity of additional insured endorsements is the fact courts do not interpret the same endorsements uniformly. The best way to deal with the complexity is to know the common issues associated with additional insured endorsements and to carefully analyze those issues, as well as any unique factors involved in a particular claim. Then, as with any coverage matter, apply the law of the applicable jurisdiction to the specific policy language and the facts of the claim.

Review the policy to determine whether it uses “arising out of” language or “caused, in whole or in part” language. As discussed above, the phrase “caused, in whole or in part” is generally construed more narrowly than the “arising out of” language. For years, the "arising out of" language often allowed additional insureds to obtain coverage for claims arising from the additional insured’s own sole negligence. Although the “caused, in whole or in part” language is found in the more recent ISO form, general contractors may convince some subcontractors to obtain policies with the broader “arising out of” language.

The key to properly applying an additional insured endorsement is with careful analysis of the language of the endorsement. Of course, that cannot be done in a vacuum. You must understand and consider the underlying agreement between the named insured and the additional insured, as well as the claims against the additional insured for which it seeks coverage.

Whether an indemnity agreement applies depends on the contract language, the facts surrounding the claim and the applicable law. Refusing to defend and/or indemnify an insured based on contractual liability shifting provisions is a risky proposition if the contract is drafted incorrectly. Determining whether other entities may owe indemnification at an early stage is critical to ensure timely notice may be provided to those parties’ insurers. Moreover, in construction defect claims involving latent defects, all policies in effect from the date of the alleged improper construction and the date of discovery of the defects may be triggered.

So what should you do? Taking the application of the law to these clauses and policy language, an insurer’s main questions when looking to applicable contracts, an insurer’s own policy and those of others, are as follows: (1) does the contract specify insurance to be procured; (2) how expansive is the language in the insured’s own policy; (3) how expansive is the language in the endorsements purporting to include the insured as an additional insured on other contracting parties’ policies; (4) what is the damage asserted; (5) who does the complaint assert caused the damage; and (6) what is the date of construction and the date of discovery of a latent defect? If another policy is arguably applicable to the loss whether through contract or insurance policy language, the insured should give notice of the claim or suit as soon as practicable and tender its defense for same. The same applies to any tender of a defense and indemnification to the indemnitee under a construction contract.

Attorney Bios

Michael H. Schroder

Partner

For more than 30 years, Michael H. Schroder has maintained a broad defense litigation practice, handling numerous trials and appeals. He advises insurance clients on a wide range of insurance coverage issues, including both first- and third-party coverage matters, the defense of premises and transportation cases, professional liability and intellectual property matters.

Mr. Schroder is a member of the Federation of Defense and Corporate Counsel, the Atlanta Bar Association and the Defense Research Institute. He participates as a speaker, a discussion leader and a panelist for litigation seminars on numerous subjects. He serves as the dean of the Litigation Management College presented each year at Emory University. Mr. Schroder has consistently been named a Georgia Super Lawyer by *Atlanta Magazine*.

As a 1972 graduate of Princeton University, *magna cum laude*, with a degree in history, Mr. Schroder obtained his Juris Doctor in 1976 from the University of Georgia, graduating with honors.

Mark T. Dietrichs

Partner

Mark T. Dietrichs specializes in property insurance law and the representation of insurance companies in first- and third-party coverage litigation, extracontractual claims and property subrogation cases. He has more than 30 years of experience investigating and trying coverage, bad faith, arson, fraud and property damage cases in state and federal courts throughout Georgia and the Southeast.

Mr. Dietrichs serves on the Litigation and the Tort and Insurance Practice Sections of the American Bar Association. He is also a member of the State Bar of Georgia, the Defense Research Institute, the Georgia Defense Lawyers Association and the Atlanta Bar Association. He is a member of the International Association of Arson Investigators, the Georgia Fire Investigators Association, the Metro Fire Investigators Association and the Southern Loss Association. He has served as the chairman of the Ethics and Grievance Committee for the Georgia Fire Investigators Association for more than a decade.

