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Georgia's Workers' Compensation Subrogation Handbook:

When, Why, and How to Pursue the Recovery of Your Subrogation Lien

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Workers' Compensation Subrogation in Georgia

When, Why and How to Pursue the Recovery of Your Subrogation Lien

Subrogation under workers' compensation law gives the employer/insurer the right to recover money spent in a workers' compensation claim that the claimant gets from a third party claim arising from the same accident.

Georgia's laws on subrogation have varied drastically over the years. There has been an ongoing dispute as to whether there should even be a right to subrogation. When the Georgia Workers' Compensation Act was enacted in 1920 it did not include a subrogation statute, but in 1922 the legislature amended the Act and included the right of subrogation. Fifty years later, in 1972, the state legislature abolished workers' compensation subrogation in its entirety. The subrogation statute was revived in 1992 with a watered-down version. Georgia's employer/insurer subrogation rights are derived from the 1992 statute. Unlike many surrounding states, Georgia's subrogation statute does not provide the employer/insurer with a first right to recovery, but this does not mean subrogation is not worth pursuing in Georgia.

The statutory requirements to pursue and recover in workers' compensation subrogation claims are:

1. Benefits, whether indemnity, medical, death, or settlement, have been paid under workers' compensation;

2. The injury or death for which workers' compensation benefits were paid was caused by someone other than the employer or co-employee; and,

3. The employer/insurer's recovery is limited to the amount of benefits actually paid, if they prove the employee has been made whole, taking into consideration the benefits received under workers' compensation and the amount of the recovery in the third party claim for all economic and non-economic damages paid.

Part One: Do I have a Subrogation Lien?

Workers' compensation subrogation is state-specific just like general workers' compensation laws. The Georgia status is codified at O.C.G.A. § 34-9-11.1, and is attached as Appendix 1. For Georgia, there are three preliminary questions to ask yourself to make an initial determination whether your workers' compensation claim has a viable subrogation lien:

1. **Have you actually paid the claimant workers' compensation benefits in Georgia?**

   In Georgia, the subrogation lien is equal to the total amount of workers' compensation benefits actually paid in the claim. These may be income benefits, medical benefits, death benefits, or a workers' compensation settlement. Future benefits are not included. There is no way to file a lien against benefits that have not been paid, even if it is certain the benefits will become due in the future.

2. **Did an action of someone other than the claimant, a co-employee, the employer, or a statutory employer cause the workers' compensation accident?**

   Payment of workers' compensation benefits alone is not enough to create a cause of action. The lien arises when someone other than the claimant, a co-employee, the employer, or a statutory employer acted negligently, and the negligence caused the worker's compensation accident. Common examples of workers' compensation accidents involving a third party include:

   - A work-related car accident where the other driver is insured;
   - A work-related accident caused by machinery or equipment malfunction; or,
   - A work-related accident caused by the premises liability of someone other than the employer or statutory employer.

3. **Has it been less than two years since the date of accident?**

   The statute of limitations requires that most claims be filed within two years.

Frequently Asked Questions

1. Is there a subrogation lien against future workers' compensation benefits owed?

No.

In Georgia, the employer/insurer do not have a legal right to recover benefits not already paid no matter how certain they are that the benefits will become due in the future. If no benefits have been paid in the claim, then there can be no subrogation lien. The size of the lien is only equal to the amount of income and/or medical benefits already paid.

Case law example: In Georgia Star Plumbing, Inc. et al. v. Bowen et al., the claimant was involved in a motor vehicle accident during work. Bowen, 225 Ga. App. 379 (1997). The insurer controverted the case before paying any income benefits or authorizing any medical treatment. During the litigation of the workers' compensation claim, the claimant filed a third-party suit against the driver of the car that hit him. The claimant and third-party defendant negotiated settlement, but before the final settlement was reached the employer/insurer gave written notice to the third-party defendant that they had a subrogation lien by virtue of the claimant's mere claim that workers' compensation benefits were owed. The Court of Appeals found the subrogation statute plainly states the subrogation lien does not exist until workers' compensation payments have been paid to the employee. Even though an Administrative Law Judge eventually found the workers' compensation claim was compensable, there was no lien when the third-party claim settled, because at the time of the third-party settlement the employer/insurer had not actually paid workers' compensation benefits. Also, because there was no lien, there was also no right to intervene in the third-party claim. See also CGU Ins. Co. v. Sabel Ind., et al. 255 Ga. App. 236, 237 (2002).

