

9-1-2003

CIVIL PRACTICE Civil Practice Act: Allow for Discretionary Appeal of Class Certification; Adopt Federal Rule of Civil Procedure 23 Pertaining to Class Actions; Amend Interest Amount on Judgments; Prohibit Third Voluntary Dismissal by Plaintiff; Permit Courts to Use Discretion in Declining Jurisdiction When Another Forum is More Convenient; Change the Pre-Judgment Interest Rate; Provide for Vacation of an Arbitration Award Based Upon an Arbitrator's Manifest Disregard for the Law

Ashley Harris

Crystal Ferrier

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>



Part of the [Law Commons](#)

Recommended Citation

Ashley Harris, Crystal Ferrier & Andrew Lewinter, *CIVIL PRACTICE Civil Practice Act: Allow for Discretionary Appeal of Class Certification; Adopt Federal Rule of Civil Procedure 23 Pertaining to Class Actions; Amend Interest Amount on Judgments; Prohibit Third Voluntary Dismissal by Plaintiff; Permit Courts to Use Discretion in Declining Jurisdiction When Another Forum is More Convenient; Change the Pre-Judgment Interest Rate; Provide for Vacation of an Arbitration Award Based Upon an Arbitrator's Manifest Disregard for the Law*, 20 GA. ST. U. L. REV. (2003).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol20/iss1/3>

CIVIL PRACTICE

Civil Practice Act: Allow for Discretionary Appeal of Class Certification; Adopt Federal Rule of Civil Procedure 23 Pertaining to Class Actions; Amend Interest Amount on Judgments; Prohibit Third Voluntary Dismissal by Plaintiff; Permit Courts to Use Discretion in Declining Jurisdiction When Another Forum is More Convenient; Change the Pre-Judgment Interest Rate; Provide for Vacation of an Arbitration Award Based Upon an Arbitrator's Manifest Disregard for the Law

CODE SECTIONS:	O.C.G.A. §§ 7-4-12, 9-9-13, 9-11-23, -41, 50-2-21, 51-12-14, -71, -72 (amended)
BILL NUMBER:	HB 792
ACT NUMBER:	363
GEORGIA LAWS:	2003 Ga. Laws 820
SUMMARY:	The Act replaces the Georgia rule relating to class actions by adopting Federal Rule of Civil Procedure 23. The Federal Rule allows for a discretionary intermediate appeal, which existing state law did not allow. The Act amends the Georgia Code to allow courts to vacate arbitration awards when the arbitrator disregarded background substantive law in making a decision. The Act changes pre-judgment and post-judgment interest amounts on civil awards. Further, the Act prohibits plaintiffs from filing the same claim three times after voluntarily dismissing the claim twice. The Act also gives courts more discretion to deny jurisdiction in civil actions against nonresident defendants when a more convenient forum is available.
EFFECTIVE DATE:	July 1, 2003

HB 792 was introduced to revise Georgia's class action procedures. Part I of this Legislative Review discusses this provision. Ultimately, HB 792 also included the provisions originally appearing in HB 91, the "2003 Fairness in Arbitration Act," and in SB 133, amending the "Common Sense Civil Justice Reform Act." SB 133 was the legislation aimed at reforming Georgia's tort system. Provisions from HB 91 appear in section 2 of the Act and are discussed in Part II of this Review. Portions of SB 133 comprise sections 1 and 4 through 6 of the Act and are discussed in Part III of this Review.

I. Allow for Discretionary Appeal of Class Certification; Adopt Federal Rule of Civil Procedure 23 Pertaining to Class Actions

History of Class Action Revision (O.C.G.A. § 9-11-23)

Would you sue Blockbuster for a couple of free movie rentals? Members of one class received this equivalent in damages, while their lawyers received \$9.25 million.¹ When introducing SB 217, a predecessor to the Act, Senator Eric Johnson of the 1st district used this and other anecdotes.² Opponents of the legislation, however, argued that these anecdotes were not relevant to SB 217, which provided for replacing current Georgia law with Federal Rule of Civil Procedure 23.³ SB 217's provisions eventually passed the Georgia General Assembly on the 40th and final day of the legislative session as section 3 of HB 792.⁴

Representatives from Home Depot and Georgia Pacific originally brought the idea of reforming Georgia's class action procedures to the attention of Senator Johnson.⁵ Their ideas were "strikingly similar to key items in the Georgia Chamber [of Commerce's] legislative

1. See Audio Recording of Senate Proceedings, Mar. 25, 2003 (remarks by Sen. Eric Johnson), at <http://www.ganet.org/services/leg/audio/2003archive.html> [hereinafter Senate Audio] (referring to Scott v. Blockbuster, Inc., No. D 162-535, 2001 WL 1763966 (D. Tex. Dec. 21, 2001)).

2. See *id.*

3. See Telephone Interview with Bill Clark, Lobbyist, Georgia Trial Lawyers Association (May 15, 2003) [hereinafter Clark Interview] (stating that these anecdotes reflect a select number of cases that are really the bane of the law profession).

4. Compare SB 217, as introduced, 2003 Ga. Gen. Assem., with O.C.G.A. § 9-11-23 (Supp. 2003).

5. See Telephone Interview with Sen. Eric Johnson, Senate District No. 1 (May 13, 2003) [hereinafter Johnson Interview].

agenda.”⁶ Other companies that joined in support of the class action revision included Georgia Power, General Electric, Weyerhaeuser, Monsanto, Pfizer, AGL Resources, International Paper, the Georgia Retail Association, and the Georgia Chemistry Council.⁷ This support, however, did not necessarily stem from dissatisfaction with the current system.⁸ The rationale behind this preemptive change was twofold: (1) legislation pending in Congress proposed to limit the venues for class action suits to the state where the corporation is located, making it important for companies headquartered in Georgia to ensure Georgia’s law is favorable,⁹ and (2) many Georgia courts were already doing in practice what the Act codifies.¹⁰

In 2002, the U.S. Chamber of Commerce ranked Georgia’s legal system 23rd in the nation; however, the state fell to 39th place in 2003, and proponents of the Act hoped that its passage would help the state’s legal system climb the rankings.¹¹ Creating a process for appealing class certification prior to a court hearing the merits of the case would satisfy the goal of making Georgia’s law more favorable to domestic corporations.¹² This idea of an immediate appeal stemmed from a 1999 Alabama law enacted in an effort to curtail Alabama’s reputation as a “plaintiff friendly” state.¹³ That law allows either party to make a motion requesting the court to stay all discovery related to “the merits of the action until the court makes its decision regarding whether the requested class should or should not be certified.”¹⁴ The Alabama law also requires the trial court to hold

6. See Sarah Rubenstein, *Business Issues Dominate Legislature*, ATLANTA BUS. CHRON., Jan. 20, 2003, available at <http://atlanta.bizjournals.com/atlanta/stories/2003/01/20/story1.html>.

