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Torts General Provisions: Change Provisions Relating to the Establishment of Liability and Standard of Care in Certain Actions Relating to Emergency Health Care; Change Provisions Relating to Agency Liability of Hospitals; Change Provisions Relating to Apportionment of Award According to Degree of Fault; Create Provisions Related to Apportioning Damages in Certain Malpractice Actions; Limit Noneconomic Damages in Certain Actions Relating to Health Care; Provide for Payment Over Time of Certain Future Damages in Certain Actions; and for Other Purposes

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TORTS AND CIVIL PRACTICE

Civil Practice and Procedure Generally: Change Provisions Relating to Venue in Actions with Joint Defendants; Provide That Courts of This State May Under Certain Circumstances Decline to Decide Cases Under the Doctrine of Forum Non Conveniens; Change Provisions Relating to Affidavits Accompanying Charges of Professional Malpractice; Provide for Defendants' Access to Plaintiffs' Health Information in Medical Malpractice Cases; Provide for Offers of Judgment and the Effect Thereof; Provide New Procedures for Damages for Frivolous Claims and Defenses. Torts General Provisions: Change Provisions Relating to the Establishment of Liability and Standard of Care in Certain Actions Relating to Emergency Health Care; Change Provisions Relating to Agency Liability of Hospitals; Change Provisions Relating to Apportionment of Award According to Degree of Fault; Create Provisions Related to Apportioning Damages in Certain Malpractice Actions; Limit Noneconomic Damages in Certain Actions Relating to Health Care; Provide for Payment Over Time of Certain Future Damages in Certain Actions; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 9-10-31 (amended), 9-10-31.1 (new), 9-11-9.1 (amended), 9-11-9.2 (new), 9-11-68 (amended), 24-3-37.1 (new), 24-9-67 (amended), 24-9-67.1 (new), 33-3-27 (amended), 43-34-37 (amended), 51-1-29.5 (new), 51-2-5.1 (new), 51-12-31 (amended), 51-12-33 (amended), 51-13-1 (new)
BILL NUMBER:	SB 3
ACT NUMBER:	1
GEORGIA LAWS:	2005 Ga. Laws 1
SUMMARY:	The Act provides for civil justice reform in Georgia, amending Titles 9, 24, 33, 43, and 51 of the Official Code of Georgia Annotated. The Act addresses venue for cases involving

joint defendants and the doctrine of forum non conveniens. It also amends procedures relating to affidavits in professional malpractice cases by requiring that the plaintiff file, with the complaint, an affidavit of an expert competent to testify. In addition, the Act also requires authorizing the release of the plaintiff's medical information in medical malpractice cases. The Act further provides guidelines associated with offers of settlement and the reduction of frivolous lawsuits. Moreover, the Act provides that courts shall not admit certain statements of apology or similar statements by health care providers as evidence in civil actions. It also changes the standards of expert testimony and expert witness qualification. The Act requires reporting instances of medical malpractice judgments and settlements and provides for investigations and remedial actions with respect to physicians' fitness to practice. Further, the Act addresses liability in the emergency room context and liability involving independent contractors. It also eliminates joint and several liability in favor of apportionment of damages according to degree of fault. The Act also provides a cap on noneconomic damages in certain actions relating to health care and allows for periodic payments over time. The Act concludes by providing for severability, designating an effective date, and repealing conflicting laws.

EFFECTIVE DATE: February 16, 2005

History

Tort reform is one of the most polarizing and controversial issues that society faces today.[1] Year after year, opposing sides set the battlefield and draw the lines.[2] States throughout the country have struggled with the issue.[3] The controversy pits Republicans against Democrats, doctors against lawyers, and business advocates against consumer advocates.[4]

In Georgia, the issue divides not only along party lines but also within them.[5] In 2004, as in previous years, the Georgia Legislature unsuccessfully attempted to pass tort reform.[6] In 2004, the focus of HB 1028 was specifically on medical malpractice.[7] It would have given rural hospitals the ability to self-insure, provided limited liability associated with independent contractors, and eliminated joint and several liability.[8] The bill ultimately failed in Conference Committee over the issue of caps on noneconomic damages.[9]

The same players came to the table during the 2005 legislative session for consideration of SB 3.[10] Lawmakers heard many views throughout the lengthy process—over 20 combined hours of testimony from both chambers.[11] Many claimed Georgia needed tort reform due to the ever increasing medical malpractice insurance

1. Sonji Jacobs, *Panel Weighs Malpractice Issue; Tort Reform Would Cap Injury Awards*, ATLANTA J. CONST., Jan. 25, 2005, at B1.

2. *See id.*

3. *See* Douglas Heller & Allison Wall, *'Cap' Cheats Patients and Doctors*, ATLANTA J. CONST., Feb. 3, 2005, at A15.

4. *See id.*; Greg Bluestein, *More Get in on the Tort Reform Act*, FULTON COUNTY DAILY REP., Jan. 26, 2005, at 26; Bill Rankin, *LEGISLATURE '05: THE BIG ISSUES: Malpractice Fight Renewed; As Republicans Take Over House, Doctors, Lawyers Prepare to Slug it Out Again Over Jury Awards and Medical Liability*, ATLANTA J. CONST., Jan. 2, 2005, at C1.

5. Rankin, *supra* note 4.

6. *Id.*

7. *Review of Selected 2004 Georgia Legislation*, 21 GA. ST. U. L. REV. 178, 182-94 (2004).

8. *Id.*

9. *Id.*

10. Bluestein, *supra* note 4; Greg Bluestein, *Bar Won't Budge on Tort Reform*, FULTON COUNTY DAILY REP., Jan. 19, 2005, at 19; Rankin, *supra* note 4.

