



ICLE

BUSINESS LITIGATION

PROGRAM MATERIALS | March 19, 2019

Tuesday, March 19, 2019

ICLE: State Bar Series

BUSINESS LITIGATION

7 CLE Hours including

1 Ethics Hour | 5 Trial Practice Hours

Sponsored By: Institute of Continuing Legal Education

Copyright © 2019 by the Institute of Continuing Legal Education of the State Bar of Georgia. All rights reserved. Printed in the United States of America. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form by any means, electronic, mechanical photocopying, recording, or otherwise, without the prior written permission of ICLE.

The Institute of Continuing Legal Education's publications are intended to provide current and accurate information on designated subject matter. They are offered as an aid to practicing attorneys to help them maintain professional competence with the understanding that the publisher is not rendering legal, accounting, or other professional advice. Attorneys should not rely solely on ICLE publications. Attorneys should research original and current sources of authority and take any other measures that are necessary and appropriate to ensure that they are in compliance with the pertinent rules of professional conduct for their jurisdiction.

ICLE gratefully acknowledges the efforts of the faculty in the preparation of this publication and the presentation of information on their designated subjects at the seminar. The opinions expressed by the faculty in their papers and presentations are their own and do not necessarily reflect the opinions of the Institute of Continuing Legal Education, its officers, or employees. The faculty is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. This publication was created to serve the continuing legal education needs of practicing attorneys.

ICLE does not encourage non-attorneys to use or purchase this publication in lieu of hiring a competent attorney or other professional. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Although the publisher and faculty have made every effort to ensure that the information in this book was correct at press time, the publisher and faculty do not assume and hereby disclaim any liability to any party for any loss, damage, or disruption caused by errors or omissions, whether such errors or omissions result from negligence, accident, or any other cause.

The Institute of Continuing Legal Education of the State Bar of Georgia is dedicated to promoting a well organized, properly planned, and adequately supported program of continuing legal education by which members of the legal profession are afforded a means of enhancing their skills and keeping abreast of developments in the law, and engaging in the study and research of the law, so as to fulfill their responsibilities to the legal profession, the courts and the public.

Printed By:



State Bar
of Georgia

INSTITUTE OF CONTINUING LEGAL EDUCATION

SOLACE

Support of Lawyers, All Concern Encouraged

HOW CAN WE HELP YOU?



Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.



The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

TESTIMONIALS

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

A solo practitioner's quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn't have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal's son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

Contact SOLACE@gabar.org for help.

FOREWORD

Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the **AGENDA** page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker's, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Rebecca A. Hall
Associate Director, ICLE

AGENDA

- PRESIDING:** *James C. "Jake" Evans*, Program Co-Chair, Holland & Knight LLP, Atlanta
Edwin M. Cook, Program Co-Chair, Edwin Cook Law LLC, Atlanta
- 8:15 **REGISTRATION AND CONTINENTAL BREAKFAST** (All attendees must check in upon arrival. A removable jacket or sweater is recommended.)
- 8:45 **WELCOME AND PROGRAM OVERVIEW**
James C. "Jake" Evans
Edwin M. Cook
- 9:00 **IN-HOUSE COUNSEL PANEL – LITIGATION VIEWED FROM INSIDE**
John Henry Theiss, Corporate Counsel, North Highland, Lawrenceville
Jonathan W. Wood, General Counsel, Cumberland Group LLC, Atlanta
Damon Moore, StartCHURCH Georgia, Inc., Chief Legal Counsel, Lawrenceville
- 10:00 **RESTRICTIVE COVENANT LITIGATION**
Kurtis A. "Kurt" Powell, Hunton Andrews Kurth LLP, Atlanta
- 11:00 **CORPORATE FIDUCIARY DUTY LITIGATION**
David Balsler, King & Spalding LLP, Atlanta
- 12:00 **LUNCH** (Included in registration fee.)
- 12:20 **BUSINESS TORTS**
William J. Piercy, Berman Fink Van Horn PC, Atlanta
- 1:20 **LITIGATION AVOIDANCE TIPS FROM TRANSACTIONAL LAWYERS**
Laurice R. Lambert, BakerHostetler LLP, Atlanta
Baylie M. Fry, BakerHostetler LLP, Atlanta
- 2:20 **INSURANCE COVERAGE LITIGATION**
Laurie Dugoniths Busbee, Dugoniths Law LLC, Atlanta
- 3:30 **REAL ESTATE & FINANCE LITIGATION**
Bryan M. Knight, Knight Johnson, LLC, Atlanta
James M. Johnson, Knight Johnson, LLC, Atlanta
- 4:20 **ADJOURN**

TABLE OF CONTENTS

	PAGE
Foreword	6
Agenda.....	7
BUSINESS LITIGATION	9- 98
Appendix:	
ICLE Board	1
Georgia Mandatory CLE Fact Sheet	2

8:45 **WELCOME AND PROGRAM OVERVIEW**
James C. "Jake" Evans
Edwin M. Cook

9:00 **IN-HOUSE COUNSEL PANEL – LITIGATION
VIEWED FROM INSIDE**
John Henry Theiss, Corporate Counsel, North
Highland, Lawrenceville
Jonathan W. Wood, General Counsel,
Cumberland Group LLC, Atlanta
Damon Moore, StartCHURCH Georgia, Inc.,
Chief Legal Counsel, Lawrenceville

Litigation Viewed from Inside

What In-House Counsel Wants and How to Give it to Them

The position of in-house counsel requires that a lawyer be able to think both in legal and business terms simultaneously. Focus on the intricacies of the law must be balanced against the straightforward necessities of business. For an outside counsel aiding a corporate lawyer with litigation, the key to being successful is helping his in-house colleague maintain this balance.

To that end, I give the following advice:

1. Be Upfront
 - a. What will it cost?
 - b. How long will it take?
 - c. What are the risks?
2. Be Proactive
 - a. Help fill in the gaps.
 - i. Provide a Basic Review of the State of the Law
 - ii. Sketch Out an Outline of Possible Defenses
 - iii. Help Outline the Investigation
 - iv. Remind Counsel of Things They May Have Forgotten (e.g. Initiate a Legal Hold)
 - b. Be clear regarding what information you need to answer questions.
 - c. Determine who are the key executives and stakeholders.
 - d. Set out action items for requisite key executives and stakeholders.
 - e. Lay out a timeline and keep in touch.
 - f. Get feedback regarding how you are doing.
3. Be Practical
 - a. Don't meander; get to the point.
 - b. Don't just provide options; provide actionable recommendations.
 - c. Be flexible. Strategy and desired outcomes may change.
 - d. Never be afraid to ask, "Is this litigation worth it?"
4. Be Backup
 - a. Never underestimate the usefulness of a sounding board for a corporate counsel.
 - b. Understand the business, but more importantly the corporate politics.
 - c. Consider your actions in light of the corporate counsel's position, needs, and resources.

Leveraging Relationships in Litigation

Methods of using a continuing business relationship in threatened and real litigation

An in-house lawyer has different priorities in managing litigation involving his employer. Where outside lawyers are typically focused on the best outcome in an individual matter, in-house attorneys are critical in managing wholistic business relationships that often live long after the litigated matter is concluded.

My career has been at a technology consulting company that's involved in resale of software and hardware from hundreds of vendors. While I typically work to prevent claims and concerns from becoming litigated matters, there are unavoidable issues which arise within long-term business relationships. Often, the value of the claim or potential litigated matter is insubstantial when compared to the value of the relationship as a whole and settlement negotiations are more focused on saving face and relationship repairing than on typical liability and damages issues.

My company had a deep relationship with a large technology manufacturer. One of our affiliates was a certified reseller for the manufacturer which was a productive source of income for both our business and theirs. Another affiliate was a services provider for the manufacturer. And one division of the services provider affiliate also bought and sold pre-owned hardware produced by the manufacturer on the secondary market. When we received a demand letter from the manufacturer, I was surprised—but my mind went to our substantial business dealings and the risk to our company unrelated to the litigation if things were to turn ugly. We had allegedly sold counterfeit goods bearing the manufacturer's trademark on the secondary market and they were demanding substantial damages. We had no easy way to determine if the allegation of trademark counterfeiting was accurate, as we had procured the goods on the secondary market ourselves and they had passed our standard audit procedure. The business was very averse to paying damages as they felt they had committed no wrong—there may be no legal defense for unknowingly reselling counterfeit goods, but the business certainly felt they were morally above reproach. Since we valued the longstanding relationship, we offered to allow a limited investigation of our warehouse and purchase records to give the manufacturer peace of mind that we were not the source of any counterfeit goods and asked for support in adjusting our audit procedure to more accurately identify counterfeits. We ended up paying a settlement to cover the costs of their investigation team, but it was substantially less than we could have expected were we to lose at trial. And we strengthened our business relationship by cooperation. If we had taken a more hardline route there may have been a successful defense of the claim, but we would have hampered our future business dealings.

Litigated matters with opposing parties where a vital relationship is at stake require a different approach. Alternative dispute resolution and creative solutions are

paramount. Here's a few of the tools I've used and some helpful tips for utilizing the value of business relationships in litigation that counsel may employ.

PUT THE LITIGATED MATTER IN PERSPECTIVE

My first tip is to frame the relationship with opposing counsel in light of the larger relationship between the parties. Be additionally courteous and deferential to the opposing counsel, whether in-house or outside, because your professionalism in handling the matter reflects your business. Often business relationships are managed across multiple departments and business units on each side, but negative impressions spread quickly.

FOCUS ON REPAIRING THE RELATIONSHIP INSTEAD OF DEFENDING THE CLAIM

While you want to persuade the opposing party to be flexible on their relief, attacking the claim itself is often damaging to the goal of quick resolution and relationship mending. When faced with accusations of wrongdoing, move quickly past the question of whether the claim has merit and focus instead on ways to could improve procedures and communication and ways to prevent similar issues from arising in the future. By focusing the conversation on a fix, you minimize the opposing party's need for a moral victory. And by looking toward the future you remind the opposing party that there's more value in a continuing relationship than a one-time payout.


OFFER CREATIVE SOLUTIONS

A long-term business relationship often has many opportunities to create value other than simple cash payouts. Creative solutions can open pathways to reduce settlement values while still making the damaged party whole. Purchase credits and discounted services can be an effective alternative to cash when the parties have other business arrangements. And arrangements for the parties to be more vigilant as part of the ongoing relationship can be added to master agreements as a way to solidify a long-term arrangement and also prevent future claims.

10:00 **RESTRICTIVE COVENANT LITIGATION**
Kurtis A. "Kurt" Powell, Hunton Andrews Kurth
LLP, Atlanta

HUNTON
ANDREWS KURTH

Practical Aspects of Drafting and Litigating Restrictive Covenant Agreements in Georgia



Kurt A. Powell
Partner, Hunton Andrews Kurth LLP
March 19, 2019

Overview **HUNTON**
ANDREWS KURTH


- Georgia Restrictive Covenants Act (2011)
- Key Points When Drafting Restrictive Covenant Agreements
- Practical Aspects To Litigating Restrictive Covenants
- Q&A

2


Overview **HUNTON**
ANDREWS KURTH

- Common uses
 - Employment agreements
 - Commercial leases and deeds
 - Employee stock agreements
 - Shareholder, partnership, and membership agreements
 - Merger and sales agreements
- Types of restrictive covenants in employment
 - Non-solicit
 - Non-compete
 - Non-disclosure (distinct but related to protection of trade secrets)


3

Georgia Restrictive Covenants Act (2011) 

- Prior to the Georgia Restrictive Covenant Acts....
The wild west!
- Cases finding defective covenants on nearly every issue.
- Three levels of scrutiny.
- No **blue penciling** → if one part was found void for any reason, the entire agreement was void.





4

Georgia Restrictive Covenants Act (2011) 

- Because of the historic hostility towards restrictive covenants . . .
- Employees sometimes moved to Georgia to avoid enforcement of their agreements
- Had to draft the “perfect” non-compete
- Had to rely on trade secret law and lesser covenants for protection

5

Georgia Restrictive Covenants Act (2011) 




- Georgia Restrictive Covenants Act (2011) codified and clarified many aspects
- Effective May 2011
- O.C.G.A. §§ 13-8-50 to 13-8-59

- “Fun” (?) fact: The work on RCA began much earlier. To be effective, the RCA required a constitutional amendment authorizing the state legislature to pass laws regarding restrictive covenants. Voters ratified the amendment in 2010.


