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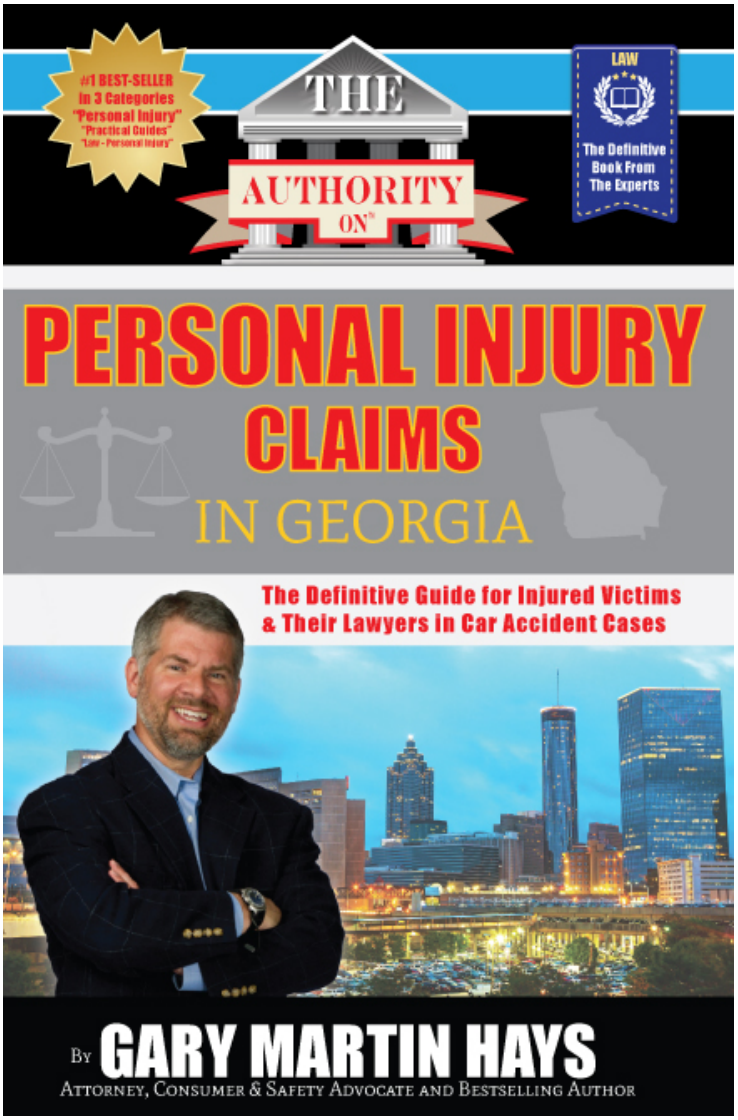

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CHAPTER 5 – Property Damage: Total Losses, Repairs, and Diminished Value

This chapter will help address a lot of questions and concerns that you will have regarding the property damage aspect of your claim. It is bad enough that you have suffered personal injuries caused by an accident. Damage to your vehicle can also become a pain if you do not know what to do or how to do it. If your car was damaged in a wreck, it is our hope this information will be helpful in educating you about your rights and obligations when seeking repair of your car.

We have broken down the chapter into the following sections:

(1) Towing & Storage

(2) Repairs

(3) Rental Car

(4) Total Loss

(5) Salvage

(6) Uh Oh - I'm Upside Down

(7) Diminished Value

PLEASE NOTE:

The information we are sharing with you in this book is general in nature, and not designed to provide specific legal advice regarding you and your potential claim. The summary listed below may or

may not apply to your specific case. Nothing can replace a consultation with an experienced attorney to discuss the facts about your particular claim. Further, should you have any desire to explore pursuing your potential claim, you should not delay as there are various statutes of limitation which could limit or completely bar your claims for recovery should you not pursue the matter in a timely fashion. We are NOT providing you information regarding the specific statute(s) of limitation applicable to your potential claim as this can only be determined after a detailed consultation of your case with an experienced attorney. By providing you with this information, we are not giving you specific legal advice about your case, nor have we been retained to handle your claim unless you and our firm have entered into a written contract of representation regarding your potential legal claim. Should you have any questions regarding a potential claim, please contact us right away at (770) 934-8000 or toll free, 1-888-934-8100.

Before we address the different topics in this chapter, it is VITALLY IMPORTANT to mention something else. We suggest that you deal with the Insurance Claims Adjuster in a professional and courteous manner for a lot of reasons, even if they may act like the most condescending horse's rear end you have ever encountered. Your goal is to get your vehicle repaired in an effective and timely manner. If the vehicle is a total loss, your goal is to get the most money you possibly can for your property damage loss. It is our hope this goal can be accomplished without litigation, which is costly, and very time consuming. A certain level of cooperation and understanding may prove to be crucial in obtaining the best possible settlement for you.

Let me give you an example:

> Imagine that you are trying to get the best possible settlement on your car if it is a total loss in a wreck. I would respectfully suggest that it might not be a good idea to walk into the insurance company's office, kick the adjuster in the shin, tell him he does not know what he is doing, and then say “give

me the most money you can on this car, buddy." I believe that dealing with the adjuster in as courteous a manner as is reasonably possible will significantly contribute to the possibility of resolving your property damage claims as quickly and effectively as possible.

1. TOWING & STORAGE:

Who is going to pay if your car needs to be towed from the scene of a wreck?

