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The 1st Party Report

A Property & Insurance Update

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Statute of Limitations Applied to Water Runoff Nuisance Claims

By Michael H. Schroder and Kathleen A. Quirk

Mike Schroder, partner with Swift Currie, recently won summary judgment for Swift Currie's client in a water runoff action, arguing successfully that the four year statute of limitations for nuisance claims barred the plaintiff's action. Citing a recent opinion from the Georgia Supreme Court, Schroder convinced the Cobb County trial judge to reject the plaintiff's argument that a new cause of action arose every time water ran into his building from his neighbor's property. Instead, the plaintiff's case was barred because he failed to file suit within four years of the original construction of the building and parking lot that was causing him harm.

The facts of the case were fairly common. In 1988, the defendants purchased a property in Austell for the construction of a Burger King restaurant. As part of the construction process, the defendants demolished a 90-year-old hotel on the property and replaced a large amount of top soil that was too wet and "peaty" to support the planned restaurant and parking lot. In the process, the contractors allegedly raised the surface level of the ground, causing rain water to accumulate next to a neighboring 90-year-old brick building with wooden floors over a crawl space. Over the ensuing fifteen years, this accumulation of rain water would seep through the brick foundation into the crawl space of the neighbor's building, causing damage.

In 2005, Plaintiff Hans Moise purchased the old brick building next door to the Burger King for $97,000. Moise had the building inspected before he purchased it, and his inspector pointed out the serious moisture problems in the crawlspace that had rotted the wooden beam supports. However, Moise believed that he could remedy the problem by removing the old wooden floor structure and putting a poured concrete floor in its place. Once he began renovating the building and removed the wooden floors, Moise learned that the ground underneath was too saturated with water to remedy with concrete. As a result, Moise discontinued renovations at the property and filed suit in the Superior Court of Cobb County in November 2006 against the Burger King owners, asserting claims of trespass and nuisance. Moise alleged that every time it rained, water was forced back into his building's crawlspace by the neighboring parking lot and curb that was constructed along with the Burger King restaurant.

Georgia law defines nuisance as "anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance." O.C.G.A. § 41-1-1. Reasonable use of one property that causes damage to another in the form of a nuisance, such as water runoff, obligates the person maintaining the nuisance to pay the injured party regardless of negligence on his part. Although our courts have said, "Georgia law does not impose strict liability on any party for damage caused by surface water runoff," *Uniroyal, Inc. v. Hood*, 588 F.2d 454, 462 (5th Cir. 1979), the effect of strict adherence to the Georgia law has been, in fact, to impose strict liability upon developers who replace raw ground with impervious surfaces for parking lots, sidewalks and rooftops, causing more water to run off than before. Moreover, where a purchaser knowingly buys land upon which an entity maintains a nuisance, Georgia law requires not that the purchaser accept the existing nuisance or move, but that the entity abate the preexisting nuisance. *Rentz v. Roach*, 154 Ga. 491, 491, 115 S.E. 94, 94 (1922).

Developers and builders have often turned to the statute of limitations defense to avoid this liability, but with little success. Georgia law provides a four-year statute of limitations for any action brought for trespass or damage to realty. *See* O.C.G.A. § 9-3-30. The problem with claims for a continuing nuisance, however, is that "every continuance of the nuisance is a fresh nuisance for which a fresh action will lie. Further, where one creates a nuisance and permits it to remain, it is treated as a continuing wrong and giving rise, over and over again, to causes of action." *Southfund Partners v. City of Atlanta*, 221 Ga. App. 666, 668-69, 472 S.E.2d 499 (1996). Traditionally, if the entity creating the nuisance could somehow abate it, then the courts have required that entity to pay damages suffered by the claimant even though the nuisance was created more than four years before the action was filed.