Mr. Dietrichs has presented numerous seminars on property insurance issues to the Georgia Bar Association, the Atlanta Bar Association, the International Association of Arson Investigators, the Georgia Fire Investigators Association, the Southeastern Claims Executive Association, the Atlanta Claims Association, the Southern Loss Association, the Women's Insurance Association and other professional organizations. He is also a frequent speaker and contributor to the annual Southeastern Arson Seminar sponsored by the Georgia State Fire Marshal's Office and various seminars sponsored by the local and statewide Chapters of the G.F.I.A.

Mr. Dietrichs is admitted to practice before the United States Supreme Court; the Eleventh Circuit Court of Appeals; the Northern, Middle and Southern District Courts of Georgia; and all Georgia Appellate Courts.

Mr. Dietrichs received a B.A. degree with distinction at the University of Virginia in 1978 and graduated, *cum laude*, in 198l, from the University of Georgia with a law degree. He was an oralist and brief writer for the Jessup International Law Moot Court Team and served on the staff of the *Georgia Journal of International and Comparative Law* as articles editor. He has worked with Swift Currie since 1981.

Stephen M. Schatz
Partner

Stephen M. Schatz practices in a wide variety of litigation cases, especially areas related to insurance, construction and general liability. Throughout his career, he has handled a multitude of complex coverage issues under commercial general liability, excess, reinsurance, auto, specialty lines, D&O, disability, pollution, professional liability and first-party insurance policies. He has litigated numerous bad faith, insurance coverage, arson, fraud, theft, damage disputes, agency liability, subrogation and construction defects cases. He has also litigated and tried cases involving general liability, products liability, class actions, multidistrict litigation (MDL), environmental liability, employer liability, professional liability and business/contract disputes.

Mr. Schatz is a member of the State Bar of Georgia and practices in all state and federal courts in Georgia. In addition to Georgia, he has litigated matters in jurisdictions pro hac vice, including Alabama, Florida, Mississippi, Missouri, New Jersey, North Carolina, South Carolina, Tennessee and Virginia. Mr. Schatz is a member of the Defense Research Institute, the Claims and Litigation Management Alliance, the Georgia Fire Investigators Association and the Southern Loss Association. He has published an article every year in the *Mercer Law Review* (the "Annual Insurance Survey") since 2002 and the *National Fire and Arson Report*. He is also a frequent speaker on insurance coverage, bad faith and construction litigation issues.

Mr. Schatz graduated with distinction from the University of Virginia in 1985 and earned his J.D. degree from the University of North Carolina School of Law in 1988. He has been a partner with Swift Currie since 1997.

Melissa K. Kahren
Senior Attorney

Melissa K. Kahren joined Swift Currie in 1999. Her practice is focused in the areas of property, first-party coverage and construction litigation.

Ms. Kahren was admitted to the Georgia Bar in 1996. She is also admitted to practice before the United States District Courts for the Northern and Middle Districts of Georgia and the Eleventh Circuit Court of Appeals.

Ms. Kahren graduated, *summa cum laude,* with a degree in English literature from Vanderbilt University in 1992 where she was a member of Phi Beta Kappa. Ms. Kahren received her J.D. from Emory University School of Law in 1995, where she was a managing editor of the *Emory International Law Review*.

Bright Kinnett Wright

Senior Attorney

Bright Kinnett Wright originally joined Swift Currie in 1981, practicing in the areas of first-party insurance litigation, property law, bad faith, insurance coverage, arson and fraudulent insurance claims. She has worked for Swift Currie for 14 years. She also practiced for six years at other Atlanta law firms in the area of asbestos litigation and pharmaceutical defense. Ms. Wright currently practices property insurance law. She has significant experience in handling jury trials in both state and federal courts, as well as experience with workers' compensation hearings.

Ms. Wright has been a member of the State Bar of Georgia since 1980 and is a member of the Litigation Section. She is admitted to practice in the U.S. Court of Appeals for the Eleventh Circuit and the United States District Courts for the Northern, Southern and Middle Districts of Georgia. Ms. Wright formerly served on the Law Council of the Emory University School of Law and she is a fellow of the State Bar of Georgia Lawyers Foundation. She has participated as a judge on several occasions for the Emory University Law School Trial Techniques program and law school trial team competitions. She is also a member of the International Association of Arson Investigators and the Georgia Fire Investigators Association.

