Insurance

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I. INTRODUCTION

This survey year was a good year for Georgia insureds. The supreme court's unqualified affirmance of *State Farm Mutual Automobile Insurance Co. v. Mabry*[1] meant diminished value litigation in Georgia and spelled nine-digit losses for insurers, losses avoided in every contiguous state. Apparently, responding to the supreme court's plea, the General Assembly waived sovereign immunity on a uniform, limited, and compulsory basis for local governments beginning in 2005. Insureds benefitted from a broad variety of coverage-finding opinions; though, substantial disagreement on and among various panels of the court of appeals resulted in several incongruous results. Until the waters become more settled by full court or final appellate court decisions, insurers may wish to err even more on the side of caution when declining coverage.

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1. 274 Ga. 498, 556 S.E.2d 114 (2001).

II. AUTOMOBILE INSURANCE

Although the volume of cases decided during this survey period was less than in the recent past, the impact of the major decisions this year was tremendous. Chief among the cases in importance was the supreme court's decision in *Mabry*.[2] *Mabry* and other significant developments during the survey period are discussed below.

A. Diminished Value Litigation—Georgian Style

In *Mabry* the Supreme Court of Georgia held that an automobile insurance policy that promises to pay the insured for "the loss" caused by damage to the insured vehicle obligates the insurer to either restore the vehicle to its pre-loss value as well as its pre-loss condition or, in the alternative, to compensate the insured for any residual loss of value remaining after repairs are made to the vehicle.[3] *Mabry* was brought by two State Farm policyholders who sought damages and injunctive relief for the company's failure to pay them "inherent diminished value"[4] arising from damage to their vehicles. The complaint, filed in the Superior Court of Muscogee County, sought the following:

1. Certification of two classes of plaintiffs—one class consisting of all former and current Georgia State Farm insureds who had made first-party physical damage claims within the six years preceding the filing of the lawsuit (the "Breach of Contract Class") and a second class consisting of all present insureds of State Farm in Georgia (the "Equitable Relief Class");
2. A declaratory judgment that State Farm's Georgia automobile insurance policies provide coverage for diminution in value to the insureds' vehicles and impose upon State Farm an obligation to assess each first-party physical damage loss for the presence of diminution in value;
3. An injunction requiring State Farm to advise its policyholders of the coverage for diminution in value, to assess in each first-party claim for physical damage whether the vehicle has suffered a

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2. *Id.* at 498, 556 S.E.2d at 114.
3. *Id.* at 509, 556 S.E.2d at 123.
4. "Inherent diminished value" is the diminution in value of a vehicle that has been damaged and repaired when the repairs are performed properly and are sufficient to return the vehicle to its pre-damage condition. Thus, plaintiffs' claims arose not from inadequacy of the repair, but from the sole fact that their vehicles had been damaged and were, therefore, allegedly worth less, despite the repairs, than a vehicle that had never been damaged.

diminution in value, and to pay such damages or deny the presence of diminution in value; and

4. Money damages for the diminution-in-value losses sustained by State Farm's Georgia insureds during the six-year limitations period.[5]

State Farm's Georgia automobile insurance policies that contain comprehensive coverage, collision coverage, or both for the insured vehicle provide that the company will "pay for loss to your car."[6] The policies also contain provisions (1) limiting the coverage to the lower of the actual cash value of the vehicle or the cost of repair or replacement and (2) providing that State Farm has the right to settle claims for physical damage by paying up to the actual cash value of the vehicle or paying "to repair or replace the property or part with like kind and quality."[7] State Farm contended that there was no cognizable loss sustained by inherent diminished value; it could only be liable to its insureds for diminution in value when repairs are unable to restore the vehicle to its pre-loss condition in appearance or function; and if any loss of value occurred, it could not be determined until a vehicle was sold.[8] In addition, State Farm denied that it had any duty to affirmatively assess vehicles for losses not claimed by the policyholder, and thus, the company could not be required to advise its insureds of diminution in value and pay for such loss unless the insured claimed a loss in value after repairs were completed.[9]

The trial court granted plaintiffs interlocutory relief in two separate orders. First, the court entered an order certifying the two classes of claimants. Then, in December 2000, the court entered an order declaring that State Farm's Georgia automobile insurance policies must provide coverage for first-party diminution in value, that State Farm was enjoined to evaluate its first-party physical damage claims to determine whether there is any diminution in value, and that State Farm either pay its insureds for this loss or deny its presence.[10] The order also required State Farm to develop "an appropriate methodology and procedure" and to "collect, catalog, and maintain any information necessary to make a determination of diminution in value."[11]

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5. 274 Ga. at 498-99, 556 S.E.2d at 116.
6. *Id.* at 502, 556 S.E.2d at 118.
7. *Id.*
8. *Id.* at 509, 556 S.E.2d at 123.
9. *Id.* at 502, 556 S.E.2d at 118.
10. *Id.* at 498, 556 S.E.2d at 118.
11. *Id.* at 498-99, 556 S.E.2d at 116.

State Farm appealed both trial court orders to the supreme court, and the court affirmed.[12] After the court resolved the procedural issues concerning class certification and whether a declaratory judgment was appropriate, the court turned to the case's central issues. The court framed the question for declaratory judgment as:

> Whether the fact of physical damage resulting from an event covered by the policy reduces the value of a vehicle, even if repairs return it to pre-loss condition in terms of appearance and function; if so, whether the policies issued by State Farm obligate it to compensate its policyholders for that loss of value, or permit it to discharge its responsibility under the policy by making repairs that return the vehicle to pre-loss condition in terms of appearance and function; and if State Farm is obligated to pay its policyholders for diminution in value, whether it is required to assess that element of loss along with the elements of physical damage when a policyholder makes a general claim of loss.[13]

Addressing the first question, whether diminution in value occurs even when repairs are properly made, the court found the existence of a question of fact.[14] Based upon State Farm's own documents and witnesses, the supreme court held that the trial court's finding of a potential for diminution in value in every physical damage loss was not clearly erroneous.[15] The trial court's finding was thus affirmed.[16]

Next, the court held that whether or not State Farm was contractually obligated to pay first-party diminution in value losses to its policyholders was a question of contract construction and, therefore, a question of law.[17] On this issue, the court reviewed seventy-five years of case law from the court of appeals and concluded that Georgia law requires insurers to restore damaged property to its pre-loss value, not just its pre-loss condition, if the policy undertakes to pay the insured for the loss, and that the option to repair can only fully discharge the insurer's obligation when the property is restored to both its pre-loss condition and value.[18] Justifying its rationale, the supreme court asserted:

> The foregoing review of Georgia case law establishes clearly that value, not condition, is the baseline for the measure of damages in a claim under an automobile insurance policy in which the insurer undertakes

12. *Id.* at 511, 556 S.E.2d at 124.
13. *Id.* at 502-03, 556 S.E.2d at 119.
14. *Id.* at 503, 556 S.E.2d at 119.
15. *Id.*
16. *Id.*
17. *Id.* at 508, 556 S.E.2d at 123.
18. *Id.*

> to pay for the insured's loss from a covered event, and that a limitation of liability provision affording the insurer an option to repair serves only to abate, not eliminate, the insurer's liability for the difference between pre-loss value and post-loss value.[19]

Thus, if the insured can only be made whole by the payment of diminution of value in addition to repairs, the court held that such payment is required under State Farm's policies.[20]

