THE THREAT OF BAD FAITH LITIGATION
ETHICAL HANDLING OF CLAIMS AND GOOD FAITH SETTLEMENT PRACTICES

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INTRODUCTION

In the ever increasing litigiousness of our society, there has been a significant trend toward threatening bad faith litigation and attorney fees as a settlement tool. This is especially true in cases where an insured maintains only the minimal statutory insurance coverage limits. Most often, bad faith claims arise out of personal injury and/or property damage claims where the injured Plaintiff/Claimant has medical expenses, lost wages and/or property damage in excess of the insured's policy limits. If the insurer does not properly investigate and adjust such a claim, it could potentially expose its insured to an excess verdict and itself to potential bad faith claims.

Recently, the Georgia Legislature codified an insurance carrier's responsibility to adjust and settle claims in good faith via O.C.G.A. §§ 33-4-6 and 33-4-7. These code sections were enacted to establish basic rules for responding to settlement demands presented to the insurer by its own insureds (in the case of O.C.G.A. § 33-4-6) and by third parties for recovery under an automobile liability insurance policy (O.C.G.A. § 33-4-7). Unfortunately, both of these provisions are limited in scope and are not particularly well drafted. They rely on a more subjective definition of bad faith that is subject to interpretation instead of providing a clear, bright-line test for determining bad faith or providing a "safe harbor" for insurers. As such, these code sections provide limited guidance to insurers with respect to how to handle claims in a manner that avoids exposure for bad faith. As a result, litigants have had to rely Georgia appellate court decisions to determine how to properly handle demands for insurance policy limits.

ESSENTIAL TERMS OF O.C.G.A. § 33-4-6 and § 33-4-7

O.C.G.A. § 33-4-6 was enacted by the legislature to provide first party insurance policy

holders with the means of enforcing prompt and reasonable adjusting and settlement of claims by insurers. That section provides in relevant part:

> (a) In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $ 5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith. The amount of any reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in the action; provided, however, the attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services based on the time spent and legal and factual issues involved in accordance with prevailing fees in the locality where the action is pending; provided, further, the trial court shall have the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and the plaintiff's attorney for the services of the attorney in the action against the insurer.

O.C.G.A. § 33-4-6(a). By its very terms, the rights afforded by O.C.G.A. § 33-4-6 are granted to the holder (i.e. the insured) of an insurance policy and not to third parties. As such this code section is inapplicable to third party claims. Under this code section, an insured provides a written demand to the insurance company to pay his or her claim. If the insurance carrier fails to resolve the claim within sixty (60) days of receiving the insured's demand for payment and presuming that there is a finding by the court or jury that the refusal of the insurer to pay the claim was in bad faith, the insurer can be liable to the insured for 150% of the loss or $5,000.00 – whichever is greater. In addition, the insurer can be held liable to the insured for all of his or her attorney fees. It should be

noted that the insurer cannot avoid this liability by simply paying the claim after the sixty (60) day mark has been reached but before a trial/hearing on the issue of sanctions.

It is important to note that O.C.G.A. § 33-4-6 is inapplicable to third party claims. The Court of Appeals has held that the cause of action codified by O.C.G.A. § 33-4-6 can only be brought by an insured. It is a statutory claim that cannot be assigned to a third party. See Southern General Insurance Company v. Ross, 227 Ga. App. 191, 489 S.E.2d 53 (1997); Canal Indemnity Co. v. Greene, 265 Ga. App. 67, 593 S.E.2d 41 (2003). As a result, an insured cannot assign his or her claim to anyone else. In addition, simple notice of a claim is insufficient to enact the penalty provisions of O.C.G.A. § 33-4-6. See Stedman v. Cotton States Insurance Co., 254 Ga. App. 325, 562 S.E.2d 256 (2002). Instead, an actual demand for payment needs to be provided to the insurer. Id. Similarly, a proof of loss does not qualify as a demand for payment under O.C.G.A. § 33-4-6. See Brown v. Ohio Casualty Insurance Co., 239 Ga. App. 251, 519 S.E.2d 726 (1999).

