

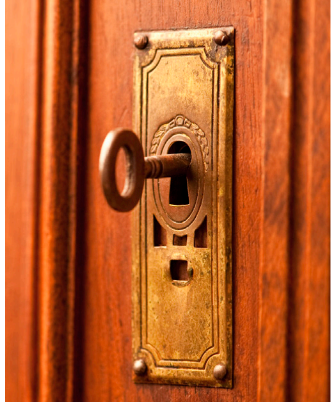

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The 1st Party Report
A Property & Insurance Update
Spring 2013

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Timing of Felonious Intent — Covered Versus Not Covered

By: Jessica P. Morgan

Many auto policies have a specific exclusion for theft by conversion, thus avoiding losses where the insured willingly relinquishes his vehicle to, for example, a prospective buyer, but the buyer never returns the vehicle after the "test drive." Without an exclusion for conversion, would such voluntary parting be considered a "theft" under an auto policy? And what if the conversion is by someone claiming a right to the vehicle, such as an estranged spouse? These questions were reviewed by the Georgia Court of Appeals in *Byrd v. United Services Automobile Association*, 317 Ga. App. 280, 729 S.E.2d 522 (2012).

Mr. Byrd parked his Lamborghini at a car dealership belonging to his friend and business associate, David Jordan. On occasion, Mr. Byrd would sell other cars parked at the dealership to Mr. Jordan, after receiving inquiries from an interested buyer. On such occasions, Mr. Byrd would transfer the title to Mr. Jordan in exchange for an agreed-upon price. Mr. Jordan would then sell the vehicle to the interested buyer. At no time did Mr. Byrd have any business relationship with Mr. Jordan's brother, who possibly worked at the car dealership.

After some time, Mr. Byrd learned the Lamborghini was no longer at the dealership. Upon inquiry, Mr. Jordon's brother advised that he sold the vehicle to an interested buyer. Mr. Jordan later confirmed the sale and, on May 24, 2008, Mr. Byrd ratified the sales contract and agreed to a price of $225,000.00. Mr. Byrd also immediately canceled his auto insurance policy with USAA. The purchase money was to be paid to Mr. Byrd within 30 days. In fact, the buyer had already paid Mr. Jordan the full purchase price of $225,000.00 for the vehicle.

When Mr. Byrd did not receive payment of the sales price, he filed a police report in July 2008. By that time, however, the dealership had closed and the Jordan brothers had left the country. Mr. Byrd filed a claim for theft under the USAA policy. USAA denied the claim on the basis that there had been no criminal taking of the vehicle while its policy was in force because there was no evidence of a felonious intent to steal the vehicle before the policy was canceled. Instead, Mr. Byrd had voluntarily parted with his vehicle with the understanding that it could be sold, and he ratified the sale. After the policy was canceled, the Jordan brothers stole the proceeds of the sale, but the vehicle was not "stolen" at the time the policy was in force. The disappearance of the vehicle did not constitute a "theft" under the policy. The trial court agreed and granted summary judgment to USAA.

The Court of Appeals reversed and found there was an issue of fact for the jury to determine whether a theft of the vehicle had occurred while the policy was still in force. The policy defined loss as "direct and accidental damage to the operational safety, function or appearance of, or theft of, your covered auto." Although the Court recognized theft insurance was "universally" viewed as furnishing protection only against losses arising from criminal takings, the Court emphasized that Georgia's criminal theft statute defines "theft" as the appropriation of property with the "intention of depriving [the owner] of the property, regardless of the manner in which the property is taken or appropriated."

The Court held that Georgia's "theft" statute was broad enough to encompass "theft by conversion." Georgia has a separate statute that defines theft by conversion as the situation where the offender, "having lawfully obtained . . . property of another . . . under an agreement . . . to make a . . . specified disposition of such property, knowingly converts the . . . property to his own use in violation of the agreement." Absent a specific exclusion for conversion, a theft by deception or conversion would be covered by a policy covering "theft." Because there was at least some evidence that Mr. Jordan or his brother had fraudulent intent at the time they transferred possession of the Lamborghini to the purchaser, the jury must decide whether such fraudulent intent existed while the policy was in force.