7. See Telephone Interview with John Poole, Executive Director, Georgia Industry Association (May 13, 2003) [hereinafter Poole Interview]; Electronic Mail Interview, Home Depot Representative (May 14, 2003) (on file with the Georgia State University Law Review) [hereinafter Home Depot E-mail].

8. See Senate Audio, *supra* note 1 (remarks by Sen. Eric Johnson).

9. *Id.*

10. See Clark Interview, *supra* note 3.

11. See *Survey: Georgia’s Legal System Ranked ‘Fair,’* ATLANTA BUS. CHRON., Apr. 9, 2003, available at <http://atlanta.bizjournals.com/atlanta/stories/2003/04/07/daily28.html>; Home Depot E-mail, *supra* note 7.

12. See Johnson Interview, *supra* note 5; Clark Interview, *supra* note 3.

13. See Johnson Interview, *supra* note 5; Clark Interview, *supra* note 3; *Alabama’s Class Action System: Is There Reason for Federal Preemption or Can the State Manage Its Own Judicial System?*, PUB. CITIZEN, at http://www.citizen.org/congress/civjus/class_action/articles.cfm?ID=771 (last visited June 9, 2003).

14. *Litigation Newsletter: A Summary of Recent Tort Reform Enactments in Alabama*, HAND ARENDALL LAWS., June 1999, at <http://www.handarendall.com/LIT9901Rev.htm> (last visited June 9, 2003) [hereinafter *Litigation Newsletter*]; ALA. CODE § 6-5-642 (1999).

“a full evidentiary hearing on class certification” if either party makes such a motion.¹⁵ In this full evidentiary hearing, parties may present any admissible evidence relating to the class certification.¹⁶ The Alabama law also allows parties to immediately appeal the trial court’s class certification.¹⁷

Although SB 217 originally contained the same provisions as the Alabama law, these provisions do not appear in the Act.¹⁸ Instead, section 3 of the Act provides for only discretionary appeals, giving parties the option of petitioning the appellate court for review.¹⁹ The Act signifies the first time that the General Assembly codified a right to an immediate review, albeit a discretionary one, for parties in class actions.²⁰

The change in Georgia’s political climate is another reason the bill was introduced during the 2003 session.²¹ Once legislators knew that Republicans would lead the General Assembly for the first time in over a century, some legislators floated ideas that previously would have been difficult to pass in a Democrat-controlled General Assembly.²² When Senator Johnson first outlined his proposal for civil action reform “at the Georgia Chamber of Commerce’s annual ‘Eggs and Issues’ breakfast,” his comments “drew more applause than those of [Governor Sonny] Perdue, who outlined in only general terms his ideas about ethics, education and the state’s budget.”²³

Additionally, civil action reform was a hot topic in the national political arena, making considering ways to reform Georgia’s practices an “understandably opportunistic” political move for Georgia legislators.²⁴ In both the national and local contexts, reforming civil procedure included not only changing how plaintiffs bring class actions but also included attempts to enact tort reform

15. See *Litigation Newsletter*, *supra* note 14.

16. See *id.*; ALA. CODE § 6-5-642 (1999).

17. See *Litigation Newsletter*, *supra* note 14; ALA. CODE § 6-5-642 (1999).

18. Compare SB 217, as introduced, 2003 Ga. Gen. Assem., with ALA. CODE § 6-5-642 (1999), and O.C.G.A. § 9-11-23 (Supp. 2003).

19. See O.C.G.A. § 9-11-23 (Supp. 2003); Clark Interview, *supra* note 3.

20. See Clark Interview, *supra* note 3.

21. See Johnson Interview, *supra* note 5; Clark Interview, *supra* note 3.

22. See Johnson Interview, *supra* note 5.

23. Sarah Rubenstein, *Business Issues Dominate Legislature*, ATLANTA BUS. CHRON., Jan. 20, 2003, available at <http://atlanta.bizjournals.com/atlanta/stories/2003/01/20/story1.html>.

24. See Clark Interview, *supra* note 3; Facsimile Interview with Bill Clark, Lobbyist, Georgia Trial Lawyers Association (Oct. 21, 2003) [hereinafter Clark Interview Two].

legislation.²⁵ SB 133 was the original tort reform legislation that the Republican Senate passed, which later died in the House Judiciary Committee.²⁶ The HB 792 Conference Committee added several significant sections of SB 133 to HB 792.²⁷

SB 217/HB 792

Introduction

Senator Johnson, along with Senators Charles Clay of the 37th district, Robert Lamutt of the 21st district, Ginger Collins of the 6th district, and Thomas Price of the 4th district sponsored SB 217, the predecessor to section 3 of the Act.²⁸ SB 217 was read for the first time in the Senate on March 3, 2003, and assigned to the Senate Insurance and Labor Committee.²⁹ On March 6, 2003, the Committee favorably reported the bill without making any changes.³⁰

Senate Consideration of SB 217

The Senate debated SB 217 on March 25, 2003.³¹ Senator Seth Harp of the 16th district introduced an amendment to the bill.³² Senator Harp's "friendly" amendment addressed the appeals process.³³ Senator Harp described a Fourth Circuit case that exemplified the concern that Senator Johnson said existed among companies like Home Depot and Georgia Pacific.³⁴ In that case, after four-and-a-half years of litigation on the merits, the Fourth Circuit "threw the [entire case] out" for failing to have a properly certified class.³⁵ The original language of SB 217 would have allowed parties to make a determination with the court as to whether a valid class

25. See Clark Interview, *supra* note 3.

26. See State of Georgia Final Composite Status Sheet, SB 133, Apr. 25, 2003.

27. Compare SB 133, as introduced, 2003 Ga. Gen. Assem., with HB 792 (CCS), 2003 Ga. Gen. Assem.

28. See SB 217, as introduced, 2003 Ga. Gen. Assem.

29. See State of Georgia Final Composite Status Sheet, SB 217, Apr. 25, 2003.

30. *Id.*

31. See *id.*

32. See SB 217 (SFA), 2003 Ga. Gen. Assem.

33. See Senate Audio, *supra* note 1.

34. See *id.* (remarks by Sen. Seth Harp).

35. See *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331 (4th Cir. 1998).

exists and would have permitted a second appeal “if there [was] a change in law or if there [was] information that [came] out in trial that may [have affected] the class determination.”³⁶ Senator Harp, along with other trial lawyers, felt that this was a duplicative process and that the trial should not be delayed with an extra appeal once the court issues a determination.³⁷ Senator Johnson agreed that the amendment would not harm SB 217’s purpose, and the Senate passed the amendment unanimously.³⁸ The Senate passed the bill by a vote of 52 to 2, with one member excused.³⁹ On March 27, 2003, the Speaker of the House assigned SB 217 to the House Judiciary Committee, which never considered the bill.⁴⁰

