2011 COURT WATCH REPORT

"*The Georgia Supreme Court and Court of Appeals decide cases in as equitable a manner as possible. While many of these 2011 decisions directly protect Georgia consumers, the judiciary can only correct so many harms. Legislative loopholes, political pressures, and economic realities result in consumers' rights being trampled upon time and time again. Recognizing these necessarily finite judicial protections, Georgia consumers must work to protect themselves from the deleterious effects of systemic wrongs. Education is the first step, and action is the second."*

– 2011 Court Watch Fellow, Matthew P. Massey

INTRODUCTION

The 2011 Court Watch Report is a publication of Georgia Watch, a nonprofit, nonpartisan 501(c)(3) watchdog group that focuses on consumer education and research in the areas of health care, insurance, identity theft, personal finance, and energy and utility issues. The Court Watch Report is intended to inform the public about state court decisions that affect consumer rights in Georgia.

Founded in 2002, Georgia Watch protects individuals and families by developing pro-consumer policies, advocating for consumer-friendly legislation at the state capitol, and assisting consumers in a wide range of areas. As Georgia Watch board member Clark Howard so aptly put it, Georgia Watch "is the only bona fide group in Georgia looking out for me and you as consumers."

The goal of the 2011 Court Watch Report is to educate consumers. Georgia Watch believes that it is important for citizens to know about relevant consumer issues being decided by our judicial system. If Georgia citizens remain cognizant of these matters, then they will be better prepared to avoid compromising situations when they arise. In this way, Georgia consumers may avoid and combat pitfalls that so often occur in the marketplace.

The Georgia judicial system plays an important role in protecting consumers. While the Georgia General Assembly promulgates legislation, courts must rule on how those laws are to be implemented. Nearly every law can be interpreted in more than one way. The judicial system must decide how to properly do that.

Georgia has a three-tiered, hierarchical judicial system. The Trial Courts are the general courts of first impression, the Court of Appeals is the first source for appealing a decision, and the Georgia Supreme Court is the highest court in the state. The Supreme has the discretion to decide which cases it hears. All Georgia courts must follow the Supreme Court's rulings, and the Court of Appeals' decisions are binding on the Trial Courts. This report focuses on Supreme Court decisions and especially salient Court of Appeals decisions, as those cases have the most widespread impact on consumers' rights throughout Georgia.

Consistent with Georgia Watch's mission to protect and empower all Georgia consumers, this report is geared toward readers with diverse backgrounds. It is not a legal treatise, a law review article, or a publication intended solely for lawyers. It is not replete with legalese or specialized jargon. Rather, the Court Watch Report is simply a review of 2011 Georgia Supreme and Appellate Court decisions that may impact the lives of Georgia citizens. Should a reader wish to delve deeper into a given case or issue, then he or she may look up that decision on either the Supreme Court of Georgia's website (http://www.gasupreme.us) or the Court of Appeals' website (http://www.gaappeals.us/).

The Report is organized by area of interest, so that readers may quickly seek out issues that are of special import to them. It is published to raise awareness about the critical role played by our state's courts in rendering decisions that impact millions of Georgia consumers, and provides a reader-friendly overview of those decisions. By issuing the Court Watch Report, Georgia Watch promotes an informed citizenry and enables Georgia consumers to educate themselves regarding laws and court rulings that affect their rights.

The 2011 Court Watch Report was written by Matthew Massey, a 2012 graduate of Emory University School of Law. On behalf of Georgia Watch, the author would like to thank the Court Watch Advisory Committee members for their generous support and advice:

Clare McGuire
Senior Counsel, Georgia Watch

Wingo Smith
Attorney, Georgia Legal Services

Angela Riccetti
Attorney, Atlanta Legal Aid

Danny Orrock
Attorney, Crawford Media Services

Kimberly Charles
Attorney, Atlanta Legal Aid

Mark Elliott Budnitz
Professor of Law, Georgia State University College of Law

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ACCESS TO COURTS

American Home Products Corp. v. Ferrari, 289 Ga. 184 (2011)

This decision represents the culmination of a long, nationally followed court battle that was eventually resolved by the United States Supreme Court. At the direction of those Justices, the Georgia Supreme Court ruled that the National Childhood Vaccine Injury Compensation Act preempts all design-defect claims against vaccine manufacturers for death or serious bodily injuries caused by a vaccine.

In 2007, the Ferrari family brought suit against 18 different vaccine manufacturers after their son was vaccinated and sustained severe neurological damage. The parents claimed that mercury in those manufacturers' vaccines caused their son's injuries, and sued them for negligently researching, manufacturing, testing, warning, and failing to recall the vaccines. The manufacturers denied liability and claimed that the Vaccine Act preempted the Ferraris' lawsuits, thereby shielding them from liability in the Georgia state courts.

Congress passed the Vaccine Act in 1986 to protect vaccine manufacturers from crippling litigation costs. The Act, 42 U.S.C. § 300aa-11 et seq., created a no-fault system whereby victims of vaccine-related injuries must file claims in a designated court to recover for their injuries. Here, the Ferraris argued that the Vaccine Act did not preempt their lawsuit because their son's injuries could have been avoided if the defendants used mercury-free materials. The defendants, however, claimed that some side effects from vaccines are always unavoidable, and therefore the suit should be dismissed and brought in the designated court system.

The Trial Court ruled in favor of the vaccine manufacturers, and the Court of Appeals reversed that decision. The Georgia Supreme Court, on certiorari, initially ruled that the Vaccine Act does not preempt all design defect claims against vaccine manufacturers, because Congress did not clearly intend for the Vaccine Act to automatically preempt each and every one of these claims. Rather, the Court ruled that vaccine manufacturers would not be liable for injurious side effects only if the manufacturers showed, on a case-by-case basis, that the side effects were unavoidable for that specific vaccine.

In response, the United States Supreme Court agreed to hear the case and make a final decision regarding how the national Vaccine Act applied. The U.S. Supreme Court, in *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1070–71 (2011), held that the Vaccine Act "preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects." In accordance with this ruling, the Georgia Supreme Court vacated its earlier decision in favor of the Ferraris, and sent the case to the Court of Appeals to rule in favor of the manufacturers. Now, in Georgia and presumably across the nation, design-defect claims against vaccine manufacturers for injuries or deaths resulting from a vaccine's side effects are automatically preempted and cannot go forward in state court.

Daniel v. Amicalola Electric Membership Corporation, 289 Ga. 437 (2011)

This decision involves the destruction of private property by an electric membership corporation ("EMC"). In 2006, Margaret and Buddie Daniel purchased roughly 25 acres of rural land in Pickens County, GA. On April 6, 2007, the Daniels were shocked to learn that workers from Amicalola Electric Membership Corporation ("AEMC") had entered their land and used chainsaws to clear-cut 40 old trees in a 750-feet-long by 40-feet-wide area through the Daniels' forest. This razing damaged a local spring and creek bank, and exposed an old, single-standing utility pole with unconnected wires dangling on the ground. Apparently, AEMC once maintained utility lines through that area, but had not used the lines in over 15 years. Neither the Daniels nor the land's prior owners ever knew that this easement once existed.

Angered about this destruction on their newly purchased land, the Daniels immediately contacted AEMC. They spoke with a manager who admitted to the Daniels that AEMC had no easement to the land, and promised that AEMC would not reenter the Daniels' property. Wary of these promises, the Daniels hired an attorney to send a cease-and-desist letter to AEMC. The Daniels believed that this issue was over. They were wrong.

