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THE FIRST PARTY REPORT

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IS SHARING REALLY CARING — SHARING PROTECTIVE ORDERS

BY: BRADY HERMAN

Attorneys for both plaintiffs and defendants often seek to obtain as much information as possible about a lawsuit and corresponding claims through the discovery process. Such intent typically leads to broad discovery requests that purportedly conform with the broad standard of what is discoverable under Georgia law. Georgia's discovery statute, O.C.G.A. § 9-11-26, provides for liberal discovery. When a discovery dispute arises, it is often easy for the party seeking to obtain information to contend that a particular document includes information that is "reasonably calculated to lead to the discovery of admissible evidence." O.C.G.A. § 9-11-26. But, what if only a portion of a document is relevant and other portions contain a party's confidential, business, proprietary and trade secrets? Further, what if the party seeking the discovery responses intends to disseminate the confidential information obtained through discovery with other attorneys to help build similar cases against the responding party?

The seemingly clear answer to the responding party would be to move for a protective order. However, some attorneys, when faced with a motion for protective order, often propose "sharing protective orders." The very idea of sharing the information that is confidential business information appears counterintuitive.

On one hand, the argument in favor of a "sharing protective order" is that shared discovery is an effective means to ensure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses and documents. In addition, proponents of a "sharing protective order" contend that it provides for more efficient discovery. Without it, the system forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical.

On the other hand, where such an argument has been advanced in favor of a "sharing protective order," the responding parties have contended the party seeking such confidential information must both demonstrate and explain how those goals would be served by entry of a sharing protective order. In *Porter v. Tyco Healthcare Group LP*, the Northern District of Georgia held the moving party must do more than vaguely reference unknown and unnamed plaintiffs and lawyers with similar claims against the defendant. 2008 U.S. Dist. LEXIS 129757, at *7-8 (N.D. Ga. June 11, 2008). The district court further stated permitting plaintiffs to share a defendant's confidential information "unduly heightens the risk" that a defendant's competitors will gain access to the confidential information as, the more widely confidential documents are disseminated, the release of those documents becomes more likely and more difficult for the court to enforce. *Id*. at *8-9. As such, the district court held the entry of a sharing protective order was inappropriate. *Id*. at *9.

> "The burden shifts to the party seeking to disseminate to show it is necessary to warrant a sharing protective order.

The issue then turns on which party has the burden of proving a sharing provision in a protective order is proper. Under O.C.G.A. § 9-11-26(c), the respondant has the burden to show "good cause" to warrant the entry of any protective order. Thus, the moving party bears a heavy burden of showing good cause because the discovery process is liberally construed to allow parties to explore fully the issues and be fully prepared on the facts. *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144 (1965).

But does that same burden apply to the sharing provision portion of a protective order? The party seeking the information will likely contend it seems

logical that a respondant must meet a similar burden to defeat a request for a sharing protective order. For example, in *Waelde v. Merch*, *Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981), the district court held satisfaction of the heavy burden requires a showing that sharing of the requested documents would work a "clearly defined and very serious injury" for the party seeking to avoid sharing the information. Moreover, the party seeking to avoid sharing confidential information must make a showing of clearly defined and very serious injury by "particular and specific demonstration of fact, as distinguished from stereotype and conclusory statements." *General Dynamics Corp. v. Selb,* 481 F.2d 1204, 1212 (8th Cir. 1973).

Yet, in Georgia, again *Porter* is instructive on this issue. There, the district court held the party moving for a protective order is not required to show good cause for the entry of a non-sharing protective order. Rather, the moving party only has the burden of showing good cause for entry of a protective order. *Porter*, at *7. Therefore, the burden of proof shifts to the party seeking to disseminate allegedly confidential information to show that dissemination of such information is necessary in order to warrant a sharing protective order. *Id*.

As it stands, courts are generally weighing the risk of dissemination of a company's confidential documents and the judicial difficulties in enforcing a sharing protective order against a plaintiff's interest in sharing that company's confidential documents with unspecified individuals and attorneys for an infinite duration of time. Of course, these considerations will be contingent upon the circumstances in each case.

JUDICIAL ESTOPPEL AS A DEFENSE IN PERSONAL PROPERTY CLAIMS

BY: SMITA GAUTAM

Investigating a property claim may involve many avenues, from reviewing financial records to interviewing witnesses. One such avenue that should not be ignored is a careful review of an insured's filings in prior lawsuits — especially a past or pending bankruptcy filing.

