

# Duty to Settle, Pollution Exclusion, Extracontractual Damages Coverage Update

May 3, 2021

## Duty to Settle – Georgia

### *GEICO Indem. Co. v. Whiteside*

--- S.E.2d ---, 2021 WL 1521527 (Ga. Apr. 19, 2021)

The Supreme Court of Georgia held that automobile insurer GEICO Indemnity Company (GEICO) breached its duty to settle a claim on behalf of its insured, Bonnie Winslett (Winslett), even though Winslett failed to notify GEICO of the third-party lawsuit against her. Despite Winslett's failure to adhere to the notice provisions in the policy, GEICO was liable for its negligent failure to settle the third-party claim because its duty to settle arose before Winslett had an obligation to notify GEICO of the third-party lawsuit.

While driving a vehicle owned by another person, Winslett struck a bicyclist, Terry Guthrie (Guthrie), causing injuries. GEICO notified Winslett in a letter that “[b]ased 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 his attorney.” GEICO did not inform Winslett that she had an obligation under the policy to notify it if she was sued. Shortly after, Guthrie’s lawyer sent GEICO a letter demanding the \$30,000 policy limit to settle the liability claim against Winslett. GEICO countered with \$12,409, even though it had been informed that Guthrie’s medical expenses were closer to \$15,000. Guthrie’s attorney did not respond to the counteroffer. Ultimately, GEICO rejected the settlement demand, and Guthrie filed suit against Winslett. Neither Guthrie’s attorney nor Winslett informed GEICO of the suit, and eventually, a default judgment of \$2,916,204 was entered against Winslett. GEICO unsuccessfully attempted to have the judgment set aside. Guthrie forced Winslett into involuntary bankruptcy, and the bankruptcy court appointed Guthrie’s personal injury attorney to represent the bankruptcy estate.

The trustee filed suit against GEICO alleging that GEICO negligently, or in bad faith, failed to settle Guthrie’s claim against Winslett, resulting in a judgment that exceeded the policy limits. The tort case went to trial, and the jury found that Winslett was 30% liable for the default judgment against her and GEICO was 70% liable. Thus, the final judgment against GEICO, including interest, exceeded \$2.7 million.

The U.S. Court of Appeals for the Eleventh Circuit certified to the Supreme Court of Georgia the question, among others, of whether the insurer is relieved of liability from a follow-on suit for bad faith

under the terms of the policy and identical notice provisions codified by statute when an insurer has no notice of a lawsuit against its insured. The Supreme Court concluded that GEICO breached its duty to settle when it unreasonably rejected Guthrie's policy-limits demand. The fact that Winslett failed to notify GEICO of the third-party lawsuit after the settlement demand was rejected was of no consequence to determining if GEICO was liable for the breach of its duty to settle the claim. According to the Supreme Court, Winslett was covered under the policy, GEICO owed her a duty to settle the claim, GEICO breached that duty, and the jury found that GEICO was partially at fault for Winslett's failure to comply with the notice-of-suit provision and the resulting default excess judgment.

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### **Pollution Exclusion – Ninth Circuit (Montana Law)**

***BITCO Gen. Ins. Corp. v. J. Burns Brown Operating Co.***

No. 20-35490, 2021 WL 1526707 (9th Cir. Apr. 19, 2021)

The U.S. Court of Appeals for the Ninth Circuit held that J. Burns Brown Operating Co. (J. Burns) was not entitled to insurance coverage from its insurer, BITCO General Insurance Corporation (BITCO), for costs it incurred after one of its wells discharged oil and contaminants into a reservoir. The BITCO policy contained a pollution exclusion, which precluded coverage for pollution-caused property damage except where J. Burns possessed "underlying insurance" for pollution costs "at the limits shown in the schedule of underlying insurance." The schedule of underlying insurance at issue listed a \$1 million each-occurrence limit on J. Burn's primary policy, but only provided \$100,000 in pollution coverage.

The appellate court held that while the underlying insurance covered some of J. Burns' cleanup costs, it did not do so at the necessary limits and, therefore, the pollution exclusion applied, without any exceptions, to bar coverage. The appellate court further rejected J. Burns' contention that the BITCO policy was ambiguous, holding that "a reasonable policyholder would understand the need to have \$1 million in pollution coverage." The appellate court further noted that the language in the BITCO policy is typical of an umbrella policy, that the policy could not reasonably be read as dismissing the requirement to have a certain level of pollution coverage, and that J. Burns could not reasonably expect BITCO to cover its pollution costs. Thus, the appellate court held that coverage was not available to J. Burns.