The statute of limitations battleground has centered upon whether the nuisance is considered "permanent" or "abatable." If a nuisance is not abatable, then it is deemed permanent and the statute of limitations begins to run when it is created. If the nuisance is abatable — i.e., if the defendant has the power and ability to cure the problem — then each incident (of flooding, etc.) starts a new four-year statute of limitations. The harm caused by both types of nuisances is continuing in nature, but a defendant almost always has the ability to cure the problem. Therefore, the courts have rarely found that the nuisance is permanent such that the four-year statute of limitations bars a nuisance action.

Recently, the Supreme Court of Georgia issued a game-changing opinion, *City of Atlanta v. Kleber*, 285 Ga. 413, 416, 677 S.E.2d 134 (2009). The Court, in effect, changed the way we determine whether a nuisance is permanent or abatable by holding that, "to the extent that the [plaintiffs] complain that the *mere presence [of a structure]* creates a nuisance … [the] nuisance claim is permanent in nature," and the statute of limitations begins to run at the time the nuisance was constructed. On the other hand, if a party contends that the nuisance results from *improper maintenance* of the offending condition, then that nuisance is continuing in nature, and the statue of limitations runs from the time of each damaging incident. *Id.* at 416-417.

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Paying Blue Book Value for Commercial Property? *Diminution in value as applied to commercial property claims*

By Elizabeth J. Satterfield

On April 21, 2010, the Office of the Insurance and Safety Fire Commissioner issued Directive 10-EX-1. This directive addresses whether the principle of diminution in value applies to commercial property claims. The principle has traditionally been applied in the context of automobile claims. With respect to automobiles, the Commissioner previously opined that physical damage resulting from a covered event may reduce the value of a vehicle, and instructed that "insurers should assess diminution in value along with elements of physical damage when a policyholder makes a general claim of loss." Office of the Insurance and Safety Fire Commissioner Directive 01-P&C-01; *State Farm Mutual Automobile Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001). In other words, in certain circumstances, diminution in value should be added to the cost of repairing the vehicle.

In the new directive (10-EX-1), the Commissioner acknowledged that the applicability of diminution in value to commercial property claims had not been addressed by either the legislature or Georgia courts. In the absence of that legal authority, the Commissioner directed that, barring specific policy language to the contrary, diminution in value should be considered in commercial property claims. The directive reasons that such diminution in value should be considered because a property owner should be restored to the same position it was in before the loss. In that respect, property may be worth less after repairs than it was prior to the loss.

The new directive cites *State Farm v. Mabry* as authority for application of diminution in value to first party property claims. In *Mabry*, the Supreme Court of Georgia affirmed that diminution in value must be assessed as an element of loss as part of physical damages in a first party automobile claim. The Court found that whether depreciation occurs even when physical damage is properly repaired was a question of fact. In the *Mabry* case, there was substantial evidence from both parties to the accident that the car was damaged to the extent that it could not be repaired to restore its value prior to the accident. Based on that evidence, the Court found that depreciation in market price should be added to cost of repairs, or the property or its value replaced, so that the insured will be made whole. *Id.* at 502-503. As indicated later in this article, there are some significant practical differences between an automobile and a commercial structure, which make the application of *Mabry* to commercial structures seem an odd fit.

The new directive came under fire by the local press, which reported that donors to Commissioner Oxendine's gubernatorial campaign were the benefactors of this latest instruction from the Commissioner's office. Significant campaign donors included a local commercial property owner and his public adjuster, who admitted in an article published by the *Atlanta Journal Constitution* that they benefited from the directive in connection with a pending damages claim involving a Buckhead commercial structure. *http://www.ajc.com/news/georgia-politics-elections/oxendine- donors-deny-link-571811.html*

This directive also poses some problematic questions for insurers. How is diminution calculated for a commercial structure? Is the diminution in value attributable to the loss or is it a result of market-driven factors such as the economy and downturn in real estate values? There is no "blue book value" for a commercial structure. Further, repairs to real property often cause the property to *appreciate* in value (consider a new roof, for example). This is distinguishable from automobiles, which depreciate as soon as they leave the dealer's lot and whose value is directly and negatively impacted by accident and repair history.

Georgia case law has not caught up with the new directive. However, we will continue to monitor this development in the context of commercial property claims.