Ms. Wright obtained her B.A. in psychology from the University of North Carolina at Chapel Hill in 1974 and received her Paralegal Certificate in Civil Litigation from the National Center for Paralegal Training in 1980. In 1980, Ms. Wright obtained her J.D. degree from the Emory University School of Law, where she was a teaching assistant for two years in research, writing and advocacy.

Roberta Ann Henderson

Senior Attorney

Roberta Ann “Bobbie-Ann” Henderson has been practicing law for more than 20 years, focusing on commercial and civil litigation, including first- and third-party insurance coverage, surety and construction matters, business transactions and creditor rights.

Ms. Henderson counsels insurance companies in policy formation and regulatory issues. She handles claims arising out of commercial general liability, personal and commercial auto, property and casualty, homeowners and inland marine. Ms. Henderson is involved from the initial stages of a claim through final resolution, helping to examine coverage issues, identifying policy exclusions and sources of loss. She represents carriers in state and federal courts and has significant litigation experience involving bodily and personal injury, property damage, general liability and extra-contractual claims. She successfully positions matters for effective resolution, including interpleader, mediation, declaratory judgment and summary judgment.

Ms. Henderson’s representation also extends to assisting surety companies, design professionals and contractors on public and private projects throughout the southeast. She has successfully resolved disputes involving payment and performance bonds, defective construction claims, tenders and takeovers, financing and escrow agreements, scheduling, change orders and backcharges. She also successfully handled a broad array of probate, guardianship and estate bond matters and miscellaneous bonds including motor vehicle bonds, public official bonds and custom bonds.

In addition to her insurance and surety practice, Ms. Henderson represents a variety of large and small businesses. She handles corporate governance, commercial transactions and disputes, creditor rights and secured transactions. She has significant experience in representing businesses and individuals in bankruptcy matters.

Before joining Swift Currie, Ms. Henderson practiced with a surety law firm in Atlanta for 15 years and served as in-house corporate counsel for a national insurance company.

Jessica B. Seiden

Senior Attorney

Jessica B. Seiden is a senior attorney, practicing in the areas of insurance coverage, commercial litigation and appeals. Ms. Seiden represents and defends insurance companies in first- and third-party disputes involving policy construction, fraud, breach of contract, bad faith and coverage disputes.

Prior to joining Swift Currie, Ms. Seiden practiced at an insurance defense firm in Miami, Florida, where she handled first-party litigation matters, coverage disputes and appeals. Before focusing her practice on insurance, Ms. Seiden spent several years at a commercial litigation firm in Miami. There, she gained experience handling a wide array of complex business litigation matters dealing with construction, first-party insurance, employment, banking and intellectual property/technology disputes. Ms. Seiden also has extensive experience handling appeals and business transactional matters.

Ms. Seiden graduated, *magna cum laude*, from Vanderbilt University in three years with a Bachelor of Arts dual degree in anthropology and sociology and a minor in history. She then returned home to Miami, Florida, to attend law school at the University of Miami School of Law, where she graduated, *cum laude*, in 2010.

R. Brady Herman

Associate

Robert Brady Herman is an associate in the firm's coverage and commercial litigation practice area.

Mr. Herman received his J.D., *cum laude*, from the Mercer University School of Law. While in law school, Mr. Herman served as a member on the *Mercer Law Review*. He also served on the Mercer Advocacy Council as the student writing editor for Moot Court. During his time with the Mercer Advocacy Council, he competed in the John J. Gibbons National Moot Court competition in Newark, New Jersey. In addition, he served on the Student Bar Association as both his class representative and the chair of community service. During his final semester of law school, Mr. Herman gained valuable experience working as a judicial extern for the Honorable Chief Justice Hugh P. Thompson of the Supreme Court of Georgia.

Prior to law school, Mr. Herman received his B.B.A. in real estate with a minor in legal studies from the Terry College of Business at the University of Georgia. Mr. Herman was a summer associate with Swift Currie in 2015 before joining the firm as an associate.

