Unsettling News: Recent Developments in Georgia Law and Issues Faced by Defendants in Making and Responding to Settlement Offers

By: Martin A. Levinson, Chair, GDLA Premises Liability Committee
Hawkins Parnell Thackston & Young, LLP

Martin A. Levinson is a partner at Hawkins Parnell Thackston & Young LLP in Atlanta. He handles all phases of the litigation process in cases involving premises liability, personal injury and wrongful death matters, product liability, trucking and transportation, and general property and casualty liability. He presently serves as Chair of GDLA's Premises Liability Substantive Law Committee. In 2013, Martin prepared the GDLA's *amicus curiae* brief in the Georgia Court of Appeals case of *Graham v. HHC St. Simons, Inc.*, 322 Ga. App. 693 (2013), which involved novel questions relating to enforceability of a settlement agreement and represented the first time the GDLA had been requested by the Court of Appeals to submit such a brief in a case.

In recent years, Georgia has seen a number of developments and changes in its statutory and case law relating to making and responding to settlement demands and offers. With only a small percentage of litigated matters and even a smaller percentage of claims overall reaching trial, it has become increasingly important for Georgia attorneys to stay apprised of those changes. Several recent developments in Georgia law, in particular, either address existing issues applicable to settlement offers and demands or create new issues: (1) "bad faith" claims under *Southern General Insurance Co. v. Holt*[1] and the recent enactment of O.C.G.A. § 9-11-67.1; (2) recent developments regarding the "offer of judgment" statute (O.C.G.A. § 9-11-68), including dealing with contingent fees and whether an offer was made in "good faith"; (3) issues and recent developments in Georgia law regarding attempts to clarify or resolve outstanding liens in responding to a settlement demand, and when the same amounts to a counteroffer, rather than an acceptance, of a settlement offer; and (4) the danger of making a settlement offer while a motion for summary judgment is pending (including discussion of the Georgia Court of Appeals' opinion in *Graham v. HHC St. Simons, Inc.*[2]).

I. "Bad Faith" Claims Against an Insurer Under *Southern General Insurance Co. v. Holt* and the Recent Enactment of O.C.G.A. § 9-11-67.1

In the case of *Southern General Insurance Co. v. Holt*,[3] the Supreme Court of Georgia essentially held that an insurer can be required to pay a verdict in excess of applicable policy limits where the insurer acts in "bad faith" by failing to pay a time-limited demand for the policy limits. The test

to determine if an insurer has acted in bad faith in rejecting an offer to settle claims against its insured within the policy limits is "whether the insurer, in light of the existing circumstances, has accorded the insured the same faithful consideration it gives its own interest."[4]

The Supreme Court expressly stated in *Holt* that its decision was not intended to permit a plaintiff's attorney to "'set up' an insurer for an excess judgment merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open."[5] More than 20 years after *Holt* was decided, however, uncertainty remains as to what constitutes "an unreasonably short time" or when a claimant or plaintiff has impermissibly "set up" an insurer for extra-contractual liability. Indeed, the perception and experience of many Georgia attorneys suggests that unreasonable time-limited policy-limits demands have become much more common since *Holt* was decided.

During the Georgia General Assembly's 2011-2012 session, a proposed bill was introduced that would have provided significant structure and reform to policy-limits demands and subsequent "bad faith" claims against insurers who do not accept those demands. Some felt the bill was too broad or restrictive, and the proposed legislation ultimately failed to pass. A similar statute was passed by the General Assembly in 2013, but it contains many limitations in time, scope, and otherwise that make it of limited help in resolving the problems that *Holt* has created for insurers and attorneys.

The new statute, O.C.G.A. § 9-11-67.1, became effective on July 1, 2013. Where it applies, the statute requires that the settlement demand be made in writing and contain the following material terms: (1) the time period the offer will remain open (which must be at least 30 days); (2) the amount of the demand; (3) the party/parties to be released if the offer is accepted; (4) the type of release the claimant(s) will execute; and (5) the specific claims to be released.[6] The statute also limits the harshness of recent Georgia jurisprudence regarding what manner of response to a demand will generally constitute a counteroffer and rejection (see Section III below) by providing that the recipient of a demand subject to the statute "shall have the right to seek clarification regarding terms, liens, subrogation claims, standing to release claims, medical bills, medical records, and other relevant facts" and that "[a]n attempt to seek reasonable clarification shall not be deemed a counteroffer."[7]

Although O.C.G.A. § 9-11-67.1 represents some degree of progress in that it provides a specific framework for making and accepting offers of settlement, the statute has serious limitations. The most significant of the new statute's weaknesses is that it only applies to pre-suit demands made in "causes of action for personal injury, bodily injury, and death arising from the use of a motor vehicle."[8] The new statute also makes a distinction between claimants who are represented by counsel and those who

are not, subjecting only those demands "prepared by or with the assistance of an attorney" to the requirements of the statute.

