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# The 1st Party Report

A Property & Insurance Update

Fall 2008

## COPPER AND ROBBERS

*By Thomas D. Martin and William W. Downs*

As the price of copper continues to skyrocket, so too are incidents of copper theft. Thieves target the copper wiring and plumbing found in many residential homes. For insurers, the resulting claims from copper theft are problematic. Some policies provide coverage for vandalism, but not for theft. With copper theft, there is often evidence of both. That is, in accessing the copper wiring or piping, walls and appliances are often damaged. How should insurers adjust these claims?

Insurers should be aware that Georgia courts have taken a fairly narrow approach to these seemingly mixed claims. Essentially, if a policy excludes liability for theft, then coverage may not exist for damage resulting from the theft. This can be true even if the policy provides coverage for vandalism. Georgia courts often look to the incident that inflicted the damage in determining covered events. At issue in *Pacific Indemnity Co. v. N.A., Inc.*, 120 Ga. App. 793, 172 S.E.2d 192 (1970) was a claim for damage to walls due to the removal of a substantial amount of copper flashing from the insured's roof. The insured's policy specifically provided coverage for vandalism, but limited the insurer's liability for any loss due to theft or burglary, except for willful damage to the building caused by burglars. The *Pacific* court found the exclusionary provision plain and unambiguous and held its "purpose was to exclude loss by injury to or destruction to the insured premises by theft or occurring in connection with theft." 120 Ga. App. at 795. The court "recognize[d] that the cutting and tearing away of the copper flashing may have caused other damage to the buildings," but denied the insured recovery because the event that inflicted the damage - i.e., the theft – was excluded by the express terms of the policy. *Id.* (noting, "if injury to the premises occurred incident to a theft, the loss is clearly not covered.")

A similar issue was presented in *Theo v. National Union Fire Insurance Co.*, 99 Ga. App. 342, 109 S.E.2d 53 (1959). The insureds sought recovery from their insurer for, among other things, missing plumbing and a 50-foot length of sewer pipe. The *Theo* court upheld the insurer's denial of the claim and held that "the loss with respect to these items... was due to burglary or theft ... [and] clearly was not covered." It should be noted, though, that the insured in *Theo* was seeking recovery for the stolen items themselves, and not for damage incident to the theft as in *Pacific*.

There are, however, reasons to be cautious about whether *Pacific's* focus on the incident causing the damage will survive further scrutiny. *Pacific* was decided almost 40 years ago, and since then other states have rejected its holding. Also, there was a special concurring opinion in *Theo* specifically noting that had a claim been made by the insured for damage to walls, the policy would have provided coverage. *See* 99 Ga. App. at 349, *concurring opinion*. Insurers therefore should be aware of the coverage implications surrounding their particular policy language.

For more information on this topic, please contact Tom Martin at tom.martin@swiftcurrie.com or at 404.888.6128.

## NON-PARTY DESIGNATION – AN ALTERNATIVE TO THIRD-PARTY LITIGATION

*By Brian W. Burkhalter*

Under the modern workers' compensation legislation, negligent employers and co-workers cannot be involved in a liability suit because they are subject to the no-fault Workers' Compensation Act. Under that system, regardless of its fault, an employer must pay benefits to an employee whose injury arises out of and in the course of employment. O.C.G.A. § 34-9-1. Under this system, it makes sense that an employee who received workers' compensation benefits cannot then sue his employer in tort for the same injury and this immunity generally extends to the injured employee's co-workers. O.C.G.A. § 34-9-11.

The workers' compensation "exclusive remedy bar" not only prevents an injured person from suing a negligent employer or co-worker contributing to the injury, but also prevents a non-immune tortfeasor defendant from bringing the employer/co-worker into a negligence suit or asserting a third-party claim against the persons or entities enjoying such immunity. *J.R. Mabbett & Son, Inc. v. Ripley*, 185 Ga. App. 601, 365 S.E.2d 155 (1988). Under traditional rules of Georgia tort law, the non-immune defendant must bear the full liability for

the injury and is unable to obtain contribution from those who would otherwise be considered joint tortfeasors. Moreover, because of the collateral source rule, the defendant may not seek a set-off from any verdict against him for workers' compensation benefits paid. *Hudson v. Union Carbide Corp.*, 620 F. Supp. 558 (N.D. Ga. 1985).

To add further insult to injury, as it were, O.C.G.A. § 34-9-11.1(b) provides an employer and its workers' compensation insurer the right to recover wage benefits and medical expenses paid under the Act for injuries to an employee from a partially responsible tortfeasor. Thus, the Workers' Compensation Act provides an employer with an opportunity for reimbursement even while denying other tortfeasors any reduction of liability for an employer's or co-worker's negligence.

