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The 1st Party Report

A Property & Insurance Update

Fall 2009

Economy in Crisis: Effects on Homeowners' Claims?

By Elizabeth Jones Satterfield

The country's current economic crisis presents many legal questions relevant to insurance claims. Claims in this environment may be affected by foreclosure, bankruptcy, and other influences brought on by the recession. The following are a few areas of inquiry that a claims handler should address to determine if recent economic impacts present potential coverage issues:

1) **Foreclosure:** Once a property is foreclosed upon, the mortgagee's rights and named insured's rights are affected. The primary question here is whether the foreclosure occurred prior to or following the covered loss event. If the mortgagee is presenting the claim, there are different contractual obligations applicable to the mortgagee as outlined in the mortgagee clause. However, the mortgagee's independent right of recovery may be broader than that of a named insured individual. For example, generally the mortgagee must give notice of the loss, just as the insured is obligated to do. In contrast, an insurer dealing with a named mortgagee generally may not raise defenses of misrepresentation or fraud unless it can prove that the mortgagee committed the fraud.

2) **Vacancy and Residency:** Often, as a result of a job loss or other financial strain, the insured homeowner has either abandoned the property or rented it to third parties. Alternatively, the insured may have relocated, but his personal property may remain in the home. If a theft or vandalism loss occurs at the property, there are often coverage questions that arise. Specifically, the coverage available for the insured's personal property is in question: is it covered as "personal property anywhere in the world," as property located at a secondary residence, or is it not covered at all due to residency requirements?

3) **Bankruptcy:** Similar to a foreclosure situation, an important question with bankruptcy is whether the loss occurred prior to or after an insured has filed his or her bankruptcy petition. Also important to the analysis is whether the policy itself predated the bankruptcy petition and thus might be considered part of the bankruptcy estate. These issues can affect the Trustee's rights and obligations in the presentation of a claim and whether actions by the insured can bar the Trustee's right of recovery.

4) **Liability:** What happens if an injury occurs on the premises after the homeowner no longer occupies the property (or after the mortgagee has foreclosed on the property and assumed ownership)? Who holds the duty to make the premises safe for visitors?

The timing of events surrounding the claim is crucial in determining coverage for these losses. Information concerning that chronology may be determined by interviewing witnesses, obtaining court documents, and communicating with the mortgagee to determine what information it has regarding the status of the property (i.e. when it was last occupied). These are just a few of the considerations for claims arising in this economic environment. These issues and more will be addressed in detail at the property team's annual seminar, November 6, 2009.

For more information on this topic, please contact Elizabeth Satterfield at elizabeth.satterfield@swiftcurrie.com or at 404.888.6145.

Issues Surrounding an Insurer's Bad Faith Failure to Settle

By Esther Vayman

In the context of a third-party claim, when an insurance company is faced with a demand for settlement within policy limits, a heightened good faith duty to give equal consideration to the interests of the insured is triggered. In light of this duty, the insurance company acts in bad faith if it capriciously refuses to entertain the offer or fails to consider the risk to the insured should the case proceed to trial and a judgment in excess of the policy limits be rendered. *Cotton States Mutual Insurance Co. v. Fields*, 106 Ga. App. 740, 128 S.E.2d 358 (1962); *Government Employees Insurance Co. v. Gingold*, 249 Ga. 156, 288 S.E.2d 557 (1982). Put another way, the insurer "may not gamble" with the funds of its insured by refusing to settle within the policy limits in the hopes of striking a better deal later, knowing that its liability is capped by policy limits if hard ball tactics fail. *McCall v. Allstate Insurance Co.*, 251 Ga. 869, 310 S.E.2d 513 (1984).

In failing to abide by this duty, the insurance company faces exposure on two separate, but closely related theories: (1) bad faith failure to settle within policy limits; and (2) negligent failure to settle within policy limits. Both of these causes of action share similar standards and tests. *Home Insurance Co. v. North River Insurance Co.*, 192 Ga. App. 551, 385 S.E.2d 736 (1989).