In addition, O.C.G.A. § 9-11-67.1(a) explicitly applies only to offers made "[p]rior to the filing of a civil action." The statute inexplicably fails to provide any framework or guidance whatsoever as to settlement offers made while a lawsuit is pending. Moreover, there is at least a colorable argument that the requirements of O.C.G.A. § 9-11-67.1 would not apply to any demand made where suit was *ever* filed on the claim in question, even if the suit had been dismissed without prejudice prior to the offer being made and no lawsuit was pending at the time the demand was made. This would make the statute exceedingly easy to circumvent, rendering it even less effective in combating unreasonable demands in tort actions.

Overall, while it represents some improvement over the total dearth of limitations on short-deadline, "gotcha" *Holt* demands that existed before, O.C.G.A. § 9-11-67.1 is sorely inadequate in resolving the concerns posed by such demands in Georgia.

II. Recent Developments Regarding the "Offer of Judgment" Statute (O.C.G.A. § 9-11-68) -- Contingent Fees and Whether an Offer is Made in "Good Faith"

In 2005, Georgia enacted O.C.G.A. § 9-11-68, commonly referred to as the "Offer of Judgment" Statute. Essentially, O.C.G.A. § 9-11-68 serves as a fee-shifting statute that requires the party who receives an offer made under the statute to pay the other party's reasonable attorney's fees and expenses of litigation from the date of rejection of the offer through trial if the statute's conditions are met and the judgment is sufficiently favorable to the offeror.[9] Where the "offer" is made by a plaintiff, the fee-shifting provision applies if the plaintiff subsequently obtains a judgment of more than 125 percent of the amount demanded.[10] Where the offer is made by a defendant, fee-shifting applies if the eventual judgment is less than 75 percent of the defendant's offer.[11]

To qualify as an "offer" under O.C.G.A. § 9-11-68 and to entitle the offeror to recover fees in the event of a favorable judgment, the offer must: (1) be in writing and state it is made pursuant to O.C.G.A. § 9-11-68; (2) identify the party making the proposal and to whom it is made; (3) identify the claims to be resolved; (4) state "with particularity any relevant conditions" of the offer; (5) state the total amount of the offer; (6) state any amount to be allocated to punitive damages; (7) state whether attorney's fees/expenses are included in the offer; and (8) include a certificate of service and be served by certified mail or statutory overnight delivery.[12] In addition, to qualify for a subsequent attorney's fee award, a party's offer under the statute must remain open for at least 30 days.[13]

It is important to note that although O.C.G.A. § 9-11-68(a) explicitly provides that only fees and expenses incurred after rejection of an "offer" may be collected in the event of

a qualifying judgment, a different rule appears to apply for plaintiffs who have contingent fee agreements with their counsel. In the recent case of *Georgia Department of Corrections v. Couch*,[14] the Court of Appeals held, essentially, that the limitation on recovering fees and expenses only from the date of rejection of an offer made under O.C.G.A. § 9-11-68(a) does not apply where the party making the "offer" is a plaintiff who has entered into a contingent fee arrangement:

> Our Supreme Court has held that when the contingency which fixed an attorney's entitlement to a fee is "a jury verdict and judgment," then "the right to a specific amount as a contingent fee was fixed by the judgment." However, evidence of the existence of a contingent fee contract, without more, is not sufficient to support the award of attorney fees. An attorney cannot recover for professional services without proof of the value of those services. A naked assertion that the fees are "reasonable," without any evidence of hours, rates, or other indication of the value of the professional services actually rendered is inadequate.
>
> Here, the right to the 40 percent contingency fee was fixed by the judgment entered on the verdict, and the fee awarded by the trial court reflected that percentage. Further, the trial court was presented with evidence of the hours worked and rates charged, substantiating the value and reasonableness of the services thereof. Thus, we find no error [in awarding the plaintiff's entire contingent fee under O.C.G.A. § 9-11-68].[15]

While there arguably remains room for defendants to contend that a 40 percent contingent fee might not be reasonable in some cases, such an argument is likely to fail in all but the most egregious cases.[16] More importantly, since Georgia's appellate courts view a contingent fee as not having been incurred to any degree or in any portion until *after* a judgment is obtained, whether the attorney's work was done before or after rejection of the statutory offer of settlement is irrelevant in determining what amount may be recovered by the plaintiff under O.C.G.A. § 9-11-68. Essentially, based on the *Couch* decision, a plaintiff may recover <u>all</u> of the attorney's fees and expenses owed under a contingent fee agreement if the plaintiff makes a statutory offer of settlement in good faith, the offer is rejected by the defendant, and the plaintiff then obtains a verdict of more than 125 percent of the amount demanded.

This holding arguably defeats the apparent intent of O.C.G.A. § 9-11-68, which expressly provides that a plaintiff may only recover reasonable attorney's fees and expenses of litigation incurred *after* the statutory settlement offer is rejected. Moreover, the Court of Appeals' decision in *Couch* essentially applies a *per se*

different rule to plaintiffs and defendants in tort cases, since contingent fees have become the most common manner of fee charged by plaintiffs' attorneys in personal injury cases but are impossible in defense of such cases.

The Supreme Court of Georgia recently granted *certiorari* in *Couch*, specifically identifying as one of two issues of particular concern on appeal whether "the Court of Appeals…err[ed] by failing to prorate the 40 percent contingency fee to reflect that some of the fees were incurred before the settlement offer was rejected."[17] Thus, there is hope that litigants will receive further clarification and a more even-handed rule will be applied in this area in the near future.

