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THE FIRST PARTY REPORT

A PROPERTY & INSURANCE UPDATE FALL 2020

COVID-19 DELAYS IN CRIMINAL AND TRAFFIC CASES AND THE IMPACT ON CIVIL MATTERS

BY: GILLIAN CROWL

COVID-19 continues to impact our legal system. While some courts have started to reopen and adjust to the "new normal," many courts are still closed for traffic cases, and many criminal cases will not be tried or resolved for months. For example, Fulton County State Court in Atlanta canceled all traffic citation hearings until further notice, and there is currently no scheduled date to reopen the court for traffic cases. In some counties, criminal charges have not gone to arraignment, and the Supreme Court of Georgia is not expected to allow courts to convene grand juries until at least November. This will further delay the resolution of charges and disposition of citations and will result in an inevitable backlog of criminal and traffic cases. This backlog will impact deadlines and investigations in civil cases.

> " Delay in resolving these matters will impact the investigation of accidents.

Importantly, the delay in resolving criminal cases will also result in extended statutes of limitations in civil cases. O.C.G.A. § 9-3-99 provides:

> The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years . . . .

A traffic citation issued by an officer in connection with a motor vehicle accident commences prosecution of the alleged misdemeanor traffic offense, and § 9-3-99 extends the time for filing a related tort action while there are pending criminal charges. *See Williams v. Durden*, 347 Ga. App. 363 (2018).

Before COVID-19, when a party was issued a citation arising from a motor vehicle accident, those matters generally resolved within 45-60 days, resulting in only a short extension of the statute of limitations. However, with COVID-19 requiring that courts close and delaying traffic citations for hearings, the statute of limitations will continue to be tolled while the prosecution of the traffic citation remains pending. For more serious charges – such as DUIs, assault and vehicular homicide – months of no arraignments or grand juries, and the resulting backlog of cases, will delay the ultimate resolution of criminal charges and continue to toll the civil statutes of limitations. As a result, claims professionals and attorneys will need to closely monitor related criminal cases and traffic citations to be cognizant of the proper statute of limitations and keep claim files open accordingly.

The delay in resolving criminal and traffic matters will also impact the investigation of accidents. Without a disposition in a related criminal case, investigative agencies are not required to produce records through open records requests. Generally, the Georgia Open Records Act provides for public access to records prepared, maintained or received by a government agency, including a police department, the Georgia State Patrol or the Georgia Bureau of Investigation. *See* O.C.G.A. § 50-18-70. However, O.C.G.A. § 50-18-72 limits access to agency records when prosecution of a related criminal case or traffic citation is still pending.

> (a) Public disclosure shall not be required for records that are:
> . . .
> (4) Records of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports; provided, however, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving such investigation and prosecution has become final or otherwise terminated . . . .

The open records departments of state agencies will confirm whether there is a related criminal matter or require that the entity requesting the public records provide proof the prosecution of the related criminal matter is final before producing any records in response to an open records request. Therefore, if a citation was issued or an arrest was made, requests for scene photographs taken by investigating officers, dash camera and body camera videos depicting the condition of the parties at the scene, written statements obtained from parties and witnesses, physical evidence and detailed investigative reports will be denied until the related criminal or traffic matter is resolved.

In cases of disputed liability, lack of access to public records could delay the investigation of claims. To the extent a claimant chooses to file suit early or make a pre-suit demand, the lack of access to this information can also result in losing access to valuable information needed to defend a claim or lawsuit.

If suit is filed before the resolution of a related criminal case, consider requesting a stay of the civil suit pending the resolution of the criminal case. *See U-Haul Co. of Arizona v. Rutland*, 348 Ga. App. 738, 752 (2019). Although a stay is not automatic, it may be worth requesting in the right case to avoid prejudice.

GEORGIA COURT BRINGS CLARITY TO ASSIGNMENTS OF BENEFITS IN GEORGIA

BY: ALEX MIKHALEVSKY

Recently, Georgia insurers have seen a growing trend of contractors and public adjusters pursuing claims and suing insurers directly based on the insured's purported assignment of a claim or benefits due under an insurance policy. This often has a substantially negative impact on the claims handling process and on the policyholder because the assignee (the insured's contractor or public adjuster who took the assignment) will use the assignment to drastically increase the scope of the loss for its own financial benefit without completing the full scope of repairs paid by the insurer or by performing substandard work in order to increase its profits.

