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## CHAPTER 2

# ***WARNING!*** ***YOUR RIGHTS ARE EXPIRING***

We live in a deadline-driven society.

Rent is due the 1st of each month.

Taxes are due April 15<sup>th</sup>.

At work or at school the big report is due in 2 weeks.

The same applies to lawsuits. You must file the lawsuit within the deadline or lose your claim. Sometimes, you must provide advance notice of your lawsuit, or lose your claim.

One of the most important deadlines is the time to file the lawsuit. The time period is set forth by law, commonly called the statute of limitations. If the deadline is passed, the right to make a claim is lost. The statute of limitations is one of the strictest and harshest rules. Filing a lawsuit too late is an automatic win for the defendant.

Occasionally, even before filing suit, you must provide notice of the injury. Notice is always required when a defendant is a government entity, i.e., a city, county, state, national government, or an employee of a government entity. The requirement to provide notice falls under the so-called ante litem laws. Before you think that the ante litem notice does not apply to your case – beware– because unfortunately, there are more people covered by this protection than you may initially believe.

Many times, clients have said to me that surely the defendant knew that they acted wrongly. Why don't they simply make it right? Unfortunately, that is not the way it works. If the defendant wanted to make it right, they would have reached out to you instead of wanting to escape responsibility. Many times the defendants have insurance companies that will pay to defend any claim. The easiest way to deny paying a claim is on the grounds that it was filed too late. When I worked at one of the largest insurance defense firms, we always counted these late claims as wins for our clients.

### ***A. The General Rule = the Georgia Statute of Limitations is Two Years***

As a general rule to bring a claim for injury in Georgia, one must file the lawsuit and obtain service over the defendant (i.e., properly notify the person) before two (2) years from the date of injury or the act of the defendant which caused the death of the loved one. O.C.G.A. § 9-3-31.

This general rule is applied to many situations, including if the victim was killed in a motor vehicle collision, by medical malpractice or due to a defective product or machine. With reference to a car crash, the claim must be filed by the two-year anniversary of the collision; and in medical malpractice, two (2) years from the malpractice.

However, claims against the employer must be brought in just one year. At the same time, if the death occurred at work, and was due to the negligence of a third party, then those claims can be brought within the two-year rule.

This is the problem with the “general rule”. Sometimes the general rule applies, and sometimes the exception applies. Occasionally there are exclusions and exceptions to the exception. This is what makes the law complex, and why retaining lawyers in complex situations, such as wrongful death lawsuits is a good idea.

### ***B. Why Ignoring the General Rule will Preserve Your Rights.***

I know that it is odd to give you the general rule, and then tell you to ignore it. However, there is a variety of reasons that one needs to hire an attorney now, rather than at the time of the statute of limitations. Of course, these are fact dependent situations, but for example.<sup>6</sup>

If this is a medical malpractice case, the plaintiff must include a doctor’s affidavit specifying that one or more of the defendants committed malpractice. To obtain such an affidavit, requires that all the medical records are ordered. To get the medical records and to obtain an affidavit can take a significant amount of time. Merely getting the medical records can take 90 days. Selecting and vetting the right expert also takes an extremely long time.

Defendant Has Moved. The law requires that one not only file the lawsuit on time, but also a plaintiff is required to have the lawsuit hand delivered to the defendant – in legal term “service of process”. I have always been amazed how many people move in less than 2 years, regardless if the defendant is a doctor or new to the workforce. Finding the new address of the Defendant

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<sup>6</sup> Some related issues are also covered in Chapter 14 below.

is a challenge, and often requires retaining the services of a private investigator. If one files just at the time of the statute of limitations, it is possible that one cannot obtain service.

The remaining section of this chapter discusses other situations in which the statute of limitations is less than 24 months. The way to avoid these issues, and the possible loss of your claim, is to retain an attorney now.

### ***C. If a Loved One is Killed on the Job, There is One Year for Claims under the Workers' Compensation System***

If a loved one was killed on the job, it is possible that the family has two separate claims.

The family may bring a claim against the employer under the workers compensation system. This claim is valid, regardless of how the death occurred. In other words, if the loved one was injured due to an accident, or due to the negligence of a fellow employee, one still has a claim under the workers compensation system. This is because the workers compensation system is really an insurance benefit (See Chapter 9 for further explanation). To bring a claim under workers compensation, that claim must be made within one (1) year of the event of the death, or the claim is lost.

Sometimes, there is also a second claim in addition to the workers compensation claim. Sometimes, the family can also pursue a claim under the Wrongful Death Statute. In such a situation, the family can bring suit against third parties within two (2) years of the date of the death. This is so even if no claim was made against the employer.

## ***D. Claims Against the Government Require Advance Notice – The Problem Is, How Do You Know?***

Bringing suits against any government agency is more difficult than suits against a corporation. One problem is providing notice of the claim to the correct government entity. Unfortunately, it is sometimes unclear that such notice is even required.

### ***i. The Notice Requirement.***

As a general rule, there is no legal requirement that you notify a defendant of your intent to file suit; one simply files the lawsuit.

Yet, if the defendant is a city, county, state or federal government, then the plaintiff is required to provide notice of the claim prior to filing suit. Just as with the statute of limitations, this is a strict rule and a plaintiff will lose the entire case if this procedural requirement is not followed.

