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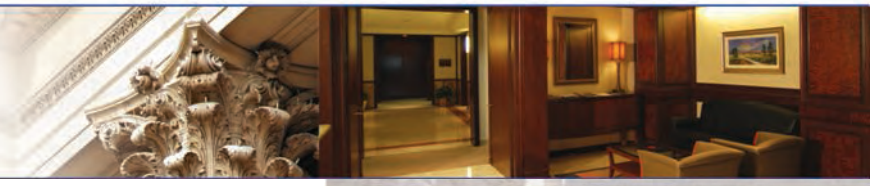
LAWLINE

December 2009
Recent Trends of Interest to Business and Government



Dear Friends,

Another year has flown by and is now ending. It really is difficult for most of us to believe that it was nearly 13 years ago when we started this law firm. It seems like yesterday we were opening our doors on this new enterprise. Each year has seen substantial changes and certainly this year was no exception.

Indeed, we know first hand that everyone has been impacted for better or worse by the "Great Recession." At FMG, while we have been fortunate that our practice has stayed strong, we have found much of our work this year has shifted to critical legal issues confronting our clients in working through this difficult economic climate. From implementing reductions in force to handling litigation for deals gone bad, we have seen all aspects of how this economy has impacted everyone.

Still, like many of you, we have viewed this year's challenges as an opportunity to be embraced. At FMG, we frankly have been fortunate to attract several outstanding lawyers who felt our firm presented a better situation for their practices. We were pleased to have Fred Dawkins join us as a partner in our labor group, Kamy Molavi come to us as a partner in our construction section and Bill Linkous, the former Dekalb County attorney, join our government practice. These three seasoned and accomplished lawyers, as well as several others who joined us, were key additions in continuing to strengthen both the depth and breadth of our firm's capabilities. We are glad they chose to join our team.

Finally, it has been our tradition to use this opportunity at year's end to say "thanks" to our clients and friends. We never quite adequately communicate our appreciation for your entrusting us with your legal matters. We never take that trust lightly and strive every day to continue to deserve the trust you place in us as your lawyer.

On behalf of my partners, our lawyers and our staff, we are thankful to be your attorneys. We wish you and your families a healthy and prosperous new year.

Ben Mathis
For the Firm

Inside this Issue

About FMG

Freeman Mathis & Gary, LLP is a leading specialty litigation firm, serving clients through its practice groups in Business Liability and Insurance Law, Labor and Employment Law, Construction Law, Commercial and Complex Litigation, and Government Law. FMG attorneys serve as trusted counsel to corporations and governments throughout the country, providing practical, efficient, and cost-effective solutions for legal issues. For more information about FMG, visit **www.fmglaw.com**.

Freeman Mathis & Gary, LLP

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
Tel: 770.818.0000
Fax: 770.937.9960

661 Forest Parkway
Suite E
Forest Park, Georgia 30297-2257
Tel: 404.366.1000
Fax: 404.361.3223

Open Records: Electronic Documents and Metadata

By Murray Weed and David Cole

It's 10:00 a.m. on Tuesday morning and you receive an open records request for a copy of the City Council's resolution adopted at its meeting last night. You reach for the minutes to make a copy of the resolution, but then realize that the paper document you are holding was created using a word processing program on the computer. This means that an electronic "copy" of the resolution is saved on the City's network and, seemingly, fits the description of the records request.

Do you have to produce both the electronic and paper versions of the document, or will the paper version suffice? If you produce the electronic version, do you have to produce it with all of its metadata intact?

Under the current state of Georgia's Open Records Act ("ORA"), the answers to these questions are unclear because no appellate court decision has directly addressed these issues. Instead, we must rely on the text of the ORA and case law from other states to reach a pragmatic decision about how to respond in situations like this.

Producing Electronic Records Generally

Georgia's Open Records law defines "public records" as "all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency." O.C.G.A. § 50-18-70(a). The statute also states that, upon request, "records maintained by computer shall be made available where practicable by electronic means, including Internet access, subject to reasonable security restrictions[.]" O.C.G.A. § 50-18-70(g). From these provisions, it is clear that the ORA contemplates the production of electronic records. It remains unclear, however, whether a government must produce the electronic version and paper version of a document if a document exists in both forms. Without further guidance from the statute or an appellate court decision, the most pragmatic answer is that it depends on how the request is worded.

In our example, if the request did not specify the form of the information desired, providing the resolution in paper form will most likely meet the City's obligations. But if the request specifically asked for the electronic version of the City Council's resolution, or a copy of the resolution "in native format," then the City may have to provide access to the word processing document on the computer. In doing so, the Open Records law will allow you to charge the actual cost of a computer disc or tape onto which the information is transferred and for the administrative time actually spent in providing access to the document after the first fifteen minutes. O.C.G.A. § 50-18-71(f).

