Offers of Settlement
Under New O.C.G.A. § 9-11-68

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In 2004, the Georgia legislature enacted a new "offer of settlement" statute, O.C.G.A. § 9-11-68 (attached as Exh. A). The new statute allows a party to make an offer and, if the other party does not beat the offer by at least 25% at trial, then the party who received the offer owes the other side's attorneys' fees. The statute is mandatory, and does not allow the Court any discretion unless the Court finds the offer was not made in good faith.

The new Georgia statute is substantially different from the federal rule (Fed. R. Civ. P. 68, att. as Exh. B) and most other state statutes because:

(1) It applies only to tort cases, not to all types of civil litigation.

(2) It arguably applies only to plaintiffs' claims, not to defendants' counterclaims. According to an article in the ABA's Journal eReport, Professor Polly Price of Emory Law School maintains that:

> [T]he statute appears to be written in a neutral manner, but it actually penalizes only plaintiffs who turn down settlement offers. She points to section (b), which states that the law applies only against a party that both receives an offer of settlement and subsequently obtains a judgment on a tort complaint. Since only a plaintiff can obtain a judgment on a tort complaint, the statute applies only to the claims of tort plaintiffs, she says.

Seidenberg, *Georgia Settlement Law Ruled Unconstitutional: Plaintiffs Can't Be Punished for not Winning Enough Money, Judge Finds*, ABA Journal eReport (10/7/05).

(3) Under the statute the plaintiff not only has to win the case, the plaintiff actually has to get a verdict that beats the settlement offer by at least 25%.

Because of these differences, the statute is controversial. According to a recent article in the ABA's Online Journal: "Many state legislatures have taken a crack at tort reform, but few states have gone as far as Georgia. Its law, enacted Feb. 16, is so strict that many legal observers have wondered whether it is constitutional." Seidenberg, *supra*. At least one Georgia court has found the statute unconstitutional.

Many practitioners also complain that the statute is confusing. University of Georgia law professor Thomas A. Eaton calls it "a drafting nightmare." Daily Report at 2 (8/23/05). Professor Lonnie Brown, also of the University of Georgia, remarks: "Federal Rule 68 may be characterized as moderately

confusing, but it's 'child's play' compared to Georgia's new 'offer of judgment' statute, which is extremely lengthy and laden with numerous undefined terms and confusing provisions that will, no doubt, be the subject of much satellite litigation in the future." *Georgia's New Battleground*, U. Ga. Advocate, Vol. 39, No. 2 (Spring/Summer 2005).

According to the Daily Report, "Republican leaders in the House and Senate almost guaranteed that the offer-of-judgment clause would be tweaked next year. 'It's too confusing as it's written now," said Rep. Wendell Willard, R-Atlanta, chairman of the House Judiciary Committee. 'It's misunderstood by all parties, on both the intent and how it should be applied.'" *Id*.

This paper will cover the basic provisions in the rule, including how to make an offer of judgment. The paper then will briefly discuss some open issues related to the statute, such as whether it is constitutional, and how it relates to other attorneys' fees provisions already in existence under other Georgia laws. Finally, the paper will cover the results of an informal survey on how and whether Georgia lawyers are using the new statute.

I. The Basics.

The basic rules under this new statute are:

A. **Who** can make an offer of settlement?

"[E]ither party," in a tort case only, may make an offer of settlement. See O.C.G.A. § 9-11-68 (a).

B. **What** is the rule?

(1) The offer can be an offer of settlement **or** judgment.

(2) The party rejecting the offer must beat the offer by at least 25 percent, or the party owes the offeror's attorneys' fees and costs.

(3) A party may make as many offers as it wants.

(4) Offers are not admissible except in an action to enforce settlement or determine reasonable attorneys' fees and costs.

(5) The award of fees and costs is mandatory.

(6) Both sides may end up owing each other's fees. For example, if a plaintiff makes an offer of $115,000, and a defendant makes an offer of $85,000, and the jury renders a verdict of $100,000, then both sides owe each other's attorneys' fees. (This point is true unless Professor Price is correct that under the statute only defendants are allowed to recover fees).

