2010 Court Watch Report

"Many areas of law affect the way consumers participate in the marketplace, from contract law to access to the court system. Georgia has many procedural hurdles that limit the consumer's access to civil justice for fear that such access will hamper economic activity and increase the cost of consumer goods and services. Georgia must do more to protect consumers' access to civil justice, because access to the court system is often the only means to redress for individual consumers harmed by their interactions with the marketplace"

- 2010 Court Watch Fellow Simeon Niles

The Court Watch report is a publication of Georgia Watch, a nonprofit, nonpartisan 501(c)(3) watchdog Group focusing on consumer education and research in the areas of health care, energy and utility matters, identity theft, foreclosure, predatory lending and access to civil justice.

This report derives from decisions from the Supreme Court of Georgia. The Supreme Court of Georgia is the highest court in the state and reviews the decisions of both the state trial courts and the Court of Appeals. The Supreme Court exercises discretionary authority, declining or accepting applications for review as it sees fit, and any decisions of the Supreme Court are binding in all state courts.

The Supreme Court of Georgia was expanded in 1945 to seven members. Currently, they are: Chief Justice Carol Hunstein, Presiding Justice George Carley, and Justices Robert Benham, Hugh Thompson, P. Harris Hines, Harold Melton, and David Nahmias.

The Supreme Court faces the important task of correcting errors that occur in court proceedings throughout the state. Appeals may be based on a wide array of legal issues and frequently address many disparate points of law. It is thanks to this variety and their privileged role in our democratic system of government that the appellate courts enjoy great latitude to craft the development of the laws of the State of Georgia.

Due to the constant interplay between the legislature and judiciary, laws affecting the rights of consumers and regular citizens confronted with debt, foreclosure, or injury are in continuous flux. Unfortunately, even though these opinions are matters of public record, their manner of presentation is often too specialized for the general public and their import either too specific or simply understated.

The cases included in this report are divided into two sections: Access to Civil Justice—opinions which either expanded or reduced consumer access to be heard in court, usually due to procedural or evidentiary hurdles, and Developments in Consumer Law—changes in what the law is as it pertains to a variety of consumer situations. Each case also has an indicator as to whether it was a "consumer win" or a "consumer loss." This year we have also included a Glossary of Terms for ease in understanding the legal terminology used in the case summaries.

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Setlock v. Setlock, 286 Ga. 384 (Jan. 25, 2010)

Consumer WIN

This case has special relevance for many homeowners who have been foreclosed upon wrongfully. Georgia law does not require a lender to sue the homeowner in order to foreclose on their house. Before many homeowners are able to find an attorney to help them undo a wrongful foreclosure, they are faced with an eviction by the lender. Evictions are extremely quick cases in Georgia. In an eviction, you only have seven days to answer and many Magistrate courts across the state will schedule hearings in less than a week's time. Once the judge issues his or her decision, you only have seven days to appeal it. With these strict time lines, it is very difficult for many people to find an attorney who can investigate the facts and assist them in preventing the eviction and undoing a foreclosure. This case spared homeowners who are not likely knowledgeable on how to navigate the different levels of Georgia courts from losing an opportunity to be heard on their claims that they are still rightful owners of the property.

Steven Setlock and his father, Eugene Setlock, allegedly entered into an oral agreement to purchase a lake house property together. However, Steven and his wife acquired ownership of the property solely in their names, but Eugene and his wife lived on the property. After a dispute arose between Steven and Eugene, Steven filed suit in magistrate court to have Eugene and his wife evicted from the property. Steven contended that Eugene and his wife were only tenants, not joint owners of the property. Eugene filed counterclaims in the case, including a claim that he jointly owned the property. Eugene made a request to have the case transferred to superior court, because the amount of money he requested exceeded the jurisdictional limits imposed on magistrate courts. The magistrate court denied the transfer request, granted possession of the property to Steven, and issued a court order requiring Eugene and his wife to vacate the premises. Eugene attempted to appeal the magistrate court's decision in superior court, but the superior court dismissed the appeal because it was not made at the suitable time.

In superior court, Eugene then brought a separate action against Steven to establish his rights to the property. The superior court lawsuit contained the same claims that he had previously raised as counterclaims in magistrate court. Steven requested that the superior court dismiss the case. The superior court dismissed Eugene's claims that had been raised as counterclaims in magistrate court, reasoning that the doctrine of *res judicata* prevented Eugene from reviving in superior court the same claims that he had previously asserted as counterclaims in magistrate court.

The Georgia Supreme Court held that the doctrine of *res judicata* did not prevent Eugene from raising claims in superior court that he had already raised as counterclaims in magistrate court. The doctrine of *res judicata* prevents one party from raising claims in one court that have been decided between the same parties by another court of competent jurisdiction. The magistrate court was not a court of competent jurisdiction; it lacked jurisdiction over the counterclaims because the claims exceeded the magistrate court's jurisdictional limits. Notwithstanding the limits on money damages, if Eugene had initially chosen the magistrate court to bring his claims,

he would have been bound by that court's decision. However, Eugene did not choose to bring his claims in magistrate court; he was required to raise those claims as counterclaims in that court under O.C.G.A. 15-10-45(a). The Court held that the statutory requirement to raise counterclaims did not confer jurisdiction to the magistrate court where there was none, and therefore *res judicata* did not apply. Eugene was allowed to proceed with his claims in superior court.

Broda v. Dziwura, 286 Ga. 507 (Feb. 8, 2010)

Consumer WIN

Plaintiffs can now recover amounts greater than a jury award for damages they suffer through the negligence of others. Mindy Broda sustained injuries from a car accident caused by Joan Dziwura . Mrs. Broda and her husband, John, Joan Dziwura and Winmark Homes for negligence. At trial, Mrs. Broda presented evidence that Winmark Homes was liable for the accident as Dziwura's employer. Winmark Homes presented evidence that Dziwura was not its employee, but rather an independent contractor of the real estate brokerage firm which marketed and sold its homes. Before the jury returned the verdict, Mrs. Broda entered into an agreement with Winmark Homes that if the jury returned a verdict in favor of Winmark Homes, or against Winmark Homes for an amount less than $350,000, then Winmark Homes would pay Mrs. Broda $250,000. If the jury returned a verdict against Winmark Homes for an amount between $350,000 and $3.1 million, then Winmark Homes would pay the exact amount without appeal by either party. If the jury returned a verdict against Winmark Homes for an amount greater than $3.1 million, then Winmark Homes would only have to pay $3 million to Mrs. Broda. The jury returned a verdict against Ms. Dziwura for over $1 million, but did not find that Winmark Homes had any liability for Mrs. Broda's injuries. Under the agreement, Winmark Homes was to pay $250,000 to Mrs. Broda.

Before judgment was entered, Dziwura requested that the trial court reduce the $1 million verdict against her by the $250,000 settlement amount between Winmark Homes and Mrs. Broda. The trial court denied Dziwura's request because the jury did not find Winmark Homes had any liability for Mrs. Broda's injuries. Dziwura appealed the trial court's decision to the Court of Appeals. The Court of Appeals agreed that Winmark Homes was not jointly liable for Mrs. Broda's injuries, but reversed the trial court's denial to reduce the jury verdict against Dziwura by adopting the Restatement (Second) of Torts. The Restatement is a summary of the law written and updated by legal scholars and published by the American Law Institutes, and has no legal effect unless a court or the Legislature adopts it. Under section 885(3) and Comment (f) of the Restatement (Second) of Torts, Dziwura was entitled to have the verdict against her reduced by any payment that Mrs. Broda received from a settling defendant in the same suit, that is, Winmark Homes.

The Georgia Supreme Court disagreed and reversed the Court of Appeals. The Court rejected the adoption of the Restatement (Second) of Torts and held that as the settling defendant, Winmark Homes must be in some part liable for Mrs. Broda's injuries before the settlement

amount could reduce the amount awarded against Dziwura. A reduction was improper here because Dziwura was found to be solely liable for Mrs. Broda's injuries. The Court noted that a defendant found liable "should not benefit from a plaintiff's good fortune in reaching settlements with other potential defendants not determined to be liable."

Gliemmo v. Cousineau, 287 Ga. 7 (March 15, 2010), reaffirmed by, Watkins v. Anegundi, 287 Ga. 133 (March 29, 2010)

Consumer LOSS

This court decision raises the bar that patients must climb over to recover for the negligence of emergency room doctors. Carol and Robert Gliemmo brought a medical malpractice action against Mark Cousineau, an emergency room doctor, Emergency Medical Specialists of Columbus, P.C., and St. Francis Hospital. After the defendants answered the complaint, the Gliemmos challenged the constitutionality of O.C.G.A. § 51-1-29.5(c) on the grounds that the law violated the uniformity clause of the Georgia Constitution, and the equal protection and due process guarantees of U.S. and Georgia Constitutions. Section 51-1-29.5(c) provides:

> "In an action involving a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence."

Under section 51-1-29.5(c), the Gliemmos would have to prove that Dr. Cousineau and the other defendants were grossly negligent in providing emergency medical care to prevent their medical malpractice case from being dismissed.

