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THE TORT REPORT

An Update on Liability Issues FALL 2021

AMENDMENTS TO O.C.G.A. § 9-11-67.1 AND IMPLICATIONS ON PRE-SUIT SETTLEMENT DEMANDS

BY: ALEX McDONALD

Georgia has amended O.C.G.A. § 9-11-67.1, the statute governing pre-suit offers to settle personal injury claims arising from motor vehicle accidents. House Bill 714 was signed into law by Governor Brian Kemp on May 4, 2021, and marks the first time this often-used statute has been revised since its enactment in 2013 to address "set up" tactics that proliferated in the aftermath of *Southern General v. Holt*, 262 Ga. 267 (1992). The 2021 amendments address ambiguities in the statute, prohibit certain strategies developed by claimants' attorneys and reverse case law that eroded protections the statute was intended to create. This article summarizes the significant changes to O.C.G.A. § 9-11-67.1 enacted in HB 714.

The 2013 version of the statute set forth five material terms that were required to be included in any settlement offer, including:

1. The time for acceptance
2. Monetary amount
3. Parties to be released
4. Claims to be released
5. The form of the release

The same material terms remain after the 2021 amendment. However, subsection (b)(1) now declares that these five material terms (plus a new one discussed below) are the only conditions of acceptance that may be included in a demand without the consent of the recipient in writing. This amendment reverses the Supreme Court of Georgia's decision in *Grange Mutual Cas. Co. v. Woodard*, 300 Ga. 848 (2017), which held that an offer could include conditions to acceptance beyond the five listed above. The *Grange* decision encouraged claimants' attorneys to always require timely payment and include other problematic terms, such as the preparation of affidavits and other commitments as conditions to acceptance. The most notable impact of this amendment appears to be that the requirement of timely payment may no longer be imposed as a condition of acceptance. Rather, a timely payment requirement is now merely a matter for enforcement of a settlement agreement as contemplated by the dissent in *Grange*. While claimants' attorneys may continue to impose additional conditions before a claim is resolved, this is expected to be less common now that the additional conditions will render the offer non-compliant with O.C.G.A. § 9-11-67.1. As a compromise, new subsection (a)(3) permits an offer to require the "recipient" to provide a sworn statement as to whether all insurance "issued by the recipient" has been disclosed.

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The revised statute also moves attorneys a step closer to clarity on the effect of including a proposed release along with either the offer or a response. Subsection (d) of the statute provides that "if a release is not provided with an offer to settle, a recipient's providing of a proposed release shall not be deemed a counteroffer." This amendment addresses the confusion that arose from appellate decisions, including *Pritchard v. Mendoza*, 357 Ga. App. 283 (2020) and *Turner v. Williamson*, 321 Ga. App. 209 (2013), which discussed what happens when the party receiving an offer wants to accept the offer and send a proposed release.

HB 714 now requires that settlement demands "include medical or other records in the offeror's possession incurred as a result of the subject claim that are sufficient to allow the recipient to evaluate the claim." This subjective requirement may lead to disputes both before and after a demand expires about whether the demand has included "sufficient" documentation.

The provision governing timely payment in subsection (g) has also been slightly adjusted to allow a period "not less than 40 days" from receipt of the offer to make payment, rather than the 30-plus-10-day requirement included in the 2013 version. This revision will have the practical effect of permitting the recipient to accept in advance of the deadline without starting a 10-day clock on delivery of the check.

Finally, the requirements of O.C.G.A. § 9-11-67.1 now apply to offers submitted "prior to the filing of an *answer*." Previously, the statute only applied to offers made "prior to the filing of a civil action." Thus, settlement offers that are submitted after filing of a lawsuit will be required to comply with O.C.G.A. § 9-11-67.1 through such time as an answer is filed.

The revised statute applies to causes of actions arising on or after July 1, 2021, so claimants' attorneys will continue to utilize the prior version of the statute in issuing settlement demands for claims that arose prior to that date. The statute also continues to apply only to offers "prepared by or with the assistance of an attorney," so it is not applicable to pro se claimants.