If you were hurt and taken away by ambulance, your car was probably towed to the nearest wrecker yard. Your car may be inoperable because of the severity of damage. Either way, you will be faced with towing and storage costs. The answer to the question of "Who pays?" depends on you being able to prove the other driver is at fault for the wreck. This is often referred to by the legal phrase "Who is liable?" If the other side was at fault - if they breached a legal duty to you - that party may be held liable.

We shall assume that the other driver caused the wreck and is liable for your injuries and property damage. There may be times when the other driver is given the ticket for causing the wreck, but the insurance company will want to fight it based on other witness testimony or legal loopholes. It is our hope this is not the case in your claim.

If your car is towed from the scene of the wreck, YOU are ultimately responsible for the bill if the liability insurer does not accept responsibility for the wreck. Plain and simple. The towing company and the storage lot will look to you for payment. When you go to the storage lot to get your vehicle, they will ask you to pay the charges in full before they will release it. Therefore, it is important to get in touch with the property damage adjuster for the other at fault driver as quickly as possible so they can arrange payment of your towing and storage charges so you will not have to pay.

Under **O.C.G.A. Section 33-7-11.1**, every insurance company licensed to issue an automobile policy in Georgia must have coverage for the benefit of a third party claimant for loss of use and towing and storage costs. The insurer's duty to pay under this statute is triggered when they accept liability on behalf of their insured - the at fault driver.

Once your car is towed to a storage facility, the daily charges will add up very quickly. You should look to the other driver's insurance company to also pay for all storage charges from the day of the wreck to the time the insurance company authorizes release of your car for repairs.

> WARNING: If you delay in any way the repair of your car because you are fighting with the insurance company over who is at fault or some other issue, YOU may be personally liable for any storage charges incurred. You have an obligation to ***MITIGATE*** (or lessen) your damages. You do not need to leave your car in storage for five weeks at the storage yard and expect the insurance company to pay for these charges.

How can you ***MITIGATE*** your damages? If you have collision coverage, you should immediately contact YOUR insurance company to pay for towing, storage, and rental car expenses if the at-fault party's insurance company is balking at paying. You DO NOT want to wait for a determination of liability while the storage fees mount.

What is ***collision coverage?*** Collision coverage is optional and available to cover damages done to the insured vehicle. This is usually limited to damage as a result of an impact with another vehicle or object. Collision coverage will allow you to get your damaged vehicle repaired - even if you caused the wreck. But please note - collision coverage is not required in Georgia. Also, collision coverage does not usually cover events where the vehicle is damaged because of fire, theft, striking an animal, vandalism, falling objects, or because of the weather - like hail or flood damage. These losses are usually covered under comprehensive coverage.

What should you do to get your collision coverage to apply? Call your insurance company and notify them of the wreck IMMEDIATELY. Complete an accident report for them -- which often times is taken over the phone. The insurer may also ask for a copy of the police incident report. Once this is done, your adjuster will give you instructions regarding the property damage claim.

If you still have personal items in your car, you have the right to remove them from your vehicle at the storage lot - provided you can supply proof that you own the car. The storage lot may even have someone go to the car with you. When you go to the lot to get any items, make sure you obtain an accurate receipt of every thing you remove from the vehicle.

TAKE PICTURES:

A picture is worth a thousand words (and sometimes thousands of dollars). Take pictures of the property damage to your car. If the other driver's vehicle is at the lot, take pictures of it as well - especially if there is extensive damage. Don't be cheap. Take pictures from different angles so you can pick out the best photos that show all the damage to your car.

2. REPAIRS:

Now the insurance company has taken responsibility for their driver causing the wreck. What happens next? If your car can be repaired, it needs to be taken to the repair facility. We are often asked this question - "Do I have to get my car repaired where the insurance company tells me it needs to be fixed?" The answer is NO. You can get it fixed at the body shop of your choice. In fact, Georgia law prohibits an insurer from restricting you to use one of their selected repair facilities. Further, they cannot threaten to withhold payment on your claim because you chose your own repair shop. (See **O.C.G.A. Section 33-34-6**.) We do suggest that you find a reputable shop experienced in handling cars like yours. You

can call the dealership that sold you the vehicle for a recommendation. Your own insurance agent may know of a good repair facility as well.

When the car is at your selected repair facility, they will perform an appraisal of the damages to the car. The insurance adjuster and the repair facility will decide what needs to be fixed, and how much it will cost. Once the adjuster, you, and the repair shop agree on the charges, the work is then performed on your car.

When your car is repaired, the insurance company will often times cut a check directly to you and the body shop. It should be your goal (and the body shop's), to have your car in the same condition it was in BEFORE the wreck. It is important that you perform a COMPLETE examination and evaluation of your car before you sign anything! Also, make sure that if the check for the repairs is made payable to you and the body shop, that you endorse the check as follows:

"For property damage ONLY; not a full and final settlement as other damages may be discovered; not a settlement of diminished value."

This may cover you in the event another item needs to be repaired, or was repaired inadequately. However - it is difficult, sometimes impossible, and often too expensive to try to prove months later that a certain problem you are now having with your car was due to the wreck. You may want to consider hiring an appraiser at *your expense* to evaluate and document the condition of your vehicle following its repair.

3. RENTAL CAR:

What do you do while your car is being repaired? You are entitled to a replacement vehicle. The at fault driver's insurance company will either pay for your rental, or reimburse you for your "loss of use" of your vehicle while it is being repaired. But please understand — the

"replacement" or "rental" vehicle DOES NOT necessarily have to equal your car in value or quality. The reimbursement cost could run between $20.00 per day to $35.00 per day - depending on the insurer. You may upgrade to a nicer vehicle, but you may be responsible for the difference.