6

Georgia Restrictive Covenants Act (2011) 

- The RCA created a **playbook** and **roadmap**
 - Clearer definitions of important terms
 - Clarified types of employees who can be subject to a non-compete
 - Created default presumptions of reasonableness for temporal restrictions
 - Broadened and clarified the principles around customer non-solicitation




7

Georgia Restrictive Covenants Act (2011) 

- After 8 years under the RCA, what is the “state of play?”
 - Very few reported cases under RCA
 - Major shift in risks
 - From invalidity risk to enforcement risk

8

Georgia Restrictive Covenants Act (2011) 


- **Blue penciling** - “permissive rather than mandatory”. Lifebrite Labs., LLC v. Cooksey, 2016 U.S. Dist. LEXIS 181823 (N.D. Ga. Dec. 9, 2016).
- Does “modify” in the RCA mean to strike or rewrite or both?
 - → “Though courts may strike unreasonable restrictions, and may narrow over-broad territorial designations, courts may not completely reform and rewrite contracts by supplying new and material terms from whole cloth.” *Id.* at *19.
- More correctly a **blue eraser**, not a blue pencil.
- → If one provision is voided, the remainder will be enforced.

9

Drafting Restrictive Covenant Agreements: Non-Competes 


- By far, non-competes are the most litigated and require the most care in drafting.
- Key drafting considerations:
 - Type of employee?
 - What are the legitimate business interests?
 - Use of definitions, language and safe harbors set forth in RCA
 - Choice of venue and consent to personal jurisdiction

10

Drafting Restrictive Covenant Agreements: Non-Competes 


- Who can be subject to a non-compete? Only certain classes of employees:
 - Sales:
 - Those who customarily and regularly solicit customers or prospective customers;
 - Those who customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;
 - Management:
 - Those who have a primary duty of managing the enterprise; Customarily and regularly direct the work of two or more other employees, and; Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to personnel decisions;

11

Drafting Restrictive Covenant Agreements: Non-Competes 


- Key Employee:
 - “by reason of the employer’s investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee’s employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer’s representative or spokesperson or has gained a high level of influence or credibility with the employer’s customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.”

12

Drafting Restrictive Covenant Agreements: Non-Competes 

- Professional:
 - “has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Such term shall not include employees performing technician work using knowledge acquired through on-the-job and classroom training, rather than by acquiring the knowledge through prolonged academic study, such as might be performed, without limitation, by a mechanic, a manual laborer, or a ministerial employee.”

13

Drafting Restrictive Covenant Agreements: Non-Competes 

- Don't forget!
- The statutory definition of “employee” excludes:
 - “any employee who lacks selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information”
- By defining “employee,” it excludes some additional people even if they are in one of the four classes
- Also applies to non-solicits too


14

Drafting Restrictive Covenant Agreements: Non-Competes 

- Hairdressers? Dog groomers? In-home aides?
- Kennedy v. Shave Barber Co., 348 Ga. App. 298 (Dec. 20, 2018).
 - Employee was a master barber for a barbershop providing cutting, shaving and grooming services. She used the employer’s social media accounts to promote products, inform customers of her schedule, and show photographs of services. She quit to form her own competitive business.
 - The court of appeals upheld the non-compete because she “customarily and regularly solicited customers”. She had extensive, direct contact with them in-person and via social media.




15

Drafting Restrictive Covenant Agreements: Non-Competes 


- Geographic scope. RCA allows employers to define the geographic scope by:
 - listing specific geographic area (usually radius); or
 - Listing particular competitors; or
 - Both methods.
- When to use which one?

16

Drafting Restrictive Covenant Agreements: Non-Competes 


- Unique geographic restriction issues: “Moving targets”?
- CarpetCare Multiservices, LLC v. Carle, 347 Ga. App. 497 (Oct. 3, 2018).

17

Drafting Restrictive Covenant Agreements: Non-Competes 

- Unique geographic restriction issues: Global enforcement?
- Novelis Corp. v. Smith, No. 1:16-CV- 1557-ODE, 2017 WL 1745635 (N.D. Ga. Mar. 10, 2017).

18

Drafting Restrictive Covenant Agreements: Non-Competes 


- BUT must do SOMETHING.
- Found void under RCA for no restriction:
 - **“7.2. Non-Competition.** For as long as she is employed and for a period of one (1) year thereafter, employee shall not participate, directly or indirectly, as an owner, employee, consultant, office management position, in any proprietorship, corporation, partnership, limited liability company or other entity, engaged in any laboratory testing that is being sold by employee on behalf of company.” Lifebrite Labs, LLC v. Cooksey, 2016 U.S. Dist. LEXIS 181823 (N.D. Ga. Dec. 9, 2016).

19

Drafting Restrictive Covenant Agreements: Non-Competes 

- Potential mistakes in drafting non-competes:
 - Forgetting to prohibit non-competition *during* employment
 - Being careless or forgetting about activities that are competitive with “Affiliates” (defined term under the RCA)
 - Forgetting about the statutory definition of employee
 - Poorly-drafted tolling provisions
 - Consideration of how restrictive covenant conflicts or interacts with past agreements (if any) such as arbitration agreements

20

Drafting Restrictive Covenant Agreements: Non-Solicitations 

- Under the RCA, you can restrict an employee's solicitation of customers and prospective customers with whom the employee had “material contact.”
- “material contact” – now defined by statute (O.C.G.A. § 13-8-51(10)) as customer/potential customer:
 - with whom the employee dealt
 - whose dealings with the employer were coordinated or supervised by the employee
 - about whom the employee obtained confidential information in the ordinary course of business
 - who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination

21

Drafting Restrictive Covenant Agreements: Non-Solicitations HUNTON ANDREWS KURTH

- Hypothetical: My sales employee solicited business nationwide and had “material contact” with people in 10 different states. How will this work?



- For **non-solicitations**: No geographic limitation required!

22

Drafting Restrictive Covenant Agreements: Non-Solicitations HUNTON ANDREWS KURTH


- BUT...still must be reasonable
- Non-solicitation must be limited to solicitation made to offer “products or services that are competitive with those provided by the employer’s business”
- Safe harbor: “. . . of the type conducted, authorized, offered, or provided within two years prior to termination”.
- Two years post-employment restriction presumed reasonable.

23

Drafting Restrictive Covenant Agreements: Non-Solicitations HUNTON ANDREWS KURTH

- Example of the road map being followed: Interra Int’l, LLC v. Al Khafaji, 2017 WL 4866266 (N.D. Ga. Mar. 21, 2017).
- On a motion to dismiss, a non-solicit was found to comply with RCA where it applied to:
 - Customers that the employee bought or sold “Core Products” to two years prior to termination or whom he serviced one year prior to termination; and
 - Prospective customers or vendors whom the employee solicited or attempted to solicit sales for “Core Products” two years prior to termination.
- “The covenants are not applicable to all of Interra’s clients, but limited to clients or potential clients with whom Al Khafaji interacted.”

24

Drafting Restrictive Covenant Agreements: Non-Disclosure 

- Interacts with and supplements Georgia Trade Secrets Act of 1990.
 - Based on the Uniform Trade Secrets Act which nearly all states have passed.
 - Don't forget it preempts tort claims on the same subject matter.
- Federal Defend Trade Secrets Act of 2016. No preemption → potentially parallel or multiple claims, and federal jurisdiction available


25

Practical Aspects To Litigating Restrictive Covenants 



- Litigation strategy can depend on whether you are the defendant, plaintiff, employee, or third party.
- Regardless of represented party, the key is to understand and consider the client's true objectives.
- These cases can be expensive and get out of hand quickly without careful planning and a full understanding of client objectives.

26

Practical Aspects To Litigating Restrictive Covenants 

- **Regardless of the represented party:**
 - Start with the agreement itself
 - Does it provide for attorneys' fees? What are the risks?
 - Is there an arbitration agreement? Many agreements still contain a right to seek injunctive relief.
- Investigation
 - Preferable before the action is filed.
 - Computer forensics – amazing and relatively inexpensive these days.
 - Something less than computer forensics (internal email review) also could be a gold mine.
- Legal hold/preservation

27

Practical Aspects To Litigating Restrictive Covenants HUNTON
ANDREWS KURTH

- **If the plaintiff:**
 - Who are the defendants? Consider the pros and cons of naming the hiring entity as a defendant v. the individual, or both.
 - **VENUE.**
 - Personal jurisdiction.
 - What are the claims? Consider whether to bring a trade secrets claims.
 - Timing – can you and should you seek a TRO or injunctive relief? Verified complaint v. affidavit.
 - Do NOT overplead.

28

Practical Aspects To Litigating Restrictive Covenants HUNTON
ANDREWS KURTH

The caveat to overpleading as Plaintiffs: Discovery.

3 Q. (By Mr. Powell) Paragraph 23 let me	2 THE WITNESS: Okay. Personal meaning
4 refer you to Paragraph 23. Do you have any evidence	3 firsthand knowledge?
5 or knowledge or information to support the allegation	4 Q. (By Mr. Powell) We'll start with that
6 that [REDACTED] knowingly encouraged [REDACTED] to end	5 question. Sure.
7 her employment with [REDACTED]	6 A. No.
8 MR. [REDACTED] Objection to form.	7 Q. Okay. Do you have any secondhand
9 THE WITNESS: Personally, no.	8 knowledge?
10 Q. (By Mr. Powell) Do you have any knowledge	9 A. Well, it could --
11 or information at all to suggest that [REDACTED]	10 MR. [REDACTED] Objection to form.
12 encouraged [REDACTED] to end her employment with	11 THE WITNESS: It could be thirdhand,
13 [REDACTED]	12 fourth hand. I don't really know specifically.
14 MR. [REDACTED] Exclude information	13 Q. (By Mr. Powell) Okay. What information
15 from your lawyers.	14 do you -- are you aware of to suggest that [REDACTED]
16 THE WITNESS: To end her employment, no.	15 was involved in any way in the solicitation of any of
17 Q. (By Mr. Powell) Okay. Do you have any	16 the [REDACTED] sides listed on Exhibit 32?
18 knowledge or information that [REDACTED] encouraged	17 MR. [REDACTED] Excluding lawyers.
19 [REDACTED] to solicit [REDACTED] clients?	18 THE WITNESS: If I exclude what my
20 MR. [REDACTED] Same objection to form.	19 attorneys told me, because I was not involved in
21 Nothing from your lawyers.	20 the investigation, I don't really know, as I did
22 THE WITNESS: Other than rumors, no.	21 not discuss it with people at [REDACTED]

29

Practical Aspects To Litigating Restrictive Covenants HUNTON
ANDREWS KURTH

- **If the defendant employer:**
 - Contest venue? If wholly improper, is a special appearance needed?
 - If a TRO was entered, should you modify or dissolve the TRO?
 - If no TRO yet, should you consent to a TRO?
 - A "CYA" memorandum to the hired employee, if not already memorialized at hire.
 - If defending a trade secret claim, hit them hard in discovery.
 - Represent the individual or engage other counsel? Consider ethical obligations or potential conflicts.
 - "Die on the hill" for a new hire?

30

Practical Aspects To Litigating Restrictive Covenants: Discovery **HUNTON**
ANDREWS KURTH

- For either party: expedited discovery? Special master? Independent forensics?
- If plaintiff, serve with complaint (state court)?
- If defendant, use the affidavit/verified complaint to draft narrow, specific requests, and particularly in trade secret cases, focus on identifying the alleged secrets and undermining them.
 - Any and all documents and ESI evidencing, demonstrating or reflecting the allegations in paragraph 28 of the Verified Complaint that “.....”
- 30(b)(6): a powerful tool for either side.


31

Settling: no-hire and no-poach clauses **HUNTON**
ANDREWS KURTH

- In 2016, the FTC and DOJ’s position was that “naked” no-poaching agreements are “per se illegal”.
- On January 25, 2019, the DOJ filed a Notice of Intent to File a Statement of Interest in three class actions indicating it may change this position:
 - “certain horizontal restraints . . . including no-poaching agreements, that are reasonably necessary to a separate, legitimate business transaction or collaboration between the companies” may be legal.
 - No-poaching agreements between a franchisor and franchisee within the same franchise system is likely a legitimate business transaction.

32

Q&A **HUNTON**
ANDREWS KURTH



- Kurt A. Powell
- Hunton Andrews Kurth LLP
- kpowell@huntonAK.com
- 404-888-4015

33

11:00 **CORPORATE FIDUCIARY DUTY LITIGATION**
David Balser, King & Spalding LLP, Atlanta

12:20 **BUSINESS TORTS**
William J. Piercy, Berman Fink Van Horn PC,
Atlanta

Business Torts

BERMAN FINK VAN HORN P.C.



William J. Piercy
Berman Fink Van Horn P.C.
wpiercy@bfvlaw.com

March 19, 2019
Business Litigation
State Bar of Georgia

What is a Business Tort?



Business: To engage in commerce for profit

Business relationships are generally contractual in nature



Tort: Unlawful violation of private legal rights other than mere breach of contract (express or implied)

May also be a violation of public duty if special damages accrue (O.C.G.A. § 51-1-1)



Business Tort: A civil wrong other than a breach of contract that arises from or relates to a business relationship

BERMAN FINK VAN HORN P.C.



Fraud

Any kind of artifice by which another is deceived

Elements:

- False representation or omission of a material fact
- Scier: knowledge that representation is false
- Intent to induce reliance
- Reasonable reliance
- Damages proximately resulting from reliance

Engelman v. Kessler, 340 Ga. App. 239 (2017)

BERMAN FINK VAN HORN P.C.

