# The 1st Party Report

## A Property & Insurance Update

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## One Year Suit Limitation Valid for Non-Fire Claims

By: Katie A. Quirk

In June 2006, Georgia's Insurance Commissioner changed the "Standard Fire Policy" to provide a two-year suit limitation period for all fire losses. Ga. Comp. R. & Regs. 120-2-20-.01. Ga. Comp. R. & Regs. r. 120-2-20-.02 provides that no insurance policy providing first party insurance coverage for real or personal property may have a contractual limitation period less favorable than the period specified in the "Standard Fire Policy." In light of these regulations, since 2006 insurers have been unsure whether to apply the two-year limitation period to non-fire-related claims. Georgia's Supreme Court recently cleared up the questions on this matter, and determined the two-year limitation period promulgated by the Commissioner is **only** applicable to fire claims.

In *White v. State Farm Fire & Casualty Co.*, 291 Ga. 306 (2012), the plaintiff filed suit against State Farm for a theft loss claim over a year after the alleged loss. State Farm moved for summary judgment, arguing the action was barred under the one-year suit limitation period in the plaintiff's policy. In response, the plaintiff argued the two-year limitation period in the Commissioner's regulation extended the period for bringing suit on his theft loss claim, and as such his lawsuit was timely. In assessing the case, the District Court considered the above regulations and O.C.G.A. § 33-32-1(a). That statute provides, "***with respect to the fire portion of the policy,***" all insurance coverage must be at least as favorable to the insured as the terms of the Commissioner's approved standard fire policy. The court found that while the regulations required the policy be reformed to reflect a two-year limitations period for fire losses, the policy's one-year limitation period remained valid as applied to suits for theft-related losses. Accordingly, the District Court granted summary judgment.

After the plaintiff appealed, the Eleventh Circuit Court of Appeals certified the case to the Supreme Court of Georgia. On June 25, 2012, the Supreme Court concluded the Commissioner exceeded his authority under O.C.G.A. § 33-32-1(a) by attempting to impose the two-year period on non-fire policies, holding as follows:

> The import of this statute is clear: multiple line policies are not required to adhere to the Standard Fire Policy promulgated by the Commissioner as long as the fire portion of the policy, not other portions relating to different coverage such as theft, has language at least as favorable to the insured as the Standard Fire Policy.

Consequently, the plaintiff's suit on the theft-loss claim was time-barred. The Supreme Court of Georgia's holding assures insurers that they can validly enforce the one-year suit limitations period in their policies for all non-fire related losses.

For more information on this topic, contact Katie Quirk at katie.quirk@swiftcurrie.com or by calling 404.888.6142.

## Extra Expense Claims

By: Steven J. DeFrank

"Extra expenses" coverage is generally meant to compensate an insured for incurring costs related to avoiding or minimizing the suspension of business, as well as reasonable and necessary expenses an insured incurs during the "period of restoration" that the insured would not normally have incurred had no loss occurred. "Extra expense" coverage has been defined as "necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered

Cause of Loss." *Lavoi Corp. v. Nat'l Fire Ins. of Hartford*, 239 Ga. App. 142 (2008). Extra expense provisions are sometimes calculated by providing for a value per day as a measure of loss. *Appleman*, Volume 4, page 323, Section 2329; 44 American Jurisprudence 2d 305, Section 1439. The burden is on the insured to prove the amount of the loss sustained, if any. 44 *American Jurisprudence* 2d 604, Section 1694.

One of the issues presented in extra expenses claims is what constitutes "necessary expenses" in order to constitute an "extra expense" claim under the policy? Often an insured will present a variety of expenses affiliated with a loss to constitute extra expenses, including management fees if a separate management company acts as a general contractor during the post-fire renovation, legal fees an insured has incurred related to assisting in the claim process or protecting the insured's assets, advertising expenses, evacuation orders, cost of signage and other expenses related to the loss that the insured claims it would not have sustained but for the loss. *See Lavoi Corp. v. Nat'l Fire Ins. of Hartford, supra*, (Insured sought coverage for the extra expense it incurred in baking bread at two other locations after a fire occurred at one of its bakeries); *Blis Day Spa, LLC v. Hartford Ins. Group*, 427 F. Supp. 2d 621, 630-31 (D.N.C. 2006) (Insured sought extra expense for the cost of additional advertising after a fire loss); *Assurance Co. of Am. v. BBB Serv. Co.,* 265 Ga. App. 35 (2003) (Insured, owner of several restaurants in Florida and Georgia, sued its insurance company charging the insurer with breach of contract in rejecting its claim for loss of business income and extra expenses following mandatory evacuation from threat of Hurricane Floyd). Regardless of what type of expenses an insured argues constitutes "extra expense," the crux of the analysis is whether those expenses were "necessary expenses" in order to trigger coverage.

