Georgia

By Pamela N. Lee

Causes of Action

Is there a statutory basis for an insured to bring a bad faith claim?

Yes. O.C. Ga. Ann. §33-4-6 allows a fact finder to award a penalty of 50 percent of loss or $5,000, whichever is greater, plus reasonable attorney fees. The statute is aimed, primarily, at first-party claims handling. The damages set forth in O.C. Ga. Ann. §33-4-6 are the exclusive remedy for bad faith denial of insurance benefits, such that litigation expenses under O.C. Ga. Ann. §13-6-11 are not recoverable. *See Atlanta Title Ins. Co. v. Aegis Funding Corp.*, 287 Ga. App. 392, 651 S.E.2d 507 (2007), *cert. denied*, 2008 Ga. Lexis 107 (2008). The statute is strictly construed due to the penalty involved. *See Doss & Assocs. v. First Am. Title Ins. Co.*, 325 Ga. App. 448, 754 S.E.2d 85 (2013). If a demand submitted to the insurance company does not contain sufficient information, the courts will not consider it to be a proper demand for payment under the statute and will not assess the penalty. *Id.* The insured bears the burden of proving bad faith. *Id.*

Georgia courts, however, have allowed a statutory claim for bad faith in handling third-party claims. *See, e.g.*, *Leader Nat'l Ins. Co. v. Kemp & Son, Inc.*, 189 Ga. App. 115, 375 S.E.2d 231 (1988), *aff'd*, 259 Ga. 329, 380 S.E.2d 458 (1989).

O.C. Ga. Ann. §33-4-7 is specifically directed at the handling and settlement of motor vehicle claims. The penalties match O.C. Ga. Ann. §33-4-6, allowing an award of 50 percent of the loss or $5,000, whichever is greater, plus reasonable attorney's fees.

Can a third party bring a statutory action for bad faith?

A third-party claimant has no direct right to bring a statutory bad faith claim. *Fla. Int'l Indem. Co. v. City of Metter*, 952 F.2d 1297 (11th Cir. 1992), presenting certified question answered by *Googe v. Fla. Int'l Indem. Co.*, 262 Ga. 546, 422 S.E.2d 552 (1992); *Payne v. Twiggs Cnty. Sch. Dist.*, 269 Ga. 361, 496 S.E.2d 690 (1998) (absent statutory obligation, injured party was not a third-party beneficiary under the insurance policy); *Googe v. Fla. Int'l Indem. Co.*, 262 Ga. 546, 422 S.E.2d 552 (1992); *Scott v. Mamari Corp.*, 242 Ga. App. 455, 530 S.E.2d 208 (2000); *Raintree Trucking Co., Inc. v. First Am. Ins. Co.*, 245 Ga. App. 305, 534 S.E.2d 459 (2000); *Owens v. Allstate Ins. Co.*, 216 Ga. App. 650, 455 S.E.2d 368, 369 (1995); *Pub. Nat'l Ins. Co. v. Wheat*, 100 Ga. App. 695, 112 S.E.2d 194, 197–98 (1959).

Though a third-party claimant aggrieved by an insurer's failure or delay in settling has no independent legal standing to seek a statutory or common law claim for extracontractual damages, after becoming a judgment creditor of an insured, such claimant may have a direct right to seek recovery against the policy as an asset of the insured. *See Metro. Prop. & Cas. Co. v. Crump*, 237 Ga. App. 96, 513 S.E.2d 33 (1999); *Commercial Union Ins. Co. v. Bradley Co.*, 186 Ga. App. 610, 367 S.E.2d 820 (1988); *Smith v. Gov't Emps. Ins. Co.*, 179 Ga. App. 654, 347 S.E.2d 245 (1986). While a statutory bad faith claim is not assignable, a tort-based claim—such as negligent failure to settle—can be assigned. *See S. Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 605 S.E.2d 27 (2004); *Canal Indem. Co. v. Greene*, 265 Ga. App. 67, 593 S.E.2d 41 (2004), *cert. denied*, May 3, 2004; *S. Gen. Ins. Co. v. Ross*, 227 Ga. App. 191, 489 S.E.2d 53 (1997).

Is there a common law cause of action for bad faith?

Georgia recognizes a tort-based cause of action for failure to settle a third-party claim within policy limits. *S. Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 605 S.E.2d 27 (2004); *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 580 S.E.2d 519 (2003); *S. Gen. Ins. Co.*

v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992); *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 870, 310 S.E.2d 513, 514–15 (1984). In deciding whether to settle a claim within limits, the insurance company must give equal consideration to the interests of the insured. *Id.*; *Great Am. Ins. Co. v. Exum*, 123 Ga. App. 515, 519, 181 S.E.2d 704, 707 (1971). To support a common law cause of action for bad faith in auto accident claims based on a failure to properly respond to a time-limited demand, the requirements under Georgia law for the contents of the time-limited demands has now been codified at O.C. Ga. Ann. §9-11-67.1.

