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IN THIS ISSUE

Eric Mull and Katelyn Fischer examine a recent Georgia Supreme Court decision that addressed whether a liability carrier has a duty to settle when no formal demand to settle within policy limits has been issued. The Georgia Supreme Court's decision is compared to the standard from other jurisdictions, which lessens the stringent requirement that there must be a formal demand in order to trigger an insurer's duty to settle.

Georgia Court Takes Bright-Line Approach to Question of When Liability Insurer Has a Duty to Settle, Thereby Limiting Insurers' Potential Bad Faith Exposure Where No Formal Settlement Demand within Policy Limits Has Been Made

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A recent Georgia Supreme Court Decision unequivocally places Georgia on the side of the insurer when it comes to the long-debated question of when a liability insurer has a duty to settle a third-party claim.

In *First Acceptance Insurance Co. of Georgia, Inc. v. Hughes*, the Georgia Supreme Court addressed the specific question of "whether an insurer's duty to settle arises when it knows or reasonably should know settlement with an injured party within the insured's policy limits is possible or only when the injured party presents a valid offer to settle within the insured's policy period."[1] The *Hughes* decision involved an insured who caused a multi-vehicle collision and was, at the time of the collision, insured by an auto policy that had bodily injury liability limits of $25,000 per person and $50,000 per accident. Five of the third-parties involved in the collision sustained various personal injuries; the insured driver was killed in the accident. The insurer determined that its policy did provide coverage to the insured for the collision, the insured was liable for the loss, and the insured's exposure for the claims exceeded the policy limits.

The insurer notified the injured parties of its interest in initiating a global settlement conference in an effort to resolve all of the personal injury claims. Two of the five injured parties indicated that they were interested in attending the proposed settlement conference, or, in the alternative, settling their claims for the available policy limits. When no response was received, the two injured parties filed suit and revoked their previous settlement offers. Eventually, the insurer offered to settle the two injured parties' claims for $25,000 each. However, the offers were rejected and judgment was ultimately entered in favor of the two injured parties, with one award exceeding $5.3 million.

After entry of the judgments, the administrator of the deceased insured's estate filed suit against the insurer, alleging negligence and bad faith failure to settle the claim of the injured party who received judgement exceeding $5.3 million. The trial court granted the insurer's motion for summary judgment on all claims; however, the Georgia Court of Appeals reversed the trial court's decision with regard to the bad faith failure-to-settle claim, holding that the trail court erred in granting summary judgment to the insurer because, in the Court of Appeal's view, a genuine issue of material fact existed as to whether the insurer could have settled the claim within the policy limits.[2]

The Georgia Supreme Court granted *certiorari* and reversed the court of appeals, ultimately concluding that an insurer's knowledge that settlement of the third-party claim within the policy limits is possible is not enough to create a duty to settle the claim, but instead, an insurer's duty to settle

[1] 305 Ga. 489, 492 826 S.E.2d 71, 74 (2019).

[2] *Hughes v. First Acceptance Insurance Company of Georgia, Inc.*, 343 Ga. App. 693, 698, 808 S.E.2d 103, 107 (2017).

arises only when the third-party presents a valid settlement demand within the policy limits.3 Relying on language from a previous Eleventh Circuit Court of Appeals decision, the Georgia Supreme Court indicted that there were "sound policy reasons" supporting the limitation of the duty, including the fact that if a demand within policy limits were not a prerequisite, insureds would be encouraged to offer potentially unreliable and/or self-serving after-the-fact testimony that the third-party would have settled within policy limits but-for the inaction of the insurer in attempting to settle the claim, potentially leading to collusion between the insured and the third party.4 Accordingly, the court held that the insurer's liability for bad faith and negligence in *Hughes* hinged solely on whether it had rejected a valid settlement demand that was within the policy limits.5

Georgia's bright-line approach to the issue, while once the clear majority view, can no longer be said to represent the outlying trend among states.6 Some jurisdictions, while refusing to place a duty on an insurer to instigate settlement negotiations itself, are lessening the stringent requirement that there must be a formal demand in order to trigger an insurer's duty. These jurisdictions are, instead, opting for a more fluid approach allowing for bad faith claims against insurers for excess judgments when, regardless of whether there was a formal offer, the insurer had a reasonable opportunity to settle within the policy limits, but failed to do so.7 Under this approach, finding that the insurer had a reasonable opportunity to settle requires "some evidence either that the insured party has communicated to the insurer an interest in settlement, or some other circumstances demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated."8 Courts adopting this position therefore exhibit an unwillingness to insulate insurers from bad faith litigation merely because the insurer has not received a formal settlement demand. However, liability insurers in these states do not have the benefit of operating under the clear and objective parameters that a duty to settle only arises in instances where a valid and formal settlement demand has been tendered. Instead, courts adhering to this less structured approach are tasking insurers with making a more imprecise and subjective determination as to whether and when it could be found to have had a

[3] *Id*. at 492-93, 826 S.E.2d at 75 (*quoting Delancy v. St. Paul Fire & Marine Ins. Co.*, 947 F.2d 1536, 1533 (11th Cir. 1991)).
[4] *Id*. at FN 3. Other courts that have also implemented Georgia's approach to imposing a duty to settle on insurers have indicated that to do otherwise would "discourage early dispute resolution by effectively requiring an insurer to bid against itself." *See Rocor International, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA,* 77 S.W.3d 253, 261-62 (Tex. 2002).
[5] *Id*. at 493, 826 S.E.2d at 75.
[6] *See Powell v. Prudential Property & Cas. Ins. Co.*, 584 So.2d 12 (Fla. Dist. Ct. App. 1991) ("Although an offer of settlement was once considered a necessary element of a duty to settle…an offer to settle is [no longer] a prerequisite to the imposition of liability for an insurer's bad faith refusal to settle, but is merely one factor to be considered.")
[7] *See, e.g.*, *Reid v. Mercury Ins. Co.*, 220 Cal.App.4th 262 (2013)
[8] *Id*. at 272.

reasonable opportunity to settle within the policy limits, thereby triggering its duty to settle.