The Georgia Supreme Court held that section 51-1-29.5(c) did not violate the U.S. or Georgia constitutions. First, the Court held that section 51-1-29.5(c) did not violate the uniformity clause of the Georgia Constitution. The uniformity clause provides, in part, that "[l]aws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law . . ." Past Court decisions have held that a statute is a general law if it operates uniformly on a subject or class of subjects. In addition, a statute is a special law if it (1) deals with a limited activity in a specific industry and (2) is applies for a limited time. The Court held that section 51-1-29.5(c) does not fit within the definition of a special law because it generally applies to all medical malpractice cases throughout the State arising from emergency medical care as established in the statute and does not have time restrictions. Therefore, the Court reasoned that the law's uniform operation makes it a general law. Notwithstanding, a general law that operates uniformly on a subject or class of subjects may still violate the uniformity clause if the class of persons it operates on is arbitrary or unreasonable. Without further discussion on what constitutes arbitrary

or unreasonable, the Court concluded that section 51-1-29.5(c) does not violate the uniformity clause.

Justice Benham reached the opposite conclusion in his dissent. He argued that a special law is limited by the existence of a general law on the same subject. The General Assembly enacted section 51-1-27 as a general law that established that medical providers must exercise "reasonable care" when treating patients. Justice Benham argued that section 51-1-29.5(c) was a special law because it affected the limited class of medical providers that provide emergency medical care in a hospital setting. Therefore, Justice Benham would have held that section 51-1-29.5(c) would violate the uniformity clause because there already existed a general law on the standard of care for all medical providers. Even if there was no general law on point, Justice Benham argued that section 51-1-29.5(c) is unreasonable and arbitrary in its classification because its protections are available based on where the patient was treated (e.g., the hospital emergency room), as opposed to how the patient was treated.

Second, the Court held that section 51-1-29.5(c) did not violate the equal protection guarantees of the U.S. and Georgia constitutions. A statute that does not disadvantage one of the established suspect classes or infringe on an established fundamental right is subject to rational basis review, the lowest level of judicial scrutiny. Under rational basis analysis, the statute must bear a rational relationship to a legitimate government purpose. The Court found that promoting affordable liability insurance for health care providers and hospitals supports the availability of quality health care services. Supporting the availability of quality health care services is a legitimate governmental purpose. Therefore, establishing a standard of care that reduces potential liability of providers of emergency medical care and makes liability insurance more affordable is rationally related to the legitimate governmental purpose of promoting the availability of quality health care services. The Court noted that although imperfect, the classification drawn between emergency medicine and regular medicine, has some reasonable relation to furthering that purpose.

Third, the Court held that section 51-1-29.5(c) did not violate the due process protections of the U.S. and Georgia Constitutions. The Gliemmos argued that section 51-1-29.5(c) violated their due process rights because it did not define "gross negligence" within the statute. Past Court decisions have held that if a statute is unconstitutionally vague it offends due process. Nevertheless, there is no requirement that a phrase that has a commonly understood meaning be defined within the statute. Moreover, section 51-1-4, written within the same chapter as section 51-1-29.5(c), defined "gross negligence." Therefore, the Court held that section 51-1-29.5(c) satisfied "due process requirements because it is not so vague and indefinite in its meaning that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application."

Atlanta Oculoplastic Surgery v. Nestlehutt, 286 Ga. 731 (March 22, 2010)

Consumer WIN

This landmark case highlights how caps on damages fundamentally restrict the constitutional rights of those who have been harmed by a health care provider. In a huge victory for consumer rights and access to civil justice, the Georgia Supreme Court held that a controversial law capping the amount of money an injured patient could recover from a negligent medical provider for non-economic damages was unconstitutional. Georgia's Senate Bill 3, enacted in 2005, had limited in the amount of non-economic damages that a victim of medical malpractice could recover from a jury verdict to $350,000 even if the harm caused was catastrophic in nature. Georgia Watch was instrumental in the fight to overturn the damage cap, and submitted an *amicus curiae*, or "friend of the Court" brief in the case in support of the Nestlehutts right to justice.

In 2006, Betty Nestlehutt was permanently disfigured due to complications from cosmetic surgery performed by Dr. Harvey P. Cole. Nestlehutt and her husband sued Dr. Cole and his practice for medical malpractice. At trial, the jury returned a verdict of $115,000 for medical expenses, $900,000 in noneconomic damages for Ms. Nestlehutt's pain and suffering, and $250,000 in noneconomic damages for Mr. Nestlehutt's loss of consortium. Total noneconomic damages awarded by the jury exceeded the maximum allowed under O.C.G.A. § 51-13-1. Section 51-13-1(b) provides that in a medical malpractice action, "the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00." The trial court declared the statutory maximum unconstitutional and Dr. Cole appealed. The Georgia Supreme Court agreed with the trial court and held that maximums on noneconomic damages violate the constitutional right to trial by jury. The Court's decision opens the way for plaintiffs to receive full compensation for their injuries and recover the full amount of noneconomic damages attributed to the negligence of medical providers.

Article I, Section I, Paragrap. XI (a) of Georgia Constitution states that "[t]he right to trial by jury shall remain inviolate." It preserves the right to trial by jury for the types of cases that had that right at common law or by statute at the adoption of the Georgia Constitution in 1978. At common law, a jury determined liability for medical negligence in Georgia courts. The jury's determination included setting the level or amount the plaintiff should win. The Court reasoned that because noneconomic damages are a part of what a plaintiff may win in medical malpractice cases, the amount of these types of damages fall within the jury's purview. The Court concluded that reducing a noneconomic damage award to the maximum under statute undermined the jury's basic constitutional function to determine and set liability, and infringed on the plaintiff's right to a jury determination on noneconomic damages. Thus, the Court held that section 51-13-1 was unconstitutional.

"The very existence of the caps, in any amount, is violative of the right to trial by jury," wrote Chief Justice Carol Hunstein. "[The cap] clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."

Smith v. Baptiste, 287 Ga. 23 (March 15, 2010)

Consumer LOSS

Plaintiffs must play the guessing game on potential final judgment of their claims, and if they're wrong, they could face paying the attorney's fees of the opposing party. Salon and Cheryl Baptiste sued Chuck Smith and WQXI 790 AM based on allegedly defamatory statements made by Smith and broadcast by WQXI. Smith and WQXI offered to settle the case for $5,000, but the Baptistes did not respond to the offer, which was considered a rejection under section 9-11-68(c). The trial court subsequently ruled in favor of Smith and WQXI, who requested that the Baptistes pay their attorney's fees under section 9-11-68(b)(1). The trial court denied the request for attorney's fees on the ground that section 9-11-68 violated the right of access to the courts provided under the Georgia Constitution by depriving litigants the right to pursue their cases. Smith and WQXI appealed the trial court's decision.

The Georgia Supreme Court upheld the constitutionality of O.C.G.A. § 9-11-68(b)(1). Section 9-11-68(b)(1) activates when a plaintiff or defendant makes a settlement offer to the opposing side. When a defendant makes a settlement offer and a plaintiff rejects it, if the defendant wins the case or the plaintiff wins an amount less than 75 percent of the settlement offer, then the defendant can recover attorney's fees incurred from the date the plaintiff rejected the settlement offer. When a plaintiff makes a settlement offer and a defendant rejects it, if the plaintiff wins an amount greater than 125 percent of settlement offer, then the plaintiff can recover attorney's fees incurred from the date the defendant rejected the settlement offer.

In her dissent, Chief Justice Hunstein recognized the impact of section 9-11-68(b)(1) on the right to access the courts. She argued that the plain meaning of the Art. I, Sec. I, para. XII created a right of access to the courts, and that section 9-11-68 violated this right of access by deterring plaintiffs with meritorious claims from bringing them in court. The contrary opinion adopted by the Court would mean that plaintiffs could incur substantial financial liability from simply litigating a matter, whereas other statutes require proof that the plaintiff filed a frivolous lawsuit.

The Court held that, based on legislative history, Art. I, Sec. I, para. XII of the Georgia Constitution was intended to protect a right of choice between self-representation and representation by counsel; it did not create a right of access to the courts. In his concurring opinion, Justice Nahmias elaborated that the constitutional provision of a court system indeed manifests a right to access that court system; however, he cautioned that the right of access to the courts is not "unfettered."

Having held that there is no constitutional right of access to the courts, the Court concluded that even if there was a right of access, section 9-11-68 would not violate that right because it only delineates circumstances under which attorney's fees may be sought. Other procedural mechanisms, such as statutes of limitation, have been upheld in past court decisions. Justice Nahmias' concurrence added that even if the Georgia Constitution created a right of access to the

courts, a constitutional claim would be unavailable under due process or equal protection grounds. A due process claim would fail in this case because there was no evidence that the litigant's rights had been "chilled" by the statute. The plaintiffs had all their issues resolved during the trial and only challenged the constitutionality of the statute after the trial court entered a final judgment on the issues of the case and defendants sought attorney's fees. An equal protection argument would also fail because there are many scenarios of differing plaintiffs, defendants and causes of action under which the statute could be applicable.