The question of bad faith is determined by whether or not the insurer had reasonable and legitimate grounds in law or in fact to refuse to settle the third party's claim within policy limits. The mere fact that the claim could have been settled within policy limits, that the insurer rejected such a demand by the plaintiff, or that the insured requested such a settlement is not dispositive of the existence of bad faith.

The Supreme Court of Georgia recently addressed the issue of whether a judgment must be entered against an insured at trial in excess of the policy limits before an action for negligent or bad faith failure to settle can be brought against the insurer. *Trinity Outdoor, LLC v. Central Mutual Ins. Co.*, 285 Ga. 583, 679 S.E.2d 10 (2009). The Court answered in the affirmative.

In *Trinity*, the insured's billboard fell, killing two men. The decedent's family sued and offered to settle for the policy limit of $2 million. Although the insured requested its insurer, Central Mutual Insurance Co., settle because the insured believed its liability exceeded the policy limits, the insurer declined to settle and filed a motion for summary judgment on the insured's behalf.

The federal district court mandated mediation. During the settlement negotiations, the insurer offered to pay $200,000 on behalf of its insured. Ultimately, the insured agreed to pay $954,530.00, without its insurer's approval, to settle the claim. The settlement was comprised of the $200,000 offered by Central and $754,530 the insured received from the insurance company of the billboard manufacturer in satisfaction of an earlier judgment against the manufacturer. When the insurer refused to pay on the settlement, the insured filed suit claiming the insurer breached the insurance policy, failed to settle in bad faith, and negligently failed to settle.

The *Trinity* court found in favor of the insurer, holding that the $754,530 portion of the settlement was a voluntary payment that the insurer was not required to pay based upon policy provisions that expressly gave the insurer the right to defend and settle claims and that prohibited the insured from making voluntary payments without the insurer's prior consent. In this case, the insurer was actively defending the claim against its insured when the insured entered into a settlement agreement without its consent. Additionally, the *Trinity* court held that a policy provision limiting the insured's right to sue its insurer to "an agreed settlement or on a final judgment against an insured obtained after an actual trial," … "made it clear" … that "Trinity cannot maintain an action against Central for bad faith failure to settle the … claim in the absence of a jury verdict." *Id.* at 4 and 9-10.

It is unclear from the case whether this holding will be limited in application to factually similar cases or whether it has a much broader application. The certified question answered by the court is framed very broadly; however, the court's answer indicates the holding may have a much narrower application with regard to an insured's claim for negligent or bad faith failure to settle against its insurer.

For more information on this topic, please contact Esther Vayman at esther.vayman@swiftcurrie.com or at 404.888.6148.

The Evolution of the Loss Payable Clause in Automobile Policies

By Jeremy E. Catlin

Originally, two types of loss payable clauses were found in automobile insurance policies: the "open" and the "standard" clause. The open clause, which often contains language indicating that the loss will be paid to the named lienholder "as its interest may appear," was developed in response to demands by lienholders that they be included on checks issued to the named insured when they had a secured interest in the insured property. Open clauses provide lienholders no greater protection than that afforded to the named insured. The standard clause, on the other hand, developed in response to demands by lienholders that their coverage remain in force even if the named insured did something that caused coverage to be invalidated. A standard clause provides additional protection to lienholders by subjecting them only to defenses based on their own breaches, rather than those of an insured, based upon a separate contract between the insurance company and the lienholder.

The standard clause usually states that the insurance is not invalidated by any act of neglect of the named insured. However, the "standard" loss payable clause in automobile policies does not guarantee protection for the lienholder when the type of loss is not covered under the policy, rather than by some act of neglect of the named insured. While the majority of courts hold that, where an insured's actions trigger an exclusion or breach a condition of the policy, the lienholder is still entitled to recover, the minority position views the standard loss payable clause as subject to the coverage provided by the policy. Thus, recovery by the lienholder is precluded where the loss falls outside the policy's coverage. *See Western Leasing, Inc. v. Occidental Fire & Cas. Co.*, 268 Ore. 426, 521 P.2d 352, 354 (1974) (insurer did not owe the insured or lienholder under the policy where a driver negligently pulled a damaged trailer for 1,000 miles because the damage incurred was not caused by a "collision" as required by the policy).

