Fields Howell

Case Advisory August 2015

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This month we report on two decisions from the Georgia Court of Appeals, involving professional liability of insurance agents, and commercial property appraisal.

Georgia Court of Appeals Rules Insurance Agent May Be Liable for Failing to Procure Duty to Defend Coverage

In *Cottingham & Butler, Inc. v. Belu* (30 July 2015), the Georgia Court of Appeals held a retail agent may be liable for failing to procure insurance providing coverage for defense costs. The insureds were the owners of a small trucking company with a cargo insurance policy from Underwriters at Lloyd's, London. While transporting a load of vehicles, the insureds' truck caught fire, damaging the vehicles. The vehicle owners sued the insured trucking company, which then made a claim to Underwriters under the cargo policy.

Underwriters declined to pay for the insureds' defense costs, but did pay to settle the vehicle owners' lawsuits against the insureds. Underwriters then filed a declaratory judgment action and obtained a court determination that the policy unambiguously gave them the option whether to provide the insureds' defense or not. The court thus ruled the insureds had no coverage for the defense costs.

The insureds then brought an action for professional negligence against their retail insurance agent that procured the policy. The insureds asserted the retail agent was negligent in failing to advise them properly about what coverage to obtain, and for failing to procure a "duty to defend" policy which would have required the insurer to provide for the defense costs.

The Court of Appeals held the retail agent could be liable to the

insureds. Under Georgia law, an insurance agent is not liable to an insured for failing to procure coverage, subject to several exceptions. One exception is where the insured's agent holds itself out as providing expert advice as what coverage to obtain. In this case, the insureds specifically told the agent they did not know what insurance they needed, the agent procured the policy, and told the insureds not to worry because they were covered. The court determined that under these circumstances, there were genuine issues of fact for a jury to decide as to whether the retail agent could be liable to the insureds.

The Court of Appeals also considered another exception under Georgia law, that an insured has as duty to read his policy, and where the terms of non-coverage are "readily apparent" to the insured, the retail agent is not liable even if he did give advice about what coverage to obtain. Since the court determined that the Underwriters' policy unambiguously gave the insurer the option to defend or not, the agent argued it could not be liable since this limitation on coverage was "readily apparent" if the insured had read the policy. Despite the ruling that the policy was unambiguous, the Court of Appeals held there was a jury question as to whether the limitation on coverage was "readily apparent" to the insured.

Georgia Court of Appeals Vacates Appraisal Award for Umpire Bias

The Georgia Court of Appeals has held an appraisal award in a commercial property insurance dispute must be vacated where the umpire began working for an independent adjusting company for the insurer during the appraisal proceedings. *Zurich Am. Ins. Co. v. Omni Health Solutions, LLC* (31 July 2015).

The insured sustained hail damage to its commercial building and submitted a property insurance claim to its insurer. When they could not agree on the amount of the loss, the insured invoked the appraisal provision of the policy. Under that provision, each party appoints an independent appraiser, and the two appraisers appoint a neutral

umpire. Agreement by any two of the three determines the amount of the loss.

The parties submitted the amount of the structure loss and business interruption loss to appraisal. Both appraisers and the umpire agreed on the amount of the structure damage as $800,000. However, with respect to the claim for business interruption, only the insurer's appraiser and the umpire agreed on the amount of the loss, at $322,445.61. Shortly after the award was made, the insured learned that during the appraisal process, the umpire had gone to work as an independent adjuster for a company that did work for the insurer. The trial court held the entire appraisal award must be vacated because the umpire was not impartial.

The Court of Appeals, however, held that only the business interruption award had to be vacated. The court reasoned that since both party appraisers had agreed on the amount of structure damage, and because agreement by any two of the three determines the amount of the loss, the award for the $800,000 structure loss was binding. However, because the award for the business interruption claim was only agreed between the insurer's appraiser and the umpire, and the umpire was not impartial due to his employment for a company doing work for the insurer, that portion of the appraisal award had to be vacated.

The Court of Appeals held the standard of review for overturning the award was whether the trial court abused its discretion in determining the umpire was not impartial. Given the umpire's change in employment during the appraisal, the Court of Appeals held the trial court's determination on the umpire's impartiality was not an abuse of discretion.

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