Walker v. Cromartie, 287 Ga. 511 (June 28, 2010)

Consumer LOSS

This case arises from an action for legal malpractice, ordinary negligence and breach of fiduciary duty against defendants for legal work performed in a prior case. Joel and Patricia Walker did not file an expert affidavit with their complaint as required by O.C.G.A. § 9-11-9.1 for the legal malpractice claim. The defendants requested that the court dismiss the legal malpractice claim because the Walkers did not comply with the affidavit requirement. The plaintiffs responded by arguing that section 9-11-9.1 was unconstitutional as applied to indigent litigants because it infringed on their (1) right to due process, (2) equal protection rights, and (3) right to trial. The Georgia Supreme Court disagreed and held that section 9-11-9.1 does not infringe on indigent litigants' constitutional rights.

First, the Court held that section 9-11-9.1 does not violate constitutional due process. The plaintiffs alleged that the statute violated indigent litigants' due process rights by imposing an additional cost for filing an expert affidavit. The expert who is paid to create the affidavit would impose the additional cost, not the government. If the cost had been directly imposed by the government, it would be state action. Without state action, there can be no due process violation.

Second, the Court held that section 9-11-9.1 does not violate the plaintiffs' right to equal protection. The Court reasoned that the statute makes no distinction between classes of citizens because it requires any person or entity to file an expert affidavit to sustain a professional negligence claim, a claim of legal malpractice in this case. Moreover, because poverty is not a suspect classification, the least level of constitutional scrutiny, rational basis equal protection analysis, applied. Under rational basis analysis, the statute must bear a direct relationship to the legitimate legislative purpose. The Court held that the General Assembly enacted section 9-11-9.1 to reduce the number of frivolous malpractice lawsuits filed against professionals, and that purpose is directly served by requiring an expert to attest that at least one act of professional negligence occurred.

Third, the Court held that section 9-11-9.1 does not deny plaintiffs access to the courts. Although, the Walkers' legal malpractice claim prevented from being raised in court for failure to file an expert affidavit, their claim of breach of fiduciary duty was still pending in the trial court. They were free to litigate that claim.

Windsor v. City of Atlanta, 287 Ga. 334 (June 28, 2010)

Consumer LOSS

This case follows and affirms the "five year rule" statutes. The five year rule is a double edged sword. For plaintiffs it may be seen as limiting access to justice because a case may be dismissed with the costs to the plaintiff if no written order is taken for a period of five years. It can also be favorable for defendants, however because in certain cases, such as dispossessory actions and consumer debt collection cases many times cases are just removed from the calendar and not dismissed. It is not in the defendants' best interests to have the case placed back on the calendar. This statute provides a mechanism for courts to prevent very old and inactive cases from cluttering the docket.

The case also interprets the definition of plaintiff under the five year rule statute. In this particular case, Ms. Windsor was the property owner in a condemnation case. The court found that she was not a plaintiff or a counter-claimant under the meaning of the terms in the five year rule statutes and therefore she was not able to renew, or reopen the case after it lie dormant for over five years since the last written order.

O.C.G.A. § 9-2-60(b) hinders access to justice by creating a Five-Year Rule that acts as a procedural hurdle for plaintiffs. In order to construct a new sewer line, the City entered negotiations with Judith Windsor for an easement under her property. When negotiations fell through, the City utilized the declaration of taking method, authorized under O.C.G.A. § 22-3-140, filed a complaint for condemnation and deposited $400 in the registry of the court, which the City alleged was just and adequate compensation. On June 9, 2004, Windsor appealed to the Georgia Supreme Court, which it denied, filing a remittitur in the trial court on July 12, 2004. On June 8, 2009, five years after Windsor appealed, the trial court dismissed the case for lack of prosecution under O.C.G.A. § 9-2-60(b). Windsor appealed challenging the dismissal.

O.C.G.A. § 9-2-60(b) and § 9-11-41(e) establish a Five-Year Rule whereby any case in which no written order is taken for a period of five years shall automatically be dismissed with costs to the plaintiff. In order to reset the five-year clock, a trial or appellate court order must be written, signed by the trial judge, and properly entered in the records of the trial court by filing it with the clerk. Notwithstanding the above, the renewal provisions in both statutes allow the plaintiff in an involuntarily dismissed case to file a renewal action within six months of dismissal.

The last order entered by the trial court was a certificate of immediate review granted on April 7, 2004. On June 6, 2009, Windsor filed a motion to have the matter placed on the trial court's calendar, but the trial court dismissed the case under the Five-Year Rule. Windsor argued that the Georgia Supreme Court's denial of review on June 9, 2004, and subsequent remittitur to the trial court on July 12, 2004 tolled the five-year clock. However, the Court agreed with the trial court that because the remittitur order was both not signed by the trial court and not entered into its official records, it does not reset the five-year clock. Windsor could not avail herself of the

renewal provisions because a property owner in a condemnation case is neither a plaintiff nor a counter-claimant within the meaning of the two statutes.

Schorr v. Countrywide Home Loans, 287 Ga. 570 (July 12, 2010)

Consumer WIN

Bradley and Lori Schorr financed and secured the purchase of their home with a security deed to Countrywide Home Loans, Inc. Upon full repayment of the loan, the Schorrs demanded in writing that Countrywide cancel the security deed. When Countrywide allegedly failed to cancel the security deed within the 60-day period required by former O.C.G.A. § 44-14-3(b)(1), the Schorrs made a written demand for $500 in liquidated damages under former section 44-14-3. Countrywide did not pay the liquidated damages and the Schorrs filed a class action in federal district court on behalf of Countrywide customers whose security deeds had not been cancelled as required by former section 44-14-3. The district court asked the Georgia Supreme Court to determine whether the Schorrs' written demand to Countrywide was sufficient to satisfy the written demand requirement for the entire class.

Under former section 44-14-3, a plaintiff must make a written demand for payment of the $500 liquidated damages before he may initiate a lawsuit against the defendant. The Court held that the purpose of the written demand requirement is to put the defendant on notice of potential liability. The Schorrs' written demand and subsequent filing notified Countrywide of the potential for a class action lawsuit for violations of former section 44-14-3. The class action lawsuit itself notified Countrywide that it would be liable to all customers for whom it failed to properly cancel their security deeds. Therefore, the Schorrs satisfied the written demand requirement for the entire class.

In his dissent, Justice Melton disagreed with the Court's decision on the nature of the written demand. He argued that notice of potential liability was not the purpose of the written demand, as the Court reasoned. He argued instead that Countrywide would have no liability "unless and until" an individual made a written demand for liquidated damages. Because there is no liability until each class member made a written demand, Justice Melton would have held that the Schorrs could not satisfy the written demand requirement for the entire class.

Deen v. Stevens, 287 Ga. 597 (July 23, 2010)

Consumer LOSS

On July 18, 2005, Dr. Shannon Egleston, a dentist, examined Kenneth Deen and diagnosed him multiple dental problems. Dr. Egleston referred him to Dr. Randolph Stevens, an endodontist, to determine whether removing an old root canal and doing a new one could be performed to help

with his dental problems. Dr. Stevens concluded that the procedure was appropriate, but prescribed an antibiotic to Deen to help with some swelling in his mouth. Dr. Stevens also instructed him to schedule an appointment to perform the procedure a week or two after the antibiotic had taken effect and the swelling had gone down. Deen did not schedule the appointment. In April 2009, Deen died.

On March 10, 2008, Linda Deen filed suit on behalf of herself and her husband against Dr. Stevens and his professional corporation, alleging that he committed dental malpractice. On March 21, 2008, Ms. Deen filed suit in federal court against Dr. Egleston for dental malpractice and other causes of action.

Dr. Stevens and his professional corporation asked the trial court to dismiss the lawsuit because Ms. Deen had not filed the suit against him until two years after treatment. In the trial court, Ms. Deen argued that although the statute of limitations for medical malpractice was two years, it was tolled because Mr. Deen was mentally incompetent, and that O.C.G.A. § 9-3-73(b) was unconstitutional because it irrational discriminated against the mentally incompetent in violation of the equal protection guarantees of the U.S. and Georgia constitutions.

The Georgia Supreme Court held that O.C.G.A. § 9-3-73(b) does not violate the equal protection guarantees of the U.S. and Georgia constitutions. Under O.C.G.A. § 9-3-71(a), the statute of limitation for medical malpractice claims is two years from the time of injury. Generally, Georgia law suspends statutes of limitation during periods of mental incompetence. However, section 9-3-73(b) expressly excludes medical malpractice actions from being suspended for mental incompetence.

The Court adopted the Eleventh Circuit's rationale in the federal counterpart to this case. Although, by not allowing mental incompetence to suspend the statute of limitations for medical malpractices claims, the General Assembly separated the mentally incompetent as a distinct class, equal protection analysis did not recognize the mentally incompetent as a suspect class. Therefore, the Court applied rational basis analysis when determining the constitutionality of the statute. The Court examined whether suspending the medical malpractice statute of limitation for mental incompetence had a rational relationship to the General Assembly's objective. The Court held that the General Assembly could rationally conclude that protecting health care professionals from litigating old claims would decrease costs and promote quality affordable health care, a legitimate state objective.

