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CIVIL PRACTICE REFORM Civil Practice: Amend Article 3 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated, Relating to the "Civil Practice Act," so as to Change Provisions Relating to Civil Practice; Provide for the Appointment of Special Masters; Provide for Authority; Provide for Orders and Reports; Provide for Procedure; Provide for Compensation; Provide for a Stay of Discovery When a Motion to Dismiss Is Filed; Provide for Related Matters; Provide for Effective Dates and Applicability; Repeal Conflicting Laws; and for Other Purposes.

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## CIVIL PRACTICE REFORM

***Civil Practice: Amend Article 3 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated, Relating to the “Civil Practice Act,” so as to Change Provisions Relating to Civil Practice; Provide for the Appointment of Special Masters; Provide for Authority; Provide for Orders and Reports; Provide for Procedure; Provide for Compensation; Provide for a Stay of Discovery When a Motion to Dismiss Is Filed; Provide for Related Matters; Provide for Effective Dates and Applicability; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 9-11-12, 9-11-53 (amended)
BILL NUMBER:	SB 108
ACT NUMBER:	N/A
GEORGIA LAWS:	N/A
SUMMARY:	This Bill provided for a “loser pays” provision that the party losing on a motion to dismiss would be assessed the prevailing party’s attorney fees. The Bill also provides for a stay of discovery when a motion to dismiss is filed to ensure that the costly discovery process would not begin until the legal merits of a complaint have been tested. This legislation was originally introduced by the Governor to reduce frivolous law suits in Georgia and provide relief to those wrongly sued.
EFFECTIVE DATE:	N/A

### *History*

#### *Georgia’s 2005 Civil Justice Reform*

Governor Sonny Perdue’s floor leader, Senator Bill Cowsert (R-46th), introduced Senate Bill (SB) 108 as part of the Governor’s

continued efforts at tort reform.<sup>1</sup> Since his first term in the Georgia Senate, Governor Perdue has devoted a great deal of time and energy into reforming Georgia's civil justice system.<sup>2</sup> In 2005, the combined efforts on behalf of Governor Perdue, Georgia legislators, local public interest groups, and political action committees resulted in significant reform to Georgia's civil justice system.<sup>3</sup>

The Georgia legislature had civil justice reform on its agenda for several years before the 2005 legislative session; the reform efforts, however, focused primarily on healthcare litigation.<sup>4</sup> In April of 2004, Southeastern Legal Foundation held a conference on legal reform in Georgia.<sup>5</sup> This conference initiated group efforts of compromising pro-reformers in many sectors including the following four major organizations: the Southeastern Legal Foundation, the Georgia State Chamber, the Medical Association of Georgia, and the Georgia Hospital Association.<sup>6</sup> The group also included Representative Glenn Richardson (R-19th), who later became Speaker of the House.<sup>7</sup>

Proponents of the 2005 civil justice reform aimed to level the playing field for all participants.<sup>8</sup> On February 16, 2005, when Governor Perdue signed SB 3 into law,<sup>9</sup> SB 3 contained numerous provisions related specifically to the healthcare industry and some to

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1. See Press Release, The Office of Governor Sonny Perdue, Governor Perdue Introduces Tort Reform Legislation to Improve Business Environment, Protect Landowners (Feb. 6, 2009), available at [http://gov.georgia.gov/00/press/detail/0,2668,78006749\\_132830663\\_133093179,00.html](http://gov.georgia.gov/00/press/detail/0,2668,78006749_132830663_133093179,00.html); see also Interview with Josh Belinfante, Executive Counsel to the Governor (Apr. 7, 2009) [hereinafter Belinfante Interview].

2. See Belinfante Interview, *supra* note 1; see also SB 3, as passed, 2005 Ga. Gen. Assem.

3. See SB 3, as passed, 2005 Ga. Gen. Assem.; see also Hannah Yi Crockett, Rebecca McArthur, & Matthew Walker, *Review of Selected 2005 Georgia Legislation: Torts and Civil Practice*, 22 GA. ST. U. L. REV. 221 (2005).

4. Press Release, Southeastern Legal Foundation, Georgia Wins! Civil Justice Reform a Reality, Despite Trial Lawyers (Feb. 16, 2005), available at <http://www.southeasternlegal.org/default.aspx?page=1&release=363>.

