

CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XVII

Spring 2012

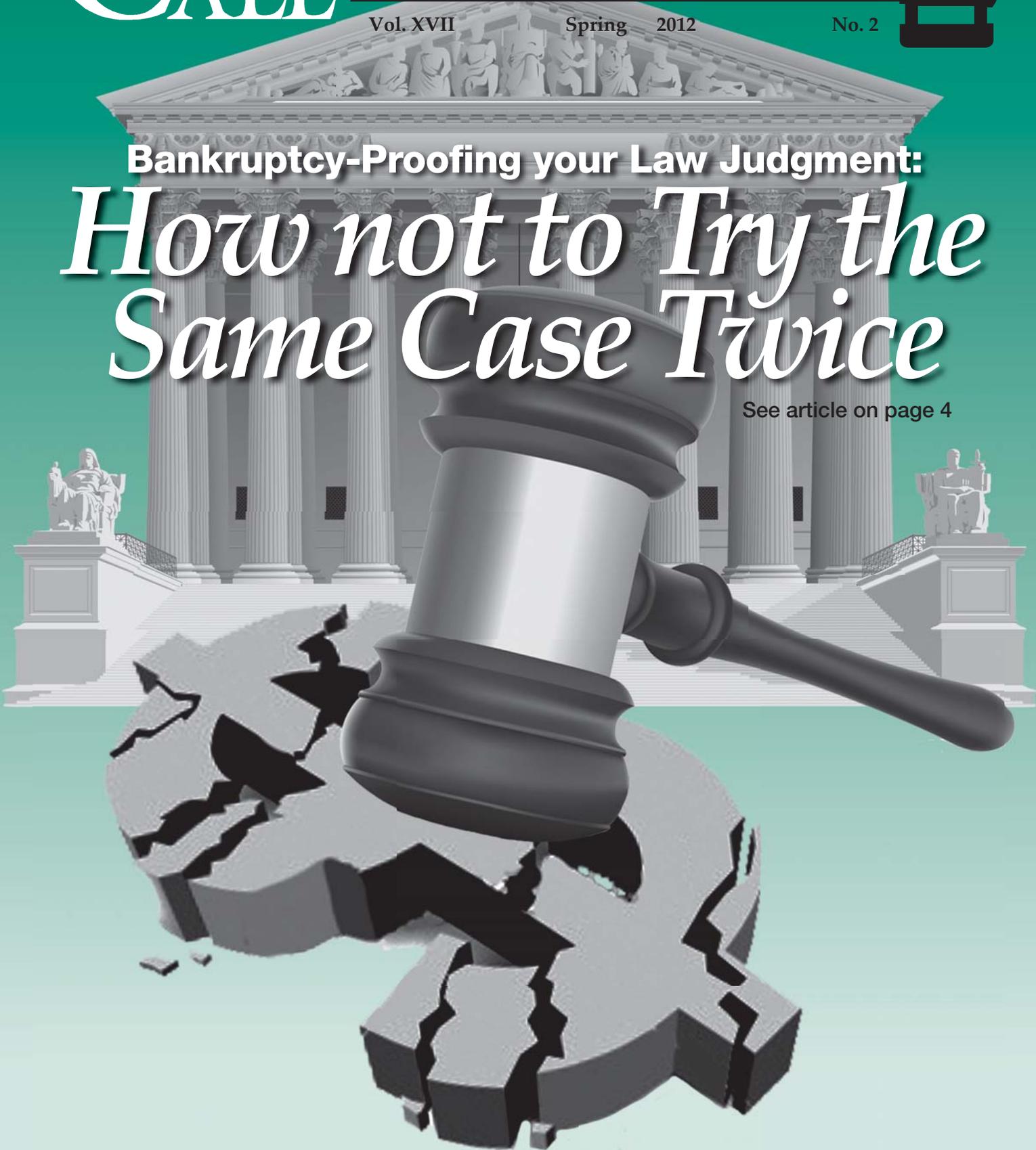
No. 2



Bankruptcy-Proofing your Law Judgment:

How not to Try the Same Case Twice

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GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XVII

Spring 2012

No. 2



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Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be double-spaced, typewritten on letter-size paper, with the article on disk or sent via e-mail together with a bio and picture of the author and forwarded to Co-Editors: R. Walker Garrett, 233 12th St., Suite #900. The Corporate Center, Columbus, GA, 31901, rwalkergarrett@gmail.com and David A. Sleppy, 649 Irvin St., P.O. Box #689, Cornelia, GA 30531, dsleppy@catheyandstrain.com.

Published by Appleby & Associates, Austell, Georgia.

Darren W. Penn
Section Chair



A NEW YEAR BRINGS NEW CHALLENGES, NEW OPPORTUNITIES

The ringing in of a New Year always provides the perfect opportunity to reflect on the successes and challenges faced over the previous months as well as plan for the upcoming year. I hope you all enjoyed a restful holiday break and are now ready to dig back in to your practice and prepare for 2012.

We kicked off the year with our annual luncheon and an outstanding speaker, the Honorable Steve C. Jones from the Northern District federal bench. Judge Jones was introduced by good friend and General Practice and Trial Section member and Past Chairman John Timmons. Judge Jones' words were an inspiration to all in attendance and we thank him for the opportunity to share some quality time with section members.

As happens every year at this time, the Georgia General Assembly legislative session begins. This year stands to be an active year for issues important to our section members and we are currently following several issues with the potential to adversely affect the Georgia Civil Justice system. A special thank you to my friend, Bill Clark, Director of Political Affairs, Georgia Trial Lawyers Association, and the State Bar legislative team for all

that they do to monitor and champion the issues that affect all of our practices.

While several pieces of legislation are still floating around from the 2011 Session, here are just a few of the issues that could come up during the current Session:

- 1) A Workers' Compensation proposal to implement "Medical Treatment Guidelines." This proposal would allow the State Board of Workers' Compensation to implement regulations dictating the nature and quantity of medical treatments injured workers can receive.
- 2) A potential Workers' Compensation proposal to overturn a recent Georgia Court of Appeals decision called McRae v Arby's, 2011WL6015797 (Dec. 2011) wherein the COA held that injured workers in the WC system do not forfeit their medical privacy rights under HIPAA and that injured workers cannot be compelled to permit a lawyer representing their employer to meet ex parte with their treating physician without first giving the patient notice and the opportunity to object.
- 3) A proposal to create an administrative procedure for han-

dling medical malpractice claims, purportedly patterned after the workers' compensation system, which would *eliminate the right to trial by jury*. The proponents of this bill have not introduced it yet, but are lobbying hard and mounting a media campaign to support it. The bill would create an entirely new bureaucratic agency of state government comprised of a panel of medical personnel to determine the validity of medical malpractice claims and a second panel of persons to determine how much compensation patients should receive.

- 4) There may be a proposal from property and casualty insurance companies to minimize their liability for bad faith refusal to settle claims following automobile accidents in response to settlement demands (i.e., *Holt* demands). The two main issues will be (a) how to codify what is a reasonable time frame within which insurers must respond to settlement demands made by plaintiffs and (b) how to deal with pending liens that may affect the settlement of claims.
- 5) HB397. Attorney General Sam Olens has been working for

more than a year on HB397 to amend the Open Records laws. Our section members have worked with Attorney General Olens and generally support the bill. However, there were concerns about a provision that would have precluded litigants from using Open Records Act (ORA) requests to secure public records in the midst of litigated cases. A compromise was crafted that permits the continued use of ORA requests but requires litigants to notify defense counsel for a government agency that is a litigant in pending litigation when those adverse parties send that agency an ORA request during their pending litigation.

6) A bill that would amend the service of process statute so that a plaintiff could no longer serve a corporation by leaving the summons and complaint with a "secretary, cashier [or] managing agent." Service would have

to be made either on an officer of the corporation, a registered agent of the corporation or the Secretary of State.

7) HB658 would change the manner in which the trier of fact could determine the present value of future damages. The bill would replace the current method of relying on "the basis of interest calculated at 5 percent per annum" with the use of "expert testimony" regarding the present value "or the actual present cost" of such damages. The bill also expands the types of damages on which the present value can be calculated from just "earnings, annuity, or amounts" to include "wages, medical expenses, living expenses, or other damages."

As members of Georgia's Largest Law Firm, *you* are the experts when it comes to these important legislative discussions. I encourage each of you to get involved, talk to

your elected officials and join us at the state capital to assist the lobbying effort. If you're unsure how to begin, let us know and we'll get you plugged in!

And, in addition to paying attention to and working on important legislative issues, we need our members to submit articles to *Calendar Call*, attend seminars and actively participate in the General Practice and Trial Section events. This is an outstanding section with so much to offer.

I am regularly humbled by the expertise and excellence each of you brings to the practice of law. If I, or anyone else at the Georgia Bar, can be of assistance or if you have suggestions to share, please email me at darren@hpllegal.com.

I hope to see each and every one of you this spring at the General Practice and Trial Institute March 15-17 at the beautiful Omni Amelia Island Plantation!

Bankruptcy-Proofing Your Law Judgment: How Not to Try the Same Case Twice

William L. Rothschild



Bill Rothschild is a member of the law firm of Ogier, Rothschild, Rosenfeld & Ellis-Monro, P.C. in Atlanta, GA. A native Atlantan, he received his B.A. degree (1970) from Yale and his J.D. degree (1974) from Harvard. He has practiced bankruptcy law since 1982, representing all major parties in chapter 11 and in chapter 7 cases, including debtors in possession, trustees, creditors' committees, buyers of estate assets, and avoidance defendants. He regularly takes cases involving unsettled or novel bankruptcy and state law issues on appeal to Georgia and federal courts. Bill is also an ordained rabbi. He provides pro bono counsel to the Central Conference of American Rabbis, and is a permanent guest teacher of Bible at the Westminster Schools in Atlanta. He regularly writes and speaks on bankruptcy and related topics.

Introduction

Greetings to trial lawyers – or as we call you, “real litigators” – from the bankruptcy bar. Here is an issue that we get asked about, sometimes too late:

You get a judgment against somebody that may be nondischargeable if the judgment debtor flees to bankruptcy court, because it arose from fraud, conversion, or the like. When the debtor does file a bankruptcy case, how do you make your judgment nondischargeable without having to try your underlying case all over again?

The issue here is collateral estoppel, i.e., giving preclusive effect in a later case to a fact or issue determined in an earlier case, so that there

is no opportunity to retry that fact or issue. The short answer is that you must take the right steps in the state court case to give collateral estoppel effect to the facts that constitute the elements needed to deny dischargeability of a debt in a bankruptcy case. This article explains those steps.

Let me begin with bankruptcy itself. Most human beings (called “individuals” in the bankruptcy code) file bankruptcy to get a discharge of their debts. The debt remains in existence for a number of purposes, for instance, to keep liens on any secured property alive. “Discharge” means that the individual can no longer be held personally liable for it, e.g., no seizure of unsecured property, and no garnishment of future wages.

As a public policy matter, Congress has excepted certain debts from discharge, if proper procedures are followed. Three types of nondischargeable debts concern you most and provide the bulk of collateral estoppel issues: 11 U.S.C. § 523(a) (2) (A) (“false pretenses, a false representation, or actual fraud”); § 523(a)(4) (“fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny”); and § 523(a)(6) (“willful and malicious injury by the debtor to another entity or to the property of another entity”).

Debts falling in these three categories are *discharged* unless the creditor timely files a proceeding in the bankruptcy court to obtain a ruling that the debt in question is *not* discharged. That is, you must file what amounts

to a separate case within the bankruptcy case, to which a set of bankruptcy rules will apply that mirror the Federal Rules of Civil Procedure. And there is a very strict bar date that occurs early in the bankruptcy case.

The dischargeability of a debt is a matter of federal law. It is not the claim you tried in state court, although it may come close (see below concerning fraud, for example). So res judicata, a/k/a claim preclusion, does not apply from a state court action. But through a series of decisions toward the end of the 20th century, the United States Supreme Court established that collateral estoppel, a/k/a issue preclusion, may apply.¹

The rule now is this: in nondischargeability proceedings, the bankruptcy court must apply the collateral estoppel rule of the jurisdiction in which the earlier judgment was rendered.

How helpful is this rule? First, it applies to punitive damages as well as compensatory damages. Cohen v. De La Cruz, 523 U.S. 213 (1998), held that all liability from the bad act, including punitive damages, rises or falls with the act itself. The eleventh circuit had reached the same conclusion five years earlier with this suitable-for-framing aphorism: “the malefic debtor may not hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct.” St. Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 680 (11th Cir. 1993). The rule likewise applies to attorneys’ fees awards. If the underlying act creates a nondischargeable debt, and the attorneys’ fees flow from the underlying act, then the attorneys’ fees are nondischargeable as well; and attorneys’ fees from bad conduct within the case may be nondischargeable even if the underlying claim is fully dischargeable in bankruptcy.²

This article has three parts: the first discusses Georgia’s collateral estoppel rule, as bankruptcy judges formulate it; the second discusses how Georgia substantive law fits

within the federal nondischargeability provisions; and the third discusses how to construct your state court case with the defendant’s later bankruptcy case in mind.

A.

GEORGIA’S COLLATERAL ESTOPPEL RULE

The Georgia rule on collateral estoppel is based on O.C.G.A. §§ 9-12-40 and -42.³ Georgia state courts vary in their expressions of the Georgia rule, so Georgia bankruptcy courts do as well. You may see it stated in anywhere from three to five separate elements.⁴

I believe that the best and most current statement belongs to Judge Davis in Hebbard v. Camacho (In re Camacho), 411 B.R. 496 (Bankr. S.D. Ga. 2009). In a well-researched opinion, he assumes the identity of parties (usually requirement 1), and then recites the next three requirements on the five requirement list:

Under Georgia law, a party may only assert the doctrine of collateral estoppel if the issue was (1) raised in a prior proceeding, (2) actually litigated and decided, and (3) necessary to final judgment.

