

The Senate Insurance and Labor Committee offered the following substitute to HB 792:

A BILL TO BE ENTITLED
AN ACT

1 To amend Article 4 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated,
2 relating to parties in civil actions, so as to provide for the comprehensive revision of
3 provisions regarding class actions; to provide for procedures, conditions, and limitations; to
4 provide for related matters; to provide an effective date; to repeal conflicting laws; and for
5 other purposes.

6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

7 Article 4 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated, relating to
8 parties in civil actions, is amended by striking Code Section 9-11-23, relating to class
9 actions, and inserting in its place a new Code Section 9-11-23 to read as follows:

10 ~~"9-11-23.~~

11 ~~(a) *Representation.* If persons constituting a class are so numerous as to make it~~
12 ~~impracticable to bring them all before the court, such of them, one or more, as will fairly~~
13 ~~ensure the adequate representation of all may, on behalf of all, bring or defend an action~~
14 ~~when the character of the right sought to be enforced for or against the class is:~~

15 ~~(1) Joint, or common, or secondary in the sense that the owner of a primary right refuses~~
16 ~~to enforce that right and a member of the class thereby becomes entitled to enforce it; or~~

17 ~~(2) Several, and the object of the action is the adjudication of claims which do or may~~
18 ~~affect specific property involved in the action.~~

19 ~~(b) *Secondary action by shareholders.* In an action brought to enforce a secondary right~~
20 ~~on the part of one or more shareholders in an association, incorporated or unincorporated,~~
21 ~~because the association refuses to enforce rights which may properly be asserted by it, the~~
22 ~~complaint shall be verified by oath and shall aver that the plaintiff was a shareholder at the~~
23 ~~time of the transaction of which he or she complains or that his or her share thereafter~~
24 ~~devolved on him or her by operation of law. The complaint shall also set forth with~~
25 ~~particularity the efforts of the plaintiff to secure from the managing directors or trustees~~
26

~~such actions as the plaintiff desires and the reasons for his or her failure to obtain such action or the reasons why irreparable injury to the association, incorporated or unincorporated, would result by waiting for 90 days from the date of the demand upon the managing directors or trustees. This Code section is cumulative of Code Section 14-2-831.~~

~~(c) *Dismissal or compromise.* A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subsection (a) of this Code section, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraph (2) of subsection (a) of this Code section, notice shall be given only if the court requires it.~~

9-11-23.

(a) 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 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.

(b) An action may be maintained as a class action if the prerequisites of subsection (a) of this Code section are satisfied, and, in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

1 (B) The extent and nature of any litigation concerning the controversy already
2 commenced by or against members of the class;

3 (C) The desirability or undesirability of concentrating the litigation of the claims in the
4 particular forum; and

5 (D) The difficulties likely to be encountered in the management of a class action.

6 (c)(1) As soon as practicable after the commencement of an action brought as a class
7 action, the court shall determine by order whether it is to be so maintained. An order
8 under this subsection may be conditional, and may be altered or amended before the
9 decision on the merits.

10 (2) In any class action maintained under paragraph (3) of subsection (b) of this Code
11 section, the court shall direct to the members of the class the best notice practicable under
12 the circumstances, including individual notice to all members who can be identified
13 through reasonable effort. The notice shall advise each member that:

14 (A) The court will exclude the member from the class if the member so requests by a
15 specified date;

16 (B) The judgment, whether favorable or not, will include all members who do not
17 request exclusion; and

18 (C) Any member who does not request exclusion may, if the member desires, enter an
19 appearance through counsel.

20 (3) The judgment in an action maintained as a class action under paragraph (1) or (2) of
21 subsection (b) of this Code section, whether or not favorable to the class, shall include
22 and describe those whom the court finds to be members of the class. The judgment in an
23 action maintained as a class action under paragraph (3) of subsection (b) of this Code
24 section, whether or not favorable to the class, shall include and specify or describe those
25 to whom the notice provided in paragraph (2) of subsection (b) of this Code section was
26 directed, and who have not requested exclusion, and whom the court finds to be members
27 of the class.

28 (4) When appropriate:

29 (A) An action may be brought or maintained as a class action with respect to particular
30 issues; or

31 (B) A class may be divided into subclasses and each subclass treated as a class, and the
32 provisions of this rule shall then be construed and applied accordingly.

33 (d) In the conduct of actions to which this rule applies, the court may make appropriate
34 orders:

35 (1) Determining the course of proceedings or prescribing measures to prevent undue
36 repetition or complication in the presentation of evidence or argument;

1 (2) Requiring, for the protection of the members of the class or otherwise for the fair
2 conduct of the action, that notice be given in such manner as the court may direct to some
3 or all of the members of any step in the action, or of the proposed extent of the judgment,
4 or of the opportunity of members to signify whether they consider the representation fair
5 and adequate, to intervene and present claims or defenses, or otherwise to come into the
6 action;

7 (3) Imposing conditions on the representative parties or on intervenors; and

8 (4) Requiring that the pleadings be amended to eliminate therefrom allegations as to
9 representation of absent persons, and that the action proceed accordingly.

10 The orders may be combined with other orders, and may be altered or amended by the
11 court as may be desirable from time to time.

