O.C.G.A. § 34-9-11.1 IS UNCONSTITUTIONAL

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The scenario is all too common. One of our clients is injured by a third party while he is working. He hires us to assist him in resolving his claims - workers compensation and third party tort claims. At some point in the process the O.C.G.A. § 34-9-11.1 will raise its evil head to screw up the process. The workers compensation carrier will use this statute, which purports to allow it to obtain reimbursement for benefits paid to the employee, to either beat down the workers compensation settlement or complicate the resolution of the third party claim. No one seems to really know what the statute means or how to apply it. It has been the basis of numerous appellate decisions but has never been scrutinized under the microscope of constitutional inquiry.

It is this author's opinion that O.C.G.A. § 34-9-11.1 is unconstitutionally vague. Its terms are not understandable by men of ordinary intelligence, it fails to define how it is to be enforced, and its failure to set a point in time at which it can be enforced deprives our clients of their right to use their property without due process of law. Below, printed in its entirety,

is a brief written in opposition to an employer's and carrier's joint motion to intervene. This brief explains why O.C.G.A. § 34-9-11.1 should stricken as an unconstitutional intrusion into the rights of our injured clients. Clients who already have enough to worry about without having to fight off the claims of their employers' insurers for money they did not earn and which they are not using to reimburse their insureds' premiums. The theories raised in this brief have been raised in multiple cases; but no court of record has been compelled to reach a decision on the merits because in every case in the employer/insurer has backed away from taking the issue any further than necessary and has resolved claims totaling in the millions of dollars for mere cents on the dollar. As of October 1, 2001 the trial court in this case has not yet reached a decision.

IN THE STATE COURT OF [redacted] COUNTY
STATE OF GEORGIA

[redacted], Plaintiff, v. [redacted], Defendants.	**CIVIL ACTION FILE NO.** [redacted]

PLAINTIFF'S OBJECTION AND BRIEF IN OPPOSITION TO [redacted] MOTION TO INTERVENE

COMES NOW Plaintiff, [redacted] and submits this Objection and Brief in Opposition to [redacted] Motion Of The Employer and Workers' Compensation Insurer to Intervene, showing this Court as follows:

INTRODUCTION

Movants' motion to intervene should be denied because the statute upon which Movants rely is so vague it fails to give this Court or the parties any appropriate direction as to its meaning or its application, and deprives Plaintiff of his property rights without due process of law. As such, it is unconstitutional and cannot serve as the basis either for intervention in this action or subsequently for the creation or enforcement of a lien on Plaintiff's recovery.

FACTUAL BACKGROUND

This case arises out of serious electrical burn injuries and permanent deformities (including an amputated arm and leg) caused by lack of warnings and other defects in a high lift truck (a/k/a "bucket truck") manufactured by Defendant [redacted]. The injuries occurred while Plaintiff [redacted] was working on fibre optic communication lines while standing in the fiberglass bucket of the truck manufactured by Defendant.

Plaintiff [redacted] was working for movant [redacted] when he was injured on the job and has collected workers' compensation benefits from his employer through its insurer [redacted]. Both have moved to intervene in this action. Plaintiff [redacted] is still receiving benefits and will be entitled to do so for the rest of his life. Accordingly, while Movants seek to intervene in this action, they cannot even define a finite sum to which they believe they are entitled.

ARGUMENT AND CITATION OF AUTHORITY

Movants rely on O.C.G.A. § 34-9-11.1 as the basis for their right to intervene in this action. This statute cannot be the basis of an intervention or any other right for the Movants because it is unconstitutionally vague in its language, it has no defined method of giving it effect, it attempts to take away property rights without due process of law, and it contravenes the public policy of this state by not only chilling the settlement of disputes but by actually fostering litigation. (Plaintiff acknowledges that this statute has been interpreted several times by the Georgia Court of Appeals as if it is a valid statute. However, the constitutionality of the statute has never been considered by any appellate court and, as will be shown below, the opinions which do attempt to interpret the statute support the argument that it is unconstitutional.)

I. O.C.G.A. § 34-9-11.1 IS UNCONSTITUTIONALLY VAGUE.

O.C.G.A. § 34-9-11.1 is unconstitutionally vague. The Statute fails to provide any guidance as to the meaning of its principal terms and fails to provide any means for its application. No appellate court has reviewed this statute to determine whether its failure to define substantive terms, and its failure to provide direction as to how the Statute is to be enforced meets the demands of either the Georgia or United States Constitutions. Had the Statute been analyzed with constitutional mandates in mind, it surely would have failed to survive such scrutiny. This Court should now hold the statute unconstitutional and put an end to the mischief it causes.

