CASE NO. S21Q0227

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In the

**SUPREME COURT OF GEORGIA**

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GEICO INDEMNITY COMPANY,

*Appellant/Defendant,*

v.

FIFE M. WHITESIDE, trustee in bankruptcy
On behalf of Bonnie Winslett,

*Appellee/Plaintiff.*

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# *AMICUS CURIAE* BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT/DEFENDANT GEICO INDEMNITY COMPANY

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On behalf of the Georgia Defense Lawyers Association

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## I. STATEMENT OF THE ISSUE

When an insurer has no notice of a lawsuit against its insured, do O.C.G.A. § 33-7-15 and a virtually identical insuring provision relieve the insurer of liability from a follow-on suit for bad faith?

## II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Georgia Defense Lawyers Association ("GDLA") is an association of more than 950 Georgia lawyers, including sole practitioners and lawyers in law firms of all sizes, who engage in litigation, primarily for defendants in civil litigation, and represent insurance companies, individuals, and self-insured corporations. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise improving the administration of justice.

The GDLA and its members are interested in ensuring that basic principles of insurance law and tort law are clearly defined and uniformly applied. It is axiomatic that legal systems are intended to provide a level of certainty and predictability so that individuals and businesses can shape their conduct appropriately. Furthermore, all defendants in civil cases in Georgia -- including insurance companies -- must be treated fairly and subjected to potential liability only where Georgia law allows it.

This Court has never directly addressed the question certified to it by the Eleventh U.S. Circuit Court of Appeals as to whether the failure of an insured (or anyone else) to notify a liability insurer that a lawsuit has been served on the insured, as required by O.C.G.A. § 33-7-15 and the statutorily-mandated condition

of the insurance policy, relieves an insurer of potential liability for a bad faith failure to settle claim when the lawsuit against the insured results in a default judgment in excess of the policy limits. Nor has the Court directly addressed a similar question raised by the facts of this case, whether the combination of O.C.G.A. § 33-7-15, the mandatory notice condition of the policy, and a "no action" clause in an insurance policy preclude the insured's ability to assert a bad faith failure to settle claim where the insured's breach of the policy condition to give notice causes prejudice to the insurer.

This case involves facts – an insured's failure to notify an insurer of a lawsuit, resulting in a default judgment against the insured and post-judgment actions against the insurer – which have arisen in past cases and are likely to reoccur in the future. The GDLA and its clients have a vested interest in having these questions resolved to provide certainty in the law.

## III. SUMMARY OF THE ARGUMENT

Where neither an insured nor an injured claimant notify a liability insurer that suit has been filed and served on the insured, prejudicially depriving the insurer of the opportunity to defend the suit, the notice of suit requirement of O.C.G.A. § 33-7-15(b), a parallel provision of the insurance policy, and a "no action" clause in the liability insurance policy bars any claim by the insured against

the insurer for the failure to settle the injured person's claim within the policy limits, irrespective of when the insurer declined to settle the injured person's claim.

## IV. ARGUMENT AND CITATION OF AUTHORITY

### The Insured And Claimant's Failure To Notify GEICO Of The Lawsuit, Together With The "No Action" Provision Of The Policy, Preclude A Bad Faith Action Against GEICO.

In this case, GEICO was not notified of the lawsuit against its insured until after a final default judgment for millions of dollars had been entered against her. Georgia law and the insurance policy required the insured to notify GEICO of the lawsuit and relieved GEICO of any liability to the insured because of her breach of the notice condition. In addition, the insurance policy contained a "no action" clause, barring suits against the insurer unless there has been full compliance with the terms and conditions of the policy.

This Court should hold that where neither an insured nor anyone else notifies a liability insurer that suit has been filed and served, prejudicially depriving the insurer of the opportunity to defend the suit, the notice of suit requirement of O.C.G.A. § 33-7-15(b), a mandatory parallel provision of the insurance policy, and a "no action" clause in the liability insurance policy preclude any claim by the insured against the insurer for a failure to settle the injured person's claim within the policy limits.

