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THE FIRST PARTY REPORT

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LATE AMENDED ANSWER MAY NOT CURE FRIVOLOUS DEFENSE

BY: CHRISTY MAPLE

Earlier this year, the Eleventh Circuit Court of Appeals considered whether a defendant who had, throughout the lawsuit, denied that he breached a duty to the plaintiff but then, on the eve of trial, amended his answer to admit liability, was liable to the plaintiffs for attorney's fees and litigation expenses for asserting frivolous defenses. *Showan v. Pressdee*, 922 F.3d 1211 (11th Cir. 2019).

In *Showan*, a Krispy Kreme employee, while in the course of his employment, was driving when he rear-ended the plaintiff's vehicle while she was stopped at a traffic light, causing plaintiff's vehicle to strike the vehicle in front of it. The plaintiff suffered serious injuries, and she was transported via ambulance to the emergency room.

Within days after the accident, Krispy Kreme issued the employee a corrective action report acknowledging that the employee "was at fault" for the accident. Krispy Kreme also prepared an insurance claim summary indicating that the plaintiff was "0%" negligent.

The plaintiff filed a personal injury lawsuit against Krispy Kreme and the employee. In their answer, the defendants asserted they did not breach a duty to the plaintiff, the plaintiff was comparatively negligent, the plaintiff assumed the risk, and the plaintiff's injuries were not foreseeable. Similarly, in responses to requests for admission, the employee refused to admit his actions caused or contributed to the collision or the plaintiff suffered injuries. At his deposition, however, the employee testified the plaintiff's vehicle was stopped at a traffic light and she did nothing to cause to the collision.

> "Frivolous defenses may not always be "cured" by a late amended answer.

Shortly before trial, the defendants moved to amend their answers "to streamline the issues to be tried." The district court granted the motion, but stated the defendants' amended answer did not preclude the plaintiff from seeking attorney's fees and costs pursuant to Georgia state law should she prevail at trial. The district court explained that this condition was "appropriate because this case is eighteen months old and only now, on the eve of trial, are Defendants willing to admit significant liability of which they have arguably been aware since the collision at issue." 922 F.3d at 1214.

The plaintiff obtained a $330,000 verdict at trial. Following the verdict in her favor, the plaintiff argued she was entitled to attorney's fees under Georgia law because the defendants presented frivolous defenses and acted in bad faith during the litigation. Specifically, she claimed the defendants raised the affirmative defenses of comparative negligence and assumption of risk despite knowing the Krispy Kreme employee was solely at fault. As the plaintiff put it: "It was not until the eve of trial, and after Plaintiff was forced to conduct discovery and mediation under Defendants' false pretenses, that Defendants moved to amend their Answers to recant these frivolous claims and defenses." 922 F.3d at 1222.

The district court denied the plaintiff's motion for attorney's fees under O.C.G.A. § 9-11-68(e), which provides the prevailing party may request the finder of fact determine whether the opposing party presented a frivolous claim or defense. The statute further provides: "In such event, the court *shall* hold a separate bifurcated hearing at which the finder of fact must make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses." (emphasis added.) Such damages may include reasonable attorney's fees and expenses of litigation.

While the jury deliberated, the district court dismissed the plaintiff's claim for attorney's fees, concluding as a matter of law, the pleadings filed by the defendants

were not frivolous. On appeal, the Eleventh Circuit – noting the statute's use of the word "shall" – concluded the plaintiff was entitled to a bifurcated hearing on the issue of the defendants' alleged frivolous defenses. 922 F.3d at 1227-28. The Eleventh Circuit therefore remanded the case for a new trial consistent with this position.

Showan makes it clear that a defendant cannot "cure" asserting a frivolous defense throughout the pendency of the lawsuit by amending an answer on the eve of trial. A defendant who denies breaching a duty and asserts comparative negligence by the plaintiff may be subject to a penalty of attorney's fees and litigation of expenses, even if the defendant amends his answer prior to trial. Thus, insurers and their defense counsel should take caution when defending cases of clear liability to avoid the potential assessment of attorney's fees for asserting frivolous defenses.