A. IT IS IMPOSSIBLE TO FIGURE OUT WHAT "FULLY AND COMPLETELY COMPENSATED" MEANS.

Movants base their subrogation lien and their claimed right to intervene on O.C.G.A. 34-9-11.1(b), which purports to create only a conditional lien. O.C.G.A. § 34-9-11.1(b) states, in pertinent part, the following:

> 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. (emphasis added).

The plain language of the statute conditions the enforceability of the workers' compensation carrier's lien on full compensation of all economic and non-economic losses of the claimant from a third-party tortfeasor. Thus, "[a] right of action in the employer is not unconditionally granted by the Statute." *Rowland v. Dept. of Admin. Services,* 219 Ga. App. 899, 900, 466 S.E.2d 923, 925 (1996). Instead, there is only a right to a lien, and the foreclosure of any such lien, in the event that the employee is "fully and completely compensated."

The Statute is fundamentally unconstitutional due to the inherent vagueness of the concept of full and complete compensation. The problems with vagueness arise in every possible context to which the Statute might apply - in settlement, in verdict, and when the workers' compensation benefits continue long after any recovery is obtained from a third party. Under the due process of law requirements of both the United States and the Georgia Constitutions, property cannot be taken under a statute whose terms are "so vague, indefinite, and uncertain that we cannot determine their meaning." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-9 (2nd ed. 1988) (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). *See also Anderson v. Little & Davenport Funeral Home, Inc.*, 242 Ga. 751, 752, 251

S.E.2d 250 (1978) ("A statute must be 'definite and certain in its provisions to be valid and when it is so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential due process of law.'") (quoting *City of Atlanta v. Southern R. Co.*, 213 Ga. 736, 738, 101 S.E.2d 707, 709 (1958).

As recognized by at least one commentator, the present status of Section 34-9-11.1 "leaves more questions than answers." Potter & Heirs, *Workers' Compensation, Law and Practice* 8-4 Subrogation (Supp. 1994). The Statute clearly states that the employee must be fully compensated for both economic and noneconomic losses; however, what constitutes "full and complete compensation" is not defined with any level of certainty. Reference to the common law is of no assistance as this phrase has never been defined in any decision of any court in the land. Additionally, the very idea that this may be a question of fact renders the statute unduly vague. Men of common intelligence will always differ as what this statute means in the context of [redacted] and in the context of any particular plaintiff.

Appellate decisions which relate to the Statute, but which have not considered constitutionality of the statute, offer no guidance. There is no way they could, because for an appellate court to consider the constitutionality of a statute, the issue had to be raised by a litigant before the trial court. *E.g., Flynn v. State*, 209 Ga. 519, 74 S.E.2d 461 (1953). However, multiple opinions have recognized the very problem which Plaintiff now raises as a constitutional defect: "The statute does not indicate how to determine whether the insured has been 'fully and completely compensated.'" *Anthem Casualty Co. v Murray*, 246 Ga. App. 778, 780, 542 S.E.2d 171, 173, (2000).

The courts' consideration of other statutes found to be unconstitutionally vague, provides some guidance. For example, in *Hartrampt v. Georgia Real Estate Commission*,

256 Ga. 45, 343 S.E.2d 485 (1986), the Georgia Supreme Court examined the vagueness of O.C.G.A. § 43-40-25 (25), which provided for the suspension of real estate licenses of a person who "demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interest of the public or any other conduct whether of the same or a different character than heretofore specified which constitutes dishonest dealing." The Court focused on the vagueness of the standard of "unworthiness or incompetency" in striking the law as unconstitutional. The Court stated: "A civil statute must provide fair notice to those to whom it is directed, and its provisions must enable them to determine legislative intent." *Id*. The Court went on to note that "the term 'unworthiness' is too subjective to advise as to those acts which are permitted, and those acts which are prohibited." *Id*.