O.C.G.A. § 33-7-15 provides in relevant part:

> (a) No motor vehicle liability insurance policy covering a motor vehicle principally garaged or principally used in this state shall be issued, delivered or issued for delivery, or renewed in this state unless such policy contains provisions or has an endorsement thereto which specifically requires the insured to send his insurer, as soon as practicable after the receipt thereof, a copy of every summons or other process relating to the coverage under the policy and to cooperate otherwise with the insurer in connection with the defense of any action or threatened action covered under the policy.
>
> (b) Noncompliance by the insured with this required provision or endorsement shall constitute a breach of the insurance contract which, if prejudicial to the insurer, shall relieve the insurer of its obligation to defend its insureds under the policy and of any liability to pay any judgment or other sum on behalf of its insureds.
>
> ***
>
> (c) Subsections (a) and (b) of this Code section shall not operate to deny coverage for failure to send a copy of a summons or other process relating to policy coverage if such documents are sent by a third party to the insurer or to the insurer's agent by certified mail or statutory overnight delivery within ten days of the filing of such documents with the clerk of the court. …

As required by the statute, the GEICO policy contained language requiring the insured notify the insurer of lawsuits and cooperate in the defense of such actions:

> NOTICE
>
> * * *
>
> If a claim or suit is brought against an ***insured***, unless otherwise received by us, ***you*** are required to send us a copy of every summons or other process relating to the coverage under this policy and to

> otherwise cooperate with us in connection with the defense of any action or threatened action covered under this policy.
>
> If ***you*** fail to comply with this provision, it will constitute a breach of the insurance contract and if prejudicial to us, shall relieve us of our obligation to defend ***you*** and any other ***insureds*** under this policy and of any liability to pay any judgment or other sum on ***your*** or any other ***insureds*** behalf. However, we will accept notice of a claim against an ***insured*** from an injured party if the ***insured*** has failed to give written notice within 30 days from the date of the occurrence. The notice from the injured party must be in writing and sent by registered mail.

(R-Vol. 2, pp. 85-86); (Doc. 119-27, pp. 8-9).

The meaning of O.C.G.A. §§ 33-7-15 (b), (c), and the similar policy condition is clear: the insured's failure to notify the insurer that a lawsuit has been served is a breach of a statutorily-required policy condition. And where no one tells the insurer about the lawsuit until after a final default judgment has been entered against the insured, the failure to notify the insurer of the suit is prejudicial, *per se*. *Champion v. S. Gen. Ins. Co.*, 198 Ga. App. 129, 130-31, 401 S.E.2d 36, 38 (1990); *Chadbrooke Ins. Co. v. Fowler*, 206 Ga. App. 778, 780, 426 S.E.2d 578, 580-81 (1992). In such cases, the insured forfeits coverage and the insurer has no obligation to defend the insured or to pay "any judgment resulting from the suit." *Berryhill v. State Farm Fire & Cas. Co.*, 174 Ga. App. 97, 99, 329 S.E.2d 189, 191 (1985).

Pursuant to both the statute and the policy, a prejudicial violation of the notice condition relieves the insurer of the obligation to pay any judgment on the

insured's behalf. There is no dispute that the insured did not comply with the notice provision of the policy and the insured's breach of that condition was not remedied by notice of the suit from anyone else. There is also no dispute that the failure to notify GEICO of the suit was prejudicial.

In its order certifying questions to this Court, the U.S. Court of Appeals for the Eleventh Circuit expressed uncertainty about whether an insurer in these circumstances is only relieved of liability to pay a judgment against the insured, or if the breach of the notice requirement also relieves the insurer of an obligation to pay the insured, or the insured's assignee, the amount of the excess default judgment awarded in a follow-on "bad faith" lawsuit for failure to settle the claim within the policy limits. *Whiteside v. GEICO Indem. Co.*, 977 F.3d 1014 (11th Cir. 2020).