LOOPHOLES FOR ROOF HOLES: RECENT TRENDS IN GEORGIA ROOFING CLAIMS

BY: SEAN FARRELL

More and more roofing claims are being handled by public adjusters who also own or are affiliated with roofing contractors despite the inherent conflict of interest. This situation negatively affects insurers because a public adjuster who also operates as a roofing contractor is financially incentivized to inflate claims and propose roofing work, such as a total roof repair, when the roof may not require this level of work. While there are provisions of the Georgia Code which allow public adjusters who also operate roofing companies to handle claims on the behalf of insureds, insurers need to make sure that these contractor entities and public adjusters are following the appropriate formalities when conducting themselves during a claim. If public adjusters are not abiding by these regulations, Georgia law allows insurers and other members of the public to seek recourse.

> "Public adjusters must comply with corporate formalities.

The Fair Business Practices Act includes a section which governs residential roofing contractors. Specifically, O.C.G.A. § 10-1-393.12, states, in part:

> (e) A residential roofing contractor shall not represent or negotiate, or offer or advertise to represent or negotiate, on behalf of an owner or possessor of residential real estate on any insurance claim in connection with the repair or replacement of roof systems. This subsection shall not apply to a public adjuster licensed under Chapter 23 of Title 33.

While the first sentence seems to prohibit contractors from handling insurance claims on behalf of insureds, there is an exception for public adjusters found in the last sentence. That exception creates several problems in the arena of roofing claims.

The House Bill, which amended the Fair Business Practices Act to include this section, was presented and enacted in 2011. The Bill was enacted to provide that certain acts by residential roofing contractors as they relate to insurance claims shall be considered violations of Fair Business Practices Act. While not discussed in the bill itself, the exception in this specific provision considers that public adjusters are licensed and are required to follow certain formalities and requirements under Chapter 23 of Title 33, which governs public adjusters generally.

As an example, Tom Smith may be a public adjuster who handles roofing claims. His clients allow him to evaluate claims and submit them to insurance companies on their behalf. Smith also operates a roofing company called Tom Smith Roofing Company, LLC, and he is the sole owner of the company. Smith could use his roofing company to conduct work for his clients after he, as a public adjuster, submits claims to his clients' insurers. As long as Smith is operating in his capacity as a public adjuster when he submits and negotiates claims to the insurance companies on behalf of his clients and is compliant with the requirements to act as a public adjuster, he is generally compliant with O.C.G.A. § 10-1-393.12.

In contrast, if Smith appears to be operating in his capacity as the roofing contractor or is inconsistent with how he communicates with the insurer, Smith may not be compliant with O.C.G.A. § 10-1-393.12.

Tom Smith Roofing Company, LLC, is obviously owned by Tom Smith, the public adjuster, and, while he is submitting claims to the insurance company as a public adjuster, the same person is operating the roofing company and responsible for performing the work. Yet, in order to be compliant with this section, the corporate formalities must be maintained. Insurers should make sure that letterhead and emails are coming from the public adjuster, and not the contractor. Any checks issued should be to the insured and/or the public adjuster, not the contractor.

If an insurer, or an attorney handling a roofing claim on behalf of an insurer, believes a public adjuster is violating the corporate formalities while submitting a claim, there is recourse for these violations under Georgia Law.

Under O.C.G.A. § 33-23-36, illegal or improper conduct can be reported to the Georgia Office of Insurance and Safety Fire Commissioner. The relevant section states the following:

> The Commissioner may upon his or her own motion and shall upon a written complaint signed by a citizen of this state and filed with the Commissioner inquire into any alleged illegal or improper conduct of any licensee or inquire into the question of whether a licensee is untrustworthy or not competent or not qualified to act as a licensee under this chapter.

Accordingly, if public adjusters are muddying the waters during the claims process by involving the roofing companies that they own, insurers can consider filing a complaint with the Georgia Office of Insurance and Safety Fire Commissioner. A proactive first step to this process is for the insurer to send a letter indicating that it will only communicate with the public adjuster and it will only issue checks on the claim to the insured and/or public adjuster. This correspondence should clear up the issue while also serving as supporting evidence for the complaint to the Georgia Office of Insurance and Safety Fire Commissioner.

At this time, the Georgia legislature has not closed this loophole, but the Code allows for recourse through the Commissioner. Unless the Code changes on this issue, insurers are best served by working with the Commissioner on these issues.

NAVIGATING THE TIDE OF FAULTY WORKMANSHIP CLAIMS IN ALABAMA

BY: BRANDON CLAPP

One of the most litigated coverage questions involves whether a commercial general liability (CGL) policy covers claims for construction defects. Whether a contractor's faulty workmanship constitutes an occurrence is a difficult question, and courts across the country have answered it in a variety of ways. In a minority of jurisdictions, damages occurring as a result of faulty workmanship constitute an occurrence, or accident, so long as the insured did not intend for the damage to occur. However, a majority of jurisdictions hold faulty workmanship is not an occurrence, and therefore, not covered under a standard CGL policy. Although faulty workmanship is not an occurrence in the majority of jurisdictions, an accident, or other property damage, caused by faulty workmanship is generally considered an occurrence.

