How Ga. High Court Ruling May Shape Damage Liability

By **Christian Bromley and Kevin Arocha** (October 6, 2021)

Christian Bromley

Kevin Arocha

On Aug. 10, the Georgia Supreme Court issued a landmark decision in Alston & Bird LLP v. Hatcher Management Holdings LLC,[1] holding that damages cannot be apportioned to nonparties under Georgia's now 16-year-old apportionment statute — Section 51-12-33 of the Official Code of Georgia Annotated — in any case where there is only one named defendant.

This limitation applies even where a jury or trier of fact expressly determines that a nonparty was also at fault.

In practical terms, single named defendants in Georgia may now be obligated to cover the entirety of a damage award, minus any proportion attributable to the plaintiff's fault, when that nonparty is not named, is never joined, or settles and is dismissed before trial.

The Hatcher Management Decision

Georgia's Apportionment Statute, enacted as part of the Tort Reform Act of 2005, governs the reduction of damages awarded by a jury based upon the proportion of fault attributed to others.

Subsection (b) — at issue in Hatcher Management — concerns the fault of nonparty entities and individuals.

The Supreme Court of Georgia explained that although subsection (a) allows for the reduction of damages in proportion to the plaintiff's fault in cases against either one or multiple defendants, subsection (b) contains a critical textual difference.

Subsection (b) applies only "[where] an action is brought against more than one person."

In so ruling, the court noted that it expressly "follow[ed] the path of the text, not the apparently different path of the 'purpose'" of the Tort Reform Act that may have warranted a different outcome.

Thus, under Hatcher Management, only defendants in multidefendant cases will be able to apportion damages to nonparties.

Practical Considerations for Single-Party Defendants

Unless and until the Georgia General Assembly reconsiders the language of the Apportionment Statute, a single defendant may not reduce its financial liability for a damage award through any apportionment of fault to nonparties, regardless of how little responsibility or fault is actually attributable to this sole named defendant.

Some of the various avenues defendants in Georgia should closely consider to counter this precarious result include the following.

Contribution by Other At-Fault Parties

First, the Hatcher Management decision notably leaves the door open for single defendants to pursue contribution from joint tortfeasors not named in the litigation despite the limitations otherwise imposed on apportionment. In pertinent part:

> Just because [the Apportionment Statute] does not apply to cases with a single defendant does not mean that a single defendant is without a remedy against its joint tortfeasors. Where apportionment does not apply, joint tortfeasors who both proximately cause a single injury are jointly and severally liable for damages caused by the injury, and a tortfeasor may seek contribution from its joint tortfeasor(s).[2]

As the court in Hatcher Management explains, subsection (b) does not apply to cases with a single defendant.

Therefore, the Apportionment Statute should not prevent single-party defendants from filing a third-party complaint under OCGA Section 9-11-14(a) to seek contribution from a nonparty tortfeasor.[3]

In this context, the plaintiff claims the single defendant owes tort damages to the plaintiff, and then in turn, the single defendant, as a third-party plaintiff, may claim that an originally unnamed third-party defendant owes some or all of that amount to the single defendant.

Third-Party Claims for Indemnification

In addition to contribution from joint tortfeasors, a single defendant may also consider indemnification from other nonparties.

In District Owners Association v. AMEC Environmental & Infrastructure Inc. in 2013 — years before the Hatcher Management decision this summer — the Georgia Court of Appeals indicated that the Apportionment Statute does not prevent third-party indemnity claims.[4]

Just with contribution claims, Section 9-11-14 of the Civil Practice Act permits defendants to act as third-party plaintiffs to pursue indemnification claims.

However, since the issuance of the Hatcher Management decision, the Georgia Court of Appeals also held on Sept. 27 in ALR Oglethorpe LLC v. Fidelity National Title Insurance Co. that the state's Apportionment Statute eliminated the cause of action for common law indemnification "based on the distinction between active and passive negligence."[5]

Instead, according to the panel, common law indemnity in Georgia now exists only under contractual relationships or allegations of vicarious liability between principal and agent or employer and employee.

The panel further held that defendants "may not seek indemnification from another defendant as a joint tortfeasor simply based on allegations that the other defendant's negligence actually caused the harm."[6]

Although the appeals court cited Hatcher Management, its limitation of common law indemnification to those based on contract or vicarious liability is potentially inconsistent with the above-quoted language from Hatcher Management, which expressly permits an unabated avenue for single defendants to pursue contribution where the Apportionment Statute does not apply.

The same logic should also apply to claims for indemnification where the Apportionment Statute does not apply. Such claims need not be limited to scenarios where indemnification arises only from contract or vicarious liability.

Therefore, the decision of the panel in ALR Oglethorpe is arguably of limited effect to the extent that it is inconsistent with the ruling of the Georgia Supreme Court in Hatcher Management.

