

# 2021 Year in Review

Part 1 of a 2-Part Series

January 12, 2022

# Georgia Updates

Presented by Blair Cash

# Apportionment

- ▶ A single defendant in a one-defendant case is not allowed to apportion fault to a non-party.
  - *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 2021 Ga. LEXIS 568 (Aug. 10, 2021).
- ▶ Applied
  - Direct Negligence Claims Against Motor Carrier
  - Interplay with *Quynn v. Hulsey*, 310 Ga. 473 (2020)
  - 50% Rule

# Apportionment: *Hatcher* Fallout

Georgia personal injury lawyer tip of the day: here is an example of language we are including in our demands about the new Hatcher case—feel free to tailor it to your cases and use it.

They can't do that,  
can they?!

The Georgia Supreme Court recently issued an opinion in *Alston & Bird, LLP v. Hatcher Management Holdings, LLC* that has significant impact for cases like this one. Because of Hatcher, single defendants are no longer be able to apportion fault to non-parties. Pre-Hatcher, we would have filed a single lawsuit in this case against [defendant 1] and [defendant 2] and [defendant 3]. The jury would then allocate fault among all the defendants and any non-parties, and the defendants would only be responsible for their pro-rata share of the judgment.

Now, post-Hatcher, we will file 3 separate lawsuits against [defendant 1] and [defendant 2] and [defendant 3]. At trial, the individual defendants will not be allowed to apportion fault to the each other or to any non-parties. This means that the sole defendant in each case will be responsible for the entire judgment. Plus, it means we have 3 chances to win, with the potential to win all 3 cases and triple our recovery. We cannot overstate how important the Hatcher decision is and how much more risk it puts on defendants and their insurance companies.

# Important Georgia Update



Photo courtesy of [www.ajc.com](http://www.ajc.com)

# OSHA ETS UPDATE

Presented by Blair Cash

# OSHA Emergency Temporary Standard (ETS)

- ▶ 100 employee threshold
- ▶ Requirements:
  - Employers must “develop, implement, and enforce a mandatory COVID-19 vaccination policy”
  - Determine vaccination status of each employee
  - Keep Record of Employee Vaccination Status
  - Support vaccination – 4 hours PTO + recovery
  - Vaccination or Weekly Testing + Face Coverings
  - “Remove” non-complying employees
  - Fines
- ▶ January 10: Policies in place & gathering data
- ▶ February 9: Testing

# OSHA Emergency Temporary Standard (ETS)

- ▶ 5<sup>th</sup> Circuit: Stayed enforcement
- ▶ 6<sup>th</sup> Circuit: Reversed stay
- ▶ Supreme Court:





# OSHA Emergency Temporary Standard (ETS)

- ▶ “Reasonable, good faith efforts” could help avoid enforcement and fines
- ▶ What to do?
  - Covered employer with more than 100 employees?
  - Which categories of employees are covered by the vaccinate-or-test mandate?
  - Begin gathering data on employee vaccination status
  - Begin developing policies on the mandatory vaccine and/or testing/masking options required under the ETS
  - Provide training and materials to managers and supervisors
  - Communicate with your employees re: uncertainty

# North Carolina Updates

Presented by Wilson Jackson  
Wilson.Jackson@momarlaw.com

# North Carolina Update

- ▶ *Peay v. S. & D. Coffee, Inc.*, 2021–NCCOA–371, 2021 N.C. App. LEXIS 400, 860 S.E.2d 51
- ▶ Venue: Anson County, North Carolina
- ▶ On the morning of March 10, 2017, Defendant Burgess was driving a commercial truck for his employer, Defendant S. & D. Coffee. As Burgess traveled on Highway 74 West, he began swerving between lanes until he finally crossed over the median into the eastbound lanes of traffic. Burgess collided head-on with a Direct Link Logistics cargo van driven by Sammie Pendergrass ("Decedent").
- ▶ At trial, Burgess reported that on the morning of the accident he had called his personal physician to make an appointment. Burgess testified that shortly after the call, he began coughing and "blacked out" until he came to a complete stop. His doctor diagnosed the episode as cough-related syncope.
- ▶ The punitive damages phase was not bifurcated.
- ▶ Plaintiff's attorney stated Defendant's attorney was bamboozling the jury about five times during closing arguments, which was allowed by the court and the rulings were upheld on appeal.
- ▶ Jury verdict \$6,000,000.00

