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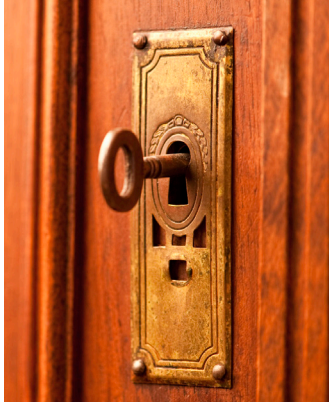

The 1st Party Report

A Property & Insurance Update

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Court Finds Insurer in Bad Faith for Misapplying Judicial Estoppel and Misrepresentation Defenses

By: Shannon L. Schlottmann

We have frequently written about judicial estoppel and the good, bad, and the ugly insurers face when contemplating whether to rely upon judicial estoppel in their claims investigation. Recently, the United States District Court issued an opinion showing the potential pitfalls of applying judicial estoppel prematurely and for purposes broader than that for which it was intended. In *Ussery v. Allstate Fire and Casualty Co.*, 2015 WL 8773291 (M.D. Ga. 2015), Allstate sought to use judicial estoppel to show the insured misrepresented information to the carrier during a claims investigation. The United States District Court for the Middle District of Georgia disagreed with Allstate's position and held Allstate acted in bad faith under O.C.G.A. § 33-4-6 when it denied payment of an insured's claim.

Allstate issued a homeowners insurance policy to Plaintiffs, Albert Ussery and the Estate of Miriam Ussery, which provided coverage for the insureds' dwelling and personal property. After a fire completely destroyed the insureds' home and personal property, they submitted a claim to recover the full policy limits. Allstate denied the entire claim based on its discovery of a bankruptcy petition in which the insureds listed a personal property valuation in the amount of $2,700, which was significantly lower than the $205,608 amount claimed in their proof of loss. The insureds admitted during their examination under oath that their bankruptcy petition did not list all of their possessions and inaccurately reflected the true value of their personal property. *Id.* at *2. Allstate argued that the two different valuations conclusively established that the insureds were judicially estopped from recovering the higher amount.

Following the denial of their insurance claim, the insureds amended their bankruptcy petition to include the exact inventory and reflect the same value of the personal property listed in their insurance claim. The bankruptcy court accepted the amendment, which related back to the original filing date of the petition and resulted in no change to the repayment terms under the Chapter 13 plan. Thereafter, the insureds submitted a demand to Allstate pursuant to O.C.G.A. § 33-4-6. Allstate rejected the demand and the insureds filed suit. Relying upon its judicial estoppel defense during discovery, Allstate did not question or request proof of any items listed in the insureds' personal property inventory or the valuation. In fact, Allstate's adjuster testified that the insureds' inventory was "a fair representation of what he would have expected to be in the home at the time of the fire" and that it would have been unreasonable to consider the value of the personal property to be $4,000.

The Court rejected Allstate's judicial estoppel argument. The Court held that, as a result of the amended bankruptcy petition and the bankruptcy court's acceptance of the amendment, the insureds were no longer taking inconsistent positions regarding the valuation of their personal property. Indeed, prior cases had long allowed that escape route for claimants facing judicial estoppel problems. *Johnson v. Trust Co. Bank*, 223 Ga. App. 650, 478 S.E.2d 629 (1996).

According to the insureds, they should be entitled to bad faith penalties as a matter of law because Allstate's only basis for denying their claim was its erroneous belief that judicial estoppel applied. In response, Allstate argued that, even if the inconsistent positions no longer supported a judicial estoppel defense, there was still evidence that the insureds breached the Concealment or Fraud provision. The Concealment or Fraud provision provides that Allstate does "not cover any loss or occurrence in which

any insured person has concealed or misprepresented any material fact or circumstance." Allstate argued that the original bankruptcy petition could serve as evidence that the insureds materially misrepresented the value of their personal property. But the Court noted that any material misrepresentations were made to the bankruptcy court, not to Allstate, so the Concealment or Fraud provision was not violated. Indeed, the insureds were completely forthcoming with Allstate about the misrepresentations on the bankruptcy petition, so this defense had no evidentiary support. The Court held that because Allstate's sole basis for the misrepresentation defense was the bankruptcy petition, Allstate had not met its burden of demonstrating any evidence that the insureds made material misrepresentations to Allstate during the claim. Accordingly, the Court found that Allstate acted in bad faith for refusing to provide coverage for the loss. The Court noted that "[a]n insurer cannot abdicate its contractual duties simply because it believes it might have some legal authority to deny an insured's claim, and then offer no evidence or defense when a plaintiff makes a claim of bad faith." *Id.* at 16.