What is Metadata?

Continuing with our example, if you are producing the electronic version of the resolution, then the next question is whether you must do so with the document's metadata intact. Unlike paper documents, there often is a large amount of data embedded within an electronic document that is not apparent when viewing the document on your computer screen. This additional, embedded data is known as "metadata." Metadata, thus, is often described as "data about data" because it describes information about an electronic document such as authorship, where it was stored, who was in possession of the file, when it was created, when and where it was last accessed, and when and where it was last modified or saved. This information is rarely, if ever, created by the user of a document, but is created automatically by the computer to help it store and retrieve the document.

Arizona's Case

Only one case has directly addressed whether metadata constitutes a "public record" that must be produced under a state's open records law. In Lake v. City of Phoenix, ___ P.3d ___, 2009 WL 3461304 (Ariz. Oct. 29, 2009), a former employee filed an open records request asking the city to produce electronic versions of documents with their metadata in tact so he could determine whether his supervisor back-dated performance evaluations. On appeal, the Supreme Court of Arizona held that the city had to produce the documents with full metadata in tact. In doing so, it established the new rule that, when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under Arizona's public records law.

The reasoning behind the Arizona court's decision was that metadata in an electronic document is part of the underlying

document; it does not stand on its own. When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page. Therefore, the court concluded that if the city had to produce the electronic document, it also had to produce the metadata because the two could not be separated.

In reaching this decision, the court dismissed the city's arguments that an "administrative nightmare" would occur if it was required to produce electronic documents with their metadata in tact. The court explained that many open records requests would not even seek metadata, and that metadata would not necessarily have to be provided unless specifically requested. Likewise, the court explained that the public records request could be satisfied by providing a copy of the record in its "native format," which means the city could simply email the document directly to the requestor or place a copy on disc. Viewed from this perspective, producing the electronic version of the document with metadata in tact would likely require less administrative work than providing a paper copy of the document.

Georgia Law

There is no case like this in Georgia that clearly resolves the metadata issue. Perhaps the closest case is Smith v. DeKalb County, 288 Ga. App. 574, 654 S.E.2d 469 (2008), which involved a request for a computer disc containing ballot information after an election. The Secretary of State objected to the request and sought a decision on whether or not the computer disc was subject to disclosure under the ORA.

The Georgia Court of Appeals initially held that the disc was protected from disclosure because of an election code provision requiring that ballots remain sealed after an election. In addition, however, the court did not require production because the disc was protected by encryption codes that were needed to access the information on the disc. In this regard, the court held that releasing the disc with the encryption codes would compromise election security, meaning that the disc was exempt under the ORA exemption for documents that might compromise security against sabotage criminal or terrorist acts. O.C.G.A. § 50-18-72 (a)(15)(A)(iv).

In response, the requestor alternatively asked for a copy of the disc without the encryption codes and passwords. However, the ORA specifically provides that governments are not required to create any report, summary, or compilation that is not already in existence at the time of the actual request. O.C.G.A. § 50-18-70 (d). The court held producing an unencrypted version of the disc would effectively require the government to create a version of the records that did not already exist, and, therefore, it did not require Dekalb County to take this extra step.

Analysis and Predictions

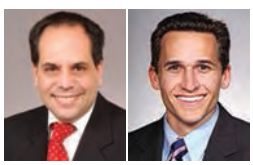
There is an important distinction between Smith and the Arizona case. From a technical perspective, the encryption codes in Smith were not metadata because they were not embedded data within the document designed to help describe properties of the document. Rather, they were added to the document to restrict access. In contrast, the Arizona case involved metadata about the date a document was created so that an employee could see if his supervisor back-dated a performance review. This constituted metadata because it was automatically created by the computer to describe a characteristic about the document itself. Encryption codes and passwords do not share this quality.

Because of this important distinction, the rationale from Arizona's case likely provides better guidance on how to respond to open records requests for metadata, than does the Smith case. Thus, when a government receives an ORA request, the best practice is to closely evaluate the wording of the request to determine whether it must produce a paper or electronic version of a document, or both. If the request only seeks a "copy" of the document, or if it does not explicitly request an electronic version, then the government will most likely comply with the ORA by providing a traditional, paper copy. If the request asks for an electronic version, however, then the government must provide access to the document and then decide whether it must do so with the document's metadata in tact.