411 B.R. at 501 (Georgia Supreme Court citations omitted).

Judge Davis questions the vitality of others’ additional requirement, namely, the “full and fair opportunity to litigate the issues.” In his footnote 2, Judge Davis traces the origin of that requirement to a 1996 bankruptcy case, and shows that the two Georgia Court of Appeals cases which led to the requirement were later overturned. He then writes in the body of the opinion:

Because of the origins of that element as noted in footnote 2, that element is not applied in this Order except to this extent. It should be self evident that the collateral estoppel could only arise out of a proceeding in which fundamental due process was accorded. That

should always be an unspoken element for application of collateral estoppel. To the extent that courts have articulated the “full and fair opportunity” standard, I find that it requires nothing more than notice and an opportunity to be heard.

411 B.R. at 501 (emphasis added).

In practice, the “full and fair opportunity” requirement appears to morph into the “actually litigated” part of requirement (3). The issue calls for further review when the defendant bails out of the earlier litigation at any time before judgment. See section C.4 below.

Of course the state court judgment must itself be in effect to have collateral estoppel effect, and it must be “final” in the sense of being the trial court’s last word on the matter, i.e., not “interlocutory.” But must it be final in the sense of being no longer subject to appeal? In law school, the answer to that question is this: the law is unclear, but the better argument is that a judgment even under appeal, as long as it is not stayed, has collateral estoppel effect.⁵ In practice, the answer is this: timely file your adversary proceeding in the bankruptcy case to deny dischargeability of the judgment debt, and then ask the bankruptcy court to stay the adversary proceeding pending completion of all appeals to that judgment.

What tribunals qualify for collateral estoppel? Georgia bankruptcy courts have recognized courts of record including probate court,⁶ an arbitrator’s report,⁷ an auditor’s report,⁸ and a settlement memorialized in a consent judgment, discussed in section C.3 below.⁹

B.

FITTING THE STATE LAW CLAIM INTO THE FEDERAL NDISCHARGEABILITY ELEMENTS

As noted above, federal law applies to the nondischargeability ad
continued on next page

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versary proceeding. What trips up “real litigators” most after they’ve already won their state court judgment is that common terms such as “fiduciary” or “willful and malicious injury” have different meanings in state law, which you used to win your judgment, and in the federal bankruptcy statute, where you must prove them again to deny the discharge of your judgment debt. Let me begin with the most litigated similarities and differences between Georgia law and 11 U.S.C. § 523.

1. Fraud and Misrepresentation under 11 U.S.C. § 523(a)(2). First, the good news: fraud is fraud. Section 523(a)(2) denies discharge “from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than” financial statements, which have additional requirements under § 523(a)(2)(B). The tort of fraud under Georgia law does meet the requirement of “fraud” in 11 U.S.C. § 523(a)(2).¹⁰

2. Fraud or Defalcation while acting in a fiduciary Capacity, etc. under 11 U.S.C. § 523(a)(4). Now, the bad news. Section 523(a)(4) denies discharge “from any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” The section raises several definitional issues.

First, “fiduciary” has a narrower definition in this section than in Georgia law. Here “fiduciary” is limited to an express trust, i.e., a pre-existing contract of some sort, and an express, pre-existing res, i.e., trust property. By contrast, “fiduciary” in Georgia law may extend to implied trusts or resulting trusts, i.e., fiduciary relationships inferred after the fact.¹¹

A “guardian” under Georgia law is a “fiduciary” under 11 U.S.C. § 523(a)(4).¹² “Defalcation” generally means the failure of the fiduciary to

account for the money he received in his fiduciary capacity.¹³ It is a lesser standard than fraud or conversion. You need only prove a wrongful expenditure, not an accompanying intent to deceive or to harm.

Finally, “[t]o establish larceny under Section 523(a)(4), it must be shown that Debtor unlawfully took and carried away property belonging to another with intent to permanently deprive the owner of same. To prove embezzlement, it must be established that Debtor, with fraudulent intent, appropriated property he did not own, but of which he was rightfully in possession, for a use other than that for which such property had originally been entrusted to Debtor.” Tower Oak, Inc. v. Selmonosky (In re Selmonosky), 204 B.R. 820, 828 (Bankr. N.D. Ga. 1996) (J. Brizendine) (internal citations omitted).

3. Willful and Malicious Injury under 11 U.S.C. § 523(a)(6). This section denies discharge “from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity.” Again, beware. “Willful and malicious injury” means “a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) (emphasis original) (medical malpractice liability was not per se nondischargeable where the surgeon (of course!) intended to cut, but did not intend to cut wrongly).

Section 523(a)(6) addresses only those situations in which a debtor desired the injury caused by his conduct. It does not reach a debtor’s failure to meet a duty of care that results in injury to someone else. In Henderson v. Woolley (In re Woolley), 288 B.R. 294, 302 (Bankr. S.D. Ga. 2001), Judge Davis quoted a fifth circuit case for the most concise definition: “‘An injury is ‘willful and malicious’ where there is either objective substantial certainty of harm or subjective motive to cause

harm.’ Miller v. J. D. Abrams, Inc. (In re Miller), 156 F.3d 598, 606 (5th Cir. 1998).”

In Stinson v. Morris (In re Morris), 2005 Bankr. LEXIS 2865 (Bankr. N.D. Ga. 2005), Judge Massey defined the “willful and malicious injury” requirement by quoting In re Walker, 48 F.3d 1161, 1163-1164 (11th Cir. 1995):

We have interpreted “willful” to require a showing of an intentional or deliberate act, which is not done merely in reckless disregard of the rights of another. As used in section 523(a)(6), “malicious” means “wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will.” Malice may be implied or constructive. (Constructive or implied malice can be found if the nature of the act itself implies a sufficient degree of malice.). In other words, a showing of specific intent to harm another is not necessary.

2005 Bankr. LEXIS 2865 *5 - *6 (original footnote omitted in Morris opinion; internal quotations and citations omitted here).

Accordingly, any Georgia tort that broadens its intent requirement, such as “knowingly or recklessly,” “knew or should have known,” does not per se lead to collateral estoppel under this section. Two examples are conversion¹⁴ and defamation.¹⁵ That does not mean you must always retry your entire case; rather, you must make sure that the record of the case includes findings of fact that show the federally-required intent; see Section C below.

C.

CREATING YOUR STATE COURT RECORD

When determining a summary judgment motion based on collateral estoppel, the bankruptcy court is not limited to a review of the judgment

itself, but may review anything else in the earlier case, including not only pleadings and pretrial orders, but jury charges,¹⁶ jury verdicts,¹⁷ and trial transcripts¹⁸ as well.

The bankruptcy court may also decide a collateral estoppel motion in pieces. For example, the court may grant summary judgment on the claim itself but leave for trial the amount of damages attributable to that claim, because there was also a dischargeable claim, and the record was unclear on the division of damages between them.¹⁹ The court may grant summary judgment on the amount of damages but not on the nondischargeability of the claim itself.²⁰ Or the court may grant summary judgment on the nondischargeability of one claim and leave another for trial.²¹

Almost invariably, the bankruptcy court that denies collateral estoppel in whole or in part does so because the prior court record that the plaintiff presented to the bankruptcy court was not extensive enough for the court to make a needed determination. The job of the prebankruptcy litigator is to keep that failure from happening; i.e., to create the proper record for later use. This final section discusses four prebankruptcy case issues: the complaint; the record in a fully contested case; the consent judgment; and the defendant who makes an early exit.

1. Drafting the Complaint. It may seem obvious, but the first rule of drafting a civil complaint to prepare for collateral estoppel in a later bankruptcy case is this: know what you have to prove under 11 U.S.C. § 523(a) to get the discharge denied, and to figure out whether you can prove it. The second rule is to divide up dischargeable liability and nondischargeable liability into separate counts, even where you're asking for the same damages under alternate theories.

In short, the well-pled paragraphs of at least one count in the complaint

must not only state a claim on which relief can be granted in the present action, but also state a claim that will be nondischargeable in the defendant's subsequent bankruptcy case. Why? First, you need to know from the beginning where to steer the ship. Second, if the defendant's answer is struck for whatever reason, you will not get the opportunity to secure your collateral estoppel through a special jury verdict or language in the judgment; rather a default judgment can state no better facts than its complaint pled.

For example, if the sole claim is "she broke the contract or defrauded me," then a bankruptcy court cannot tell if the jury awarded damages for breach of contract (dischargeable), or fraud (nondischargeable), and you try your case again. But if Count I is breach of contract, Count II is fraud, and the jury finds for the plaintiff on Count II -- no matter what happens on Count I -- then you have a judgment that will be given preclusive effect. (You still need to make clear that particular damages arose from the fraud itself, or you may get collateral estoppel on the judgment, but have to retry the damages part.)

And to continue an example from above, if you are suing for conversion, and you can prove that the act was intentional, remember 11 U.S.C. § 523(a)(6) (willful and malicious injury to property). Aver that the act was done "knowingly," or "intentionally," but do not just by rote say that the defendant "knew or should have known," or that the defendant acted "recklessly or intentionally." "Knew" and "intentionally" lead to collateral estoppel; "should have known" and "recklessly" don't. (If you do both, you can cure the problem with a special jury verdict; see below.)

2. Making your Record. If the matter is contested to the end, take the opportunity to get specific findings of fact. Remember the bank-

ruptcy dischargeability action to follow when you suggest jury charges, or, in a bench trial, present proposed findings of fact and conclusions of law. Submit special interrogatories to the jury. A good example appears in the footnote.²²

3. The Consent Judgment. Yes, we have all heard of civil defendants who will sign anything put in front of them, many of whom are motivated by a well-reasoned aversion to their own incarceration. Can a civil defendant consent to the nondischargeability of a debt? Directly no, but indirectly yes, through a consent judgment and collateral estoppel. This one is yours to lose.

As a preliminary matter, settling a claim exchanges the right to sue for bad acts now (the lawsuit or claim being settled), for the right to sue later in contract, if necessary, for breach of contract (the agreement that settles the claim or lawsuit). That exchange, i.e., the very act of settling a claim, does not wash away the nondischargeability of the underlying act. If the debt was nondischargeable to begin with, it remains so through the settlement agreement.²³

As a matter of public policy, a defendant may not consent to refrain from filing bankruptcy, or at least directly to the nondischargeability of a debt. But a defendant may consent to the existence of particular facts that fulfill all the elements for a later finding of nondischargeability, and the resulting consent judgment will preclude relitigation of those facts. Halpern v. First Georgia Bank (In re Halpern), 810 F.2d 1061 (1987), aff'g an unpublished district court opinion, aff'g First Georgia Bank v. Halpern (In re Halpern) 50 B.R. 260 (Bankr. N.D. Ga. (1985) (J. Kahn), remains the roadmap for doing just that. It bears extended discussion.

Mr. Halpern was the CEO and principal shareholder of a food wholesaler. First Georgia Bank sued

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the company for unpaid extensions of credit in 1973, and amended the complaint in 1976 to allege that Mr. Halpern had “engaged in a check kiting scheme.” 810 F.2d at 1062. The parties settled through a consent judgment in 1983. Here is what the eleventh circuit said Mr. Halpern signed:

As a part of the consent judgment, Halpern admitted certain facts. The factual findings included: that Halpern made material misrepresentations of fact to First Georgia; that Halpern knew the statements were false at the time they were made; and that Halpern made the misrepresentations with the intent to induce reliance by First Georgia in extending cash, bank obligations and deposit credits to Halpern. Halpern admitted that this conduct was “wilful, malicious, and intentional and designed solely for the purpose of fraudulently deceiving First Georgia Bank.” Moreover, Halpern agreed that:

These Findings of Fact and Conclusions of Law will collaterally estop [Halpern] from denying any of the facts or law established herein. Specifically, [Halpern] recognizes that these Findings of Fact and Conclusions of Law will conclusively establish that the liability which he is adjudged in this civil action to owe to [First Georgia] will be excepted from discharge in any bankruptcy case in which he is a debtor. This is because . . . Halpern’s liability to [First Georgia] is (a) for obtaining money or property by false pretenses, false representations, and actual fraud, (b) for fraud or defalcation while acting in a fiduciary capacity, and (c) for wilful and malicious injury by the Defendant Halpern to Plaintiff’s property.

Halpern also agreed that the debt discussed in the judgment

had not been discharged in bankruptcy and that Halpern “does not intend to seek a discharge as to this Judgment.” Both Halpern and his attorney witnessed and signed the consent judgment.

810 F.2d at 1062-63 (brackets in original).

That formula worked. According to the eleventh circuit, the bankruptcy court reacted like this:

The court found that applying collateral estoppel is appropriate in this case because: (1) the state court findings of fact were detailed and carefully drawn; (2) Halpern and his attorney voluntarily agreed to the judgment; (3) there is no reason to believe that Halpern’s interest in the direction and outcome of the state court litigation was less than his interest in the dischargeability proceeding; and (4) Halpern did not deny the factual findings in the consent judgment and he presented no additional evidence indicating that the factual findings should not be given their clear meaning.

810 F.2d at 1063. The bankruptcy court held the debt nondischargeable under 11 U.S.C. § 523(a)(2)(A) (fraud and misrepresentation) and did not decide nondischargeability under § 523(a)(4) or (a)(6). The eleventh circuit expressly agreed that the issues were the same, that “the parties intended that the consent judgment operate as a final adjudication of the factual issues contained therein[.]” and that there was “no evidence of coercion or duress[.]” 801 F.2d at 1064-65.

