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## **GEICO v. Whiteside: Navigating Complex Post-Loss Duties in Bad Faith Refusal to Settle Cases**

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TUESDAY, JULY 27, 2021

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## What Is A Policy Limit Demand and What Is The Concern?

- **WHAT:** A demand that insurer pay the **liability limits** of its policy (or other amount within limits) by a **date certain to settle claims against the insured**
  - O.C.G.A. § 33-3-28 (Insurance disclosure statute)
  - O.C.G.A. § 9-11-67.1 (Demand statute for motor vehicle accident claims)
  - *“Holt Demand”* (*Southern General Ins. Co. v. Holt*, 262 Ga. 267 (1992))
- **WHY:** Failure to accept a demand may subject **insured** to liability in **excess** of its insurance coverage and may subject **insurer** to **extra-contractual** damages, i.e., damages in **excess** of its policy limits.

## O.C.G.A. § 33-3-28

### Request To Insurer

- **60 days** to respond.
- Statement **under oath** of corporate officer or claims manager:
  - Name of insurer;
  - Name of each insured; and
  - Limits of coverage.
- Or provide Declarations page.

#### Applies to:

- Every insurer providing liability or casualty insurance in GA, which is or **may be** liable to pay all or part of any claim, and
- All known policies of insurance issued by it, including excess/umbrella policies.

Request **must** set forth **under oath** nature of claim **and** be mailed via certified mail or statutory overnight delivery.

- Permits request for more information where insufficient info given.
- Response does not create a waiver of defenses to coverage and not admissible in evidence unless otherwise admissible under GA law.
- Continuing obligation to amend disclosure upon discovery of new or different information.

### Request To Insured

- **30 days** to respond
- Disclose name of each insurer “which may be liable to claimant upon such claim”.

## O.C.G.A. § 9-11-67.1

- Amended effective July 1, 2021.
- *Prior to filing an answer*, offer to settle a tort claim for personal injury, bodily injury or death arising from the use of a motor vehicle and prepared by or with assistance of any attorney on behalf of a claimant(s).
- Required material terms:
  - Date for acceptance (not less than 30 days)
  - Amount of payment
  - Parties to be released
  - Type of release (full or limited) and an itemization of what claimant will provide to each release
  - Claims to be released
- *Must include medical or other records in the offeror's possession sufficient to allow recipient to evaluate claim.*
- *Allows for request of sworn insurance disclosure.*
- *Prohibits inclusion of terms other than those specifically required by statute, unless agreed to by both parties.*
- Allows recipient to seek clarification, and propose release (if not provided), without constituting a counter-offer.
- Must be sent certified mail or statutory overnight delivery, R.R.R., reference statute, and provide contact info for accepting demand.
- Applicable to causes of action arising from use of a motor vehicle on or after July 1, 2021.
  - Before that, prior statute applied to MVAs on or about July 1, 2013.

## ***Southern General Ins. Co. v. Holt – The Facts***

- Insured's liability for MVA undisputed; \$15,000 policy limits.
- Offer to settle for \$30,000 within 10 days.
- Demand withdrawn when claimant enters hospital for treatment for ruptured disk and requests disclosure of policy limits. Carrier refused to disclose limits.
- New demand for policy limits, claiming medical bills/lost wages in excess of \$15,000. Included medical bills of \$6,568 and doctor's notes showing herniated disk.
- Demand extended and provided additional expenses of \$4,335 and certified copy of complete medical records.
- No response from insurer to demand.
- Demand withdrawn.
- Insurer then offered limits to settle. Rejected.
- Jury verdict of \$82,000 against insured.
- Insured assigns to claimant claims against insurer for negligent or bad faith refusal to settle.
- Insured also sued insurer for intentional infliction of emotional distress and punitives.
- \$83,000 in compensatory damages awarded to claimant.
- \$25,000 in compensatory damages, plus \$100,000 in punitives, awarded to insured.
- Court of Appeals reversed award of compensatory damages to insured, but otherwise affirmed.

## ***Southern General Ins. Co. v. Holt – The Law***

1. Insurer may be liable for damages to its insured for failure to settle when **the insurer is guilty of negligence, fraud, or bad faith** in failing to compromise the claim.
  - An insurer is negligent in failing to settle if an **ordinarily prudent insurer** would consider choosing to try the case against the insured created an unreasonable risk.
2. Insurer **does not** act in bad faith **solely** by failing to accept settlement offer by deadline.
3. In deciding whether to settle a claim within limits, the insurer **must give equal consideration** to the interests of the insured.
4. **The jury** generally must decide whether insurer, **in view of existing circumstances**, has accorded the insured the same faithful consideration it gives **its own interest**.
  - Clear liability?
  - Damages in excess of limits?

