BASIC OVERVIEW OF PROPERTY LOSS CLAIMS

I. INTRODUCTION

Although property loss claims can come in all forms, the two most common are destruction of property and theft. In many cases, once liability is established, the value of a property loss claim is relatively clear cut. However, on occasion, questionable claims do arise. Toward that end, this topic is intended to provide an overview of the investigation and defense of suspected arson and fraudulent theft claims.

II. INSTITUTION OF THE CLAIM

Upon report of a property loss or a fire loss claim an initial investigation is performed by the field adjusters. This will commonly include a review of reports and statements made by the insured and others. An adjuster will frequently also review incident and accident reports prepared by law enforcement. If a recorded statement has not been taken, the adjuster will often take such statements from both the insured and other potential witnesses. Most insurance companies require that insureds submit themselves to recorded statements and examinations under oath (EUO) as a prerequisite for coverage under their policies. A failure of the insured to submit to a recorded statement and examination under oath can result in coverage being denied based on failure to cooperate in the investigation of the claim. In addition, an insured is frequently required under the policy to cooperate with his insurer in investigating the claim – including requests for documents and inspection of the property damage in question by an expert. This allows the insurer to determine whether a fraudulent claim is being presented for payment.

Examinations under oath are recorded statements taken under oath before a court reporter. It is similar to a deposition except on two points. Initially, the statement is taken while no formal litigation is pending. In addition and because no formal Complaint has been filed, the Georgia Civil Practice Act and the rules of evidence technically do not apply. As such, the attorney retained to perform an examination under oath may ask many questions that would normally be objectionable if asked during a formal deposition. The attorney taking the EUO is also relatively free to inquire into a broader range of subjects that he might during a formal deposition. Although, the party being examined under oath (or his attorney) can refuse to answer questions posed to him, he places himself in jeopardy of having insurance coverage denied based on failure to cooperate in the investigation of the claim. Many insurance policies provide that coverage can be excluded if the insured does not cooperate in its investigation of the claim. As such, if the insured decides to terminate an EUO or otherwise refuses to cooperate with the investigation of the claim, the insurer may be in its rights to exclude coverage. In such circumstances, the insured would be left in a situation where it would be required to file suit against the insured and claim the exclusion was made in bad faith. This can be especially problematic in cases where the insured has been indicted or charged with a criminal offense. In such circumstances, the insured may invoke his fifth amendment right against self-incrimination.

III. OPERATING UNDER THE POLICY

Under most insurance policies, an insured has certain obligations to cooperate in the investigation and reporting of a claim. The insurance company also has similar obligations under the policy to evaluate, adjust and if appropriate, pay under the policy in good faith. This would include acting in good faith not only with the insured but also with other interested third parties such as mortgage holders.

Often, questions of coverage are not only fact intensive but also involve interpretation of the terms of the insurance policy itself. In Georgia, the courts have held that due to unequal bargaining positions of the parties, insurance policies are considered to be contracts of adhesion. As such, any ambiguity in the policy will be construed against the insurer as drafter of the agreement. As such, the provisions of the contract, including exclusions, must be careful and clearly worded to avoid any potential ambiguity in its terms.

It should also be noted that the insurer can be liable for missing investigation and payment deadlines provided by O.C.G.A. §§ 33-4-6 and 33-4-7. This is a statutorily defined deadline of sixty (60) days from the date that payment is demanded by an insured (in the case of O.C.G.A. § 33-4-6 or a third-party (in the case of O.C.G.A.§ 33-4-7). Failure to comply with these deadlines could potentially expose the insurer to statutory bad faith penalties.

IV. INVESTIGATION OF CLAIM

As indicated above, insurers are normally allowed, based on the language of their policy, to conduct a reasonable investigation of the facts and circumstances surrounding a property damage claim. This investigation often, but does not necessarily, include an investigation over liability and the extent of the property damage claimed.

In addition to recorded statements and examinations under oath (as referenced above), insurance policies frequently require an insured to cooperate in other parts of the investigation and to provided documents and other items requested by the insurance company in its efforts to investigate and adjust the claim in good faith. Especially in fire loss claims where arson is suspected, the insurer will frequently request access to the property where the damage occurred so that its experts can determine if accelerants were utilized in starting or maintaining the fire in question.

In addition, the insurer will often interview other potential witnesses as part of their investigation. In fraud and arson cases, such witnesses can often be the basis for a denial of the claim.

V. CRITICAL DECISION MAKING: ISSUE A DENIAL OR SEEK A RULING FROM THE TRIAL COURT VIA DECLARATORY JUDGMENT.

When dealing with property loss either through damage or theft, the insurance company is often faced ultimately with the question of whether to accept or deny the claim. However, this decision can take on three different forms. Obviously, if the claim is ultimately accepted, there should be little, if any, subsequent litigation. If the insurer decides to deny the claim outright, the insurer could potentially be exposed for bad faith. Fortunately, the Courts have also provided insurers with a "safe harbor" in the form of the declaratory judgment action. This statutory remedy enables the insurer to seek a judicial determination of whether the insurer can properly deny a claim without the potential exposure for bad faith.

O.C.G.A. § 9-4-2 provides in relevant part:

> (a) In cases of actual controversy, the respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
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> (b) In addition to the cases specified in subsection (a) of this Code section, the respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for the declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

By this language, O.C.G.A. §9-4-2 has empowered Georgia's superior courts to exercise equitable relief in determining legal rights and relationships between parties that petition for that relief. However, a ruling by the Court will only have binding effect on entities that were actually parties to the declaratory judgment action. As such, it is imperative that any petition for declaratory relief not only name the insured as a Defendant/Respondent but also any other party with a potential interest in the insurance proceeds. This would include, but would not be limited to, any mortgage holder or lien holder with respect to property loss claims. Should the Superior Court determine that a proper basis is had for the insurer to deny coverage, that determination, when reduced to order, shall be binding on all parties to the declaratory judgment action. See O.C.G.A. §§ 9-4-2 and 9-4-3

It should be noted that the declaratory judgment provisions contained in O.C.G.A. § 9-4-1 et seq. can also be invoked by either the insurer or the insured. It can also be invoked where other equitable and legal rights are available to the petitioning party. Frequently, once a Petition for

Declaratory Relief is filed and discovery is completed, one or more of the parties will file a motion for summary judgment. In the insurer's case, it will seek an order finding that it can deny coverage. Should the insurer's motion be granted, it will have no exposure for denying the claim so long as the basis for doing so was encompassed by the Court's order.

VI. CONCLUSION

As reflected above, many considerations go into an insurer's decision whether to accept or deny a property damage claim. In close calls, the insurer will often petition the superior court to determine whether a denial of coverage would be proper in order to avoid potential liability for bad faith. A proper investigation by the insurer will go far to allowing it to make an informed decision on such claims.