In contrast to O.C.G.A. § 33-4-6, O.C.G.A. § 33-4-7 was enacted to address third party claims arising out of motor vehicle collisions. That code section provides in relevant part:

> (a) In the event of a loss because of injury to or destruction of property covered by a motor vehicle liability insurance policy, the insurer issuing such policy has an affirmative duty to adjust that loss fairly and promptly, to make a reasonable effort to investigate and evaluate the claim, and, where liability is reasonably clear, to make a good faith effort to settle with the claimant potentially entitled to recover against the insured under such policy. Any insurer who breaches this duty may be liable to pay the claimant, in addition to the loss, not more than 50 percent of the liability of the insured for the loss or $ 5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action.
>
> (b) An insurer breaches the duty of subsection (a) of this Code section when, after investigation of the claim, liability has become reasonably clear and the insurer in bad faith offers less than the amount reasonably owed under all the circumstances of which the insurer is aware.

O.C.G.A. § 33-4-7. Initially, it should be noted that this code section applies to all personal injury and property damage claims covered by a motor vehicle liability insurance policy. However the provisions of this code section are not simply limited to claims arising out of motor vehicle collisions. Instead the legislature intentionally broadened this section to include any claim covered by a motor vehicle liability policy including claims made by pedestrians and/or any other claim that is covered under the terms of the insurance policy itself. As a result, an insurer can limit its exposure under this code section by carefully crafting the language contained within its insurance policies to exclude specific types of claims or incidents.

In any event, once the insurer determines that an incident is covered by its motor vehicle insurance policy, it has an affirmative duty to fairly and promptly adjust the loss and to make reasonable efforts to investigate and evaluate the claim. If the insurer's investigation indicates that liability on the part of its insured is reasonably clear, it must make good faith efforts to settle the claim. As with O.C.G.A. § 33-4-6, a violation of O.C.G.A. § 33-4-7 could result in an award of 150% of the loss or $5000.00 – whichever is greater. The insurer could also be held liable for the Plaintiff/Claimant's attorney fees. As with O.C.G.A. § 33-4-6, the insurer cannot avoid liability under this code section by paying the claim after the 60 day deadline for responding to the offer has passed. O.C.G.A. § 33-5-7(e).

A Plaintiff/Claimant can also recover damages under O.C.G.A. § 33-4-7 if he and or his attorney deliver a settlement demand letter to the insurer via statutory overnight delivery or certified mail and the insurer refuses or declines to accept that settlement within sixty days of receipt. If and as a result of such refusal, the Plaintiff/Claimant pursues a lawsuit to recover damages and ultimately recovers an amount equal to or greater than the amount originally demanded, then the

insurer is deemed, as a matter of law, to have acted in bad faith. See O.C.G.A. § 33-4-7(c).

In such a case, an insurer will be deemed to be unnamed defendant once the Plaintiff/Claimant serves the insurer with a copy of his Complaint. If the jury returns a verdict in excess of Plaintiff/Claimant's initial settlement demand, then the Court would proceed with a second phase of the trial. During this second phase, the factfinder would hear evidence concerning whether the insurer acted in bad faith. O.C.G.A. § 33-4-7(d). A recovery of the Plaintiff/Claimant against the insurer under this code section would be entered as a separate judgment and can be enforced like any other judgment.

EARLY CASE LAW REGARDING BAD FAITH CLAIMS

Georgia appellate courts have generally acknowledged that an insurance company can be liable for damages to its insured where through negligence, fraud or bad faith it fails to compromise a claim. See McCall v. Allstate Insurance Company, 251 Ga. 869, 870, 310 S.E.2d 513 (1984). "In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured." Great American Insurance Co. v. Exum, 123 Ga. App. 515, 519, 181 S.E.2d 704 (1971). The jury generally must decide whether the insurer, in view of the existing circumstances, has accorded the insured the same faithful consideration it gives its own interest". Id. Through these decisions, Georgia appellate courts recognized a potential cause of action against insurers should they not act reasonably and in good faith in adjusting and settling claims.