Similarly, in *Cox v. DeJarnette*, 104 Ga. App. 664, 678, 123 S.E.2d 16, 25 (1961) the court was faced with interpreting a statute which demanded that steps be constructed in a fashion to "prevent persons from slipping thereon." The owner of the steps complained that this was too vague as it was impossible to determine what was required. The Court held "the ordinance was too vague and indefinite to be enforceable. 'It is a general principle of statutory law that a statute must be definite and certain in its provisions to be valid, and when it is so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law.' *City of Atlanta v. Southern Ry. Co*., 213 Ga. 736, 738, 101 S.E.2d 707, and the authorities there cited."

The entire concept of "full and complete compensation" is similarly too subjective. Reasonable minds will inevitably disagree as to what full compensation will be. The

subjectivity inherent in the entire concept of full compensation makes the Statute too unclear to advise as to when a statutory lien will arise and when it will be enforceable. O.C.G.A. § 34-9-11.1 is accordingly unconstitutionally vague. Examples prove this point. If the Plaintiff attempts to settle this case for $100,000.00, it would be hard to imagine that he will be fully and completely compensated for two amputations. But, there is nothing in the Statute to prevent the Movants from attempting to prove otherwise. The phrase simply is not one on which reasonable minds can agree.

Further, the statute is so vague that one must wonder what happens to a fully and completely compensated plaintiff who is forced to repay his employer/insurer. If he repays them from his full and complete compensation, he will then be undercompensated at their expense. Yet the statute does not limit the lien to situations in which an employee is overcompensated and then required to repay sums to bring his compensation level back to merely full and complete. It is this kind of imprecision in language which demands that this Court refuse to enforce any rights under this statute.

B. THERE IS NO DIRECTION AS TO HOW TO ENFORCE THE STATUTE.

The statute purports to give the Movants the right to seek reimbursement from the Plaintiff if he is "fully and completely compensated." But the statute fails to describe how this is to be accomplished. "The statute prescribes no **method** by which an employer can establish that a workers' compensation recipient has been fully and completely compensated by a recovery from a third-party tortfeasor." *North Brothers v. Thomas*, 236 Ga. App. 839, 840, 513 S.E.2d 251, 253 (1999); *Liberty Mutual v. Johnson*, 244 Ga. App. 338, 535 S.E.2d 511 (2000); *Bartow County Bd. of Ed. v. Ray,* 229 Ga. App. 333, 334, 494 S.E.2d 29 (1997).

In every conceivable circumstance in which a method of determination is considered, it fails when measured against the demands of the Georgia Constitution.

The Statute fails to define the parties' rights if the claim against the third party is settled before judgment, if the claim against the third party goes to judgment, if the claims against the third party settles for an amount greater then or less than the judgment, and when the employer/insurer continues to pay the Plaintiff after the settlement with the third party. This failure to provide detailed instruction is fatal when measured against the demands of the Constitution. "Statutes which provide no means for enforcement are frequently held too incomplete and imperfect for practical enforcement." *Employers Mutual Liability Insurance Co. v. Carson*, 100 Ga. App. 409,410, 111 S.E.2d 918, 918 (1959)

In *Borden v. Atlantic Coast Line R.R.,* 60 Ga. App. 206 (1939), the Georgia Court of Appeals refused to honor an amendment to an appeal because the statute giving rise to the right to amend was not clear on what procedures were to be followed. The appellant, in his original appeal, had omitted some language which was necessary, under the law in effect at the time, for the appellate court to hear the case. The appellant then amended the appeal by applying for and receiving an order from the trial court which added the proper language, pursuant to a statute which allowed for amendments to an appeal. The court refused to hear the appeal. The court reasoned that while a statute authorized amendments to an appeal, the statute did not provide for procedures for the effectuation of that amendment and could not accordingly be enforced. The statute did not provide for the procedure by which an amendment was to be made, did not say whether or not the amendment was to be ordered by the trial court or by the appellate court, and did not say whether the amendment was to be

served on the other party. *Id.* The court declared that the "act [allowing amendment] is . . . too imperfect and incomplete for enforcement." *Id.*

(i) THE STATUTE FAILS TO GIVE DIRECTION AS TO MOVANTS' RIGHTS IF THERE IS A SETTLEMENT.

The statute fails to provide any direction to the parties or the Court regarding what to do if the Plaintiff and Defendant seek to settle this case before verdict or judgment. On the one hand, Movants, if allowed to intervene, will be parties; on the other hand, they have no rights against the Defendant. *See, Anthem Casualty Insurance Co. v. Murray*, 246 Ga. App. 778, 542 S.E.2d 171 (2000). Yet, after intervention, they will be parties and it would seem that if the Statute was properly thought out and written, there would be some guidance as to how to handle their rights. Surely they cannot be allowed to prevent the settlement; if that is the law, then it violates the public policy that encourages settlement.