Whether State Farm is required to assess each physical damage loss for potential diminution in value, even without a specific claim for such loss by the policyholder, the supreme court again held that a question of contract interpretation, and thus a question of law, was presented.[21] The court found that State Farm's policy imposed upon the insured certain specific obligations, including the obligations to report the fact of the loss, to protect the property, to show the insurer the damage, and to present certain records, receipts, and invoices.[22] However, the court held that nothing in the policy required the insured to assert a right of recovery for each item of damage or loss sustained.[23] Therefore, "it stands to reason that the policy does not require a separate claim for diminution in value."[24]

Finally, the court affirmed the trial court's imposition of an injunction requiring State Farm to develop a methodology for assessing diminution-in-value claims and requiring State Farm to "collect, catalog, and maintain" the information necessary to assess such claims.[25] The court held that allowing State Farm to develop its own methodology was the "least oppressive means" to accomplish the necessary task, and compiling the information was also necessary as State Farm did not have the information necessary to evaluate diminution-in-value claims.[26]

Following the supreme court's decision, the parties then faced the daunting task of evaluating the diminution-in-value claims of State Farm's policyholders. Several methods were considered, including proposed third-party vendors' proprietary formulas for individually assessing the difference in value between a damaged and repaired vehicle and an undamaged vehicle. Eventually, the parties reached a settlement agreement, which required State Farm to utilize the so-called

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19. *Id.* at 506, 556 S.E.2d at 119.
20. *Id.* at 508, 556 S.E.2d at 122.
21. *Id.*, 556 S.E.2d at 123.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 510, 556 S.E.2d at 124.
26. *Id*.

"17(c)" or "Insurance Commissioner's" formula[27] and evaluate each physical damage loss claim falling within the class period. State Farm assembled a "cat" (catastrophe) team and assigned it responsibility for individually reviewing approximately 700,000 claims and applying the agreed-upon formula to each claim in order to evaluate the diminished value loss. In the end, State Farm reached a comprehensive settlement of the class claims by paying $150,000,000 to the class members and counsel to resolve the *Mabry* case.

In addition to the case against State Farm, similar class action suits for diminution in value were brought against a number of Georgia's largest automobile insurers, including Allstate, GEICO, Progressive, Travelers, Georgia Farm Bureau, Cotton States, USAA, USF&G, St. Paul, and Grange Mutual. Reported settlements in these cases exceeded $100,000,000, and many of the cases were either still unresolved or their results not yet publicly available at the time of this writing.

Diminished value litigation has certainly not been unique to Georgia. Claims similar to those presented in *Mabry* have been made around the country, many recently, and a definite split of opinion exists despite the relative identity of policy language at issue and the fact that only questions of law are involved in determining whether the policies provide coverage for the claim.[28] It is interesting to note that the decisions on this question, which have been reached by our sister states since the decision in *Mabry*, have unanimously rejected the Georgia Supreme Court's construction of the insurance contract and found that the insurers, including State Farm, had no obligation to compensate their insureds for diminished value or do more than restore the insureds' vehicles to their pre-loss condition.[29]

B. Sovereign Immunity—Uniform Compulsory Waivers for 2005 and Beyond

At present, local governments have the discretionary option of whether they will subject themselves to suits arising out of injuries caused by the

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27. This formula, which was not written by the Insurance Commissioner, is attributed to that office although it was previously submitted by another insurer as its method for evaluating diminished value claims. The use of the formula was approved by the trial court in *Mabry* in paragraph 17(c) of its order issued on June 12, 2000 and has since been known as the "17(c)" formula. The formula, along with key documents from *Mabry*, can be found at www.Georgia17c.com.

28. *See, e.g.*, L.S. Tellier, Annotation, *Measure of Recovery by Insured Under Automobile Collision Insurance Policy*, 43 A.L.R.2d 327 (1995), cited by the court in *Mabry*.

29. *See* Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732 (2002); Smither v. Progressive County Mut. Ins. Co., 76 S.W.3d 719 (2002); Pritchett v. State Farm Mut. Auto. Ins. Co., 2002 Ala. Civ. App. LEXIS 130 (Ala. Civ. App. Feb. 22, 2002).

use of municipal- and county-owned vehicles. The Official Code of Georgia Annotated ("O.C.G.A.") section 33-24-51[30] provides a limited waiver of sovereign immunity for claims arising out of the use of government vehicles, but applies only if the governmental entity has purchased liability insurance covering the use of the vehicle, and then only to the extent of that insurance.[31]

In *Cameron v. Lang*,[32] the supreme court considered, in a consolidated appeal, challenges to this scheme, which denies recovery to innocent citizens injured or killed because of the negligent operation of a motor vehicle when the local government has elected not to purchase any (or sufficient) liability insurance. This case involved injuries and death that occurred during high-speed police pursuits.[33] Although the court upheld application of the statute, it issued strong editorial comment in favor of a change.[34]

The court noted that "[a]s these cases illustrate, the failure to require cities and counties to maintain liability insurance for the use of motor vehicles on official business has created inconsistent and often unfair results."[35] The results, the court said, "do not provide the proper incentive to governing bodies to obtain insurance covering the use of their law enforcement vehicles."[36] Therefore, the court urged the General Assembly to take action: "Due to the danger to the public caused by high speed chases and the choice of many local governments to forego purchasing of liability insurance, we urge the legislature to remove the city and county's discretion and require them to procure liability insurance for the operation of their vehicles."[37]

The General Assembly heard and responded to the supreme court's call. House Bill 1128 was passed as Act 763[38] and creates new statutory provisions concerning sovereign immunity. All of the following changes become effective January 1, 2005. Section 36-92-2 waives the sovereign immunity of municipalities, counties, and other political subdivisions of the state for injuries and damages arising out of the negligent use of covered motor vehicles while operated within the scope of the government's business.[39] The extent of the waiver is generally

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30. O.C.G.A. § 33-24-51 (1996).
31. *Id.*
32. 174 Ga. 122, 549 S.E.2d 341 (2001).
33. *Id.* at 122, 549 S.E.2d at 343.
34. *Id.* at 127, 549 S.E.2d at 347.
35. *Id.*
36. *Id.*
37. *Id.*
38. 2002 Ga. Laws 579 § 3.
39. O.C.G.A. § 36-92-2 (2000).

limited in amount, with provisions for escalation of the cap from $100,000 per person and an aggregate of $300,000 per accident in 2005 to $500,000 per person and $700,000 per accident after January 1, 2008.[40] However, O.C.G.A. section 33-24-51,[41] also effective January 1, 2005, provides that local governments may purchase insurance in amounts above the statutory waiver amount and thereby waive their sovereign immunity up to the amount of such liability insurance.[42] Another portion of the Act creates section 36-92-3,[43] which provides immunity for the local government officials and employees whose negligent operation of a motor vehicle during the performance of his or her official duties results in the loss causing the claim or suit.[44] O.C.G.A. section 36-92-4[45] prohibits the award of punitive damages against a local government entity and also mandates the venue of any suit subject to the chapter in the county where the local government resides.[46]

C. Public Policy Trumps Policy Exclusion

Although a policy exclusion is unambiguous and enforceable in other circumstances, in *Woody v. Georgia Farm Bureau Mutual Insurance Co.*,[47] the court of appeals held that an exclusion in an automobile insurance policy cannot be enforced if such enforcement would result in an innocent injured party having no access to insurance funds to compensate him for his injuries.[48] Readers will be interested not only in the result reached by the court of appeals, but also in the fact that the authors of the principle opinions are reversed in position from what one might anticipate given the traditional alignment of the court.

