THE CURRENT STATE OF THE LAW IN WORKERS' COMPENSATION SUBROGATION – A PRACTICAL PRIMER©

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INTRODUCTION

On July 1, 1992, the general assembly made significant changes to the Georgia Workers' Compensation Act by providing subrogation lien rights to Employer/Insurers against third parties who have injured an Employee. See O.C.G.A. § 34-9-11.1. Although the concept of subrogation in Workers' Compensation cases was first introduced in 1922, the repeal of Georgia Code Annotated § 114-403 in 1972 left Georgia Employer/Insurers with no subrogation lien recovery rights for twenty years. Unfortunately, O.C.G.A. § 34-9-11.1 itself is poorly written and provides little guidance to injured Employees and their Employer/Insurer on how to interpret many of its terms. As a result, Georgia's appellate courts have been forced to define and interpret many of the basic elements of this code section. As such, the purpose of this primer is to provide a framework or guide for evaluating and handling Georgia Workers' Compensation subrogation lien issues.

ESSENTIAL TERMS OF O.C.G.A. § 34-9-11.1

O.C.G.A. § 34-9-11.1 provides that if a third party, other than those excluded by O.C.G.A. § 34-9-11, causes an injury or death to an Employee for which benefits under the Georgia Workers' Compensation Act are payable and for which said third party is legally liable, the injured Employee, or those to whom such Employee's right of action survives at law, may file suit against that third party in any court of competent jurisdiction. O.C.G.A. § 34-9-11.1(a). However, any such cause of action must be filed within the applicable statute of limitations. O.C.G.A. § 34-9-11.1(b). For most personal injury lawsuits, the applicable statute of limitations is two years from the date the injury occurred. O.C.G.A.

§ 9-3-33. If the Employee does not file such an action within one year after his date of injury, then the Employer/Insurer may, but is not required to, assert the Employee's cause of action in tort, either in its own name or in the name of the Employee. O.C.G.A. § 34-9-11.1(c). O.C.G.A. § 34-9-11.1 further provides that once the Employer/Insurer files suit against the Third-Party Tortfeasor, it shall "immediately" notify the Employee that it has done so. Similarly, if the Employee files suit against the Third-Party Tortfeasor more than one year after the date of accident, it must likewise notify the Employer/Insurer that it has taken such action. In any event, Employer/Insurers and the Employee are entitled, as a matter of right, to intervene in any lawsuit filed by the other. O.C.G.A. § 34-9-11.1(c). See Canal Insurance Company v. Liberty Mutual insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002); P.F. Moon and Company v. Payne, 256 Ga. App. 191, 568 S.E.2d 113 (2002).

Subsequent decisions of the Court of Appeals suggest that it is error not to allow an Employee or Employer/Insurer to intervene in a third-party tort action where the rights of the intervening parties have not been protected (such as when the statute of limitations has expired), where denial of the intervention would dispose of the intervening parties' cause of action, and where final judgment has not been entered. See Brown v. Department of Administrative Services, 219 Ga. App. 27, 464 S.E.2d 7 (1995); Payne v. Dundee Mills, Inc., 235 Ga. App. 514, 510 S.E.2d 67 (1998). The Court of Appeals has also held that a subrogation lien holder has no standing to appeal error in the underlying third-party tort action unless it intervenes at the trial level. Astin v. Callahan, 222 Ga. App. 226, 474 S.E.2d 81 (1996).

O.C.G.A. § 34-9-11.1 further provides that to the extent the Employer/Insurer has

fully or partially paid any Workers' Compensation benefits, it maintains a subrogation lien consisting of all disability, death benefits and/or medical benefits it has paid to or on behalf of the Employee against the recovery against the Third-Party Tortfeasor. However, the Employer/Insurer is not entitled to collect its Workers' Compensation subrogation lien until it establishes that the Employee has been "fully and completely compensated, taking into consideration both the benefits received under this chapter [of The Georgia Workers' Compensation Act] and the amount of the recovery in the third-party claim for, for all economic and non-economic losses incurred as a result of the injury." O.C.G.A. § 34-9-11.1(b). This limitation on the Employer/Insurer's right to subrogation/reimbursement is consistent with the legislature's concern that the injured Employee first be made whole. See North Brothers Company v. Thomas, 236 Ga. App. 839, 840, 513 S.E.2d 251, 253 (1999). However, the Georgia Supreme Court has held that subrogation liens based on payment of workers' compensation benefits to federal employees is not governed by O.C.G.A. § 34-9-11.1. Instead they are governed by the provisions of the Federal Employees Compensation Act (FECA) and Federal Employee Health Benefit Act (FEHBA). Since federal law applies to such claims, the "full and complete compensation" language contained in O.C.G.A. § 34-9-11.1 is inapplicable to such claims. See Thurman v. State Farm Mutual Automobile Insurance Company, 278 Ga. 162, 598 S.E.2d 448 (2004).

In addition, the Employer/Insurer cannot recover more that the total amount of death benefits, income benefits and medical benefits it has paid to the Employee from any Third-Party Tortfeasor. Any excess verdict or settlement funds must be paid over to the Employee. O.C.G.A. § 34-9-11.1(c). This provision is incorporated into O.C.G.A. § 34-9-11.1 to prevent the Employer/Insurer from receiving a windfall from a large judgment

against a Third-Party Tortfeasor. Fortunately, in one of the rare occasions that the drafters of O.C.G.A. § 34-9-11.1 have actually defined the terms contained in this code section, "employee" is defined as "not only the injured employee but also those persons in whom the cause of action in tort rests or survives for injuries to such employee." O.C.G.A. § 34-9-11.1(c).