(ii) THE STATUTE FAILS TO GIVE DIRECTION AS TO MOVANTS' RIGHTS IF INTERVENTION IS ALLOWED.

Movants seek to intervene. What if they do? The statute upon which they rely gives them no rights at all as intervenors. They do not have a cause of action against the third party and thus they cannot participate as if they are adverse to that party. *See, Anthem Casualty Insurance Co. v. Murray*, 246 Ga. App. 778, 542 S.E.2d 171 (2000). It has been suggested that they can ask for a special verdict form, *id*, but it has been held by the same court that they have no statutory right to any particular verdict form. *Bartow County Board of Education v. Ray*, 229 Ga. App. 333, 335, 494 S.E.2d 29, 31 (1997). In fact, special verdict forms are not required in any tort cases and it is left to the discretion of the trial court to

decide if one should be used. O.C.G.A. § 9-11-49; *Shivers v. Webster*, 224 Ga. App. 254, 480 S.E.2d 304 (1997).

Surely, as Intervenors, they will not be able to ask questions. If they did, this would violate both the prohibition against admission of collateral source evidence and the Georgia Constitution that guarantees the Plaintiff the right to represent himself.

A simple look at the ways in which Movants may seek to protect their interest reveals the danger of this case being tainted with collateral source evidence. Certainly Movants could not press a case at trial, as even the mere presence of Movants' counsel will reveal to the jury that Plaintiff has received collateral benefits. Movants could not even insist on a special verdict form which might possibly allow them to determine whether or not the amount a jury awards plus the amount or workers' compensation benefits paid to Plaintiff are equal to the amount necessary to fully compensate Plaintiff for all his economic and noneconomic injuries. There is simply no way to formulate such a verdict form so that it will not reveal the receipt of collateral benefits. Nor is any such form required by the Statute. It is difficult to imagine any way in which Movants could seek to participate in this case which will not poison this case with improper evidence; and the Statute offers no guidance on the issue.

Even if there is some method that can be fashioned to allow the Movants to participate in the trial without the likelihood of introduction of collateral sources, a bigger problem would result - a problem of constitutional dimension. Art. 1, § 1 ¶12 of the Georgia Constitution provides that "no person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." This right will be violated by any participation whatsoever in the prosecution of this case by

the Movants. The case against the Defendant is Plaintiff's own cause and Movants do not have any rights at all against the Defendant. Accordingly, if the Movants are permitted to do anything that affects Plaintiff's case, including his strategy, his handling of the evidence, his selection of the witnesses, and yes, his argument in favor of a general jury verdict form if that is what he thinks is in his best interest, then the Statute allowing such conduct must be void as unconstitutional.

(iii) THE STATUTE FAILS TO PLACE LIMITS ON MOVANTS' RIGHTS.

Not only does the statute fail to meet constitutional muster before and during trial, it also has a very significant constitutional defect even if a verdict is rendered. This holds true even if the verdict is in the form suggested by the appellate courts. Simply put, the Statute does not limit the number of times the Movants can seek to create new liens. The case at bar is a perfect example of this problem. At the end of this case, Movants will attempt to prove that Plaintiff is fully and completely compensated and will seek reimbursement of some of the benefits paid. But, in all likelihood, they will still be actively paying both weekly wage loss and medical benefits. There is nothing to prevent them from trying to enforce a new lien every year or two, or even every week they pay a benefit check, based on the argument that Plaintiff has been fully and completely compensated and that, therefore every check they pay should be paid right back to them. This is not only a problem with vagueness, but it also puts Plaintiff in the impossible position of never knowing when he will have finality. Certainly, it interferes with the unfettered rights in his property, by denying his right to due process of law.

(iv) THE STATUTE FAILS TO GIVE DIRECTION AS TO HOW TO DETERMINE IF FULL AND COMPLETE COMPENSATION EXISTS.

