

# GEORGIA BAD FAITH CLAIM ISSUES

*Presented by:*

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# PROSECUTING AND DEFENDING BAD FAITH CLAIMS: STATUTORY AND TORT BAD FAITH CLAIMS

The contractual right of an insured to compromise and settle a claim or action against the insured is found in the personal auto policy as follows:

We will settle or defend, as we consider appropriate, any claim or suit asking for these damages [bodily injury or property damage]

Personal Auto Policy, Part A – Liability Coverage

Subsection A

**The insurer's duty to its insured is to exercise the proper degree of care to protect the insured's personal assets from liability arising out of a claim covered under the policy.**

**An insured's personal assets are subject to liability for the claim where the judgment against the insured is in excess of the policy limit payable by the insurer.**

**If a judgment falls within the insurer's policy limits,  
then the judgment is satisfied and no issue of bad  
faith on the part of the insurer arises.**

**Whether an insurer exercised the proper degree of care in protecting the insured's interest arises where the judgment against the insured is in excess of the policy limits.**

**Could the insurer have settled the claims against its insured within its policy limit? If so, what is the standard of care that an insurer will be held to in deciding whether to settle a claim within the policy limits?**

**An insurer may be liable for an excess judgment based on its bad faith or negligent refusal to settle within the policy limit.**

**McCall v. Allstate Insurance Company, 251 Ga. 869,  
310 S.E.2d 513 (1984)**

Applying the ordinarily prudent insurer standard, an “insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk.”

Cotton States Mutual Insurance Company v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003); US Fidelity & Guaranty Company v. Evans, 116 Ga.App. 93, 156 S.E.2d 809 (1967), *aff'd*, 223 Ga. 789, 158 S.E.2d 243 (1967); Fortner v. Grange Mutual Insurance Company, 286 Ga. 189, 686 S.E.2d 93 (2009)

“An insurance company 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.”

Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992)

In deciding whether to settle a claim within the policy limits, an insurer must give equal consideration to the interest of the insured as it does to its own interest.

Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992)

“To promote equal consideration of these interests, the applicable standard of care requires that the insurer ‘must use such care as would have been used by an ordinarily prudent insurer with no policy limit applicable to the claim.’”

Baker v. Huff, 2013 WL 3358027 (Georgia Court of Appeals)

US Fidelity & Guaranty Co. v. Evans, 116 Ga.App. 93 (1967)

The mere refusal of an insurer to settle within its policy limits does not subject the insurer to liability for an excess judgment.

An insurer does not have a duty to make a counteroffer to every settlement demand that involves a condition beyond its control. But in facing a demand involving multiple insurers, an insurer can create a safe harbor from liability by meeting that part of the demand over which it has control.

Cotton States Mutual Insurance Company v. Brightman,  
276 Ga. 683, 580 S.E.2d 519 (2003)

An insurer's tender of its policy limits may not absolve it of excess liability where it places a condition on acceptance of the policy limits, such as a general release. A jury may be authorized to consider whether the conditions imposed on a policy limits offer was a reasonable response to a settlement offer.

Fortner v. Grange Mutual Insurance Company, 286 Ga. 189, 686 S.E.2d 93 (2009)

An insurer does not have an affirmative duty to engage in negotiation in response to a settlement demand in excess of the insurer's policy limits.

Cotton States Mutual Insurance Company v. Brightman,  
276 Ga. 683, 580 S.E.2d 519 (2003);

Cotton States v. Fields, 106 Ga.App. 740, 128 S.E.2d 358  
(1962)

Baker v. Huff, 2013 WL 3358027 (Georgia Court of  
Appeals)

If an insurer appeals an excess judgment, it has an even higher duty to settle a claim if a demand for settlement is less than the policy limits.

US Fidelity & Guaranty Company v. Evans, 116

Ga.App. 93, 156 S.E.2d 809 (1967), *aff'd*, 223 Ga.

789, 158 S.E.2d 243 (1967)

An insurer may be liable for bad faith refusal to settle within its policy limits where it failed to reach a settlement within a time-limited deadline imposed by the claimant.

Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992)

An insured is not entitled to recover bad faith penalties under O.C.G.A. § 33-4-6 because the insurer does not have a contractual duty to settle a claim. Statutory bad faith penalties arise only upon failure of the insurer to meet a contractual obligation set forth in the policy.

The insurer's duty of care in negotiating the settlement of a claim is owed to its insured, not to the claimant.