Woody was injured in a wreck with a vehicle driven by a person who had no driver's license. The insurance policy on the other vehicle contained an exclusion from liability coverage when the vehicle was knowingly used by an operator without a valid license. Woody had no uninsured motorist ("UM") coverage on his vehicle.[49]

In a declaratory judgment action brought by Georgia Farm Bureau Mutual Insurance Co., the trial court granted summary judgment to the

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40. *Id.*
41. *Id.* § 33-24-51.
42. *Id.*
43. *Id.* § 36-92-3.
44. *Id.* § 36-92-3(a).
45. *Id.* § 36-92-4.
46. *Id.*
47. 250 Ga. App. 454, 551 S.E.2d 837 (2001).
48. *Id.* at 456, 551 S.E.2d at 838.
49. *Id.* at 454, 551 S.E.2d at 837.

insurer. The court found that even though enforcement of the exclusion would leave Woody without access to insurance coverage, no public policy was violated because Woody could have purchased UM coverage.[50] The court of appeals reversed the lower court in an opinion written by Judge Andrews.[51] Although it found the coverage exclusion unambiguous and enforceable if other insurance coverage had been available, the court held that Georgia public policy, as embodied in the compulsory insurance statute and as announced by the supreme court in *Cotton States Mutual Insurance Co. v. Neese*,[52] would be contravened by enforcement of the exclusion.[53]

Judge Eldridge authored a spirited dissent in which he argued that the choice to reject uninsured motorist coverage should not justify ignoring an unambiguous exclusion when the injured person and the insured who rejected the coverage are the same individual.[54] The majority's decision, Judge Eldridge wrote, treats similarly situated liability insurers unequally, with the viability of their policy terms determined not by the intent or contractual agreement of the insurer and insured, but by the choices made by the ultimately injured parties on whether to avail themselves of UM coverage.[55]

D. No Report of Accident Equals No Coverage

Just over a month after deciding *Woody*, in *Navarro v. Atlanta Casualty Co.*,[56] the court of appeals upheld summary judgment in favor of an insurer, precluding an innocent injured victim from gaining access to insurance funds for compensation.[57] Plaintiff, Navarro, was injured while riding in a truck that was struck by an unidentified motorist. The owner and driver of the vehicle had purchased uninsured motorist coverage from Atlanta Casualty Co. ("Atlanta Casualty"). Neither the driver nor Navarro reported the accident for four or five days, thereby violating O.C.G.A. section 40-6-273,[58] which requires that such accidents be reported immediately. Because the UM statute, O.C.G.A.

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50. *Id.* at 454-55, 551 S.E.2d at 837.
51. *Id.* at 456, 551 S.E.2d at 838.
52. 254 Ga. 335, 329 S.E.2d 136 (1985). In *Neese* the supreme court held that the compulsory insurance statute was enacted to ensure access to insurance to compensate innocent victims of negligence by motorists. *Id.* at 341, 329 S.E.2d at 141.
53. 250 Ga. App. at 455, 551 S.E.2d at 837.
54. *Id.* at 459-60, 551 S.E.2d at 840 (Eldridge, J., dissenting).
55. *Id.* at 460, 551 S.E.2d at 840 (Eldridge, J., dissenting).
56. 250 Ga. App. 550, 552 S.E.2d 508 (2001).
57. *Id.* at 554-55, 552 S.E.2d at 511.
58. O.C.G.A. § 40-6-273 (2001).

section 33-7-11(c),[59] also requires immediate reporting of the accident as a condition precedent to recovery against a UM carrier, the court held that Atlanta Casualty was entitled to summary judgment against Navarro's claims.[60]

Judge Eldridge issued a lengthy dissent in which he traced the history of the reporting statute and the interaction of that statute with the UM Act.[61] The dissent argued that a jury question existed as to whether the driver might have been exempt from the reporting requirement and whether there was substantial compliance with the UM statute by the reporting of the accident within a few days.[62] Finally, Judge Eldridge argued that the failure to report an accident as required by O.C.G.A. section 40-6-273[63] could only serve as a matter in abatement and not as the basis for summary judgment in favor of an insurer.[64]

The majority, in an opinion again written by Judge Andrews, dispatched these arguments, stating that the reporting statute's requirement that a report be made "immediately" and by the "quickest means of communication . . . cannot be stretched to include four or five days later."[65] Further, the majority distinguished the precedent relied upon by the dissent in support of the abatement argument.[66] The majority reasoned that the case cited by Judge Eldridge was decided under a materially different reporting statute.[67]

E. When Notice of a Suit is Not Really "Notice"

Every automobile insurance policy requires the cooperation of the insured in the defense of any suit arising out of use of the insured vehicle. O.C.G.A. section 33-7-15(a)[68] also imposes the duty of cooperation and specifically requires that the insured provide notice of any suit by forwarding to the insurer a copy of "every summons or other process" related to any action covered under the policy.[69] Subsection (b) of this statute relieves insurers of their obligation to defend and indemnify their insureds in the event of a breach of the notice requirement "if prejudicial

59. *Id.* § 33-7-11(c) (2000).
60. 250 Ga. App. at 555, 552 S.E.2d at 508-09.
61. *Id.* at 553, 552 S.E.2d at 509 (Eldridge, J., dissenting).
62. *Id.* at 554, 552 S.E.2d at 511 (Eldridge, J., dissenting).
63. O.C.G.A. § 40-6-273 (2001).
64. 250 Ga. App. at 554-55, 552 S.E.2d at 511 (Eldridge, J., dissenting).
65. *Id.* at 551, 552 S.E.2d at 509.
66. *Id.*
67. *Id.*
68. O.C.G.A. § 33-7-15(a) (2000).
69. *Id.*

to the insurer."[70] But the statute contains a saving provision that allows the required notice to be provided by a third party:

> Subsections (a) and (b) of this Code section shall not operate to deny coverage for failure to send a copy of a summons or other process relating to policy coverage if such documents are sent by a third party to the insurer or to the insurer's agent by certified mail or statutory overnight delivery within ten days of the filing of such documents with the clerk of the court.[71]

In *Peachtree Casualty Insurance Co. v. Bhalock,*[72] the court of appeals addressed whether sending a courtesy copy of an as yet unfiled complaint satisfies the requirement of subsection (c).[73] In the circumstances of the case, where the insured defendant never notified the insurer of the suit, no notice of service was filed with the trial court, and plaintiff's counsel repeatedly told the insurer's adjuster that service had not been effected upon defendant until after a default judgment was taken, the court held that the unfiled complaint did not satisfy the statutory requirement of forwarding "a copy of a summons or other process" to the insurer.[74]

In reaching this result, the court distinguished several cases in which less than complete compliance with the statutory requirement was found sufficient to satisfy the notice requirement.[75] The court also held that the prejudice requirement of the statute applies only to the insured's failure to notify the insurer and not to deficiencies in a third party's attempt to provide the notice.[76] Nevertheless, the court found that Peachtree Casualty Insurance Co. ("Peachtree") was prejudiced by its inability to determine that defendant was served, notwithstanding the fact that Peachtree was aware that the suit had been filed well before service was effected and, thus, arguably could have arranged for an answer to be filed, avoiding a default judgment.[77]

F. Late Notice of Occurrence Destroys First-Party Coverage

In *Allstate Insurance Co. v. Walker*,[78] another case involving the insureds' duty to give the insurer notice—this time notice of loss instead