Another potential limitation on the usefulness of statutory settlement offers in Georgia appears in O.C.G.A. § 9-11-68(d)(2), which provides that upon a party's request for fees under the statute, the trial court "may determine that an offer was not made in good faith," and, in such a case, "the court may disallow an award of attorney's fees and costs." In making any such finding, the trial court must issue "an order setting forth the basis for [the court's] determination" that the "offer" at issue was not made in good faith.[18]

Based on the few Georgia appellate decisions considering whether an "offer of judgment" was made in "good faith" within the meaning of O.C.G.A. § 9-11-68(d)(2), it is clear that the trial court's discretion in making the determination is extremely broad. Whether the trial court grants or denies a request for fees under O.C.G.A. § 9-11-68, it appears that the trial court's finding of fact as to whether the offer was made in "good faith" will stand on appeal as long as the trial court provides essentially any purported basis at all for its finding.

In *Cohen v. Alfred & Adele Davis Academy, Inc.*,[19] the Court of Appeals affirmed a trial court's award of $84,104.63 in attorney's fees and expenses to the defendant based on an "offer of judgment" of $750 made by the defendant four months after suit was filed. The defendant subsequently moved for and was granted summary judgment on the plaintiff's numerous claims, and the plaintiff appealed. On appeal, the plaintiff contended, among other things, that the defendant's offer was not made in good faith because (1) the defendant had taken the position that the plaintiff's claims were frivolous; (2) the defendant was unwilling to engage in any further settlement negotiations; (3) the amount of the offer was very small compared to the amount of fees incurred thereafter by the defendant; and (4) the defendant's attorney allegedly engag[ed] in a pattern of harassment against [the plaintiff] throughout the litigation."[20]

The Court of Appeals rejected the plaintiff's argument, holding that the trial court had not abused its discretion in finding the defendant's offer was made in good faith. Among other things, the Court of Appeals noted that the trial court's finding was supported by the fact that the defendant ultimately obtained

summary judgment in the case, and "because the [defendant] reasonably and correctly anticipated that its exposure was minimal, the fact that it was willing to settle Cohen's claims for a nominal value [did] not demand a finding that its offer was made in bad faith."[21] Finally, the Court of Appeals held that the large amount of attorney's fees and expenses incurred by the defendant "[did] not preclude a finding of good faith."[22]

Similarly, in *Eaddy v. Precision Franchising, LLC*,[23] the Court of Appeals affirmed a trial court's award of $28,656.37 in attorney's fees to a defendant. In that case, one defendant, Precision, made an offer of $1,000.00 pursuant to O.C.G.A. § 9-11-68, which was ignored (and, thus, rejected) by the plaintiff, and the trial court subsequently granted Precision's motion for summary judgment. The plaintiff appealed the grant of summary judgment, and while that appeal was pending, the plaintiff entered into a settlement with the remaining defendants in the case. After the settlement was completed, the plaintiff withdrew her appeal of the grant of Precision's motion for summary judgment. Precision then moved for an award of attorney's fees under O.C.G.A. § 9-11-68.

On appeal of the trial court's award of attorney's fees to Precision, the plaintiff contended that the offer was not made in good faith because the offer "was far below her actual damages and nowhere near Precision's potential liability had the case proceeded to a jury."[24] In affirming the trial court's decision that the offer was made in good faith, the Court of Appeals noted only that the trial court had granted summary judgment to Precision on the plaintiff's claims and that the plaintiff had appealed that judgment but withdrawn her appeal.[25] Without further elaboration on the factual basis for the finding of good faith, the Court of Appeals stated that the finding "was supported by the evidence and was not an abuse of discretion," and affirmed the trial court's order.[26]

By contrast, in the case of *Great West Casualty Co. v. Bloomfield*,[27] the full Court of Appeals affirmed a trial court's finding that an insurer's "offer of judgment" of $25,000.00 to settle a wrongful death case was not made in good faith. In that case, the plaintiffs alleged that two different truck drivers had negligently caused a motor vehicle accident that had resulted in the death of the plaintiffs' decedent. After suit was filed, one of the drivers (along with his trucking company and its insurer) made a statutory settlement offer of $25,000.00. The plaintiffs rejected the offer, and the case proceeded to trial, where the jury returned a large verdict in favor of the plaintiffs and against one set of defendants, but a verdict of no liability on the part of the driver, company, and insurer that had made the settlement offer.

