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Practice Update

Abracadabra – How a Stalking Bill Magically Turned into Revisions to a Georgia Settlement Statute

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In Georgia's recent Legislative Session, Senate Bill 83 started off addressing the eligibility for restraining orders related to stalking, but there must have been some magic pixie dust floating around the House Committee rooms because when the bill emerged, like pulling a rabbit out of a hat, the stalking bill had transformed into much needed revisions to O.C.G.A. § 9-11-67.1.

Georgia Code § 9-11-67.1 was originally passed in 2013 in an attempt to reduce the number of bad faith claims filed against insurers related to settlement demands for tort claims arising from the use of motor vehicles. The purpose of the statute was to stop obvious "set-up" attempts that were clearly intended to create extra-contractual liability rather than to achieve a settlement. Yet, the statute apparently fell short of its goal given the continued proliferation of these "set up" attempts. This recent revision is the Legislature's third attempt to try to get it right, and with it, things are looking a bit brighter for insurers involved with certain motor vehicle injury claims in Georgia.

The real magic of Senate Bill 83 lies in the bad faith protections provided to insurers. For any offers falling within the statute's reach, insurers no longer have to rely on a crystal ball to determine whether

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they could be held liable for extra-contractual liability. To elaborate, S.B. 83 presents an exhaustive list of terms that qualify as material terms and further states that all other terms are immaterial.[1] With that in mind, subsection (c) crucially provides that an insurer's variance from these immaterial terms cannot result in a bad faith failure to settle claim against the insurer, assuming the insurer complies with subsection (i), which is discussed in more detail below. As touched on in our previous article, plaintiffs' lawyers aim to set up insurers for bad faith failure to settle claims by putting numerous terms in their offers and then using the mirror image rule to twist an insurer's failure to adhere to every last term (no matter how immaterial) into a flat out rejection of the whole offer. This new amendment, however, blocks plaintiffs' lawyers from using this trick to instill fear in insurers of the potential for a bad faith case, assuming the claim is subject to O.C.G.A. § 9-11-67.1.[2]

In that same vein, S.B. 83 also states that any offer under O.C.G.A. § 9-11-67.1 constitutes "an offer to enter into a bilateral contract."[3] Under the previous version of O.C.G.A. § 9-11-67.1, courts construed terms requiring specific conduct to accept an offer (like delivery of payment in a specific manner) as creating a unilateral contract, "whereby an offer calls for acceptance by an act rather than by communication."[4] Under such unilateral contracts, "if an offer calls for an act, it can be accepted only by the doing of the act," and "[t]he acceptance by act must be identical and without variance of any sort."[5] Georgia courts found these rules applied to offers made under O.C.G.A. § 9-11-67.1, which reinforced the notion that an insurer's failure to comply with every single term of an offer constituted a "fatal" rejection of the offer.[6] As of April 22, 2024, when S.B. 83 was signed by Governor Kemp, every offer under O.C.G.A. § 9-11-67.1 will be an offer to enter into a bilateral contract. Importantly, "[i]t is the law of contracts that an acceptance of a bilateral contract requires communication."[7] Thus, insurers now can accept

the offer through written communication, as opposed to the previous version of the statute, which required performing all of the tasks to accept the offer. Acceptance through written communication also echoes the other parts of the statute, which expressly state that accepting an offer only requires written acceptance of the exhaustive list of material terms.[8]

S.B. 83 provides even more concrete bad faith protections through subsection (i), as follows:

> There shall be no civil action arising from an alleged failure by the recipient to settle a tort claim for personal injury, bodily injury, or death arising from a motor vehicle collision, where the recipient provides the offeror on or before the dates specified in the offer:
>
> (A) A writing that purports to accept in their entirety the material terms of the offer, with the exception of the amount of payment;
>
> (B) A statement by the recipient under oath regarding insurance coverage provided by the recipient, if required as a material term; and
>
> (C) Payment of the lesser of:
>
> (i) The amount demanded in such offer; or
>
> (ii) The available bodily injury liability limits of the applicable insurance policy or policies issued by the recipient.[9]

