IN THE SUPREME COURT OF THE STATE OF GEORGIA

Case No. S23C1156

KYNDYL YVETTE BANKS et al.,

Petitioners/Defendants,

v.

AARON PIERCE,

Respondent/Plaintiff.

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs on issues of concern to the nation's business community.

The Chamber's membership includes many businesses that operate in Georgia. The decision below is deeply problematic not only for Chamber-members that are insurance companies doing business in Georgia but also for Georgia businesses that need obtainable and affordable insurance to operate. Those interests are threatened by the Court of Appeals' decisions here and in other recent cases involving failed settlement attempts by insurers where the conditions of the plaintiff's settlement offer are so elaborate, yet often trivial, that they almost never will be matched with perfect precision. Indeed, with this decision, there is now a trend of case law that actually reward settlement offers crafted by lawyers in bad faith even though such conduct is strictly prohibited by the Georgia Rules of Professional Conduct. And this trend is costing Chamber members dearly.

To be clear, both insureds and their insurers *want* to settle claims early for policy limits, but the plaintiffs' creative settlement "offers"—typically involving page-after-page of technicalities—are making that almost impossible, subjecting insureds to burdensome and risky litigation. If the insured has assets independent of an insurance policy, a plaintiff might try to enforce the judgment against the insured. But if the insured is an individual, the plaintiff likely will pursue an assigned "*Holt*" claim against the insurer for failure-to-settle. The case law approving these tactics has increased insurance premiums and caused some insurers to withdraw from the Georgia market due to the sky-high exposure plaintiffs now claim can result from inadvertent and immaterial variations in an attempted acceptance of a "set-up" settlement offer.

Because the Chamber represents both insurers and insureds, it has a strong interest in having this Court review the Court of Appeals' approval of such sharp practices. Further, as a representative of business entities, the Chamber hopes this Court will review and reject the rationale the Court of Appeals used to uphold these tactics in this case because it conflicts with the text of the UCC, thereby threatening massive confusion over enforcement of commercial paper.[1]

[1] No counsel for a party authored this brief in whole or in part and no person or entity other than amicus, its members, or counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The genesis of the gamesmanship at issue here is *Southern General Insurance Co. v. Holt*, 262 Ga. 267 (1992). *Holt* held that an insurer faced with a plaintiff's offer to settle for policy limits could be held extra-contractually liable to its insured for "negligence, fraud, or bad faith in failing to compromise the claim." 262 Ga. at 268. Ever since, certain plaintiffs' attorneys have tried to manufacture "*Holt*" claims by making "offers" with numerous technical conditions designed to trip-up an insurer that wants to comply with the offer but sends an acceptance that contains inadvertent and trivial variances. *See*, *e.g*, *White v. Cheek*, 360 Ga. App. 557, 566 (2021) (McFaddin, J.) (concurring specially) ("The offer before us specifies that it could be accepted only through compliance with its many requirements [that] are buried in a 22-page, single-spaced letter that includes 16 footnotes and is filled with warnings and threats on a wide variety of subjects.). If the settlement fails because the insurer does not "dot every i"—and thereafter a large verdict is returned—the strategy is for the plaintiff to settle with the insured, obtain an assignment of the *Holt* claim, then go after the insurer for the full amount of the judgment though it is well above policy limits. *See Holt*, 262 Ga. at 268.

True, *Holt* warned that "[n]othing in this decision is intended to lay down a rule of law that would mean that a plaintiff's attorney under similar circumstances could 'set up' an insurer for an excess judgment." 262 Ga. at 269. But, in recent

cases, the Court of Appeals has approved the very set-up tactic rejected *by Holt*. For example, the decision here rejected the settlement—despite the written confirmation by counsel for the insurer that she was authorized to accept it—where the plaintiff complained that the settlement check was sent too early, the check omitted a comma from the payee's name, and the check bore the legend "void after 180 days"—which is standard for commercial paper. *See Pierce v. Banks*, --- S.E.2d ----, 2023 WL 4227923 at *2 (Ga. Ct. App. June 28, 2023).