2. Is there a subrogation lien against uninsured motorist coverage?

No. The workers' compensation carrier cannot assert a subrogation lien against the uninsured motorist (UM) benefits the claimant receives from his own policy. The prohibition against asserting a subrogation lien on an employee's UM coverage is based on the public policy consideration that the subrogation statute was written to provide a right to recover money where the claimant's recovery is actually from the third party tortfeasor, not from the claimant's own personal insurance. Stewart v. Auto-Owners Ins. Co., 230 Ga. App. 265 (1998).

3. Do I have a lien if benefits were initially paid but timely controverted?

Yes, probably. There is a subrogation lien as long as workers' compensation benefits were actually paid and the claimant filed a personal injury claim against a third party. Payment of benefits would include payment of a no-liability workers' compensation settlement approved by the State Board because it is a workers' compensation settlement. However, because the wording of the subrogation statute states the employer/insurer shall have a subrogation lien if "the employer's liability under this chapter has been fully or partially paid" an attorney could argue that there is no lien from a controverted claim because a controverted claim means there is no accepted liability, but we would counter that payment was made nonetheless.

4. Do I have a subrogation lien if workers' compensation benefits were paid in a different state but the accident happened in Georgia and the third party claim was filed in Georgia?

No.Georgia's subrogation statute extends only to workers' compensation benefits paid in Georgia, meaning there is no right to subrogation if workers' compensation benefits were not paid here. Also, even if there is a subrogation lien under the laws of the state where workers' compensation benefits were paid, Georgia courts will only apply the Georgia subrogation statute. This means that there is no right to recovery of a subrogation lien under Georgia law if benefits were paid elsewhere.

Case law example: In Tyson Foods, Inc. v. Craig et al., the Court of Appeals held that the employer had no right of subrogation in the claimant's Georgia third party claim when his workers' compensation benefits were paid under Texas law because the Georgia subrogation statute plainly states subrogation rights are limited to benefits paid under the Georgia Workers' Compensation Act. Craig, 266 Ga. App. 443 (2004). See also Johnson v. Comcar Ind., 252 Ga. App. 625, 626 (2001); Liberty Mutual Insurance Company v. Roark, 297 Ga. App. 612 (2009); Performance Food Group, Inc. v. Wiliams, 300 Ga. App. 831, 834 (2009) (holding there is no "inherent right" to subrogation in Georgia so the legislature's decision to limit the subrogation rights to benefits paid under Georgia law is not a violation of due process).

5. Who is the lien against?

The lien is against the money the employee recovers, unless the employee does not file his claim within one year of the date of accident, in which case the employer/insurer may file the lien against the third-party defendant. The claimant has the exclusive right to file the claim for the first year.

The employer/insurer's claim for repayment of the subrogation lien from a third-party tortfeasor (i.e. third-party defendant) rather than the claimant arises solely by statute, which limits such claim to a situation where more than one year has passed since the date of accident and the employee has not filed a third-party suit. Georgia Star Plumbing, Inc. et al. v. Bowen et al. 225 Ga. App. 379, 382 (1997).

6. Does the lien extend to a spouse's loss of consortium claim or awards for pain and suffering?

No. The employer/insurer have no right to recover money the claimant's spouse is awarded in a loss of consortium claim. They also do not have the right to recover money the claimant is awarded for pain and suffering. The lien extends only to economic benefits because the workers' compensation system only compensates employees for economic damages.

Case law example: In CGU Ins. Co. v. Sabel Ind. Inc., the Court of Appeals found the employer/insurer had not met their burden of proving the claimant had been made whole in part because they did not submit evidence about which portion of the claimant's third party settlement was attributable to his spouse's loss of consortium claim, and the employer "could not enforce its lien against the settlement proceeds due" to the claimant's wife. 255 Ga. App. 236, 238 (2002).