In addition, the statute provides that in the event a recovery is made against a Third-Party Tortfeasor, the Employee's attorney is entitled to a reasonable fee for services provided. However, if the Employer/Insurer has also retained counsel to protect their interests in the case, a court of competent jurisdiction (i.e. the trial court) shall, upon application, apportion the reasonable fee between the parties' respective attorneys. Any such attorney fee is also subject to the provisions contained in O.C.G.A. §§ 15-19-14 and 15-19-15. See O.C.G.A. § 34-9-11.1(d). As with many of the provisions contained in O.C.G.A. § 34-9-11.1, the legislature did not indicate whether the Employee's attorney is entitled to a fee based on his representation of the Employee/Plaintiff as commonly determined by a contingency fee contract or whether it intended for counsel for the Employee/Plaintiff to be entitled to an additional attorney fee to be deducted from the lien recovered by the Employer/Insurer. In any event, the attorney fee comes "off the top" of the recovery. See O.C.G.A. § 34-9-11.1(b).

Finally, O.C.G.A. § 34-9-11.1(e) provides that the 1995 amendment to subsection (c), concerning the parties' respective rights to file suit against a third party and the application of the statute of limitations, shall be applied both prospectively and retroactively. See Vaughn v. Vulcan Materials Company, 266 Ga. 163, 465 S.E.2d 661 (1996); Bozeman v. Liberty National Life Ins. Co., 265 Ga. 757, 462 S.E.2d 376 (1995); Conner v. Greene,

219 Ga. App. 860, 467 S.E.2d 199 (1996); Moore v. Savannah Cocoa, Inc., 217 Ga. App. 869, 459 S.E.2d 580 (1995). This amendment is a legislative overruling of the Court's holding in Bennett v. Williams Electrical Construction Company, 215 Ga. App. 423, 450 S.E.2d 873 (1994). In Bennett, the Court of Appeals held that in the originally enacted O.C.G.A. § 34-9-11.1(b), the Employee's right to file suit against a Third-Party Tortfeasor was assigned to his Employer/Insurer if it was not exercised within one year of the date of accident. Id. Under the 1995 amendment, both the Employee and Employer/Insurer have the right to file suit so long as it is within the applicable period of limitation. However, the Court of Appeals has determined that the 1995 amendment to subsection (b), including death benefits as part of the subrogation lien, only applies prospectively. Therefore, an Employer/Insurer is not entitled to include death benefits as part of its subrogation lien nor does it have a right to intervene in an action to recover death benefits payments between July 1, 1992 and July 1, 1995. See Wausau Insurance Co. v. McLeroy, 266 Ga. 794, 471 S.E.2d 504 (1996)

JUDICIAL INTERPRETATION OF UNDEFINED TERMS WITHIN O.C.G.A. § 34-9-11.1

Due to the legislature's failure to define several critical terms or to provide procedures for dealing with subrogation liens with respect to actions filed against Third-Party Tortfeasors, Employees and their Employer/Insurers were given little guidance on how to implement and apply O.C.G.A. § 34-9-11.1. As such, the appellate courts have been forced to address these issues.

One of the most litigated of these issues is the "fully and completely compensated" requirement contained in O.C.G.A. § 34-9-11.1(b). Although the Employer/Insurer

automatically possesses a subrogation lien from the moment any Workers' Compensation benefits have been paid, it is not entitled to recover on that lien unless the evidence establishes that the Employee has been fully and completely compensated, taking into account all Workers' Compensation benefits paid to the Employee along with his recovery in the third-party tort claim, for all economic and non-economic losses incurred as a result of the injury.

In several opinions, the Court of Appeals has held that the burden of proof is on the Intervenor lienholder to show that the Plaintiff employee has been fully and completely compensated pursuant to O.C.G.A. § 34-9-11.1. See Georgia Electric Membership Corporation v. Hi-Ranger, Inc., 275 Ga. 197, 563 S.E.2d 841 (2002). See also CGU Insurance Company v. Sabel Industries, Inc., 255 Ga. App. 236, 564 S.E.2d 836 (2002). The Court in Hi-Ranger further held that in cases where the lienholder has filed a direct action against a third party Tortfeasor in the second year of the statute of limitations as set forth in O.C.G.A. § 34-9-11.1 and where the Claimant does not intervene in such an action, there is no requirement for the Plaintiff lienholder to establish that the Claimant was fully and completely compensated. This is because the Claimant waived this issue by failing to intervene in the action filed by the workers' compensation lienholder. See Georgia Electric Membership Corporation v. Hi-Ranger, Inc., 275 Ga. 197, 198, 563 S.E.2d 841, 843 (2002).

Interestingly enough, the Courts have apparently decided that the "fully and completely compensated" standard is applied to each form of damages that can be awarded by the jury, and not the Employee's recovery from the Third-Party Tortfeasor as a whole. The different types of recoverable damages do not merge when determining

whether the Employee has been "fully and completely compensated" in the context of O.C.G.A. § 34-9-11.1(b). This is reflected in such opinions as North Brothers Co. v. Thomas, 236 Ga. App. 839, 513 S.E.2d 251 (1999) and Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

In North Brothers Co. v. Thomas, the Court of Appeals applied its definition of "fully and completely compensated" to each kind of damages that can awarded by a jury. In that case, the jury awarded Thomas $25,000 for medical expenses, $0 for lost wages, $0 for loss of consortium, $0 for attorney's fees and $25,000 for pain and suffering. At the time the verdict was returned, North Brothers and GAB Robins had maintained a subrogation lien consisting of $61,844.89 in medical benefits and unspecified income benefits. In the opinion, the Court stated: "Where, for example, the employee's weekly wages exceeded the amount of the Workers' Compensation weekly benefit actually received, the employer would not be allowed to recover the weekly benefits paid unless and until such time as the employee has been compensated for the difference between the Workers' Compensation weekly benefit actually received and the employee's normal weekly wage." North Brothers Co. v. Thomas, 236 Ga. App. 839, 841-842,513 S.E.2d 251, 253-254 (1999). Similarly, the Court held: "the employee has not been fully compensated, and no subrogation claim would thus be permitted, if there are any outstanding claims for medical expenses for which the employee would be liable, or there are other such items, for which damages are recoverable from the Tortfeasor, for which Workers' Compensation provides no benefits." North Brothers Co. v. Thomas, 236 Ga. App. 839, 842, 513 S.E.2d 251, 254 (1999).