There is no better way to do it than in Halpern. By contrast, see Hutchins v. Temples (In re Temples), 2006 Bankr. LEXIS 3174 (Bankr. N.D. Ga. 2006) (J. Bonapfel). Apparently the creditor plaintiff tried to follow Halpern, but cut corners. The parties executed a separate settlement

agreement, but did not record it with the judgment, and there were factual findings regarding fraud either in the final judgment or in the settlement agreement. Under Florida law (no different from Georgia law on this point), the bankruptcy court denied collateral estoppel.

4. Default Judgments and other Early Exits. Many defendants don’t stick around until final judgment. Some never answer, others run out of money, and a healthy number have their answers struck for discovery abuse. Does a resulting judgment have collateral estoppel effect?

The answer depends upon how far along the case is. The probability of collateral estoppel is low when the defendant is served, but increases the longer the defendant remains active in the case, and becomes a certainty if the defendant actively obstructs the judicial process.

In Bush v. Balfour Beatty Bahamas, Ltd., 62 F.3d 1319 (11th Cir. 1995), an individual was defaulted out of a federal fraud case for discovery abuse and then filed a bankruptcy case. The bankruptcy court had applied collateral estoppel to hold the debt nondischargeable. The eleventh circuit faced the federal collateral estoppel rule, under which, “[o]rdinarily, a default judgment will not support the application of collateral estoppel because in the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.” 62 F.3d at 1323 (internal quotation omitted). The reason is that “a party may decide that the amount at stake does not justify the expense and vexation of putting up a fight.” 62 F.3d at 1324 (internal quotation omitted).

The Bush court nonetheless applied collateral estoppel on this reasoning:

We . . . are reluctant to allow this debtor a second bite at the apple. Bush actively participated in the prior action over an extended period

of time. Subsequently, he engaged in dilatory and deliberately obstructive conduct, and a default judgment, based upon fraud, was entered as a sanction against him. He now attempts, in this bankruptcy proceeding, to avoid Section 523 by denying the fraud. Such abuse of the judicial process must not be rewarded by a blind application of the general rule denying collateral estoppel effect to a default judgment. *Ibid.*

Almost all default judgment cases I have surveyed follow that analysis, although they found ways to do so under other applicable law. While

Georgia law is stated to accord collateral estoppel effect to default judgments generally,²⁴ the cases appear to split at the “fault line;” i.e., collateral estoppel is applied for egregious conduct or extensive participation in the case,²⁵ but not for explainable nonfeasance and minimal participation.²⁶ There is one outlying case.²⁷

If your defendant walks out, or is thrown out, of the action, do two things to preserve the collateral estoppel effect of the judgment. First, make sure that the record contains ample instances of the defendant’s bad conduct. Second, be as meticu-

lous on the entry into the record of evidence and findings of fact concerning liability and damages as if the defendant had remained active in the case.

Conclusion

If you have read this far, God bless you, and I hope the article helps. You will make a friend of your client, who won’t have to watch you try your case a second time, and the bankruptcy judge, who won’t have watch you to try it once.

FOOTNOTES

1. *Brown v. Felson*, 442 U.S. 127, 139 n. 10 (1979) (would not apply res judicata to nondischargeability because the claims were different, but in footnote 10 suggested that collateral estoppel could apply); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (28 U.S.C. § 1738 applies full faith and credit from state court judgments to federal court cases; held that a state court’s finding of fact on a state court claim could have preclusive effect in a federal court case on a different claim, even though the federal court’s claim arose under federal law (antitrust) and the state court could not have had jurisdiction over it in the first place); *Grogan v. Garner*, 498 U.S. 279 (1991) (the “preponderance of evidence” standard used in state law civil cases, and not the more stringent “clear and convincing” standard, would apply to nondischargeability actions); In addition, *St. Laurent v. Ambrose* (In re St. Laurent), 991 F.2d 672, 675-76 (11th Cir. 1993), applied the *Marrese* holding, which concerned antitrust law, to bankruptcy nondischargeability law.
2. *Stinson v. Morris* (In re Morris), 2005 Bankr. LEXIS 2865, *10 (Bankr. N.D. Ga. (J. Massey); *Mills v. Ellerbee* (In re Ellerbee), 177 B.R. 731 (Bankr. N.D. Ga. 1995) (J. Massey). If the attorneys’ fees award flows from conduct during the case itself, then its dischargeability will independently depend upon 11 U.S.C. § 523(a)(6) (willful and malicious injury). *Foran v. Lutz* (In re Lutz), 169 B.R. 473 (Bankr. S.D. Ga. 1994) (J. Davis) applied collateral estoppel to hold nondischargeable a judgment in an earlier admiralty action of attorneys fees to the defendants because the plaintiffs had “lied about the very existence of the events on which they based their claim.” 169 B.R. at 475 (internal quotation omitted). The attorneys’ fees may be nondischargeable, even if the underlying debt is not. In *Karl v. Stalaker* (In re Stalaker) 408 B.R. 440, 448 (Bankr. M.D. Ga. 2009), under West Virginia law, Judge Walker denied collateral estoppel on the main claims (the plaintiff failed to submit a state court record), but grant collateral estoppel on the attorney’s fees claim because “they are subject to an independent legal standard.”
3. O.C.G.A. § 9-12-40. Conclusiveness of judgments
A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.
O.C.G.A. § 9-12-42. Former judgment not a bar when
Where the merits were not and could not have been in question, a former recovery on purely technical grounds shall not be a bar to a subsequent action brought so as to avoid the objection fatal to the first. For a former judgment to be a bar to subsequent action, the merits of the case must have been adjudicated.
4. Here’s a three:
Thus, the Court will look to Georgia law to determine the effect of the state court judgment. In Georgia:
[“]The doctrine of collateral estoppel precludes relitigation when there is: (1) an identity of parties or their privies; (2) a previous determination of the same or similar issues in a previous court with competent jurisdiction; and (3) [collateral estoppel] precludes only those issues actually litigated or by necessity had to be decided for the judgment to be rendered.”
Cincinnati Insurance Co. v. MacLeod, 259 Ga. App. 761, 577 S.E. 2d 799, 803 (2003) cert. denied.
Davis v. Conner (In re Conner), 2010 Bankr. LEXIS 1455 (Bankr. M.D. Ga. 2010) (J. Smith).
Here’s a five:
Under Georgia law, a party may only assert the doctrine of collateral estoppel when the following elements have been satisfied: (1) identity of the parties is the same; (2) identity of the issues is the same; (3) actual and final litigation of the issue in question occurred; (4) the adjudication was essential to the earlier action; and (5) the parties had a full and fair opportunity to litigate the issues in question.
Lewis v. Lowery (In re Lowery), 2010 Bankr. LEXIS 4564 (Bankr. N.D. Ga. 2010) (J. Hagenau) (citation omitted).
5. O.C.G.A. § 9-12-40 explicitly states that a “judgment . . . shall be conclusive . . . until the judgment is reversed or set aside.” A line of cases suggests that the appeal must be completed, but that line confuses the issue of the appeal itself with the general, but not universal, granting of supersedeas during the appeal. “In Georgia a judgment is suspended

- when an appeal is entered within the time allowed. And the judgment is not final as long as there is a right to appellate review.” *Lexington Developers, Inc. v O’Neal Construction Co.*, 143 Ga. App. 440, 441 (1977), cited in *Thomas v. Brown*, 708 F. Supp. 336 (N.D. Ga. 1989). In *Lusk v. Williams* (In re Williams), 282 B.R. 267, 274 (Bankr. N.D. Ga. 2002), Judge Mullins recognized the split of authority, but applied collateral estoppel after a state court jury verdict despite a pending motion in the state court case for new trial and judgment notwithstanding the verdict.
6. *RLI Insurance Co. v. Waters* (In re Waters), 419 B.R. 919 (Bankr. M.D. Ga. 2009) (J. Hershner).
 7. *Tower Oak, Inc. v. Selmonosky* (In re Selmonosky), 204 B.R. 820 (Bankr. N.D. Ga. 1996) (J. Brizendine)
 8. *Duff v. Postell* (In re Postell), 132 B.R. 788 (Bankr. N.D. Ga. 1991) (J. Bihary).
 9. *Halpern v. First Georgia Bank* (In re Halpern), 810 F.2d 1061 (1987), aff’g an unpublished district court opinion, aff’g *First Georgia Bank v. Halpern* (In re Halpern) 50 B.R. 260 (Bankr. N.D. Ga. (1985) (J. Kahn). See the last section of this article.
 10. See the discussion and citations in *Lewis v. Lowery* (In re Lowery), 2010 Bankr. LEXIS 4564 (Bankr. N.D. Ga. 2010) (J. Hagenau).
 11. See the discussion in *RLI Insurance Co. v. Waters* (In re Waters), 419 B.R. 919 (Bankr. M.D. Ga. 2009) (J. Hershner).
 12. *Ibid.*
 13. *Duff v. Postell* (In re Postell), 132 B.R. 788, 791 (Bankr. N.D. Ga. 1991) (J. Bihary) (internal quotation and citations omitted).
 14. *Strong Industries, Inc. v. McKenzie* (In re McKenzie), 2006 Bankr. LEXIS 827, *6 - *7 (Bankr. N.D. Ga. 2006) (J. Bonapfel) (Conversion under Georgia law may result from reckless conduct).
 15. *Mills v. Ellerbee* (In re Ellerbee), 177 B.R. 731 (Bankr. N.D. Ga. 1995) (J. Massey).
 16. *Newton v. Lemmons* (In re Lemmons), 2005 Bankr. LEXIS 2765 (Bankr. N.D. Ga. 2005) (J. Diehl); *Dement v. Gunnin* (In re Gunnin), 227 B.R. 332 (Bankr. N.D. Ga. 1998) (J. Bihary)
 17. *Lusk v. Williams* (In re Williams), 282 B.R. 267 (Bankr. N.D. Ga. 2002) (J. Mullins).
 18. *Aegis Mortgage Corp. v. Lauderhill* (In re Lauderhill), 2007 Bankr. LEXIS 1570 (Bankr. N.D. Ga. 2007) (J. Brizendine); *Foran v. Lutz* (In re Lutz), 169 B.R. 473 (Bankr. S.D. Ga. 1994) (J. Davis).
 19. *Davis v. Conner* (In re Conner), 2010 Bankr. LEXIS 1455 (Bankr. M.D. Ga. 2010) (J. Smith).
 20. *Lewis v. Lowery* (In re Lowery), 2010 Bankr. LEXIS 4564 (Bankr. N.D. Ga. 2010) (J. Hagenau); *Tower Oak, Inc. v. Selmonosky* (In re Selmonosky), 204 B.R. 820 (Bankr. N.D. Ga. 1996) (J. Brizendine)
 21. *Karl v. Stalaker* (In re Stalaker) 408 B.R. 440 (Bankr. M.D. Ga. 2009) (J. Walker).
 22. In *Lusk v. Williams* (In re Williams), 282 B.R. 267 (Bankr. N.D. Ga. 2002) (J. Mullins), the jury returned the special verdict form, which read as follows:
2. Do you find that fraud has been committed against Judy Lusk?
[a. Yes.]
[a. All Defendants]
3. Please state the amount of damages awarded.
[a. \$ 450,000.00 General Damages and \$ 0.00 Loan Repayment]
4. Do you wish to award punitive damages?
[a. Yes.]
If yes, against whom?
[a. Sherry Williams]
An addendum to the verdict form awarded the Plaintiff \$ 400,000.00 in punitive damages. In sum the jury issued a special verdict in favor of the Plaintiff in the amount of \$ 850,000.00.
After entry of the verdict, the state court entered a judgment that states in pertinent part:

- WHEREAS, the jury found that fraud was committed against Plaintiff by Sherry Williams; and
WHEREAS, the jury returned a verdict in favor of Plaintiff against all Defendants in the amount of Four Hundred, Fifty Thousand Dollars (\$ 450,000.00); and
WHEREAS, the jury further awarded punitive damages in favor of the Plaintiff against Sherry Williams in the amount of Four Hundred Thousand Dollars (\$ 400,000.00);
Plaintiff shall have judgment against Sherry Williams individually and d/b/a Airtex of Dalton, Inc., Bellemead, Inc. and Textile Concepts, Inc. in the amount of Four Hundred Fifty Thousand Dollars (\$ 450,000.00). Furthermore, Plaintiff is awarded the additional sum of Four Hundred Thousand Dollars (\$ 400,000.00) against Sherry Williams individually.
282 B.R. at 269-70.
23. *Archer v. Warner*, 538 U.S. 314 (2003).
 24. *League v. Graham* (In re Graham), 191 B.R. 489, 495 (Bankr. N.D. Ga. 1996) (J. Drake) (“A default judgment, however, will qualify as such a “judgment on the merits” for the purposes of the Georgia standard” (Georgia Court of Appeal citations omitted); *Hebbard v. Camacho* (In re Camacho), 411 B.R. 496, 502 (Bankr. S.D. Ga. 2009) (J. Davis) (“A judgment of default is a “judgment on the merits” for purposes of § 9-12-42”) (internal quotation omitted).
 25. Collateral estoppel applied; *Hebbard v. Camacho* (In re Camacho), 411 B.R. 496 (Bankr. S.D. Ga. 2009) (J. Davis) (the defendant filed an answer, participated afterward, but failed to appear for trial); *Branton v. Hooks* (In re Hooks), 233 B.R. 880 (Bankr. S.D. Ga. 1999) (Judge Dales) (answer struck for discovery abuses); *Lewis v. Lowery* (In re Lowery), 2010 Bankr. LEXIS 4564 (Bankr. N.D. Ga. 2010) (J. Hagenau) (answer struck for discovery abuses); *Stinson v. Morris* (In re Morris), 2005 Bankr. LEXIS 2865 (Bankr. N.D. Ga. 2005) (J. Massey) (answer struck for discovery abuse); *Aegis Mortgage Corp. v. Lauderhill* (In re Lauderhill), 2007 Bankr. LEXIS 1570, *8 (Bankr. N.D. Ga. 2007) (J. Brizendine). (“Debtor did appear in that litigation but chose not to be present for the entire proceeding.”); *Morris v. Cunningham* (In re Cunningham), 355 B.R. 913 (Bankr. N.D. Ga. 2006) (J. Bihary) (defendant answered the complaint, filed a counterclaim, and failed to appear after his counsel withdrew); *Fincher v. Holt* (In re Holt), 173 B.R. 806 (Bankr. M.D. Ga. 1994) (J. Hershner) (debtor filed the original suit as plaintiff. The court dismissed his claim when he did not respond to the defendants’ motion for summary judgment or requires for admissions. Debtor did not appear for trial on the counterclaim); *Henderson v. Woolley* (In re Woolley), 288 B.R. 294 (Bankr. S.D. Ga. 2007) (J. Davis) (defendant participated until jury selection had been set and the court denied his nonmeritorious defense (CT law); *League v. Graham* (In re Graham), 191 B.R. 489 (Bankr. N.D. Ga. 1996) (J. Drake) (discovery abuse); *Sterling Factors, Inc. v. Whelan* 245 B.R. 698 (N.D. Ga. 2000) (Judge Forrester) (answer struck for discovery abuses).
 26. Collateral estoppel not applied; *Naveb v. Barzegar* (In re Barzegar), 198 B.R. 864 (Bankr. N.D. Ga. 1995) (J. Massey) (defendant dropped out when he lost a motion to dismiss, he did not abuse the system, and he did not get adequate notice of the damages and liability hearing) (MD law); *Bass v. Barber* (In re Barber), 316 B.R. 391, 394 (Bankr. M.D. Ga. 2004) (J. Laney) (defendant was served, but did not file an answer; his financial condition was deteriorating and his defense counsel advised him to file a bankruptcy case instead. “Defendant acted on advice of counsel when he chose to allow the lawsuit to go into default and file for bankruptcy protection, rather than incur the cost of litigation. The Court is not persuaded that Debtor did anything deliberate that could be considered an abuse of the judicial process.”); *Kendall Electric, Inc. v. Black* (In re Black), 2009 Bankr. LEXIS 406 (Bankr. N.D. Ga. 2009) (J. Bonapfel) (defendant was served and simply never answered; default entered only three months after the complaint was filed) (MI law); *Chevy Chase Bank, FSB v. Harkins* (In re Harkins), 302 B.R. 927 (Bankr. M.D. Ga. 2003) (J. Hershner) (defendant did not produce requested discovery documents because he no longer had possession of them or access to them, ran out of money, and went to a bankruptcy lawyer to prepare his bankruptcy filing).
 27. In *McKelvey v. Murray* (In re Murray), 2009 Bankr. LEXIS 3290 (Bankr. N.D. Ga. 2009) (J. Murphy), the defendant was served, but appears to have done nothing in the case, and yet collateral estoppel applied to the judgment.

It Is Seldom a Simple Contract

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Ken is a partner at Ashe, Rafuse & Hill, LLP, where his practice is focused on commercial, civil rights, and RICO litigation. Ken spent 15 years of his 20-year career as a prosecutor, including 12 as the District Attorney of the Dougherty Judicial Circuit. He has appeared before juries hundreds of times in both civil and criminal matters, supervised literally thousands of cases and argued before the Georgia Court of Appeals and Supreme Court of Georgia.

Ken was also the nominee in 2010 of the Democratic Party of Georgia for Attorney General after carrying 158 out of 159 counties in the primary. He garnered more votes than any other Democratic candidate in the General Election.

*He was selected District Attorney of the Year in 2002 in part due to his work as co-counsel in the case of *State v. Sidney Dorsey* and received the Justice Robert Benham Award for Community Service for his dedication to public service from The State Bar of Georgia and the Eagle Award for outstanding work on behalf of victims of crime by the Criminal Justice Coordinating Council of Georgia.*

He is a former Chairman of the Prosecuting Attorney's Council of Georgia, a past President of the District Attorney's Association of Georgia, and past President of the Dougherty Bar Association. He is a graduate of Leadership Georgia and served on its Board of Directors.

Ken has also been recognized by Georgia Trend Magazine as one of Georgia's "40 Under 40" and by the Fulton County Daily Report as an attorney "On The Rise." Ken received his B.A. from Emory University and his J.D. from the University of Georgia School of Law.

I. **The Drama**

A potential client, an executive at the Widget Manufacturing Company ("Widget"), has come to you because one of Widget's suppliers, Low Budget, has failed to meet their obligations under a supply contract with Widget.

As the Widget executive talks, you learn that six months ago Widget entered into a written contract with Low Budget under which Low Budget agreed to provide high-quality parts to Widget. Low Budget was brought to Widget by Widget's exclusive, long-time parts broker who assured Widget that Low Budget could supply a high-

grade part. Unfortunately, Low Budget never possessed the capability to supply these high-grade parts.

The Widget Executive tells you that he has learned, post-contract, that Widget's broker was college roommates with Low Budget's CEO, that Widget's broker knew, pre-contract, that Low Budget did not have the capability to supply the parts that Widget needed. Widget's broker, nonetheless, recommended Low Budget in return for an undisclosed commission paid to him by Low Budget. To make matters worse, after Widget fired the broker, he started his own competing widget manufacturing company and hired away Widget's best engineer.

The engineer, while at Widget, developed and was in charge of a unique process by which Widget manufactured their widgets. This process allowed Widget to make widgets faster and cheaper than their competitors. Without the engineer, Widget's production has slowed to a halt. The engineer was under contract to Widget.

With Widget's lack of production, customers have moved their business to the broker's company. Widget has also learned that the broker has directly contacted Widget customers currently in contractual agreements with Widget and has solicited them to his new company and has told them that Widget is being investigated for

fraud—a false allegation.

The Widget Executive tells you that Widget needs your help to get back on track, to recover its damages and to stop future damages to its sales and reputation. He then asks, “What do you think?”

II. The Contract

The first place to look is to the contractual agreement. An express contract is where the parties have agreed, either orally or in writing, to be bound.¹ This is the type of contract that most people imagine when they think of parties agreeing to do business together. It is also the type of contract that exists between Widget and Low Budget.

Normally, the remedy for the breach of an express contract is damages which compensate the plaintiff for the loss resulting from the breach.² Under a breach of contract theory Widget may be able to recover from Low Budget any damages that flow from the breach by Low Budget, such as lost profits.

If there is no express contract—if the parties have not agreed either orally or in writing to be bound—a lawyer should ask whether the court would imply an equitable contract. Such contracts are often called quasi or constructive contracts³ and are obligations that arise not because there is a mutual assent by two parties, as in a legal contract, but because equity requires them.⁴ An implied contract is created by the court only when no express legal contract exists.⁵ The remedy for a breach of an implied contract “is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff.”⁶

This equitable concept of unjust enrichment stands for the proposition that a benefited party should compensate another party for any conferred benefits even if there is no legal contract to pay.⁷ For example, assume there had been no express contract

between Widget and Low Budget, that Widget simply paid Low Budget with the reasonable expectation that Low Budget would then supply parts, and assume that Low Budget accepted the cash. If Low Budget does not provide Widget with parts, Low Budget will have been unjustly enriched. Under these facts, a court may imply a contract and Low Budget may be in breach of that contract.

However, the theory of unjust enrichment has limitations. For it to apply, the party who confers the benefit must have conferred that benefit with the expectation that they would be compensated.⁸ Otherwise, a volunteer would have an equitable right to recovery, which is not the current state of the law.⁹ Conversely, the party receiving the benefit must have known he was receiving it and have consented to it.¹⁰ This prevents Low Budget from unilaterally leaving a box of parts on Widget’s doorstep and then suing Widget when Widget fails to pay.

III. Are There Business Tort Claims?

A breach of contract claim may not be Widget’s only recourse, and Low Budget may not be the only potential defendant. After looking to the contract, it is always good practice to test for tort claims and other potential defendants. While contract law aims to compensate a party for its loss resulting from a breach, tort law seeks to compensate the victim and deter and punish the wrongdoer.¹¹ Thus, a plaintiff, by bringing a tort claim, may be able to reach other potential defendants and may be entitled to recover punitive damages.¹² Fraud is good starting place.

A. Fraud

There are ostensibly three types of fraud. Fraud by misrepresentation is the first category and is defined as a “[w]illful misrepresentation of a material fact, made to induce another to act, upon which such person acts to his

injury.”¹³ This type of fraud involves a misrepresentation that is intended to deceive and does deceive a party.¹⁴ Within this type of fraud is fraud in the inducement, which stands for the proposition that a promise made as an inducement to enter a contract will constitute fraud as long as the promise was made in a manner to deceive and mislead.¹⁵ Widget may have a claim for fraud by misrepresentation if Widget can show that either Low Budget or the Broker made an affirmative representation to Widget with the intent to deceive. Further, Widget may have a claim for fraud in the inducement if Low Budget or the Broker made the representation with intent to induce Widget into entering into the contract.

The second type of fraud is fraud by concealment, which allows a plaintiff to hold a defendant liable for the failure to disclose a material fact to the plaintiff if the defendant was obligated to disclose the concealed information.¹⁶ The question that follows is, when is a defendant obligated to disclose a material fact?

There are two circumstances where Georgia law has recognized this obligation to disclose. The first is when there is a confidential relationship.¹⁷ A confidential relationship is “where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.”¹⁸ This definition encompasses fiduciary relationships, but is broader.¹⁹

For example, the broker above worked exclusively for Widget for a “long time.” This may well have placed him within the definition of a confidential relationship because he was in a position to procure supply contracts for Widget and may have held a position of influence with Widget. If the relationship between Widget and its broker was an arms-length

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relationship, no confidential relationship would have been created,²⁰ but because he was the exclusive, long-time broker, there may have been an obligation to disclose that he knew Low Budget could not supply the contracted for parts, that he was the college roommate of the CEO of Low Budget, and he was paid an undisclosed commission by Low Budget. At a minimum, genuine issues of fact are raised that may well preclude a motion to dismiss by the broker.

The second circumstance in which a party has an obligation to disclose a material fact is when the "particular circumstances of the case" require it.²¹ Courts have tried to define this amorphous term and have settled on "any case where a person intentionally concealed a fact from a certain other person, hoping thereby to derive a benefit, and knowing that only by silence and by concealing the truth would the anticipated benefit accrue."²² In other words, courts will proceed on a case-by-case basis to determine the culpability of the defendant and whether the defendant had an obligation to disclose a material fact.

Even if the court does not find that a confidential relationship existed between the broker and Widget, there is a reasonable probability the court will find the broker had a duty to disclose because he stood to receive the undisclosed commission only if Widget signed the contract, and Widget might not have signed the contract if it had known of the broker's concealment of the fact that Low Budget made low-grade parts and that Low Budget was paying the broker a commission.

There is one last important issue when pleading fraud by concealment. A plaintiff, after showing the defendant had an obligation to disclose, must show that he or she could not have discovered the concealed fact despite reasonable diligence.²³ What constitutes reasonable diligence is a question for the jury.²⁴ Under this rule,

it may be that Widget cannot plead fraud by concealment if Widget could have discovered through reasonable diligence that Low Budget could not supply the parts contracted for, that the broker was college roommates with Low Budget's CEO, or that the broker was paid a commission by Low Budget.

It is likely that Widget could have, through reasonable diligence, discovered the concealed fact that Low Budget could not supply the parts, which were the subject of the contract. The absence of the exercise of reasonable diligence could prevent Widget from succeeding on its fraud by concealment claim against Low Budget for that issue. However, Widget may be able to show that through the exercise of due diligence it could not have discovered that the broker was receiving an undisclosed commission or that the broker was the college roommate of the Low Budget CEO. A claim for fraud by concealment of these facts may have a higher chance of success.

The third and final type of fraud occurs when a promise is made without a present intent to perform. Generally, speculation and projections cannot form the basis for fraud in Georgia,²⁵ and a fraudulent misrepresentation must relate to past rather than future acts.²⁶ The exception to this rule is when the promise is made with no present intent to perform. For example, when Low Budget contracted to supply the bargained for parts, but knew that it could not supply the same, Low Budget may have made the promise with no present intent to perform.²⁷ This sort of promise by a defendant will constitute a misrepresentation, and as long as it is made with the intent to deceive and mislead, the plaintiff will have an action for fraud.²⁸

B. Civil RICO

Another often overlooked but powerful tool is RICO. Both Congress and the Georgia General Assembly

have enacted a RICO statute,²⁹ but the Georgia statute, in many ways, is broader because it has less demanding definitions of "pattern of racketeering activity" and "enterprise." The Georgia statute also provides for a wider variety of predicate acts and gives the plaintiff the option for injunctive relief when appropriate. However, the two statutes are substantially interrelated and Georgia courts often look to the federal act for guidance.³⁰ In Georgia, the RICO Act is meant to deal with the "increasing sophistication of various criminal elements,"³¹ and, although many people think of the Georgia RICO Act as only dealing with organized crime, no nexus with organized crime is needed.³²

Substantively, the Georgia RICO Act prohibits three types of activity. First, it prohibits a person from gaining or maintaining an interest or control in any enterprise, real property or personal property through a pattern of racketeering activity.³³ Second, it prohibits a person employed or associated with an enterprise from operating that enterprise through a pattern of racketeering activity.³⁴ Further, the Georgia statute prohibits conspiring to commit a RICO violation.³⁵

Unquestionably, the definitions in the statute can be confusing, but understanding them is crucial to the viability of a RICO claim. "A pattern of racketeering activity" is defined as engaging in two or more acts of racketeering activity.³⁶ These acts are referred to as predicate acts³⁷ and must have similar intents, results, accomplices, victims, or methods of commission or must be interrelated in some way.³⁸ Also, one of the acts, according to the Georgia statute, must have occurred after July 1, 1980, and the last of the acts must have occurred within four years of a prior commission of a predicate act.