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70. *Id.* § 33-7-15(b).
71. *Id.* § 33-7-15.
72. 252 Ga. App. 328, 556 S.E.2d 218 (2001).
73. *Id.* at 328, 556 S.E.2d at 219.
74. *Id.*, 556 S.E.2d at 218.
75. *Id.* at 330, 556 S.E.2d at 220.
76. *Id.* at 331, 556 S.E.2d at 221.
77. *Id.*
78. 254 Ga. App. 315, 562 S.E.2d 267 (2002).

of notice of a suit—"as soon as possible," the court of appeals held that the insureds' failure to give notice of a theft loss of their vehicle for almost a year after the incident was untimely as a matter of law.[79] In *Walker* the insureds claimed that they failed to notify the insurer of the loss because they did not know that the policy might provide coverage for the theft of their vehicle.[80]

However, the court noted that although questions concerning the adequacy of notice and the justification for any delay in giving the notice are generally questions of fact to be resolved by a jury, an unexcused significant delay may be found to be unreasonable as a matter of law.[81] Further, as in *Walker*, if the only excuse for the delay is the insureds' ignorance of coverage, there is no question of fact to be resolved by a jury and summary judgment was appropriate for the insurer.[82]

G. Accidents at the Intersection of Uninsured Motorist and Workers' Compensation Coverage

If an insured is injured in the scope and course of employment and collects workers' compensation benefits, may an uninsured motorist carrier reduce its limit of available UM coverage by the amount of such benefits pursuant to a limitation contained in the automobile insurance policy? In *Hudson v. Whited,*[83] the court of appeals held that a policy limitation that purports to reduce the coverage amount or that excludes from coverage losses paid under workers' compensation is contrary to the UM statute[84] and unenforceable if it "thwart[s] the insured's ability to recover 'all sums' the insured is legally entitled to recover."[85]

A bit of background: In *Johnson v. State Farm Mutual Automobile Insurance Co.,*[86] the court of appeals allowed State Farm Mutual Automobile Insurance Co. to reduce its UM obligation to an insured by the amount of medical expenses the carrier had already paid under its policy.[87] In that case, the policy limits greatly exceeded the jury verdict, so the "write-off" for expenses already paid did not prevent the insured from being made whole and recovering "all sums" to which she was entitled.[88] However, the court distinguished the circumstances

79. *Id.* at 316, 562 S.E.2d at 268.
80. *Id.*
81. *Id.*
82. *Id.*
83. 250 Ga. App. 451, 552 S.E.2d 447 (2001).
84. O.C.G.A. § 33-7-11 (2000).
85. 250 Ga. App. at 452, 552 S.E.2d at 449.
86. 216 Ga. App. 541, 455 S.E.2d 91 (1995).
87. *Id.* at 543, 455 S.E.2d at 93.
88. *Id.*

presented in *Hudson*, in which the actual damages exceeded the policy limits,[89] and warned that:

> Such a clause [would] *not* [be] enforceable when actual damages are greater than the policy limits because it would then operate to reduce recovery to an amount below the judgment, violating the requirement that uninsured motor vehicle insurance contracts undertake "to pay the insured all sums [that] he shall be legally entitled to recover as damages . . . within limits [of the policy]."[90]

Because the facts of the case indicated that Hudson's actual damages exceeded the policy limits, the court held that allowing the UM carrier to enforce the limitations provisions of its policy would contravene the UM statute and, therefore, reversed the summary judgment granted by the trial court.[91]

H. Reformation of Release to Effect Justice

In *Clark v. Byrd*,[92] yet another case pitting Judges Eldridge and Andrews on opposite sides of the decision, the court of appeals reversed a summary judgment order and allowed a claim of fraud and promissory estoppel to go forward against a UM insurer and its claims adjuster despite the injured insured's execution of a general release in favor of the tortfeasor.[93] In *Clark* plaintiff asserted an injury claim in excess of the tortfeasor's minimal liability limits and notified her UM carrier of the claim. The claims adjuster told the insured that she would have to settle the liability claim and exhaust that coverage before she would be eligible for UM benefits. The liability carrier presented a general release of all claims, which the claimant signed. Neither the liability carrier nor the UM carrier advised the injured party that signing the general release would have the legal effect of precluding her claim against the UM carrier. When the UM carrier subsequently denied any liability, the insured sued the two insurers, the adjusters, and the tortfeasor for fraud and equitable relief.[94]

Reversing the trial court's grant of summary judgment to the UM carrier and its adjuster, the majority, in an opinion written by Judge Eldridge, acknowledged that there is no fiduciary relationship between

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89. Hudson had incurred over $30,000 in medical expenses and over $40,000 in lost wages. The UM policy limits were $15,000. *Id.* at 544, 455 S.E.2d at 94.

90. *Id.*

91. 250 Ga. App. at 454, 552 S.E.2d at 450.

92. 254 Ga. App. 826, 564 S.E.2d 742 (2002).

93. *Id.* at 829, 564 S.E.2d at 745.

94. *Id.* at 826, 564 S.E.2d at 744.

an insured and an insurer against whom a claim is presented; therefore, the injured party had no legal right to rely upon statements made by the UM claims adjuster.[95] Nevertheless, the court held that a jury could find that any adversarial relationship ended at the time the settlement with the liability carrier was consummated and that the failure of the UM carrier to warn its insured of the consequences of a general release could constitute actual fraud.[96]

In addition, the majority held that the UM carrier's representation that a settlement with the liability carrier was a necessary precondition to the payment of UM benefits could be construed as a promise to pay that was relied upon to the insured's detriment.[97] Thus, Judge Eldridge wrote, "[w]hile [the UM carrier] has a complete legal defense of the general release to underinsured coverage, injustice can be avoided only by the enforcement of a promise to pay underinsured benefits."[98]

Finally, the majority held that because there was no evidence the liability carrier intended to effect a release of any claim against the UM carrier, the trial court should have considered whether there had been a mutual mistake of fact warranting a reformation of the release to avoid a "gross injustice" and prevent an "unconscionable advantage" to the UM carrier.[99]

The dissent, authored by Judge Andrews and joined by Judges Johnson and Ruffin, argued there was no mutual mistake of law or evidence of fraud and the insured had not raised promissory estoppel below.[100] The dissent pointed out that the language of the general release made it clear that by signing the document, the injured party was releasing all claims against any person or firm on account of any injury or damage incurred in the subject collision.[101] While the insured read the release carefully and "was troubled" by the language of the release, she nevertheless signed it despite the clear language releasing all claims.[102] The dissent further noted that the UM adjuster's statement concerning the need to resolve the liability claim first was consistent with the policy provision requiring exhaustion of liability limits by settlement or judgment and was, therefore, true.[103] Moreover, the dissent said that nothing in the record indicated that the UM

95. *Id.* at 827, 564 S.E.2d at 744.
96. *Id.* at 827-28, 564 S.E.2d at 745.
97. *Id.* at 828, 564 S.E.2d at 745.
98. *Id.*
99. *Id.*
100. *Id.* at 830, 564 S.E.2d at 746 (Andrews, J., dissenting).
101. *Id.* (Andrews, J., dissenting).
102. *Id.* (Andrews, J., dissenting).
103. *Id.* (Andrews, J., dissenting).

adjuster was even aware of the wording of the liability carrier's release until after it was executed by the insured.[104]

The majority in *Clark* may have, by implication, created a new duty incumbent upon UM carriers engaged in negotiations with their insureds: the duty to advise that a limited release is necessary to preserve underinsured motorist claims and to warn against the legal effect of a general release—despite the fact that the parties are in an adversarial relationship at the time the settlement negotiations are taking place.

