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CIVIL PRACTICE

Civil Practice Act: Amend Article 8 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated, Relating to Provisional and Final Remedies and Special Proceedings in Civil Practice, so as to Provide for Certain Presuit Settlement Offers and Agreements as to Tort Claims Arising out of Use of Motor Vehicles; Repeal Conflicting Laws; and for Other Purposes

CODE SECTION:	O.C.G.A. § 9-11-67.1 (new)
BILL NUMBER:	HB 336
ACT NUMBER:	271
GEORGIA LAWS:	2013 Ga. Laws 860
SUMMARY:	The Act addresses issues created by the Supreme Court of Georgia's decision in *Southern General Insurance Company v. Holt* by setting technical parameters for settlement offers stemming from tort claims that arise out of motor vehicle accidents when the offer to settle is prepared with the assistance of an attorney.
EFFECTIVE DATE:	July 1, 2013

History

In 1992, the Supreme Court of Georgia decided *Southern General Insurance v. Holt* and dramatically changed insurance litigation in Georgia.[1] Holt, who maintained a $15,000 policy with Southern General Insurance Company, ran through a stop sign injuring another driver, Fortson.[2] Subsequently, Fortson filed a claim with Southern General and Holt's liability was undisputed.[3]

On November 2, 1987, Fortson wrote Southern General and offered to settle for the policy limits[4] even though medical records

1. S. Gen. Ins. Co. v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992).
2. *Id.* at 267, 416 S.E.2d at 275.
3. *Id.*
4. *Id.* at 268, 416 S.E.2d at 275. Prior to the early November settlement offer, Fortson made several other offers to settle. *Id.* All of those offers were either withdrawn by Fortson or rejected by Southern

showed his claim far exceeded that amount.[5] He initially intended for the offer to remain open for ten days, but later extended the deadline to November 17.[6] Southern General neither requested additional time to evaluate the claim nor responded to the offer before its expiration.[7] On November 18, Fortson withdrew the settlement offer.[8] On November 20 and again on December 4, Southern General offered to settle the claim for the policy limits of $15,000,[9] but Fortson rejected both offers.[10]

At trial, a jury found in favor of Fortson, awarding a verdict of $82,000—well above Holt's policy limits and the amount contemplated by Fortson's settlement offer.[11] Holt then assigned her claim against Southern General for negligent or bad faith refusal to settle within the policy limits to Fortson.[12] Based on this assignment, Fortson sued Southern General seeking $67,000 plus interest.[13] At trial, a jury awarded Fortson $83,000 in compensatory damages.[14] The Court of Appeals later affirmed the award of compensatory damages to Fortson and punitive damages to Holt.[15]

The Supreme Court of Georgia affirmed the damages awarded to Fortson for Southern General's bad faith failure to settle the claim.[16] As a result of the Court's holding, a plaintiff in clear liability, high-stakes litigation was free to make a settlement offer at or near the policy limit and expose the insurance company to a potential "bad faith" claim if it refused to accept within a given time period. Although, on its face, this rule seems fair, recall the ten-day window of Holt's initial offer. In effect, the Supreme Court's decision in *Holt* enables a plaintiff to present a settlement offer with impossible deadlines and expose an insurance company to potential "bad faith" claims when it is unable or unwilling to abide.

General. *Id.*

5. *Id.*
6. *Id.*
7. *Holt*, 262 Ga. at 268, 416 S.E.2d at 275.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Holt*, 262 Ga. at 268, 416 S.E.2d at 275.
14. *Id.*
15. *Id.*
16. *Id.*

During the 2012 session, the Georgia legislature attempted to address the problems created by Court's decision in *Holt*, but the bill never made it to the floor for a vote.[17] According to Representative Jay Powell (R-171st), the bill failed because it contained a number of unintended consequences.[18] However, during the 2013 legislative session, the General Assembly took another shot at addressing the issues created by the Georgia Supreme Court's decision in *Holt*.[19]

