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The 1st Party Report
A Property and Insurance Update

CASE SUMMARIES

Additional Insured Language Construed Broadly

By Fredric W. Stearns

***Ryder Integrated Logistics, Inc. v. BellSouth Telecommunications, Inc.*, 281 Ga. 736, 642 S.E.2d 695 (2007).**

In *Ryder*, the Georgia Supreme Court affirmed a decision by the Court of Appeals which gave a very broad interpretation to additional insured endorsements in Georgia. Ryder supplied transportation and logistical services to BellSouth. A Ryder employee was seriously injured while working at a BellSouth facility. BellSouth did not dispute that it was solely responsible for the injuries to the employee and did not contend that Ryder contributed to those injuries. Bellsouth contended that Ryder's insurer should provide complete coverage for the employee's injuries under the additional insured endorsement contained in Ryder's policy.

In the contract between Ryder and BellSouth, Ryder was required to secure liability insurance for BellSouth in an amount of "at least $1,000,000.00." Meanwhile, Ryder's CGL policy provided that BellSouth would be an additional insured under that policy, "but only with respect to liability arising out of [Ryder's] operations."

The Georgia Court of Appeals rejected an argument that under this language, Bellsouth was an additional insured only if the liability at issue stemmed from Ryder's negligence. Rather, the court construed the words "arising out of [Ryder's] operations" as meaning, essentially, any connection to Ryder's operations, whether Ryder was negligent or not. Therefore, Bellsouth was an additional insured under Ryder's policy regardless of whether Ryder was negligent and regardless of whether the sole negligence at issue was Bellsouth's.

The Georgia Supreme Court vacated the Court of Appeals' decision, but it vacated that decision on other grounds. The Supreme Court left intact the Court of Appeals' ruling on these additional insured issues. Thus, insurers need to be aware that under such "arising out of" language – which is contained in many additional insured endorsements – only a slight causal connection will be required between the injuries alleged and the contractual scope of work in order to trigger coverage for an additional insured, and that proof of negligence by the named insured will not be required in order to trigger such coverage. Indeed, this principle was affirmed again by the Georgia Court of Appeals in *BBL-McCarthy, LLC v. Baldwin Paving Co.*, 285 Ga. App. 494, 646 S.E.2d 682 (2007), which specifically held if an insurer grants coverage to an additional insured for damages "arising out of" the named insured's operations, the additional insured is entitled to coverage "without regard to whether the injury is attributable to the named insured or the additional insured."

For more information or for questions regarding this case, contact Fred W. Stearns at 404.888.6132 or via email at fred.stearns@swiftcurrie.com.

Bad Faith: Submission of a Claim Does Not Satisfy "Demand for Payment" Requirement Under O.C.G.A. 33-4-6

By Brooke N. Williams

***Bayrock Mortgage Corp. v. Chicago Title Ins. Co.*, 286 Ga. App. 18, 648 S.E.2d 433 (2007).**

In *Bayrock*, the Georgia Court of Appeals reaffirmed the technical requirements that must be met before a demand under O.C.G.A. § 33-4-6 (Georgia's bad faith statute) is proper. The insured

in this case sued the insurer, alleging that the insurer refused to pay a claim and seeking bad faith damages. The insurer responded by filing a counterclaim, seeking a declaration that no coverage was owed for the subject claim and its expenses in defending the lawsuit.

With regard to the insured's bad faith claim, the insured had submitted a claim under the policy 60 days before filing suit but had not sent a formal demand for payment. The court outlined that, in order for an insured to prevail on a claim for an insurer's bad faith under O.C.G.A. § 33-4-6, the insured must prove: (1) that the claim is covered under the policy, (2) that a demand for payment was made against the insurer within 60 days prior to filing suit, and (3) that the insurer's failure to pay was motivated by bad faith. The court specifically found that the mere submission of a claim could not be considered a "demand for payment" as required under the bad faith statute. As for what must be contained in such a demand, the court found that no specific language is required, but that the language used must be sufficient to alert the insurer that it is facing a bad faith claim for a specific refusal to pay. The submission of the claim by the insured in this case did not meet any of these requirements, so no bad faith claim could lie against the insurer.