The Court emphasized that the presence of fraudulent intent distinguished theft by conversion from breach of contract. In order for a conversion to be covered as a theft under these circumstances, the insured must prove the person who converted the vehicle did so with "fraudulent intent," and was not merely operating under an honest belief that he had the right to take the vehicle. The former would be a theft, while the latter would simply be a breach of contract, and thus not a theft covered by the policy. For example, if an estranged spouse is accused of "theft" by an insured, but the spouse believes he or she has a right to the property, the requisite "fraudulent intent" would not be shown and the loss would not meet the definition of a "theft" under an insurance policy.

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Franks: Disapproval of Formula for Value of Insurable Interest?

By: Michael H. Schroder and Laura A. Murtha

Since at least the 1980's, insurers have calculated insurable interest issues relating to dwelling damages (including innocent co-insured payments) using the common sense formula set forth in two Georgia Court of Appeals opinions. An innocent spouse is paid one-half of the policy proceeds remaining after payment of the mortgage. In March, two appellate Judges signed off on an opinion seemingly questioning our use of that formula.

In *Georgia Farm Bureau Mututual Insurance Co. v. Franks*, 2012 WL 812427 (Ga. App., March 6, 2013), Thomas Franks and his domestic partner, Sterling Morrison, owned the insured residence as joint tenants with survivorship and not as tenants in common. Franks was the only one on the mortgage and the only named insured on Farm Bureau's homeowners policy. After a fire destroyed the residence, Farm Bureau paid off the mortgage and paid Franks one-half of the remaining policy limit for his interest in the property. Franks sued to recover the other half.

The Court of Appeals opinion focused on the nature of the real estate conveyance and found that Franks might recover 100% of the insurance coverage because his deed included a right of survivorship. While most deeds in favor of two or more persons create a "tenancy in common" *without* survivorship, Franks' deed expressly vested him with a "joint tenancy" and full ownership in the event Morrison predeceased him. A "tenancy in common" is easily divisible between the owners; a "joint tenancy with survivorship" is not so easily untangled. Because the Farm Bureau policy only limited its coverage to the "amount of the insured's interest at the time of loss," and did not specify that an individual insured's recovery was limited to a formula (i.e., coverage limit minus mortgage balance, with remainder divided by the total number of persons with an insurable interest), there was nothing preventing Franks from collecting up to the policy limit for his "undivided" joint interest. Although the insured had argued that the Valued Policy Statute, O.C.G.A. § 33-32-5, should fix his recovery at the full policy limit, the Court reserved ruling on that issue until another day.

The opinion went on to criticize the formulaic approach outlined in *Allstate Insurance Co. v. Ammons*, 163 Ga. App. 385 (1982) and *Allstate Insurance Co. v. Thompson*, 164 Ga. App. 508 (1982), upon which we have relied for decades. Those cases held a co-owner's recovery of insurance proceeds was limited to one-half of the difference between the policy limit less the mortgage balance (which was owed as well). But the Court's criticism was limited to the fact that those prior opinions did not identify the ownership interest of the Ammons and the Thompsons as either a "tenancy in common" or a "joint tenancy with survivorship." The "formula" might apply to one, but not the other. So the *Franks* Court did not go so far as to overrule those prior decisions; nor did it suggest to the trial court an alternate "formula" for quantifying Franks' insurable interest. The Court just states that the issue is not as simple as those prior cases suggest.

We also note that one of the three Judges on the *Franks* panel concurred in the judgment only, and would not sign the opinion.

Appraisals: Is Itemization Required?

By: Sarah L. Chambers

The Insurance Commissioner of Georgia adopted a Georgia Standard Fire Policy to which all fire insurance policies must comply. However, when an insurance policy provides multiple lines of coverage, O.C.G.A.§ 33-32-1(a) states a policy can vary from the Georgia Standard Fire Policy as long as the policy contains language which is at least as favorable to the insured as the applicable portion of the Standard Fire Policy. With regard to appraisals, the Standard Fire Policy provides that appraisers shall appraise the loss and state separately the actual cash value and loss to each item claimed. Any award made by an appraiser or umpire should be so itemized. But what if a policy's appraisal provision omits the words "so itemized?" Would this omission amount to bad faith? And are the appraisers still required to provide an itemization of their award?

In a recent decision by the Georgia Court of Appeals, *Bell v. Liberty Mutual Fire Insurance Company*, 734 S.E.2d 894, 2012 Ga. App. LEXIS 1031 (2012), the Court of Appeals was presented with this very question. In *Bell*, the insureds suffered a fire loss to their home. When the parties could not agree on the amount of the claim, the matter was submitted to two appraisers and the trial court appointed an umpire.

