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THE FIRST PARTY REPORT

A PROPERTY & INSURANCE UPDATE SPRING 2020

THE *(MARTIN-)*PRICE OF SETTLEMENT NEGOTIATIONS

BY: KORI ESKRIDGE

Claims professionals and litigators engage in settlement discussions and negotiations more often than we like and we often feel like we could do it in our sleep. However, a recent case decided by the Court of Appeals reminds us of the basics of contract law and what makes a binding settlement agreement — an offer and an acceptance.

In *Barnes v. Martin-Price*, 2020 Ga. App. LEXIS 59 (2020), the court considered what constitutes a binding settlement agreement in a claim in which a vehicle driven by Latoya Barnes struck a vehicle driven by Norman Favors, resulting in his death. At the time of the accident, Barnes was insured by National Unity Insurance Company.

Shortly after the accident, counsel for Norman Favors' estate sent a letter of representation to National Unity and provided a copy of the death certificate. Within a week, National Unity offered to tender the full liability limit of Barnes' policy, totaling $25,000. The estate responded that it needed a limited release and the check. National Unity began drafting the release. Before receiving the release, the estate requested to interview Barnes. Importantly, the estate did not indicate that the interview had any effect on the pending settlement. The next day, National Unity emailed the proposed release to the estate.

Approximately two weeks later, the estate advised that Barnes refused to speak to it and it was going to file suit. It advised that the release and potential settlement could be revisited after receiving Barnes's discovery responses. Suit was filed on March 23, 2015.

Approximately one month later, National Unity sent a $25,000 check to the estate, which stated in the memo line "FULL AND FINAL PAYMENT FOR BODILY INJURY CLAIM." The estate confirmed receipt of the release and check, advising that it would hold the check in trust, but that it intended to continue its investigation and would not release Barnes from liability. Although the estate offered to return the check, it was ultimately deposited into an escrow account.

Ultimately, Barnes filed a motion to enforce the settlement agreement, arguing that an agreement was reached when the estate requested a limited liability release and a check for the policy limits, and National Unity responded and provided both. The trial court denied the motion.

> "Ensure your settlement offer response matches your intention.

The Court of Appeals held an enforceable settlement agreement exists when the answer to an offer "is unconditional and identical with the terms of the offer." *Torres v. Elkin*, 317 Ga. App. 135, 140 (2012). If there are any new conditions in the response, it constitutes a counteroffer, not acceptance. Moreover, the Court of Appeals held that an offer is accepted "either by a promise to do the thing contemplated therein, or by the actual doing of the thing." *Herring v. Dunning*, 213 Ga. App. 695, 696 (1994). If an offer calls for an act, "it can be accepted only by the doing of the act." *Id.* at 699. Furthermore, "[t]he delivery and acceptance of a check stating on its face that it constitutes final settlement of a claim, whether the amount of the claim is established or

uncertain, amount to an accord and satisfaction which discharges the claim." *Rabenstein v. Cannizo*, 244 Ga. App. 107 (2000).

In *Martin-Price*, National Unity offered to settle the claim for its policy limits and a general release. The estate countered, demanding a limited release, as well as the policy limits check. National Unity accepted this counteroffer by providing a limited liability release and, later, tendering the check, indicating that it was for "full and final payment for bodily injury claim." Notably, in reaching its holding, the Court of Appeals rejected the estate's claim that the agreement was contingent upon speaking to Barnes, finding the request was not contradictory to the execution of a limited liability release and did not preclude the estate from filing suit against other potential tortfeasors. Moreover, the Court of Appeals found that the deposit of the check amounted to an accord and satisfaction, discharging the estate's claims against Barnes.

> "Lawsuits have already been filed seeking coverage for business interruption losses.

Simply put, words and actions matter. A slight factual change could have resulted in a very different outcome in *Martin-Price*, so it is important to carefully evaluate the language of each settlement offer to ensure that your response matches your intention.