False representation made without intent to deceive, on which another reasonably relies and is harmed

Elements:

- Negligent supply of false information to foreseeable persons
- Reasonable reliance on the information
- Economic injury proximately caused by the reliance

Liberty Cap., LLC v. First Chatham Bank, 338 Ga. App. 48 (2016)

Negligent Misrepresentation

BERMAN FINK VAN HORN P.C.

Misrepresentation Claims



Must be of a material fact

Puffing and opinions are not enough



Reasonable reliance: Plaintiff must exercise due care to discover fraud



SoL is 4 years, or you're SoL

Tolling for fraud, not negligent misrepresentation



Fraud claims must be pled with "particularity," while negligent misrepresentation claims need not be

BERMAN FINK VAN HORN PC.

Misrepresentations and the Merger Clause



Merger/Entire Agreement clauses defeat many fraud and negligent misrepresentation claims

No reasonable reliance



Note: misrepresentation must pre-date the contract

BERMAN FINK VAN HORN PC.

Defamation

- False, harmful statement of fact
- Elements:
 - Unprivileged communication to third party
 - Concerning the Plaintiff
 - Intentionally or negligently made
 - Special harm to Plaintiff or per se exception satisfied
- *Eason v. Marine Terminals Corp.*, 309 Ga. App. 669 (2011)

BERMAN FINK VAN HORN P.C.

Defamation

- Libel: defamation published in writing
- Slander: defamation published orally
- Defamation per se (O.C.G.A. § 51-5-4)
 - Falsely accusing someone of a crime
 - Accusing someone of sharp practices in their trade or profession
 - Damages inferred (no proof needed)
- Truth is an absolute defense

BERMAN FINK VAN HORN P.C.

Breach of Fiduciary Duty



Elements:

Existence of fiduciary duty
Breach of duty
Damage proximately
caused by the breach



Nash v. Studdard, 294 Ga. App. 845 (2008)

BERMAN FINK VAN HORN P.C.

- Conflicting Interest Transactions (O.C.G.A. § 14-11-307(c))
 - Officers and directors cannot cause company to engage in transaction that benefits that officer above others without disclosing the transaction to other officers, directors, and shareholders
- Business Judgment Rule (O.C.G.A. §§ 14-2-830, 14-2-842)
 - Law presumes officers and directors acted in good faith. Presumption may be rebutted by evidence of gross negligence or gross deviation from the standard of care
- No specific SoL—look to underlying conduct to determine
- *Godwin v. Mizpah Farms, LLLP*, 330 Ga. App. 31 (2014)

BERMAN FINK VAN HORN P.C.

Breach of Fiduciary Duty

Tortious Interference with Contractual Relations

- Elements:
 - Valid and enforceable contract
 - Defendant induces third party not to contract or terminate a contract with Plaintiff
 - Through improper/non-privileged conduct by Defendant
 - Proximate cause
 - Financial injury
- *Cook Pecan Co. v. McDaniel*, 334 Ga. App. 370 (2018)



BERMAN FINK VAN HORN P.C.

Tortious Interference




Stranger Doctrine: Only a stranger to both the contract and the underlying business relationship can be liable for tortious interference




Perry Golf Course Dev., LLC v. Housing Auth. of City of Atlanta, 294 Ga. App. 387 (2008)


BERMAN FINK VAN HORN P.C.




Conversion

 **Elements:**

- Plaintiff has title to property or right of possession
- Actual possession by Defendant
- Plaintiff makes demand for return
- Defendant refuses

 *Johnson v. First Union Nat. Bank*, 255 Ga. App. 819 (2002)

 Inapplicable money in tangible property

BERMAN FINK VAN HORN PC.



Tortious Deprivation of Corporate Interest

-  Recognizes cause of action for depriving another of an interest in a business entity
-  Basically a conversion claim for intangible property that consists of ownership interest
-  "One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to liability similar to that of conversion, even though the document itself is not converted."
-  *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439 (2005) (overruled on other grounds)

BERMAN FINK VAN HORN PC.

Usurpation of Corporate Opportunity

- Elements:
 - Business opportunity presented to officer or director
 - In the company's line of business
 - That is of practical advantage to the company
 - The opportunity is one in which the company has an interest or reasonable expectancy
 - An officer or director commits the tort by taking the opportunity for himself and depriving the company of it
- *Bob Davidson & Assocs., Inc. v. Norm Webster & Assocs., Inc.*, 251 Ga. App. 56 (1984)

BERMAN FINK VAN HORN PC.

Conspiracy to...commit another tort

- Elements:
- Two or more persons
 - Acting in concert
 - To commit another tort

McIntee v. Deramus, 313 Ga. App. 653 (2012)



BERMAN FINK VAN HORN PC.

There are
Business Torts
and there are
Business Tortes

BERMAN FINK VAN HORN P.C.



Tort or Torte? Why it might
matter:

Offer of settlement
O.C.G.A. § 9-11-68
Punitive damages



BERMAN FINK VAN HORN P.C.

Georgia Trade Secrets Act

O.C.G.A. § 10-1-760 *et seq.*

Elements:
Plaintiff possesses a trade secret
That trade secret is misappropriated by the Defendant

BERMAN FINK VAN HORN P.C.



Trade Secret

- 

Information including data, formulas, techniques, drawings, compilations, devices, business plans, and customer lists

Not commonly known to the public
Derive economic value by not being known
Subject to reasonable efforts to maintain secrecy
- 

Misappropriation: Acquisition of another's trade secret by person by improper means or the disclosure of another's trade secret without the consent of its owner
- 

Improper means: Includes theft, bribery, misrepresentation, breach of fiduciary duty or espionage

Note: reverse engineering doesn't constitute improper means

BERMAN FINK VAN HORN P.C.

Georgia Computer Systems Protection Act

Elements:

Using the computer network of another
Without authority

With intent to:

- Take property of another
- Damage or delete the property or data of another
- Convert the property of another

O.C.G.A. § 16-9-90

BERMAN FINK VAN HORN P.C.

Racketeering



"I'm restringing a racquet, not 'racketeering'!"

BERMAN FINK VAN HORN P.C.



"Loan sharking, extortion and racketeering are fine for now, but someday, I'd like to get into soccer."

BERMAN FINK VAN HORN P.C.

Racketeering



O.C.G.A. § 16-14-1 *et seq.*



Pattern of racketeering activity: Attempting or committing two or more predicate acts



Enterprise: In concert with two or more people



Predicate Acts: Theft, murder, fraud, etc.

BERMAN FINK VAN HORN P.C.

Whose claim is it? Direct vs. Derivative

- Is the direct injury to the shareholder or the company?
 - If company, claim must be brought derivatively
- Reasons to require derivative claims:
 - Prevent multiple suits by shareholders
 - Protect corporate creditors by ensuring recovery goes to company
 - Protect non-suing shareholders by ensuring money goes to company rather than to some shareholders at the exclusion of others
 - Adequately compensate shareholders by increasing share value
- *Rollins v. LOR, Inc.*, 345 Ga. App. 832 (2018)
- Exception to derivative claim if shareholder suffered special injury different from that suffered by other shareholders

Derivative Claim Notice Requirement

O.C.G.A. § 14-11-801

Basically, an owner must provide written notice to company management

Describe owner's concerns with some aspect of the company's operations or management and demand remedial action

Company has 90 days to investigate and respond

If company fails to do so to the owner's satisfaction, the owner may file suit derivatively and on behalf of the company

Questions?

William J. Piercy
Berman Fink Van Horn P.C.
wpiercy@bfvlaw.com
(404) 917-3223

BERMAN FINK VAN HORN P.C.
BFV

1:20

**LITIGATION AVOIDANCE TIPS FROM
TRANSACTIONAL LAWYERS**

Laurice R. Lambert, BakerHostetler LLP, Atlanta
Baylie M. Fry, BakerHostetler LLP, Atlanta

BakerHostetler



Litigation Avoidance Tips from Transactional Lawyers

March 19, 2019

Laurice Lambert and Baylie Fry

BakerHostetler

Overview

- Contract Law Basics
- Prospective Considerations
- Avoidance Considerations
- Risk Shifting Approaches

The Basics



3

The Basics: Contract Formation

- Parties and Capacity
 - At least two parties
 - Negotiating at “arm’s length”
 - Legal capacity
 - Anyone under guardianship, infant, mentally ill or intoxicated have no legal capacity
- Mutual Assent
 - Offer
 - Acceptance
- Consideration



4

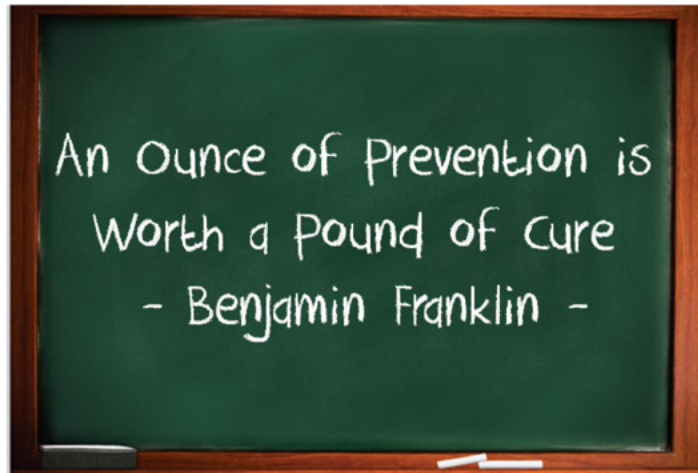
The Basics: Contract Interpretation

- Generally, courts determine whether the language is clear and *unambiguous*, meaning it is capable of only one reasonable interpretation.
 - If it is clear, the court simply enforces the contract according to its terms.
 - “Four Corners of a Contract”
- If it is *ambiguous*, the court must apply the rules of contract construction provided in O.C.G.A. § 13-2-2 to resolve the ambiguity.

The Basics: Contract Construction

- Words
 - Usual and Common Meaning
 - Pointer: Use defined terms to provide clarity in agreements
- Grammar
 - Rules of grammatical construction typically govern; but to effectuate the parties intent, grammar rules may be disregarded in to effectuate parties' intention
- Parol Evidence
 - Generally inadmissible in Georgia
 - But, parol evidence may be admissible if ambiguity is not resolved by applying the above rules of constructive

Prospective Considerations



Prospective: Due Diligence

- Identifies issues to prospectively address in the transaction documents
- Enables the parties to analyze the risk, liabilities and exposure



Prospective: Representations, Warranties and Covenants

- Assertions by the one party, relied upon by the other party, that provide a true account of all information and supporting documentation of significant importance to the “deal”
- Examples
 - **Organization:** “Seller is a limited liability company, duly organized, validly existing and in good standing under the laws of the State of Georgia and in every jurisdiction where it is authorized to do business and has all requisite power and authority . . .”
 - **Authority:** “Seller has the right, full power and authority to enter into this Agreement . . .”
 - **Consents and Approvals**
 - **Title to and Condition of Assets**
 - **Compliances with Laws**

9

Prospective: Disclosure Schedules

- Purpose is to supplement the reps and warranties
- Generally:
 - Lists of information
 - Exceptions or qualifications
 - Information too lengthy
- Examples:
 - Material contracts
 - Description of assets (or supplementation)
 - Licenses, permits or other similar approvals necessary for operation of the business
 - Intellectual property
 - Employees
 - Insurance policies
 - Pending or threatened litigation/investigations
 - Liens on assets



10

Prospective: Holdback Escrow

- Generally used to allay buyer's concerns over the seller's financial ability to satisfy indemnification provisions contained in the definitive agreement
- It protects the buyer from future unforeseen liabilities or loss in value, and prevents buyers from having to file lawsuits to recoup damages related to the liabilities/loss in value
- Usually 10%-20% of the purchase price, which, if unused, will be paid to the seller after the agreed upon period expires



Prospective: Boiler Plate Provisions

- Assignment
- Waiver
- Entire Agreement
- Notices
- Amendments
- Schedules / Exhibits / Attachments
- Severability
- Governing Law
- Jurisdiction
- Counterparts

Prospective: Clear Drafting

Above all, make sure the contract is clear and that it properly and accurately reflects the “deal” and the parties’ intention



Avoidance Considerations



Avoidance: Restrictive Covenants

- Limitations and restrictions on a party from performing or engaging in specific activities during the term of the agreement and for a specified time period following termination or expiration of the agreement
 - Non-solicitation of employees, contractors, and clients / customers
 - Non-compete in specified geographic areas
- Courts strictly scrutinize restrictive covenants



Avoidance: Cure Provisions for Breach

- Allows the breaching party an opportunity to cure a breach of the agreement before a lawsuit is pursued
- *“If either party is in breach of any representation, warranty, covenant or other obligation under this Agreement, the other party shall provide written notice specifying in reasonable detail the nature of such breach, and the breaching party shall have 30 calendar days from receipt of such notice to cure such breach.”*