This analysis was reiterated by the Court in Canal Insurance Company v. Liberty Mutual insurance Company. In that decision, the Court held that: "Thus, where the

recovery for medical expenses was more than sufficient to fully and completely compensate for all medical expenses incurred as a result of the injury, i.e., medical expenses paid by the insurer, by the employee, and for unpaid expenses, the insurer was entitled to a subrogation lien against the medical recovery up to the total of its lien." Canal Insurance Company v. Liberty Mutual insurance Company, 256 Ga. App. 866, 873, 570 S.E.2d 60, 67 (2002).

This language, contained in the Canal opinion, implies that the Court would determine that the Employee has not been fully and completely compensated where the jury verdict is insufficient to compensate him for the difference between the two-thirds of the average weekly wage paid under the Georgia Workers' Compensation Act and the Employee's actual wages. In such a case, the Employer/Insurer would not be allowed to recover the income benefits portion of the lien. Similarly, if the Employee has medical bills which have not been paid by the Employer/Insurer and the verdict is insufficient to reimburse the Employee for such a difference, then the Court would find that he was not fully and completely compensated and would not allow the Employer/Insurer to recover the medical expense portion of the lien.

Finally, this opinion also seems to indicate that whether the Employee has been awarded any pain and suffering, future lost wages, future medical expenses or his spouse's loss of consortium claim is irrelevant to determining whether the Employee has been "fully and completely compensated" as contemplated by O.C.G.A. § 34-9-11.1. Unfortunately, we will have to wait and see if future court decisions bear this out. Ultimately, the Court held in North Brothers that the Employee was "fully and completely compensated" as to medical expenses and allowed the Employer/Insurer/Intervenor to attach its lien to that

portion of the jury's verdict. See also Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

Recently, the Court of Appeals has also held that evidence of contributory/comparative negligence and assumption of the risk are irrelevant to determining whether the Employee/Plaintiff has been fully and completely compensated. See Homebuilders Association of Georgia v. Morris, 238 Ga. App. 194, 518 S.E.2d 194 (1999); Canal Insurance Company v. Liberty Mutual insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002). Although the Court agreed that these issues are proper in determining the liability of the Third-Party Tortfeasor to the Employee/Plaintiff, it has absolutely no bearing on determining full and complete compensation within the meaning of O.C.G.A. § 34-9-11.1(b). This issue normally arises when the Employee/Plaintiff settles his claim against the Third-Party Tortfeasor/Defendant, leaving only the issue of whether the Employee has been "fully and completely compensated" to be determined by the Court or jury. However, in cases where the Employer/Insurer has brought a lawsuit directly against the Third-Party Tortfeasor pursuant to O.C.G.A. § 34-9-11.1(c), it steps into the shoes of the Employee and is subject to all liability defenses provided by law.

Another area of heavy litigation is the issue of to what kinds of damages does the Georgia Workers' Compensation subrogation lien attach. Although it would seem that legislature's use of the phrase "...the employer or such employer's insurer shall have a subrogation lien, not to exceed the actual amount of compensation paid pursuant to this chapter **against such recovery**" [emphasis added] would imply that the lien would attach to whatever damages a jury might award. However, the Georgia appellate courts have not interpreted O.C.G.A. § 34-9-11.1 in that manner. In North Brothers Co. v. Thomas, the

Court of Appeals held that a Georgia Workers' Compensation subrogation lien does not attach to a jury award for pain and suffering. North Brothers Co. v. Thomas, 236 Ga. App. 839, 513 S.E.2d 251 (1999). The Court reasoned that since North Brothers did not pay any sums for pain and suffering as part of Employee Thomas' Workers' Compensation claim, and if the subrogation lien was allowed to attach to the jury's pain and suffering award, then the injured Employee would then not have been compensated for such losses. North Brothers Co. v. Thomas, 236 Ga. App. 839, 841,513 S.E.2d 251, 253 (1999).

In addition, the Georgia Court of Appeals held in Stewart v. Auto-Owners Insurance Co., that a Georgia Workers' Compensation subrogation lien does not attach to any benefits paid under an uninsured/underinsured motorist policy. Stewart v. Auto-Owners Insurance Co., 230 Ga. App. 265, 495 S.E.2d 882 (1998). The Courts have also held that the appropriate statute of limitations with respects to initial claims for subrogation is two years and not the twenty years afforded by O.C.G.A. § 9-3-22. See Newsome v. D.O.A.S., 241 Ga. App. 357, 526 S.E.2d 871 (1999).

Another heavily litigated issue is interpretation of the phrase "circumstances creating a legal liability against some person other than the employer" contained in O.C.G.A. § 34-9-11.1(a). This issue most often arises where an injured employee settles his claim against a Third-Party Tortfeasor and his Insurer without satisfying or otherwise addressing the Employer/Insurer's subrogation lien. Often the settlement release states that the Third-Party Tortfeasor does not admit any liability and that the parties to the release agree that the Employee has not been fully and completely compensated (even though this is an ultimate issue of fact to be determined by the Court or jury). Once the agreement has been executed and funds disbursed, the Employee/Plaintiff dismisses his civil complaint with

prejudice against the Third-Party Tortfeasor/Defendant without satisfying the subrogation lien. Often the Third-Party Tortfeasor argues that the Employer/Insurer's subrogation lien is extinguished upon settlement and dismissal of the lawsuit.

This issue was initially addressed by the Court of Appeals in Rowland v. Department of Administrative Services, 219 Ga. App. 899, 466 S.E.2d 923 (1996). In Rowland, the Court held that settling the underlying tort action does not extinguish the Employer/Insurer's lien on the Employee/Plaintiff's recovery. Rowland v. Department of Administrative Services, 219 Ga. App. 899, 901, 466 S.E.2d 923, 925 (1996); See also Vigilant Insurance Company v. Bowman, 128 Ga. App. 872, 198 S.E.2d 346 (1973). Instead, the Employer/Insurer maintains a right to recover settlement proceeds from the Employee. Id.