An insured may sustain an independent cause of action for fraud based upon the insurer's conduct outside its strict performance under the insurance policy/contract. *See, e.g.*, *Delancy v. St. Paul Fire & Marine Ins. Co.*, 947 F.2d 1536, 1545 (11th Cir. 1991) (quoting *Leonard v. Farmers Ins. Co.*, 100 Ga. App. 434, 111 S.E.2d 773 (1959)). These actions fall into two broad categories. First, a carrier may be liable for misrepresenting the existence or extent of coverage it sold the insured. Second, it may be found liable for misrepresentations in the claims handling process.

What cause of action exists for an excess carrier to bring a claim against a primary carrier?

When a judgment is returned in excess of primary limits, an excess carrier is equitably subrogated to any rights the insured might have against its primary carrier for negligent failure to settle. *Home Ins. Co. v. N. River Ins. Co.*, 192 Ga. App. 551, 385 S.E.2d 736 (1989). There is no authority on an excess carrier's right to equitable subrogation of a statutory bad faith claim.

What causes of action for extracontractual liability have been recognized outside the claim handling context?

An insured may sustain an independent cause of action for fraud based upon the insurer's conduct outside its strict performance under the insurance policy/contract. *See, e.g.*, *Delancy v. St. Paul Fire & Marine Ins. Co.*, 947 F.2d 1536, 1545 (11th Cir. 1991) (quoting *Leonard v. Farmers Ins. Co.*, 100 Ga. App. 434, 111 S.E.2d 773 (1959)). These actions fall into two broad categories. First, a carrier may be liable for misrepresenting the existence or extent of coverage it sold the insured. Second, it may be found liable for misrepresentations in the claims handling process. Such a claim is not assignable. O.C. Ga. Ann. §44-12-24; *Hayslip v. Speed Check Co.*, 214 Ga. 479, 482, 105 S.E.2d 455 (1958); *State Farm Mut. Auto. Ins. v. Health Horizons, Inc.*, 264 Ga. App. 443, 590 S.E.2d 798 (2003) (citing *Couch v. Crane*, 142 Ga. 22, 82 S.E. 459 (1914)); *Barnes v. Collins*, 275 Ga. App. 750, 423 S.E.2d 308 (1992).

An insurer can be liable to its insured for failure to disclose excess or additional coverage known to insurance adjusters. *Merritt v. State Farm Mut. Auto. Ins. Co.*, 247 Ga. App. 442, 544 S.E.2d 180 (2000).

An insurer is not liable for negligent work performed by its "preferred" repair contractors. *Carter v. Allstate Ins. Co.*, 197 Ga. App. 738, 399 S.E.2d 500 (1990). *But see Jerrell v. Classic Ins. Co.*, 246 Ga. App. 565, 541 S.E.2d 53 (2000).

Damages

Are punitive damages available?

There is no prohibition against punitive damages under the tort-based actions of either failure to settle or fraud, but the statutory penalties do not include punitive damages. *Howell v. S. Heritage Ins. Co.*, 214 Ga. App. 536, 448 S.E.2d 275 (1994).

Are attorneys' fees recoverable?

Yes, both O.C. Ga. Ann. §33-4-6 and §33-4-7 specifically allow an award of attorneys' fees.

Are consequential damages recoverable?

Under O.C. Ga. Ann. §33-4-6 "the exclusive remedy for an insurance company's bad faith refusal to pay a claim is set forth in [the statute]." *Anderson v. Ga. Farm Bureau Mut. Ins. Co.*, 255 Ga. App. 734, 566 S.E.2d 342, 345 (2002). However, there is no proscription against consequential damages for either negligent failure to settle or fraud.

Can a plaintiff recover damages for emotional distress?

Generally, no. *S. Gen. Ins. Co. v. Holt*, 262 Ga. 267,

416 S.E.2d 274 (1992) (summary judgment against insured who had assigned her failure-to-settle claim to third party and then sued insurer for emotional damages and punitive damages); *see also Lincoln Nat'l Life Ins. Co. v. Davenport*, 201 Ga. App. 175, 176, 410 S.E.2d 370 (1991) (it is well established that insurer's failure to pay benefits does not, as matter of law, rise to level of outrageous behavior required in cause of action for intentional infliction of emotional distress).

Elements of Proof

What is the legal standard required to prove bad faith in a first-party case?