As explained in the Arizona case, many ORA requests will not seek metadata, and metadata likely does not have to be produced unless it is specifically requested. If metadata is requested, however, then Georgia courts will likely follow the rationale of the Arizona case and conclude that it has to be produced under the ORA because it forms part of the document itself. That said, as demonstrated by the decision in Smith, the traditional ORA exemptions still apply, even in the context of electronic documents and metadata. Therefore, metadata likely does not have to be produced, even when specifically requested, if the metadata itself contains information that fits within a traditional ORA exemption. Therefore, whenever producing electronic documents or metadata, one must be aware of the metadata contained within the documents and evaluate whether that information is protected from disclosure.

For more information regarding this article, please contact Mr. Weed at 770.818.1294 or by email at mweed@fmglaw.com, and Mr. Cole at 770.818.1287 or by email at dcole@fmglaw.com

Does a Defense Without Reservation of Rights Waive an Insurer's Coverage Defenses?



By Phil Savrin and Josh Portnoy

The Supreme Court of Georgia may soon resolve whether an insurer's defense of its insured without a reservation of rights prevents an insurer from relying on coverage defenses absent a showing of prejudice to the insured. Generally speaking, coverage involves contractual obligations and cannot be created by waiver or estoppel. Many states, including Georgia, recognize an exception to this rule where the insurer has assumed the defense of its insured without properly informing the insured of potential coverage defenses.

The explanation provided for this exception is that the insured can reasonably rely on the insurer's conduct of the defense in not taking additional steps to protect its own interests. Any prejudice to the insured's rights of defense, in other words, must be borne by the insurer. The states differ, however, as to whether such prejudice is presumed from a defense without a reservation of rights or must be affirmatively shown by the insured.

In the early decision of Jones v. Georgia Cas. & Sur. Co., 89 Ga. App. 181 (1953), the insurer had assumed the insured's defense and taken the case all the way through final judgment without advising the insured that coverage might be absent. When the insurer thereafter attempted to disclaim coverage, the court found that prejudice to the insured could be presumed under the circumstances presented. In a subsequent case heard in federal court, the appeals court - relying on Jones - interpreted Georgia law as holding that, where the insurer assumes and conducts the defense without giving notice of its reservation of rights, "prejudice to the insured ... is conclusively presumed." Fidelity and Cas. Co. of New York v. Riley, 380 F.2d 153, 156 (5th Cir. 1967). The Riley court appears to have concluded on its own that prejudice is "conclusively presumed," but it was never overruled nor relied upon by a subsequent decision to find an estoppel of coverage defenses.

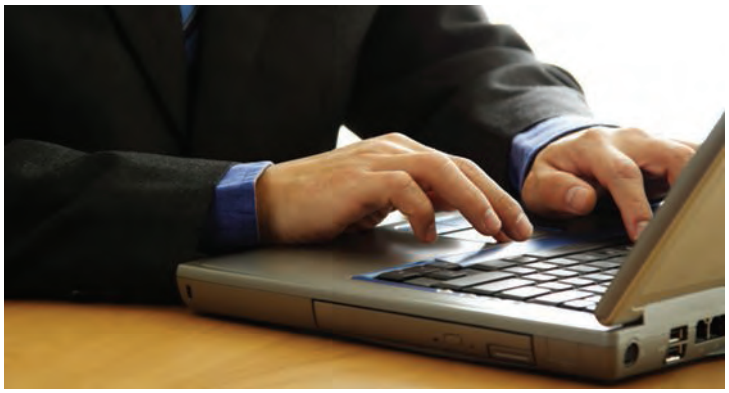
Meanwhile, in 1984, the Supreme Court of Georgia analyzed a case where the insurer had not defended the insured, but simply filed an answer to forestall default. By taking steps to avoid a default, the insurer had not defended its insured, meaning there was no defense without a reservation of rights. But even if there had been, the court continued, there could be no estoppel as the insured "failed to demonstrate how [the insurer's] participation ha[d] prejudiced the insured's defense." Prescott's Altama Datsun, Inc. v. Monarch Ins. Co. of Ohio, 253 Ga. 317 (1984). Consequently, the insurer was not estopped from asserting a defense of noncoverage, despite the absence of a reservation of rights. In cases that followed, the courts have held that an insured has the burden to show prejudice from receiving a defense without reservation of rights in order to prevent the insurer from asserting coverage defenses. See Danforth v. Gov't Employees Ins. Co, 282 Ga. App. 421, 429 (2006); Adams v. Atlanta Cas. Co., 235 Ga. App. 288, 289 (1998).