Even if the claimant obtains a judgment against an insured in excess of the policy limits, it is not a party to the liability policy, does not have a fiduciary relationship with the insurer, nor is there privity of contract.

A claimant who is successful in obtaining an excess judgment against an insured does not have a cause of action against the insurer, only the insured has a claim for bad faith in failing to settle.

An insured may assign a bad faith claim to the claimant.

Cotton States Mutual Insurance Company v.

Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003)

A claim for bad faith refusal to settle sounds in tort and may give rise to a claim for punitive damages.

But the claim for punitive damages lies only with the insured and may not be assigned.

Empire Fire & Marine Insurance Company v. Driskell,

264 Ga.App. 646, 592 S.E.2d 80 (2008);

Southern General Insurance Company v. Holt, 262 Ga.

267, 416 S.E.2d 274 (1992)

In responding to a demand for settlement, if an insurer insists on a condition, such as a general release, that was not part of the demand, it is deemed a counteroffer and thus not a binding settlement offer.

Frickey v. Jones, 280 Ga. 573, 630 S.E.2d 374 (2006)

## § 9-11-67.1 OFFER TO SETTLE TORT CLAIM MUST BE IN WRITING

A time-limited demand for settlement prepared by or with the assistance of an attorney shall be in writing and contain the following material terms:

1. The time period within which such offer must be accepted but not less than 30 days from the receipt of the offer,
2. The amount of monetary payment,
3. The party the claimant will release if the offer is accepted,
4. The type of release, if any, the claimant will provide to each releasee, and
5. The claims to be released.

An offer to settle under this code section must be sent by certified mail or statutory overnight delivery, return receipt requested, and must specifically reference this code section (§ 9-11-67.1).

Recipients of a time-limited demand shall have the right to seek clarification, including liens, other claims, medical bills, and other relevant facts, and such requests shall not be deemed a counteroffer.

A demand under this code section may require payment within a specified time after acceptance, but not less than 10 days.

## STATUTORY BAD FAITH CLAIMS

- First Party Claims  
O.C.G.A. § 33-4-6
- Third Party Property Damage Claims  
O.C.G.A. § 33-4-7
- Uninsured Motorists Claims  
O.C.G.A. § 33-7-11(j)

## 1<sup>st</sup> PARTY CLAIMS FOR BAD FAITH

1. Loss under Policy
2. Demand by Insured
3. 60 Days to Respond
4. Refusal in Bad Faith

## BAD FAITH ATTORNEY'S FEES

1. Fees Determined by Jury
2. Based on Expert Evidence
3. Court May Increase or Decrease
4. Attorney's Contract Not Control

## 3RD PARTY PROPERTY DAMAGE CLAIMS – OCGA § 33-4-7

Imposes penalties on 3rd party liability insurer where insurer refuses in bad faith to settle property damage claim.

## PROCEDURES (O.C.G.A. § 33-4-7)

1. Demand Letter
2. Settle for Amount Certain
3. Refuse to Settle
4. After 60 Days, File Suit
5. Lawsuit Served on Insurer without Name
6. Recover at Least Amount Demanded

## BAD FAITH: 3RD PARTY PROPERTY DAMAGE CLAIM AFFIRMATIVE DUTIES

1. Adjust Fairly & Promptly
2. Reasonable Effort to Investigate  
& Evaluate
3. Good Faith Effort to Settle  
Where Liability Reasonably Clear

## BAD FAITH ATTORNEY'S FEES

1. Fees Determined by Jury
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## UNINSURED MOTORIST BAD FAITH CLAIMS – OCGA § 33-7-11(j)

Imposes penalties on UM carrier that refuses in bad faith to pay UM benefits.

## UM: PENALTIES FOR BAD FAITH REFUSAL TO SETTLE

- up to 25% of UM benefits
- all reasonable attorney's fees for prosecution of case

# PROCEDURES FOR PERFECTING UM BAD FAITH PENALTIES

1. Demand for payment of UM benefits in certain amount
2. Demand may be made before or after suit filed against tort-feasor
3. Refusal of UM insurer to settle within 60 days of demand
4. In tort suit recover UM benefits of at least amount of demand
5. Must file separate action against UM insurer for bad faith penalties

## UM BAD FAITH ATTORNEY'S FEES

1. Attorney's fees proved by expert witness
2. Based on reasonable values of services determined by time spent and legal and factual issues involved and prevailing fees in locality
3. If jury trial, court may increase or decrease award without affecting remainder of judgment
4. Amount of attorney's fees not controlled by attorney's fee contract