AUTOMOBILE COLLISIONS

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I. Statute of Limitations for Automobile Collisions

Generally, for an auto accident case there is a two-year statute of limitations for bodily injuries, medical expenses, lost wages, lost income, or lost earning capacity.[1] There are two exceptions. The first exception is for minors since by statute "the right to recover a minor's medical expenses in a tort action is vested solely in the child's parents." The parents have two years from the injury date to recover the expenses they incurred.[2] While the parents have two years to recover for the medical expenses, the minor has until he reaches the age of majority. The second exception is if there is a criminal case in addition to the potential civil case you intend on pursuing. The statute may be tolled (though it cannot go past six years) pending the outcome of a criminal prosecution against the tortfeasor.[3]

II. Letter of Representation and Request for Insurance Coverage

One of the first actions you need to take is send a letter of representation and request for insurance coverage to all insurance carriers. This is especially true for Uninsured/Underinsured Motorist insurance carriers. Make a written request to an insurer under oath identifying the specific nature of a claim; send it by certified mail or statutory overnight delivery to the insurer. Upon receipt, the insurer has 60 days within which to provide a statement, also under oath, stating with regard to each applicable policy the name of the insurer, the name of each insured, and the limits of liability as to each policy.[4] The insurer may respond by providing the declaration page of each applicable liability policy.[5]

Absent any of the statutory exceptions, as a general rule, liability insurance "follows the car."[6] When the driver of a non-owned automobile is charged with liability, the policy insuring the automobile involved is the primary insurer. The driver's own liability insurer becomes the secondary insurer and may also provide liability coverage in addition to the primary insurer.

In the trial of an automobile collision case, the existence of a liability insurance coverage is not generally admissible into evidence. However, although evidence of liability insurance is not admissible in evidence in an auto accident case (except as to motor carriers' liability coverage), a trial court qualifies each prospective juror as to a possible relationship with a nonparty liability insurer which has an interest in the outcome of the case. If an insurance company is a stock company, the court must qualify jurors as to their relationship to officers, employees, stockholders, and their relatives. As to mutual companies, the jurors are qualified as to their relationship to officers, employees, policy holders, and their relatives. Courts require qualification of the jury as to liability insurance so that the jury impaneled is fair and impartial.[7]

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[1] O.C.G.A. § 9-3-33
[2] Mitchell v. Hamilton, 228 Ga.App. 850, 851 (1997), citing O.C.G.A. § 19-7-2
[3] O.C.G.A. § 9-3-99; Beneke v. Parker, 285 Ga. 733, 734 (2009)
[4] O.C.G. A. § 33-3-28(a)(1)
[5] O.C.G.A. § 33-3-28(a)(1)
[6] Georgia Casualty & Surety Co. v. Waters, 146 Ga. App. 149 (1978)
[7] Smith v. Crump, 223 Ga. App. 52 (1996)

III. Uninsured/Underinsured Motorist Insurance

Uninsured motorist (UM) coverage is virtually identical in everything but name to underinsured motorist coverage. Both are "insurance against lack of insurance." The purpose of UM coverage is to place the injured insured in the same position as if the at-fault driver was covered with liability insurance. UM coverage is available to your client no matter where he is injured. His UM coverage literally travels with him, meaning that your client (assuming he has UM coverage) will have access to the insurance almost anywhere almost anytime.

Unlike the rule followed in the case of liability insurance coverage, where two or more uninsured/underinsured policies are applicable to the same incident, the carrier who received the premium from the injured party would be the first to pay its insured regardless of whether it was the policy insuring the automobile or the policy insuring the injured insured.[8]

Often your client is entitled to stack the UM coverages under multiple policies. This again is why you write to every insurance carrier. Find out from your client if he owns a boat, a golf cart, an ATV, another car or any other vehicle for that matter.