A broad range of conduct can constitute a predicate act.³⁹ In Georgia, a predicate act can occur not only

through the violation of a number of Georgia statutes, but also through the commission of conduct defined as a predicate act in the federal statute. The result is that the definition of racketeering activity is broader under the Georgia statute as compared to the federal statute.⁴⁰ The standard of proof for showing a predicate act is as in any other civil action—that the plaintiff must prove the existence of a predicate act by a preponderance of the evidence.⁴¹

The concept of “enterprise” is also important. The federal statute prohibits a person from using or investing income derived from a pattern of racketeering activity to acquire any interest in an “enterprise.”⁴² The federal statute also prohibits a person employed by an enterprise from operating that enterprise through a pattern of racketeering activity.⁴³ The Georgia statute’s language, however, is broader because it expands the concept of prohibited activity.⁴⁴ The Georgia RICO statute prohibits the acquiring or maintaining of “any enterprise, real property, or personal property of any nature, including money” through a pattern of racketeering activity.⁴⁵ Thus, the Georgia statute does not limit the prohibited activity to acquiring any interest in, or operating an enterprise, but expands to include real and personal property. For example, the federal RICO statute would only prohibit the defendants in this case from using a pattern of racketeering activity to operate or gain an interest in an enterprise, such as a business. In contrast, under the Georgia RICO statute, the prohibition is broader in that it would prohibit the defendants not only from buying or controlling an enterprise, but also from buying or maintaining a boat, piece of land, or money through a pattern of racketeering activity. However, if the facts in the case show that the defendants did not take an interest or control of real or personal property, under the Georgia

RICO statute the plaintiff must show the existence of an enterprise.⁴⁶

An enterprise is defined as “any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.”⁴⁷ This is a broad definition, and a plaintiff does not need to show evidence of a formal group to prove that an enterprise exists.⁴⁸ Instead, an enterprise is proven by “evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”⁴⁹ Importantly, a plaintiff can use the same evidence to show the existence of both an enterprise and a pattern of racketeering activity.⁵⁰

However, meeting the above definitions is not enough for a plaintiff to sustain a RICO action. To have standing against the defendant, the plaintiff must show that he was injured, and the defendant’s commission of one or more predicate acts proximately caused that injury.⁵¹ The injury must flow directly from the predicate acts.⁵² For example, had one of Low Budget’s employees found out about Low Budget’s fraudulent activities, refused to go along with the activities, and gotten fired as a result, he would not have a RICO claim because his injury would not flow directly from the predicate acts.⁵³

If Widget can prove liability under RICO, there are a broad range of remedies available. Widget can recover treble damages and may be able to recover punitive damages as well.⁵⁴ Widget may also have the opportunity to recover attorney fees and costs,⁵⁵ and, in Georgia, Widget can seek injunctive relief under the same standard as in other civil cases, except instead of having to show irreparable

harm, Widget must show “immediate danger of significant loss.”⁵⁶

C. Trade Secrets

Widget may have a claim for misappropriation of trade secrets under the Georgia Trade Secrets Act.⁵⁷ The engineer may have taken with him the knowledge of a unique process by which Widget could manufacture widgets cheaper and faster than the competition. Widget will understandably be apprehensive that the engineer will disclose and use the process at his new employer. Widget may want to use the Trade Secrets Act to prohibit the disclosure of any trade secrets. Widget will have to use the Trade Secrets Act, rather than tort law, because the statute expressly supersedes all tort actions, thus any claim for misappropriation must be brought under the statute.⁵⁸

A trade secret is any type of information that is (1) subject to reasonable efforts to maintain its secrecy and (2) valuable as a result of its secrecy.⁵⁹ A trade secret must not be ascertainable through proper means, thus anything that can be derived through reverse engineering, independent development, or is available through public sources will not be considered a trade secret.⁶⁰ If Widget had a unique way of manufacturing widgets which they chose to keep secret, and from that process Widget derived economic benefit, that process could be classified as a trade secret as opposed to confidential information (the latter requiring an enforceable nondisclosure agreement).⁶¹

Misappropriation of a trade secret can happen in one of two ways. A person can be liable if he or she acquires a trade secret under circumstances where he or she knew or should have known that the trade secret information had been obtained by improper means or, if he or she, already in possession of trade secret information,

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It Is Seldom a Simple Contract

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discloses that trade secret after using improper means to acquire it or in violation of a duty to keep it secret.⁶² Widget may be able to sue both the broker and the engineer. The broker, if he acquired the trade secret information from the engineer and knew or should have known that the engineer procured the secret process through improper means, could be liable. Also, the engineer could be liable for disclosing the trade secret information. He created the process so he did not use improper means to acquire the trade secrets, but, he may have had a duty to keep it a secret as an employee for widget. If he did have a duty, then he will be liable.

If the broker or engineer did misappropriate a trade secret or if there is a threat of misappropriation, Widget has the right to enjoin the defendant from using the trade secret, and Widget will be able to recover damages.⁶³ If the misappropriation was willful, exemplary damages may be awarded and can be up to twice the amount of compensatory damages.⁶⁴ Further, if a claim for misappropriation is made in bad faith, a motion to terminate an injunction is made in bad faith, or willful or malicious misappropriation exists, then the court may award attorneys' fees to the prevailing party.⁶⁵

D. Tortious Interference

Widget may also consider action against the broker for soliciting customers that had contracts with Widget. Widget's cause of action would be a tort for the malicious injury to the business of another.⁶⁶ With these torts "a claim may be stated by showing a general malicious intention to harm the plaintiff's business, or to drive the plaintiff out of business."⁶⁷ Widget may be able to show that the broker, when talking to customers who were contracted with Widget, maliciously interfered with Widget's business and is liable for damages.

There are two categories of tortious interference that are recognized in

Georgia—interference with contractual relations and interference with business relations.⁶⁸ The two have a few common elements:

(1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.⁶⁹

But, there is one large distinction. For interference with contract relations, a plaintiff must show that there was a valid and enforceable contract with which the defendant interfered.⁷⁰ Tortious interference with contractual relations seems to be the tort that fits this fact pattern because there were contracts between Widget and its customers. Interference with business relations can be used when there is no contract.⁷¹

Interference with business relations also encompasses interference with prospective business relationships.⁷² This allows a plaintiff to sue a defendant for interfering with the plaintiff's efforts to procure new business relations. Along with the other elements of the pair of interference torts, a plaintiff needs to show that but for the interference, the business relations interfered with were reasonably likely to develop.⁷³

Widget may have a claim for interference with contractual relations if the defendant maliciously induced the customers to breach their contracts with Widget and Widget suffered damage as a result.⁷⁴ In the context of tortious interference, the term malicious means that the defendant must have been aware of the contract and had the intent to interfere with the

contract.⁷⁵ If the broker in our fact pattern was aware of the contracts that existed between Widget and his customers, he may have had the requisite intent.

To be held liable the broker must also be a "stranger" to the contract.⁷⁶ This means a party cannot tortiously interfere with its own business relationships.⁷⁷ The term is narrow and does not include all non-parties. In fact, the Supreme Court of Georgia has held that the term stranger does not encompass any one party to the "contract and any business relationship giving rise to and underpinning the contract."⁷⁸ For example, agents, attorneys and third-party beneficiaries have all been held not to be strangers to the contract in Georgia.⁷⁹ Widget will need to show that the broker meets this narrow definition of stranger to hold the broker liable for tortious interference.

To show that interference occurred, Widget need not show that the interference actually caused a breach in the contract.⁸⁰ Widget only needs to show that the broker's actions interfered with Widget's ability to perform the contract or made it more expensive to perform the contract.⁸¹ Widget must then be able to show damages, such as lost profits from losing customers to the broker's company and any additional costs of entering into a new contract. If Widget can show these elements, Widget may be entitled to compensatory damages and to punitive damages.⁸³

E. Conspiracy

A conspiracy is a combination of two or more people to accomplish an unlawful end or to accomplish a lawful end by unlawful means.⁸⁴ An essential element is the agreement between two or more people to accomplish the tort.⁸⁵

Once a person is aware of a conspiracy and they join, that person is as much a member as if they had been in the conspiracy from the be-

ginning.⁸⁶ This means anybody who joins a conspiracy is liable for any acts that were committed in furtherance of the conspiracy even before the person joined.⁸⁷

To be entitled to damages for civil conspiracy, a plaintiff must show that two or more people, acting in concert, engaged in conduct that constitutes a tort.⁸⁸ There is really no such thing as a cause of action for civil conspiracy. Instead, conspiracy is an action for damages caused by an underlying tort.⁸⁹ As a result, proving that an underlying tort occurred is necessary to show conspiracy.⁹⁰

Successfully pleading a conspiracy may give a plaintiff some litigation advantages. If Widget successfully pleads and proves a civil conspiracy encompassing the CEO of Low Budget, the broker and the engineer, all of

whom may have conspired to commit a number of torts, Widget may then be entitled to assess joint and several liability over a larger group of defendants. Instead of trying to recoup its losses and punitive damages from one defendant, Widget may be able to recover damages against the broker, the engineer, the CEO or all three.⁹¹ Because co-conspirators are joint-tortfeasors, a plaintiff may try its case in any county in which any defendant resides in Georgia,⁹² and if the court has personal jurisdiction over one co-conspirator, that personal jurisdiction may be imputed to the other co-conspirators.⁹³ Also, pleading conspiracy can give a case jury appeal.

Conclusion

Although asserting a breach of contract claim is often the easiest and

most apparent cause of action in the business context, there are a number of business torts that allow a plaintiff a much larger range of remedies against an expanded field of possible defendants. While some of these claims, RICO for example, may require a larger expenditure of time and financial resources, a successful tort claim may provide a client with a resolution that better fits the client's needs. Also, provisions such as exemplary damages under the Georgia Trade Secrets Act, treble damages under RICO, and punitive damages under tortious interference can increase a plaintiff's leverage in settlement talks. A lawyer armed with this knowledge can be of great benefit to her/his client.

FOOTNOTES

1. *Classic Restorations, Inc. v. Bean*, 155 Ga. App. 694, 699 (1980). Parol contracts are contracts made orally as remembered by witnesses. O.C.G.A. § 13-1-6. Parol contracts are legal and may be enforced, unless the parties disagree on whether a contract existed. *Speed v. Muhanna*, 274 Ga. App. 899, 905 (2005). If the parties disagree, the absence of writing prevents enforcement. *Id.* Further, parol evidence may be used to explain any ambiguities in a written contract but is inadmissible to contradict or vary the terms of a valid written instrument. O.C.G.A. § 24-6-3; O.C.G.A. § 24-6-1 (2011).
2. O.C.G.A. § 13-6-1 (2011).
3. *Eaves v. J.C. Bradford & Co., Inc.* 173 Ga. App. 470, 471 (1985).
4. *Butts County v. Jackson Banking Co.*, 129 Ga. 801 (1908).
5. *Ades v. Werther*, 256 Ga. App. 8, 10 (2002).
6. *Id.*
7. *Morris v. Britt*, 275 Ga. App. 293, 294 (2005).
8. *Id.*
9. *Id.*
10. *Reidling v. Holcomb*, 225 Ga. App. 229, 232 (1997).
11. *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 407 (1993).
12. O.C.G.A. § 51-12-5 (2011).
13. O.C.G.A. § 51-6-2 (2011).
14. *Adkins v. Lee*, 127 Ga. App. 261, 264 (1972).
15. *Perimeter Realty v. GAPI, Inc.* 243 Ga. App. 584, 595-96 (2000).
16. *Pinkerton and Laws Co., Inc., v. Roadway Exp., Inc.*, 650 F. Supp 1138, 1147 (1986) (citing O.C.G.A. § 23-2-53 (2011)).
17. O.C.G.A. § 23-2-53.
18. O.C.G.A. § 23-2-58 (2011); see also *Williams v. Dresser Industries, Inc.*, 795 F. Supp. 1144, 1148 (1992) (whether a confidential relationship exists is a question for the jury) (reversed on other grounds by *Williams v. Dresser Industries, Inc.*, 120 F.3d 1163, 1171 (11th Cir. 1997); *Bogle v. Bragg*, 248 Ga. App. 632, 638 (2001) (the burden of proof is on the party asserting the existence of the confidential relationship).
19. See *Williams*, 120 F.3d at 1169.
20. *Colony Square Co. v. Prudential Ins. Co. of Am.*, 843 F.2d 479, 482 (1988).
21. O.C.G.A. § 23-2-53.
22. *Williams*, 795 F. Supp. at 1149 (citing *Reeves v. Williams & Co.*, 160 Ga. 15, 21 (1925)).
23. *Pinkerton*, 650 F. Supp. at 1147.
24. *Id.*
25. *Seale v. Miller*, 698 F. Supp. 883, 900 (1988).
26. *Id.*
27. *Perimeter Realty*, 243 Ga. App. at 595-596 (2000).
28. *Id.*
29. O.C.G.A. § 16-14-4 (2011); 18 U.S.C. § 1962 (2006).