Christy M. Maple
Associate

Christy M. Maple practices in the areas of insurance coverage and commercial litigation. Ms. Maple has represented insurers in connection with commercial first-party property disputes and litigation arising from catastrophic and other large value losses. Her first-party practice also involves representing insurers with respect to high value claims arising out of fidelity bonds, financial institution bonds and commercial crime policies. In addition to her first-party practice, Ms. Maple has significant experience in representing insurers in coverage disputes involving various types of liability policies, including commercial general liability and directors and officers liability policies. Ms. Maple also routinely defends insurers against alleged statutory and common law bad faith claims and extra-contractual damages.

Ms. Maple earned her J.D. from the University of North Carolina School of Law in 2008. In Germany, Ms. Maple studied at the University of Regensburg and taught English at the University of Erfurt. In 2004, she graduated, *summa cum laude*, with a B.S. in mathematics and German from Vanderbilt University.

Clayton O. Knowles
Associate

Clayton "Clay" O. Knowles practices in the areas of insurance coverage, commercial litigation, property insurance, automobile liability, arson and fraud and premises liability. He has defended some of Georgia's most prominent insurance companies and their insureds in litigation involving automobile policies, homeowners policies and commercial general liability policies.

Mr. Knowles has effectively litigated complex matters through trial and defended coverage disputes around Georgia. He has gained trial and deposition experience with first- and third-party automobile insurance litigation. He has also drafted and argued dispositive motions, evaluated coverage issues and defenses and negotiated settlements across all areas of his practice. He achieves success in the courtroom by combining his skill in evaluating claims with an aggressive approach in defending his clients.

Mr. Knowles graduated, *cum laude*, from the University of Georgia with a B.B.A. in economics in 2011. He returned to Athens to obtain his J.D. from the University of Georgia School of Law in 2014. While in law school, Mr. Knowles won the award for Best Oralist at the Georgia Intrastate Moot Court Competition. He also served as the executive chairman of UGA Law's Moot Court program and as a pupil in the Lumpkin Inn of Court.

Kellie T. Holt
Associate

Kellie Turner Holt is an associate in the firm's coverage and commercial litigation section. Her practice includes working on matters that have reached the appellate stage, as well as those that may result in bad faith or other coverage litigation.

Ms. Holt graduated, *magna cum laude*, from the University of Georgia with a Bachelor of Arts degree in English, and as a member of Phi Beta Kappa. She received her J.D. from the University of Georgia School of Law in May 2017.

While in law school, Ms. Holt served on the managing board of the *Georgia Law Review* as an articles editor. Additionally, her student note was selected for publication in Volume 51 of the journal. Ms. Holt previously worked as a summer associate with Swift Currie.

Brycen D. Maenza
Associate

Brycen D. Maenza is a member of the firm's coverage and commercial litigation practice group. Ms. Maenza's areas of practice are insurance coverage, personal injury, catastrophic injury and wrongful death litigation, premises liability and commercial litigation. Her practice includes defending individuals, insurance carriers, corporations, hotels, retailers, convenience stores, general contractors and subcontractors. Ms. Maenza has conducted numerous examinations under oath, depositions and mediations to obtain favorable results for her clients. In conjunction with her defense of these matters, Ms. Maenza has prepared and successfully argued several dispositive motions, including motions to dismiss and motions for summary judgment. She has also provided coverage advice, drafted reservation of rights and coverage disclaimer letters for several insurance companies with respect to pending litigation.

Ms. Maenza received her J.D. from the New England School of Law in Boston, Massachusetts, in 2014. While in law school, Ms. Maenza clerked for the Honorable A. Gregory Poole of the Superior Court of Cobb County. In 2010, she graduated from University of South Carolina with a Bachelor of Science degree in sports and entertainment management.

Elliot Kerzner
Associate

Elliot Kerzner practices in the areas of insurance coverage and commercial litigation. He advises and represents insurers in a broad range of coverage and litigation matters, including commercial general liability and construction defect claims. Mr. Kerzner assists clients in evaluating the legal and factual issues in insurance coverage disputes and defends clients in complex litigation arising in both federal and state courts.

