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In This Issue

Bendin Sumrall & Ladner, LLC

Offer of Settlement Statute

—BY: PHI NGUYEN, ESQ.—

As part of the Tort Reform Act of 2005, the Georgia Legislature enacted the offer of settlement statute with the intended purpose of encouraging litigants to make and accept good faith offers of settlement and avoid unnecessary litigation. The offer of settlement statute, codified at O.C.G.A. 9-11-68, provides, in relevant part:

> *(1) If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant, or on the defendant's behalf, from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.*
>
> *(2) If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff, or on the plaintiff's behalf, from the date of the rejection of the offer of settlement through the entry of judgment.*

Under this statute, a defendant who makes an offer of settlement can potentially recover all of its litigation costs and attorney's fees thereafter incurred if it gets a defense verdict or a verdict in an amount sufficiently less than the offer. However, defendants must satisfy two distinct requirements in order to take advantage of this statute. Whether these requirements have been satisfied requires the discretion of the trial court and profoundly affects a party's ability to recover litigation costs.

Good Faith Requirement

Any offer of settlement made under the statute is subject to a challenge by the opposing party that the offer was not made in good faith. If a trial court determines that the offer was made in bad faith, the defendant will be unable to recover any attorneys' fees or litigation expenses. Appellate case law on the good faith requirement does not yield any bright line rules about when a settlement offer will be deemed to have been made in good faith; rather, this determination is a function of the trial court's discretion.

What the appellate law does make clear, however, is that a defense verdict at trial does not alone establish that a defendant's offer of settlement was made in good faith. In Great West Cas. Co. v. Bloomfield, 313 Ga. App. 180 (2011), the Court of Appeals upheld the trial court's ruling that the defendant's offer of settlement was not made in good faith, even though the defendant secured a verdict in its favor at trial. Great West Cas. Co. was a wrongful death case in which the plaintiff named two different truck drivers and their respective employers and insurers as defendants, alleging that the negligence of the truck drivers caused a motor vehicle accident that resulted in her husband's death. Before trial, one truck driver, his employer and insurer made an offer of settlement i n the amount of $25,000. The plaintiff rejected the offer, and at trial, the same defendants offered to settle the case for their policy limits of $1 million. The plaintiff again rejected the offer, and the defendants subsequently obtained a verdict in their favor at trial. However, the jury awarded several millions in damages to plaintiff against the other truck driver and his employer. Included among the factors the trial court cited in support of its finding that the offer of $25,000 was not made in good faith was the defendants' offer of $1 million at trial in the absence of any new evidence.

On appeal, the defendants argued that a verdict in their favor established that their offer of settlement was made in good faith. However, the Court explained that while a defense verdict is, of course, relevant to the issue of good faith, it does not *conclusively* establish that the defendant made its offer of settlement in good faith. Rather, a trial court's determination of whether an offer of settlement was made in good faith requires a multifactorial analysis based on the trial court's assessment of the case, the parties, the lawyers, and all other relevant facts gathered during the progress of the case. In the Great West Cas. Co. case, the Court of Appeals specifically stated that the trial court properly considered the defendants' second offer of $1 million as evidence of bad faith. The Court also emphasized the fact that the amount of damages grossly exceeded the amount of the offer.

However, a nominal offer can and has under other circumstances survived a challenge based on lack of good faith. In Cohen v. Alfred & Adele Davis Acad., Inc., 310 Ga. App. 761 (2011), the Court of Appeals held that a trial court did not err in finding that an offer of settlement in the amount of $750 was made in good faith, even though the defendant sought to recover in attorneys' fees and expenses in an amount far exceeding the offer—$84,104.63. In upholding the trial court's finding of good faith, the Court in Cohen explained

that the defendant, who obtained summary judgment in the underlying action, reasonably and correctly anticipated that its exposure was minimal. The Court further explained that the fact that the defendant incurred attorneys' fees and expenses - an amount far greater than the offer did not demand a finding of bad faith.