On May 21, 2008—thirteen months after receiving the AEMC manager's promises—AEMC re-entered the same area of forest. This time, workers sprayed the entire area with herbicide to kill all vegetation. The

Daniels immediately sued AEMC for trespass, conversion, and a declaratory judgment forbidding future entry on the land. In defense, AEMC claimed that it had a valid prescriptive easement to that area, and that the lawsuit could not go forward because the Daniels could only sue within one year of the alleged trespass. This time period during which a lawsuit may be brought is called the "statute of limitations." The Daniels responded that AEMC had no easement, that the statute of limitations did not apply where fraud was present, and that the statute of limitations under O.C.G.A. § 46-3-204 was unconstitutional. The Trial Court ruled in favor of AEMC, and the Supreme Court heard the case to resolve these issues.

First, the Court decided whether the Daniels could contest the constitutionality of the statute of limitations. Under O.C.G.A. § 9-4-7(c), plaintiffs must notify the Attorney General's office when contesting a statute's constitutionality. This notice gives the Attorney General time to respond to the lawsuit should he or she wish to weigh in on the matter. AEMC wanted the Court to declare the Daniels' constitutionality argument void, because the Daniels did not notify the Attorney General until the day after they filed this claim. The Court, however, responded that the Daniels' claim could go forward, because they provided the Attorney General's office with sufficient notice.

Second, the Court held that O.C.G.A. § 46-3-204 was constitutional. This statute shields EMCs from easement lawsuits filed more than a year after the right to sue accrued, and was enacted during the Great Depression to provide protection to public utility companies operating in rural areas. Here, the Daniels sued AEMC more than one year after that right accrued. Applying the "rational basis test" of *Nichols v. Gross*, 282 Ga. 811, 813 (2007), the Court held that this statute serves a legitimate government interest by "encourag[ing] widespread growth of public utility service in Georgia." Therefore, the one-year statute of limitations was declared valid, leaving the Court to decide how to apply that law to the Daniels' claims.

The Court ruled that the initial 2007 clear-cutting incident was barred by the statute of limitations under O.C.G.A. § 46-3-204. The Daniels claimed that the statute of limitations should not be applied, because the AEMC manager fraudulently promised them that the company had no easement and would not reenter the property. The Court, however, ruled that these statements did not stop the one-year time-period from running, and that the Daniels should have sued AEMC if they wanted to obtain a

binding decision. Therefore, the Daniels could not sue AEMC for this claim.

The Court did, however, hold that the Daniels could go forward with their lawsuit concerning the 2008 trespass when AEMC sprayed herbicide on their land. Since the Daniels filed the lawsuit only two months after that intrusion, the one-year statute of limitations did not time-bar the suit. Therefore, the Supreme Court reversed the Trial Court's decision in favor of AEMC on this claim, and remanded the case so that the Daniels could proceed on this issue.

This decision is important because it clarifies the timeframe during which a consumer may bring a trespass suit against an EMC, and because the Court refused to punish AEMC for its manager's broken promises. By explaining the constitutionality of O.C.G.A. § 46-3-204, the Court ensured that future plaintiffs like the Daniels must bring their lawsuit within one year, or else lose the ability to sue for that claim.

Further, the Court held that the AEMC manager's promises did not stop the statute of limitations from running on that claim. By maintaining that the Daniels could not rely on the AEMC manager's promises, the Court effectively held that the only recourse in similar situations is to file a lawsuit. Therefore, citizens faced with these issues must sue an EMC if they want a valid, enforceable resolution.

Oglethorpe Power Corporation v. Forrister, 289 Ga. 331 (2011)

This case involves a lawsuit by Polk County residents against the neighboring Sewell Creek Energy Facility. The residents claimed that the power plant's loud noises and vibrations constituted a public nuisance. The Georgia Supreme Court used this case to clarify when citizens may sue power plants under this theory.

Sewell Creek Energy Facility began operating in Polk County in 2000. It is a "peaking" power plant, which means that it is only used when consumer demands for energy are especially high, such as when people turn on air conditioners en masse in the summertime. When the power plant's extra energy is needed to supplement regular energy supplies, workers fire up gas-fired combustion turbines that produce energy quickly. While this gives consumers the extra energy that they need, it also creates very loud

noises and strong vibrations that can diminish enjoyment of their property.

In Georgia, public nuisance lawsuits are classified by whether the nuisance is permanent or continuing. A permanent nuisance is one that is not abatable and continues indefinitely. For example, if a bridge produces downstream runoff pollution, then that nuisance is considered permanent because it is constant and enduring. A continuing nuisance, on the other hand, is one that can be stopped, and the nuisance may vary over time.

The distinction is important because if a nuisance is permanent, then a plaintiff is only allowed to sue once and must bring suit within four years after the nuisance is created, pursuant to O.C.G.A. § 9-3-30(a). Therefore, the owner of a permanent nuisance—such as a county that owns a power plant that constantly creates loud noises—cannot be sued repeatedly and at great expense. However, if a nuisance is continuing, then a citizen may sue within four years of every time that the nuisance reoccurs—this time period is called the "statute of limitations." This provides an incentive to fix public nuisances that may be cured relatively quickly and easily.

The distinction between permanent and continuing was important in this case because if the power plant's noises and vibrations were considered to be permanent, then the citizens could not sue. They filed suit in 2007—more than four years after the noises and vibrations began in 2000. The plaintiffs, however, argued that in 2004 the power plant noises and vibrations significantly changed. They claimed that this constituted a continuing nuisance, which would allow the suit to go forward.

The Supreme Court made two rulings in this case. First, it ruled that the old noises and vibrations at Sewell Creek Energy Facility were a permanent nuisance. This meant that the lawsuit could not go forward on that basis. Second, the Court ruled that the new noises in 2004 might be considered a continuing nuisance, which would allow the plaintiffs to sue with respect to that new noise, as opposed to the general, old noise. The Court was extremely direct in the scope of this distinction between old and new noises, and clarified that the new noise was only truly different if it was of a different type—rather than degree—than the pre-2004 old noises.

The Court based this decision on public policy concerns. It reasoned that "[i]f a plaintiff could sue a public utility each time the harm resulting from a permanent nuisance changed by degree, the rule requiring a plaintiff

to bring one lawsuit for past and future damages within the applicable statute of limitation would be meaningless." The Court ruled in favor of the power plant for the permanent, old noises and vibrations that had been occurring since 2000, and remanded the case to the lower courts to determine whether the new noises and vibrations were qualitatively different than the old ones.

The Supreme Court ultimately decided in favor of consumers, because it allowed the suit to survive the power plant's motion for summary judgment for the new noises and vibrations. The Court gave the power plant's neighbors a chance to seek abatement of the new noises and vibrations, yet still maintained the policy concerns for shielding the power plant from crippling litigation expense for the old noises.

BUSINESS FRAUD AND ABUSE

American Home Services v. A Fast Sign Company, Inc., 310 Ga. App. 315 (2011)

With this decision, the Georgia Court of Appeals invited the Georgia Supreme Court to revisit how much money plaintiffs may recover from businesses that violate consumer protection laws. In 2003, A Fast Sign Company, Inc. ("Fastsigns") filed a class action lawsuit against American Home Services, Inc. ("AHS") for alleged violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). Fastsigns claimed that, between 2002 and 2003, AHS bombarded its fax machines with unsolicited advertisements regarding siding, window, and gutter-installation services. Fastsigns argued that the use of these "junk faxes" directly violated the TCPA, which prohibits a company from using "any telephone, facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." Companies that violate this statute may be liable to the plaintiff for treble damages, which allows courts to triple the fines for each violation of the TCPA. Accordingly, the Trial Court awarded $459,000,000 to the class for the 306,000 unsolicited faxes sent by AHS.