Prompt notice of an accident is made a condition precedent to coverage. Timely notice of an accident covered under the terms of the liability policy creates in the insured the right to enforce the insurer's performance of its duties and obligations as provided by contract.[9] Insurance carriers will be only glad to waive coverage and not pay for defense costs and/or jury verdicts. If the insured's defense to an insurer's contention of untimely notice is that the delay was excused or justified, the sufficiency of the excuse offered by the insured generally is a question of fact which revolves on whether the insured was reasonably diligent in giving notice to the insurer according to the nature and circumstances of each case. The standard of "reasonable diligence" is ordinarily a factual determination based upon a case-by-case analysis.[10]

There are now two types of UM insurance: "Add On"/"Excess" UM, which permits your client to collect any available liability coverage plus his UM coverage, and "Traditional" / "Reduced" UM, which generally limits your client's total recovery to the amount of his UM coverage (because the UM insurer may be entitled to an "offset" in the amount of liability coverage). A UM carrier cannot cancel a policy or raise a premium if the wreck was not their insured's fault.[11] As a general rule, your client will likely have added on UM coverage equal to his liability limits unless the insurer can produce a written rejection showing the rejection of such coverage.

Before getting to the UM coverage, you first need to exhaust the insurance limits available with the defendant tortfeasor. In resolving the case against the tortfeasor's insurance carrier, make sure you have the carrier prepare a Limited Release for Tortfeasor pursuant to O.C.G.A. § 32-24-41.1.[12] Sometimes a general release can foreclose any chance of recovering from the UM carrier.

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[8] Georgia Farm Bureau Mutual Ins. Co. v. State Farm Mutual Auto Ins. Co., 255 Ga. 166, 167 (1985)
[9] Bituminous Casualty Corp. v. J. B. Forrest & Sons, Inc., 132 Ga.App. 714 (1974); Wolverine Ins. Co. v. Sorrough, 122 Ga.App. 556 (1970)
[10] Sims T.V., Inc. v. Fireman's Fund Ins. Co., 108 Ga.App. 41 (1963)
[11] O.C.G.A. § 33-9-40
[12] See Limited Liability Release attached.

IV. Damages

There are two types of damages: special and general. Special damages are readily quantifiable. They are awarded to compensate for a very specific part of the loss. For example, medical bills are recoverable as proximately resulting from the negligence of the tortfeasor.[13] The plaintiff himself, a member of his family, or another person responsible for his care,is a competent witness to identify the plaintiff's bills. It is usually not necessary for an expert witness to testify that the charges were reasonable and necessary. Future medical expenses are also recoverable.

Your client is also entitled to recover for his lost earnings as another type of special damages.[14] The loss of one's earnings from the date of injury to the date of trial as a result of a personal injury is a separate and distinct pecuniary damage that is recoverable, so long as the amount can be determined with reasonable certainty.[15] Have your client submit a lost wage verification to his employer wherein his employer verifies the amount of lost wages.

Recovery for "lost earning capacity" is another measure of special damages. It means a physical injury to the plaintiff resulting in a permanent or total physical disability. Measure of damages for lost earning capacity involves numerous considerations, among which are the earnings before the injury, earnings after the injury, probability of increased or decreased earnings after the injury, probability of increased or decreased earnings in the future considering the capacity of your injured client, and the effects of sickness and old age. Proof of the plaintiff's actual earnings, either before or after the injury, is not essential to establishing the value of the plaintiff's lost earning capacity.

Recovery for "loss of future earnings" occurs when your client misses out on identifiable earnings which would have been earned in the future but for the injury.

General damages is the plaintiff's diminished quality of life—the difference between the quality of life the plaintiff could enjoy before the wreck and the plaintiff's quality of life afterward. In cases of serious injury, this is often the largest component of damages. The plaintiff can also recover for pain and suffering. Damages for past, present, and future pain and suffering are determined solely by the enlightened conscience of an impartial jury.[16] Physical and mental pain and suffering are recoverable. Additionally, a plaintiff may recover for mental pain and for shame and mortification as result of disfigurement or mutilation inflicted by tortuous conduct of defendant.[17] For example, permanent scarring is a claim for general damages.