Reasonable Fees Requirement

Another caveat to the offer of settlement statute is that it limits the recovering party to an award of *reasonable* fees and expenses as determined by a trial court at an evidentiary hearing. Therefore, a defendant will not necessarily be awarded the full amount of attorneys' fees and expenses. Oil Co. v. Abraham, 511 Fed. Appx. 930 (2013), a recent Eleventh Circuit case, provides some guidance to trial courts on determining reasonable attorneys' fees and expenses under § 9-11-68. In Oil Co., the Eleventh Circuit advised that the starting point in any determination for an objective estimate of the value of a lawyer's services is to multiply hours reasonably expended by a reasonable hourly rate. A "reasonable hourly rate" is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation.

Oil Co. also indicates that a defendant may sometimes recover fees for hours billed by different attorneys on the same project. Specifically, multiple attorneys may be compensated if each attorney bills for his or her specific and distinct contribution to an activity or task. However, if multiple attorneys, for example, attend a hearing or deposition when only one attorney is necessary, the trial court is authorized to discount some of the hours billed for the activity. In Oil Co., the Eleventh Circuit upheld the portion of the trial court's award reflecting fees billed for a meeting attended by four different attorneys. In so doing, the Court considered affidavits submitted by the attorneys that explained in detail how each attorney was responsible for a different portion of the motion for summary judgment discussed at the meeting. For example, two partners present at one of the meetings drafted different parts of the brief, and one associate reviewed the facts in the brief. Given this evidence of the different roles each attorney played at the meeting, the Court of Appeals did not question the trial court's determination that the hours spent at the meeting were reasonable. Again, as with assessing whether an offer of settlement was made in good faith, determining what constitutes reasonable attorneys' fees and litigation expenses lies within the sound discretion of the trial court.

The limited appellate decisions on the offer of settlement statute suggest that parties should consider their likelihood of success on a claim and the amount of potential damages when making offers of settlement. This practice will help ensure that a party can articulate to the court why its offer of settlement was made in good faith if challenged by the opposing party. The case law also indicates that a good practice for litigants and their attorneys is to make sure that billing entries for attorneys' fees sufficiently describe the activity or task undertaken. If this practice is consistently followed, recovering attorneys' fees under the offer of settlement statute should be a more straightforward process. ■

Does Georgia Law Allow Common Law Indemnity Claims?

A Simple Question with a Complex Answer

—ROGER S. SUMRALL, ESQ. AND JENNIFER C. BELLIS, ESQ.—

Contribution claims have long been important tools in a defendant's litigation strategy. When a defendant believes that other entities are actually responsible for the alleged liability, a contribution claim allows him to bring those entities into the case, making them parties. A common law indemnity claim also allows a defendant who has been hit with a verdict or who has settled a claim to seek reimbursement from other entities. In either scenario, a common law indemnity claim is a common-sense way to place liability with the responsible party, where it should properly rest. However, the 2005 Georgia Tort Reform Act— with the support of the defense bar— has abolished joint and several liability, and in the process, changed the analysis of common law indemnity claims. Without joint and several liability, a defendant no longer necessarily faces liability for a plaintiff's entire injury. Rather, it can only be sued for that portion of the plaintiff's injury resulting directly from that particular defendant's actions. Because an ordinary negligence claim now can only be made for damages caused by that *particular* defendant's negligence, it follows logically that the defendant should no longer be allowed to seek reimbursement from other entities. In other words, if a defendant is hit with a verdict, that defendant would not be entitled to reimbursement from other entities because the verdict only included the damages caused by that defendant. Likewise, a defendant who settles a claim can only settle the damages it caused and would not have a common law indemnity claim against other entities because damages caused by those entities were not included in the settlement.

While all of this seems fairly straightforward, the Georgia tort reform statutes are somewhat contradictory. This statutory scheme clearly abolished joint and several liability. O.C.G.A. § 51-12-31. Further, the statutory scheme provides a method for a defendant to

require that the jury apportion damages to non-parties where appropriate. O.C.G.A. § 51-12-31(d). However, the statute specifically allowing contribution claims against joint tortfeasors was not repealed and remains in force. O.C.G.A. § 51-12-32. Although the tort reform statutes were enacted in 2005, significant appellate rulings addressing the questions raised by tort reform, including the continued viability of common law indemnity claims in Georgia, are still being decided in the year 2013.