"As a matter of general law, where the wrongdoer settles with the insured...without the consent of the insurer...with knowledge of the insurer's payment and right of subrogation, such right is not defeated by settlement." Rowland v. Department of Administrative Services, 219 Ga. App. 899, 902, 466 S.E.2d 923, 1996. With this language, the Court of Appeals essentially held that if the Employee and the Tortfeasor settle their claim with knowledge of the Employer/Insurer's subrogation lien, then the Employer/Insurer are provided with a new cause of action in tort against all parties for settling the action in abeyance of the subrogation lien -- not just the Employee. As such, the Employee, the Third-Party Tortfeasor and the Tortfeasor's Insurer are all potentially liable for the full extent of the Employer/Insurer's subrogation lien.

As a practical matter, exposure to double payments should prevent many insurance companies from settling claims against their insureds without also first resolving the

subrogation lien. To some extent, the Third-Party Tortfeasor's Insurer can avoid the risk of double payments to the Workers' Compensation Employer/Insurer by withholding an amount of the settlement proceeds that would be sufficient to satisfy the subrogation lien and/or listing the Employer/Insurer as payee on the settlement check.

Of course, the new cause of action set forth in Rowland is only applicable if the Tortfeasor and his Insurer have notice of the subrogation lien. If they did not have notice, then they are not liable to the Employer/Insurer for the subrogation lien. D.O.A.S. v. Deal, 220 Ga. App. 846, 470 S.E.2d 817 (1996). Similarly, settlement of an Employee's claim against the Third-Party Tortfeasor where the Employer/Insurer has not yet paid any Workers' Compensation benefits extinguishes the "lien". The Court reasoned that since the Employer/Insurer had not actually paid Workers' Compensation benefits at the time the settlement was executed, the Employer/Insurer did not have an effective lien as defined by O.C.G.A. § 34-9-11.1(b) to attach to any settlement proceeds. Georgia Star Plumbing, Inc. v. Bowen, 225 Ga. App. 379, 484 S.E.2d 26 (1997).

Interestingly enough, the Court in Rowland found that a Third-Party Tortfeasor and his Insurer are not deemed to have received constructive knowledge of a subrogation lien simply because the alleged Tortfeasor is involved in a motor vehicle accident. See Rowland v. Department of Administrative Services, 219 Ga. App. 899, 903, 466 S.E.2d 923, 927 (1996). For that reason, it is generally preferable to intervene in a pending lawsuit so as to insure that all involved parties are aware of the Employer/Insurer's subrogation lien. For cases in which no formal civil complaint has been filed, notice can be perfected by forwarding appropriate letters to the Employee, any potentially liable Third-Party Tortfeasor, and the Insurer of any potential party. Copies of the notification letters should

be mailed to each party by both certified and regular mail. By doing so, the Employer/Insurer can establish that all parties received actual knowledge of its subrogation lien. In addition, should the Employee not file a complaint within the first year following his accident, it can be in the Employer/Insurer's best interest to immediately file a complaint. In so doing, the Employer/Insurer will be more in control over a future settlement of the case.

Although, the issue of enforceable legal liability normally arises in the context of settlement between the Employee, the Third-Party Tortfeasor and its Insurer, it naturally follows that a defense verdict indicating no liability on the part of a Third-Party Tortfeasor invalidates the Employer/Insurer's lien pursuant to O.C.G.A. § 34-9-11.1(a). There is also no recovery against the Third-Party Tortfeasor to which the lien can attach. Id.

It should be stressed, however, that an Employer/Insurer should intervene in any action brought by the Employee/Claimant to insure that its subrogation lien will be protected. In Anthem Casualty Insurance Company v. Murray, the Employer/Insurer failed to do so and paid a heavy price. Anthem Casualty Insurance Company v. Murray, 246 Ga. App. 778, 542 S.E.2d 171 (2000). In that action, the Plaintiff and the Workers' Compensation insurance carrier, Anthem Casualty Insurance Company, entered into an agreement wherein the Plaintiff recognized Anthem's subrogation lien and agreed not to settle his claims without Anthem's approval. In return, Anthem Casualty Insurance Company agreed not to intervene in Barry Murray's third-party tort claim. However, this agreement between the Plaintiff and Anthem did not address how the lien would be handled in the event that the tort case was tried and judgment entered.

At trial, the jury returned with a general verdict of $1.5 million. In a special

interrogatory form, the jury also found that the Plaintiff was 20% negligent in causing his injuries. Although the Defendant satisfied the judgment against it, neither the Defendant nor the Plaintiff paid anything to Anthem Casualty Insurance Company. In response, Anthem sued both parties allegedly under the Court's holding in Rowland v. D.O.A.S. Eventually, the Defendants sought and received summary judgment. On appeal, the Court focused on the fact that Anthem had failed to intervene to protect its lien. In failing to do so, it allowed the Plaintiff and Defendant to utilize a general verdict form instead of a special verdict form. As held by the Court: "It is the responsibility of the workers' compensation provider to protect its interest by intervention and special verdict requests." Anthem Casualty Insurance Company v. Murray, 246 Ga. App. 778, 780, 542 S.E.2d 171, 174 (2000) (Quoting North Brothers Co. v. Thomas, 236 Ga. App. 839, 841-842, 513 S.E.2d 251 (1999)).

The Court further held that by failing to follow the procedures contained in O.C.G.A. § 34-9-11.1 to protect its subrogation lien, (i.e. moving to intervene and to request special jury verdict forms), Anthem was prevented from recovering its subrogation lien. Unfortunately, the holding of Anthem Casualty Insurance Company appears to be in conflict with the Court's earlier holding in Rowland v. D.O.A.S. which suggested that parties with knowledge of a subrogation lien cannot ignore the lien in settling the Plaintiff's claim. As such, it would behoove the Employer/Insurer to intervene in any action by the Claimant where it maintains a subrogation lien. Failure to do so can result in the trial court determining that the Employer/Insurer did not take adequate action to protect their lien. See Canal Insurance Company v. Liberty Mutual insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002).

