**Offers of Settlement O.C.G.A. § 9-11-68**

A. **The Statute**

§ 9-11-68. Offers of settlement; damages for frivolous claims or defenses

**(a)**  At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:

**(1)**  Be in writing and state that it is being made pursuant to this Code section;

**(2)**  Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

**(3)**  Identify generally the claim or claims the proposal is attempting to resolve;

**(4)**  State with particularity any relevant conditions;

**(5)**  State the total amount of the proposal;

**(6)**  State with particularity the amount proposed to settle a claim for punitive damages, if any;

**(7)**  State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and

**(8)**  Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by [Code Section 9-11-5](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=aa28af24-aa10-499b-90a2-bccfb43e0415&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5WRH-YDH1-FGRY-B2R2-00000-00&pdcontentcomponentid=6306&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=OCGA+%C2%A7+9-11-68&pdproductcontenttypeid=urn%3Apct%3A83&pdiskwicview=false&ecomp=1s39k&prid=8a6db805-9ecc-4bf3-9b91-7f0d4f39c219).

**(b)**

**(1)**  If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.

**(2)**  If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf from the date of the rejection of the offer of settlement through the entry of judgment.

**(c)**  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, but an offeror shall not be entitled to attorney's fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least 30 days (unless it is rejected during that 30 day period). A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under this Code section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and costs under this Code section.

**(d)**

**(1)**  The court shall order the payment of attorney's fees and expenses of litigation upon receipt of proof that the judgment is one to which the provisions of either paragraph (1) or paragraph (2) of subsection (b) of this Code section apply; provided, however, that if an appeal is taken from such judgment, the court shall order payment of such attorney's fees and expenses of litigation only upon remittitur affirming such judgment.

**(2)**  If a party is entitled to costs and fees pursuant to the provisions of this Code section, the court may determine that an offer was not made in good faith in an order setting forth the basis for such a determination. In such case, the court may disallow an award of attorney's fees and costs.

**(e)**  Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that **the finder of fact** determine whether the opposing party presented a frivolous claim or defense. In such event, the court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses. Under this subsection:

**(1)**  Frivolous claims shall include, but are not limited to, the following:

**(A)**  A claim, defense, or other position that lacks substantial justification or that is not made in good faith or that is made with malice or a wrongful purpose, as those terms are defined in [Code Section 51-7-80](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=aa28af24-aa10-499b-90a2-bccfb43e0415&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5WRH-YDH1-FGRY-B2R2-00000-00&pdcontentcomponentid=6306&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=OCGA+%C2%A7+9-11-68&pdproductcontenttypeid=urn%3Apct%3A83&pdiskwicview=false&ecomp=1s39k&prid=8a6db805-9ecc-4bf3-9b91-7f0d4f39c219);

**(B)**  A claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position; and

**(C)**  A claim, defense, or other position that was interposed for delay or harassment;

**(2)**  Damages awarded may include reasonable and necessary attorney's fees and expenses of litigation; and

**(3)**  A party may elect to pursue either the procedure specified in this subsection **or** the procedure specified in [Code Section 9-15-14](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=aa28af24-aa10-499b-90a2-bccfb43e0415&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5WRH-YDH1-FGRY-B2R2-00000-00&pdcontentcomponentid=6306&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=OCGA+%C2%A7+9-11-68&pdproductcontenttypeid=urn%3Apct%3A83&pdiskwicview=false&ecomp=1s39k&prid=8a6db805-9ecc-4bf3-9b91-7f0d4f39c219), but not both.

**B. Legislative History and Purpose**

“ [OCGA § 9-11-68](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=a13059b1-3297-4cd8-a124-1d57de16c6e1&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4NWP-0R50-TXFS-D1SV-00000-00&pdpinpoint=PAGE_77_3100&pdcontentcomponentid=6291&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=Fowler+Properties+v.+Dowland%2C+282+Ga.+76%2C+77+(1)+(646+SE2d+197)+(2007)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=1s39k&prid=e714d460-d69a-4759-895d-91f594c5fa6b) was enacted as part of the Tort Reform Act of 2005, Ga. L. 2005; it became effective on February 16, 2005, during the pendency of this litigation. The Code section was amended by Ga. L. 2006, p. 447, § 1/HB 239, effective April 27, 2006.” *Fowler Props. v. Dowland*, 282 Ga. 76 (2007).