House Consideration of HB 792

Almost simultaneously, HB 792 was introduced in the House.⁴¹ On March 26, 2003, the House read HB 792 for the first time; the bill’s language was identical to SB 217’s language.⁴² The Speaker also sent HB 792 to the House Judiciary Committee on March 27, 2003.⁴³ The House Committee favorably reported the bill on April 7, 2003, but the bill underwent significant changes.⁴⁴ The House adopted and passed the House Committee substitute on April 7, 2003, without additional changes.⁴⁵

The House Committee substitute to HB 792 deleted subsections 1(f) and 1(g) of the bill.⁴⁶ These subsections dealt with the appeals process that opponents considered duplicative.⁴⁷ Proponents of the original legislation wanted to require an appellate court to hear interlocutory appeals of class certification.⁴⁸ Even if an appellate

36. See Senate Audio, *supra* note 1 (remarks by Sen. Eric Johnson).

37. See *id.* (remarks by Sen. Seth Harp); Clark Interview, *supra* note 3.

38. See Senate Audio, *supra* note 1.

39. See Georgia Senate Voting Record, SB 217 (Mar. 25, 2003).

40. See State of Georgia Final Composite Status Sheet, SB 217, Apr. 25, 2003.

41. *Id.*

42. Compare SB 217, as introduced, 2003 Ga. Gen. Assem., with HB 792, as introduced, 2003 Ga. Gen. Assem.

43. See State of Georgia Final Composite Status Sheet, HB 792, Apr. 25, 2003.

44. Compare HB 792, as introduced, 2003 Ga. Gen. Assem., with HB 792 (HCS), 2003 Ga. Gen. Assem.

45. See State of Georgia Final Composite Status Sheet, HB 792, Apr. 25, 2003.

46. See HB 792 (HCS), 2003 Ga. Gen. Assem.

47. See HB 792, as introduced, 2003 Ga. Gen. Assem.; Johnson Interview, *supra* note 5.

48. See Clark Interview, *supra* note 3.

court agreed with a plaintiff that a valid class existed, the defendant could appeal the entire case again, after the verdict, and still successfully move the court to overrule the certification.⁴⁹ The Senate amendment to SB 217 tweaked these subsections, but opponents believed that the General Assembly needed to remove subsections 1(f) and 1(g) altogether from the bill to adequately address the problem.⁵⁰

In place of subsections 1(f) and 1(g), the House Committee added language allowing the appellate court the discretion to hear a defendant's "appeal from an order of a trial court granting or denying class action certification."⁵¹ Additionally, the House Committee added language similar to section 4 of SB 133.⁵² After the House Committee made these changes, HB 792 passed the House by a vote of 170 to 0, with eight members abstaining and two members excused.⁵³

Senate Consideration of HB 792

Senator Johnson presented HB 792 to the Senate on April 8, 2003.⁵⁴ HB 792, like SB 217, was sent to the Senate Insurance and Labor Committee.⁵⁵ The Senate Committee restored subsections 1(f) and 1(g), which the House Committee had previously deleted.⁵⁶ The Senate Committee also removed the dismissal language taken from SB 133.⁵⁷ The Senate Committee favorably reported their version of HB 792 on April 11, 2003.⁵⁸ On April 17, 2003, the Senate passed the Committee substitute to HB 792 by a vote of 44 to 1, with eight members not voting and two members excused.⁵⁹

49. *See id.*

50. *See id.*

51. *See* HB 792 (HCS), 2003 Ga. Gen. Assem.

52. *See id.*; *infra* Part II. This language would not have made any substantive changes to the existing law.

53. *See* Georgia House of Representatives Voting Record, HB 792 (Apr. 7, 2003).

54. *See* State of Georgia Final Composite Status Sheet, HB 792, Apr. 25, 2003.

55. *See id.*

56. *See* HB 792 (SCS), 2003 Ga. Gen. Assem.

57. *Compare* HB 792 (HCSFA), 2003 Ga. Gen. Assem., *with* HB 792 (SCS), 2003 Ga. Gen. Assem.

58. *See* State of Georgia Final Composite Status Sheet, HB 792, Apr. 25, 2003.

59. *See id.*

House Reconsideration of HB 792

On April 22, 2003, the House voted to not agree to the Senate's substitute to HB 792, but the Senate insisted on its position.⁶⁰ The same day, the House also insisted on its position.⁶¹ A compromise between the two chambers would have to occur in a Conference Committee.⁶² The Conference Committee was comprised of Senator Eric Johnson of the 1st district, Representative Mary Margaret Oliver of the 56th district, Representative Dubose Porter of the 119th district, Representative Tom Bordeaux of the 125th district, Senator Preston Smith of the 52nd district, and Senator Tim Golden of the 8th district.⁶³ Representative Oliver sponsored HB 91, the Fairness in Arbitration Act—a bill that the Conference Committee incorporated into section 2 of HB 792.⁶⁴ Similarly, section 1 and sections 4 through 8 of SB 133, the bill that originally aimed at reforming Georgia's tort system, were also added to HB 792 in the Conference Committee.⁶⁵ Ultimately, the Conference Committee agreed not to include the controversial subsections 1(f) and 1(g) of SB 217 in the Committee report.⁶⁶ These two subsections had been the source of contention between the House Committee and the Senate Committee.⁶⁷ Representatives of the Georgia Trial Lawyers Association who opposed the bill said they were "glad to get [those subsections] back out."⁶⁸

Consideration of the Conference Committee Report

The HB 792 Conference Committee report, which now included HB 91 in its entirety and six sections from SB 133, went back to the

60. *See id.*

61. *See id.*

62. *See id.*

63. *See* Audio Recording of House Proceedings, Apr. 25, 2003, at <http://www.ganet.org/services/leg/audio/2003archive.html> [hereinafter House Audio].

64. *Compare* HB 91, as introduced, 2003 Ga. Gen. Assem., with HB 792 (CCS), 2003 Ga. Gen. Assem.

65. *Compare* SB 133, as introduced, 2003 Ga. Gen. Assem., with HB 792 (CCS), 2003 Ga. Gen. Assem.

66. *Compare* HB 792, as introduced, 2003 Ga. Gen. Assem., with HB 792 (CCS), 2003 Ga. Gen. Assem.

67. *Compare* HB 792 (HCS), 2003 Ga. Gen. Assem., with HB 792 (SCS), 2003 Ga. Gen. Assem.

68. *See* Clark Interview, *supra* note 3.

