Southern General Insurance Co. v. Holt: Defining "Duty" in the Duty-to-Settle Doctrine as Applied to Third-Party Insurance Claims in Georgia

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SOUTHERN GENERAL INSURANCE CO. v. HOLT:
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INTRODUCTION

When insurance coverage is purchased, a contract is formed between the insurer and the insured under which the insurer assumes the risk for certain covered losses in exchange for the payment of a premium. Many people who have called upon their insurance carriers when covered losses occur have experienced the frustration of not being able to obtain a satisfactory resolution of their claim, even when coverage is not disputed. The emergence of a cause of action sounding in tort against an insurer for the mishandling of a claim, often referred to as "bad faith" litigation, is a product of twentieth century jurisprudence.\(^1\)

The point at which the insurer's handling of a claim crosses the judicially defined boundary into the murky waters of "bad faith," thus subjecting it to tort liability, is the subject of much controversy.

In its infant stages, the tort of bad faith applied to conduct which was fraudulent or oppressive.\(^2\) In modern parlance, the tort of bad faith includes a wide range of culpable conduct including tortious breach of contract and negligence.\(^3\) The evolution of the tort of bad faith is approaching strict liability in certain instances.\(^4\) Thus, bad faith has become a catch-all term

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2. Koenen, supra note 1.


for conduct which does not necessarily exhibit the sort of malevolence or ill will that the term typically implies.\(^5\)

By proving that an insurer acted in bad faith and hence breached its contractual duty to pay a claim in a timely manner, the insured is entitled to an award of damages in tort.\(^6\) The rationale for awarding traditional tort damages to what is, in essence, a breach of contract is that a “special relationship” exists between the insurer and the insured.\(^7\)

Several policy reasons have been offered to justify the imposition of this “special relationship.” First, insurance contracts are contracts of adhesion because of the imbalance in bargaining power between the parties.\(^8\) Second, because the commodity purchased is protection against unexpected loss, insurance contracts are distinguishable from all other types of contracts.\(^9\) Third, the consequence facing the insurer when the contract is breached is merely the payment of its original contractual obligation, which in many cases, is an inadequate remedy for the individual insured.\(^10\) Finally, because the insurance industry is quasi-public in nature, the imposition of a particularly strong duty of good faith and fair dealing in handling claims is necessary to protect the public.\(^11\)

The implied-in-law duty of good faith and fair dealing is the rationale for allowing extra contractual damages in the first party context where the insurance company agrees to pay for

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5. Cotkin, supra note 3.
6. Kornblum, supra note 3, at 813.
7. Id.
9. Richard B. Graves III, Comment, Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability, 65 Tul. L. Rev. 395, 411 (1990); see also John, supra note 8, at 2049-50 (in addition to a service, the insured is purchasing “peace of mind and security”).
10. Theresa Viani Agee, Breach of an Insurer’s Good Faith to Its Insured: Tort or Contract, 1988 Utah L. Rev. 135, 141 (1988); Cavico, supra note 8, at 405. Traditionally, contract damages have been limited to expectation damages (the amount that would put a party in the same position as if there had been no breach) on the theory that “efficient breach” results in a net gain for society. Id. at 370-71; John, supra note 8, at 2041. The trend of awarding extra contractual damages for breaches in certain instances has been attributed to changing economic realities of modern society. Id. at 2043.
11. Cavico, supra note 8, at 404.
losses directly sustained by the insured. Where the insurer agrees to provide protection for claims asserted against the insured by third parties, the implied-in-law duty of good faith and fair dealing gives rise to an agency relationship between the insurer and the insured. The agency theory exists because, in a typical liability insurance policy, the insurer has absolute control over negotiating and settling the claim against the insured, who is contractually precluded from taking an active role in the disposition thereof absent consent of the insurer. Since the insurer has complete control over the disposition of a claim against the insured, a duty to settle has been imposed consistently upon the insurer.

This Comment will focus upon the duty-to-settle aspect of the tort of bad faith in Georgia. In the recent case of Southern General Insurance Co. v. Holt, the Georgia Court of Appeals adopted an unannounced policy of strict liability in duty-to-settle cases which could have dire consequences for the insurance industry and consumers in this state. Following a brief overview of the duty-to-settle doctrine in Part I, Part II describes the historical development of the doctrine in Georgia prior to Holt. Part III discusses the factual scenario giving rise to the Holt decision and critically analyzes the court's holding in terms of the law in other jurisdictions. A proposal for reforming the duty-to-settle doctrine is presented in Part IV.

I. OVERVIEW OF THE DUTY-TO-SETTLE DOCTRINE

Liability policies typically provide that the insurer has an obligation to defend the insured against claims asserted by third parties, while the right to settle is discretionary. A frequent

13. Id.
14. Kent D. Syverud, The Duty to Settle, 76 VA. L. REV. 1113, 1119 (1990); see also Robert E. Keeton, Liability Insurance and Responsibility for Settlement, 67 HARV. L. REV. 1136 (1954) (explores alternatives in which the insured has the ability to settle with the third party claimant absent consent from the insurer and concludes that giving the insured the right to settle would hinder effective operation of the liability insurance mechanism thereby increasing the cost to the public of purchasing liability insurance).
15. Keeton, supra note 14, at 1138.
17. Keeton, supra note 14, at 1137. Liability coverage provides protection for the costs of defending a suit against the insured as well as the risk of paying money damages to the third party claimant. Syverud, supra note 14, at 1118.
conflict of interest arises between the insurer and the insured when the insurer rejects a settlement offer within policy limits, thereby exposing the insured to personal liability for an excess verdict.\textsuperscript{18}

There is considerable disagreement among the courts and the commentators as to the appropriate standard to apply in determining whether an insurer acted in bad faith with regard to settlement decisions.\textsuperscript{19} Generally, the first level of inquiry is focused upon the special relationship between insurance companies and their insureds under the applicable law. The prevailing view is that the insurer and the insured stand on equal footing, and thus an insurer must give equal consideration to its interests and to those of the insured.\textsuperscript{20} A minority position affords the insured a preference in the relationship and consequently requires an insurer to give greater consideration to the insured's interests.\textsuperscript{21}

Some courts and commentators regard the interests of the insured as supreme and have advocated that strict liability is the appropriate standard.\textsuperscript{22} Among those who espouse the strict