THE EFFECTS OF THE SUPREME COURT'S HOLDING IN SOUTHERN GENERAL INSURANCE COMPANY V. HOLT AND ITS PROGENY

The watershed case for bad faith claims is Southern General Insurance Company v. Holt. See Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992). In Holt, the

Georgia Supreme Court reviewed the applicability of a Plaintiff set time limit for responding to settlement demands. In that case, Plaintiff's counsel forwarded a demand letter to Southern General Insurance Company to settle Ms. Holt's personal injury claims. As part of that settlement demand, Plaintiff gave the insurer ten days in which to settle the matter for policy limits. Upon request, the Plaintiff's attorney granted the insurer an additional five days to make a decision so that it could review additional medical expenses. After expiration of the time limit set by the Plaintiff, the Defendant's insurance carrier tendered its policy limits of $15,000.00. Plaintiff refused this offer and proceeded with trial. At trial, the jury entered a verdict for $82,000.00.

In its opinion, the Court initially indicated that it did not intend to provide a rule of law which would enable a Plaintiff's attorney to "set up" an insurer for an excess judgment (and resulting possible bad faith claim) simply by making a settlement demand for policy limits with an unreasonably short time limit. See Southern General Insurance Company v. Holt, 262 Ga. 267, 269, 416 S.E.2d 274, 276 (1992). The Court was clearly concerned that an insurer could be left in position where it could not reasonably and diligently investigate/evaluate a claim without exposing itself to potential bad faith litigation.

As held by the Georgia Supreme Court, an insurance company does not act in bad faith solely because it fails to accept a settlement offer within the deadline set by the Plaintiff's attorney. See Southern General Insurance Company v. Holt, 262 Ga. 267, 269, 416 S.E.2d 274, 276 (1992). However, the Court rejected the insurance company's arguments that an insurance company has no duty to respond to a Plaintiff's settlement deadline "when the company has knowledge of clear liability and special damages exceeding the policy limits." Southern General Insurance Company v. Holt, 262 Ga. 267, 269-270, 416 S.E.2d 274, 276-270 (1992). By this language, the Court held

that a claim for bad faith can survive summary judgment/directed verdict and get to a jury where there is clear liability and where the special damages (medical expenses, property damages and lost wages) exceed the defendant's policy limits. Id. This holding was also confirmed by the Supreme Court in Cotton States Mutual Insurance Company v. Brightman, 276 Ga. 683, 685, 580 S.E.2d 519, 521 (2003).

In Brightman, the Supreme Court again indicated that an insurer has a duty to its insured to respond to a time deadline set by the Plaintiff where it had knowledge of clear liability and special damages exceeding the policy limits. Id. Although lost wages, medical expenses and property damages are considered to be special damages, punitive damages are not. Unlike lost wages and medical expenses, punitive damages are not considered to be special damages. O.C.G.A. § 51-12,2; Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943). Similarly, pain and suffering is not considered to be special damages.

Furthermore, the Court of Appeals held in Canal Indemnity Company v. Greene, that punitive damages cannot be assigned to another party as part of a bad faith claim. See Canal Indemnity Company v. Greene, 265 Ga. App. 67, 593 S.E.2d 41 (2003). See also Southern R. Co. v. Malone Freight Lines, 174 Ga. App. 405, 330 S.E.2d 371 (1985); In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498 (2003). As such, the insured cannot assign any punitive damages claim he may have to Plaintiff. Only special damages can be assigned to the Plaintiff as part of a bad faith claim.

It should also be noted that the Court in Brightman provided additional limits on bad faith claims. As held by the Court:

> Although we agree with the court of appeals that the evidence supported the jury's verdict in favor of Brightman, we disagree with its description of the insurer's duty

> to settle. Specifically, we disapprove of the language placing an affirmative duty on the company to engage in negotiations concerning a settlement demand that is in excess of the insurance policy's limits. We are also unwilling to ascribe a duty to insurers to make a counteroffer to every settlement demand that involves a condition beyond their control. Instead, we conclude that an insurance company faced with a demand involving multiple insurers can create a safe harbor from liability for an insured's bad faith claim under Holt by meeting the portion of the demand over which it has control, thus doing what it can to effectuate the settlement of the claims against its insured. This rule is intended to protect the financial interests of policyholders in cases where continued litigation would expose them to a judgment exceeding their policy limits while protecting insurers from bad faith claims when there are conditions involved in the settlement demand over which they have no control.