House.⁶⁹ The bill passed the House at 10:38 p.m. on the 40th day of the legislative session after only cursory remarks from Representative Bordeaux regarding the significant changes.⁷⁰ It passed by a vote of 157 to 3, with 17 members not voting and three members excused.⁷¹ Less than an hour later, the Conference Committee report to HB 792 passed the Senate by a vote of 43 to 2, with 11 members abstaining.⁷²

The Act

Section 3 of the Act completely replaces the language previously found in Code section 9-11-23 relating to class actions.⁷³ The new language is essentially the same as the Federal Rule of Civil Procedure pertaining to class actions.⁷⁴ Most Georgia courts were already using the Federal Rule in practice; therefore, the Act merely codifies what courts were already doing.⁷⁵ A commentator summarized the situation as follows:

Given the limited but growing number of class action lawsuits in Georgia, there has been little effort or interest in overhauling Georgia's statutory class action scheme. As a consequence, Georgia case precedent dealing with . . . class action settlements is scarce; for the most part, Georgia courts defer heavily to federal law interpreting rule 23 of the Federal Rules of Civil Procedure.⁷⁶

In order for a court to certify a class, four characteristics must be present. Specifically, the Act provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) The class is so

69. See State of Georgia Final Composite Status Sheet, HB 792, Apr. 25, 2003.

70. See House Audio, *supra* note 63.

71. See Georgia House of Representatives Voting Record, HB 792 (Apr. 25, 2003).

72. See Georgia Senate Voting Record, HB 792 (Apr. 25, 2003).

73. Compare 1996 Ga. Laws 1203, § 1, at 1204 (formerly found at O.C.G.A. § 9-11-23 (2001)), with O.C.G.A. § 9-11-23 (Supp. 2003).

74. Compare O.C.G.A. § 9-11-23 (Supp. 2003), with FED. R. CIV. P. 23.

75. See Clark Interview, *supra* note 3.

76. Jeffrey G. Casurella, *Class Action Law in Georgia: Emerging Trends in Litigation, Certification, and Settlement*, 49 MERCER L. REV. 39, 59 (1997).

numerous that joinder of all members is impracticable; (2) There are questions of law or fact common to the class; (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) The representative parties will fairly and adequately protect the interests of the class.⁷⁷

Basically, the characteristics may be classified as numerosity, commonality, typicality, and adequate representation. Although these characteristics existed somewhat in the former language of Code subsection 9-11-23(a), they were ill-defined and intertwined with other provisions, making application of federal precedent to Georgia cases involving Code subsection 9-11-23(a) difficult.⁷⁸ The Act clarifies the language, providing a statutory framework less open to court interpretation. The new language of Code subsections 9-11-23(a) and 9-11-23(b) creates a two-tiered inquiry that a court must satisfy to determine whether class certification is appropriate.⁷⁹ First, a court must look at the aforementioned characteristics to determine if a class is certifiable.⁸⁰ If it deems the class certifiable, the court must then decide whether the class action is maintainable.⁸¹ Specifically, the Act provides that “[a]n action may be maintained as a class action if the prerequisites of [Code subsection 9-11-23(a)] are satisfied.”⁸² In addition, the Act requires that class members satisfy one of the three following situations: (1) Maintaining separate actions would create a risk of conflicting results for class members or would impede non-party class members’ ability to protect their interests; (2) “The party opposing the class has acted or refused to act on grounds generally applicable to the class,” justifying injunctive or declaratory relief “to the class as a whole;” or (3) “Questions of law and fact common to the members of the class predominate questions affecting only individual members, and that a class action is superior to other”

77. O.C.G.A. § 9-11-23 (Supp. 2003).

78. The Georgia Court of Appeals, as recently as 2002, declined to take a position as to whether the former language of Code section 9-11-23 required all four of the prerequisites found in the federal statute. *See UNUM Life Ins. Co. of Am. v. Crutchfield*, 568 S.E.2d 767, 769 (Ga. Ct. App. 2002) (“We may proceed without deciding whether the test under [Code section] 9-11-23 is identical to the federal test . . .”).

79. *See* O.C.G.A. § 9-11-23 (Supp. 2003).

80. *See id.*

81. *See id.*

82. *See id.*

methods of adjudication.⁸³ Thus, a court may determine that a class is certifiable under Code subsection 9-11-23(a) yet find that the class action may not be maintained for failure to meet one of the conditions in Code subsection 9-11-23(b). This provides parties opposing the class with a new means to defeat a class action suit.⁸⁴

The Act will also help to resolve uncertainty regarding what a class member must do to exclude himself from a class action judgment or settlement.⁸⁵ Previously, the Code section did not address class member exclusions, or “opting out.”⁸⁶

Additionally, section 3 of the Act provides for a discretionary appeal that was not previously available.⁸⁷ Prior to the Act, a trial court had sole discretion to certify a class.⁸⁸ Section 3 of the Act provides an appellate court with the ability to hear, at its discretion, a defendant’s appeal regarding the validity of a class.⁸⁹ This represents the first time that the Code has provided parties access to interlocutory appellate review of class determinations.⁹⁰ Previously, if a trial court granted class certification, the opposing party could not immediately appeal the certification.⁹¹ Defendants were forced to “live [with] the trial court’s determination.”⁹²

The significance of this section of the Act will depend on Congress’ actions.⁹³ The Georgia General Assembly enacted this legislation with a backdrop of pending federal legislation that would require class action suits involving parties from different states to automatically take their case to federal court.⁹⁴ If this federal legislation does not pass, state courts will continue to hear a significant number of class action suits, increasing the Act’s impact.⁹⁵

83. *See id.* Paragraph (b)(3) of this Code section codifies the Supreme Court of Georgia’s decision in *Georgia Investment Co. v. Norman*, 190 S.E.2d 48 (Ga. 1972).

84. *Compare* O.C.G.A. § 9-11-23 (Supp. 2003), *with* 1966 Ga. Laws 609 (formerly found at O.C.G.A. § 9-11-23 (1982)).

85. *See* O.C.G.A. § 9-11-23 (Supp. 2003).

86. *See* 1966 Ga. Laws 609 (formerly found at O.C.G.A. § 9-11-23 (1982)). For a detailed discussion of the problems Georgia courts face in the absence of a statutory “opting out” provision, *see Casurella, supra* note 76.

87. *See* O.C.G.A. § 9-11-23 (Supp. 2003).

88. *See* Clark Interview, *supra* note 3.

89. *See* O.C.G.A. § 9-11-23 (Supp. 2003).

90. *See* Clark Interview, *supra* note 3.

91. *See* Telephone Interview with Charlie Hood, Lobbyist, Georgia Pacific (May 14, 2003).

92. *See id.*

93. *See* Clark Interview, *supra* note 3.