The Georgia Court of Appeals vacated this decision and sent it back to the lower court to recalculate the damages. The Appellate Court ruled that the Trial Court incorrectly calculated damages based on the number of faxes sent, as opposed to the number of faxes received. In its analysis, the Court noted that—while other jurisdictions calculate damages based on the number

of faxes sent rather than received—Georgia courts must calculate damages based on the number of faxes actually received by plaintiffs for two reasons.

First, in 2005, the Georgia Supreme Court ruled that "[t]he TCPA is violated only if a plaintiff receives an unsolicited fax," thereby suggesting that damages may only be awarded for faxes that a plaintiff receives. Second, the Court reasoned that because damages are meant to compensate plaintiffs for harm done by the defendant, "[a] person or entity that does not receive an unsolicited fax has no need for such recovery." Therefore, the Court vacated the Trial Court's decision to award $459 million, and sent the case back down with instructions to recalculate damages based on the number of unsolicited faxes received as opposed to sent.

The Georgia Supreme Court granted certiorari on February 6, 2012. In deciding how to calculate damages, the Supreme Court may either significantly expand or constrain the incentives for businesses to honor consumer protection laws in Georgia. Defendants in AHS's position would rather that courts calculate damages based on the number of faxes received as opposed to sent. Such a calculation would force plaintiffs to track down all faxes sent, ask recipients to check their files, and then clarify whether each unsolicited fax was indeed received. This investigative work would be extremely costly and burdensome, discourage similar suits, and likely result in a lower damages award.

Plaintiffs, on the other hand, would rather that the Court calculate damages based on the number of faxes sent. This analysis would require a simple consultation of a defendant's records, and avoid the burden of investigating whether each and every fax was actually received. Should the Court calculate damages based on the number of advertisements sent, then the Court will send a clear message to Georgia businesses that if they violate consumer protection laws, then they will pay harsh penalties.

The Supreme Court's decision had not been rendered by the publication date of the 2011 Court Watch Report.

Amerireach.com LLC v. Walker, 290 Ga. 261 (2011)

Here, a Georgia physician sued a Texas company and individual corporate officers for violations of the Georgia Fair Business Practices Act. The Georgia Supreme Court both reinforced the validity of contract forum

selection clauses, and clarified how the "fiduciary shield" doctrine applies in Georgia. This decision significantly impacts businesses throughout Georgia for both issues.

In 2006, Dr. Carol Walker began purchasing nutritional supplements from Amerireach.com, LLC ("AmeriSciences"), and continued with that relationship until it soured in early 2009. On February 5, 2009, Dr. Walker tried to terminate the supply contract and force AmeriSciences to buy back her prior purchases. Being unsuccessful, she sued the company on April 7, 2009, in Gwinnett County for violations of the Georgia Fair Business Practices Act. In turn, AmeriSciences filed suit in a Harris County, Texas court to enforce a contractual forum selection clause between the parties that designated Harris County as the location for any litigation between the parties. The Texas court ruled to enforce the forum selection clause, and the Georgia Supreme Court held that the Texas judgment—as per the Full Faith and Credit Clause—was binding for that issue. Therefore, Dr. Walker had to litigate the Fair Business Practices Act violation in Texas.

The second significant issue that the Georgia Supreme Court addressed involved the fiduciary shield doctrine. Dr. Walker sued three individual corporate officers at AmeriSciences, including the company's President, Chief Operating Officer, and General Counsel for their roles in the alleged Fair Business Practices Act violations. These individuals asserted that the Georgia courts could not force them to appear in court, because their only connections to Georgia were through their roles as corporate officers in AmeriSciences. This defense—the "fiduciary shield doctrine"—protects employees from being sued in an individual capacity for actions that they take on behalf of an employer.

In its decision, the Supreme Court declared that the fiduciary shield doctrine did not apply in this factual scenario. This decision overruled earlier Georgia cases, and went against three federal decisions that followed that precedent. As Justice Carley noted, "employees of a corporation . . . may themselves be subject to jurisdiction if those employees were primary participants in the activities forming the basis of jurisdiction over the corporation." The Court then clarified that this ruling extends to officers of other corporate forms, and held that the AmeriSciences corporate officers could be sued as individuals in Georgia.

This decision is important for two reasons. First, the Court clarified

that forum selection clauses will be enforced for lawsuits concerning Fair Business Practices Act claims in Georgia. Second, the Court eliminated the fiduciary shield doctrine, thereby making it easier to exercise personal jurisdiction in Georgia over individual corporate officers. This decision opens the door for corporate officers who violate Georgia laws to be sued in an individual capacity, and makes it easier for Georgia citizens to recover damages against those individuals when necessary.

Benedict v. State Farm Bank, 309 Ga. App. 133 (2011)

The Georgia Court of Appeals ruled heavily against consumer interests with this far-reaching decision. In 2003, State Farm Bank issued a credit card to C.M. Benedict. In July 2006, State Farm informed Benedict that it intended to increase the card's interest rate. During that call, State Farm representatives inquired about his card's outstanding balance, to which Benedict replied that he would be paying off his account within a month. A week later, on August 20, 2006, a second State Farm representative called Benedict and told him to pay off the balance immediately. Benedict informed the employee of his plan to pay off the balance in September, and asked that the company stop calling him. However, the representative allegedly told Benedict that State Farm would not honor his request, and instead would call Benedict as often as it liked. Benedict claimed that—true to its employee's word—State Farm called him from blocked numbers at least 168 times between August 20 and September 2. Benedict alleged that every time he picked up the phone, State Farm representatives immediately would hang up the phone but call back later.

Benedict sued State Farm in Fulton County. He claimed that State Farm's incessant phone calls amounted to an invasion of privacy or an intentional infliction of emotional distress. State Farm moved to dismiss Benedict's claim, and also sued him for both his outstanding debt and to enforce the credit card agreement's mandatory arbitration clause. The Trial Court granted State Farm's motion to dismiss Benedict's tort claims, and upheld the mandatory arbitration clause. Benedict appealed that decision, and the Georgia Court of Appeals issued its ruling on March 22, 2011.

First, the Court analyzed whether the Fulton County Superior Court properly dismissed Benedict's claims regarding invasion of privacy and intentional infliction of emotional distress. The Court quickly affirmed the ruling on intentional infliction emotional distress, because Benedict's

complaint did not allege the requisite "humiliation, embarrassment, fright, extreme outrage, or severe emotional distress" to recover on that theory.

Second, the Court entered a lengthier discussion on the reasons as to why Benedict's invasion of privacy claim would not stand. While acknowledging that State Farm may have indeed called Benedict hundreds of times over approximately three weeks, the Court wrote that an invasion of privacy claim requires a "physical intrusion" that is more than "merely annoying someone or disturbing his peace or tranquility." Here, Benedict would need to show that the incessant collection calls were "akin to surveillance, a physical trespass upon his property, or a physical touching of his person" to sufficiently state this claim. Since Benedict did not show that the 168 calls rose to this standard, the Court of Appeals affirmed the dismissal.

Finally, the Court analyzed whether the Trial Court erred when it compelled Benedict to arbitrate the claim for outstanding credit card fees. Benedict appealed this ruling on the basis that State Farm provided no evidence whatsoever that it ever informed Benedict of a mandatory arbitration clause. Benedict claimed that since the company was unable to show this fact, the clause was unenforceable. The Court, however, rejected this argument, noting that the company's "usual and customary business practice was to mail a newly issued credit card and a copy of the standard agreement to the cardholder in a single envelope," and that Benedict referenced a "Credit Card Agreement and Disclosure Statement" in his pleadings. The Court deemed this evidence sufficient to show that State Farm provided notice of the mandatory arbitration clause to Benedict. Thus, the Court of Appeals affirmed the Trial Court's rulings in favor of State Farm Bank.