Bill Tracking of HB 336

Consideration and Passage by the House

Representatives Jay Powell (R-171st), John Meadows (R-5th), Richard Smith (R-134th), Stacey Abrams (D-89th), Mike Jacobs (R-80th), and Tom Weldon (R-3rd) sponsored HB 336.[20] The House read the bill for the first time on February 14, 2013 and for the second time on February 19, 2013.[21] Speaker of the House David Ralston (R-7th) subsequently assigned HB 336 to the House Judiciary Committee.[22]

The House Committee made only one technical change, applying the bill to the filing of a "civil action," rather than the filing of a "lawsuit."[23] During the Committee hearing, Representative Powell (R-171st) spoke in support of the bill,[24] as did representatives from the Georgia Trial Lawyers Association (GTLA),[25] the State Bar of Georgia,[26] and the Georgia Link Public Affairs Group.[27] The Georgia

17. Telephone Interview with Rep. Jay Powell (R-171st) (July 26, 2013) [hereinafter Powell Interview].

18. *Id.*

19. *Id.*

20. HB 336, as introduced, 2013 Ga. Gen. Assem.

21. State of Georgia Final Composite Status Sheet, HB 336, May 9, 2013.

22. *Id.*

23. *Compare* HB 336, as introduced, § 1, p. 1, ln. 11, 2013 Ga. Gen. Assem., *with* HB 336 (HCS), § 1, p. 1, ln. 11, 2013 Ga. Gen. Assem.

24. Video Recording of House Judiciary Committee, Feb. 21, 2013 at 22 sec. (remarks by Rep. Jay Powell (R-171st)), http://www.house.ga.gov/Committees/en-US/CommitteeArchives106.aspx [hereinafter House Judiciary Video].

25. *Id.* at 2 min., 12 sec. (remarks by Bill Clark, Director of Political Affairs, Georgia Trial Lawyers Association).

26. *Id.* at 1 min., 45sec. (remarks by Bobby Potter, Partner, Swift Currie McGhee & Hiers, LLP).

27. *Id.* at 3 min., 43 sec. (remarks by Boyd Pettit, General Counsel, GeorgiaLink Public Affairs Group, L.L.C.). GeorgiaLink Public Affairs Group represents the United States Chamber Institute of

Link representative even commented that the bill should be extended beyond motor vehicle tort claims.[28] The House read HB 336 for a third time on February 27, 2013.[29] Representative Powell (R-171st) presented the bill, noting its purpose to reduce bad faith claims from both defense and plaintiffs' lawyers.[30] The House adopted the Committee substitute by a unanimous vote of 163 to 0.[31]

Consideration and Passage by the Senate

After adoption in the House, HB 336 was read in the Senate for the first time on February 28, 2013,[32] and Lieutenant Governor Casey Cagle (R) assigned the bill to the Senate Judiciary Committee.[33] No amendments were made to the bill in the Senate.[34] After being favorably reported by the Senate Judiciary Committee on March 20, 2013, HB 336 was read in the Senate for a second time on March 21, 2013 and for a third time on March 22, 2013.[35]

Senator Charlie Bethel (R-54th) presented the bill on March 22, 2013, and the Senate passed it by a vote of 47 to 0.[36]

The Act

The Act amends Title 9 of the Official Code of Georgia Annotated to provide certain guidelines for pre-suit settlement offers in tort claims arising out of motor vehicle accidents.[37] Section 1 of the Act creates a new Code section, 9-11-67.1, which sets forth requirements for offers made to settle tort claims in motor vehicle accidents.[38]

Legal Reform. *Id.*

28. *Id.*

29. State of Georgia Final Composite Status Sheet, HB 336, May 9, 2013.

30. Video Recording of House Floor Debate, Feb. 27, 2013 at 49 min., 16 sec. (remarks by Rep. Jay Powell (R-171st)), http://www.gpb.org/lawmakers/2013/day-25.