In *Squires v. State Farm Fire & Cas. Co.*, 2019 U.S. Dist. LEXIS 31954 (N.D. Ga., Feb. 28, 2019), the court held State Farm did not breach an insurance contract or engage in bad faith when it denied a first-party claim because the insureds' proof of loss contradicted their bankruptcy filings.[1] The insureds in *Squires* submitted a claim under their homeowners policy following a fire loss. Prior to the loss, the insureds filed a petition for bankruptcy, in which they disclosed only $2,925 in assets (excluding cash accounts and automobiles). The bankruptcy was pending at the time of the loss and the filing of the insurance claim.

Throughout the adjustment of the claim, the insureds submitted multiple sworn statements in proof of loss, with accompanying contents inventories. Two of the inventories were submitted during the pendency of the insureds' bankruptcy, and claimed personal property totaling $144,881 and $91,815, respectively. These representations to State Farm clearly exceeded the $2,925 of personal property assets identified in the insureds' bankruptcy filings. State Farm denied the claim based on the concealment and fraud provision of the policy.

The insureds sued State Farm for breach of contract and bad faith. State Farm moved for summary judgment based on the doctrine of judicial estoppel, arguing the discrepancies between the insureds' bankruptcy schedule and their representations made during the claim investigation warranted denial. The district court granted State Farm's motion for summary judgment, applying judicial estoppel, which is intended "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Burnes v. Pemco Aeroplex*, *Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (internal quotations omitted).

The district court explained debtors in a bankruptcy case have a continuing obligation to disclose details of their financial status and amend filings as needed — "[t]he failure to timely amend a Chapter 13 plan to reflect a pending claim while simultaneously pursuing that claim in another court of law constitutes inconsistent positions under oath." *Squires*, at *6. The insureds submitted two inventories to State Farm during the pendency of their bankruptcy, yet the insureds never amended their bankruptcy schedules to reflect the amounts listed in either inventory.

These discrepancies amounted to a prior inconsistent position under oath. The district court determined these inconsistencies were "calculated to make a mockery of the judicial system," noting the insureds "clearly received an unfair advantage in the bankruptcy proceeding by failing to accurately provide information about their assets and by failing to disclose their insurance claim."

[1] Mark T. Dietrichs and Jessica M. Phillips of Swift, Currie, McGhee & Hiers, LLP, successfully argued the motion for summary judgment on behalf of State Farm Fire and Casualty Company.

Id. at *10. The district court also noted the insureds were "educated, sophisticated parties" with "ample access to counsel."

Typically, an insured has a straightforward burden of proof in establishing the amount of damages for a personal property claim. Under Georgia law, "where tangible personal property has been damaged or destroyed, the plaintiff has the burden of furnishing evidence sufficient to enable the jury to calculate the amount of damages with reasonable certainty without speculation." *Champion v. Dodson*, 587 S.E.2d 402, 404 (Ga. App. 2003) (internal citations omitted). However, an insured need only present the inventory and provide oral testimony regarding their ownership of the property, their belief with respect to its replacement cost and the fact that it was destroyed by the loss. Once this *prima facie* case is satisfied, the burden shifts to the insurer to prove the values are less than the amount claimed by the insured or the items were not present in the insured property. Thus, insureds generally are given the benefit of the doubt when presenting claims for personal property loss.

For example, in *Haugabrook v. Waco Fire & Cas. Ins. Co.*, 380 S.E.2d 347 (Ga. App. 1989), the Georgia Court of Appeals held where the insured prepares an inventory of the personal property loss and the insurer fails to present evidence contesting the accuracy of the inventory, the jury is not authorized to assign a value to the personal property damage based solely upon the amount of invoices provided in support of the inventory. The *Haugabrook* court explained while an insurance policy requires the submission of all bills, receipts and related documents substantiating the values in an inventory, there is no policy language conditioning the insured's recovery on the existence of such documentation. Thus, insurers are typically left with only the ability to challenge whether the insured owned the property claimed.

In this burden-shifting framework, the recent *Squires* decision levels the playing field for insurers — they are able to refute the inventory and oral testimony of an insured by pointing to evidence of a prior inconsistent position under oath, such as in a bankruptcy schedule or other sworn statement or pleading. Thus, insurers should review an insured's prior pleadings, especially bankruptcy filings, as part of their claim investigation, to confirm the insured is accurately reporting personal property.

> "... insurers are able to refute the inventory by pointing to a prior brankruptcy schedule pleading.

DON'T SLEEP ON *SOMNUS MATTRESS*: INSURANCE AGENT DUTIES IN ALABAMA

BY: MURRAY FLINT

Insurance is a unique product — everyone needs it in some form or another, but very few outside of the industry understand it. This dichotomy makes for a lot of confused consumers. For many, the local insurance agent is the best (if not the only) source of advice about insurance coverage. As a result, insurance agents are seen as easy scapegoats when things go wrong.