At least to some degree, these questions have been resolved by the Georgia Court of Appeals' recent decision in District Owners Association v. AMEC Environmental & Infrastructure, Inc., 2013 Ga. App. LEXIS 595 (July. 9, 2013). The District Owners case arises out of a premises liability action in which the plaintiff was injured while jogging. He was jogging through the Atlantic Station area on a sidewalk between a grocery store and the parking deck of a department store. Next to the sidewalk was a three-feet high concrete wall. From the plaintiff's vantage point, the ground on the other side of the wall appeared to be only slightly lower than the top of the wall, and so he assumed that if he jumped over the wall, he could continue his jog through the parking deck on the other side. But as the plaintiff jumped over the wall, he realized that the drop off was over 30 feet. He fell and was seriously injured. The plaintiff asserted a personal injury claim against District Owners Association ("DOA"), the premises owner, for negligence in failing to install a fence or other barrier to keep visitors from falling from the wall. DOA then asserted third-party claims against the designers and builders of the wall and parking lot, seeking common law indemnification, or, in the alternative, common law apportionment. These third-parties, including AMEC, filed motions to dismiss, arguing that the contribution action filed by DOA is barred by Georgia's apportionment statute. These motions were granted and DOA appealed.

DOA argued that the trial court was wrong when it held that common law indemnity claims have been abrogated by O.C.G.A. § 51-12-33. Id. at 3. The Court of Appeals explained that DOA was misinterpreting the trial court's holding and stated that "[c]ontrary to DOA's contention, the trial court actually held that '[t]he common law indemnity claim *as set forth by DOA in its Third-Party Complaint* has been abrogated by O.C.G.A. § 51-12-33.'" Id. at 7 (emphasis in the original). In the Court of Appeals' view, the trial court did not say that *all* common law claims for indemnity had been abrogated. The Court of Appeals further acknowledged that its decision was limited to the facts of the case, rather than standing for the broad proposition that common law indemnity claims have been abrogated. The Court of Appeals simply agreed with the trial court that DOA's third-party complaint did not allege either imputed negligence or vicarious liability and agreed with the trial court's assessment of the third-party complaint as seeking contribution from joint tortfeasors. Id. at 7-8.

The Court of Appeals reaffirmed in District Owners that, even after Tort Reform, Georgia law continues to recognize two broad categories of indemnity: created by contract, as between a surety and a debtor; and under the common law of vicarious liability, as between principals and agents. Specifically regarding the latter category, '[i]f a person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action for indemnity against the person whose wrong has thus been imputed to him.'" Dist. Owners Ass'n., 2013 Ga. App. LEXIS 595, at *6 (citing City of Atlanta v. Benator, 310 Ga. App. 597, 608-09 (2011)).

Although the right to bring a common law indemnity claim is severely limited in the absence of an indemnity agreement, the District Owners holding that common law indemnity claims remain viable in cases of vicarious

liability may have a broader effect than anticipated. The obvious result of this holding would be to allow an employer who is found liable for his employee's negligence based only on *respondeat superior* to bring a claim against the employee. The holding may apply much more broadly to any entity which enters into contracts with independent contractors. For example, a general contractor who is sued for construction defects may still be allowed to make a common law indemnity claim against the various sub-contractors who performed the work at issue. In Georgia, although an employer is generally not vicariously liable for the torts of an independent contractor, there are certain circumstances in which such vicarious liability can arise. See O.C.G.A. § 51-2-4. One of those circumstances, codified in O.C.G.A. § 51-2-5 (3), is "where the wrongful act is the violation of a duty imposed by express contract upon the employer; for where a person contracts to do a certain thing, he cannot evade liability by employing another to do that which he has agreed to perform." Id. A general contractor that expressly contracts with another can be held liable for the negligence of the independent contractor it engaged to complete the contract. Id. In Crispens Enter. v. Halstead, the Court of Appeals held that Crispens Enterprises, which had contracted with the Halsteads to build a garage on their residential property, could be held vicariously liable for the negligence of its subcontractor, Con-Wall Construction Company, in designing and constructing a retaining wall. Id.; see also Hudgins v. Bacon, 171 Ga. App. 856, 862-863 (Ga. Ct. App. 1984) (finding that a defendant builder-seller could be vicariously liable for the negligence of the independent contractor who poured the footings and laid the foundation for a home under O.C.G.A. § 51-2-5 (3) or (5), stating, "[a]s for a negligence claim, having held himself out as having the ability to build a fit and proper house, the builder generally cannot abdicate to an 'independent contractor' his duty to do it. The right to direct and control the work is assumed and retained by the builder in these cases.").