III. DUTY TO DEFEND THE INSURED

Potential serious ramifications can occur to an insurer who does not attempt to open a default against its insured because of its reliance on a policy coverage defense. In *Thomas v. Atlanta Casualty Co.*,[105] the insured asserted a claim of bad faith against Atlanta Casualty Co. ("Atlanta Casualty") for allowing a default judgment to be taken against her in excess of policy limits. Atlanta Casualty received notice of the lawsuit, which had been filed against its insured from a third-party, but it refused to provide a defense to the insured because it contended that such notice was not timely and that the company had been prejudiced as a result.[106] Consequently, the lawsuit went into default, and a default judgment against the insured was issued. The insurer did not attempt to open the default prior to the judgment; instead, it unsuccessfully sought to set aside the default judgment after it was entered.[107]

The court denied Atlanta Casualty's motion for summary judgment on the issue of bad faith.[108]

> Where the insured is in default, has a meritorious defense, and has a legal excuse for the default, and the insurer has notice of both the pending action and the default of the insured prior to plaintiff taking a default judgment, a jury question arises as to whether the insurer's failure to seek to open default constitutes bad faith, giving rise to liability.[109]

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104. *Id.* (Andrews, J., dissenting).

105. 253 Ga. App. 199, 558 S.E.2d 432 (2001).

106. The court determined that a question of fact for jury determination existed as to whether Atlanta Casualty had been prejudiced by the allegedly late notice. *Id.* at 203, 558 S.E.2d at 438.

107. *Id.* at 201, 558 S.E.2d at 436.

108. *Id.* at 202, 558 S.E.2d at 437.

109. *Id.* at 204, 558 S.E.2d at 439.

Moreover, the court found that a heightened duty to protect the interest of the insured arises when the insured is placed at great risk for an excess judgment.[110]

> Whe[n] there [i]s a default judgment already in excess of the policy limits, the insurer has the duty to act with the utmost good faith on behalf of the insured to dispose of the judgment against her without exposing her to the risk of excess liability inherent in the default judgment.[111]

As a warning to all insurance companies doing business in Georgia, the court concluded that Atlanta Casualty should have considered settlement to protect the insured instead of seeking a policy defense to avoid coverage that would expose the insured to liability on an excess default judgment.[112]

If an insurer refuses to defend the insured or participate in settlement negotiations, the insurer cannot rely on policy language preventing a claimant's direct suit against it in the event the insurer did not agree in writing to the settlement of the case. In *Henning v. Continental Casualty Co.*,[113] the claimant, who was injured by the insured, settled with the insured after the insurer, St. Paul Fire & Marine Insurance Co. ("St. Paul"),[114] refused to provide a defense to the claimant. St. Paul did not participate in the settlement. St. Paul's policy contained a provision stating that no one could sue the company directly on a liability claim "until the amount of the protected person's liability has been finally decided either by a trial or by a written agreement signed by the protected person, *by us*, and by the party making this claim."[115] Relying on this provision, the district court granted summary judgment to St. Paul.[116] The Eleventh Circuit vacated and found that because St. Paul refused to defend the insured or participate in settlement, it was barred from contesting the settlement amount.[117]

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110. *Id.* at 205, 558 S.E.2d at 439.
111. *Id.*
112. *Id.* at 206, 558 S.E.2d at 439.
113. 254 F.3d 1291 (11th Cir. 2001).
114. The other defendant carrier, Continental Casualty Co., prevailed on a motion for summary judgment on the basis that the claimant's bodily injury was clearly excluded by its policy. *Id.* at 1292.
115. *Id.* at 1294.
116. *Id.*
117. *Id.* at 1295.

IV. DECLARATORY JUDGMENT ACTION FOR COVERAGE

As demonstrated in *Thomas v. Atlanta Casualty Co.*[118] and *Henning v. Continental Casualty Co.*,[119] an insurer would be well-advised to file a declaratory judgment action if it has any doubts concerning whether coverage exists and whether it has a duty to defend its insured.[120] According to a recent opinion from the court of appeals, an insurer can bring a declaratory judgment action to determine coverage under its policy, even though it previously disclaimed coverage to its insured, if facts or circumstances develop subsequent to the disclaimer that cause the insurer to reconsider its disclaimer.[121] In *Colonial Insurance Co. of California v. Progressive Casualty Insurance Co.*,[122] Progressive Casualty Insurance Co. ("Progressive") initially disclaimed coverage for an automobile accident claim under an automobile liability policy because its investigation revealed that the insured vehicle at fault in the accident was being driven by an unlicensed driver. However, in the disclaimer letter Progressive indicated that it would reconsider its coverage position if presented with additional information. When the insured was subsequently sued, Progressive decided to provide a defense to the insured under a reservation of rights and filed a declaratory judgment action.[123]

Before *Colonial Insurance Co.* was decided, courts generally accepted that once an insurer issues a disclaimer, it has established its rights and obligations under the policy and is estopped from later bringing a declaratory judgment action because there is no longer any "controversy" or "uncertainty" concerning the parties' rights for a court to consider.[124] The court of appeals has now created an exception to this general rule. Because the disclaimer letter was a qualified refusal and subject to change, Progressive was not estopped from subsequently filing a declaratory judgment action. The court found that the insured suffered

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118. 253 Ga. App. 199, 558 S.E.2d 432 (2001).

119. 254 F.3d 1291 (11th Cir. 2001)

120. *See* Thomas v. Atlanta Cas. Co., 253 Ga. App. 199, 558 S.E.2d 432 (2001); *Henning*, 254 F.3d 1291 (11th Cir. 2001).

121. Colonial Ins. Co. v. Progressive Cas. Ins. Co., 252 Ga. App. 391, 556 S.E.2d 486 (2001).

122. 252 Ga. App. 391, 556 S.E.2d 486 (2001).

123. *Id.* at 392-93, 556 S.E.2d at 487-88.

124. *See generally* Chastain v. U.S. Fid. & Guar. Co., 190 Ga. App. 215, 378 S.E.2d 397 (1989); Empire Fire & Cas. Ins. Co. v. Metro Courier Corp., 234 Ga. App. 670, 507 S.E.2d 525 (1998).

no detriment as a result of Progressive's reassessment of its legal position because "[t]he question of coverage [wa]s still an issue."[125]

A different result would have occurred had Progressive simply rested on its disclaimer of coverage and not provided a defense to the insured under a reservation of rights.[126] Moreover, the court did not address whether a declaratory judgment action is barred when an insurer fails to follow the conditions precedent outlined in *Richmond v. Georgia Farm Bureau Mutual Insurance Co.*[127] Insurers should take away a valuable tip from *Colonial Insurance Co.*: When preparing a disclaimer letter, an insurer should not make it absolute; the insurer should make it qualified and include language notifying the insured that if he disagrees with the company's position or can provide additional information that may have a bearing on coverage, then he should inform the insurer immediately, and the insurer will reconsider its position.

V. REFORMATION OF POLICY

In *Insurance Agency of Glynn County, Inc. v. Atlanta Casualty Co.*,[128] a case of first impression, the court of appeals determined that an insurance agent cannot seek reformation of an insurance policy that it had a role in obtaining.[129] In this case, the wife of the named insured was involved in an automobile accident for which she was subsequently sued for damages. Prior to the accident, the wife had become estranged from the named insured. As a result, she requested that an agent at the Insurance Agency of Glynn County, Inc. ("Agency") add her vehicle to her husband's policy. The agent did so, but mistakenly failed to add her as an authorized driver of the vehicle, leaving her uninsured. Atlanta Casualty sought a declaration that the wife was excluded from coverage under the policy. In the same action, the Agency sought to have the policy reformed to list the wife as an authorized driver of the vehicle.[130]

Refusing the Agency's request for reformation, the court relied upon the general rule that in order to reform a contract to express the intentions of the parties, a request for reformation must first be made by "'the immediate parties'" to the contract and "'by those standing in

125. *Colonial Ins. Co.,* 252 Ga. App. at 393, 556 S.E.2d at 488 (citing State Farm Mut. Ins. Co. v. Allstate Ins. Co., 132 Ga. App. 332, 335, 208 S.E.2d 170, 172 (1974)).