Even if all of the other problems are ignored, the statute still fails because it does not define how the parties are to go about deciding how to define full and complete compensation - assuming of course there is a definition available. Is there to be another jury trial? Is this to be decided by the trial court? "The statute prescribes no **method** by which an employer can establish that a workers' compensation recipient has been fully and completely compensated by a recovery from a third-party tortfeasor." *North Brothers v. Thomas*, 236 Ga. App. 839, 840, 513 S.E.2d 251, 253 (1999); *Liberty Mutual v. Johnson*, 244 Ga. App. 338, 535 S.E.2d 511 (2000); *Bartow County Bd. of Ed. v. Ray,* 229 Ga. App. 333, 334, 494 S.E.2d 29 (1997) The answer is unclear. It cannot be so unclear for the statute to be enforceable. *Employers Mutual Liability Insurance Co. v. Carson*, 100 Ga. App. 409 ,410, 111 S.E.2d 918,918 (1959)

On the one hand, the Court of Appeals has ruled (in an opinion that is outside its constitutionally mandated jurisdiction - see Article 6 § 6 ¶ II) that the employer/insurer does not have a right to a jury trial to decide the extent of its lien. *Liberty Mutual Insurance Co. v. Johnson*, 244 Ga. App. 338, 535 S.E.2d 511 (2000). On the other hand, it is beyond comprehension that the Plaintiff can have property recovered from a third party and have that property taken away without benefit of a jury trial should he choose to have one. From the Plaintiff's point of view this is not an action in equity - it is a factual determination of the extent of his damages.

It is axiomatic that the determination of questions of fact relating to the amount of damages was a matter for determination by juries at common law. The Georgia Constitution

guarantees the right to a jury trial at Article 1 §1 ¶ XI for all matters that were in the provence of the jury at common law. As the statute at issue has been interpreted so that no jury trial is allowed, (*Liberty Mutual Insurance Co. v. Johnson*, 244 Ga. App..338, 535 S.E.2d 511 (2000)), it must be in violation of this constitutional mandate as to the Plaintiff's right to have a jury determine the factual question of whether he has or has not been fully and completely compensated. As such, it cannot be enforced.

C. THE STATUE VIOLATES PUBLIC POLICY

Admittedly, a statute in controvention of public policy is probably not per se unconstitutional. However, when this Court is subjecting the statute to constitutional scrutiny, public policy is a valuable tool in deciding close questions. Here, the public policies that are violated are those favoring settlement and encouraging a prompt and efficient resolution of disputes. As noted above, if Movants are allowed any rights as intervenors, those rights arguably will be contrary to the interests of the Plaintiff.

Is the Movant permitted to stand in the way of settlement between Plaintiff and Defendant? Not only is there no statutory authority for the blocking of such a settlement, permitting Movant to do so would run afoul of the clear Georgia authority which greatly favors compromise over litigation. *Solleck v. Laseter*, 126 Ga. App. 137, 140, 190 S.E.2d 148 (1972); *Southern Medical Crop. v. Liberty Mutual Insurance Co.*, 216 Ga. App. 289, 291, 453 S.E.2d 505 (1989). It must be presumed that the Georgia Legislature was aware of this rule of law when it enacted O.C.G.A. § 34-9-11.1. It remains the duty of this Court to attempt, given the assumption that the Georgia Legislature was aware of this rule of law, to construe both this rule and the statute at issue consistently. Allowing Movant to block a voluntary settlement between Plaintiff and Defendant would be antithetical to the strong

public policy favoring compromise. Yet, if it cannot assert some influence in preventing a settlement and dismissal of the case, then one must ask what is the purpose of the intervention in the first place?

Indeed, the Georgia Legislature actually promoted settlement by conditioning the creation of the lien on the receipt of full compensation. Assuming for the sake of argument that the only way to obtain "full compensation" is by a verdict and that a settlement by its very nature is a compromise; under the terms of the statute, Plaintiff gains an advantage by not insisting on going to trial in pursuit of full compensation. One interpretation of O.C.G.A. §34-9-11.1 is that it promotes settlement by ensuring that no lien will even exist unless the claimant is fully compensated. It is to the advantage of a plaintiff who has been paid workers' compensation benefits to settle for an amount which will constitute less than full compensation, even taking into account all the workers' compensation benefits paid, as plaintiffs can thereby avoid an enforceable lien.