11. *See* Audio Recording of Senate Proceedings, Feb. 1, 2005, http://www.georgia.gov/00/article/0,2086,4802_6107103_33091490,00.html [hereinafter Senate Audio]; Audio Recording of House Proceedings, Feb. 10, 2005, http://www.georgia.gov/00/article/0,2086,4802_6107103_33078458,00.html [hereinafter House Audio]; Greg Bluestein, *Damages Caps Divide House GOP*, FULTON COUNTY DAILY REP., Feb. 8, 2005, at 8.

premiums resulting from large jury awards and settlements.[12] Specifically, the Medical Association of Georgia feared that without tort reform, they would not be able to attract and retain an adequate number of doctors to sustain the state's needs.[13] Additionally, the Georgia Chamber of Commerce believed that "tort reform would translate into a better business climate" for the state.[14] In particular, the National Federation of Independent Business felt that with civil justice reform, small businesses would be less of a target for trial lawyers.[15]

While many voiced the need for civil justice reform, opponents saw tort reform as coming at too great a cost.[16] The opponents argued tort reform will restrict access to the courts and deny victims the right to compensation for their injuries.[17] Further, they claimed tort reform will hinder wrongdoers' accountability for their acts.[18] They also argued that while many other states have enacted tort reform legislation, the overwhelming majority have not seen a reduction in insurance premiums.[19]

Bill Tracking of SB 3

Consideration by the Senate

Senators Preston Smith, Eric Johnson, Mitch Seabaugh, Bill Stephens, and William Hamrick of the 52nd, 1st, 28th, 27th, and 30th districts, respectively, sponsored SB 3.[20] The Senate first read the bill on January 11, 2005, and the Senate Judiciary Committee favorably reported the bill, by substitute, on January 28, 2005.[21]

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12. Jay Bookman, *For Cruelty, Malpractice Cap Tops All*, ATLANTA J. CONST., Feb. 14, 2005, at A11.
13. Bluestein, *supra* note 4.
14. *Id.*
15. *Id.*
16. *See* discussion *infra* notes 16-18.
17. Rankin, *supra* note 4.
18. Bluestein, *supra* note 4.
19. Weiss Ratings, Inc., *The Impact of Noneconomic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*, June 3, 2002, http://www.weissratings.com/malpractice.asp.
20. *See* SB 3, as introduced, 2005 Ga. Gen. Assem.
21. *See* State of Georgia Final Composite Status Sheet, SB 3, Jan. 11, 2005 (May 11, 2005); State of Georgia Final Composite Status Sheet, SB 3, Jan. 28, 2005 (May 11, 2005).

The Bill, As Introduced

As introduced, SB 3 would have amended Titles 9, 24, and 51 of the Official Code of Georgia Annotated.[22] Lawmakers proposed to amend various civil procedure rules, evidence rules, and tort laws.[23] Its sponsors introduced the bill as a response to the rising cost of hospital and medical liability insurance while also addressing the need for general reform regarding civil actions.[24]

Section 2 of the bill, as introduced, replaced Code section 9-10-31 and inserted in its place a revised section 9-10-31 and the new section 9-10-31.1, which addressed venue in cases with joint defendants.[25] The proposed section allows plaintiffs to bring a case in a jurisdiction where one of the defendants resides, but it permits transferring the case to an appropriate venue if the plaintiff drops that defendant from the suit.[26]

As introduced, section 3 of the bill focused on expert testimony in professional malpractice cases.[27] It amended Code section 9-11-9.1 by requiring contemporaneous filings of affidavits in all circumstances without exception.[28]

As introduced, section 4 of the bill created new Code section 9-11-9.2, requiring contemporaneous filing of a medical authorization form with the complaint in medical malpractice actions.[29] The authorization allows the attorneys representing the defendant "to obtain and disclose protected health information" from medical records, except privileged information, to assist in "the investigation, evaluation, and defense of . . . allegations set forth in the complaint."[30] The authorization allows "the defendant's attorney [the] right to discuss the care and treatment of the plaintiff . . . with the plaintiff's . . . physicians."[31] Failure to attach this authorization can result in dismissal of the suit.[32]

22. SB 3, as introduced, 2005 Ga. Gen. Assem.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. SB 3, as introduced, 2005 Ga. Gen. Assem.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

Section 5 of the bill, as introduced, proposed the addition of Code section 9-15-16, which would penalize either the plaintiff or the defendant for rejecting a reasonable offer of judgment by requiring them to pay the opposing party's attorney's fees.[33] The bill provided specific instructions for offer of judgment procedures by setting out offer requirements and adding separate penalty provisions for defendants and plaintiffs.[34] One provision states:

> if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by him or her or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.[35]

The bill also provided specific language relating to the plaintiff by requiring that:

> [i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount of at least 25 percent greater than the offer, he or she shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.[36]

In addition, the bill provided a "bad faith" exception allowing the court to determine whether to impose the penalty.[37]

33. *Id.*
34. SB 3, as introduced, 2005 Ga. Gen. Assem.
35. *Id.*
36. *Id.*
37. *Id.*

Section 6 added Code section 24-3-37.1 relating to the admissibility of admissions by health care providers. The section provided:

> any and all statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, fault, or a general sense of benevolence which are made by a health care provider or an employee or agent of a health care provider to the patient, a relative of a patient, or representative of the patient [relating] to the unanticipated outcome shall be inadmissible as evidence . . . [38]

Section 7 completely replaced Code section 24-9-67.[39] The new section codified the *Daubert* standard for the admissibility of expert testimony, and in professional malpractice actions, it provided that expert opinions regarding the appropriate standard of care is admissible only if the expert holds a proper state license.[40] Additionally, in medical malpractice actions, the section required that the expert has "actual professional knowledge and experience in the area of practice or specialty" and regularly engages in active practice in that area for a specified amount of time prior to the action, taught in the specific area of practice at least part-time at an accredited teaching institution, or "any combination of the active practice or the teaching . . . for at least three of the last five years."[41]

Section 8 added new Code section 51-1-29.5, which addressed the special nature of the emergency room environment.[42] The section required plaintiffs to prove "willful or wanton misconduct" in order to recover for noneconomic damages in that setting.[43] These limitations to liability did not apply to any act or omission while rendering care or assistance unrelated to the original medical condition that occurs 24 hours after the hospital began giving such

38. *Id.*
39. *Id.*
40. SB 3, as introduced, 2005 Ga. Gen. Assem.; *see generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
41. SB 3, as introduced, 2005 Ga. Gen. Assem.
42. *Id.*
43. *Id.*

care.[44] Additionally, the limitations did not apply to any act or omission during the rendering of care to a pregnant woman in active labor or who has previously received prenatal care from that hospital for that pregnancy.[45]

Section 9 provided new Code section 51-2-5.1, which limited hospital liability to actions of their agents and employees, provided specific guidelines hospitals must follow to inform the public to relieve liability from actions of independent contractors, and required patients to sign a waiver relating to limiting such liability.[46] The bill set forth factors for determining whether someone is an agent or independent contractor for liability purposes.[47]

Section 10 replaced Code section 51-12-31, providing that in a case brought against several joint tortfeasors, a plaintiff may only recover damages against a defendant who was actually liable for the injury.[48] The bill also replaced Code section 51-12-33 with a new section requiring the fact-finder to determine the percentage of negligence of the plaintiff and to reduce the amount of damages in proportion to that negligence.[49] Additionally, the fact-finder will apportion the damages among the defendants who are actually liable according to the degree of fault for each party, thus eliminating joint and several liability and any right of contribution.[50] Further, if the plaintiff is 50% or more liable, the bill eliminates the plaintiff's ability to recover any damages.[51]