If the other person's insurance company is still contesting liability, you may have to file using your insurance if you have "Rental" coverage on your policy. Again, you must ***mitigate*** your damages if liability is contested. If you have this coverage through your insurer, you must notify them immediately and ask them to supply you with a rental car.

When you get the rental vehicle, you are required to show proof of insurance when you sign the rental agreement. Many companies will not rent to people under the age of 25. They will often require you to leave a credit card number just in case the insurance company revokes the rental, or you incur excess charges beyond what the insurance company will pay.

> WARNING: If your car is found to be a total loss, the insurance company will often times not extend your rental loss beyond the date they make you an offer to settle your property damage claim.
>
> For example: Your car is found to be a total loss. The insurance company offers you $4,500.00 as settlement for your lost vehicle. You think the value is $5,000.00, and you want to hold out for the extra $500.00. The insurance company will typically stop paying for rental once the offer is made. At most, they will extend the rental for a day or two. You may be responsible for any additional days you have the rental vehicle.

4. **TOTAL LOSS**:

There really is not a set rule that all insurance companies use in determining when a car is a "total loss." Some companies use a "70%" figure. For example, if the cost of repairing your damaged vehicle is 70% or greater of the fair market value of your vehicle, then they will usually determine it is a total loss. When that happens, the insurance company will issue a check to you and any lien holder(s) for the fair market value of the vehicle before the wreck. You then sign the car over to the insurance company and they will in turn sell it to a salvage yard.

How can you determine what the fair market value of your vehicle was before the wreck? There are a couple of sites on the internet that will allow you to do some research:

www.nadaguides.com

www.edmunds.com

Another method is getting a copy of the Sunday newspaper, as well as a copy of any free auto trader magazine you can pick up at the grocery store. Look for comparable vehicles to yours. You can use this as evidence to support your claims with the adjuster that the car is worth more than what they are offering.

What about any additional upgrades that you added to the car? Document, document, document. It is extremely important that you provide proof of any add-on items that may increase the value of the vehicle. This could include receipts, purchase orders, or work orders. The fact that you just had the oil changed or the air conditioner repaired does not increase the fair market value of the car as you would expect the car to be in proper working order before the wreck. But if you put in a new, upgraded stereo system and speakers, the insurance company will consider this if you are able to provide proof of purchase and reasonable proof of value.

5. SALVAGE:

What happens if you want to keep the car and have the insurance company pay you for the total loss? You will need to find out how much a salvage yard would give you for your car, and then negotiate with the insurance company on a fair amount for the totaled vehicle.

For example:

> You have a car with a fair market value of $8,000.00. The salvage value is only $2,000.00 after the wreck. The insurance company should give you $6,000.00 for the total loss of the car. This is the fair market value ($8,000.00) minus the salvage value ($2,000.00).

But after you have settled and kept the salvaged car, you will be responsible for towing your car to another location, paying any storage costs, and repairing or disposing of the car. Plus, if you plan on repairing your car, you will have to get the title changed to reflect that the car was a total loss. This is required so anyone that may purchase the vehicle at a later date will be on notice of the prior wreck and repairs. In our opinion, unless you have extensive experience in this area, the less hassle approach is to accept the check for the total loss of your car and let the insurance company deal with the vehicle and salvage.

6. UH OH - I'M UPSIDE DOWN

If you owe more to a creditor for the car than what the car is worth (the fair market value), you are "upside down" in your vehicle. In these days of "ZERO PERCENT FINANCING" and 60 month loans, we see a lot of people in this situation. The longer the term of the car note, the more affordable the monthly payments. But the end result may be that you pay $25,000.00 over time for a vehicle that is only worth $12,500.00 at the time you bought it.

But here is the problem:

> If your car is totaled, and the fair market value is only $5,000.00, yet you owe the creditor $10,000.00, the insurance company WILL NOT pay off your car note. They will just pay your creditor/lien holder the fair market value for your car - $5,000.00. You are still responsible for paying your creditor the extra $5,000.00. And you still owe the creditor this money even though you do not have the car any more.

What can you do?

- Avoid this situation on the front end. Don't try to buy more car than you can realistically afford. BEWARE the financing traps that place you in this predicament!
- See if you can purchase "Gap" insurance when you buy the vehicle. Essentially, gap insurance will pay off the excess balance on the car note in the event of a total loss.
- See if the creditor will work with you on rolling this balance into the purchase of another vehicle. But this solution may only cause you the same problem down the road if you are in another wreck. Think long and hard before you decide on this option.

There is no way to politely put this. The insurance company DOES NOT CARE how much you owe to your creditor for your vehicle. Their only concern is "What is the fair market value of the vehicle?"

7. DIMINISHED VALUE:

I want to expose one of the best kept secrets in the insurance industry. The insurance companies

are saving literally hundreds of millions of dollars each year right here in Georgia because of this secret. This money should be paid to Georgia's consumers. But like most things, if the person doesn't know they are entitled to receive this money, the insurance company is not going to knock on their door and voluntarily hand it to them.