Avoidance: Term & Termination

- Term
 - Specified term that expires upon completion
 - Automatic renewal of successive one year terms
- For-Cause Termination
 - Breach or default of the agreement
 - Specific grounds for termination based on the industry and subject matter of the agreement (compliance with laws; insurance requirements)
 - Termination upon mutual agreement of the parties
- Without Cause Termination
 - If there is no without cause termination provision, then you cannot terminate the agreement unless there is a breach
 - Note, some without cause termination provisions are limited (e.g., agreement may be terminated upon 30 days written notice prior to the commencement of a renewal term)

17

Avoidance: Mandatory Good Faith Conferral

- In the event of a dispute, the parties agree to negotiate or confer in good faith to resolve the dispute without involvement of third parties
- Questionable whether this process is successful, but it's the first step to at least get the parties to communicate about the issue



18

Avoidance: Dispute Resolution

- If a dispute arises among the parties, these provisions require the parties to engage in dispute resolution (i.e., mediation and/or binding arbitration)
 - Mediation is generally non-binding process conducted by a neutral third-part tasked with facilitating discussion and hopefully resolution
 - Arbitration is a binding process that is conducted by a single arbiter or a panel of arbiters "acting as judges."
- Both processes can be provided for in agreements to avoid litigation
- Dispute Resolution provisions generally include:
 - Specific mediator/arbiter acceptable to the parties or a mediator/arbiter mutually agreed upon by the parties
 - How the costs should be split
 - Location
 - Rules to be applied
 - Confidentiality

Avoidance: Expert Opinions

- If a dispute arises, the parties can agree to engage an expert, and can agree to be bound by the expert's determination
- Less of an adversarial process than arbitration and mediation
 - This can assist the parties in maintaining a business relationship (particularly for long-term contracts)
- Helpful with technical disputes that may require more in-depth knowledge to resolve
- Similar details and specifics regarding the expert determination (costs, confidentiality, process to select the expert) should be specified



Risk Shifting



Risk Shifting: Indemnity

Indemnity provisions commit one party (or both parties) to compensate the other party (or each other) for:

- Any harm, liability or loss arising out of the agreement,
- A breach of any of the covenants, representations or warranties, or
- Specific actions which may result in loss (the operations of the business).

Risk Shifting: Insurance

Require a party to obtain and maintain insurance

- Specify types of insurance and limits
- Require the insured party to notify other party of any cancellation, termination or material change to the insurance



23

Risk Shifting: Representations and Warranties Insurance (RWI)

- Specific type of insurance policy purchased in connections with transactions
 - For **sellers**, it limits post-closing indemnification exposure by covering indemnification for breaches of the representations and warranties in transaction agreements
 - For **buyers**, this can be used to increase appeal and distinguish themselves in a bid
- Requires the insurance company to be involved and have a “say” in the drafting of the reps and warranties; insurers involved in diligence
- From the insurers perspective, the transaction size, industry, level of risk are considerations in whether to underwrite a policy
- Policy premiums range from 1% - 3% of coverage limits

24

Risk Shifting: Releases

Releases a party from claims, liabilities, demands, lawsuits, damages, losses (suspected or unsuspected; active or contingent) that arise out of, relate to, or result from any act or omission

- Can limit to a specific period of time, or specific liability or action
- Always add that the provision does not operate to release the seller of any obligations under the agreement
- Can be mutual under some circumstances

25

Risk Shifting: Disclaimers

- Statement that expressly disclaims specific claims or liability
- Used to minimize risks when the results of certain actions are uncertain
- Generally seen in product purchase agreements where the manufacturer disclaims warranty of merchantability or fitness for a particulate purpose
- Also used for websites to disclaim liability



26

Questions / Comments



Laurice Lambert
404.256.8417
LLambert@bakerlaw.com



Baylie Fry
404.946.9304
Bfry@bakerlaw.com

BakerHostetler

Atlanta
Chicago
Cincinnati
Cleveland
Columbus
Costa Mesa
Denver
Houston
Los Angeles
New York
Orlando
Philadelphia
Seattle
Washington, DC

bakerlaw.com

2:20

INSURANCE COVERAGE LITIGATION

Laurie Dugoniths Busbee, Dugoniths Law LLC,
Atlanta



INSURANCE COVERAGE:
PITFALLS AND POSSIBILITIES

Written and Presented by

Laurie Dugoniths
Dugoniths Law LLC
www.DugonithsLaw.com
678.221.4651

TABLE OF CONTENTS

I.	Read The Policy	1
II.	Read Your Client’s Contracts	2
	<i>a. Additional Insured Status</i>	2
	<i>b. Indemnity Obligations</i>	3
	<i>c. Limits</i>	4
	<i>d. Loss Payee/Mortgagee</i>	5
III.	Prompt Notice Is Key to Securing Coverage	6
	<i>Key Things To Remember With Regard To Notice</i>	8
IV.	What To Expect After Notice Is Given	8
	<i>a. Investigation of claim</i>	8
	<i>b. Coverage Position Letter</i>	9
	1. Read the letter and the Policy.....	9
	2. Respond if warranted.....	10
	3. Duty to Defend.....	11
	i. Can the insured choose its own counsel?.....	12
	ii. What if the suit alleges covered and non-covered claims?.....	12
	iii. Can the insurer recover defense costs?.....	13
	4. Duty to Indemnify.....	13
V.	Recovery of attorney’s fees against the insurer – O.C.G.A. § 33-4-6	14
VI.	Key Advice For Business Litigators	15

The majority of the matters you have or will work on will in some way involve insurance. The key to not creating issues for yourself or your client is recognizing that there is an insurance issue and making sure that it is addressed. Below is a broad overview of what every practitioner should know and some pointers to help ensure that your client takes advantage of the insurance it has.

BEFORE A LOSS HAPPENS

I. Read The Policy

In Georgia, the insured has a duty to read their insurance policy to confirm that it properly sets forth the agreed to terms of coverage. *Cottingham & Butler, Inc. v. Belu*, 332 Ga. App. 684, 774 S.E.2d 747 (2015); *Traina Enters. v. Cord & Wilburn, Inc. Ins. Agency*, 289 Ga. App. 833, 658 S.E.2d 460 (2008); *MacIntyre & Edwards, Inc. v. Rich*, 267 Ga. App. 78, 599 S.E.2d 15 (2004).

In general, an insured has an obligation to read and examine an insurance policy to determine whether the coverage desired has been furnished. If an examination of the policy would have made it readily apparent that the desired coverage was not issued, the policyholder's failure to examine the policy bars recovery against the insurer or its agent for negligent failure to provide coverage. *Cottingham*, cited supra.

One exception to that rule arises when the agent has held himself out as an expert and the insured has reasonably relied on the agent's expertise to identify and procure the correct amount or type of insurance, unless an examination of the policy would have made it readily apparent that the coverage requested was not issued. Other exceptions lie where an agent intentionally misrepresents the existence or extent of coverage or where the evidence reflects a special relationship of trust or other unusual circumstances which would have prevented or excused plaintiff of his duty to exercise ordinary diligence to ensure that no ambiguity existed between the requested insurance and that which was issued. *Traina Enters.*, 289 Ga. App. At 837.

Advising your clients concerning their obligation to read their policies could potentially save them from lengthy coverage litigation and a finding that they did not have the coverage they thought they bought. If you do not believe they are equipped to read the policy to confirm the policy covers what it is supposed to, you should read it or advise your client to hire coverage counsel for such a review. Missing a readily apparent error may result in them not having the coverage they need when a loss occurs.

II. Read Your Client's Contracts

Confirming your client has the right coverage not only involves reading the policy, it also requires that you/your client have an understanding of that client's contractual insuring obligations to third parties. Leases, master service agreements, contracts, etc. all typically have some nature of requirement for insurance. You may have even drafted or reviewed some or all of these agreements on behalf of your client for other purposes. Your job is not done until you have confirmed that your client's insuring and indemnity obligations are properly reflected in their insurance policies. To the extent that your client only has the declarations pages for its policy(ies), a direct request for a complete copy of the policy as quickly as possible after coverage is bound is imperative. In the meantime, if all you have are the declarations, be sure to review those to make sure that they properly reflect your client's understanding of the limits and coverage applied for.

a. Additional Insured Status

When your client is required by contract to name someone as an additional insured to its insurance policies, the policy must say so. It is often not enough that your client can point to a Certificate of Insurance that says that an entity is to be named as an additional insured. That Certificate on its face requires that there be a specific endorsement to the policy in order to effect coverage. *See e.g., Catlin Syndicate, Ltd. v. Ramuji, LLC*, No. 4:16-CV-1331-VEH, 2017 U.S. Dist. LEXIS 132018 (N.D. Ala. Aug. 18, 2017) (Court found that even though an "Evidence of Insurance" document had been issued, the policy itself did not include the claimant as an insured or additional insured prior to the loss); *Cnty. Asphalt Corp. v. Travelers Indem. Co. of Am.*, No. 16-21758-CIV, 2017 U.S. Dist. LEXIS 63877 (S.D. Fla. Apr. 26, 2017) (Broad form endorsement did not apply and certificate without specific endorsement did not make the claimant additional insured). The policy must contain an endorsement that broadly grants additional insured status to a class of people that covers the people and entities with whom your client has agreed to secure additional insured coverage. In the absence of that there needs to be an express endorsement that lists the entity by name.

b. Indemnity Obligations

Many service agreements, leases, and other contractual arrangements contain indemnity and hold harmless provisions. If your client is contractually required to indemnify a third party, you will want to ensure that your client's insurance policies cover that indemnity obligation. *Kirby v. Nw. Nat'l Cas. Co.*, 213 Ga. App. 673, 445 S.E.2d 791 (1994)

An example of contractual indemnity language:

Indemnity. Except with respect to claims arising from a Party's separate negligence or willful acts, which shall remain that Party's personal obligation, each Party agrees to defend, indemnify and hold harmless the other Party and its directors, officers, and employees with respect to a claim arising from the Party's actual or alleged act, failure to act, error, or omission in the performance of their obligations under this Agreement or any governing law or regulation.

Many standard form commercial general liability (CGL) policies will include coverage for the insured's indemnity obligations. However, some expressly exclude it. For example, professional liability policies contain contractual liability exclusions without exception. Standard ISO CGL policies typically contain an exclusion for liability assumed in a contract but provide an exception for "insured contracts".

This insurance does not apply to ...

b. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

...

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement...¹

"Insured contract" is then typically defined as

That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.²

A Contractual Liability exclusion *without an exception* for insured contracts may read like this:

Contractual Liability. This Policy does not apply to any damages, claims, or claim expenses based upon or arising out of liability assumed by You under any oral or written contract or agreement, including but not limited to hold harmless and

¹ ISO Form CG 00 01 12 07, p. 2 of 16.

² ISO Form CG 00 01 12 07, p. 13 of 16.

indemnity agreements, agreements to defend others, and liquidated damages clauses, except that this exclusion shall not apply to a Claim where legal liability exists in the absence of such contract or agreement and arises from Your Wrongful Act or the Wrongful Act of Your subconsultants in the rendering of or failure to render Professional Services.

The definition of “insured contract” clarifies that the exception to the exclusion in the CGL policy does not apply to liability that you assume by contract that you would not have had in the absence of the contract language. In other words, if you were negligent, your insurance covers you and the contractual liability exclusion is not an issue. If, however, you were not negligent, and the basis for the client's recovery against you is solely the contractual indemnification obligation, you have no coverage for that loss.

You and your client should also be mindful of the effect of an indemnity obligation on the limits of liability available to your client. If your client is being sued in the same suit as its indemnitee, there may not be sufficient limits to cover the total liability, as the defense costs and indemnity monies paid on behalf of the indemnitee will be applied to reduce the available limits of the Policy. The limits are reduced that much faster if your client is also being defended and those defense costs also apply against the available limits (in what is known as a “wasting policy”).

c. Limits

Does your client have an agreement with third parties that specifies a limit of insurance it will maintain? If so, the insurance policy must provide at least that amount of insurance. As noted above, when determining how much limits to buy, your client should also consider whether the policy is a “wasting limits” policy where the limits of insurance are reduced by defense costs. Moreover, if a contract is entered into midway through a policy term, you should also consider whether any other losses have been applied against the limits or if the available limits are exhausted at that time. Pointing to a policy without the necessary available limits may be considered a breach of the requirement to procure/maintain a specific limit of insurance.

Here is an example of the insurance terms that provide a requirement for minimum limits:

Insurance. Each Party shall purchase and maintain throughout the term of this Agreement insurance or indemnity protection that is co-equal with its indemnity obligations. This shall include, but not necessarily be limited to (1) broad form commercial general liability insurance (including, as appropriate, products coverage if goods are being provided, and completed operations coverage, if construction- related services are being provided), (2) personal/commercial automobile liability insurance (including, as appropriate, owned, hired, and

borrowed auto coverages), and (3) professional liability/errors and omissions (if legal, accounting, consulting, IT consulting, or similar professional services are provided). The limit of liability for such coverage shall be no less than **[\$1 million]** per claim/occurrence, and the other Party and its directors, officers, and employees, to the extent of the owed indemnity obligations, shall be named as “additional insureds” under such policies. Each Party shall also maintain workers’ compensation insurance.