In International Maintenance Corporation v. Inland Paper Board and Packaging, Inc. the Courts addressed the issue of what effect an Intervenor's rights have over Plaintiff and Defendant's efforts to resolve the case in chief. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 569 S.E.2d 865 (2002). In International Maintenance Corporation, the Court of Appeals held that although a workers' compensation insurer has the right to intervene in an pending action to protect its subrogation lien, such intervention does not affect the employee's power to direct his lawsuit against the third-party tortfeasor or settle the claim. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 755-756, 569 S.E.2d 865, 869 (2002). In so holding, the Court has essentially eviscerated any power the Intervenor may have had to prevent settlement of a third party action without the Intervenors consent or satisfaction of its lien. Id. However, the Court did not make any opinion on this issue in cases where the Insurer files suit against a third party tortfeasor in the second year of the statute of limitations provided by O.C.G.A. § 34-9-11.1. See International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 756, 569 S.E.2d 865, 869 (2002).

Unfortunately, the Court further held that once a settlement between the Plaintiff and Defendant was consummated, the Intervenor cannot continue to pursue its lien against the Defendant. Instead, it can only continue to claim recovery from settlement proceeds already in the hands of the Plaintiff employee. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 756-757, 569 S.E.2d 865, 869-870 (2002). Furthermore, the Court held that there is no legal basis for forcing a Plaintiff to place settlement funds in a constructive trust pending resolution of the Intervenor's

subrogation lien. International Maintenance Corporation v. Inland Paper Board and Packaging, Inc., 256 Ga. App. 752, 756, 569 S.E.2d 865, 869 (2002).

The rights of the Intervenor suffered another setback with the Court of Appeals decision in the City of Warner Robins v. Baker. City of Warner Robins v. Baker, 255 Ga. App. 601, 565 S.E.2d 919 (2002). In Baker, the trial court granted Plaintiff Baker's motion to extinguish the City of Warner Robins subrogation lien on the basis that subrogation lien was unenforceable. Id. Unfortunately, the City of Warner Robins did not intervene in the underlying tort claim in an effort to protect its subrogation lien. City of Warner Robins v. Baker, 255 Ga. App. 601, 602, 565 S.E.2d 919, 921 (2002). The Court of Appeals held that in order to protect its subrogation lien, a workers' compensation insurer is required to intervene in the underlying tort action. See City of Warner Robins v. Baker, 255 Ga. App. 601, 604, 565 S.E.2d 919, 922 (2002). If the insurer fails to do so, it has not adequately protected its lien. Id.

In dicta, the Court further intimated that a settlement in the third party tort claim that does not differentiate what types of damages are contemplated by the amount paid in consideration of the settlement agreement acts as a general verdict form. See City of Warner Robins v. Baker, 255 Ga. App. 601, 604-605, 565 S.E.2d 919, 922-923 (2002). As indicated by the Court:

> When the employee has received a jury award, an appellate court cannot determine from a general verdict form what portion was meant to cover noneconomic losses. North Bros. Co. v. Thomas, 236 Ga. App. 839, 841, 513 S.E.2d 251 (1999). The same is true when the employee negotiates a settlement of his claim against the tortfeasor and the settlement is a lump sum. A reviewing court cannot determine from the settlement documents what portion of the settlement was allocated to economic losses and what portion was meant to compensate for noneconomic losses. The result is that the lien cannot be enforced, because full and complete compensation cannot

be shown.

See City of Warner Robins v. Baker, 255 Ga. App. 601, 604-605, 565 S.E.2d 919, 922-923 (2002). However, it should be noted that this language represents dicta and does not necessarily represent the Court's holding with respect to lump sum settlements. However, it is indicative of the direction the Court is taking with respect to settlements where the Plaintiff and Defendant do not differentiate what monies are attributable to which damages.

One critical factor in the Baker decision is the Appellant's decision not to request a transcript of the proceedings. By failing to do so, the Intervenor left very little for the Court of Appeals to consider other than the settlement documents themselves. As such, it would behoove the Intervenor to elicit testimony during a hearing on "full and complete compensation" to procure admissions from the parties to the settlement that it was drafted intentionally in such a way as to prevent the Intervenor not to recover its lien. In addition, we would take the position that since a settlement is an agreement between Plaintiff and Defendant, that such an agreement was not entered into and is not binding on the Intervenor and since such a settlement agreement is not a finding by a third party factfinder such as a jury or judge, it is not akin to a general verdict form. As such, the Court would need to delve into the intent of the Plaintiff and Defendant in drafting the agreement to determine whether it was drafted as a means of preventing recovery of the lien by the Intervenor. This particular issue has not been addressed by the appellate courts.

One issue that is currently in flux is whether an Employer/Insurer/Intervenor is entitled to a jury trial on whether the Employee has been "fully and completely compensated." In Sommers v. State Compensation Ins. Fund, the Court held that the Employer/Insurer/Intervenor is not entitled to a jury trial if they waive it. Sommers v. State

Compensation Ins. Fund, 229 Ga. App. 352, 494 S.E.2d 82 (1997). In Liberty Mutual Insurance Company v. Johnson, Judge Yvette Miller held for the Court that Employer/Insurers are not entitled to a jury trial on the "fully and completely compensated" issue. Judge Miller based this decision on the fact that the right to subrogation is derivative of the Workers' Compensation Act and not common law. As such, the constitutional guarantee of a jury trial does not apply. Therefore, the trial court must determine this issue and not a jury. See Liberty Mutual Insurance Company v. Johnson, 244 Ga. App. 338, 535 S.E.2d 511 (2000). However, the Court in Hammond v. Lee indicated fifteen days later that a bifurcated jury trial was appropriate to determine whether the Employee was fully and completely compensated as contemplated by O.C.G.A. § 34-9-11.1. See Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000).

Based on its holding in Canal Insurance Company v. Liberty Mutual insurance Company, it appears that the Court of Appeals is adopting its holding in Johnson and distancing itself from its contrary holding in Hammond. In Canal Insurance Company, the Court of Appeals reiterated that the trial court and not the jury must determine whether the Claimant/injured employee has been fully and completely compensated as contemplated by O.C.G.A. § 34-9-11.1. Canal Insurance Company v. Liberty Mutual insurance Company, 256 Ga. App. 866, 870, 570 S.E.2d 60, 65 (2002).