# North Carolina Update

- ▶ *Barrow v. Sargent*, 2021–NCCOA–295, 862 S.E.2d 688 (2021).
  - Plaintiff was riding his bicycle through a crosswalk when he was run over by the Defendant in a passenger vehicle. The North Carolina Court of Appeals upheld the trial court’s denial of Plaintiff’s request for a jury instruction regarding Plaintiff having the right of way pursuant to two North Carolina Statutes. The court found the statutes were limited to pedestrians, and the ordinary meaning of pedestrian had long been understood to be a person traveling on foot, not a person bicycling, and bicycles were explicitly classified as vehicles, not pedestrians, under N.C. Gen. Stat. § 20–4.01(49). However, the court noted a person traveling on foot and pushing a bicycle would then be classified as a pedestrian. *Holmes v. Blue Bird Cab, Inc.*, 227 N.C. 581, 584, 43 S.E.2d 71, 73 (1947).

# North Carolina Update

- ▶ Duvall v. Novant Health Inc.
- ▶ A federal jury in Charlotte, North Carolina awarded David Duvall, a white male and former top executive with Novant Health Inc., \$10 million in a lawsuit against Novant Health for violating Title VII of the Civil Rights Act, which prohibits race and gender discrimination in the workplace. The lawsuit asserted Novant Health's termination of Duvall for the purpose of improving diversity constituted discrimination based on sex and race.

# North Carolina Update

- ▶ **Increases to surcharge for reinsurance**
- ▶ The North Carolina Reinsurance Facility was created in 1973 "to ensure that all eligible risks can purchase auto liability insurance." According to NCRF, it covers about 25% of the drivers in the state, making it one of the largest residual market mechanisms for automobile insurance in the United States. The Facility's goal is to distribute the losses proportionally across all member insurers to help offset the insurers' high-risk policies.
- ▶ Unlike most states that require this to run at a profit, NC subsidizes this with a premium tax from people that buy private insurance.
- ▶ The last increase was in October of 2018 when NCRF announced a new 14.61% commercial auto loss recoupment surcharge.

# North Carolina Update

Worker's compensation insurance is required for all independent contractors in the state of North Carolina.

# Towing

- ▶ The American Trucking Associations' National Accounting & Finance Council has begun a towing-scam initiative. The task force can be emailed at [towingtaskforce@trucking.org](mailto:towingtaskforce@trucking.org).
- ▶ The task force will be chaired by longtime board member Ryan Erickson, executive vice president at McGriff, part of Truist Insurance Holdings Inc. Members of the task force include attorneys, insurance professionals, state executives and motor carriers.



# Towing

- ▶ Results of ATA Survey
  - 169 motor carriers reported that nonconsensual towing is problematic because federal law specifically leaves to state control, but few states have any regulations.
  - Of nearly 200 motor carriers, 77% reported law enforcement referrals as problematic when selecting a towing company.
  - Of nearly 200 motor carriers, 70% reported they faced serious issues getting their cargo released after a tow.
- ▶ ATA's Towing Task Force aims to fix these problems by lobbying for state laws and regulations that attack predatory towing practices.

# Towing

- ▶ American Trucking Associations, the American Property Casualty Insurance Association and the Coalition Against Insurance Fraud have announced a plan to combine their resources to pursue legislation to tackle two of trucking's biggest problems — towing fraud and staged accidents.  
<https://www.ttnews.com/articles/ata-insurance-groups-vow-tackle-towing-fraud-staged-accidents>
- ▶ The group said in local jurisdictions, towing companies are abusing insurers and crash victims by showing up to sites without authorization or contracted by authorities that receive kickbacks to tow unsuspecting vehicle owners at exorbitant rates. The tows often also include unreasonable storage and access fees.