Note: This is also where the additional insured requirement may be in the contract.

d. Loss Payee/Mortgagee

Loan agreements and many other contracts your client is a party to may contain a requirement for the other party to be identified as a loss payee or a mortgagee on certain policy coverages. These terms normally pertain to property insurance coverage.

Loss payee clauses reflect that someone has an interest in the property, such as a lender. In the event of a claim under a property policy, this may mean that the payments under the policy will be issued via check naming both the insured and the loss payee. If there is a denial of the claim as a result of some malfeasance by the insured, the loss payee receives nothing.

Alternatively, the mortgagee clause on a policy creates a separate contract between the mortgagee and the insurance company. *Am. Cent. Ins. Co. v. Lee*, 273 Ga. 880, 881 (548 S.E.2d 338) (Ga. 2001) Under that stand-alone contract, even if the insured does something which results in a denial of coverage, the mortgagee still gets paid. A mortgagee clause also entitles the mortgagee to advance notice of cancellation of the policy and the right to pay premium to keep the policy in place. You can expect that payments for loss will be issued to both the insured and the mortgagee and that the mortgagee may have a right to those funds until the repairs are made.

The ramifications of failing to name a party as a loss payee or mortgagee on the policy could result in significant exposure to your client in the event of a property loss. Therefore, it is imperative that both the declarations pages and the policy itself be closely examined to confirm that the policy confers the contractually required insured status.

ONCE A LOSS OCCURS

III. Prompt Notice Is Key to Securing Coverage

All insurance policies will have some language that specifies when notice of a potential claim must be given. In the typical ISO CGL form, the notice provision falls under the section entitled “Duties in the Event of Occurrence, Offense, Claim or Suit” which reads as follows:

Duties in the Event of Occurrence, Offense, Claim or Suit

- a. You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the “occurrence” or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.
- b. If a claim is made or “suit” is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or “suit” and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or “suit” as soon as practicable...³

Evident from this language is that the policy has arguably three or four different notice requirements: Notice of the “occurrence,” notice of the “offense,” notice of the claim and notice of the “suit”. This means the insurance company requires that your client or someone on their behalf tell them about the incident, event, damage, etc. as near to the time of the occurrence as possible. “Occurrence” is most often defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” ISO Form CG 00 01 12 04, (2003). Thereafter, if a claim (demand letter, corrective action letter, etc. –this may not be defined in the Policy) is given to the insured or a suit is filed against the insured, notice of those must also be given as near to the time it is received or served as possible. Keep in mind, this could require three

³ See ISO form CG 00 01 12 04, p. 10 of 15.

different notices be given to the insurer: the first at the time of the occurrence, the second if a demand letter is written and a third at the time suit is filed.

It cannot be emphasized enough how critical timely notice is to avoiding a forfeiture of coverage in Georgia. If you are made aware of an occurrence that may give rise to a claim or suit against your client, your client must be advised to provide notice of that occurrence, or the related claim and/or suit to their insurer without delay. This applies regardless of the fact that your client believes the claim to be frivolous or groundless or contends that it was not at fault or has no liability for the claim being made.

Unlike the majority of jurisdictions, prejudice in cases involving late notice is of no real consequence in Georgia. *OneBeacon Am. Ins. Co. v. Catholic Diocese of Savannah*, 477 F. App'x 665 (11th Cir. 2012). Rather the issue is whether there was a reasonable excuse for any delay in providing notice. *JNJ Found. Specialists, Inc. v. D. R. Horton Inc.*, 311 Ga. App. 269, 717 S.E.2d 219 (2011); c.f., *Grange Mut. Cas. Co. v. Snipes*, 298 Ga. App. 405, 680 S.E.2d 438 (2009) (Court appears to consider prejudice of delay as factor in determining if there was a forfeiture of coverage). A brief review of Georgia law on this issue demonstrates how detrimental late notice can be in Georgia.

An unexcused delay in notifying an insurer about an incident or lawsuit, can be found to be unreasonable as a matter of law. *Kay-Lex Co. v. Essex Ins. Co.*, 286 Ga. App. 484, 490, 649 S.E.2d 602, 608 (2007), citing, *Kirby v. Nw. Nat'l Cas. Co.*, 213 Ga. App. 673, 445 S.E.2d 791 (1994). See *State Farm Fire & Cas. Co. v. LeBlanc*, 494 F. App'x 17 (11th Cir. 2012)(four month delay in providing notice was unreasonable – only excuse offered by the insured was a lack of knowledge of the policy's notice condition - policy required *immediate* notice); *Allstate Ins. Co. v. Walker*, 254 Ga. App. 315, 562 S.E.2d 267 (2002)(delay of eleven to twelve months was unreasonable as a matter of law); *Se. Express Sys. v. S. Guar. Ins. Co.*, 224 Ga. App. 697, 482 S.E.2d 433 (1997)(eight month delay unreasonable, prejudice not required); *Diggs v. S. Ins. Co.*, 172 Ga. App. 37, 321 S.E.2d 792 (1984) (three month delay resulted in forfeiture of coverage-policy required *immediate* notice); but see, *JNJ Found. Specialists, Inc. v. D. R. Horton Inc.*, 311 Ga. App. 269, 269, 717 S.E.2d 219, 221 (2011)(“The words ‘as soon as practicable’ are relative, and must be measured by all the circumstances. Lapse of time alone, even approximately eleven months, does not of itself establish a non-compliance with a notice provision.”)

The issue is less clear for excess policies because those policies generally only require notice when it appears that the claim will involve those excess limits, but late notice can certainly be an issue in those cases as well.

Whether notice to an insurer is timely under a policy depends, in part, on the event that triggers the duty of notice. In contrast to an insured's notice obligation under a primary liability policy, which may be triggered for example by an occurrence that may give rise to the insured's liability to another, under an excess policy like the one at issue, the notice obligation is triggered by the insured's assessment regarding the likelihood that the monetary amount for which the insured may be liable will exceed the ceiling of any underlying primary policy or lower tier of excess coverage.

See Plantation Pipe Line Co. v. Stonewall Ins. Co., 335 Ga. App. 302, 306-07, 780 S.E.2d 501, 506-07 (2015), citing, *Lumbermens Mut. Cas. Co. v. Plantation Pipeline Co.*, 214 Ga. App. at 25 (1).

Key Things To Remember With Regard To Notice

- 1. Identify all applicable policies – CGL, E&O, D&O, Prof. Liab. and Excess and give notice to all**
- 2. Give notice early and often**
- 3. Provide notice in writing**
- 4. If you are relying on the agent/broker to provide the notice, get confirmation of notice being transmitted to the insurer**
- 5. If giving notice of a claim or suit, tender the defense to the insurer – don't assume the insurer will interpret the notice as a request for a defense**

IV. What To Expect After Notice Is Given

a. Investigation of claim by insurer

When notice is received, the insurer should be expected to start its investigation of the claim. This investigation may include: taking a recorded statement from the insured, setting out

written requests for information, inspecting the insured's records, etc. This investigation is what should inform the insurer's initial decision as to how to proceed with coverage.

O.C.G.A. § 33-24-40 states as follows:

Without limitation of any right or defense of an insurer otherwise, none of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer under the policy:

- (1) Acknowledgment of the receipt of notice of loss or claim under the policy;
- (2) Furnishing forms for reporting a loss or claim, for giving information relative to the loss or claim, or for making proof of loss or receiving or acknowledging receipt of any forms or proofs completed or uncompleted; or
- (3) Investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any loss or claim.

Most policies contain a requirement for the insured to cooperate with the insurer in the investigation of the claim. A failure to cooperate can result in a forfeiture of coverage. *State Farm Fire & Cas. Co. v. King Sports, Inc.*, 489 F. App'x 306 (11th Cir. 2012); *S. Mut. Ins. Co. v. Mason*, 213 Ga. App. 584, 445 S.E.2d 569 (1994); *Hurston v. Ga. Farm Bureau Mut. Ins. Co.*, 148 Ga. App. 324, 325, 250 S.E.2d 886, 888 (1978); *St. Paul Fire & c. Ins. Co. v. Gordon*, 116 Ga. App. 658 (158 SE2d 278) (1967).

b. Coverage Position Letter

Once the insurer investigates, it may issue either a reservation of rights or a declination letter. Not every claim warrants the issuance of such a letter, but it is wise to understand your client's rights and obligations when they get one.

A declination of coverage is simply a letter that expresses the basis for the insurance company's decision to deny coverage for the claim. It needs to be complete and state each basis for the denial of the claim. *Hoover v. Maxum Indem. Co.*, 291 Ga. 402, 730 S.E.2d 413 (2012) It is not permissible in Georgia for an insurer to decline coverage and reserve its right to decline on other grounds later. *Id.* If the insurer intends to decline it must state all grounds for doing so on the outset so that the insured can govern itself accordingly. *Id.*

A reservation of rights is intended to inform the insured of any potential defense to coverage the insurer may have which may result in the absence of coverage for the claim. This necessarily includes any possible breach of a policy condition as well as any potentially applicable

exclusions. *Id.* Reservations must also be fully expressed. A general reservation of all terms, conditions and exclusions is unlikely to be sufficient under *Hoover*.

1. Read the letter and the policy

Examine the basis for the reservation(s) and do not assume that the letter properly or fully cites the applicable policy provisions. Be sure to review the policy and confirm that the insurer has properly cited its terms. At a minimum, the reservation of rights must fairly inform "the insured that, notwithstanding [the insurer's] defense of the action, it disclaims liability and does not waive the defenses available to it against the insured." *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 287 Ga. 149, 152, 695 S.E.2d 6, 10 (2010), *citing*, *State Farm Mut. Auto. Ins. Co. v. Anderson*, 104 Ga. App. 815 (123 SE2d 191) (1961).

2. Respond if warranted

A reservation of rights is a unilateral statement by an insurer in writing⁴ notifying the insured of its intention to continue with the defense while retaining the right to press all issues that could lead to a finding of non-coverage. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S. C., LP*, 336 F. Supp.2d 610, 613 (D.S.C. 2004) (citing *Black's Law Dictionary* 1082 (7th ed. 1999)) It may include requests for information from your client. Your client, you or their coverage counsel should respond in writing to any inaccuracies in the facts, provide additional facts your client wants the insurer to consider, and respond to the insurer's request for information promptly. The insured should not unreasonably refuse consent to the reservation of rights if requested but it does not have to consent if it believes the insurer's position is wrong. In the event your client cannot consent to the reservation of rights, Georgia has a specific procedure to be employed by an insurer when an insured will not consent to its reservation of rights:

Upon learning of facts reasonably putting it on notice that there may be grounds for non-coverage and where the insured refuses to consent to a defense under a reservation of rights, the insurer must thereupon (a) give the insured proper unilateral notice of its reservation of rights, (b) take necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise prejudiced, and (c) seek immediate declaratory relief

⁴ An oral reservation may be permissible but it must adequately and fully inform the insured of the basis for the insurer's reservations. *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 287 Ga. 149, 152, 695 S.E.2d 6, 10 (2010)

including a stay of the main case pending final resolution of the declaratory judgment action.⁵

If the insurer does not follow this procedure its coverage defenses are considered waived. *Richmond*, 140 Ga. App. at 219.

3. Duty to Defend

The reservation of rights letter under a liability policy will address the insurer's obligation to defend the insured as well as its obligation to indemnify. Again, the insurer's obligation to defend even extends to claims that are groundless, false or fraudulent. *S. Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 605 S.E.2d 27 (2004)

The duty to defend is a contractual obligation almost always found in, and unique to, CGL policies and, as the costs of litigation continue to rise, this defense obligation is often considered to be more valuable to an insured than the duty to indemnify. The origin of the duty to defend is purely contractual. Most CGL policies contain a standard clause setting forth the obligation and the right to defend. That contractual duty to defend comes directly from the "Insuring Agreement" set forth in the coverage form and typically reading as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any occurrence and settle any claim or "suit" that may result:
But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.⁶

Contrast the CGL policy language with that of a professional malpractice policy:

Subject to this Subsection V.C., it shall be the duty of the Insureds and not the duty of the Underwriter to defend Claims against the Insureds.

⁵ *Briggs & Stratton Corp. v. Concrete Sales & Ser., Inc.*, 166 F.R.D. 43, 46 (M.D. Ga. 1996) (citing *Richmond v. Ga. Farm Bureau Mut. Ins. Co.*, 140 Ga. App. 215, 231 S.E.2d 245 (1976)).

⁶ ISO Form CG 00 01 12 04, (2003).

