



ATLANTA - ALBANY - AUGUSTA
COLUMBUS - MACON - SAVANNAH

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Nathan C. Levy
nlevy@lsfslaw.com
229-854-4399

Phillip A. Sibley
psibley@lsfslaw.com
478-742-8300

Casey B. Foreman
cforeman@lsfslaw.com
229-449-7419

Kelly R. Speir
kspeir@lsfslaw.com
706-728-0896

John D. Blair
jblair@lsfslaw.com
229-854-7141

William R. Merchant
bmerchant@lsfslaw.com
706-442-0505

Austin M. Hammock
ahammock@lsfslaw.com
706-527-0901

Karen J. Gibson
kgibson@lsfslaw.com
478-960-5178

Kent J. Miller
kmiller@lsfslaw.com
770-561-4017

Taylor G. Martin
tmartin@lsfslaw.com
706-570-3000

Spenser L. West
swest@lsfslaw.com
224-828-0816

Of Counsel
R. Napier Murphy
nmurphy@lsfslaw.com
478-742-8300

James M. Elliott, Jr.
jelliott@lsfslaw.com
478-747-3399

SPECIFICITY MATTERS UNDER O.C.G.A. § 9-11-68

Austin M. Hammock
Associate, Litigation and Employment

No “Walk Away” Settlements with Statutory Offers Says Georgia Court of Appeals.

When Winning Isn’t Enough:

Plaintiffs consistently take the approach of “throw it all out, and see what sticks” when filing their complaint. While the issues typically are narrowed through the discovery process and/or through the filings of summary judgment motions, our insureds/clients still, at times, find themselves facing multiple causes of actions at trial. An increasingly common way Plaintiffs and Defendants alike, attempt to mitigate the ever-increasing costs of a trial is by making a statutory offer of settlement pursuant to O.C.G.A. § 9-11-68.

An offer made pursuant to O.C.G.A. § 9-11-68 has distinct advantages over a simple offer or counter-offer to a demand. Namely, if you meet the requirements of the statute (be in writing, identify the parties involved, identify the claim, state relevant conditions, state the amount, state any amount for punitive damages, state if attorney’s fees are included, include a certificate of service, and let the offer remain open for 30 days unless sooner rejected) and the plaintiff recovers less than 75% of that offer at trial, then you become entitled to reasonable attorney’s fees from the time of their rejection of that offer through trial. However, the Georgia Court of Appeals in Casemetrix LLC v. Sherpa Web Studios, Inc., No. A19A2072, 2020 Ga. App. LEXIS 74 (Ct. App. Feb. 20, 2020) reversed an award of attorney’s fees due to the language of the offer being ambiguous as to what claims the offer intended to settle.

O.C.G.A. § 9-11-68 (a) (3) provides that an offer made under this section must: “Identify generally the claim or claims the proposal is attempting to resolve.” While the statute clearly says **generally**, the court reversed the award on an offer that contained the following language, “This proposal attempts to resolve all pending claims of Plaintiff in the above-styled action, arising out of claims sounding in tort for lost data relating to a Workers’ Compensation database... This Offer of Settlement is to resolve **all claims** of Plaintiff for the sum of Thirty Thousand Dollars and 00/100 Cents (\$30,000.00). The relevant conditions of this offer are as follows: Upon receipt of the funds, Plaintiff shall file a Settlement, Satisfaction, and Dismissal with Prejudice as to all of Plaintiff’s claims.”

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The Court found that these terms were inconsistent with each other, thus creating an ambiguity as to what was being offered. This case involved both negligence (tort) claims and breach of contract claims, the latter of which O.C.G.A. § 9-11-68 does not apply (it only applies to tort claims). The Court noted that requiring the Plaintiff to dismiss the case in its entirety did not limit the offer to solely the tort claims involved. The Court also noted that because all sections didn't use the language "arising out of claims sounding in tort" and simply stated *all claims* that there was sufficient ambiguity to reverse the award of fees.

The Issue:

Defendants and the insurance companies who cover them usually foot the bill of litigation and prefer "total walk away" settlements. While this tactic is beneficial in routine settlement negotiations, it is potentially detrimental when making statutory offers. We often use the language "any and all" or phrases similar to "including, but not limited to, actual/plead and potential" when referencing the claims that we want resolved as part of any settlement. This ruling seems to disfavor such language when used as part of a statutory offer.

While it is important to note that not all lawsuits and not all claims encompass both contract and tort claims, many do. Further, many involve multiple counts of each. Take for instance, the all-too-common, property damage due to a trucking accident case. The owner of the property contracts for goods to be transported from point "A" to point "B" and the goods are then damaged en route due to an accident. The Plaintiff pleads negligence of the driver and also breach of contract for failing to deliver the goods and likely many other counts of negligence (i.e. respondeat superior for the defendant trucking company). When faced with situations like this it is important to not only be aware of which claims O.C.G.A. § 9-11-68 applies to, but also to ensure that you clarify the offer's terms to exclude any contract claims.

Solution(s):

Be specific. Do not be fooled by the word "generally" in the statute. Only include *tort* claims when making such offers. Make your offers of settlement as specific as you are comfortable with. Understand that this may mean, adjusting or offering a lesser settlement amount, as you could still be potentially facing a trial on other issues. In a perfect world, you would specifically lay out and include only the tort claims plead, preferably with references to the complaint, and accordingly adjust the settlement amount for those claims only. Naturally, this has its downsides, but is the most reliable method for having your statutory offer upheld when requesting attorney's fees after a favorable trial result.

An alternative solution would be to include a draft of the release you would like signed as an exhibit to the offer. While this will likely not get around the issue if you include contract claims in that release, it may be at least possible to have a plaintiff release tort claims not currently in suit. Including the release will, at a minimum, give the appearance of specificity. The Court in Casemetrix noted, "a word or phrase is ambiguous only when it is of uncertain meaning, and may be fairly understood in more ways than one. An ambiguity, then, involves a choice between two or more constructions of the contract." Western Pac. Mut. Ins. Co. v. Davies, 267 Ga. App. 675, 680 (1) (601 SE2d 363) (2004). The addition of the release itself may clarify terms or at least, give a trial judge grounds to say there is a certain meaning as to the terms of the offer.

Conclusion:

Due to most plaintiffs' approach of "sue everyone you can, for everything that may be possible," it is incumbent upon defendants and their insurance companies to ensure they understand the inner workings of O.C.G.A. § 9-11-68. It is vital, that *statutory offers* are only made for the tort claims plead and to specifically lay out each individual claim that is being released. This will make drafting statutory offers more tedious, but, in theory, the cost of this extra specificity will pay for itself from the attorney's fees provision of the statute when the offer is deemed valid.