However, the Court in Canal Insurance Company reiterated its prior holding in Hammond v. Lee that any trial involving a subrogation lien would need to be bifurcated. As held by the Court:

> Where the employer or insurer has intervened, the bifurcation of the tort action trial and determination of tort damages first is appropriate to avoid revealing to the jury that the employee has already recovered a collateral

> source, the workers' compensation benefits. Hammond v. Lee, 244 Ga. App. 865, 868-869(4), 536 S.E.2d 231 (2000). In the first portion of the bifurcated trial, a special verdict form rather than a general verdict should be used to determine what recovery is returned for medical expenses, lost wages, and pain and suffering, because the subrogation cannot be satisfied out of a non-economic recovery. North Bros. Co. v. Thomas, 236 Ga. App. 839, 840-841, 513 S.E.2d 251 (1999); Bartow County Bd. Of Ed. V. Ray, 229 Ga. App. 333, 335, 494 S.E.2d 29 (1997); Dept. of Admin. Svcs. V. Brown, Supra at 28, 464 S.E.2d 7.

See Canal Insurance Company v. Liberty Mutual insurance Company, 256 Ga. App. 866, 870-871, 570 S.E.2d 65 (2002). The Court further held that by agreement of the parties or by failure of a party to timely, the trial court can still submit the issue to the jury. Id. at 871.

Another issue awaiting determination by the Courts is what items constitute disability benefits, death benefits and medical benefits in the context of O.C.G.A. § 34-9-11.1(b). O.C.G.A. § 34-9-13 & 3411.1 provides that the Employer/Insurer's subrogation lien is comprised of disability benefits, death benefits and medical expenses paid to or on the Employee's behalf under the Georgia Workers' Compensation Act. O.C.G.A. § 34-9-11.1(b). Although it seems clear that disability benefits would encompass all temporary total, temporary partial and permanent partial disability benefits, the Courts have not determined whether salary paid in lieu of Workers' Compensation benefits are considered disability benefits in the context of O.C.G.A. § 34-9-11.1(b). See O.C.G.A. §§ 34-9-261, 34-9-262 and 34-9-263. Death benefits as defined by O.C.G.A. § 34-9-265 includes burial/funeral expenses and death benefits paid to the Employee's dependents. Medical expenses would include anything paid pursuant to O.C.G.A. §§ 34-9-200, 34-9-200.1 and 34-9-202. However, since O.C.G.A. § 34-9-11.1 does not provide for attorney fees, expenses, fines or penalties incurred in litigating the underlying Workers' Compensation

claim, these are not recoverable as part of a subrogation lien.

Yet another area that was ripe for judicial interpretation is whether the Employer/Insurer can include future benefits owed to the Employee under the Workers' Compensation Act. Most often, this issue arises where the Employee has received a permanent impairment rating pursuant to O.C.G.A. § 34-9-263, yet no permanent partial disability benefits have been paid because the Employee remains partially or totally disabled. The benefits have already accrued pursuant to O.C.G.A. § 34-9-263 but have not been paid because the Employee is still receiving Temporary Total Disability (TTD) or Temporary Partial Disability (TPD) benefits. See O.C.G.A. § 34-9-263(b)(2). The issue also arises in the context of death benefits paid to the children of the Employee pursuant to O.C.G.A. § 34-9-13 & 34-9-265. Death benefits are automatically payable to the deceased Employee's children until they reach 18 years of age. Since Permanent Partial Disability (PPD) benefits and death, as illustrated above, have already accrued and must be paid at some point in the future by the Employer/Insurer, it would make sense that they should be included in the subrogation lien. However, the language contained in O.C.G.A. § 34-9-11.1 suggests that the lien consists only of benefits "paid" to the Employee under the Georgia Workers' Compensation Act. In CGU Insurance Company v. Sabel, Industries, Inc., the Court of Appeals held that a lienholder was only allowed to recover for income, medical and death benefits already paid (not accrued) to or on behalf of the injured/deceased employee. CGU Insurance Company v. Sabel, Industries, Inc., 255 Ga. App. 236 564 S.E.2d 836 (2002). Even though future benefits, such as those under O.C.G.A. § 34-9-265 may have already accrued, there is no lien for such benefits unless they have actually been paid. Similarly, no workers' compensation lien can attach to future

medical expenses and lost wages. Id. See also Harrison v. CGU Insurance Company, 269 Ga. App. 549, 604 S.E.2d 615 (2004).

Also keep in mind that O.C.G.A. § 34-9-11.1 is only applicable when benefits have been paid to the Employee under the Georgia Workers' Compensation Act. See O.C.G.A. § 34-9-11.1(a). In a recent opinion entitled Johnson v. Comcar Industries, Inc., the Court of Appeals held that there currently is no substantive law that allows Employer/Insurers who have paid Workers' Compensation benefits under another state's law to intervene in a tort action pending in Georgia. Johnson v. Comcar Industries, Inc., 252 Ga. App. 625, 556 S.E.2d 148 (2001). See also Tyson Foods, Inc. v. Craig, 266 Ga. App. 443, 597 S.E.2d 520 (2004). The Court based its holding on an earlier opinion where the Court held that Georgia law governs any right of subrogation in Georgia. Unfortunately, O.C.G.A. § 34-9-11.1 is the only substantive Georgia code section that provides for the recovery of a Workers' Compensation subrogation lien. Since O.C.G.A. § 34-9-11.1 provides that the Employer/Insurer's right to subrogation is limited to benefits paid under the Georgia Workers' Compensation Act, the Employer/Insurer cannot intervene in a Georgia tort case to protect a lien based on benefits paid under another state's law.

In Simpson v. Southwire Company, the Appellate Courts addressed the apportionment of attorney fees issue. O.C.G.A. § 34-9-11.1(d) provides that upon application by a party, the Court can apportion a reasonable fee between the attorney for the injured employee and the attorney for the Employer/Insurer in proportion to the service rendered. In Simpson, the intervenor moved the Court to apportion the Plaintiff attorney's fee based on alleged efforts by Counsel for the Intervenor/Employer/Insurer in assisting the Plaintiff/Injured Employee in procuring a recovery in the underlying action. The Court held

that since the Intervenor/Employer/Insurer did not recover anything on its subrogation lien, it did not have a right to seek apportionment of Counsel for Plaintiff/Injured Employee's attorney fee. See Simpson v. Southwire Company, 249 Ga. App. 406, 548 S.E.2d 660 (2001).

