The 1st Party Report

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Timeless Values. Progressive Solutions.

"*Holt*" it Right There! No Good Tender Goes Unpunished

By: Mike O. Crawford, IV

Time-limited demands, also known in Georgia as "*Holt* Demands," have long been the bane of an adjuster's existence. For years, plaintiff's lawyers used *Holt* Demands to engage in various kinds of chicanery. For instance, it became the norm for insurers to receive pre-suit demands for policy limits with obtuse payment conditions and unreasonably short acceptance periods. Moreover, insurers were unwilling to risk asking for clarification of a demand's terms for fear of inadvertently rejecting the demand. Fortunately, the recent passage of O.C.G.A. § 9-11-67 indicated the tide was flowing in favor of insurers.

O.C.G.A. § 9-11-67 applies only to motor vehicle accidents occurring after July 1, 2013. It requires demands be in writing and be sent by certified mail or statutory overnight mail. The statute requires that a carrier be allowed a minimum of 30 days to accept a demand (effectively preventing claimants from ambushing a carrier with an unreasonably short acceptance window). It also requires that certain other information be included in the demand, such as the amount of the demand, the parties and claims to be released, and the type of release being offered. Most importantly, O.C.G.A. § 9-11-67 gives the carrier the right to seek clarification regarding terms, liens, subrogation, medical bills and records, and other relevant facts, without such a request for reasonable clarification being deemed a counteroffer.

Unfortunately, the recent case, *Camacho, et. al. v. Nationwide Mut. Ins. Co.*, 13 F.Supp.3d 1343 (2014), could represent a new loophole for plaintiffs to exploit when making pre-suit demands.

In *Camacho*, the defendant, who was suspected of driving while intoxicated, ran a red light. The accident occurred in 2007 (meaning the safeguards provided by O.C.G.A. § 9-11-67 did not apply in *Camacho*). The resulting collision killed the wife of Jesus Camacho. The defendant's vehicle was insured by Nationwide under a policy with limits of $100,000 per person and $300,000 per occurrence. Nationwide determined that liability was clear. So, in a face-to-face meeting with Mr. Camacho and the decedent's mother (who was the administratrix of the estate), Nationwide tendered the limits of its policy in exchange for a general release. The plaintiffs, who were not yet represented, chose to hire counsel to review the offer before accepting it. The plaintiffs' new attorney then sent a policy limits demand to Nationwide, the conditions of which included a limited liability release, rather than a general release. Believing that it had found a safe harbor by tendering its policy limits before any demand was made, Nationwide responded to the plaintiffs' demand by accepting most of its terms, but continued to require a general release. The plaintiffs filed suit in state court, and a jury awarded $5.83 million to the plaintiffs—a verdict that was 58 times the policy limits.

Following the trial, Nationwide's insured assigned his bad faith claim to the plaintiffs, who then filed a bad faith action in federal court against Nationwide, arguing that Nationwide did not consider its insured's interests on equal footing with its own interests when it rejected the plaintiffs' policy limits claim by insisting on a general release.

Nationwide responded by filing a motion for summary judgment, arguing that its pre-suit offer to tender policy limits provided it with a safe harbor from any bad faith claims by its insured. Recognizing the "Hobson's choice" carriers face when presented with a policy limits demand, the court nevertheless rejected Nationwide's argument, holding that Nationwide's actions did not fall under any safe harbor contemplated under Georgia law.

Nationwide also argued it was entitled to a safe harbor because it lacked the ability to comply with the condition that the release be "limited." According to Nationwide, it needed its insured's approval to agree to a limited liability release. Although the court questioned whether Nationwide actually needed its insured's permission to agree to a limited liability release, even if permission was required, Nationwide waited until after the deadline for acceptance to seek that permission.

Moreover, Nationwide argued that attempting to obtain a general release was in its insured's best interest, but the court rejected this as well. The court noted that it was in Nationwide's power to settle for some sort of release, and an "insurer may not gamble with the funds of its insured." Importantly, Nationwide made other arguments as well, but those arguments have largely been rendered moot by the subsequent passage of O.C.G.A. § 9-11-67 (which statute did not apply to this case).