Section 11 added a new Chapter 13, capping noneconomic damages at $250,000 regardless of the number of health care providers involved.[52] Additionally, it provided a $500,000 cap for medical facilities regardless of the total number of defendant medical facilities.[53] Thus, the aggregate amount of noneconomic damages could not exceed $750,000.[54]

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44. *Id.*
45. *Id.*
46. *Id.*
47. SB 3, as introduced, 2005 Ga. Gen. Assem.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. SB 3, as introduced, 2005 Ga. Gen. Assem.
54. *Id.*

Section 12 provided for an effective date of July 1, 2005 and made retroactive all actions not arising under Code sections 51-12-31, 51-12-33, and 51-13-1.[55]

Senate Committee Substitute

The Senate Committee substitute greatly modified the bill.[56] First, it amended Titles 33 and 43.[57] Additionally, where section 2 of the bill as introduced allowed the plaintiff to select the venue when there were two or more defendants, the substitute required the court to make that determination.[58]

Section 3, addressing affidavits, originally required a defendant to file a motion to dismiss with the original responsive pleading.[59] The substitute allowed that filing on or before the close of discovery.[60]

In section 5, the Committee substitute changed the language used in the explanation of the penalty provision by substituting "offeror" and "offeree" instead of specifically referring to the plaintiff and defendant.[61] Additionally, it created a standard for nonmonetary claims that are more favorable than the last offer.[62] It also added that any offer must remain open for 30 days.[63] If an offer is withdrawn before that time, the penalty provision does not apply.[64] The section also allowed the prevailing party to move for the fact-finder to determine, in a separate hearing, whether the opposing party presented a frivolous claim or defense and whether to impose damages.[65] The substitute then eliminated the factors for determining the reasonableness of awarding attorney's fees.[66]

The substitute eliminated "fault" from section 6 and replaced it with "mistake" and "error."[67]

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55. *Id.*
56. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3, as introduced, 2005 Ga. Gen. Assem.
57. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3, as introduced, 2005 Ga. Gen. Assem.
58. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3, as introduced, 2005 Ga. Gen. Assem.
59. SB 3, as introduced, 2005 Ga. Gen. Assem.
60. SB 3 (SCS), 2005 Ga. Gen. Assem.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3, as introduced, 2005 Ga. Gen. Assem.
67. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3, as introduced, 2005 Ga. Gen. Assem.

Under section 7, the substitute provided that a doctor of osteopathy can testify regarding the standard of care of a medical doctor and vice versa.[68] Additionally, an expert who is a physician can testify regarding the standard of care of nurses as long as he has supervised, taught, or instructed nurses in three of the past five years, but nurses cannot testify as to the standard of care of the doctor.[69] Section 7 also specifically provided that when interpreting this Code section, courts are to draw on Supreme Court rulings, such as *Daubert*, and other federal precedent.[70]

The substitute added a new section 8 to the bill, requiring every medical malpractice insurer to notify the Composite State Board of Medical Examiners when it pays a judgment or enters into an agreement, regardless of dollar amount, within 30 days of payment.[71]

The substitute added a new section 9 to the bill which amended Code section 43-34-37, requiring the Board to investigate any doctors involved in medical malpractice cases with judgments or settlements in excess of $100,000.[72] Additionally, the Board will assess the licensee's fitness to practice medicine if the Board disciplined the licensee three times in the last ten years as a result of a medical malpractice action.[73]

The substitute then took section 8 of the bill as introduced and renamed it section 10.[74] That section expanded the limitation beyond purely noneconomic damages to include all damages.[75] Additionally, it required the fact-finder to determine whether the service provider met the standard of care and gave factors to use in making that determination.[76] The substitute also eliminated the provision that limited liability relating to specific circumstances.[77] Further, it changed the standard of proof from "preponderance of the evidence" to "clear and convincing."[78]

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68. SB 3 (SCS), 2005 Ga. Gen. Assem.
69. *Id.*
70. *Id.*; *see generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).
71. SB 3 (SCS), 2005 Ga. Gen. Assem.
72. *Id.*
73. *Id.*
74. *Compare id.*, *with* SB 3, as introduced, 2005 Ga. Gen. Assem.
75. SB 3 (SCS), 2005 Ga. Gen. Assem.
76. *Id.*
77. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3, as introduced, 2005 Ga. Gen. Assem.
78. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3, as introduced, 2005 Ga. Gen. Assem.

The substitute changed section 12 by allowing the consideration of all involved in the event, even nonparties, in apportioning fault.[79]

The Committee amended section 13 to exclude earning capacity and domestic and other necessary services performed without compensation from the definition of noneconomic damages.[80]

The substitute added a new section 14 providing that if any section is struck down as unconstitutional, the remaining provisions will remain in full force.[81]

The substitute changed the effective date from July 1, 2005 to the day the Governor signed the bill. It also included sections 51-1-29.5 and 51-2-5.1 to the list of sections not affected by the retroactivity provision.[82]

Senate Motion and Debate to Engross

Senator Preston Smith, the bill's sponsor, strongly encouraged engrossing the bill because "[e]xperience has taught us that there are certain bills that are not well perfected on the floor of the Senate."[83] He recounted what happened to the prior year's tort reform bill: 163 pages of amendments clogged the Senate floor with debate and destroyed the bill.[84] He then urged his fellow senators to take a different approach and engross this year's bill.[85] Several senators strongly opposed engrossing such a highly contentious bill and felt they should debate more.[86] They noted that engrossment is a rare congressional action, especially on a controversial bill of such high importance.[87] The Senate voted 29 to 25 to engross the bill.[88] As a result of the engrossment, the Senate floor did not hear several proposed amendments, including a substitute.[89]

79. SB 3 (SCS), 2005 Ga. Gen. Assem.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Senate Audio, *supra* note 11 (remarks by Sen. Preston Smith).
85. *Id.*
86. *See id.* (remarks by Sens. Robert Brown, Steve Thompson, & David Adelman).
87. *Id.*; *see also* Interview with Sen. Kasim Reed, Senate District No. 35 (Apr. 13, 2005) [hereinafter Reed Interview] ("[E]ngrossing a bill as important as this piece of legislation was cowardly and I think it was particularly thoughtless, considering how substantial the impact is of this bill.").
88. Georgia Senate Voting Record, SB 3 (Feb. 1, 2005).
89. *See* Reed Interview, *supra* note 87.