126. *See Colonial Ins. Co.*, 252 Ga. App. at 393, 556 S.E.2d at 488.

127. 140 Ga. App. 215, 231 S.E.2d 245 (1976).

128. 255 Ga. App. 323, 565 S.E.2d 547 (2002).

129. *Id.* at 324, 565 S.E.2d at 548.

130. *Id.* at 323-24, 565 S.E.2d at 548.

privity with them.'"[131] "'However, a person not a party or privy to the transaction in question, even a person with a substantial interest therein, may not maintain the action.'"[132]

The court held that the Agency lacked standing to sue for reformation because it was not in privity with the insurance contract.[133] This was true regardless of whether the Agency was determined to be the agent of the insured or the agent of the insurer.[134] It should be noted that the holding of this case does not prevent an insured or insurer from seeking reformation of a policy. However, when an agency has made a mistake in obtaining a policy, it has little recourse other than to place its errors and omissions carrier on notice.

VI. DUTY TO DISCLOSE COVERAGE LIMITS

The court of appeals has confirmed that an insurer's misrepresentation to the claimant regarding the amount and extent of its coverage limits does not create a cause of action against the insurer when the claimants cannot prove that they were damaged by the misrepresentation.[135] In *Cross v. Tokio Marine & Fire Insurance Co.,*[136] claimants were involved in a car accident with the insureds and sent a letter to Tokio Marine & Fire Insurance Co. ("Tokio Marine") demanding that the insurer provide them with information about the limits of coverage under the policy pursuant to O.C.G.A. section 33-3-28.[137] Tokio Marine responded that the limit was $1,000,000. In the subsequent trial against the insured, the jury awarded claimants $1,204,000 in damages. Shortly thereafter, the insurer informed claimants that its insured actually had coverage in the amount of $7,000,000. Claimants then sued the insurer for violation of O.C.G.A. section 33-3-28, fraud and misrepresentations, and RICO[138] violations.[139]

Granting Tokio Marine's motion for summary judgment, the court cited to the general rule that a violation of O.C.G.A. section 33-3-28 does not create a private right of action against an insurer.[140] However,

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131. *Id.* at 324, 565 S.E.2d at 548 (quoting 76 C.J.S. *Reformation of Instruments* § 49 (1994)).
132. *Id.* (quoting 76 C.J.S. *Reformation of Instruments* § 49 (1994)).
133. *Id.*, 565 S.E.2d at 549.
134. *Id.* at 324-25, 565 S.E.2d at 549.
135. Cross v. Tokio Marine & Fire Ins. Co., 254 Ga. App. 739, 563 S.E.2d 437 (2002).
136. 254 Ga. App. 739, 563 S.E.2d 437 (2002).
137. O.C.G.A. § 33-3-28 (2000).
138. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000).
139. 254 Ga. App. at 739-40, 563 S.E.2d at 438-39.
140. *Id.* at 741, 563 S.E.2d at 439.

citing to *Merritt v. State Farm Mutual Automobile Insurance Co.*,[141] the court asserted that a "proper factual scenario" can result in liability by the insurer, especially where the claimant can show that he was damaged by settling a case for less than he otherwise would have agreed to had he known the full extent of coverage available under the policy.[142] Here, though, claimants could not prove they would have received a greater recovery but for the insurer's misrepresentation because the claims were tried before a jury, which returned a verdict based upon the evidence of claimants' damages and not based upon the insurance coverage available.[143]

VII. CONTRACTUAL SUIT LIMITATION PROVISION

The scope of the suit limitation period in a homeowners policy has been expanded. In *McCoury v. Allstate Insurance Co.*,[144] plaintiffs owned a house that was damaged by fire. Their homeowners policy provided a limit of $225,000 for damage to the dwelling, but the cost to repair the house exceeded $300,000. Plaintiffs sued Allstate Insurance Co. ("Allstate") and its agent for failing to provide coverage guaranteeing full repair or replacement of the dwelling, which plaintiffs had allegedly requested. The policy contained a provision requiring any suit against Allstate be brought within one year after the inception of loss or damage. However, plaintiffs brought their suit more than one year after the fire occurred.[145]

Absent a waiver, Georgia courts have historically upheld contractual suit limitation provisions similar to the one contained in Allstate's policy.[146] However, they have done so typically for actions alleging breach of the policy. In *McCoury*, though, the court held that because the provision applies to "any suit or action" seeking recovery for "loss or damage" to property covered by the policy, such provision is not limited solely to actions for breach of the policy.[147] Plaintiffs' cause of action against Allstate was essentially one in tort for failure to provide the coverage requested.[148] Because the suit was brought by policyholders against the insurer to obtain indemnification, which they claim the

141. 247 Ga. App. 442, 544 S.E.2d 180 (2000).
142. 254 Ga. App. at 741, 563 S.E.2d at 439-40.
143. *Id.* at 742, 563 S.E.2d at 440.
144. 254 Ga. App. 27, 561 S.E.2d 169 (2002).
145. *Id.*
146. *See, e.g.*, Hunt v. Greenway Ins. Agency, 213 Ga. App. 14, 443 S.E.2d 661 (1994).
147. 254 Ga. App. at 28, 561 S.E.2d at 171.
148. *Id.* at 27, 561 S.E.2d at 170.

policy should have provided, the one-year suit limitation provision barred plaintiffs' suit as a matter of law.[149]

In contrast, an insurer can waive the suit limitation provision through conduct that is contrary to the enforcement of the provision. In *Ogden v. Auto-Owners Insurance Co.*,[150] the applicable policy contained a one-year suit limitation provision similar to the one contained in the policy addressed in *McCoury*.[151] After the one-year period from the date of loss had expired, the adjuster for Auto-Owners Insurance Co. ("Auto-Owners") notified the insureds that their claim to recover repair costs to their fire-damaged home was denied because of the application of the suit limitation provision.[152] After that notification, however, the adjuster sent a letter to the insureds' attorney stating that "it is possible that [Auto-Owners] would consider payment" of the repair costs.[153]

The court recognized the general rule that an insurer does not waive a contractual suit limitation period by "engaging in negotiations looking toward a possible settlement of [a] loss or claim."[154] However, the court found that a question of fact on the issue of waiver existed and reversed the grant of summary judgment because Auto-Owner's adjuster informed the insureds' counsel that Auto-Owners might consider payment, which was inconsistent with its earlier position that the claim was denied because the one-year suit limitation period had expired.[155]

The decision in *Ogden* is contrary to the general rule that allows an insurer to negotiate toward a possible settlement of the claim despite the running of the one-year suit limitation period. In the past, courts have found a waiver only if the insurer made an affirmative promise, statement, other act, or some constructive fraud that led the insured to believe that the insurer intended to enlarge the contractual suit limitation period.[156] In the future, insurers will need to be more

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149. *Id.* at 31, 561 S.E.2d at 173. With respect to plaintiffs' claim against the agent, summary judgment for the agent was affirmed. While the policyholder's failure to read and examine the policy generally bars recovery against the agent for negligent failure to provide coverage, *id.* at 28, 561 S.E.2d at 171 (citing Greene v. Lilburn Ins. Agency, 191 Ga. App. 829, 830, 383 S.E.2d 194, 195 (1989)), an exception exists "when the agent has held himself out as an expert and the insured has reasonably relied on the agent's expertise to identify and procure the correct amount or type of insurance." *McCoury*, 254 Ga. App. at 28-29, 561 S.E.2d at 171 (citing *Hunt*, 213 Ga. App. at 15, 443 S.E.2d at 662).