Further, interpreting the statute in a manner that allows intervention and that therefore allows the workers' compensation carrier and employer to participate in and approve settlement negotiations will allow them to stand in the way of a tort settlement which might be in the injured party's best interest. For example, assume a worker was injured by a defective machine and was paid $100,000.00 in workers' compensation benefits, and then sued the manufacturer of the machine. Further assume that the plaintiff's product liability case faced tough liability challenges, but that the plaintiff is nevertheless offered $50,000.00. The workers' compensation carrier and employer will be in a position to block the $50,000.00 settlement and force the worker to a trial at which he will face extraordinary expense and a risk of obtaining a zero verdict. The workers' compensation carrier and

employer would have no risk in this as, under the compromise settlement, it receives zero anyway. This certainly was not the intent of the Legislature. Of course all of this is avoided by recognizing that the Statute is so vague that it makes no sense and therefore cannot be enforced at all.

Whether Plaintiff's case against Defendant resolves by settlement or verdict, he will not have peace and quiet possession of his property without additional, potentially endless, litigation. He will not only face another action to determine whether he has been fully and completely compensated, but might face several more such actions if Movants continue to pay benefits long after he ahs resolved his dispute with the Defendant. To enforce this statute is "to violate the policy of the law to effect a speedy, just, and inexpensive determination of every action." *American Tire Co. v. Creamer*, 132 Ga. App. 781, 781, 209 S.E.2d 240, 241 (1974).

II. MOVANTS HAVE NOT SHOWN THAT THEY COME WITHIN THE STATUTE PERMITTING INTERVENTION.

Even if this Court refuses to rule that O.C.G.A. § 34-9-11.1 is unconstitutional, Movants have not shown that they come within the confines of O.C.G.A. § 9-11-24 which governs intervention. Movants seem to urge this Court to accept the proposition that they may intervene as of right, but fail to demonstrate that they meet the prerequisites for such intervention. Just because there is a statute that purports to allow intervention does not mean that intervention is automatically allowed under O.C.G.A. § 9-11-24(a) as an "unconditional right to intervene." Admittedly, *Department of Administrative Services v. Brown*, 219 Ga. App. 27, 464 S.E.2d 7 (1995). appears to hold exactly the opposite of the position Plaintiff is taking. However, Plaintiff submits that the court was wrong as it did not consider the fact

that the lien sought to be protected by intervention did not exist and that the action to perfect that lien could occur only after the case was over. Further, the court did not consider or discuss the fact that O.C.G.A. § 34-9-11.1 does not allow the intervenor any rights. The intervenor has no claim against the tortfeasor and only has *potential* rights against the employee after the employee obtains full and complete compensation from the tortfeasor and the workers compensation carrier combined. The "insurer's right of action against a third party is derivative of the injured employee's claim; the insurer "has no right to pursue its own independent action against the third part[y]." *Anthem Casualty Co. v Murray*, 246 Ga. App. 778, 782 , 542 S.E.2d 171, 175, (2000). Accordingly, the right to intervene cannot be considered as unconditional, but must instead be considered merely permissive.

A. MOVANTS CANNOT DEMONSTRATE THAT THEIR INTEREST WILL BE IMPAIRED.

Movants' interests will not be impaired by Plaintiff's conduct of this action free from Movants' interference. (Actually, as noted above, it is the Plaintiff's rights that will be impeded by the Movants' presence and participation.) Movants' interest in this action is apparently to obtain reimbursement for sums they have paid pursuant to their obligations under Georgia Workers' Compensation law. As noted above, the law which allows Movants to obtain this reimbursement and grants Movants a right to subrogation conditions Movants' rights to do so on Plaintiff's recovery of full and complete compensation for "all economic and noneconomic losses incurred as a result of the injury." O.C.G.A. § 34-9-11.1(b).

Movants' interests will not be impaired because Plaintiff's and Movants' interests meet and are entirely consonant should the case proceed all the way to verdict. Plaintiff's obvious and ultimate goal is to obtain full compensation. If Plaintiff achieves that goal,

Movants' interests will be served, as such compensation will trigger Movants' lien. The interests of Movants and Plaintiff are identical and will be vigorously pursued by Plaintiff, with or without Movants in the case. Movants accordingly cannot demonstrate that their interests will be impaired in any fashion. To the extent Plaintiff may choose to settle his claims, Movants' intervention is irrelevant as their intervention does not give them any rights to stand in the way of settlement for less than full and complete compensation.