94. *Id.*

95. *Id.*

Therefore, legislators intended section 3 of the Act to help ensure that Georgia remains a favorable place for businesses and to prevent Georgia's judicial reputation from becoming "plaintiff friendly," as Alabama had become before legislators similarly reformed that state's class action provisions.⁹⁶

II. Amend Interest Amount on Judgments; Prohibit Third Voluntary Dismissal by Plaintiff; Permit Courts to Use Discretion in Declining Jurisdiction When Another Forum is More Convenient; Change the Pre-Judgment Interest Rate

History of Tort Reform

Physician and Senator Tom Price of the 56th district introduced provisions in SB 133 (later partially incorporated into HB 792) in response to Georgia's medical malpractice crisis.⁹⁷ Rising medical malpractice premiums prompted Senator Price and others to initiate legislative tort reform.⁹⁸ For example, in 2002, Georgia physicians saw a 20% increase in their malpractice premiums.⁹⁹ Analysts predict Georgia physicians will see another 20% increase in 2003.¹⁰⁰ Moreover, Ty Cobb Health Care System, comprising of several rural hospitals in northeast Georgia, watched its insurance premium jump in 2002 "from \$553,000 to \$3.15 million—a 469% increase."¹⁰¹ Overall, Health Care Insurance Resources, Inc. reported that in 38% of Georgia hospitals, malpractice insurance premiums have increased more than 200%.¹⁰² As a physician, Senator Price requested that the Georgia General Assembly implement laws making it harder for a plaintiff to file a lawsuit and decreasing the ceiling on damage awards.¹⁰³ Previously, a plaintiff could file suit multiple times.¹⁰⁴

96. See Johnson Interview, *supra* note 5.

97. See Interview with Sen. Bill Hamrick, Senate District No. 30 (Apr. 9, 2003) [hereinafter Hamrick Interview].

98. See *id.*

99. Andy Miller, *Grady Makes \$15 Million Bet*, ATLANTA J. CONST., Oct. 7, 2002, at A5.

100. See *id.*

101. Susan Laccetti Meyers, *Malpractice Premiums on a Rocket Ride*, ATLANTA J. CONST., Aug. 11, 2002, available at 2002 WL 3733338.

102. See *id.*

103. See Hamrick Interview, *supra* note 97.

104. See *id.*

Senator Bill Hamrick of the 30th district believed that allowing a plaintiff to voluntarily dismiss a claim twice and then file the claim a third time was outrageous.¹⁰⁵

Opponents believed that restricting damage awards and interest on judgments hurt innocent victims of medical malpractice and was not the answer to the malpractice insurance crisis.¹⁰⁶ Supporters and opponents of tort reform in Georgia arrived at a compromise by incorporating some of SB 133's provisions into HB 792.¹⁰⁷ Under the Act, pre-judgment and post-judgment interest will be measured by a new criteria, and a plaintiff will no longer have the ability to bring a third tort claim in Georgia if a plaintiff voluntarily dismisses the case the first two times.¹⁰⁸

SB 133

Introduction

Senators Thomas Price, Eric Johnson, Tim Golden, Bill Hamrick, and Don Balfour of the 56th, 1st, 8th, 30th, and 9th districts, respectively, sponsored SB 133.¹⁰⁹ Upon Senator Price's introduction of SB 133 on February 12, 2003, the bill was assigned to the Senate Judiciary Committee.¹¹⁰ The Senate Committee favorably reported a substitute on March 25, 2003.¹¹¹ The Senate Committee substitute was the result of a compromise between trial lawyers, physicians, and malpractice insurance writers.¹¹² The Senate then passed the bill by a vote of 53 to 1 on March 27, 2003.¹¹³

SB 133 was introduced in the House on March 28, 2003.¹¹⁴ The House did not pass SB 133, but a Conference Committee

105. *See id.*

106. *See* Interview with Bill Clark, Lobbyist, Georgia Trial Lawyers Association (Apr. 9, 2003) [hereinafter Clark Interview Three].

107. *See id.* Compare HB 792 (CCS), 2003 Ga. Gen. Assem., with SB 133, as introduced, 2003 Ga. Gen. Assem.

108. *See* HB 792 (CCS), 2003 Ga. Gen. Assem.

109. *See* SB 133, as introduced, 2003 Ga. Gen. Assem.

110. *See* State of Georgia Final Composite Status Sheet, SB 133, Apr. 25, 2003.

111. *See id.*

112. *See* Clark Interview Three, *supra* note 106.

113. *See* Georgia Senate Voting Record, SB 133 (Mar. 27, 2003).

114. *See* State of Georgia Final Composite Status Sheet, SB 133, Apr. 25, 2003.

incorporated some of its provisions into HB 792.¹¹⁵ The Committee copied sections 1, 4, 5, and 6 of HB 792 almost word-for-word from four provisions in SB 133.¹¹⁶

Senate Judiciary Committee Consideration of SB 133

After introduction, the Senate assigned SB 133 to its Judiciary Committee.¹¹⁷ The Senate Committee favorably reported the bill, as substituted, on March 25, 2003.¹¹⁸ The Senate Committee substitute changed the pre-judgment interest rate from a rate equal to the published “weekly average one-year constant maturity treasury yield” to a rate equal to the published prime rate plus 3%.¹¹⁹ The substitute also changed the timing in which a plaintiff may voluntarily dismiss a claim.¹²⁰ As introduced, SB 133 allowed a plaintiff to dismiss a claim without court permission any time before the defendant serves an answer or before a summary judgment motion is made, whichever occurs first.¹²¹ The substitute, however, required a plaintiff who voluntarily dismisses an action to do so before the jury is sworn or in non-jury trials, before the first witness is sworn.¹²²

The Senate Committee substitute removed language from Code section 50-2-21, regarding a court’s jurisdiction for civil claims, so that the Code would no longer limit a court to only deciding inconvenient forum issues in personal injury claims.¹²³ Additional language in the substitute provided the courts with factors to weigh when deciding whether another more convenient forum for the trial exists.¹²⁴ For civil claims filed before July 1, 2003, judges may not exercise discretion in dismissing or transferring the case.¹²⁵

115. *See id.*; HB 792 (CCS), 2003 Ga. Gen. Assem.

116. *Compare* SB 133, as introduced, 2003 Ga. Gen. Assem., *with* HB 792 (CCS), 2003 Ga. Gen. Assem.

117. State of Georgia Final Composite Status Sheet, SB 133, Apr. 25, 2003.

118. *See id.*

119. *Compare* SB 133, as introduced, 2003 Ga. Gen. Assem., *with* SB 133 (SCS), 2003 Ga. Gen. Assem.

120. *Compare* SB 133, as introduced, 2003 Ga. Gen. Assem., *with* SB 133 (SCS), 2003 Ga. Gen. Assem.

121. *See* SB 133, as introduced, 2003 Ga. Gen. Assem.

122. *See* SB 133 (SCS), 2003 Ga. Gen. Assem.

123. *Compare* SB 133, as introduced, 2003 Ga. Gen. Assem., *with* SB 133 (SCS), 2003 Ga. Gen. Assem.

124. *See* SB 133 (SCS), 2003 Ga. Gen. Assem.

125. *See* O.C.G.A. § 50-2-21 (Supp. 2003).

