

2022 Year-In-Review

Part One

Regulatory Updates

»» Presented by Fredric Marcinak
and Lesesne Phillips

FTC Proposed Rule on Non-Compete Agreements

- ▶ January 5, 2023 FTC issued a proposed rule to prohibit employers from enforcing non-competes
- ▶ Definition of Non-competes is broad
 - “A contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment”
- ▶ No prohibition on outside work by employees *during* the term of their work with employer
- ▶ Exception for non-competes related to the sale of a business (or percentage ownership interest in a business) when restricted person is a “substantial owner” meaning owning at least 25% of the business entity at the time the employee enters into the non-competes
- ▶ 60-day comment period

FMCSA Proposal for Increased Oversight of Freight Brokers

- ▶ \$75,000 bond/trust not believed to be enough
- ▶ FMCSA considers regulatory modifications in 5 areas:
 - Assets readily available
 - Immediate suspension of broker/freight forwarder operating authority
 - Surety or trust responsibilities in cases of broker financial failure or insolvency
 - Enforcement authority
 - Entities eligible to provide trust fund filings
- ▶ Drawdown of surety bond or trust fund if payout on claim
 - Must replenish within 7 calendar days
 - If fail to replenish suspension of authority

FMCSA Updated Guidelines for Brokers, Dispatch Services

- ▶ Brokers
 - Important factor is the handling of money exchanged between the shipper and motor carrier—strongly suggests broker
- ▶ Bona Fide Agents
 - Not necessarily represent only one motor carrier
- ▶ Dispatch Services—Broker Authority Needed if:
 - Interacts/negotiates a shipment directly with shipper
 - Accepts compensation for a load from a broker or factoring company, or involved in part of the monetary transaction
 - Arrange for shipment of freight for a motor carrier with no contract
 - Accepts a shipment without a truck/carrier and then finds a truck/carrier
 - Named part on the shipping contract
 - Soliciting open market of carriers to transport freight
- ▶ Catch all: “Any determination will be highly fact specific and will entail determining whether the person or company is engaged in the allocation of traffic between motor carriers”

File Annual Reports

- ▶ Review filings with Secretary of State
- ▶ Make sure information is correct
- ▶ Update email addresses or contact information

Changes in Business Corporation Acts in 2022

▶ Iowa

- January 1, 2022 Iowa revised the Iowa Business Corporation Act based on the ABA's Model Business Corporation Act
 - Domestications to or from the Iowa are now allowed

▶ California

- January 1, 2023 extensive amendments to Corporations Code and LLC law
 - Example: Changes in dissolution and winding up of LLC

▶ Delaware

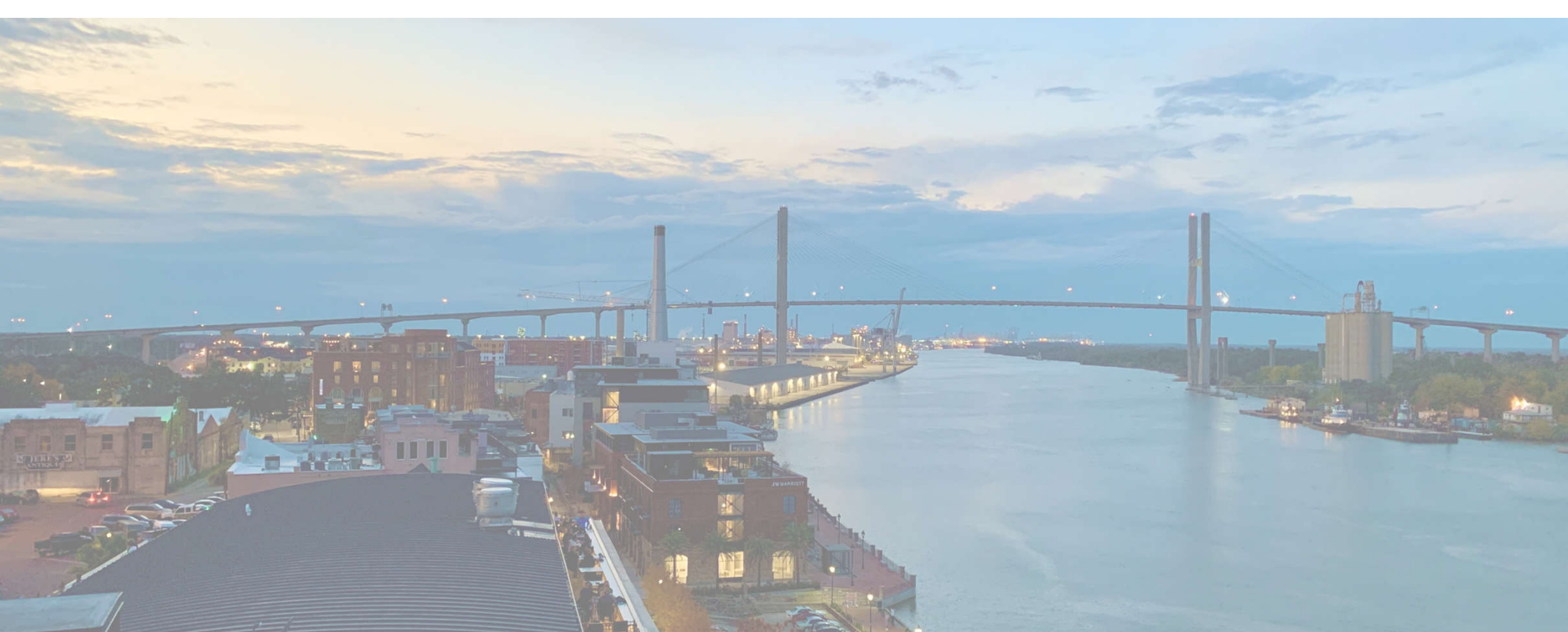
- January 1, 2022 many changes to business entity laws
 - Timing for conversion to a Delaware Corporation has changed
 - Stockholder approval of conversions now requires majority of outstanding shares instead of unanimous consent

