**MEMORANDUM**

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| Date: | April 2, 2020 |
| To: | Ryan Pumpian; Robert Mollohan |
| From: | Ben Dell’Orto |
| Re: | Common Issues Arising in Insurance Coverage Actions |

## Potential Direct Claims Against Insurer:

### Direct Actions:

As a general rule, an injured party cannot bring a direct action against an insurer until the injured party has secured a monetary judgment. See Hartford Ins. Co. v. Henderson & Son, Inc., 258 Ga. 493, 494 (1988). This is because the injured party is not a party to the contract with the insurer.

### Bad Faith Under 33-4-6:

O.C.G.A. § 33-4-6 authorizes the insured to recover an additional 50% of the insurer’s liability where the insured can prove that (1) the claim is covered under the policy; (2) at least 60 days prior to filing suit, insured demanded payment; and (3) the insurer’s failure to pay was motivated by bad faith. O.C.G.A. § 33-4-6. An additional insured may bring an action for bad faith denial of coverage. See Southern Trust Insurance Company v. Cravey, 345 Ga. App. 697 (2018).

### Declaratory Judgment

An additional insured may bring an action for a declaratory judgment regarding an insurer’s obligations under the policy. Tiller v. State Farm Mut. Auto. Ins. Co., 549 Fed. Appx. 849, 584 (11th Cir. 2013); Atlantic Wood Industries, Inc. v. Argonaut Ins. Co., 258 Ga. 800, 800 (1989). Such a claim is not ripe until the insurer denies coverage, reserves rights, or creates a controversy over the scope of coverage. See City of College Park v. Georgia Interlocal Risk Management Agency, 313 Ga. App. 239 (2011).

### Breach of Contract

A general contractor may bring a first-party breach of contract action where an insurer refuses to reimburse it for repairs to the work of the subcontractor. However, depending on the language of the policy, a general contractor’s claim may be barred by a business risk exclusion. Auto Ins. Co. v. Gay Const. Co., 332 Ga. App. 757, 760 (2015).

## Timely Notice:

Policies typically provide that an insured must provide notice of a claim “as soon as practicable.” Timely notice is a precondition to coverage.

“[T]he duty to provide notice to the insurer is triggered when the insured actually knew or should have known of the possibility that it might be held liable for the occurrence in question.” South Carolina Ins. Co. v. Coody, 957 F. Supp. 234, 237 (M.D. Ga. 1997). For example, a “warning letter” from a claimant triggers the duty to notify. Travelers Indem. Co. of Connecticut v. Douglasville Development, LLC, 2008 WL 4372004 (N.D. Ga. 2008). The courts will look to four factors to determine if the obligation to provide notice was triggered:

(1) the nature of the event;

(2) the extent to which it appeared that injuries or property damage resulted from the event;

(3) the apparent severity of any such injuries or damage; and

(4) whether anyone gave an indication that he intended to hold the insured responsible for the event and resulting injuries.

Forshee v. Employers Mut. Cas. Co., 309 Ga. App. 621, 711 S.E.2d 28, 31 (2011).

While there are no hard and fast rules about how quickly notice must be provided, as little as three months can be sufficient to render notice defective. Allstate Ins. Co. v. Airport Mini Mall, LLC, 265 F. Supp. 3d 1356 (N.D. GA. 2017),

## Triggering Events:

Policies typically define “occurrence” as an “accident,” which can include defective work causing damage to property. American Empire Surplus Lines Ins. Co. v. Hathaway Development Co., Inc., 288 Ga. 749, 752 (2011) (finding “[a]n occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property.”); Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. Co., 293 Ga. 456 (2013).

The courts recognize four types of triggering events:

* Exposure trigger – “coverage is triggered when injury-producing agent first makes contact with the property.”
* Injury in Fact trigger – “coverage is triggered at the point in time when actual injury first occurs” Id. at 1345-46.
* Continuous/Multiple trigger – “all liability policies in effect from the exposure to manifestation provide coverage and are responsible for the loss.
* Manifestation trigger – “coverage is triggered only when damage occurs and is discovered, that it ‘manifests’ itself as readily obvious , within the policy period.”

Arrow Exterminators, Inc. v. Zurich American Ins. Co., 136 F. Supp. 2d 1340, 1345-46 (N.D. GA. 2001). Policies do not typically require that the property damage be discovered during the policy period, only that the damage occur. Id.