Holt's preemptive disapproval of set-up offers is impotent, as policy-limit offers have become increasingly intricate, contorted, designed-for-failure, and, at bottom, a sophisticated form of trickery. And, as several Court of Appeals judges have observed, the gamesmanship in these so-called offers is evident. *See White*, 360 Ga. App. at 567 (McFadden, J.) (concurring specially) ("The 22-page offer letter is compelling, if not dispositive, evidence of a lack of intent to settle the claim and so of bad faith."); *Pierce*, 2023 WL 4227923 at *6 (Rickman, C.J. and Dillard, P.J.) (concurring specially) ("[T]hese requirements at times can be a trap for the unwary, leading us to caution parties to avoid crossing the line from vigorous advocacy to gamesmanship."). But the Court of Appeals appears to be constrained by its own precedent, as it continues to condone obvious set up settlement offers—crafted by counsel—that disavow the principles of good faith and fair dealing required by the Georgia Rules of Professional Conduct. *See id*.

The General Assembly also has noticed and repudiated these sharp practices. In response to *Holt*, it adopted legislation to regulate certain material requirements of policy-limit offers. *See* O.C.G.A. § 9-11-67.1 (effective July 1, 2013 to June 30, 2021); *see also Grange Mut. Cas. Co. v. Woodard*, 826 F.3d 1289, 1299-1300 (11th Cir. 2016) (observing that O.C.G.A. § 9-11-67.1 was meant "to address the negative effects of case law that had been enabling plaintiffs to present settlement offers with impossible deadlines and expose the insurance company to potential 'bad faith' claims when it is unable or unwilling to abide.").

In *Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848 (2017), however, this Court held that the mandatory terms in Section 9-11-67.1 were non-exclusive. After *Grange*, policy-limit offers began piling on non-statutory and objectively immaterial terms to set up a *Holt* claim. And the Court of Appeals has upheld this tactic, even if the attempted acceptance had only trivial and unintended deviations. *See, e.g., White*, 360 Ga. App. at 563; *Ligon v. Hu*, 363 Ga. App. 251, 253 (2022).

In response to this practice, the General Assembly recently amended Section 9-11-67.1 so that "the terms outlined in subsection (a) . . . shall be the only terms which can be included in an offer to settle made under this Code section." O.C.G.A. § 9-11-67.1(b)(1) (effective July 1, 2021). The revised statute, however, applies only to offers made "prior to the filing of an answer." O.C.G.A. § 9-11-67.1(a). And now insurers are seeing set-up offers designed to avoid the statute

because, for example, they are sent shortly *after* an answer is filed. So, bad faith settlement offers is still a problem despite this legislation.

The legislature, however, is not the only tribunal that can address this problem. The statute at issue in this case, O.C.G.A. § 9-11-67.1, explicitly limits its terms to lawyer-conduct—offers "prepared by or with the assistance of an attorney"—and thereby implicitly incorporates the Rules of Professional Conduct that apply to all Georgia lawyers. And it is this Court that has the power and responsibility to enforce the Rules of Professional Conduct. Those rules do not allow the "sharp practices" of lawyers who prepare these bad faith offers. Indeed, the Rules of Professional Conduct must be enforced with respect to any settlement offer, whether or not covered by a statute, as long as it is crafted by an attorney. That is the only way to effectuate the intent of the *Holt* doctrine—which was judicially created and thus can be judicially refined—that a plaintiff's attorney cannot "'set up' an insurer for an excess judgment." *See Holt*, 262 Ga. at 269.

Additionally, the Court of Appeals has created an alarming precedent that could wreak havoc on the enforcement of commercial paper in this State if it is not corrected. The Court of Appeals held that the acceptance of the offer was non-conforming because the settlement check had a common legend on its face saying "void after 180 days." *See Pierce*, 2023 WL 4227923 at *1, 3, 5 n.7. And the Court repeatedly referred to the legend as a payment "expiration" term. *Id.* That holding,

however, contravenes several provisions of the UCC, as adopted in Georgia, and case law holding that a check does not "expire" due to such a legend because, even if the check has been dishonored, the payee has the right to enforce the instrument up to the statute of limitations. *See* O.C.G.A. § 11-3-318; § 11-3-310(b). Moreover, while not having the same degree of gravity, the Court of Appeals' ruling that the settlement failed because the check was received too *early* also is in error.

