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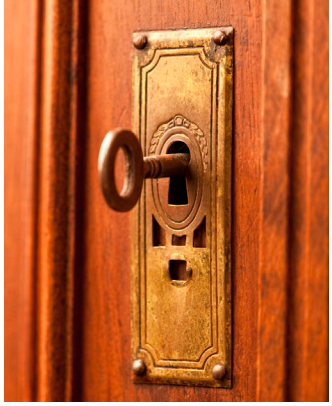

The 1st Party Report

A Property & Insurance Update

Spring 2014

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Wade v. Allstate: Plaintiff May Seek UM Coverage Without Exhausting All Possible Liability Benefits

By: Shannon L. Schlottmann

A recent opinion from the Court of Appeals of Georgia has changed how insurers must evaluate uninsured/underinsured motorist ("UM") claims that involve multiple tortfeasors or defendants. In *Wade v. Allstate Fire & Cas. Co.*, 751 S.E.2d 153 (2013), the Georgia Court of Appeals held that under Georgia's UM statute and apportionment statutes, a plaintiff may seek UM coverage without exhausting all possible available liability coverage. In *Wade*, the plaintiff was injured in a multi-vehicle accident and filed a lawsuit against the three other drivers involved — Bergh, Froman, and Bruce. Included as defendants were Froman's employer, under the doctrine of respondeat superior, and Bruce's mother, under the family purpose doctrine. Plaintiff also served Allstate as his UM carrier, which had $25,000/50,000 in "added-on" coverage.

Plaintiff reached a partial settlement with Bruce and his mother for their liability policy limits, and executed a limited liability release. With regard to his claims against Bergh, Froman, and Froman's employer, Plaintiff settled for a total sum of $30,000 (an amount less than the full amount of their respective liability policies), executed a general release, and dismissed them from the lawsuit with prejudice. Allstate moved for summary judgment, arguing that Plaintiff was not entitled to UM benefits because he had not exhausted the liability limits of the insurance coverage for all of the defendants. The trial court granted the motion, but the Court of Appeals reversed.

The Court of Appeals found that Plaintiff's failure to exhaust the total liability policy coverage of the three dismissed defendants, Bergh, Froman, and Froman's employer, and his general release of claims against them precluded him from being able to pursue UM benefits for any uncovered losses for which these three defendants were deemed responsible. The Court found that while Plaintiff could not claim UM benefits with respect to the three dismissed defendants he settled with for less than the limits of their policies, he might still have a claim with respect to the Bruce Defendants (with which Plaintiff settled for the full limits of their policy). If the trial court later determined their share of the damages exceeds those limits, then Allstate would still be on the hook for uninsured motorist benefits.

The Court of Appeals held that, under the terms of the Allstate policy, Allstate did not have to pay until all "applicable" liability limits had been exhausted, but that the applicable limits could not be determined until there was an apportionment of damages under O.C.G.A. § 51-12-33. "Since a tortfeasor is not responsible to pay for the damages caused by another, it stands to reason that an individual tortfeasor's liability insurance is not 'applicable' to pay for any other tortfeasor's damages." *Id.* at 156. Each tortfeasor's coverage must be evaluated in conjunction with his apportionment of fault.

The two defendants who had reached a partial settlement, the Bruce defendants, were still in the case pursuant to the limited release so that Plaintiff could pursue UM coverage. If the Bruce defendants' share of Plaintiff's damages exceeded the limits of their liability coverage, then they would be underinsured, and Plaintiff could recover the excess amount from Allstate.

The Court remanded the case for a determination of the plaintiff's damages and an apportionment of fault.

What Does *Wade v. Allstate* Mean for Insurers?

In any personal injury claim or case where there is more than one tortfeasor or defendant, the trial court must (1) determine the total amount of damages owed to a successful plaintiff; and (2) "apportion" the damages among each tortfeasor or defendant. Thus, an insurer evaluating a claim will have to effectively assess a share of the blame for the accident to each tortfeasor. Only then can the insurer determine whether and to what extent there is UM coverage.