In her dissent, Chief Justice Hunstein believed the Court misapplied rational basis analysis. Chief Justice Hunstein argued that that while decreasing health care costs and promoting quality health care are rational and legitimate objectives of the state, those objectives do not bear a rational relationship to the classification created by section 9-3-73(b). Specifically, it is not rational to suspend the statue of limitations during periods of mental incompetence in every civil cause of action except for one type, especially where suspending the statute of limitation would be most essential.

Newell Recycling of Atlanta v. Jordan Jones and Goulding, 288 Ga. 236 (November 22, 2010)

Consumer WIN

This case arises from claims for breach of contract and professional malpractice. Jordan Jones and Goulding, Inc. ("JJ&G"), a professional engineering firm, designed an automobile shredding facility for Newell Recycling of Atlanta, Inc. JJ&G completed the work based on an agreement to prepare a concrete work platform, and other documents and letters that it sent to Newell about the facility. In May 2000, after work had been completed on the project and the shredding facility became operational, the concrete platform around the facility began to fail. Four years later, in August 2004, Newell sued JJ&G for breach of contract and professional malpractice. On August 4, 2005, JJ&G requested the trial court dismiss the case, arguing that the four-year statute of limitation contained in O.C.G.A. § 9-3-25 prevented Newell from bringing the lawsuit.

The trial court did not dismiss the case because it still had decide whether a written contract existed between the parties. If there existed a written contract between JJ&G and Newell, it would trigger the six-year statute of limitations under O.C.G.A. § 9-3-24, not the four-year state of limitations. Under O.C.G.A. § 9-3-24, the statute of limitations on a complete written contract is six years, whether the promise sued on is an express promise or implied by law. Where the agreement is incomplete or an oral contract, the four-year statute of limitations of O.C.G.A. § 9-3-25 applies. The Court of Appeals reversed the trial court and held that even if there was a written contract, Newell's claim would still be subject to the four-year statute of limitations. The Court of Appeals reasoned that claims of professional malpractice, even if based on a written contract, were subject to the four-year statute of limitations. Therefore, Newell would be prevented from bringing a claim of professional negligence against JJ&G.

The Georgia Supreme Court reversed the Court of Appeals. The Court held that the threshold question is whether there exists a written contract between the parties, and the nature or form of a professional services contract does not alter the threshold question. The Court stated, "Where a complete written contract exists and an action for breach of contract is pursued, the Legislature and this Court have made clear that the six-year statute of limitation of OCGA § 9-3-24 applies." Where no contract exists or it is a purely oral agreement, the four-year statute of limitation of applies.

Developments in Consumer Law

Holmes v. Grubman, 287 Ga. 149 (Feb. 8, 2010)

Consumer WIN

Although this case deals specifically with securities and brokers' duties to their clients, the claim of negligent misrepresentation has potential in other areas where consumers rely on the advice and instruction of professionals. For example, there have been many complaints that mortgage servicers have frequently misled clients about home loan modifications by telling them information that is that untrue. Even if the mortgage servicer did not intend to mislead clients, clients may have a claim for the harm that occurred when they relied on those untrue statements. Given the very strict interpretation of wrongful foreclosure by some Georgia courts, claims like negligent misrepresentation may be another option for homeowners who have been foreclosed upon because they relied on bad information about the modification process from their mortgage servicing company.

Through the multi-district WorldCom Securities Litigation class action, the Georgia Supreme Court recognized state causes of action for consumers who are induced to hold onto securities, and non-discretionary account holders who suffer a breach of fiduciary duty by a brokerage firm. William Holmes and four entities controlled by him alleged that he verbally ordered his broker at then Salomon Smith Barney (SSB) to sell all of their WorldCom stock. However, Holmes alleged that the SSB broker convinced him not to sell the WorldCom stock based on recent research reports by Jack Grubman, an SSB financial analyst. Instead, Holmes purchased additional shares as the stock price declined, which resulted in alleged losses of nearly $200 million. Holmes alleged that SSB and Grubman operated under a conflict of interest because they promoted WorldCom stock to retain its investment banking business even though they knew it was overvalued. Holmes filed for bankruptcy and brought this action for damages under Georgia law in bankruptcy court. The case was transferred to district court and consolidated with the multi-district WorldCom Securities Litigation. The Georgia Supreme Court decided that in district court Holmes (1) could assert fraud claims based on forbearance in the sale of publicly traded securities; (2) must prove that the truth about WorldCom, which was concealed by SSB, entered the market place precipitating a drop in the price of the security; and (3) as the holder of a non-discretionary account, was owed a fiduciary duty by SSB.

First, the Georgia Supreme Court held that Georgia common law recognizes fraud claims based on holder claims. Holder claims are claims of forbearance in the sale of publicly traded securities. They are claims based on either intentional or negligent misrepresentations made to a party, which causes them to continue to hold previously purchased stock. The defendant must directly communicate the misrepresentations to the party, and the party must rely on the misrepresentations when making the decision to hold on to the previously purchased stock.

Second, the Court held that under Georgia law, the plaintiff must prove that he sustained loss or damage due to the alleged misrepresentations in order to recover in an action for fraud. The Court clarified this point of law by also requiring the plaintiff to allege and prove that the defendant's misrepresentations or omissions concerning publicly traded securities entered the marketplace and directly caused a drop in the price of the securities.

Third, under O.C.G.A. § 23-2-58, a stockbroker and his customer have a fiduciary relationship as principal and agent. Limited fiduciary duties extend towards a customer who holds a non-discretionary account. In a nondiscretionary account, the broker is only authorized to transact business after receiving authorization from the client (as opposed to a discretionary account where the broker is authorized to carry out transactions on behalf of its client without prior authorization). The Court held that the stockbroker owes a duty to not misrepresent any fact material to the transaction and not to recommend an investment which the customer has previously rejected or to which the broker has a conflict of interest.

American Lien Fund v. Dixon, 286 Ga. 562 (March 1, 2010)

Consumer WIN

This case highlights Georgia's policy in favor of property owners and establishes that a property owner retains the right to redeem property before a final judgment is entered against the property in a tax sale. In 1976, Sharon Dixon acquired ownership of property in Fulton County. In 2003, 2004, and 2005, the Fulton County Tax Commissioner issued tax liens authorizing the sale of the property to satisfy Dixon's unpaid property taxes. The Commissioner transferred the tax liens to Vesta Holdings I, LLC to sell at auction. At auction, American Lien Fund, LLC ("ALF") purchased the tax liens and received a tax deed. On November 29, 2007, Dixon sued Vesta and ALF arguing that the tax liens were illegally transferred to Vesta, making the sale of the property to ALF illegal. Dixon sought redemption of the property under O.C.G.A. § 48-4-40 and an injunction against any attempt to dispossess her, foreclose on the property or collect on any lien on it. On September 12, 2008, ALF served Dixon with a notice stating that the right to redeem the property would expire on November 14, 2008. At a hearing on October 10, 2008, the trial court granted an injunction preventing Vesta and ALF from foreclosing Dixon's right of redemption. ALF appealed the trial court's decision.

On appeal, the Georgia Supreme Court held that the trial court did not abuse its discretion when it granted an injunction to prevent Vesta and ALF from foreclosing Dixon's right of redemption. Section 48-4-47(a) provides that one who wishes to redeem the property must make complete tender in order to challenge the tax deed except when "it clearly appears that . . . [t]he tax . . . was not due at the time of the sale." There remained a factual dispute as to whether Dixon paid her taxes before the tax sale. If she had paid her taxes before the tax sale, then she would fall within the exception and maintain her right to redeem the property.

State Auto Property & Casualty Co. v. Matty, 286 Ga. 611 (March 1, 2010)

Consumer LOSS

This case involves a dispute over the meaning of the word "accident" in an automobile liability insurance policy. The Georgia Supreme Court adopted a pro-insurer rule that disfavors policyholders and those injured in automobile accidents. While driving, Rachel Griffin struck and killed Matthew Matty, a bicyclist. Griffin's car then struck a second bicyclist, Jeffrey Davis, seriously injuring him. An accident reconstruction expert testified that, assuming the insured had traveled at the speed limit from the point she struck the first bicyclist to the point where she struck the second one, it would have taken her "just over a second" to travel the distance between the two bicyclists. Griffin had an insurance policy with State Auto Property & Casualty Company. The policy contained a liability limit for bodily injury of $100,000 for "each accident." The policy also provided that this liability limit was the most State Auto would pay under the policy "for all damages resulting from any one auto accident . . . regardless of the number of: 1. Insureds; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident." The policy did not define "accident," "each accident," or "any one accident."