QUESTIONS PRESENTED

The Chamber agrees with Petitioners that the Court should address the requirements for accepting policy-limit offers, the impact of the legend on the settlement check, and the timing of receipt of the check. But the Chamber asks the Court to consider these questions framed this way:

- Is there a good faith requirement governing policy-limit settlement offers made to insurers such that inadvertent non-material deviations in an otherwise unequivocal acceptance by the insurer cannot defeat enforcement of the settlement?

- Does the Court of Appeals' opinion, holding that the commonly found legend on commercial paper saying "void after 180 days" signifies an "expiration" of the check or payment obligation, conflict with the text of the Uniform Commercial Code as adopted in O.C.G.A. § 11-3-310(b)?

- Did the Court of Appeals err in holding that the settlement failed because the check was received at the same time as the insurer's written acceptance of the offer, where receipt of the check at that time was consistent with the terms of the offer as understood in common parlance and also with the notice required by the medical benefits statute and applicable health insurance policy, which relates to when a check is paid, not when the check is received?

STATEMENT OF THE CASE

Following a motor-vehicle accident, Plaintiff-Respondent Aaron Pierce, through counsel, made a written pre-suit offer to Trexis One Insurance Company ("Trexis"), the insurer of Defendants-Petitioners Kyndyl Banks and Octavius Smith, to settle Plaintiff's personal injury claim. Pet., Ex. A at 1-2. The detailed offer contained a blanket designation that all terms were material and constituted conditions of acceptance. *See* Pet., Ex. A at 2; Pet., Ex. B. The offer required, *inter alia*, that (1) Trexis must accept certain "aforementioned material terms" within 31 days of receipt of the offer; (2) payment "must be received 15 days after Trexis' written acceptance"; (3) payment must be made to "Aaron Pierce and Brooks Injury Law, LLC"; and (4) "the settlement payment . . . must not include any . . . expirations . . . or restrictions that are not expressly permitted in this offer." Pet., Ex. B.

A few days later, counsel for Trexis sent an acceptance package to Plaintiff's counsel, which included (1) a letter indicating that Trexis had "authorized [her] to accept" the offer, (2) a limited release, and (3) a settlement check for policy limits made out to "Aaron Pierce and Brooks Injury Law LLC" and bearing a notation "void after 180 days." Pet., Ex. A at 3; Pet., Ex. E. In subsequent correspondence, Plaintiff's counsel maintained that the settlement package constituted a non-identical counter-offer that was rejected. Pet., Ex. A at 3-4.

Plaintiff brought a personal injury action and Defendants moved for summary judgment, arguing that there was a valid and enforceable settlement agreement. *Id.* In response, Plaintiff argued that (1) the letter from Trexis' counsel stating that she was "authorized [] to accept" the offer was not, in fact, a statement of acceptance, (2) plaintiff received payment too early—*i.e*., on the day of, rather than the15th day after, Trexis' written acceptance, (3) the check payee information omitted a comma between "Law" and "LLC", and (4) the notation "void after 180 days" constituted an impermissible expiration regarding payment. *Id.*

The trial court granted summary judgment for Defendants and Plaintiff appealed. *Id.* The Court of Appeals reversed, holding that (1) Plaintiff's receipt of the settlement check prior to 15 days after Trexis' acceptance of the offer was a non-identical variance, and (2) the check's notation, "void after 180 days," constituted a non-identical variance—an "expiration"—that precluded acceptance. *Id.* at 9-12, *id*. at 12 n.7. The Court of Appeals rejected the argument that Plaintiff sought enforcement of "immaterial and inconsequential details" and held that the Trexis' acceptance package did not create an enforceable agreement because it did not "mirror" the "precise terms" of the offer. *Id.* at 7-9. The Court chose not to rule on the "authorized to accept" phraseology and the comma argument, though it could have—and should have—rejected these arguments as frivolous and incapable of thwarting the settlement. *Id.* at 13 n.9.