The Company and the Insured Persons agree not to settle any Claim, incur any Defense Cost or otherwise assume any contractual obligation or admit any liability with respect to any Claim without the Underwriter's written consent. The Underwriter shall not be liable for any settlement, Defense Cost, assumed obligation or admission to which it has not consented.

The Underwriter shall have the right and shall be given the opportunity to effectively associate with the Company and the Insured Person in the investigation, defense and settlement, including but not limited to the negotiation of a settlement, of any Claim that appears reasonably likely to be covered in whole or in part by this policy.

Defense Costs are part of and not in addition to the Limits of Liability set forth in Item 2 of the Declarations, and the payment by the Underwriter of Defense Costs reduces such Limits of Liability.⁷

i. Can the insured choose its own counsel?

Where the insurer has the duty to defend it will usually select counsel to defend the insured in the event of a suit. However, certain policies and certain insurers will allow the insured either some direct input in the counsel selected or the outright choice of counsel. If your client prefers working with a specific firm, it would be wise to negotiate with the insurance company at the time the policy is procured for that firm to serve as defense counsel in the event of a suit under the policy. The resistance to using the insured's choice of counsel generally arises when selected counsel is not "panel counsel" with the insurance company such that it has not been vetted by the insurer and the desired counsel's rates do not fall within the insurer's accepted fee structure. This is a negotiable issue and the resolution may be for your client to pay the difference in fees or negotiate with the desired attorney to accept the fees offered by the insurer.

ii. What if the suit alleges covered and non-covered claims?

In Georgia, if the complaint asserts even one covered claim, the insurer has an obligation to defend the entire suit. *JNJ Found. Specialists, Inc. v. D. R. Horton Inc.*, 311 Ga. App. 269, 717 S.E.2d 219 (2011); *Colony Ins. Co. v. Corrosion Control, Inc.*, 390 F. Supp. 2d 1337 (M.D. Ga. 2005). If all covered claims are dismissed from the suit, the insurer no longer has a duty to defend the case.

⁷ Zurich Non-Profit Directors, Officers and Employees Liability and Reimbursement Policy, Form U-DO-101-B CW (7/94), pp. 6-7.

iii. Can the insurer recover defense costs?

If the claims asserted warrant a reservation of rights by the insurer, the insurer may also attempt to reserve its right to recoup defense costs expended on non-covered claims. Some view this practice as contradicting the requirement that the insurer defend all claims. The recovery of these defense costs is not usually contemplated by the insurance policy. Essentially the insurance company, by including this in its reservation of rights or a non-waiver agreement, attempts to construct a second contract with the insured for the recovery of defense fees. This happens when the reservation of rights or non-waiver agreement expressly reserves the right to the insurer to recoup fees for uncovered claims (the offer), which is then accepted by the insured (either through a failure to respond or by expressly signing it), perhaps without even realizing it, has agreed to something that is not a part of its insurance contract. Some courts will construe that agreement as a new contract and agree to permit the insurer to recover those costs, others hold the opposite. See opinions reviewing majority and minority positions: *Auto-Owners Ins. Co. v. Prairie Auto Group, Inc.*, No. CIV. 5065-KES, 2008 U.S. Dist. LEXIS 45327, at *9-10 (D.S.D. June 10, 2008); *V.I. Port Auth.*, 564 F. Supp.2d at 476-7; *Westport Ins. Corp. v. Ong*, No. 1:07CV10 DAK, 2008 U.S. Dist. LEXIS 26683, at *11-12, *17 (D. Utah Mar. 28, 2008) (certifying question to Utah Supreme Court); *RLI Ins. Co.*, 2007 U.S. Dist. LEXIS 53058, at *20 (holding that Tennessee would permit reimbursement); *Am. Motorist Ins. Co.*, 2006 U.S. Dist. LEXIS 59436, at *23; *Unionamerica*, 2005 U.S. Dist. LEXIS 46337, at *24-25 (predicting Alaska would follow majority rule).

Georgia's highest court has not decided this issue although some decisions out of the Northern District have weighed in. See *Essex Ins. Co. v. Segal Ventures, LLC*, No. CV413-253, 2015 U.S. Dist. LEXIS 42932 (S.D. Ga. Mar. 28, 2015)(court found reservation of rights letter ambiguous on recoupment of fees issue and denied insurer's request); *Ill. Union Ins. Co. v. NRI Constr.*, 846 F. Supp. 2d 1366 (N.D. Ga. 2012)(applying concept of unjust enrichment and finding that the Georgia Supreme Court would allow for recoupment of fees for non-covered claims).

4. Duty to Indemnify

Separate from the duty to defend is the insurer's duty to indemnify. *S. Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 605 S.E.2d 27 (2004) It is the obligation to provide payment for a judgment or settlement against the insured. The duty to indemnify is based entirely on the terms of the contract and whether or not the alleged liability for which the insured has been held liable is

covered under the policy. An insurer does not have to make a determination with regard to its duty to indemnify until its insured has been found liable. However, insurers are often called upon and do pay claims in settlement.

A Cautionary note here: your client should be advised against entering a settlement that is not approved by the insurance company as that may be considered a voluntary payment in violation of the policy terms. *Richmond v. Ga. Farm Bureau Mut. Ins. Co.*, 140 Ga. App. 215, 231 S.E.2d 245 (1976)

V. Recovery of attorney's fees against the insurer – O.C.G.A. § 33-4-6

Georgia has historically had a pro-insurer bend, which is reflected in its relatively conservative bad faith statute. It is conservative not only because of its cap on recovery, but also because the only basis for bad faith in Georgia is an unreasonable denial of coverage. Contrast that with Florida's statutory right to recover for attorney's fees if you prevail in a coverage action without the need to show bad faith. Fla. Stat. §627.428 Georgia also offers no right to file a civil action against an insurer based on its poor handling of a claim or failure to communicate with its insured. While some courts in Georgia have liberally interpreted the bad faith statute, most apply it conservatively. The statute reads:

(a) In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or \$5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith. The amount of any reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in the action; provided, however, that the attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services based on the time spent and legal and factual issues involved in accordance with prevailing fees in the locality where the action is pending; provided, further, that the trial court shall have the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and the plaintiff's attorney for the services of the attorney in the action against the insurer.

This statute essentially provides the only right to attorney's fees against an insurance company arising out of a coverage dispute under the policy. *Clary v. Allstate Fire & Cas. Ins. Co.*, 340 Ga. App. 351, 795 S.E.2d 757 (2017); *Balboa Life and Cas. v. Home Builders Finance, Inc.*, 304 Ga. App. 478 (2010) Arguments may exist with regard to the right to attorney's fees arising out of an insurer's bad faith and stubbornly litigious conduct but generally that will require conduct outside of the Policy.

VI. Key Advice For Business Litigators

If you keep the following pointers in mind, you will steer your client in the right path when addressing its insurance matters and steer yourself away from the threat of malpractice.

- a. Do NOT wait to hire coverage counsel**
- b. Get the whole policy (not just the declarations) and read it**
- c. Move quickly in the event of a loss but take no action without giving notice**
- d. Ask to see all policies**
- e. Tender to all potentially applicable coverages – merits of the claim do not matter**
- f. Push the insurance company for a prompt investigation and be sure to cooperate with all requests for information**
- g. Consider if there are any facts outside of the complaint that you believe the insurer should know and if so, share them**
- h. Pay attention to the insurance coverage as the case proceeds – as claims develop and motions are decided the insurer's obligations may change – if covered claims disappear on summary judgment, your client may be left paying the bills**
- i. Do NOT wait to hire coverage counsel**



LAURIE E. DUGONITHS, **Owner**. Ms. Dugoniths Busbee is the founding member of Dugoniths Law LLC, which counsels insureds on their rights and obligations under primary, excess and umbrella insurance policies. She also litigates complex coverage issues, bad faith and extra-contractual liability on behalf of those clients. Her coverage expertise extends to policies covering commercial property, business interruption, builder's risk, inland marine, commercial general liability, and professional E & O. Before starting her own practice, Ms. Dugoniths Busbee spent 18 years representing insurance companies, for whom she regularly provided analysis and counseling on first-party and third-party coverage issues and the interrelated contractual obligations for indemnity and insurance. Having worked in the marine industry prior to starting her career as a lawyer, Ms. Dugoniths Busbee possesses a unique understanding of marine risks. She also enjoys a national practice, having assisted clients with coverage advice and/or litigation in the state and federal courts of over 23 states, and in the Second, Fourth, Fifth, and Eleventh Circuit Courts of Appeals.

Ms. Dugoniths Busbee was voted one of Georgia's top 50 women lawyers from 2012-2014 and has consistently been recognized as a Super Lawyer by Atlanta Magazine for the past 9 years. As vice chair of the ABA's Insurance Coverage Litigation Committee, she frequently presents on topics related to insurance coverage at their midyear meetings. She is also a contributing author of "The Reference Handbook on the Comprehensive General Liability Policy."

Ms. Dugoniths Busbee received her bachelor's degree from the University of Dayton and her juris doctor degree from the University of Miami.

Email: Laurie@DugonithsLaw.com
Direct dial: 678.221.4651

Education

- J.D., University of Miami
- B.S., University of Dayton

Admissions

- Supreme Court of Georgia
- The U.S. Courts of Appeal for the Second, Fourth, Fifth and Eleventh Circuits
- The U.S. District Court for The Northern District of Georgia

Organizations

- State Bar of Georgia
- American Bar Association
- Atlanta Bar Association

Committees/Positions

- Member-At-Large, Atlanta Bar – Small Firm/Solo Practitioner Section
- Contributing Editor, *IRMI's CGL Reporter*

Commendations

- Top 50 Women Lawyers in Georgia 2012-2014
- Georgia Super Lawyers 2011-2019
- Georgia Rising Stars 2005, 2006, 2007, 2009

3:30

REAL ESTATE & FINANCE LITIGATION

Bryan M. Knight, Knight Johnson, LLC, Atlanta

James M. Johnson, Knight Johnson, LLC, Atlanta

REAL ESTATE LITIGATION CLE

March 19, 2019

**BRYAN M. KNIGHT
JAMES M. JOHNSON
KNIGHT JOHNSON, LLC
ONE MIDTOWN PLAZA
1360 PEACHTREE STREET
SUITE 1201
ATLANTA, GEORGIA 30309
(404) 228-4822
bknight@knightjohnson.com
jjohnson@knightjohnson.com**

A. LITIGATING TITLE INSURANCE CLAIMS

1. What is Title Insurance

Title insurance is insurance of owners of real property or others having an interest in such real property, or liens or encumbrances on such real property, against loss by encumbrance, defective titles, invalidity, adverse claim to title, or unmarketability of title by reason of encumbrance or defects not excepted in the insurance contract, which contract shall be written only upon evidence or opinion of title obtained and preserved by the insurer.” O.C.G.A. § 33-7-8. A “title insurance contract” is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specified amount against loss through defects of title to, or liens or encumbrances upon, realty in which the insured has an interest as purchaser or otherwise. Beaulieu v. Atlanta Title & Trust Co., 60 Ga. App. 400 (1939).

2. Types of Title Insurance

Title insurance insures against problems adversely affecting title to real estate, for example: problems not disclosed by the record (forgeries, unknown heirs, etc.); errors by the title examiner; survey errors if there is a current survey; or other assorted problems. Title insurance comes in two forms: (1) owner's title policy,

which insures the interest of the purchaser, and (2) mortgagee title policy, which insures the interest of the lender.¹

3. Common Title Defects

Common defects in title include:

- a. easements
- b. liens (mechanics, judgment, security deeds, etc.)
- c. use restrictions (restrictive covenants, groundwater, development, etc.)
- d. notice of contamination
- e. affidavits of ownership

4. What to do if a title defect is discovered

If a title defect is discovered, the insured should send written notice to the title company, pursuant to the title policy, upon discovery of the defect. Delay in disclosing the defect could void the claim. Promptly provide all documentation for title company's investigation. Failure to do so not only adversely affects the likelihood of success, it could provide a defense for the title company against bad faith fees in the future. A practice pointer to lawyers, if a title defect is discovered, promptly inform the client. Do not try to hide it or fix it. This is an ethical violation.

5. What to do if a title company denies a title claim

¹ Ga. Real Estate Title Exam and Closings § 3:20 (Hinkel, August 2016 Update)

If the title company denies a title claim, the insured should send a bad faith letter to the title company, pursuant to O.C.G.A. § 33-7-8, which allows an insured to collect attorneys' fees and up to \$5,000.00 in additional penalties if the claim was denied without justification. This bad faith letter must provide the insurance company at least sixty (60) days to pay the claim. Therefore, the insured must wait at least 60 days before filing suit, in order to seek bad faith fees. If the insurance company does not pay within 60 days of the bad faith letter, filing suit is the next step for the insured.

6. Claims and Parties to Lawsuit

If suit is filed the first claim for the insured to assert is a breach of contract claim against the title company for breach of the title policy. The second claim would be negligence claims against the closing lawyer and closing lawyer's firm, if applicable. Note, if negligence claims are asserted against lawyers, an expert affidavit supporting the negligence claims must accompany the lawsuit, pursuant to O.C.G.A. § 9-11-9.1. The third claim would be a claim for bad faith attorney's fees and penalties, pursuant to O.C.G.A. § 33-7-8 against the title insurance company.