12 (e) A class action shall not be dismissed or compromised without the approval of the court,
13 and notice of the proposed dismissal or compromise shall be given to all members of the
14 class in such manner as the court directs.

15 (f)(1) No class of civil litigants shall be certified or recognized by any court of the State
16 of Georgia unless there shall have been compliance with the procedures for certification
17 of the class set forth in this subsection.

18 (2) As soon as practicable after the commencement of an action in which claims or
19 defenses are purported to be asserted on behalf of or against a class, or as soon as
20 practicable after such assertions in an amended pleading, but in no event prior to the time
21 allowed by law for each party, including, but not limited to, counterclaim, cross-claim,
22 and third-party defendants to file an answer or other pleading responsive to the complaint,
23 counterclaim, cross-claim, or third-party claim, the court shall hold a conference among
24 all named parties to the action for the purpose of establishing a schedule, in the same
25 manner and to the same extent contemplated by Code Section 9-11-16, for any discovery
26 in which the parties may wish to engage which is both allowed by Code Section 9-11-26
27 through Code Section 9-11-37 and germane to the issue of whether the requested class
28 should or should not be certified. At this conference, the court may set a date for a
29 hearing on the issue of class certification, but such hearing may not be set sooner than 90
30 days after the date on which the court issues its scheduling order pursuant to the
31 conference unless a shorter time is agreed to by all parties.

32 (3) Upon motion of any party, the court shall, except for good cause shown and even then
33 only if the interests of justice require that it not do so, stay all discovery directed solely
34 to the merits of the claims or defenses in the action until the court shall have made its
35 decision regarding certification of the class. In considering such a motion, the court shall
36 consider whether any prejudice to the plaintiff exists because of the filing by the

1 defendant of a motion for summary judgment pursuant to Code Section 9-11-56 prior to
2 the court's decision regarding class certification.

3 (4) The court shall, on motion of any party, hold a full evidentiary hearing on class
4 certification. The hearing shall be recorded, and all named parties to the action shall be
5 given notice of the date, time, and place of the hearing by written notification given to the
6 party's attorney, or if appearing pro se, to the party, no later than 60 days prior to the date
7 set for the hearing. At the hearing, the parties shall be allowed to present, in the same
8 manner as at trial, any admissible evidence in support of or in opposition to the
9 certification of the class.

10 (5) When deciding whether a requested class is to be certified, the court shall determine,
11 by employing a rigorous analysis, if the party or parties requesting class certification have
12 proved its or their entitlement to class certification under this Code section. The burden
13 of coming forward with such proof shall at all times be on the party or parties seeking
14 certification, and if such proof shall not have been adduced, the court shall not order
15 certification of the class. In making this determination, the court shall analyze all factors
16 required by this Code section for certification of a class and shall not order certification
17 unless all such factors shall have been established. In announcing its determination, the
18 court shall place in the record of the action a written order addressing all such factors and
19 specifying the evidence, or lack of evidence, on which the court has based its decision
20 with regard to whether each such factor has been established. In so doing, the court may
21 treat a factor as having been established if all parties to the action have so stipulated on
22 the record and if the court shall be satisfied that such factor could be proven to have been
23 established.

24 (6) Nothing in this Code section shall affect, or be construed to affect, any provision of
25 Code Section 9-11-12 or Code Section 9-11-56.

26 (g) A court's order certifying a class or refusing to certify a class action shall be appealable
27 in the same manner as a final order to the appellate court which would otherwise have
28 jurisdiction over the appeal from a final order in the action. Such appeal may only be filed
29 within 42 days of the order certifying or refusing to certify the class. The filing of such
30 appeal, the failure to file an appeal, or the affirmance of the certification or denial order
31 shall in no way affect the right of any party, after the entry of final judgment, to appeal the
32 earlier certification of, or refusal to certify, the class. If the appeal is not the first appeal
33 taken by the party, the subsequent appeal shall be based upon the record at the time of final
34 judgment and shall be considered by the court only to the extent that either the facts or
35 controlling law relevant to certification have changed from that which existed or controlled
36 at the time of the earlier certification or refusal to certify. During the pendency of any such
37 appeal, the action in the trial court shall be stayed in all respects. Following adjudication

1 on appeal or, if the initial appeal is to an intermediate appellate court, adjudication of the
2 action on any writ of certiorari granted by the Supreme Court of Georgia, if the class is not
3 to be certified, the stay in the trial court shall automatically dissolve and the trial court may
4 proceed to adjudicate any remaining individual claims or defenses. If, after such appeal or
5 procedure on writ of certiorari, the class is to be certified, the stay shall likewise dissolve
6 and the trial court shall proceed with adjudication on the merits, except that the trial court
7 shall at all times prior to entry of a final order retain jurisdiction to revisit the certification
8 issues upon motion of a party and to order decertification of the class if during the litigation
9 of the case it shall become evident to the court that the action is no longer reasonably
10 maintainable as a class action pursuant to the factors enumerated in subsection (b) of this
11 Code section."

12 **SECTION 2.**

13 This Act shall become effective upon its approval by the Governor or upon its becoming law
14 without such approval.

15 **SECTION 3.**

16 All laws and parts of laws in conflict with this Act are repealed.