

## Georgia Supreme Court: Insured Cannot Sue for Settlement Amount or Bad Faith Absent Insurer's "Consent to Settle"

On April 20, 2015, the Georgia Supreme Court unanimously held that when an insured fails to seek its insurer's consent to settle a claim, the insured cannot pursue litigation against its insurer to recover settlement amounts paid by the insured without its insurer's consent or for bad faith refusal to settle.

In *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, No. S15Q0418 (Ga. Apr. 20, 2015), Piedmont Office Realty Trust, Inc. (Piedmont or the Insured) was insured under a primary directors and officers insurance policy issued by Liberty Surplus Insurance Company and an excess directors and officers insurance policy issued by XL Specialty Insurance Company (XL). The primary policy provided coverage of up to \$10 million for claims against Piedmont. The excess policy provided an additional \$10 million excess of the primary policy's \$10 million limit of liability.

The primary policy's \$10 million limit as well as \$4 million of the excess policy limit were exhausted through payment of defense costs incurred by Piedmont in a securities class action. After Piedmont prevailed on summary judgment in the securities class action, and while the appeal of the summary judgment decision was still pending, Piedmont and the securities class action plaintiffs agreed to mediation. Prior to the mediation, Piedmont sought XL's consent to settle the claim for the excess policy's remaining \$6 million limit. XL rejected Piedmont's demand for the excess policy's remaining limit, but agreed to contribute \$1 million toward a settlement.

Without further notice to XL and without obtaining XL's consent, Piedmont agreed to settle the securities class action at the mediation for \$4.9 million. The U.S. District Court later approved the settlement and Piedmont demanded that XL provide coverage for the full settlement amount, which XL refused. Piedmont subsequently sued XL in the District Court for breach of contract and bad faith. XL moved to dismiss Piedmont's complaint on the basis that Piedmont failed to seek XL's consent to settle. XL also argued that the excess policy's "no action" provision prohibited Piedmont from filing suit against it, unless Piedmont complied with all of the terms of the excess policy and the amount of Piedmont's obligation to pay was determined by a judgment against Piedmont after a trial, or a written agreement between the claimant, the insured, and the insurer.

In opposition to XL's motion, Piedmont argued that its lawsuit should proceed because XL unreasonably withheld its consent in violation of the excess policy's consent to settle provision, which expressly provided that XL would not withhold its consent unreasonably. Piedmont also argued that XL was "legally obligated" to pay the settlement because the settlement agreement was approved by the District Court. The District Court rejected Piedmont's arguments and granted XL's motion. Thereafter, Piedmont appealed to the 11<sup>th</sup> U.S. Circuit Court of Appeals, which in turn issued certified questions to the Georgia Supreme Court.

Relying primarily on its earlier decision in *Trinity Outdoor, LLC v. Central Mutual Insurance Co.*, 285 Ga. 583, 279 S.E.2d 10 (Ga. 2009), a case also involving an insured's failure to seek an insurer's consent to settle, the Georgia Supreme Court held that "[P]iedmont is precluded from pursuing this action against XL because XL did not consent to the settlement and Piedmont failed to fulfill the contractually agreed upon condition precedent." Thus, Piedmont was precluded from suing for coverage for the settlement amount or for bad faith refusal to settle.

The Court also rejected Piedmont's attempt to distinguish *Trinity Outdoor* on the ground that the policy in *Trinity Outdoor* did not expressly state that the insurer's consent would not be unreasonably withheld. Notably, the Court found that "[e]ven without such an express provision in its policy, an insurer cannot unreasonably refuse to settle a covered claim."



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In addition, the Court rejected Piedmont's argument based on the excess policy's definition of "loss," which provided that XL will only pay for a loss that Piedmont becomes "legally obligated to pay." Specifically, Piedmont argued that it was legally obligated to pay the settlement because the settlement was approved by the District Court. The Court rejected Piedmont's argument finding that Piedmont "[c]ould not settle the underlying lawsuit without XL's consent – in breach of its insurance contract – and then, after breaching the contract, claim that the District Court's approval of the settlement imposed upon XL a distinct legal obligation to pay the settlement ..."

The Court also refused to accept that XL was estopped from relying on the consent to settle provision. Piedmont argued that XL was estopped from relying on the consent to settle provision because XL had denied coverage. The Court disagreed and noted that XL had provided Piedmont with coverage and a defense in the underlying action. Indeed, it appears that the Court did not consider the insurer to have withheld consent when it declined to grant authority to settle for up to \$6 million, possibly because the insurer did grant some authority.

The Georgia Supreme Court's decision in *Piedmont* is significant in that it squarely places Georgia among those jurisdictions that strictly enforce an insurance policy's no action provision, when an insured violates the consent to settle requirement. Moreover, this appears to be a flat prohibition of any claim for coverage or bad faith without any analysis of whether the insurer reasonably withheld consent. The decision provides a firm lesson to insureds whose policies are governed by Georgia law that they need to obtain the insurer's prior consent to each and every settlement offer, or risk losing their coverage.

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**To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Elan Kandel at (212) 453-3762 or [ekandel@cozen.com](mailto:ekandel@cozen.com). or Angelo Savino at (212) 908-1248 or [asavino@cozen.com](mailto:asavino@cozen.com)**