# Towing

- ▶ Officials Call \$202,000 Towing Bill a Textbook Example of a Scam <https://www.ttnews.com/articles/officials-call-202000-towing-bill-textbook-example-scam>
- ▶ South Carolina
  - *Wayne's Auto. Ctr., Inc. v. S.C. Dep't of Pub. Safety*, 431 S.C. 465, 848 S.E.2d 56 (2020) (upholding sanctions/temporary removal from Highway Patrol's rotational list because the towing company violated the billing requirements of S.C. Code Ann. Regs. 38-600).
- ▶ North Carolina
  - *State v. David Jewel Satterfield, individually, and A1 Towing Solutions, Inc.*, Civil Action No.: 20CV005504. (discussing excessive fees and violation of unfair trade practices statute for charging \$4,400.00 to remove boot from tractor-trailer and indicating the market rate, on the high end, for towing a tractor-trailer rig in North Carolina is \$500.00 per hour and would take three hours, on the high end).

# Coverage Updates

Presented by Rocky Rogers  
Rocky.rogers@momarlaw.com

# Coverage Updates

- ▶ *Mt. Hawley Ins. Co. v. East Perimeter Pointe Apts.*, 2021 U.S. App. LEXIS 15932, C.A. 19—13824 (11<sup>th</sup> Cir. 2021)
  - Loss occurred in GA
  - NI was a CA-based risk purchasing group and policy was delivered to this entity in CA
  - Under GA law, failure of insured to provide notice to insurer can result in no coverage
  - Under CA law, failure to provide notice to insurer results in no coverage only if insurer substantially prejudiced by failure
  - 11<sup>th</sup> Circuit held GA common law applied to whether notice endorsement was enforceable to deny coverage for loss
  - Rule: “If the law applied to be applied to a contract dispute by a Georgia court or a federal court in Georgia is judicially-created, then the common law as expounded by the courts of Georgia must govern.” Only deference to foreign state’s law is when that law comes from a statute or judicial decisions interpreting that statute

# Coverage Updates

- ▶ *Carolina Cas. Ins. Co. v. Capital Trucking, Inc.*, 523 F.Supp.3d 661 (S.D.N.Y. 2021)
  - Driver deemed a statutory employee of both Trucker's Association of Chicago (lessee of trailer) and Capital Trucking (lessee of tractor) and each could be held liable for his negligence
  - Capital Trucking was named insured under Carolina auto liability policy, but tractor was not scheduled
  - TAC was named insured under Imperium Policy and coverage was in order
  - Imperium paid \$900K plus (remainder of \$1 mill policy) to tort plaintiffs following state court's ruling on liability
  - Carolina rejected \$750K demand under its MCS 90 because no coverage under policy and Carolina was covered under the Imperium policy as an omnibus/additional insured in at least federal minimum limits
  - Court rejected Carolina's argument that *Yeates* meant its MCS 90 was not triggered
  - Court held that since the liability involved two motor carriers (Capital Trucking and TAC), each had to have at least \$750K
  - Limited *Yeates* holding to situation involving only liability of one motor carrier

# Coverage Updates

- ▶ *American S. Ins. Co. v. SPN Trans, LLC*, 858 S.E.2d 558 (Ga. Ct. App. 2021)
  - Involved whether NTL insurer had coverage for loss
  - Owner–operator leased onto motor carrier
  - Lease required o/o to obtain commercial auto liability coverage while about business of motor carrier and also obtain bobtail/NTL coverage
  - Date of accident, driver was operating tractor without trailer
  - Was driving tractor to have it repaired at friend’s house
  - Court of Appeals upheld trial court’s ruling that driver was not in furtherance of motor carrier’s business at time of accident
  - “Our holding in this case is not intended to create a bright–line rule that driving a truck for repairs can never constitute a business use.”