Senate Floor Debate

During the floor debate, a number of senators spoke in support and in opposition of the bill.[90] The bill's sponsor, Senator Preston Smith of the 52nd district, introduced the bill.[91] He provided a section by section analysis, discussed the major policy initiatives in Georgia, and addressed various questions from the floor regarding the effect caps would have on Georgia citizens' access to legal representation and the perceived discriminatory nature of a noneconomic cap.[92] Senator Smith indicated that he primarily supported the bill in an effort to increase overall access to quality health care.[93]

Senator Judson Hill of the 32nd district gave a narrative of his personal experiences resulting from medical malpractice, yet he still rose in support of the bill: "We as leaders must weigh the needs of the many while considering the needs of a few."[94] Later, Senator Tommie Williams of the 19th district spoke in support of the bill due to his belief that the current medical crisis is forcing doctors to practice "defensive medicine" instead of focusing on what is best for the patient.[95] Senator John Wiles of the 37th district spoke in favor of the bill by focusing on the effect of tort reform in other states and the need to reduce frivolous lawsuits.[96] Finally, Senator Don R. Thomas of the 54th district spoke in favor of the bill based on the need to retain specialized physicians and help small businesses.[97]

Various senators also rose in opposition of the bill.[98] Senator Steve Thompson of the 33rd district opposed the bill because he did not believe a health care crisis existed or that a cap would lower insurance premiums.[99] Senator Gloria Butler of the 56th district spoke against the bill because she believed in holding people accountable for their actions and maintaining access for redress.[100]

90. *See* Senate Audio, *supra* note 11.
91. *Id.* (remarks by Sen. Preston Smith).
92. *Id.*
93. *Id.*
94. *Id.* (remarks by Sen. Judson Hill).
95. *Id.* (remarks by Sen. Tommie Williams).
96. *See* Senate Audio, *supra* note 11 (remarks by Sen. John Wiles).
97. *See id.* (remarks by Sen. Don R. Thomas).
98. *See id.* (remarks by Sens. Steve Thompson, Gloria Butler, Kasim Reed, & Emanuel Jones).
99. *See id.* (remarks by Sen. Steve Thompson).
100. *See id.* (remarks by Sen. Gloria Butler).

Senator Kasim Reed of the 35th district spoke out against SB 3 because he believed caps would deny access to the legal system and competent legal representation.[101] He also expressed his view that there are very few unwarranted, excessive jury verdicts.[102] He identified California as a state where tort reform had failed to reduce insurance premiums, arguing that insurance reform was the only answer to the issue of high premiums.[103] Senator Emanuel Jones of the 10th district favored tort reform, but he implored the Senate to consider SB 36 instead of SB 3 because SB 36 provided for equal protection while also providing equal access to affordable health care.[104] Finally, Senator Preston Smith closed the debate by stressing the need to consider the practical reality instead of focusing on an ideal solution.[105] The Senate passed SB 3 by a vote of 39 to 15.[106]

Consideration by the House

The House first read SB 3 on February 3, 2005.[107] Although Speaker Glenn Richardson split the House Judiciary Committee into two groups at the beginning of the session for the sake of efficiency, ultimately the Speaker assigned the bill to a Special Committee on Civil Justice Reform instead of the House Judiciary Committee.[108] The House read SB 3 for the second time, and the Committee favorably reported on February 7, 2005.[109] The House read the bill for the third time and passed it on February 10, 2005.[110]

101. *See id.* (remarks by Sen. Kasim Reed).
102. *See* Senate Audio, *supra* note 11 (remarks by Sen. Kasim Reed).
103. *See id.*
104. *See id.* (remarks by Sen. Emanuel Jones).
105. *See id.* (remarks by Sen. Preston Smith).
106. Georgia Senate Voting Record, SB 3 (Feb. 1, 2005).
107. State of Georgia Final Composite Status Sheet, SB 3, Feb. 3, 2005 (May 11, 2005).
108. State of Georgia Final Composite Status Sheet, SB 3, Feb. 3, 2005 (May 11, 2005); Greg Bluestein, *New Judiciary Leaders Gear Up for Next Round on Tort Reform*, FULTON COUNTY DAILY REP., Jan. 12, 2005, at 12.
109. *See* State of Georgia Final Composite Status Sheet, SB 3, Feb. 7, 2005 (May 11, 2005).
110. *See* State of Georgia Final Composite Status Sheet, SB 3, Feb. 10, 2005 (May 11, 2005).

House Committee Substitute

Under section 2, the House Committee resurrected the vanishing venue provision and codified forum non conveniens.[111] Under section 3, the House Committee added audiologists and speech language pathologists as professions to which the code section applies.[112] Under section 5, the House Committee limited the offer of judgment provision to tort claims for money, eliminated the nonmonetary relief, and required service by certified mail.[113] Under section 7, the House Committee provided for the admissibility of all expert opinions in criminal actions by inserting Code section 24-9-67 and moving the Senate's codification of *Daubert* to Code section 24-9-67.1.[114] Under section 10, the House Committee added additional definitions to the emergency room provision, took out the provision covering an unborn child, and listed different examples of the factors needed to determine whether the health care provider met the standard of care.[115] Under Section 11, the House Committee added audiologists and speech pathologists to the list defining health care professionals.[116]

House Floor Debates and Amendments

Prior to the third reading of the bill, representatives gave four floor amendments to the members of the House.[117] Speaker Glenn Richardson of the 19th district and Representative Earl Ehrhart of the 36th district proposed Amendment 1 to the Committee substitute.[118] This amendment changed the standard to recover under section 10 from "willful and wanton" to "gross negligence" in the emergency room context.[119] The House adopted Amendment 1 without

111. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3 (HCS), 2005 Ga. Gen. Assem.
112. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3 (HCS), 2005 Ga. Gen. Assem.
113. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3 (HCS), 2005 Ga. Gen. Assem.
114. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3 (HCS), 2005 Ga. Gen. Assem.; *see also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
115. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3 (HCS), 2005 Ga. Gen. Assem.
116. *Compare* SB 3 (SCS), 2005 Ga. Gen. Assem., *with* SB 3 (HCS), 2005 Ga. Gen. Assem.
117. *See infra* notes 118-124 and accompanying text.
118. *See* SB 3 (HCSHFA), 2005 Ga. Gen. Assem.
119. *Id.*

objection.[120] Representatives Edward Lindsey of the 54th district and Wendell Willard of the 49th district proposed Amendment 2, which created an exception to noneconomic caps by allowing greater recovery for catastrophic injury.[121] Amendment 2 failed by one vote.[122] Speaker Glenn Richardson and Representative Earl Ehrhart proposed Amendment 3, which raised the noneconomic damages cap to $350,000 from any single medical facility, $700,000 when there are multiple medical facilities, and a maximum cap of $1,050,000 under section 13.[123] The House adopted the amendment without objection.[124] Representatives Wendell Willard and Edward Lindsey introduced Amendment 4, which proposed specific criteria for health care providers testifying as to the applicable standard of care.[125] Amendment 4 failed by a vote of 38 to 134.[126]