Fair Labor Standards Act and Independent Contractors

- ▶ Department of Labor Notice of Proposed Rulemaking
 - No ABC Test
 - Economic Realities Test +
 - Stricter Requirements on each factor
 - Example: Second Factor: “Worker’s opportunity for profit or loss”—DOL will not consider taking more loads as evidence
 - First Factor: “Freedom from Control”—DOL wants to see service of multiple customers and decision making authority over rates to charge

ABC Test: Dynamex / AB5

- ▶ June 30, 2022 SCOTUS denied the California Trucking Association's petition for a hearing
- ▶ Now in full force
- ▶ (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
- ▶ (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
- ▶ (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.



Georgia Updates

Presented by Donovan Eason

Distortion of 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*](#), 312 Ga. 350 (2021).
- ▶ Decision handed down less than a year after Supreme Court held negligent hiring, training, supervision, and retention claims survive admission of employee's fault while under course and scope
 - [*Quynn v. Hulsey*](#), 310 Ga. 473 (2020).

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.

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.

They can't do that,
can they?!

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.

Immediate Legislation

- ▶ Apportioning Fault ([HB 961](#) / [SB 329](#))
 - “The Hatcher Fix”—[Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC](#), 312 Ga. 350 (2021)
 - Strikes 4 words; Adds 6 words; and saves millions
 - Senate versus House distinctions
 - House: Applied to cases filed after law took effect
 - Senate: Applied to causes of action accruing on or after law takes effect

2022 Legislative Fix

▶ [HB 961](#)

- Struck 4 words; added 6 words
 - “Where an action is brought against ~~more than one person~~ one or more persons for injury to persons or property, the trier of fact . . . shall . . . Apportion its award of damages among the person or persons who are liable according to the percentage of fault of each person.”
- Took effect on May 13, 2022
- Applies to all cases filed after May 13, 2022
 - SB 329 would have applied to causes of action that accrued on or after May 13, 2022
- Georgia courts likely saw an uptick in negligence suits preceding passage in anticipation of passage

Ongoing Legislation

- ▶ Tolling SoL Pending Traffic Citation ([SB 160](#))
 - “The Benecke Fix”—[Benecke v. Parker](#), 285 Ga. App. 733 (2009); [Williams v. Durden](#), 347 Ga. App. 363 (2018)
 - Statute would only toll when felony is involved—not a complete removal of tolling provision
- ▶ Elimination of Direct Action ([SB 191](#))
 - Introduced in 2021 but voted down in committee
 - Strong GTLA opposition



Photo by Joe McTyre (AP Images)

Other Ideas for Legislation


- ▶ 2019 Study Committee on Reducing Georgia's Cost of Doing Business
 - Seatbelt Admissibility
 - Phantom Damages
 - Pre-Dissmissal Rule
 - Proportionality in Discovery
 - Mandatory Scheduling Orders
 - Trial Bifurcation
 - Increase of Weight Variants for Intrastate Carriers