States like Florida, where assignments became commonplace over the last few years, addressed the issue head on through the legislature. *See* Fla. Stat. 627.7152.

However, assignments have not been used extensively in Georgia until recently, and neither the Department of Insurance nor Georgia's legislature have addressed the validity of assignments in Georgia. Presently, Georgia courts have little guidance on how to address assignments in first-party insurance claims.

Until recently, Georgia courts have relied on archaic case law from the early 1900s or judicial opinions addressing assignments in connection with health insurance claims. *See e.g., Georgia Co. Op. Fire Assn. v. Borchardt & Co.*, 123 Ga. 181 (1905); *Allianz Life Ins. Co. of N. Am. v. Riedl*, 264 Ga. 395, 397 (1994). Earlier this year, the

U.S. District Court for the Northern District of Georgia addressed the validity of assignments in two first-party insurance claims under homeowners' insurance policies. *See Affinity Roofing, LLC a/a/o Farzam Kadkhodaian v. The Cincinnati Ins. Co.*, 18-CV-01205-ELR (N.D. Ga. Jan. 9th, 2020); *Affinity Roofing, LLC a/a/o Kriston Hall v. State Farm Fire & Cas. Co.*, 18-CV-4329-TCB (N.D. Ga. Apr. 28th, 2020.)

In both cases, the insureds executed a document entitled, "Assignment of Claim for Damages," and sued the insureds' respective insurers for the cost to repair the alleged damage to the insureds' properties based on the assignment document. Both insurers involved in the cases denied the contractors/assignees' claim on the grounds the assignments were not enforceable under the terms of the insurance policies, which required the insurers' written consent to any assignment.

In addressing the assignment issue in both cases, the court acknowledged anti-assignment provisions in insurance policies are not always enforceable in Georgia and can be waived by an insurer. More specifically, the court held the validity of an assignment and an insurer's ability to invoke an anti-assignment provision in an insurance policy will depend on whether there is a dispute over coverage or damages for a loss. In short, if there is a dispute over coverage or damages, the assignment will not be valid and will be barred by the anti-assignment provision in the insurance policy unless the insurer has consented to the assignment or waived its right to rely on the anti-assignment provision.

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An insurer can waive the anti-assignment provision, like other policy conditions, through an "affirmative promise" or other act suggesting it does not intend to enforce the policy condition. *See Stapleton v. Gen. Accident Ins. Co.*, 236 Ga. App. 835, 838 (1999). While not specifically addressed by the court in these cases, it is possible that certain acts of investigation and adjustment of a claim, such as payment directly to the assignee or direct communications with the assignee, could be used as grounds to argue an insurer waived its right to rely on the anti-assignment provision or that it consented to the assignment. With these principles in mind, claims professionals should consider the following tips in handling first-party property claims to avoid potential "assignment" pitfalls:

1. Carefully review all correspondence and documents submitted by insureds, contractors, public adjusters and other parties for "assignment" language;
2. If you identify an assignment, evaluate whether it is valid (is there an agreement as to the amount owed to the insured and has the insured complied with all the policy conditions? If so, the assignment may be valid);
3. If the assignment is not valid, immediately draft a letter to the insured, copying the assignee (the other party to the assignment) expressly rejecting the assignment and citing the anti-assignment provision(s) in the insured's policy; and
4. After rejecting the assignment, refrain from taking any action inconsistent with the rejection of the assignment (do not issue payment to or directly communicate with the assignee).

While it will most likely take action from the Department of Insurance or the Georgia legislature to put limitations on or prohibit the use of assignments in Georgia, the *Affinity Roofing* cases can be used by insurers to fight back against unscrupulous contractors and public adjusters who attempt to take advantage

of insureds and insurers through assignments. These cases also provide guidance for claim professionals about how to avoid unknowingly consenting to an assignment and avoid waiving the insurer's right to rely on an anti-assignment provisions in an insurance policy.

INSUFFICIENT POLICY LIMITS IN A MULTIPLE CLAIMANT SITUATION

BY: LAUREN MEADOWS

Insurance companies face a tricky situation when there are multiple claimants vying for an insured's policy limits. When a motor vehicle accident involves multiple fatalities or multiple claimants with substantial bodily injuries, a situation may arise where the available policy limits are insufficient to compensate each of the claimants. In this scenario, multiple policy limit demands may be issued, requiring a strategic analysis and response from the insurer.