INSURANCE COVERAGE FOR BUSINESS INTERRUPTION LOSSES DURING THE COVID-19 PANDEMIC

BY: CHRISTY MAPLE

An unfortunate consequence of the COVID-19 pandemic has been the widespread closure of restaurants, retail stores and other businesses. Policyholders have already filed lawsuits in several states seeking insurance coverage for their business interruption losses. *See, e.g.*, *Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's, London et al.*, Civil District Court for the Parish of Orleans, State of La.; *French Laundry Partners, LP dba The French Laundry, et al.* v. *Hartford Fire Ins. Co., et al.*, Superior Court for the State of Cal., County of Napa; *Sharecropper LLC d/b/a Ollie Irene v. Farmers Ins, Exch., Inc.*, Circuit Court of Jefferson County, Alabama.

Most policies providing this type of coverage require direct physical loss to covered property to trigger coverage. Policyholders and insurers are honing their respective arguments for and against coverage. On the one hand, insurers argue the "direct physical loss" requirement of most policies has not been satisfied. In *United Airlines v. Insurance Co. of the State of Pennsylvania*, the insured airline sought indemnity for losses it suffered as a result of the Sept. 11, 2001, terrorist attacks. 439 F.3d 128, 129 (2nd Cir. 2006). The issue was whether the insured could recover for its lost earnings caused by the national disruption of flight service and the government's temporary shutdown of the airport. Because the insured could not show that such lost earnings resulted from physical damage to its property or from physical damage to an adjacent property, under the unambiguous language of the insurance policy, the losses were not covered.

Insurers also note because the virus can be cleaned off surfaces and repair or replacement of property is not necessary, there has been no "direct physical loss." Moreover, the business closures are due to a concerted effort to stop the spread of the virus, and not necessarily due to the confirmed presence of the virus in the insured's facility.

On the other hand, policyholders argue the "direct physical loss" requirement is satisfied by the presence of the coronavirus. This argument finds support in the CDC's statement that a person can get COVID-19 "by touching a surface or object that has the virus on it and then touching their own mouth, nose or possibly their eyes." https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html. Some local stay-at-home orders include a finding that there has been "direct physical loss."

In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, ammonia was released inside one of the insured's facilities. 2014 U.S. Dist. LEXIS 165232, at *1 (D.N.J. Nov. 25, 2014). There was no genuine dispute that the ammonia discharge rendered the insured's facility physically unfit for normal human occupancy and continued use until the ammonia was sufficiently dissipated. The U.S. District Court for the District of New Jersey found as a matter of law that the ammonia discharge inflicted "direct physical loss of or damage to" the insured's facility because the ammonia physically rendered the facility unusable for a period of time.

Even if the "direct physical loss" requirement is satisfied, most business interruption policies contain a virus or bacteria exclusion that was developed in response to the outbreak of SARS, another coronavirus. The typical virus or bacteria exclusion excludes coverage for loss or damage caused by or resulting from any virus capable of inducing physical distress, illness or disease.

Notwithstanding the "direct physical loss" requirement and the virus or bacteria exclusion, policyholders likely will argue that insurers should honor their "reasonable expectations" that their business interruption policies would cover these losses. However, the reasonable expectations doctrine should not apply where, as in the standard ISO forms, the policy language is unambiguous.

In some states, bills have been introduced that would retroactively expand the scope of coverage under existing policies to include coverage for business interruption losses due to COVID-19. For example, the Massachusetts legislature introduced a bill that mandates coverage "for business interruption directly or indirectly resulting from the global pandemic known as COVID-19." The bills states "no insurer in [Massachusetts] may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property." Other states are considering similar bills that may impact how insurers address business interruption and loss of use claims arising out of the pandemic.

Most insurance policies were not designed to provide coverage against communicable diseases, such as COVID-19. However, court intervention will likely be required to make a final determination as to coverage for business interruption losses due to COVID-19, and the results could vary based on the specific policy language at issue, factual circumstances surrounding the claim and the state law applied to the policies.