This decision is important for two reasons. First, the Court of Appeals affirmed significant barriers to recovery against creditors who harass consumers via telephone calls. The Court passed on the chance to expand consumer protections as it did in *Anderson*,[1] where it held that a plaintiff

[1] The Court distinguished this case from *Anderson v. Mergenhagen*, 239 Ga. App. 546 (2007), which Benedict relied upon to show that "a relatively harmless activity can become tortious with repetition as when, for example, telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, and becoming such a substantial burden to his existence." (internal citation omitted). The Court noted that the defendant's actions in *Anderson* involved visual surveillance rather

could show an invasion of privacy based on a defendant's frequent video surveillance of her actions. Rather, the court restricted the full impact of that ruling, and upheld a requirement of "physical intrusion" for invasion of privacy claims. This opens the door to similar behavior by collection agencies in the future, as the Court held that incessant phone calls—such as allegedly occurred here—are not actionable invasions of privacy.

Second, the Court of Appeals reinforced the binding nature of arbitration clauses in consumer contracts. While arbitration is theoretically a fair proceeding in front of an unbiased neutral party, consumer groups disfavor this method of alternative dispute resolution when doing so is detrimental to the consumer. While certain types of arbitration may be entered into voluntarily, in this case, Benedict claimed that State Farm could not show that it ever informed him of a mandatory arbitration clause. The Court of Appeals did not make State Farm prove that it gave notice to Benedict; rather, it merely made the corporation show that its standard business practice was to include such clauses when it issued new credit cards. Therefore, the Court instituted a low standard—one where the defendant need only show customary practice, rather than specific notice—that corporations must abide by to enforce the validity of mandatory arbitration clauses.

The Georgia Supreme Court denied certiorari on November 7, 2011; therefore, this case will remain good law for the foreseeable future.

Novare Group, Inc. v. Sarif, 290 Ga. 186 (2011)

This case involves sales representatives' broken promises regarding scenic views that buyers would enjoy from their new Atlanta high-rise condominiums. In late 2005 and early 2006, eight people purchased units in the 26-story Twelve Atlantic Station condominium complex. According to plaintiffs, the sales representatives and advertisers touted the condos' "spectacular city views" of the Atlanta skyline. The representatives allegedly promised that these breathtaking views would remain unobstructed, and that the only surrounding development would be no taller than low- to mid-rise office buildings. Nothing, in the purchasers' eyes, would ever block those views.

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than harassing phone calls, and that Benedict made no showing whatsoever that the frequent phone calls constituted a "substantial burden to his existence."

The purchasers were fooled. The developers—while simultaneously promoting the unobstructed views—were allegedly planning to build a 46-story apartment building directly across the street from the purchasers' new condos. This taller building would completely obstruct the cherished views. After learning of this construction, the purchasers sued the builders and representatives for fraud, negligent misrepresentation, negligent supervision, and violations of the Georgia Fair Business Practices Act. The Fulton Superior Court ruled in favor of the developers, the Court of Appeals reversed that ruling, and the Georgia Supreme Court agreed to hear the case.

The Georgia Supreme Court ruled in favor of the developers. The Justices based their ruling on the plain language of the consumers' contracts. On each contract, the developers wrote that "[t]he views from the natural light available to the Unit may change over time due to, among other circumstances, additional development and the removal or addition of landscape." Furthermore, in accordance with the Georgia Condominium Act, the very first contract page stated that "[o]ral representations cannot be relied upon as correctly stating the representations of seller." The Court held that since the consumers "all signed agreements that expressly state[d] that the views may change over time," they could not rely on what the sales representatives promised. Therefore, the purchasers could not bring the suit.

This decision reinforced that, at the end of the day, "caveat emptor" rules in Georgia. The Court strictly looked at the plain language of the real estate contracts, and refused to allow consumers to sue for oral misrepresentations made during the sales process. This interpretation of the consumer's claims seemingly ignored certain provisions of the Georgia Fair Business Practices Act, which do not have the same reliance requirements as the common law claims. Furthermore, this decision significantly insulates developers from liability, and provides no incentive to ensure that sales representatives tell the truth to consumers. So long as a contract contains enough pointed disclaimers, then the developer's sales representatives may, apparently, utter whatever falsities that they believe will ensure a closing. This decision effectively waters down the consumer protections that should have been afforded by the Georgia Fair Business Practices Act. As the Georgia Supreme Court harshly reminded Georgia consumers with this decision, "Let the buyer beware."

Pollman v. Swan, 289 Ga. 767 (2011)

Stephen and Linda Pollman purchased a Savannah townhome in 2004. The couple soon found that their new home—built by Swan Construction—had multiple defects that decreased its value. Therefore, they sued the construction company for claims of breach of contract, negligence, fraud, and violations of the Georgia Racketeer Influenced and Corrupt Organizations Act ("RICO"). The Trial Court quickly ruled in favor of the construction company on the contract, negligence, and RICO claims, and the Court of Appeals affirmed this decision. The Georgia Supreme Court agreed to hear this case because it wanted to clarify two issues: (1) the rationale for the RICO claim decision; and, (2) the reasons that the plaintiffs lost on the contract and negligence claims.

The Supreme Court first examined the Pollmans' RICO claim. The Court of Appeals initially ruled that the Pollmans could not proceed with the RICO suit because they did not prove that they detrimentally relied on Swan Construction's alleged misrepresentations. The Supreme Court, however, ruled that the Court of Appeals' analysis was incorrect, and instead followed the United States Supreme Court's RICO interpretation in *Bridge v. Phoenix Board & Indemnity Co.*, 553 U.S. 639 (2008). There, the U.S. Supreme Court held that the plaintiffs did not need to show specific reliance on the alleged misrepresentations to go forward with their suit. Adopting this rule, the Georgia Supreme Court ruled that the Pollmans were not required to show detrimental reliance as a prerequisite to the RICO claim. This new reading makes it easier for plaintiffs to bring these actions.

Second, the Court ruled that the Pollmans lost on their claims of breach of contract and negligence because they did not provide concrete evidence from which one could calculate specific damages. Since the Pollmans could not show any evidence other than the amounts for which they purchased and sold the townhome, they could not go forward with the breach of contract and negligence claims. The Pollmans did not need to provide a specific dollar amount when attesting to damages suffered; however, they nonetheless needed to "present evidence sufficient to serve as the basis for a fact finder to calculate the amount of damages due" should the defendants be found liable. This ruling should be a cautionary message to consumers' attorneys that they must plead their damages with discrete and concrete evidence in similar lawsuits.

Thomas v. Bank of America Corp., 309 Ga. App. 778 (2011)

This decision demonstrates how consumers should use great discretion before purchasing certain financial packages. In 2007, Bank of America offered Thomas a debt cancellation product called "Credit Protection Plus." The bank sold this product to ensure debt cancellation in the event of a consumer's job loss, injury, death, or other enumerated condition. While the selected Bank of America customers could each purchase this product for 95 cents per $100 of outstanding credit card debt, not every consumer qualified for all of the product's benefits. Therefore, while various consumers bought Credit Protection Plus, some of them—such as Thomas—did not receive all the benefits that the package offered.

When Thomas purchased the Credit Protection Plus package, Bank of America officials allegedly never told her that she did not qualify for the package's full range of services. Rather, she claimed that Bank of America employees misrepresented to her that she would receive debt cancellation services for which she was actually ineligible. Thomas brought a class action lawsuit against the bank for claims of insurance fraud, unfair and deceptive acts, and RICO violations. After a series of decisions concerning the proper venue, the Trial Court dismissed the lawsuit because it ruled that federal banking law preempted this action.