5. *Id.*

6. *Id.*

7. *Id.*

8. Shannon L. Goessling, *Georgia Civil Justice Reform: A Business Primer, Part I*, ATLANTA BUS. CHRON. (Jan. 7, 2005).

9. State of Georgia Final Composite Status Sheet, SB 3, Feb. 16, 2005.

civil litigation in general.<sup>10</sup> The provisions relating to general civil litigation eliminated joint and several liability, provided for apportionment of fault, provided for offer of judgment in particular situations, strengthened expert witness rules, and allowed a co-defendant to move the case back to his home county if venue vanishes.<sup>11</sup> Not all pro-reform goals were achieved through SB 3, but there was no doubt that the reforms implemented were a major victory for supporters of civil justice reform in Georgia.<sup>12</sup>

### *Georgia's 2009 Civil Justice Reform*

At the commencement of the 2009 Georgia legislative session, Governor Perdue announced a civil justice reform package that included SB 101, SB 108, and SB 75.<sup>13</sup> The goal of Governor Perdue's second round of civil justice reform was "to improve Georgia's business environment" and to "make plain that the threat of meritless litigation is not a viable business strategy in Georgia."<sup>14</sup>

The 2009 civil justice reforms were spurred by the BIO International Conference, which Atlanta hosted in 2009,<sup>15</sup> and recognition that, despite the achievements of the pro-reformers in 2005, the problem of meritless claims had not been addressed.<sup>16</sup> Though the fairness and reasonableness of Georgia's civil justice system has improved since 2005, these ongoing issues are still of a great concern to many pro-reformers.<sup>17</sup>

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10. See SB 3, as passed, 2005 Ga. Gen. Assem.; see also Crockett, McArthur, & Walker, *supra* note 3.

11. See SB 3, as passed, 2005 Ga. Gen. Assem.; see also Press Release, Southeastern Legal Foundation, *supra* note 4.

12. Press Release, Southeastern Legal Foundation, *supra* note 4.

13. Press Release, The Office of Governor Sonny Perdue, *supra* note 1.

14. *Id.*

15. *Id.* The BIO International Conference did not implicate SB 108; however, it implicated SB 101, which was also part of Governor Perdue's 2009 tort reform package.

16. See Belinfante Interview, *supra* note 1.

17. The State Liability Systems Ranking Study conducted by the Harris Poll group ranked Georgia's liability system 39th and 28th in 2003 and 2008, respectively. See Goessling, *supra* note 8; see also INSTITUTE FOR LEGAL REFORM, 2008 STATE LIABILITY SYSTEMS RANKING STUDY, HARRIS POLL, GEORGIA (2008), available at <http://www.instituteforlegalreform.com/states/pdf/Georgia.pdf>. The study explores "how reasonable and balanced the tort system is perceived to be by U.S. business." INSTITUTE FOR LEGAL REFORM, 2008 STATE LIABILITY SYSTEMS RANKING STUDY, EXECUTIVE SUMMARY (2008),

The purpose of SB 108 was to “provide relief to individuals and companies wrongly sued” and to “free up [Georgia’s] courts to pursue justice in cases with merit, protect our existing businesses that provide jobs for Georgians[,] and attract new investment.”<sup>18</sup> SB 108 contained a loser pays provision as well as a discovery stay provision.<sup>19</sup> Though a version of the discovery stay provision eventually passed as part of House Bill 29,<sup>20</sup> the pro-reformers did not have the same luck with the loser pays provision.

### *Loser Pays Provision*

Supporters of the loser pays provision introduced in SB 108 wished to address what they viewed as a particular problem facing Georgia’s civil justice system, the problem of nuisance lawsuits. SB 108 limited the loser pays provision to only those cases dismissed pursuant to Code section 9-11-12(b) and provided for numerous exceptions.<sup>21</sup> It focused primarily on “allow[ing] the judiciary to sweep out unfounded lawsuits so that cases with merit can receive the court’s full attention and justice can be pursued.”<sup>22</sup> Supporters wanted attorneys to be more cautious by ensuring that there are proper grounds to support the lawsuit, that the right parties are being sued, that the suit is brought in the correct court, and that the defendant is adequately notified of the claim.<sup>23</sup>

The supporters of SB 108 argued that the current laws lack fairness and rarely provide relief for parties who are either wrongly sued or are defending against a meritless counterclaim.<sup>24</sup> Current law in Georgia provides that attorney’s fees *may* be assessed against a party that brings a claim, defense, or other position in which there is “a

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available at [http://www.instituteforlegalreform.com/component/ilr\\_harris\\_poll/30/lawsuitclimate/1.html](http://www.instituteforlegalreform.com/component/ilr_harris_poll/30/lawsuitclimate/1.html) (last visited Apr. 14, 2009).

