GEORGIA'S NEW TIME-LIMITED DEMAND STATUTE

Is the Third Time the Charm?

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Few legal issues have sparked more consternation among Georgia insurers (and insurance defense counsel) than pre-suit, time-limited settlement demands that are intended as bad-faith setups. These demands are a maze of terms and conditions that require insurers to upend standard settlement practices and cause inadvertent rejections or counter-offers. Armed with an inadvertent rejection, plaintiff's counsel set up a bad faith failure to settle claim. These tactics are particularly widespread in serious injury automobile accidents involving low policy limits.

In 2013, Georgia enacted O.C.G.A. § 9-11-67.1 to curtail these tactics. The statute (in its original form) set forth specific procedures governing pre-suit settlement offers. But over the years, plaintiffs' lawyers and Geogia's textualist courts circumvented the statute's purpose.

Even after the legislature revised the statute in 2021, Georgia Courts continue to uphold new tactics. Among the horror stories: a settlement check with "void after 180 days" (*Pierce v. Banks*, 368 Ga. App. 496, 499 (2023)) and the back of its settlement check required an endorsement from all payees (*Redfearn v. Moore*, A24A1028 (May 23, 2024)) were both considered rejections because they placed improper "conditions" on the payment.

Georgia's Legislature has again revised O.C.G.A. § 9-11-67.1, effective on April 22, 2024. As the adage goes, the third time may be the charm. Whether it is or not, however, it attempts to relieve insurers of some of the problems circumvented under the two prior versions of the statute. Here are some highlights:

INADVERTENT VARIATIONS IN RESPONSES SHOULD NO LONGER CREATE REJECTIONS

Subsection (a) of the revised statute

provides that any offer to settle a personal injury/death tort claim arising from a motor vehicle collision, and which is made before all named defendants have filed their answers or are in default, shall be considered an offer to enter into a bilateral contract. This revision should prevent a court from finding that an insurer rejected a demand merely because of minor variations between the settlement offer and the insurer's response, especially with the conditions of "acceptance by act rather than communication." This may be the most important section and change of the new statute.

Inclusion of the language that pre-suit offers are offers to enter into a *bilateral contract* was likely an attempt to address the following holding from *Pierce v. Banks*:

> Appellees did not comply with one or more of the precise terms of acceptance of the settlement offer. Appellees maintain, however, that this should not bar the conclusion that the parties have a contract ...
>
> Appellees argue that a contract is created when parties agree on the material terms which define their rights and obligations and that parties need not necessarily agree on non-material matters for a contract to form. *While this may be typically true of bilateral contracts ... the type of contract at issue here is a unilateral contract,* whereby an offer calls for acceptance by an act rather than by communication.

Pierce v. Banks, 368 Ga. App. 496, 500 (2023) (emphasis added) (internal citations omitted).

The *Pierce* holding held that plaintiffs' counsel could send unilateral contract offers—as opposed to bilateral contract offers—and, thus, a response failing to comply with expected conduct (providing a complying check), no matter how minor, would be considered a rejection. This same principle resulted in the *Redfern* holding finding that State Farm had rejected a time-limited demand by virtue of sending a settlement check which required an endorsement from all payees.

Because the revised version of O.C.G.A. § 9-11-67.1 now stipulates that all pre-suit settlement offers are bilateral contracts, failure to comply by conduct should not create a counteroffer. The agreement to settle should create a binding contract, with the remedy being breach of contract. In sum, under the revised statute, a carrier should be able to accept a time-limited demand by simply announcing "accepted" and complying with the contract's material terms. What terms are material? The statute also answers that question.

STATUTE APPLIES UNTIL THE ANSWER

The statute also now applies "before the filing of an answer." The prior version applied until the lawsuit was filed. Plaintiff's attorneys were filing lawsuits, but not serving them, and then sending demands that purposely did not comply with the statute in hopes that the insurer would refuse to ac-

cept the non-compliant terms because they mistakenly believed that the statute applied. This new provision closes the loophole by ensuring that the insurer is aware of the lawsuit and has appointed defense counsel.

WHAT SPECIFICALLY CONSTITUTES A MATERIAL TERM IN A PRE-SUIT SETTLEMENT

Another notable improvement in the revised version of O.C.G.A. § 9-11-67.1 (2024) is that an insurance carrier's inadvertent failure to comply with immaterial terms in responding to a demand will not create a counteroffer. Importantly, however, an insurance carrier still must accept all of the material terms presented in a time-limited demand.

