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The 1st Party Report

A Property & Insurance Update

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GEORGIA CASE LAW UPDATE

By Thomas B. Ward

Reed v. Auto-Owners Ins. Co., S07G1768 (September 22, 2008).

In *Reed*, the Georgia Supreme Court considered the proper construction of the pollution exclusion in a commercial general liability policy. The coverage question arose from a lawsuit brought by a residential tenant against her landlord for carbon monoxide poisoning stemming from the landlord's alleged failure to keep the house in good repair. The landlord tendered the claim to his CGL carrier, and the CGL carrier filed a declaratory judgment action. The trial court denied the CGL's motion for summary judgment, but the court of appeals reversed, holding that the pollution exclusion unambiguously excluded the tenant's claim for coverage. The Georgia Supreme Court affirmed.

The pollution exclusion stated in relevant part that "this insurance does not apply to … '[b]odily injury' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants....Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste...." Under that definition, the question narrowed to whether carbon monoxide gas is a "pollutant," which is the same as asking whether carbon monoxide gas is "matter, in any state, acting as an 'irritant or contaminant,' including fumes." Having phrased the issue in that manner, the Court easily concluded it need not consult dictionaries, statutes or other sources in order to determine that carbon monoxide is a pollutant under the plain language of the pollution exclusion.

The Supreme Court dissent echoed the views of the dissenting opinion from the court of appeals. While the majority interpreted the exclusion under the admonition that a court should apply the plain terms of the contract as written, the dissent operated from the basic premise that an insurance policy should be strictly construed against the insurer and read in favor of coverage based on the reasonable expectation of the insured. From that starting point, the dissent found the pollution exclusion ambiguous because it could be reasonably read to apply only to substances that are traditionally viewed as environmental pollutants.

Since ambiguities are to be resolved in favor of the insured, the dissent would not have applied the pollution exclusion. Further, the dissent chided the majority for adhering to a baldly literal interpretation even though no reasonable insured would have expected the result.

Aside from the intriguing result of characterizing carbon monoxide as pollution, this case highlights the difficulties inherent in construing insurance policies when no guide exists for determining the relative importance or applicability of the many, oft quoted rules for interpreting an insurance contract.

Fortner v. Grange Mutual Casualty Co., A08A0983 (September 24, 2008).

In *Fortner*, the Court considered an insurance company's duty to settle a case within policy limits. In the underlying incident, the owner of a plumbing business, Arnsdorff, caused an accident while driving his work truck, injuring Fortner. Arnsdorff's policy with Grange Mutual provided a $50,000 bodily injury liability limit, while his plumbing business had an additional $1 million in liability coverage.

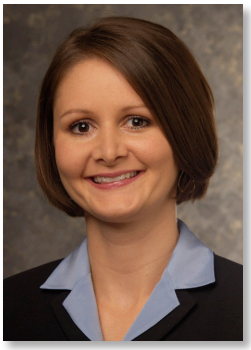
Fortner made a demand on Arnsdorff's carriers, seeking the $50,000 limit from Grange Mutual and $750,000 from the business insurer. The business insurer did not respond in time. Grange Mutual responded by agreeing to pay the $50,000, contingent upon Fortner releasing and dismissing Arnsdorff. Fortner rejected Grange Mutual's counteroffer, and Fortner won a $7 million dollar verdict.

Arnsdorff assigned his bad faith action to Fortner, and at the trial of the bad faith action, the jury entered a verdict in favor of Grange Mutual. Fortner appealed, arguing that the Court improperly charged the jury regarding an insurance company's duty in responding to a settlement demand conditioned upon another insurance company's response. The jury charge, which was based on the language from *Cotton States Mut. Ins. Co. v. Brightman*, essentially stated that an insurance company can discharge its duty to the insured by offering the policy limits and letting the plaintiff negotiate with the remaining insurers. The court of appeals affirmed the verdict, holding the charge properly reflected the law and applied to the facts.