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  \item \textsuperscript{18} Note, Conflicts of Interest in the Liability Insurance Setting, 13 GA. L. REV. 973 (1979) [hereinafter Conflicts of Interest]; see generally Syverud, supra note 14 (comprehensive overview of the duty-to-settle doctrine, including a thorough analysis of the potential sources of conflict between the insurer and the insured in Part II).
  \item \textsuperscript{20} Id.; Syverud, supra note 14, at 1122.
  \item \textsuperscript{21} Koenen, supra note 1, at 181. Modern courts often expressly reject this notion that the interests of the insured are "paramount." See, e.g., National Emblem Ins. Co. v. Pritchard, 231 S.E.2d 126 (Ga. Ct. App. 1976) (holding that a jury charge stating that "[a]s a champion of the person insured, the insurance company must consider as paramount his interests rather than its own, and may not gamble with his funds" constituted reversible error). However, the trend in duty-to-settle decisions is clearly toward imposing an ever-increasing duty on the insurer to place the interests of the insured above its own. Scannell, supra note 4, at 385.
  \item \textsuperscript{22} Koenen, supra note 1, at 185; see also Mark Goodall, Johansen v. California State Automobile Association: Has California Adopted Strict Liability for an Insurer's Failure to Settle?, 27 HASTINGS L.J. 895, 895 n.2 (1976) (listing commentaries advocating strict liability as a means to eliminate conflicts of interest between the insurer and the insured); Langerman & Langerman, supra note 19, at 356-57 (arguing that the imposition of strict liability is necessary to protect consumer expectations that the risk of personal exposure for third party claims against the insured is eliminated when liability coverage is purchased); David Pomerantz, The Insurer's Exploding Bottle: Moving From Good Faith to Strict Liability in Third and First Party Actions, 46 OHIO ST. L.J. 157, 159 (1985) (arguing that strict liability eliminates the difficulty in applying a standard based upon the good faith of an insurer).
\end{itemize}
liability standard, two distinct views are emerging. The moderate position will be referred to in this Comment as "traditional" strict liability, and the severe view will be referred to as "extreme" strict liability.\footnote{23}

The second level of inquiry is the standard of conduct to which an insurer is held in terms of its relationship with an individual insured. The duty of care an insurer owes to its insured has been articulated as "reasonableness under the circumstances,"\footnote{24} "the same care a reasonable man would exercise in the management of his own affairs,"\footnote{25} and "whether a prudent insurer without policy limits would have accepted the settlement offer."\footnote{26} In most jurisdictions, the line of demarcation between bad faith and negligence has virtually been erased.\footnote{27}

Evidentiary factors used in determining whether the conduct of an insurer in rejecting a settlement offer constitutes bad faith include the following:\footnote{28} (1) disregard of settlement advice from the insurer's counsel or experts;\footnote{29} (2) disregard of authorization to settle within policy limits;\footnote{30} (3) adamant refusal to settle;\footnote{31} (4) lack of communication between the insurer and the insured;\footnote{32} (5) strong evidence of the insured's liability with respect to damages suffered by the injured claimant.\footnote{33} (6)

\footnote{23. See discussion infra part III.C.2-3.}
\footnote{24. Cavico, supra note 8, at 401.}
\footnote{27. Id. at 401-02; Keeton, supra note 14, at 1140-45; Koenen, supra note 1, at 184-85.}
\footnote{28. For comprehensive discussions of evidentiary factors that have been used to prove an insurer's bad faith, see David Rand, Jr., Annotation, Recoverability of Punitive Damages in Action by Insured Against Liability Insurer for Failure to Settle Claim Against Insured, 85 A.L.R.3d 1211 (1978); W. E. Shipley, Annotation, Duty of Liability Insurer to Settle or Compromise, 40 A.L.R.2d 168 (1955).}
\footnote{30. See, e.g., Commercial Union Ins. Co. v. Ford Motor Co., 599 F. Supp. 1271, 1273 n.4 (N.D. Cal. 1984) (insurer liable for failure to settle when defense counsel refused settlement demand stating that he was not authorized to do so when he was, in fact, authorized to settle for the amount demanded by the third party claimant).}
\footnote{31. See, e.g., State Farm Mut. Auto. Ins. Co. v. Smoot, 381 F.2d 331, 338 (5th Cir. 1967). For a discussion of this case, see infra text accompanying notes 51-52.}
\footnote{32. Id.}
failure to properly investigate the claim;\footnote{34} (7) the insurer's attempt to obtain a contribution toward settlement from the insured;\footnote{35} and (8) refusing to accept a compromise after a trial verdict in favor of the injured plaintiff.\footnote{36}

Much of the difficulty in this area of the law stems from the application of standards traditionally sounding in tort to what is, in essence, a breach of contract.\footnote{37} Moreover, the courts have not clearly enumerated the elements of the tort. Instead, they have relied on factual examples to define what constitutes a bad faith failure to settle.\footnote{38} Obviously, the success of a bad faith claim against an insurer depends on the definition of bad faith adopted in a given jurisdiction and the corresponding burden of proof placed upon the plaintiff.\footnote{39}

\section{II. The Evolution of the Duty-to-Settle Doctrine in Georgia}

The present confusion over the duty-to-settle doctrine in Georgia is due to an early lack of clarity in defining the circumstances in which an insurer can be held liable for the failure to settle a third party claim. The case of \textit{Francis v. Newton},\footnote{40} decided in 1947, marked the first recognition in Georgia of a cause of action for an insurer's failure to pay a third party claim against its insured. The court of appeals stated that liability could be imposed "where the insurer is guilty of negligence or of fraud or bad faith in failing to adjust or compromise the claim."\footnote{41}

\begin{footnotes}
35. The threat of an excess verdict to induce the insured to contribute funds toward a settlement within policy limits as evidence of bad faith was relied upon by the courts in the early duty-to-settle decisions. Shipley, \textit{supra} note 28, at 205; see also Keeton, \textit{supra} note 14, at 1149.
37. Cavico, \textit{supra} note 8, at 398; Agee, \textit{supra} note 10, at 141.
41. \textit{Id.} at 284.
\end{footnotes}
Approximately 20 years later, the law in Georgia was first stated in terms of the equal consideration standard. In *United States Fidelity & Guaranty v. Evans*, the jury found that the insurer breached a duty to its insured by refusing an offer to settle for $10,000 after a verdict had been rendered against the insured for $25,000. In struggling to define the relevant duty owed, the court of appeals addressed the confusion caused by the inconsistent use, between and within different jurisdictions, of such terms as negligence and bad faith. Rejecting the extreme positions that an insurer has an absolute duty to accept any settlement offer within policy limits or that the insurer has an absolute right to appeal an excess verdict, the court described the duty as one of equal consideration, defined as “the duty owed by any prudent insurer to refrain from taking an unreasonable risk on behalf of its insured, e.g., where the chances of unfavorable results on appeal are out of proportion to the chances of favorable results.”