## ***Southern General Ins. Co. v. Holt – The Holdings***

Insurer has a duty to respond to a deadline to settle a claim within policy limits *when the company has knowledge of **clear liability** and **special damages exceeding the policy limits**.*

Unless facts show a basis for a directed verdict, the **jury must determine** whether insurer acted reasonably in declining to accept a time-limited settlement offer.

- Evidence showed clear liability and damages in excess of limits.
- Despite claiming a need for more information, no request for **more information** or more time to respond.

No claim by insured for punitive damages, because she assigned her compensatory damages claim.

## Demand Required

### Contrast to Florida – no demand required

- Insurer has an affirmative obligation to investigate liability and damages, and if insured likely subject to excess exposure, tender limits.

### In Georgia, demand required:

- An insurer's duty to settle arises **only** when the injured party **presents a valid offer** to settle **within insured's policy limits**. *First Acceptance Ins. Co. of Ga. v. Hughes*, 305 Ga. 489 (2019)
  - Rationale – prevents unreliable, speculative, after-the-fact testimony regarding claimant's willingness to settle for limits, and avoids collusion between claimant and insured.
- Rules of contract construction govern settlement demand.
  - Interpretation of an offer is an issue of law for the court.
  - Absent specific deadline for acceptance, offer will be construed to remain open for a reasonable time.
  - O.C.G.A. § 9-11-67.1 not applicable because underlying accident occurred in 2008.

## Other GA-Specific Issues To Consider

### Non-Settling Insurers:

- Georgia limited release statute. *O.C.G.A. § 33-24-41.1*

### Multi-Claimant Settlements:

- Insurer **can** settle some, but not all, **claims** against insured, without notifying other claimants, even if doing so will deplete or exhaust available coverage. *Miller v. Ga. Interlocal Risk Mgmt. Agency*, 232 Ga. App. 231 (1998); *Allstate Ins. Co. v. Evans*, 200 Ga. App. 713 (Ga. Ct. App. 1991).

## What to Do

- **RULE #1: Check, double-check, calendar due date**
  - Keep proof of service
- Contact insured
- Investigation
  - Police reports
  - Medical records
  - Lost wages
- Clarify conditions with plaintiff's counsel
- Follow claims handling guidelines

## Accepting a Demand

- Duty arises only upon a valid demand (*Hughes*)
- Strict compliance with offer
- Any counteroffer = rejection
  - Example: *White v. Cheek*

## Bad Faith Suit

- Rejected demand
- Excess judgment
- Assignment of the claim (usually)
- Suit against insurer

**Was the decision to reject the demand reasonable?**

**Did the insurer give equal consideration?**

## ***Whiteside: The Accident***

- February 26, 2016: Winslett borrowed friend's car
  - Car was insured by GEICO
  - Winslett was a permissive driver
  - “Insured” under the policy
  - NOT the policyholder
- Struck cyclist Terry Guthrie



## ***Whiteside: GEICO Accepts Liability***

- Winslett gives notice to GEICO
- GEICO sent a letter to Winslett admitting liability and stating “we will be handling this injury directly with Guthrie’s attorney.”

Dear Ms. Winslett,

We have completed our liability investigation for the above listed accident. Based on the evidence we have gathered, we are responsible for the accident.

Mr. Guthrie was injured in this accident and we will be handling this injury directly with Attorney Charles Gower.

Please contact me at the number below so I may obtain a recorded statement from you about the accident details and verify you were not injured in the accident.

## ***Whiteside: The Demand***

- May 15, 2012: Demand letter
  - \$30,000 policy limits
  - 30-day deadline

Please be advised that this demand is expressly withdrawn at 5:00 p.m. on June 15, 2012.

To accept this offer to settle, you must deliver to my office a check in the amount of \$30,000.00 by 5:00 p.m. on June 15, 2012.

- Medical Expenses
  - Exceeded \$10,000
  - Guthrie needed additional treatment

## ***Whiteside: The Rejection***

- Eight days later: GEICO rejected the demand
  - Counteroffered \$12,409

Dear Mr. Gower,

This will confirm our most recent conversation regarding settlement of all claims arising out of the Bodily Injury claimed by your client, Terry Guthrie. Please discuss our settlement offer of \$12,409.00 with your client.