During the floor debate, a number of representatives spoke in favor and against SB 3 and the various proposed amendments.[127] House Majority Leader Jerry Keen of the 179th district spoke to support the passage of SB 3 because he believed it would ensure better access to health care for all Georgians.[128] Representative Barry Fleming of the 117th district gave a section by section explanation of the bill.[129] Representative Tom Rice of the 51st district based his support of SB 3 on simple economics.[130] The simple economics were comprised of three factors: the increase in insurance premiums, the number of insurance companies leaving the state, and the number of medical specialists and facilities leaving the state.[131] He also provided an explanation for the reasonableness of the cap by noting that the average jury award for pain and suffering was approximately $250,000.[132]

120. Georgia House of Representatives Voting Record, SB 3 (Feb. 10, 2005).
121. *See* Failed House Floor Amendment to SB 3, introduced by Reps. Edward Lindsey and Wendell Willard, Feb. 10, 2005.
122. Georgia House of Representatives Voting Record, SB 3 (Feb. 10, 2005).
123. *See* SB 3 (HCSHFA), 2005 Ga. Gen. Assem.
124. Georgia House of Representatives Voting Record, SB 3 (Feb. 10, 2005).
125. *See* Failed House Floor Amendment to SB 3, introduced by Reps. Edward Lindsey and Wendell Willard, Feb. 10, 2005.
126. Georgia House of Representatives Voting Record, SB 3 (Feb. 10, 2005).
127. *See* House Audio, *supra* note 11.
128. *Id.* (remarks by Rep. Jerry Keen).
129. *Id.* (remarks by Rep. Barry Fleming).
130. *Id.* (remarks by Rep. Tom Rice).
131. *Id.*
132. *Id.*

Representative Sue Burmeister of the 119th district also spoke in favor of SB 3 because it would provide access to health care for everyone, specifically poor women.[133] Representative Ron Dodson of the 74th district supported SB 3 because he understood that under the present system, medical facilities were leaving the state.[134]

Various representatives also spoke in opposition of SB 3.[135] Representative David Ralston of the 7th district, although in favor of tort reform, did not like some of the details contained in SB 3.[136] He did not like the idea of putting a value on human life and wanted concrete data relating to the impact of insurance on doctors, rather than only malpractice suits.[137] Representative Rich Golick of the 34th district opposed SB 3 because he believed that government should not put itself in the place of juries and the right to trial by jury should "remain an inviolate right" as guaranteed by both the federal and Georgia Constitutions.[138] Representative Edward Lindsey of the 54th district opposed the bill because he believed SB 3 only acted as "a band-aid on a problem that needs surgery" and did not adequately address the important issues.[139] Representative Fran Millar of the 79th district wanted to strengthen SB 3 through adding Amendments 1, 2, and 4.[140] Chairman of the House Judiciary Committee, Wendell Willard, spoke out against how the House conducted the process.[141] Although he had proposed two different amendments addressing the need for a catastrophic injury exception, he was angry that the House only presented the one coupled with a $750,000 cap, instead of a $350,000 cap, for a vote.[142] He recognized that many would consider a cap of $750,000 too high but felt that a catastrophic injury exception was far too important of an issue for a high cap to block it and urged the House to pass Amendment 2.[143] Representative Jill Chambers of the 81st district, Tom Bordeaux of the 162nd district,

133. *See* House Audio, *supra* note 11 (remarks by Rep. Sue Burmeister).
134. *Id.* (remarks by Rep. Ron Dodson).
135. *Id.* (remarks by Reps. David Ralston, Rich Golick, Edward Lindsey, Fran Millar, & Wendell Willard).
136. *Id* (remarks by Rep. David Ralston).
137. *Id.*
138. *Id.* (remarks by Rep. Rich Golick).
139. *See id.* (remarks by Rep. Edward Lindsey).
140. House Audio, *supra* note 11.
141. *Id.* (remarks by Rep. Wendell Willard).
142. *Id.*
143. *Id.*

and Representative Vance Smith of the 129th district also spoke in support of Amendment 2.[144] Instead of supporting Amendment 2, Representative Dean Douglas of the 59th district urged voting against all caps and voting against SB 3 in its entirety.[145]

Representative Barry Flemming of the 117th district and Chairman of the Special Committee on Civil Justice Reform, rose to speak against Amendment 4 and Amendment 2 and urged voting for the original bill instead.[146] House Speaker Glenn Richardson then rose in support of Amendment 1's change in the emergency room care standard from willful and wanton negligence to gross negligence and Amendment 3's cap increase from $250,000 to $350,000.[147]

The House passed the amended Committee substitute to SB 3 by a vote of 136 to 34.[148]

Senate Reconsideration

Senator Preston Smith, the bill's sponsor, spoke in support of a motion to agree to the House changes to SB 3.[149] He summarized the major changes the House made to each section of the bill.[150] He concluded with a plea to adopt the House version of SB 3.[151] During questioning, Senator Smith noted that Mag Mutual, Georgia's largest medical malpractice insurance provider, indicated it would continue to honor the 10% rollback of insurance premiums upon the adoption of the House version of SB 3.[152]

Several senators rose in opposition of the motion to agree.[153] Senator Steve Thompson of the 33rd district urged further consideration by a Conference Committee and stressed that the amendment for the $750,000 cap only failed in the House by one

144. *See id.* (remarks by Reps. Jill Chambers, Tom Bordeaux, & Vance Smith)
145. *Id.* (remarks by Rep. Dean Douglas).
146. House Audio, *supra* note 11 (remarks by Rep. Barry Fleming).
147. *Id.* (remarks by Rep. Glenn Richardson).
148. *Id.*
149. *See* Audio Recording of Senate Proceedings, Feb. 10, 2005, http://www.georgia.gov/00/article/0,2086,4802_6107103_33091490,00.html [hereinafter Senate Audio II] (remarks by Sen. Preston Smith).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* (remarks by Sens. Steve Thompson, Robert Brown, & Seth Harp).