Example: Driver A is driving and is hit head on by Driver B. Driver C is driving directly behind Driver A and rear ends him immediately after Driver B hits Driver A's vehicle.

Driver A has a $250,000/500,000 add-on UM policy.

Driver B has $1,000,000 single limits of liability insurance.

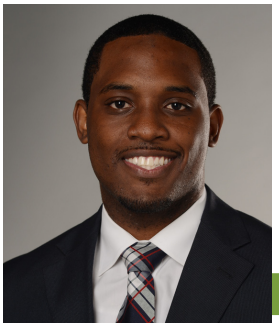
Driver C has $100,000/300,000 in liability insurance.

Assume that there will be a likely verdict of $1,000,000 in total damages if the case goes to trial.

As it turns out, Driver B is a friend of Driver A. Driver A settles with Driver B's liability carrier for $5,000 and executes a general liability release. Driver A settles with Driver C's liability carrier for the limits of $100,000 and executes a limited liability release. Driver A now seeks the full limits of his UM policy.

Under *Wade*, Driver A's UM carrier *cannot* deny coverage based on the fact that Driver A did not exhaust Driver B's liability coverage. Rather, the UM carrier must determine whether UM is available *as to Driver C —i.e.*, it must determine if Driver C is underinsured and, if so, to what extent. The UM carrier should evaluate the claim by looking at Driver C's potential liability at trial. For instance, if a jury could later find that (1) special damages total $1,000,000; and (2) Driver C is 40% liable, then the portion of the verdict attributable to Driver C would be $400,000. If the policy was the same as in *Wade*, the UM should pay its $250K limits.

For more information, contact Shannon Schlottmann at shannon.schlottman@swiftcurrie.com or 404.888.6174.



Do Insurers Have a Choice Under Georgia's Valued Policy Law?

By: Marcus L. Dean

There may be a choice after all. Georgia's Valued Policy Law provides that when a home is wholly destroyed by fire, the amount

"Paws" for Thought: Interpretation of the Vandalism Exclusion and Domestic Animals Exclusion in Rental Dwelling Policies

By: Sara M. Andrzejewski

Under a rental dwelling policy, when does a tenant's negligent maintenance of domestic animals constitute vandalism, as opposed to some other accidental cause of loss? Although Georgia law offers little guidance, a recent decision from the United States District Court for the District of Oregon may provide some insight onto how future courts will rule on this issue. *Bjugan v. State Farm Fire and Cas. Co.*, 2013 WL 4591111 (D. Or., Aug. 28, 2013).

Georgia courts define vandalism as "the destruction of property generally." *Livaditis v. American Casualty Co.*, 117 Ga. App. 297, 299 (1968). The property must have been destroyed willfully or maliciously, i.e., the destruction must have been intentional or committed with such reckless and wanton disregard for the rights of others as to equal intent. *Id.*

Based on this definition, the *Livaditis* Court determined that property damage related to a tenant's moon-shining operation constituted vandalism, a covered loss under the landlord's rental dwelling policy. *Livaditis*, 117 Ga. App. at 300. In *Livaditis*, the tenant vented the moonshine still so that the smoke, fumes and vapor were pulled by a fan into the interior of the house. *Id.* at 299. The steam and condensation caused the paint in the rooms to peel, the plaster to loosen, and extensive mold damage throughout. *Id.* The Court reasoned that, since the landlord was unaware of the illegal moonshine activities, and since the property was occupied, the tenant's acts constituted vandalism and the property damage would be covered under the policy. *Id.* at 300.

While no other Georgia decisions discuss whether a tenant's acts constitute vandalism, other jurisdictions have decided the issue applying similar standards. For example, a Washington court has held that damage caused by a tenant's marijuana growing operation qualified as vandalism. *See Bowers v. Farmer Insurance Exchange*, 99 Wash. App. 41 (2000). In *Bowers*, the tenants diverted heat from a furnace for a marijuana "grow room," which created a sauna-like environment resulting in significant mold growth. The Court held that, although the tenants may not have had malicious intent, their actions showed wanton disregard for the landlord's property rights. *Id.* Since the tenants' actions were the proximate cause of the damage, the Court found that the tenants' acts constituted vandalism, which was a covered loss under the policy. *Id.*

of insurance listed in the insurance policy shall conclusively establish the value of the relative structure or building. *See Marchman v. Grange Mutual Insurance Co.*, 232 Ga. App. 481, 483 (1998); *see also* O.C.G.A. § 33-32-5. The purpose of the Valued Policy Act is to protect the homeowner from the overwhelming burden of establishing the market value for property after it has been completely destroyed by fire. *Marchman*, 232 Ga. App. at 482.

