10-16-2018

SunTrust Banks, Inc. et al., Order on Movant Insurers' Motions Related to SunTrust's Bad Faith Claim (Count IX)

John J. Goger
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

SunTrust Banks, Inc., et al.,[1]	)	
	)	
Plaintiffs,	)	CASE NO. 2014CV249230
v.	)	
	)	
Certain Underwriters at Lloyd's of London, et al.[2]	)	Bus. Ct., Div. 1
	)	
Defendants.	)	
	)	

ORDER ON MOVANT INSURERS' MOTIONS RELATED TO SUNTRUST'S BAD FAITH CLAIM (COUNT IX)

The above styled action is before the Court on a number of pending motions, including: (1) Defendant Underwriters[3] Motion to Dismiss Plaintiffs' Bad Faith Claim; (2) Indian Harbor Insurance Company's Partial Motion to Dismiss or in the Alternative for Partial Summary Judgment on Count IX of the Second Amended Complaint; (3) Württembergische Versicherung

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[1] The named Plaintiffs in this case include: SunTrust Banks, Inc.; SunTrust Bank; SunTrust Investment Services, Inc.; SunTrust Mortgage, Inc.; SunTrust Robinson Humphrey, Inc.; and SunTrust Robinson Humphrey Funding, LLC. They will be referred to collectively herein as "SunTrust" or "Plaintiffs".

[2] The named Defendants in this case include: Certain Underwriters at Lloyd's London Subscribing to Policy Numbers 509/QA061105, 509/QA061205, 509/QA074605, 509/QA075005, 509/QA059106, 509/QA063806, 509/QA059206, 509/QA063306, 509/QA063206, 509/QA055407, 509/QA055507, and 509/QA055607; ACE American Insurance Company ("ACE American"); Arch Insurance Company ("Arch"); Axis Insurance Company ("Axis Insurance"); Axis Reinsurance Company ("Axis Re"); Axis Specialty Insurance Company ("Axis Specialty"); Federal Insurance Company ("Federal"); Houston Casualty Company ("Houston Casualty"); Indian Harbor Insurance Company ("Indian Harbor"); National Union Fire Insurance Co. of Pittsburgh, Pa. ("AIG"); St. Paul Mercury Insurance Company ("St. Paul Mercury"); St. Paul Surplus Lines Insurance Company ("St. Paul Surplus"); St. Paul Travelers Companies ("St. Paul Travelers"); Twin City Fire Insurance Company ("Twin City"; and U.S. Specialty Insurance Company ("U.S. Specialty"). The London underwriters at Lloyd's London involved in this litigation include: ACE Underwriting Agencies Limited, Managing Agent for Lloyd's Syndicate 2488 ("ACE GM"); Brit UW Ltd. ("Brit"); Novae Syndicates Limited ("Novae"); Wurttembergische Versicherung AG ("Wurtt"); and Syndicate 1084, managed by Chaucer Syndicates Ltd. in respect of and on behalf of Pembroke and Syndicate 4000 ("Chaucer"). Collectively the foregoing insurers will be referred to herein as "Insurers" and will be referred to with more particularly as appropriate.

[3] The moving Defendants with respect to this motion include: Defendants ACE Underwriting Agencies Limited, Managing Agent for Syndicate 2488 ("AGM"); Novae Syndicates Limited, as Managing Agent and on behalf of the Underwriting Members of Syndicates 1007 and 2007 at Lloyd's for the 2005, 2006, and 2007 Years of Account ("Novae"); St. Paul Mercury Insurance Company and St. Paul Surplus Lines Insurance Company (collectively "Travelers"); and AXIS Insurance Company, AXIS Reinsurance Company, and AXIS Specialty Insurance Company (collectively "AXIS"). Collectively AGM, Novae, Travelers, and AXIS will be referred to with respect to this motion as the "Movant Insurers").

AG's Motion to Dismiss Plaintiffs' Bad Faith Claim and Partial Joinder to Underwriters' Motion to Dismiss Plaintiffs' Bad Faith Claim; (4) Defendant Brit UW Ltd.'s Partial Motion to Dismiss [and] Motion for Partial Summary Judgment; (5) Defendant Federal Insurance Company's Motion to Dismiss and Alternative Motion for Summary Judgment on Plaintiffs' Bad Faith Claim; and (6) Defendant Chaucer Syndicates Ltd.'s Motion to Dismiss Plaintiff's [sic] Bad Faith Claim and Partial Joinder of Underwriters' Motion to Dismiss Plaintiff's [sic] Bad Faith Claim.[4] Having considered the record with respect to the foregoing motions, the Court finds as follows:

SUMMARY OF PLEADINGS AND ALLEGATIONS

In this action SunTrust asserts claims of breach of contract and seeks declaratory judgments against various international and domestic Insurers that provided primary and excess blended Directors, Officers, and Corporate Liability, Bankers Professional Liability, Fiduciary Liability, Employment Practices Liability, and Financial Institutions Bond policies (collectively "Policies") effective for four separate policy periods: (1) October 1, 2005 to October 1, 2006 (the "2005-06 Policy Period"); (2) October 1, 2006 to October 1, 2007 (the "2006-07 Policy Period"); (3) October 1, 2007 to October 1, 2008 (the "2007-08 Policy Period"); and (4) October 1, 2010 to October 1, 2011 (the "2010-11 Policy Period") (collectively "Policy Periods").[5] The Policies provide "claims made" coverage such that coverage for a claim is provided under the Primary and Excess Policies that were in effect at the time the claim was first made against SunTrust (as

[4] The foregoing motions will collectively be referred to as the Movant Insurers' "Motions Related to Bad Faith Claim".