Thomas appealed the Trial Court's ruling on two main grounds. First, she argued that, despite federal banking laws on the issue, debt cancellation contracts are inherently of state concern, which requires those lawsuits to proceed in state courts. The Court of Appeals disagreed, holding that federal banking laws expressly preempt the entire field of debt cancellation contracts. The Court noted that the Comptroller of the Currency regulates these contracts pursuant to 12 C.F.R. § 37.1, which "sets forth the standards that apply to debt cancellation contracts and debt suspension agreements entered into by national banks." Therefore, Thomas could not proceed in state court on this issue.

Second, Thomas argued that debt cancellation contracts act as insurance policies that are subject to state—rather than federal—regulation. The Court of Appeals, however, responded that debt cancellation contracts are not insurance policies because a "[bank's] necessity to maintain such reserves and to adjust its charges in relation to both reserves and the risk involved in a particular transaction has long been recognized as an essential

part of the business of banking." Therefore, Thomas could not sue in a Georgia state court, and instead had to bring her action in federal court.

While this case's immediate issues involved the proper forum for litigation, Thomas never would have been in this situation if she had been thoroughly advised of the financial package that she purchased. When deciding whether to purchase similar financial packages, consumers must take extra precautions to employ "caveat emptor" skepticism. Consumers should refrain from making such a purchase if unable to consult an expert or if unsure of the package's specificities.

While remaining good case law for the immediate future, the holding of this case may soon no longer be applicable in Georgia depending on certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. As those preemption issues are still being ironed out, it is not entirely clear at this time how the Act will apply to lawsuits such as this.

CONSUMER DEBT

Cook v. NC Two, LP, 289 Ga. 462 (2011)

The Supreme Court reinforced Georgia safeguards from abusive debt collection practices with this decision. By mandating strict compliance with O.C.G.A. § 18-4-64(a), the Court ruled that judgment creditors—people or companies that collect outstanding debt pursuant to a valid court-issued judgment—who attempt to garnish a consumer's assets must wholly satisfy notice requirements that protect consumer interests.

Under O.C.G.A. § 18-4-64(a), a judgment creditor must timely notify a consumer by one of several methods within a short time of taking a garnishment action. Generally, garnishment actions are between a judgment creditor and an entity that holds a consumer's assets—such as a bank or employer. Garnishment actions compel these asset-holders to hand over a consumer's money to the judgment creditor. Unless expressly notified, the consumer may never know that this action occurred until after the money has been debited from his or her account. Therefore, this statute ensures that a consumer is provided with early notice of a garnishment action so that he or she may intervene and raise any objections, or to request garnishment exemptions pursuant to various Georgia and federal statutes.

In 2009, NC Two, L.P, a debt collector, served a summons of garnishment to an Athens, GA bank, and ordered that the bank turn over assets belonging to Mr. Kenneth Cook. Under O.C.G.A. § 18-4-64(a), NC Two was required to send Mr. Cook a written notice within three days after serving the summons to Mr. Cook's bank. However, NC Two did not mail that notice until eight days after it served the bank. Mr. Cook sued NC Two for failure to provide the timely notice, and NC Two argued that—while not strictly complying with the three-day notice requirement—it nonetheless "substantially complied" with the notice statute.

The Trial Court ruled in favor of NC Two, and the Court of Appeals affirmed that decision. The Georgia Supreme Court agreed to hear this case to determine whether NC Two "substantially complied" with O.C.G.A. § 18-4-64(a).

The Georgia Supreme Court reversed the lower court's decision, and ruled that NC Two did not substantially comply with the three-day requirement for providing notice. The Court noted that the Georgia legislature passed O.C.G.A. § 18-4-64(a) after the U.S. Supreme Court ruled in *North Georgia Finishing v. Di Chem*, 419 U.S. 601 (1975), that Georgia's then-existing garnishment laws violated a consumer's due process by denying the consumer an early opportunity to contest a garnishment action. Accordingly, the Georgia General Assembly passed O.C.G.A. § 18-4-64(a) to require a judgment creditor to provide notice either by delivering a copy of the garnishment summons "as soon as is reasonably practicable," or by mailing the notice within three days after the creditor serves the bank.

These rules ensure that a consumer in Mr. Cook's position has sufficient time to protect his own interests. In ruling against NC Two, the Supreme Court held that "when the statute is plain and unambiguous and susceptible to but one natural and reasonable construction," the plain language of the statute must be followed. Therefore, in Georgia, a judgment creditor must strictly abide by the three-day notice requirement when mailing a garnishment notice to a debtor.

In re: UPL Advisory Opinion, No. 2010-1 (Sept. 12, 2011)

This advisory opinion[2] clarified when a licensed attorney must represent a person or corporate entity in garnishment actions. The Court concluded that a non-lawyer may not represent someone who is served with judicial notice to surrender money in settlement of a debt or claim. Should a non-lawyer, such as a clerical or administrative corporate employee, attempt to answer for another individual or a corporation in such an action, then that person would be engaging in the unlicensed practice of law.

Justice Nahmias pointed out, in his concurring opinion, that interested parties should propose court rules that would allow a non-lawyer corporate agent to file garnishment answers. Such rules, if adopted, would significantly lessen the corporate burden of hiring counsel for garnishment work, as it would allow the corporation to use non-lawyer personnel to undertake some of the routine aspects of these proceedings.

In early 2012, the Georgia General Assembly followed Justice Nahmias's suggestion and passed H.B. 683. This bill amended O.C.G.A. § 18-4-1 to specifically clear the way for authorized officers or employees—including non-licensed attorneys—to file certain answers on behalf of garnishees. This amendment is important to consumers because, when filing these answers, the responding individual's decisions may significantly impact a consumer's well-being. These decisions may include ascertaining forms of excludable income, making ownership determinations, and applying other legal principles to potentially complicated factual scenarios. As filing these answers is no longer considered the practice of law, non-licensed corporate officers and employees may now make these decisions without the aid of counsel.

GENERAL CONSUMER INTERESTS

Karle v. Belle, 310 Ga. App. 115 (2011)

This decision impacts landlords and tenants throughout Georgia. Under O.C.G.A. § 44-7-14, an out-of-possession landlord may not be responsible for a damages stemming from his or her property if certain

[2] An advisory opinion is an opinion by the Court that does not have the effect of deciding a specific legal issue, but instead is the Court's standpoint on a given rule or proposition.

conditions are met. The statute reads that such a landlord "is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair."

In 2005, Manjiri Karle purchased an Atlanta condo that he began leasing to the Pulipakas, who remained in exclusive possession throughout all relevant times. On March 5, 2008, the condo's hot water heater burst, causing significant damage to a neighboring unit owned by Euris Belle. Belle sued Karle, claiming that Karle breached his landlord's duty to repair and maintain the hot water heater. Belle moved for summary judgment, and the Trial Court ruled in the plaintiff's favor. Karle appealed, claiming that—as an out-of-possession landlord without the requisite notice—he was not liable for those damages under O.C.G.A. § 44-7-14.

The Court of Appeals ruled in favor of the out-of-possession landlord, Karle. The Court wrote that Karle fully qualified for the protections of O.C.G.A. § 44-7-14, because he relinquished control of the condo to the Pulipakas, fully parted with possession, and never revoked those conditions. The Pulipakas, meanwhile, testified that they never reported any problems to Karle, and that Karle could not otherwise have known that the hot water heater was malfunctioning. Therefore, in accordance with O.C.G.A. § 44-7-14, Karle was not liable to Belle for the damages to his condo.