However, the passage of the Tort Reform Bill in 2005 may have provided the non-immune defendant a means of mitigating its liability and overcoming the "exclusive remedy" bar in some cases. Through O.C.G.A. § 51-12-33, the Legislature provided a means by which the negligence of *non-parties* must be considered by the jury, along with the contributory negligence of the plaintiff, and the liability of those designated non-parties can be apportioned out of any award against the defendant. The statute allows any judgment against the defendant in a proper case to be reduced by the percentage the jury finds others to have contributed.

The language of the statute does not expressly exclude employers protected by the "exclusive remedy" bar. Presumably then, a defendant may designate an employer or co-employee as a negligent contributor despite its immunity and seek to have the defendant's liability reduced to account for the employer/co-employee's "share." This is a fairly recent development in Georgia law and the appellate courts may ultimately limit the non-immune defendant's ability to use the designation statute in this scenario. At this time, however, the appellate courts have not ruled on the issue, so non-immune defendants may designate potentially liable employers and co-employees and seek to reduce a judgment against their client.

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## CARE, CUSTODY OR CONTROL

*By Jeremy E. Catlin*

In a variety of businesses, including trucking, construction, moving and automotive repair, situations arise where a business takes control of property that belongs to another. Inevitably, there are occasions when the property being held by the business is damaged. When litigation arises between the business and the party whose property was damaged, a bailment cause of action is sometimes alleged. Expectedly, businesses faced with allegations they damaged another's property often try to assert a claim for indemnity under their Commercial General Liability (CGL) policy. If faced with such a claim, insurers should be aware that bailment claims potentially trigger policy exclusions, including the "care, custody or control" exclusion (which states that the insured will not be indemnified for damage to property in its "care, custody or control").

The first issue to be addressed in these situations is whether a bailment was created. The existence of a bailment relationship often depends on the type of property in question. To constitute bailment, the bailee (the party receiving the property) must have independent and exclusive possession of the property delivered to it by the bailor. *See*, O.C.G.A. § 44-12-40; *Buckley v. Colorado Min. Co., Inc.*, 163 Ga. App. 431, 294 S.E.2d 665 (1982).

The second issue to be addressed in these claims is the nature of the property involved. Georgia courts confronting this issue favor the application of the exclusion when the damaged property involves chattels or personal property. In *Park 'n Go v. United States Fid. & Guar. Co.*, 266 Ga. 787, 471 S.E.2d 500 (1996), for example, a parking lot flooded causing damage to over 200 vehicles. The owners of the vehicles brought a class action against the owner/operator of the lot to recover for their damages. The insurer of the parking lot filed a declaratory judgment action to determine whether there was coverage for the vehicles damaged by the flooded parking lot. First, the court determined that a bailment existed between the parking lot owners and vehicle owners because the parking lot exercised control over the vehicles while in its possession. However, because Georgia law was unsettled at the time, the Supreme Court of Georgia was asked to determine whether the "care, custody or control" exclusion would apply under these facts.

The insured stated the nature of its business was to maintain custody of this property and provide other services associated with the nearby airport. The insured argued that, without coverage for damage to vehicles located at its lot, the liability policy was useless. The insured also argued that no bailment existed because the Park 'N Go facility was an open air lot and also because the disclaimer on the back of the parking tickets altered the bailment relationship. However, the court rejected these arguments and found that the lot was a bailee and had complete dominion over the vehicles at all times. Therefore, the "care, custody or control" exclusion applied.

However, in cases dealing with real property, courts have been more reluctant to apply the "care, custody or control" exclusion. For example, in *Tifton Mach. Works v. Colony Ins. Co.*, 224 Ga. App. 19, 480 S.E.2d 37 (Ga. App. 1996) the Court explained, "[i]n cases dealing with real property, courts have been reluctant to find care, custody or control in the hands of insureds who were hired to work on only a portion of a structure. At the other end of the continuum, when there is a clear bailment of chattels, care, custody or control is nearly always found." *Id.* at 20. The *Tifton* court relied, in part, upon *Royal Indem. Co. v. Smith*, 121 Ga. App. 272, 173 S.E.2d 738 (1970) where an insured was contracted to paint the exterior walls of a treatment tank. During that process, the insured moved a radial sweeper arm in the wrong direction, damaging it. The Court held that because the insured only controlled the tank section which it was hired to paint, and not the arm, the "care, custody or control" exclusion did not

apply. Additionally, insurers should be aware that some insurance policies specifically limit the "care, custody or control" exclusion to personal property.