In *Great American Insurance Co. v. Exum*, the equal consideration test developed in *Evans* was extended to a pre-trial situation where an insurer failed to accept a settlement demand within policy limits. In this case, a five year old child sustained permanent brain injuries when she was hit by a car driven by Mr. Exum. The facts justifying the Georgia Court of Appeals decision in *Exum* included: (1) at the time the settlement offer was made, the insurer had extensive knowledge of the evidence that would be presented on the issue of Exum’s liability and the extent of the child’s injuries; (2) a reserve had been set

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42. 156 S.E.2d 809 (Ga. Ct. App. 1967), aff’d 158 S.E.2d 243 (Ga. 1967).
43. Id. The court assumed without deciding that the refusal to settle before the verdict was not “arbitrary or capricious.” Id. at 811.
44. Id.
45. Id. at 812; see also Georgia Casualty & Sur. Co. v. Reville, 104 S.E.2d 643, 645 (Ga. Ct. App. 1958) (sufficient basis for liability demonstrated by testimony of insurance company vice president that the reason for rejecting a postverdict settlement offer within policy limits was that the insurer had nothing to lose if an appeal failed).
47. Liability of the insurer for failure to settle before trial is less clear as compared to a situation where the insurer refuses to settle within policy limits after an excess verdict is rendered against the insured. *Conflicts of Interest, supra* note 18, at 994; see also Richard A. Rominger & G. Mason White, *Duty to Settle and Insurance Defense Counsel’s Ethical Dilemmas*, 26 GA. ST. BAR. J. 68, 69 (1989) (quoting Evans).
48. 181 S.E.2d at 704.
up for the claim; (3) the case was considered to be "dangerous" by
the insurer's counsel; and (4) the insurer was aware of the
possibility of an excess verdict and had investigated the financial
position of its insured. Accordingly, the jury award of damages
to Exum for Great American Insurance Company's refusal to
accept a settlement demand before trial was upheld.

A jury award of punitive damages to the insured was upheld in
State Farm Mutual Insurance Co. v. Smoot. The United States
Court of Appeals for the Fifth Circuit examined State Farm's
conduct in handling the claim, and upheld the award based on
the following: (1) the failure to have a transcript made of a
hearing to determine whether service on Smoot was proper,
resulting in an inability to challenge the decision on appeal; (2)
admitting into evidence testimony of two physicians with
knowledge that their testimony would be unfavorable to the
insured; (3) the failure to timely file a brief in support of a
motion for new trial; (4) repeatedly refusing to settle within the
policy limits even though Smoot's negligence in causing the
accident was not in dispute and a physical examination
performed by the insurer clearly indicated that the medical
condition of the third party claimant was deteriorating; and (5)
the failure to communicate both the settlement demands and the
subsequent refusals thereof to the insured.

There is case law in Georgia that suggests the insurer has no
duty to initiate settlement negotiations with the third party
claimant. Therefore, many Georgia lawyers believe that a

49. Id. at 708.
50. Id. Mr. Exum believed, and other evidence indicated, that the child may have
darted in front of him causing the accident to be unavoidable. Id. at 706-07. The
implication here is that the insurer is not entitled to rely on the insured's statement
that he was not at fault in deciding whether to settle or go to trial.
51. 381 F.2d 331 (5th Cir. 1967). Before it was finally laid to rest, Smoot visited
the United States Court of Appeals for the Fifth Circuit three times between 1962
and 1967. State Farm Mut. Auto Ins. Co. v. Smoot, 337 F.2d 223 (5th Cir. 1964);
52. 381 F.2d at 333-34.
Rominger & White, supra note 47, at 69. But see Koenen, supra note 1, at 182
(including failure to initiate settlement negotiations in list of evidentiary factors used
to demonstrate bad faith); Syverud, supra note 14, at 1123 (noting that some
jurisdictions regard the failure to initiate settlement negotiations as evidence of the
insurer's bad faith). At least one commentator in Georgia has suggested that an
affirmative duty to make a good faith effort to settle should be imposed upon the
insurer. Conflicts of Interest, supra note 18, at 991. To date, however, the Georgia
prerequisite for an insurer's liability is an affirmative act by the third party claimant demanding that the insurer settle within the policy limits of its insured. These so called "Smoot letters demanding settlement within policy limits and reminding the insurer that failure to do so may render the insurer liable to its insured are routinely sent by plaintiff's counsel.

Another instance where an award of punitive damages has been upheld in the third party failure to settle context in Georgia is Alexander Underwriters General Insurance Co. v. Lovett. In Alexander, the insurer, under a good faith belief that the policy with its insured had been canceled, ignored thirty-five pieces of correspondence including a "Smoot" letter demanding settlement of a wrongful death action against the insured. Thus, Alexander suggests that an insurer can be liable for the failure to settle even when it had a good faith belief that there was no contractual obligation on the part of the insurer to settle or defend.

Due to the absence of a meaningful definition of what constitutes culpable conduct, the decisions following Evans reveal that the courts continue to grapple with the application of the equal consideration standard. In 1975, the Georgia Court of

courts have declined to heed this suggestion. Rominger & White, supra note 47, at 69.

The duty to initiate settlement negotiations should be distinguished from the duty of the insurer to use ordinary care in investigating claims in order to determine whether to defend or settle. Cotton States Mut. Ins. Co. v. Phillips, 139 S.E.2d 412, 415 (Ga. Ct. App. 1964); see also Koenen, supra note 1, at 182 (since the insurer has absolute control over the disposition of a claim against the insured, the insurer has an affirmative duty to determine the potential for liability of the insured).

54. Rominger & White, supra note 47, at 69. State Farm Mut. Ins. Co. v. Smoot, 381 F.2d 331, 335 (6th Cir. 1967), suggests that a demand to settle made by the insured will not be a determinative factor in an excess liability case. Moreover, any attempt on the part of the insured to settle directly with the third party claimant is fraught with peril. Keeton, supra note 14, at 1154-55.

55. See supra notes 51-52 and accompanying text.

56. Rominger & White, supra note 47, at 69. "Smoot" letters are admissible as evidence that the insurer was on notice of the third party claimant's desire to settle. Id.; see also Alexander Underwriters Gen. Agency v. Lovett, 357 S.E.2d 258, 264 (Ga. Ct. App. 1987) (admissibility of settlement demand relevant to issue of notice).


58. Id. The court stated that the insurer should have filed a defense with reservation and sought a declaratory judgment to determine whether it was obligated to handle the claim. Id. at 263.