ARGUMENT

I. This Court should grant certiorari to recognize a materiality exception to the mirror-image rule where an attorney makes a settlement offer to a defendant's insurer in bad faith.

A. This Court has plenary authority to regulate the sharp practice inherent in set-up demands.

"[T]he power to license and regulate attorneys at law is vested in this Court and administered through the Court and through the State Bar of Georgia." *Moss v. City of Dunwoody*, 293 Ga. 858, 859 (2013) (citing 1983 Ga. Const., Art. III, Sec. VI, Par. IV; O.C.G.A. § 15-19-30 et seq). Indeed, "this Court has the inherent power to govern the practice of law in Georgia." *State ex rel. Doyle v. Frederick J. Hanna & Assocs., P.C.*, 287 Ga. 289, 291 (2010). And "matters relating to the practice of law . . . are within the inherent and exclusive power of this Court." *Matter of Barge*, 264 Ga. 498, 499 (1994) (cleaned up).

The Rules of Professional Conduct approved by this Court prohibit deceitful conduct by attorneys, such as set-up policy-limit offers that are made in bad faith with the hope of manufacturing a *Holt* claim against the defendant's insurer. *See Shaha v. Gentry*, 359 Ga. App. 613, 615 (2021) (holding that an offeror's "lack[] [of] intent to settle the claim" indicates an absence of "good faith" under Georgia's offer of settlement statute). Indeed, such an offer is by definition devoid of "good faith." *See* ACTING IN GOOD FAITH, *Black's Law Dictionary* (11th ed. 2019) ("Behaving honestly and frankly, without any intent to defraud or to seek an

unconscionable advantage."); Yarn, Douglas H., Ethical considerations in negotiation, Ga. ADR Prac. & Proc. § 6:51 ("Good faith also can be used in reference to participation in negotiations [where] participants are expected to be there to make a bona fide effort to settle and not for ulterior motives.").

Set-up offers also are a quintessential example of "sharp practice." *See* SHARP PRACTICE, *Black's Law Dictionary* (11th ed. 2019) ("Unethical action and trickery, esp. by a lawyer); "Sharp practice," *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/sharp%20practice (last visited July 25, 2023) ("[T]he act of dealing in which advantage is taken or sought unscrupulously.").

The sharp practice of issuing set-up demands in fact implicates several provisions of the Georgia Rules of Professional Conduct. First, the preamble of this code establishes the overriding principle that, "as negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of *honest* dealing with others." Georgia Rules of Professional Conduct Preamble ¶ 2 (emphasis added). Rule 8.4 provides that a lawyer shall not "engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation." Georgia Rules of Professional Conduct Rule 8.4(a)(4). And Rule 3.1, titled "Meritorious Claims and Contentions," prohibits a lawyer from taking any position on behalf of a client aimed at harassing or "maliciously injur[ing] another." *Id.* Rule 3.1(a). Comment 1

to Rule 3.1 explains further. While and advocate has a duty to represent the client zealously, there is "also a duty not to abuse legal procedure." And a position is not meritorious if it is "taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a good faith argument on the merits of the action taken[.]" *Id*., comment 2. Thus, the requirement that a lawyer always act in good faith permeates Georgia's Rules of Professional Conduct.

A "set-up" offer, however, violates all these provisions. Transmission of a letter masquerading as a genuine effort to compromise a claim that, in reality, seeks no compromise at is the antithesis of "honest dealing." And the inclusion of complex, highly technical provisions—the legal implications of which are not immediately apparent on the face of the letter—constitutes a covert and "deceitful" attempt to create a mine field of extra-contractual liability exposure. Indeed, Holt expressly condemned set-up offers in this context. *See* 262 Ga. at 269 (holding claimants cannot "set up" insurers for failure-to-settle claims).

Additionally, Georgia public policy requires that settlement negotiations be conducted in good faith. For example, Georgia's offer-of-settlement statute allows fee-shifting only if the offer is made in "good faith." *See* O.C.G.A. § 9-11-68(d)(2); *see also Smith v. Baptiste*, 287 Ga. 23, 29 (2010) (explaining that it is the

policy of this State "to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation").