This case illustrates that there are serious consequences for insurers who rely too casually on judicial estoppel to support the denial of a claim. Even if a bankruptcy case has been closed and the debtor has been discharged, the possibility exists for the debtor to petition the bankruptcy court to reopen his case and "fix" the misrepresentations in the bankruptcy petition. In that event, the insurer's decision to deny a claim due to judicial estoppel may be jeopardized. An argument should still be made that — if the misrepresentation to the bankruptcy court was intentional and designed by the debtor to defraud his creditors — he should not be allowed to escape the consequences of his attempted fraud only because it now suits him to come clean. Judicial estoppel is intended to punish an individual for misrepresenting information to the bankruptcy court. The punishment is that the individual will be bound by those statements in all future actions, and it should be too late to "correct" the statements only when forced by his adversary to do so. This argument was successfully made in *Scoggins v. Arrow Trucking Co.*, 92 F.Supp.2d 1372 (S.D. Ga. 2000), where the district court applied judicial estoppel even after the claimant corrected his bankruptcy petition to "fix" misrepresentations.

Insurers should be careful not to confuse the judicial estoppel defense with the misrepresentation defense. In circumstances where judicial estoppel is applicable, the misrepresentation has been made to the bankruptcy court, not necessarily to the carrier. To support a misrepresentation defense, the misrepresentation must have been made to the insurer with the intent to defraud the insurer. Moreover, insurers should fully investigate the validity of the claim for all possible defenses rather than relying on judicial estoppel alone.

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Appraisal: A Refresher Course

By: Marcus L. Dean

Appraisal is a dispute resolution mechanism within insurance agreements. The purpose of appraisal is to provide a method for settling disputes regarding the amount of loss. That avoids the delay and expense of litigation. Unfortunately, insureds are using appraisal as a method to obtain additional payments by allowing their selected appraiser to estimate the loss at a far higher amount than its true value. The umpire then usually determines a value somewhere in between the insured's inflated estimate and the insurer's estimate, which often results in an inequitably high award. For this reason, we strongly recommend that insurers not demand appraisal.

In Georgia, there are a number of valid reasons for an insurer to refuse an appraisal demand. While there is case law indicating that an insurer may never have to comply with an appraisal demand, this article focuses on two specific reasons for refusing to comply with an appraisal demand – untimely demands and inappropriate coverage/scope of loss determinations.

Coverage Questions and Scope of Loss Disputes are Inappropriate for Appraisal

In 2006, the Georgia Supreme Court held that coverage questions were inappropriate for appraisal. *McGowan v. Progressive Preferred Ins. Co.*, 281 Ga. 169, 171 (2006). The court indicated that appraisal is a procedure for

Insurance Coverage in the Sharing Economy

By: Amer H. Ahmad

"Sharing is caring" goes the old adage. But for many Americans financially pressed in the post-Great Recession economy, sharing can also be very lucrative. The sharing of personal goods for personal gain through the internet or use of mobile phone apps has come to be called the "sharing economy." Over the past few years, companies have taken advantage of the growth in this sharing economy, allowing users to share their homes or cars, using Airbnb or Uber's platforms, for a fee. Airbnb now has more than 60 million guests using its services and home rental locations in over 190 countries. Uber boasts over a billion drivers and riders in 395 cities worldwide. However, this new sharing economy presents new insurance coverage issues for both users and their insurers.

For example, a family renting a cottage in Texas through Airbnb suffered tragedy when their father, testing a rope swing before his children used it, was killed when the tree limb supporting the swing snapped. In such a situation, is there coverage under the homeowners policy? What is Airbnb's liability, if any? In this instance, the owner's insurance policy included coverage for commercial activity and the insurer reached a settlement with the family. However, that outcome is likely the exception, not the rule.

Airbnb and Uber users are not really sharing their homes and cars in the traditional sense. Instead, they provide goods and services to others for a price. Thus, the question raised for insurance carriers is whether their insureds are merely sharing their property or if they are engaging in a commercial activity when using Airbnb or Uber.

With respect to Airbnb, a homeowner's liability coverage typically excludes claims arising from the renting of any part of the insured premises, and the property coverage typically excludes losses to business property. However, those exclusions can be different from policy to policy. Some insurers allow their homeowners to rent out a room occasionally, but not for business purposes. Other insurers allow homeowners to occasionally rent their residence out while maintaining liability coverage for a few weeks a year. Another insurer will maintain coverage if the insured does not take in more than $15,000 in rental income. In each of those scenarios, if a claim is asserted, an analysis of the policy terms would likely be required on a case-by-case basis to determine coverage.

The amount of coverage, if any, may be further complicated by the existence of Airbnb's "Host Protection Insurance." Hoping to keep existing users, as well as attract new ones, Airbnb recently announced that the secondary insurance coverage it provides to hosts, which allows up to $1 million in liability coverage, has been upgraded to primary coverage. As such, in situations where a homeowners policy actually provides coverage to an Airbnb host, and Airbnb's Host Protection Insurance also provides coverage, each insurer's liability for a claim will require a comparison of each policy's "other insurance" clause. Although Airbnb's coverage is provided through Lloyd's of London, the details of its "other insurance" clause are currently unknown.