In summary, HB 714 addresses multiple issues that have arisen in litigation regarding pre-suit offers under O.C.G.A. § 9-11-67.1. Insurance companies will find comfort in the amended provisions regarding the terms that may be included in an offer. However, we should expect that claimants' attorneys will develop new and creative strategies to maximize the potential for bad faith exposure. As in any compromise, both sides are sure to be dissatisfied before long.

RECENT UPDATES TO THE APPLICABILITY OF GEORGIA'S APPORTIONMENT STATUTE, O.C.G.A. § 51-12-33

BY: KATY ROBERTSON

In its recent decision of *Alston & Bird v. Hatcher Management Holdings, LLC*, 2021 WL 3501075, the Supreme Court of Georgia examined the apportionment statute, O.C.G.A. § 51-12-33, to determine whether subsection (b) allows for nonparty apportionment of damages in single-defendant cases and whether litigation expenses are "damages" subject to apportionment under the statute. O.C.G.A. § 51-12-33 was enacted as part of the Tort Reform Act of 2005, which abolished joint and several liability in Georgia in most circumstances. In reaching its opinion, the court looked at the plain and ordinary meaning of the text of the statute. As the court noted, the "General Assembly does not enact a general intention; it enacts statutes. Statutes have words, and words have meanings. It is those meanings that we interpret and apply, not some amorphous general intention."

In determining the statute's true meaning, the court held that O.C.G.A. § 51-12-33(b), which provides defendants the ability to reduce their damages through apportionment to nonparties, does not apply in cases where there is only one defendant. The statutory language in subsection (b) clearly states application in cases "brought against more than one person." The court points out that this language is in direct contrast to language used in other subsections, which apply in cases "brought against one or more persons." It appears that the court's ruling pertains to cases with only one defendant at the time of filing, and not cases where other defendants were dropped or dismissed from the litigation while it was pending. However, this issue was not before the court because the plaintiff only sued a single defendant.

Since its enactment, the apportionment statute has been routinely used to apportion damages in both single-defendant and multi-defendant cases, and *Alston & Bird* is the first decision from the Supreme Court of Georgia to provide an interpretation of the statutory language. As a result of this ruling, the current statutory language of subsection (b) will limit nonparty apportionment to multi-defendant cases. However, in cases where apportionment does not apply, a defendant may still seek contribution from any joint tortfeasor(s) who proximately caused injury to the plaintiff. As such, we expect to see an increase in third-party complaints against potential joint tortfeasors where a plaintiff only files suit against a single defendant. This decision will not impact the determination of the plaintiff's percentage of fault; a single defendant will still be entitled to reduce its damages by the percentage of fault a jury attributes

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to the plaintiff. As before, through the timely filing of a Notice to Apportion Nonparty Fault, parties in cases brought against two or more defendants may continue to seek apportionment among co-defendants and nonparties at fault, regardless of whether the person or entity was, or could have been, named as a party to the suit.

In this same decision, the Supreme Court of Georgia determined that an award for expenses of litigation under O.C.G.A. § 13-6-11 is subject to apportionment under O.C.G.A. § 51-12-33 because litigation expenses constitute a measure of damages. O.C.G.A. § 13-6-11 provides that litigation expenses are only allowed where the defendant has "acted in bad faith, has been stubbornly litigious or has caused the plaintiff unnecessary trouble and expenses." The court determined that § 13-6-11 does not create an independent cause of action, but simply provides the circumstances where litigation expenses may be recovered as an additional element of damages. This additional element of damages is a part of the "total amount of damages to be awarded" identified in § 51-12-33. The court noted, "There may be instances in which a plaintiff is partly at fault for a defendant's bad faith, and we see no reason why a jury cannot make such a factual determination. And, of course, the same may be true of other defendants and nonparties, although our holding in Division 2 makes clear that expenses of litigation may be reduced based on percentages of fault of other defendants or nonparties only in tort actions brought against multiple defendants."