Georgia in 2022

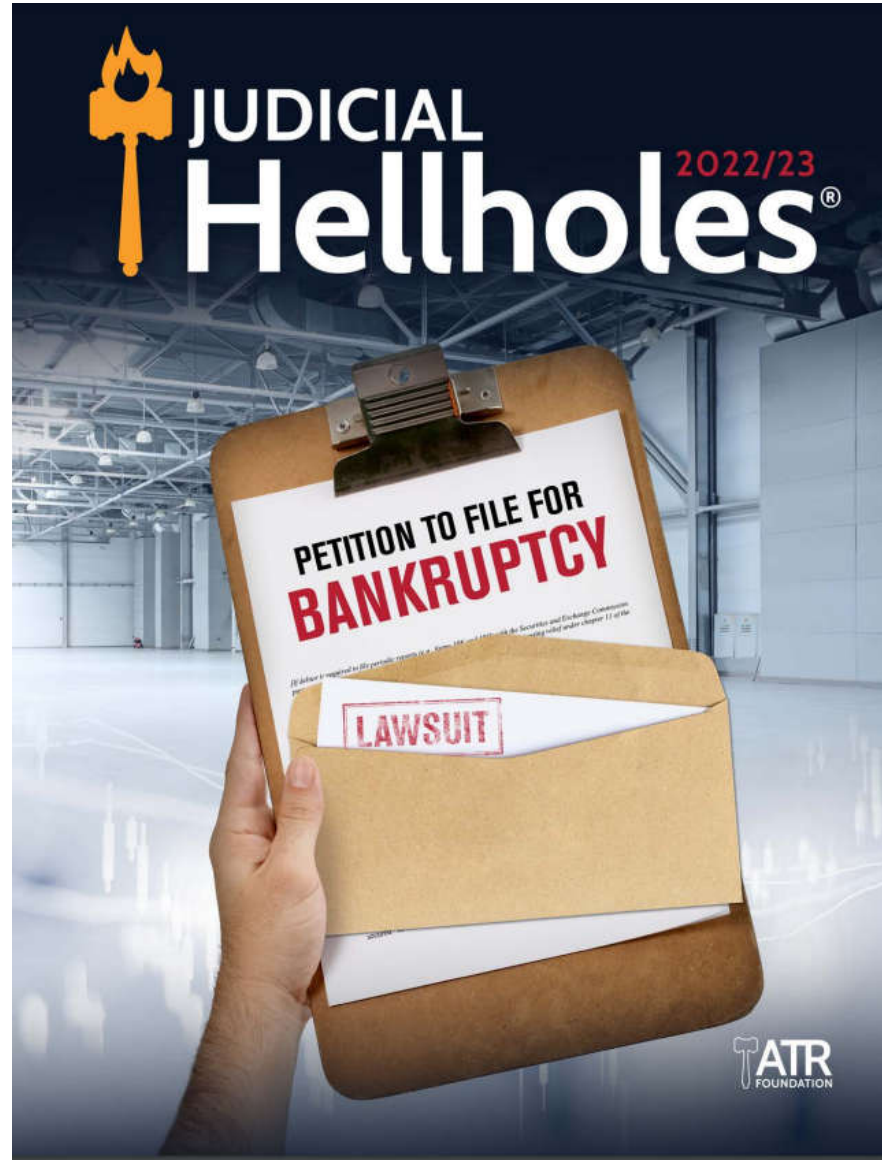


Photo courtesy of AP

Georgia in 2022

- ▶ COVID-19 Impact
 - Nearly 8k deaths in trucking industry - 22% of total
 - Source: wsbtv.com
 - ▶ HB 389
 - Employee v. Independent Contractor Designations
 - O.C.G.A. § 34-8-35(n)(17): Employment does not include services performed for a motor carrier
 - ▶ Venues changing?
 - ▶ Juror Attitudes changing?
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What is a Judicial Hellhole?



Georgia is Number 1 ...Not In A Good Way

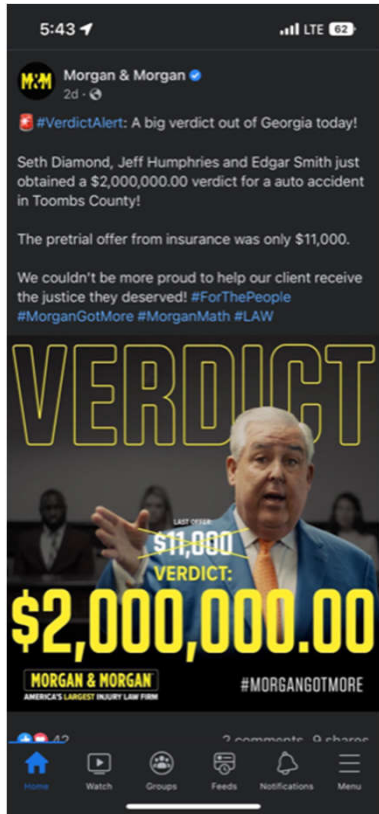
- ▶ Supreme Court Decisions
 - Alston & Bird v. Hatcher
 - Georgia CVS Pharmacy, LLC v. Carmichael
- ▶ \$1.7 billion verdict against Ford
- ▶ Snapchat Speed Filter Lawsuit
- ▶ Apex Doctrine

Verdicts

Jury Awards \$77M in Suit Against Addiction Treatment Center

Jurors Say 2 Doctors Owe \$75M To Man Paralyzed After Stroke

Ga. Judge Rejects Boat Co.'s Bid To Ditch \$200M Verdict



Ford is Ordered to pay \$1.7 Billion in Damages for Fatal Rollover Accident 2014 Ford F-150 Fatal Rollover Car Accident

August 31, 2022

“Relief” on the Way?

- ▶ “Hatcher” Fix
- ▶ Constitutional Challenges to Punitive Damages Cap
- ▶ Legislative Action?

Thank You

Join us on February 8, 2023 for Part 2 of 2022 Year-In-Review which will include, updates on broker liability, personal injury, and Rob's 2023 Industry Predictions.



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