The prevailing defendants then moved for an award of attorney's fees and expenses, which was denied by the trial court. In denying the award, the trial court found that the offer "was not a reasonable offer or a realistic assessment of liability in a wrongful death case," relying on the facts that the driver paid the traffic

ticket fine from the incident and that the driver's insurer never deposed or even interviewed the first police officer on the scene who testified at trial for the plaintiff.[28] The trial court also found that those defendants' subsequent offer during trial to settle for the policy limits of $1 million "showed the bad faith intent of the defendant's [sic] initial offer" since there was no evidence of any "new discovery or factual evidence" obtained by those defendants between the two offers.[29]

On appeal, the Court of Appeals affirmed the trial court's denial of the prevailing defendants' motion for fees and expenses under O.C.G.A. § 9-11-68. As an initial matter, the Court of Appeals held that "while the defense verdict [was] relevant to the issue of good faith, it [was] not conclusive evidence that [the defendants] acted in good faith" in making their offer pursuant to O.C.G.A. § 9-11-68.[30] The Court of Appeals also held or at least implied that the amount of damages awarded by the jury *against the other defendants* suggested that the amount of the prevailing defendants' offer was "nominal" and not made in good faith.[31] Finally, the Court of Appeals held that the fact and amount of the second offer of settlement made by the prevailing defendants during trial "was a factor that the trial court properly considered" in reviewing and ultimately denying the motion for attorney's fees.

As with other matters subject to an "abuse of discretion" standard on appeal, it appears that whether a settlement offer will be found to have been made in "good faith" under O.C.G.A. § 9-11-68(d)(2) in any given case will be up to the individual judge hearing the motion for attorney's fees at the conclusion of the case. The decisions in this area of the law strongly suggest that whatever the trial court decides in that regard will be affirmed on appeal as long as it is supported by any potentially reasonable basis at all.

III. Clarification or Counteroffer? "Precatory Language" and How to Respond to a Settlement Offer Without Rejecting It

The need for defendants and insurers to protect themselves from having to pay whatever liens the plaintiff or claimant in a personal injury claim or suit may have incurred is nothing new. In recent years, however, concern about liens has become heightened, due in large part to rising healthcare costs and the well-chronicled changes in how Medicare liens are being handled and pursued for collection by the Centers for Medicare and Medicaid Services (CMS). At the same time, it has become increasingly common for claimants or plaintiffs to make time-limited settlement demands while neglecting or refusing to provide for or ensure the payment of any outstanding liens against the plaintiff's recovery.

Georgia law permits a medical provider to "step into the shoes of the injured person for purposes of receiving payment from the tortfeasor or the tortfeasor's insurance company for economic damages represented by the hospital bill."[32] If liens remain

after a settlement is completed, a medical provider with a properly perfected lien will remain free to collect on the lien from the alleged tortfeasor or its insurer. Moreover, if an insurer settles a claim for policy limits without ensuring that outstanding liens have been paid or otherwise released, the insured tortfeasor will remain personally liable under the outstanding liens and now will have no remaining insurance coverage.

When faced with time-limited demands and the specter of extra-contractual liability in light of *Holt* and its progeny, defendants and insurers have tried to find ways to accept otherwise reasonable settlement demands while still protecting themselves and/or their insureds from additional exposure from outstanding liens. As recent Georgia appellate decisions have made clear, however, the specific language used in responding to a settlement demand is critical; a single word can be the difference between an acceptance and a counteroffer, particularly as to statements concerning the resolution of outstanding liens.

To determine whether language regarding potential liens in a response to a settlement offer renders the response a counteroffer rather than an acceptance, Georgia courts look to whether the language "makes [the offeree's] acceptance conditional on [the offeror's] assent to an additional term, or whether it is mere precatory language seeking confirmation of an aspect of the agreement."[33] "Language is properly characterized as 'precatory' when its ordinary significance imports entreaty, recommendation, or expectation rather than any mandatory direction."[34] If the language in the offeree's response is "precatory," it will not be deemed to convert a purported acceptance into a counteroffer.[35]

Thus, for example, in *Herring v. Dunning*, the Georgia Court of Appeals held that a defendant unconditionally accepted a plaintiff's offer despite the defendant's acceptance letter referencing an "understanding that no liens of any kind exist in this case" and asking the plaintiff to "confirm this at [his] earliest convenience."[36]

Similarly, the Court of Appeals has held in several recent cases that inclusion of language unacceptable to the plaintiff in a proposed release will *not* convert an acceptance into a counteroffer. In *Sherman v. Dickey*, for example, the plaintiffs sent the defendants a time-limited demand for the $25,000 limits of the defendants' insurance policy in connection with injuries allegedly suffered by the plaintiffs in a motor vehicle collision in which the parties were involved.[37] The plaintiffs' demand also directed the defendants to provide a proposed limited-liability release and affidavits establishing the amount of available insurance coverage. The plaintiffs' demand specifically prohibited any proposed release from including language requiring indemnification or the release of any property-damage claims, but no other specific language or provisions were addressed.

Before expiration of the deadline in the plaintiffs' demand, the parties' attorneys exchanged proposed settlement language. In one e-mail, the defendants' attorney provided some "proposed revisions" to a limited-liability release drafted by the plaintiffs' attorney, and one of the revisions was to insert a statutory healthcare provider lien affidavit pursuant to O.C.G.A. § 44-14-473.[38] The defendants' attorney specifically stated that "[i]f you do not want your client to sign a release with my proposed changes, please let me know and let's discuss." The plaintiffs' attorney said he would take a look at the revised settlement documents and "get back to" the defendants' attorney.

