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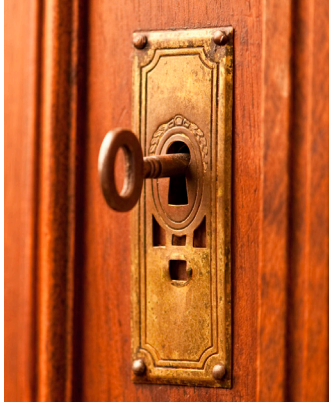

The 1st Party Report

A Property & Insurance Update

Fall 2014

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Georgia Cracks Down on the Use of "Runners" to Solicit Injury Clients

By: Amer H. Ahmad

Our June 11, 2014, client alert entitled "Stiffer Penalties for Use of Runners," touched on recent legislation enacted by the Georgia General Assembly assessing heightened penalties for soliciting accident victims or selling information regarding motor vehicle accidents. This article will trace the development of that law and its anticipated future application.

Georgia House Bill 82, aimed at curbing the use of "runners" to solicit injured clients following auto accidents, was signed into law by Governor Nathan Deal on April 21, 2014. "Runners" are individuals who engage in "ambulance chasing" by contacting injured victims or grieving families to persuade them to use a particular lawyer or health care provider to make an insurance claim. In turn, the runners receive kickbacks from those lawyers and health care providers for each client referred.

The Georgia State Bar already tried to address this issue in Georgia Rule of Professional Conduct 7.3. Per the rule:

> "A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:
>
> . . . . the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; . . . or the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer."

Rule 7.3

In addition, Rule 7.3 further states that "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client." The Georgia legislature codified Rule 7.3 in the original O.C.G.A. § 33-24-53, and also included restrictions on health care providers using referral or recommendation services to obtain clients as well.

The penalty for violating Rule 7.3 and O.C.G.A. § 33-24-53 was the same for both health care providers and lawyers. Violations were treated as misdemeanors and lawyers or health care providers were penalized with suspension or disbarment/revocation of license. However, local prosecutors were reluctant to enforce criminal penalties where the underlying criminal offense was only a misdemeanor. In one of the few cases where lawyers were disciplined for utilizing runners, that discipline only came about because federal agents searched the attorney's offices pursuant to a warrant and seized a "runner book" detailing payments to non-lawyers for referrals. *See In re Sinowski*, 290 Ga. 303, 304 (2011). The attorneys in that case were ultimately disbarred in 2011, after approximately 10 years of litigation.

Improper solicitation of accident victims through "runners" is not a problem limited to Georgia. In 2011, Texas created new civil remedies for "barratry," defined as "soliciting employment, either in person or by telephone, for himself or another" in the context of contacting accident victims. Tex. Penal Code Ann. § 38.12(a)(2). Texas' statute punishes barratry as a misdemeanor on the first offense and as a felony on any subsequent offense. Tex. Penal Code Ann. § 38.12(g). In Florida, the Attorney General's Office released a statewide grand jury report discussing the fraud associated with patient solicitation, finding a "strong correlation between illegal solicitation and the commission of a variety of frauds, including phony or inflated billing, unnecessary or inappropriate diagnostic testing, and trumped up lawsuits." *See* The Office of

the Attorney General, Statewide Grand Jury Report, Second Interim Report of the Fifteenth Statewide Grand Jury, No. 95,746 (Fla. 2000), available at http://www.florida-lawblog.com/auto_accident_law_in_florida. Since the release of that report, Florida's legislature has debated various corrections, including restricting access to police reports documenting motor vehicle accidents or eliminating coverage for chiropractic care under Florida's personal injury protection statute. *See* Battling Against Personal Injury Protection Fraudulent Activities and Abuses in the State of Florida (2012), http://www.smithrolfes.com/Uploads/files/Battling%20Against%20PIP%20Fraudulent%20Activities%20and%20Abuses%20in%20the%20State%20of%20Florida.pdf.