Different notice requirements apply depending on whether the government or government agency is at the federal or state level, i.e., the United States of America, the State of Georgia, a county in Georgia, or a city in Georgia. Yet, regardless of the government entity, the injured party must provide notice to the specific governmental agency of the claim before filing suit.

### ***ii. Why Notice?***

The reason for these technical barriers turns on the very special protections of state actors, under the concept of sovereign immunity. The sovereign, originally meaning and referring to the king, could never be held responsible for any wrongdoing. This concept of sovereign immunity remains and is important in the administration of law. At the same time, the state, along with the federal government, has waived some of its rights to immunity in certain situations. O.C.G.A. § 50-21-23(a)

provides: the state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from conduct on the part of state officers or employees that were not within the scope of their official duties or employment.

The same explanation is provided under the Federal Tort Claims Act (FTCA). Under this act, the federal government can be held responsible for the harm "caused by the negligent, wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

### ***iii. What Type of Notice is Required?***

Usually, notice requires completing a specific form, identifying the parties, the plaintiff's injuries, and explaining why the government entity is responsible. The purpose of the provision is to "provide enough information to enable the city or the county to conduct an investigation into the alleged injuries and determine if the claim should be settled without litigation." *City of Columbus v. Barngrover*, 250 Ga.App. 589 (2001). The challenge is not what is in the notice, but rather, when and to whom the notice is provided. Of course, any lawsuit can be resolved at any point during litigation, so the true purpose of the notice is to provide a barrier to reduce the number of claims.

One of the biggest concerns is the difficulty in identifying if a defendant is a governmental actor. A good example of this is a doctor providing care at a private hospital. Sometimes, that doctor is actually an employee of a federally funded healthcare clinic. If that is the situation, one must provide advance notice of the claim to the appropriate agency, in this situation, the U.S. Department of Health and Human Services, prior to filing suit.

#### ***iv. When is Notice Due?***

Three separate statutes cover Georgia governmental entities, depending on whether the actor is the city, the county, or the state of Georgia. A similar notice requirement is due when filing suit against the federal government.

Claims against Georgian cities require notice within six months of the event. O.C.G.A. § 36-33-5.

Claims against Georgia counties require notice within twelve months of the event. O.C.G.A. §36-11-1.

Similarly, claims against the State of Georgia must also be provided within twelve months after the event. However, there are some important distinctions between the requirements of notice to the county and to the state. In short, the notice requirements to the state are more restrictive, because the statute is more precise with how such notice is provided.

Claims against a federal employee, under the Federal Tort Claims Act, also require notice within two years of the loss. This creates some interesting questions in situations when the statute of limitations is two (2) years, and of course, the best approach is simply to provide notice at least six (6) months prior to such a suit.



So, let's apply this to an example. John is severely injured by a garbage truck operated by the City of Macon on May 1, 2014. One might reasonably find that since the statute of limitations in a motor vehicle wreck is two years, John could file suit on May 1, 2016, two years thereafter. Yet, because the defendant is a city employee, the plaintiff would need to provide notice to the City of Macon by November 1, 2014—within just six months after the injury.

Sometimes, you do not know that one of the defendants is a government entity. For example, one of our clients was injured at a private hospital. Unbeknown to everyone, the defendant doctor was an employee at a federally funded clinic. (Why a federal employee is working at a private hospital is still unclear). We were fortunate twice. First, that the client retained our office very shortly after the injury. Second, we provided notice of the claim, and in the response, we learned that the doctor was considered a federal employee. We thus were able to satisfy the ante litem notice, which in federal court requires a completion of federal Form 95, and after waiting the required 6 months, and then proceeded with filing suit.

### ***E. Exceptions and Extensions to the Statute of Limitations: Tolling and the Statute of Repose.***

The statute of limitations can be extended. Yet, even if the statute is extended, the right to file suit is eventually foreclosed by the statute of repose.

For example, the right to file a wrongful death action extends beyond the two-year time period of the bad act. Under the so-called statute of repose, a claim can be brought beyond the statute of limitations, provided: the death occurred within five (5) years of the bad act of the defendant, the plaintiff filed the

suit one (1) year after the death, and all the other requirements are satisfied.

For example, if there is a car collision that occurred in January 2015, and the death does not occur until February 2017, under the statute of limitations, the claim would normally be closed. But, under the statute of repose, so long as the lawsuit was filed by February 2018, the claim will be preserved. This extension in the time period to file suit does not last forever, and once the fifth anniversary of the wrongful act of the defendant passes, the right is lost.

The statute of limitation is also extended or ‘tolled’ if the matter arises from a crime. For example, if a person is killed in a motor vehicle collision, the defendant is often charged with the crime of involuntary manslaughter. This serves to extend the statute. In Georgia, the tolling can be up to six (6) years. O.C.G.A. § 9-3-99. The tolling can be for any criminal action, even if the crime is merely a traffic citation.

Please note that if the statute of limitations is extended, the ante litem notice may still need to be sent timely.

Please also note that there are other extensions of the statute of limitations not discussed here, given that this book focuses on wrongful death actions. For example, if a child is injured at birth due to medical malpractice, the statute of limitations does not begin until she has reached age 5, however, the parents’ claims are lost once the child reaches age 2.

Lawsuits must be filed timely. As shown above, this is a tricky issue. One must be aware of the exceptions and limitations to make sure the claim is preserved. Timely and prompt action allows the family to bring their claims in a court of law.