150. 251 Ga. App. 723, 554 S.E.2d 575 (2001).

151. *See id.* at 725, 554 S.E.2d at 577.

152. *Id.*

153. *Id.* at 726, 554 S.E.2d at 578.

154. *Id.* (quoting O.C.G.A. § 33-24-40(3) (1996)).

155. *Id.*

156. *See* Broadfoot v. Reliance Ins. Co., 601 F. Supp. 87 (N.D. Ga. 1984), *aff'd*, 767 F.2d 936 (11th Cir. 1985) (holding that the contractual limitation period runs from the date of

cautious in making any communications with the insured that are inconsistent with its reliance on the provision after the one-year period has expired.

VIII. LIFE INSURANCE—AMBIGUITY

A cluster of rulings against Life Insurance Company of Virginia ("Life of Virginia"), d/b/a GE Life and Annuity Insurance Company, shredded the insurers' standard litany of defenses, which were calculated to enforce the terms of the contracts as written and required the carriers to successfully explain to jurors why premiums that were allegedly represented to be "fixed" for life really were not.[157] The Honorable Wilbur D. Owens first decided the motions in a putative class action on behalf of individuals nationwide who purchased life insurance policies from Life of Virginia beginning in the mid-1980s. Although the precise vehicle of representation and reliant party varied, common to the class action and other cases was a purported representation that "premiums were fixed" for life. Whereas, the life insurance company's own Vice President for Business Development testified that such a fixed premium would be the case only if one assumed a constant interest rate (9.71%), and even if that were the case, McBride's policy, which was to remain in force until 2028, would have lapsed in 1999.[158] In one of these cases, it was interesting to note that the selling insurance agent could not understand the policy that was sold.[159] These extreme facts apparently swayed the court to find exceptions from the general rules attending insurance contract disputes at every turn. The breach of contract claim was preserved for jury consideration because of an ambiguity (i.e., the policy was "so confusing that an average policyholder [could not] make out the boundaries of coverage . . . ."[160] The face of the policy, which did not clearly explain premium calculations, was compounded by the selling agents' damning testimony.[161] With respect to the fraud and concealment claims, the court combined the Georgia test for indirect

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loss and ends one year later, regardless of whether the insurer issued a denial to the insured before the expiration of the period); Brown v. Nationwide Ins. Co., 167 Ga. App. 84, 306 S.E.2d 62 (1983).

157. McBride v. Life Ins. Co., 190 F. Supp. 2d 1366 (M.D. Ga. 2002); G.E. Life & Annuity Assurance Co. v. Combs, 191 F. Supp. 2d 1364 (M.D. Ga. 2002); G.E. Life & Annuity Assurance Co. v. Donaldson, 189 F. Supp. 2d 1348 (M.D. Ga. 2002); G.E. Life & Annuity Assurance Co. v. Barbour, 189 F. Supp. 2d 1360 (M.D. Ga. 2002); G.E. Life & Annuity Assurance Co. v. Barbour, 191 F. Supp. 2d 1375 (M.D. Ga. 2002).

158. *McBride*, 190 F. Supp. 2d at 1369.

159. *Barbour*, 191 F. Supp. 2d at 1386.

160. *McBride*, 190 F. Supp. 2d at 1374 (internal quotation marks omitted).

161. *Id.*

concealment (whether the "'concealment is of intrinsic qualities of the articles [that] the other party by the existence of ordinary prudence and caution, could not discover'")[162] with persuasive precedent, including another loss taken by Life of Virginia in *Greenberg v. Life Insurance Co. of Virginia*,[163] to avoid "a complete miscarriage of justice."[164] In the court's consideration of the various motions, it expressly adopted the analysis of *Tidwell v. Allstate Insurance Co.*,[165] in upholding, to *Daubert*[166] standards, the qualifications of Dr. Tim Ryles, who testified "'regarding the standard of care in the industry'"[167] "to explain the complex nature of the contracts and the terms and concepts contained therein."[168] The opinion is recommended to practitioners having cases with seemingly outrageous fact patterns and less than crystal-clear insurance contract language standing in the way of noncoverage. The court expressly adopted the Southern District's definition of ambiguity in *Essex Insurance Co. v. Newton Agrisystems, Inc.*,[169] i.e., "when its language 'is so confusing that an average policyholder cannot make out the boundaries of coverage . . . .'"[170]

IX. MISCELLANEOUS

A. *Structure—Settlement, Non-Assignability, Enforced*

In *CGU Life Insurance Co. v. Singer Asset Finance Co.*,[171] the court of appeals held, in a case of first impression, that an explicit structured settlement term prohibiting assignment is enforceable.[172] The provision in question stated that future payments "could not be accelerated, deferred, increased or decreased . . . ."[173] Singer vigorously attacked the contract using *Mail Concepts, Inc. v. Foote & Davies, Inc.*,[174] which

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162. *Id.* at 1376 (quoting Rivers v. BMW of N. Am., Inc., 251 Ga. App. 880, 883-84, 449 S.E.2d 337, 340 (1994)).
163. 177 F.3d 507 (6th Cir. 1999).
164. *McBride*, 190 F. Supp. 2d at 376-77.
165. 1:96-CV-189-1 (M.D. Ga. 2000), *aff'd*, 253 F.3d 710 (11th Cir. 2001).
166. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
167. *McBride*, 190 F. Supp. 2d at 1370 (quoting *Tidwell*, 1:96-CV-189-1 (M.D. Ga. 2000)).
168. *Id.* at 1370-71.
169. 832 F. Supp. 1565 (S.D. Ga. 1993).
170. *McBride,* 190 F. Supp. 2d at 1374 (quoting *Essex Ins. Co.,* 832 F. Supp. at 1569).
171. 250 Ga. App. 516, 553 S.E.2d 8 (2001), *aff'd,* Singer Asset Fin. Co. v. CGU Life Ins. Co., 275 Ga. 328, 567 S.E.2d 9 (2002).
172. 250 Ga. App. at 525, 553 S.E.2d at 15.
173. *Id.* at 518, 553 S.E.2d at 11.
174. 200 Ga. App. 778, 409 S.E.2d 567 (1991).

held that "'once a party to the contract performs its obligations . . . its right to enforce the other party's liability under the contract may be assigned without the other party's consent even if the contract contains a non-assignment clause.'"[175] The court of appeals found very different circumstances presented here because (1) assignment was expressly prohibited, (2) it might have been in violation of IRS regulations, and (3) it might have endangered the tax treatment of the structured settlements.[176] The court observed that the Restatement (Second) of Contracts recognizes the validity of assignments with three exceptions:

> "(a) the substitution . . . would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, . . . or materially reduce its value to him, or (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or (c) assignment is validly precluded by contract."[177]

The court found that "nonenforcement of the nonassignment agreement could materially increase the burden or risk imposed on CGU of tax liability and the assignment [was] validly precluded by contract . . . ."[178] The decision seemed to turn upon an express prohibition against assignment and the fact that assignment might affect the sheltering of some of the settlement funds from CGU's potential tax liability.