vote, thus demonstrating the need for further debate.[154] Senator Robert Brown of the 26th district strongly urged the Senate to send the bill to Conference Committee because the senators had not had an opportunity to debate the bill due to engrossment.[155] Finally, Senator Seth Harp of the 29th district expressed concern that the bill "cheapen[ed] life" because gross negligence was still too high of a standard and the emergency room provision granted immunity for all damages, not just noneconomic damages.[156] The motion to agree failed by a vote of 28 to 27.[157]

Senate Adoption of House Substitute

On February 14, 2005, Senator Preston Smith again rose to speak in favor of adopting the House Substitute to SB 3.[158] He warned that if the Senate did not adopt the House Substitute, the bill would have to go to the Conference Committee where the Senate would urge passing the $250,000 cap as well as the other provisions originally passed by the Senate.[159] He further warned that if the bill went to Conference Committee, the Committee could lower the cap even further.[160] Instead of risking the uncertainty of the bill going through Conference Committee, he felt that adopting the House Substitute was a "reasonable and necessary compromise."[161]

Senator David Adelman from the 42nd district then rose in opposition to the adoption of the House substitute to SB 3.[162] He specifically addressed the provision regarding the standard of proof necessary for recovery in an emergency room setting.[163] He expressed his opinion that requiring proof of gross negligence by clear and convincing evidence was too burdensome, especially in a

154. *See* Senate Audio II, *supra* note 149 (remarks by Sen. Steve Thompson).
155. *Id.* (remarks by Sen. Robert Brown).
156. *Id.* (remarks by Sen. Seth Harp).
157. Georgia Senate Voting Record, SB 3 (Feb. 10, 2005).
158. *See* Audio Recording of Senate Proceedings, Feb. 14, 2005, http://www.georgia.gov/00/article/0,2086,4802_6107103_33091490,00.html [hereinafter Senate Audio III] (remarks by Sen. Preston Smith).
159. *See id.*
160. *See id.*
161. *See id.*
162. *Id.* (remarks by Sen. David Adelman).
163. *Id.*

case of catastrophic injury.[164] He wanted the bill to go to Conference Committee to slow the process down and fix the bill at that time, instead of gambling on the legislature amending the bill later.[165] Senator Steve Thompson of the 33rd district also voiced concerns about relying on promises that the legislature would fix the bill later and instead urged sending the bill to Conference Committee.[166] Senator Robert Brown of the 26th district described the bill as "flawed" and encouraged sending the bill to a Conference Committee.[167] Senator Kasim Reed of the 35th district also spoke in opposition of passing the House Substitute and referenced the Senate's prior vote against the House Substitute.[168] He warned that although many took "heat" for their votes, it was the best vote for the people.[169] In the end, the Senate adopted the House Substitute by a vote of 38 to 15.[170]

Analysis

Constitutional Issues

Georgia's Tort Reform Act has already faced and will continue to face constitutional challenges to many of its provisions. Unclear language and apparently conflicting goals in a number of areas have left the law open to vagueness challenges.[171] Furthermore, where the law appears to favor defendants over plaintiffs, plaintiffs will challenge the law on equal protection grounds.[172] Also, certain portions of the Act may violate specific provisions in the Georgia Constitution.[173]

164. Senate Audio III, *supra* note 158 (remarks by Sen. David Adelman).
165. *Id.*
166. *Id.* (remarks by Sen. Steve Thompson).
167. *Id.* (remarks by Sen. Robert Brown).
168. *Id.* (remarks by Sen. Kasim Reed).
169. *Id.*
170. Georgia Senate Voting Record, SB 3 (Feb. 14, 2005).
171. *See* Ted Carter, *Tort Reform Law May Need Overhaul*, BUS. REP. & J., Mar. 28, 2005, http://www.savannahbusiness.com/main.asp?SectionID=29&articleid=2877.
172. *Id.*
173. *See* Greg Bluestein, *DeKalb Judge Deals First Blow to Tort Reform Law*, FULTON COUNTY DAILY REP., Mar. 23, 2005, at 1.

One general challenge to the Act as a whole could come under Georgia's single subject rule.[174] The Georgia Constitution provides that "no bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof."[175] While opponents have argued that this Act is truly omnibus legislation, Georgia courts have held that so long as there is some relationship between subjects within an act, there is no constitutional violation.[176]

On March 21, 2005, DeKalb State Court Judge J. Antonio DelCampo ruled that Code section 9-10-31(c) of the Tort Reform Act's section 2 conflicted with venue provisions in the Georgia Constitution.[177] Code section 9-10-31(c) allows any nonresident defendant in a medical malpractice action to transfer the action to that defendant's home county if that is where the events giving rise to the claim occurred.[178] But the Georgia Constitution provides that "[s]uits against . . . joint tortfeasors . . . residing in different counties may be tried in either county."[179] Noting that statutes cannot vary constitutional venue provisions, Judge DelCampo held that this statutory venue provision impermissibly narrowed the plaintiff's rights under Georgia's Constitution.[180] The Georgia Supreme Court has subsequently granted an interlocutory appeal to this decision, which will lead to the first ultimate decision as to the constitutionality of any portion of the Act.[181]

Of all of the provisions in SB 3, the Act's offer of judgment provision is perhaps the most likely to see a challenge for vagueness.[182] While it is clear that the purpose of the provision is to encourage parties in tort cases to accept legitimate offers for settlement, it is unclear as to what constitutes a reasonable offer and what consequences will ensue if a party does not accept that offer.[183]

174. *See* Charles M. Cork, III, Constitutional Issues, Materials for SB 3 Seminar, 8-9 (Mar. 1, 2005) (on file with the Georgia State University Law Review).
175. GA. CONST. art. III, § V, para. III.
176. *See* Cork, *supra* note 174.
177. Bluestein, *supra* note 173.
178. *See* O.C.G.A. § 9-10-31 (Supp. 2005).
179. GA. CONST. art. VI, § II, para. IV.
180. *See* Bluestein, *supra* note 173.
181. 2005 Granted Interlocutory Applications, Supreme Court of Georgia, http://www.gasupreme.us (last visited Feb. 7, 2006) (remitted to lower court, case no. S05I1162, EHCA Cartersville v. Turner).
182. *See* Chance, *supra* note 176; O.C.G.A. § 9-11-68 (Supp. 2005).
183. *See* Chance, *supra* note 176.