NO VACCINE REQUIRED: GOVERNMENTAL IMMUNITY FROM COVID-19 TORT CLAIMS

BY: KRISTEN VIGILANT

In response to the novel coronavirus outbreak, state and local governments across the country — including Georgia — shuttered businesses and issued stay-at-home orders, leaving many in financial distress. However, lawsuits based in tort that will inevitably follow may face insurmountable hurdles, including sovereign immunity and sweeping emergency powers of Georgia's state and local governments. When faced with a claim arising from the COVID-19 pandemic, governmental risk managers and their insurance partners should be armed with the sovereign immunity defense, which may be dispositive.

Under the doctrine of sovereign immunity, the state and its departments and agencies are absolutely immune from liability unless the state has waived its immunity through a constitutional amendment or statute. Ga. Const. Art. I, Sec. II, Par. IX. This includes local governments, which are protected by "the shield of governmental immunity." *Harry v. Glynn Cty.*, 501 S.E.2d 196, 198 (Ga. 1998).

In 1990, Georgia voters approved a constitutional amendment allowing "for the waiver of the state's sovereign immunity through legislative acts." Ga. Const. Art. I, Sec. II, Par. IX. Subsequently, in recognizing the "inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity," the General Assembly passed the Georgia Tort Claims Act, which is a limited waiver of sovereign immunity subject to several statutory exceptions. *See* O.C.G.A. § 50-21-21; § 50-21-23.

The Act provides:

> The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article.

O.C.G.A. § 50-21-23(a).

Importantly, the Georgia Tort Claims Act does not waive sovereign immunity for local governments or local government entities. O.C.G.A. § 50-21-22(5). Instead, the Act creates a limited waiver of sovereign immunity for the state, which includes "the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions." O.C.G.A. § 50-21-22(5). "State" specifically excludes local governmental entities, including "counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities." O.C.G.A. § 50-21-22(5).

Sovereign immunity is not a waivable defense, and a government entity does not bear the burden of proving its sovereign immunity. *See Kelleher v. State*, 369 S.E.2d 341, 342 (Ga. App. 1988). A government entity does not waive its immunity simply by procuring insurance. *See* O.C.G.A. § 36-92-2. Under Georgia law, "the defense of sovereign immunity to tort liability cannot be waived by the mere purchase of insurance coverage." *Woodard v. Laurens Cty.*, 456 S.E.2d 581, 582 (Ga. 1995). Instead, a plaintiff seeking to recover from a government entity must point to a separate legislative act that explicitly waives sovereign immunity and describes the extent of the waiver. *See* Ga. Const. Art. I, Sec. II, Par. IX(e). Local government's sovereign immunity is even broader. O.C.G.A. § 33-24-51(b) creates a limited waiver of a county's immunity, but only "to the extent of the amount of liability insurance purchased for the negligence of [county] officers, agents, servants, attorneys, or employees arising from the use of a motor vehicle." *Woodard*, 265 Ga. at 406.

A plaintiff in Georgia may find this burden difficult to overcome. No explicit legislative act waives sovereign immunity for a tort claim arising from governmental action during a public health emergency, and Georgia courts may not construe the Georgia Tort Claims Act to allow a plaintiff to maintain such an action. Indeed, in declaring a public health state of emergency and issuing subsequent executive orders, Governor Brian Kemp invoked O.C.G.A. § 38-3-51, which grants emergency powers to a Georgia governor in the event of a statewide or national emergency, including, among other specific emergencies, "a public health emergency" and "pandemic influenza emergency." O.C.G.A. § 38-3-51(a). It is worth noting that the statute grants immunity to individuals and private entities complying with a governor's order pursuant to the statute "in any action seeking legal or equitable relief." O.C.G.A. § 38-3-51(j). A plaintiff's burden to show waiver of sovereign immunity may prove fatal to a plaintiff's tort claim arising from government action related to COVID-19. Thus, government entities and their insurers should have the viable defense of sovereign immunity when faced with tort claims arising out of governmental responses to the COVID-19 outbreak.

EVENTS

Webinar: Posted Panel and Initial Claims Handling | June 16 — 1-2 p.m. ET

Webinar: Evaluating Coverage for Business Income and Bodily Injury Claims Due to COVID-19 June 17 — 1-2 p.m. ET

Webinar: Time-Limited Demands and Statutory Bad Faith | July 15 — 1-2 p.m. ET

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