Finally, the fate of the District Owners decision is not yet certain. A petition for certiorari has been filed and briefed and remains pending before the Georgia Supreme Court. Additionally, only four months earlier, the Georgia Court of Appeals issued a somewhat contradictory opinion in Zurich Amer. Ins. Co. v. Heard, 321 Ga. App. 325 (2013). That decision found that a right to common law indemnity is only abolished when damages have been apportioned by the trier of fact. Because certain of the defendants were entitled to demand arbitration, the Court held that the jury did not apportion damages among all of the tortfeasors. It is unclear whether this analysis would be different if the defendants entitled to arbitration had simply never been sued at all, which was the situation presented in District Owners. The Heard decision would appear to be faulty as the statutory scheme specifically provides for a method to allow the jury to apportion among both parties and non-parties. In the event that the Supreme Court decides to hear the District Owners case, the validity of the Heard decision will hopefully be addressed as well.■

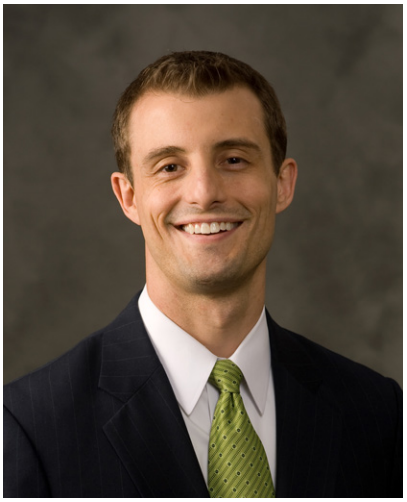
Attorney Spotlight

Phi Nguyen

The daughter of Vietnamese immigrants, Phi Nguyen grew up in a bilingual household with four sisters and is conversational in Vietnamese. Phi primarily devotes her law practice to the areas of medical malpractice and professional liability. She represents hospitals, nurses, respiratory therapists, allied health professionals, physicians, and their practices. She also has expertise defending and trying cases of premises liability.

In addition to her work as an attorney, Phi serves on the board of Athena's Warehouse, a 501(c)(3) nonprofit organization dedicated to educating, inspiring, and empowering teen girls, with an emphasis on positive female role models. As a board member, Phi volunteers her time organizing community service projects, recruiting volunteers and fundraising. She also works directly with the local high school girls that Athena's Warehouse serves.

Phi enjoys traveling, eating good food and spending time with her family and friends. She is trying her hand at still photography and film. She is currently working on a documentary to chronicle her parents' escape from Vietnam and rebuilding of their life in America.



The Georgia Supreme Court Provides Clarification

On Coverage For Faulty Workmanship Claims

—STEPHEN T. SNOW, ESQ.—

As discussed in "The Changing Tide of Insurance Coverage for Construction Defect Claims," featured in our last newsletter, the United States Court of Appeals for the Eleventh Circuit recently certified two questions to the Georgia Supreme Court seeking clarification as to the meaning of "occurrence" with respect to insurance coverage for "property damage" arising from faulty workmanship in residential construction.[1] Specifically, the Eleventh Circuit questioned whether damage to property other than the insured's completed work itself was required for an "occurrence" to exist. It further inquired as to whether claims for breach of contract, fraud, or breach of warranty from the failure to disclose information give rise to a duty to defend.