This decision is important to consumers because it shows that tenants must inform the landlord of problems with the property, or else the landlord may not be responsible if something goes wrong. This conclusion may serve to be problematic, because it seems to require residents to rely on neighboring tenants to inform their landlords of property problems if the neighbor wants to eventually sue that landlord for property damages. Therefore, tenants should be careful to timely and accurately report any property problems as soon as they arise.

Riggins v. Deutsche Bank National Trust Co., 288 Ga. 850 (2011)

This case is very important for anyone who may inherit a gift from someone's will. Here, Amanda Jones owned a home in Fulton County, where she lived with her niece, Lillie Mae, and her great-niece, Riggins. Before passing away, Amanda executed two wills. The first will—executed

June 13, 2003—left her entire property to her stepson, Eugene. Amanda later reconsidered this decision, and decided instead to leave her property to Lillie Mae and Riggins. Amanda executed this will on October 27, 2003, and, in it, explicitly revoked the will leaving the property to Eugene.

After Amanda passed away in April of 2005, Lillie Mae and Riggins continued to live in Amanda's house. They did not immediately offer the will for probate, presumably deciding to deal with those formalities later. However, during this time, Eugene—knowing that his stepmother had passed—probated the will in his possession, took ownership of the property, and transferred ownership of the property to Ameriquest Mortgage Company, which later sold it to Deutsche Bank. While Riggins and Lillie Mae initially had a superior will, Eugene quickly took control of the property and sold it.

After learning of Eugene's actions, Lillie Mae and Riggins tried to probate the October 27 will. They argued that they owned the property, because that later will left the property to them and explicitly revoked Eugene's will. Deutsche Bank, on the other hand, argued that it owned the deed because it bought the property in good faith.

In Georgia, the "good faith" statute of O.C.G.A. § 44-2-4(a) states that "[a]ll innocent persons, firms, or corporations acting in good faith" when purchasing property are protected against any unrecorded liens or conveyances to the property. Citing this statute, the bank argued that it was a good faith purchaser because it bought the property from Ameriquest in good faith, and there were no other recorded liens or conveyances at that time. The Supreme Court agreed with the bank, and held that the good faith statute protected its interest in the property. Since Lillie Mae and Riggins had yet to probate the October 27 will when the bank purchased the property, that unrecorded deed had no bearing on the bank's ownership. Therefore, Lillie Mae and Riggins lost their claim to Amanda's house.

This case serves as a stark warning to anyone who is an intended beneficiary in someone's will. When a consumer knows that he or she was left a gift, the consumer should immediately execute the will and establish proper legal ownership over the gift. Here, Lillie Mae and Riggins lost ownership because they did not come forward with the superior will in a timely fashion. Because of this procrastination, Eugene was able to probate Amanda's first will and eventually transfer the security deed to the bank,

which established the "good faith" defense against Lillie Mae and Riggins' claims to the house. So as to avoid a similar outcome, Georgia citizens should probate valid wills as soon as possible with the applicable local court.

Sapp v. Canal Insurance Co., 288 Ga. 681 (2011)

The Georgia Supreme Court displayed significant respect for consumer and public policy interests in this opinion. Here, the plaintiff, Ms. Sapp, was injured in Tift County when a dump truck driver crashed into her car. Ms. Sapp brought suit against: (1) the dump truck driver; (2) the driver's employer, EDB Trucking; and, (3) EDB Trucking's insurer, Canal Insurance Company. She claimed that these entities were liable for damages and injuries that she sustained in the crash.

Canal Insurance immediately moved for a ruling that would protect the company from any liability for the dump truck driver's negligence. The company pointed to its insurance contract clause dictating that Canal Insurance would not be responsible for any accidents that occurred outside a 50-mile radius-of-use limitation. Here, the accident undeniably occurred outside that 50-mile radius, and the lower courts ruled in the insurance company's favor.

Ms. Garland's appeal concerned the Georgia Motor Carrier Act. Under that statute, motor carriers must be licensed and subject to certain insurance standards. A "motor carrier," under O.C.G.A. § 46-1-1(8), is a vehicle "engaged in transporting property, except household goods, in intrastate commerce in this state." Dump trucks, such as the one operated by EDB Trucking and insured by Canal Insurance, fall under this category. The Georgia Motor Carrier Act does not allow the radius-of-use limitations for motor carriers that Canal Insurance provided for. These coverage limitations may be acceptable for passenger vehicles, but not for motor carriers.

EDB Trucking never obtained the appropriate motor carrier coverage, and instead only insured the dump truck as a regular passenger vehicle. Consequently, EDB Trucking paid less money for its inadequate insurance coverage. Canal Insurance argued that, since EDB Trucking lied on its application papers by not applying for the proper motor carrier coverage, the insurance company could not be held liable for a crash that occurred outside the 50-mile radius-of-use. If accepted by the Court, this argument would have left Ms. Sapp unable to fully recover for her injuries.

The Supreme Court ruled in favor of Ms. Sapp. The Court noted that while EDB Trucking did not obtain the proper motor carrier coverage, Canal Insurance should have known that the company's dump truck was a motor carrier and required a proper insurance plan. The Court proclaimed that "any consequence arising from noncompliance with the Act by the insured motor carrier or its insurer should be suffered by one or both of the noncompliant parties rather than by the innocent motoring public." As Canal Insurance did not supply the dump truck with more comprehensive coverage, the Court ruled that Ms. Sapp could sue the company for the full policy limit of $500,000. Therefore, the Court eschewed the 50-mile-radius limitation, as "[a]ny other result under the circumstances presented here would have the effect of rewarding an insurer for its insured's noncompliance with the law and its own duplicity or negligence in failing to supply the appropriate type of coverage to its insured, all to the detriment of the motoring public and contrary to the purpose of the Act."

The Georgia Supreme Court's decision in this case greatly benefits consumers. This ruling requires insurance companies to take responsibility for its customers even when they do not obtain proper coverage. The Court implemented good public policy, and ruled on the reality of the matter rather than on technicalities. In declaring Canal Insurance's limitations void, the Supreme Court put the best interests of Georgia citizens first.

GOVERNMENT TRANSPARENCY

City of Statesboro v. Dabbs et al., 289 Ga. 669 (2011)

This case implicates government officials' violations of the Open Meetings Act. Pursuant to this statute—O.C.G.A. § 50-14-1—government officials must notify the public of when, where, and why certain meetings are to take place so that "[t]he public at all times shall be afforded access to meetings declared open to the public." The Georgia General Assembly gave Trial Courts the power to enforce compliance with this statute, which "include[s] the power to grant injunctions or other equitable relief." The statute also requires government officials to comport with specific record-keeping requirements, all in an effort to promote the transparency and honesty of local governments.

On April 1 and April 19, 2010, the Statesboro Mayor and City

Council Members met to discuss the city's budget without giving proper notice or correctly recording the meeting. After plaintiffs filed suit, the Statesboro Mayor and City Council Members admitted that they violated the Open Meetings Act by having secret meetings on the specified dates. They argued, however, that the Trial Court erred by (1) awarding attorney's fees to the citizens, and (2) issuing an injunction requiring the Statesboro officials to refrain from holding secret meetings. The Trial Court also ordered the Statesboro officials to redo the secret meetings, albeit this time in an open and public setting. The Statesboro politicians based these defenses on statutory technicalities that the citizens supposedly failed to honor, such as not sending *ante litem* ("before litigation") notice to the City before suing.

