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The 1st Party Report

A Property & Insurance Update

Summer 2010

Swift Currie Firmly Establishes Suit Limitation Trigger

By Mark T. Dietrichs and Thomas B. Ward

Mark Dietrichs and Tom Ward recently obtained a victory on behalf of one of our clients that settled several important questions concerning the application of the suit limitation provision in an insurance contract. In *Thornton v. Georgia Farm Bureau Mutual Insurance Company*, the Georgia Supreme Court unanimously ruled that the suit limitation period begins to run from the date of loss, and not another calculation such as when the claim is denied, accrues, or is due and payable.

LaGrande Thornton's home was destroyed by fire on February 28, 2006, and he provided Georgia Farm Bureau ("GFB") with notice of the fire the day it occurred. On March 2, 2006, GFB informed Thornton by letter of his duties under the policy, including his duty to submit a proof of loss, and explained that the "Suit Against Us" provision required him to file suit within one year of the date of loss. Shortly after the investigation began, Thornton retained the legal services of former Governor Roy Barnes. After a thorough investigation that included numerous communications between GFB and Thornton through their respective counsel, GFB denied the claim. Even though GFB timely denied the claim four months before the suit limitation ran, Thornton missed the deadline and filed suit one year and 15 days after the loss.

GFB moved for and was granted summary judgment by the trial court in Bibb County because the suit was not filed within one year of the loss. The Georgia Court of Appeals affirmed, and the Georgia Supreme Court granted certiorari to decide whether the one-year time-to-sue clause was tolled during the 60-day period GFB had to pay the claim under the Loss Payment provision.

The court ruled that this was "a case of straightforward contract interpretation" and held that the clear and unambiguous suit limitation provision should be upheld as written. Thus, Thornton had to file suit within "one year after the date of loss" as clearly stated in the policy (and later extended to two years by the Insurance Commissioner). Moreover, the court rejected Thornton's argument that the one-year limitation should be tolled until the 60-day loss payment period ends, expressly overruling the case *Nicholson v. Nationwide Mut. Fire Ins. Co.*, 517 F. Supp. 1046 (N.D. Ga. 1981). In rejecting the tolling argument, the court reaffirmed the importance of waiver and estoppel to protect insureds when insurer conduct causes the suit deadline to be missed.

Notably, the court's focus on GFB's disclosures and statements in its letters to Thornton underscores the importance of timely and clear communications to the insured during the investigation. The *Thornton* decision also furthers a recent trend in the Georgia Supreme Court of enforcing insurance contracts as written instead of interposing the court's own concept of fairness in the guise of interpreting a contract.

For more information on this case, contact Mark Dietrichs at 404.888.6127 or mark.dietrichs@swiftcurrie.com or Tom Ward at 404.888.6147 or tom.ward@swiftcurrie.com.

Failure to Issue Timely Reservation of Rights Waives Coverage Defenses, Even if Insured Suffers No Harm

By Melissa K. Kahren

On May 3, 2010, the Supreme Court of Georgia rendered a decision that effectively closes the door for insurers who may wish to stop providing a defense to an insured because of coverage defenses under the policy if the insurance company has already provided a defense without issuing a timely reservation of rights. *World Harvest Church, Inc. v. Guideone Mut. Ins. Co.*, 2010 Ga. LEXIS 365 (May 3, 2010). In *Guideone*, Charles Richard Homa and Michael E. Gause operated a Ponzi scheme, through which Gause donated over $1 million to World Harvest Church. The Securities and Exchange Commission ("SEC") filed proceedings against Homa and Gause, who also pled guilty to securities fraud. In November 2002, the SEC filed suit against World Harvest Church, seeking recovery of Homa's donations to the church on grounds of fraudulent transfer and unjust enrichment. Guideone, the commercial general liability insurer for World Harvest Church, received notice of the suit. One of Guideone's affiliated companies issued a written reservation of rights regarding the duty to defend and indemnify, later concluding that no coverage existed.

