South Carolina Litigation Update

November 8, 2021

Media Contact
Erica Gianetti
Marketing & Communications Supervisor
erica.gianetti@mgclaw.com

Should the *Tyger River* be Shifting?

Nothing seems to frustrate insurance carriers and defense attorneys in South Carolina more than a *Tyger River[1]* or *Nichols[2]* demand with unreasonable, and oftentimes, ridiculous terms. The demands can sometimes read as if they have been written by Dr. Evil from the *Austin Powers* movies.[3] However, the use of this type of demand as leverage for potential bad faith lawsuits against insurance companies has "become fashionable in recent years" in South Carolina as noted by our Supreme Court earlier this year.[4]

South Carolina does not have a bright-line rule for time-limit demands, and there is no set time period in which insurance carriers have to respond—the standard is only whether the carrier acted reasonably.[5] What is or is not reasonable in such demands has been the subject of numerous lawsuits and the start of many arguments between the Plaintiff and Defense bar.

The South Carolina Court of Appeals is currently considering a case involving a "failure" to meet such a demand and Georgia has recently enacted a statute providing guidance for issuing time-limit demands. Should South Carolina be the next state to address the issue? Hopefully, we will see some changes to the *Tyger River* doctrine to provide more clarity for everyone's sake.

The so-called "Tyger River doctrine" was first enunciated in *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). In *Tyger River*, an employee of Tyger River Pine Company was injured. The applicable insurance coverage only had a $5,000.00 limit. The insurer provided a defense and had exclusive control over the defense including the exclusive right to settle. The employee subsequently won a $7,000.00 verdict and offered to settle for $5,000.00 but the insurer refused. The South Carolina Supreme Court held that the insurer was bound to "sacrifice its interest in favor of those of the insured." The South Carolina Supreme Court ruled the insurer was liable for the difference between the proposed settlement amount and the verdict, plus interest and costs. The Court concluded an insurer against liability for accidents which assumes the duty for defending a claims owes the duty of settling the claim if that is the reasonable thing to do.

There is no guidance on what terms are or are not allowed in these demands and some plaintiff lawyers are notorious for *Tyger River* demands replete with special stipulations, sometimes contradicting footnotes, and overly detailed instructions that only provide a short time to respond. As such, a *Tyger River* demand is often calculated to put pressure on insurance carriers (especially those with minimum or nominal limits in comparison to the injuries) to settle under the threat of a bad faith refusal to settle.[6]

Recognizing increased litigation over issues with recent trends used by plaintiff attorneys, the Georgia legislature recently made significant revisions to O.C.G.A. 9-11-67.1, the Georgia statute governing pre-suit settlement demands for injuries arising out of the use a motor vehicle.

In 2013, O.C.G.A 9-11-67.1 was enacted to outline procedures and requirements for these pre-suit settlement demands, and how those demands could be accepted. Subsection (a) of O.C.G.A. 9-11-67.1 included important limitations on pre-suit demands, including five material terms that are required to be in included in all pre-suit settlement offers:

1. The time period within which the offer must be accepted, which cannot be less than 30 days from the receipt of the offer;
2. The amount of monetary payment;
3. The party or parties that will be released;
4. The type of release, if any, that will be provided to each releasee; and
5. The claims to be released.

The statute's intent was to provide clarity for insurers in responding to pre-suit time-limit demands. However, over time, plaintiff attorneys successfully used complicated demands with various conditions on insurance carriers to make it more difficult for them to meet all terms of the demand.[7] The statute did not expressly prohibit additional terms to be added to the material terms listed in subsection (a), and courts held if those additional terms were not accepted, there was no settlement. The Georgia Supreme Court held "timely receipt of the settlement funds" as a condition of settlement was proper, even though it was not required by the statute. *Grange Mutual Cas. Co. v. Woodard*, 300 Ga. 848 (2017).

An amended statute was recently signed into Georgia law and applies to causes of action arising on or after July 1, 2021.[8] The amended statute limits the terms that can be included in pre-suit demands to those terms in subsection (a) and those "shall be the only terms" included in an offer to settle under the code section. The amended statute also states if a release is not provided by the claimant with the demand, the insurers "providing of a proposed release shall not be deemed a counteroffer."