What is this secret? It's called a "diminished value claim." Let me explain what that means. If you are involved in a car wreck, your car will suffer property damage. When you get your car repaired, you know it will be worth less than it was before the wreck. Think of it this way. If you walk onto a used car lot and you saw two identical cars parked side by side. One had never been wrecked, and one had been wrecked and repaired. Most people would never buy the car that had been repaired. You don't want to buy someone else's problem. And if you would even consider buying the car that had been wrecked, you would want a substantial discount.

Diminished value is what the market says your vehicle lost in value because of the repairs.

How do you calculate the amount of diminished value? The best way to do it is by hiring an appraiser to do a market survey for your car. And this is where the insurance companies are misleading consumers. A lot of insurance companies use a ridiculous formula the industry created to calculate diminished value. They make it sound like it is a fair and reasonable method but it is not.

> Let me give you an example of how the insurance companies are not being fair:

One insurance company sent my client a check for $496.00 using their formula. We hired an independent appraiser. His market survey showed the vehicle lost $2,235.00 in diminished value. The insurance company was trying to cheat my client out of over $1,700.00 This isn't right.

And they get away with this every day here in Georgia. It's time we stop them.

Let's do some math here to further illustrate just how badly the insurance industry is screwing over Georgia consumers. There are on average approximately 350,000 car wrecks in Georgia each year. Now remember, the cars in some of those wrecks will be total losses so they will not be repaired and will not have a diminished value claim. But let's just say only 150,000 are repaired. If the insurance company is holding on to a minimum of $1,000 on each of those claims that they would ordinarily have to pay out, they are taking $150 million out of the pockets of Georgia's consumers.

It does not matter who is at fault in the wreck for you to be able to pursue a diminished value claim. If you are at fault in causing the wreck, you can still pursue a diminished value claim against your insurance company. If someone else causes the wreck, you can pursue the claim against their company. Either way, if your car is wrecked and repaired, you have a diminished value claim and should pursue it.

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The following material is taken from a paper and presentation I delivered to a large audience of attorneys in Destin, Florida, in 2011, regarding diminished value claims at the Georgia Trial Lawyers' Annual Auto Torts Seminar:

In 2009, I was driving around the Discover Mills Shopping Center when a car in front of me stopped. I stopped, but the young woman driving her dad's truck that was traveling behind me was not as attentive. She slammed into the back of my car. I was driving a 2006 Mercedes CLK 350 convertible. The wreck caused approximately $6,500.00 in property damage to the rear of the car.

Before the wreck, the car was in great condition. I kept up with the maintenance schedule suggested by the manufacturer - kept the oil changed, tires rotated, etc. It had never been damaged before this

incident. I was thankful that no one was hurt, but was ticked that my car had lost value because of the wreck.

A good friend of mine, who also happened to be an attorney, suggested I pursue a diminished value claim. I thanked him for his kind words but told him I did not have the time to deal with it. He politely agreed to handle the claim for me. He had an appraisal performed on my car, sent a demand to the insurance company, and within 60 days, had a check for me in the amount of $3,950.00 - the full amount of the diminished value appraisal. I quickly realized I needed to learn more about these claims.

The information and material I am sharing with you is the compilation of two years of work - not just by me, but by many amazing attorneys who have been willing to freely share their work product, their thoughts, and their time on these claims

WHAT IS DIMINISHED VALUE?

It is the loss in market value of a car **after** it has been wrecked and repaired.

Here is another way to look at it: Assume two identical cars are side by side on a car lot. One has been wrecked and repaired, and the other has never been wrecked and repaired. Diminished value is what the market says it expects Joe Consumer would want in a discount before he would be willing to buy the wrecked and repaired car vs. the one that has never been wrecked.

Exhibit A

Which vehicle would you want to purchase? According to a recent survey, 55% of consumers say they would NEVER buy a vehicle that has been wrecked and repaired. 81% said they would buy it ONLY if they were given a LARGE discount. Most consumers do not want to buy someone else's problem.

Example #1:

Our client owned a 2008 Nissan Altima that sustained rear end damage in a wreck in October, 2009. Her car had approximately 34,000 miles on it at the time of the wreck. The vehicle was in great condition. She kept up with the manufacturer's maintenance program, such as oil changes, tire rotations, etc. Her car had never been damaged in any way prior to the wreck.

As a result of the wreck, the property damage was a little over $10,000.00.

Exhibit B:

2008 Nissan Altima

Vehicle #1 - Never Wrecked

Vehicle #2 - Wrecked and Repaired

*FRAME DAMAGE
*Over 111.3 hours to repair
-including 26 hours of refinishing/painting
-8.4 hours mechanical
*Damage to 10 panels:
-right quarter panel
-left quarter panel
-left corner panel
-left wheelhouse
-luggage lid
-rear body panel
-rear floor plan
-right rear sidemember
-left rear sidemember
-rear bumper

Put those cars side by side on a car lot and see how this will appear to a consumer:
Which vehicle would you want to purchase? According to this insurer's method of computing diminished value, the consumer would buy that wrecked and repaired car if you discounted it only $572.63.

Exhibit C:

Several insurance companies use some variation of a formula known as 17c to calculate diminished value. Exhibit C demonstrates the lunacy of this formula. They argue with a straight face that a consumer would buy a vehicle with a NADA value of $15,775.00 before the wreck that sustained over $10,000 in property damage, including FRAME DAMAGE, and required over 111 hours to repair, if the seller would reduce the price of the car by only $572.63.

In this claim, we hired an independent appraiser to assess the diminished value of our client's Nissan Altima. He did an appraisal of the vehicle BEFORE the wreck and then AFTER the wreck and repairs. He opined the Nissan Altima sustained an inherent diminished value loss of $3,550.00.