Taking the above cases and statutes into account, insurers can generally rely on the "care, custody or control" exclusion in circumstances where the bailed property is personal property. When dealing with real property, insurers should be aware of the limits sometimes placed on the exclusion and courts' reluctance to find that the exclusion applies.

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## GEORGIA CASE LAW UPDATE

***By Melissa K. Kahren, Steven J. DeFrank and Brian W. Burkhalter***

*Morrill v. Cotton States Mut. Ins. Co.*, A08A1391 (July 24, 2008). In *Morrill*, the Georgia Court of Appeals upheld the enforceability of a one-year suit limitation provision contained in a fire insurance policy issued before June 20, 2006. Specifically, suit was brought against the insurer some eighteen months after a fire destroyed a house and personal property. The trial court granted the insurer's motion for summary on the grounds that the suit was not brought within the one-year time limit contained in a policy last renewed in June 2004. In affirming the trial court's decision, the Court of Appeals first recognized the statutory authority granted to the insurance commissioner to establish by regulation the minimum standards for fire insurance policies in Georgia. At issue here was the commissioner's regulation that all fire policies contain a minimum two-year period in which to bring suit on a policy. *See* Ga. Comp. R. & Regs. 120-2-19-.01 and 120-2-20-.02. However, the regulation requiring a two-year period was only "effective for policies written or renewed on or after June 20, 2006." Prior to that time, the minimum fire insurance standards allowed a one-year time limitation. Because the policy in this case was last renewed in June 2004, the Court of Appeals held that the insurance regulation did not apply to alter the suit limitation provision.

*Great S.W. Express Co. Inc. v. Great Amer. Ins. Co. of New York*, A08A0625; A08A0626 (July 16, 2008). In *Great S.W. Express*, Great American filed for summary judgment on the issue of bad faith refusal to pay under O.C.G.A. § 33-4-6. In moving for summary judgment, Great American argued that it was insulated from the claim of bad faith as a matter of law because it entered into a reservation of rights and filed a petition for declaratory judgment. The trial court denied Great American's motion, and the Court of Appeals affirmed. In affirming the trial court's decision, the Court of Appeals held that the mere filing of a declaratory judgment action does not in and of itself absolve an insurer from being subject to a bad faith penalty under O.C.G.A. § 33-4-6. Rather, the question of good or bad faith of the insurer is ordinarily for the jury, and thus the trial court did not err in denying Great American's motion.

*Turner v. Gateway Ins. Co.*, A08A0635 (April 3, 2008). *Turner* involved a dispute as to whether an insurance policy could be reformed to meet a federal guideline for minimum limits of liability. The Turners were involved in a motor vehicle accident involving Gateway's insured, a commercial transportation company. The policy issued to Gateway contained limits of liability in the amounts of $100,000 per person injured and a maximum coverage of $300,000 per incident. The Turners filed a motion for partial summary judgment, arguing that the Federal Motor Carrier Safety Act and its regulations mandated that motor carriers engaging in interstate transport of passengers maintain $5 million in liability coverage. Gateway argued that its liability, if any, should be limited to the coverage amounts contained in the policy issued to its insured. The trial court granted Gateway's motion for partial summary judgment. In affirming the trial court's decision, the Court of Appeals held that, where the limits of liability are unambiguous, reformation of the policy is not available to increase the limits of liability beyond what the parties actually contracted for and what was purchased by the insured. Even if public policy reasons existed to justify a minimum amount of liability coverage, no authority requires insurers to provide coverage beyond what is unambiguously provided for in the policy.

*Lavoi Corp. v. National Fire Ins. of Hartford,* 2008 Ga. App. LEXIS 713 (June 20, 2008). Lavoi Corporation d/b/a/ EPI Breads ("Lavoi"), filed suit against its insurers based on the insurers' alleged breach of contract and bad faith involving a claim arising out of a January 13, 2005, fire. Prior to filing suit, Lavoi sent a bad faith demand letter to the insurers on September 23, 2005, alleging that it was entitled to $308,000 for its equipment loss and $740,000 in extra expenses. On January 19, 2006, the insured submitted a sworn statement in proof of loss, asserting the value of its loss and damage to be $3,716,000. The insurers had already paid $1,795,000 on the loss, but the insured claimed that it was still owed $1,921,000. Lavoi later submitted a supplemental proof of loss for extra expenses totaling $747,511.34, and for equipment which had already been referenced in the bad faith demand letter. The amounts asserted in the proofs of loss were larger than the amounts demanded in the bad faith demand.