In a case of first impression, the Supreme Court of Alabama recently considered whether insurance agents have a duty to advise their customers about the adequacy of insurance coverage in *Somnus Mattress Corp. v. Hilson*, 2018 Ala. LEXIS 139 (Ala. 2018). The court issued a favorable ruling for insurers and agents and held insurance agents have no general duty to advise their customers about the adequacy of their insurance coverage. However, the court implied a careless agent can voluntarily assume a duty to provide advice.

In *Somnus Mattress*, an insurance agent approached the president of Somnus Mattress Corporation in 2009 about providing property coverage for its factory. The agent met the company president at the factory on several occasions to inspect the property and discuss its insurance needs.

During one of those visits, the agent and the company president discussed insurance coverage for business interruption and loss of profits (collectively referred to as "business-income coverage"). The agent allegedly said Somnus did not need such coverage due to its high cost and the difficulty of obtaining it. Shortly after, Somnus purchased coverage from the agent, opting against business-income coverage.

The company president and the agent met to discuss Somnus's insurance needs every year during the renewal period. The agent said he advised the company president to purchase business-income coverage during each subsequent meeting, and the company president admitted he could not recall what they discussed during the renewal periods. Nevertheless,

the company president continued to opt against purchasing business-income coverage because of the agent's earlier statements.

In 2013, the mattress factory was destroyed by a fire. Somnus moved its operation to Mississippi, but ultimately shut down in 2015.

Somnus filed suit against the agent and his insurance agency, claiming they negligently failed to advise Somnus it needed business-income coverage. The court affirmed summary judgment in favor of the agent and agency, holding (1) an insurance agent does not have a general duty to advise its customers about the adequacy of coverage; and (2) the agent and agency did not voluntarily assume a duty.

Before *Somnus Mattress*, Alabama courts never considered whether insurance agents have a general duty to advise their customers about the adequacy of coverage. However, the court acknowledged other jurisdictions "overwhelmingly concluded" agents do not owe a general duty to provide such advice. *Id.* at *15-16. In this regard, the court quoted a leading insurance treatise with approval:

> Absent a specific agreement to do so, an insured's agent does not have a continuing duty to advise, guide, or direct the insured's coverage after the agent has complied with his or her obligation to obtain coverage on behalf of the insured. Insurance agents do not have an independent duty to identify their clients' needs and to advise them regarding whether they may be underinsured because it is the client's responsibility or duty, not the insurance agent's, to determine the amount of coverage needed and advise the agent of those needs . . . . In addition, insurance agents generally are not liable for actions other than obtaining insurance coverage for their insureds unless a special relationship has been established between the parties.

Id. (quoting 3 Steven Plitt *et al., Couch on Insurance* § 46:38 (3d ed. 2011)). Importantly, the court also noted other jurisdictions recognize an insurance agent can voluntarily assume a duty to provide advice about a customer's insurance needs when there is a special relationship between the agent and customer or when the agent holds himself out as an expert insurance consultant. Other jurisdictions hold a special relationship may exist when (1) the agent misrepresents the scope or nature of coverage; (2) the customer makes an ambiguous request that requires clarification; (3) the agent gives inaccurate advice in response to a request by the customer; or (4) the agent makes an express agreement with or promise to the insured.

However, the court did not explicitly adopt this "voluntary duty" rule because it was not applicable to the facts presented. Specifically, the court found Somnus presented no evidence to refute the agent's position he advised Somnus to purchase business-income coverage during the renewal periods. Thus, while Alabama law does not currently hold an insurance agent can adopt a duty to advise their customers, it appears likely the court will adopt this rule when it is faced with this issue directly.

This is a significant holding for insurers and insurance agents operating in Alabama. It clarified there is no general duty to advise customers about their coverage and suggested the circumstances under which an agent may voluntarily assume a duty to do so. Insurers and agents would be prudent to recognize these situations and take precautions against inadvertently assuming a duty to advise policyholders about whether or not they have adequate coverage.

EVENTS

WEBINAR:
Getting into the Weeds of Medical Marijuana
Aug. 21, 2019 — 1-2 p.m. ET

2019 Annual Workers' Compensation Seminar
Cobb Energy Performing Arts Centre
Sept. 20, 2019 — 9 a.m.-3:30 p.m.

2019 Litigation Seminar
Cobb Energy Performing Arts Centre
Nov. 15, 2019 — 9:15 a.m.-3:30 p.m.

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