In Taylor Morrison Servs. v. HDI-Gerling Am. Ins. Co., 2013 Ga. LEXIS 618 (Ga. July 12, 2013), the Georgia Supreme Court broke its silence on insurance coverage matters and, in doing so, provided long-awaited clarification as to these questions of fundamental insurance coverage law in Georgia.[2]

"Occurrence" Versus "Property Damage"

In its first certified question, the Eleventh Circuit inquired whether, for an "occurrence" to exist under a standard commercial general liability (CGL) policy, Georgia law requires there to be damage to "other property"; that is, property other than the insured's completed work itself. The Georgia Supreme Court responded in the negative. However, this victory for insureds was short-lived, as the Court quickly clarified that although damage to other property is not required for an "occurrence" to exist, it *is* required for "property damage" to exist.

The insuring agreement in standard CGL policies provides that the insurance only applies to the insured's liability for "bodily injury" or "property damage" that is

1 See HDI-Gerling America Insurance Company v. Morrison Homes, Inc., 701 F.3d 662 (11th Cir. Ga., 2012).
2 Taylor Morrison Servs. v. HDI-Gerling Am. Ins. Co., 2013 Ga. LEXIS 618 (Ga. July 12, 2013).

caused by an "occurrence." The policy defines "property damage" as either "[p]hysical injury to tangible property" or "[l]oss of use of tangible property that is not physically injured." The policy further defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Policies do not define "accident," but Georgia courts have typically defined the term as "an unexpected happening without intention or design."[3] Policies also contain a number of exclusions, including several known as "business risk" exclusions, which generally exclude coverage for defects in the insured's work. It has long been the law in Georgia that "coverage is intended to insure against liabilities to third parties for injury to property or person, but not mere liabilities for the repair or correction of the faulty workmanship of the insured."[4]

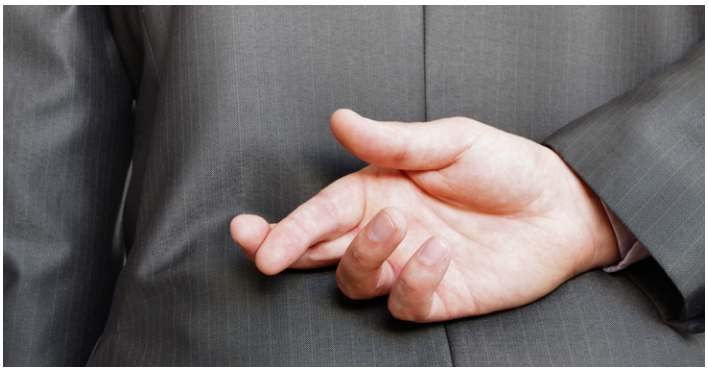
In 2011, the Supreme Court had previously held that "an occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property."[5] However, it had not previously addressed whether faulty workmanship can amount to an "occurrence" when the only damage alleged is to work of the insured, as opposed to "other property." On several occasions, the Georgia Court of Appeals has treated damage to other property as a near-requirement for an "occurrence" to exist.[6] However, in responding to the Eleventh Circuit's certified question on this issue, the Supreme Court held that such decisions by lower courts improperly combined the "occurrence" analysis with the analyses for other terms and exclusions under the policies. The Supreme Court held that the definition of "occurrence" does not take into consideration the nature and extent of injuries caused by the faulty workmanship or the identity of the person whose interests are injured. Rather, the primary requirement for an "occurrence" to exist under a standard CGL policy is that the "bodily injury" or "property damage" must simply be accidental. As such, the Court concluded that damage to other property beyond the work of the insured is not required for an "occurrence" to exist.