7. Is there a lien on the estate's wrongful death claim?

Yes. The employer/insurer do have a lien for death benefits paid and have the right to protect and enforce their lien in the estate's third party claim. Liberty Mut. Ins. Co. v. Johnson, 244 Ga.App. 338 (2000).

Part Two: Is the Lien Worth Pursuing?

Georgia places a heavy burden on the employer/insurer to prove their entitlement to recover on a subrogation lien. The standard for recovery in Georgia is often referred to as "made whole," or in other words, "fully and completely compensated." The made whole doctrine deters many employers and insurers from pursuing recovery of a subrogation lien in Georgia.

However, there are multiple factors to consider when determining whether the lien is worth pursuing, and the burden of proof is only one of these factors. From a legal perspective, it is important to consider how the facts of the case will either hinder or advance the ability to prove the claimant has been made whole. These include the type of injury and the workers' compensation exposure in the claim. The cost of litigation, the defendant's ability to pay damages, and the relationship between the employer and the third party defendant weigh into the decision as well.

The Burden of Proving Made Whole

Georgia's subrogation statute is written to protect the claimant. The claimant recovers first and the intervenor (the employer/insurer) recovers only after the claimant. But, the employer/insurer only recover if they first prove the claimant has been fully and completely compensated, taking into consideration both the benefits received under the Workers' Compensation Act and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury. In other words, the employer/insurer have two hurdles to cross to recover their lien: (1) they must prove the claimant has been fully and completely compensated by the amount of recovery from the third party claim plus the amount of workers' compensation benefits paid, and (2) they must show to the court which portion of the money paid to the claimant was for economic damages and which portion was for non-economic damages like pain and suffering. The employer/insurer cannot recover their lien against noneconomic damages. Therefore, if there is no evidence to show how much money was paid for what purpose, then the employer/insurer automatically fail to meet their burden.

There is no specific formula or exhaustive list of requirements to meet to prove made whole. The Georgia Workers' Compensation Act provides very little guidance to attorneys or the Court; the subrogation statute is intentionally quite vague. It is also difficult to show someone has been made whole, especially in cases involving a very serious injury or death. As a result, 100% recovery of a subrogation lien in Georgia is unlikely to occur, but percentages are often paid by agreement.

When the lien might be worth pursuing despite the challenges of proving made whole:

Knowing the challenges of recovery in Georgia, why bother to pursue recovery of the lien?

1. The workers' compensation claim is still open

The subrogation lien can be used as leverage to put pressure on a difficult claimant to settle his workers' compensation claim, particularly if the employer/insurer are willing to waive the lien as part of the workers' compensation settlement. The annoyance of having to defend against the subrogation lien coupled with the promise the employer/insurer will waive the lien as part of settlement may be the incentive the claimant needs to finally make a settlement demand, or to give him the last push to settle the claim for a reasonable amount.

2. The amount of the lien is very large

If the amount of the subrogation lien is high, then chances are the damages in the third party claim will be high as well. If the cost of litigating to recover the lien is less than the amount of potential recovery, even if the anticipated recovery is only a percentage of the total paid, then it makes sense to pursue recovery of the subrogation lien.

3. The injury is of a nature that the claimant could be "made whole" by a sum of money

The type of injury the claimant sustained should be a consideration when deciding whether to pursue recovery of the lien. If the workers' compensation accident resulted in a death or the loss of of a body part then it will be much more difficult to prove the claimant has been made whole, because arguably no amount of money will make the claimant whole.

On the other hand, repairable injuries, such as a torn meniscus, broken bone, or torn rotator cuff are of a nature that can arguably be made whole by a sum of money, in part because the higher damages are more likely to be economic damages and not pain and suffering. Higher economic damages are also advantageous for the employer/insurer, who can only recover their lien from economic damages.

When the lien might not be worth pursuing:

1. The lien is small

Litigation is time consuming and can be costly. If the value of the lien is low, pursuing recovery may not be worth the cost, since the cost of litigation may end up being more than the amount of the lien itself.