Mirroring the efforts of Texas and Florida, Georgia's most recent attempt to crack down on the use of runners replaces the existing O.C.G.A. § 33-24-53 with a new code section that continues to prohibit the solicitation, release, or sale of car wreck information, including the personal information of individuals involved in an accident. The new statute states it is unlawful for "any person in an individual capacity or in a capacity as a public or private employee or any firm, corporation, partnership, or association to act as a capper, runner, or steerer for any practitioner or health care service provider." While the previous statute penalized lawyers or health care providers with suspension or disbarment/revocation of license for utilizing runners, the new code section punishes the first offense as a misdemeanor with at least 30 days in jail and a fine of $1,000 or less. A second offense constitutes a felony and brings a maximum of 10 years in prison and a fine up to $100,000 per violation.

While the enactment of the amended O.C.G.A. § 33-24-53 is a step forward in preventing and punishing those lawyers and health care providers that utilize "runners," the new law's ultimate success will hinge upon law enforcement officers and prosecutors exercising their new authority. In the meantime, insurers should not wait for local prosecutors or the legislature to combat fraud in Georgia. Using policy provisions as well as the state and federal court system, insurers can actively combat fraud, seek recovery of payments made, and even seek monetary damages from those engaged in questionable practices. Swift, Currie, McGhee & Hiers has a track record of experience in serving our clients in investigating and deterring fraudulent insurance activities and welcomes any opportunity to meet your needs.

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Anticipation of Litigation: A Practical Guide to Determining When Claim File Materials are Not Discoverable

By: Melissa K. Kahren

For every claim, insurance companies open a claim file and record information obtained during the adjustment of the claim. As the claim progresses, the claim file materials may include opinions and conclusions regarding the scope and extent of the claim and whether coverage is afforded under the policy for the insured's loss. In cases where the insurer and the insured are unable to agree about the resolution of the claim, litigation can result. As a consequence, at least some portions of the claim file will likely be revealed to the insured during the course of discovery for the litigation. Insurers, therefore, should be aware of events that may trigger legal privileges and protections as to production of the entire claim file, especially if the insurer begins to believe the claim may be headed towards litigation.

The Federal Rules of Civil Procedure provide as follows:

> A party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

Fed. R. Civ. P. 26 (b)(3) (A). The Georgia rule is virtually identical. *See* O.C.G.A. § 9-11-26(b)(3). Once the insurer reasonably anticipates litigation, claim materials are protected, unless the insured can show a need for the documents and undue hardship in obtaining the information by other means. Fed. R. Civ. P. 26(b)(3)(B). In order to determine whether a document was prepared in anticipation of litigation, courts look to whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation, . . . (and not) in the regular course of business." *Pleasant Grove Missionary Baptist Church of Randolph County, Inc. v. State Farm and Fire Cas. Co.,* 2012 WL1997916, at *4 (M.D. Ga. 2012). To answer this question, courts consider the facts of the claim on a case-by-case basis. *Id.*

Generally speaking, preliminary claim notes and other materials generated by an insurance company during the initial phases of a claim investigation will be discoverable since they are created in the regular course of the insurance company's business. *Carver v. Allstate Ins. Co.,* 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Pleasant Grove,* 2012 W.L.1997916, at *4. Although the early stages of claims adjustment focus on whether to pay the claim, at some point an insurance company may change the focus of its activities "from mere claims evaluation to a strong anticipation of litigation." *Carver*, 94 F.R.D. at 134. When "the probability of litigating the claim is substantial and imminent," the insurance company's claim file materials will be protected from that point forward because they were prepared in anticipation of litigation, and, therefore, are protected by the work product privilege. *Id.*

Dual Agents: What They Know and Do Can Hurt You

By: Audrey S. Eshman

A recent opinion from the Court of Appeals of Georgia reinforces the potential dangers of using dual agents to sell policies. In *Assaf v. Cincinnati Insurance Company,* the Court held that an insurer could be obligated to provide coverage specifically rejected on the application where a dual agent forged the insured's signature on an insurance application. 327 Ga. App. 475 (2014), *cert. denied* (Sept. 8, 2014).