Subsection (b) provides that when a party receiving a settlement offer ("the offeree") does not accept that offer and later fails to obtain a judgment "at least 25 percent more favorable than [that] offer," the offeree is liable for attorney's fees and costs.[184] However, Subsection (d) of the Act also sets forth a method for determining the reasonableness of an offer: "If the offer of judgment was 25 percent more favorable than the monetary award, the court shall award reasonable attorney's fees and costs."[185]

Thus, although the subsections both serve the purpose of encouraging settlement, they also support different methods of calculation, possibly depending on who makes the offer.[186] For instance, if the defendant makes the offer, it is unclear whether the plaintiff must obtain a judgment that exceeds that offer by at least 25%, or whether the offer must have been less than 75% of the final judgment.[187] Furthermore, if the plaintiff makes the offer, it is unclear whether the defendant must receive a judgment equal to 75% of the last offer or less, or whether that offer must not have exceeded the final judgment by 25%.[188] Ultimately, when calculating these percentages, the critical question is which number—"offer" or "judgment"—is the numerator and which is the denominator.[189] The answer to that question is not clear from the text of the Act, making due process challenges to this provision likely.[190] Furthermore, because this provision applies only to tort claims, it could be subject to equal protection challenges as well.[191]

The Act's adoption, in section 7, of the *Daubert* standard for the admissibility of expert testimony in civil cases, creates the potential for a challenge on an equal protection basis.[192] By adopting more stringent requirements for the admissibility of expert testimony in

184. *See* O.C.G.A. § 9-11-68 (Supp. 2005).
185. *See id.*
186. *See* Chance, *supra* note 176.
187. *See* Al Pearson, Offer of Settlement in Georgia, Materials for SB 3 Seminar (Mar. 1, 2005) (on file with the Georgia State University Law Review).
188. *Id.*
189. *See id.*
190. *Id.*
191. *Id.*
192. Robert E. Shields & Lesley J. Bryan, *Georgia's New Expert Witness Rule: Daubert and More*, *in* INSTITUTE OF CONTINUING LEGAL EDUCATION, GEORGIA'S NEWLY ENACTED 2005 TORT REFORM LAW, SENATE BILL 3, ANALYSIS AND PRACTICE TIPS 20 (2005); O.C.G.A. § 24-9-67 (Supp. 2005); Daubert v. Merrell Pharms., Inc., 509 U.S. 579 (1993).

civil cases than in criminal cases, the legislature has varied the admissibility of expert testimony depending on whether that testimony is presented in a criminal case or a civil case.[193] Furthermore, the intent that "the courts of the State of Georgia not be viewed as open to expert testimony that would not be admissible in other states" creates another constitutional question of vagueness.[194] Since different states use different standards for the admissibility of expert testimony, is the legislature directing the state courts to refuse to admit evidence that no other state would admit?[195] Does Georgia now have the "strictest" standards for the admissibility of expert testimony, or does a state court merely need to ensure it does not allow testimony that *no* other state would allow?[196] Again, because the text does not answer these questions, it is likely that this provision is also ripe for constitutional challenges.[197]

Plaintiffs bringing medical malpractice claims can challenge caps on damages for violation of equal protection on the grounds that the Act treats medical malpractice victims and other tort victims differently.[198] Similarly, these plaintiffs can challenge such caps on the grounds that they treat less seriously injured plaintiffs differently from these more seriously injured by allowing the former to receive total compensation for their injuries while preventing the latter from doing so.[199] Courts in other states are split on whether or not these arguments justify invalidating such provisions.[200] Recently, the Wisconsin Supreme Court struck down that state's cap on noneconomic damages, noting that where "the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational."[201]

Another argument for the unconstitutionality of caps is that by altering the jury's ability to give awards that it sees fit, caps deprive

193. Shields & Bryan, *supra* note 192; O.C.G.A. § 24-9-67 (Supp. 2005); *Daubert*, 509 U.S. 579.
194. Shields & Bryan, *supra* note 192; O.C.G.A. § 24-9-67 (Supp. 2005); *Daubert*, 509 U.S. 579.
195. *See* Shields & Bryan, *supra* note 192.
196. *Id.*
197. *See id.*
198. *See* Carol A. Crocca, Annotation, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5th 245, 266 (2005).
199. *See id.*
200. *See id.*
201. Ferdon v. Wis. Patients' Comp. Fund, 701 N.W.2d 440, 466 (Wis. 2005).

parties of the right to trial by jury guaranteed under the Seventh Amendment.[202] Again, courts in other states have split on whether caps on recovery violate the Seventh Amendment.[203] A plaintiff could make a similar argument that this provision violates a plaintiff's access to the court system, which the Georgia Constitution guarantees.[204]

Section 15 of the Act indicates that, with the exception of the provisions relating to joint and several liability, emergency medical care, agency, and caps on noneconomic damages, the Act intends to apply to future claims as well as all pending cases, unless such retroactive application would be unconstitutional.[205] This has already created some litigation as to whether or not retroactive application of a particular provision is unconstitutional.[206] Judge Melodie Clayton in the State Court of Cobb County and Judge Hermann Coolidge in the State Court of Chatham County have both already ruled that application of the *Daubert* expert testimony standards to cases in which the parties have prepared for trial under the previous, less strict standards would violate due process.[207] Parties are already litigating the constitutionality of retroactive application of the new affidavit requirements in malpractice cases.[208]

Federal Preemption Issues

In section 4, the Act added Code section 9-11-9.2 to require a medical malpractice plaintiff to file a medical authorization form at the time he files the complaint or risk dismissal.[209] This form authorizes the defendant's attorney to obtain and disclose private information contained in medical records pertaining to the

202. *See* U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved.").

203. *See* Crocca, *supra* note 198.

204. *See* GA. CONST. art. I, § I, para. IV.

205. *See* O.C.G.A. §§ 51-12-31, 51-12-33, 51-1-29.5, 51-2-51.1, & 51-13-1 (Supp. 2005).

206. *See* Interview with Stephen Chance, Esq., Partner & Joe Watkins, Esq., Partner, Watkins, Lourie, Roll, & Chance, P.C., in Atlanta, Ga. (Apr. 18, 2005).

207. *See* Ken Shigley, *Retroactive Application of New Expert Rules Unconstitutional*, ATLANTA INJURY LAW BLOG, May 7, 2005, http://www.atlantainjurylawblog.com; Daubert v. Merrell Pharms., Inc., 509 U.S. 579 (1993).

208. *See* Chance, *supra* note 172.