Several conditions must be met prior to the statute being applicable. The conditions include the following:

1. The insured must be a natural person and not some other type of legal entity;
2. The insured property must be a one or two family residential building or structure;
3. The home must be wholly destroyed by fire;
4. The insured must not have engaged in fraud;
5. The loss must occur more than 30 days after the original effective date of the policy;
6. The policy cannot be a builders' risk policy;
7. The insured property must not be insured under a blanket form coverage insuring multiple properties; and
8. There must not be multiple undisclosed policies on the same property.

See O.C.G.A.§ 33-32-5.

When the above listed conditions are met, the statute provides that the limits of insurance stated in the policy shall be conclusively deemed the value of the destroyed property. *Marchman*, 232 Ga. App. at 482. The amount payable is subject to any depreciation "occurring between the date of the policy or its renewal and the loss." O.C.G.A. § 33-32-5. This provision drastically limits an insurance company's ability to independently determine an equitable value for the destroyed structure.

Importantly, in *Love v. Safeco Insurance Co. of Indiana*, the United States District Court for the Middle District of Georgia analyzed the interplay between the Valued Policy Act and a provision in the insurance policy allowing the insurer to repair or replace the damaged structure. 3:12-CV-87

Similarly, in *Graff v. Allstate Insurance Company*, 113 Wash. App. 799 (2002) the insured sought to recover for damages resulting from the tenant's activities. Rejecting the insurer's arguments, the Court explained:

> Allstate contends that *Bowers* is not controlling because Graff's tenant caused no visible damage to the house and no physical damage preceded the methamphetamine-related damage. These arguments are unpersuasive. The tenant's methamphetamine lab released hazardous vapors into the house. Moreover, visibility is not the measure of vandalism; the chemical release was measurable, even after it had contaminated the interior of the house. If the chemicals had never been released or mixed, then the contamination would not have occurred. Thus, *Bowers* is controlling.

Id. at 806.

The recent *Bjugan* decision addressed whether damages caused by a tenant's negligent care of domestic animals constituted vandalism. *Bjugan*, 2013 WL 459111 (D. Or., Aug. 28, 2013). In *Bjugan,* the tenant "maintained" 95 cats and 2 dogs in a rental house and the manner in which the animals were kept resulted in damage to the house. *Id.* Upon investigation, local authorities discovered that the interior of the property was covered with animal urine and feces. *Id.* at *1. The property owners filed a claim under their insurance policy. The owners argued that the efficient proximate cause of the damage was not the animals, but instead was "vandalism" resulting from the manner in which the tenants maintained the animals. The insurer denied the claim based on a provision that excluded damage if directly and immediately caused by domestic animals. The insureds sued the insurer for breach of contract and bad faith. *Id.*

The Court agreed with the insurer and determined that the issue was "whether the loss was caused directly and immediately by domestic animals, vandalism or some other cause of loss." *Id.* at *4. The Court concluded the damage was caused directly and immediately by domestic animals (a loss not insured) instead of vandalism (a covered loss). *Id.* at *7. Ultimately, the Court determined that, even if the tenant's act of keeping 95 cats and 2 dogs constituted "vandalism," the damage to the property was nonetheless caused by the animals themselves and thus fell within the domestic animal exclusion of the policy.

Based on the Court's decision in *Bjugan*, it is unlikely that damage caused by domestic animals will be covered under rental dwelling policies with a similar exclusion, even if the tenant is negligent in maintaining the animals. Of course, each claim will be evaluated on a case-by-case basis, but the conclusion will ultimately rest on the proximate cause of the damage. Since damages caused by pets will likely be the result of the behaviors of the pets themselves, these damages will likely not be covered under a rental dwelling policy in Georgia.