59. Id.

60. See supra notes 42-45 and accompanying text. The difficulty in applying the equal consideration standard has long been recognized by the commentators. Keeton,
Appeals stated that "[i]t is not the mere refusal to settle, but the refusal in bad faith which subjects the insurer to a damage action." However, by 1982 in Davis v. Cincinnati Insurance Co., the court abandoned any pretext of applying a bad faith standard by upholding a jury award for an insurer's failure to settle absent a finding of bad faith.

Regardless of the actual terminology used by the courts, the common theme in the decisions rendered since Evans is that the final determination of liability depends upon the circumstances surrounding each case. Therefore, whether the insurer breached a duty to its insured is a determination of fact for a jury to decide. While the Georgia Supreme Court has recognized that there are circumstances under which an insurer does not have a reasonable opportunity to effectuate a compromise, the trend clearly demonstrates a progression toward liberal findings of bad faith in the handling of third party claims.

III. SOUTHERN GENERAL INSURANCE CO. V. HOLT

The Georgia decisions that found liability on the part of an insurer for failing to settle a claim asserted against its insured by third parties prior to Southern General Insurance Co. v. Holt.

supra note 14, at 1146; see also Koenen, supra note 1, at 181 (although equal consideration is the standard adopted by a majority of jurisdictions, it is "the least workable standard for determining bad faith"); Langerman & Langerman, supra note 19, at 359 (arguing that "strict liability eliminates the difficult task of second guessing the settlement decisions of the insurer").


63. In the opinion delivered by Judge Birdsong, the court stated that "the standard of bad faith has no application to the duty of care which has its source in the law of torts and not the law of contracts." Id. at 238. Judge Birdsong dissented from the majority opinion in Holt. See infra notes 99-104 and accompanying text. See also Home Ins. Co. v. North River Ins. Co., 385 S.E.2d 736 (Ga. Ct. App. 1989) (mere negligence is sufficient to permit recovery, but rejecting a theory of constructive bad faith to uphold an award for expenses of litigation).


65. Government Employees Ins. Co. v. Gingold, 288 S.E.2d 557 (Ga. 1982). In Gingold, the insured intentionally concealed his whereabouts causing the insurer to be unable to settle the claim against him.

have been predicated upon the conscious decision not to settle a claim within policy limits. In Holt, the Georgia Court of Appeals upheld an expansion of the insurer's obligation in the third party claim context to include an affirmative duty to accept pre-trial settlement demands within arbitrary time restraints established by counsel for the third party claimant. Therefore, the failure to settle within the time frame dictated by the third party has been added to the laundry list of factors to be considered in the determination of bad faith in Georgia.

A. Summary of the Facts and Procedural History

A jury awarded Geneva Fortson $82,000 in damages for personal injuries caused by Bridget Holt as a result of an automobile accident in which Holt negligently ran a stop sign on June 19, 1987. Holt's liability coverage under her Southern General Insurance Company policy had a $15,000 limit, and therefore, the award to Fortson constituted an excess verdict against Holt.

Prior to the litigation between Fortson and Holt, the following series of communications took place between Southern General and Fortson's attorney, Charles A. Gower.

July 27, 1987—Southern General requested that Gower provide medical information for "further evaluation and consideration in regards to any potential bodily injury settlement."

October 7, 1987—Gower apprised Southern General of the status of Fortson's treatment for a back injury resulting from the accident. Gower offered to settle the claim for $30,000.

October 13, 1987—Gower withdrew the offer stating that Fortson may have a ruptured disk.

October 19, 1987—Gower informed Southern General that Fortson did in fact have a ruptured disk and inquired as to the amount of Holt's policy limits.

67. See supra part II.
68. 409 S.E.2d at 852.
69. See supra text accompanying notes 28-36.
70. 409 S.E.2d at 854.
71. Id.
73. Brief for Appellee at 3, Holt (No. A91A0045).
74. Id. at 4.
75. Id.
October 28, 1987—Southern General requested further medical information from Gower to enable it to properly evaluate Fortson's claim.76

November 2, 1987—Gower informed Southern General that Fortson had undergone back surgery on October 20, and furnished copies of physician's notes, test results, medical bills, and an undocumented estimate of Fortson's lost wages. Notwithstanding the fact that Fortson was scheduled to undergo further testing, the results of which were not yet available, Gower offered to settle the claim for the amount of the undisclosed policy limits ($15,000). The settlement offer expired in ten days (November 12).77

November 9, 1987—Gower mailed to Southern General a copy of the lawsuit that he intended to file against Holt if Southern General did not accept the settlement offer.78

November 10, 1987—Gower forwarded additional medical bills to Southern General.79

November 12, 1987—Gower sent (via Federal Express) the medical records pertaining to Fortson's back injury to Southern General along with a letter extending the settlement deadline for five days, through November 17.80

November 18, 1987—Gower sent correspondence to Southern General withdrawing the offer.81

November 20, 1987—A representative of Southern General telephoned Gower and offered to settle for the full amount of the policy limits. Gower refused the offer without explanation.82

During this time period, Southern General neither informed Holt of its communications with Gower or the possibility that Fortson might bring suit against her, nor did it request an extension of the settlement deadline from Gower.83 Southern General's offer to settle for the full amount of the policy limits

76. Brief for Appellant at 3, Holt (No. A91A0045). Southern General stated that "it is not our intention to delay evaluation of this claim and cause litigation. However, we would like to have the relevant information pertinent to your client's injury, in order that we may properly evaluate the worth of this claim, short of litigation." Id.
77. Id. at 3-4.
78. Id. at 4. At this point, the file was transferred from Southern General's bodily injury unit to its litigation unit. Id.
79. Id.
80. Id.
81. Id.
82. Id. at 5.
83. Holt, 409 S.E.2d at 855.
did, however, remain "on the table" through the entry of the verdict against Holt.\textsuperscript{84}

After the trial, Holt assigned her rights to compensatory damages arising from Southern General's failure to settle the claim to Fortson in exchange for a release from liability for the excess verdict.\textsuperscript{85} Holt retained her cause of action against Southern General for emotional distress, for which she sought punitive damages.\textsuperscript{86} Holt and Fortson then brought suit against Southern General alleging that the handling of the claim amounted to bad faith failure to settle.\textsuperscript{87}

The jury awarded Fortson $83,000 in compensatory damages. The jury also awarded Holt $25,000 for the intentional infliction of emotional distress claim and $100,000 in punitive damages.\textsuperscript{88} In its appeal, Southern General argued, among other things, that the trial court erred in not granting its motion to dismiss or its motions for a directed verdict on the issues of compensatory and punitive damages.\textsuperscript{89} In a 5-3-1 decision, the Georgia Court of Appeals reversed Holt's award for intentional infliction of emotional distress but upheld Holt's punitive damage award and Fortson's compensatory damage award.\textsuperscript{90} The Supreme Court of Georgia granted certiorari on November 4, 1991.\textsuperscript{91}

\textsuperscript{84} Id. at 864.
\textsuperscript{85} The court raised sua sponte, but did not address, the issue of whether Holt's assignment of her claim against Southern General to Fortson was valid under Georgia law. Id. at 854. The court cited O.C.G.A. § 44-12-24 (1988), which states that "a right of action is assignable if it involves, directly or indirectly, a right of property. A right of action for personal torts or for injuries arising from fraud to the assignor may not be assigned." Id.