The Georgia Supreme Court affirmed the Trial Court's decision in favor of the Statesboro citizens. The Court reiterated that Georgia citizens may be awarded attorney's fees when suing to enforce the Open Meetings Act. Further, the Supreme Court maintained that the Statesboro officials were correctly prohibited from further violations of the Open Meetings Act.

The Georgia Supreme Court ruled in favor of government candor and accountability with this decision. It also clarified that government officials will be held strictly accountable to the Open Meetings Act requirements, and preserved the ability for Trial Courts to impose sanctions against officials who hold secret meetings.

In the spring of 2012, the Georgia General Assembly enacted H.B. 397 in an effort to strengthen Georgia's Open Meetings and Open Records Acts. The substantive changes include: clarifying what meetings must be open to the public, reducing the cost of record requests, providing broad enforcement powers to the Attorney General, and increasing fines for violations. This bill is considered by many to be a significant step towards greater government transparency in Georgia.

PRODUCTS AND CONSTRUCTION LIABILITY

Campbell v. Altec Industries Inc., 288 Ga. 535 (2011)

This decision directly protects Georgia consumers from injuries caused by defective products. In this case, the Georgia Supreme Court allowed a longer period of time during which consumers may sue a

manufacturer for injuries sustained from a defective product. This time period—the "statute of repose"—is similar to a statute of limitations, except that a statute of repose is a strict time frame that does not have the same exceptions as a statute of limitations. This decision gives manufacturers an increased incentive to vigorously maintain product quality and safety after a product is manufactured.

This case involved the interpretation of a Georgia state law by the federal courts. Because federal courts do not want to misapply state law, they sometimes certify a question regarding a vague or unclear issue for state courts to answer. After receiving an answer regarding how to interpret that law, the federal court may then rule on a pending issue. This allows the courts to maintain appropriate boundaries between the two jurisdictions.

Here, the United States Court of Appeals for the Eleventh Circuit sent the Georgia Supreme Court a question regarding how to correctly interpret an issue involving a products liability claim. Specifically, the Georgia Supreme Court was asked to determine the length of time during which a manufacturer could be held liable for injuries caused by a defective product.

The defendants in this case were manufacturers of a bucket truck that collapsed and traumatically injured a Georgia Power employee. The manufacturers claimed that they could not be sued because the consumer did not timely file an action. Under O.C.G.A. § 51-1-11, an injured consumer may not sue product manufacturers for injuries that occurred more than 10 years after a consumer buys a product.

The manufacturers argued that the statute's 10-year time period began when the manufacturers made the product, rather than when the manufacturers sold the product. Under this interpretation, the injured consumer would not have been able to sue for her injuries because she was injured more than 10 years after the truck was made. The consumer, however, claimed that the Court should interpret the statute of repose as beginning when her employer purchased the product, which occurred within the applicable 10-year time period.

The Georgia Supreme Court ruled that the 10-year time period does not begin running until "the sale of the finished product to the consumer who is intended to receive it as new." Thus, the Court allowed the injured plaintiff to sue the bucket truck manufacturers for the company's defective

product. This decision is important because it clarifies that the finished product's sale date—rather than the date of manufacture—is the date that starts the ticking of the ten-year statute of repose. This gives consumers more time to bring similar lawsuits in the future.

Rosenberg v. Falling Water, Inc., 289 Ga. 57 (2011)

This decision represents a general loss for consumers in Georgia. The Georgia Supreme Court declined to extend the time during which citizens may sue construction companies for personal injuries. Georgia statute O.C.G.A. § 9-3-51(a) requires consumers to sue a construction company for injuries from real property construction defects within eight years after the project is completed. The Court upheld this time limitation even when a construction company allegedly committed fraud by covering up structural defects in the construction of a deck that led to a man's gruesome injuries.

Here, the plaintiff, Richard Rosenberg, was seriously injured when the deck on his house collapsed. In 2005, Mr. Rosenberg decided to improve his house—originally built in 1994—by replacing the original wood siding with new, vinyl siding. After hiring local workers to help him remove siding where the deck was attached on the back of his house, Mr. Rosenberg walked out onto the deck to survey the day's work. As soon as he stepped onto the deck, it collapsed and brought Mr. Rosenberg with it. Mr. Rosenberg suffered serious injuries in that fall.

Mr. Rosenberg sued the deck's builder, Falling Water, Inc. He claimed that the company (1) negligently constructed the deck by improperly attaching it to the house, and (2) fraudulently hid this construction defect with certain bolts that made it appear that the deck was securely attached to the house.

The Trial and Appellate Courts quickly ruled in favor of Falling Water, Inc., because Mr. Rosenberg did not sue the company within the eight-year time limit imposed by O.C.G.A. § 9-3-51(a). Mr. Rosenberg admitted that he sued the company more than 12 years after Falling Water, Inc. originally put the deck on his house. Nonetheless, he asked the Supreme Court to let him sue the company because he believed that it committed fraud in covering up the weak bolts and dangerous attachment.

The Supreme Court disagreed with Mr. Rosenberg, and held that he

could not sue Falling Water for his personal injuries. The Court ruled that Mr. Rosenberg could not assert Falling Water's alleged fraud as a basis upon which to render inapplicable the eight-year statute of repose, because the alleged fraud occurred during construction rather than after the injury. Therefore, since Mr. Rosenberg was injured more than eight years after the deck was completed, the Court ruled in favor of Falling Water, Inc., and granted the corporation's motion for summary judgment.

This decision is important because it demonstrates that, under Georgia law, there is a strict eight-year timeframe during which an injured person may sue a company for construction defects. Even when the construction company allegedly committed fraud by covering up significant structural defects, Georgia citizens lose the ability to sue that company once eight years have passed.

TAXES AND FORECLOSURES

Community Renewal & Redemption v. Nix, 288 Ga. 439 (2011)

Here, the Georgia Supreme Court analyzed the steps that a consumer must take when redeeming ownership to property that was previously lost at a tax sale. After a consumer fails to pay property taxes for a certain amount of time, the local government may seize that property and sell it at a tax sale to recoup the unpaid tax obligations.

Under Georgia Statute O.C.G.A. § 48-4-40, the delinquent taxpayer may redeem the property and take back ownership if that person pays off the outstanding taxes within 12 months of the sale. This is known as the "one-year redemption period." However, if 12 months pass after the tax sale and a new owner has not established a legal claim[3] to the property, then the consumer may still pay off the tax debt and redeem the property. This is important because it allows a window of time during which a consumer can get back his or her property after losing it for failure to pay taxes.

[3] Specifically, the purchaser forecloses the original owner's right to redeem the property if he or she abides by O.C.G.A. § 48-4-45, which requires the purchaser to notify the property's occupant, the defendant of the tax sale, and all persons who have a title to or interest in the property.

In December of 1993, DeKalb County seized residential real property because the owner was not paying taxes. Since no one stepped forward to purchase the property at the tax sale, DeKalb County retained the property under a tax deed. In February of 1999, Mr. Nix purchased the property but did not establish legal ownership. Instead, he transferred his ownership interest to Bank of America so that he could secure a different loan. Therefore, Bank of America held a property interest that had yet to be legally established.

During this time, the original owner decided to cut his losses and sell his interest in the property. In January 2003, that consumer sold a quitclaim deed to Community Renewal and Redemption, LLC ("CRR"), thereby transferring all interests in that foreclosed property to CRR. Now, CRR wanted to take legal ownership of the property.

In an attempt to pay off the outstanding property tax obligation, CRR offered the requisite payment under O.C.G.A. § 48-4-40 to Mr. Nix. Mr. Nix, however, refused to accept that money because he had transferred his interest to Bank of America, which Mr. Nix identified as the only party that could accept payment to redeem the property. CRR, however, refused to act on this advice, and instead sued Mr. Nix in an attempt to force him to accept the funds and hand over the legal title.