For more information on this topic, contact Sarah Andrzejewski at sarah.andrzejewski@swiftcurrie.com or 404.888.6155. ■

CAR, 2013 WL 5442208 (M.D. Ga., Sept 27, 2013). The right of an insurer to repair or replace the structure may offer an alternative to paying the policy limits for dwelling coverage when the Valued Policy Act is triggered for a loss.

In *Love*, the insureds' home was destroyed during a fire. *Id.* at *2. The insureds then asserted that they were entitled to recover $267,100, which was the stated value of the home listed in the policy, and the policy limits. *Id.* at *9. In opposition, the insurance company argued that it was entitled to rebuild the property at its own cost. *Id.* at *8.

Notably, the insureds also made misrepresentations in their insurance application. *Id.* at *4. Specifically, the insureds misrepresented the existance of several prior losses and failed to disclose that their previous policy had been cancelled. *Id.* at *4.

Ultimately, the Court reasoned that an insurer does not have "an absolute right" to choose to repair or replace damaged property. *Id.* at *9. Instead, the right could only be exercised if it is reserved in the policy, as noted in O.C.G.A. § 33-32-3, and if the insurer completed all necessary conditions precedent to exercise the right. *Id.* In *Love*, the insureds' policy required that Safeco give notice that they were electing to repair or replace the damaged property within 30 days of receiving the insureds' sworn proof of loss. *Id.* At the time of litigation, Safeco had yet to provide the insureds with a proof of loss form or to request the insureds submit a proof of loss. *Id.* Based on this failure, the Court determined that the insurer waived the right to repair or replace the property. *Id.* Therefore, the insurer did not have the right to exercise the repair or replace option under the policy. The court also held that Safeco waived the right to deny coverage based on the misrepresentations in the application because it elected to continue the policy for approximately one month after learning of the material misrepresentations. *Id.* at *7.

Based on the Court's analysis in *Love*, insurance companies may have the right to elect to repair or replace the damaged property. However, this right is not absolute. Notably, the right must be set forth in the insurance policy and the insurer must have acted in accordance with conditions precedent to exercise the right.

What Does *Love v. Safeco* Mean for Insurers?

In *Love,* the Court suggested that an insurer may have another choice when faced with a total loss where the Valued Policy Act is triggered. Although the Court ultimately ruled against the insurer, it did so because the insurer waived its right to repair or replace. *Id.* If, however, the insurer reserved this right, the insurer may be able to repair or replace the building even when it is a total loss. This may permit the insurer to choose the lesser of two evils. For example, if a home can be repaired or replaced at a rate far less than that of the value listed in the policy, then exercising the right to repair or replace the property, if the policy allows, may be economically advantageous. On the other hand, there may be situations where having to repair/replace the home may be drastically more expensive and/or difficult. In that situation, it would be more advantageous for the insurer to pay the limits of dwelling coverage under the policy. Each situation requires a detailed review of the options and costs associated.

While each claim is unique, it seems worthwhile to explore this option whenever possible. It is always good to have a choice!

For more information on this topic, contact Marcus Dean at marcus.dean@swiftcurrie.com or 404.888.6136.

Events

Joint Litigation Luncheon Presented with McAngus Goudelock & Courie
Offers 3 Ethics Hours (pending approval)
April 24, 2014 — Atlanta, GA
May 2, 2014 — Charlotte, NC
October 1, 2014 — Raleigh, NC
October 2, 2014 — Richmond, VA

Joint Workers' Compensation Luncheon Presented with McAngus Goudelock & Courie
May 1, 2014 — Charlotte, NC
May 15, 2014 — Atlanta, GA

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The First Report is edited by Mike Schroder, Melissa Segel and Jessica Phillips. If you have any comments or suggestions for our next newsletter, please email mike.schroder@swiftcurrie.com, melissa.segel@swiftcurrie.com or jessica.phillips@swiftcurrie.com.