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Wednesday, October 28, 2009

In Practice: Boost for personal injury plaintiffs ...

... May create more risks for plaintiff's lawyers who handle those cases

By David N. Lefkowitz, Special to the Daily Report



David N. Lefkowitz, who founded The Lefkowitz Firm in 1999, frequently is an invited speaker at continuing legal education seminars on the topics of legal malpractice, ethics and professionalism. He is chairman and moderator of an annual seminar entitled "Professional and Ethical Dilemmas in Litigation," in which Supreme Court justices, Court of Appeals judges, trial judges, ethics experts and practicing attorneys address ethical and professional

On Sept. 28, the Georgia Supreme Court issued a unanimous opinion that will significantly affect the statute of limitations for many personal injury cases in Georgia. The case is likely to provide a benefit to individuals who are injured in car accidents and other incidents that result in criminal charges for the wrongdoer. The case also, however, is likely to create risks for the attorneys who handle these claims.

O.C.G.A. § 9-3-99 provides that "the running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years." The question facing the court was: What about typical misdemeanors arising out of car crashes; is the statute of limitations tolled while a criminal citation such as following too closely makes its way through the system?

In *Beneke v. Parker*, No. S08G2078, the court held that O.C.G.A. § 9-3-99 applies to all crimes. A violation of one of the Uniform Rules of the Road, such as the rule that a driver must not follow another vehicle too closely, is a misdemeanor, and a misdemeanor is a "crime" to which the statute applies. The court stated that its ruling was based on a plain reading of O.C.G.A. § 9-3-99, and also noted that "we recognize that our holding in this case will have a significant impact on personal injury actions arising out of

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challenges that lawyers face in their profession. He graduated from Columbia University in 1985 and from Emory University School of Law in 1988. He can be reached at dnl@lefkowitzfirm.com.

vehicle accidents by tolling the statute of limitation in those situations where a traffic citation is issued.”

A reading of the code section may indicate that the code section was intended to have this effect. By way of background, O.C.G.A. § 9-3-99 was part of HB 172, the self-entitled “Crime Victims Restitution Act of 2005.” That omnibus bill provided various means to protect and aid victims of crime. One of those methods of protecting victims was to extend the statute of limitations so that a crime victim would not be pressed to file a civil suit before the crime was fully prosecuted. This was one way to remove from the criminal defendant's arsenal the ability to make it appear

that the crime victim had a pecuniary interest in seeing the defendant prosecuted. The criminal defense attorney would no longer be able to batter the victim on the stand with questions like, “So, Mrs. Smith, you've sued this gentleman for \$200,000 and trying to convict him is just a way for you to get some money, isn't that true?” That portion of the bill was a mechanism to keep the criminal defendant from making it look as though the victim was greedy or just after money.

For those injured in a car crash (or other incident resulting in criminal charges), the good news is that the Supreme Court ruled that claims are tolled for the entire period of time that a criminal charge is pending (up to six years). This also means, however, that personal injury attorneys need to carefully evaluate the statute of limitations on all incoming cases. For instance, if someone contacts an attorney 25 months after a car crash, the attorney cannot simply say, “Sorry, your statute of limitations has expired, so I can't help you.”

If you are a personal injury attorney, and someone comes to you when the statute of limitations has seemingly expired, there is the risk of the claim expiring while the file is sitting on your desk or your advising the client that no claim can be pursued, when, in fact, time remains to assert the claim. This is always a risk, of course, but now you likely won't know—when you first speak with a prospective client—how much time you really have to file suit. To protect yourself and adequately serve the prospective client, a personal injury attorney now should:

(1) determine whether there was a criminal charge (and if the target defendant is listed as “vehicle No. 1” on the accident report, the odds are that there was a criminal charge), and find out when the charges were resolved, so you will know how much longer you have to file suit; or

(2) decline the claim and inform the prospective client that they may still have more time to file suit. If you decline the claim, you should do it in writing so you can later prove that you did not take the case and that you did tell the prospective client that there was more time to file suit, depending on the status of the criminal case.

As always, diligence is the best way to serve your clients and the best way to protect yourself from a claim.

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