31. Georgia House of Representatives Voting Record, HB 336 (Feb. 27, 2013).

32. State of Georgia Final Composite Status Sheet, HB 336, May 9, 2013.

33. *Id.*

34. *Id.*

35. *Id.*

36. Video Recording of Senate Proceedings, March 22, 2013 at 30 min., 45 sec. (remarks by Sen. Charlie Bethel (R-54th)), http://www.gpb.org/lawmakers/2013/day-37; Georgia Senate Voting Record, HB 336 (March 22, 2013).

37. O.C.G.A. § 9-11-67.1 (Supp. 2013).

38. *Id.*

Before a civil action is filed, subsections (a) and (e) require that any offer to settle a claim arising from a motor vehicle accident that caused personal injury, bodily injury, or death to be in writing and sent with return receipt requested via certified mail or "statutory overnight delivery" with specific reference to Code section 9-11-67.1.[39] Moreover, subsection (a) requires the offer to include five "material terms."[40]

Further, subsection (b) provides that the recipient of such an offer may accept it in writing.[41] Code section 9-11-67.1 also provides that requests for clarification of the "terms, liens, subrogation claims, standing to release claims, medical bills, medical records, and other relevant facts" do not constitute counter offers.[42] If a party does choose to accept an offer, subsection (f) sets forth six acceptable forms of payment.[43]

The party proposing the settlement retains the right, under subsection (g), to require payment within a specified time frame; however, the required time frame must not be less than ten days after written acceptance of the offer to settle.[44] Importantly, subsection (c) emphasizes that the Act is not intended to prevent the parties "from reaching a settlement agreement in a manner and under terms otherwise agreeable to the parties."[45]

39. O.C.G.A. § 9-11-67.1(a) (Supp. 2013); O.C.G.A. § 9-11-67.1(e) (Supp. 2013).

40. O.C.G.A. § 9-11-67.1(a) (Supp. 2013) (The material terms include: "(1) The time period within which such offer must be accepted, which shall be not less than 30 days from receipt of the offer; (2) Amount of monetary payment; (3) The party or parties the claimant or claimants will release if such offer is accepted; (4) The type of release, if any, the claimant or claimants will provide to each releasee; and (5) The claims to be released.").

41. O.C.G.A. § 9-11-67.1(b) (Supp. 2013).

42. O.C.G.A. § 9-11-67.1(d) (Supp. 2013).

43. O.C.G.A. § 9-11-67.1(f) (Supp. 2013) (acceptable forms of payment include cash, money order, wire transfer, cashier's check, draft or bank check from an insurance company, and electronic payment).

44. O.C.G.A. § 9-11-67.1(g) (Supp. 2013).

45. O.C.G.A. § 9-11-67.1(c) (Supp. 2013).

Analysis

Something Is Better Than Nothing: What The Legislature Hopes HB 336 Will Achieve

HB 336 is the manifestation of the legislature's intent to overrule the approach adopted by the Georgia Supreme Court in *Holt*.[46] Prior to this Act, plaintiffs' attorneys were free to cripple the defense with unrealistic expiration dates for settlement offers.[47] The short turn around, though advantageous for the plaintiffs' bar, required responses that were too short to allow for any meaningful investigation of the claims.[48] Because careful defense attorneys would be remiss to accept a settlement offer without fully evaluating all of the facts, those attorneys faced a no-win situation: refuse the settlement offers, miss the deadline, or accept a settlement without a full appreciation of the claims.[49] Moreover, if a defendant inquired as to the details of a settlement, for example information regarding liens associated with the claim, it could constitute a counter-offer and trigger a negligent failure to settle the claim.[50]

The Act is the product of closed-door meetings moderated by the Speaker's office between GTLA and the insurance defense bar, and demonstrates a significant compromise between the two groups.[51] The most significant benefits are three-fold: (1) HB 336 addresses a clear problem facing Georgia lawyers, (2) HB 336 will likely increase efficiency in settling claims, and (3) HB 336 provides much needed clarity to the pre-suit settlement process.

Preliminarily, the Act solves a very well-understood problem facing Georgia defense attorneys: respond to a settlement offer

46. *See* Interview with Barbara Marschalk, Partner, Drew Eckl & Farnham (May 21, 2013) [hereinafter Marschalk Interview.].