30. *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 430 (2005).
31. O.C.G.A. § 16-14-2 (2011).
32. *Cotton, Inc. v. Phil-Dan Trucking, Inc.*, 270 Ga. 95 (1998).
33. O.C.G.A. § 16-14-4(a).
34. O.C.G.A. § 16-14-4(b).
35. O.C.G.A. § 16-14-4(c).
36. O.C.G.A. § 16-14-3(8)(a) (2011).
37. *Williams*, 279 Ga. at 428.
38. O.C.G.A. § 16-14-3(8)(a).
39. O.C.G.A. § 16-14-3(9).
40. O.C.G.A. § 16-14-3(9)(A)(xxix).
41. *Williams*, 279 Ga. at 429.
42. 18 U.S.C. § 1962(a-b).
43. 18 U.S.C. § 1962(c).
44. *Cobb Cnty. v. Jones Gp. P.L.C.*, 218 Ga. App. 149, 152-53 (1995).
45. O.C.G.A. § 16-14-4(a).
46. *Jones*, 218 Ga. App. at 152-53.
47. O.C.G.A. § 16-14-3(6).
48. *Martin v. State*, 189 Ga. App. 483, 486 (1988).
49. *Id.*
50. *Id.*
51. *Nicholson v. Windham*, 257 Ga. App. 429, 431 (2002).
52. *Id.*
53. See *Id.*
54. Treble damages allow a plaintiff to recover three times the actual damages caused by the defendant. O.C.G.A. § 16-14-6(c); A plaintiff must show "clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences" to receive punitive damages. O.C.G.A. § 51-12-5.1(b)
55. *Id.*
56. O.C.G.A. 16-14-6(b).
57. O.C.G.A. § 10-1-763(a) (2011).
58. O.C.G.A. § 10-1-767 (2011).
59. O.C.G.A. § 10-1-761(4) (2011).
60. Uniform Trade Secret Act § 1, Official Comment.
61. "Even in the absence of an express agreement, it is an implied term of an employment contract that an employee will not divulge a trade secret learned by virtue of his employment to a competitor of his former employer. *Am. Bldgs. Co. v. Pascoe Bldg. Sys., Inc.*, 260 Ga. 346, 348 (1990). However, if the information does not qualify as a trade secret and is only confidential information, then the information must be covered by an enforceable non-disclosure agreement. See *Nasco, Inc. v. Gimbert*, 239 Ga. 675, 676 (1977).
62. "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a confidential relationship or other duty to maintain secrecy or limit use, or espionage through

- electronic or other means. Reverse engineering of a trade secret not acquired by misappropriation or independent development shall not be considered improper means. O.C.G.A. § 10-1-761(1); O.C.G.A. § 10-1-761(2)(B).
63. O.C.G.A. § 10-1-762 (2011); O.C.G.A. § 10-1-763.
64. O.C.G.A. § 10-1-763(b).
65. O.C.G.A. § 10-1-764.
66. *Alta Anesthesia Assoc. of Ga. v. Gibbons*, 245 Ga. App. 79, 84 (2000).
67. *Id.*
68. *Disaster Services, Inc. v. ERC P'ship.*, 228 Ga. App. 739, 740 (1997).
69. *Id.*
70. *Atlanta Market Center Management Co. v. McLane*, 269 Ga. 604, 609 (1998).
71. *Tom's Amusement Co., Inc. v. Total Vending Serv's.* 243 Ga. App. 294, 295 (2000).
72. *Hayes v. Irwin*, 541 F. Supp. 397, 430 (N.D.Ga. 1982).
73. *Id.*
74. See *Luke v. Pree*, 158 Ga. 590 (1924).
75. *Medlin v. Morganstern*, 268 Ga. App. 116, 119 (2004).
76. *McLane*, 269 Ga. at 609.
77. See *Id.*
78. *Id.* at 611.
79. *Id.* at 609.
80. *Rome Industries, Inc. v. Jonsson*, 202 Ga. App. 682, 684 (1992).
81. *Id.*
82. *Automated Solutions v. Clearview Software*, 255 Ga. app. 884, 889 (2002); *WMH, Inc. v. Thomas*, 260 Ga. 654, 655 (1990).
83. O.C.G.A. § 51-12-5 (2011).
84. *Miller v. Lomax*, 266 Ga. App. 93, 103 (2004).
85. *Traub v. Washington*, 264 Ga. App. 541, 546 (2003).
86. *Blackstone Ind., Inc. v. Andre*, 232 Ga. 715 (1974).
87. *Savannah College of Art & Design, Inc. v. School of Visual Arts of Savannah, Inc.*, 219 Ga. App. 296, 297 (1995).
88. *Traub*, 264 Ga. App. at 546.
89. *First Fed. Sav. Bank v. Hart*, 185 Ga. App. 304, 305 (1987).
90. *Lomax*, 266 Ga. App. at 103.
91. *American Family Life Assur. Co. v. Queen*, 171 Ga. App. 870 (1984) ("it has long been the law of this state that civil conspirators are liable as joint tortfeasors."); *Northwest Plaza, LLC (MI) v. Northeastern Ent., Inc.*, 305 Ga. App. 182, 193 (2010) ("the allegations showing a conspiracy make any actionable deed by one of the conspirators chargeable to all. The liability is joint and several.");
92. *Id.* at 870.
93. *Hyperdynamics Corp. v. Southridge Cap. Mgmt., LLC*, 305 Ga. App. 283 (2010)

Punitive Damages in Automobile Collision Litigation

Shawn P. O'Hara



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Introduction

On July 1, 2010, Georgia became one of 35 states that prohibit texting while driving.¹ Subject to certain exceptions, reading, sending or writing text based communications while driving is prohibited in Georgia, O.C.G.A. § 40-6-241.1, and drivers under age 18 are prohibited from all forms of wireless communication while driving, except in certain specified situations. O.C.G.A. § 40-6-241.1(b). The law is called the Caleb Sorohan Act, after a young Georgia

man who died in a car crash while texting.² The law prohibits drivers from using a cell phone, text messaging device, personal digital assistant (PDA), computer, or similar wireless device to write, send, or read text data while driving. O.C.G.A. § 40-6-241.1. The ban applies to text messages, instant messages (IM), email, and Internet data. *Id.*

With the newly enacted ban on texting while driving, Georgia drivers know or should know that the decision to text while driving or to read an email while driving is un-

lawful and dangerous and puts their life and the lives of others in danger. Offenders of Georgia's ban on texting while driving are subject to a \$150 fine and one point against their driving record. O.C.G.A. § 40-6-241.1(d)(1).

However, the most significant impact of the ban on texting while driving in Georgia may come in the form of punitive damages in civil litigation. This article reviews punitive damages in automobile collision litigation under current Georgia law and reviews a recent decision from

the Georgia Court of Appeals, which may serve as a premonition for the future of automobile collision litigation in Georgia with regard to texting while driving and punitive damages.

Background on Punitive Damages in Automobile Collision Litigation

In Georgia, punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. O.C.G.A. § 51-12-5.1(b).

In cases involving automobile collisions, punitive damages are authorized when the accident results from a pattern or policy of dangerous driving, such as excessive speeding or driving while intoxicated. Brooks v. Gray, 262 Ga. App. 232 (2003); Miller v. Crumbley, 249 Ga. App. 403 (2001).

In order to recover punitive damages the plaintiff must show that the tortfeasor engaged in some form of culpable conduct by clear and convincing evidence. O.C.G.A. § 51-12-5.1(b); Howard v. Alamo Corp., 216 Ga. App. 525 (1995); Ralston v. Etowah Bank, 207 Ga. App. 775, 777 (1993). However, willful and intentional conduct is not essential to recover punitive damages, because where the facts and circumstances of the tort show an entire want of care, such conduct gives rise to a presumption of indifference to the consequences, i.e., wantonness, which is sufficient to support an award of punitive damages. See Brown v. StarMed Staffing, 227 Ga. App. 749, 755 (1997); see also Hoffman v. Wells, 260 Ga. 588 (1990); Hodges v. Effingham County Hosp. Auth., 182 Ga. App. 173 (1987).

The peculiar facts and circumstances of a particular case, when supported by clear and convincing evidence of culpability, may cause

ordinary negligence to give rise to the presumption that the conduct showed a conscious indifference to the consequences and an entire want of care. See Durben v. American Materials, 232 Ga. App. 750 (1998).

The standard for awarding punitive damages in Georgia is clear, the plaintiff has the burden of proving by clear and convincing evidence that the defendant engaged in culpable conduct. The ambiguity for a punitive damages award in an automobile collision case in Georgia arises when determining how much culpable conduct on the part of the defendant is enough to survive a motion for summary judgment.

A. Punitive Damages Not Recoverable

In automobile collision cases decided under O.C.G.A. § 51-12-5.1, punitive damages are not recoverable where the driver at fault simply violated a rule of the road. See, e.g., Bradford v. Xerox Corp., 216 Ga. App. 83 (1994) (defendant's speeding did not warrant imposition of punitive damages absent evidence of other aggravating circumstances); Coker v. Culter, 208 Ga. App. 651 (1993) (punitive damages not warranted even though defendant was speeding on wet roads, had consumed some alcohol, and behaved abominably after collision); Cullen v. Novak, 201 Ga. App. 459 (1991) (careless running of red light not sufficient aggravating circumstance).

B. Punitive Damages Recoverable

On the other hand, punitive damages are recoverable under the Georgia statute where the collision resulted from a pattern or policy of dangerous driving. See, e.g., Boyett v. Webster, 224 Ga. App. 843 (1996) (cert. granted) (DUI in incident and on previous occasions); Cheevers v. Clark, 214 Ga. App. 866, 869 (1994) (drunk driving in incident at issue as well as subsequent arrests for drunk driving); Holt v. Grinnell, 212 Ga.

App. 520 (1994) (drunken driving); Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826, 828 (1993) (a "policy" of excessive speed plus defendant struck plaintiff's vehicle twice and kept pushing); J.B. Hunt Transport v. Bentley, 207 Ga. App. 250, 255 (1992) (truck driver drove 20 miles despite serious mechanical problem which caused collision); Viau v. Fred Dean, Inc., 203 Ga. App. 801, 804 (1992) (drunken driving); Day v. Burnett, 199 Ga. App. 494, 496 (1991) (driving under the influence and in violation of a number of traffic safety laws).

Cases which involved the less stringent standards of proof applicable before the effectiveness of OCGA § 51-12-5.1 also related to aggravated circumstances of driving. See Harrison v. S & B Trucking, 179 Ga. App. 291, 292 (1986) (excessive speeds of tractor-trailer "in conjunction with the other facts"); and Moore v. Thompson, 255 Ga. 236, 237 (1985) (DUI in incident and on previous and subsequent occasions).

C. Uncertainty as to When Defendant's Conduct Allows Recovery of Punitive Damages in Georgia

One thing that is clear with regard to punitive damages in automobile collision cases in Georgia is there is no bright line rule as to when punitive damages will survive a motion for summary judgment. The closest thing to a bright line rule is that merely violating a rule of the road is insufficient for an award of punitive damages. Bradford, 216 Ga. App. at 83. In the cases that survived motions for partial summary judgment with regard to punitive damages, the defendant's conduct tended to be a sequence of events that were cumulative violations of rules of the road. Compare, for instance, the Georgia Court of Appeals decision in Coker, 208 Ga. App. at 652, where the Court held that punitive damages could

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not be imposed because the totality of the defendant's conduct did not give rise to the requisite culpability, with Day, 199 Ga. App. at 494, where the Georgia Court of Appeals held that the defendant's collective violations of rules of the road were sufficient for punitive damages.

In Coker, the defendant was driving 40 mph in a 35 mph zone on a wet road with low visibility, the defendant admitted to drinking prior to the collision, and one-hour after the collision the defendant had a blood alcohol level of .03. Coker, 208 Ga. App. at 652. Immediately after the collision, the defendant jumped out of the car and stomped and slammed the front end of his car while cursing; all the while, the plaintiff, who was pregnant, screamed she was in labor. Id. The Georgia Court of Appeals found that the defendant's actions probably arose to the level of gross negligence, but there was no clear and convincing evidence that the defendant's acts arose to the level sought to be punished under OCGA § 51-12-5.1. Id.

In Day, the defendant was driving under the influence of alcohol, was negligent in following too closely and traveling too fast for conditions and in failing to maintain a proper lookout for other traffic. Day, 199 Ga. App. at 494. The Georgia Court of Appeals held that evidence of driving in such a manner which caused a plaintiff's injuries was evidence of willful misconduct or wantonness authorizing imposition of punitive damages. Id. at 495.

The uncertainty as to when a defendant's conduct warrants punitive damages in automobile collision litigation causes some concern as to whether motions for summary judgment on punitive damages are appropriate mechanisms to adjudicate a defendant's culpability. The Georgia Court of Appeals has stated that the issue of punitive damages is ordinarily a jury question that cannot

be resolved on motion for summary judgment. Crosby v. Kendall, 247 Ga. App. 843, 848 (2001). That being said, the Georgia Court of Appeals recently faced the issue as to whether punitive damages could be disposed of by motion and in doing so, affirmed the trial court's grant of summary judgment for the defendant as to punitive damages.

Recent Georgia Case Involving Cell Phone Use While Driving

On September 14, 2011, the Georgia Court of Appeals affirmed a Lowndes County Trial Court's Order, which granted partial summary judgment to the defendants on punitive damages. Lindsey et al v. Clinch County Glass, Inc. et al, 2011 WL 4057533 *1 (Ga. App. Sept. 14, 2011). In Lindsey, an employee of Clinch County Glass was in route to a job site when he negligently rear-ended the plaintiff's automobile. Id. The underlying facts of the case were undisputed. Id.

The Clinch County Glass employee routinely drove a company truck, spending eight to ten hours of his working day driving. Id. The employee spent so much time in the company truck that he installed a desk in the cabin where he mounted his cell phone. Id. On the day of the accident, the employee was driving to a job site and was searching through his cell phone in an attempt to locate a number. Id. While thumbing through the phone, the employee was unmindful to his surroundings and failed to notice the stopped traffic ahead of him. Id. The employee, preoccupied by his telephone, plowed into the plaintiffs' stopped car. Id. The employee admitted to the responding officer that he was looking for a number in his phone at the time of the collision and that he was not paying attention to the road. Id.