The Senate Committee substitute also added subsections 6(c), 6(d), 6(e), and 6(f) to SB 133.¹²⁶ These subsections explain what happens when a court dismisses an action based on inconvenient forum.¹²⁷ If a defendant files a motion to dismiss within 90 days after the expiration of the time limit for filing an answer and can show that the “existing forum constitutes an inconvenient forum . . . [and] there is another forum which can assume jurisdiction, [then] the court may dismiss the action without prejudice”¹²⁸ If a court dismisses based on the aforementioned reasons, a defendant must (1) accept service of process from that court and (2) waive a statute of limitations defense if the “plaintiff elects to file the action in another forum within one year of the dismissal order,” even if the statute of limitations has expired in the other forum.¹²⁹ If a defendant does not abide by these conditions, the original court shall retain jurisdiction over the claim.¹³⁰ Additionally, “[i]f the court in the other forum refuses to accept jurisdiction, the plaintiff may, within 60 days of the final order refusing jurisdiction, reinstate the cause of action in the court in which the dismissal was granted.”¹³¹ Finally, where a court does transfer a case, the transferring court’s clerk must transmit originals of all filed papers to the transferee court’s clerk.¹³²

The Senate Committee substitute would have also amended Code section 51-12-14 relating to post-judgment interest, altering the way the interest rate is computed on the day a court finds a defendant liable.¹³³

The Senate passed the bill, as substituted, by a vote of 53 to 1 on March 27, 2003.¹³⁴ The bill was then referred and read in the House on March 28, 2003.¹³⁵

126. Compare SB 133, as introduced, 2003 Ga. Gen. Assem., with SB 133 (SCS), 2003 Ga. Gen. Assem.

127. See SB 133 (SCS), 2003 Ga. Gen. Assem.

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.*

132. See SB 133 (SCS), 2003 Ga. Gen. Assem.

133. Compare SB 133, as introduced, 2003 Ga. Gen. Assem., with SB 133 (SCS), 2003 Ga. Gen. Assem.

134. See Georgia Senate Voting Record, SB 133 (Mar. 27, 2003); State of Georgia Final Composite Status Sheet, SB 133, Apr. 25, 2003.

135. See State of Georgia Final Composite Status Sheet, SB 133, Apr. 25, 2003.

House Consideration of SB 133

The Speaker assigned SB 133 to the House Judiciary Committee.¹³⁶ Representatives divided the bill and incorporated certain sections into another bill, HB 792.¹³⁷ Initially, the Senate Committee substitute to HB 792 did not include the tort reform provisions taken from SB 133;¹³⁸ however, the House Committee insisted on including in HB 792 the fair dismissal provisions of SB 133.¹³⁹ The House and Senate were unable to strike a compromise until the last day of the legislative session, when the chambers agreed to adopt sections 1 and 4 through 6 of SB 133 into HB 792.¹⁴⁰

The Act

Section 1 of the Act amends Code section 7-4-12 to require all judgments in Georgia to have an annual interest rate equal to the prime rate on the day the court enters a judgment as published by the Board of Governors of the Federal Reserve System plus 3%.¹⁴¹ The Act further makes Code section 7-4-12 applicable to civil actions.¹⁴² The Act also amends Code section 9-11-41 to allow a plaintiff to dismiss an action only (1) if accomplished before the court swears in the first witness, or (2) if the plaintiff files a stipulation of dismissal signed by all parties in the action.¹⁴³

In addition, the Act amends Code section 50-2-21 to allow courts more discretion when determining whether to exercise jurisdiction over “any civil cause of action of a nonresident accruing outside this state” if another more convenient forum is available.¹⁴⁴ In making this determination, the court must look at a number of factors: “(1)

136. *See id.*; Clark Interview Two, *supra* note 24.

137. *Compare* SB 133 (SCS), 2003 Ga. Gen. Assem., with HB 792 (CCS), 2003 Ga. Gen. Assem.

138. *Compare* SB 133, as introduced, 2003 Ga. Gen. Assem., with HB 792 (SCS), 2003 Ga. Gen. Assem.

139. *See* State of Georgia Final Composite Status Sheet, HB 792, Apr. 25, 2003. *Compare* HB 792 (HCS), 2003 Ga. Gen. Assem., with SB 133, as introduced, 2003 Ga. Gen. Assem.

140. *Compare* SB 133, as introduced, 2003 Ga. Gen. Assem., with HB 792 (CCS), 2003 Ga. Gen. Assem.

141. *See* O.C.G.A. § 7-4-12 (Supp. 2003).

142. *See id.*

143. *Compare* 1985 Ga. Laws 418, § 1, at 546-47 (formerly found at O.C.G.A. § 9-11-41 (1993)), with O.C.G.A. § 9-11-41 (Supp. 2003).

144. *See* O.C.G.A. § 50-2-21 (Supp. 2003).

The place of accrual of the cause of action; (2) The location of witnesses; (3) The residence or residences of the parties; (4) Whether a litigant is attempting to circumvent the applicable statute of limitations of another state; and (5) The public factor of the convenience to and burden upon the court.”¹⁴⁵ The Act neither requires courts to choose the more convenient forum nor requires courts to dismiss actions with prejudice when a plaintiff could have filed the suit in a more convenient forum.¹⁴⁶ In order to take advantage of this Code section, a defendant must file a motion with the court no later than 90 days after the last day allowed for the filing of the defendant’s answer.¹⁴⁷

The Act also amends Code section 51-12-14 to require the pre-judgment interest rate on tort awards to equal the prime rate as published by the Board of Governors of the Federal Reserve System plus 3%.¹⁴⁸ This new rate will begin accruing on the 30th day following the mailing or delivery of written notice and will continue until the date of judgment.¹⁴⁹

Opposition to Tort Reform

Most of the opposition to the tort reform legislation originally proposed by SB 133 came from trial lawyers and plaintiff advocates.¹⁵⁰ Health care providers and professional insurance writers, concerned about skyrocketing medical malpractice premiums, actively supported the bill.¹⁵¹ Lobbyist Bill Clark opposed the bill because he felt that the reasons behind the bill were based on a false assumption that high jury verdicts were causing the high medical malpractice insurance premiums.¹⁵² Senator Rene Kemp of the 3rd district was also opposed to SB 133 and thought that the bill should never have made it out of the Senate Committee.¹⁵³ Mr. Clark

145. *See id.*

146. *See id.*

147. *See id.*

148. *Compare* 1991 Ga. Laws 510, § 1, at 1394-95 (formerly found at O.C.G.A. § 51-12-14 (2002)), with O.C.G.A. § 51-12-14 (Supp. 2003).

149. *See* O.C.G.A. § 51-12-14 (Supp. 2003).

150. *See* Hamrick Interview, *supra* note 97.

151. *See* Clark Interview Three, *supra* note 106.