Moreover, by enacting Section 9-11-67.1(a)—a legislative response to abuse of the *Holt* decision—the General Assembly targeted specifically the conduct of lawyers, incorporating into the legislation the explicit provision that it applies only to offers "prepared by or with the assistance of an attorney." Thus, any case governed by the prior version of O.C.G.A. § 9-11-67.1—such as this case—or the new version which has the same lawyer-targeted language—necessarily requires that an offer must be made in good faith because good faith is required of all actions taken by Georgia lawyers. And the same premise applies to any lawyer-crafted policy-limit offer whether or not a version of O.C.G.A. § 9-11-67.1 applies because this Court will not condone such sharp practices by lawyers in this State. *See Holt*, 262 Ga. at 269.

Accordingly, this Court should grant certiorari to address this particular abusive practice that is becoming quite prominent and is actually encouraged by the Court of Appeals' recent decisions. Indeed, it is particularly appropriate for this Court to address this problem because the "set-up" offers flow from this Court's holding in *Holt*. Again, the Holt doctrine is a judicially created principle, so it is most appropriate that it be judicially refined by this Court in the exercise of its exclusive and constitutional power to regulate the practice of law in this State.

B. This Court should hold that where an attorney communicates an offer to an insurer without exercising requisite good faith, any immaterial deviation in an otherwise unequivocal acceptance does not render the settlement unenforceable.

Where a plaintiff's lawyer violates the duty to act in good faith when extending a settlement offer to the defendant's insurer, the insurer's acceptance of that offer should be enforceable if all material terms are satisfied. Stated another way, an attorney-crafted offer must be construed as requiring only material satisfaction to satisfy the good faith requirement imposed by the Rules of Professional Conduct such that where, as here, there is an unequivocal good faith attempt by the insurer to accept all the terms of the offer, the settlement will not be thwarted by trivial, formalistic, and immaterial deviations. Moreover, such a holding would be consistent with other Georgia precents holding that there is a materiality component to the mirror-image rule in certain circumstances. *see Crystal Cubes of Stone Mt. v. Kutz*, 201 Ga. App. 338, 339 (1991) (holding an immaterial variance did not preclude settlement agreement because "[a] counteroffer results where one party makes an offer and the other party purports to accept that offer, but with *material changes in the terms*.") (emphasis original); *accord State v. U.S. Oil Co.*, 194 Ga. App. 1, 2 (1989).

Georgia common law has embraced the materiality principle for over a century. In *Grange*, this Court reaffirmed in passing the common law rule that an agreement "requires a meeting of the minds on all *material* terms." 300 Ga. at 856

(emphasis added). Cases from the Court of Appeals also have embraced this concept as a generally applicable principle of contract law. *See, e.g., Yim v. Carr*, 349 Ga. App. 892, 903 (2019) ("No contract exists until all *essential* terms have been agreed to. . . .") (emphasis added); *Calhoun v. Cullum's Lumber Mill*, 247 Ga. App. 859, 865 (2001) (holding "attempt to *materially* alter and restrict the terms of [a] timber bid acted as a counteroffer thereto.") (emphasis added); *U.S. Oil Co*., 194 Ga. App. at 2 ("Where one party makes an offer and the other party purports to accept that offer, but with *material* changes in the terms, the second party has made a counteroffer which, if accepted, constitutes a contract between the parties.") (emphasis added); *Winder Mfg. Co. v. Pendleton Co*., 27 Ga. App. 476, 477 (1921) ("acceptance" changing time for delivery was a counter-offer because of a "material variance" in terms).

Other jurisdictions recognize the common-law principle that acceptance must mirror only the material terms of an offer. *See, e.g., Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 514 (Tex. 2014) ("[A]n immaterial variation between the offer and acceptance will not prevent the formation of an enforceable agreement."); *Romaine v. Romaine*, 291 So.3d 1271, 1272 (Fla. App. 5 Dist., 2020) ("It is well-established that an acceptance must be a "mirror image" of the offer in all material respects") (emphasis added); *Gresser v. Hotzler*, 604 N.W.2d 379, 383 (Minn. App. 2000) ("[A]n immaterial variation in

the acceptance does not impede contract formation."); *Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 208 (5th Cir. 1998) ("Under th[e] 'mirror image' rule, a modification of an offer qualifies as a rejection and counteroffer only if the modification is 'material.'").