Exhibit D:

What is the proper method for calculating diminished value? Both the first party and third party statutes are silent on this issue, but there is guidance for us in the case law.

According to Canal Ins. Co. v. Tullis, 237 Ga. App. 515, 516-17(1999), where damage to a vehicle is not a total loss, a party seeking to recover for damage to the vehicle has two options in proving the amount of damage. These choices of proof are:

1. The difference between the fair market value of the vehicle before and after the collision; and
2. The reasonable costs of repair, together with hire on the vehicle while rendered incapable of use and the value of any additional permanent impairment, provided that the aggregate of such amounts does not exceed the fair market value before the collision.

See Myers v. Thornton, 224 Ga. App. 326, 480 S.E.2d 334 (1997).

> "There are two ways to prove damages to a motor vehicle caused by a collision. One alternative is by showing the difference between the fair market value of the vehicle before the collision as compared with the market value of the damaged vehicle after the collision. Damages may also be proved by proof of the reasonable value of labor and material used for necessary repairs that are the direct and proximate result of the collision, together with hire on the vehicle while rendered incapable of use, plus the value of any permanent impairment in the value of the vehicle." Id. at 326. See also Archer v. Monroe, 165 Ga.App. 724, 302 S.E.2d 583 (1983); Sykes v. Sin, 229 Ga.App. 155, 493 S.E.2d 571 (1997).

FIRST PARTY DV CLAIMS

A. Statute:

The statute that authorizes first party diminished value claims is **O.C.G.A. Section 33-4-6**:

> (a) In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith. The amount of any reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in the action; provided, however, the attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services

> based on the time spent and legal and factual issues involved in accordance with prevailing fees in the locality where the action is pending; provided, further, the trial court shall have the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and the plaintiff's attorney for the services of the attorney in the action against the insurer.

B. Nuts and Bolts:

How can you prove the diminished value of your client's vehicle? There is a code section under Georgia law that deals specifically with "value." According to **O.C.G.A. Section 24-9-66**:

> "Direct testimony as to market value is in the nature of ***opinion*** evidence. One need not be an expert or dealer in the article in question but may testify as to its value if he has had an opportunity for forming a correct opinion."

You can prove diminished value through an expert, through a dealer, or through someone else - including the owner - as long as you can show that person "had an opportunity for forming a correct opinion."

Here are my suggestions:

(1) Hire an independent appraiser to evaluate the vehicle.

(2) In addition to the independent appraisal, have your client take the final repair bill to CarMax. Your client should provide them with a copy of the complete repair bill and ask them to appraise the vehicle and get your client an offer on the vehicle. Have your client get the appraiser's card. When they come back with an appraisal and offer, tell your client to get

detailed and specific reasons from the appraiser as to the basis for their offer. Make sure your client takes notes.

But isn't this hearsay? Yes, but . . .

See Apostle v. Prince, 158 Ga.App. 56, 279 S.E.2d 304 (1981):

> "In order for a witness to give his opinion as to value, he must give his reasons for forming that opinion by showing that he has some knowledge, experience, or familiarity as to the value of the item." Citing Toney v. Johns, 153 Ga. App. 880, 881, 267 S.E.2d 298 (1980). Evidence of value is not to be excluded merely because the valuation fixed by the witness as a matter of opinion depends . . . wholly or in part upon hearsay, provided the witness has had an opportunity of forming a correct opinion. If it is based on hearsay this would merely go to its weight and not be a ground for valid objections."

See also B&L Service Co. v. Gerson, 167 Ga.App. 679, 307 S.E.2d 262 (1983):

> "Evidence of value is not to be excluded merely because the valuation fixed by the witness as a matter of opinion depends on hearsay, hence the testimony of the witness is not objectionable for the reason stated. Market value may rest wholly or in part upon hearsay, provided the witness has had an opportunity of forming a correct opinion. If it is based on hearsay this would go merely to its weight and would not be a ground for valid objections."

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There are so many cases standing for the proposition that even though the testimony is based in whole or in part on hearsay, as long as the witness can show he/she had an opportunity to form a correct opinion, then it will be admissible.

I'd suggest making sure your client can - at a minimum - lay a factual basis for the opinion of the value of the car by knowing these factors:

- Date and purchase price of the car
- Options on the vehicle
- Condition of the car at the time of purchase
- Mileage of the vehicle at the time of wreck
- Maintenance history on the car
- Any new upgrades on the car since the date of purchase
- New tires immediately before wreck
- Any prior wrecks or damage repairs
- Value of car at the time of wreck based upon AJC Cars, NADA Guides, Edmunds, or by asking the dealer about the value of the car immediately BEFORE the wreck.
- Make sure they are educated on what repairs were made to their car and why.
- How many hours were spent repairing the car; number of panels damaged, repaired, and replaced?
- Frame damage?
- Amount of paint required?
- Were airbags deployed, repaired/replaced?
- Did the repair facility use OEM parts (Original Equipment from the Manufacturer) or other parts? There may be some warranty issues if non-OEM parts are used.
- Knowledge of the amount of the repair costs?
- Be able to offer testimony about the condition of the vehicle post-repairs.