Unlike some other states, Georgia does not have any express rules defining the specific method the insurer must utilize when assessing demands from multiple claimants in an insufficient policy limits situation. For example, while other states may require a "first-in-time approach" in which demands are accepted in the order in which they are received, Georgia insurers may elect to use a first-in-time approach, but are not necessarily required to do so. An insurer may also elect to settle as many claims as possible, whether it be through a global settlement conference or simply an informal negotiation process.

> "The insurer's focus should be minimizing the potential exposure to its insured.

However, no Georgia case law requires an insurer to conduct a global settlement conference and attempt to resolve all of the potential claims within the available policy limits.

In fact, under Georgia law, an insurer may elect to accept the demand(s) with the highest potential exposure, even if that means exhausting the available policy limits before each claimant gets a "piece of the pie." In this situation, there may be no insurance money left for subsequent claimants, which may expose the insured to personal liability for any subsequent claims.

In *Miller v. Ga. Interlocal Risk Mgmt. Agency*, 232 Ga. App. 231 (1998), the Court of Appeals of Georgia explained "a liability insurer may, in good faith and without notification to others, settle part of multiple claims against its insured even though such settlements deplete or exhaust the policy limits so that remaining claimants have no recourse against the insurer." 232 Ga. App. at 231. In *Miller*, the insurer decided to pay $900,000 of the available $1 million policy limits to one claimant, leaving only $100,000 left for the second claimant. The Court of Appeals rejected the second claimant's bad faith claim against the insurance company, finding he "had no right to a pro rata division of the insurance proceeds, and the insurer had no legal obligation to confer with him before settling with [the first claimant]." *Id.* at 232. Rather, the decision of "whether to evaluate claims for settlement one at a time or together is in the discretion of the insurer." *Id.* The Court of Appeals explained its reasoning as follows: "a contrary rule would put insurers at risk of being liable to remaining claimants for amounts above the coverage limits, which would necessarily result in a general policy by insurers of paying claims only after they were reduced to judgment, and

would discourage the sound public policy of encouraging settlements." *Id.* at 231; *see also Allstate Ins. Co. v. Evans*, 200 Ga. App. 713, 714 (1991) (discussing the right of an insurer to exhaust the policy coverage applicable to a common disaster or occurrence by selectively settling a portion of the claims against its insured arising from the accident, to the detriment of other claimants who are thereby denied the means to satisfy their claims against the insured).

Notably, the Supreme Court of Georgia recently clarified that an insurance company is not necessarily required to take this "highest exposure" approach. In *First Acceptance Ins. Co. of Ga. v. Hughes*, 305 Ga. 489 (2019), the Supreme Court explained "*Miller* does not require that an insurer settle part of multiple claims." 305 Ga. at 497. Rather, the "highest exposure" approach is one method that an insurance company *can* use to evaluate the claims made against its insured. *Id.*

While a Georgia insurer has wide latitude and discretion to determine its chosen strategy, it must remember its obligations to the insured and the requirement that it "give the insured's interests the same consideration that it gives its own." *Fortner v. Grange Mut. Ins. Co.*, 286 Ga. 189, 190 (2009). For this reason, the insurer should immediately notify the insured in writing when it determines that the policy limits may be insufficient to cover all potential claims and recommend that the insured obtain independent counsel to advise him/her on potential excess exposure. Likewise, the insurer should immediately notify the insured in writing as demands are received and responded to. Finally, whatever the chosen method used to resolve the demands (whether it be first-in-time, a global settlement conference or acceptance of the claims with the highest potential exposure), the insurer should document the chosen method and be able to articulate its good faith basis for utilizing this method. Whatever the method, the insurer's focus should be minimizing the potential exposure to its insured.

Ultimately, an insured's chosen policy limits may not always be sufficient to cover the potential damages resulting from a motor vehicle accident. So long as the insurer acts in good faith with consideration of the insured's interests, it has wide discretion to determine how it should evaluate and respond to policy limit demands, even if that means a potential claimant misses out on a piece of the "policy limits pie."

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How Courts and Legislatures are Responding to COVID-Related Business Interrruption Claims
Oct. 28 — 1-2 p.m. ET

Webinar: Why Does it Always Feel Like Somebody's Watching Me? Surveillance and Investigations in a Digital Age
Nov. 4 — 1-2 p.m. ET

Webinar: Super Sleuths
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