Although the law generally allows the assignment of causes of action based upon contract, but not upon tort, at least seventeen states have allowed the assignment of a cause of action for an insurer's failure to settle from the insured to the third party claimant after an excess verdict had been handed down against the insured. V. Woerner, Annotation, Assignability of Insured's Right to Recover Over Against Liability Insurer for Rejection of Settlement Offer, 12 A.L.R.3d 1158 (Supp. 1991).

\textsuperscript{86} 409 S.E.2d at 852.
\textsuperscript{87} Id.
\textsuperscript{88} Id.

\textsuperscript{89} Brief for Appellant at 11, Holt (No. A91A0045). Other issues involving whether Gower should have been disqualified as counsel for Holt and Fortson because of his alleged dual role as advocate as well as witness due to his involvement in the events giving rise to the action is beyond the scope of this Comment.

\textsuperscript{90} 409 S.E.2d at 852.
\textsuperscript{91} Id.
B. The Court’s Holding and Reasoning

Rejecting Southern General’s contention that it owed no duty to Holt to evaluate and determine whether to accept an offer to settle Fortson’s claim within five days after receipt of medical records provided by the plaintiff’s counsel, the court of appeals upheld the trial judge’s refusal to grant Southern General’s motion to dismiss. Noting that “there may be situations in which, given the valid business concerns of the ordinary prudent insurer, the time restriction in a settlement offer may be so unreasonable under the circumstances of the claim that as a matter of law an insurer could not appropriately consider it,” the court held that the time limitation is but one of the elements that the trier of fact should consider in determining the insurer’s bad faith.92

The majority found that by following its internal operating procedures, namely handling claims on “a first come, first serve basis” and transferring files from its bodily injury unit to its litigation unit upon the occurrence of certain events,93 Southern General failed to give equal consideration to Holt’s interest in processing Fortson’s claim against her.94 The majority opinion suggests that in fulfilling its obligation to exercise diligence and good faith in processing claims, Southern General had a duty to give “special consideration” to settlement demands that contain an arbitrarily brief time limitation for acceptance.95

The validity of the punitive damage award was likewise premised on Southern General’s adherence to established operating procedures.96 The majority found that “[t]he evidence established that every aspect of [Southern General’s] conduct ... was deliberate and intentional, and was the conscious and calculated result of appellant’s decision to give greater importance to its interests in its internal operating procedures than it gave to the interests of its insureds.”97 This failure to give special consideration to Fortson’s claim constituted “aggravated circumstances” sufficient to meet the “clear and

92. Id. at 856. This time limitation is a new factor to be considered in the determination of bad faith. See supra text accompanying notes 28-36.
93. Brief for Appellant at 10, Holt (No. A91A0045).
94. 409 S.E.2d at 857.
95. Id. at 866, 860.
96. Id.
97. Id. at 861.
convincing” burden of proof necessary to support a punitive damage award in Georgia.98

Judges Andrews and Birdsong dissented from the majority position that the evidence was sufficient for the jury to find that Southern General acted in bad faith.99 While agreeing that the jury could reasonably have found Southern General had, in fact, received information indicating that the claim could exceed policy limits, Judge Andrews disagreed with the interpretation that the evidence demonstrated that liability was uncontestable.100 The dissent also criticized the majority position of requiring an insurance carrier to accept at face value the medical information presented by the opposing party101 as adopting a standard which requires that the interests of the insured be given paramount consideration.102

The dissent further stated that, even if a jury could reasonably find that Southern General’s failure to settle constituted bad faith or negligence, Fortson failed to prove that the breach was the proximate cause of Holt’s harm.103 The legal causation element required to establish a prima facia case in a tort action was missing because no facts were introduced explaining why Fortson was unable to accept an offer on November 20, even though the same offer was available three days earlier. Failing to find that Southern General breached a duty to Holt, the dissenters necessarily disagreed with the punitive damage award.104

While joining the majority in finding that Southern General did breach a duty to Holt, Judge Carley disagreed that the award of punitive damages was in accordance with the law of

98. O.C.G.A. § 51-12-5.1(b) (Supp. 1991). The burden of proof for punitive damages is as follows:

Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

Id.

99. 409 S.E.2d at 863-64.
100. Id. at 864.
102. Id. This proposition was specifically rejected in National Emblem Ins. Co. v. Fritchard, 231 S.E.2d 126 (Ga. Ct. App. 1976).
103. 409 S.E.2d at 884.
104. Id.
Noting that the standard of proof for punitive damages is clear and convincing evidence, Judge Carley would have granted Southern General’s motion for a directed verdict on this issue.105

C. Analysis and Critique

The court of appeals holding in Holt is couched in terms of the law in Georgia which requires an insurance company to “accord the interest of its insured the same faithful consideration it gives its own interest”107 when deciding whether to accept a settlement demand within policy limits. Prior to Holt, however, the decisions in Georgia finding bad faith have all been based upon an affirmative decision not to settle, rather than a failure to respond to a settlement demand within an arbitrary time limit. Thus, while not expressly stated by the court, the real issue decided in Holt is when the “duty” to settle arises.

It is instructive at this point to recall the ultimate social goal to be advanced by the American system of insurance, which is to spread the losses of a few among the many.106 Thus, the commodity being purchased by the insured is protection from unexpected loss.109 However, the extent to which the risk of loss is transferred to the insurer is ultimately determined by the insured when he decides how much coverage to purchase.110 For an additional premium, the insured is free to increase the amount of “risk avoidance” provided by an insurance policy.111 In analyzing the distribution of risks inherent in our system of insurance, Professor Keeton stated the following:

If there is ... a breach of duty, ... then [the] insured is entitled to full reimbursement from the company in excess of the policy limits, and he may safely keep hands off and await the outcome of claimant’s suit without fear of personal loss. Only if the company is not guilty of a breach does [the] insured suffer a loss. No possible rule, short of changing the

105. Id. at 863.
106. Id.
107. Id. at 856 (citing Great American Ins. Co. v. Exum, 181 S.E.2d 704, 707 (Ga. Ct. App. 1971)).
109. See supra note 9.
110. Keeton, supra note 14, at 1167.
111. Id.
obligations of the parties before breach, would protect [the]
insured against this risk.\textsuperscript{112}

Therefore, under our current system of insurance any inference
that the insured is purchasing protection from all risk of loss is
incorrect.