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[13] Gillis v. Atlantic Coast Line R. Co., 52 Ga.App. 806 (1936).
[14] French v. Dilleshaw, 313 Ga.App. 834 (2012)
[15] Dossie v. Sherwood, 308 Ga.App. 185 (2011); see French v. Dilleshaw, 313 Ga. App. 834 (2012) (lost earnings can be fixed with reasonable certainty by sufficient proof of past earnings).

[16] Arnsdorff v. Fortner, 276 Ga.App. 1 (2005); see Park v. Nichols, 307 Ga.App. 841 (2011)
[17] Fields. v. Jackson, 102 Ga.App. 117 (1960)

V. Litigation

1. Complaint for Damages and Summons

First, draft a lawsuit ("Complaint.") A Complaint need only state a claim, not allege facts sufficient to set forth a cause of action.[18] The Summons is a one page document signed by the clerk of court; identifying the court the case is in; the case's file number; the type of case; the names of the parties; your firm's contact information; be directed to the defendant; and state the time required for the defendant to appear and file appropriate defensive pleadings.

If you are representing a minor remember that a minor cannot recover for his medical expenses as that is a cost incurred by his parent. Parents recover for the medical bills because parents are required to provide medical care for their child.[19] The child's only claim is for pain and suffering. Although the child's suit is typically brought by the child through his parents as "next friend", the two causes of action do not have to be combined and, if they are, any settlement or judgment should separate the two recoveries. The style of the pleading should state: _____, a minor, who sues through _____, his/her parent and next friend; and _____, individually, (if the parent is also a named plaintiff.)

2. Punitive Damages

To prevail on a claim for punitive damages you must "prove by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences."[20] The more common situations which may warrant punitive damages are when the defendant driver was driving under the influence of alcohol or drugs, and in hit and run cases. Generally, an employer may be vicariously liable for punitive damages arising from the tortuous conduct of its employee.[21] If the employee's wrongful conduct is sufficient to warrant punitive damages, the employer's respondeat superior liability includes liability for punitive damages.[22] The employer does not need to authorize or ratify the tortuous conduct in order to be held vicariously liable for punitive damages.[23]

As a practice pointer, get a certified copy of the insurance policy and study it. Look for an exclusion clause. If you do ask for punitive damages and there is an exclusion clause, the insurance carrier may attempt to escape punitive liability on the basis of that clause. Read the policy before deciding whether to seek punitive damages.

3. Service of Process

Once you have filed the Complaint (and the Summons), hire a process server. Once he

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[18] Bazemore v. Burnet, 117 Ga. App. 849 (1968)
[19] O.C.G.A. § 19-7-2
[20] O.C.G.A. § 51-12-5.1(b)
[21] See, e.g., Gasway v. Atlanta & West Point R. Co., 58 Ga. 216(2) (1877)
[22] Crane Bros., Inc. v. May, 252 Ga.App. 690, 692 (2001)
[23] Crane Bros., Inc. v. May, 252 Ga.App. 690, 692 (2001)

has successfully located the defendant and served him, the process server needs to prepare an "Affidavit of Service" which you file with the court. File the Complaint and effect proper timely service. The process server should serve the defendant within 5 days from the time of receiving the complaint and summons, though failure to make service within 5 days does not invalidate later service.[24] If reasonable and diligent efforts are not made and the statute of limitation expires, a plaintiff may be guilty of laches and the statute of limitation may not toll.[25]

"…[T]he Summons and Complaint shall be served together….to the defendant personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the Summons and Complaint to an agent authorized by appointment or by law to receive service of process." The process server must have authority from the court in the county your suit is.

4. Venue

If the defendant lived in Georgia at the time of the crash and still does, then venue is the county in which the driver lives at the time you file the suit. Subject to some exceptions, Georgia citizens have a Constitutional right to only be sued in their home county.[26]

If you are trying to serve an out of state defendant, then the Non-Resident Motorist Act and Long Arm Statute apply.