Also, the terms of the policy provided the insurer with a certain amount of time in which to investigate the claim and adjust the loss, and the Georgia Court of Appeals emphasized that the demand must be timely, i.e., made at a time when immediate payment of the insurance proceeds is due. If the insurer has additional time left under the terms of the insurance policy in which to perform its investigation, then no bad faith demand can be made. For this reason as well, the court found that the insured's bad faith claim failed as a matter of law.

For more information or for questions regarding this case, contact Brooke N. Williams at 404.888.6183 or via email at brooke.williams@swiftcurrie.com.

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Time to Demand Appraisal?

By Robert M. Sneed, Jr.

***Rebel Tractor Parts and Rebel Auction Co. v. Auto-Owners Insurance Company*, 2006 US Dist. LEXIS 86502 (S.D. Ga. 2006).**

This recent decision shows that an insurer can waive an appraisal provision in its policy if it waits too long to demand appraisal, and that in certain circumstances, an arguably inappropriate invocation of appraisal rights by an insurer can result in a jury question as to an insurer's bad faith. Following a fire loss occurring on April 7, 2004, to an insured's facility that contained parts and other inventory sold by the insured as part of its business, the insurer paid its insured for the damages sustained to that inventory under a policy's property coverage. By October 2004, the insured had disputed the insurer's valuation of the inventory and the insured ultimately demanded the difference between the amount already paid by the insurer and the applicable policy limits. The insurer responded by reaffirming its position regarding the value of the damaged inventory, while at the same time reminding the insured of its rights to demand an appraisal. The insurer did not demand an appraisal at that time. Later, on April 5, 2006, two days before the two-year contractual suit limitation period for the insured's claim was to expire, the insurer demanded an appraisal itself. Rather than submit to an appraisal, the insured responded by filing suit against the insurer, seeking to recover the additional amount claimed for the inventory as well as attorney fees and other bad faith damages.

The insurer responded, in part, by arguing that under the policy, participation in the appraisal was a condition precedent to filing suit against the insurer. The insured countered by arguing that the insurer's appraisal demand, made two days before the contractual suit limitations expired, was untimely and the insurer had thereby waived its rights to demand appraisal.

The federal district court found that in order for an appraisal provision to be a valid condition to filing suit under an insurance policy, the insurer must demand the appraisal within a

reasonable amount of time. Here, the insurer had been on notice of the dispute regarding valuation since October 7, 2004, at the latest, but did not demand appraisal until April 5, 2006. Under these facts, the court found that a jury question existed as to whether the insurer waived its rights to an appraisal. Even beyond this, the court noted that under certain facts, a reasonable jury might see the insurer's attempt to invoke the appraisal provision two days before the suit limitation was to expire, as an attempt to unreasonably delay the adjustment of a valid loss.

For more information or for questions regarding this case, contact Robert M. Sneed, Jr. at 404.888.6174 or via email at robert.sneed@swiftcurrie.com.

Application Misrepresentation Extended to Renewal Questionnaires

By Brian W. Burkhalter

***Marchant v. Travelers Indem. Co. of Illinois*, 2007 Ga. App. LEXIS 779 at *6-7 (July 6, 2007).**

In this case, the Georgia Court of Appeals considered whether representations contained in a renewal questionnaire completed by the insured can establish an application misrepresentation defense. The insured, Marchant, sought coverage under his liability policy with Travelers in conjunction with a construction defect claim asserted against him in a separate lawsuit. Travelers defended Marchant under a reservation or rights and initiated a declaratory judgment action on the grounds that Marchant had misrepresented the true nature of his business in a renewal form he completed at Travelers' request.