[5] The Primary Policies for the 2005-06, 2006-07, and 2007-08 Policy Periods are referred to collectively as the "Lloyd's Policies" while the Primary Policy for the 2010-11 Policy Period, which was underwritten by a difference primary insurer—Indian Harbor—is referred to as the "Indian Harbor Policy". These Primary Policies are attached to the SAC as Exhibits A-D, respectively.

opposed to "occurrence" coverage, which provides coverage for claims that arise from acts that occur during a policy period).

According to SunTrust's Second Amended Complaint ("SAC"), in the last decade it has faced hundreds of claims alleging that SunTrust entities committed various types of errors, omissions, and other wrongful acts in its rendering of professional services to clients. As a result, SunTrust has incurred billions of dollars in losses, including the costs of settlements, judgments, and defense costs.[6] SunTrust has tendered to the Insurers more than 200 claims for insurance coverage (the "Claims"), seeking coverage for the claims under the foregoing Policy Periods.[7]

Specifically, SunTrust seeks coverage under the Policies for four separate groups of claims which it refers to as the: Auction Rate Securities Claims ("ARS Claims"); Underwriting Claims; Foreclosure Claims; and DOJ HAMP Claim. According to SunTrust, each of the four groups of claims respectively constitutes a "Single Claim", as that term is defined under the Policies, compromised of various individual claims involving "Interrelated Wrongful Act[s]…or losses."[8]

SunTrust seeks coverage for the ARS Claims under the 2005-06 Policies, asserting they arise out of a May 31, 2006 Securities and Exchange Commission cease-and-desist order that SunTrust tendered to the Insurers under the 2005-06 Policies. SunTrust alleges the ARS Claims constitute a Single Claim first made during the 2005-06 Policy Period that are all interrelated by virtue of alleging "Wrongful Acts" by SunTrust in connection with disclosures and investment advice to customers and clients concerning auction rate securities ("ARS").[9]

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6 SAC, ¶1.

7 SAC, ¶3. *See generally* Plaintiffs' Claims Index.

8 SAC, ¶¶ 79-80.

9 SAC, ¶¶ 81, 88, 92-156. SunTrust also noticed certain of the ARS Claims under the 2007-08 Policy Period and "reserves its rights in that regard." SAC, ¶149.

SunTrust asserts the Underwriting Claims constitute a Single Claim under the 2006-07 Policies as they arise out of a fact, situation, or circumstances set forth in a May 10, 2007 Subpoena Duces Tecum issued by the New York Attorney General and served upon SunTrust Mortgage[10] that SunTrust tendered as a Notice of Circumstances to the Insurers under the 2006-07 Policies. The Underwriting Claims are allegedly interrelated by virtue of "Wrongful Acts" to the underwriting and origination of high risk residential mortgages, disclosures made to mortgage-backed securities issuers and investors concerning mortgage underwriting or quality, and SunTrust's investment in mortgage-backed and other securities.[11]

SunTrust seeks coverage for the Foreclosure Claims under the 2007-08 Policies, asserting they are logically or causally connected to a lawsuit filed against SunTrust on Sept. 17, 2008 involving SunTrust's foreclosure practices and procedures (the "Mosqueda Claim"). SunTrust asserts the claims are interrelated and constitute a Single Claim first made in the 2007-08 Policy Period insofar as they all involve allegations of Wrongful Acts in connection with SunTrust's servicing of mortgage loans, including *inter alia*: foreclosure on mortgages where SunTrust was not the holder of the title; improper use of Mortgage Electronic Registration Systems, Inc. ("MERS") when foreclosing on mortgages; and the failure to complete foreclosures in a timely manner.[12]

Finally, SunTrust asserts the DOJ HAMP Claim constitutes a Claim first made under the 2010-11 Policy Period that arises from a Nov. 15, 2010 subpoena issued by the United States Attorney's Office for the Western District of Virginia, Roanoke Division ("USAO") and a

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10 SAC, Ex. E.

11 SAC, ¶¶ 84, 89, 157-257. In the alternative, SunTrust also noticed certain of the Underwriting Claims under other Policy Periods and to the extent the Underwriting Claims are not deemed made in the 2006-07 Policy Period, SunTrust asserts the claims are deemed made in the later policy periods so noticed. SAC, ¶89.

