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## CIVIL PRACTICE Civil Practice Act: Change Provisions Relating to the Time of Filing an Affidavit that Must Be Filed with the Complaint in Any Action for Damages Alleging Professional Malpractice; Provide for Dismissal of Complaints; Provide for the Curing of Defects; Provide a List of Professions to Which the Affidavit Requirement Applies

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## CIVIL PRACTICE

***Civil Practice Act: Change Provisions Relating to the Time of Filing an Affidavit that Must Be Filed with the Complaint in Any Action for Damages Alleging Professional Malpractice; Provide for Dismissal of Complaints; Provide for the Curing of Defects; Provide a List of Professions to Which the Affidavit Requirement Applies***

**CODE SECTION:** O.C.G.A. § 9-11-9.1 (amended)  
**BILL NUMBER:** SB 276  
**ACT NUMBER:** 327  
**GEORGIA LAWS:** 1997 Ga. Laws 916  
**SUMMARY:** The Act makes several changes to the provisions relating to the affidavit that must be filed by a plaintiff when suing for professional malpractice. The Act provides that the affidavit requirement also applies in such an action against a licensed healthcare facility alleged to be liable based upon malpractice by a professional. The Act provides for dismissal of professional malpractice claims if the affidavit requirement is not met within forty-five days after filing of the claim or within the time allowed by the court, if the defendant alleges by motion to dismiss filed with its initial responsive pleading, that the plaintiff has failed to file the requisite affidavit. The Act provides that if a plaintiff files the affidavit within the period specified in this Code section, no statute of limitations defense may be raised as long as the original complaint was filed within the statutory period. The Act provides that a plaintiff may cure an alleged defect in his affidavit by amendment within thirty days of service of the motion alleging that the affidavit is defective, or longer if the trial court determines justice so requires. The Act provides a list of professions to which this Code section applies.

**EFFECTIVE DATE:** July 1, 1997

*History*

In 1987, the Georgia General Assembly passed the Medical Malpractice Reform Act<sup>1</sup> to reduce the amount of frivolous professional malpractice litigation.<sup>2</sup> One method provided for in the Medical Malpractice Reform Act was the requirement that in any suit for professional malpractice, a plaintiff must file an expert's affidavit with his complaint setting forth specifically at least one negligent act or omission giving rise to the plaintiff's claim.<sup>3</sup>

Since the Medical Malpractice Reform Act of 1987 went into effect, however, several Court of Appeals decisions have suggested that the affidavit requirement was seriously flawed and the Georgia General Assembly should consider repealing or redrafting the law.<sup>4</sup> The problem with the affidavit requirement was that an entirely new subset of litigation arose over the issue of whether the affidavit itself was valid.<sup>5</sup>

Such litigation could last more than a year, raising statute of limitations problems for plaintiffs.<sup>6</sup> It is hoped that, as amended, Code section 9-11-9.1 will simplify the process of determining the validity of an affidavit at the outset of a lawsuit.<sup>7</sup>

*SB 276*

The Act serves as a compromise between the goals of cutting back on frivolous professional malpractice suits and allowing legitimate claims to be maintained even if the initial complaint suffers from a technical defect.<sup>8</sup>

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1. 1987 Ga. Laws 887 (formerly found at O.C.G.A. § 9-11-9.1 (1993)).

2. See Telephone Interview with Sen. William Ray, Senate District No. 48 (Apr. 24, 1997) [hereinafter Ray Interview]; see also *Tye v. Wilson*, 208 Ga. App. 253, 430 S.E.2d 129 (1993).

3. 1987 Ga. Laws 887 (formerly found at O.C.G.A. § 9-11-9.1(a) (1993)).

4. See Ray Interview, *supra* note 2; see also *Tye*, 208 Ga. App. at 256, 430 S.E.2d at 132 (Johnson, J., dissenting) ("Few issues have proved more vexatious to trial lawyers, trial judges, and the appellate courts of this state than the proper application of OCGA § 9-11-9.1. Intended to prevent frivolous litigation and all the costs inherent therein for both litigants and courts, this rule has instead caused more litigation. . . . Perhaps it is time for the legislature to reconsider OCGA § 9-11-9.1, and to conclude that it was little more, in the end, than a noble effort which failed miserably to accomplish the goals for which it was enacted.").

5. See Ray Interview, *supra* note 2.

6. See *id.*

7. See *id.*

8. See Telephone Interview with Sen. Clay Land, Senate District No. 16 (Apr. 24, 1997) [hereinafter Land Interview].

The first change the Act makes is the addition of language that provides a list of twenty-four professions to which the Act applies.<sup>9</sup> This language was added by the House Judiciary Committee by way of a substitute to SB 276.<sup>10</sup> Prior to the Act, the question of who is considered a professional regularly arose in the courts.<sup>11</sup> The list is an effort to clarify those professions covered by the Act.<sup>12</sup> If a profession is not listed, it is not covered.<sup>13</sup> The list is composed of those professions that the Court of Appeals held to be within the coverage of the Act as it stood before this amendment.<sup>14</sup>

The next change provides that a licensed healthcare facility is to be treated the same as an individual professional for the purposes of this Act when it is sued based on a medical professional's alleged action or inaction.<sup>15</sup> Senator Land, the primary sponsor of SB 276, added this language in a Senate amendment to a House substitute of the bill.<sup>16</sup> Senator Land indicated that this was not an actual change in the law, since it was already customary to treat such a facility the same as one of its employees for the purposes of a malpractice suit.<sup>17</sup> However, he believed that it was important to make it absolutely clear that this treatment was what the Act required.<sup>18</sup>