Thus, even though Nationwide proactively tendered its policy limits in exchange for a general release of its insured, the court ruled a jury must decide whether Nationwide acted in bad-faith in failing to timely settle the plaintiffs' claims against its insured.

Although the appellate courts frequently claim safe harbors exist for insurers navigating waters mined with *Holt* Demands, safe passage continues to elude even the most prudent and careful insurers. In that sense, *Comache* seems counterintuitive. If a safe harbor actually exists, surely Nationwide found it. How can an insurance company act in bad faith when it arguably did everything within its power to protect its insured—namely voluntarily and proactively offering its policy limits in exchange for the broadest possible release of its insured? And yet, Nationwide, having done precisely what is expected of an insurer, must now endure protracted and expensive litigation, in the hopes that 12 jurors armed with 20/20 hindsight will vindicate how it responded to the Hobson's choice put before it by the plaintiffs.

Bottom line, it cannot be taken for granted that tendering policy limits creates an absolute safe harbor from allegations of bad faith. If a tender of policy limits is rejected and countered with a *Holt* Demand, the insurer must respond reasonably to the *Holt* Demand, just as it has always been required to do. That is the mistake Nationwide made. The problem was not with Nationwide proactively tendering policy limits. That is a sound tactic that should be followed, because doing so increases the likelihood of settlement before a plaintiff can trip up the insurer with a *Holt* Demand. The problem was Nationwide rigidly insisted on strict acceptance of its initial tender and failed to adequately address the *Holt* Demand the plaintiffs sent in response.

Fortunately, it is believed O.C.G.A. § 9-11-67 will curtail these kinds of results by reducing the traps plaintiff's lawyers can set through unreasonable *Holt* Demands. Even so, that statutory reform only applies to auto accidents, and so the chicanery of plaintiff's lawyers is expected to continue for all other types of claims.

For more information on this topic, contact Mike Crawford at mike.crawford@swiftcurrie.com or at 404.888.6149. ■

A Refresher on Georgia's Valued Policy Act — the Nuts and Bolts of a Total Loss

By: Jessica M. Phillips

In 1971, the Georgia Legislature first enacted the Valued Policy Act, which is codified at O.C.G.A.§ 33-32-5. The Act conclusively establishes the value of a residential structure in the event of a total loss by fire. It was designed to protect insureds against the arduous task of proving the pre-loss value of a residential structure after the structure has been completely destroyed by fire. *Marchman v. Grange Mut. Ins. Co.,* 232 Ga. App. 481, 500 S.E.2d 659 (1998). The Act offers this protection by establishing the value of the property at the limits of coverage contained in the insurance policy covering the property. For example, if an insurance policy provides coverage limits of $160,000 for structural damage to a residential property, then the property will be valued at $160,000 in the event of a total loss by fire, regardless of the true market value of the property prior to the fire. However, there are certain requirements that must be satisfied to receive the protections of the Act. Specifically, the Act provides:

> (a) Whenever any policy of insurance **is issued to a natural person or persons** insuring a specifically described **one or two family residential building or structure** located in this state **against loss by fire** and the building or structure is **wholly destroyed by fire without fraudulent or criminal fault on the part of the insured or one acting in his behalf**, the amount of insurance set forth in the policy relative to the building or structure **shall be taken conclusively to be the value of the property,** except to the extent of any depreciation in value occurring between the date of the policy or its renewal and the loss, provided that, **if loss occurs within 30 days of the original effective date of the policy, the insured shall be entitled to the actual loss sustained** not exceeding the sum insured. Nothing in this Code section shall be construed as prohibiting the use of coinsurance or as preventing the insurer from repairing or replacing damaged property at its own expense without contribution on the part of the insured.

O.C.G.A.§ 33-32-5 (emphasis added).