Mr. Kerzner joined Swift Currie after gaining experience at another firm in Atlanta, where his practice focused on a wide variety of civil litigation matters. His prior experience includes representing domestic and international insurers in coverage disputes and defending insureds against property damage and personal injury claims. Previously, Mr. Kerzner served as a staff attorney for the U.S. Court of Appeals for the Eleventh Circuit, where he assisted federal appellate judges in both civil and criminal cases.

Mr. Kerzner graduated with honors from Emory University School of Law in 2014. While at Emory, he was an editor on the *Emory Bankruptcy Developments Journal*. He received his undergraduate degree in Talmudic Law from Beth Medrash Govoha.

Mr. Kerzner is admitted to practice in the state of Georgia, the Court of Appeals of Georgia and the U.S. District Court for the Northern District of Georgia.

Smita Gautam
Associate

Smita Gautam is an associate in the firm's coverage and commercial litigation team, handling a variety of issues related to arson, property damage, fraudulent claims and general liability. Prior to joining Swift Currie, she worked at another metro Atlanta firm where her practice included consumer financial services litigation, as well as the favorable resolution of title insurance claims and contract disputes for her clients. She has experience at both the trial and appellate level, including preparing and successfully litigating dispositive motions.

Ms. Gautam was born and raised in Ohio, and graduated from The Ohio State University with a B.S.B.A. in marketing and a B.A. in history. She earned her law degree from Emory University School of Law, where she was published in the *Emory Bankruptcy Developments Journal* and served as the executive symposium editor.

Sabrina L. Atkins
Associate

Sabrina L. Atkins is a litigation associate practicing in the areas of appellate law, coverage, commercial litigation, financial services litigation and insurance defense. Ms. Atkins has experience defending errors and omissions claims, as well as bad faith claims arising out of third-party administrator services.

Ms. Atkins graduated, *magna cum laude*, with her J.D. from the Mercer University School of Law in 2013. While in law school, Ms. Atkins was a judicial intern for the Georgia Court of Appeals, the Honorable Stephen Dillard and the State Court of Brooks County for the Honorable William R. Folsom. Ms. Atkins also served as the administrative editor for the *Mercer Law Review* and the Hugh Lawson Moot Court editor for the Mercer Advocacy Council. Prior to law school, Ms. Atkins graduated, *cum laude*, from Georgia College & State University with a degree in political science.

A. Warren Adegunle
Associate

A. Warren Adegunle is an associate in the firm's coverage and commercial litigation section. Prior to joining Swift Currie, Mr. Adegunle was an attorney at the largest criminal defense firm in Georgia, where he represented hundreds of indigent clients and first- or second-chaired more than 30 jury trials. He then joined an in-house staff counsel for a national insurance company where he litigated first- and third-party automobile insurance liability claims.

In 2014, he received his law degree from the University of Georgia School of Law. During his time in law school, Mr. Adegunle won the DeKalb Lawyers Association Donald Lee Hollowell Legacy Award for his essay on the Second Amendment. He later won the Center for Alcohol Policy Essay Contest while interning at the White House in Washington, D.C. In 2011, Mr. Adegunle graduated from Dartmouth College with a Bachelor of Arts in philosophy.

Sean P. Farrell
Associate

Sean P. Farrell is a member of the firm's coverage and commercial litigation team and handles a variety of legal matters, including arson and fraud, commercial litigation and insurance coverage matters.

Prior to joining the firm, Mr. Farrell practiced at a law firm in Chicago, IL, focusing primarily on subrogation and insurance defense matters through every stage of litigation for large insurance institutions. In this role, he gained extensive litigation experience by personally trying almost a dozen jury trials and numerous court-mandated arbitrations. Additionally, he assisted in the defense of diacetyl litigation on behalf of a national chemical company.

Mr. Farrell received his J.D. from the Loyola University Chicago School of Law in 2015. While in law school, he participated in the Willem C. Vis East Moot, an international commercial arbitration moot competition in Hong Kong, and was given honorable mentions for Best Oralist and Best Respondent's Brief. He also participated in the American Bar Association Labor and Employment Law Trial Advocacy Competition with the Loyola Civil Mock Trial Team. Prior to law school, Mr. Farrell graduated from Wake Forest University with a double major in history and English and was board member of the mock trial team.