12 SAC, ¶¶ 85, 90, 258-318. In the alternative, SunTrust also noticed certain of the Foreclosure Claims under other Policy Periods and to the extent the Foreclosure Claims are not deemed made in the 2007-08 Policy Period, SunTrust asserts the claims are deemed made in the other policy periods so noticed. SAC, ¶90.

subsequent investigation concerning SunTrust's administration of the Home Affordable Modification Program, a federal program which launched on Mar. 4, 2009 and allowed qualified borrowers to have their residential mortgage loans modified by reducing their monthly mortgage payments to a percentage of their monthly gross income.[13] The USAO ultimately alleged SunTrust made errors, omissions, misstatements and misleading statements in connection with its administration of HAMP.

SunTrust alleges the foregoing groups of claims "involve different types of conduct and business activities, different types of alleged errors and omissions that occurred in different time periods, different claimants asserting different wrongful conduct, different areas of SunTrust's business, and in many instances different SunTrust affiliates." Thus, they do not involve "Interrelated Wrongful Act[s]" and do not constitute a Single Claim but rather are distinct groups of claims arising from different types of activities and coverage.[14] SunTrust alleges it has suffered millions of dollars in damages and losses in relation to the ARS Claims, Underwriting Claims, Foreclosure Claims, and DOJ HAMP Claim, that are insurable and covered under the Policies and has submitted the claims for coverage under the appropriate Policies as summarized above but the Defendant Insurers have refused to provide coverage and to indemnify SunTrust.

Thus, in this action SunTrust asserts the following claims: (Count I) breach of contract for denying coverage under the 2005-06 Policies for damages and losses arising from the ARS Claims and wrongfully repudiating their coverage obligations thereunder (asserted against the 2005-06 Insurers)[15]; (Count II) declaratory judgment related to the ARS Claims, seeking "a judgment declaring that the Insurers are obligated to pay SunTrust for the full amount of their

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[13] SAC, ¶¶ 86, 91, 319-340, Ex. F. In the alternative, SunTrust also noticed the DOJ HAMP Claim under other Policy Periods and to the extent it is not deemed made in the 2010-11 Policy Period, SunTrust asserts the claim is deemed made in the one of the other policy periods so noticed. SAC, ¶91.

[14] SAC, ¶87.

[15] SAC, ¶¶ 365-372.

respective shares of the Damages arising from the ARS Claims, up to $84.8 million in covered losses" (asserted against the 2005-06 Insurers)[16]; (Count III) breach of contract for denying coverage under the 2006-07 Policies for damages and losses arising from the Underwriting Claims and wrongfully repudiating their coverage obligations thereunder (asserted against the 2006-07 Insurers)[17]; (Count IV) declaratory judgment related to the Underwriting Claims, seeking "a judgment declaring that the Insurers are obligated to pay SunTrust for the full amount of their respective shares of the Damages arising from the Underwriting Claims, up to the $150 million limit of the 2006-07 Policies" (asserted against the 2006-07 Insurers)[18]; (Count V) breach of contract for denying coverage under the 2007-08 Policies for damages and losses arising from the Foreclosure Claims and wrongfully repudiating their coverage obligations thereunder (asserted against the 2007-08 Insurers)[19]; (Count VI) declaratory judgment related to the Foreclosure Claims, seeking "a judgment declaring that the Insurers are obligated to pay SunTrust for the full amount of their respective shares of the Damages arising from the Foreclosure Claims, up to the $150 million limit of the 2007-08 Policies" (asserted against the 2007-08 Insurers)[20]; (Count VII) breach of contract for denying coverage under the 2010-11 Policies for damages and losses arising from the DOJ HAMP Claim and wrongfully repudiating their coverage obligations thereunder (asserted against the 2010-11 Insurers)[21]; (Count VIII) declaratory judgment related to the DOJ HAMP Claim, seeking "a judgment declaring that [the] 2010-11 Insurers are obligated to pay SunTrust for the full amount of their respective shares of the Damages arising from the DOJ HAMP Claim, up to the $125 million limit of the 2010-11

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16 SAC, ¶¶ 373-379.
17 SAC, ¶¶ 380-387.
18 SAC, ¶¶ 388-394.
19 SAC, ¶¶ 395-402.
20 SAC, ¶¶ 403-409.
21 SAC, ¶¶ 410-417.

Policies" (asserted against the 2010-11 Insurers)[22]; (Count IX) statutory penalty for bad-faith denial of insurance (asserted against ACE GM, Brit, AXIS Insurance, AXIS Re, AXIS Specialty, St. Paul Mercury, St. Paul Surplus, St. Paul Travelers, Novae, Wurtt, Chaucer, Indian Harbor, and Federal)[23].

