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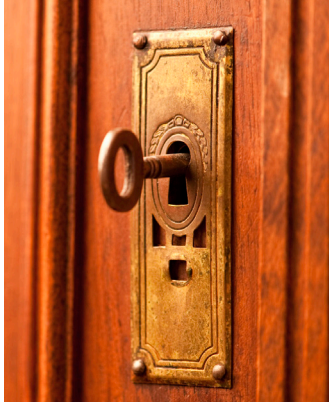

The 1st Party Report

A Property & Insurance Update

Spring 2012

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Apportionment Statutes Held Unconstitutionally Vague

By: Melissa A. Segel

Judge Wong in the DeKalb State Court declared the apportionment statutes unconstitutionally vague, employing a rational basis scrutiny. Under the rational basis test, a statute does not violate equal protection as long as it is rationally related to a legitimate government interest, it is not arbitrary, and it has a fair and rational relationship to the government's objective such that all persons similarly situated are treated alike. *Rhodes v. State*, 283 Ga. 361, 363 (2008); *Benefit Support, Inc. v. Hall County*, 281 Ga. App. 825, 829 (2006). With this decision, Judge Wong "found that the apportionment rule was so sloppily drafted as to violate the state's Constitution." *See* Palmer, Alyson M., "Cases Challenge Apportionment; DeKalb Judge Calls Part of Tort Reform Law Unconstitutional; Federal Judge Sends Questions about Statute to High Court," Fulton Daily Report, Feb. 1, 2012.

Under the apportionment statutes, codified at O.C.G.A. §§ 51-12-31, 51-12-32 and 51-12-33, defendants are only responsible for the damage that they cause. The statutes allow the jury to consider the fault of nonparties, reducing the verdict by the nonparty's percentage of fault. Since the apportionment statute was enacted seven years ago, plaintiffs have sought to have the statute invalidated as unconstitutional and as inconsistent with the prior joint and several liability statute. With Judge Wong's ruling in *Medina v. GFI Mgmt. Svcs., Inc.*, a third party criminal premises liability action, property owners may now be faced with complete liability for the actions of criminals within their midst. Additionally, this ruling potentially affects almost every other case involving liability and an "empty chair," from products liability to medical liability and everything in-between; any case where the defendant seeks to apportion fault and damages among the plaintiff and other potential at-fault defendants.

In *Medina*, the plaintiff was shot in the leg by an unknown assailant. Plaintiff sued the defendant apartment complex manager and then filed a motion in limine to preclude apportionment of damages to the non-party criminal pursuant to O.C.G.A. § 51-12-33. Judge Wong held that it is a legitimate government interest to limit the amount of damages a defendant is responsible to pay as its proportionate degree of fault. However, he found that, although the right to a jury trial under the Georgia Constitution includes the right to have the jury determine the amount of damages awarded to the plaintiff, it is the legislature who should have responsibility for apportionment. Judge Wong found that "[t]he wisdom of allowing a negligent actor to seek to reduce the damages he must pay by placing blame on the person whose conduct he had a duty to prevent is a question for the legislature, not this Court."

In this decision, Judge Wong found no merit in the plaintiff's argument that the statute was vague, but found the court cannot reconcile Sections 31 and 33. O.C.G.A. § 51-12-31 is the previous codification of common law joint and several liability, which was not eliminated with the tort reform apportionment statute of O.C.G.A. § 51-12-33. Under O.C.G.A. § 51-12-31, apportionment was discretionary. In contrast, O.C.G.A. § 51-12-33 mandates apportionment of damages among "the persons who are liable according to the percentage of fault of each person." O.C.G.A. § 51-12-33(b). The new apportionment statute identifies that the trier of fact, in assessing percentages of fault, "shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." O.C.G.A. § 51-12-33 (c).

Judge Wong found it inexplicable as to why the "Legislature made apportionment under Sections 33 (a) and (b) mandatory with the use of the word 'shall' but left apportionment discretionary under Section 31 by keeping the word 'may.'" Further, the Legislature failed to explain when a party could designate a nonparty at fault and "[t]here is no rational basis to justify a defendant's ability to invoke mandatory apportionment in a multiple defendant case based on whether the plaintiff is at fault or not." Highlighting a number of cases dealing with apportionment before the appellate courts Judge Wong successfully identified the discrepancies between these two sections. "[T]he present statutory scheme leaves trial courts and litigants unable to determine the legislative intent as evidenced by the flood of litigation." The court therefore found "O.C.G.A.