\textit{Holt} is a case of first impression in Georgia. As will be shown,
the decision changes the obligation of the parties to an insurance
contract by redefining when the "duty" to settle arises. The
following discussion will analyze the \textit{Holt} decision in terms of the
equal consideration standard, the "traditional" strict liability
standard, and the "extreme" strict liability standard.\textsuperscript{113}

1. \textbf{The Imposition of Liability Under the Equal Consideration
Standard}

A review of the law in other jurisdictions that have adopted
the equal consideration standard reveals several cases in which
an insurer has been held liable for the failure to settle in light of
a demand to do so within an arbitrary time limit. However, these
cases are factually distinguishable from \textit{Holt} in two respects.
First, either the third party suing the insured has sustained
severe and permanently disabling injuries or the suit was a
wrongful death action. Second, the settlement demand was made
after the passage of sufficient time to afford the insurer an
opportunity to investigate the claim.

For example, in \textit{Grumbling v. Medallion Insurance Co.},\textsuperscript{114}
the insurer was held liable for the failure to settle in light of a fifteen
day demand letter from counsel for the third party, who was
seriously injured and whose wife was killed as a result of the
insured's driving in the wrong direction on a four lane highway
while he was drunk.\textsuperscript{115} Moreover, at the time when the

\textsuperscript{112} \textit{Id.}
\textsuperscript{113} See supra text accompanying notes 19-23.
\textsuperscript{114} 392 F. Supp. 717 (D. Or. 1975).
\textsuperscript{115} \textit{Id.} An employee of Medallion Insurance Company telephoned counsel for the
third party claimant and attempted to accept the settlement offer on the day after it
expired. The delay in responding to the settlement demand was, in part, caused by
the fact that the general claims superintendent in the home office followed a policy of
communicating settlement authorizations to claims employees in satellite offices via
regular mail rather than via telephone in order to "prevent misunderstandings." \textit{Id.}
at 720. The court found the failure to take advantage of "speedy telephone
communications . . . approximately ninety-seven years after Bell invented the
telephone" demonstrated unreasonable conduct under the circumstances. \textit{Id.} at 721.
settlement demand was made, the insured had been charged with negligent homicide.\textsuperscript{116} Recognizing that settlement demands with arbitrary time limits are common, the United States District Court for the District of Oregon stated that the relevant considerations in evaluating the conduct of the insurer are the stage in the proceeding in which the demand is made, and whether the insurer knew that the damages would far exceed the policy limits.\textsuperscript{117} The court warned against an interpretation of its decision which would allow an insurer to be "set up" by plaintiff's counsel by imposing an unreasonable time limit by stating "[o]bviously, . . . if such an offer expired before the insurer's investigation was sufficiently incomplete so as to prevent adequate evaluation of the severity of the claim (and, therefore, of the danger of an excess judgment to the insured), this would not necessarily allow the plaintiff to prevail."\textsuperscript{118}

Likewise, in Andrews v. Central Surety Insurance Co.,\textsuperscript{119} the insurer was found liable for failure to accept a settlement demand within a five day time limit, which was followed by two ten day extensions. There, the insured, after "drinking alcoholic beverages," crossed the center line of a highway and caused a head-on collision. The third party claimant was the estate of a twenty-six year old man who burned to death in his car as a result of the accident.\textsuperscript{120} Because the insurer had the benefit of two separate accident reports from its adjuster concluding that liability was certain and that the damage far outweighed the policy limits, the insurer knew or should have known that failure to respond within the stated time period constituted conduct sufficient to find the insurer liable for the amount of the excess verdict. As in Grumbling, the factual scenario here involved aggravated circumstances and clearly demonstrated incontestable liability of the insured to the third party well in excess of the policy limits.\textsuperscript{121}

\textsuperscript{116} Id. at 719. Other facts relevant to the court's decision included that Medallion had considered retaining local counsel to assist the insured's counsel in defending the insured on the negligent homicide charge, and that the local claims manager ordered his investigator to destroy portions of his first report in which the investigator stated that this was clearly a policy limits case. Id.
\textsuperscript{117} Id. at 721.
\textsuperscript{118} Id.
\textsuperscript{120} Id.
\textsuperscript{121} See also Commercial Union Fire Ins. Co. v. Ford Motor Co., 599 F. Supp. 1271 (N.D. Cal. 1984). Here, counsel for the injured third party, who was rendered a
Decisions in other equal consideration jurisdictions which encompass fact patterns more closely resembling those presented in *Holt* have not imposed liability on the insurer. In *DeLaune v. Liberty Mutual Insurance Co.*, the Florida Court of Appeals found that, under the circumstances, a ten day time limit imposed upon a settlement demand precluded the insurer from making an intelligent acceptance. Moreover, the court rejected the notion that the insurer was required to rely on a doctor's affidavit which stated that the third party claimant was permanently disabled as a result of brain injuries sustained in the accident and concluded that the insurer had a right to be given an opportunity to conduct its own inquiry.

The Illinois Court of Appeals, in *Aducci v. Vigilant Insurance Co.*, found dispositive the absence of sufficient facts indicating why the third party claimant refused to accept an offer to tender policy limits forty days after the expiration of the time limit set forth in its demand and only thirteen months after the accident. Refusing to recognize a standard in which the insurer must treat the interests of its insured as paramount, the court reasoned that such a standard overlooks the benefits to society of the availability of liability coverage at a reasonable cost and therefore, "lacks sound business sense."

Under the equal consideration standard, the insurer has a duty to accept only reasonable settlement demands. Thus, the "duty" to settle arises only after the insurer has had a meaningful opportunity under the circumstances to perform its own investigation and evaluation of the claim. Moreover, by

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quadruple as a result of an improperly manufactured car door latch, withdrew an offer to settle of $150,000 after defense counsel claimed that he was only authorized to settle for up to $125,000. A subsequent offer to settle for $350,000 during trial was likewise rejected. *Id.*

123. *Id.* at 603.
125. *See also* *Baton v. Transamerica Ins. Co.*, 584 F.2d 907, 913 (9th Cir. 1978) (where counsel for the third party claimant imposed a five day time limit on a settlement demand before filing a wrongful death action against the insured, the court refused to "reorder[] the usual burden of proof which requires a plaintiff insured to prove the elements of an action for excessive damages based upon bad faith").
126. 424 N.E.2d at 650; *see also* *Clauss v. Fortune Ins. Co.*, 523 So. 2d 1177, 1178 (Fla. Dist. Ct. App. 1985) (one month period to verify claim not excessive). The dissent in *Holt* found *Aducci* and *Clauss* to be the better reasoned decisions. 409 S.E.2d at 884.
requiring that the insured establish that the conduct of the insurer was the proximate cause of the insured's damage, equal consideration is consistent with the traditional burden of proof required to establish a prima facie case in a tort action. If equal consideration is the law in Georgia, then Holt was wrongly decided and should be overturned.