This makes the opinion "physical precedent only," which is not binding on future cases and is only to be cited as persuasive authority, like a case from another state. Nevertheless, we anticipate insureds will argue in the future that *Franks* always requires insurers to pay an innocent co-insured 100% of the policy limits. That is not the holding in *Franks*.

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Demand for Appraisal? Just Say No!

By: Matthew J. Simmons

Property insurance policies permit insurance companies to invoke appraisal as a means for resolving a damage dispute with their insureds. Most jurisdictions, including Georgia, agree that appraisal resolves disputes over "amount of loss," and that appraisal is not a proper method for resolving coverage disputes. But there remains widespread disagreement where an insurer admits a covered loss exists but disputes coverage of a particular portion of the loss on the bases of causation and policy exclusions. The best example is where a loss occurs pursuant to a covered event (e.g., hail damage), but the insured seeks recovery for additional losses that the insurer deems to be effected by exclusions and/or limitations in the policy (e.g., code upgrades). If an appraisal is to be of use in finally resolving a damage dispute, it is often necessary that the appraisers consider these coverage issues in deciding the "amount of loss." Otherwise, the parties are left with an award for the total cost to repair, with no resolution of the question about what portion of that "amount of loss" is covered and what is not.

There is no Georgia case directly addressing whether an appraisal award that decides some coverage issues is voidable for that reason. Courts in Alabama, Connecticut, Mississippi, New York, North Carolina and Oklahoma regard causation disagreements, in the context of policy exclusions, to be outside the scope of the appraisal process and within the exclusive competence of the courts. *See, e.g., N.C. Farm Bureau Mutual Insurance Company, Inc. v. Sadler*, 711 S.E.2d 114 (N.C. 2011); *Rogers v. State Farm Fire & Casualty Company*, 984 So. 2d 382, 392 (Ala. 2007). Courts in Delaware, Florida, Massachusetts, Minnesota, Rhode Island and Texas consider causation disputes related to policy exclusions to be "amount of loss" issues, within the scope of the appraisal process, where the insurer has admitted that at least some covered loss exists. These jurisdictions have held causation is a coverage issue that is to be exclusively resolved by the court only where an insurer wholly denies there is a covered loss. In essence, these states hold that where the insurer admits some covered loss exists, causation determinations are within the purview of appraisal. *See, e.g., State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009); *State Farm Fire & Casualty Company v. Licea*, 685 So. 2d 1285, 1288 (Fla. 1996).

Due to the uncertainty of this issue in Georgia, it is paramount for the parties to an appraisal to agree ahead of time to a detailed Memorandum of Appraisal signed by both parties that outlines the issues to be resolved and sets forth the areas that will be reserved for another day, such as specific coverage issues. The insurer can insist on a detailed appraisal award that sets forth each and every item being awarded, so the insurer may only pay what is covered and reaffirm its declination of coverage for what is not.

Sometimes an agreement cannot be reached between the parties before the appraisal is conducted. Rather than proceed blindly into this thicket, the prudent insurer should consider asking a court to set forth the parameters of the appraisal inquiry. An example of this approach is found in *Anders v. State Farm Fire and Casualty Co.*, 296 Ga. App. 663, 675 S.E.2d 490 (2009). In that case, the insured discovered trees had fallen on his house after an extended absence. While State Farm agreed that at least some covered loss existed, most of the damage was caused by the insured's

The insurance policy included an appraisal clause, but the clause did not require itemization. After evaluating the claim, the umpire issued an award in the form of lump sums for the dwelling, the personal property and the additional living expenses. The Bells challenged the award on the basis that it was not itemized such that it included sums for specific components of the dwelling and specific items of personal property, similar to their personal property inventory. The Bells also alleged the insurance company's omission of the words "so itemized" in the policy's appraisal clause was bad faith, because the term was a "statutorily and contractually required provision in its homeowner's insurance policy."

The trial court granted the insurer's motion for entry of the appraisal award and, in so doing, essentially held that there was no bad faith. The Court of Appeals affirmed, explicitly finding there is no requirement that an appraisal award contain an itemization of the different components of the dwelling or the separate articles of personal property. The Court reviewed decisions from other states supporting this conclusion and also found that the Georgia Standard Fire Policy did not demand a different result.

The Court noted that the parties to an appraisal can agree ahead of time that an itemization is required. Such an itemization may be advisable, since it may make it easier to challenge an aberrant award for mistake, irregularity or fraud. But such itemization is not required in the absence of the agreement of the parties.