18. Press Release, The Office of Governor Sonny Perdue, *supra* note 1.

19. See SB 108, as introduced, 2009 Ga. Gen. Assem.

20. See HB 29, as passed, 2009 Ga. Gen. Assem.

21. See SB 108, as introduced, 2009 Ga. Gen. Assem.

22. Press Release, The Office of Governor Sonny Perdue, *supra* note 1.

23. See *Lawmakers 2009* (GPTV broadcast, Feb. 11, 2009) (remarks by Sen. Bill Cowsert (R-46th)) (on file with the Georgia State University Law Review).

24. See generally Belinfante Interview, *supra* note 1.

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.”<sup>25</sup> Attorney’s fees *may* also be assessed against a party that brings or defends an action “that lacked substantial justification,” which is defined as “substantially frivolous, substantially groundless, or substantially vexatious.”<sup>26</sup> Further, when a plaintiff in a contract action “has specially pleaded . . . [that] the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense,” the jury may allow expenses of litigation.<sup>27</sup> Finally, “[a]ny person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another” will be liable for litigation expenses if that person acted with malice and without substantial justification.<sup>28</sup> Though opponents of the loser pays provision argued that these provisions are sufficient,<sup>29</sup> supporters of SB 108’s loser pays provision countered that the standard on Rule 12 motions in Georgia is extremely deferential to the non-moving party, much more so than the federal standards.<sup>30</sup> In Georgia, the party that asserts the 12(b) motion has the burden of proof.<sup>31</sup> In addition, when a motion to dismiss is filed, the court must construe all pleadings in favor of the party that filed the claim, and all doubts are resolved in that party’s favor.<sup>32</sup>

Finally, supporters argued that, ultimately, fairness dictated the inclusion of the loser pays provision into SB 108.<sup>33</sup> Supporters

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25. O.C.G.A. § 9-15-14(a) (2009).

26. *Id.* § 9-15-14(b).

27. *Id.* § 13-6-11.

28. *Id.* § 51-7-81.

29. Posting of Andy Peters to Atlanta Injury Lawyer Blog, [http://www.atlantainjurylawyerblog.com/2009/03/some\\_georgia\\_legislators\\_inten.html](http://www.atlantainjurylawyerblog.com/2009/03/some_georgia_legislators_inten.html) (Mar. 6, 2009) (“There are already five different loser-pays provisions in state law. This [bill] didn’t really add anything constructive, it just added another layer.”) (quoting Kenneth L. Shigley, Secretary of the Georgia State Bar).

30. See Belinfante Interview, *supra* note 1.

31. See *id.*; see also *Vibratech, Inc. v. Frost*, 291 Ga. App. 133, 135 (2008).

32. See Belinfante Interview, *supra* note 1; see also *Quetgles v. City of Columbus*, 264 Ga. 708 (1994).

33. See Belinfante Interview, *supra* note 1; see also Marie Gryphon, Manhattan Institute for Policy Research, *Greater Justice, Lower Cost: How a “Loser Pays” Rule Would Improve the American Legal System*, 11 CIV. JUST. REP. (Dec. 2008), available at [http://www.manhattan-institute.org/html/cjr\\_11.htm](http://www.manhattan-institute.org/html/cjr_11.htm).

believed if a party brings a claim that appears patently meritless to a judge, then the plaintiff who brought the meritless case should bear the costs of the action, not the wrongfully accused defendant.<sup>34</sup> Supporters further argued that because the provision is limited to claims that are dismissed pursuant to Code section 9-11-12(b), and because it contains exceptions for claims that exhibit substantial merit or were brought in good faith, the loser pays provision only affects those nuisance claims that are patently meritless.<sup>35</sup>

Despite the arguments of supporters, opponents of SB 108's loser pays provision argued that the provision is an "unnecessary, unfair, one-sided bill" that "will discourage attempts to resolve technical deficiencies in legitimate claims and will encourage 'gamesmanship' and manipulation of the legal system by corporate defendants."<sup>36</sup> The opponents' primary argument was that a loser pays provision will be a deterrent for people seeking redress from Georgia courts.<sup>37</sup> There is also a fear that the loser pays provision will deter potential plaintiffs from bringing suits against large corporations that have the resources to run up significant legal fees.<sup>38</sup>

Opponents of SB 108's loser pays provision also argued that it would most negatively impact small businesses and those in the middle class because "[t]he very rich can afford legal fees and poor plaintiffs, as a practical matter, will not have to pay either."<sup>39</sup> They argued that traditional "mom and pop" businesses, as well as middle class-Georgians, would be forced to choose between seeking redress in the courts and the possibility of bankruptcy if forced to pay the "steep fees corporate defense attorneys charge".<sup>40</sup>

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34. See Belinfante Interview, *supra* note 1.