To determine whether the Valued Policy Act applies, there are several important issues that frequently must be evaluated by insurers.

1. <u>Determination of a total loss</u>

The Act applies when the residential structure has been "wholly destroyed" by fire, i.e. a total loss. Whether the damage to the property results in a total loss is a question of fact for the jury. *Allstate Ins. Co. v. Baugh*, 173 Ga. App. 615, 327 S.E.2d 576 (1985); *Huckaby v. Travelers Property Cas. Co. of America*, 2011 WL 6300569, *9 (M.D. Ga. 2011).

An insured can present evidence that the structure was "wholly destroyed" by submitting reports, estimates, photographs, or similar documents showing that the cost to repair the structure would exceed the value of the limits of coverage. Similarly, an insured can also present documents from the county or city's building department which state that no remaining portion of the structure could be utilized in rebuilding the structure. In effect, this means that any remaining portions of the structure would have to be torn down prior to any rebuild.

To counter an insured's contention that the property was "wholly destroyed," the insurer must present evidence that portions of the remaining structure could be used to rebuild the property. An example of this would be a report from a structural engineer that states that portions of the structure can be reused. Once that evidence is presented, the insurer may then submit estimates and other evidence showing that

Share the Wealth! When Multiple Parties Want a Piece of the Proceeds Pie

By: Sarah L. Chambers

In 1990, Georgia's court of appeals in *Georgia Farm Bureau Mutual Ins. Co. v. Alma Exchange Bank & Trust*, 195 Ga. App. 103 (1990), held that an unnamed lienholder had a legally enforceable right to the insurance proceeds paid to an insured in connection with an insured's claim. In that case, the lienholder, Alma Bank, was not listed on the insured's policy despite having two secured loans on the insureds' real property. One year after the policy was issued to the insureds, the property burned. The insurer paid the claim, but did not include Alma Bank on the drafts, despite knowing of Alma Bank's status as a lienholder. Ultimately, the insurer was ordered to pay the proceeds to the lienholder, resulting in a double payment by the insurer for the claim. Following the *Alma Exchange* decision, it was clear that an insurer must issue payments to both the insured and to any known lienholders, whether named in the policy or not. This directive is simple enough when there are only one or two lienholders and the insurance proceeds exceed the amount of debt owed to the lienholders. However, in today's world, it is not unusual for an insured to have not just a traditional mortgage and home equity line of credit secured by an insured's real property, but also judgment liens attached to the insured's real and personal property. Often, insureds with this debtload have filed for bankruptcy. In addition, there may be other parties competing for portions of the insurance proceeds pie. For example, in a large loss, a mitigation company may have performed emergency services on the property and/or the insured may have hired a public adjuster to assist with the claim. When this happens, an insurance company may be unsure who should be included on the payment, and rightly so.

In a recent Northern District of Georgia court order obtained by this firm, the court noted that the numerous lienholders who had obtained valid judgment liens against the insureds (and whose liens had attached to the insureds' real and personal property) were entitled to a portion of the insurance proceeds to satisfy their liens. See order, *Owners Insurance Company v. James Galiah, et. al.*, 1:13-CV-02695-JEC, No. 117 (N.D.GA. March 10, 2015). This means that not only is the mortgagee entitled to payment on the claim, but the numerous judgment lienholders are also entitled to be included on the drafts issued for the loss. In this case, the insureds had filed bankruptcy after the judgment liens attached to their property but before the loss occurred. In its order, the court clarified that the judgment liens only attached to the property acquired by the insureds *prior* to filing for bankruptcy. This means that the judgment liens do not attach to property acquired by the insureds after the insureds filed for bankruptcy but before the loss occurred. This is in accordance with bankruptcy law in Georgia.

The court also noted that the public adjuster may only be entitled to payment to the extent the insureds are entitled to payment. In dicta, the court indicated that the public adjuster's right to the proceeds was only by virtue of the assignment clause in the public adjuster's contract with the insureds. The court further noted that the insureds may only be entitled to payment for the personal property that was acquired after their bankruptcy. This would significantly reduce not only the amount the insureds would ultimately receive, but also the amount recoverable by the public adjuster.