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The Prospect of Subrogating for Deductible Amounts

By Jeremy E. Catlin

Can a party who enters into a contract with a waiver of subrogation clause recover its unpaid deductible costs from the other party to the contract? Waiver of subrogation clauses generally preclude subrogation from the other party for "perils insured against" under an insurance policy. Therefore, the question that must be addressed is whether a policy deductible is included in the "perils insured against" language of the waiver clause.

Recently, Georgia courts addressed this issue in *Hancock Fabrics v. Alterman Real Estate, Inc.,* 302 Ga. App. 568, 692 S.E.2d 20 (2010). In *Hancock*, a commercial tenant (Hancock Fabrics) brought an action against its commercial landlord (Alterman) for property damage and business losses arising from two alleged water leaks in the roof. Alterman was required by the lease to maintain the roof. The lease also included a waiver of subrogation clause, which provided in pertinent part as follows:

> Each party to the lease mutually releases the other from liability, and waives all right of recovery against the other, for any loss of or damage to the property of each…, caused by or resulting from … perils insured against under any insurance policies maintained by the parties hereto.

Hancock was not required to maintain property insurance by the terms of the lease, but bought insurance anyway. Hancock's property insurance was subject to an annual aggregate deductible of $75,000 and a $25,000 deductible for each individual property loss. Hancock did not meet the annual aggregate deductible in the years for which it sought damages from Alterman, and it had received no insurance payment for either water loss.

Alterman contended that the waiver of subrogation clause required that Hancock look solely to its own insurance company for any property damage claim. The question for the court was whether Hancock's property insurance deductible fell within the "perils insured against" for purposes of the waiver of subrogation clause. Based on the reasoning described below, the court held the deductible did not fall within the "perils insured against" and further held that there was no legal impediment to Hancock seeking to recover from Alterman its uninsured loss, including the deductible.

In its opinion, the court noted that waiver of subrogation clauses in leases are enforceable in Georgia, even in the absence of a requirement that either party purchase insurance. Although Hancock chose to obtain property insurance, it did not receive any payment from the insurance company for its losses because it did not meet the policy's deductible. Subrogation requires an actual payment of the claim. In the absence of payment, there can be no subrogation and therefore, no waiver of subrogation.

Because Georgia courts had not been presented with a case of similar circumstances, the court also considered *Gap, Inc. v. Red Apple Cos.*, 282 A.D.2d 119, 725 N.Y.S.2d 312 (2001), a New York case where a lease between the parties contained a subrogation clause. The subrogation clause did not require the tenant to obtain its own fire insurance. The Gap chose to obtain fire insurance with a $1 million deductible. Although the court noted the procurement of first-party property insurance with a $1 million deductible might not be reflective of good business sense, it did not undermine the effect of the waiver of subrogation clause, because the lease did not require insurance coverage in any specified amount. Again, absent coverage and payment of an insured loss, there is no right to subrogation, and, thus, the waiver clause has no application.

In the *Hancock Fabrics* case, Alterman could have contracted with Hancock to maintain a specific amount of property insurance on the leased premises. In fact, Alterman did contract with Hancock for specific amounts of liability for injury, death or property damage to third parties. Under the terms of the lease, however, Hancock was free to assume a substantial deductible on its property insurance instead of paying a higher premium in exchange for a smaller deductible. Thus, there was no legal impediment to Hancock seeking to recover from Alterman its uninsured loss, including the deductible.

Based on this new law, the prospect of subrogating for deductibles has increased, and insurers should be aware that the number of these lawsuits will likely increase. However, the applicability of the principles discussed herein will depend greatly on the actual language of the waiver of subrogation clause. If presented with such a claim, a quick review of the facts and contract language at issue by an attorney can usually clear up any legal issues and a determination can be made regarding whether it is worth disputing such a claim.