The Court was quick to point out, however, that coverage does not hinge on the word "occurrence" alone, and that the mere existence of an "occurrence" does not give rise to coverage.[7] Rather, the "occurrence" must also cause "bodily injury" or "property damage" that is not excluded elsewhere in the policy. More importantly, the alleged "property damage" must refer to property that is non-defective and to damage beyond mere faulty workmanship.[8] The Court reasoned that property or work that is inherently defective because it was produced by faulty workmanship cannot be said to have been "physically injured" by the very faulty workmanship that brought it into being in the first place.[9] The Court further explained that property or work that is inherently defective cannot be said to have sustained a "[l]oss of use" to the extent that it was unusable at its creation, inasmuch as a "[l]oss of use" necessarily requires that the property or work once have been capable of being put to use.[10] In summary, the Court observed that "[A] claim for the repair or replacement of faulty workmanship is not covered by a standard CGL policy — not because there

3 Id. at *8.
4 Id. at *12.
5 Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 288 Ga. 749 (Ga. 2011).
6 See e.g. McDonald Constr. Co. v. Bituminous Cas. Corp., 279 Ga. App. 757 (632 SE2d 420) (2006); Custom Planning & Dev. v. American Nat. Fire Ins. Co., 270 Ga. App. 8 (606 SE2d 39) (2004); SawHorse, Inc. v. Southern Guaranty Ins. Co., 269 Ga. App. 493, 496-497 (1) (a) (604 SE2d 541) (2004).
7 Taylor Morrison Servs., 2013 Ga. LEXIS 618 at *12-13.
8 Id. at *13.
9 Id. at *14, n.10.
10 Id. at *14-15, n.10.

was no 'occurrence' — but most typically because such a claim is not a claim for 'property damage.'"[11] Ultimately, although the Court eliminated damage to other property as a necessary element for an "occurrence," it included it as a necessary element for "property damage." As a result, insureds will continue to bear the burden of establishing that the liability for which they seek coverage arises out of damage to other, non-defective property, as opposed to defects or faulty workmanship in their work.

Fraud Claims Are Not "Accidents"



The Court made short order of the Eleventh Circuit's request for clarification as to whether fraud constitutes an "occurrence" under standard CGL policies. Because fraud claims necessarily require some degree of knowledge or intent on the part of the insured, the Court held that fraud is not an "accident." As a result, fraud claims do not give rise to an "occurrence."

Breach Of Warranty May Give Rise To An "Occurrence," But Coverage Is Unlikely

The Court declined to offer a response as to whether a standard breach of contract claim gives rise to an "occurrence" since that question was not at issue in the matter before the Eleventh Circuit. For the same reason, it also declined to offer a response as to breach of warranty claims for the failure to disclose material information. However, it did offer a response as to claims for breach of contract that arise out of an alleged breach of warranty unrelated to the failure to disclose material information. The court held that claims for breach of warranty arising out of allegations of faulty workmanship often do constitute "occurrences."[12] In so holding, it disapproved of dicta in Custom Planning & Dev. Inc. v. Am. Nat. Fire Ins. Co., 270 Ga. App. 8 (Ga. Ct. App. 2004), and overruled Forster v. State Farm Fire & Cas. Co., 307 Ga. App. 89 (704 SE2d 204) (2010), to the extent those decisions stood for the position that a breach of warranty claim could never be an "occurrence."[13]

However, the Court promptly noted that because a standard CGL policy only applies to "damages *because of* 'bodily injury' or 'property damage'" it is unlikely that coverage would exist for the typical breach of warranty claim.[14] Where faulty workmanship is the "occurrence," the Court explained, "property damage" may be found only when the faulty workmanship causes physical injury to, or the loss of use of, non-defective property or work.[15] By their nature, most breach of warranty claims allege defects in the insured's work. However, coverage could only exist for a breach of a warranty claim that alleges damage to non-defective property. This is because liability for a breach of warranty as to the defective property would not involve "damages *because of*" "property damage" to the non-defective property.[16] As a result, although breach of warranty claims may constitute "occurrences," they would rarely be able to satisfy the "property damage" requirement.

While the Court's recent responses to the certified questions posed by the Eleventh Circuit provide much-needed clarification as to the definitions and interpretations of an "occurrence" and "property damage" under Georgia law, the Court stopped short of delineating between damage to defective, as opposed to non-defective, work. As a result, as long as claimants continue to allege resulting damages caused by defects in the insured's work, the coverage debates are certain to continue. ■

11 Id. at *15, n.10.
12 Id. at *27.
13 Id. at *28-29, n. 15.
14 Id. at *29 (emphasis added).
15 Id.
16 Id.

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