O.C.G.A. § 34-9-11.1(c) provides that during the second year of the statute of limitation for personal injuries, a workers' compensation employer/insurer's can bring an action against a third-party to recover their subrogation lien in either their own name or that of the Claimant. See O.C.G.A. § 34-9-11.1(c). As a result of this code provision, there is an issue of whether the "prior case pending" provisions of O.C.G.A. § 9-2-5 apply in situations where the insurer files an action in the injured employee's name to recover its lien before that same employee files his own action to recover for personal injuries. In Janet Parker, Inc. v. Floyd, the Court held that the prior case pending provisions of O.C.G.A. § 9-2-5 do not apply where the workers' compensation employer/insurer bring an action to recover their subrogation lien in their own name. The Court held that in such a circumstance there would be no privity of parties or causes of action so as to invoke O.C.G.A. § 9-2-5. See Janet Parker, Inc. v. Floyd, 269 Ga. App. 59, 603 S.E.2d 485 (2004). However, it appears that the Court left open the possibility that O.C.G.A. § 9-2-5 would apply to actions filed by an injured employee after the Employer/Insurer had filed their suit in the Claimant's name to recover their lien. Id. Future opinions from the Court of Appeals should clarify this issue.

Finally, the Courts have also determined that O.C.G.A. § 34-9-11.1 does not confer any special substantive rights to Employer/Insurers or Employees, nor does it affect the statutory immunity provisions contained in O.C.G.A. § 34-9-11. Warden v. Hoar

Construction Company, 269 Ga. 715, 507 S.E.2d 428 (1998). In a fairly recent opinion entitled Liberty Mutual insurance Company v. Johnson, the Court of Appeals held that the issue of whether the Employee is fully and completely compensated is a question of fact for the trial court to decide and not a jury. Apparently, the Court of Appeals based this decision primarily on the fact that, since the right to subrogation arose under the statutory scheme of the Georgia Workers' Compensation Act, and since the Act provides that hearings on benefits should be heard by an administrative law judge and not a jury, and since O.C.G.A. § 34-9-11.1 did not specify that the "fully and completely compensated" issue must be decided by a jury, then the Employer/Insurer does not have a constitutional right to a jury determination of that issue. Liberty Mutual insurance Company v. Johnson, 244 Ga. App. 338, 535 S.E.2d 511 (2000).

PRACTICAL APPLICATION OF O.C.G.A. § 34-9-11.1

Clearly the law concerning the application of O.C.G.A. § 34-9-11.1 to third-party tort claims is likely to remain in flux for an extensive period of time; however, the following guidelines should prove useful in avoiding unnecessary litigation concerning Workers' Compensation subrogation liens.

1. Special Jury Verdict Forms

If the matter should go to trial, keep in mind that there is no presumption that the Employee has been "fully and completely compensated" simply because the jury verdict exceeds the actual amount of Workers' Compensation benefits paid by the Employer/Insurer or the amount of special damages proven. Instead, the Employer/Insurer has the burden of establishing that the Employee/Plaintiff has been fully and completely compensated as contemplated by O.C.G.A. § 34-9-11.1. Bartow County Board of

Education v. Ray, 229 Ga. App. 333, 494 S.E.2d 29 (1997). See also Georgia Electric Membership Corporation v. Garnto, 266 Ga. App. 452, 597 S.E.2d 527 (2004).

Absent evidence in the record reflecting the jury's intent, a general verdict form is usually insufficient to establish that the Employee has been fully and completely compensated for all economic and non-economic damages he has incurred as a result of his injury. Id. In Ray, the Court indicated in dicta that the only way the trial court can determine whether an Employee has been "fully and completely compensated" with a general verdict form is where the verdict is less than the proven economic losses or where the verdict is the same as the amount of damages sought. The Employee would be fully and completely compensated in the latter situation but not in the former. Bartow County Board of Education v. Ray, 229 Ga. App. 333, 334-335, 494 S.E.2d 29, 30-31 (1997). For that reason, the Courts have repeatedly urged the use of a special jury verdict form. Brown v. Department of Administrative Services, 219 Ga. App. 27, 464 S.E.2d 7 (1995); Bartow County Board of Education v. Ray, 229 Ga. App. 333, 494 S.E.2d 29 (1997); North Brothers Company v. Thomas, 236 Ga. App. 839, 840, 513 S.E.2d 251, 253 (1999); Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000); Canal Insurance Company v. Liberty Mutual insurance Company, 256 Ga. App. 866, 570 S.E.2d 60 (2002).

Similarly, a general verdict form does not reflect whether the jury believes that some of the Employee's injuries were caused in a previous accident or elsewhere. It would also not reflect whether the jury believed that the Employee was disabled for a lesser period of time than he received disability benefits under the Georgia Workers' Compensation Act. Special interrogatories incorporated into a special verdict form can address these issues and cut down on appeals.

2. Alternative Resolution of Subrogation Lien

Attorneys for Employees and Employer/Insurers should also consider alternative methods of dealing with a subrogation lien. One possibility is the "ladder" agreement or consent order. In such an order or agreement, the parties agree that in the event that the Employee receives a recovery, either in settlement or by judgment, the Employer/Insurer will receive a dollar for every two dollars the Employee receives (or some other agreeable ratio) up to the maximum amount of Workers' Compensation benefits paid to the Employee. Any excess funds would be payable to the Employee. The parties can also agree and stipulate that upon receiving a settlement or judgment in the underlying tort action, the Employee is deemed "fully and completely compensated" as contemplated by O.C.G.A. § 34-9-11.1 and that the Employee will pay to the Employer/Insurer a set sum agreed upon by the parties. In these situations, the Employer/Insurer's subrogation lien is protected without being involved in the trial at all.