Alabama follows the majority rule and faulty workmanship is not an occurrence. The state of the law in Alabama on coverage for construction defects was most recently discussed in *Nationwide Mut. Fire Ins. Co. v. The David Group, Inc.*, --- So. 3d ----, 2019 Ala. LEXIS 52 (Ala. May 24, 2019).

In *The David Group*, Saurin and Valerie Shah bought a newly constructed house from The David Group. After moving into the house, the Shahs filed a lawsuit against The David Group alleging construction defect claims. The David Group's insurer, Nationwide, provided a defense under a reservation of rights until Nationwide completed its investigation and determined the Shahs' claim did not allege an "occurrence" under the CGL policy.

After Nationwide withdrew its defense, The David Group filed a declaratory judgment action against Nationwide requesting the trial court declare Nationwide owed a duty to defend and a duty to indemnify it in the lawsuit brought by the Shahs. The lawsuit between the Shahs and The David Group was ordered to arbitration and resulted in an award for the Shahs in the amount of $12,725.00.

In the declaratory judgment action, the trial court ruled that The David Group "was entitled to coverage and indemnification under the CGL policy not only for the damages awarded against it in the [homeowners'] action but also for its attorney fees and expenses incurred in defending the [] action." *The David Group,* at *4-5. Nationwide appealed to the Alabama Supreme Court.

On appeal, Nationwide argued The David Group was not entitled to coverage under the CGL policy because the defects alleged referred to nothing more than faulty work performed by the insured, which were not occurrences that would trigger coverage. The Alabama Supreme Court agreed and reversed the trial court's decision.

In its opinion, the Court explained "faulty workmanship itself is not 'property damage' 'caused by' or 'arising out of' an 'occurrence.'" *Id.* at *7 (internal citations omitted). The Court recognized "faulty work may lead to an occurrence and thus trigger coverage . . . if it subjects personal property or other parts of the [damaged] structure to 'continuous or repeated exposure' to some other 'general harmful condition' . . . and, as a result

of that exposure, personal property or other parts of the structure are damaged." *Id.* at *8 (internal citation omitted). Thus, the Court reaffirmed there is no coverage for replacing poor work, but there may be coverage for repairing resulting damage caused by the poor work. *Id.* This inquiry necessarily depends on the nature of the damage that results from that faulty work.

Applying this analytical framework, the Court looked to the Shahs' complaint and the arbitrator's award to determine whether the claim was covered. Significantly, the Court held the Shahs' complaint clearly alleged faulty workmanship, but at no point did the Shahs allege additional or resulting damage to their house or to their personal property as a result of that faulty workmanship. *Id.* at 12. Further, the Court noted the arbitrator in the underlying action concluded that the Shahs' home did not suffer defects outside of some minor damage. *Id.*

> "Faulty work itself is not an occurrence in Alabama.

Based on this record, the Court determined the evidence did not support the conclusion that the Shahs suffered damages because of an occurrence caused by faulty workmanship. *Id.* at 12-13. Thus, there was no evidence of property damage or personal injury resulting from an occurrence necessary to trigger coverage under the Nationwide CGL policy. *Id.*

The David Group decision demonstrates the limitations for coverage in claims involving faulty workmanship in Alabama. The takeaway for insurers analyzing these types of claims is the importance of determining whether the claim presents additional damage caused by the allegedly faulty work. If the claim merely seeks remediation of the faulty work, there is no coverage under a CGL policy in Alabama.

DEFINITIONS MATTER: AN (UN)AMBIGUOUS CAUTIONARY TALE

BY: KORI ESKRIDGE

Definitions contained in an insurance policy can make or break an argument regarding coverage in a litigated claim. While it is not practical to define every word in an insurance policy, there are many instances when seemingly unambiguous terms require interpretation by the court. When this happens, the insurer enters into perilous territory and often finds itself on the losing end of the argument.

In Georgia, an insurance policy term is given its plain meaning when the provisions are clear and unambiguouos. *Taylor Morrison Svcs., Inc. v. HDI-Gerling America Ins. Co.*, 293 Ga. 456, 459-60 (2013). Policy definitions may be included by the insurer, even if the term is defined in an unusual or uncommon way. *Id.* A policy term is ambiguous if it is susceptible to two or more reasonable interpretations. *Auto-Owners Inc. Co. v. Neisler*, 334 Ga. App. 284, 286-87 (2015).