While the court's ruling that nonparty apportionment is limited to multi-defendant cases may hinder solo defendants, the ability to apportion litigation costs has the potential to be beneficial in all matters, regardless of the number of defendants, as the plaintiff's role in the litigation must also be considered by the jury. The true impact of *Alston & Bird* will likely take years to evaluate. For now, both the "old" rule of joint and several liability and the "new" rule of apportionment remain applicable in particular tort cases. We expect additional appellate decisions to further clarify the limitations of each.

LITIGATION FUNDING COMPANIES AND DISCOVERY

BY: NEGIN PORTIVENT

Litigation funding companies (LFCs) have become almost as common as tort litigation itself. LFCs are third-parties, unrelated to a lawsuit, that provide capital to a plaintiff in return for a percentage of any settlement reached or trial verdict rendered. In other words, these companies finance a plaintiff's lawsuit in exchange for a portion of what the plaintiff ultimately recovers. This growing industry has important implications for the discovery process. Focused discovery can unearth potential biases and motives, evidence of which is admissible at trial.

Discovery in Georgia is governed by O.C.G.A. § 9-11-26, which provides that parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." Of note, the potential inadmissibility at trial of the information sought is not grounds for objection if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Georgia courts have routinely interpreted this statute broadly to fulfill the intended purpose of discovery — issue formulation and factual revelation — and afford parties "wide latitude" in conducting discovery. This wide latitude given to parties engaged in discovery extends to discovery sought from nonparties as well. O.C.G.A. § 9-11-34(c) governs discovery on nonparties, like LFCs, and provides that "any party may serve . . . a request to produce . . . documents on any . . . persons, firms, or corporations who are not parties."

Nonparty discovery to LFCs should be narrowly crafted to seek specific information, such as contracts between the LFC and the plaintiff or plaintiff's counsel, liens, assignments of rights, and text messages/voicemails between the LFC and the plaintiff or plaintiff's counsel. However, the request must also be broad enough to capture any documents in the LFC's possession regarding the plaintiff. Requests to LFCs should be drafted with an eye toward discovering the details of the financial agreement between a plaintiff and the LFC. For example, did the LFC enter into an agreement with plaintiff directly by giving him a cash advance? Did the LFC enter into an agreement with the plaintiff's medical providers where it would pay them directly or did it purchase a provider's existing medical lien? If so, how did that affect the rates charged and the special damages claimed?

Discovery on these issues may produce evidence of the relationship between a plaintiff, his attorneys, his doctors and the LFC, which is relevant to demonstrate bias, intent and motive. If evidence of bias or motive is obtained, it should be admissible at trial. *See ML Healthcare Servs., LLV v. Publix Super Markets, Inc.*, 881 F.3d 1294, 1301 (11th Cir. 2018); *see also Stephens v. Castano-Castano*, 346 Ga. App. 284

(2018). In fact, several LFCs have websites touting their relationships with their network of health care providers. When a provider's compensation or business relationship is dependent upon the outcome of the case, it can be argued the provider has become an investor of sorts in the lawsuit and a jury should know that information to evaluate the provider's bias and motivation when testifying. *See Stephens*, 346 Ga. App. at 291. This is particularly true if, for example, the LFC referred the plaintiff to his doctors. If the plaintiff has a favorable recovery, the LFC may be inclined to refer other plaintiffs to that doctor in the future. A jury is entitled to know how a provider's relationship with the LFC might affect the doctor's testimony or may motivate the doctor to testify in a way that he may not have, absent the financial entanglement. Id.

More often than not, discovery served on LFCs will be met with an objection. The most frequently cited ground for objection is that documents sought from the LFC are barred by the "collateral source rule," which prohibits a defendant from presenting evidence of payments of expenses by a third party. In other words, a defendant cannot present evidence of payments made by a health insurance company to a plaintiff and take credit for that payment to reduce damages. With respect to LFCs, however, courts applying Georgia law have ruled LFCs are not a traditional collateral source because they do not pay or even reduce a plaintiff's medical bills. *Rangel v. Anderson*, 202 F.Supp.3d 1361, 1373 (S.D. Ga. 2016); *Houston v. Publix Supermarkets, Inc.*, No. 1:13-CV-206, 2015 WL 4581541, at *2 (N.D. Ga. July 29, 2015). While litigation surrounding LFCs is still evolving, there appears to be some clarity with respect to the collateral source rule, and any objection founded on that theory should be challenged.