35. See *id.*

36. Posting to The Cooper Firm Blog, SB 108—Victim Pays, <http://www.thecooperfirm.net/contents/view/news/120/sb-108-victim-pays.html> (Feb. 17, 2009 at 13:04 EST).

37. See Interview with Sen. Ed Tarver (D-22nd) (Mar. 20, 2009) [hereinafter Tarver Interview]; see also *Lawmakers 2009* (GPTV broadcast, Feb. 11, 2009) (remarks by Buck Rogers, Legislative Chairman for the Georgia Trial Lawyer's Association) (on file with the Georgia State University Law Review).

38. See Tarver Interview, *supra* note 37.

39. Posting of Robin Frazer Clark to the Atlanta Injury Lawyer Blog, Georgia Should Not Have a Victim's Pay Law—It Is Unfair to Every Georgian, [http://www.atlantainjurylawyerblog.com/2009/02/georgia\\_should\\_not\\_have\\_a\\_vict.html](http://www.atlantainjurylawyerblog.com/2009/02/georgia_should_not_have_a_vict.html) (Feb. 6, 2009).

40. *Id.*

Supporters counter-argued that, because the loser pays provision was limited to those claims that could not even survive a motion pursuant to Code section § 9-11-12(b), then the opportunity for defendants, regardless of size and resources, to drive up significant legal fees was practically non-existent.<sup>41</sup> In addition, the National Federation of Independent Business conducted a survey of its members in Georgia and 76% of those who responded supported the changes proposed in SB 108, including the loser pays provision.<sup>42</sup>

Opponents of SB 108's loser pays provision also argued that adequate protections against "so called 'frivolous' lawsuits" already exist."<sup>43</sup> Georgia already has "a well-settled standard for what is a meritorious claim and what is not a meritorious claim."<sup>44</sup> Opponents believed that SB 108 would have thrown out those standards and "replaced them with an embarrassingly sophomoric, double-negative laced definition, the origin of which is unknown and unprecedented."<sup>45</sup> Further, opponents argued that the contingency fee system acts as "a natural deterrent against claims with little-to-no merit."<sup>46</sup> Under a contingency fee system, the attorney examines the case closely before deciding to take it because the attorney fronts the entire cost of litigation and receives payment only upon winning the case.<sup>47</sup> Thus, the opponents argue, the attorney acts as a gatekeeper by refusing to file frivolous claims due to the high financial risk involved.<sup>48</sup> Supporters of loser pay provisions, in general, counter-argued that lawyers will still take cases which they never expect to win in court because of the high likelihood that the case will settle and they will profit from the settlement.<sup>49</sup>

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41. See Belinfante Interview, *supra* note 1.

42. David Raynor, *NFIB/Georgia News from the Gold Dome*, NFIB, Feb. 20, 2009, <http://www.nfib.com/tabid/598/Default.aspx?cmsid=48738&v=1>.

43. Posting to The Cooper Firm Blog, SB 108—Victim Pays, <http://www.thecooperfirm.net/contents/view/news/120/sb-108-victim-pays.html> (Feb. 17, 2009, 13:04 EST).

44. See Electronic Mail Interview with Darren Penn, Georgia Trial Lawyers Association (June 4, 2009) [hereinafter Penn Interview].

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Gryphon, *supra* note 33, at 5–6.



The fundamental difference between supporters and opponents of SB 108's loser pays provision can best be summarized by how each side characterized the provision: supporters referred to it as "loser pays," while opponents referred to it as "victim pays." Supporters believed that it would increase fairness in Georgia's civil justice system and make the state more attractive to businesses. Opponents believed that it would scare away individuals with valid claims as well as harm small businesses and middle-class Georgians.

### *Discovery Stay Provision*

The discovery stay provision introduced in SB 108 was not nearly as controversial as the loser pays provision and in the end was "crafted with the help of a bipartisan collection of legislator-lawyers."<sup>50</sup> The provision's primary goal was to "allow the court to determine if a lawsuit is meritless before a defendant has to begin the costly discovery process" and to "save our justice system time and money."<sup>51</sup> The discovery stay provision addressed both the problem of defendants' feeling forced into settlements during the infancy stages of the litigation process and the costs generated by the discovery process.<sup>52</sup>

The Georgia Rules of Practice and Procedure permit plaintiffs to file their discovery requests when they file their complaint.<sup>53</sup> At that point, a defendant has thirty days to answer the complaint.<sup>54</sup> Once the plaintiff has filed discovery requests, it is not uncommon for the plaintiff to call the defendant and try to settle using the estimated discovery costs as a ceiling for settlement. In this situation, defendants may feel strong-armed into a settlement agreement even though the judge may have yet to decide if the case involves the right parties, sits in the right court, or if the claim can withstand a motion

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50. SB 108, as introduced, 2009 Ga. Gen. Assem.; see also Belinfante Interview, *supra* note 1; Tarver Interview, *supra* note 37; Penn Interview, *supra* note 44.