O.C.G.A. 9-11-67.1 also requires the demands include medical or other records in the claimant's possession so the claim can be evaluated and also provides that demands can include a term requiring a statement under oath regarding whether all insurance coverage has been disclosed and also can require payment within a specified period of time, but the date shall not be less than 40 days from receipt of the offer.

Despite O.C.G.A. 9-11-67.1's seemingly narrow application to pre-suit demands involving the use of a motor vehicle, Georgia has case law addressing procedures for time-limit demands for tort claims not involving the use of a motor vehicle, and in *Baker v. Huff*, 323 Ga. App. 357 (2013), the Georgia Court of Appeals did not condone a 10-day settlement demand that did not provide material information about the claim necessary for the insurer to evaluate it.[9]

Returning to South Carolina, a carrier's duty to protect the interests of its insured does not require an insurance carrier to immediately accede to a demand for settlement before it has had a reasonable time to conduct an investigation. The linchpin of the insurer's liability is its unreasonable delay in tendering its policy limits. *Columbia Ins. Co. v. Reynolds*, C.A. No. 2:18-2975 RMG (D.S.C. Feb. 3, 2020); *citing Noonan v. Vermont Mut. Ins. Co.*, 761 F. Supp 2d 1330, 1336 (M.D. Fla. 2010). Thus, "an insurer, acting with diligence and due regard for its insured, is allowed a reasonable time to investigate a claim; no obligation exists to accept a settlement offer…without time for investigation." *Johnson v. GEICO*, 318 Fed. Appx. 84 7, at * 3 (11th Cir. 2009).

In *Columbia Ins. Co. v. Reynolds*, the Court held that no reasonable jury could find CIC's failure to meet the ten business day deadline set by Plaintiff's counsel before the carrier had conducted a basic investigation, which included a review of the relevant medical records, constituted a bad faith refusal to settle. This is despite the fact the carrier had been alerted that Plaintiff's injuries would exceed policy limits, and the insurer was under no duty to accept undocumented information about those injuries.

Because "reasonable" varies on an individual case's facts, is it time for South Carolina to "shift" the *Tyger River* and provide attorneys and carriers with some direction on how to navigate the same? Some momentum could potentially be in the works.

The South Carolina Court of Appeals is considering a case that illustrates some of issues that are the result of not having a statue or clear case law governing the terms or contents of time-limit demands in *Allstate Fire and Casualty Insurance Company v. Pamela Goodwin*, Appellate Case No. 2018-001108, Civil Action No. 2015-CP-16-0815.[10]

The *Goodwin* case arises from an accident that occurred on August 20, 2014. By letter dated December 12, 2014, and received by Allstate on December 17, 2014, Goodwin made a time-sensitive demand for Allstate's policy limits ($50,000.00) with specific requests as to how payment should be made to resolve her bodily injury claim. The deadline to respond to the demand was Saturday December 27, 2014.

On December 23, 2014, Allstate sent a check for the applicable bodily injury policy limits via overnight mail that was received prior to the deadline. However, Goodwin rejected Allstate's payment as it did not comply with the specific payment terms in the demand letter and deemed it a counteroffer that was rejected. Goodwin filed suit against Allstate's insured. In turn, Allstate filed a declaratory judgment action seeking a declaration that Allstate's performance under the demand was valid and enforceable and filed a motion for summary judgment in line with this argument. In response, Goodwin argued Allstate's payment of the policy limits by way of regular check as opposed to the requested cashier's or certified check constituted a breach of a material term of the agreement to settle and amounted to a counteroffer.

The trial court granted summary judgment to Allstate and determined Allstate accepted the material terms of the time-sensitive demand and their payment constituted a valid and enforceable settlement. The trial court also noted there is no material difference between an insurance check that does not exceed $50,000.00, and a certified or cashier's check per South Carolina Rule of Professional Conduct 1.15, and thus, the type of check was not an essential or material term of a settlement agreement.