§ 51-12-31 and O.C.G.A. § 51-12-33 [were] unconstitutionally vague and the uncertainty brought about deprives the citizens of this state of due process and equal protection of the law."

Importantly, the rationale of apportionment was upheld, as the unconstitutionality was based on poor drafting and inconsistencies. Judge Wong allowed a Certificate of Immediate Review of his Order, but the appeal was rejected so the issue will remain unresolved, for the near future at least. What remains to be seen, however, is how this will impact defendants until the issue is finally clarified at either the appellate level or the legislative level.

For more information on this topic, contact Melissa Segel at 404.888.6153 or melissa.segel@swiftcurrie.com.

The Critical Definition of "Dwelling" in First Party Insurance Policies

By: Laura A. Murtha

Two recent decisions establish that Georgia courts consider the definition of "dwelling," which appears in nearly all homeowners, rental and landlord policies, to be clear and unambiguous. In *Stillwell v. Allstate Insurance Company*, the Eleventh Circuit Court of Appeals evaluated whether a rental property qualified as a dwelling under the terms and conditions of the insurance policy. 2011 WL 6057561 (11th Cir. 2011). The insurer issued a landlord insurance policy to its insured for a property in East Point, Atlanta. The property had nine bedrooms, which the insured rented to unrelated tenants. Each bedroom had a separate lock and key and all of the tenants had access to the property's common areas, which included a bathroom, kitchen and living area.

In 2007, the property suffered a fire loss and subsequent water loss. Following its investigation of the losses, the insurer denied coverage on the basis the property did not qualify as a "dwelling" under the terms and conditions of the insurance policy.

The insurance policy defined "dwelling" as "a one, two, three, or four family building structure which is used principally as a private residence and located at the address stated in the Policy Declarations." Despite the insured's argument that the definition of "dwelling" was ambiguous, the Eleventh Circuit affirmed the lower court's holding that there was no coverage afforded under the policy. The Eleventh Circuit held that the definition of "dwelling" was unambiguous and that the rental property did not constitute a dwelling because the insured rented rooms to more than four unrelated people.

The definition of "dwelling" was also recently addressed in *Mahens v. Allstate Insurance Company*, 2011 WL 1321578 (N.D. Ga.). The insured purchased a residence in Georgia in 2006. The insurer issued a homeowner's insurance policy, which provided coverage for the Georgia residence. Although the insured initially planned to live at the Georgia residence, the insured never moved into the dwelling. Instead, the insured continued to maintain his prior residence in Florida.

Even though he lived in Florida, two individuals maintained the Georgia residence on behalf of the insured. Because the property was vacant, the insured did not supply central heat to the proper-

Keeping a Lid on Mold Claims

By: Thomas A. Ward

Mold is not a new problem, but property owners are suddenly discovering it everywhere and reading on the internet that it is a toxic health hazard. Alarmed property owners naturally look to their property insurance companies to pay for the cleanup and the medical bills. Needless to say, claims professionals have to be prepared to handle the many issues created by these claims, from investigation and detection, to coverage analysis and a multitude of adjustment and remediation issues.

Mold infestations represent an expensive type of loss because they can cause considerable property damage and require expensive remediation protocols. Moreover, there is considerable uncertainty in the literature about the exact health risks posed by mold. The Environmental Protection Agency and the Centers for Disease Control and Prevention are still struggling to define what levels and types of mold contamination are dangerous.

It is often not clear what qualifies any particular person to hold himself out as a mold expert. In the absence of federal or state guidelines or the emergence of a dominant certifying or accrediting entity, there are almost no limits on the ability to claim an expertise in mold detection and remediation. A casual search on the internet will reveal dozens of official-sounding mold certifications offered for fee by obscure companies. There is also a proliferation of mold-related websites that perpetuate much of the hysteria surrounding "toxic" or "black" mold.