Most insurance policies do not define the term "necessary." Typically, unless a term in an insurance policy is deemed ambiguous, it is given its plain meaning when interpreting an insurance contract. The plain and ordinary meaning of "necessary" is "absolutely essential; that which is needed to achieve a certain result or effect; requisite." *Glass Serv. Co. v. Progressive Specialty Ins. Co.*, 603 N.W.2d 849, 852 (Minn. Ct. App. 2000) (quoting American Heritage Dictionary 1207 (3d ed. 1992)).

In *Blis Day Spa, LLC v. Hartford Insurance Group*, 427 F. Supp. 2d 621, 630-31 (D.N.C. 2006), the insured sustained a fire loss, and made a claim for increased advertising costs under the "extra expense" provision of the policy. The insured claimed extra expenses in the amount of $35,000 in advertising costs related to a radio campaign after the loss. Hartford claimed this expense was not "necessary" within the meaning of the policy, and argued the insured had only spent $22,279.92 on advertising over the ten-month, startup period prior to the loss.

In response, the insured argued the startup costs incurred were very different than the advertising costs incurred after the fire, and both were "necessary." According to the

## Commercial Property Insurers' Subrogation Rights and the "Made Whole" Doctrine

By: Melissa K. Kahren

A recent decision of the Court of Appeals of Georgia has determined that commercial property insurers are not bound by the "made whole" doctrine when pursuing their rights of subrogation. *Georgia Cas. & Surety Co. v. Woodcraft by MacDonald, Inc.*, 315 Ga. App. 331, 726 S.E.2d 793 (2012). In *Woodcraft*, the insured's business premises was blown up by an explosion as a result of an allegedly negligently maintained gas line owned and operated by Atmos Energy Corporation. The insured, Woodcraft, had two insurance policies with Georgia Casualty. One was a commercial garage policy, providing coverage for the damage to customers' vehicles and property stored at the insured's premises. Under this policy, Georgia Casualty paid $1,307,169. The other policy was a commercial property policy, through which Georgia Casualty provided Woodcraft with coverage for Woodcraft's building and business personal property, along with coverage for its business interruption loss and other expenses. Under this policy, Georgia Casualty paid the insured total payments of $368,000, exhausting the coverage limits under the commercial property policy. *Woodcraft* at 332.

Georgia Casualty then filed a subrogation lawsuit against Atmos to recover the amounts it paid to Woodcraft under its policies. Woodcraft and its principal ("Woodcraft") intervened as plaintiffs to recover the amount of their alleged losses that exceeded the coverage under the commercial property policy. Two and a half years later, Georgia Casualty entered into an agreement with Atmos, under which it was agreed that Atmos would pay Georgia Casualty $950,000 and Georgia Casualty would completely release all claims against Atmos. They also agreed that Atmos would dismiss its counterclaims against Woodcraft. Likewise, Georgia Casualty and Atmos agreed that Woodcraft could continue to pursue claims against Atmos. *Id.* at 333. Woodcraft objected to the proposed settlement, claiming that Georgia Casualty could not settle until the insured was "made whole." The court rejected Woodcraft's objections, finding that Woodcraft was not prejudiced or prohibited from continuing to pursue its claims against Atmos. *Id.* at 333-34. Woodcraft did not go to trial against Atmos, instead settling their claims against Atmos for $125,000. *Id.* at 334.

insured, during the startup phase, the insured was able to plan the advertising expenditures and thus take advantage of the lower radio and print media costs. However, after the fire, the insured needed to conduct a radio campaign on short-notice to maintain its customer base. Therefore, the additional expenses were reasonable because the short notice meant the insured was unable to take advantage of the reduced advertising costs it enjoyed during its previous advertising campaign.