O.C.G.A. § 9-11-67.1(b) enumerates what terms are material while also providing that all other terms are immaterial and, therefore, can be disregarded. It provides that any offer to settle a tort claim for injury or death arising from a motor vehicle collision, and which is made at any point before all named defendants have filed their answers or are in default, **"shall contain the following material terms, which shall be the only material terms:"** 1) the deadline for acceptance, which cannot be less than 30 days; 2) the settlement amount; 3) the identities of who will be released; 4) the claims that will be released; 5) a date when payment must be made—not to be less than 40 days after receipt of the offer; and 6) a demand for an under oath statement from the carrier that all coverage has been provided. A demand must also include sufficient material for the carrier to evaluate the claim.

THE CLAIMANT CANNOT CREATE ADDITIONAL TERMS

O.C.G.A. § 9-11-67.1 (2024) explicitly sets forth what constitutes a "material term." It also explicitly provides that if a settlement offer contains an additional term, then that additional term "shall be construed as an immaterial term," and **"a variance by the recipient from such immaterial terms shall not subject the recipient to a civil action arising from an alleged failure by the recipient to accept an offer to settle…"** O.C.G.A. § 9-11-67.1 (c) (emphasis added).

A PLAINTIFF CANNOT CONTRACT AROUND THE STATUTE

The revised statute also addresses another common abusive tool: A settlement demand which requires the defendant to agree—as a condition of acceptance—that O.C.G.A. § 9-11-67.1 does not apply. The revised statute expressly provides, "no party shall require another party, as a condition of settlement, to waive or modify the application of this Code section or any provision of this Code section." O.C.G.A. § 9-11-67.1 (e).

CATCHALL TO PREVENT PLAINTIFFS FROM CREATING BAD FAITH SETUPS

One frustrating aspect of the history of the legislature's revisions to O.C.G.A. § 9-11-67.1 has been the plaintiff's bar's continual ability to develop new strategies to engineer bad faith set ups. With enough effort, claimants were able to make a settlement offer convoluted enough to trigger a counteroffer regardless of how well intentioned the insurer and its counsel tried to comply.

The revised statute seeks to end this cycle by including a safeguard in O.C.G.A. § 9-11-67.1(i) that provides that a civil claim for failure to settle (bad faith) cannot arise from an insurer's failure to settle a tort claim if the insurer: 1) agreed in writing to accept the material terms of the settlement offer; 2) provides a statement under oath of the insurance coverage provided by the carrier to its at-fault insured; and 3) pays the amount demanded or the available policy limits—whichever is less. In other words, even if the plaintiffs' bar devises a way to create a counteroffer, no bad faith should arise from a failure to settle if those three terms are met.

IMMEDIATELY APPLICABLE TO ALL DEFINED OFFERS

The two prior versions of the statute became effective on July 1 of the year in which they were passed, and they only applied to offers arising out of motor vehicle accidents that occurred on or after the effective date of the statute. The new version became effective immediately on April 22, 2024, and it applies to all offers, without regard to when the motor vehicle accident occurred. Though we expect some litigation over this difference in the new statute, the statute applies to all current demands.

POTENTIAL DISPUTES AND PITFALLS

Typical with new legislation, there are issues open to dispute under the new statute. For instance, the statute changes the phrase "use of a vehicle" to "vehicle collision," raising questions about when a vehicle collides with something that is not a vehicle (e.g., a person). Sub-section (c) of the new statute states that any term that is not included in sub-section (b) will be construed as an immaterial term that may be agreed to and a variance from an immaterial term may not give rise to a bad faith claim. We anticipate that plaintiffs may argue that while sub-section (c) provides safe harbor against a bad faith claim, there is no settlement where all terms, even immaterial terms, are not accepted. Paragraph (c) of the statute requires payment of the less or the amount demanded or policy limits. This may mean that the demand cannot be ignored just because it exceeds the policy limits, i.e., the limits must be tendered. This change could be a potential trap and may modify existing common law, where a demand exceeding policy limits cannot give rise to bad faith.

CONCLUSION

There is a lot of minutia in this new statute that will result in quite a bit of litigation over its meaning and application. We have not covered all potential issues or challenges to the wording in this, nor do we even think we can predict all of the arguments that will be made. The Georgia Supreme Court is hyper-textualist, so if you see an argument arising out of the literal language in the statute, even if you think it violates the intent of the legislature, Georgia's Court will follow the language.

It remains to be seen how Courts will interpret the new O.C.G.A. § 9-11-67.1. The statute itself seems to make significant strides towards ending the unfair tactics plaintiff's lawyers have used to trap carriers into bad faith claims. But if subsection (a) alone withstands court scrutiny, it should help carriers quite a bit with the pre-suit "gotcha" settlement demands.

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