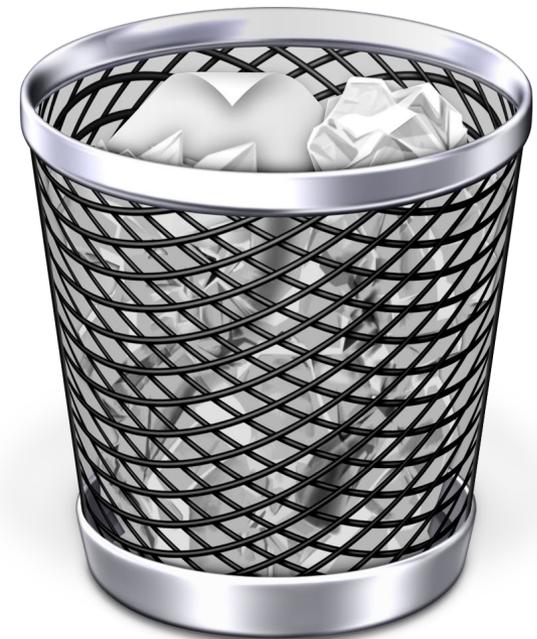
Please be advised that the hospital lien will need to be honored out of this amount.

Settlement of the claim will include your client signing an agreement that releases Karen Griffis and Bonnie Winslett and Geico Indemnity of any and all claims resulting from this loss.

- GEICO adjuster continued communications with counsel and Winslett

## ***Whiteside: The Underlying Suit***

- Six days after rejection, Guthrie files suit
  - Did not forward complaint to GEICO
- Winslett served
  - Did not forward complaint to GEICO
  - Did not inform GEICO
    - Even upon plaintiff's recommendation
    - Thought GEICO was handling already
  - Tossed it away



## ***Whiteside: Excess Judgment***

- \$2.9M default judgment
  - \$30k policy limits
- One week later, plaintiff's counsel informs GEICO
- Court denies motion to reopen
- Was this a set-up?
  
- Verdict sent Winslett into bankruptcy
  - Bankruptcy trustee (Whiteside) files bad faith suit

## ***Whiteside: Bad Faith Suit***

- Middle District of Georgia
- Negligent or bad faith failure to settle

## ***Whiteside: GEICO's Defenses***

- Failure to provide notice
  - Policy condition
  - OCGA § 33-7-15 (b)
- Proximate cause
- Default judgment should not be measure of damages

## ***Whiteside: Verdict***

- (1) Do you find by a preponderance of the evidence that Defendant GEICO Indemnity Company failed to exercise that degree of care that a reasonably prudent insurance company would exercise in its response to Terry Guthrie's offer to settle his claims against Bonnie Winslett for \$30,000?

Answer Yes or No YES

- (2) Do you find by a preponderance of the evidence that Defendant GEICO Indemnity Company's failure to accept Terry Guthrie's offer to settle his claims against Bonnie Winslett for \$30,000 was a proximate cause of the default judgment against Bonnie Winslett?

Answer Yes or No YES

## ***Whiteside: Verdict***

- (3) Do you find by a preponderance of the evidence that Bonnie Winslett was negligent and that her negligence was a proximate cause of the default judgment against her?

Answer Yes or No YES

## Whiteside: Verdict

- (4) Indicate Bonnie Winslett's percentage of fault compared to that of Defendant GEICO Indemnity Company. Please answer in terms of percentages. The total of the percentages should add up to 100%.

Bonnie Winslett 30 %

GEICO Indemnity Company 70 %

*If you find that Bonnie Winslett's percentage of fault is 50% or greater, this ends your deliberations. Your foreperson should sign and date this verdict form on Page 3. If you found that Bonnie Winslett's percentage of fault is less than 50%, then you should check the following:*

       We, the jury, find that damages shall be awarded to Plaintiff and against Defendant in the amount of \$2,886,204.00 less the percentage of Ms. Winslett's fault as found above.

**70% x \$2.9M + interest = \$2.7M**

## ***Whiteside: Certified Question 1***

- Does lack of notice relieve the insurer of bad faith liability?