The next change, in subsection (b), allows a plaintiff who has a good faith basis to believe that the statute of limitations is about to run, to proceed with filing his complaint, without the contemporaneous filing of the affidavit, if he alleges in his complaint that an expert's affidavit could not be prepared in time.<sup>19</sup> The plaintiff will then have forty-five days to supplement the pleadings with the required affidavit.<sup>20</sup> The "good faith basis to believe" language was added to account for situations when there has been a failure to diagnose a medical condition and, subsequently, a plaintiff's lack of knowledge that medical malpractice may have occurred.<sup>21</sup> In such a case, the plaintiff would not know when the limitations period began, and therefore, when it would end.<sup>22</sup> The "good faith" language was added by the House

9. O.C.G.A. § 9-11-9.1(a), (f) (Supp. 1997).

10. See Final Composite Status Sheet, Mar. 28, 1997.

11. See Ray Interview, *supra* note 2.

12. See Land Interview, *supra* note 8.

13. See *id.*

14. See *id.*

15. See *id.*; O.C.G.A. § 9-11-9.1(a) (Supp. 1997).

16. See Final Composite Status Sheet, Mar. 28, 1997.

17. Land Interview, *supra* note 8.

18. *Id.*

19. O.C.G.A. § 9-11-9.1(b) (Supp. 1997).

20. See *id.*

21. See Land Interview, *supra* note 8.

22. See *id.*

Judiciary Committee in an attempt to provide plaintiffs with some leeway in such a situation.<sup>23</sup>

Subsection (b) also provides for dismissal of a suit if the plaintiff fails to file the required affidavit within the allotted time period.<sup>24</sup> To have the suit dismissed, the defendant must file his motion to dismiss contemporaneously with his first responsive pleading, and must allege that the plaintiff has failed to file the requisite affidavit.<sup>25</sup> The purpose of this provision is to resolve any questions about the sufficiency of the affidavit early in the litigation.<sup>26</sup> This language was also added by the House Judiciary Committee as a substitute to SB 276.<sup>27</sup>

Subsection (c) provides that a statute of limitations will not run if the affidavit is filed in accordance with the Act, even if it is filed after the statutory period has run, as long as the claim was filed within the statutory period.<sup>28</sup>

Subsection (d) adds language allowing a plaintiff to cure an alleged defect in his affidavit within thirty days of service of a defendant's motion alleging that the affidavit is defective.<sup>29</sup> Prior to this change, no explicit provision existed for the curing of a defect in a plaintiff's affidavit, although mention was made of situations when a plaintiff failed "to file an affidavit as required by this Code section."<sup>30</sup> In those cases, when the plaintiff failed to file the requisite affidavit, his complaint could not be cured unless the court determined that he had the affidavit before filing his complaint and the failure to file the affidavit was the result of a mistake.<sup>31</sup>

Under the new law, a plaintiff may cure a defect in his affidavit within thirty days of defendant's service of a motion alleging that the affidavit is defective—no determination by the court is necessary.<sup>32</sup> The court has discretion to extend this time for curing the complaint, "as it shall determine justice requires."<sup>33</sup> The amendments contained in subsection (d) were part of the language of the bill as it passed the Senate, with only minor technical changes taking place in the House.<sup>34</sup>

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23. *See id.*; Final Composite Status Sheet, Mar. 28, 1997.

24. O.C.G.A. § 9-11-9.1(b) (Supp. 1997).

25. *See id.*

26. *See* Land Interview, *supra* note 8.

27. *See* Final Composite Status Sheet, Mar. 28, 1997.

28. O.C.G.A. § 9-11-9.1(c) (Supp. 1997).

29. *Id.* § 9-11-9.1(d).

30. *See* 1989 Ga. Laws 419 (formerly found at O.C.G.A. § 9-11-9.1(e) (1993)).

31. *See id.*

32. O.C.G.A. § 9-11-9.1(d) (Supp. 1997).

33. *Id.*

34. *Compare* SB 276 (SCSFA), 1997 Gen. Assem., with O.C.G.A. § 9-11-9.1(d) (Supp. 1997).

Subsection (e) provides that in certain circumstances, a plaintiff's complaint will not be subject to renewal after the applicable limitations period expires if he does not file the requisite affidavit.<sup>35</sup> Prior to the Act, a defendant merely needed to "raise the failure to file the affidavit in its initial responsive pleading" in order to prevent a plaintiff's claim from being subject to renewal.<sup>36</sup> The Act requires the defendant to raise such failure in a motion to dismiss filed contemporaneously with its initial responsive pleading.<sup>37</sup> This language was added in the Senate and was passed without change by the House.<sup>38</sup>

*Robert J. Coursey III*

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35. O.C.G.A. § 9-11-9.1(e) (Supp. 1997).

36. 1989 Ga. Laws 419 (formerly found at O.C.G.A. § 9-11-9.1(f) (1993)).

37. O.C.G.A. § 9-11-9.1(e) (Supp. 1997).

38. Compare SB 276 (SCSFA), 1997 Gen. Assem., with O.C.G.A. § 9-11-9.1(e) (Supp. 1997).