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### **Extracontractual Damages – Seventh Circuit (Illinois Law)**

***Creation Supply, Inc. v. Selective Ins. Co. of the SE***

No. 20-2509, 2021 WL 1608791 (7th Cir. Apr. 26, 2021)

The U.S. Court of Appeals for the Seventh Circuit reversed the district court's order requiring the insurer to pay extracontractual damages under an Illinois statute. The appellate court found that the statute's prerequisites to liability had not been met and, accordingly, the insurer had no liability under

the statute.

Selective Insurance Company of the Southeast (Selective) issued a liability insurance policy to Creation Supply Inc. (CSI), an importer and vendor of writing instruments. One of CSI's competitors brought a lawsuit against it in 2012 for alleged trademark infringement. CSI sought a defense from Selective, but Selective denied coverage under its policy and commenced a declaratory judgment action in Illinois state court, seeking a ruling that it had no duty to defend. In that state court action, the court found that Selective had a duty to defend CSI and awarded CSI damages relating to CSI's defense costs in the trademark infringement action.

CSI then commenced an action in federal court, alleging that Selective was also liable for damages under Section 155 of the Illinois Insurance Code, which allows for extracontractual damages to be awarded to an insured where at least one of three issues "remains undecided: (1) the insurer's liability under the policy, (2) the amount of the loss payable under the policy, or (3) whether there was an unreasonable delay in settling a claim." The district court sided with CSI, finding that Selective's refusal to defend CSI in the trademark action was "vexatious and unreasonable" in violation of the statute.

On appeal, the appellate court examined each of the three issues in Section 155 and concluded that none were left undecided as required by the statute. In particular, both Selective's liability under the policy and the amount of loss payable had been determined in the earlier state court action. In addition, because the underlying trademark action had been reduced to a judgment, it was not a claim that Selective could have settled. The appellate court found that CSI's "allegations prove the point – Selective allegedly failed to timely pay on a *judgment*; it did not allegedly fail to timely settle a *claim*."

The appellate court also rejected CSI's argument that its request for damages under Section 155 could proceed because it was brought in conjunction with a breach-of-contract claim. The appellate court found that "not all breach-of-contract claims permit an accompanying Section 155 claim. Just those for which 'one of three issues remains undecided: the liability of the insurer, the amount owed under the policy, or whether a delay in settling a claim has been unreasonable.' And the breach-of-contract claim in this case is not among them."

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## Information Laws Exclusion – Seventh Circuit (Illinois Law)

### ***Mesa Laboratories, Inc. v. Federal Ins. Co.***

--- F.3d ---, 2021 WL 1538230 (7th Cir. Apr. 20, 2021)

A three-judge panel for the U.S. Court of Appeals for the Seventh Circuit recently ruled that Federal Insurance Company (Federal) has no duty to cover the \$3.3 million settlement incurred by its insured, Mesa Laboratories, Inc. (Mesa) for violation of the U.S. Telephone Consumer Protection Act (TCPA). The underlying case arose in 2018 when a proposed class action was filed against Mesa, accusing it

of sending unsolicited faxes to dental offices advertising its equipment sterilization services. Mesa tendered the suit to Federal, but Federal refused to defend or indemnify Mesa on the ground that the suit fell outside of the policy's coverage. One of the policy provisions that Federal cited was the "information laws exclusion," which states that the policy "does not apply to any damages, loss, cost or expense arising out of any actual or alleged or threatened violation of ... the [TCPA] ... or any similar regulatory or statutory law in any other jurisdiction."

Mesa filed suit against Federal, alleging breach of contract, improper delay and denial of claims and bad faith. On appeal, the appellate court held that the policy's "information laws exclusion" barred coverage for damages and costs associated with a violation of the TCPA. Specifically, at issue was whether the exclusion precluded coverage for the common law claims brought against Mesa. The panel concluded that the common law and TCPA claims resulted from the same conduct – the allegedly illegal sending of unwanted faxes. Because of this, the appellate court panel determined that the exclusion barred coverage for all of the underlying claims. Accordingly, Federal did not have to indemnify Mesa for the resulting settlement.

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