Insurers, presumably, in response to the uncertainty surrounding the "standard" clause, developed a "modified" clause. The modified clause traditionally excludes coverage for the lienholder if the loss was caused by the insured's "conversion, embezzlement or secretion" of the vehicle. Such clauses provide substantially more coverage than the old "open" clauses, but less coverage than that found in a pure "standard" clause under the majority view. Under these modified clauses, coverage to the lienholder is not invalidated by the negligent or fraudulent act or omission of the insured, ***unless*** that act constitutes "conversion, embezzlement or secretion" of the insured's vehicle. *See, Progressive American Ins. Co. v. Florida Bank at Daytona Beach*, 452 So. 2d 42 (Fla. App. 1984).

Due to ambiguities as to what constitutes a "conversion, embezzlement or secretion," some modified clauses have evolved to include "omissions" or "fraudulent omissions" by the insured as further barring a lienholder's rights to coverage. This language has been interpreted to mean that the lienholder will not be protected from the fraud and omissions of the policyholder. *Cardwell v. Chrysler Financial Corporation*, 804 A.2d 18 (Pa. Super. 2002).

The rationale between the majority and minority positions is still an under-developed area of the law. In fact, no Georgia court has addressed the specific issue of the loss payable clause in an automobile policy. However, based upon Georgia courts following the majority view with regard to the standard mortgage clause found in homeowners policies, it is reasonable to assume Georgia will also follow the majority position with respect to loss payable clauses found in automobile policies. Because of the unsettled nature of the loss payable clause, though, it would be prudent for insurers to analyze the loss payable clauses in their policies to determine if the coverage being provided by the policy is what was intended when the policy was written.

For more information on this topic, please contact Jeremy Catlin at jeremy.catlin@swiftcurrie.com or at 404.888.6144.

Georgia Case Updates

***Mason v. Allstate*, 2009 Ga. App. LEXIS 670 (2009)**

In *Mason*, Amy Stowers attended a birthday party hosted by the insureds for their daughter. Stowers and the insureds' daughter borrowed the insureds' ATV and both were injured when the insured's daughter lost control of the vehicle while riding in a field about fifteen miles from the insureds' home. The field was owned by friends of the insureds who regularly allowed the insureds to use the property for riding the ATV and for fishing and hunting. Both girls were injured in the accident, and their families submitted claims under the insureds' homeowner's insurance policy issued by Allstate Insurance Company ("Allstate"). The policy excluded coverage for "any motor vehicle designed principally for recreational use off public roads" when "that vehicle is owned by an insured person and is being used away from an insured premises." The policy defined "insured premises" as "premises used by an insured person in connection with residence premises." Based on this exclusion, Allstate denied coverage for the claims. The trial court granted summary judgment to Allstate.

The Georgia Court of Appeals affirmed the trial court's judgment. On appeal, the insureds argued that the policy language, "in connection with," was ambiguous and therefore a jury should have decided whether the field where the incident occurred was being used in connection with the insured premises. The Court noted, however, that while no Georgia cases had expressly defined the policy language, "in connection with," a couple of Georgia cases had addressed similar losses under similar policy provisions. The Court also analyzed cases from other jurisdictions that upheld such policy language and that "… almost universally ruled…" such language would exclude loss away from the insured premises. In the end, the Court was satisfied that, at the time of the incident, the field where the accident occurred was not being used "in connection with" the insureds' property and, therefore, was not an "insured premises" under the policy.

Moreover, the court rejected the insureds' argument that they were using the field "in connection with" their home because they were holding their daughter's birthday party there; they went to the party from the home and returned home afterwards. The Court noted that the same can be said for any outing by any family member at any time. The Court bristled at the notion that such a finding could extend the policy's definition of "insured premises" to cover almost any family outing or celebration at almost any location regardless of the distance from or actual connection with the insureds' residence. Such could subject insurers "… to virtually endless liability, liability for which neither it nor the insureds could have reasonably expected or intended to be covered by the insurance policy."