2. The Imposition of Liability Under the "Traditional" Strict Liability Standard

While some courts have espoused a strict liability standard, it has never been formally adopted as the law in any jurisdiction. Several commentators have noted that recent applications of both the negligence and bad faith approaches to duty-to-settle cases suggest strong movement toward the adoption of the traditional strict liability standard. This trend marks a tipping of the scales of equality against the insurer.

Traditional strict liability differs from equal consideration because it presumes that the conduct of the insurer is the proximate cause of the insured's damage. Thus, the burden of proving the causation element in a prima facie tort claim is lifted from the plaintiff. However, this standard does not change the point at which the "duty" to settle arises because the insurer is still afforded the opportunity to investigate and evaluate claims.

The traditional strict liability standard does not require that insurers accept all settlement offers. It envisions a rule that affords the insurer a reasonable opportunity to resolve a claim within policy limits. The rationale underlying this approach is that the insurer should bear the consequences of its mistake in judgment as to the value of a claim. In other words, if

127. "It is conceivable that in some cases the breach of the duty . . . would not be a legal cause of the insured's loss in excess of policy limits . . . ." Keeton, supra note 14, at 1141.
129. Koenen, supra note 1, at 185; Scannell, supra note 4, at 379.
130. Koenen, supra note 1, at 185.
131. Scannell, supra note 4, at 395.
132. Pomerantz, supra note 22, at 179.
133. Langerman & Langerman, supra note 19, at 360.
134. Id.; Koenen, supra note 1, at 185.
insurers choose to reject settlement offers within policy limits and "gamble that they may escape from liability altogether, they will have to gamble with their own money, not the money of the insured."\textsuperscript{135}

Proponents of traditional strict liability contend that the rule advances the following objectives: (1) elimination of the second tier of bad faith suits following excess verdicts, thereby reducing the number of cases litigated;\textsuperscript{136} (2) elimination of the difficulty in applying the equal consideration standard, thereby creating certainty;\textsuperscript{137} (3) elimination of the inherent conflicts of interest between the insurer and the insured;\textsuperscript{138} (4) furthering goals of "insurance compensation" to injured parties;\textsuperscript{139} (5) encouraging more thorough investigations of the merits of a claim, rather than cursory investigations to document a file in the event of a subsequent failure to settle suit;\textsuperscript{140} and finally, (6) deterring unreasonable claims practices, thereby greatly reducing the need for awards of punitive damages.\textsuperscript{141}

Assuming that one accepts the proposition that traditional strict liability is the best standard to apply,\textsuperscript{142} Holt was wrongly decided because it fails to promote the objectives of the standard. First, by holding fast to the notion that liability is to be decided on the circumstances of each case, the court failed to clearly enumerate standards for future determinations of liability, and thus the goal of reducing future litigation is defeated. Furthermore, a rule based on the circumstances of each case that lacks even rudimentary guidelines for determining liability does not create certainty or eliminate any difficulty in the application of that rule.

Second, a finding of liability based on "rigid adherence to internal procedures"\textsuperscript{143} resulting in uniform claims management,\textsuperscript{144} absent a clear showing that these procedures

\textsuperscript{135} Pomerantz, supra note 22, at 177.
\textsuperscript{136} Langerman & Langerman, supra note 19, at 359.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Pomerantz, supra note 22, at 179.
\textsuperscript{141} Langerman & Langerman, supra note 19, at 359.
\textsuperscript{142} The most common criticism of the strict liability standard is that it will cause the cost of insurance to increase. See, e.g., Langerman & Langerman, supra note 19, at 359-60; Scannell, supra note 4, at 379.
\textsuperscript{143} Holt, 409 S.E.2d at 857-58.
\textsuperscript{144} See supra note 93.
systematically result in the abusive handling of those claims, does little to eliminate the inherent conflicts of interest between the insurer and the insured. In fact, this situation invites further conflicts of interest by encouraging plaintiff's counsel to inundate insurers with "Holt" letters imposing unreasonably short "sudden-death" time limits regardless of the merits of the claim.

Third, furtherance of insurance compensation to the injured party in light of Holt assumes that the injured party deserves compensation for damage caused by the insured in the form of insurance proceeds well in excess of the amount of liability coverage that the insured purchased. This notion imposes upon the insurer a greater amount of risk than it bargained for in its contract with the insured.

Fourth, a decision finding the insurer liable for failing to respond within a brief time period before it has had an opportunity to investigate the claim, absent aggravated circumstances, hardly promotes the goal of encouraging thorough investigation of claims. Finally, by upholding an award of punitive damages, the court set a precedent in Georgia which will certainly be relied upon in future cases, thus negating any argument that future awards of punitive damages would be reduced.

Correctly applied, traditional strict liability discourages filing overinflated and frivolous claims by preserving certain defenses for the insurer. For example, the insurer may be able to prove that it was "set up" if a settlement demand was unreasonable and made in bad faith. Alternatively, the insurer may be able to prove that misconduct on the part of the insured, such as failing to cooperate or to provide information, contributed to the decision not to settle. Since the decision to

145. One commentator has suggested that a better approach to the determination of an insurer's liability for bad faith is to focus upon the policies of the insurer over time rather than on the facts surrounding the handling of a specific claim. Graves, supra note 9.
146. The dissent in Holt recognized the implications of the majority opinion as rendering policy limits meaningless in the face of a "Holt" letter. 409 S.E.2d at 864.
147. See supra text accompanying notes 114-23.
148. See Range, supra note 1, at 333 n.68 (compilation of cases in which the insurer successfully defended bad faith claims).
149. See supra text accompanying note 118.
150. Range, supra note 1.
151. Id.; see, e.g., Government Employees Ins. Co. v. Gingold, 288 S.E.2d 557 (Ga.
reject a settlement demand would be reasonable under such circumstances, the insurer can overcome the presumption that its conduct was the proximate cause of the excess verdict against the insured.