51. Press Release, The Office of Governor Sonny Perdue, Governor Commends Passage of Tort Reform Legislation (Apr. 3, 2009), available at [http://gov.georgia.gov/00/press/detail/0,2668,78006749\\_136688711\\_137220224,00.html](http://gov.georgia.gov/00/press/detail/0,2668,78006749_136688711_137220224,00.html).

52. See Belinfante Interview, *supra* note 1.

53. See *id.*

54. O.C.G.A. § 9-11-12(a) (2009); see also *id.*

to dismiss pursuant to Code section 9-11-12(b)(6).<sup>55</sup> The idea behind the discovery stay provision was to give the judge the opportunity to decide any pending motions filed, pursuant to Code section 9-11-12(b)(6), before the defendant agrees to a settlement and before either party spends significant amounts on discovery.<sup>56</sup>

The discovery stay provision in SB 108 as introduced granted a discovery stay until the judge ruled upon the pending motion to dismiss.<sup>57</sup> Due to opposition in both the Senate and the House of Representatives, however, the discovery stay provision as passed in SB 29 only required that discovery be stayed for 90 days from when a motion to dismiss is filed.<sup>58</sup>

### *Bill Tracking of SB 108*

#### *Consideration and Passage by the Senate*

Senators Bill Cowser (R-46th), Chip Pearson (R-51st), Ralph Hudgens (R-47th), Bill Heath (R-31st), Judson Hill (R-32nd), and John Wiles (R-37th), respectively, sponsored SB 108.<sup>59</sup> The Senate read the bill for the first time on February 5, 2009.<sup>60</sup> The Senate President, Lieutenant Governor Casey Cagle, assigned SB 108 to the Senate Special Judiciary Committee.<sup>61</sup>

The bill, as originally introduced, required a party whose claim, counterclaim, cross-claim, or third-party claim was dismissed pursuant to Code section § 9-11-12(b) to “pay reasonable attorney’s fees and costs to the prevailing party.”<sup>62</sup> The bill contained three exceptions to this requirement: 1) if the claim was dismissed for insufficiency of process<sup>63</sup> or service of process<sup>64</sup> and the party bringing or alleging the dismissed claim acted with due diligence; 2)

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55. See Belinfante Interview, *supra* note 1.

56. *See id.*

57. *See* SB 108, as introduced, 2009 Ga. Gen. Assem.

58. *See* HB 29, as passed, 2009 Ga. Gen. Assem.

59. *See* SB 108, as introduced, 2009 Ga. Gen. Assem.

60. State of Georgia Final Composite Status Sheet, SB 108, Apr. 3, 2009.

61. *Id.*

62. SB 108, as introduced, 2009 Ga. Gen. Assem.

63. O.C.G.A. § 9-11-12(b)(4) (2009).

64. *Id.* § 9-11-12(b)(5).

if the claim was dismissed for lack of jurisdiction over subject matter,<sup>65</sup> lack of jurisdiction over the person,<sup>66</sup> improper venue,<sup>67</sup> failure to state a claim upon which relief can be granted,<sup>68</sup> or failure to join a party under Code section § 9-11-9,<sup>69</sup> and the claim exhibited “substantial merit” or a good faith attempt to establish a new theory of law in Georgia if that new theory is based on some recognized precedential or persuasive authority; or 3) the award would render a substantial injustice on the party being held liable for fees.<sup>70</sup> The bill specifically noted that substantial merit does not mean ‘not frivolous’ because a claim may not be frivolous and still may not have substantial merit.<sup>71</sup> The bill also required attorneys to provide notice of this code section to their clients and provided that failure to do so may result in the court’s imposing the attorney’s fees awarded against the noncompliant attorney.<sup>72</sup>

The bill also contained a provision that automatically stays discovery when a party files a motion to dismiss pursuant to Code section 9-11-12.<sup>73</sup> The discovery would be stayed “until the trial court rules on the motion” and would be limited to the challenged claims only.<sup>74</sup> If a party shows good cause,<sup>75</sup> then a “court may grant a motion for expedited discovery while the motion to dismiss is pending.”<sup>76</sup>

The Senate Special Judiciary Committee amended SB 108, removing all of the provisions relating to and requiring a party whose claim, counterclaim, cross-claim, or third-party claim is dismissed pursuant to Code section 9-11-12(b) to pay reasonable attorney’s fees and costs to the prevailing party.<sup>77</sup> There was little debate in the

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65. *Id.* § 9-11-12(b)(1).