Coverage questions are similarly raised by an insured's use of his vehicle to drive for Uber. When Uber first started, its insurance strategy was to have drivers pursue claims under their personal automobile insurance if they were involved in an accident while working. However, just as with most homeowners policies, standard automobile insurance policies contain exclusions for commercial activity. As such, Uber recently changed its insurance strategy, providing contingent insurance that covers the driver when he or she is logged into the Uber app and looking for riders in the event that the driver's insurer denies coverage for an accident. Uber also provides primary commercial liability insurance when the driver is carrying an Uber passenger. Regardless of what Uber tier of coverage applies, if an Uber driver is involved in any accident, an investigation into the facts of that accident and analysis of the policy terms will be required to determine if the driver was engaged in excluded commercial activity at the time. For instance, even if a driver is not logged into or using the Uber app, a driver traveling to another area of town, like the airport, in order to search for riders upon arrival could arguably constitute excluded commercial activity.

The sharing economy poses new risks and coverage questions for traditional auto insurance and homeowners policies. Navigating those risks will require a mix of old and new, including experience with investigating claims and analyzing policy terms and a familiarity with new technologies and market trends.

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determining the amount of loss. Further, the court held that appraisal should not be used to determine an insurer's potential liability. Still, the *McGowan* decision left questions regarding what constituted a scope of loss and/or coverage dispute.

In 2014, the Georgia Court of Appeals further analyzed the appraisal issue. In that case, an insured demanded appraisal regarding the extent of the wind and/or hail damage to his roof. *Lam v. Allstate Indem. Co.*, 327 Ga. App. 151, 152 (2014). Both parties agreed a covered loss had occurred. The insured, however, argued that he suffered damage to his entire roof, whereas the insurer contended that only four shingles were damaged. Obviously, the cost of replacing the entire roof was much greater than the cost of replacing four shingles. Thus, the insured argued the parties disagreed on the amount of the loss — is a proper dispute for appraisal. On the other hand, the insurer argued the discrepancy in the amount was due only to vastly different scopes of loss, which amounts to a coverage dispute that is not proper for resolution through appraisal. The court agreed with the insurer and held that the disagreement over the number of damaged shingles constituted a coverage issue. Therefore, appraisal was inappropriate.

In short, it is important to analyze whether there are coverage issues prior to complying with an insured's appraisal demand. An insurer may waive its scope of loss arguments by complying with an inappropriate appraisal demand.

Untimely Appraisal Demands

An appraisal demand must be timely and comply with the terms of the insurance contract. *See Georgia Farm Bureau Mut. Ins. Co. v. Boney*, 113 Ga. App. 459 (1966); *Rebel Tractor Parts, Inc. v. Auto Owners Ins. Co.*, 2006 WL 6931891 (S.D. Ga. Nov. 29, 2006); *Aaron v. Georgia Farm Bureau Mut. Ins. Co.*, 298 Ga. App. 403 (2009); *Shelter Am. Corp. v. Georgia Farm Bureau Mut. Ins. Co.*, 209 Ga. App. 258 (1993).

"The right to require an appraisal is not indefinite as to time, but must be exercised within a reasonable period of time depending on the facts of a particular case or the right to demand appraisal is waived." *Rebel Tractor* 2006 WL 6931891 at *3 (referencing Ga. Jur., Insurance § 21:14). Georgia courts have held that appraisal demands submitted near and/or after the expiration of the one-year suit limitation provision are untimely. *Id.*; *see also Aaron* 298 Ga. App. at 403. The two main factors for determining the enforceability of an appraisal demand are the length of time between the breakdown of good faith negotiations and the prejudice to the other party from the delay. *Rebel Tractor* 2006 WL 6931891 at *3.

Courts have also analyzed the extent of the repairs to the damaged property and an appraiser's ability to make an intelligent appraisal of the loss. *Boney*, 113 (79 App. at 460). Insureds often submit appraisal demands after much of the damaged property has been repaired. This leaves appraisers with only photographs and previous estimates to appraise the damage. While photographs are helpful, the best evidence is long gone after a repair. Arguably, appraisers are unable to fully evaluate the claimed damage and reach an intelligent decision after the damage has been repaired. Some courts have deemed these last-minute appraisal demands untimely.

Other insureds file lawsuits hoping to force an insurer into settlement negotiations. When insurers resist the settlement demands, insureds often submit an appraisal demand. However, the purpose of appraisal, which is to avoid the costs associated with litigation, no longer exists after suit is filed. Thus, some courts have deemed these types of appraisal demands untimely.

It is important to thoroughly analyze an insured's appraisal demand prior to complying with the demand. Overall, we recommend that insurers avoid appraisal because of the high likelihood of an inequitable reward.

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Events

LITIGATION WEBINAR:
Federal Rules of Civil Procedure - Change for the Better? - A Discussion of Recent Changes to the Rules and How They Will Affect Case Management in Federal Court
Thursday, June 23
1:00 - 2:00 pm EST

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