The dissent strongly criticized the majority opinion as representing a significant modification of Georgia bad faith insurance law. While the jury charge was an accurate statement of the *Brightman* decision, the dissent argued that the facts of that case were completely inapplicable to this situation. According to the dissent, the correct charge is whether the insurer, in view of the existing circumstances, acted reasonably in responding to a settlement demand. Fortner has applied for *writ of certiorari* to the Supreme Court.

For more information on this topic, contact Tom Ward at 404.888.6147 or at tom.ward@swiftcurrie.com.

COMMUNICATING WITH LAW ENFORCEMENT DURING ARSON OR FRAUD INVESTIGATIONS



By Brooke N. Williams

As the state of the economy and the housing market continue to decline, arson is on the rise in many areas of the country. Therefore, it is prudent to revisit the requirements and guidelines for communicating with law enforcement during arson and fraud investigations. In Georgia, legislation requires insurance companies to provide notice to the authorities when arson or fraud is suspected. The statutes that create an obligation for insurance companies to participate in third-party governmental investigations of arson and fraud claims are O.C.G.A. §§ 25-2-33 and 33-1-16.

Under O.C.G.A. § 25-2-33, which is entitled "release of fire loss information by insurers on request by state or local officials," authorities may request that any insurance company, investigating a fire loss of real or personal property, release any information in its possession relative to that loss. Individuals who may request such information from an insurance company include the state fire marshal, any deputy designated by the state fire marshal, the director of the Georgia Bureau of Investigation or the chief of a fire department of any municipal corporation or county where a fire department is established. The documents that insurers shall release include, but are not limited to, the following:

(1) Any insurance policy relevant to the fire loss under investigation and any application for such a policy;

(2) Policy premium payment records on the policy, to the extent available;

(3) Any history of previous claims made by the insured for fire loss with the reporting carrier; and

(4) Material relating to the investigation of the loss, including statements of any person, proof of loss and any other relevant evidence.

The statute also requires that if an insurance company has reason to suspect a fire loss was caused by incendiary means, the company shall notify the state fire marshal and furnish him or her with all relevant materials acquired by the company during its investigation. The insurance company or person who furnishes information shall be given immunity and shall not be liable for damages in a civil action or subject to criminal prosecution for such statements made to the fire marshal.

Georgia's Fraud Reporting Statute, O.C.G.A. § 33-1-16, also provides insurers with immunity from civil liability if they report fraudulent insurance claims in good faith to authorities. The statute provides that insurers who have knowledge of, or who believe a fraudulent insurance act is being or has been committed, shall send to the Insurance Commissioner a report or information pertinent to such knowledge or belief.

Both statutes discussed above encourage insurers to assist governmental entities in the investigation of arson and fraud claims and provide a basis for immunity from civil suit for the insurer. Additionally, insurers who furnish information to an authorized agency also have a right to request information from that agency under O.C.G.A. § 25-2-33(d). Insurers should not expect substantial cooperation from authorities until their investigation is complete so as not to jeopardize the investigation. However, it is recommended that insurers proceed with making a request for information in writing pursuant to O.C.G.A. §§ 25-2-33(d) and 50-18-70, the Open Records Statute.

For more information on this topic, contact Brooke Williams at 404.888.6183 or at brooke.williams@swiftcurrie.com.

WHAT HAPPENS WHEN AN INSURED CHANGES ITS CORPORATE STATUS DURING THE POLICY PERIOD

By Laura A. Murtha

It is not unusual for a business entity to change its corporate status. For example, a business originally formed as a partnership may decide that incorporation would best serve the interests of the business. But what happens when a business changes its corporate status and then suffers a property loss? Does the insurance policy transfer from the original entity to the new corporation? Are insurers automatically liable for losses affecting the new corporation?