In *Pierce*, the Court of Appeals accepted the proposition that "a contract is created when parties 'agree on the material terms which define their rights and obligations' and that parties need not 'necessarily agree on non-material matters for a contract to form.'" 2023 WL 4227923 at *3. The court, however, held that the materiality principle applied only to bilateral contracts, not unilateral contracts. *Id.* But there is no reason to reject this established principle just because the plaintiff has characterized the transaction as a "unilateral contract" requiring the performance of an act rather than a promise. As recognized by numerous courts from other jurisdictions, under the common law a unilateral contract may be accepted by "substantial performance," and an offer cannot be withdrawn once there has been "part performance." *See Storti v. University of Washington*, 181 Wash.2d 28, 37, 330 P.3d 159, 164 (2014) ("Under the Restatement [(Second) of Contracts § 45], substantial performance by the offeree precludes withdrawal by the offeror"); *see also*, *e.g.*, *Cook v. Coldwell Banker*, 967 S.W.2d 654 (Mo. Ct. App. 1998); *Arenberg v. Central United Life Ins. Co*., 18 F.Supp.2d 1167 (D. Colo. 1998).

Indeed, "'[t]he reason for the rule is, not that part performance or tender is the 'equivalent' of full performance, but that honorable men do not repudiate their promises after part performance has been given or tendered.'" *Lazarus v. American Motors Corp.*, 21 Wis.2d 76, 83, 123 N.W.2d 548 (1963) (quoting 1 Corbin, Contracts (1963), sec. 63, p. 264). Accordingly, this rule is particularly applicable to attorney-crafted settlement offers because lawyers must be considered "honorable" people who "do not repudiate their promises after part performance has been given or tendered." The lawyer's duty of good faith and fair dealing in negotiations simply does not allow repudiation based on trivial non-material variances even with respect to a unilateral contract. And this Court should grant the petition for certiorari here to make clear that Georgia also follows this venerable rule.

II. This Court should grant certiorari to review significant errors of law in the Court of Appeal's interpretation and application of the UCC which, if not corrected, could wreak havoc on the statutory scheme governing commercial paper in Georgia.

Legends on checks stating "void after 180 days" do not mean that the check or the underlying payment obligation "expires" at that time. The check is not "void" as that term is often used. Rather, such a legend confirms that the check becomes "stale" after 180 days. *See* 7 Anderson U.C.C. § 4-404:7 [Rev] (3d. ed.) ("Right of bank to pay stale check—Effect of language on check"). Despite this legend and the corresponding provision of O.C.G.A. § 11-4-404 stating that the

check becomes stale as a matter of law after 180 days, a bank is still authorized to pay the check after 180 days. Notably, these issues are governed by UCC Article 4, Part 4 ("Relationship Between Payor Bank and its Customer"). On the other hand, the validity of the check vis-à-vis the payee is governed by UCC Article 3, Part 3 ("Enforcement of [negotiable] instruments"). In other words, a legend such as this goes to the relationship between the payor-depositor and the payor-bank, not the relationship between the payor and the payee.

Under UCC Article 3 ("Negotiable Instruments"), even if the check is dishonored by the payor's bank pursuant to such a legend, the check is not "void" and it has not "expired." To the contrary, the payee still can "enforce the instrument." O.C.G.A. § 11-3-310(b)(3) ("[I]f the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation"); O.C.G.A. § 11-3-118(c) ("[A]n action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or ten years after the date of the draft, whichever period expires first."); *see also Gainesville News v. Harrison*, 58 Ga. App. 744 (1938) (The Code "simply provides that the drawee [bank] of a check which is not presented for payment within six months from the date thereof shall not be subject to a liability [to the payor/depositor] for dishonoring the check. It does not mean

that the drawer [payor/depositor] is relieved of the obligation to pay the check or the obligation for which it was given.").