“The clear purpose of this general law is to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation. See [OCGA §§ 9-11-68 (b) (1)](https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crid=6110df9e-8c74-4715-b5b7-ee714a0be04a&pdsearchwithinterm=purpose&ecomp=1s39k&prid=8da57424-2715-44c8-9299-358bcefb5a44), [(2)](https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crid=6110df9e-8c74-4715-b5b7-ee714a0be04a&pdsearchwithinterm=purpose&ecomp=1s39k&prid=8da57424-2715-44c8-9299-358bcefb5a44), [(d) (2)](https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crid=6110df9e-8c74-4715-b5b7-ee714a0be04a&pdsearchwithinterm=purpose&ecomp=1s39k&prid=8da57424-2715-44c8-9299-358bcefb5a44) (party rejecting a settlement offer may be liable for attorney's fees, but court may determine that an offer was not made in good faith and disallow an award of attorney's fees).” *Smith v. Baptiste*, 287 Ga. 23, 29 (2010).

**C. Potential Issues**

1. **Standard of Appellate Review** – A trial court's decision on whether a settlement offer was made in good or bad faith is reviewed for abuse of discretion. *Great West Cas. Co. v. Bloomfield*, 313 Ga. App. 180, 181 (2011).

2. The **motion for attorney’s fees** must be made within same term of court as the original judgment, but trial court may issue a decision in a different term of court. *Stevens v. Food Lion, LLC*, 341 Ga. App. 644, 646 (2017).

3. **A hearing is required**, but may be waived. “Although a party may waive a hearing expressly or by conduct, a timely objection to the motion ‘even without a specific request for a hearing, is generally sufficient to preclude a waiver by conduct of the right to an evidentiary hearing.’” *Richardson v. Locklyn*, 339 Ga. App. 457, 462-63 (2016)(discussing similar Florida statute).

*4.* **Reasonableness** of fees must be shown andtrial court must determine what portion of fees and expenses attributable to defense of the plaintiffs' claims versus its own counterclaims. *Canton Plaza, Inc. v. Regions Bank, Inc.*, 325 Ga. App. 361, 363-64 (2013).

5. **Court required to state in writing basis of finding of not good faith**. “Where a party is entitled to costs and fees under [OCGA § 9-11-68 (b) (1)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=e714d460-d69a-4759-895d-91f594c5fa6b&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A7Y2W-DC70-YB0P-N04C-00000-00&pdcontentcomponentid=6289&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=Great+West+Cas.+Co.+v.+Bloomfield%2C+303+Ga.+App.+26%2C+693+S.E.2d+99+(2010)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=1s39k&prid=167b1be6-eeeb-4fea-994a-1a587fbf2d18), the court may deny its request only upon a finding that the party's offer of settlement under that Code section was not a good faith offer. In such case, the court must set forth in its order the basis for finding that the offer was not a good faith offer.” *Great West Cas. Co. v. Bloomfield*, 303 Ga. App. 26, “””(emphasis added).

6. But, **Court need not make written findings when it determines an offer was made in good faith**. “By its terms, [OCGA § 9-11-68](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=33cd8fb0-c693-42d8-bd7d-b0225705e002&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5341-5931-F04F-T0W6-00000-00&pdcontentcomponentid=6289&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=Cohen+v.+Alfred+%26+Adele+Davis+Acad.%2C+Inc.%2C+310+Ga.+App.+761%2C+714+S.E.2d+350+(2011)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=1s39k&prid=855dfc9f-8eac-40c0-8d8d-d463a813c9b2) does not require that the trial court make written findings of fact or conclusions of law unless the court concludes that an offer was not made in good faith, and we decline to impose a requirement not mandated by the statute.” *Cohen v. Alfred & Adele Davis Acad., Inc.*, 310 Ga. App. 761, 764 (2011). **This is the opposite of the rule in OCGA § 9-15-14**, where no fees means no findings needed.