47. *Id.*

48. *Id.*

49. *See id.* (noting the pressure to avoid a bad faith claim often required defense attorneys to either face potential liability above and beyond policy limits for failing to accept settlement offers by a certain date or accept a settlement offer without fully investigating the claims because the timeframe set forth by the plaintiff was unworkable).

50. *Id.*

51. Kathleen B. Joyner, *Insurer-Bad Faith Bill Advances*, DAILY REPORT, Feb. 28, 2013; Powell Interview, *supra* note 17 (emphasizing that because Georgia's legislative session lasts only 40 days, it is often necessary to handle contentious issues in the off-season to allow all interested parties an opportunity to weigh in).

prematurely, risking harm and damage to the client, or refuse to settle, and face potential bad faith liability, which could result in a jury award exceeding policy limits.[52] By enacting HB 336, the General Assembly gives credence to the plight of these defense attorneys while still respecting Georgia's strong history of promoting pre-trial settlements.[53] Now, through HB 336, the General Assembly provides clear guidelines and limitations on expiration dates for settlement offers.[54]

Second, the Act increases judicial efficiency by providing standards for pre-suit settlement offers.[55] At its most basic level, this Act recognizes a plaintiff's attorney needs to settle a claim quickly to avoid expending vast resources in cases of clear liability, while also allowing the defense attorney sufficient time to investigate the best course of action for his or her client.[56] Ideally, the declared frame work will reduce procedural quibbling over the technical sufficiency of a settlement offer, leaving the merits as the primary consideration.

Finally, and building on the discussion above, the Act very clearly lays out the means to achieve these goals.[57] It leaves very little to the imagination, except the future of its reach.

Bringing A Knife To A Gun Fight: Does HB 336 Go Far Enough?

One criticism—noted both during the committee meetings and in interviews with attorneys involved with the bill—is that the Act falls short of solving all of the problems caused by *Holt*.[58] Though the Act makes significant strides with personal injury cases involving motor vehicle accidents, it ignores entire areas of the law dependent on insurance settlements that are equally impacted by the Supreme

52. *See* Powell Interview, *supra* note 17 (explaining how HB 336 provides a safe harbor for attorneys to avoid liability for bad faith refusal to settle and prevents settlement offers from including unrealistic terms that do not provide sufficient time to evaluate the settlement, parameters, and medical records).

53. *Id.* (noting that the goal of HB 336 is to encourage pre-trial settlements and discourage unnecessary litigation over what constitutes a bad faith failure to settle).

54. *Id.*

55. *See* Marschalk Interview, *supra* note 46 (agreeing that the bill normalizes the process of offering and accepting settlements).

56. *Id.*

57. *See* O.C.G.A. § 9-11-67.1(a)-(h) (Supp. 2013).

58. *See* Marschalk Interview, *supra* note 46; House Judiciary Video, *supra* note 24, at 4 min., 28 sec. (remarks by Rep. Wendell Willard (R-51st)).

Court of Georgia's decision in *Holt*.[59] Given that the same issues addressed in HB 336 are present outside motor vehicle accidents, one is left to wonder why the legislature did not simply draft the bill to apply universally to similar situations. According to House Judiciary Committee Chairman Wendell Willard (R-51st), the Act is the "beginning of what may be further review" and the legislature may look at other areas of law affected by *Holt*."[60] Representative Powell (R-171st) additionally commented that the legislature hoped to perfect the settlement requirements in one limited setting before expanding into other areas of the law.[61]

Accordingly, the true scope of HB 336 is yet to be determined, as it may have far-reaching implications or it could be limited to one, specific area of the law.

Alex Galvan & Ashley Worrell

59. *See* Powell Interview, *supra* note 17 (emphasizing that if HB 336 achieves the legislature's goal of reducing unnecessary litigation over bad faith failure to settle, the legislature can act to expand the settlement requirements into other areas of law).

60. House Judiciary Video, *supra* note 24, at 4 min., 28 sec. (remarks by Rep. Wendell Willard (R-51st)).

61. Powell Interview, *supra* note 17.