152. *See id.*

153. *See* Hamrick Interview, *supra* note 97.

said that SB 133's provisions were not going to solve the problem of high medical malpractice premiums.¹⁵⁴ Mr. Clark thought that passage of this tort reform bill would harm "innocent plaintiffs and . . . not guarantee . . . that premiums will drop."¹⁵⁵ Although agreeing with the pre-judgment and post-judgment provisions, Mr. Clark felt that those provisions only passed as a result of a compromise between the dissenters and the supporters of this bill.¹⁵⁶ Opponents of "tort reform" were relieved when the legislators deleted the cap on non-economic damages from SB 133.¹⁵⁷ Opponents were even more relieved when legislators incorporated into HB 792 only 4 out of 12 sections from SB 133.¹⁵⁸

III. Provide for Vacation of an Arbitration Award Based Upon an Arbitrator's Manifest Disregard for the Law

History of the Fairness in Arbitration Act

Prior to the passage of HB 792, the Georgia Arbitration Code¹⁵⁹ strictly limited trial courts' discretion to vacate arbitration awards.¹⁶⁰ Courts could only vacate arbitration awards if (1) the award was procured through "corruption, fraud, or misconduct," (2) the arbitrator showed partiality towards a party, (3) the arbitrator overstepped his authority such that the award was neither final nor definite, or (4) the arbitrator failed to follow procedure, "unless the party applying to vacate the award continued the arbitration, without objection, despite having notice of this failure."¹⁶¹ Georgia courts interpreted these grounds as constituting an exclusive list of exceptions to the general rule that courts should uphold awards "in order not to frustrate the purpose of avoiding litigation by resorting to arbitration."¹⁶²

154. See Clark Interview Three, *supra* note 106.

155. See *id.*

156. See *id.*

157. See *id.*

158. See *id.*

159. O.C.G.A. §§ 9-9-1 to -15 (1982).

160. *Green v. Hundley*, 468 S.E.2d 350, 352 (Ga. 1996).

161. 1978 Ga. Laws 914 (formerly found at O.C.G.A. § 9-9-13(b) (1982)); *Green*, 468 S.E.2d at 352.

162. See, e.g., *Cotton States Mut. Ins. Co. v. Nunnally Lumber Co.*, 335 S.E.2d 708, 712 (Ga. Ct. App. 1985) (citing O.C.G.A. § 9-9-12 (1982)). Code section 9-9-12 required courts to confirm awards

Whether an arbitrator's "manifest disregard of the law" could constitute an "overstepping" of his authority, and therefore provide a basis for a court to vacate the award, was an open question for many years.¹⁶³ The Georgia Supreme Court answered this question in 2002 by holding in *Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*¹⁶⁴ that courts could not do so because an arbitrator's "manifest disregard of the law" did not constitute an overstepping of his authority within the statutory framework.¹⁶⁵ The court held that an arbitrator oversteps his authority within the meaning of the Georgia Arbitration Code only when he "determines matters beyond the scope of the case."¹⁶⁶

Representative Mary Margaret Oliver of the 56th district introduced HB 91, the 2003 Fairness in Arbitration Act, in response to the Georgia Supreme Court's decision in *Progressive Data Systems, Inc.*¹⁶⁷ Representative Oliver thought that the court's decision wrongly legitimized arbitration awards made by arbitrators who knowingly disregarded background substantive law when they made their decision.¹⁶⁸

Although both parties in *Progressive Data Systems, Inc.* were businesses, Representative Oliver introduced HB 91 out of concern that the decision would negatively affect "consumer interests."¹⁶⁹ Representative Oliver was worried that many consumers sign arbitration agreements without understanding the full impact of the rights that they have waived.¹⁷⁰ She felt that allowing these

"upon application of a party made within one year of its delivery to him, unless the award is vacated or modified by the court as provided in this part." O.C.G.A. § 9-9-12 (1982).

163. See, e.g., *Ralston v. City of Dahlonega*, 512 S.E.2d 300, 302 (Ga. Ct. App. 1999) (raising but not answering whether "manifest disregard of the law" constitutes a valid basis for vacating an award); *Akintobi v. Phoenix Fire Restoration Co.*, 513 S.E.2d 507, 508 (Ga. Ct. App. 1999) (implying in dicta that "manifest disregard for the law" could constitute a basis for vacating an award); *Martin v. RocCorp, Inc.*, 441 S.E.2d 671, 672 (Ga. Ct. App. 1994) (confirming an arbitrator's award because the arbitrator correctly applied Georgia law).

164. 568 S.E.2d 474 (Ga. 2002).

165. *Id.* at 475.

166. *Id.*

167. See Audio Recording of House Proceedings, Feb. 12, 2003 (remarks by Rep. Mary Margaret Oliver), at <http://www.ganet.org/services/leg/audio/2003archive.html> [hereinafter House Audio Two].

168. *Id.*

169. Telephone Interview with Rep. Mary Margaret Oliver, House District No. 56 (May 27, 2003) [hereinafter Oliver Interview].

170. *Id.*

consumers to suffer when an arbitrator knew the law but chose not to follow it was not in the public's best interest.¹⁷¹

Though roughly half of Georgia credit card holders have signed arbitration agreements, the Act will not affect these consumers because the Georgia Arbitration Code specifically excludes many consumer transactions.¹⁷² However, the Act will correct a problem in the building industry, where arbitration agreements sometimes provide that the builder's chosen arbitrator will arbitrate all disputes arising under the agreement,¹⁷³ by providing another way for a party to vacate an award in addition to the partiality basis that pre-dated the Act's passage, contained in Code paragraph 9-9-13(b)(3).¹⁷⁴

HB 91

Introduction

As originally introduced, HB 91 would have amended two provisions of the Georgia Arbitration Code.¹⁷⁵ First, the bill would have amended Code section 9-9-6, which provides the bases for a court to compel or stay arbitration.¹⁷⁶ This provision would have allowed parties not participating in the arbitration to apply to stay arbitration because the "neutral" arbitrator was actually partial to a party.¹⁷⁷ The amendment to Code section 9-9-6 would have allowed a court to stay pending arbitration in order to allow discovery on the matter of the arbitrator's partiality.¹⁷⁸

Second, the bill would have added a basis for vacating an arbitration award to Code section 9-9-13.¹⁷⁹ The bill would have

171. *Id.* Representative Oliver understood that the "manifest disregard" exception would only apply when the arbitrator knew the law but chose to disregard it. *Id.*

172. *See id.*; O.C.G.A. § 9-9-2(c) (1982); Telephone Interview with Gary Leshaw, Magistrate Judge, DeKalb County, Georgia (June 2, 2003) [hereinafter Leshaw Interview].

173. *See* O.C.G.A. § 9-9-13 (Supp. 2003); *see also* Oliver Interview, *supra* note 169; Leshaw Interview, *supra* note 172. Agreements to arbitrate real estate sales or loan agreements are generally enforceable as the exclusive method of dispute resolution, provided that the parties have agreed and initialed their agreement. *See* O.C.G.A. § 9-9-2(c) (1982); Leshaw Interview, *supra* note 172.