Murray S. Flint
Associate

Murray S. Flint is an associate in the firm's coverage and commercial litigation section. He has experience representing businesses and individuals in the areas of insurance coverage, construction defect, premises liability, product liability, personal injury and appellate advocacy.

Before joining Swift Currie, Mr. Flint practiced law with a defense firm in Birmingham, handling a wide variety of litigation matters. In this role, he tried multiple high-exposure cases to verdict and prepared successful briefs in both state and federal appellate courts.

Originally from Meridian, Mississippi, Mr. Flint spent the majority of his childhood near Atlanta. He earned a degree in economics from the University of Georgia and his J.D. from the University of Alabama School of Law. While in law school, he was an articles editor for the *Journal of the Legal Profession*, served as class representative on the law school Honor Council and was a member of the Bench and Bar Legal Honor Society.

Coverage & Commercial Litigation Attorneys

Michael H. Schroder	404.888.6126	mike.schroder@swiftcurrie.com
Mark T. Dietrichs	404.888.6127	mark.dietrichs@swiftcurrie.com
Thomas D. Martin	404.888.6128	tom.martin@swiftcurrie.com
Frederick O. Ferrand	404.888.6182	fred.ferrand@swiftcurrie.com
Stephen M. Schatz	404.888.6133	steve.schatz@swiftcurrie.com
Steven J. DeFrank	404.888.6130	steven.defrank@swiftcurrie.com
Thomas B. Ward	404.888.6147	tom.ward@swiftcurrie.com
Melissa A. Segel	404.888.6153	melissa.segel@swiftcurrie.com
F. Lane Finch, Jr.	205.314.2403	lane.finch@swiftcurrie.com
Mike O. Crawford, IV	404.888.6149	mike.crawford@swiftcurrie.com
Melissa K. Kahren	404.888.6179	melissa.kahren@swiftcurrie.com
Bright Kinnett Wright	404.888.6223	bright.wright@swiftcurrie.com
Roberta Ann Henderson	404.888.6197	bobbieann.henderson@swiftcurrie.com
Jessica B. Seiden	470.639.4860	jessica.seiden@swiftcurrie.com
Jessica M. Phillips	404.888.6148	jessica.phillips@swiftcurrie.com
Marcus L. Dean	404.888.6136	marcus.dean@swiftcurrie.com
Rebecca E. Strickland	404.888.6183	rebecca.strickland@swiftcurrie.com
Kori E. Eskridge	404.888.6191	kori.eskridge@swiftcurrie.com
Brian C. Richardson	205.314.2404	brian.richardson@swiftcurrie.com
Kelly G. Chartash	404.888.6169	kelly.chartash@swiftcurrie.com
R. Brady Herman	404.888.6275	brady.herman@swiftcurrie.com
Christy M. Maple	404.888.6142	christy.maple@swiftcurrie.com
Brandon J. Clapp	205.314.2406	brandon.clapp@swiftcurrie.com
Nelofar Agharahimi	404.888.6181	nelofar@swiftcurrie.com
Gillian S. Crowl	404.888.6252	gillian.crowl@swiftcurrie.com
Clayton O. Knowles	404.888.6255	clay.knowles@swiftcurrie.com
Kellie T. Holt	404.888.6266	kellie.holt@swiftcurrie.com
Brycen D. Maenza	404.888.6239	brycen.maenza@swiftcurrie.com
Elliot Kerzner	404.888.6170	elliot.kerzner@swiftcurrie.com
Smita Gautam	404.888.6155	smita.gautam@swiftcurrie.com
Sabrina L. Atkins	404.888.6154	sabrina.atkins@swiftcurrie.com
A. Warren Adegunle	404.888.6190	warren.adegunle@swiftcurrie.com
Sean P. Farrell	404.888.6152	sean.farrell@swiftcurrie.com
Murray S. Flint	205.314.2407	murray.flint@swiftcurrie.com

For a complete list of our other practice areas and attorneys, please visit swiftcurrie.com.