With this addition to the statute, insurers will have certainty of what must be done when responding to an offer of settlement sent pursuant to the statute to protect themselves from extra-contractual exposure. As long as an insurer complies with these requirements, it will be shielded from a bad faith suit, even if a plaintiff rejects an insurer's acceptance for some immaterial reason. However, if an insurer fails to comply with these requirements, then the

insurer loses the protection, and this subsection of the statute shall not apply to any subsequent offer to settle.[10]

Importantly, under current Georgia case law, an insurer cannot be found to have acted in bad faith for failing to accept a settlement demand in excess of the relevant policy's limits.[11] It is currently unclear whether subsection (C) above, would remove this protection, as it allows for the payment of the *lesser of* (i) the amount demanded in the offer or (ii) the available bodily injury limits of the applicable policy. As written, it would appear the revised statute would require an insurer seeking the bad faith protections of the statute to respond to a settlement demand in excess of the policy limits by paying the policy limits.

While S.B. 83 provides bad faith protections to insurers, it does not apply to all settlement offers in all situations. Most notably, the revised statute specifically states that it does not apply to "any offer to settle a product liability claim, including failure to warn arising under product liability."[12] Equally notable, it applies to claims for personal injury, bodily injury, or death arising from a "motor vehicle collision," rather than claims for "the use of a motor vehicle" as stated in the previous version of the statute.[13] Also, even for claims that would seem to fall within the scope of O.C.G.A. § 9-11-67.1, the statute only applies to offers made before all named defendants have either "filed their initial answers or been found to be in default."[14]

In sum, O.C.G.A. § 9-11-67.1 provides insurers with broader and more concrete bad faith protections regarding certain settlement offers for injuries and death arising from motor vehicle collisions. While the revisions to O.C.G.A. § 9-11-67.1 mark a much-needed shift in the landscape for bad faith claims, the statute does not extend to every claim, meaning the dragon has not been fully slain. Rather, insurers must still beware of offers that are not subject to O.C.G.A. § 9-11-67.1 because the mirror image rule

presumably still applies to such offers. In those situations, insurers must remember that the failure to comply with every single term in an offer, no matter how trivial, may constitute a complete rejection of the offer. Because of these risks, insurers should be aware of the "safe harbors" available to insurers under current Georgia case law protecting insurers from bad faith liability, which will be the subject of our next update.

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[1] O.C.G.A. § 9-11-67.1 (b), (c).

[2] The statute only applies to "settlement offers and agreements for personal injury, bodily injury, and death from motor vehicles." However, the statute specifically states it does not apply to any offer to settle a product liability claim.

[3] O.C.G.A. § 9-11-67.1 (a).

[4] *Pierce v. Banks*, 368 Ga. App. 496, 500 (2023).

[5] *Id.* (internal quotations omitted).

[6] *Pierce*, 368 Ga. App. at 500 ("An offeree's failure to comply with the precise terms of an offer is generally fatal to the formation of a valid contract").

[7] *Gainesville Glass Co. v. Don Hammond, Inc.*, 157 Ga. App. 640, 641 (1981) (internal modifications added).

[8] O.C.G.A. § 9-11-67.1 (d).

[9] O.C.G.A. § 9-11-67.1 (i)(1).

[10] O.C.G.A. § 9-11-67.1 (i)(3).

[11] *Baker v. Huff*, 323 Ga. App. 357, 365 (2013), citing *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 687 (2003) (finding "[the insurer] had no duty to engage in negotiations concerning a settlement demand that is in excess of the insurance policy's

limits") (internal quotations omitted); *Linthicum v. Mendakota Ins. Co.*, 687 F. App'x 854, 857 (11th Cir. 2017) ("[a]n insurer has no affirmative duty to engage in negotiations concerning a settlement demand that is in excess of the insurance policy's limits") (modification in original).

[12] O.C.G.A. § 9-11-67.1 (j).

[13] O.C.G.A. § 9-11-67.1 (a)–(c), (i).

[14] O.C.G.A. § 9-11-67.1 (b).