2. The injury is so severe that no amount of money would conceivably make the claimant whole

As noted above, if the cost of pursuing the lien will be less than the amount potentially recovered, it is reasonable to pursue recovery of the lien. However, also consider that if the workers' compensation lien is very large then the claimant likely experienced the type of injury that would make it difficult to show he or she has been made whole.

3. The workers' compensation claim is closed

Oftentimes in Georgia, the lien is used as leverage to settle the workers' compensation claim by offering, at the appropriate time, waiver of the lien as part of the consideration for settlement. When the workers' compensation claim is already closed, the claimant has less incentive to negotiate the subrogation lien, particularly when the claimant's attorney is aware of the challenges an intervenor can have in proving made whole.

4. The defendant does not have deep pockets

The defendant's ability to pay damages is a consideration. The less money the defendant has from which to pay, the less likely the claimant will have a large recovery, and the less likely the employer/insurer are to get a piece of the pie. The defendant's ability to pay is a particular concern where the defendant is an individual, such as in a motor vehicle accident, because the defendant may not have insurance (and Georgia does not allow lien recovery against uninsured motorist benefits) or may have a minimum coverage plan of 25/50/25 that often will not provide

enough coverage for there to be a reasonable argument the claimant was made whole even if the policy limits are paid.

5. The relationship between the employer and third party defendant

On occasion, the employer and third-party defendant have a business or contractual relationship. A relationship between the employer and the third-party defendant should be a consideration when deciding whether to pursue recovery of the lien. A common type of contractual relationship that is relevant to the subrogation lien is an indemnification agreement between the employer and the third-party defendant. If the employer has agreed to indemnify the third-party defendant, then the employer is effectively suing itself if it files a motion to intervene. Even if there is no contractual relationship, the employer may decide that pursuing lien recovery would harm its business relationship with a third-party defendant, such as when equipment used by the employer is serviced by another company with which the employer regularly does business.

Part Three: How to Protect the Lien

Notice of Lien Letter vs. Motion to Intervene

Notice of Lien letter:

A notice of lien letter is not in and of itself enforceable in Georgia. However, if a lawsuit has not been filed in the third party claim then a notice of lien letter is the only way to put the other parties on notice of the lien and to bestow on them some obligation to communicate with you about the status of the case. For a sample notice of lien letter, please see Appendix 2.

When there is actual litigation, putting the claimant on notice of a lien with a letter does not sufficiently protect the lien in Georgia, although there is case law suggesting once a claimant and third party defendant receive a lien letter they are prohibited from reaching a settlement in the third party claim without providing notice of the settlement to the employer/insurer. This does not mean they cannot proceed with settlement and cut the employer/insurer out, but they cannot do so without providing notice.

Motion to Intervene:

A motion to intervene is a legal pleading filed with the same court where the third-party claim is filed. The motion to intervene is filed by the proposed intervenor (the workers' compensation employer and/or insurer). The motion asks the court to grant the intervenor status as a party to the claim. The Georgia Workers' Compensation Act gives the workers' compensation employer/insurer who paid workers' compensation benefits the unequivocal right to intervene in the employee's third-party lawsuit when the suit arises from the same cause of action as the work accident and they have paid workers' compensation benefits for the cause of action at issue in the third-party claim. The employer/insurer also have the right to intervene based on the provisions of the Georgia Civil Practice Act, which permits intervention when the intervenor's interests are not adequately protected by the other parties. In a third-party claim, the intervenor's interest in recovering money for workers' compensation benefits paid is not protected by the claimant, who is out to recover as much money as possible for himself, or by the defendant whose goal is to avoid paying any damages.

Difference Between Year 1 and Year 2

Protecting the lien during the first year after the date of accident:

Only the claimant has the right to file a lawsuit against the third party tortfeasor during the first year after the date of injury. If the claimant files a personal injury claim against the third party, then the employer/insurer must intervene in the lawsuit by filing a motion to intervene. If a motion to intervene is not filed (and granted by the court) then there is no avenue to recover the lien. Legal intervention in the third party claim by filing a motion to intervene is the only way to protect the lien.