For example, even though the repair facility did everything possible to restore the vehicle to its pre-loss condition, the vehicle still has problems:

- car noises are now present either from the engine or within the passenger compartment;
- the vehicle does not track down the road like it did pre-wreck;
- braking is not as smooth;
- obvious paint discrepancies in trying to get repaired panels to match original panels; and
- Be able to testify re: efforts to get quotes re: value of vehicle post-wreck and repair from dealer and CarMax facility.

(3) Once you have the appraisal in place, prepare a demand to send to the insurance carrier.

Under the statute, you must give the carrier 60 days to review the demand **BEFORE** a lawsuit can be filed. You can not shorten the time period. If the insurer asks to inspect the vehicle, allow them to do it but stress it must be done within the 60 day time period. You do not want them to use your client's failure to cooperate as a defense to the bad faith claims.

Keep track of what the insurer does within that 60 day time period. Did they speak with your appraiser? Did they ask for additional information from you?

If an offer is made, write them a letter asking for the basis of their offer. If they hired an independent appraiser, demand a copy of it.

(4) If the insurer does not make a reasonable offer at the expiration of the 60 day time period, then file suit. No exceptions. The more attorneys that are holding these insurers accountable, the better it will be for all of Georgia's consumers.

C. Tips:

- I highly suggest filing in State or Superior Court. This will allow you to send discovery to the insurance company and both the defendant driver and the defendant insurance company in 3rd party claims.
- Always send a letter to the adjuster asking how they calculated the diminished value. If it is based upon an appraiser's report, ask for a copy of the report. Let them know you need it within the 60 day TIME LIMIT DEMAND.
- If they ask to inspect the vehicle, allow them this opportunity. But again, in writing, stress to them the importance of doing it within the 60 day TIME LIMIT DEMAND.
- If they make any new offers, write them a letter asking them the basis for their new offer. Make them document it. If they don't, hound them about it in writing to establish their continuing bad faith.
- If offers are made outside the 60 day TIME LIMIT DEMAND, and you have filed suit, make sure you file a Motion In Limine to exclude these as offers of compromise.
- If a lawsuit is filed, look to see when the diminished value was calculated by the adjuster. One insurance company's "Auto Claims Manual" states that diminished value should not be assessed until all the repairs are completed. See what the total amount of the repairs were that the adjuster used in assessing DV.
- Do not let the insurance company argue that they are under a "permanent injunction" pursuant to the Mabry Order to use 17c. This is BS. First of all,

the Order does not say 17c is the "end all" measure of diminished value. It is a starting point, especially when the insurer receives "relevant information" from it's own insured. Second, the insurance commissioner issued a directive in December of 2008 that required insurers to consider this additional information from it's own insured. State Farm MODIFIED their procedures to consider additional information. Finally, this permanent injunction can not be binding on anyone that was not a member of the settlement class nor had a wreck after the class period ***between and including June 30, 1997 and June 20, 2003***.

- In a first party claim, you do not have to hit your demand amount in order to recover for bad faith. For example, if the jury finds bad faith, you will recover 50% of the DV amount in penalties, or $5,000.00 (whichever is greater), plus reasonable attorneys' fees. The law is different in 3rd party claims. With these claims, you must hit your demand amount. For example, if you demanded $2,000.00 in your time limit demand, you must receive at least $2,000.00 in a jury award for DV. If not, you cannot recover bad faith penalties and attorneys' fees.
- You can not send an offer of judgment in a first party claim. The insurance company can not threaten you with one either. Plaintiff's claims are for breach of contract pursuant to **O.C.G.A. Section 33-4-6**. These are not tort claims. (See Estate of Thornton v. Unum Life Ins. Co. of America, 445 F.Supp. 2d 1379 (2006)). **O.C.G.A. Section 9-11-68** only applies to "tort claims."
- You may not seek attorneys' fees under **O.C.G.A. Section 13-6-11**.

IV. THIRD PARTY DV CLAIMS

A. Statute:

O.C.G.A. Section 33-4-7 Actions for loss under motor vehicle liability policy; insurer's liability for bad faith; notice to Commissioner

(a) In the event of a loss because of injury to or destruction of property covered by a motor vehicle liability insurance policy, the insurer issuing such policy has an affirmative duty to adjust that loss fairly and promptly, to make a reasonable effort to investigate and evaluate the claim, and, where liability is reasonably clear, to make a good faith effort to settle with the claimant potentially entitled to recover against the insured under such policy. Any insurer who breaches this duty may be liable to pay the claimant, in addition to the loss, not more than 50 percent of the liability of the insured for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action.

(b) An insurer breaches the duty of subsection (a) of this Code section when, after investigation of the claim, liability has become reasonably clear and the insurer in bad faith offers less than the amount reasonably owed under all the circumstances of which the insurer is aware.

(c) A claimant shall be entitled to recover under subsection (a) of this Code section if the claimant or the claimant's attorney has delivered to the insurer a demand letter, by statutory overnight delivery or certified mail, return receipt requested, offering to settle for an amount certain; the insurer has refused or declined to do so within 60 days of receipt of such demand, thereby compelling the claimant to institute or continue suit to recover; and the claimant ultimately recovers an amount equal to or in excess of the claimant's demand.

(d) At the expiration of the 60 days set forth in subsection (c) of this Code section, the claimant may serve the insurer issuing such

policy by service of the complaint in accordance with law. The insurer shall be an unnamed party, not disclosed to the jury, until there has been a verdict resulting in recovery equal to or in excess of the claimant's demand. If that occurs, the trial shall be recommenced in order for the trier of fact to receive evidence to make a determination as to whether bad faith existed in the handling or adjustment of the attempted settlement of the claim or action in question.