ANALYSIS

I. MOVANT INSURERS' MOTIONS RELATED TO BAD FAITH CLAIM

As noted above, the Movant Insurers have filed various motions seeking judgment as a matter of law with respect to Count IX of the SAC whereby SunTrust seeks statutory penalties under O.C.G.A. §33-4-6 against certain Insurers for their allegedly bad faith denial of insurance coverage for the Underwriting Claims, Foreclosure Claims, and DOJ HAMP Claim for the 2006-07 Policies, 2007-08 Policies, and 2010-11 Policies, respectively ("Bad Faith Claim").

A. Applicable Standard

The Movant Insurers have filed a variety of motions to dismiss and/or alternatively motions for summary judgment with respect to the Bad Faith Claim. A motion to dismiss brought under O.C.G.A. §9-11-12(b)(6) for failure to state a claim upon which relief may be granted should not be sustained unless:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought…

Austin v. Clark, 294 Ga. 773, 774–75, 755 S.E.2d 796, 798–99 (2014) (citing Anderson v. Flake, 267 Ga. 498, 501(2), 480 S.E.2d 10 (1997)); Abramyan v. State, 301 Ga. 308, 309, 800 S.E.2d 366, 368 (2017), reconsideration denied (June 5, 2017). "When the sufficiency of the complaint

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22 SAC, ¶¶ 418-425.
23 SAC, ¶¶ 426-435.

is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the rules require that it be construed in the light most favorable to the plaintiff with all doubts resolved in his favor even though unfavorable constructions are possible." Cobb Cty. v. Jones Grp. P.L.C., 218 Ga. App. 149, 152, 460 S.E.2d 516, 520 (1995) (citing Time Ins. Co. v. Fulton–DeKalb Hosp. Auth., 211 Ga. App. 34, 35, 438 S.E.2d 149 (1993)).

Nevertheless, insofar as the parties have referenced matters outside of the pleadings in their papers addressing these motions and whereas the parties have had ample opportunity to present and address all materials pertinent to the motions addressing the Bad Faith Claims, the Court will treat the motions as motions for summary judgment and take into consideration the entire record. *See* O.C.G.A. § 9-11-12(b) ("If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56"); Minnifield v. Wells Fargo Bank, N.A., 331 Ga. App. 512, 515, 771 S.E.2d 188, 191 (2015); Brooks v. Multibank 2009-1 RES-ADC Venture, LLC, 317 Ga. App. 264, 268, 730 S.E.2d 509, 513 (2012); Tucker v. Talley, 267 Ga. App. 820, 823, 600 S.E.2d 778, 781 (2004).

Summary judgment should only be granted when the movant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c).

> A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered

immaterial.

Scarbrough v. Hallam, 240 Ga. App. 829, 830, 525 S.E.2d 377, 378 (1999) (quoting Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474, 475–76 (1991), abrogated on other grounds by Robinson v. Kroger Co., 268 Ga. 735, 493 S.E.2d 403 (1997)) (emphasis in original).

To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial." O.C.G.A. §9-11-56(e). In reviewing the record, the Court views the evidence in the light most favorable to the nonmoving party. Morgan v. Barnes, 221 Ga. App. 653, 654, 472 S.E.2d 480, 481 (1996). However, "[m]ere speculation, conjecture, or possibility [are] insufficient to preclude summary judgment." State v. Rozier, 288 Ga. 767, 768 (2011) (quoting Rosales v. Davis, 260 Ga. App. 709, 712, 580 S.E.2d 662, 665 (2003)); *see* Ellison v. Burger King Corp., 294 Ga. App. 814, 819, 670 S.E.2d 469, 474 (2008); Pafford v. Biomet, 264 Ga. 540, 544, 448 S.E.2d 347, 350 (1994).

B. Findings and Conclusions of Law

Having considered the record, the Court finds the Movant Insurers are entitled to judgment as a matter of law with respect to the Bad Faith Claim. "O.C.G.A. §33-4-6 provides the exclusive remedy for an insured's claim of bad faith failure to pay policy proceeds." Am. Safety Indem. Co. v. Sto Corp., 342 Ga. App. 263, 273, 802 S.E.2d 448, 456 (2017) (citing Anderson v. Ga. Farm Bureau Mut. Ins., 255 Ga. App. 734, 737 (2), 566 S.E.2d 342 (2002)). That Code Section provides in relevant part:

> In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable

> attorney's fees for the prosecution of the action against the insurer. The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith.

(Emphasis added).

> To prevail on a claim for an insurer's bad faith under O.C.G.A. §33-4-6, the insured must prove: (1) that the claim is covered under the policy, (2) that a demand for payment was made against the insurer ***within 60 days prior to filing suit***, and (3) that the insurer's failure to pay was ***motivated by bad faith***.