7. **Level of particularity needed for a condition in a settlement offer**

“Georgia enforces settlement agreements conditioned upon releases or other documentation even if the specific terms of those documents have not yet been established, so long as there is a meeting of the minds between the parties as to the essential terms of the settlement.” *Great West Cas. Co. v. Bloomfield*, 303 Ga’ App. 26, ?? (2010) (emphasis added).

Particularity **requirement not met**. *Chadwick v. Brazell*, 331 Ga. App. 373 (2015) (re: pending punitive damage claim).

**Ambiguity** of offer of settlement precludes application of statute. *Tiller v. RJJB Assocs., LLP*, 331 Ga. App. 622, 627 (2015).

8. **Such fees may be awarded in connection with consent judgments**. [*Strategic Law, LLC v. Pain Management & Wellness Centers of Georgia, LLC*, 343 Ga. App. 444 (2017)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=029417fb-04d7-4bbf-a7f1-7deda4978fbe&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5PTK-G151-F04F-T1M7-00000-00&pdcontentcomponentid=6289&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=Strategic+Law%2C+LLC+v.+Pain+Management+%26+Wellness+Centers+of+Georgia%2C+LLC%2C+343+Ga.+App.+444%2C+806+S.E.2d+880+(2017)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=1s39k&prid=855dfc9f-8eac-40c0-8d8d-d463a813c9b2); and **against the State in Tort Claim suits**. *Ga. Dep't of Corr. v. Couch*, 295 Ga. 469, 482 [(2014)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=35d1059e-c85c-4e72-949d-a9d846152c88&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A58N2-1BD1-F04F-T00S-00000-00&pdcontentcomponentid=6289&pdsearchoptionscontext=INTERDOCUMENT-LINK&pddoctitle=Ga.+Dep't+of+Corr.+v.+Couch%2C+322+Ga.+App.+234%2C+744+S.E.2d+432+(2013)&pdproductcontenttypeid=urn%3Apct%3A30&pdiskwicview=false&ecomp=1s39k&prid=855dfc9f-8eac-40c0-8d8d-d463a813c9b2)*.*

9. **Attorney’s fees and expenses may not be awarded** in connection with “settlement offers made during the course of arbitration.”  *Alessi v. Cornerstone Assocs*., 334 Ga. App. 490, 495 (2015).

**D. Important Cases**

1. *Smith v. Baptiste*, 287 Ga. 23 (2010) (constitutional).

2. *Richardson v. Locklyn*, 339 Ga. App. 457, 462-63 (2016), explicating both objective and other factors considered by Florida courts in determining offeror’s good faith in making an offer of settlement. Recognizing that Florida courts “have held that the burden is on the *offeree*, or the person seeking to avoid the payment of attorney fees, to prove the absence of good faith.”

3. *The Coastal Bank v. Rawlins*, 347 Ga. App. 847, 851 (2018). “In the context of a nominal offer, the trial court may consider objective factors including: (1) whether the offer bore no reasonable relationship to the amount of damages, (2) a realistic assessment of liability, or (3) that the offeror lacked intent to settle the claim. [Id. at 460](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=364d6a22-f9d4-4350-a868-94a93917305a&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5TKV-MWT1-JG02-S2PT-00000-00&pdcomponentid=6289&ecomp=s7xfk&earg=sr0&prid=829f4374-7787-433b-af03-6352d4e2bdd4). However, the trial court “cannot base a ruling exclusively on the objective factors” but is instead “required to consider the offeror's explanation and then determine whether, despite consideration of the objective factors … the offeror had a subjectively reasonable belief on which to base its offer.”