# Coverage Updates

- ▶ *Am. Inter-fidelity Exch. v. Hope*, 2021 U.S. Dist. LEXIS 137644, C.A. No. 17 C 7934 (N.D. Ill. July 23, 2021)
  - Rejected that MCS 90 applied to judgment against driver
  - Limited MCS 90 to motor carrier named in the endorsement



# Coverage Updates

- ▶ Trends we expect to continue in 2022
  - Bad faith litigation and PC's setting tort case up for later bad faith case
  - Abstention by federal courts in favor of pending state court tort actions and inconsistent rulings
    - *Nat'l Specialty Ins. Co. v. S. Fla. Transp. Svcs., Corp.*, 2021 U.S. Dist. LEXIS 48944, C.A. No. 20-24599 (S.D. Fla. Mar. 16, 2021)
    - *Trisura Specialty Ins. Co. v. Blue Horse Trucking Corp.*, 2021 U.S. Dist. LEXIS 92551, C.A. No. 20-cv-24134 (S.D. Fla. May 13, 2021)
    - *Westfield Ins. Co. v. J.B. Hunt Transp., Inc.*, 2021 U.S. Dist. LEXIS 134887, C.A. No. 3:20-cv-565 (W.D.K.Y. July 20, 2021)
    - *Wesco Ins. Co. v. M.O.S. Express*, 2021 U.S. Dist. LEXIS 238743, C.A. No. 2:21-cv-00374 (S.D. Ala. Dec. 13, 2021)
  - Use of consent judgments to go after MCS 90
    - *Phila. Indem. Ins. Co. v. Bogel*, 2021 Del. Super LEXIS 690, C.A. No. K181C-09-024 (Del. Dec. 6, 2021)
  - Attempts at reforming policies to include MCS 90 and Form F endorsements
  - Enforceability of notice provisions/cooperation clauses vary state-by-state
  - Litigation over COIs
  - Assigned risk policies to brokers
  - Scheduled auto coverage

# Broker Liability

Presented by Megan Early-Soppa

# About Miller v. CH Robinson

- ▶ The case is based on a crash involving a motor carrier hired by C.H. Robinson to haul Costco shipments.
- ▶ The broker hired Kuwar Singh's trucking company RT Service and Rheas Trans..
- ▶ The truck crashed into a vehicle driven by Allen Miller.
- ▶ Miller sued C.H. Robinson, Kuwar Singh and Costco in June 2017.

- ▶ C.H. Robinson moved to have the case dismissed, arguing that the F4A preempts Miller's negligence claim.
- ▶ The district court granted the motion, stating Miller's claim "sets out to reshape the level of service a broker must provide in selecting a motor carrier to transport property."
- ▶ Regarding the safety exception, the district court ruled that it does not "permit a private right of action - allowing▶ for Miller to essentially do the state's work and enforce the state's police power."

# Enter the Ninth Circuit

- ▶ The Ninth Circuit agreed that Miller's claim was "related to" C.H. Robinson's broker services. However, the panel ruled that the district court erred in finding that the safety exception did not apply.
- ▶ "The panel held that in enacting the exception, Congress intended to preserve the states' broad power over safety, a power that included the ability to regulate conduct not only through legislative and administrative enactments, but also through common law damages."

# The Magic Moment

- ▶ C.H. Robinson wants the Supreme Court to look into its claim that F4A preempts a negligence claim against a broker. Specifically, the company claims that a broker does not fall within the safety exception.



# Amicus Brief – Motor Carriers with Broker Authority

- ▶ Motor Carriers need brokers
- ▶ Decision by Ninth Circuit is contrary to the Transportation Policy contained in 49 U.S.C. 13101
  - Ninth Circuit’s decision creates uncertainty and is contrary to Congress’ goal of de-regulating the industry
  - Supreme Court should “break” the tie



# Thank You For Attending!

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