The rules of construction do not favor the insurer, as the drafter of the contract. Any ambiguities and potential coverage exclusions are strictly construed against the insurer. In addition, the contract is read and interpreted in accordance with the reasonable expectations of the insured. This analysis often results in policy provisions and coverage exclusions being interpreted in favor of the insured.

In the recent case of *Wilkinson v. Ga. Farm Bureau Mut. Ins. Co.*, 2019 Ga. App. LEXIS 514 (Sep. 20, 2019), the Georgia Court of Appeals addressed a homeowners policy's terms and definitions after an accident involving two friends, Mr. Buchanan and Mr. Wilkinson. Mr. Buchanan purchased a Ford truck. Mr. Wilkinson learned of the purchase and asked his friend if he could look at the truck. Mr. Wilkinson and his wife went to Mr. Buchanan's home to see the truck. When they arrived, Mr. Buchanan drove the truck forward approximately eight feet so Mr. and Mrs. Wilkinson could inspect the truck. In doing so, Mr. Buchanan applied the parking brake because his driveway was on an incline.

The parties decided to look at the truck's engine. Mr. Buchanan told Mrs. Wilkinson to pull the truck's hood latch, but warned her to avoid disengaging the parking brake. Mrs. Wilkinson looked under the truck's dashboard and mistakenly pulled the parking brake, which caused the truck to "take off." Unfortunately, Mrs. Wilkinson was holding on to the door jamb when this occurred, causing her to fall and her ankles were run over by the truck. Mrs. Wilkinson sustained multiple serious injuries.

The Wilkinsons filed suit against Mr. Buchanan for claims of negligence and loss of consortium. Upon notice of the lawsuit, Mr. Buchanan's homeowners insurer, Georgia Farm Bureau, filed a declaratory judgment seeking a determination of whether it owed a duty to defend Mr. Buchanan in the personal injury lawsuit. Ultimately, Georgia Farm Bureau sought

declaratory judgment on two issues: 1) whether coverage was excluded for injuries arising out of or in connection with a business, and 2) whether coverage was excluded for injuries arising out of the ownership, maintenance, use, loading or unloading of motor vehicles. The trial court granted summary judgment in favor of Georgia Farm Bureau, finding the claimed injuries were excluded from coverage. The Wilkinsons appealed.

> “Even common words in policies can be construed as ambigious.

The Court of Appeals' analysis focused on whether the injuries were caused by the "use of a motor vehicle." The policy did not define the phrase "use of a motor vehicle." However, the Court of Appeals relied on legal precedent to conclude the term "use" as found in the policy was previously defined as "to employ for some purpose." *Hays v. Ga. Farm Bureau Mut. Ins. Co.*, 314 Ga. App., 110, 112 (2012). In the *Hays* case, the Court of Appeals developed a three-part analysis to determine whether an injury arose out of the use of a motor vehicle consisting of 1) the physical proximity of the injury site to the vehicle; 2) the nature of the conduct which caused the situation of jeopardy; and 3) whether the vehicle was being utilized in the plain and ordinary sense of the word. *Id.* at 112-13.

Employing this analysis, the Court of Appeals determined the trial court erred in granting summary judgment in favor of Georgia Farm Bureau. The Court of Appeals held the evidence did not show the vehicle was in "use" as a vehicle at the time of the accident, but instead "merely showed that the parked truck was being inspected at the time of the accident." *Wilkinson,* at *8. Thus, because the truck was not "in use as a motor vehicle" at the time of the incident, the exclusion was inapplicable and the Court reversed the trial court's summary judgment order.

Wilkinson serves as a cautionary reminder that even common words like "use" can be the key factor to a determination of coverage. It is important for insurance professionals to be well-versed in their company's policy language and to pay special attention to the definitions provided in the policy, especially when making decisions about the applicability of exclusions and other provisions that may limit or exclude coverage.

EVENTS

2019 Client Litigation Seminar: Swift Currie University
Cobb Galleria Centre
Nov. 15, 2019
9:15 a.m. - 3:30 p.m.

Webinar: Petition for Medical Treatment -- A Complete Overview of the Process, Utility and Best Practices for Avoiding Pitfalls
Dec. 10, 2019
1-2 p.m. ET

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