The Georgia Non-Resident Motorist Act is codified in O.C.G.A. § 40-12-1. If the defendant is a minor, then both the minor and his guardian must be served.[27] Service of process is made by serving a copy of the Complaint and Summons on the Secretary of State together with an affidavit of compliance with the service requirements. To accomplish that, you need to first send notice of such service and a copy of the Complaint and process by registered or certified mail or statutory overnight delivery to the defendant if his address is known.[28] Once the return receipt comes back, file that along with your affidavit of compliance. The nonresident does not have to actually receive the mail for service to be perfected.[29] If the plaintiff is a Georgia resident, then under the Nonresident Motorist Act you bring the action in the county where the accident occurred or in the county of the plaintiff's residence, whichever the plaintiff chooses. If the plaintiff is not a Georgia resident then you bring the action in the county where the accident occurred.[30]

The Nonresident Motorist Act is not the only way of obtaining personal service on nonresident motorists. Under the Georgia Long Arm Statute codified in O.C.G.A. § 9-10-91(1), the proper venue is the county where the crash happened. If you sue a defendant under this statute or have to because they used to live in Georgia and now live elsewhere, you still need to get the defendant served. The best practice is to hire a locally authorized process server or the sheriff local to the defendant's county to get him served; then get an Affidavit of Service from

[24]O.C.G.A. § 9-11-4c
[25] Crane v. Lazaro, 281 Ga. App. 127 (2006)
[26] Ga. Const. 1983, Art 6, Sec. 2, Par. 6
[27] Medlin v. Church, 157 Ga.App. 876, 877 (1981)
[28] O.C.G.A. § 40-12-2
[29] Tate v. Hughes, 255 Ga.App. 511, 512 (2002)
[30] O.C.G.A. § 40-12-3

the Process Server and file it with the court your case is pending in. Once served you have jurisdiction over the defendant.

The Nonresident Motorist Act only applies if the defendant was a nonresident on the day of the accident. On the other hand, the Long Arm Statute expressly defines "nonresident" to include a defendant who was a resident of Georgia at the time of the accident but who had become a resident of another state by the date on which he was personally served with process.[31]

5. Written Discovery

You normally have thirty days to respond. However, if you serve the lawsuit with your written discovery, the length of time to respond is extended to forty-five days. Discovery (including deposition notices) generally are not filed with the court. You file a certificate of service identifying the pleading that you served, the date of service, and the person(s) served.[32] Interrogatories are codified in O.C.G.A. § 9-11-33. You are limited to asking fifty written Interrogatories. Requests for Production of Documents are codified in O.C.G.A. § 9-11-34. You can send requests to the defendant (through his attorney) and you can also send requests to non-parties. Requests for Admissions of Fact are codified in O.C.G.A. § 9-11-36. Requests for admission must receive a response or else the matter is admitted. If an objection is made, the reasons therefor shall be stated.

6. Depositions

Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours, exclusive of all breaks, exclusive of time for document review by counsel, and exclusive of the time for examination of the deponent by the party offering him for deposition. The court must allow additional time if needed for a fair examination of the deponent or if the deponent or another person or other circumstance impedes or delays the examination.[33] Once you have a date selected send a Notice to Take Deposition pursuant to O.C.G.A. §§ 9-11-26 and 9-11-30 confirming the date.

While depositions are normally only noticed once written discovery is complete, O.C.G.A. § 9-11-30(a) provides that a deposition may be taken after commencement of the action of any person, including a party, and that leave of court, is only needed if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under subsection (f) of Code § 9-11-4, except that leave is not required if a defendant has served a notice of taking deposition or otherwise sought discovery.

[31] Crowder v. Ginn, 248 Ga. 824, 825 (1982)
[32] Ga. Unif. Super. Ct. Rule 5.2(2)
[33] Rule 30(d)(2) F.R.Civ.P.