The plaintiffs' attorney never contacted the defendants' attorney to discuss the proposed language. Before the demand expired, the defendants' attorney sent the plaintiffs' attorney a letter unconditionally accepting the demand and enclosing a check for the policy limits, the requested affidavits, and another copy of the proposed release with the defendants' proposed revisions. The letter again referred to the release as "proposed" and "invited feedback if the [plaintiffs] disagreed with the proffered changes."[39]

In the weeks that followed, the defendants' attorney again invited the plaintiffs "to discuss or make changes to the proposed release" at least two more times. The plaintiffs did not do so, and eventually, the plaintiffs returned the settlement check and "rejected" what they characterized as a "counteroffer" by the defendants to the plaintiffs' original demand. The plaintiffs subsequently filed suit, and when the court granted summary judgment to the defendants to enforce the settlement agreement, the plaintiffs appealed.

On appeal, the plaintiffs contended that insertion of the statutory lien affidavit language into the proposed release by the defendants rendered the purported acceptance a counteroffer. The Court of Appeals, however, disagreed, explaining that "the record reflects that the [defendants] repeatedly invited changes to the proposed release and feedback regarding any concerns the [plaintiffs] might have, and we discern nothing to suggest that the [defendants] intended for the release to constitute a counteroffer or that the [plaintiffs] were required to sign that particular release to effectuate settlement."[40] The appellate court also found that "the inclusion of the statutory-lien affidavit sought only to confirm an assertion that had previously been made by the [plaintiffs'] attorney—i.e., that there were no known healthcare-provider liens."[41] Accordingly, the Court of Appeals held the trial court was correct in holding that the defendants' response was an acceptance of the plaintiffs' demand as a matter of law.[42]

The Court of Appeals also held on two separate occasions that sending the plaintiff a general release and asking the plaintiff to "please" sign it, rather than a limited release as the plaintiff agreed to execute in his time-limited, policy limits demand, did not convert an insurer's acceptance of the demand into a counteroffer.[43] In *Newton v. Ragland* and *Turner v. Williamson*, the Court of

Appeals held that "[a]lthough the general release provided by [the insurer] included additional terms not acceptable to [the plaintiff]," that did not render the acceptance a counteroffer because "it is well settled that the mere inclusion of a release form unacceptable to the plaintiff does not alter the fact that a meeting of the minds had occurred with regard to the terms of the settlement."[44] "[S]ince the agreement to terminate the controversy already had been created, the defendant's subsequent proffer of a release form which plaintiff believed was not in compliance with the understanding of the parties would not be a rejection of the previously accepted offer."[45] The Court of Appeals also held that the offeree's use of the word "please" with regard to execution of the general release and the lack of any language conditioning the offeree's acceptance on execution of the general release rendered inclusion of the general release "precatory."[46]

"In contrast, when the offeree's response makes acceptance conditional on the offeror's assent to an additional term, the response then constitutes a counteroffer rather than an acceptance."[47] In *Frickey v. Jones*, the Supreme Court of Georgia held that a defendant's response to a plaintiff's settlement offer amounted to a counteroffer and not an acceptance because it stated that "payment is complicated by what appears to be a [hospital lien] as well as potential liens by your client's health carrier."[48] Similarly, in *McReynolds v. Krebs*, the Supreme Court also held a purported acceptance of a settlement offer was actually a counteroffer because it included the direction to "call…in order to discuss how the lien(s) ([s]pecifically, but not limited to the $273,435.35 lien from [the hospital]) will be resolved as part of this settlement."[49]

In *Torres v. Elkin*, the Court of Appeals considered whether the inclusion of a statement by an insurance adjustor that "I trust that your office will satisfy any liens arising out of this matter" rendered the response a counteroffer rather than an acceptance.[50] Relying largely on the Supreme Court's decisions in *Frickey* and *McReynolds*, the Court of Appeals held that the sentence regarding satisfaction of liens in the insurer's response was "sufficiently insistent to indicate a requirement that [the plaintiff] was required to satisfy [any outstanding liens] for [the insurer's] acceptance to be effective."[51] The Court of Appeals held that "[a] reasonable person in the position of the other contracting party would interpret such language as imposing a condition, rather than as merely precatory."[52] Accordingly, the court held that the insurer's letter in response to the plaintiff's settlement offer was a counteroffer rather than an acceptance of the plaintiff's offer.[53]

Thus, while the Court of Appeals' holdings in cases such as *Sherman*, *Newton*, and *Turner* demonstrate that Georgia courts are required to give defendants some benefit of the doubt as to acceptance of settlement offers, those cases do nothing to resolve the current crisis posed by the use of time-limited

demands by unscrupulous or careless plaintiff's attorneys with respect to medical liens. Under the current state of Georgia law, a plaintiff or claimant remains free to require an alleged tortfeasor, defendant, or insurer to respond to a time-limited demand without permitting the offeree to ensure it will not be required to satisfy outstanding liens above and beyond the cost of the settlement proposal. There is no legal authority stating whether such a settlement demand would be considered to have been made in "good faith" within the meaning of O.C.G.A. § 9-11-68 nor whether rejection of the demand could amount to "bad faith" as contemplated under *Holt* and its progeny (despite the fact that payment would not completely resolve the potential liability of the defendant, insurer, or tortfeasor in connection with the plaintiff or claimant's claims).