On occasion, either the claimant or the defendant will file an objection to the motion. However, the court is required to grant the motion over any objection as long as the employer/insurer have paid workers' compensation benefits, because the right to intervene is guaranteed by statute. Sometimes the court may sever the claim after granting intervention.

Severing creates two separate cases and will make it more difficult for the employer/insurer to conduct discovery and tender the evidence necessary to prove made whole.

Protecting the lien during the second year after the date of accident:

If the employee does not file a lawsuit against the third-party tortfeasor in the first year after the date of accident, then in the second year the employer/insurer have the option of filing suit on the employee's behalf. If the employer/insurer file the suit they have the option of asserting the claim either in their own name for the purpose of recovering the lien, or on behalf of the claimant by filing the personal injury claim. If a lawsuit is not filed by either the claimant or the employer/insurer within two years, then the right to file the claim will be lost because it is time-barred by the personal injury statute of limitations.

Protecting the lien before a lawsuit is filed:

Protecting the lien becomes more difficult when there is no litigation pending in the third-party claim. If the claimant and third-party defendant are negotiating settlement, but no lawsuit has been filed, then the employer/insurer should still provide written notice of the lien.

Once a claim exists in court, the employer/insurer can file their motion to intervene. However, if the settlement does not break down how much money is being paid for what purpose, it is more difficult for the employer/insurer to recover their lien because they cannot show how much of the settlement was for economic damages and how much was for non-economic damages.

Part Four: Litigation of the Third-Party Claim and the Subrogation Claim

The discovery process

Once the motion to intervene is granted, the employer/insurer become an official party to the litigation. Their discovery rights are the same as the other parties' rights, which include the right to take depositions and serve written discovery.

Discovery should focus on gathering evidence that will help prove the claimant has been made whole. The claimant's lost wages and medical expenses (both out of pocket and covered) are relevant to proving made whole. In one case, the Georgia Court of Appeals found the employer was entitled to enforce its subrogation lien against the medical expenses awarded to the claimant in the third-party claim because there was nothing in the record that indicated the claimant had any outstanding medical or other claims or obligations:

> A review of the record in this matter shows that Thomas admits that the medical benefits paid under his workers' compensation claim are at least $60,030.37. The jury awarded Thomas the sum of $25,000 for medical expenses. There is nothing in the record which indicates that Thomas has any outstanding medical or other claims or obligations which should be considered in determining whether or not he has been fully compensated. We conclude, therefore, that Thomas has been fully compensated for his medical expenses. North Brothers therefore has a right to enforce its subrogation lien, but only as to sums in excess of the amount required to fully and completely compensate Thomas. North Bros. Co. v Thomas, 236 Ga.App. 839, 841 (1999).

Just like any other litigated case, the discovery process in a subrogation claim will take time and money. Consider the type of evidence that will help the judge find the claimant has been made whole for all present and future economic and noneconomic losses. Often, the discovery conducted by the other parties will be relevant to the subrogation lien. The extent to which the intervenor conducts its own discovery is case-specific. In some instances the intervenor will not need or want to conduct its own discovery, but instead will gather the information it needs from other parties' discovery.

However, this certainly does not mean the intervenor should take a back seat during discovery. The other parties tend to take an "out of sight out of mind" approach. Thus, it is extremely important for the intervenor to be visible during discovery. The intervenor should attend any depositions that are relevant to the lien and should contact both sides periodically to check in about developments in the claim. It is also be appropriate to attend motions hearings related to discovery, and attendance at pre-trial motions hearings is absolutely necessary.

Trial Tactics

At a minimum, the intervenor must request a special jury verdict form at the close of the trial. The special jury verdict form forces the jury to break down how much money it is awarding for each type of damage claimed. The jury verdict form and jury instructions may also ask the jury to determine whether the amount they award makes the claimant whole. However, the final determination of whether the claimant has been made whole is solely the decision of the trial court judge. Without a special jury verdict form, the judge has no way to determine what portion of the award is for economic damages. Recovery of the lien is then impossible, even if the total award

plus workers' compensation benefits paid would make the claimant whole, because the employer/insurer can only recover their lien from economic damages.
In almost all cases, the employer/insurer will want to present evidence at trial to show the claimant has minimal future damages and has been made whole by the jury award. More likely than not, the intervenor's case will be tried after the liability and damages portion of the case is tried and decided. This is called bifurcation.