(7) Exception: The Court may deny fees and costs if it finds, in an order setting forth the basis for such determination, that the offer was not made in good faith.

See O.C.G.A. § 9-11-68.

C. **Where** is the offer made?

The offer is "serve[d] upon the other party, but [not filed] with the court." O.C.G.A. § 9-11-68 (a).

D. **When** is the offer to be made?

The offer must be made more than 30 days after the complaint is served but not less than 30 days (or 20 days if it is a counteroffer) before trial. O.C.G.A. § 9-11-68 (a).

The offer has to remain open for thirty days, unless the party rejects it during that period. O.C.G.A. § 9-11-68 (c).

A counteroffer is a rejection but may be its own offer if it is specifically denominated that way. O.C.G.A. § 9-11-68 (c).

E. **Why**?

The historical notes give this reason for the statute:

> The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. . . . The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. . . . The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.

Laws 2005, Act 1, §§ 1, 14, and 15.

F. **How**?

A party can take advantage of this statute in one of two ways.

First, the party can move the court within 30 days of the entry of the judgment or after voluntary or involuntary dismissal. The Court shall make the award unless it finds, in an order, that the offer was not made in good faith. O.C.G.A. § 9-11-68 (d).

Alternatively, at the time that the verdict or judgment is rendered, the moving party may ask for a bifurcated hearing. At the bifurcated hearing, the finder of fact will determine whether the opposing party presented a frivolous claim or defense, and will award damages against a party who presented a frivolous claim or defense. The statute does not require that the entire case have been frivolous, but merely that a single claim or defense has been frivolous. O.C.G.A. § 9-11-68 (e).

To be an effective offer under the statute, the offer must:

(1) Be written, and state that it is being made pursuant to the Code section.

(2) Identify the party making the proposal and the party to whom the proposal is being made.

(3) Identify generally the claim being resolved.

(4) State with particularity any conditions.

(5) State the total amount of the proposal.

(6) State with particularity the amount proposed to settle any claim for punitive damages.

(7) State whether the proposal includes attorney's fees or other expenses, and whether attorney's fees or other expenses are part of the legal claim.

(8) Include a certificate of service and be served by certified mail or statutory overnight delivery.

See 9-11-68 (a).

An acceptance must be in writing and served on the offeree. The statute states that a rejection of an offer also must be in writing, but since a failure to reject is considered a rejection, this provision seems unnecessary. *Id.*

If an offer of settlement is made, the party rejecting the offer of settlement will need information about the value and basis for the other party's claim for attorneys' fees. Since § 9-11-68 has a provision that allows an offeror to call for the jury to go immediately into a bifurcated proceeding to determine fees, courts probably will be forced to do one of two things: either allow some discovery on fees before trial, or reconvene the jury after the parties have been given sufficient time to conduct discovery on the issues raised by § 9-11-68. *See* proposed discovery by Laurie Speed-Dalton of Chambers, Aholt and Rickard, att. as Exh. C. In Ms. Dalton's case, the court quashed the discovery request.

II. The Unknown.

O.C.G.A. ß 9-11-68 overlaps Georgia's other statutes that allow attorneys' fees, and it is unclear what courts will do when the overlap occurs. It also is unclear whether the statute is unconstitutional.

A. Interplay with other statutes

Georgia already has several provisions allowing an award of attorneys' fees. With one exception, it is unclear how O.C.G.A. 9-11-68 will interact with these other statutes.

Section 9-15-14. Section 9-15-14 allows a party to move for attorney's fees, when "another party has asserted a claim, defense or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense or other position." *Id*. at 9-15-14(a). The offer of settlement statute states that a party must choose between a procedure under 9-15-14, and one under 9-11-68. *See* O.C.G.A. ß 9-11-68.