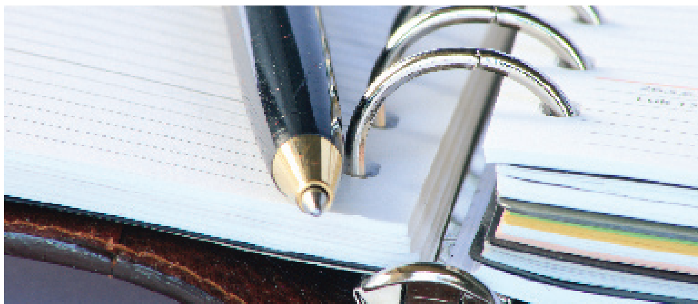
The court held that Lavoi did not make a proper demand for payment at a time when payment was due under O.C.G.A. § 33-4-6, since Lavoi made its demand months before it submitted its sworn statement in proof of loss or its supplemental proof of loss. The *Lavoi* decision confirms that when a policy requires the insured to submit a sworn statement in proof of loss, a demand for payment may be premature unless the insured has complied with the proof of loss requirement.

*Wal-Mart Stores, Inc. v. Lee,* 290 Ga. App. 541, 659, S.E.2d 905 (2008). Katoria Lee was shot at the Riverdale Wal-Mart store parking lot and her car was taken at gun point. An unmonitored video camera

at the store recorded the incident. Store personnel immediately turned the tape over to the police department. After the perpetrators of the crime were prosecuted, the videotape was returned to the store manager. However, before the return of the tape to Wal-Mart, Lee's attorney wrote to Wal-Mart in an effort to settle the claim and "avoid costly litigation." When settlement negotiations failed, Lee filed suit against Wal-Mart and her attackers. Wal-Mart, however, failed to preserve the videotape, but instead taped over it in accordance with its normal business procedures. Wal-Mart asserted that because Lee had not filed suit by the time the videotape was returned, Wal-Mart had no duty to preserve the evidence.

The trial court found that the pre-suit letter should have put Wal-Mart on notice of the possibility of litigation. The trial court further held that a lawsuit need not be pending at the time evidence is destroyed for a court to make a finding of spoliation. The trial court sanctioned Wal-Mart by allowing the recollection of both Lee and her mother of the events on the tape to be presented to the jury as stipulated facts. The jury was also charged that the spoliation created a rebuttable presumption that the lost evidence would have been harmful to Wal-Mart. The court of appeals affirmed the court's spoliation ruling and subsequent sanctions.

As the *Lee* case demonstrates, insurers must be careful to preserve all evidence regarding a claim, even if a lawsuit has not been filed against it for breach of the insurance contract or bad faith. If an insurance company fails to preserve evidence simply because the insured has not filed suit, then the insurance company risks being sanctioned for spoliation of evidence, which may severely hamper the insurer's ability to present its case at trial.



## MARK YOUR CALENDARS...

Swift Currie's annual Property and Liability Seminar is right around the corner. Join us on Friday, November 7, 2008, at Villa Christina from 9:30 am to 3:30 pm for a full day of educational and entertaining information. The day will also include a complimentary lunch and 5 CEU hours, including one hour of ethics, pending approval from the Georgia Insurance Department.

More detailed information concerning the seminar will be available soon. If you do not currently receive our mailings or email blasts, please send your name, company name, mailing address and email address to info@swiftcurrie.com to ensure you are kept abreast of all our upcoming events.

## E-mail List

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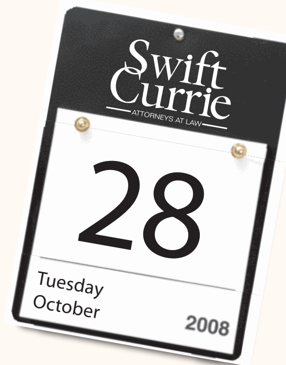


## Save the Date

**Fall Roadshow Luncheon**
Tuesday, October 28, 2008
11:00 am - 1:15 pm
Maggiano's Buckhead

**Swift Currie's Annual Property and Liability Seminar**
Friday, November 7, 2008
9:30 am - 3:30 pm
Villa Christina

**Joint WC Seminar with Peachtree Orthopaedic Clinic**
Tuesday, November 11, 2008
11:00 am - 1:30 pm
Maggiano's Buckhead

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**The First Party Report is edited by Steven J. DeFrank and Melissa K. Kahren. If you have any comments or suggestions for our next newsletter, please contact Steven at steven.defrank@swiftcurrie.com or Melissa at melissa.kahren@swiftcurrie.com.**