Subsequently, the initial lawsuit against World Harvest Church was dismissed. The SEC then filed a similar suit against World Harvest Church in January 2004 in the United States District Court for the Northern

District of Georgia. When Guideone learned about the new lawsuit, the adjuster assigned to handle the coverage questions told the attorney for World Harvest Church, "we didn't see coverage but we would have to evaluate what we have currently to see if there would be coverage issues." Guideone provided World Harvest Church with a defense to the action in the Northern District of Georgia for ten months, without issuing a written reservation of rights.

Guideone then notified World Harvest Church that no coverage existed under the policy, and withdrew its defense in thirty days. World Harvest Church hired new defense attorneys, who requested an extension to the discovery period, which was denied. A month after the church's new attorneys filed their appearance, a motion for summary judgment was filed against the church. The district court granted the motion for summary judgment, and entered an award of damages totaling $1.8 million. The church filed an appeal, but later settled the claim for $1 million.

In July 2007, World Harvest Church filed suit against Guideone, alleging breach of Guideone's duty to defend and indemnify the church. The district court ruled in favor of Guideone, holding that the insurance company could raise coverage defenses because World Harvest Church had not shown that it was prejudiced by Guideone's initial assumption of the church's defense. When the church appealed, the Eleventh Circuit Court of Appeals certified the issues to the Supreme Court of Georgia.

Finding in favor of World Harvest Church, the Supreme Court of Georgia concluded that while a reservation of rights is not required to be in writing, Guideone's adjuster's statement that Guideone "didn't see coverage but we would have to evaluate what we have currently to see if there would be coverage issues" did not qualify as a sufficient reservation of rights under the policy.

More importantly, the Supreme Court of Georgia then held that when an insurance company assumes a defense of its insured without issuing a reservation of rights, it is now conclusively presumed that the insured suffered prejudice by virtue of the insurance company's assuming and controlling the initial defense of the insured. In reaching its conclusion, the court stated,

> The insured has surrendered innumerable rights associated with the control of the defense including choice of counsel, the ability to negotiate a settlement, along with determining the timing of such negotiations, and the ability to decide when and if certain defenses or claims will be asserted.

Id. at *15 (*quoting Northwestern Nat. Ins. Co. v. R.S. Armstrong & Brothers Co.*, 627 F. Supp. 951, 956 (D.S.C. 1985)).

Again, the *Guideone* decision effectively closes the door on any real argument that the insured must show that it has been prejudiced by the insurance company's initial assumption, and then withdrawal, of a defense. As a practical matter, however, the *Guideone* decision is not a radical departure from the approach of most insurance companies to these issues. Many insurers have erred on the side of caution, already assuming that a court would find actual prejudice to the insured in the event that the insurance company attempted to withdraw from providing a defense where the insurance company did not timely issue a reservation of rights. The *Guideone* case reinforces the importance of issuing a timely reservation of rights. The better practice would be to do so in writing.

For more information on this topic, contact Melissa Kahren at 404.888.6179 or melissa.kahren@swiftcurrie.com.

Update: Construction Defects - Definition of "Occurrence" in CGL Policies

By Fredric W. Stearns

This is an update to an article entitled "Construction Defects: Definition of 'Occurrence' in CGL Policies" that appeared in the preceeding issue of the First Party Report. In the recent case of *QBE Insurance Company v. Couch Pipeline & Grading, Inc.*, (2010 Ga. App. LEXIS 309, decided on March 26, 2010), the Georgia Court of Appeals held that the allegation of defective work without evidence of intent on the part of the insured to perform its work in a defective manner may constitute an "occurrence" under the policy.

In *QBE*, the court indicated that the issue of whether the defective work damaged "other property" was not dispositive in determining whether an "occurrence" was alleged in the complaint. However, the court did hold that the absence of damage to other property precluded coverage based upon the business risk exclusion precluding coverage for damaged property on which the insured is performing operations.

Relegating the "other property" damage requirement in CGL policies to exclusions rather than including it as a necessary part of an "occurrence" is potentially significant. This is especially true from a general contractor's perspective in completed operations where such exclusions may not apply to work performed by subcontractors.

For more information on this topic, contact Fred Stearns at 404.888.6132 or at fred.stearns@swiftcurrie.com.

Save the Date

Swift Currie's Annual Property Seminar
Friday, November 5, 2010
More Details to Come
Cobb Energy Performing Arts Centre

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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.