This similarity of interests was recognized in *Olden v. Hagerstown Cash Register*, Inc., 619 F.2d 271 (3rd Cir. 1980), in which the Third Circuit approved a district court's refusal of a workers' compensation carrier's motion to intervene. In that case, the district court noted that the plaintiff's pursuit of her goals would serve to benefit the carrier, noting that "both the plaintiff and the carrier were seeking the largest recovery possible . . . ." *Id.* at 272. This court should follow the dictates of the *Olden* decision and deny the intervention requested by Movants.

B. MOVANTS' INTERESTS ARE ADEQUATELY REPRESENTED BY PLAINTIFF.

This leads naturally to the second failure of Movants in their bid for intervention: Movants cannot show that Plaintiff will not adequately represent their interests should the case proceed all the way to verdict. As noted above, Plaintiff and Movants have the same interests if a verdict proves necessary. Moreover, Plaintiff and his counsel have the resources and ability to effectively pursue those interests. Plaintiff has retained counsel with a great deal of trial experience, who have handled many similar actions, and who have the resources to vigorously prosecute the pending case to its conclusion. Plaintiff's counsel has retained appropriate expert assistance, have vigorously sought and obtained discovery materials, and

have shown every indication that the pending matter is being pursued with an eye towards maximizing Plaintiff's recovery. Without a showing of a conflict, or of incompetency of Plaintiff's counsel, Movants cannot meet this element of the test. *See Olden v. Hagerstown Cash Register*, Inc., 619 F.2d 271, 275 (3rd Cir. 1980).

C. MOVANTS' MOTION TO INTERVENE IS UNTIMELY.

Movants first put Plaintiff on notice of their interest in this case on August 20, 2001. This lawsuit was filed on April 10, 2000. Since that time, discovery has progressed and Movants have shown no interest whatsoever in joining the action. O.C.G.A. §9-11-24(a) (relating to intervention as a matter of right) and (b) (relating to permissive intervention) both require that the intervention effort be made in a timely fashion. Here, more that 17 months have passed since the filing of this action. Movants did nothing to protect their interests during this time period. They should not now be allowed to intervene and delay the ultimate outcome of this case.

D. MOVANTS' HAVE AN INDEPENDENT RIGHT OF ACTION

To the extent O.C.G.A. §34-9-11.1 is constitutional at all, it only allows a claim by the Movants against the Plaintiff. That claim does not even exist until there is reason to believe that the Plaintiff is fully and completely compensated. Once the Plaintiff obtains full and complete compensation, the Movants can seek to enforce a lien against that recovery in a separate action where it will be up to the fact finder to determine the extent of the lien. Since they have the right to this independent action, they have no need to intervene now. *Gregory v. Tench*, 138 Ga. App. 219, 225 S.E.2d 753 (1976).

IV. EVEN IF THIS COURT PERMITS INTERVENTION, IT SHOULD IMPOSE RESTRICTIONS ON MOVANTS' RIGHTS TO PARTICIPATE.

At a bare minimum, even if this Court disagrees with Plaintiff and permits Movants' intervention, this Court should condition Movants' participation in a manner which avoids the problems regarding collateral source evidence, the interference with Plaintiff's rights to settle, the interference with the trial of the case (including the appropriate general verdict form which Plaintiff is likely to seek as being in his best interests) and the scheduling conflicts which may poison this case. Little doubt exists that this Court may impose conditions on an intervention and dictate the methods in which the intervenor may participate.

This Court must guard against the admission of any evidence of workers' compensation payments and guard against any interference with Plaintiff's right to settle, and conditioning Movants' participation in this case is both appropriate and required. Additionally, this Court should condition the Movants' participation in this case so that such participation will not interfere with the progress of this case. Movant must not be permitted to be noticeably at the trial of this case. Movant must not be permitted to interfere with settlement negotiations between Plaintiff and Defendant. Movant must not be able to be at the depositions in this case. Accordingly, even if it grants Movants' Motion to Intervene, this Court should condition Movants' participation in a manner which will avoid the serious dangers of prejudice and delay Movants' proposed intervention poses.

CONCLUSION

"Legislative acts in violation of [the Georgia Constitution] . . . are void and the judiciary shall so declare them." Georgia Constitution Article 1, §11, ¶ V. Section (b) of O.C.G.A. § § 34-9-11.1 is in violation of the Georgia Constitution. It makes no sense, cannot be fairly applied, exposes Plaintiff's property rights to endless litigation, and is working

against the best interests of the people of this state. This Court should end its evil now by declaring it unconstitutional and refusing to allow Movants to use it to intervene in this action.

Respectfully submitted,