The testimony presented needs to be "something more reliable than speculation." Expert witness testimony from a certified rehabilitation registered nurse and rehabilitation consultant can provide testimony concerning the claimant's future medical and vocational needs, including the cost of such needs. A vocational expert who is familiar with the labor market particular to the claimant may provide testimony about the employability of the claimant in order to provide evidence of limited future economic damages. Testimony from physicians as to the type and amount of future medical procedures that will be prescribed is relevant to showing the amount of damages that would cover future medical care. Physician testimony may also be relevant to employability factors. In addition, the workers' compensation insurance adjuster may provide helpful testimony concerning benefits already paid to the claimant. Even if the adjuster does not testify, his or her presence in court may influence the judge to more carefully consider whether the employer/insurer have proven made whole.

Overcoming Hurdles on Appeal

After the intervenors present their case in a bench trial before the judge on the issue of made whole, the other parties can move for an involuntary dismissal, which if granted would dissolve the lien. The dismissal will be granted if the judge decides the intervenor has not carried its burden of proving made whole by showing the claimant was fully and completely compensated.

The judge alone determines whether the claimant has been fully and completely compensated. In other words, the judge plays the role of both judge and jury by making both the legal and factual determinations. The judge's findings will not be overturned if there is any evidence to support them. O.C.G.A. § 9-11-41(b). See Liberty Mutual Ins. Co. v. Johnson, 244 Ga.App. 338, 340 (2000), holding in part, "because there was some testimony that the settlement amount plus the workers' compensation benefits did not fully and completely compensate plaintiffs, we will not disturb the court's factual determination to that effect." See also Tate v. State, 264 Ga. 53, 54 (1994) (when the judge sits as the trier of fact, his factual findings should not be disturbed if there is any evidence to support them).

The Court of Appeals will not overrule the trial court judge's ruling on made whole if the only basis for the appeal is error in the factual findings. However, it may be appropriate to appeal if there is reasonable support to show the judge made a legal error.

Part Five: Settlement Strategies

At What Point?

Due to the challenges the intervenor can face in Georgia, it is never too early to begin working to reach a settlement with the other parties in any third-party claim. It is certainly appropriate to begin to negotiate settlement once you know the policy limits in the third-party case.

The other parties may view the intervenor as a nuisance. Sometimes this can be used to the intervenor's advantage, because by coming to an agreement on the terms of the lien recovery, the intervenor steps out of the way, allowing the claimant to refocus his efforts on the third party claim alone.

Use of A Ladder Agreement

Reaching a ladder agreement with the claimant is usually the most effective way for the intervenor to resolve the lien and have a reasonable chance of recovery. The ladder agreement lays out how much of the lien will be recovered based on the amount of the settlement or jury verdict award in the third-party claim. For instance, a sample ladder agreement may state:

Net Award/Settlement Amount	Amount of Recovery
$30,000 or less	No Recovery
$30,000.01 - $50,000	10% of the lien
$50,000.01 - $75,000	20% of the lien
Over $75,000	50% of the lien

The ladder agreement is advantageous to the intervenor because recovery is not contingent on first proving made whole, and the employer/insurer do not have the expense of trial preparation since the lien is resolved. However, the ladder agreement leaves open the risk that the parties will settle the third-party case and fund the settlement in a way not contemplated by the ladder agreement, such as by placing the bulk of the settlement on a spouse's loss of consortium claim, resulting in the parties still effectively settling out from under the insurer. Vigilance is still necessary, therefore, even with the issue primarily resolved by a ladder agreement.