Moreover, other jurisdictions have taken the view that an insurer's duty to settle is no longer tied directly to instigation of settlement opportunities by the third-party in any form. Instead, courts in those jurisdictions have imposed an affirmative duty on an insurer to initiate settlement in certain circumstances, namely, when liability is clear and damages in excess of policy limits is likely and/or when the insurer controls the defense and settlement of the third-party claim, regardless of whether an insurer has received any sort of settlement demand.

Last year, the Florida Supreme Court used its decision in *Harvey v. GEICO General Insurance Co.*9 to clarify that Florida unquestionably falls into the category of jurisdictions that impose an affirmative duty on insurers, placing Florida's position on the issue in direct opposition to the position recently taken by the Georgia Supreme Court's decisions in *Hughes*. In its opinion in *Harvey*, the Florida Supreme Court noted that an insurer's duty, as it relates to the handling of the defense of claims against its insured, "arises from the nature of the insurer's role in handling the claim on the insured's behalf" and that "because the insured had surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, [ ] the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard to the interest of the insured."10 As such, the court settled any uncertainty regarding Florida's position as to when an insurer has a duty to settle within the policy limits, holding that "[i]n a case where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations.11 Given its adoption of the affirmative duty view, the court went on to hold that where liability is clear and an excess judgment likely, "any delay in making an offer…even where there was no assurance that the claim could be settled could be viewed…[is] evidence of bad faith."12

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[9] 259 So.3d 1 (Fla. 2018).

[10] *Id*. at 6. The court went on to explain that, "[a]n insurer is not absolved of liability simply because it advises its insured of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment. Rather, the critical inquiry in a bad faith [claim] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, working on the insured's behalf to avoid an excess judgment." *Id*. at 7.

[11] *Id*. at 7. While the Florida Supreme Court did not delve into the rationale behind imposing this affirmative duty when an excess judgment is likely, other courts have indicated that the basis for this approach stems from the fact that if a third-party is aware that it is likely to recover damages in excess of the policy limits at trial, it may not be incentivized to initiate and settlement discussions within the policy limits and therefore, an insurer should have a duty to initiate those settlement discussions itself to protect its insured from any possible financial exposure. *See Fulton v. Woodford*, 26 Ariz. App. 17, 22 545 P.2d 979, 984 (1976).

[12] *Id*.

Similarly, in the oft-cited New Jersey Supreme Court decision of *Rova Farms Resort Inc. v. Investors Insurance Co. of America*, the court imposed an affirmative duty on an insurer to instigate settlement efforts based in part on its interpretation that where the policy grants the insurer full control over the defense and/or settlement of a third-party claim against its insured, the insurer is therefore an agent of the insured, meaning that "the relationship of the [insurer] to its insured regarding settlement is one of inherent fiduciary obligation."13 Accordingly, the court held that a firm offer was not a prerequisite for finding that an insurer has acted in bad faith because "an insurer, having contractually restricted the independent negotiating power of its insured, has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage.14

Likewise, in the more recent state supreme court case of *Kelly v. State Farm Fire & Casualty Co.*, the Louisiana Supreme Court also held that an insurer could be found liable for bad faith failure-to-settle, notwithstanding that the insurer never received a firm settlement offer.15 There, the court reasoned that because neither the insurer nor the insured have control over whether a firm demand will be submitted by a third-party involved in a claim, there is "no practical reason why the insurer's obligation to act in good faith should be made subject to the tenuous possibility than an insurer will receive a firm settlement offer."16 Instead, the court held that because an insurer has undertaken the obligation to protect the insured, "the insurer's obligation to act in good faith is triggered by knowledge of the particular situation which knowledge, the insurer has an affirmative duty to gather during the claims process."17

Accordingly, while the *Hughes* decision can be considered progress for insurers in Georgia, it appears that the Georgia decision is one of the few recent holdings explicitly following the traditional formal settlement demand rule in its entirety. Had the various other positions on the issue been applied to the facts of *Hughes*, the outcome of that bad faith failure-to-settle claim would likely have been wholly opposite to the conclusion reached by the Georgia Supreme Court. As such, the nature of an insurer's duty to settle overall remains increasingly unsettled, as courts throughout the country continue to take vastly different approaches in determining when a liability insurer has a duty to settle a third-party claim.

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[13] 65 N.J. 474, 492, 323 A.2d 495, 505 (1974).
[14] *Id.* at 493, 496, 232 A.2d at 505, 507.
[15] 169 So.3d 328, 341 (La. 2015). Note that this decision turned, in part, on the court's interpretation of a Louisiana statute dealing with an insurer's good faith duties which states that "[t]he insurer has an *affirmative duty*…to settle claims with…the claimant…." La. Stat. Ann. §22:1973 (2012) (emphasis added).
[16] *Id*.
[17] *Id*.

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