In *Assaf,* the insured, Eugene F. Assaf, contacted an independent insurance agent to purchase automobile liability insurance and a personal liability umbrella policy. Assaf spoke with one of the agents and allegedly informed her that he wanted the umbrella policy to include $1,000,000 of UM coverage. Assaf subsequently visited the agent's office where he signed documentation pertaining to the insurance and received copies of the automobile policy and umbrella policies issued to him by the insurer. One of the documents purportedly signed included a statement that read, "I reject Excess Uninsured/Underinsured Motorists Coverage under this policy." *Id.* at 477. Subsequently, Assaf was struck by an underinsured motorist. Assaf filed a personal injury action against the driver and served Cincinnati Insurance, his automobile and excess carrier, with a copy of the Complaint. Cincinnati contended the excess policy did not provide for the UM coverage requested. Assaf amended his complaint to allege breach of contract against Cincinnati. Assaf maintained that his signature on the application was forged and that he never signed the form rejecting excess UM coverage under the umbrella policy. *Id.* at 476.

Cincinnati moved for summary judgment arguing: (1) it reasonably relied on the application in issuing coverage; (2) it could not be held liable for the alleged wrongful acts of an independent insurance agent; and (3) Assaf was precluded from seeking coverage because he failed to read the policies issued to him. The State Court of Fulton County agreed with Cincinnati and granted summary judgment in favor of the insurer. *Id.* at 560.

Various triggering events may signal when the insurance company's activities shift from merely adjusting the claim in the ordinary course of business to anticipating that a lawsuit will arise. For example, when an insurance company determines that a fire's cause may be suspicious, and therefore refers the claim to its special investigative unit, claim file materials created after that point are deemed protected. *Id.* at 132, 135. Another triggering event may occur when the claim is referred to subrogation counsel once a cause and origin investigator determines the fire was caused by a faulty product. *Allstate Ins. Co. v. Ever Island Elec. Co.*, 2007 WL2728979, at *6 (N.D. Ga. 2007).

As a practical matter, what does this mean for claims adjusters and investigators when they are investigating a claim? Claims adjusters and investigators should keep in mind that during the preliminary investigation at the early stages of adjusting the claim, observations, analyses, and conclusions regarding the claim will likely be discoverable if the claim should go into litigation. As a consequence, claims handlers should be careful not to speculate or offer opinions beyond the scope of their expertise regarding any aspect of the claim. Rather, claim handlers should focus on providing detailed factual information regarding the scope and extent of the loss, as well as any other facts observed that are related to the loss.

For example, if the claim results from a fire that may have occurred under suspicious circumstances, claim handlers should avoid making comments based entirely on speculation as to potential causes of the fire, particularly where the handler does not have the experience or training to support such opinions. Similarly, claim handlers should not make statements as to who may have caused the loss if no evidence exists to support those statements during the preliminary investigation. Making such unsupported comments could result in an uncomfortable deposition down the road. Again, the insured's attorney will likely be entitled to a copy of the early claim file materials and claim notes generated during the routine claim adjustment process. Any comments contained in these documents and notes will be available for use at a deposition, and may ultimately be presented to a jury for consideration.

As a consequence, the claim notes should focus on careful documentation of the factual evidence supporting the insurer's questions about the claim, as well as what those questions may be. Likewise, if the facts developed during the investigation raise questions about the validity of any aspect of the claim, or whether coverage even exists, then the facts and evidence that support such questions should be documented. The insurance company should then refer the claim to a special investigation unit and/or an attorney in a timely manner for further investigation. Following these steps should help create a clear indication of when the insurance company reasonably anticipated litigation so the insurance company's investigatory materials from that point forward will be protected under the work product privilege.