The plaintiffs pursued a claim for punitive damages, alleging that the

evidence showed that the employee frequently used his cell phone while driving, which was against Clinch County Glass company policy, and that the employee admitted that he was not paying attention to the road while driving because he was searching for a number in his cell phone. Id. The plaintiffs disclosed several studies in their trial brief, which inferred that talking on a cell phone is as much or more dangerous than driving while intoxicated. Id.

The Georgia Court of Appeals ultimately affirmed the trial court's denial of punitive damages, stating "in Georgia, the proper use of a wireless communication device while driving does not constitute a violation of the duty to exercise due care while operating a motor vehicle." Id. at *2. The Court also stated that mere negligence, even gross negligence, of looking away from the road while driving is not enough to support a claim for punitive damages. Id.

The decision to deny punitive damages in Lindsey seemed to come down to whether the defendant was using his cell phone properly when the accident occurred. Id. The Georgia Court of Appeals stated "the proper use of a wireless communication device while driving does not constitute a violation of the duty to exercise due care while operating a motor vehicle. Id. However, while discussing the proper use of cell phones while driving, the Court made it a point to cite to the newly enacted Georgia statute that bans texting while driving. Id. The Court made a distinction between the legality of talking on a cell phone while driving and the illegality of texting while driving with regard to whether punitive damages were appropriate or not. Id. Even further proof of the Court's distinction between cell phone use and texting was the cautionary conclusion to the opinion in which the Georgia Court of Appeals stated "we would stress that our

opinion in this case should not be read for the proposition that punitive damages are never available in a case where a driver causes an accident because he or she was distracted while talking on a wireless communication device." *Id.* The Court's conclusion left the door wide open as to whether punitive damages are available with regard to improper cell phone use while driving.

Implications of Texting While Driving

The Georgia Court of Appeals cautionary conclusion in *Lindsey* comes as no surprise in light of Georgia's enacted ban on texting while driving and the national awareness of the dangers associated with texting while driving. The number of drivers in the United States with cell phones and the crash statistics with regard to texting while driving are disturbing. According to the Cellular Telecommunications Industry Association ("CTIA") wireless association, in June 2010, there were 292.8 million operational cell phones in the United States, which amounted to more than one cell phone for each person in the United States aged 5 and older.³

With the growing trend of cell phone subscriptions it was only a matter of time before cell phone use while driving became a national safety issue. Recent research indicates that people under age 45 now send and receive three times more text messages than calls on their cell phones.⁴ Americans are also texting multi-taskers: a recent survey found that 77 percent of respondents said they have texted or sent mobile e-mails while driving.⁵

The relative ease of obtaining a cell phone has created a situation in which the majority of drivers now either own or have access to a cell phone.⁶ In recent surveys, about two-thirds of all drivers reported talking on a cell phone while driving and about one-eighth of all drivers

reported texting or emailing while driving.⁷ The growth in the number of drivers using cell phones has led to an increased number of distracted driver accidents in the last few years.⁸ The increase in cell phone use while driving is alarming because studies have shown that drivers who use cell phones are four times more likely to be involved in a crash.⁹ Two different studies found this same conclusion, a 1997 New England Journal of Medicine examination of hospital records and a 2005 Insurance Institute for Highway Safety study linking automobile crashes to cell phone use by reviewing the driver's cell phone records.¹⁰ Even more alarming is a report from the Virginia Tech Transportation Institute, which recently found that a texting driver is 23 times more likely to get into a crash than a non-texting driver.¹¹

According to the National Highway Traffic Safety Administration (NHTSA), in 2009 nearly 5474 people died and half a million were injured in crashes involving a distracted driver.¹² The NHTSA research also revealed that distraction-related fatalities represented 16 percent of all traffic fatalities in 2009.¹³

In an effort to cure the onslaught of cell phone related automobile accidents, as of December 2011, nine states and the District of Columbia prohibited talking on a hand-held cell phone while driving, 30 states and the District of Columbia prohibited the use of all cell phones by novice drivers, 35 states and the District of Columbia prohibited texting while driving, and seven additional states prohibited texting by novice drivers.¹⁴

The U.S. Department of Transportation recently joined the movement of banning the use of hand-held cell phone devices and texting while driving. In a press release dated November 23, 2011, U.S. Transportation Secretary Ray LaHood announced a new federal rule that prohibits in-

terstate truck and bus drivers from using hand-held cell phones while operating their vehicles.¹⁵ LaHood was quoted as saying "when drivers of large trucks, buses and hazardous materials take their eyes off the road for even a few seconds, the outcome can be deadly, I hope that this rule will save lives by helping commercial drivers stay laser-focused on safety at all times while behind the wheel."¹⁶

Despite 35 states, including Georgia, having now prohibited texting while driving, the number of accidents involving distracted drivers has remained constant.¹⁷ In a recent automobile safety study, the Highway Loss Data Institute ("HLDI") researched the effect of texting while driving bans on collision claims.¹⁸ HLDI concluded that texting while driving bans did not reduce collision claims.¹⁹ In fact, there was a small increase in the states enacting texting while driving bans compared to neighboring states.²⁰ HLDI suggested two possible reasons for the increase; (1) drivers who text while driving may realize that texting bans are difficult to enforce, so they may have little incentive to reduce texting for fear of being detected and fined, and/or (2) drivers who text while driving may have responded to the ban by hiding their phones from view, potentially increasing their distracting effects by requiring longer glances away from the road.²¹

The act of talking on a cell phone while driving is distracting and dangerous. Texting while driving is even more distracting and even more dangerous. Further, the revelation in the HLDI study that texting bans may actually be useless is ominous news for observant drivers.²²

Therefore, the question that must be answered is, other than enacting statutes that ban texting while driving, how can texting while driving be slowed down or stopped? One sug-

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Punitive Damages

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gestion is to treat texting while driving like driving under the influence and allow jurors to decide if punitive damages should be awarded to deter and punish negligent drivers from texting while driving. Georgia's punitive damages statute provides that "punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant." O.C.G.A. § 51-12-5.1(c). In *Carter v. Spells*, 229 Ga. App. 441 (1997), the Georgia Court of Appeals held that the purpose of punitive damages for a tort is to punish or penalize the defendant for the tort committed or to deter the defendant from future similar acts.

Conclusion

In light of the Georgia Court of Appeals conclusion in *Lindsey* that the opinion should not be read for the proposition that punitive damages are never available in an automobile accident case where the at-fault driver was distracted by their cell phone, the case law in Georgia is unsettled as to whether using a cell phone or texting while driving rises to the level of punitive damages. 2011 WL 4057533 at *2.

With the newly enacted ban of texting while driving in Georgia and the widespread awareness of the safety hazards associated with texting

while driving, it seems that a jury should be allowed to decide whether an at-fault driver's cell phone use rises to the level of punitive damages. By allowing jurors to decide whether punitive damages are recoverable in automobile collision cases involving drivers distracted by their cell phones, Georgia Courts can help the movement toward deterring and punishing drivers who carelessly text while driving and the Courts can provide some certainty as to when an automobile collision case will survive a motion for summary judgment on the issue of punitive damages.

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Wanted: Clarification Regarding Georgia's Hospital Lien Statute

David T. Rohwedder



David T. Rohwedder is an associate with Brown & Adams, LLC in Columbus, Georgia. His practice consists of defense-oriented civil litigation including automobile, construction, premises and professional liability. David is licensed to practice in Georgia, Alabama and the United States District Court for the Middle District of Georgia.

David graduated from the University of Alabama at Birmingham in 2005 with bachelor degrees in Philosophy and Sociology. After graduating from UAB, he attended graduate school University of Pennsylvania School of Medicine where he earned a master's degree in bioethics in August, 2006. While studying at Penn, David served as a research fellow working with the University of Pennsylvania Ethics of Vaccines Project. After graduation David moved back to Birmingham, Alabama to attend law school at the Cumberland School of Law at Samford University. As a student at Cumberland, he served as a Senior Associate Editor for the American Journal of Trial Advocacy and earned a research fellowship with the Cumberland Center for Biotechnology, Law and Ethics. Prior to graduating from Cumberland in 2009, David published two articles in Volume 32 of the American Journal of Trial Advocacy.

Outside of work, David enjoys playing the guitar, golf, basketball and hunting. David is also an adjunct professor at Columbus State University where he teaches

a course entitled "Ethics and Legal Issues in the Profession: Bioethics." He also serves on the board of the Columbus State University Athletic Fund.

Introduction

Hospital liens have become a complicating factor in the arena of personal injury practice. Whether a plaintiff's counsel endeavors to negotiate a resolution of a hospital lien or defense counsel insists upon the satisfaction of a hospital lien, everyone recognizes that a hospital lien must be addressed upon settlement. However, there are instances when counsel for the injured claimant does not satisfy a known hospital lien despite an express agreement to do so. Such a failure potentially subjects a tortfeasor's liability carrier to a direct action to enforce the lien.

Integon Indemnity Corporation v. Henry Medical Center, Inc., 235 Ga. App. 97, 98 (1998); see also O.C.G.A. § 44-14-471. The success of the direct action is contingent upon the hospital's compliance with the filing provisions set forth in Georgia's hospital lien statute, O.C.G.A. § 44-14-470 *et seq.*, which is discussed in more detail below.

This article discusses the controlling authority with respect to the perfection and enforcement of hospital liens and the lack of the appellate decisions that apply the current version of Georgia's hospital lien statute.

O.C.G.A. 44-14-470 *et seq.*

Georgia's hospital lien statute, O.C.G.A. § 44-14-470 *et seq.*, establishes the right of a hospital rendering treatment to a patient to have a "lien for the reasonable charges for hospital . . . care and treatment of [an] injured person." O.C.G.A. § 44-14-470(b). Such a "lien shall be upon any and all causes of action accruing to the person to whom the care was furnished . . . on account of the injuries giving rise to the action." *Id.* The lien is not against the injured person and "shall not be evidence of such person's failure to pay a debt." *Id.* The method for

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perfecting such a lien is set forth in O.C.G.A. § 44-14-471.

To properly perfect a hospital lien, a hospital must first, at least 15 days prior to filing said lien, “provide written notice to the patient and, to the best of the claimant’s knowledge, the persons, firms, corporations, and their insurers claimed by the injured person or the legal representative of the injured person to be liable for damages arising from the injuries.” O.C.G.A. § 44-14-471(a)(1). In conjunction with subsection (a)(1), a hospital is further required to:

file in the office of the clerk of the superior court of the county in which the hospital . . . is located and in the county where in the patient resides . . . a verified statement setting forth the name and address of the patient . . .; the name and location of the hospital . . . and the name address of the operator thereof; the dates of admission and discharge of the patient . . . and the amount due for the hospital . . . care.

O.C.G.A. 44-14-471(a)(2). The filed statement must “be filed within 75 days after the person has been discharged from the facility.” *Id.* “The filing of a claim or lien shall be *notice* to all persons, firms, or corporations liable for the damages, whether or not they received the written notice provided for in this Code section.” O.C.G.A. § 44-14-471(b) (emphasis added). Notably, failure to comply with the above requirements invalidates the hospital lien with respect to the enforceability against, for example, a liability carrier unless the carrier “receives prior to the date of any . . . settlement, *actual notice* of a notice and filed statement made under subsection (a) [sic], via hand delivery, certified mail, return receipt requested, or statutory overnight delivery with confirmation of receipt” prior to any settlement with the injured claimant.

O.C.G.A. § 44-14-471(b) (emphasis added).

On its face, the statute appears to be hospital-friendly. For example, if a hospital complies with subsection (a)(1), but otherwise fails to timely file the verified statement required under subsection (a)(2), the hospital can nevertheless enforce its lien against the tortfeasor’s liability carrier. Subsection (b) of O.C.G.A. § 44-14-471, amended in 2006, operates as a “savings clause” that provides a hospital an opportunity to resurrect an otherwise invalid lien – that is, one that does not timely comply with subsections (a)(1) and/or (a)(2) – provided the party against whom the hospital seeks enforcement of the lien receives “actual notice” of the lien via one of the three methods listed therein prior to any settlement.¹ With the addition of the savings clause, hospitals are given an additional avenue within which to enforce liens. This amendment dictates that strict compliance with subsections (a)(1) and (2) is not mandatory.

As discussed in greater detail below, the definitions, distinction between and practical implications of having “notice” and “actual notice” are markedly absent from O.C.G.A. § 44-14-470 *et seq.* and relevant case law.² If the filing entity did not strictly comply with subsections (a)(1) and/or (a)(2), such definitions would certainly provide guidance regarding whether such hospital lien is enforceable given the recent additions to subsection (b). This distinction is especially important given the first sentence of subsection (b) specifically references, but does not define the term “notice.”³ “Although the purpose of the filing requirements is to provide notice to all potentially liable parties,” the most recent cases discussing the enforceability liens that were not filed in accordance with subsections (a)(1) and/or (a)(2) all mention the importance of, but fail to define what it means when a person

or entity has “actual notice.” *Macon-Bibb Hosp. Auth. v. Nat’l Union Fire Ins. Co.*, 793 F. Supp. 321, 325 (M.D. Ga. 1992); *see also Thomas v. McClure*, 236 Ga. App. 622, 624 (1999). Clearly defining and distinguishing these terms is important given the fact that the current version of O.C.G.A. § 44-14-471 is significantly different than what was in effect at the time both of the following cases were decided.