209. *See* O.C.G.A. § 9-11-9.2 (Supp. 2005); *see also* Stephen Chance, SB3's Changes to O.C.G.A. § 9-11-9.1, Materials for SB 3 Seminar (Mar. 1, 2005) (on file with the Georgia State University Law Review).

plaintiff.[210] Opponents of the Act have noted that, at least in certain cases, this requirement could directly conflict with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which Congress designed to prevent unauthorized disclosure of private health information.[211] Under HIPAA, if a state law directly conflicts with one of its provisions or regulations, HIPAA preempts that state law.[212]

Policy Issues

With the passage of caps on noneconomic damages in medical malpractice cases, the Georgia General Assembly has taken a step towards controlling the increasing insurance rates for physicians in the state.[213] But no one knows what effect this legislation will have. Proponents of such caps point to similar legislation in other states like Texas and Ohio, where insurance rates have decreased in the years since passage and more insurers have returned to the state.[214] Proponents often cite California, in particular, as the model of tort reform, because it enacted a noneconomic damages cap in 1975 and has effectively controlled insurance rates in recent years.[215] But opponents of damages caps note that California's insurance rates did not truly lower until ten years after the legislature put the damages cap in place—when the legislature passed *insurance* reform laws that capped insurance rates.[216] Furthermore, opponents note that placing limits on noneconomic damages results in denial of recovery to the most severely injured victims and greatly reduces the potential recovery for injured non-professionals—particularly homemakers

210. *See* O.C.G.A. § 9-11-9.2 (2005); *see also* Chance, *supra* note 209.
211. *See* 45 C.F.R. § 164.508 (2005); *see also* Chance, *supra* note 209.
212. *See* 45 C.F.R. § 160.203 (2005); *see also* Chance, *supra* note 209.
213. SB 3, as passed, 2005 Ga. Gen. Assem.
214. *See* Michael Norbut, *Three 'Crisis' States Show Improvement Since Tort Reform*, HEALTH CARE NEWS (May 1, 2005), http://www.heartland.org/Article.cfm?artId=16859; *see also* Senate Audio, *supra* note 11 (remarks by Sen. John Wiles).
215. *See* William K. Scheuber & Bradford P. Cohn, *California MICRA, the National Model in Tort Reform*, SAN FRANCISCO MEDICINE (Mar. 2003).
216. *See Medical Malpractice Fibs and Facts*, http://www.iltla.com/Medical Malpractice/medmalfibsandfacts.pdf (last visited Feb. 9, 2006).

and children.[217] The debate over the costs and benefits of damages caps is ongoing and apparently endless.[218]

Opponents of SB 3 also argue that the Act's abolition of joint and several liability "results in a completely innocent plaintiff's inability to collect the full amount of an award of damages."[219] Furthermore, they argue that this change is likely to increase litigation, because it encourages defendants to seek "as many other responsible parties as possible in order to decrease its relative degree of total fault."[220] Also, plaintiffs will have little incentive to settle with defendants because other defendants will later exaggerate the settling defendant's negligence to reduce their own proportional liability.[221] Finally, by forcing juries to consider not only the liability of the litigants but also non-parties, the Act adds to the complexity of litigation and stands to increase the associated costs.[222]

While proponents of the Act's "offer of judgment" provision argue that it encourages parties to accept reasonable settlement offers and will decrease litigation, opponents argue that such measures are unnecessary, as "95% of civil cases filed are [already] settled without the need for trial."[223] Furthermore, opponents argue that wealthy defendants could bully private citizen plaintiffs into accepting "low ball" offers out of fear that they will have to pay attorney's fees that "could financially destroy the net worth of a middle class citizen."[224] Opponents point out that the American Bar Association's model law on offers of judgment caps the amount recoverable by an offering defendant at the amount of the plaintiff's award—preventing a plaintiff from having to pay more than the he recovers.[225] The ABA's

217. *See, e.g.*, Kevin Lamb, *Exposing the Myths of Tort Reform*, DAYTON DAILY NEWS (Ohio), Oct. 26, 2004, at E2; *see also* Senate Audio, *supra* note 11 (remarks by Sen. Steve Thompson).

218. *See supra* notes 204-207 and accompanying text.

219. Charles M. Cork, III, *SB3: Abolition of Joint Liability, in* INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA, GEORGIA'S NEWLY ENACTED 2005 TORT REFORM LAW, SENATE BILL 3, ANALYSIS AND PRACTICAL TIPS 5 (2005).

220. *Id.*

221. *Id.* at 6.

222. *Id.*

223. *See* Senate Audio, *supra* note 11 (remarks by Sen. Preston Smith); Matthew C. Flournoy, *Georgia's Newly Enacted 2005 Law on Offer of Judgment or Settlement (OJS) O.C.G.A. 9-11-68 (a) to (d) (Section 5 of S.B. 3), in* INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA, GEORGIA'S NEWLY ENACTED 2005 TORT REFORM LAW, SENATE BILL 3, ANALYSIS AND PRACTICAL TIPS 6-7 (2005).

224. Flournoy, *supra* note 223 at 7 (2005).

225. *Id.* at 14.

model law also allows the judge discretion to reduce or eliminate fees to avoid hardship or injustice.[226]

Opponents also argue that instead of decreasing litigation, section 5 could increase litigation by dividing each lawsuit into two trials: one on the merits of the case, and another to determine whether a party is entitled to costs based on the adequacy or inadequacy of an offer of judgment.[227] Finally, opponents note that there is no legal duty to settle a case, that no party should suffer for insisting on the litigation of a nonfrivolous claim, and that it is "unfair to punish a Party . . . simply because the Party has no crystal ball upon which to accurately predict the jury verdict in a tort trial."[228]

Conclusion

While some see the passage of SB 3 as the first step towards major civil justice reform in Georgia, the Act's drafting and policy choices leave questions as to how effective it will be in practice.[229] The next legislative session will undoubtedly see the proposal of legislation intended not only to further reform the civil justice system, but also to remedy some of the constitutional problems that have become apparent since the passage of the Act.[230] In the meantime, attorneys will continue to challenge the constitutionality of SB 3, and courts will continue to decide the validity of the Act's provisions. As both politicians and the public continue to debate the pros and cons of tort reform, only time will tell whether the benefits of such legislation outweigh the costs.

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226. *Id.*
227. *Id.* at 7-8.
228. *Id.* at 26.
229. *See supra* notes 204-217 and accompanying text.
230. Greg Bluestein, *Tort Lobby Planning Wish List for 2006: Next Year Could Bring Limits on Contingency Fees, 'Double Awards'*, FULTON COUNTY DAILY REP., Apr. 20, 2005, at 20.