**NO**

## ***Whiteside #1: GEICO Argues***

- Policy contained a notice provision
- OCGA § 33-7-15
  - Insured's noncompliance with notice provision is a breach of the policy
  - If prejudicial, no duty to defend or indemnify

## ***Whiteside #1: Court's Analysis re: Insured***

- Reasonable to anticipate Winslett would not give notice
  - Not the named insured
  - Didn't have the policy
  - Did not have a driver's license
  - Not stable
- Unreliable and unsophisticated

## ***Whiteside #1: Court's Analysis re: OCGA § 33-7-15***

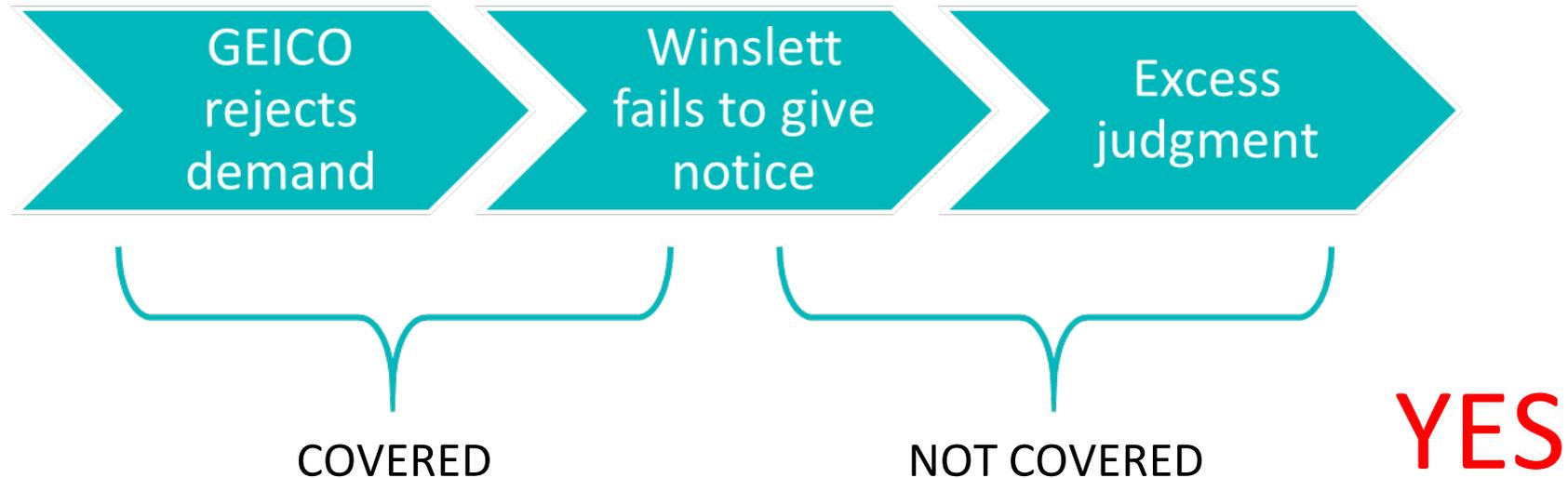
- OCGA §33-7-15(b) relieved insurers from their contractual obligations to defend and indemnify but did not bar resulting tort claims.
- Statute relieved the insurer from its contractual duty to defend or “to pay any judgment or other sum on behalf of its insureds.”
- The judgment in the bad faith case was not a judgment being paid on behalf of Whiteside but rather a judgment obtained by her for GEICO’s bad faith.

## ***Whiteside #1: Court's Analysis re: OCGA § 33-7-15***

- The damages sought by Whiteside were not for reimbursement for a covered loss but rather for a breach of GEICO's duty to settle.
- The measure of damages was the difference between the amount of the underlying judgment and the policy limits.
- Bad faith sounded in tort under Georgia law. The failure to give notice is a proximate cause issue.
- Did the insurers own conduct proximately cause the underlying judgment against the insured?