Lawyers Title Ins. Corp. v. Griffin, 302 Ga. App. 726, 730–31, 691 S.E.2d 633, 636–37 (2010) (emphasis added) (citing Bayrock Mtg. Corp. v. Chicago Title Ins. Co., 286 Ga. App. 18, 19, 648 S.E.2d 433 (2007)). "As the statute imposes a penalty, it is strictly construed." Primerica Life Ins. Co. v. Humfleet, 217 Ga. App. 770, 771, 458 S.E.2d 908, 910 (1995). *See also* Howell v. S. Heritage Ins. Co., 214 Ga. App. 536, 536, 448 S.E.2d 275, 276 (1994) ("The penalties contained in O.C.G.A. § 33-4-6 are the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds").

The purpose of the statute's pre-suit demand requirement is to adequately notify an insurer that it is facing a bad faith claim so that it may make a decision about whether to pay, deny or further investigate the claim within the 60-day deadline and to penalize insurers that delay payments without good cause. *See* Primerica Life Ins. Co., 217 Ga. App. at 772; Cagle v. State Farm Fire & Cas. Co., 236 Ga. App. 726, 512 S.E.2d 717 (1999). Thus, "[i]t is well-settled that, in order to assert a claim under O.C.G.A. §33-4-6, the demand for payment [must] be made at least 60 days before suit is filed." Cagle, 236 Ga. App. at 727 (citing Guarantee Reserve Life Ins. Co. v. Norris, 219 Ga. 573, 575, 134 S.E.2d 774 (1964))

"[A] failure to wait at least 60 days between making demand and filing suit constitutes an absolute bar to recovery of a bad-faith penalty and attorney fees under [O.C.G.A. §33-4-

6]." Blue Cross & Blue Shield of Georgia/Atlanta, Inc. v. Merrell, 170 Ga. App. 86, 86, 316 S.E.2d 548, 549 (1984). *See, e.g.*, Cagle, 236 Ga. App. at 272 (affirming summary judgment to insurer where insureds sent demand for payment on the day they filed suit); Guarantee Reserve Life Ins. Co. of Hammond, 219 Ga. at 574 (reversing jury verdict on bad faith claim where action was filed 51 days after demand was made on insurer); Howell v. S. Heritage Ins. Co., 214 Ga. App. 536, 536, 448 S.E.2d 275, 276 (1994) (affirming summary judgment to insurer where insured sent its demand for payment 118 days after insured first filed his counterclaim seeking penalties for bad faith refusal to pay claim, finding the demand was not proper under O.C.G.A. §33-4-6 even though the insured subsequently amended his complaint to assert a claim thereunder). Notably, "[a]n insurer's mere denial of a claim does not waive the statutory demand for payment requirement in O.C.G.A. §33-4-6." Stedman v. Cotton States Ins. Co., 254 Ga. App. 325, 328, 562 S.E.2d 256, 259 (2002) (citing Kilpatrick Marine Piling v. Fireman's Fund Ins. Co., 795 F.2d 940, 947 (11th Cir.1986)).

Further, an insured seeking bad faith penalties under O.C.G.A. §33-4-6 must establish that the insurer's failure to pay on a claim was "motivated by bad faith." Primerica Life Ins. Co., 217 Ga. App. at 771. Bad faith under §33-4-6 is defined as "any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy." Fortson v. Cotton States Mut. Ins. Co., 168 Ga. App. 155, 157, 308 S.E.2d 382, 384 (1983) (citing Royal Ins. Co. v. Cohen, 105 Ga. App. 746, 747, 125 S.E.2d 709 (1962)). *See* Dixie Const. Prod., Inc. v. WMH, Inc., 179 Ga. App. 658, 658, 347 S.E.2d 303, 304 (1986); Pub. Sav. Life Ins. Co. v. Wilder, 123 Ga. App. 754, 755, 182 S.E.2d 536, 538 (1971)). "Bad faith is shown by evidence that under the terms of the policy under which the demand is made and under the facts surrounding the response to that demand, the insurer had no 'good cause' for resisting

and delaying payment." Lawyers Title Ins. Corp. v. Griffin, 302 Ga. App. 726, 731, 691 S.E.2d 633, 637 (2010) (citation omitted).

However,

> [a]s this provision is a penalty, which is not favored at law, the right to recovery must be clearly shown. Interstate Life & Acc. Ins. Co. v. Williamson, [220 Ga. 323, 325, 138 S.E.2d 668 (1964)]; Progressive Cas. Ins. Co. v. Avery, 165 Ga. App. 703, 302 S.E.2d 605 (1983). Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact. U.S. Fidelity & Guaranty Co. v. Woodward, [118 Ga. App. 591, 164 S.E.2d 878 (1968)].Where the question of liability is close and the facts are disputed so that the insurer has reasonable grounds to contest the claim, no penalty should be permitted. Hartford Fire Ins. Co. v. Lewis, 112 Ga. App. 1, 143 S.E.2d 556 (1965).

Fortson, 168 Ga. App. at 157–58. *See also* Fireman's Fund Ins. Co. v. Dean, 212 Ga. App. 262, 266, 441 S.E.2d 436, 439 (1994) ("[O]ur courts have consistently held that no bad faith exists where there is a doubtful question of law involved") (citing Schoen v. Atlanta Cas. Co., 200 Ga. App. 109, 111, 407 S.E.2d 91 (1991)).