Marchant was originally insured by another liability carrier and had represented to that carrier that his business operations consisted of "carpentry, interior trim-new construction." Marchant's account had then been "rolled over" from another carrier and transferred to Travelers. Shortly after this transfer, Marchant completed renewal forms for Travelers in which he stated that there had been no change in the nature of his business. However, a subsequent audit revealed that Marchant's business operations included general contracting, not just carpentry, and Travelers terminated the policy.

In the declaratory judgment action, Travelers presented testimony from an underwriter indicating that either the policy would not have been issued had the true nature of Marchant's business been known, or the premium would have been higher based on the increase in exposure. In light of such testimony, the Georgia Court of Appeals found in favor of Travelers as a matter of law, reasoning that regardless of whether the information on which Travelers relied in issuing the policy came from an initial application form or a renewal questionnaire, the information was "used to ascertain and calculate the risk associated with coverage." *Id.* at *7. The court therefore found that Travelers was entitled to rescind the policy based on the insured's misrepresentations.

For more information or for questions regarding this case, contact Brian W. Burkhalter at 404.888.6142 or via email at brian.burkhalter@swiftcurrie.com.

Suit Limitation Period: Waiver or Estoppel?

By Esther Vayman

***Georgia Farm Bureau Mutual Insurance Company v. Pawlowski*, 284 Ga. App. 183, 643 S.E.2d 239 (2007).**

In this case, the insureds sued their homeowners insurer for damages caused by a burst pipe in their home 20 months after the loss occurred, well after the one-year suit limitation period contained in the policy had expired, claiming that the insurer's earlier $7,000 offer for the damages at issue was insufficient. The trial court denied the insurer's motion for summary judgment based on the policy's suit limitation period. On appeal, the Georgia Court of Appeals reversed, finding that no coverage was owed to the insureds as a matter of law.

In coming to its decision, the Court of Appeals noted that while one-year suit limitation periods in insurance policies are valid in Georgia, an insurer can waive such periods in certain situations. The insureds argued that in this case, the insurer waived the limitations period by "fraudulently inducing" the insureds into believing that the insurer would not enforce that period. In making this argument, the insureds relied on *Auto-Owners Ins. Co. v. Ogden*, 275 Ga. 565, 569 S.E.2d 833 (2002), where an insured filed a timely claim for fire damage to his house under his homeowner's policy. In *Ogden*, the insurer prepared a proof of loss stating a specific amount for the full cost of repair, and it issued a check for part of that amount. The insurer withheld the remainder of the repair cost pending the insured's return of the proof of loss within 15 days. The insured did not meet the 15-day deadline, the insurer withheld the remainder, and the insured sued to recover it. The *Ogden* court held that there was a factual dispute as to whether the insured had waived the one-year contractual limitation period contained in the policy.

The *Pawlowski* court distinguished *Ogden* by noting that the insurer in *Pawlowski* did not concede that it owed the insureds anything more than the $7,000 they were offered within the one-year limitations period (which the insureds rejected). By contrast, in *Ogden*, the insurer had already conceded that it owed the insured the amount in dispute, but just withheld that amount pending the completion of the proof of loss. In other words, a plain denial of further liability within the suit limitation period, rather than an admission of potential further liability, cannot serve as a basis for an insured to contend that the limitations period has been waived by the insurer.

Pawlowski serves as a useful reminder that, while courts are not eager to enforce policy suit limitation periods, and will often look for reasons not to apply such periods, suit limitation periods do remain valid and enforceable under Georgia law and will be applied by the courts in appropriate circumstances. (That said, insurers should remain aware of new rules set in place last year by the Insurance Commissioner in Georgia, which require that, for all policies issued after June 20, 2006, the suit limitation period must be a minimum of two years).

For more information or for questions regarding this case, contact Esther Vayman at 404.888.6148 or via email at esther.vayman@swiftcurrie.com.

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Brian Leepson

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