The Georgia Supreme Court was asked to determine the meaning of the term "accident" in an automobile liability insurance policy where the word is not expressly defined in the policy and the word limits the liability of the insurer. State Auto argued that the incident in which Griffin struck the bicyclists constitutes one accident and that it was liable for providing only $100,000. The bicyclists argued that the incident constituted two accidents and that State Auto was liable for providing $200,000, that is, $100,000 for each individual's injuries. The Court adopted the Cause Theory to determine the meaning of the term "accident" in an automobile liability insurance policy where the word is not expressly defined in the policy. Under the Cause Theory, the number of accidents is determined by the one uninterrupted cause that resulted in all subsequent accidents. In the automobile collision context, the definition of "accident" is limited to events that occurred after the negligent act of the driver but before the driver regained control of the vehicle.

The Court eschewed the Effect Theory, which determines the number of accidents from the point of view of the injured, so that each individual injury constitutes a separate accident. Adoption of the Effect Theory would have expanded Griffin's insurance coverage and benefitted the bicyclists who were harmed in the accident.

Justice Benham, in his dissent, argued that there was no need to adopt a new rule to answer the question. He would have relied on principles of contract interpretation to determine the meaning of the word "accident" in an automobile liability insurance policy where the word is not defined in the policy. Under Georgia law, undefined terms in an insurance policy are to be given their plain, ordinary meaning. If there is still some ambiguity in the policy, then the language is to be interpreted most strongly against the insurer and in favor of the insured.

Reynolds v. Infinity General Ins. Co., 287 Ga. 86 (March 15, 2010)

Consumer LOSS

In this case, the Georgia Supreme Court was asked to determine whether notice of cancellation of an insurance policy is if ineffective if it provides the insured an opportunity to keep the policy in force by paying the past-due premium within the statutory ten-day period. On June 5, 2006, Russell Graham purchased a commercial automobile insurance policy from Infinity General Insurance Company. On July 10, 2006, Infinity sent a cancellation notice to Graham. The cancellation date on the notice was July 25, 2006, which was set out in a small box at the top of the notice and again in another small box at the bottom of the notice. On August 2, 2006, while driving the insured vehicle, Graham's son was involved in a collision that took the lives of his two passengers, Joey Lee Reynolds and Dustin Edward Lloyd.

To preempt anyone filing a claim under the insurance policy, Infinity filed suit against Graham and the estates and widows of the deceased passengers. In the suit, Infinity claimed that the insurance policy was cancelled effective July 25, 2006, and was not in force at the time of the collision. The cancellation notice stated:

> "As of 07/10/2006, we have not received your payment. You are hereby notified . . . that your insurance policy will cease at 11:59 P.M. on the cancellation date mentioned above, unless we receive your payment before the cancellation date. If the premium amount listed on this notice is not received by the company before the cancellation date specified, your insurance will cease at 11:59 P.M. on that date."

The Georgia Supreme Court held that effective notice of cancellation is given when a cancellation notice clearly, unambiguously and unequivocally puts the policyholder on notice that automobile coverage will be terminated by the cancellation date. The sufficiency of a cancellation notice will depend on the language of that particular cancellation notice. "The mere fact that the notice contains an option for the policyholder to avoid the imminent cancellation does not alter the clear statement to the policyholder that coverage is being terminated because the premium was not timely paid."

The language in the cancellation notice to Graham stated three times that coverage ended at 11:59 P.M. on July 25, 2006. The notice explained that coverage was being cancelled because Graham failed to pay the premium. Infinity did not convert the cancellation notice into a demand for payment of the overdue premium by providing an option for the Graham to pay the overdue premium and avoid cancellation. Therefore, the Court held, the cancellation notice was effective notice to terminate coverage. The Court concluded that to hold otherwise would undercut the General Assembly's intent to encourage the retention of automobile insurance.

The dissenting opinion, authored by Presiding Justice Carley, would have held that effective notice is given when a cancellation notice clearly, unambiguously, unequivocally *and*

unconditionally puts the policyholder on notice that automobile coverage will be terminated by the cancellation date. Presiding Justice Carley argued that inclusion of an option to pay the overdue premium and avoid cancellation treated cancellation as a future occurrence conditioned on nonpayment of the premium. Under this reasoning, the cancellation notice stated Infinity's intention to cancel coverage rather than an unconditional cancellation of coverage.

Justice Nahmias concurred with the majority opinion. He pointed out that the difference between the majority and dissenting opinion is a question of whether a cancellation notice must be "unconditional" in order to be effective. In practice, he noted, the difference amounts to whether an insurer may provide an option to continue coverage if the overdue premium is paid or cancel coverage but allow for reinstatement after the date of cancellation. Justice Nahmias believed that there is no meaningful legal distinction between the two theories, but based on the facts, agrees with the majority that the standard should not include an unconditional statement of cancellation for the cancellation notice to be effective.

Southstar Energy Services v. Ellison, 286 Ga. 709 (March 15, 2010)

Consumer WIN

The Georgia Supreme Court opened the way for natural gas consumers to recover overpayments made to Georgia gas companies. Charles Ellison and Susan Bresler filed a class action against Southstar Energy Services, LLC seeking to recover overpayments and other damages due to the gas company's violations of the Natural Gas Act. Southstar requested that the case be dismissed and the trial court granted the request on the basis that the voluntary payment doctrine prevented Ellison and Bresler from suing to recover overpayments. The Court of Appeals reversed the trial court, and the Georgia Supreme Court agreed, holding that the voluntary payment doctrine does not apply because the General Assembly specifically authorized a private right of action for violations of the Natural Gas Act.

Under Georgia law, the specific statute prevails over a general statute, absent any indication of a contrary legislative intent. The General Assembly wrote the voluntary payment doctrine into the legal code when it enacted O.C.G.A. § 13-1-13. Section 13-1-13, a general statute, provides that when payments are made "through ignorance of the law or where all the facts are known" and there is no fraud or mistake of facts, then the payment is deemed voluntary and cannot be recovered. Notwithstanding this fact, the Georgia Supreme Court held that O.C.G.A. § 46-4-160.5 is a specific statute that permits customers to bring a civil action against a gas company for overcharging the customer in violation of the Natural Gas Act. Therefore, the Court held, section 46-4-160.5 prevailed over section 13-1-13.

World Harvest Church v. GuideOne Mutual Ins. Co. (May 3, 2010)

Consumer WIN

This case involves a suit between World Harvest Church action against GuideOne Mutual Insurance company alleging that the insurance company breached the insurance contract it had with the church and its duty to defend World Harvest in separate lawsuit in Illinois.

A lawsuit was brought against World Harvest Church in an Illinois federal district court. GuideOne Mutual Insurance Company, who was the Church's commercial general liability insurer, was informed of that lawsuit, but a sister company of GuideOne responded with a written reservation of the right to deny all liability. The sister company concluded that the policy did not cover the lawsuit in Illinois.

After that action was dismissed, a similar lawsuit was filed against the Church in Georgia. Dale Hubbell, a claims adjuster for GuideOne, testified that he had stated to the Church's General Counsel that "we didn't see coverage but we would have to evaluate what we have currently to see if there would be coverage issues." Without issuing a written reservation of rights, GuideOne assumed the defense of the lawsuit for over 10 months. On January 26, 2005, GuideOne informed the Church that it would stop defending the action in 30 days because there was no coverage. The Church hired its own attorneys to defend the lawsuit and eventually settled for $1,000,000. Three months later, World Harvest Church brought this action against GuideOne, arguing that GuideOne breached the insurance contract, and its duty to indemnify and defend the previous lawsuit.

The Georgia Supreme Court determined that because GuideOne did not provide an effective reservation of rights to the Church, it was prevented from arguing that the insurance policy did not cover the lawsuit after conducting an initial defense of the Church.

First, the Court held that GuideOne did not provide an effective reservation of rights to the Church. Under Georgia law, there is no requirement that the reservation of rights be in writing. However, the reservation of rights must be unambiguous and "fairly inform" the insured (1) that the insurer disclaims liability; (2) the basis for the insurer's reservations about coverage; and (3) that the insurer does not waive its defenses against the insured despite the insurer's defense of the action. A written reservation of rights from the GuideOne's sister company in a similar lawsuit in another state was ambiguous because it was about a different insurance policy than the one in this lawsuit. Moreover, a statement made by GuideOne's claims adjuster that the he "did not see coverage" was insufficient to fairly inform the Church of GuideOne's position, even though it was not required to be in writing.

Second, the Court held that GuideOne was prevented from arguing that the insurance policy did not cover the lawsuit. Where an insurer assumes exclusive control of the defense of claims against the insured without a reservation of rights, prejudice to the insured is presumed and the insurer is prevented from arguing that the insurance policy does not cover the liability.

GuideOne was prevented from arguing that the insurance policy did not cover the lawsuit because it conducted an initial defense of the Church without providing an effective reservation of rights. If GuideOne had only participated in the defense of the Church, then the Church would be required to show prejudice to its case to prevent the insurer from arguing that the insurance policy did not cover the lawsuit.

State ex rel. Doyle v. Frederick J. Hanna & Assocs., 287 Ga. 289 (June 7, 2010)

Consumer LOSS

This case is important to both consumers and attorneys. It was a divisive case with a 4-3 split decision with a spirited dissent from Justice Melton. The case basically says that debt collection attorneys, who often also operate debt collection outfits out of the same office space, or own debt collection outfits, are not subject to the Georgia Fair Business Practices Act (FBPA). The court found that the regulation of the practice of law, even when it is debt collection, is not subject to the FBPA.