The *Blis* court held the Business Policy did not define the word "necessary" and thus the phrase was ambiguous. According to the court, because either party's interpretation could be permissible in light of both a technical reading of the policy and the actions of the parties, it was the not the duty of the court to decide whether Blis's advertising expenses were "necessary." *Citing Cram v. Sun Insurance Office, Ltd.*, 375 F.2d 670, 673-74 (4th Cir. 1967). Because the *Blis* court held there was a material issue of fact, it denied Hartford's motion for summary judgment with regard to the extra expense claims under the Business Policy.

In *Fold-Pak Corp. v. Liberty Mutual Fire Insurance Co.*, 784 F. Supp. 49, 57 (D.N.Y. 1992), a fire destroyed the Fold-Pak business. In its Complaint, Fold-Pak claimed it was owed "management expediting expenses" and "extra expenses" under a Liberty Mutual policy of insurance. The insurer took issue with Fold-Pak's claim for management expediting expenses of $200,250, as set forth in Fold-Pac's Proof of Loss. Fold-Pak claimed the amount because various individuals at Fold-Pak were required to divert from their normal activities in order to provide for the proper development and implementation of a plan of post-fire recovery. The insurer argued that the $200,250 portion of plaintiff's claim should be stricken in its entirety because there was no evidence plaintiff actually expended these additional amounts.

In response, Fold-Pak acknowledged that its officers' salaries did not increase as a result of the fire. Further, the CEO of the insured acknowledged that the $200,250 constituted "continuing salary expenses." After reviewing this evidence, the court concluded the insured offered nothing to rebut the insurer's arguments that the management expediting expenses were not incurred as a result of the loss. As a result, the *Fold-Pak* court granted Liberty Mutual's motion to strike that amount from the plaintiff's extra expense claim.

When faced with extra expense claims, insurance companies should closely follow the requirements contained in the applicable provisions of coverage with regard to the loss, and request documentation from the insured early in the claims process to identify the source of the insured's claims. Then, it is often prudent to retain forensic accountants, contractors and other experts who can interpret the documentation provided by the insured, and establish time periods to define the scope of exposure prior to proceeding with the actual valuation of the claim.

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

Woodcraft then filed suit against Georgia Casualty, claiming Georgia Casualty breached its contract and acted in bad faith by entering into the settlement with Atmos without first making Woodcraft whole. On appeal, the Georgia Court of Appeals found the "full compensation" or "made whole" rule does not apply when a commercial property insurer seeks compensation from the tortfeasor rather than from the insured. *Id.* at 338. Moreover, the Court of Appeals noted that Georgia Casualty did not seek to recover medical or disability payments. *Id.* at 339. Finally, the court noted that the tortfeasor, Atmos, did not have limited assets, so Woodcraft would not go unpaid because of the insurer's settlement. *Id.* In reaching its decision, the Court of Appeals explained:

> We cannot conclude that Georgia's public policy nevertheless conditioned Georgia Casualty's contractual subrogation rights upon the insurance company's first "ensuring" that Brad MacDonald and [Woodcraft] were made whole – including pursuing, on their behalf, Atmos through trial. Under the circumstances of this case, Georgia Casualty's exercise of "its subrogation 'Woodcraft rights against [Atmos][did] not deprive [Brad MacDonald] of [their] priority [as would be contemplated] under the full compensation rule. Moreover, to bar subrogation in this case [where the insureds simply determined they could not afford to litigate against the tortfeasor] would defeat one of the equitable purposes of subrogation: to deter wrong doing by placing the ultimate responsibility for paying an obligation on the person who in equity and good conscience ought to pay for it." For the foregoing reasons, Georgia Casualty's subrogation rights were not defeated.

*Id.* at 341 (*quoting Landrum v. State Farm Ins. Co.*, 241 Ga. App. 787, 790, 527 S.E.2d 637 (2000)).

The *Woodcraft* case is important because it distinguishes an insurer's subrogation rights and duties under commercial property insurance coverage from the rights and duties insurers may have when asserting subrogation rights when medical or disability insurance is involved. Because the insurer is not required to first make sure the insured is "made whole," the insurer is in a better position to negotiate subrogation recoveries from the tortfeasors, especially when the insured is free to pursue its own recovery against the tortfeasor to make itself "whole."

