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Insurance Litigation & Regulation ADVISORY ■

MARCH 20, 2019

A Good-Faith Attempt to Limit Unwarranted Bad-Faith Liability in Georgia

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In a recent victory for insurers by Alston & Bird's insurance team before the Georgia Supreme Court, the court issued an opinion in *First Acceptance Insurance Co. of Georgia v. Hughes* clarifying longstanding (and much debated) Georgia law governing an insurer's liability for failing to settle a claim within the policy limits. The court held that a claimant's ambiguous demand letter did not create a duty for the insurer to settle a claim, shedding light on three key aspects of Georgia law:

- Insurers have no duty to settle a claim until they receive a valid offer to settle.
- Demand letters are construed by the court with the principles of general contract construction, with ambiguous terms to be construed against the drafter.
- Insurers have no duty to settle one of multiple claims when there is no time-limited demand and the claimant has expressed a willingness to engage in a joint settlement conference.

Georgia Law on Liability for Bad-Faith Failure to Settle Claims Against an Insured

The Georgia Supreme Court recently stepped in to clarify Georgia's law governing an insurer's liability for failing to settle a claim within the policy limits. Decades ago, the Georgia Supreme Court announced a rule in *Southern General Insurance Co. v. Holt* that if an insurer acts in bad faith by refusing to settle a claim for an amount within the policy limits, it may be liable for the full amount of any judgment against the insured. The reason for the rule was simple: to encourage insurers to settle to avoid liability to their insured for judgment amounts exceeding the insurance coverage rather than take a chance at a trial where the insurer will face the same policy-limits maximum exposure but will possibly save money if the insured is found not liable.

In the 27 years following *Holt*, however, the rule has been weaponized. Plaintiffs' attorneys have recognized that when the person at fault in a catastrophic accident may be rendered insolvent by a massive judgment, the insurer is often the only possible source to collect from. In these instances, plaintiffs' attorneys have every incentive to break through the contractual limits of the insurance policy and to seek collection of the entire judgment from the insurer. *Holt* provided an inlet with its bright-line rule. As a result, rather than promoting settlement, the *Holt* rule has often been used as a trap to ensnare unwary insurers through the use of strategic "set-up" demands to create bad-faith liability even when the claimant never truly intends to settle their claim for an amount within the policy limits.

Set-up tactics have included demand letters that require hand delivery of settlement payments within an unrealistic timeframe and vague and confusing demands that may not fully release all claims. These tactics have become so widespread that plaintiffs' attorneys have actually created continuing legal education seminars to instruct on their use.

The Georgia Supreme Court's Opinion in *Hughes*

Although the Georgia legislature took action to curb the abusive tactic of sending time-limited demands,[1] the Georgia Supreme Court recognized in *Hughes* that the law governing bad-faith liability needed further reform. In *Hughes*, the insured caused a car accident that seriously injured multiple parties and resulted in the insured's death. The insurer, recognizing the $50,000 policy limit would quickly be exhausted, attempted to schedule a joint settlement conference with all injured parties. One of the injured parties (on her own behalf and her minor child's) sent two letters to the insurer on the same day: (1) a letter expressing interest in a joint settlement conference and alternatively offering a limited release that would carve out claims for uninsured motorist coverage upon payment of the policy limits and receipt of coverage information; and (2) a letter requesting coverage information within 30 days.

After 41 days, the attorney "withdrew" the offer, filed suit, and the claimants at issue were awarded a judgment of $5.3 million against the insured's estate. The estate then filed suit against the insurer for the full amount of the judgment. The trial court granted the insurer's motion for summary judgment, finding that the insurer could not have reasonably known that all of the injured parties' claims could have been settled within the policy limits. The Georgia Court of Appeals reversed, relying on a rigid application of *Holt*, finding that a jury could find that a demand had been made with a "purported 30-day time limit" and that the insurer failed to settle the two claims at issue within that timeframe. The Georgia Supreme Court reversed the court of appeals, finding that there was no "time-limited" demand for settlement and that the insurer could not be liable for bad-faith failure to settle when the claimant unilaterally withdrew a pending offer that had no express time limit.

Georgia's highest court in *Hughes* made three key holdings that work to further limit an insurer's potential exposure from the use of set-up demands:

An insurer's duty to settle does not arise until the injured party presents a valid offer.

The court in *Hughes* held that insurers cannot be liable for excess judgments if the claimant never presented a valid offer to settle a claim within the insured's policy limits. Before *Hughes*, courts had openly questioned whether under Georgia law an insurer could be liable for bad-faith failure to settle even without an express offer to settle for the policy limits. Many plaintiffs argued that an insurer had an obligation to initiate settlement discussions or make an offer even if the claimant had not. However, the court in *Hughes* recognized that such a rule would encourage after-the-fact testimony that a claimant would have settled every time a judgment is entered that exceeds the policy limit.

By holding that a claimant must first present a valid offer to settle within the policy limits, the court has provided insurers with a powerful defense to set-up demands that are vague, contradictory, or fail to settle the entire claim. In those instances, insurers can argue that there was no valid offer to "accept" that would avoid future liability for the insured.

Whether a claimant has made a valid offer to settle is a legal question decided by the court according to the general rules of contract construction.

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[1] Effective July 1, 2013, Georgia enacted a law that provided insurers with a minimum of 30 days to respond to a time-limited demand and clarified that an insurer's request for clarification of an offer letter will *not* be deemed a rejection and counteroffer. O.C.G.A. § 9-11-67.1(a)(1), (d).

The court also struck at the heart of set-up demands that provide vague, confusing, or contradictory terms by holding that courts must construe the validity of an offer as a matter of law, resorting to a jury only if ambiguity remains after applying the rules of contract construction. Ambiguous demand letters are construed against the drafter—in this instance, the claimant. Before *Hughes*, plaintiffs often sought to avoid summary judgment (and to appeal to sympathetic jurors) by arguing that the interpretation or intent of a demand letter was a fact question that was appropriately resolved at trial and by arguing that agreements are generally construed in favor of the insured or claimant.

The court in *Hughes* clarified that demand letters are to be construed against the injured party, and that if its terms are "too indefinite for a court to [ ] determine, there can be no assent thereto" and the offer is not valid. Applying this basic rule of contract interpretation, the court held as a matter of law that there was no time-limited demand when a claimant mailed two separate letters—one expressing a willingness to attend a joint settlement conference or, in the alternative, to settle the claims if insurance information was provided, and the other requesting insurance information within 30 days. In light of *Hughes*, insurers will have a powerful defense when faced with vague, confusing, or contradictory demand letters.

Insurers may exhaust the policy limits by settling one of multiple claims, but need not do so absent a time-limited demand.

Finally, the court addressed the situation insurers face when there are multiple claimants involved. It has long been the rule that an insurer *may* settle one claim that exhausts the policy limits without incurring liability for excess judgments resulting from litigation by the non-settling claimants. However, *Hughes* clarifies that an insurer has no *obligation* to settle one of multiple claims for the full policy limits, absent a time-limited demand.

However, *Hughes* should not be seen as limiting an insurer's potential liability in the face of a valid time-limited demand—even in the context of multiple claimants. The court noted that in *Hughes*, the two claimants at issue "expressed their interest in attending a settlement conference with the other claimants." Consequently, the insurer's failure to settle with the two individual claimants was "reasonable as an ordinarily prudent insurer could not be expected to anticipate that, having specified no deadline for the acceptance of their offer, [the claimants] would abruptly withdraw their offer and refuse to participate in the settlement conference."

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