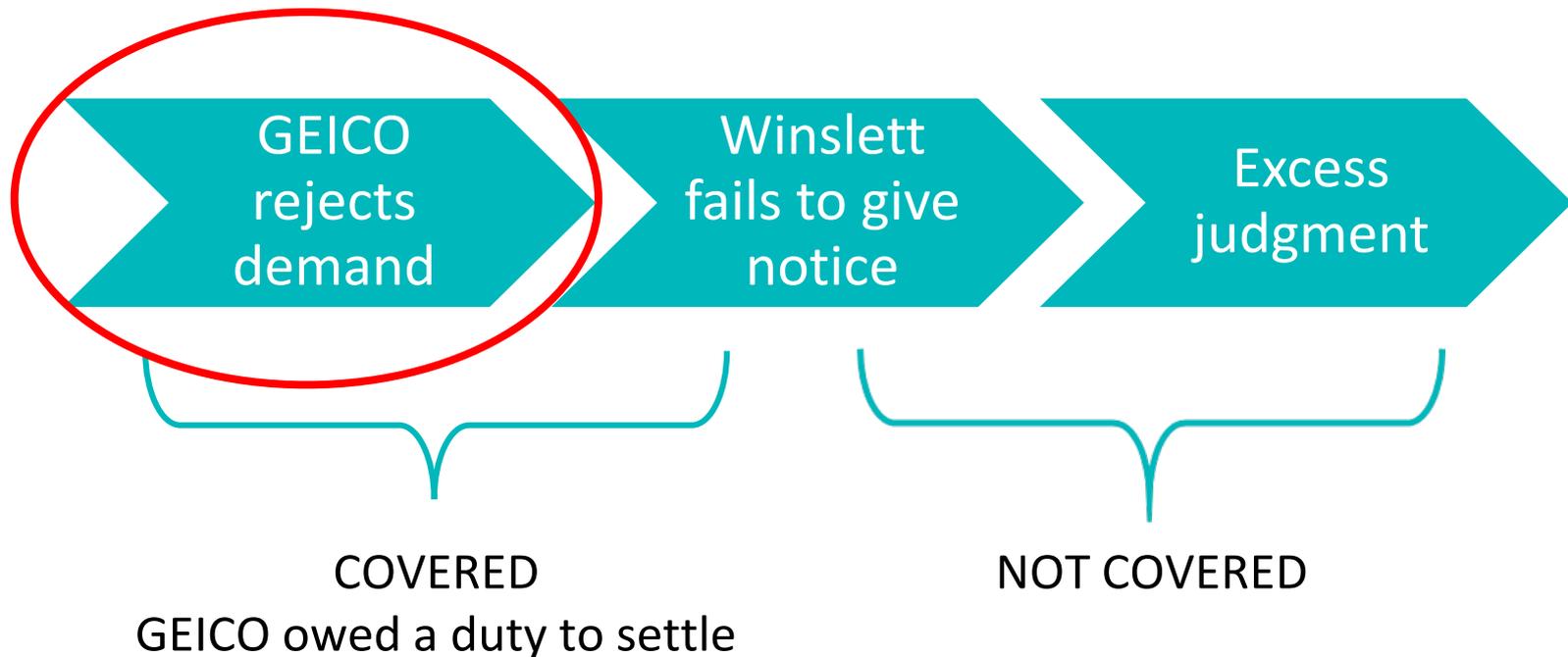
## ***Whiteside: Certified Question 2***

- Can insured sue for bad faith after losing coverage for failure to comply with the notice provision
  - after insurer's refusal to settle but
  - before judgment against her?



## ***Whiteside #2: Court's Analysis re: Timing***

- Reasonableness judged at the time of insurer's actions



## ***Whiteside: Certified Question 3***

- Did GEICO have a right to contest damages?

**NO**

- Damages for failure to settle = excess judgment

## ***Whiteside #3: GEICO Argues***

- Damages violate its due process
  - Did not get a chance to argue default judgment was excessive in light of plaintiff's injuries

## ***Whiteside #3: Court's Analysis re: Damages***

- Damages = damages insured incurred because of the failure to settle
  - Not plaintiff's underlying damages

## ***Whiteside: New Duty of Foreseeability?***



## ***Whiteside: Advice for Claims Handlers***

- Remind insured to forward all legal documents
- Remind insured this is an obligation
- Provide copy of the policy to non-named insureds?
  - Privacy considerations?
  - Time to make the determination if he/she is an insured?
- How does insured's "reliability" play in?

## ***Whiteside: Set-Up?***

- Was this a bad faith set-up?
- *White v. Cheek* demand letter
  - Footnote upon footnote of conditions

“All communications to this firm initiated by or on behalf of your insurance company or your insured relating to this offer of compromise must be made in writing, and that any other form of communication would constitute a rejection.”

- GEICO adjuster’s voicemail = rejection



# Questions?



Thank You

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