(e) The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith.

(f) The amount of recovery, including reasonable attorney's fees, if any, shall be determined by the trier of fact and included in a separate judgment against the insurer rendered in the action; provided, however, the attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services based on the time spent and legal and factual issues involved in accordance with prevailing fees in the locality where the action is pending; provided, further, the trial court shall have the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his or her attorney for the services of the attorney.

(g) In any action brought pursuant to subsection (b) of this Code section, and within 20 days of bringing such action, the plaintiff shall, in addition to service of process in accordance with Code Section 9-11-4, mail to the Commissioner of Insurance and the consumers' insurance advocate a copy of the demand and complaint by first-class mail. Failure to comply with this subsection may be cured by delivering same.

HISTORY: Code 1981, Sec. 33-4-7, enacted by Ga. L. 2001, p. 784, Sec. 1.

B. Nuts and Bolts:

The same rules apply as in first party claims.

- You must send a 60 day Time Limit Demand.
- You cannot file your lawsuit until the 60 day time limit demand has expired.
- You still need to support your demand with an appraisal.
- If you file suit, the insurer is an "unnamed party" to the lawsuit. You can still send them discovery.

V. MABRY and 17c

In paragraph 17 of the Mabry v. State Farm Mutual Automobile Insurance Co. Order on Compliance and Injunction Granting Further and Consistent Relief, dated June 12, 2001, Judge Pullen of the Superior Court of Muscogee County wrote the following:

> "Within thirty (30) days of the entry of this Order, State Farm is to submit in writing for approval, by the Court, a methodology for assessment of non-repair related diminished value based on criteria and standards that the Court can approve as being acceptable. State Farm may employ or use the following methodologies to make such required assessments:
>
> (a) The ClaimCoach.com system;
>
> (b) The Classic Car Appraisal Service (Don Peterson) methodology;

(c) The formula distributed by the Georgia Insurance Commissioner's Office and used by Safeco, Progressive, Nationwide, and Crawford & Co.;

(d) Any combination or modification of (a), (b) or (c) as approved by the Court;

If State Farm were to employ or use (a) or (b) or any combination thereof, such employment and use would be at State Farm's expense."

A lot of insurance companies select 17c as the methodology they use for assessing diminished value. Why? I believe it is simply a business decision. Of all the methodologies, this one consistently generates the lowest amount of diminished value every time. It is also interesting to note that the 17c formula was **NEVER** distributed by the Insurance Commissioner's Office nor approved by the office. It is designed to undercut diminished value payouts for insurers. There is no science behind the methodology.

Here are the basics of the 17c formula:

VEHICLE INFORMATION

Year:
Make:
Model:

NADA SUMMARY

Base Vehicle: $_____
Additions: _____
_____
_____
_____
Total: $ _____
*Add/Deduct Mileage:
$ _____
TOTAL: $ _____

DIMINISHED VALUE SUMMARY

NADA Summary x 10% = Base LOV
Base LOV: $ _____
Damage Modifier: $ _____
Mileage Modifier: $ _____
Total Loss of Value:$ _____

Damage Modifier:

This decision is up to the appraiser. The damage modifier is based on the extent of actual physical damage sustained by the vehicle, rather than the cost of repair as its basis.

Mileage Modifier:

Mileage:	Modifier:
0 - 19,999	1.0
20,000 - 39,999	.80
40,000 - 59,999	.60
60,000 - 79,999	.40
80,000 - 99,999	.20
100,000 & above	0.00

There are several problems with the 17c formula:

1. It caps the diminished value at 10%. There is no authority that supports the proposition that the most a vehicle can lose in market value due to a wreck and repair is 10%. This is an arbitrary figure. In essence, it is a cap on damages.
2. When the adjuster calculates the NADA base value, he/she takes into account the mileage on the vehicle. But once the base value is calculated, there is another reduction when applying the mileage

modifier. The vehicle's value is getting hit twice with mileage deductions.

3. The damage modifier is another factor that makes zero sense. It does not account for the actual cost of repairs. There is no way one can competently and accurately measure the diminished value of a car without taking into account the dollar amount of the repairs. It does not take into account paint issues; e.g., there is no way to match the factory paint when repairs are made. This is visible to any consumer and will obviously lessen the value of the vehicle. Further, there is no reduction in value under the damage modifier when non-OEM (original equipment of the manufacturer) parts are used.
4. If a vehicle has over 100,000 miles, according to the 17c formula, it effectively sustains ZERO diminished value as the modifier is 0. There is no authority whatsoever in the automobile industry to support this position.

In practice, the carriers that use this formula to assess DV have their claims adjusters do the calculations. If you ever receive a DV "appraisal" that uses the 17c formula, please move to have this excluded. The 17c formula was pre-Daubert and the witness should never be allowed to testify about the formula or the final figure it spits out.

Don't forget the "value" code section: **O.C.G.A. Section 24-9-66**:

> Direct testimony as to market value is in the nature of opinion evidence. One need not be an expert or dealer in the article in question but may testify as to its value if he has had an opportunity for forming a correct opinion.

There is no statutory authority for the 17c methodology. Further, according to case law, there are only two (2) methods for calculating

diminished value. Canal Ins. Co. v. Tullis, 237 Ga. App. 515, 516-17(1999), sets the standard: a party seeking to recover for damage to the vehicle has two options in proving the amount of damage. These choices of proof are:

1. The difference between the fair market value of the vehicle before and after the collision; and
2. The reasonable costs of repair, together with hire on the vehicle while rendered incapable of use and the value of any additional permanent impairment, provided that the aggregate of such amounts does not exceed the fair market value before the collision.