It is important to understand a few basics about mold and mold claims. Mold is more common than people realize. Mold is a naturally occurring organic substance. Mold spores are present in every outside environment and in every home and every building. Because of its prevalence, it is impractical to elimi-

ty. However, portable electric and kerosene heaters were turned on whenever the temperatures dropped below 40 degrees.

In March 2009, a water leak was discovered at the property. A plumber inspected the property on behalf of the insured and reported that frozen pipes caused the water leak. The loss was reported to the insurance company, who notified the insured the loss was not covered because the policy excluded damage caused by frozen water pipes while the residence was vacant, unless the insured used reasonable care to maintain heat in the building. The insurance company determined the insured had not taken reasonable care to protect the water pipes and maintain heat in the building in its use of portable electric and kerosene heaters.

The insured retained a second plumber, who inspected the building and opined that the loss was not caused by frozen pipes. Rather, the loss was the result of a slow leak on the third floor of the dwelling and saturated the dwelling over time. Although this cause was not excluded by the policy, the insurer denied coverage on the basis that the insured was not residing at the property when the loss occurred.

The insured filed suit. The insurer argued the policy required the insured to reside at the property. The insured argued that the policy was contradictory and therefore ambiguous. On the one hand, the policy required that the insured reside at the dwelling, but on the other hand, the policy excluded damages caused by frozen water pipes while the residence was vacant.

Like the policy in *Stillwell*, the insured's policy in *Mahens* defined "dwelling" as "a one, two, three or four family building structure, identified as the insured property on the Policy Declarations, where you reside and which is principally used as a private residence."

The court identified three requirements for coverage in accordance with the definition of "dwelling": (1) that the insured property be identified on the declarations page; (2) that the property be principally used as a private residence; and (3) that the insured reside at the property. The court further held that coverage exclusions, such as the exclusion for damage caused by freezing temperatures while the premises are unoccupied, did not negate the requirement that the insured reside in the insured premises. Because the insured never lived at the property, the loss was not covered.

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Insanity and the Intentional Acts Exclusion

By: Steven J. DeFrank

In Georgia, insanity is not a complete defense to intentional acts exclusions contained in insurance policies. In *Eubanks v. Nationwide Mutual Fire Insurance Company*, 195 Ga. App. 359, 393 S.E.2d 452 (1990), the insured, who was at the time legally insane, shot and killed a man. When the decedent's heirs sued Eubanks for wrongful death, Eubanks looked to Nationwide to defend him under the terms of his homeowner's policy. Nationwide filed a declaratory judgment action to determine whether coverage was owed to the insured.

nate all mold spores in the air, just as it is nearly impossible to prevent mold spores from growing.

There are many different types of mold, but very few are toxic. The mere presence of visible mold growth does not automatically mean that expensive and invasive mold remediation efforts are warranted. The precise type and species of mold should be identified before opting for the most expensive remediation options. Visible mold growth also does not necessarily mean that the building's occupants have been exposed to dangerous or increased levels of mold. But even if elevated levels of mold spores are found inside (in comparison to the outside environment), there are no established thresholds or guidelines defining what levels of mold contamination are dangerous. Despite the considerable volume of anecdotal health claims found on the internet and in the news linking various ailments to "toxic" mold exposure, such claims are not widely supported by medical and academic literature.

All insurance policies will specifically address mold, typically through endorsement, and thus it is critical to examine the entire policy and all applicable endorsements closely to determine the extent of coverage for mold. Most property policies have significantly limited coverage for mold, if such coverage is not excluded outright, although mold can still present significant exposure under liability coverage.

So what is an adjuster to do when faced with a mold claim? Here are a few tips: (1) avoid unnecessary delay in responding to any water-related cause of loss where "mold" may naturally result; (2) remind the policyholder, in writing, of his duties to "preserve and protect the damaged property" and to "mitigate the loss;" (3) suggest respected contractors experienced in the drying out of buildings and the prevention or minimization of mold; and (4) follow up to be sure the policyholder is meeting his contractual obligations to prevent or minimize mold. Preventing the mold from getting out of hand may be easier, and less expensive, than fighting the insured at the courthouse to determine whether the mold damage is a covered loss.