66. *Id.* § 9-11-12(b)(2).

67. *Id.* § 9-11-12(b)(3).

68. *Id.* § 9-11-12(b)(6).

69. O.C.G.A. § 9-11-12(b)(7) (2009).

70. SB 108, as introduced, 2009 Ga. Gen. Assem.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (“[G]ood cause may include, but is not limited to, discovery needed because a witness will be unavailable during the discovery period or because a party is seeking an interlocutory injunction.”).

76. SB 108, as introduced, 2009 Ga. Gen. Assem.

77. SB 108 (SCS), 2009 Ga. Gen. Assem.

committee meeting regarding SB 108's "loser-pays" provision; however, Senator Cowsert noted the provision was removed because the Committee felt existing sections of the Georgia Code sufficiently provided judges with a loser pay option.<sup>78</sup> Josh Belinfante, Executive Counsel to the Governor, noted that there was a large amount of opposition to the loser pays provision from the plaintiff's bar.<sup>79</sup>

The Senate Special Judiciary Committee amended SB 108 to mirror House Bill 414.<sup>80</sup> The committee's substitute bill limited the days that discovery may be stayed to 120 days or until the court rules on the motion, whichever is shorter.<sup>81</sup> The committee's substitute bill added a provision that permitted the court to grant an extension to the 120-day limit via its own motion, by agreement of the parties, or by order of the court upon motion of a party to extend the stay for good cause.<sup>82</sup> In addition to the provision permitting a court to grant a motion for expedited discovery pursuant to a showing of good cause,<sup>83</sup> the committee substitute bill added a provision that automatically permits limited discovery if a motion to dismiss raises the defenses of lack of jurisdiction over the person,<sup>84</sup> improper venue,<sup>85</sup> or failure to join a party under Code section 9-11-19.<sup>86</sup> The committee substitute bill also added a provision requiring the court to rule on the motion to dismiss "during the time period in which such stay exists."<sup>87</sup>

The Senate Special Judiciary Committee favorably reported on the Senate Committee Substitute on March 4, 2009.<sup>88</sup> SB 108 was read for a second time on March 5, 2009, and for a third time on March

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78. Peters, *supra* note 29.

79. See Belinfante Interview, *supra* note 1; see also discussion *supra* History: Loser Pays Provision.

80. SB 108 (SCS), 2009 Ga. Gen. Assem.; HB 414, as introduced, 2009 Ga. Gen. Assem.

81. SB 108 (SCS), 2009 Ga. Gen. Assem.

82. *Id.*

83. *Id.*

84. O.C.G.A. § 9-11-12(b)(2) (2009).

85. *Id.* § 9-11-12(b)(3).

86. *Id.* § 9-11-12(b)(7); SB 108 (SCS), 2009 Ga. Gen. Assem.

87. SB 108 (SCS), 2009 Ga. Gen. Assem.

88. State of Georgia Final Composite Status Sheet, SB 108, Apr. 3, 2009.

10, 2009.<sup>89</sup> On the same day, the Senate passed SB 108 by a vote of 51 to 0.<sup>90</sup>

*Consideration by the House of Representatives*

The House of Representatives read SB 108 for the first time on March 12, 2009, and for the second time on March 17, 2009.<sup>91</sup> The Speaker of the House Glenn Richardson (R-19th) assigned it to the House Judiciary Committee.<sup>92</sup> In committee, further changes were proposed to broaden the scope of discovery permitted during the discovery stay and to address concerns regarding the effect of the bill on class action lawsuits.<sup>93</sup> First, the committee's substitute bill expanded the automatic grant of limited discovery during the discovery stay to include discovery needed to respond to a motion to dismiss based on insufficiency of process.<sup>94</sup> Second, the committee's substitute bill added paragraph (6) to clarify that provisions of this bill shall not modify or affect the provision relating to class actions in Code section 9-11-23(f)(2), which calls for the stay of all discovery directed at the merits of the claims and defenses until the court issues its decision on class certification.<sup>95</sup>

On March 20, 2009, the House Judiciary Committee favorably reported on the House Judiciary Committee Substitute.<sup>96</sup> On March 23, 2009, the House Rules Committee withdrew SB 108 from the calendar and recommitted it to the House Judiciary Committee at the request of Representative Wendell Willard (R-49th), Chairman of the House Judiciary Committee.<sup>97</sup> The Committee appended House Bill (HB) 73, which provided for the appointment of a special master