Under O.C. Ga. Ann. §33-4-6, the insured bears the burden of proving bad faith, defined as any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy. *Ga. Farm Bureau Ins. Co. v. Williams*, 266 Ga. App. 540, 597 S.E.2d 430 (2004). "Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact." *GuideOne Life Ins. v. Ward*, 275 Ga. App. 1, 619 S.E.2d 723 (2005) (quoting *S. Cas. Ins. Co. v. Nw. Ga. Bank*, 209 Ga. App. 867, 434 S.E.2d 729 (1993). The test is not the reasonableness of the insurer's actions at the time the insured demands payment or at the time the insurer responds. Rather, the test is whether, at the time of trial, the insurer can show that it had a reasonable basis for contesting the claim and refusing to pay the asserted demand. *Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC*, No. 1:06-cv-00695-WSD, 2007 WL 1752471, 2007 U.S. Dist. Lexis 43549 (N.D. Ga. June 15, 2007); *Lett v. State Farm Fire & Cas. Co.*, 115 F.R.D. 501 (N.D. Ga. 1987); *Interstate Life & Accident Ins. Co. v. Williamson*, 220 Ga. 323, 138 S.E.2d 668 (1964); *Fortson v. Cotton States Mut. Ins. Co.*, 168 Ga. App. 155, 308 S.E.2d 382 (1982). If an insurer can provide a reasonable basis for questioning coverage at trial, then it is of no consequence that the insured ultimately may be able to prove that the insurer's intermediate decision-making or its investigation of the claim was "not flawless." *S. Fire & Cas. Ins. Co. v. Nw. Ga. Bank*, 209 Ga. App. 867 (1999); *Mitchell v. Globe Life & Accident Ins. Co.*, 548 F. Supp. 2d 1385 (N.D. Ga. 2007).

"Good faith is determined by the reasonableness of nonpayment of a claim. Because damages for bad faith against an insurer are in the nature of a penalty, the statute is strictly construed and the right to such recovery must be clearly shown." *Fla. Int'l Indem. Co. v. Osgood*, 233 Ga. App. 111, 115–16, 503 S.E.2d 371 (1998).

Under O.C. Ga. Ann. §33-4-7, the motor vehicle liability statute, the carrier has an obligation to investigate and adjust a loss fairly and promptly. Specifically "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" an insurer has an obligation to offer a reasonable settlement. The statute outlines a procedure by which a claimant may serve notice of its demand against an insured to the carrier, and if rejected, the carrier may be added as a party to the underlying action.

What is the legal standard required to prove bad faith in a third-party failure to settle a claim?

An insurer may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim. *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 580 S.E.2d 519 (2003); *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 310 S.E.2d 513 (1984). An insurer is negligent in failing to settle if an ordinarily prudent insurer would consider electing to try the case as creating an unreasonable risk. *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 310 S.E.2d 513 (1984); *U.S. Fid. & Guar. Co. v. Evans*, 116 Ga. App. 93, 156 S.E.2d 809 (1967), *aff'd*, 223 Ga. 789, 158 S.E.2d 243 (1967). In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured. *See Great Am. Ins. 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.*; *see also U.S. Fid. & Guar. Co. v. Evans*, 116 Ga. App. 93, 156 S.E.2d 809 (1967); *S. Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992).

The rationale is that the interests of the insurer and insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy. The insured is interested in protecting itself against an excess judgment; the insurer has less incentive to settle because litigation may result in a verdict below the policy limits or a defense verdict. *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 580 S.E.2d 519, 276 Ga. 683 (2003); *see generally*, William Shernoff *et al.*, *Ins. Bad Faith Litig.*, 1.07[2] (2002).

Proof of the common elements of negligence—duty, breach, proximate cause and damages—is required. *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 580 S.E.2d 519 (2003). Under *Brightman*, an insured must show that 1) the insurer had a duty to engage in settlement negotiations with an injured party; 2) its failure to affirmatively do so was a breach of that duty; 3) the insurer's participation in settlement negotiations would have resolved the suit; and 4) the insured became subject to a judgment in excess of the policy limits. *Id.* at 453–56.

What is the legal standard required to prove bad faith in a third-party failure to defend a claim?