3. Bifurcated Trial

One option that will maximize both the Employee and Employer/Insurer's recovery in the third-party tort suit is use of a bifurcated trial. This method of trying the case was used successfully by this firm in Hammond v. Lee. See Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000). In phase one of the trial, Employee's claim against the Third-Party Tortfeasor is tried before the jury. During this phase of the trial, counsel for the Employer/Insurer does not participate and no reference is made to the fact that the Employee has received any Workers' Compensation benefits. In addition, the Employer/Insurer submits an affidavit indicating the amount of benefits paid to the Employee with supporting documentation into evidence to preserve the record on appeal

in the event the jury returns a defense verdict and the case is appealed. A special verdict form is used to determine what specific damages the jury may award to the Employee. Presuming there is a plaintiff's verdict during the first phase of the trial, the parties begin phase two of the trial. During this phase, the Employer/Insurer presents evidence to the same jury on the issue of whether the Employee has been fully and completely compensated for his injuries as contemplated by O.C.G.A. § 34-9-11.1.

As held by the Court of Appeals in Hammond v. Lee, it is appropriate to bifurcate the trial in this manner to prevent the interjection of collateral source payments and insurance into Employee's case against the Defendant. Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000). Similarly, the Employer/Insurer was able to present its case about "full and complete compensation" to the jury without interjecting contributory/comparative negligence into the trial. North Brothers Co. v. Thomas, 236 Ga. App. 839, 841,513 S.E.2d 251, 253 (1999).

4. File a Third-party Lawsuit Immediately after the First Anniversary of the Claimant's Accident Date.

By filing a lawsuit on behalf of the insurer immediately after the first anniversary of the Claimant's accident places the insurer in the "driver's seat" of the litigation and can determine when and for how much the case will settle. However, this approach also increases legal costs and expenses in that the full financial cost of the litigation is being borne by the Employer/insurer and not the Claimant. However, if the Claimant fails to intervene in the insurer's lawsuit prior to settlement, current case law suggests that the insurer would not need to prove full and complete compensation to recover its lien. This is an option that needs to be exercised only after the Insurer has made an informed

decision as to the costs of litigation as they compare to the overall extent of its lien.

5. If Contemplating Pursuit of Subrogation Lien Recovery, Do Not Settle the Claim on a No-liability Basis or Pay Benefits under Another State's Workers' Compensation Act.

As indicated above, an Insurer has no right to bring a subrogation lien claim in Georgia based on benefits paid under another state's Workers' Compensation Act. However, an Employer/Insurer can avoid this predicament in cases where there is subrogation potential by accepting the claim as compensable and paying benefits (when available) pursuant to the Georgia Workers' Compensation Act. In doing so, the Employer/Insurer are afforded the protections of O.C.G.A. § 34-9-11.1 and can intervene in a Georgia action to recover its lien.

Similarly, be careful when settling the underlying Workers' Compensation claim. If the claim is settled on a no-liability stipulation and release, the parties are agreeing that the Employee's injury did not arise out of and in the course of his employment with the Employer and is not compensable. See O.C.G.A. § 34-9-1 et seq. O.C.G.A. § 34-9-11.1 provides as a prerequisite to asserting a subrogation lien that benefits must be paid under the Georgia Workers' Compensation Act. Since a no-liability stipulation and release specifically provides that the alleged injury is not compensable, the Employer/Insurer cannot seek reimbursement for such a settlement under O.C.G.A. § 34-9-11.1.

CHECKLIST FOR ADDRESSING WORKERS' COMPENSATION SUBROGATION LIENS

The following is a brief checklist for handling Workers' Compensation subrogation liens. It is not intended to be all inclusive but does provide a basic framework for working with Workers' Compensation subrogation liens.

1. Determine whether the Employee's injury is compensable under the Georgia Workers Compensation Act;
2. Determine whether the Employee's injury arose from the actions of a third party;
3. Determine the identity of the third party and their insurance carrier;
4. Provide written notice to the Third-Party Tortfeasor, his Insurer, the Employee, and their respective attorneys (if known) by certified and regular mail of the Employer/Insurer's subrogation lien. Be sure to indicate in the letter the name of the Employee, the name of the Third-Party Tortfeasor, the name of the Employer/Insurer, the amount of benefits paid under the Georgia Workers' Compensation Act, the date of loss and that the Employer/Insurer intends to pursue its subrogation lien pursuant to O.C.G.A. § 34-9-11.1.
5. Determine whether any lawsuit has been filed by the Employee against the Third-Party Tortfeasor to recover for injuries sustained by him on the date of accident in question.
6. Move to intervene in any pending action by the Employee against the Third-Party Tortfeasor to protect the subrogation lien. If the Claimant has not already filed suit, consider filing a direct action to recover subrogation lien.
7. Try to settle or otherwise resolve the subrogation lien prior to trial through consent order or settlement.
8. If trial proves necessary, request a special jury verdict form and bifurcated trial to protect the subrogation lien and to promote maximum recovery.
9. Prepare and try the case accordingly.
10. If the Employee and Third-Party Tortfeasor settle the case in abeyance of the

subrogation lien, move to set the settlement aside pursuant to Rowland v. Department of Administrative Services, 219 Ga. App. 899, 466 S.E.2d 923 (1996). Be prepared to file a direct civil complaint against all parties to the settlement.

CONCLUSION

O.C.G.A. § 34-9-11.1 has provided Employer/Insurers with a method of seeking reimbursement for Workers' Compensation benefits paid to an Employee who was injured by a third party while protecting Employees' interests in first being made whole. Though O.C.G.A. § 34-9-11.1 was not well drafted initially, subsequent interpretation by the Georgia appellate courts has provided some guidance in determining each respective party's rights and obligations with respect to Workers' Compensation subrogation liens. Unfortunately, the Appellate Court's decisions have also substantially eroded the rights of workers' compensation lienholders. Nevertheless, by reasonably interpreting the terms of O.C.G.A. § 34-9-11.1 and applying recent appellate decisions, Employees and Employer/Insurers are given a more complete framework for handling subrogation liens and hopefully avoiding reversal on appeal.