Until Georgia's General Assembly or one of its appellate courts clarifies these points, particularly in cases where there are or may be significant liens, those receiving such time-limited demands will be in the untenable position of choosing either to risk having to "double pay" or face a potential "bad faith" claim and related extracontractual liability in the future.

IV. The Danger of Making a Settlement Offer While a Motion for Summary Judgment is Pending

In the recent case of *Graham v. HHC St. Simons, Inc.*,[54] the Georgia Court of Appeals addressed a rather interesting argument regarding a plaintiff's purported acceptance of a defendant's offer of settlement. The defendant in the case had made a settlement offer of $100,000.00 while the defendant's motion for summary judgment was pending. The offer did not contain a date of expiration. Twenty days later, the trial court granted the defendant's motion for summary judgment, and the day after that, the plaintiff's attorney faxed a letter to the defendant's attorney purportedly "accepting" the defendant's offer. After the defendant denied there was a settlement and refused to pay the plaintiff anything, the plaintiff filed a motion to enforce the purported settlement. The trial court denied the plaintiff's motion to enforce, and the plaintiff appealed.

In affirming the trial court's refusal to enforce the purported settlement agreement, the Court of Appeals held that there was no "meeting of the minds" and no consideration to support an agreement.[55] The appellate court held that the evidence, consisting of the defendant's offer, the plaintiff's purported "acceptance," and the circumstances of each, "belie[d] [the plaintiff's] claim that the parties agreed on the crucial element of consideration at the same time, in the same sense," rendering the purported agreement without the necessary consideration.[56]

The Court of Appeals also held that the purported settlement agreement failed as a matter of law because the plaintiff failed to accept the offer within a "reasonable time." In that regard, Georgia law provides that "if an offer does not contain a

specified expiration date, the offer must be accepted within a reasonable time," and "[w]hat constitutes a reasonable time in any given case must depend upon its own peculiar facts."[57] The Court of Appeals held that, "[g]iven the fact that the summary judgment motion was pending and ripe for resolution when [the defendant] made its offer, a reasonable time for acceptance of the offer was before the trial court granted summary judgment."[58] Accordingly, the trial court had correctly held that the plaintiff's purported "acceptance" of the offer was ineffective, and there was no settlement agreement to be enforced.

While this may seem like an obvious conclusion, there was previously no Georgia case addressing the situation. Furthermore, the answer might have been different had the defendant's offer been an "offer of judgment" pursuant to O.C.G.A. § 9-11-68. Courts in other jurisdictions -- including at least one federal Circuit Court of Appeals -- have interpreted either Federal Rule of Civil Procedure 68 or the "Offer of Judgment" statutes of other states as requiring any offer made pursuant to the statute to remain open for the time provided in the statute.[59] In those jurisdictions, the offer may be accepted by the plaintiff during the statutory period regardless of whether summary judgment has been entered already.

Although there does not appear to be any Georgia state or federal case law on point, a strong argument can be made that a litigant should not and would not be able to accept a statutory settlement offer made pursuant to O.C.G.A. § 9-11-68 after summary judgment had been granted to the offeror. For one thing, the language of FED. R. CIV. P. 68, regarding statutory offers of judgment in the federal courts, is substantially different from that of O.C.G.A. § 9-11-68. In particular, FED. R. CIV. P. 68 provides no mechanism for revoking or withdrawing an offer once it is made. By contrast, O.C.G.A. § 9-11-68 specifically permits revocation of an offer within the time period set forth in the offer: "Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree…."[60]

Furthermore, even under the more restrictive language of FED. R. CIV. P. 68, several courts have reached the more logical and reasonable conclusion that a grant of summary judgment renders an earlier FED. R. CIV. P. 68 offer of judgment moot and incapable of being accepted thereafter.[61] Those courts have reasoned that "when the Court enters a final judgment in favor of [the] defendant, the Court ends the litigation, and the need for settlement is no longer present," so the plaintiff cannot then "accept" a prior statutory offer of judgment.[62] Similarly, the Court of Appeals of Arizona has held that a trial court's entry of summary judgment "nullifies" an offer of settlement under Arizona's own "Offer of Judgment" Statute.[63] And a Florida District Court of Appeal recently rejected a plaintiff's argument that a settlement offer made under Florida's "Offer of Judgment" Statute could be accepted after summary judgment had

been granted on the plaintiff's claims, notwithstanding that the statutory time period for the offer had not yet elapsed.[64] The trial court's grant of summary judgment in favor of the defendant, the Florida court held, "terminated [the defendant's] pending offer of judgment and precluded [the plaintiffs'] ability to accept it."[65] Permitting a party to accept a statutory offer of judgment after the trial court has granted summary judgment against that party "would frustrate the purpose of [the offer of judgment statute] to encourage settlement, obviate the necessity of protracted litigation, and totally defeat the ends of justice and allow a mockery of the judicial system."[66]

As one federal district court explained in holding that the court's grant of summary judgment superseded and destroyed the losing party's ability to accept an Offer of Judgment pursuant to FED. R. CIV. P. 68:

> When a district court grants summary judgment in favor of the offering party, it enters judgment in favor of that party. At that point, the defendant can no longer offer a judgment because a judgment has already been entered by the district court. As such, the defendant's Rule 68 offer becomes a nullity with respect to that party. The defendant can no longer offer judgment to [the plaintiff] "on specified terms" as prescribed by Rule 68 because the terms of the judgment have already been decided by the district court when rendering its summary judgment opinion. To hold otherwise would create a scenario where there were two competing judgments: the summary judgment entered in favor of the defendant by the district court, and the judgment offered by defendant and accepted by plaintiff after the court has entered summary judgment. The judgment of the Court is paramount as the case against [the defendant] is over and there is nothing to resolve by way of the Judgment.[67]

Nevertheless, it does not appear that any Georgia appellate court or any Eleventh Circuit court has decided this issue. As a result, caution is advisable in extending statutory offers of judgment, as it remains unclear what would be decided in a Georgia case with facts similar to *Graham*, but where the offer was an offer of judgment under either O.C.G.A. § 9-11-68 or FED. R. CIV. P. 68.

End Notes

[1] 262 Ga. 267, 416 S.E.2d 274 (1992).

[2] 322 Ga. App. 693, 746 S.E.2d 157 (2013).

[3] *Southern Gen. Ins. Co.*, 262 Ga. 267, 416 S.E.2d 274.

[4] *Id.* at 268-69, 416 S.E.2d at 275-76.

[5] *Id.* at 269, 416 S.E.2d at 276.

[6] O.C.G.A. § 9-11-67.1(a) (2006 & Supp. 2013) (effective July 1, 2013).

[7] O.C.G.A. § 9-11-67.1(d).

[8] O.C.G.A. § 9-11-67.1(a).

[9] O.C.G.A. § 9-11-68(a) (2006).

[10] O.C.G.A. § 9-11-68(b)(2).

[11] O.C.G.A. § 9-11-68(b)(1).

[12] O.C.G.A. § 9-11-68(a).

[13] O.C.G.A. § 9-11-68(c).

[14] 322 Ga. App. 234, 744 S.E.2d 432 (2013).

[15] *Id.*. at 238-39, 744 S.E.2d at 436 (internal citations omitted).

[16] *See*, *e.g.*, *Brandenburg v. All-Fleet Refinishing, Inc.*, 252 Ga. App. 40, 555 S.E.2d 208 (2001) (reversing attorney's fee award because plaintiff failed to submit any evidence of hours, rates, or other indication of the value of services actually rendered by his attorney).

[17] *Ga. Dep't of Corr. v. Couch*, 2013 Ga. LEXIS 908 (Nov. 4, 2013).

[18] O.C.G.A. § 9-11-68(d)(2).

[19] 310 Ga. App. 761, 714 S.E.2d 350 (2011).

[20] *Id.* at 762-63, 714 S.E.2d at 352.

[21] *Id.* at 763, 714 S.E.2d at 352.

[22] *Id.*, 714 S.E.2d at 352.

[23] 320 Ga. App. 667, 739 S.E.2d 410 (2013).

[24] *Id.* at 670, 739 S.E.2d at 413 (internal quotation and brackets omitted).

[25] *Id.* at 670, 739 S.E.2d at 413.

[26] *Id.*, 739 S.E.2d at 413.

[27] 313 Ga. App. 180, 721 S.E.2d 173 (2011) (*en banc*).

[28] *Id.* at 181, 721 S.E.2d at 174.

[29] *Id.*, 721 S.E.2d at 174.

[30] *Id.* at 182, 721 S.E.2d at 175.

[31] *Id.*, 721 S.E.2d at 175.

[32] *MCG Health, Inc. v. Kight*, 750 S.E.2d 813, 817, 2013 Ga. App. LEXIS 983 (2013) (*en banc*) (internal brackets omitted); *State Farm Mut. Auto. Ins. Co. v. Adams*, 288 Ga. 315, 319, 702 S.E.2d

898, 902 (2010); *S. Gen. Ins. Co. v. Wellstar Health Sys., Inc.*, 315 Ga. App. 26, 30, 726 S.E.2d 488, 492 (2012). *See also* O.C.G.A. § 44-14-470(b) (2002 & 2013 Supp. 2013).

[33] *Torres v. Elkin*, 317 Ga. App. 135, 141, 730 S.E.2d 518, 523 (2012).

[34] *Id.*, 730 S.E.2d at 523 (*quoting Raines v. Duskin*, 247 Ga. 512, 523, 277 S.E.2d 26, 34 (1981)) (internal quotation marks omitted).

[35] *Torres*, 317 Ga. App. at 141, 277 S.E.2d at 34. *See also Herring v. Dunning*, 213 Ga. App. 695, 699, 446 S.E.2d 199, 203 (1994); *Pourezza v. Teel Appraisals & Advisory, Inc.*, 273 Ga. App. 880, 883, 616 S.E.2d 108, 111 (2005).

[36] *Herring*, 213 Ga. App. at 698, 446 S.E.2d at 202-03 (internal punctuation omitted).

[37] 322 Ga. App. 228, 229, 744 S.E.2d 408, 409 (2013).