Turning to the case at bar, SunTrust initiated this action by filing its original Complaint on Jul. 21, 2014. The original Complaint asserted claims for breach of contract and sought declaratory relief with respect to three groups of claims referred to as the ARS Claims, the Underwriting Claims, and the "Mortgage Servicing Claims." The original Complaint did not assert bad faith under O.C.G.A. §33-4-6.

On Sept. 3, 2014, SunTrust filed its First Amended Complaint, therein changing its description of the "Mortgage Servicing Claims" to "Foreclosure Claims", asserting the DOJ HAMP Claim was a separate group of claim that was first made in the 2010-11 Policy Period and also adding as Defendants the Insurers that issued the 2010-11 Policies. The First Amended Complaint asserted claims for breach of contract and sought declaratory relief with respect to

four groups of claims—the ARS Claims, the Underwriting Claims, the Foreclosure Claims, and the DOJ HAMP Claim—but, again, did not assert any bad faith under O.C.G.A. §33-4-6.

On Jun. 20, 2017, 1065 days after SunTrust initiated this action, SunTrust sent the Movant Insurers a demand letter threatening to bring a statutory bad faith claim (the "Demand").[24] The Movant Insurers refused SunTrust Demand.[25] On Sept. 11, 2017, SunTrust filed its SAC which added Count IX seeking statutory penalties under O.C.G.A. §33-4-6 for the Insurers' alleged bad faith denial of coverage for the unpaid Underwriting Claims, Foreclosure Claims, and DOJ HAMP Claim in excess of the policy limits for the 2006-07, 2007-08, and 2010-11 Policies, respectively.

Insofar as SunTrust failed to make its demand at least 60 days prior to filing suit against the various Movant Insurers and whereas the failure to make a demand at least 60 days before suit is filed is an "absolute bar to recovery of a bad-faith penalty and attorney fees" (Blue Cross & Blue Shield of Georgia/Atlanta, Inc. v. Merrell, 170 Ga. App. at 86), SunTrust's Bad Faith Claim fails as a matter of law. Notably, SunTrust cannot correct the failure to timely comply with the demand requirement by filing an amended complaint. *See, e.g.*, Howell v. S. Heritage Ins. Co., 214 Ga. App. at 536 (finding untimely demand submitted after counterclaim was filed was not proper under O.C.G.A. §33-4-6 even though the insured subsequently amended his complaint to assert a claim thereunder); Foliar Nutrients, In c. v. Nationwide Agribusiness Ins. Co., No. 1:14-CV-75 (WLS), 2016 WL 5796876, at *7 (M.D. Ga. Sept. 30, 2016) ("[A]n amendment to a complaint alleging bad faith under §33-4-6, must relate back to the date of the original filed complaint and the insured must prove a "demand" for bad faith purposes was made prior to filing the original suit, not prior to the amended complaint"); Prime Mgmt. Consulting &

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[24] SAC, ¶363; Plaintiffs' Documents in Support of SunTrust's Oppositions to Insurers' Motions for Partial Summary Judgment, Ex. 247 (Anthony P. Tatum Aff.) at Attachment A.

[25] Id. at Attachments B-H.

Inv. Servs., LLC v. Certain Underwriters at Lloyd's London, No. 1:07-CV-1578-WSD, 2007 WL 4592099, at *4 (N.D. Ga. Dec. 28, 2007) (denying motion for leave to amend complaint to add a bad faith claim, finding the amendment would be futile insofar as demand and notification of intent to pursue bad faith claim was made only 10 days before the plaintiff filed the action without asserting a bad faith claim); Massachusetts Mut. Life Ins. Co. v. Montague, 63 Ga. App. 137, 10 S.E.2d 279, 285–86 (1940) (action under insurance policy cannot be amended to assert a bad faith claim under the prior version of O.C.G.A. §33-4-6 where notice was sent 33 days before suit was filed).[26] Further, allowing an insured to first raise a bad faith claim in an amended complaint is contrary to the fundamental purpose of the statute, which is to allow an insurer the opportunity to reconsider its position before the onset of litigation. *See* Primerica Life Ins. Co., 217 Ga. App. at 772.