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89. *Id.*

90. Georgia Senate Voting Record, SB 108 (Mar. 10, 2009).

91. State of Georgia Final Composite Status Sheet, SB 108, Apr. 3, 2009.

92. State of Georgia Final Composite Status Sheet, SB 108, Apr. 3, 2009.

93. Video Recording of House Committee Proceedings, Mar. 19, 2009 at 1 min., 21 sec. (remarks by Rep. Mike Jacobs (R-80th)), [http://media.legis.ga.gov/hav/09\\_10/comm/judy/judy031909.wmv](http://media.legis.ga.gov/hav/09_10/comm/judy/judy031909.wmv) [hereinafter House Committee Video].

94. SB 108 (LC 21 0439S), 2009 Ga. Gen. Assem.; O.C.G.A. § 9-11-12(b)(5) (2009).

95. SB 108 (LC 21 0439S), 2009 Ga. Gen. Assem.; O.C.G.A. § 9-11-23(f)(2) (2009).

96. State of Georgia Final Composite Status Sheet, SB 108, Apr. 3, 2009.

97. *Id.*

upon the motion of any party, onto SB 108.<sup>98</sup> SB 108, with HB 73 appended, was thereafter favorably reported by the House Judiciary Committee on March 25, 2009.<sup>99</sup> On April 3, 2009, the House Rule Committee again withdrew SB 108 and recommitted it to the House Judiciary Committee.<sup>100</sup>

SB 108 did not make it through the House Judiciary Committee before the end of the 2009 legislative session.<sup>101</sup> The House Conference Committee, however, appended the discovery stay provision to HB 29 in the final hours of the 2009 legislative session.<sup>102</sup> The discovery stay provision appended to HB 29 reduced the amount of time that discovery may be stayed from 120 days to 90 days or until the court rules on the motion, whichever is shorter.<sup>103</sup> House Bill 29, with the discovery stay provision, passed the House of Representatives with a vote of 161 to 9<sup>104</sup> and the Senate with a vote of 45 to 8.<sup>105</sup> Thus, in summary, neither the loser pays provision nor the special master provision passed; however, an amended discovery stay provision did become law.

### *Analysis*

#### *Loser Pays Provision*

SB 108's loser pays provision did not pass, but its introduction is clearly an indication there are people who support further reform of Georgia's civil justice system. Governor Perdue will continue to serve in his office for one more year before retiring.<sup>106</sup> Whether he will introduce legislation to further reform Georgia's civil justice

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98. SB 108 (LC 29 3836S), 2009 Ga. Gen. Assem.

99. State of Georgia Final Composite Status Sheet, SB 108, Apr. 3, 2009.

100. See Georgia General Assem., SB 108, Bill Tracking, [http://www.legis.ga.gov/legis/2009\\_10/sum/sb108.htm](http://www.legis.ga.gov/legis/2009_10/sum/sb108.htm).

101. State of Georgia Final Composite Status Sheet, SB 108, Apr. 3, 2009.

102. *Id.*; see also HB 29, as passed, 2009 Ga. Gen. Assem.

103. HB 29, as passed, 2009 Ga. Gen. Assem.

104. Georgia House of Representatives Voting Record, HB 29 (Apr. 3, 2009).

105. Georgia Senate Voting Record, HB 29 (Apr. 3, 2009).

106. See James Salzer & Aaron Sheinin, *2010 Governor's Race Gets Off to a Fast Start*, ATLANTA J.-CONST., Apr. 12, 2009, available at [http://www.ajc.com/metro/content/metro/stories/2009/04/12/georgia\\_governor\\_race.html](http://www.ajc.com/metro/content/metro/stories/2009/04/12/georgia_governor_race.html).

system is yet to be seen and will depend on the Governor's priorities during the 2010 legislative session.<sup>107</sup> Due to the overwhelming negative response from trial attorneys during the 2009 legislative session, however, it is unlikely that a loser pays provision will pass in Georgia.