Negotiation at Mediation

If the third parties are negotiating settlement, the employer/insurer should take part in any settlement mediation that occurs. The claimant and defendant may try to exclude the employer/insurer from mediation, but the employer/insurer have a legal right to attend any mediation once the motion to intervene is granted. Even if the parties settle out from under the employer/insurer, the employer/insurer can try to delay settlement by filing an objection in court and requesting a hearing on the issue of "made whole." Attending mediation is important in order to stay up to date on the litigation in the third-party claim.

Use of the Lien as Leverage to Settle the Workers' Compensation Claim

In Georgia, full recovery of the lien is often unlikely. Therefore, one of the most common ways to use the lien is as leverage to settle the workers' compensation claim. The lien provides leverage if waiver of the lien is offered in exchange for settling the workers' compensation claim. Waiver of the lien is enticing to the claimant and his/her attorney because the intervenor is generally viewed as an annoyance and stands to complicate the resolution of the third-party claim.

Appendix 1

O.C.G.A. § 34-9-11.1

(a) When the injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability against some person other than the employer, the injured employee or those to whom such employee's right of action survives at law may pursue the remedy by proper action in a court of competent jurisdiction against such other persons, except as precluded by Code Section 34-9-11 or otherwise.

(b) In the event an employee has a right of action against such other person as contemplated in subsection (a) of this Code section and the employer's liability under this chapter has been fully or partially paid, then 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. The employer or insurer may intervene in any action to protect and enforce such lien. However, the employer's or insurer's recovery under this Code section shall be limited to the recovery of the amount of disability benefits, death benefits, and medical expenses paid under this chapter and shall only be recoverable if the injured employee has been fully and completely compensated, taking into consideration both the benefits received under this chapter and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury.

(c) Such action against such other person by the employee must be instituted in all cases within the applicable statute of limitations. If such action is not brought by the employee within one year after the date of injury, then the employer or such employer's 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. The employer or its insurer shall immediately notify the employee of its assertion of such cause of action, and the employee shall have a right to intervene. If after one year from the date of injury the employee asserts his or her cause of action in tort, then the employee shall immediately notify the employer or its insurer of his or her assertion of such cause of action, and the employer or its insurer shall have a right to intervene. In any case, if the employer or insurer recovers more than the extent of its lien, then the amount in excess thereof shall be paid over to the employee. For purposes of this subsection only, “employee” shall include 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.

(d) In the event of a recovery from such other person by the injured employee or those to whom such employee's right of action survives by judgment, settlement, or otherwise, the attorney representing such injured employee or those to whom such employee's right of action survives shall be entitled to a reasonable fee for services; provided, however, that if the employer or insurer has engaged another attorney to represent the employer or insurer in effecting recovery against such other person, then a court of competent jurisdiction shall upon application apportion the reasonable fee between the attorney for the injured employee and the attorney for the employer or insurer in proportion to services rendered. The provisions of Code Sections 15-19-14 and 15-19-15 shall apply.

(e) It is the express intent of the General Assembly that the provisions of subsection (c) of this Code section be applied not only prospectively but also retroactively to injuries occurring on or after July 1, 1992.

Appendix 2

Sample Lien Letter

Claimant's Personal Injury Attorney
123 First Street
Atlanta, GA 30303

NOTICE OF CLAIM

Re: Claimant v. Third Party Defendant
Date of Accident: 01/01/2012
Civil Action File No.: 2012CV0001
Insurer File No.: 1234567

Dear Attorney:

We (TPA) administer workers' compensation claims on behalf of (workers' compensation insurance company). Workers' compensation insurance carrier) has paid workers' compensation benefits to (the claimant) as a result of a 01/01/2012 date of accident. We are writing to you because we have been informed that you are representing (the claimant) for personal injuries sustained in connection with the 01/01/2012 accident.

You are hereby notified that our client is claiming a lien as a result of having paid workers' compensation benefits, upon any judgment, verdict or award, by the above-noted claimant in any third party claim filed in connection with the 01/01/2012 date of accident, or upon any settlement regardless of whether settlement is reached before or after the filing of a lawsuit. By virtue of this notice you are hereby required to notify us immediately upon a filing of a third-party lawsuit or commencement of settlement negotiations. All correspondence should include the above-referenced insurer file number.