Although SunTrust challenges the historical origins of the pre-suit demand under §33-4-6, as noted by the Movant Insurers in their papers and as summarized above, there is a well-developed body of binding Georgia case law regarding the pre-suit demand. In the final analysis, the Court finds the foregoing authorities binding upon this Court and applicable to the case at bar. To the extent SunTrust asserts that discovery during the litigation revealed the grounds for asserting a bad faith, "[n]othing in the case law suggests that there is an equitable exception to the 60–day rule." Cagle, 236 Ga. App. at 727. Rather, insofar as O.C.G.A. §33-4-6 imposes a

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[26] SunTrust cites to Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC, No. 106-CV-00695-WSD, 2007 WL 1752471, at *1 (N.D. Ga. June 15, 2007) for the proposition that an insured may file an amended pleading to add a bad faith claim under O.C.G.A. §33-4-6. However, that case is not a reported decision. Further, the case is distinguishable on its face. In Am. Gen. Life Ins. Co., the plaintiff insurer filed a declaratory judgment action seeking a declaration that the subject policy was void and the insureds sought leave of court to amend their counterclaims to include a claim for bad-faith denial of insurance benefits. Under Georgia law, a plaintiff insurer "waive[s] the notice requirement of §33-4-6 by filing [a] declaratory judgment action" seeking to relieve itself of liability under a policy. Owners Ins. Co. v. White, No. 2:12-CV-00233-WCO, 2014 WL 12461048, at *2 (N.D. Ga. Apr. 9, 2014) (citing Leader Nat. Ins. Co. v. Kemp & Son, Inc., 189 Ga. App. 115, 118, 375 S.E.2d 231, 234 (1988), aff'd, 259 Ga. 329, 380 S.E.2d 458 (1989)).

penalty upon insurers, it must be strictly construed. *See* id.; Stedman, 254 Ga. App. at 327; Howell, 214 Ga. App. at 536.

Moreover, the Court finds the issues regarding coverage for the Underwriting Claims, the Foreclosure Claims, and the DOJ HAMP Claim present a bona fide dispute such that the Movant Insurers had reasonable ground to contest and further investigate the Claims submitted, including their potential exclusion under various policies provisions and their potential interrelatedness with claims made under other policy periods. *See* Fortson, 168 Ga. App. at 158, 308 S.E.2d 382, 385 (1983); Flynt v. Life of S. Ins. Co., 312 Ga. App. 430, 438, 718 S.E.2d 343, 349 (2011). Indeed, SunTrust appears to acknowledge as much given its amended pleadings and shifting allegations regarding the issue of interrelatedness during the course of this litigation and the fact that SunTrust noticed certain Claims under other Policy Periods and has reserved its rights in that regard.[27]

Further, to the extent SunTrust cites to the conduct of the parties prior to a Claim being submitted for coverage or during this litigation as evidence of bad faith, such is not a basis for the imposition of penalties under O.C.G.A. §33-4-6. *See* Downer v. Georgia Farm Bureau Mut. Ins. Co., 176 Ga. App. 641, 642, 337 S.E.2d 422, 424 (1985) ("To recover penalties for bad faith, the bad faith acts must have occurred subsequent to the insured's claim but prior to claimant's filing suit to recover") (citing Brannon Enterprises v. Deaton, 159 Ga. App. 685, 285 S.E.2d 58 (1981)). *See also* Underwriters Ins. Co. v. Atlanta Gas Light Co., No. 1:03-CV-0121-JEC, 2009 WL 10671849, at *4 (N.D. Ga. Mar. 18, 2009) ("Under § 33-4-6, the "reasonableness of [an insurer's] coverage decision must be judged based on the facts appearing to [the insurer] at the time of its decision"); Exec. Risk Indem., Inc. v. AFC Enterprises, Inc., 510 F. Supp. 2d 1308, 1334 (N.D. Ga. 2007), aff'd, 279 F. App'x 793 (11th Cir. 2008) ("Where it appears from the

[27] SAC, ¶¶ 250, 311, 334.

evidence that the [insurer's] refusal to pay was justified on the basis of the facts appearing to the [insurer] at the time of the refusal, bad faith is not shown") (citing Royal Ins. Co., 105 Ga. App. at 747).

Additionally, with respect to the Movant Insurers that issued excess policies, the record establishes SunTrust did not submit a proper demand for payment. "It has long been the law that in order to serve as a bad faith demand, the demand must be made at a time when immediate payment is due." Lavoi Corp. v. Nat'l Fire Ins. of Hartford, 293 Ga. App. 142, 146, 666 S.E.2d 387, 391 (2008) (citing Primerica Life Ins. Co., 217 Ga. App. at 772). *See* Dixie Const. Prod., Inc. v. WMH, Inc., 179 Ga. App. 658, 658, 347 S.E.2d 303, 304 (1986) ("Demand must be made at a time when the insured is legally in a position to demand immediate payment, and it is not in order if the insurer has additional time left under the terms of the insurance policy in which to investigate or adjust the loss and therefore has no legal duty to pay at the time the demand is made").

> "Excess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted." U.S. Fire Ins. Co. v. Capital Ford Truck Sales, Inc., 257 Ga. 77, 355 S.E.2d 428, 431 (1987). Thus, excess policies, by their very nature, contain an exhaustion requirement. Georgia courts have repeatedly recognized the validity of excess policies and the exhaustion requirements necessarily embedded within those policies. See, e.g. Jackson v. Sluder, 256 Ga.App. 812, 569 S.E.2d 893, 898 (2002) ("[E]xcess insurance coverage is not regarded as collectible insurance until the limit of liability of the primary policy is exhausted." (quotation marks omitted)); Atl. Wood Indus. v. Lumbermen's Underwriting All., 196 Ga.App. 503, 396 S.E.2d 541, 545 (1990) (concluding that the exhaustion of the limits of a primary liability policy was "a condition precedent" to recovery under an excess policy).
>
> This Court has determined that, under Georgia law, when an excess policy clearly sets a threshold starting point for payment, the contract is unambiguous and must be enforced. *See* Garmany v. Mission Ins. Co., 785 F.2d 941, 945–46 (11th Cir. 1986).

