

*Good Faith Raises Important Issues in Settlement Offers; In Practice The Daily Report
(Fulton County GA) (Online) October 29, 2013 Tuesday*

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The Daily Report (Fulton County GA) (Online)

October 29, 2013 Tuesday

LENGTH: 898 words

HEADLINE: Good Faith Raises Important Issues in Settlement Offers;
In Practice

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BODY:

An offer of settlement can be a powerful litigation tool. Under [O.C.G.A. § 9-11-68](#), if a litigant rejects a written offer to settle tort claims and subsequently obtains a verdict that is less favorable than the settlement offer, the litigant may be required to pay the other party's attorney fees. The purpose is to encourage settlement by creating an added financial risk.

Before this fee-shifting provision can be enforced, the trial court must determine that the offer of settlement was made in "good faith." The question of good faith often arises when there is an offer to settle for a nominal amount. Several recent Georgia decisions have held that nominal offers of settlements can trigger the fee-shifting provision.

Under the statute, at any time not less than 30 days before trial, a party to litigation (either the plaintiff or the defendant) may make an offer to settle any tort claim. The offer must meet certain procedural requirements (i.e., it must be in writing, specify the amounts offered and the claims being settled, etc.) and is deemed to remain open for 30 days, unless it is withdrawn or rejected.

If the offer is not accepted within 30 days (or rejected before the period expires) and the party rejecting the offer does not achieve certain threshold amounts, the party rejecting the offer can be liable for the other's attorney fees, provided the offer was made in "good faith."

There are different threshold amounts, depending on whether the offer was made by the plaintiff or the defendant. For instance, if the defendant rejects an offer, and the plaintiff obtains a judgment that is greater than 125 percent of the offer amount, the defendant can be liable for the plaintiff's attorney fees. Conversely, if the plaintiff rejects an offer, then fails to obtain a judgment that is at least 75 percent of the offer amount, the plaintiff can be liable for the defendant's attorney fees.

The trial court can refuse to apply the fee-shifting provision if the court determines that an offer was not made in "good faith." Several recent Georgia decisions have addressed this

requirement. In *Cohen v. Davis Academy*, a mother sued her child's school for slander and other related tort claims. The school offered the plaintiff \$750 to settle all claims under Sect. 9-11-68, which the plaintiff rejected. After the trial court granted summary judgment to the school on all claims, the school filed a motion to recover its attorney fees, which totaled over \$84,000. The trial court granted that motion.

On appeal, the plaintiff argued that the \$750 offer was not made in good faith because it was only a nominal amount and was only a small percentage of the attorney fees the school spent to defend the case.

The Court of Appeals of Georgia rejected both arguments. The court explained that "because [the school] reasonably and correctly anticipated that its exposure was minimal, the fact that it was willing to settle [the plaintiff's] claims for a nominal value does not demand a finding that the offer was made in bad faith."

The court also held that the amount of fees incurred by the school to defend the case was irrelevant to the issue of whether the amount of the offer was made in good faith.

In a subsequent decision, the Court of Appeals of Georgia found that a nominal offer of settlement was not made in good faith where it was not based on an assessment of potential liability. In *Great Western Casualty Co. v. Bloomfield*, the plaintiff filed a multimillion-dollar wrongful death claim against two truck drivers who the plaintiff alleged caused a car accident that killed the plaintiff's wife.

In the early stages, one defendant made a \$25,000 offer of settlement under Sect. 9-11-68, which the plaintiff rejected. The jury ultimately returned a verdict of no liability against the defendant who made the offer of settlement, but ordered the other defendant to pay over \$10 million in damages.

When the defendant who made the offer of settlement sought to recover its attorney fees, the plaintiff argued that the offer amount was not in good faith because it represented only a small percentage of the damages sought. Moreover, at the time of trial, that defendant made a subsequent settlement offer of \$1 million. The trial court agreed and disallowed the recovery of attorney fees.

The Court of Appeals affirmed (with dissents from Judges Gary Adams and Keith Blackwell) the trial court's determination that the \$25,000 offer of settlement was not made in good faith because it was not based on a realistic assessment of the defendant's liability. Specifically, at the time the defendant made the offer, it had not conducted any sort of detailed factual or legal analysis of the case that would have supported its assessment it had only nominal exposure in the case.

As these cases illustrate, nominal offers of judgment are not per se invalid. If the party making a nominal offer of settlement has an informed basis to believe that it has no liability (such as a legal argument that can dispose of the case on a dispositive motion), such an offer will likely be found to have been made in good faith.

On the other hand, nominal offers made without any factual or legal basis are unlikely to support an award of fees under Sect. 9-11-68. Before making a nominal offer of settlement, counsel for the party making an offer should conduct a thorough analysis of the case.