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THE FUTURE OF TORT LIABILITY FOR AUTONOMOUS VEHICLES

BY: LUCY AQUINO

For years, academics have debated the risks and benefits of developing and distributing fully autonomous vehicles — and for good reason. While the most noticeable impact will be on the roads, the growing availability of autonomous vehicle technology will have a much larger impact on society and the economy as a whole. As defense lawyers, our minds jump to the impact on automobile tort liability: Can or should our current liability rules be applied to motor vehicle accidents involving vehicles driven, totally or partially, by autonomous systems?

To address this issue, we must first establish the extent to which a vehicle can be considered "autonomous." The National Highway Traffic Safety Administration (NHTSA) classifies automated vehicles in six possible levels of automation. The initial level (L0) speaks to driving systems where the human driver is in total control of the vehicle, while the final level (L5) refers to truly self-driving vehicles in which the autonomous system is expected to not only replace the human driver but also to perform better than a human driver in every scenario. The intermediate levels (L1-L3) — the only levels currently available to consumers — refer to vehicles that provide some degree of autonomous assistance, but still require the supervision of a human driver. Features such as lane departure assistance, automatic breaking and adaptive cruise control are designed to reduce instances of human error by delegating certain driving tasks to an automated system. However, even under the most evolved level of automation currently available (L3), the human driver is still ultimately responsible for supervising the vehicle and taking over in the event of emergency.

State legislatures across the country have worked to bring state laws up to speed with this new technology and to provide a legal framework for autonomous vehicles operating on public roads. Georgia is no exception. In 2017, the Georgia General Assembly passed Senate Bill 219, which amended certain aspects of the state's traffic and criminal codes to pave the way for regulation of self-driving vehicles in the future.

First, the bill modified the term "operator" to encompass anyone "who causes a fully autonomous vehicle to move or travel with the automated driving system engaged." This definition is intended to create single-point liability for any accidents, whether it lies with the automaker that directly sells and distributes an automated vehicle or the individual owners who install and/or operate autonomous driving systems.

Second, the bill exempted "operators" of autonomous vehicles from driver's license requirements. Thus, under the revised laws, an individual does not need a driver's license to ride in a fully autonomous vehicle. However, the revision does not exempt autonomous vehicles from complying with the rules of the road, including any post-accident statutory requirement the vehicle or operator remain on the scene of an accident and report it to law enforcement.

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Third, and possibly reflecting societal concerns about the implementation of autonomous vehicle technology, the bill imposed specific liability insurance requirements for fully autonomous vehicles. As of Jan. 1, 2021, owners of fully autonomous vehicles must maintain insurance coverage with minimum limits of $300,000 — the same minimum limits required for limousines and taxis.

Of note, the definition of "fully autonomous vehicle" in SB 219 renders it wholly inapplicable to any technology currently available to the general public. In order to qualify as a "fully autonomous vehicle" under the bill, a vehicle must be able to perform all aspects of the dynamic driving task and must not, at any time, require that a human driver assume any portion of the task. In the event of a malfunction, the vehicle must be able to come to a stop in a reasonably safe manner without requiring any type of human intervention. While autonomous vehicles that can be operated without a human driver are currently being tested on public roads, none are currently available for purchase. Even in the most autonomous vehicles currently available, the human driver is always responsible for the supervision of the vehicle and will remain, at least for the time being, liable for any accidents.

The Georgia General Assembly's decision to create a legal framework for truly self-driving vehicles shows that this technology is expected to be more prevalent in the near future. As these vehicles become accessible to the general public, this legal framework will be critical for determining where tort liability falls when human drivers no longer control the vehicle.

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