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neglect to protect the property from further loss after the trees fell on the house and breached the roof. State Farm determined the covered ACV loss was $15,704.33, but the insured estimated the repairs for tree-related damage at $393,036.62, and immediately demanded an appraisal. Before an appraisal was undertaken, State Farm filed an action to stay the appraisal process and asked the trial court to determine what damage was covered by the policy. After hearing from the parties, the trial court ordered that the appraisers were to determine what damages occurred only in the first 10 days after the date of loss. The appraisal resulted in an award of $158,000. After the appraisal, the insured filed a motion for reconsideration of the order setting the parameters of the appraisal, which was denied. The insurer's motion to confirm the award was then granted. These rulings were affirmed on appeal.

Even when the insurer maintains some control over the process with the help of the trial court, the appraisal process can be a disaster. A general — and common — result of appraisal is an award that "splits the baby." That is, a neutral appraiser will usually arrive at an award somewhere in the middle between the loss values asserted by insurer and insured. This can be problematic where the insurer and insured have drastically different valuations of the claim, as in the *Anders* case. The result in that case was an award 10 times State Farm's final offer. When public adjusters have estimated the damage for an insured, the insured's repair estimate may have little basis in reality, yet the umpire may split the difference between the public adjuster's estimate and the insurer's estimate, resulting in a substantial windfall to the insured.

What happens if an insured demands appraisal, but the insurer does not believe appraisal is in its best interests? In that case, we recommend the insurer reject any demand made by the insured for an appraisal. This approach, in fact, is supported by cases in Georgia as well as in other jurisdictions. Some jurisdictions go the opposite way, finding the right to an appraisal is bilateral, that is, it can be invoked by either the insured or the insurer. However, those jurisdictions generally equate the appraisal process with arbitration. Courts that equate appraisal with arbitration find insureds can demand appraisal because that is consistent with a legislative policy favoring an executive agreement to arbitrate. But Georgia courts recognize a clear difference between appraisal and arbitration, defining appraisal as a contractually agreed upon process whereby parties only resolve disputed issues of value. *See McGowan v. Progressive Preferred Insurance Company*, 281 Ga. 169, 172, 637 S.E.2d 27, 29 (2006). In fact, "arbitration clauses . . . are impermissible in contracts between insurers and insureds." *Id.* Without the public policy favoring arbitration, the Georgia courts are open to the concept that the appraisal clause is inserted wholly for the protection of the insurer.

In *National Fire Insurance Co. v. Shuman*, 44 Ga. App. 819, 163 S.E. 306 (1932), an insured invoked the appraisal provision of its insurance policy following a particular property loss and appointed its own appraiser. The insurer refused to appoint an appraiser. The insured filed suit, petitioning the court to select an umpire. The trial court selected an umpire. The umpire subsequently agreed on the amount of loss with the insured's appraiser. The insured then sought confirmation from the trial court of the appraisal amount and a judgment in its favor, and was ultimately awarded that amount by the trial court.

The Georgia Court of Appeals reversed the judgment of the trial court. The court explained: "where the insurer has selected no appraiser and has not otherwise participated in or consented to an appraisement, a finding or report on the loss, made by an appraiser selected by the insured and an umpire appointed by the court, is not binding on the insurer." *Shuman*, therefore, stands for the proposition that an insured in Georgia lacks an affirmative right to appraisal, and can neither specifically enforce the appraisal provision nor sue for breach of the appraisal provision.

Thus, while insurers can try to define the limits of what is to be addressed by appraisers before appraisal occurs, this does not guarantee a fair estimate of covered losses will be reached. Instead, we recommend the insurer reject any demand made by the insured for an appraisal when the company does not believe an appraisal is in its best interests. Just say "No!"

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Events

Joint WC Luncheons Presented with McAngus Goudelock & Courie
May 9, 2013 — Atlanta, GA
May 21, 2013 — Charlotte, NC
11:00 am - 2:15 pm

"Code-A-Palooza" GA's New Evidence Code and Updates on Additional Litigation Topics
May 14, 2013 — Atlanta, GA
Cobb Energy Performing Arts Centre
11:00 am - 3:30 pm

Joint Coverage Luncheon Presented with McAngus Goudelock & Courie
June 4, 2013 — Charlotte, NC
Stay tuned for more information.

Catastrophic Claims Luncheon
June 21, 2013 — Atlanta, GA
Villa Christina
11:00 am - 1:30 pm

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