Abusive Litigation Statutes. Georgia also has a set of statutes that allow a party to file a subsequent action to recover attorney's fees where a person a person initiated, continued or procured civil proceedings "with malice" or "without substantial justification." O.C.G.A. § 51-7-82. *See* O.C.G.A. §§ 51-7-80

through 51-7-85. These statutes may be redundant if a party already has recovered under O.C.G.A. ß 9-11-68.

O.C.G.A. § 13-6-11. Finally, Georgia has a statute that allows a plaintiff to recover fees if the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. *Id*. The courts have not ruled on how the new statute would interact with 13-6-11. For example, if a party failed to recover under 13-6-11, could the party still recover under 9-11-68?

B. Is this statute constitutional?

The constitutionality of this statute is hotly contested. A Gwinnett Superior Court has held this statute unconstitutional. *See Muenster v. Suh* Order, Judge Michael C. Clark, Gwinnett Superior Court (9/22/05), att. as Exh. D. In the Muenster case, the defendants made a $ 6300 offer of judgment. At trial, the plaintiffs won the case, but only won $ 2858.93. The defendant then moved to collect $ 4590.85 in attorneys' fees and costs. Under the terms of § 9-11-68, the plaintiffs had won the case, but still owed the defendant $ 1730.92.

The Court refused to apply the statute, concluding that it violated several provisions of the Georgia Constitution:

> *(1) Ga. Const. Art. I, § 1, ¶ 12: "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."*

The Court concluded that: "The fact remains that the jury decided **in favor** of the plaintiffs in this cause of action, and the plaintiffs should not bear the burden of having to pay for the defendants' attorney's fees and costs just because they exercised their right to present their claims for determination by the enlightened conscience of a jury, particularly when they prevailed on their claims." *Muenster v. Suh* Order (9/22/05) (emphasis in original). The Court applied "[t]he principle that a showing of bad faith, misconduct, or wanton or excessive indulgence in litigation is required before a penalty of attorney's fees and costs can be imposed." *Id*. "To penalize the *winning* parties simply for *not winning enough*, as the statute apparently permits, would effectively chill 'the right to prosecute or defend' a cause of action in the courts of this state. . . . " *Id*. (emphasis in original).

(2) Art. I, § 1, ¶ 2: Equal Protection.

The Court concluded that the statute was unconstitutional because it was a "special law," affecting only tort litigants. *Id*. The Court found that the defendants had not shown that the statute was "reasonably related" to the "needs of the state," either in general or as it was applied only in tort cases. *Id*. The Court also maintained that: "the statute tilts towards tort defendants by placing a heavier burden on plaintiffs." *Id*.

(3) Ga. Const. Art. I, § 1, ¶ 10: Prohibiting "retroactive laws."

Judge Clark ruled that the statute was substantive, not merely procedural, and therefore could not be applied retroactively to the *Muenster* case, which had been filed before the statute was enacted (although the offer and trial had taken place after the statute was passed). In a footnote, the Court added that the statute impacted the contract between the plaintiffs and their attorneys.

"The court's ruling here is not terribly surprising, and it has a good chance of being upheld on appeal," says Emory Law Professor Polly Price. Seidenberg, *Georgia Settlement Law Ruled Unconstitutional: Plaintiffs Can't Be Punished for not Winning Enough Money, Judge Finds*, ABA Journal eReport (10/7/05).

III. The Reality.

I did an informal survey of lawyers from both the defense and plaintiffs' sides of the bar. The vast majority of lawyers maintained that they did not like the statute. Almost half of the lawyers had yet to have made or received an offer of settlement. Most lawyers who reported making an offer of settlement stated that they had received no response at all from the offeree. Several lawyers reported that the new offer of settlement provision was being used to make an offer in

negotiation, rather than as a "final" demand in a case. *See* Stories, att. as Exh. "E."

Conclusion

O.C.G.A. § 9-11-68 markedly departs from traditional law in Georgia and throughout the United States. At this point, the future of the statute is uncertain. Courts may rule the statute unconstitutional, the legislature may change it, and lawyers may refuse to use it.

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