Not surprisingly, the answer to these questions depends largely on the conduct of the insurer. As a general rule, an action on a policy of insurance must be brought by the party holding legal title to the policy, unless the policy has been duly assigned to another party in writing. *U.S. Homes Assistance Corp. v. S. Guar. Ins. Co.,* 131 Ga. App. 676, 206 S.E.2d 555 (1974). The requirement of a written assignment of the policy, however, is not an absolute. *See e.g., Peoples & Planters Fire Assn. v. Wyatt*, 31 Ga. App. 684, 121 S.E. 708 (1924); *Universal Am. Life Ins. Co. v. Fin. Corp. of Am.*, 118 Ga. App. 160, 162 S.E.2d 813 (1968). For example, an insurer cannot deny coverage when the insurer itself, by its own past actions, has elected to treat a newly formed corporation as the assignee of the policy and has enjoyed the benefits of that election, in the form of higher premiums received from the corporation and retained by the insurer. Under such circumstances, the assignee of the policy, i.e. the corporation, is considered the "true owner" of the policy. If the corporation is considered the true owner, the insurer cannot deny coverage for the claim.

This situation was addressed by the Georgia Court of Appeals in *State Farm Fire & Casualty Co. v. Mills Plumbing Company, Inc.* 152 Ga. App. 531, 263 S.E.2d 270 (1979). In *Mills*, Mills Plumbing Company secured insurance coverage based on its status as a partnership. Approximately 18 months later, the partnership was incorporated; however, Mills never notified State Farm about the change in its corporate status. Additionally, the partnership never assigned its interest in the insurance policy, in writing, to the newly formed corporation. Nevertheless, State Farm learned about Mills' new corporate status when it conducted an audit, which ultimately resulted in an upward adjustment of Mills' premium payments. The corporation paid the increased premiums, and State Farm accepted premium payments from the corporation.

The court held that Mills' change from a partnership to a corporation did not, in the strictest sense of the word, introduce a "stranger" to the insurance policy. The change in corporate status merely resulted in the creation of a new and distinct business entity. Furthermore, State Farm's behavior constituted "consent" to the assignment of the policy by the partnership to the corporation. When an insurer receives information that would entitle it to treat a policy as no longer in force, and thereafter receives a premium on the policy, the insurer cannot treat the policy as void when a claim for losses is filed.

Based on the circumstances of *Mills*, insurers should be aware that the acceptance of premium payments, or other activity that the insurer is treating a newly formed corporate entity as an insured, may be treated as evidence of consent by the insurer to the assignment of the insurance policy from one business entity to another.

For more information, contact Laura Murtha at 404.888.6134 or laura.murtha@swiftcurrie.com.

RULE 4.2 AND ITS ROLE IN INSURANCE LITIGATION

By Amy E. Michaelson

An issue that frequently arises in litigation and, consequently, for insurers involved in litigation, is how to communicate with parties who are represented by counsel. The Georgia Rules of Professional Conduct prohibit attorneys from communicating with other parties to litigation who are represented by counsel. R. 4.2. This arises in the insurance context in two ways.

First, an insured may request that an insurer only communicate directly with the insured's attorney. There is no law in Georgia requiring an insurer to do so. As both the insurer and the insured are parties to litigation and not attorneys, they are not bound by the Georgia Rules of Professional Conduct.

Even though insurers are not prohibited in this regard, an insurer's refusal to abide by the insured's request may not play well with a jury in a bad faith action. In addition, now that the insured has retained an attorney, the insurer's communications are going to be more closely scrutinized, and comments by an employee of the insurer could ultimately hurt the insurer's case. For that reason, the smartest action for an insurer in this scenario is to relay all communications with its insured to the insurer's attorney, and the insurer's attorney will convey the communications to the insured's attorney.

The second way in which the rule prohibiting attorneys' communications with represented parties arises in the insurance context is when the insurer is sued. Although an insurer is represented by an attorney, every employee in the company is not then "represented" for purposes of barring communications from the insured's attorney.