Similarly, a check is "overdue" after 60 days as a matter of law under O.C.G.A. § 11-3-304(a). Thus, after 60 days it is "stale," which can impair the payee's ability to assign the check to someone else. But the fact that the check is "overdue" or "stale" after 60 days does not mean that the payee cannot enforce it against the payor. There is no "expiration" or "restriction" of the check with respect to the payee other than the statute of limitations set out in O.C.G.A. § 11-3-118(c).

The Court should grant certiorari to address the irreconcilable conflict between the holding of the Court of Appeals—that a legend on a check saying "void after 180 days" signifies an "expiration"—and the rule codified in O.C.G.A. § 11-3-310(b) that a check remains enforceable against the payor even after 180 days. Indeed, the holding of the Court of Appeals also conflicts with O.C.G.A. § 11-3-118(c), which provides that the check does not expire until the earlier of three years after dishonor or ten years after the date of the check. This conflict should be taken up now before payees of checks start facing arguments from payors, based on the Court of Appeals' holding in this case, that their obligation to pay expired after 180 days, or even 60 days if that legend appeared on the check.

III. The Court also should review the Court of Appeals' erroneous ruling that the settlement failed because the check was received at the same time as the insurer's unequivocal written acceptance of the offer.

The Court of Appeals erred in holding that sending the settlement with the acceptance package conflicted with the terms of the offer. The offer merely provided that payment had to "be received 15 days after Trexis' written acceptance." And the word "received" may be used as a simple past tense verb (*i.e.*, "I received the payment yesterday."). But the offer letter uses the word "received" to define the status of "payment," not as a verb. And "received," when used as an adjective, indicates a status of being "bestowed, accepted, taken in, or detected." *See* RECEIVED, adj., sense 2, *Oxford English Dictionary*, Oxford University Press, July 2023, https://doi.org/10.1093/OED/8727326726 ("That has been bestowed, accepted, taken in, or detected.").

The Court of Appeals interpreted the offer letter as requiring receipt of payment no earlier than 15 days after acceptance. But that is not what the offer actually says. In the controlling provision of the offer letter, "payment" is the subject, "must" is a modal verb indicating necessity, and "be" is a linking verb that ties the subject "payment" to the predicate adjective "received." And on the fifteenth day after Trexis' written acceptance, the payment had the status of being "received" at counsel's office. Even though Plaintiff initially "received" (in the simple past-tense verbal sense) the settlement payment on the same day that Trexis

accepted the offer in writing, it is still the case that fifteen days later, the payment was "received" (in the predicate adjective sense) because, on that day, payment retained the status of being "accepted" or "taken in" at counsel's office. There simply is no variance under a plain reading of the offer letter.

Additionally, the Court of Appeals' attempt to justify Plaintiff's counsel's inclusion of the 15-day provision as anything other than a "gotcha" tactic is unavailing. True, under the reimbursement of medical benefits statute, notice must be provided to a benefit provider "no later than ten days prior to the consummation of any settlement." O.C.G.A. § 33-24-56.1(g). And Plaintiff's health insurance policy echoed that language. (V2-311). But a settlement is not "consummated" merely by receipt of the check. Under O.C.G.A. § 11-3-310(b), receipt of the check only "suspends" the obligation for which the check is given. It is payment of the check that consummates the settlement. *See* O.C.G.A. § 11-3-310(b)(1) ("In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check."). Thus, no matter when the settlement check is received, a plaintiff can fully comply with the medical benefit reimbursement statute and that provision in a health insurance policy simply by holding the check for ten days before cashing it.

In sum, transmittal of payment via check on the same day that Trexis accepted the offer did not vary from the plain terms of the offer. It merely shows the insurer's good faith in making sure the Plaintiff received the check in time and thus did not suffer from the deficiency addressed in *Grange*. In contrast, Plaintiff's insistence that there was a material variance due to early receipt of payment is strong, if not dispositive, evidence that the offer was not made in good faith.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted this 28th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this July 28, 2023, I served the foregoing **AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS** upon the following counsel of record by filing a true and correct copy thereof with the Clerk of Court using the Court's electronic filing system, as permitted by Supreme Court of Georgia Rule 13, as well as by email, addressed as follows:

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