[38] The lien affidavit provision proposed by the defendants' attorney read as follows:

> The Undersigned, who first being sworn, deposed and said that they have the legal capacity to give the within affidavit, that the[y] are giving the within affidavit from personal knowledge for all purposes permitted under law, hereby declare, assure, and warrant that they are residents of Henry County, Georgia. In addition, with respect to the treatment of the injuries for which this settlement is made, all hospital, nursing home, physician practice, or provider of traumatic burn care medical practice bills have been fully paid. The sworn statement in this subpart shall constitute an affidavit in compliance with OCGA § 44-14-473.

322 Ga. App. at 230, 744 S.E.2d at 410.

[39] *Id.* at 230, 744 S.E.2d at 410.

[40] *Id.* at 232, 744 S.E.2d at 411.

[41] *Id.* at 233, 744 S.E.2d at 412.

[42] *Id.*, 744 S.E.2d at 412.

[43] *Newton v. Ragland*, 750 S.E.2d 768, 770-72, 2013 Ga. App. LEXIS 940 (2013); *Turner v. Williamson*, 321 Ga. App. 209, 213-14, 738 S.E.2d 712, 715-16 (2013).

[44] *Newton*, 750 S.E.2d at 770-71; *Turner*, 321 Ga. App. at 213, 738 S.E.2d at 715.

[45] *Turner*, 321 Ga. App. at 214, 738 S.E.2d at 716 (*quoting Herring v. Dunning*, 213 Ga. App. 695, 699, 446 S.E.2d 199, 203 (1994)).

[46] *Newton*, 750 S.E.2d at 771; *Turner*, 321 Ga. App. at 214, 738 S.E.2d at 716.

[47] *Torres v. Elkin*, 317 Ga. App. 135, 142, 730 S.E.2d 518, 524 (2012).

[48] 280 Ga. 573, 575-76, 630 S.E.2d 374-76 (2006).

[49] 290 Ga. 850, 853, 725 S.E.2d 584, 588 (2012).

[50] *Torres,* 317 Ga. App. at 141-43, 730 S.E.2d at 523-25.

[51] *Id.* at 142, 730 S.E.2d at 524.

[52] *Id.*, 730 S.E.2d at 524.

[53] *Id.*

[54] 322 Ga. App. 693, 746 S.E.2d 157 (2013).

[55]"[I]t is well settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject matter, and in the same sense." *Graham*, 322

Ga. App. at 697, 746 S.E.2d at 161 (*quoting Powerhouse Custom Homes v. 84 Lumber Co.*, 307 Ga. App. 605, 607, 705 S.E.2d 704, 706 (2011)).

[56] *Graham*, 322 Ga. App. at 697, 746 S.E.2d at 161.

[57] *Id.* (*quoting Wilkins v. Butler*, 187 Ga. App. 84, 369 S.E.2d 267 (1988)).

[58] *Id.*

[59] *See*, *e.g.*, *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993) (interpreting Colorado offer of judgment statute); *Rost v. Atkinson*, 292 P.3d 1041 (Colo. Ct. App. 2012) (interpreting Colorado offer of judgment statute after amendment by legislature in response to *Hufnagel* decision); *Hernandez v. United Supermarkets of Okla.*, 882 P.2d 84 (Okla. Ct. App. 1994) (interpreting Oklahoma offer of judgment statute); *Perkins v. U.S. West Communs.*, 138 F.3d 336 (8th Cir. 1998) (interpreting FED. R. CIV. P. 68).

[60] O.C.G.A. § 9-11-68(c).

[61] *See*, *e.g.*, *Smith v. S.E. Pa. Transp. Auth.*, 258 F.R.D. 300 (E.D. Pa. 2009); *Sershen v. Cholish*, 2010 U.S. Dist. LEXIS 39165 (M.D. Pa. Apr. 20, 2010); *Day v. The Krystal Co.*, 241 F.R.D. 474 (E.D. Tenn. 2007).

[62] *Smith*, 258 F.R.D. at 300 (internal brackets omitted). *See also Sershen*, 2010 U.S. Dist. LEXIS 39165 at *6-7; *Day*, 241 F.R.D. 474.

[63] *Wersch v. Radnor/Landgrant*, 961 P.2d 1047 (Ariz. Ct. App. 1997) (interpreting ARIZ. REV. STAT. § 12-2101(B).

[64] *Kroener v. Fla. Ins. Guar. Assn.*, 63 So. 3d 914 (Fla. Dist. Ct. App. 2011) (interpreting FLA. STAT. § 768.79(1)).

[65] *Kroener*, 63 So. 3d at 920.

[66] *Id.* (internal quotation omitted).

[67] *Sershen*, 2010 U.S. Dist. LEXIS 39165, *6-7. *See also Smith*, 258 F.R.D. at 302 (holding that "since summary judgment had already been entered and the case had come to an end, permitting the second judgment [purportedly accepting Rule 68 offer of settlement] to stand would in no way effectuate the purpose of Rule 68, which is to encourage settlement, and would not secure the just, speedy, and inexpensive determination of the action" (brackets supplied; internal brackets and punctuation omitted)); *Wersch*, 961 P.2d at 1050 (holding that "[t]he better interpretation of [Arizona's] Rule 68 is that it does not allow a party to nullify a summary judgment").