This is disappointing to consumers as often times there is little difference between the behavior of the debt collector and the debt collection law firm or attorney. Under the Georgia Supreme Court's ruling, basically debt collection attorneys are shielded from the FBPA by the fact that they are attorneys and their actions are regulated by the State Bar only. Consumers who have negative experiences with debt collection attorneys will need to file complaints with the State Bar of Georgia if they feel that debt collection attorneys are being unprofessional or unethical in their debt collection activities.

Consumers should know that they still may file actions against debt collection attorneys for violation of the federal Fair Debt Collection Practices Act (FDCPA). Such action may be asserted as a counterclaim to any lawsuit for the collection of debt filed against them, even if filed in a Georgia state court. Georgia debt collection attorneys may also be sued for violations of the FDCPA in federal district court.

The case is important to attorneys because it affirms the idea that the State Bar of Georgia is the sole regulator of professional legal services. An attorney who periodically engages in the collection of debt as part of their practice does not have to worry about running afoul of the FBPA. Not all debt collection is bad as any lawyer who obtains a judgment on behalf of a client may have to go through proceedings to collect on that judgment. Attorneys are subject to the rules of professionalism and ethics set forth by the Georgia State Bar. They should always govern themselves accordingly. As Justice Melton aptly stated in his dissent, "A lawyer can, and must, practice law without punching people in the face. And a lawyer can, and must, practice law without violating the Georgia FBPA by abusing members of the public."

The Georgia FBPA permits consumers to sue for unfair and deceptive acts and practices and is the main state consumer statute. Joseph B. Doyle, Administrator of the FBPA, issued an investigative demand to Frederick J. Hanna & Associates, P.C. ("FJH"), a law firm that seeks to

collect debts on behalf of creditors. When FJH refused to comply with the demand, Doyle filed an application with the trial court to compel FJH to comply. The trial court denied the application as an attempt by Doyle to regulate the day-to-day operations of a law firm because the investigative demand directly impacts its practice of law. The trial court held that regulation of the practice of law by a member of the executive branch was in violation of the separation of powers doctrine. The Administrator appealed this decision.

The Georgia Supreme Court agreed with the trial court and held that the Georgia FBPA did not authorize the Administrator to investigate a law firm that rendered consumer debt collection services to its clients because debt collection done by an attorney is exempt from Georgia FBPA regulation and the General Assembly did not mandate that the Court should reach an opposite conclusion.

First, the Court held that the Georgia FBPA did not apply to the debt collection practices of attorneys. The Georgia FBPA regulates commercial or entrepreneurial activities, but does not expressly regulate the rendering of certain professional services. As such, the Court reasoned that professional legal services are exempt from regulation under the Georgia FBPA. The Court concluded that when a law firm engages in debt collection practices for its clients it is engaging in conduct exempt from the Georgia FBPA regulation because debt collection is a necessary part of the practice of debtor-creditor law. This is true even if non-lawyers within the firm provide services that could have been offered by a company without attorneys.

In his dissent, Justice Melton argued that "[t]he collection of consumer debts, in and of itself, has nothing to do with the practice of law, and it is simply a commercial activity that any person can perform, and any person who engages in the activity is involved in 'trade or commerce' governed by the [Georgia] FBPA." Because the Georgia FBPA applies directly to the commercial activity of collecting debts, and makes no distinction based on who is collecting the debt, the debt collection activities of attorneys should fall under the Georgia FBPA.

Second, the Court rejected any argument that an attorney who has violated the Federal Trade Commission Act ("FTCA") has also violated the Georgia FBPA. O.C.G.A. § 10-1-391(b) provides that "[i]t is the intent of the General Assembly that [the FBPA] be interpreted and construed consistently with interpretations given the . . . [FTCA]." The federal Fair Debt Collections Practices Act amended the FTCA to apply to attorneys. The Court reasoned that a likewise express act of the General Assembly was necessary before the Court could apply the Georgia FBPA to attorneys. The dissent stuck to the clear meaning of the words of section 10-1-391(b) and argued that the Court ignored the express will of the General Assembly that the Georgia FBPA be interpreted consistently with the FTCA.

The Court did not reach a decision on whether applying the Georgia FBPA to attorneys violated separation of powers. However, Justice Melton believed that the Court relied on "a thinly-veiled separation of powers analysis in reaching its erroneous conclusion that the Georgia FBPA can have no application here." The dissenters argued that there was no violation of the separation of powers principle because the Georgia FBPA does not impermissibly regulate the practice of law, but regulated a commercial activity that may be properly investigated pursuant to Georgia FBPA.

Anthony v. American General Financial Services, 287 Ga. 289 (June 28, 2010)

Consumer LOSS

This case arises from a suit filed against American General for breach of contract, fraud and a violation of O.C.G.A. § 45-17-11(b). Terry and Sarah Anthony refinanced a mortgage loan with American General in 2002. The loan agreement specified that there was a $350 "Notary Fee." Section 45-17-11(b) sets the maximum notarial fee at $4.00, and section 45-17-11(d) requires disclosure of the statutory fee limit prior to notarization. The Anthonys argued that American General collected the $350 notarial fee and failed to inform them of the limit. The Anthonys filed suit against American General in the federal district court but lost. The Georgia Supreme Court was asked to determine whether (1) a corporation that employs notaries public to help facilitate its lending practices can be held directly or vicariously liable for violations of section 45-17-11; (2) a private person can sue to recover notarial fees paid in violation of section 45-17-11; (3) the voluntary payment statute prevents recovery for notarial fees paid in violation of section 45-17-11; and (4) the statute of limitations on fraud and money had and received claims is suspended when the contract states that the fees are "reasonable and necessary."

First, the Court held that a corporation employing a notary public to help facilitate lending practices is not directly or vicariously liable for the notary's violations of section 45-17-11(b). Section 45-17-11(b) protects consumers against only notary publics. The Court reasoned that because a notary public must be an individual, not a corporation, American General cannot directly violate section 45-17-11(b). Nor is a corporation vicariously liable for violations of section 45-17-11(b) committed by a notary public it employs because a notary public is a public officer whose duties to the public are superior to any private duties to his employer. When acting in his public capacity, his private service as an employee is suspended. Therefore, any violation he commits as a notary public cannot be in his capacity as an employee. Notwithstanding the above, under section 51-12-30, a corporation may be civilly liable for violations of section 45-17-11(b) if it participates in or procures the notary's violations.

In her dissent, Chief Justice Hunstein argued that American General should be directly liable under section 45-17-11(b) for the notary's violations. The loan agreement was drafted by American General and contained the notary fee, and the fee was paid to American General, and not to the notary.

Second, the Court held that there is no private civil action under section 45-17-11(b), and that Georgia law does not permit courts to fashion a private right of action unless the General Assembly has expressly provided one. The notary statute is a penal statute, but civil liability may be authorized where the text of the penal statute indicates the legislature intended to create a private cause of action, and public policy supports imposing civil as well as criminal penalty. However, the General Assembly did not create a private right of action in the text of section 45-17-11(b). Moreover, the General Assembly enacted O.C.G.A. § 9-2-8(a) to prevent courts from creating private causes of action where it was not expressly provided for in statute.

Chief Justice Hunstein disagreed with the Court and argued that a private cause of action should arise where a violation of section 45-17-11(b) is attributable to a corporation rather than an individual notary. The legislative intent of the statute is to protect consumers of notarial services and available ways to remedy violations of section 45-17-11(b) (e.g., criminal prosecution or administrative rebuke) were insufficient to promote corporate compliance and deter future violations.

Third, the Court held that the breach of contract claim against American General is not barred by the voluntary payment doctrine. "Under the voluntary payment doctrine, a party may not recover for payments made 'through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party.'" The loan agreement misrepresented that the $350 notary fee was "reasonable and necessary" contrary to the limit imposed by section 45-17-11(b). Because the complaint alleged sufficient "artifice, deception, or fraudulent practice" used by American General in securing the $350, the voluntary payment doctrine was inapplicable.

Fourth, the Court held that the four-year statute of limitations on claims of fraud and money had and received should not be tolled for the Anthonys. O.C.G.A. § 9-3-96 provides that "[i]f the defendant . . . [is] guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." If the fraud could not be discovered by the exercise of ordinary diligence, the statute of limitation tolls until ordinary diligence would reveal the fraud or until eventual discovery. Because the Anthonys were not prevented from discovering a violation of section 45-17-11, the statute of limitations should not be tolled for them.

Fidelity National Title Insurance Co. v. Keyingham Investments, 288 Ga. 312 (October 18, 2010)

Consumer WIN

Thoughtforce International, Inc., Sam Dobrow, and Real Estate Solutions Providers, Inc. (the "lenders") agreed to loan $106,000 to a man they thought was Michael Shanahan in exchange for a security deed in property in which the real Michael Shanahan had an ownership interest. Prior to closing, the lenders received a commitment from Fidelity National Title Insurance to insure the property against defects in the title.

