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ALERTS

Recovering Attorney's Fees Under Georgia Law Just Got Easier

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One of the advantages to business litigation in the state of Georgia is the ability for experienced litigators to wield the state's statute for the recovery of attorney's fees and expenses of litigation, known as Official Code of Georgia Annotated (OCGA) Section 13-6-11, as a sword for their clients.

The case law interpreting Section 13-6-11, specifically *Byers v. McGuire Properties, Inc.* and its progeny, inadvertently created an inherent conflict between Georgia's laws favoring settlement and the responsibility of litigators to serve as effective advocates for their clients.

On April 6, the Supreme Court of Georgia resolved that conflict. In *SRM Group, Inc. v. Travelers Property Cas. Co. of America*, the court established that "a plaintiff-in-counterclaim asserting an independent claim may seek, along with that claim, attorney fees and litigation expenses under Section 13-6-11, regardless of whether the independent claim is permissive or compulsory."

Business litigation primarily focuses on disputes that relate to a contract (i.e., an operating agreement, an asset purchase agreement, a subcontractor agreement, a promissory note, etc.) and, unless that contract contains an explicit provision for the recovery of attorney's fees, the cost of complex litigation sometimes seems prohibitive to pursuing legitimate claims. Enter Georgia's Section 13-6-11, which allows a plaintiff to seek expenses of litigation if it can allege that the other side "has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." In other words, even if the contract does not so provide, the plaintiff can at least attempt to recover its fees and costs under this statutory provision.

In most business litigation, each side asserts that the other side breached

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a contract and engaged in other illicit acts (i.e., fraud, breach of fiduciary duty, etc.). For over a decade, until last week, the side that won the "race to the courthouse" in Georgia was not only able to seek recovery of its fees and costs under Section 13-6-11, but was able to block the other side from using the statute. The only exception was for expenses associated solely with a "permissive" counterclaim – a claim that arose separately from or after the plaintiff's claim.

Thus, savvy litigators were able to use Section 13-6-11 as a shield if their client was the first to file in Georgia. In other words, even if the other side asserted virtually identical claims in the form of counterclaims, its attempt to seek recovery would likely be subject to immediate dismissal.

Dismissal of a counterclaim for recovery under Section 13-6-11 seemed equitable when the other side simply parroted the plaintiff's claims in an attempt to artificially level the litigation playing field. But, in most instances, the sword and shield aspect of the statute turned pre-litigation settlement negotiations into a game of Russian roulette in which parties sensibly worried that their decision to pull the trigger on a settlement counteroffer might kill the settlement negotiations and cause the other side to run to the courthouse and reap the spoils of being the first to file. And, sometimes, attorneys would use settlement discussions as part of a "rope-a-dope" maneuver while they prepared their client's pleading for filing and stealthily filed suit under the cover of settlement discussions.

The decision in *SRM Group*, written by Justice Charles Bethel and joined by the seven other justices sitting at the time the case was heard, overrules *Byers*. As Justice Bethel succinctly explains in the opinion:

A "permissive" counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." OCGA § 9-11-13 (b). By contrast, a "compulsory" counterclaim is "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." OCGA § 9-11-13 (a).

The *SRM Group* decision includes insightful reviews of prior relevant cases and an interesting stare decisis analysis. But the crux of the holding is that Byers relied upon a Georgia Court of Appeals decision that improperly equated a mere "independent claim" (a cause of action in addition to the counterclaim under Section 13-6-11) with a "permissive claim" when it held that a plaintiff-in-counterclaim cannot pursue recovery under Section 13-6-11 if its counterclaims were compulsory. As Justice Bethel concluded, "We see no basis in the text of the statute or otherwise for such an equation," and then went on to add, "Nothing in the text of OCGA § 13-6-11 suggests that awards of fees and expenses are limited to permissive counterclaims. Nor as a practical matter is a distinction between permissive and compulsory counterclaims always a workable distinction …."

The recent *SRM Group* decision rights a wrong that distorted the ability to use Section 13-6-11, allowing future litigants to properly include a counterclaim for recovery of fees and costs under that statute along with any other independent counterclaims. Whether those litigants will actually be able to recover under 13-6-11 ("the jury may allow" recovery) is a

subject for another review.

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