The Trial Court first held that all parties were mistaken, and that the title to the land still belonged to DeKalb County. However, after a bout of appeals, the Georgia Supreme Court reversed that decision. The Court held that DeKalb County did not own the property, and sent the case back to the Trial Court to resolve the remaining issues.

Hearing this case for a second time, the Trial Court dismissed the case altogether. On appeal, the Georgia Supreme Court noted that, under O.C.G.A. § 48-4-40, CRR did not offer to redeem the property from Bank of America, as Mr. Nix had originally pointed out. Therefore, the Supreme Court affirmed the Trial Court's decision, and forced CRR to offer the redemption amount to Bank of America before bringing the lawsuit. This decision offers guidance to consumers seeking property redemption under this statute.

In another 2011 case that interpreted O.C.G.A. § 48-4-40, the Georgia Supreme Court held that a tax sale purchaser has virtually no rights to the

property during the one-year redemption period. That case, *Brown Investment Group, LLC v. The Mayor & Alderman of the City of Savannah*, 289 Ga. 67 (2011), implicated whether an investment group that purchased Savannah property at a tax sale could sue the City after it demolished an unsafe building on that property. Because the City tore down that building during the one-year redemption period, the Court held that the tax sale purchaser could not sue for the building's value because it had "no constructive possession of the premises, and no more right to go upon and make use of [the premises] than any stranger to the title would have." Therefore, while the City of Savannah was required to provide notice to the investment group of its intent to demolish the building, the group could not sue the City for the building's value. Only the original property owner could sue the City during the one-year redemption period for the value of that loss.

JIG Real Estate, LLC v. Countrywide Home Loans, Inc., 289 Ga. 488 (2011)

Here, the Georgia Supreme Court ruled in favor of Georgia consumers facing possible home foreclosure—an issue of high relevance given the economic landscape of recent years. The Court upheld the constitutionality of O.C.G.A. § 9-13-172.1, which authorizes the rescission of foreclosure sales under certain conditions. This statute allows homeowners some respite from foreclosure actions.

In early 2007, James and Tammi Garland could not meet their mortgage payments. The bank that held their property deed, Countrywide Home Loans, Inc., contracted with a local law firm to hold the foreclosure sale on March 6, 2007. However, prior to the March 6 date, Countrywide officials conferred with the Garlands and agreed upon a way for the Garlands to meet their loan obligations. Consequently, Countrywide canceled the foreclosure and modified the loan to cure the default. Countrywide and the Garlands believed that they had everything taken care of, and that the Garlands would be able to keep their home. However, there was one mistake that could potentially ruin the whole deal—no one notified the law firm of this agreement.

On March 6, the law firm went ahead with the foreclosure sale as scheduled. JIG Real Estate, LLC was the high bidder, and took what it believed to be legal ownership of the Garlands' property. On March 8—two days after the foreclosure sale but before any deed was delivered—the

Garlands and Countrywide notified JIG of the cured default and presumptively averted the foreclosure proceedings. JIG, however, refused to accept a refund of its bid, and filed suit to enforce the delivery of the property as negotiated during the foreclosure sale. The Garlands and Countrywide pointed to O.C.G.A. § 9-13-172.1, claiming that since they rescinded the foreclosure sale within 30 days after the sale but before the deed passed to JIG, the foreclosure sale was ineffective and JIG did not have a valid claim to the property. JIG countered that this statute was unconstitutional, and the Georgia Supreme Court granted certiorari to hear the case.

The Court upheld the constitutionality of O.C.G.A. § 9-13-172.1, and ruled in favor of the Garlands and Countrywide. The Court wrote that, in adopting this statute, the Georgia General Assembly intended to "create a mechanism to give homeowners every opportunity to cure a default and avoid the harmful and disturbing effects of foreclosure." Thus, when consumers abide by one of the three enumerated conditions in this statute to avert a foreclosure, courts should respect that cured default and give the consumer the protections of the statute.

The Supreme Court ruled heavily in favor of consumers with this decision. By unanimously upholding the constitutionality of O.C.G.A. 9-13-172.1, the Court maintained consumer protections for those that find themselves in the Garlands' position. This decision retains incentives for cooperation between lenders and borrowers when consumers face possible foreclosure. Further, in clarifying this issue, the Court paved the way for more consumers to seek protection under this statute's remedies, ideally leading to more people keeping their homes and fewer foreclosures.

This issue is of special importance to Georgia consumers because of the high number of foreclosures in the state, and because of the speed with which foreclosures can occur. A recent study[4] showed that while one in every 637 homes is foreclosed upon nationally, that rate is increased to one in every 331 homes in Georgia. Furthermore, because Georgia is a non-judicial foreclosure state, these actions may not involve official court proceedings, and consequently can occur at a startlingly fast pace. Clearly,

[4] Misty Williams, *Georgia's Foreclosure Rate Remains Among Highest Nationwide*, THE ATLANTA JOURNAL-CONSTITUTION (Mar. 15, 2012), http://www.ajc.com/business/georgias-foreclosure-rate-remains-1385742.html.

this is an issue that should be taken very seriously by Georgia consumers, who are more likely to be affected by these situations than are citizens of most other states.

U.S. Bank National Association v. Gordon, 289 Ga. 12 (2011)

This decision clarifies how and when a person may record a security deed so as to give proper legal notice to any other person that may try to assert a claim to that property. The Court provided a bright-line rule by carefully explaining that a security deed gives notice when it is attested and signed by a second witness before being recorded. These clear and unambiguous requirements should help settle future disputes before they arise.

This specific issue came to the Georgia Supreme Court as a certified question from a Federal Judge in the Northern District of Georgia. In a case in that court, an issue arose regarding how to interpret a 1995 Amendment to Georgia Statute O.C.G.A. § 44-14-3. That statute reads: "In order to admit a mortgage to record, it must be attested by or acknowledged before an officer as prescribed . . . [and] must also be attested or acknowledged by one additional witness." If a person comports with these requirements, then the deed gives legal notice to all other parties that may have an interest in the security deed's property.

Here, pursuant to bankruptcy proceedings, a Chapter 7 trustee wanted to set aside a security deed that was validly recorded but not attested via the proper means set forth in O.C.G.A. § 44-14-3. The Justices ruled that a person only provides notice when he or she comports with the exact attestation and witness requirements of the 1995 Amendment. To comply with this ruling, in the future, anyone seeking to record a deed must meet the strict requirement that the deed be attested by or acknowledged before an officer—such as getting the deed notarized by a valid notary public—and, when the deed is for real property, by a second witness. Abidance by O.C.G.A. § 44-14-3 is particularly important for consumers who file for Chapter 7 protections, because if a mortgage is not properly recorded, then the consumer may not be afforded the full breadth of those protections as they relate to the real property.

CONCLUSION

Georgia Watch and other advocacy groups can only do so much to protect against consumer abuses. While we will continue to use our resources in support of this mission, the best protectors of consumer interests are consumer themselves. As Thomas Jefferson stated:

> I know no safe depositary of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.

Georgia Watch is pleased to provide the 2011 Court Watch Report to educate Georgia consumers with the information that they need to protect themselves. While Georgia Watch will continue its advocacy efforts in the most efficacious ways possible, we welcome and encourage active participation by Georgia consumers. Be it sharing consumer information with neighbors, volunteering time at an educational workshop, or making a financial or in-kind donation to support our work on behalf of all Georgians, we thank you for your help.