See also Myers v. Thornton, supra, Archer v. Monroe, supra; and Sykes v. Sin, supra. The 17c formula does not fit either one of these methods and should be excluded.

Most claims adjusters can never be qualified as "***experts***" in property damage appraisals. Most have never been automobile "***dealers***." Some insurers try to get their testimony in using the 17c claiming they are fact witnesses. Under **O.C.G.A. Section 24-9-66**, the only way they can testify is to show they have had "an opportunity for forming a correct opinion." 17c does not allow them to form a correct opinion. It **gives** the adjuster the opinion. The adjuster at least does a cursory market value survey of the pre-accident value of the vehicle under 17c. However, there is no post wreck and repair market value survey.

Permanent Injunction Defense:

Do not let any insurer argue they are bound by a "*permanent injunction*" pursuant to the March 6, 2002 Mabry Order, and therefore, must use the 17c methodology and nothing more. This is horse manure. The Mabry case was a class

action lawsuit that involved a defined class for a specific time period. Judge Pullen did not have any authority to prospectively bind anyone that was not a member of that class. If this were the case, then we need to intervene in every pending class action lawsuit so we might have an opportunity to litigate all of the issues that could bind us in the future.

They will claim that even though your client was not a party to the permanent injunction, they were, and therefore, they must use the formula and only the formula. This makes no sense as the application of this argument effectively binds everyone that was **not** a party to the class action.

Faulty Repairs:

Don't let the insurer argue that "faulty repairs" are the reason for your client's diminished value. This is a separate and distinct claim your client may have against the repair facility. This has nothing to do with your client's "inherent diminished value" claim. For the purposes of this claim, we are assuming the repair facility performed all of the repairs correctly. Even with this being done, the wrecked and repaired vehicle still has diminished value.

About The Author

About Gary

Gary Martin Hays is not only a successful lawyer, but is a nationally recognized safety advocate who works tirelessly to educate our families and children on issues ranging from bullying to internet safety to abduction prevention. He currently serves on the Board of Directors of the Elizabeth Smart Foundation and Operation Underground Railroad (O.U.R.). The mission of O.U.R. is to rescue kidnapped children from slavery. Gary has been seen on countless television programs and stations, including Fox and Friends, Bio Channel, CNN Headline News, ABC, CBS, NBC and FOX affiliates. He has appeared on over 110 radio stations, including the Georgia News Network, discussing legal topics and providing safety tips to families. He hosts “The Gary Martin Hays Show” on the CW Atlanta TV Network, The "Intersection Radio" program on Kicks 101.5, the "Wise Counsel Project" (featured on 104.7 The Fish Atlanta) and has been quoted in USA Today, The Wall Street Journal, and featured on over 250 online sites including Morningstar.com, CBS News’s MoneyWatch.com, the Boston Globe, The Miami Herald and The New York Daily News. Gary has also received 2 Silver Telly Awards for his work on the documentaries “Mi Casa Hogar” and “Stand & Serve.”

He is also co-author of eleven (11) best-selling books “TRENDSETTERS”, “CHAMPIONS”, “SOLD”, “PROTECT AND DEFEND”, “THE SUCCESS SECRET”, “THE AUTHORITY ON TOUT”, and “THE AUTHORITY ON CHILD SAFETY”, “CONSUMER’S ADVOCATE”, "THINK & GROW RICH", "I WILL MAKE A DIFFERENCE" and "THE AUTHORITY ON PERSONAL INURY CLAIMS in GEORGIA."

Gary graduated from Emory University in 1986 with a B.A. degree in Political Science and a minor in Afro-American and African Studies. In 1989, he received his law degree from the Walter F. George School of Law of Mercer University, Macon, Georgia. His

outstanding academic achievements landed him a position on Mercer's Law Review.

His legal accomplishments include being a member of the prestigious Multi Million Dollar Advocate's Forum, a society limited to those attorneys who have received a settlement or verdict of at least $2 Million Dollars. He has been recognized in Atlanta Magazine as one of Georgia's top workers' compensation lawyers. Gary frequently lectures to other attorneys in Georgia on continuing education topics. He has been recognized as one of the Top 100 Trial Lawyers in Georgia since 2007 by the American Trial Lawyers Association, and recognized by ***Lawdragon*** as one of the leading Plaintiffs' Lawyers in America. His firm specializes in personal injury, wrongful death, workers' compensation, and pharmaceutical claims. Since 1993, his firm has helped over 35,000 victims and their families.

In 2008, Gary started the non-profit organization **Keep Georgia Safe** with the mission to provide safety education and crime prevention training in Georgia. Keep Georgia Safe has trained over 80 state and local law enforcement officers in CART (Child Abduction Response Teams) so our first responders will know what to do in the event a child is abducted in Georgia. Gary has completed Child Abduction Response Team training with the National AMBER Alert program through the U.S. Department of Justice and Fox Valley Technical College. He is a certified instructor in the radKIDS curriculum. His law firm has given away 1,000 bicycle helmets and 14 college scholarships.

To learn more about Gary Martin Hays, visit www.GaryMartinHays.com. To find out more about Keep Georgia Safe, please visit www.KeepGeorgiaSafe.org or call (770) 934-8000.