7. Title Insurance Damages

Georgia Courts have consistently held that the damages arising from a breach of a title insurance policy are equal to:

*the difference between the value of the property **when purchased** with the encumbrance or encroachment thereon, and the value of the*

property as it would have been if there had been no such encumbrance or encroachment.

U.S. Life Title Ins. Co. of Dallas v. Hutsell, 164 Ga. App. 443, 446 (1983) (quoting Beaulieu v. Atlanta Title & Trust Co., 60 Ga. App. 404, 402 (1939) (emphasis added).) Both Hutsell and Beaulieu address valuation under an owner's title insurance policy, but do not distinguish between an owners and lender's title policy. Therefore, the amount of damages for an owner's policy would be the amount the title defect devalued the property at the time of purchase. The amount of devaluation is typically proved by use of expert appraisers.

Until June 29, 2016, Georgia law was silent as to the measure of damages for a lender's title policy. On June 29, 2016, the Court of Appeals in Old Republic National Title Insurance Company v. RM Kids, LLC, 788 S.E.2d 542 (Ga. App. 2016) ruled that the lender's measure of damages should be taken from the date of foreclosure and not the date of closing.

B. FRAUDULENT TRANSFER

1. History Of Fraudulent Transfer Law

The Georgia Uniform Fraudulent Transfers Act ("UFTA"), now known as the Georgia Uniform Voidable Transactions Act², traces its roots back to England and

² In May, 2015 the Georgia Legislature passed and the Governor signed into law SB 65 which renamed this title of the Georgia code and made certain substantive changes to UFTA. The amended law operates prospectively and applies only to transfers made or obligations incurred on or after July 1, 2015. Ga. L. 2015, pp. 996, 1029, § 7-1(d).

the enactment of the Statute of 13 Elizabeth in 1570. That statute made it unlawful to convey real or personal property with the “intent to delay, hinder or defraud creditors.” 13 Eliz., c. 5 (1570) (Eng.). Georgia adopted the Statute of 13 Elizabeth in 1818 when O.C.G.A. § 18-2-22 was enacted. It contained nearly identical language to the original statute. O.C.G.A. § 18-2-22 was finally repealed effective July 1, 2002 and Georgia joined 40 other jurisdictions in adopting UFTA. It is now codified at O.C.G.A. § 18-2-70 to § 18-2-85.

2. Framework Of UFTA

UFTA is a fairly detailed series of statutes that grants a creditor the right to avoid certain transfers by a debtor. The statute defines a “creditor” simply as “a person who has a claim”. O.C.G.A. § 18-2-71(4). A “claim” is defined very broadly as “a right to payment” and that right to payment need not be reduced to judgment, but can be “liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.” O.C.G.A. § 18-2-71(3). A “debtor” means one who is liable on a claim. O.C.G.A. § 18-2-71(6).

There are essentially three basic kinds of fraudulent (now called voidable) conveyances. First, there are constructively fraudulent conveyances, which are those made for less than adequate consideration while the transferor was insolvent or which rendered the transferor insolvent. O.C.G.A. § 18-2-74(a)(2). The second

type is an actual fraudulent conveyance. That is a transfer made with actual intent to hinder, delay or defraud any creditor of the debtor. O.C.G.A. § 18-2-74(a)(1). A transfer is not voidable under O.C.G.A. § 18-2-74(a)(1), however, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. O.C.G.A. § 18-2-78(a).

Since subjective intent is so hard to show, UFTA provides a short cut. To establish intent under an actual fraud claim, the jury is allowed to consider a number of factors, including eleven badges of fraud that are listed in UFTA. O.C.G.A. § 18-2-74(b). These factors include, among others, whether the transfer was to an insider, whether the debtor retained control of the property transferred, whether the transfer was disclosed or concealed, whether the debtor was insolvent after the transfer and whether the debtor absconded. Id. The list is not exclusive, and depending upon the facts of a particular case, additional factors can be considered to establish intent.

Third, a transfer can be considered a fraudulent conveyance even if it was done for adequate consideration if the transfer was made to an insider for an antecedent debt and the debtor was insolvent at the time of the transfer and the insider had reasonable cause to believe that the debtor was insolvent. O.C.G.A. § 18-2-75(b).

It is worth noting that the very elements of a fraudulent transfer claim provide a powerful discovery tool for a creditor concerning the debtor's financial affairs that is otherwise not available in most cases. For instance, by alleging a fraudulent

transfer claim, a creditor can begin conducting asset discovery of a debtor even before obtaining a judgment.

C. REMEDIES

1. Injunction

Pursuant to O.C.G.A. § 9-5-1, Equity, by writ of injunction, may restrain . . . any . . . act of a private individual or corporation which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law. Injunctive relief is designed “to preserve the status quo, as well as balance the conveniences of the parties pending final adjudication of the case.” Jackson v. Delk, 257 Ga. 541, 544 (1987). To obtain such relief, a plaintiff must establish an immediate and irreparable harm as well as the absence of any adequate remedy at law. See O.C.G.A. §§ 9-5-1 and 9-11-65(b)(1). A remedy at law is adequate only if it is as “practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.” Poe & Brown of Ga., Inc. v. Gill, 268 Ga. 749, 750 (1997). The granting of injunctive relief rests in the sound discretion of the Court. O.C.G.A. § 9-5-8. In deciding whether to order injunctive relief, the Court must balance the conveniences of the parties and consider whether greater harm will be done by refusing or granting the injunction. Westhampton, Inc. v. Kehoe, 227 Ga. 642, 645 (1971).

Disputes involving real estate often times requiring filing a motion for Temporary Restraining Order (“TRO”) and Preliminary Injunction because real estate is unique

and if sold or encumbered would cause irreparable injury. Therefore, if there is a risk the real estate will be sold, transferred, or encumbered, it is prudent to seek an injunction through motion at the beginning of the case. Pursuant to O.C.G.A. § 9-11-56, a TRO only lasts for 30 days, however, a Preliminary Injunction lasts through the duration of the case. In order to obtain a Preliminary Injunction, the Court will hold an evidentiary hearing to make its determination. Thus, Preliminary Injunction hearings must be scheduled before the TRO expires.

The following relief should be considered when requesting an injunction for real estate: selling, conveying, transferring, assigning, encumbering, and leasing. Injunction are an equitable remedy, so the case must be filed in Superior Court.

2. **Lis Pendens**

Another way to protect real estate during litigation is filing a lis pendens in the real estate records, which provides notice to any prospective buyer of the lawsuit, which will bind that buyer to any judgment or decree rendered in the case. A notice of lis pendens “gives notice to prospective purchasers that a lawsuit involving the realty has been filed.” *Aiken v. Citizens & Southern Bank of Cobb County*, 249 Ga. 481, 482 (1982). The purpose of the lis pendens statute “is to notify persons who are not parties to a pending suit involving realty that any judgment or decree rendered in the case will be binding on them[.]” *Kenner v. Fields*, 217 Ga. 745, 746 (1962) *overruled on other grounds by Scroggins v. Edmondson*, 250 Ga. 430 (1982). “A lis

pendens may not be based upon a suit for money damages only[.]” *Hutson v. Young*, 255 Ga. App. 169, 170 (2002).

While the filing of a proper Notice of Lis Pendens is privileged, the filing of an improper or invalid Notice of Lis Pendens constitutes slander of title. *See South River Farms v. Bearden*, 210 Ga. App. 156 (1993) (holding that the filing of a Notice of Lis Pendens in a suit over harassment and peaceable enjoyment of property rights did not “involve” real property and the Notice of Lis Pendens was improper. The court held that the owner of the property subject to the Notice of Lis Pendens had a claim for slander of title after they lost a contract for the sale of the property as a result of the Notice of Lis Pendens). Georgia courts may also grant a motion to cancel a Notice of Lis Pendens. *Jay Jenkins Co. v. Financial Planning Dynamics, Inc.*, 256 Ga. 39, 42 (1986) (“Although . . . there is no such statutory provision in Georgia, motions to cancel notices of lis pendens have been entertained”).

3. Appointment of a Receiver

Real estate that is income producing such as hotels, shopping centers, office, apartments, and rental homes may require the implementation of receiver to manage the properties to prevent mismanagement, destruction and waste. If a party wishes to seek a receiver a motion should be filed with the court and the court will schedule an evidentiary hearing.

The principles of equity authorize a court to appoint a receiver to preserve

assets subject to depletion during the pendency of litigation before it. Kruzel v. Leeds Bldg Prods., Inc., 266 Ga. 765 (1996). Indeed, “the very purpose of appointing a receiver is to preserve and hold the property until such time as the merits of [the plaintiff’s] claims . . . can be determined.” Id. at 766. The standard for deciding whether a receiver should be appointed is well-settled:

When any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it, a receiver of the same may be appointed by a judge of the superior court having jurisdiction thereof.

O.C.G.A. § 9-8-1. The Supreme Court of Georgia has made it clear that O.C.G.A. § 9-8-1 should be broadly construed.

It requires no strained construction to say that the words ‘having no one to manage it’ have reference, not to a mere physical management, but to a proper and efficient management. Mere physical management by an unfriendly or irresponsible person might conceivably be worse than no management at all, because it may amount to mismanagement and waste, if not destruction and total loss.

Farrar v. Pesterfield, 216 Ga. 311, 313 (1960). In other words, a receiver is appropriate “where the person who is managing the property is inimical to its best interests.” Warner v. Warner, 237 Ga. 462, 463 (1976).

Appointment of a receiver is an equitable remedy, so the case must be filed in Superior Court.

4. Accounting

In many partnership disputes that involve real estate there may be allegations of stealing and misappropriation of funds. In these types of cases a party may request the court to order an accounting of funds. A court may award the equitable relief of an accounting where a partner has been wrongfully excluded from a partners and access to its records. Zerounis v. Berry, 199 Ga. 410 (1945).

An accounting can be performed by the parties through production of document or through use a third party like a special master, receiver, or forensic accountant. An accounting is an equitable remedy, so the case must be filed in Superior Court.

5. Specific Performance

When a party breaches a contract involving the sale of real estate a party may seek specific performance of the contact to force the sale. O.G.G.A. § 23-2-130 provides: “specific performance of a contract, if within the power of the party, will be decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for non-performance.”

6. Fraudulent Transfer Remedies

O.C.G.A. § 18-2-77 sets forth the remedies available for a creditor under UFTA. The most basic remedy is an order setting aside the transfer and returning the property to the debtor. O.C.G.A. § 18-2-77(a)(1). If the creditor is also a judgment lienholder, the court may also immediately levy execution on the asset transferred. Id. In addition, to the extent a transfer is avoidable under O.C.G.A. § 18-2-77(a)(1), the creditor may instead elect to recover a money judgment against the “first transferee of the asset or the person for whose benefit the transfer was made” for the value of the asset transferred or the amount necessary to satisfy the creditor’s claim, whichever is less. O.C.G.A. § 18-2-78(b)(1)(A). The value of the property is determined as of the date it was transferred “subject to adjustment as the equities may require.” O.C.G.A. § 18-2-78(c).

One area of uncertainty arises where real property remains in the hands of a transferee, yet a creditor seeks a money judgment against the transferee for the value of the real property instead of the return of the property. It can be argued that the creditor’s remedy should be limited to the return of the property to the debtor where it has not been dissipated. However, the language of O.C.G.A. § 18-2-78 suggests that the creditor is entitled to elect a different remedy in the form of a money judgment if it so chooses. This issue usually arises where the property was worth substantially more at the time of transfer than at the time an UFTA claim is filed. The party seeking to invoke a particular remedy bears the burden of proving the applicability of that remedy. O.C.G.A. § 18-2-78(g).

UFTA contains additional powerful remedies that can be used against the debtor or the debtor's transferee. For instance, O.C.G.A. §18-2-77(a)(2)(A) allows a creditor to obtain "an injunction against further disposition by the debtor or a transferee, or both of the asset transferred" and, more broadly, "or of other property". This provision also permits a creditor to obtain the appointment of a receiver to take charge of the asset transferred "or of other property of the transferee." O.C.G.A. § 18-2-77(a)(3)(B). Thus, at the inception of fraudulent transfer case creditors should, and often do, seek injunctive relief freezing the transferred assets to prevent further dissipation of those assets by a transferee. The Georgia Supreme Court has endorsed this practice, noting that "fraudulent transfer cases are especially amendable to interlocutory injunctive relief." Bishop v. Patton, 288 Ga. 600, 605 (2011); *see also* SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1 (2011) (affirming order freezing \$24,000,000 in assets originating from a debtor). In lieu of, or in addition to, seeking an injunction, creditors also frequently record a *lis pendens* against the transferred real estate to prevent further transfers of the property.