B. ERISA Super-Preemption

In *Great West Life & Annuity Insurance Co. v. Brown*,[179] the court allowed subrogation under the ERISA[180] scheme when the plan expressly provided for it.[181] The court reiterated that the so-called "make whole doctrine" in the ERISA context is a default rule that only applies "'if an insured has not received compensation for his total loss and the plan does not explicitly preclude operation of the doctrine.'"[182] This rule is in sharp contrast with the various statutory case law

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175. *Singer*, 250 Ga. App. at 521, 553 S.E.2d at 12 (quoting *Mail Concepts, Inc.,* 200 Ga. App. at 781, 409 S.E.2d at 570).

176. *Id.* at 522, 553 S.E.2d at 13.

177. *Id.* (quoting Grieve v. Gen. Am. Life Ins. Co., 58 F. Supp. 2d 319, 322-23 (D. Vt. 1999)).

178. *Id.* at 523, 553 S.E.2d at 15.

179. 192 F.2d 1376 (M.D. Ga. 2002).

180. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1003.

181. 192 F.2d at 1379.

182. *Id.* at 1379-80 (quoting Cagle v. Bruner, 112 F.3d 1510, 1521 (11th Cir. 1997)).

provisions regulating non-ERISA subrogation attempts under various insurance schemes.

ERISA again entitled a carrier to special benefits in *Williams v. Benicorp Insurance Co.*[183] This time, ERISA's super-preemption of claims that "relate to" an employee welfare benefit plan allowed the entire case to be removed and heard in federal court. While defendant agent did not officially join in the notice of removal, the agent did file an answer within five days consenting to the jurisdiction of the court. The agent's alleged failure to provide certain documentation and information to the insurer established at least some connection to the denial of benefits. These were sufficient facts to "relate to" the employee welfare benefit plan; hence, the motion to remand was denied.[184]

C. Insurance Agent Liability

In another case involving an alleged transgression by an insurance agent, the court of appeals expressly held that an insurer's claim against an agent for unauthorized exposure for a wrongfully issued binder was a claim for indemnity, rather than breach of contract. Therefore, the twenty-year statute of limitations on settlement applied.[185] Additionally, to the extent that *Southern Nitrogen Co. v. Stevens Shipping Co.*[186] held that indemnity could not be established prior to entry of judgment against the indemnitee, the court held that case was superseded by O.C.G.A. section 51-12-32,[187] which provides that the right of indemnity "shall not be lost or prejudiced by compromise and settlement."[188]

In *Southern Heritage Insurance Co. v. Green Insurance Agency*,[189] the court of appeals, while noting that its decision might expose the carrier to inconsistent results, prohibited an insurance carrier from retaining an allegedly responsible insurance agent in a declaratory judgment action wherein Southern Heritage sought (1) a declaration against its insureds that it had no coverage and (2) in the alternative, a declaration of indemnification against its agent who allegedly made certain representations.[190] The court of appeals expressly held that damages may not be recovered in a declaratory judgment action, and

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183. 190 F. Supp. 2d 1379 (M.D. Ga. 2002).
184. *Id.* at 1381.
185. Auto-Owners Ins. Co. v. Anderson, 252 Ga. App. 361, 363-64, 556 S.E.2d 465, 466-67 (2001).
186. 114 Ga. App. 581, 151 S.E.2d 916 (1966).
187. *Anderson*, 252 Ga. App. at 365, 556 S.E.2d at 468.
188. O.C.G.A. § 51-12-32 (2000).
189. 249 Ga. App. 749, 549 S.E.2d 743 (2001).
190. *Id.* at 752, 549 S.E.2d at 746.

because damages were the only relief sought against the agent, a dismissal against the agent was demanded.[191]

D. Interpleader

In another case involving a clever attempt to use a limited procedural tool beyond its intended capacity, a carrier was precluded from using a statutory interpleader action to avoid multiple defense obligations when only one of its separately insured insureds could have been driving the at-fault vehicle.[192] In *Southern General Insurance Co. v. Crews*,[193] Southern General Insurance Co. ("Southern General") attempted to pay $15,000 to the registry of the court when only one of the two insureds, each separately insured under a policy with $15,000 limits, could have been driving the at-fault vehicle.[194] The court of appeals held that the interpleader was only appropriate when claims could expose a party to double or multiple liability.[195] In the case at hand, Southern General faced no uncertainty; it simply had dual obligations to defend its two insureds and to pay its policy limits for the at-fault driver.[196]

E. Experts—Financial Interest in Outcome

In *Chambers v. Gwinnett Community Hospital, Inc.*,[197] the court of appeals, en banc, split over the extent to which an expert could be cross-examined concerning financial interests in the outcome of the case.[198] A majority adopted the national majority rule that there must be a "substantial connection" shown between the witness and the defendant's insurance carrier, and this means more than the interests of a mere policyholder, or in the case of a mutual insurance company, membership in the insurance company.[199] Plaintiff sought to cross-examine defense experts, who were also policyholders of MAG Mutual, regarding their financial interests in the outcome of the case.[200] The record was unclear on whether the MAG Mutual policy was an assessable or nonassessable policy, and hence, the court of appeals

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191. *Id.*, 549 S.E.2d at 745.
192. S. Gen. Ins. Co. v. Crews, 253 Ga. App. 765, 560 S.E.2d 331 (2002).
193. 253 Ga. App. 765, 560 S.E.2d 331 (2002).
194. *Id.* at 765-66, 560 S.E.2d at 332.
195. *Id.* at 766, 560 S.E.2d at 332.
196. *Id.* at 767-68, 560 S.E.2d at 333.
197. 253 Ga. App. 25, 557 S.E.2d 412 (2001), *cert. denied*, No. S02C0660, 2002 Ga. LEXIS 459 (May 28, 2002).
198. *Id.*
199. *Id.* at 27, 557 S.E.2d at 416.
200. *Id.* at 26, 557 S.E.2d at 415.

concluded that plaintiff had failed to show anything more than the experts' de minimis financial interest in the outcome of the case.[201] The court also reasoned that the only way to demonstrate the expert's financial interest in the case would be to show affirmatively that defendant was insured by the same carrier.[202] Rather than going down that path, which, under *Denton v. Con-Way Southern Express*,[203] the court of appeals noted could motivate a jury to award increased damages, the majority of the court of appeals balanced the competing relevance of this slight financial interest against the prejudice that could result to a defendant should liability insurance be further broadcast to the jurors.[204] The majority noted that virtually every jurisdiction in the country, when weighing these competing interests, concluded mere policyholder status was an insufficient connection under the "substantial connection" test.[205] The court's reasoning left open the possibility of the scale coming down on the other side should there be proof of an assessable policy or something more than a de minimis financial impact on the testifying expert. Three judges filed a vigorous dissent, wherein it was noted that mutual membership was sufficient to establish relevance and admissibility because the prejudice argument was outweighed by the relevance of the proffered evidence.[206]

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201. *Id.* at 28, 557 S.E.2d at 417.
202. *Id.* at 27, 557 S.E.2d at 416.
203. 261 Ga. 41, 402 S.E.2d 269 (1991).
204. 253 Ga. App. at 26-28, 557 S.E.2d at 415-17.
205. *Id.* at 27, 557 S.E.2d at 416.
206. *Id.* at 32, 557 S.E.2d at 419 (Blackburn, C.J., dissenting).