The last party involved in the case was the mitigation company that was hired to perform emergency services immediately after the loss. Unfortunately for the mitigation company, it had no written contract. The mitigation company's only claim to the insurance proceeds was that it had a right to be paid for services rendered. The court noted that this made the mitigation company an unsecured creditor. Nevertheless, the court's order indicated that the mitigation company may be entitled to share in the proceeds, but only if monies were left after the proceeds were distributed among the secured creditors.

So what does all of this mean for the insurer? Most importantly, it is imperative that an insurer acknowledge any and all parties that may be entitled to the insurance proceeds before issuing payment for a loss. This includes not only any mortgagees, but also judgment lienholders, public adjusters, and mitigation companies. If the insurer is aware of the existence of multiple parties who may claim a right to the insurance proceeds, regardless of whether the parties are named in the policy, but the insurer does not include all of the parties on any payments issued, the insurer may be liable for double payment.

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the cost to rebuild the property will be less than the policy limits.

2. Policy must be issued to a natural person

   The insured seeking coverage for the loss cannot be a corporation, partnership, limited liability company, trust, or any other artificial entity or construct, even if such entity is considered a "person" in the eyes of the law. For example, a corporation is recognized as a separate legal entity with many of the same rights as a natural person (including the right to sue for breach of contract). However, a corporation may not seek the protections afforded under the Act.

   Often, homeowners policies are issued to a natural person (i.e. the homeowner) and identify a corporation as a named mortgagee. Many of these policies contain a Standard Mortgage Clause, which allows the mortgagee an independent right to recovery under the policy. However, even though the mortgagee may be able to recover under the policy, the mortgagee cannot use the Act to determine the value of the property in the event of a total fire. Instead, if the mortgagee has not foreclosed, then the mortgagee's ability to recover will be limited to the existing balance of the mortgage debt. If the mortgagee has foreclosed, the mortgagee will only be able to recover up to the actual market value of the property prior to the fire.

3. The damaged property must be a one- or two-family residence

   In order to use the protections of the Act, the structure must have been used as a one- or two-family residence. Commercial buildings, including apartment buildings, are not protected under the Act.

   Similarly, mobile homes also may not be protected under the Act. Generally, mobile homes are considered personal property subject to the Motor Vehicle Certificate of Title Act. However, according to O.C.G.A.§ 8-2-181, a mobile home may be considered real property if:

   1. the mobile home is permanently affixed to the land;
   2. the owner of the mobile home also has an ownership interest in the land;
   3. a Certificate of Permanent Location is filed in the county real estate records and with the commissioner of motor vehicle safety.

If these elements are satisfied, then the mobile home may be considered real property protected under the Act.

When a residential structure has decreased in value from the initial date the insurance policy was issued, knowledge of the limitations of the Act can be important in accurately evaluating the value of a total loss. In circumstances where the Act may be triggered, it is important to carefully evaluate these issues to determine if the insured may be afforded the protections thereunder.

Recently, advocates have been pushing the legislature to modify the Valued Policy Act to remove the "natural person" limitation and to remove the "destruction by fire" limitation. If these advocates are successful, then the protections available under the Act would also be available to corporate and commercial entities for all types of losses.

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Events

Liability Webinar: Defending Damages
April 21 — 1:00 - 2:00 pm EST

Joint WC Luncheon Presented with McAngus Goudelock & Courie
"Stop the Bleeding: Controlling Your Medical Costs"
April 30 — Atlanta, GA
May 5 — Charlotte, NC

Joint Liability Luncheon Presented with McAngus Goudelock & Courie
May 6 — Charlotte, NC
May 13 — Atlanta, GA

WC Webinar: Legislative Update and Common Defenses
May 20 — 1:00 - 2:00 pm EST

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