Given this line of cases, it was not surprising that a federal district court recently awarded summary judgment to an insurer on the absence of coverage despite the failure to provide a reservation of rights. In World Harvest Church, Inc. v. GuideOne Mut. Ins. Co., 2008 WL5111218 (N.D. Ga. 2008), the court reasoned that, because the insured was not prejudiced by the insurer's actions, the insurer could not be estopped from denying coverage. On appeal, the Eleventh Circuit believed it was bound by the Supreme Court of Georgia's decision in Prescott to find that the insured must show prejudice to prevent the insurer from asserting coverage defenses. World Harvest Church, Inc. v. GuideOne Mut. Ins. Co., -- F.3d --, 2009 WL3490872 (11th Cir. 2009). It nevertheless recognized an inconsistency with the Riley decision and the line of cases following Prescott. In order to clarify this inconsistency, the federal appeals court certified to the Supreme Court of Georgia the question of "whether the ... estoppel doctrine requires a showing that the insured actually was prejudiced by the insurer's assumption of the defense." Id.

Procedurally, the Supreme Court of Georgia has the option of rejecting the certified question, but in all likelihood, jurisdiction will be accepted and a decision will be issued in 2010. The decision will have a significant impact on litigation in Georgia, to insurers and insureds alike. ■

For more information regarding this article, please contact Mr. Savrin at 770.818.1405 or by email at psavrin@fmglaw.com, and Mr. Portnoy at 770.818.1439, or by email at jportnoy@fmglaw.com

Invalid Non-Compete Agreement is not a License to Sell Trade Secrets



By Fred Dawkins and David Cole

In Coleman v. Retina Consultants, P.C., ___ S.E. 2d ___ , 2009 WL 3711994 (Ga. Nov. 9, 2009), the Georgia Supreme Court invalidated a non-compete agreement because it had no time or territorial restrictions, but still found that an employer could prevent a former employee from marketing a software program he owned, but which incorporated the former company's trade secrets.

When Brendan Coleman started working as a software engineer for Retina Consultants, he already had written and marketed a medical billing program called Clinex. At Retina Consultants, Coleman created a new version of his program -- Clinex-RE -- which suited Retina Consultants' specific business needs and integrated its trade secrets and confidential information. Coleman and Retina Consultants entered into a Software Agreement which stated that Coleman owned Clinex, and granted Retina Consultants a non-exclusive license to use Clinex. The Agreement also allocated the rights to Clinex-RE between Coleman and Retina Consultants, and contained a non-compete provision that "Coleman will not distribute, vend or license to any ophthalmologist or optometrist the Clinex software or any computer application competitive with the Clinex-RE software without the written consent of Retina Consultants."

Shortly before resigning, Coleman went to all of the Retina Consultants computers and removed the encryption keys and source access codes for the Clinex and Clinex-RE programs. Afterwards, Coleman refused to give Retina Consultants the passwords for these programs and tried to license them to other ophthalmologists. Retina Consultants sued Coleman to enforce the Software Agreement and to prevent Coleman from selling Clinex-RE to other practices.

The Court held that the Software Agreement's non-compete provisions were unreasonable and could not be enforced because they were overly broad -- they contained no time or territorial limitation, and were not limited to doctors who had been Retina Consultants customers. Even without an enforceable restrictive covenant, however, Retina Consultants was able to prohibit Coleman from marketing Clinex-RE. Because Clinex-RE incorporated Retina Consultants' proprietary information and trade secrets, the Court held the software program was a trade secret belonging to the company. Because it is an implied term of every employment contract that an employee will not disclose a trade secret learned during his employment to a competitor of his former employer, Coleman was prohibited from marketing Clinex-RE to compete against Retina Consultants.

Employers should use this case as a prompt to review employment agreements to ensure that they are appropriately limited in time, territory, and scope of activity. Employers also should use this case to evaluate whether, in light of the limitations on their enforceability, non-compete agreements are necessary for all employees. The potential for overly broad non-compete agreements to invalidate other provisions in an employment agreement may mean that an employer's interests may be more effectively protected by supplemental agreements designed to accommodate collaborative efforts -- such as Coleman and Retina Consultants' Software Agreement, or "work made for hire" agreements -- or by Georgia's trade secret laws.

For more information regarding this article, please contact Mr. Dawkins at 770.818.1409 or by email at fdawkins@fmglaw.com, and Mr. Cole at 770.818.1287 or by email at dcole@fmglaw.com

FMG Cases

Bart Gary and Arthur Ebbs recently won a case before the Georgia Court of Appeals in a matter regarding a petition to register a foreign support order in Georgia. The Court of Appeals held that the Uniform Interstate Family Support Act required application of the statute of limitation of the state issuing the support order and found that the contempt order at issue could be enforced in Georgia. The written opinion of the Georgia Court of Appeals is available at 2009 WL 4282917.