As Appellant has argued, "any judgment resulting from the suit" would include a judgment awarded based on the insurer's failure to settle the case where that judgment was rendered to pay the injured party the amount of the default judgment obtained against the insured. Here, the entire purpose of the involuntary bankruptcy and the bad faith suit was to satisfy the judgment against the insured. *See id.* ("And in a real sense, payment here would amount to payment 'on behalf of' GEICO's insured. … So a win for the bankruptcy-trustee-and-cyclist's-attorney will just channel GEICO's money into the cyclist's pocket. And what will have put

it there is the default judgment the cyclist has against the driver—the judgment entered without any notice to GEICO."). Accordingly, the insured's and injured party's failure to notify the insurer of the lawsuit should preclude the insurer's liability for the bad faith failure to settle claim because established Georgia law provides that GEICO was relieved of its obligation to pay *any* judgment "resulting from the suit" or "on behalf of" the insured. That includes any "bad faith" judgment.

But even if the violation of the statutory and policy notice requirements alone only relieved the insurer of the obligation to pay a judgment against the insured as Appellee argues, a "no action" clause in the insurance policy bars the bad faith claim. GEICO's policy in this case provided that "[n]o suit will lie against us … [u]nless the insured has fully complied with all the policy's terms and conditions." (R-Vol. 2, pp. 85-86); (Doc. 119-27, pp. 8-9).

As this Court said in *Trinity Outdoor, LLC v. Cent. Mut. Ins. Co.*:

> In construing an insurance policy, we begin, as with any contract, with the text of the contract itself. Where the contractual language unambiguously governs the factual scenario before the court, the court's job is simply to apply the terms of the contract as written, regardless of whether doing so benefits the carrier or the insured.

285 Ga. 583, 584–85, 679 S.E.2d 10, 12 (2009) (quoting *Reed v. Auto-Owners Ins. Co.*, 284 Ga. 286, 287, 667 S.E.2d 90 (2008)).

"No action" clauses in insurance policies have routinely been held to be unambiguous and enforceable. *See Piedmont Office Realty Tr., Inc. v. XL Specialty Ins. Co.*, 297 Ga. 38, 41-42, 771 S.E.2d 864, 866 (2015) (insured's settlement without insurer's consent breached a policy condition and unambiguous "no action" clause precluded bad faith action); *Giles v. Nationwide Mut. Fire Ins. Co.*, 199 Ga. App. 483, 485, 405 S.E.2d 112, 114 (1991) ("We decline appellants' invitation to depart from the long line of cases holding that a limitation of action clause such as the one at issue here is valid and enforceable"); *see also Trinity Outdoor*, 285 Ga. at 587, 679 S.E.2d at 13 (no bad faith claim where insured settled without insurer's consent in violation of policy condition).

In *Piedmont*, this Court expressly rejected the argument that an insured who violates a material policy condition can sue the insurer for bad faith even where the policy contains a "no action" clause. 297 Ga. at 43, 771 S.E.2d at 867 (although "other jurisdictions have held that an insured who settles a lawsuit in violation of a 'no action' clause can still bring a bad faith claim against the insurer," "it is not the law in Georgia").

GEICO's policy contained an unambiguous term precluding suits against the company unless the insured fully complied with her obligations. The insured indisputably breached the notice condition and that breach prejudiced GEICO as a matter of law. There is no construction of the policy terms required, and they must

be given their full effect. *Cont'l Cas. Co. v. H.S.I. Fin. Servs., Inc.*, 266 Ga. 260, 262, 466 S.E.2d 4 (1996). Because the insured failed to comply with all of the terms and conditions of the policy, indeed because the insured breached a material term of the policy and prejudiced the insurer, she is precluded from suing GEICO for bad faith.

## V. CONCLUSION

For the foregoing reasons, the GDLA, as *amicus curiae*, respectfully submits that the Court should hold Appellee's bad faith claim against GEICO is barred by the insured and injured party's failure to notify GEICO of the lawsuit, in violation of the statutory and policy requirement for giving such notice and because the claim is precluded by the "no action" clause of the insurance policy.

Respectfully submitted this 9th day of November, 2020.

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## CERTIFICATE OF SERVICE

Undersigned counsel for the Georgia Defense Lawyers Association certifies that he has this date filed the foregoing *Amicus Curiae Brief of the Georgia Defense Lawyers Association in Support of Appellant/Defendant GEICO Indemnity Company* using the Court's electronic filing system which will automatically send e-mail notification to all attorneys of record and by sending via U.S. First Class mail to:

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This 9th day of November, 2020.

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