Finally, UFTA also contains a "catch-all" provision that allows "any other relief the circumstances may require." O.C.G.A. § 18-2-77(a)(3)(C). This provision is most frequently invoked by a creditor as a basis for seeking ancillary relief, such as punitive damages and attorney's fees under O.C.G.A. § 13-6-11. Unlike some states, creditors in Georgia have traditionally been allowed to seek punitive damages against a debtor in a fraudulent transfer case. Kesler v. Veal, 257 Ga. 677 (1987).

D. PIERCING COMMON DEFENSES IN REAL ESTATE SPECIFIC PERFORMANCE LITIGATION

1. “Your Damages are Capped at My Earnest Money”

Most boilerplate GAR forms and other real estate contracts contain no limitation of liability, i.e., “[a] party defaulting under this Agreement shall be liable for the default. The non-defaulting party may pursue any lawful remedy against the defaulting party.” However, Defendants often try to argue that their liability is capped at the amount of their earnest money or some other trivial amount, and they often point at special stipulations or other one-sided provisions to make this defense. However, “Because exculpatory clauses may amount to an accord and satisfaction of future claims and waive substantial rights, they require a meeting of the minds on the subject matter and must be explicit, prominent, clear and unambiguous.” *Monitronics Intern. v. Veasley*, 323 Ga. App. 126, 135 (2013). Moreover, Georgia law does not allow the interpretation of a special stipulation or other provision that thwarts the purpose of the general default provisions in the contract. “Under statutory rules of interpretation, “the construction which will uphold a contract in whole and in every part is to be preferred.” O.C.G.A. § 13-2-2; *see also Golden Peanut Co. v. Bass*, 275 Ga. 145, 149 (2002):

Viewing the contract as a whole, where there are conflicting provisions, the clause contributing most essentially to the contract is entitled to the greater consideration. A subsidiary provision should be so interpreted as not to be in conflict with what clearly appears to be the dominant purpose of the contract.

(quoting *Joseph Camacho Assoc. v. Millard*, 169 Ga. App. 937, 938 (1984) (internal quotations and ellipses omitted). An ambiguous limitation of liability provision will be construed against the drafter, especially if that provision conflicts with the contract's general default provisions. O.C.G.A § 13-2-2(5) (“If the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obligation is generally to be preferred”); *see also Monitronics*, 323 Ga. App. at 135 (“any ambiguities in exculpatory clauses are construed against the drafters.”))

2. “You Lied to Me About the Property I was Supposed to Purchase”

Most real estate contracts have a “merger clause” or “entire agreement” provision similar to this:

Entire Agreement, Modification and Assignment: This Agreement constitutes the sole and entire agreement between all of the parties, supersedes all of their prior written and verbal agreements and shall be binding upon the parties and their successors, heirs and permitted assigns. No representation, promise or inducement not included in this Agreement shall be binding upon any party hereto. This Agreement may not be amended or waived except upon the written agreement of Buyer and Seller

These provisions bar most claims and/or defenses that the seller orally misrepresented the characteristics of the property being sold. *See, e.g., Consulting Const. Corp. v. Edwards*, 207 Ga. App. 296 (1993) (contract clause stating that contract was “the entire agreement and understanding between the parties” foreclosed action premised on misrepresentation outside the contract); *Roth v. Bill*

Heard Chevrolet, Inc., 166 Ga. App. 583 (1983) (merger clause barred plaintiff's misrepresentation claims); *Touche, Inc. v. Dearborn*, 161 Ga. App. 188 (1982) (same). Moreover, under Georgia law, a purchaser has an affirmative duty to investigate the property's characteristics to ensure that it can be used for the purchaser's purposes. *See, e.g., Hill v. Century 21 Max Stancil Realty, Inc.*, 187 Ga. App. 754, 755 (1988) (fraud claim barred because plaintiffs failed to ascertain for themselves the zoning status of property prior to closing and, as a result, were not justified in relying upon defendant's allegedly false zoning representations); *T.O.H. Associates v. 2B Enterprises, Inc.*, 224 Ga. App. 730, 731 (1997) (where parties to contract had equal access to public zoning records, plaintiff could not rely on defendant's representations about property's possible uses).

E. ABANDONED CITY OF ATLANTA ALLEYWAY DISPUTES ON THE RISE

1. Background and Legal Effect of Abandonment

The City of Atlanta abandoned the vast majority of its alleyways in the 1970s. It has long been the law in Georgia that “when a city abandons an alleyway, the property reverts to the adjoining lots, with each lot expanding out to the centerline of the portion of the alley abutting it.” *Donald Azar, Inc. v. Mucbe*, 325 Ga. App. 726, 728 (2014); *Cernonok v. Kane*, 280 Ga. 272 (2006); *Bayard v. Hargrove*, 45 Ga. 342, 352 (1872). Indeed, the relevant City of Atlanta ordinance relating to

abandoned alleyways, Code Section 138.5(d), is consistent with this longstanding Georgia law:

When the city shall need to acquire real property, right-of-way, or easements within an alley, the city has and will, barring evidence to the contrary, assume the centerline of the alley to be the property line between abutting private properties, and shall consider the area within the alley to belong in equal proportions to the abutting property owners. Calculations as to the value of such property or property rights to be acquired shall be made accordingly.

If the City of Atlanta needs to acquire access to an abandoned alleyway, it assumes that each adjoining property owner owns half of the alleyway. If an owner's property is bounded by a recorded alley easement, the owner has an easement to use the alley. *See Donald Azar* at 729 (“a deed describing a tract as bounded by a street or alley will by operation of law confer upon the grantee a private easement for the use of such street or alley”) (quoting 1 Pindar's Ga. Real Estate Law & Procedure § 8:14 (7th ed.)).

2. Abandonment and Reopening of Alleyways

There is an upswing in cases where property owners conclude their land is much more valuable if they can regain access to abandoned alley easements (i.e., they want to build a two-car garage / mother-in-law suite behind their home and access it from the abandoned alleyway). Often, the abandoned alleyway has been absorbed into other owners' properties, and those owners wish to fight the reopening of the alleyway. We counsel clients to present evidence showing that any alley easement was abandoned through non-use. “[A]n easement may be lost by

abandonment or forfeited by nonuse if the abandonment or nonuse continues for a term sufficient to raise the presumption of release or abandonment intent to abandon can be established with evidence of a clear, unequivocal and decisive character.” *Id.* (finding that alley was unused and overgrown showed that any easement through the alley had been abandoned). Evidence such as physical barriers to easement access (i.e., fences, retaining walls, berms), vegetative growth making use of the easement impossible, or structures erected over the easement can be used to establish abandonment of the easement.

Where a party seeks to re-open an alleyway easement that is physically unusable because of obstructions, Georgia law does not allow that party to engage in self-help to remove obstacles or obstructions in the private way. Instead, O.C.G.A. § 44-9-59 creates a specialized procedure for a party seeking to remove such an obstacle:

§ 44-9-59. Obstructions; proceedings for removal; petition; rule nisi; order; appeal; fees

- (a) In the event the owner or owners of land over which a private way may pass or any other person obstructs, closes up, or otherwise renders the private way unfit for use, the party or parties injured by the obstructions or other interference may petition the judge of the probate court in the county where the private way has been in use to remove the obstructions; and, upon the petition being filed, the judge shall issue a rule nisi directed to the parties or parties complained against calling upon the offending parties to show cause why the obstructions should not be removed and the free use of said private way reestablished. The rule shall be served by the sheriff or his deputy at least three days before the day set for the hearing; and

when the day arrives the judge shall proceed to hear evidence as to the obstructions or other interference. **If it appears that the private way has been in continuous, uninterrupted use for seven years or more and no steps were taken to prevent the enjoyment of same, the judge shall grant an order directing the party or parties so obstructing or otherwise interfering with the right of way to remove the obstructions or other interference within 48 hours; and, if the party or parties fail to remove the obstructions, the judge shall issue a warrant commanding the sheriff to remove the obstructions immediately.** [Emphasis added].

- (b) Except as otherwise provided . . . either party who is dissatisfied with the judgment of the judge of the probate court pursuant to subsection (a) of this Code section may appeal to the superior court as a matter of right.

We have obtained injunctions preventing parties from attempting to demolish easement obstructions without first complying with O.C.G.A. § 44-9-59.

3. Rights of Third Parties to Use Abandoned Alleyway

Parties with no easement rights in an alleyway (i.e., those who do not own property adjacent to the alleyway) often claim prescriptive rights to use the alleyway. Generally speaking, a private way over another's property may be established by prescription if "the private way has been in constant and uninterrupted use for seven or more years and no legal steps have been taken to abolish it[.]" O.C.G.A. § 44-9-54; *Yawn v. Norfolk So. Railway Co.*, 307 Ga. App. 849, 851-52 (2011). But the establishment of a prescriptive easement requires far more than mere evidence of "historical use" of the alleged private way. Instead, "[p]rescriptive rights are to be strictly construed, and the prescriber must give some notice, actual or constructive,

to the landowner he or she intends to prescribe against. *The notice required is notice of the assertion of an adverse use, under claim of right, as distinguished from a mere permissive use.*” *De Castro v. Durrell*, 295 Ga. App. 194, 202 (2008) (quoting *Keng v. Franklin*, 267 Ga. 472 (1997)) (emphasis added). The element of “adverse use” is met where “notice is given to the property owner that the user intends to make the road his own.” *Trammel v. Whetstone*, 250 Ga. App. 503, 506 (2001).

Mere permissive use of another’s property does not create a prescriptive easement. *See, e.g.*, O.C.G.A. § 44-5-161(b) (“Permissive possession cannot be the foundation of a prescription until an adverse claim and notice to the other party”); *Trammel*, 250 Ga. App. at 505-06 (“[M]erely using a roadway is not enough to acquire prescriptive rights. That a property owner knows of and acquiesces in the use of his private way is insufficient to establish prescription. An owner’s acquiescence in the mere use of his road establishes, at most, a revocable license”) (internal citations omitted); *Ga. Dept. of Trans. v. Jackson*, 322 Ga. App. 212, 215 (2013) (“The notice required is notice of the assertion of an adverse use, under a claim of right, as distinguished from a mere permissive use.”) Even the *unauthorized* use of an owner’s property, without more, does not constitute adverse use necessary for the creation of a prescriptive easement. *See, e.g., McGregor v. River Pond Farm, LLC*, 312 Ga. App. 652, 656 (2011) (fact that users never asked owner for permission to use his property and owner never objected to use “is inadequate to establish the adverse notice necessary to establish an easement by

prescription”). Instead, prescriptive use only begins when “the user notifies the owner, by repairs or otherwise, that he has changed his position from that of a mere licensee to that of a prescriber.” *Yawn*, 307 Ga. App. at 852 (quoting *Keng*, 267 Ga. at 472);

The party seeking a prescriptive easement has the burden of proving that they used the easement for the requisite seven years in a manner adverse to the historical owners of that property. *Chota, Inc. v. Woodley*, 21 Ga. 678 (1983) (party claiming prescriptive easement has burden of proof). However, the party seeking a prescriptive easement can prove that their predecessors-in-title used the easement for the requisite amount of time so long as that use was adverse). *Trammel*, 250 Ga. App. at 508 (citing O.C.G.A. § 44-5-172).



Appendix

ICLE BOARD

<i>Name</i>	<i>Position</i>	<i>Term Expires</i>
<i>Ms. Carol V. Clark</i>	Member	2019
<i>Mr. Harold T. Daniel, Jr.</i>	Member	2019
<i>Ms. Laverne Lewis Gaskins</i>	Member	2021
<i>Ms. Allegra J. Lawrence</i>	Member	2019
<i>Mr. C. James McCallar, Jr.</i>	Member	2021
<i>Mrs. Jennifer Campbell Mock</i>	Member	2020
<i>Mr. Brian DeVoe Rogers</i>	Member	2019
<i>Mr. Kenneth L. Shigley</i>	Member	2020
<i>Mr. A. James Elliott</i>	Emory University	2019
<i>Mr. Buddy M. Mears</i>	John Marshall	2019
<i>Daisy Hurst Floyd</i>	Mercer University	2019
<i>Mr. Cassady Vaughn Brewer</i>	Georgia State University	2019
<i>Ms. Carol Ellis Morgan</i>	University of Georgia	2019
<i>Hon. John J. Ellington</i>	Liaison	2019
<i>Mr. Jeffrey Reese Davis</i>	Staff Liaison	2019

GEORGIA MANDATORY CLE FACT SHEET

Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

A portion of your ICLE name tag is your **ATTENDANCE CONFIRMATION** which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. **DO NOT SEND THIS CARD TO THE COMMISSION!**

ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee’s Bar record. **Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.**

Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

If you have any questions concerning attendance credit at ICLE seminars, please call:
678-529-6688

Follow ICLE on social media:



<http://www.facebook.com/iclega>



bit.ly/ICLELinkedIn



#iclega



State Bar
of Georgia

INSTITUTE OF CONTINUING LEGAL EDUCATION