For more information on this article, contact Melissa Kahren at melissa.kahren@swiftcurrie.com or by calling 404.888.6179. ■

# Juries May Apportion Damages to Non-Parties

By: Sara M. Andrzejewski

The Georgia Supreme Court recently settled the controversy surrounding Georgia's apportionment statutes in favor of defendant landowners. In a third party criminal premises liability action, the Georgia Supreme Court reversed the trial court's decision that the apportionment statutes were unconstitutionally vague. *GFI Management Services v. Medina,* 2012 Ga. LEXIS 785 (Ga. October 15, 2012). In *Medina,* the plaintiff was shot at an apartment complex managed by the defendant. The defendant sought apportionment of damages between itself and the unidentified criminal assailant. The plaintiff objected to apportionment of damages on the grounds that the apportionment statute was unconstitutional. At trial, Judge Wong in the DeKalb State Court agreed with the plaintiff and declared the apportionment statutes unconstitutionally vague. The defendant appealed.

While the defendant's appeal was pending, the Georgia Supreme Court held that (1) juries should be allowed to apportion damages among a property owner and a criminal assailant in a premises liability case and (2) a jury instruction or special verdict form *requiring* a jury to apportion damages among the property owner and the criminal assailant did not violate the plaintiff's constitutional rights. *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012).

In *Couch*, the Georgia Supreme Court had an opportunity to comment on the 2005 revisions made to the Georgia apportionment statutes codified at O.C.G.A. §§ 51-12-31, 51-12-32 and 51-12-33. Under those statutes, when multiple parties are responsible for an injury, the jury apportions or assigns a percentage of fault to each party. The parties are then only liable for his or her share of the injury. That is, if a plaintiff is awarded a $100,000 jury verdict and Defendant A is held 40% liable, then Defendant A only pays $40,000.

The new apportionment statutes were met with continued disagreement from within the legal community in Georgia, which resulted in inconsistent rulings from the lower courts. Issues included whether the apportionment statute was constitutional, whether apportionment should apply in premises liability actions against landowners and whether damages could be apportioned when there was only one defendant. In *Couch*, the Georgia Supreme Court established the framework to resolve the confusion regarding the apportionment statutes.

In *Couch*, the plaintiff was assaulted by an unknown criminal assailant while staying at the defendant's hotel. The Georgia Supreme Court found that an assailant who evades hotel security to intentionally attack a guest was, at the very least, partially at "fault." The definition of "fault" became critical in determining the correct application of the apportionment statute to intentional criminal conduct. The plaintiff argued "fault," as used in the statute, did not include intentional conduct. Relying on the plain meaning of "fault," the Georgia Supreme Court disagreed and found the word "fault" included intentional conduct. Thus, whether named as a party to the lawsuit or not, the unknown assailant was required to be included with the others who may be at fault for purposes of apportioning damages among all wrongdoing parties.

After deciding *Couch*, the Georgia Supreme Court heard oral arguments on appeal for the *Medina* case. The Georgia Supreme Court reversed Judge Wong's decision in *Medina* in light of its ruling in *Couch*. The Georgia Supreme Court confirmed that jury instructions and special verdict forms requiring apportionment do not violate a plaintiff's due process or equal protection.

The effect of the recent *Medina* ruling is that even when a jury finds the landowner is negligent in failing to prevent an attack, they may consider the assailant's fault and apportion the damages award accordingly. Landowners should attempt to reduce their own liability by emphasizing the assailant's share of responsibility in causing the plaintiff's injuries. In doing so, rather than being held accountable for all of the plaintiff's damages, the landowner's liability will be reduced to reflect the portion of fault assigned to the criminal assailant.

For more information on this topic, contact Sara Andrzejewski at sara.andrzejewski@swiftcurrie.com or by calling 404.888.6155. ■

## Events

**Annual Property & Coverage Insurance Seminar**
Friday, November 9, 2012
8:45 a.m. - 3:00 p.m.
Cobb Energy Performing Arts Centre
Atlanta, GA

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The First Report is edited by Mike Schroder, Steven DeFrank and Melissa Kahren. If you have any comments or suggestions for our next newsletter, please email mike.schroder@swiftcurrie.com, steven.defrank@swiftcurrie.com or melissa.kahren@swiftcurrie.com.