

Georgia Supreme Court Sides with Insurer in Settlement Rights Fight

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United States Court of Appeals for the Eleventh Circuit had certified questions to the Supreme Court of Georgia regarding the rights of an insurer to refuse to consent to a settlement and, thereby, absolve itself of any payment obligation for any settlement entered into by the policyholder. See ***Piedmont Office Realty Trust v. XL Specialty Ins. Co.***, No. 14-11987 (11th Cir. Oct. 21, 2014). On April 20, 2015, the Supreme Court of Georgia sided with the insurer. See ***Piedmont Office Realty Trust v. XL Specialty Ins. Co.***, No. S15Q0418 (Ga. Apr. 20, 2015). The opinion creates a Hobson's choice for policyholders wishing to settle underlying lawsuits, even in cases where those insurers expressly agreed in their policies that they would not refuse consent to settlement unreasonably.

The policy in question contained a "consent to settle" clause which stated that no settlement could be entered into without the insurer's consent; but the clause also stated that the insurer's consent "shall not be unreasonably withheld." Facing a \$150 million lawsuit and eroding policy limits, the policyholder sought the insurer's permission to settle the underlying claim for the remaining \$6 million limits of its excess policy. The insurer refused to contribute more than \$1 million toward any settlement. The policyholder ultimately settled the claims for \$4.9 million, which was approved by the trial court.

The policyholder then sued the insurer for the settlement amount, alleging breach of the policy and bad faith failure to settle. The Supreme Court of Georgia acknowledged that an insurance company cannot unreasonably refuse to settle a covered claim; but it held that the policyholder could not settle and then pursue the insurer for breach of this duty. This holding essentially eviscerates the express policy provision and Georgia law holding that an insurer may not unreasonably withhold consent for a settlement.

Worse, the court held that the policyholder also could not pursue the insurer for the settlement amount based on bad faith. The court acknowledged that many states allow such recourse, but it held Georgia law does not permit a bad faith claim under these circumstances. The court held that the policyholder could not sue the insurer for bad faith refusal to settle the underlying lawsuit "in the absence of a judgment against [the policyholder] after an actual trial."

Policyholders should anticipate that insurance company claims handlers and counsel will cite this decision as curtailing policyholders' settlement rights under Georgia law. But, policyholders do have

rights that may affect their ability to properly defend and settle cases filed against them. Georgia policyholders should not assume this opinion does away with all of their rights when it comes to the decision whether to settle claims made against them. When faced with a reservation of rights or an insurer with different opinions about how to handle a lawsuit filed against them, policyholders should consult coverage counsel to ensure they are not overlooking rights they may have with respect to the handling and settlement of such claims.

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National Law Review, Volume V, Number 111

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