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The Court of Appeals of Georgia disagreed with the State Court of Fulton County and reversed the grant of summary judgment to Cincinnati. *Id.* In so doing, the Court of Appeals found that, where an insurer and insured are represented by a dual agent, O.C.G.A.§ 10-6-56 imputes to the principal, "all representations made by his agent in the business of his agency and also by his willful concealment of material facts" even if "they are unknown to the principal and known only by the agent." *Id.* The Court held that, even if a dual agent forged an insured's signature on an application, the agent's knowledge that the signature was not authentic would be imputable to the insurer and the insurer would be bound to provide the UM coverage that it thought was rejected. *Id.* at 479. Therefore the Court found Cincinnati *could* be liable in contract for the actions of the dual agent. However, the Court noted the insurer would not be responsible for the tortious act of the agent in committing the forgery. *Id.* As such, the Court determined the principal's liability for the wrongful acts of a dual agent is limited to actions in contract and not to actions in tort. *Id.*at 480-81.[1]

Notably, the Court also rejected the argument that the insured's failure to examine the policy precluded reformation of the contract to add additional coverage. *Id.* at 481. First, the knowledge of the agent that Assaf requested UM coverage would be imputed to the carrier if the agent was acting as a dual agent. *Id.* Second, Georgia law requires that automobile policies provide UM coverage equal to the policies' overall limits in the absence of a written waiver. *Id.* at 477 (citing O.C.G.A.§ 33-7-11(a)(1)). Thus, in the event the written waiver was forged, Assaf could not be barred "from seeking to recover benefits pursuant to such coverage as was provided to him as a matter of law." *Id.* at 482. If his written waiver was found to be fabricated, his failure to discover or object to the exclusion would not serve as a bar to the insured seeking to recover benefits. *Id.*

This case reinforces the potential dangers of dual agency, particularly with respect to application or other underwriting coverage issues. Insurers who issue policies through dual agents should carefully examine the activities of both the insured and the agent when making ultimate decisions as to these types of coverage defenses. To determine whether an agent is a dual agent, adjusters should examine:

(1) Whether the agent is permitted to sell policies for several insurers or whether the agent it limited to selling policies of a single insurer. If an agent is only permitted to sell policies of a single insurer, the agent is likely a "captive" agent and is not considered a dual agent. Importantly, captive agents may also bind an insurer with respect to coverage so an adjuster for an insurer who uses captive agents should still interview the agent to determine the extent of his or her knowledge when presented with application or other underwriting coverage defenses.

(2) Whether the agent has the actual authority from the insurer to bind policies on behalf of the insurer. Actual authority would most likely be granted through an agency contract. However, if the agency agreement expressly prohibits an agent from binding coverage, then there is likely no dual agency and the agent will likely be considered the agent of the insured.

(3) Whether the insurer has held the agent out to the public as "its agent." This includes listing the agent on the insurer's website as its agent, permitting the agent, even passively, to issue binders, certificates of insurance, and other proof of coverage, and permitting the agent to execute policy documents as the insurer's "authorized agent."

There is no "bright line rule" to determine whether an agent is a dual agent and courts will evaluate each instance on a case-by-case basis. However, a good question to ask yourself would be "has the insurer represented the agent as having the authority to bind coverage for the insurer, even temporarily?" If the answer is yes, then the agent may be a dual agent and additional investigation should be conducted to determine the agent's knowledge and activities with respect to the application and other coverage issues.

For more information on this topic, contact Audrey Eshman at audrey.eshman@swiftcurrie.com or 404.888.6178.

[1] The Court of Appeals also relied on its decision in *Southern Guaranty Ins. Co. v. Cotton States Mut. Ins. Co.*, 176 Ga. App. 140 (1985). In *Southern Guaranty,* the Court addressed a similar factual situation where the insured alleged her signature on the coverage rejection form had been forged. The Court held that "[a] principal may be held responsible in contract for the misrepresentations of a dual agent upon which the other principal relied to his detriment." *Id.* at 144. However, the Court limited the insurer's liability to actions under contract, and held that "neither principal is liable to the other for the tortious acts of the dual agent, 'where the opposite principal is not in complicity with the agent or in no way participates in the tortious act.'" *Id.* (quoting *Hodges v. Mayes*, 240 Ga. 643, 644, 242 S.E.2d 160 (1978)).

Events

Property and Coverage Insurance Seminar: "Back to School with Swift Currie"
November 7, 2014 — 8:45 am - 3:00 pm
Cobb Energy Performing Arts Centre
Atlanta, GA

Joint Litigation Luncheon Presented with McAngus Goudelock & Courie
December 3, 2014 — 11:00 am - 2:30 pm
Raleigh, NC

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