The *Goodwin* case is just one of many examples that show the confusion caused when lawyers add seemingly immaterial terms in time-limit demands that may or may not be enforceable under South Carolina law. The *Tyger River* doctrine can be murky in this respect, and an attorney or insurance carrier certainly does not want to be the reason there is a "failure" to comply with a time-sensitive demand. Without guidance however, one can only wonder what is reasonable, and as the case law has shown, reasonable minds can differ.

The Court of Appeals has an opportunity in *Goodwin* to provide such guidance. We will have to wait for the ruling to see if the *Tyger River* is in fact shifting. Otherwise, time-limit demands in South Carolina with unreasonable terms may continue for the foreseeable future.

Reprinted with permission of the South Carolina Defense Trial Attorneys' Association.

ABOUT THE AUTHORS

George James joined MGC's Columbia office in August of 2017. His practice focuses on litigation matters, including premises liability and construction defect claims. George is a member of the South Carolina Defense Trial Attorneys' Association, Richland County Bar Association and the SC Bar Association's Young Lawyers Division. He can be contacted by email or 803.227.2301.

Adam Ribock joined MGC's Columbia office in September of 2014. His practice focuses on litigation matters, including personal injury defense, premises liability, construction defect claims, automotive dealership and HOA litigation. Adam is board member of the South Carolina Defense Trial Attorneys' Association. He can be contacted by email or 803.227.2254.

[1] *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933).

[2] *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983).

[3] In *Fowler v. State Farm Mutual Automobile Insurance Co.*, 300 F. Supp. 3d 751 (D.S.C. 2017), the plaintiff's attorney sent a demand letter to State Farm insisting the insurer pay its policy limits within a week, "at noon." 300 F. Supp. 3d at 753. Despite State Farm's "acceptance" of the demand, the plaintiff's attorney deemed the response a counteroffer and rejection, filed suit against the insured, negotiated with the insured—now its adverse party in a lawsuit—for a "confession of judgment of $7 million" without State Farm's involvement, took a purported assignment of the insured's bad faith claim, and sued State Farm for bad faith. *Id.* After State Farm removed the case, the district court granted summary judgment, in part because, "Defendant's response to the offer could not constitute bad faith as a matter of law." 300 F. Supp. 3d at 753-54. The Fourth Circuit affirmed. 759 F. App'x 160 (4th Cir. 2019).

[4] "The practice of assigning bad faith claims to leverage insurance companies to pay more than policy limits has apparently become fashionable in recent years." *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, Op. No. 28034 2021 S.C. LEXIS 71, *20, 2021 WL 2448359 (S.C. Sup. Ct. Filed June 16, 2021) (Shearouse Adv. Sh. No. 20 at 43 fn. 8).

[5] *Nichols*., 279 S.C. at 339 (stating "an insurer's *unreasonable* refusal to settle within policy limits subjects the insurer to tort liability" (citing *Tyger River Pine Co.*, 170 S.C. 286 at 290-91) (Emphasis Added)

[6] However, as recognized by the South Carolina Supreme Court in *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, Op. No. 28034 2021 S.C. LEXIS 71, *20, 2021 WL 2448359 (S.C. Sup. Ct. Filed June 16, 2021) (Shearouse Adv. Sh. No. 20 at 43 fn. 8), the Court has never recognized the validity of any assignment of a bad faith claim.

[7] Not meeting the demand would subject the insurer to potential extra-contractual exposure for bad faith/negligent failure to settle claims, as is argued in South Carolina.

[8] The statute applies to offers made prior to the filing of a defendant's answer. The statute previously only applied to demands that were made prior to the filing of a lawsuit, which resulted in some attorneys filing suit and then immediately serving a demand on the insurer, to avoid the requirements of the statute.

[9] Georgia has a "Holt" demand, similar to South Carolina's *Tyger River.* In responding to a time-limited settlement offer, an insurer must act reasonably, and is not required to accept an offer which, under all the circumstances, imposes an unreasonably short period of time to respond. *S. Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992).

[10] The South Carolina Court of Appeals held oral arguments in Goodwin on February 1, 2021 so it is expected a decision is forthcoming.