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Evidence was submitted which chronicled the insured's delusional and psychotic activity. The insured argued that he shot the decedent as a means of self-defense because he feared for his own safety. Psychiatrists testified that the insured acted under the delusion that his life was at risk. The court held that the insured's delusional misperception of self-defense during the shooting did not negate his intent to harm the decedent. Therefore, the intentional acts exclusion under the homeowner's policy precluded coverage.

The other notable published Georgia opinion regarding the insanity defense to an insurance policy's intentional acts exclusion is *State Auto. Mut. Ins. Co. v. Gross*, 188 Ga. App. 542, 373 S.E.2d 789 (1988). In *Gross*, the insured believed his wife to be having an affair with his next door neighbor. The insured walked over to his neighbor's house and shot him to death. The insurer filed a declaratory judgment action for determination as to whether it owed coverage to the insured given his intentional act. Expert testimony at the civil trial concluded the insured was unable to distinguish right from wrong at the time of the shooting. The appellate court reversed the trial court's judgment denying the insurer's summary judgment motion. The appellate court held that whether an insured can distinguish between right and wrong or is unable to resist committing an act does not create a jury question. The relevant question is whether the insured expected or intended the injury or damage for which insurance coverage was sought. If the insured expected such damage, then the intentional acts exclusion precludes coverage under the homeowner's policy.

Insureds who plead guilty to charges of child molestation have used similar contentions of insanity in an attempt to maintain coverage under homeowner's policies for personal injury actions brought against them by their victims. In *Roe v. State Farm Fire & Co.,* 259 Ga. 42, 376 S.E.2d 876 (1989), the offender testified that his behavior was caused by an obsessive compulsion and he did not intend to cause harm to the victim. The Georgia Supreme Court rejected this argument, holding that "intentional child molestation carries with it a presumption of intent to inflict injury. This presumption is not rebutted by the presentation of the insured's own self-serving testimony." *Id.* Few courts have addressed application of the insanity defense in the context of property coverage. The standard homeowner's policy excludes from property coverage an "intentional loss, meaning any loss arising out of any act committed: (1) by or at the direction of the insured; and (2) with the intent to cause a loss."

One case addressing insanity as a defense to an intentional acts exclusion of a property coverage case is *Nationwide Mut. Fire Ins. Co. v. May*, 860 F.2d 219 (6th Cir. 1988). In that case, the insured's son shot his mother and then set fire to their home. Nationwide denied coverage for the property loss, relying on the intentional acts exclusion, and alleged the fire was intentionally set by the son. In response, the insured argued that his son was unable to form the necessary intent to commit arson due to his mental illness. While the Sixth Circuit upheld the jury's verdict finding that the son did not have the requisite intent to commit arson, the court stated that an insured "may no longer defeat an intentional acts exclusion by proof of mental illness, such as an insane impulse, that merely precluded the insured from controlling his actions or knowing right from wrong." *Id.* at 223. The court noted, however, that insanity may defeat an exclusion if the insured "did not at the time have mind enough to know the nature and quality of his acts." *Id.*

Even if the insurer successfully overcomes an insanity defense to the intentional acts exclusion, Georgia courts have upheld recovery of innocent co-insureds. O.C.G.A. § 33-32-1 mandates that the language of any fire policy be as favorable to the insured as the language contained within the standard fire policy. The apparent effect is that sane, innocent co-insureds will be entitled to their recovery regardless of the exclusion of coverage for the intentional acts of the insane co-insured.

For more information on this topic, contact Steven DeFrank at steven.defrank@swiftcurrie.com or 404.888.6130. ■

Events

Joint Litigation Luncheon with McAngus Goudelock and Courie
Friday, April 27, 2012
8:30 am - 3:30 pm
Cobb Energy Performing Arts Centre
Atlanta, GA

Joint Workers' Compensation Luncheon with McAngus Goudelock and Courie
11:00 am - 2:00 pm
Wednesday, May 9, 2012
Villa Christina (Atlanta, GA)
and Friday, May 18, 2012
Hilton University Place
(Charlotte, NC)

For more information on these programs or to RSVP, visit www.swiftcurrie.com/events.

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