Coker v. Am. Guarantee & Liab. Ins. Co., 825 F.3d 1287, 1294 (11th Cir. 2016). *See* Walker v. N. Am. Specialty Ins. Co., No. 1:14-CV-69 (WLS), 2017 WL 354250, at *3 (M.D. Ga. Jan. 24, 2017) ("Basic contract principles dictate that there cannot be a breach before there is a duty. Georgia law requires that before [the defendant excess insurers'] duty to perform…arises, Plaintiffs must exhaust other underlying policies. Thus, there is a prerequisite to [d]efendants' duty arising: exhaustion") (citing Atl. Wood Indus., 196 Ga.App. at 507); Jackson, 256 Ga. App. at 818 ("[E]xcess insurance coverage is not regarded as "collectible insurance until the limit of liability of the primary policy is exhausted") (citing Ga. Mut. Ins. Co. v. Rollins, Inc., 209 Ga. App. 744, 747(2), 434 S.E.2d 581 (1993)).

Here the relevant excess policies provide coverage for claims only after the full limits of the underlying insurance have been exhausted and whereas SunTrust concedes the insurers of the underlying insurance have not exhausted the full amounts of their respective limits under any of the policies,[28] SunTrust's Demand was not "made at a time when immediate payment [wa]s due." Lavoi Corp., 293 Ga. App. at 146; Primerica Life Ins. Co., 217 Ga. App. at 772. As such the Bad Faith Claim fails as a matter of law with respect to the Movant Insurers that issued excess policies for which coverage obligations, if any, have not yet been triggered.

Finally, to the extent SunTrust seeks its "attorneys' fees and costs incurred in connection with seeking insurance coverage for claims asserted [in the SAC] and for prosecuting this action",[29] "[i]n Georgia, attorney fees are recoverable only when authorized by statute or by contract." City of Lawrenceville v. Heard, 194 Ga. App. 580, 582, 391 S.E.2d 441, 444 (1990). O.C.G.A. §33-4-6 clearly allows for penalties, including an award of reasonable attorney's fees, to be charged against an insurer that denies or fails to pay a claim in bad faith but such precludes

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28 SAC, ¶¶ 384-385, 399-400, 414-415.

29 SAC, Prayers for Relief, p. 82 at ¶(16).

an insured from seeking attorney's fees and costs under other statutory remedies. As explained by the Supreme Court of Georgia:

> Can a plaintiff recover under any one or several of the Code sections providing for additional damages? Unlike O.C.G.A. § 33-7-11(j) (Code Ann. § 56-407.1) supra, O.C.G.A. §§ 13-6-11 (Code Ann. § 20-1404), 51-12-5 and 51-12-6 (Code Ann. §§ 105-2002 and 105-2003) do not provide for a pretrial demand for payment, do not provide a time limit for payment (60 days) following such demand, and do not provide a limitation upon recovery (25%). If we were to conclude that the insured can recover under one or more of these general provisions, such recovery could be had without pretrial demand, without allowance of time to comply with the demand, and without a percentage limitation upon recovery. We therefore conclude that where the General Assembly has provided a specific procedure and a limited penalty for noncompliance with a specific enactment (e.g., uninsured motorist coverage), the specific procedure and limited penalty were intended by the General Assembly to be the exclusive procedure and penalty, and recovery under general penalty provisions will not be allowed. This conclusion is equally applicable to O.C.G.A. § 33-4-6 (Code Ann. § 56-1206)…

McCall v. Allstate Ins. Co., 251 Ga. 869, 871, 310 S.E.2d 513, 515–16 (1984). Thus, Georgia courts have held "[t]he penalties contained in O.C.G.A. §33-4-6 are the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds." Howell, 214 Ga. App. at 536; Estate of Thornton ex. rel. Thornton v. Unum Life Ins. Co. of Am., 445 F. Supp. 2d 1379, 1383 (N.D. Ga. 2006).[30]

Having considered the entire record and given all of the above, the Movant Insurers' various Motions Related to Bad Faith Claim are hereby GRANTED as set forth herein.

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[30] The Court makes no determination as to whether SunTrust may be entitled to attorneys' fees and expenses during the course of this litigation under O.C.G.A. §9-15-14. *See* O.C.G.A. §9-15-14 ("(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position…(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct…").

SO ORDERED this 16 day of October, 2018.

JOHN J. GOGER, JUDGE, *on behalf of*
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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