Pretrial Settlement by All But One Defendant

Third, defendants in multiparty actions also must be mindful that the settlements of co-defendants during litigation can now possibly result in a single remaining defendant against whom the entire damage award may later be levied.

In the past 16 years, since the Tort Reform Act was enacted, it has been common practice for a remaining defendant to agree to the plaintiff's settlement with a co-defendant with the caveat that fault could still be apportioned at trial as to the previously dismissed co-defendant who settled with the plaintiff before trial.

That may no longer be the case. Without apportionment, a remaining defendant should consider whether to either:

- Oppose the dismissal of its co-defendant(s) who settle in advance of trial if the defendant will then be the plaintiff's lone opponent in order to preserve the application of subsection (b) to multiple defendants. If the dismissal is granted despite that opposition, the single defendant should then examine what right to contribution or indemnification exists as outlined above; or

- Settle the plaintiff's claims before trial and then seek contribution from the co-defendants who settled first, because contribution is available as between joint tortfeasors in actions where the case settles in full before ever reaching the trier of fact.[7]

Prohibition on Consolidation of Separate Actions

Lastly, it is also very possible that Hatcher Management's abrogation of apportionment for single-defendant cases will spur plaintiffs to file multiple separate lawsuits against individual defendants.

This tactic may permit separate full damage awards against multiple defendants that the plaintiff names individually in these concurrent cases.

Unfortunately, the individually named defendants are without an avenue in Georgia to consolidate the conceivably identical cases against them.

Under OCGA Section 9-11-42(a), consolidation is permissible only in "actions involving a common question of law or fact," and only "if the parties consent" to the consolidation.

The scenario created by Hatcher Management — an apparent impetus to seek concurrent claims in different actions against individually named, single defendants — is a strategic choice by plaintiffs pursuing tort claims.

It is highly unlikely those same plaintiffs would subsequently forgo that exact strategic decision and consent to consolidation of the actions they intentionally filed separately when the plaintiffs stand to obtain multiple full judgments in each action.

Conclusion

Accordingly, the Georgia Supreme Court decision in Hatcher Management has dramatic and significant implications for plaintiffs bringing tort claims in Georgia and for the defendants who will face these claims.

These issues will no doubt continue to be litigated in the appellate courts, and there is every reason to believe that the Legislature will also consider modifications to the Apportionment Statute in the coming session.

Christian J. Bromley and Kevin Arocha are associates at Bryan Cave Leighton Paisner LLP.

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[1] Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC, S20G1419, 2021 WL 3501075, ---- S.E.2d ---- (Ga. Aug. 10, 2021).

[2] Hatcher Mgmt., 2021 WL 3501075 at *5 (quoting O.C.G.A. § 51-12-32(a) ("[R]ight of contribution 'shall continue unabated' except as provided in the apportionment statute."); Federal Deposit Insurance Corporation v. Loudermilk, 305 Ga. 558, 575, 826 S.E.2d 116, 128 (2019) ("[D]amages apportioned under O.C.G.A. § 51-12-33 (b) are not subject to any right of contribution, but where apportionment does not apply, the 'apportionment statute did not render the contribution statute a nullity.'").

[3] See O.C.G.A. § 9-11-14(a) (permitting defendants to act as a third-party plaintiffs and serve a complaint against "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him"); McCray v. Fed. Nat. Mortgage Ass'n, 292 Ga. App. 156, 160, 663 S.E.2d 736, 740 (2008) (quoting Hennessy Cadillac v. Pippin,197 Ga. App. 448, 450, 398 S.E.2d 725 (1990) (explaining that O.C.G.A. § 9-11-14(a) allows defendants "to seek affirmative relief ... predicated on secondary or derivative liability, such as indemnity, subrogation or contribution" from a non-party).

[4] See Dist. Owners Ass'n, Inc. v. AMEC Envtl. & Infrastructure, Inc., 322 Ga. App. 713, 747 S.E.2d 10 (2013), cert. denied Nov. 4, 2013 (suggesting a third-party complaint may be viable when there is a right to indemnification under contract or vicarious liability).

[5] See ALR Oglethorpe, LLC v. Fidelity National Title Insurance Co., A21A0989, 2021 WL 4398520, *8, ---- S.E.2d ---- (Ga. Ct. App. Sept. 27, 2021).

[6] Id. (citing Dist. Owners Ass'n, 322 Ga. App. at 716, 747 S.E.2d at 13).

[7] See Zurich Am. Ins. Co. v. Heard, 321 Ga. App. 325, 740 S.E.2d 429 (2013) (finding that the right to contribution exists between joint tortfeasors when settlement occurs before trial because the action never reached the trier of fact necessary for the Apportionment Statute to apply).