After the loan went into default, Fidelity learned that the man who secured the loan was an imposter. The lenders made a claim under the commitment agreement, which Fidelity denied. On June 2, 2005, two of the lenders assigned to Keyingham their interests in the claim against Fidelity. On June 6, 2005, Keyingham and Real Estate Solutions Providers sued Fidelity for breach of contract and other claims, seeking to recover the $106,000 lost in the transaction. The Court of Appeals held that conditions of the title insurance commitment were satisfied when it was later discovered that the borrower who executed a security deed was an imposter who forged the true owner's name on the deed.

The Georgia Supreme Court agreed and held that title insurance purchased by an unknowing buyer covers the risk of a forgery. Title insurance protects a party from defective titles, which necessarily results in the party not receiving an interest in the land. A forged deed conveys a defective title. The Court held that a title insurance commitment must be construed to provide coverage for forgeries in the absence of language in the agreement that plainly excludes or limits coverage.

State Farm Mutual Automobile Insurance Co. v. Adams, 288 Ga. 315 (November 30, 2010); American International South Insurance Co. v. Floyd, 288 Ga. 322 (November 30, 2010)

Consumer LOSS

In these paired cases, *Floyd* had similar facts to *Adams* and the Supreme Court reviewed them concurrently and applied the law from *Adams* to reach a similar conclusion in *Floyd*. The reasoning it gave was "for all of the reasons set forth in *Adams*, we find that *Floyd's* unpaid hospital lien does not reduce United Automobile's coverage or concomitantly increase American International's uninsured motorist coverage."

This case arises from a claim against an uninsured motorist (UM) insurer, where the insurer claimed it was entitled to a credit for payment of a hospital lien against the insured. The Court considered whether an uninsured motorist's available liability coverage may be used to make payment on a hospital lien against the victim of the uninsured motorist's negligence.

After being injured in an automobile accident, Randolph Adams sued the defendant that injured him. Adams settled with the defendant, and was paid from the defendant's $25,000 insurance policy with Nationwide. Nationwide exhausted its coverage by paying $15,782.34 directly to Adams and his attorney, and $9,217.66 to Grady Hospital to satisfy a hospital lien for unpaid services rendered to Adams to treat his injuries from the accident. Because his damages exceeded the $25,000 from Nationwide, Adams filed a claim with his UM carrier, State Farm Mutual Automobile Insurance Company. Adams carried $100,000 worth of UM coverage with State Farm. State Farm paid Adams $75,000, arguing that it was entitled to a credit for the full $25,000 paid out by Nationwide. However, Adams argued that State Farm was not entitled to a credit for Nationwide's payment of the Grady Hospital lien. The underlying lawsuit ensued, and based on the UM statute, the trial court ruled in favor of State Farm. Adams appealed and the Court of Appeals reversed the trial court, finding that State Farm was not entitled to a credit for the hospital lien paid by Nationwide.

The Georgia Supreme Court reversed the Court of Appeals. The Court held that the amount paid to settle the hospital lien should be subtracted from a UM coverage amount. The UM statute requires drivers to purchase UM insurance. The purpose of the UM insurance is to place the injured party in the same position as if the uninsured motorist who caused the injury was covered with liability insurance. Moreover, the UM statute is triggered if the motorist who caused the injury is underinsured. Under O.C.G.A. § 33-7-11(b)(1)(D)(ii), a motor vehicle is underinsured

if the injured party's UM coverage exceeds the sum of the full liability coverage of the motorist liable for the injury minus payments for "other claims or otherwise."

O.C.G.A. § 44-14-470(b) grants a hospital the right to place a lien on the patient's cause of action, that is, the patient's legal recourse against a the person who caused the patient's injuries. The hospital lien "allows the hospital to step into the shoes of the insured for purposes of receiving payment from the wrongdoer's insurance company for economic damages represented by the hospital bill." Therefore, payment of the lien benefits the patient and satisfies a debt against him. Although payment to the hospital diminishes the actual amount of money passing through the insured's hands, it does not diminish any of the benefit from the insurance proceeds he was entitled to receive under the insurance policy.

In his dissent, Justice Benham argued that State Farm was not entitled to a credit for the amount Nationwide paid to the hospital for its treatment of injuries caused by the negligent acts of the wrongdoer. He argued that the language of the UM statute should be interpreted in such a way as to give effect to the legislative purpose of protecting victims from the negligence of irresponsible drivers. He agreed with the Court of Appeals interpretation of section 33-7-11(b)(1)(D)(ii)'s "payment of other claims or otherwise" clause as encompassing a valid hospital lien. He argued that the insured is entitled to the difference between his UM policy limit and the funds he actually received from the wrongdoer's carrier after payment of the hospital lien. The majority opinion would penalize the victim by limiting his potential recovery by the amount of the hospital lien.

Court Watch Glossary of Terms

Abuse of Discretion – A standard of reviewing a lower court's or other decision maker's judgment. To overturn a decision for abuse of discretion, the reviewing court must find that the decision was wholly unsupported by the evidence, illegal, or clearly incorrect. (Nolo's Plain-English Law Dictionary)

Breach of Fiduciary Duty – When one person who acts as a fiduciary (a person to whom property or power is entrusted for the benefit of another) for client acts in any manner adverse or contrary to the interests of the client, or acts for his own benefit in relation to the subject matter. (USLegal.com)

Cause Theory – A legal theory under which a single event has occurred for insurance purposes when numerous injuries were caused by the same act or omission. (Georgia Supreme court blog)

Class Action –A lawsuit in which a large number of people with similar legal claims join together in a group (the class) to sue someone, usually a company or organization. Common class actions involve cases in which a product has injured many people, or a group of people has suffered discrimination at the hands of an organization. (Nolo's Plain-English Law Dictionary)

Counterclaim – A defendant's court papers that seek to reverse the thrust of the lawsuit by claiming that, despite the plaintiff having brought the lawsuit in the first place, the plaintiff is actually wholly or partly at fault concerning the same set of circumstances. The counterclaim goes on to allege that the plaintiff thus owes the defendant money damages or other relief. A counterclaim is commonly but not always based on the same events that form the basis of the plaintiff's complaint. For example, a defendant in an auto accident lawsuit might file a counterclaim alleging that it was really the plaintiff who caused the accident—or could claim that, as long as they're in court, the plaintiff should pay for having chopped down the defendant's tree the previous week. (Nolo's Plain-English Law Dictionary)

Declaratory Judgment – A declaratory judgment, sometimes called declaratory relief, is conclusive and legally binding as to the present and future rights of the parties involved. The parties involved in a declaratory judgment may not later seek another court resolution of the same legal issue unless they appeal the judgment. Declaratory judgments are often sought in situations involving contracts, deeds, leases, and wills. (Dictionary.com)

Dissenting opinion –The opinion of a judge of a court of appeals, including supreme courts, that disagrees with the majority opinion. (Nolo's Plain-English Law Dictionary)

Doctrine of Res judicata – Latin for a legal issue that has been finally decided by a court, between the same parties, and cannot be ruled on again. For example, if a court rules that John is the father of Betty's child, John cannot raise the issue again in another court. (Nolo's Plain-English Law Dictionary)

Due Process of Law – A fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result. While somewhat indefinite, the term can be gauged by its aim to safeguard both private and public rights against unfairness. (Nolo's Plain-English Law Dictionary)

Economic (Compensatory) Damages –Money damages recovered as compensation for economic loss, such as lost wages. (Nolo's Plain-English Law Dictionary)

Effect Theory – A legal theory which says that each individual injury constitutes a separate accident, or the "event" theory, which looks to the number of events that resulted in the injuries. (Georgia Supreme Court Blog)

Equal Protection – The right, guaranteed by the Fourteenth Amendment to the U.S. Constitution, to be treated the same, legally, as others in the same situation. If a law discriminates between one group of people and another, the government must have a rational basis for doing so. A law that discriminates on the basis of a suspect classification—that is, it makes a distinction based on race, gender, or another trait that has historically resulted in discriminatory treatment—is constitutional only if there is a very compelling reason for the distinction. (Nolo's Plain-English Law Dictionary)

Estoppel – A legal principle that prevents a person from asserting or denying something in court that contradicts what has already been established as the truth. (Nolo's Plain-English Law Dictionary)

Fair Business Practice Act of 1975 (FBPA) – The primary consumer protection law of Georgia and is enforced by the Governor's Office of Consumer Affairs. The FBPA regulates unfair or deceptive practices in consumer transactions (that is, transactions for personal, family or household purposes). The FBPA also regulates matters such as health spa memberships, "going out of business" sales, telemarketing, multilevel marketing opportunities, campground memberships and certain promotional activities. The FBPA authorizes private citizens to sue for violations in certain circumstances. (Georgia.gov)

Final Judgment-- the written determination of a lawsuit by the judge who presided at trial (or heard a successful motion to dismiss or a stipulation for judgment), which renders (makes) rulings on all issues and completes the case unless it is appealed to a higher court. It is also called a final decree or final decision (Freedictionary.com)