In Georgia, an attorney cannot communicate about the subject of litigation with an employee of a represented entity in three scenarios: (1) if the employee has a managerial responsibility on behalf of the insurer; (2) if the employee's acts or omissions in connection with the litigation may be imputed to the insurer for purposes of civil and criminal liability; or (3) if the employee's statement could constitute an admission on the part of the insurer. Georgia Rules of Professional Conduct R. 4.2 cmt 4A.

However, what about employees who no longer work for the insurer? Here is a hypothetical. Ingrid Insured is represented by Larry Lawyer in a lawsuit against Irresponsible Insurance Company. Irresponsible has retained Al Attorney. In her lawsuit, Ingrid alleges bad faith because, according to her, Carl Claims-Representative hung up on her ten times and Alice Adjuster did not adjust her claim fairly.

Months before trial, Irresponsible fires Carl because Carl has been accessing celebrities' insurance information without authorization and sharing the information on celebrity blogs. Carl wants revenge.

A few weeks later, Larry Lawyer is having difficulty making his case for bad faith, so he calls Carl for more information. Can Larry Lawyer call Carl, even though Irresponsible is represented by Al Attorney?

Comment 4A (referred to previously) states that employees whose acts or omissions can be imputed to the entity are "off limits" to direct communications by opposing attorneys. Here, in a lawsuit for bad faith, Carl's conduct while processing Ingrid's claim can still be imputed to Irresponsible, even though he is no longer employed there. Under Georgia law however, an attorney can contact the former employee of a represented entity, even if the contact is related to litigation between the attorney's client and the represented entity and even if the former employee's conduct during his employment is imputable to the entity. *Sanifill of Ga., Inc. v. Roberts*, 232 Ga. App. 510, 512 (1998).

Three conditions must be satisfied before an attorney can communicate with a former employee of a represented entity about litigation between the attorney's client and the entity: (1) Larry Lawyer must identify that his client is Ingrid Insured; (2) Carl, as the former employee, must consent to the communication; and (3) the information sought by Larry Lawyer must be non-privileged. Supreme Court of Georgia Formal Advisory Opinion No. 94-3. Applied to our hypothetical, after Larry Lawyer introduces himself and identifies

himself as Ingrid Insured's attorney, Carl "the former" Claims-Representative may speak to Mr. Lawyer, and seek his revenge, without running foul of ethics rules in Georgia.

For more information please contact Amy Michaelson at 404.888.6136 or at amy.michaelson@swiftcurrie.com.

Upcoming Speaking Engagements

Michael H. Schroder will be participating as a faculty member (and Dean of Admissions) at the 15th Annual Litigation Management College offered this year at Emory University Conference Center from June 14-18. The program is an intensive four-day experience of workshops based on a catastrophic injury case study and participatory interactive educational experiences designed for claim and litigation management professionals with 5-15 years experience. The College is sponsored by the Federation of Defense and Corporate Counsel as a service to the insurance industry.

For more information contact mike.schroder@swiftcurrie.com.

Mark T. Dietrichs and **Thomas D. Martin** will be speaking at the Georgia Fire Investigator's Association Southeastern Annual Training Conference in Savannah the week of August 3-7. Mr. Martin will be addressing "Write Makes Might" and Mr. Dietrichs will be speaking on "Cooperation Between the Public and Private Sectors in an Arson Investigation."

For more information contact mark.dietrichs@swiftcurrie.com or tom.martin@swiftcurrie.com.

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Save the Date

Swift Currie Seminar: "Managing Change"
May 8, 2009
9:00 am - 3:00 pm
Cobb Energy Performing Arts Centre
visit www.swiftcurrie.com for more info

Joint Litigation Seminar with McAngus, Goudelock & Courie, LLC
Friday, October 2, 2009
Cobb Energy Performing Arts Centre
More information coming soon.

Swift Currie 2009 Property Seminar
Friday, November 6, 2009
Villa Christina
More information coming soon.

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.