174. *See* Leshaw Interview, *supra* note 172.

175. HB 91, as introduced, 2003 Ga. Gen. Assem.

176. *See* HB 91, as introduced, 2003 Ga. Gen. Assem.

177. *See id.*

178. *Id.*

179. *Id.*

expressly allowed a court to vacate an arbitrator's award because of the "arbitrator's manifest disregard of the law."¹⁸⁰

The House Judiciary Committee favorably reported a substitute on February 12, 2003, deleting the proposed change to Code section 9-9-6.¹⁸¹ Thus, only the proposed additional basis for vacating an arbitrator's award remained in the bill.¹⁸² The House passed the Committee substitute version by a vote of 172 to 1 on the same day.¹⁸³

No one vocally objected to HB 91 on the House floor.¹⁸⁴ However, the State Bar of Georgia opposed the bill out of concern that requiring arbitrators to follow the law would discourage arbitration as an alternative dispute resolution mechanism.¹⁸⁵ The State Bar Association worried that advocates would always hire court reporters to attend arbitrations, so that if a party challenged the arbitrator's award on legal grounds, the advocates would have a written transcript of the proceedings to defend the claim.¹⁸⁶ The State Bar Association also worried that this would discourage parties from choosing to arbitrate their disputes because the use of a court reporter would raise the cost of the arbitration.¹⁸⁷ Further, the State Bar Association was concerned that allowing courts to vacate an arbitration award on legal grounds was inconsistent with the equitable, rather than legal, basis for arbitration and would effectively turn trial courts into appellate courts.¹⁸⁸ Although Representative Oliver intended HB 91 to apply only where the arbitrator knew what the law was, but chose to disregard it, the State Bar Association worried that courts would apply the provision more broadly and vacate arbitration awards when the court merely disagreed with the arbitrator's legal reasoning.¹⁸⁹

180. *Id.*

181. *Compare* HB 91, as introduced, 2003 Ga. Gen. Assem., with HB 91 (HCS), 2003 Ga. Gen. Assem.

182. *See* HB 91 (HCS), 2003 Ga. Gen. Assem.

183. *See* House Audio Two, *supra* note 167 (remarks by Rep. Mary Margaret Oliver); Georgia House of Representatives Voting Record, HB 91 (Feb. 12, 2003).

184. *See* House Audio Two, *supra* note 167.

185. Telephone Interview with Terrence Lee Croft, former Chairman, State Bar Association of Georgia, Alternative Dispute Resolution Section (June 24, 2003) [hereinafter Croft Interview].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Compare* Croft Interview, *supra* note 185, with House Audio Two, *supra* note 167.

The Senate tabled HB 91 on the 39th day of the legislative session so that they could consider it on the 40th and final day.¹⁹⁰ Although the Senate never reconsidered HB 91, the Conference Committee report for another bill, HB 792, included the entire text of the House Committee substitute version of HB 91.¹⁹¹

The Act

The Act amends the Georgia Arbitration Act by striking Code subsection 9-9-13(b), relating to a court's vacation of arbitration awards, and replacing it with new Code subsection 9-9-13(b).¹⁹² The new language empowers a court to vacate an arbitration award for "manifest disregard of the law," effectively overturning the Georgia Supreme Court's decision in *Progressive Data Systems, Inc.*¹⁹³ Arbitrators who understand governing law, but choose to disregard it when issuing decisions, now risk having their awards vacated by reviewing courts.¹⁹⁴

Courts have long been reluctant to vacate arbitration awards because vacating an award impairs the parties' trust in the finality of the process and discourages the use of arbitration as an alternative to litigation.¹⁹⁵ Very few state statutes require arbitrators to apply substantive law in issuing awards because if awards are broadly reviewable, parties will be more likely to choose litigation instead of arbitration to resolve disputes.¹⁹⁶ The Act thus places Georgia in the small minority of states that require arbitrators to apply substantive law.¹⁹⁷

190. Telephone Interview with Rep. Mary Margaret Oliver, House District No. 56 (June 24, 2003).

191. Compare HB 91 (HCS), 2003 Ga. Gen. Assem., with HB 792 (CCS), 2003 Ga. Gen. Assem. The Senate tabled HB 91 on April 22, 2003. State of Georgia Final Composite Status Sheet, HB 91, Apr. 25, 2003.

192. Compare 1988 Ga. Laws 903, § 1, at 914 (formerly found at O.C.G.A. § 9-9-13 (Supp. 2002)), with O.C.G.A. § 9-9-13(b) (Supp. 2003).

193. Compare *Progressive Data Sys., Inc. v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 475 (Ga. 2002) (holding that a Georgia court could not vacate an arbitrator's award because the arbitrator manifestly disregarded the law), with O.C.G.A. § 9-9-13(b) (Supp. 2003).

194. See O.C.G.A. § 9-9-13 (Supp. 2003).

195. See, e.g., *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (holding that a court may not vacate an arbitrator's interpretation of a collective bargaining agreement on the basis of the court's disagreement with the arbitrator's interpretation of the agreement).

196. See Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 112 (1997).

197. See *id.* New Hampshire allows a court to vacate an arbitration award where the arbitrator has made a "plain mistake" of fact or law. See N.H. REV. STAT. ANN. § 542:8 (2002); *Walsh v. Amica Mut.*

Georgia courts may not vacate arbitration awards because the court believes that either the award was not supported by sufficient evidence or that the arbitrator made a factual error.¹⁹⁸ Section 2 of the Act does not change the substantive law on this point.¹⁹⁹

Comparison with Federal Law

The Federal Arbitration Act (“FAA”) does not expressly include “manifest disregard of the law” as a basis for a federal court to vacate an arbitration award.²⁰⁰ However, most federal courts, including the Eleventh Circuit Court of Appeals, have vacated awards because the arbitrator showed a “manifest disregard of the law.”²⁰¹ “Manifest disregard of the law” is a basis for vacating an arbitration award as part of the case law interpreting the FAA in the Eleventh Circuit and in many federal courts; therefore, the Act “conforms” Georgia law to the governing federal standard.²⁰²

Ashley S. Harris, Section I
Crystal Ferrier, Section II
Andrew S. Lewinter, Section III

Ins. Co., 685 A.2d 472 (N.H. 1996) (“The words ‘plain mistake’ refer both to mistakes of fact and mistakes of law.”) (internal citations and quotations omitted).

198. See *Greene v. Hundley*, 468 S.E.2d 350, 353 (Ga. 1996).

199. Croft Interview, *supra* note 185.

200. 9 U.S.C. § 10(a) (2000).

201. *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1460-64 (11th Cir. 1997).

202. Leshaw Interview, *supra* note 172; see also *Montes*, 128 F.3d at 1464.