Forbearance – The act of abstaining from proceeding against a delinquent debtor or delay in exacting the enforcement of a right. Refraining from action. (Nolo's Plain-English Law Dictionary)

Fraud – Intentionally deceiving someone and causing that person to suffer a loss. Fraud includes lies and half-truths, such as selling a car that is a lemon and claiming "she runs like a dream." (Nolo's Plain-English Law Dictionary)

Gross Negligence – The absence of "that care which every man of common sense, however inattentive he may be, takes of his own property." (O.G.C.A. 51-1-4). A lack of care that

demonstrates reckless disregard for the safety or lives of others, which is so great it appears to be a conscious violation of other people's rights to safety. (Nolo's Plain-English Law Dictionary)

Implied cause of action – A term used in statutory and constitutional law for circumstances when a court will determine that a law that creates rights also allows private parties to bring a lawsuit, even though no such remedy is explicitly provided for in the law. (Freedictionary.com)

Injunction – A court decision commanding or preventing a specific act. Injunctions can be temporary, pending a consideration of the issue later at trial (these are called interlocutory decrees or preliminary injunctions). Judges can also issue permanent injunctions at the end of trials. (Nolo's Plain-English Law Dictionary)

Investigative Demand – a formal written request for the production of documents, a demand for oral or deposition testimony, or service of interrogatories requiring written response. (Nolo's Plain-English Law Dictionary)

Judicial Review – The judicial consideration of a lower court judgment by an appellate court, determining if there were legal errors sufficient to require reversal. In reviewing a lower court decision or order, appellate courts focus on errors of a legal nature and will usually not disturb factual findings. (Nolo's Plain-English Law Dictionary).

Legislative Intent – In law, the legislative intent of the legislature in enacting legislation may sometimes be considered by the judiciary when interpreting the law (Freedictionary.com)

Lien – A creditor's legal claim against particular property owned by a debtor as security for a debt. Liens the debtor agrees to, called security interests, include mortgages, home equity loans, car loans, and personal loans for which the debtor pledges property as collateral. Nonconsensual liens are liens placed on property without the debtor's consent, and include tax liens, judgment liens (liens a creditor obtains by suing and getting a court judgment against the debtor), and mechanics' liens (liens filed by a contractor who worked on the debtor's house but didn't get paid). (Nolo's Plain-English Law Dictionary)

Loss of Consortium – A type of legal claim made by a spouse when the other spouse has been injured to a point of being unable to provide the benefits of a family relationship, including intimacy, affection, and company. (Nolo's Plain-English Law Dictionary)

Majority Opinion–A court's written explanation of a judgment, usually including a summary of the facts, an explanation of the law on the issue, and the court's analysis for applying the law to those facts and coming to a conclusion. The opinions of appellate courts (courts that review the decisions of trial courts, the highest appellate court being the Supreme Court) are frequently published and create rules for future litigants to follow. Appellate judges who disagree with a majority opinion may file dissenting opinions. (Nolo's Plain-English Law Dictionary)

Malpractice – The delivery of substandard care or services by a lawyer, doctor, dentist, accountant, or other professional. Generally, malpractice occurs when a professional fails to provide the quality of care that should reasonably be expected in the circumstances, with the result that a patient or client is harmed. (Nolo's Plain-English Law Dictionary)

Money had and Received – An action by which the plaintiff can recover money paid to the defendant. The money is usually recoverable because the money had been paid by mistake or under compulsion, or the consideration was insufficient. Such an action also helps the plaintiff to recover money which the defendant had received from a third party. (USLegal.com)

Non-discretionary account– An investor and a financial advisor review a list of mutual funds that have been pre-screened and selected for inclusion in the program, and choose funds from that list to create a customized asset allocation model. The investor is responsible for providing approval of the rebalancing of the portfolio and for the decision to replace any of the mutual funds. (Investopedia.com)

Non-economic (General) Damages –Monetary recovery in a lawsuit for injuries suffered or breach of contract for which there is no exact dollar value that can be calculated. General damages can include, for example, pain and suffering, compensation for a shortened life expectancy, and loss of the companionship of a loved one. (Nolo's Plain-English Law Dictionary)

Notice – Information that one person gives to another, alerting the other party of the first party's intentions. Notice of a lawsuit or petition for a court order begins with personal service on the defendants (delivery of notice to the person) of the complaint or petition, together with a summons or order to appear (or file an answer) in court. In a noncourt setting, notice can simply be a written statement of intentions, as when a landlord terminates a tenancy by serving a termination notice on the tenant. (Nolo's Plain-English Law Dictionary)

Ordinary Negligence – The absence of that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. O.C.G.A. § 51-1-2. Failure to exercise the care toward others that a reasonable or prudent person would use in the same circumstances, or taking action that such a reasonable person would not, resulting in unintentional harm to another. (Nolo's Plain-English Law Dictionary)

Prejudice- A dismissal with prejudice is dismissal of a case on merits after adjudication. The plaintiff is barred from bringing an action on the same claim. Dismissal with prejudice is a final judgment and the case becomes res judicata on the claims that were or could have been brought in it. (USLegal.com)

Private Right of Action – see Implied cause of action.

Professional Negligence – see Malpractice.

Proximate cause – The immediate reason that something happened that caused harm to another person. (Nolo's Plain-English Law Dictionary)

Rational basis Analysis – Rational basis review is a test used in some contexts to determine a law's constitutionality. To pass rational basis review, the challenged law must be rationally related to a legitimate government interest. Rational basis is the most lenient form of judicial review, as both strict scrutiny and intermediate scrutiny are considered more stringent. Rational

basis review is generally used when in cases where no fundamental rights or suspect classifications are at issue. (Cornell University Law School Legal Information Institute)

Reasonable Care – The degree of caution and attention to possible dangers that an ordinarily prudent and rational person would use in similar circumstances. This is a subjective test of determining whether a person is negligent and therefore liable. (Nolo's Plain-English Law Dictionary)

Right to Redeem – The right to buy back property, as when a homeowner pays off a mortgage. (Nolo's Plain-English Law Dictionary)

Remittitur – Latin for "it is sent back." 1) A judge's order reducing a judgment awarded by a jury. 2) An appellate court's transmittal of a case back to the trial court so that the case can be retried, or an order can be entered consistent with the appellate court's decision (such as dismissing the plaintiff's case or awarding costs to the winning party on appeal). (Nolo's Plain-English Law Dictionary)

Reservation of Rights – A term referring to a situation arising when there is a question as to whether a medical service is covered; usually the insurer is obliged to defend a claim while a coverage issue between insurer and policyholder is being resolved. (Freedictionary.com)

Restatement – A series of legal treatises that set out basic U.S. law on a variety of subjects, written and updated by legal scholars and published by the American Law Institutes. While not having the force of statutes or court rulings, the Restatements (as lawyers generally call them) are prestigious and can carry some weight in a legal argument. Topics covered include agency, contracts, property, torts, trusts, and more. (Nolo's Plain-English Law Dictionary)

Separation of powers – Political doctrine of constitutional law under which the three branches of government (executive, legislative, and judicial) are kept separate to prevent abuse of power. Also known as the system of checks and balances, each branch is given certain powers so as to check and balance the other branches. (Cornell University Law School Legal Information Institute)

Statute – A law enacted by a legislative body, such as the United States Congress, or a state senate. (Cornell University Law School Legal Information Institute). The Official Code of Georgia Annotated, otherwise known as "O.C.G.A," is the statute which includes all of the laws of the state of Georgia.

Statute of Limitations – The legally prescribed time limit in which a lawsuit must be filed. (Nolo's Plain-English Law Dictionary)

Suspect Classification – In constitutional law, a group that meets certain qualifications that make the group likely subjects of discrimination. Suspect classifications include those based on race, national origin, and alienage. (Nolo's Plain-English Law Dictionary)

Tax deed – A deed issued to the successful purchaser at an auction for unpaid real estate taxes, but only after passage of a predetermined period of time during which the owner may reclaim the property by paying all past-due taxes, expenses of sale, and interest. (Freedictionary.com)

Uninsured Motorists (UM) Coverage – Uninsured motorist coverage pays for injuries to the insured motorist and his passengers, and in some locations damage to his property, when there is an accident and the other driver is both legally responsible for the accident and uninsured or considered "underinsured." (Insurance.com)

Vicarious Liability – Responsibility for a civil wrong that a supervisor bears when a subordinate or associate has actually committed the acts that give rise to the liability. For example, the owner of a residential rental may be vicariously liable if the manager discriminates against tenants on the basis of their religion. (Nolo's Plain-English Law Dictionary)

Voluntary Payment Doctrine – Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered unless made under an urgent and immediate necessity therefor or to release person or property from detention or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule prescribed in this Code section. (O.C.G.A. § 13-1-13)

WorldCom Securities Litigation – A series of class actions resulting from the collapse of WorldCom due to its stock being artificially high because public statements concerning its business and prospects were false or misleading to investors. (Wikipedia.com)