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Georgia Supreme Court Sets Precedent for Cancellation of Insurance Policies

By Laura A. Murtha

On March 15, 2010, the Georgia Supreme Court set precedent for the cancellation of insurance policies by rendering a decision in response to a certified question from the 11th Circuit. The 11th Circuit questioned whether a notice of cancellation, properly given after the insurance premium was past due, was ineffective because it provided the insured with an opportunity to keep the policy in force by paying the past-due premium within the statutory ten-day period. *Reynolds v. Infinity General Ins. Co.*, 287 Ga. 86, 694 S.E.2d 337 (2010). In *Reynolds*, the insured purchased an automobile insurance policy from Infinity General Insurance Company on June 5, 2006. On July 10, 2006, Infinity issued a cancellation notice to the insured, which informed the insured that his coverage would cease at 11:59 p.m. on July 25, 2006, unless Infinity received payment before the cancellation date. The header on the notice stated "Cancellation Notice, Non-Payment of Premium" and the cancellation date was set out in a small box at the top of the notice and in another small box at the bottom of the notice. The insured did not pay the amount owed and the policy was cancelled on July 25, 2006.

On August 2, 2006, the insured's son was involved in a collision, which took the lives of his two passengers. Following the collision, Infinity filed a declaratory judgment and/or interpleader action, claiming that the cancellation notice sent on July 10, 2006, was effective and that the policy was not in force on the date of collision.

O.C.G.A. § 33-24-44 governs the cancellation of insurance policies. The statutory requirements were designed to give the insurer the responsibility of doing everything within its power to make certain that the insured is placed on notice that the insurance coverage is being cancelled. A

cancellation notice must positively and unequivocally state that the cancellation is taking place.

In the past, Georgia courts have held that a notice of cancellation was in reality a demand for payment. *Pennsylvania National Mut. Cas. Ins. v. Person*, 164 Ga. App. 488, 297 S.E.2d 80 (1982). However, the facts of the *Person* case are markedly different from the facts of the *Reynolds* case. In *Person*, the notice of cancellation was ineffective because it was given to the insured before the premium was due. The *Person* Court held that the premium payment option in the context of the premature statement regarding termination of coverage rendered the document, at best, ambiguous, and well short of the required positive and unequivocal statement of the present intent to cancel insurance coverage.

In contrast, the cancellation notice in *Reynolds* stated three times that coverage under the policy would cease on a certain time and date. Further, the cancellation notice explained that coverage was being cancelled due to the insured's failure to pay his premium. In its ruling, the Georgia Supreme Court held the mere fact that the notice contained an option for the insured to avoid the imminent cancellation of his policy did not alter the clear statement to the insured that coverage was being terminated because the premium had not been paid. Further, the Georgia Supreme Court noted that other jurisdictions have likewise refused to find notices of cancellation, sent after the premium is past due, ineffective simply because the notice provides the insured with an opportunity to keep the policy in force by paying the overdue premium before the stated cancellation date. Finally, the Georgia Supreme Court noted that public policy supported its holding, because there is no sound reason why the insured should be denied an opportunity to avoid a clear, unambiguous cancellation and be advised of the existence of the opportunity to avoid cancellation in the notice of cancellation.

The *Reynolds* decision provides insurance companies with a clear and controlling precedent relating to the interpretation of notices of cancellation in Georgia. Insurance companies are still required to comply with the statutory requirements of O.C.G.A. § 33-24-44. However, it has now been established that insurance companies can issue a notice of cancellation following an insured's failure to pay his premium, while still providing the insured with an opportunity to keep the policy in force by paying the overdue premium before the stated cancellation date.

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Upcoming Seminar - Don't Forget!

Mark your calendars for Friday, November 5, 2010, as Swift Currie presents its annual property seminar at the Cobb Energy Performing Arts Centre from 9:00 am to 4:00 pm. The seminar will feature legal updates on the state of Georgia property law, presentations on subjects facing property adjusters on a daily basis and entertainment brought to you by the Mighty Fred Players that must be seen to be appreciated. Please join us, meet our attorneys and have fun while learning the nuances of Georgia property law. We look forward to seeing you there!

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