However, the Court warned that, depending upon the circumstances, it might not *require* that the incident location be "integral" to the use of the insured premises. A Massachusetts decision cited favorably by the Court suggested that, in order for property to qualify as property used "in connection with" an insured location, the property must be "integral" to the use of the insured premises. The Georgia Court found this was too "severe" a limitation and preferred a more "expansive view of the phrase:" whether the property was adjacent to the insured premises, whether it was owned by the insureds and whether it was leased by the insureds. Therefore, in claims involving incidents away from the insured premises, the underlying facts and the relationship between the two locations must be carefully analyzed to determine whether one was being used "in connection with" the other.

***Holder v. Grange*, 2008 U.S. Dist. LEXIS 83146 (M.D. GA. 2008)**

In *Holder*, David Holder purchased a 23-foot, 1991 Grady White Cuddy Cabin fishing boat that he kept at a marina in Fernandina Beach, Florida. Holder was a lifelong resident of Dodge County, Georgia. Holder allowed his friend, David Johnson, to use the boat whenever Johnson wanted. Johnson wanted to become a charter boat captain for a living. Holder informed Johnson that he should obtain charter insurance. But Holder and Johnson gave conflicting testimony about whether Holder authorized use of the boat for charters. Johnson arranged a fishing charter for a customer and Holder's son. During the chartered trip, the boat struck a jetty and was damaged.

State Farm, the boat's insurer, denied coverage, citing exclusions for loss that occurred while the boat was used for any business pursuit or while rented to others. Holder filed suit against State Farm. Based on the exclusionary language contained in the policy, State Farm moved for summary judgment. Holder attempted to defeat the motion by alleging that, because he did not know or consent to the use of his boat as a charter, the exclusions should not apply. The court granted State Farm's motion. According to the court, Holder's testimony was not relevant to the issue. That is, it was immaterial

MARK YOUR CALENDARS...

Swift Currie's annual Property Seminar is right around the corner. Join us on Friday, November 6, 2009, at Villa Christina from 9:00 am to 2:45 pm for a full day of educational and entertaining information. The day will also include a complimentary lunch and 4 CEU hours, including one hour of ethics.

More detailed information concerning the seminar can be found on our website at ***http://www.swiftcurrie.com/news/seminars.asp***.

what Holder thought about the trip or that he allegedly told Johnson not to charter the boat. The undisputed fact remained that Johnson chartered the boat on the day of the incident.

***US Money v. American International Specialty*, 288 Fed. Appx. 558 (2008)**

TierOne Bank Corporation ("TierOne") filed suit against US Money for unpaid mortgage loans. Judgment was entered against US Money in the amount of $1,625,630.71. USMoney sought coverage from its insurer American International Specialty ("American") and American denied coverage based on a policy exclusion regarding claims arising out of defective title. The trial court granted American's motion for summary judgment. USMoney appealed.

USMoney argued that, under Georgia law, a claim does not "arise out of" a circumstance if the claim could still exist independent of that circumstance. USMoney pointed to evidence that TierOne would have still had valid claims against USMoney even if the property titles were not defective because USMoney forged appraisals and failed to obtain closing insurance. American countered stating that the forged appraisals and closing insurance would not have been necessary if USMoney had valid title to the property.

The Georgia Court of Appeals held that American was under a duty to indemnify and defend USMoney against claims of breach of contract and negligent misrepresentation because those claims would have a basis even if valid titles had been involved in the transfers. Therefore, those claims did not "arise out of" the defective title and were not subject to the policy exclusion.

The court further held that TierOne could not have maintained its common law negligence claim without the existence of defective title. Therefore, American was not under a duty to defend USMoney with respect to that claim because the cause of action for negligence "arose under" the existence of defective title and was subject to the policy exclusion.

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1355 Peachtree Street, NE • Suite 300 • Atlanta, Georgia 30309
404.874.8800 • www.swiftcurrie.com

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.