### *Discovery Stay Provision*

The discovery stay provision as passed in HB 29 is similar to the federal practice of tolling the commencement of discovery when a defendant files a motion to dismiss.<sup>108</sup> Thus, the discovery stay provision will bring Georgia's rules regarding motions to dismiss more in line with the federal rule. The primary difference between the two provisions being that HB 29's discovery stay provision is limited to 90 days, while the federal rule permits the discovery stay to continue until the judge rules on the motion.<sup>109</sup>

Supporters expect the discovery stay provision to reduce litigation costs to all parties involved, including the courts. Before HB 29, common practice in Georgia was for a plaintiff to file discovery requests along with his complaint. If the defendant believed that the claim did not satisfy the basic notice pleading requirements, jurisdictional requirements, or failed to state a claim, then he would file a motion to dismiss<sup>110</sup> and a motion for a protective order to stay discovery.<sup>111</sup> The discovery stay provision will eliminate the motion for protective orders and save the parties litigation costs associated with the filing of the protective order, the response to the order, and the time spent arguing the motion. Further, the court will save scarce judicial resources relating to hearing and ruling on the motion for the protective order.

Supporters also expect the discovery stay provision to reduce unnecessary discovery. It is not uncommon for a court to take a long

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107. See Belinfante Interview, *supra* note 1.

108. See FED. R. CIV. P. 12(a)(4); *Ritts v. Dealers Alliance Credit Corp.*, 989 F. Supp. 1475 (N.D. Ga. 1997).

109. HB 29, as passed, 2009 Ga. Gen. Assem.; see also FED. R. CIV. P. 12(a)(4).

110. O.C.G.A. § 9-11-12(b) (2009).

111. *Id.* § 9-11-26(c).

time to rule on a motion for a protective order or, alternatively, for a court not to issue a ruling at all.<sup>112</sup> During this time lag, it is common for attorneys to disagree as to whether discovery is stayed or not—plaintiff’s counsel may want to depose a defendant, but, because the motion is pending, defendant’s counsel refuses to oblige.<sup>113</sup> These disputes cause unnecessary controversy and increase the costs of litigation through unanticipated billable hours. The discovery stay removes the need for these disputes because, pursuant to the provision, neither party will be permitted discovery unless limited discovery is needed to respond to certain motions discussed in paragraph 4 of the provision.<sup>114</sup>

Supporters also expect the discovery stay provision to alleviate the pressures on the defendant to settle before discovery.<sup>115</sup> A plaintiff who believes he has a weak case may present a settlement offer to the defendant shortly after filing the complaint and original discovery requests, with the goal of settling before the defendant files an answer or motions to dismiss.<sup>116</sup> The settlement offer at this point will usually be slightly less than the anticipated discovery costs, based upon the initial discovery requests filed and the cost to file a response to the complaint.<sup>117</sup> Thus, the plaintiff puts the defendant in a difficult position—settle for less than your anticipated costs or file a motion to dismiss and we will revoke the settlement offer. In this scenario, HB 29’s discovery stay provision diminishes the plaintiff’s power to force the defendant into settling a weak case and grants the defendant the breathing room to file his motions to dismiss.

Opponents fear that the discovery stay will limit their ability to adequately represent their clients.<sup>118</sup> Georgia’s notice pleading requirements are more relaxed than the federal notice pleading requirements.<sup>119</sup> Thus, in Georgia, an attorney may not have a great

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112. See Belinfante Interview, *supra* note 1.

113. See *id.*

114. See *id.*; see also HB 29, as passed, 2009 Ga. Gen. Assem.

115. See Belinfante Interview, *supra* note 1.

116. See *id.*; see also Gryphon, *supra* note 33, at 6.

117. See Belinfante Interview, *supra* note 1; see also Gryphon, *supra* note 33, at 6.

118. See Tarver Interview, *supra* note 37.

119. See *id.*; compare O.C.G.A. § 9-11-11 (2009), with FED. R. CIV. P. 11.



deal of information before filing the complaint.<sup>120</sup> Before HB 29, a plaintiff's attorney could file the complaint and immediately file discovery requests.<sup>121</sup> Under the discovery stay provision, the plaintiff's attorney may have to wait more than 90 days to commence discovery.<sup>122</sup> Opponents argue that this will delay redress for their client's injuries and limit their ability to adequately represent their client.<sup>123</sup>

In summary, Governor Perdue's 2009 tort reform package did not see the same success as his 2005 tort reform package. Although supporters view a loser pays system as one that eliminates allegedly frivolous lawsuits, opponents view loser pays as a means to keep plaintiffs out of the courtrooms. This continuous and highly politicized debate resulted in a quick death to the loser pays provision in SB 108. However, through bipartisan efforts, legislators included a discovery stay provision in HB 29, which brought Georgia's discovery stay practices in line with the federal rules.

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120. See Tarver Interview, *supra* note 37.

121. O.C.G.A. § 9-11-26(c) (2009).

122. HB 29, as passed, 2009 Ga. Gen. Assem.

123. Tarver Interview, *supra* note 37.