Phil Savrin and Todd Surden recently obtained a dismissal of a claim against an insurance company in a rescission action pending in the Northern District of Georgia. The case involved an insured who was sued for defective construction after a pipe burst and flooded a residential property, causing damages in excess of $250,000. The court granted judgment after finding that the policy was issued to cover landscaping and not defective construction claims.

Mary Anne Ackourey and Bill Buechner recently obtained dismissal of a claim for intentional infliction of emotional distress by a former employee of an Atlanta University. The superior court entered judgment in the University's favor finding no evidence to support the employee's discharge was unlawful.

Bob Oliver and Michelle Youngblood Terry obtained a favorable award in a condemnation case involving allegedly "unique" property in an industrial corridor adjacent to a major metropolitan airport. The property owners and their appraiser contended that the 2.4 acre tract was suitable for uses incident to the airport or for commercial development, and valued it at $1.25 million. The condemnor's appraiser deemed the value at $650,000. The panel of assessors determined the value of the property to be $750,000.

Ben Mathis and David Cole won a complete dismissal in an injunction hearing arising out of an election contest. The lawsuit sought to overturn the results of a 150 million dollar SPLOST ballot referendum that voters approved during the November election. The court ordered that the case be dismissed and that the plaintiff pay the county its attorneys' fees and costs incurred in defending the suit.

Jack Hancock and Michelle Youngblood Terry recently defeated a suit against a local government, its chairman, and its chief staff attorney, filed by attorneys who previously had represented a constitutional officer in litigation with the county. The attorneys, who had not been paid by the constitutional officer, contended that the county was responsible for paying their fees. The court found, among other things, that the plaintiff failed to follow the statutory procedure for appointment as outside counsel and that sovereign immunity protected the county and the individual defendants in their official capacity from the claim of implied contract.

FMG Attorney News

FMG has been named a 2010 "Go-To Law Firm" for both Litigation and Employment Law by Corporate Counsel Magazine. This recognizes legal work for the nation's 500 largest companies.

Ben Mathis was selected as a "Legal Elite" by Georgia Trend Magazine. Mr. Mathis also will serve on the Board of Directors for the Georgia Chamber of Commerce and the Cobb Chamber of Commerce for 2010.

Ted Freeman presented "A Practical Guide to Understanding Sovereign Immunity as it Applies to Counties, School Districts and Cities" as part of the Institute for Continuing Legal Education's Government Attorneys' seminar.

Fred Dawkins recently published an article for the American Institute for Managing Diversity entitled "Is Diversity None of Your Business - Lessons from Ricci v. DeStefano," which analyzed the Supreme Court's landmark decision involving the New Haven firefighter promotions. Mr. Dawkins also moderated a panel in New York City in November for the Minority Corporate Counsel Association on strategies for retention and promotion of diverse candidates.

Neil Wilcove recently published the article "How to Ensure Payment for Work Performed " in the Construction Executive Magazine. Mr. Wilcove also has been elected to the Board of Directors of the National Alumni Association of Albany Law School.

Brad Adler has been elected to the Board of Directors for the Sandy Springs Chamber of Commerce.

Sun Choy recently spoke on "Qualified Immunity from Suit in Section 1983 Litigation" at a Section 1983 seminar. Mr. Choy also spoke on "Effective Use of Motions to Execute Defense Strategy" at the Institute for Continuing Legal Education seminar on "Defense of a Personal Injury Claim."

David Cole has been selected as Co-chair of the YLD Labor & Employment Law Committee for the State Bar of Georgia.

Attorney Spotlight on Kamy Molavi

Born: 1958

High School: Alborz High School, Tehran, Iran

College: Georgia Tech

Law School: Emory

Family: Married to Andrea, two daughters, one in college and one in high school

Favorite Book: Recent favorite: Outliers by Malcolm Gladwell

Favorite Movie: Recent favorite: Everything Turns Green

Favorite Sports Team: Jackets, of course

Favorite Food: Indian

Favorite Band: Golub-Kaplan-Carr Trio

Favorite Quote: "Iyam what Iyam "

Favorite Charity: CHRIS Kids, Inc.

Hero: Yes. Seriously, Aaron Feuerstein, owner of Malden Mills in Lawrence Mass.

Craziest College Job: After-midnight snack-bar attendant at Iowa State University Student Union

Hobbies: Filling out forms like this.

If you won the lottery, what would you do? Buy my wife a car, travel abroad, hire house cleaners

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100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948