An insurer may be equally liable for failing to defend its insured, which is often considered broader than the duty to settle. *Mead Corp. v. Liberty Mut. Ins.*, 107 Ga. App. 167, 129 S.E.2d 162 (1962). The duty to defend is initially measured by comparing the "four corners" of the policy with the "four corners" of the claim or suit. *Great Am. Ins. v. McKemie*, 244 Ga. 84, 259 S.E.2d 39 (1979). If there is even partial convergence, there is a duty to defend. *Montgomery v. Aetna Cas. & Sur.*, 898 F.2d 1537 (11th Cir. 1990). It matters not that the allegations are patently false and frivolous. In the face of the insured's or others' contentions, the insurer has a duty to perform a "reasonable initial coverage investigation," which usually involves getting the insured's side of the story, and to consider the "true facts," even if they are different than the allegations of the claim or complaint. *Yeomen's Assoc. v. Bowen Tree Surgeons*, 274 Ga. App. 738, 618 S.E.2d 673 (2005). A defense should be afforded, should the "true facts" warrant a defense. *Colonial Oil Indus., Inc. v. Underwriters*, 268 Ga. 561, 491 S.E.2d 337 (1997). There may be an absolute duty to defend even though, admittedly, there would be no duty to settle the complaint, as pled. *Edmond v. Cont'l Ins. Co.*, 249 Ga. App. 338, 548 S.E.2d 450 (2001).

The duty to defend can seemingly go beyond the text of the policy language. For example, if the suit is in default when tendered, the insurer cannot deny, based upon that circumstance. Rather, if there is an opportunity for the carrier to attempt to open the default and defend on the merits, failure to enter a defense to make such an effort is a breach of the policy. *Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199, 558 S.E.2d 432 (2001). Additionally, the duty to defend, once undertaken, cannot be cavalierly shed where an insurer undertakes the duty to defend its insured, as this duty needs to be performed with reasonable care. *Whiteside v. Infinity Cas. Co.*, No. 4:07-CV-87 (CDL), 2008 WL 3456508, 2008 U.S. Dist. Lexis 60512 (M.D. Ga. Aug. 8, 2008).

An insurer denying a defense: "[does] so at its peril, and if the insurer guesses wrong, it must bear the consequences, legal or otherwise, of its breach of contract. [Moreover, the insurer thereafter] waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement made in good faith[,] plus expenses and attorneys' fees." *S. Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 605 S.E.2d 27 (2004).

Is there a separate legal standard that must be met to recover punitive damages?

O.C. Ga. Ann. §51-12-5.1 requires "clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences."

Does a bad faith claim require evidence of a pattern or practice of unfair or deceptive conduct?

No, O.C. Ga. Ann. §33-4-6 provides for penalties upon the failure to pay *one* claim within 60 days of written demand.

On what issues is expert evidence required to establish bad faith?

None.

On what issues is expert evidence precluded?

None.

Practice and Procedure

Under what circumstances will bad faith claims be severed for trial from the underlying claim?

Severance is within the trial court's discretion. However, under O.C. Ga. Ann. §33-4-7(d), which concerns a direct claim by a claimant against an auto liability insurer, "[t]he insurer shall be an unnamed party, not disclosed to the jury, until there has been a verdict resulting in recovery equal to or in excess of the claimant's demand. If that occurs, the trial shall be recommenced in order for the trier of fact to receive evidence to make a determination as to whether bad faith existed in the handling or adjustment of the attempted settlement of the claim or action in question." This statute applies only to property damage incurred by the claimant, not bodily injury claims. *Mills v. Allstate Ins. Co.*, 294 Ga. App. 671, 669 S.E.2d 658 (2008).

Under what circumstances will the compensatory and punitive damages claims be bifurcated?

O.C. Ga. Ann. §51-12-5.1(d) requires bifurcation of compensatory and punitive damage claims: "(1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings. (2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded according to subsection (e), (f), or (g) of this Code section, as applicable."

It should be noted, however, that punitive damages are not available remedies in failure to settle or failure to pay cases brought under O.C. Ga. Ann. §33-4-6 or O.C. Ga. Ann. §33-4-7. *Howell v. S. Heritage Ins. Co.*, 214 Ga. App. 536, 448 S.E.2d 275 (1994).

Defenses and Counterclaims

Is evidence regarding the reasonableness of the conduct of the insured or third-party claimant admissible?

While the possible acceptance of "comparable bad faith" has been raised at times, its application has not been affirmatively decided. *See Alexander Underwriters Gen. Agency v. Lovett*, 182 Ga. App. 769, 357 S.E.2d 258 (1987) (wherein the court found no error in refusing to give a comparative bad faith jury charge because there was no evidence that the insured had acted in bad faith, possibly implying that the court would recognize the comparative bad faith defense in an appropriate case). However, Georgia courts have held that conduct of the insured that may breach the contract of insurance is admissible in a bad faith action. *See*, *e.g.*, *Allstate Ins. Co. v. Hamler*, 247 Ga. App. 574, 545 S.E.2d 12 (2001).

Is "advice of counsel" a recognized defense?

The advice of counsel is not a "defense" by itself but is one factor to consider in determining whether or not the insurer acted in bad faith.

Is there a cause of action for reverse bad faith?

There is no cause of action for reverse bad faith in this jurisdiction.

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