Case Law

*Thomas v. McClure*⁴ is the most recent decision from Georgia’s appellate courts addressing the validity of a hospital lien that does not comply with the requirements set forth in O.C.G.A. § 44-14-471(a)(1) and/or (a)(2). In *Thomas*, the Court of Appeals considered whether a hospital lien was valid and enforceable despite the filing hospital’s failure to timely adhere to the requirements for filing a verified statement under subsection (a)(2). 236 Ga. App. at 622. *Thomas* arose out of a motor vehicle accident between Robert Thomas (“Thomas”) and Bobby McClure (“McClure”) that resulted in Thomas being treated for personal injuries “at Tanner Medical Center on April 15, 1994 until his discharge on April 28, 1994.” *Id.* “On May 31, 1994, Tanner Medical filed in court a verified statement for [a] hospital lien showing that Thomas owed \$13,397 for medical care.” *Id.* Thereafter, Thomas brought suit against McClure for personal injuries. *Id.* As McClure was uninsured, Thomas settled his claims with his uninsured motorist carrier for \$15,000, and the carrier, pursuant to court order, paid such sum into the court registry. *Id.* “Tanner Medical then moved to intervene, claiming that pursuant to its hospital lien it was entitled to payment from the proceeds paid into the Court. Thomas challenged the claim, arguing that the hospital had not timely perfected its lien” since the verified statement was filed 3 days late according to O.C.G.A. § 44-14-

471. *Id.* Despite Thomas' challenge, the court awarded Tanner Medical the sum of \$8,681.00. *Id.* On appeal, the Court of Appeals affirmed. *Id.*

In affirming the trial court's ruling, the Court of Appeals found that the hospital lien was enforceable even though Tanner Medical Center did not strictly comply with the filing requirements under O.C.G.A. § 44-14-471. *Id.* at 623. Specifically, the Court held that the undisputed facts showed both Thomas and his uninsured motorist carrier had *actual notice*⁵ of the lien. *Thomas*, 236 Ga. App. at 623. In so holding, the Court drew upon the opinion of *Macon-Bibb County Hosp. Auth. v. Nat. Union Fire Ins. Co.*, 793 F. Supp. 321 (M.D. Ga. 1992) for support. *Id.* In *Macon-Bibb*, an untimely hospital lien, filed 33 days after the injured person was discharged, was nevertheless determined valid and enforceable on the ground that it was undisputed that the liable insurance company had *actual notice* of the hospital lien. *Id.* at 323; 793 F. Supp. at 325. Despite holding that strict compliance with subsections (a)(1) and (a)(2) is not required to enforce a hospital lien against a liability or other insurance carrier when said carrier has actual notice of the lien, *Thomas* and *Macon-Bibb* did not actually define what constitutes "actual notice" and "notice" or the methods by which a person or entity receives "actual notice" or "notice" of the lien.

The appellate courts in Georgia have not revisited these issues since

O.C.G.A. § 44-14-471 was amended in 2006. The statute considered by the courts in *Thomas* and *Macon-Bibb* was different from the Code section's current version. On this basis, it is questionable whether these cases should remain controlling. The appellate courts have not yet reported a decision addressing whether a hospital lien that does not strictly comply with the current version of O.C.G.A. 44-14-471(a)(1) and (a)(2) can be enforced against a person or entity liable for the damages if, for example, the liability carrier (i) receives a copy of the notice and verified statement via certified mail, return receipt requested, before the injured party settles his claims with said carrier; (ii) does not receive a copy of the notice and verified statement via certified mail, return receipt requested, before the injured party settles his claims with said carrier; and/or (iii) receives a copy of the notice and verified statement by some other manner not provided in subsection (b) of this Code section. What may have constituted "actual notice" at the time *Thomas* and *Macon-Bibb* were decided is likely different from what now constitutes "actual notice" according to the 2006 amendment. As such, the Courts are left to make determinations about the validity and enforceability of hospital liens armed with cases applying a version of a statute that is no longer in effect.

Conclusion

The most recent amendment to O.C.G.A. § 44-14-471, specifically the addition of the savings clause, was likely an attempt by the Georgia legislature to enhance the rights of hospitals to enforce liens for the treatment and services rendered in their facilities, rather than providing hospitals with an automatic lien.⁶ The fact that the former versions of this Code section did not specifically provide hospitals with a similar opportunity to enforce a lien that did not otherwise strictly comply with the requirements set forth in subsections (a)(1) and (a)(2) seems to support this conclusion. However, the current version of the statute does not bridge the gap left by the pre-2006 decisions of *Thomas* and *Macon-Bibb*. As such, further revisions to this Code section may be necessary to balance a hospital's right to have and enforce a lien for the reasonable charges for treatment and services rendered to an injured person and, for example, an insurer's right against being required to satisfy a lien that does not comply with subsection (a) or (b) of this Code section. Defining the terms "notice" and "actual notice" in subsection (a) of O.C.G.A. 44-14-470 would be greatly beneficial in clarifying the importance and effect of these terms. Furthermore, it may likewise be beneficial to revisit whether the first sentence of subsection (b) of O.C.G.A. § 44-14-471 is needed given the recent addition of the savings clause.

FOOTNOTES

1. Prior to 2006, subsection (b) read as follows: "[t]he filing of the claim or lien shall be notice thereof to all persons, firms, or corporations liable for the damages, whether or not they received written notice provided for in this Code section. The failure to perfect such a lien in accordance with this Code section shall invalidate such lien."

2. Prior to the publication of this article, a diligent search was made and no case law was found that defined "notice" as it is discussed herein.

3. The first sentence of O.C.G.A. § 44-14-471(b) currently reads as follows: "[t]he filing of a claim or lien shall be notice to all persons, firms, or corporations liable for the damages, whether or not they received the written notice provided for in this Code section."

4. At the time the Court of Appeals considered the issues presented in *Thomas*, O.C.G.A. § 44-14-471 required that at a hospital file the verified statement within 30 days of the patient's discharge, as opposed to the current 75 day requirement. 236 Ga. App. at 623. Furthermore, the statute did not have the "savings clause" language that subsection (b) now contains.

5. See, e.g., ALA. CODE § 33-11-370; *Ex parte University of South Alabama*, 761 So. 2d 240, 244 (Ala. 1999) (Alabama's hospital lien statute gives a hospital an automatic lien for the reasonable value of its services).

Our apologies to Mr. Moraitakis for missing part of his speech in our last issue and we are reprinting the full speech in it's entirety.

Remarks by
Nicholas C. Moraitakis

Let me first thank my good friend, Robin Clark, for her kind introduction and for all of her work on behalf of the Bench, the Bar and our civil justice system. Robin has been a pioneer in her leadership of the Georgia Trial Lawyers Association and continues to be so with the State Bar of Georgia. We appreciate your leadership accompanied by a steady hand and a level head. We appreciate you Robin Clark.

To those of you here today, and to those responsible for this recognition, no words of appreciation can appropriately reflect that which I feel. Let me say simply "thank you". Please understand that to be recognized for a Tradition of Excellence, from the people in this room, is the greatest compliment that I can receive. Indeed, there is no other group I treasure more receiving recognition from. This is a distinct honor from the most meaningful of friends.

I look with awe at the list of past recipients of the Tradition of Excellence Award and wonder aloud why my name should be added. I am sure I speak for all of us when I say that awards and recognition are not things we seek. We wake up every morning, go to work, and give it our very best every day, all day. That is what we seek: to do our best and be our best. Many people: family, friends, mentors, co-workers, adversaries and judges contribute to placing us in a position to appreciate the severity of our mission and be the best we can be in its undertaking.

As trial lawyers of course, we frequently find ourselves up at 4:00 o'clock in the morning getting ready for a hearing, prepare opening statements or cross examination. Our families are often on the receiving end of our reaction to irrational hours and, at the end of the day, what

we may deem irrational results from juries, and yes even sometimes from judges. So I first thank and salute my family; my daughters Lia (24) and Maria (16), who could not be with us today as they are each on their own travels; and most importantly my lovely wife of 32 years, Effie. Effie helps build confidence when in doubt, lends support in each endeavor and keeps my thinking straight when it wanders astray. (I will say, however, in the privacy of our own home she will let me have it when I really screw up.)

Let me give you an example of the level of Effie's trust and support. We had been married about 9 years and in 1988 I decided to run for the United States Congress. When I relayed the idea to Effie, it was not met with a great deal of enthusiasm. She was quick to point out that we had a 14 month old child, that I was a very busy insurance defense lawyer, that we had a significant mortgage payment and perhaps most importantly that I had absolutely no chance of winning. It was easy for her to be right about the age of our daughter, the nature of my legal work and the size of our mortgage. Little did I know of her acumen for political consultation as I was trounced in the Democratic Primary by a fellow named Ben Jones. You may remember Ben; he became famous for playing Cooter in the Dukes of Hazard. With that said, if there is any interest in reconsidering the wisdom of my selection, I will certainly understand.

It has been my good fortune to practice with, litigated with, litigated against and thus be influenced by a myriad of fine lawyers and wonderful people. I started my first job in 1977 with Don Fain, Mike Gorby and Mike Reeves. Through them I gained a full understanding of the significance of preparation and a healthy



appreciation for the technical pitfalls which keep us awake at night.

The first time I went into court as a lawyer was with my first boss, Don Fain. We were representing a trucking company defendant and the plaintiff was represented by a prior recipient of this award and a giant in the practice of law, Paul Hawkins. Sitting second chair with Paul was another recent recipient of this award, Bill Bird. Bill and I sat and assisted our senior partners, soaking up the opportunity to learn. I remember at one point during his closing argument, Paul Hawkins leaned over to the jury, making his case in a whispered tone. Don Fain stood up and addressed Judge Osgood Williams with an objection, based on the fact that he could not hear what Paul was saying. Without missing a beat, Paul turned his head to Don and said in a voice that could be heard by all "that's because I'm not talking to you". Judge Williams had no chance to rule on the objection because the laughter was too loud. Everybody in the courtroom got a big kick out of the exchange except for me and Don. The jury came back with an award for Paul and Bill's client far in excess of the amount we had offered.

A lesson in courtroom opportunities and perhaps needless objections.

I have had wonderful partners in both the defense and plaintiffs practices of law. More recently, Roger Mills and then Al Pearson. I was blessed to have the opportunity to practice with one of the finest young men I've ever known, who unfortunately left us too early, Arnold Gardner. Arnold was a kind and gentle man who saw the good side of everything and everyone and influenced those of us who spent time with him to do the same. His memory will be eternal.

I have been particularly rewarded the last 19 years to have practiced law with the smartest and most capable lawyer I have ever known, Glenn Kushel. Glenn is both a big picture and

little picture guy. While he can certainly see the forest, he knows the status of every tree. While I love him to death, I hate to have him proofread any of my work. From time to time I will spend hours preparing a particular document and hand it to Glenn, with the confidence that I have all bases covered. Inevitably, the pages come back full of red ink, corrections and additions. One of my goals in life is to one day hand Glenn something to read which will come back looking at least partially similar to the document I gave him to read in the first place. Thanks for putting up with me Glenn. You are a great partner and a great friend.

The lesson taken from this relationship is always have a partner who is younger and smarter than you are.

For two years in law school, I served as a law clerk for the law firm known as Henning Chambers & Mabry. There I worked with Bo Chambers and Walter McClelland, both of whom remain friends to this day. This was a great opportunity for a young law student to be exposed to very talented lawyers. Walter has often times reminded me of the story where he sat second chair to Bo in a trial where the firm was representing the driver of a car that simply rear-ended the plaintiff. In his closing argument, Bo argued that the plaintiff's car was stopped in front of the defendant, and the while liability might seem clear, he said "my client wasn't a helicopter; he couldn't go over him. He wasn't a submarine; he couldn't go under him." In later years both Walter and I tried that same argument in front of juries who looked at us as if we had a screw loose or a marble missing.

There was also the case in which Bo represented a female plaintiff whose breast augmentation surgery had gone awry. He called the defendant doctor as his first witness and began with this question: "Doctor, why are my clients' breasts all cattywampus?" After everybody in the courtroom, including the

Continued on next page

Remarks by Nicholas C. Moraitakis

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judge and defense lawyer, stopped laughing, the doctor went on to explain to Mr. Chambers that he could not respond to that question because “cattywampus” was not a medical term. Never one to miss an opportunity, Bo said “Well you know what I mean doctor, one of em’s pointing this way and the other’s pointin’ that way”. The trial was won with the cross examination of the very first witness.

We are so lucky for our exposure to people like Paul Hawkins and Bo Chambers, who demonstrate a courtroom flair derived from confidence which is so successful for them. From this we all learn to be ourselves; be the best of ourselves and grow our own confidence and courtroom presence.

I do want to mention my father, who passed away almost thirty years ago at age 54 while lifting boxes on his job at Happy Herman’s Liquor Store. He tried to teach me a number of lessons; two in particular which I remember. The first was “If you don’t have anything good to say about somebody, just keep your mouth shut.” That was a lesson I really did not learn very well. And I think with a straight face, I can attribute the need for fierce advocacy as part of the reason for my indiscretion in this regard.

As the son of an immigrant, my father felt it important to provide for his children better opportunities than those that were afforded him. This lesson he sought to instill in us: to work hard to provide the next generation with every opportunity to succeed . . . in essence to leave things better off when you depart than you found them when you arrived. That did seem a lesson

worth learning and passing on. As I got older and studied history, I found a similar expression written by a lawyer, one of our Country’s founding fathers.

In a letter that John Adams wrote to his wife Abigail while he was serving the colonies in France, he wrote as follows:

I must study politics and war, that my sons may have liberty to study mathematics and philosophy . . . in order to give their children a right to study painting, poetry, music, architecture. . .

That is one of my favorite thoughts and I point it out at this time simply as a guiding principle for all, both in law and in life.

- I appreciate the opportunity and am mindful of the responsibility of the privilege of practicing law;
- I look forward to waking up every morning and trying to do my best every day, all day;
- I thank you for your thoughtfulness;
- I respect your good work;
- I will strive to continue a tradition of excellence. I will remember you and this day forever.

John F. Kennedy used to quote the ancient Greeks as saying, “*True happiness is the full use of your powers along lines of **excellence** in a life affording scope.*”

For all of us today, we celebrate the pursuit of this special form of happiness and for that I give you my thanks.

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