3. The Imposition of Liability Under the "Extreme" Strict Liability Standard

California has adopted a "hindsight" or "extreme" strict liability approach wherein after an excess verdict has been rendered against the insured, a court in the second bad faith suit can conclude that the excess verdict is evidence that if the insurer had accepted the demand, the insured would not have been exposed to an excess verdict.\(^{152}\) This analysis is the product of the systematic erosion of the traditional defenses afforded to an insurer,\(^ {153}\) which in turn leads to liability of the insurer absent any finding of bad faith or otherwise culpable conduct.\(^ {154}\)

The inevitable conclusion of this hindsight approach is that all settlement demands are reasonable.\(^ {155}\) Therefore, the insurer will necessarily be liable for an excess verdict against its insured, and proximate cause is no longer an element required to establish a prima facie case of tort liability. It then follows that liability limits are truly meaningless. By eliminating proximate cause as an element of the tort and stripping the insurer of any viable defense, thereby rendering it liable for all excess verdicts, the courts have, in effect, "chang[ed] the obligations of the parties before [any] breach."\(^ {156}\)

The implications of this approach are horrendous and could have dire consequences for the insurance industry and consumers. First, the third party controls when the duty to settle arises by the timing of its settlement demand, and therefore, it has unlimited leverage over the insurer.\(^ {157}\) Since the insurer no longer has a right to investigate and place any sort of meaningful

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152. Goodall, supra note 22, at 907; Kornblum, supra note 3, at 816 n.15.
153. These defenses have been summarized as follows: 1) the insurer's belief in noncoverage; 2) the likelihood of liability; 3) the extent of probable damages; and 4) the timing of the settlement demand. Goodall, supra note 22, at 906.
154. Id.
155. Id.
156. Keeton, supra note 112, at 1167.
157. Goodall, supra note 22, at 913-14.
value on the claim before the duty to settle arises, the incentive to file frivolous and overinflated claims is great. The payment of frivolous or overinflated claims is tantamount to an ad hoc redistribution of wealth and does nothing to advance the goal of spreading the losses of the few among the many.158 Moreover, the likely response of the insurer is the systematic refusal to settle most claims, thereby increasing the incidence of litigation. Insurers are much less risk-averse than individuals,159 and the threat of liability for an excess verdict against the insured is no longer a consideration. Increased litigation is a needless waste of resources and will deny those with legitimate claims the right to a prompt satisfaction of those claims.

Second, an insured has every incentive to purchase the lowest amount of liability coverage available because under no circumstances could he be held accountable for damage caused to others by his actions. Thus, all risk of loss is transferred to the insurer without adequate consideration.160 This absence of liability limits may ultimately cause tort liability to be an uninsurable risk.161 One commentator has stated that:

The infinite potential liability we each carry about with us implies that a single mistake on our part can lead to bankruptcy. That an individual’s solvency may turn on a single mistake is somewhat unnerving, but that an insurance company’s solvency could turn on a single insured’s mistake is simply intolerable.162

Bankruptcy as a means of avoiding liability by a tortfeasor for the damage he has caused is obviously unfair to those harmed by his conduct. However, the unfairness to all those who purchased insurance coverage from an insurer who subsequently becomes insolvent results in a far greater cost to society.

The ramifications of the “extreme” strict liability are, at best, undesirable. While not expressly stated in the Holt opinion, the court of appeals has adopted the hindsight or “extreme” strict liability standard as the law in Georgia by stripping the insurer of the right to perform a meaningful investigation of a claim.163

158. See supra text accompanying notes 108-11.
159. Syverud, supra note 14, at 1145-49.
160. Id. at 1148-49.
161. Id. at 1133-34.
162. Id.
163. See supra notes 153-54 and accompanying text.
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An approach to duty-to-settle cases which disregards liability limits will result in the overpayment of most claims and rewards the insured who purchases an inadequate amount of insurance.\textsuperscript{164} Only if one accepts the proposition that "extreme" strict liability is the correct approach should \textit{Holt} be allowed to stand.

IV. PROPOSAL FOR REFORM

To ensure the continued viability of the insurance industry and the availability to consumers of affordable liability coverage in Georgia, a "modified" equal consideration standard should be adopted. This modified equal consideration standard encompasses three steps. First, clearly enumerated elements of the tort of bad faith failure to settle should be established. For example, the plaintiff should have the burden of proving: (a) the existence of a contract between the parties;\textsuperscript{165} (b) the lack of a arguable reason for the refusal to settle or pay a claim;\textsuperscript{166} and (c) that the refusal to settle or pay a claim is the proximate cause of the damage to the plaintiff.

The second step is to impose upon the third party claimant a mutual obligation of good faith in the settlement process.\textsuperscript{167} Because the duty to investigate a claim has been imposed upon the insurer,\textsuperscript{168} a rule which denies the insurer the opportunity to perform that investigation makes it impossible for an insurer to avoid liability for bad faith. The result of requiring the third party claimant to demonstrate a mutual obligation of good faith toward the insurer will be that neither party has unfair leverage over the other.

Finally, by enumerating elements of a cause of action for the failure to settle, thereby abandoning the factual example approach\textsuperscript{169} and imposing a mutuality of obligation upon the parties, courts have the framework in which summary judgment procedures can effectively be utilized. By requiring a jury determination as to whether the facts in a specific dispute

\textsuperscript{164} Syverud, supra note 14, at 1149.
\textsuperscript{165} Freeland & Freeland, supra note 38, at 242.
\textsuperscript{166} Id.
\textsuperscript{168} See supra note 53.
\textsuperscript{169} See supra text accompanying notes 28-39.
demonstrate bad faith,\textsuperscript{170} courts presume that there is an issue of fact for determination by the jury,\textsuperscript{171} which is often "subject to the influences of personal prejudices and passions."\textsuperscript{172} Therefore, whether there is a debatable reason for the refusal to pay should be determined as a matter of law.\textsuperscript{173} Only after a court is satisfied that there is no debatable reason for the refusal to pay should the matter be allowed to go to a jury.

CONCLUSION

A situation where the insurer and the insured are "jockeying with each other for favorable positions with respect to the potential claim for excess liability"\textsuperscript{174} leads to increased costs of insurance and an increased burden on the judiciary.\textsuperscript{175} Judicial intervention into the relationship should serve the goal of fostering equality in the bargaining power of the parties. A modified equal consideration standard should serve to clear the murky waters of "bad faith" in the context of the duty-to-settle doctrine.

\textit{Suzan E. Roth}

\textsuperscript{170} See supra note 64.
\textsuperscript{171} Freeland & Freeland, supra note 38, at 247.
\textsuperscript{172} Graves, supra note 9, at 401.
\textsuperscript{173} Freeland & Freeland, supra note 38, at 262.
\textsuperscript{174} Keeton, supra note 14, at 1183.
\textsuperscript{175} Id.