Insurance Coverage Case Law Update

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The following case law update was provided by the GDLA's Insurance Coverage Substantive Law Committee.

Nationwide Mut. Fire Ins. Co. v. Kim,
No. 08A1063
(Ga. Ct. App. Nov. 14, 2008)

In this appeal in a declaratory judgment action, the court ruled a policy's criminal acts exclusion does not preclude an insurer from having to defend its insured when the plaintiff has substituted claims in negligence and gross negligence.

The underlying tort suit originally had been based upon a claim for battery arising from the insured throwing an ice cream scoop at a karaoke bar customer. However, the plaintiff subsequently had amended the complaint to remove the intentional acts and to allege only negligence and gross negligence, and the defendant testified that he had not intended to throw the scoop. The insurer filed a motion for summary judgment in the DJ action, claiming that the facts established that its insured had acted intentionally, and the trial court denied the motion.

The court of appeals held that a factual issue existed as to whether the defendant's acts were intentional or negligent, and therefore summary judgment was not proper. As a result, the insurer has a duty to provide a defense to the claims.

Smith v. Stoddard
No. 08A1189
(Ga. Ct. App. Nov. 19, 2008)

The court of appeals held that an uninsured motorist policy does not cover a plaintiff's right to attorneys' fees and expenses of litigation against the tortfeasor under O.C.G.A. § 13-6-11.

The plaintiff brought suit against the defendant as a result of a motor vehicle accident and also sought fees and expenses of litigation under O.C.G.A. § 13-6-11, based on the tortfeasor's bad faith and stubborn litigiousness. After receiving policy limits from the defendant's liability carrier, the plaintiff made a claim against his own UM insurer for excess damages, including the award under O.C.G.A. § 13-6-11. In seeking these damages, the plaintiff did not allege that his UM carrier had acted in bad faith or had been stubbornly litigious. Rather, the plaintiff relied solely upon the defendant's conduct

The UM insurer sought summary judgment on the issue, arguing that the UM coverage did not give the plaintiff a claim for attorney fees or expenses of litigation. The trial court granted summary judgment to the UM insurer.

The Georgia Court of Appeals affirmed, holding that there was no coverage for the fees and expenses. The court noted that the UM statute makes no provision for the recovery of attorneys' fees and expenses against a UM insurer based on the tortfeasor's stubborn litigiousness or bad faith conduct. The court also held that the UM insurance policy did not cover such damages, because the language of the policy limited coverage to the type required by the UM statute, i.e., for bodily injury and property damage.

Owners Ins. Co. v. Smith Mech. Contr. Inc.
No. 08A1563
(Ga. Ct. App. Nov. 20, 2008)

The care, custody, or control provision of an insurance policy did not exclude coverage for the damage to the property at issue, since the undisputed evidence showed that there was no bailment of property.

The insured had filed suit for indemnification against its insurer, seeking to recover amounts that the insured had paid to its customer after the customer's peanut cleaner was damaged while the insured was moving the cleaner with the insured's crane. The trial court granted summary judgment to the insured, ruling that the care, custody, or control provision of the policy did not exclude coverage for the damage, because there was no bailment of the cleaner.

The court of appeals affirmed, noting (1) no evidence showed the customer had delivered exclusive possession of the cleaner to the insured; (2) the customer's maintenance supervisor was in charge of the job it had hired the insured to do and the supervisor had the authority to control the job; (3) the insured never took the cleaner off the customer's job site; (4) the insured's job was simply to lift the cleaner from its foundation, set it on the ground and then hoist it onto a truck; and (5) the damage to the cleaner was not caused by any failure of the insured to perform the job it had been contracted to do in a workmanlike manner.

McClellan v. Evans
No. 08A1277
(Ga. Ct. App. Nov. 17, 2008)

Uninsured motorist policy was not relevant in personal injury action case. Evidence of an agreement between the defendant/tortfeasor and the plaintiff's UM carrier ("agreement") is inadmissible when the agreement only established the defendant's agreement to cooperate with the UM carrier by appearing at trial.

The plaintiff had been struck and injured by a vehicle driven by the defendant. In the tort suit, the jury found for the defendant. The plaintiff appealed, arguing the trial court had erred in denying the plaintiff's pretrial motion for permission to introduce the agreement.

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The court of appeals affirmed the judgment in the defendant's favor, holding that the trial court had properly excluded evidence of the agreement, because the UM policy was not relevant. The court of appeals also reasoned that the agreement itself established only that the defendant had agreed to cooperate with the UM carrier by appearing at trial.

A special thanks to ***Eric Mull*** *an associate with Drew Eckl & Farnham, Atlanta, specializing in commercial litigation, subrogation, and insurance coverage matters.*