Cotton States Mutual Insurance Company v. Brightman, 276 Ga. 683, 686, 580 S.E.2d 519, 521 (2003). By its ruling, the Court reiterated that where an insurer cannot be held liable for bad faith for duties for which it had no control, it still has a duty to act reasonably in making decisions over such duties for which it does exert control. In other words, an insurer cannot simply "hide" behind another insurer's failure to respond to a settlement demand. Instead, it should respond to a demand with respect to the exposure for which it could ultimately become liable. Similarly, an insurer does not have to meet a settlement demand that is in excess of the insured's policy limits in order to avoid liability for bad faith. If there were the case, the insurer could be responsible for making settlements beyond the limits bargained for with the insured.

By the Supreme Court's holding in Holt and Brightman, an insurer's exposure for bad faith exists primarily when the Plaintiff's special damages exceed the insured's policy limits. If such special damages (lost wages, property damage and medical expenses) do not exceed the insured's policy limits and/or where there is a reasonable question regarding the liability of the insured, it becomes more difficult for a Plaintiff to recover on an alleged bad faith claim.

TACTICS TO AVOID POSSIBLE EXPOSURE FOR BAD FAITH CLAIMS

The Court's holding in Holt and the codification of the insurer's responsibilities under O.C.G.A. §§ 33-4-6 and 33-4-7 suggest that the issue of bad faith is an amorphous concept that necessarily contains a subjective component. A factfinder will normally have to decide whether the insurer acted reasonably in evaluating and settling claims in light of all information known to it at the time. Nevertheless, several actions can be taken to reduce the risk of a bad faith claim being made against the insurance company.

1. Pay particular attention to settlement demands in excess of policy limits – especially where the insured has minimum policy limits. This is especially true where lost wages, property damage and medical expenses exceed the insured's policy limits. However, the risk of a bad faith claim becomes more remote the further the special damages are below the policy limits and/or where the there is a substantial liability defense.
2. If you have adequate information in your possession to make a determination of the settlement value of the case, make best efforts to respond to the demand within the time limit provided by opposing counsel.
3. Respond to Plaintiff/Claimant's settlement demand. If you need additional time to respond to Plaintiff/Claimant's demand in order to review medical records, recorded statements and things of that nature, request an extension to review those items. If you are in need of additional documentation from Plaintiff's counsel, request those items from opposing counsel and seek additional time to review same.
4. If the special damages are less than the insured's policy limits and/or if there is significant questions regarding the negligence of the insured and/or the comparative fault of the

Claimant/Plaintiff, indicate in your response to Plaintiff/Claimant's demand the basis for your denial. Generally, "silence" or lack of a response to a settlement demand is dangerous in that it leaves room for Plaintiff/Claimant's Counsel to argue that such silence or non response is indicative of bad faith.

5. The central theme in the various appellate court holdings in this state is that insurers must act reasonably in light of their insured's best interests. It is not in the insurer's best interests to arbitrarily decide not to respond to a time sensitive settlement demand or to make an offer that is extremely lower than the minimum expected exposure in the case.

6. Document every response to Plaintiff/Claimant or her Counsel in writing. If the opposing counsel grants an extension in which to respond to a time sensitive settlement demand, fax a confirming letter confirming the extension. Email also works in this situation. If you are in need of additional documentation, document that request in correspondence to opposing counsel.

7. Be wary of any correspondence from Plaintiff/Claimant's counsel. A time limited settlement demand can be hidden in the body of a lengthy letter – especially if the letter was delivered via certified mail.

CONCLUSION

Although it appears that threats of bad faith claims are increasing, careful and well documented actions of the insurer can go far in undermining such claims. By systematically documenting reasonable efforts to resolve a claim and by timely responding to Plaintiff's settlement demands, an insurer can minimize the risk of an excess judgment and possible resulting bad faith claim.