Insurance

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I. INTRODUCTION

Extra-contractual issues continue to percolate in the insurance arena. The Georgia Supreme Court resettled the law enforcing contractual suit limitations and created a "safe harbor" for an insurer faced with demands conditioned on terms beyond an insurer's control.[1] The Supreme Court of the United States, in reversing a nine-digit punitive award, laid down "bright-line," conservative rules regulating punitive considerations in extra-contractual and other situations.[2]

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1. Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003).
2. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003).

II. HOMEOWNER'S AND CGL INSURANCE

A. Suit Limitation Provision Enforced, Absent Fraud

Absent fraud, an insurer cannot waive the policy's contractual suit limitation provision after the time for bringing suit has expired.[3] In *Auto-Owners Insurance Co. v. Ogden*,[4] a Georgia Supreme Court decision, a provision in the applicable policy required that any suit against Auto-Owners be brought by the insured within one year after the inception of the loss or damage. Auto-Owners did not deny the insured's claim before that one-year period had expired. Instead, after the one-year period had expired, the claims adjuster for Auto-Owners notified the insured that his claim to recover repair costs to the fire-damaged home was denied because of the suit limitation provision.[5] After that notification, however, the adjuster sent a letter to the insured's attorney stating that "'it is possible that Auto-Owners . . . would consider payment'" of repair costs.[6]

When the Georgia Court of Appeals issued its ruling in 2001, it 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.'"[7] However, the court of appeals held that a question of fact on waiver existed, so it reversed the trial court's grant of summary judgment.[8] The claims adjuster's letter to the insured's counsel after the suit limitation period expired stated 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 run.[9]

Last year a court of appeals decision flew in the face of the general rule allowing an insurer to negotiate toward a possible settlement of the claim, despite the running of the one-year suit limitation period.[10] The

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3. *See* Auto-Owners Ins. Co. v. Ogden, 275 Ga. 565, 569 S.E.2d 833 (2002).

4. 275 Ga. 565, 569 S.E.2d 833 (2002).

5. *Id.* at 565-66, 569 S.E.2d at 834.

6. *Id.* at 566, 569 S.E.2d at 834.

7. Ogden v. Auto-Owners Ins. Co., 251 Ga. App. 723, 726, 554 S.E.2d 575, 577 (2001) (quoting O.C.G.A. § 33-24-40(3) (Supp. 2003)).

8. *Id.* at 725-26, 554 S.E.2d at 578.

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

10. Bradley S. Wolff et al., *Insurance*, 54 MERCER L. REV. 341, 361-62 (2002). In the past, courts have found that waiver existed only when the insurer made an affirmative promise, statement, or other act, or some constructive fraud, which led the insured to believe that the insurer intended to enlarge the contractual suit limitation period. *See* Broadfoot v. Reliance Ins. Co., 601 F. Supp. 87 (N.D. Ga. 1984), *aff'd*, 767 F.2d 936 (11th

Georgia Supreme Court's recent decision agrees with that analysis.[11] "Relying [up]on long-standing precedent, [the supreme court held] that an . . . insurance adjuster [or agent] cannot waive the [suit] limitations provision in the insurance contract after it has expired without express authority from the insurance company."[12] Thus, "[u]nless the [claims representative or] agent perpetrates [a] fraud that [causes] the insured to delay bringing [a] lawsuit until after the time for bringing [the action] has expired, [an] insured cannot rely on the [representative's or] agent's conduct as an excuse for the failure to sue" in a timely fashion.[13] "Once the time for bringing an action lapses, the forfeiture has taken place, the contract becomes a 'dead letter,' and an [adjuster or] agent cannot revive it by an acknowledgment or new promise."[14]

The court made it clear, however, that while an adjuster or agent of the company cannot waive the suit limitation period after the time has expired, an adjuster or agent can waive the suit limitation provision before the time has expired when the representative, by his conduct or communications, causes the insured to rely upon an express or implied promise to pay the claim.[15]

> "If the insurer never denied liability, but continually discussed the loss with its insured with a view toward negotiation and settlement without the intervention of a suit, whether or not this lulled the insured into a belief that the 12-month clause in the contract was waived by the insurer can become a disputed question of fact" for the jury.[16]

Consequently, the court affirmed the court of appeals' reversal of summary judgment in the insurer's favor because sufficient questions of fact existed regarding whether Auto-Owners and the insured had settled the claim and whether Auto-Owners had promised to pay the outstanding amount owed for the claim as part of the settlement before the suit limitation period expired.[17]

Cir. 1985) (holding that the contractual limitation period runs from the date of 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).

11. *Auto-Owners Ins. Co.*, 275 Ga. at 567, 569 S.E.2d at 834.

12. *Id.* at 565, 569 S.E.2d at 833 (footnote omitted).

13. *Id.* at 566, 569 S.E.2d at 834 (citing Underwriters' Agency v. Sutherlin, 55 Ga. 266 (1875)).

14. *Id.* (citing Graham v. Niagra Fire Ins. Co., 106 Ga. 840, 844, 32 S.E. 579, 581 (1899)).

15. *Id.* at 567, 569 S.E.2d at 835.

16. *Id.* (quoting Edwards v. Atl. Ins. Co., 203 Ga. App. 608, 611, 417 S.E.2d 410, 413 (1992)).

17. *Id.*

Based upon the wealth of previous case law addressing the issue, the Georgia Supreme Court correctly decided *Auto-Owners Insurance Co.*[18] Regardless, to completely avoid the issue, an insurer still needs to be cautious when making any communications with the insured, before or after the one-year period has expired, if those communications are inconsistent with the insurer's reliance upon the suit limitation provision.

B. Insurance Contract Interpretation—Y2K Remediation Not Direct Physical Loss

In a case of first impression, the Georgia Court of Appeals interpreted the following language commonly found in commercial property policies: The insurance company will provide insurance "'for direct physical loss of, or damage to' covered property."[19] In *AFLAC, Inc. v. Chubb & Son, Inc.*,[20] "AFLAC sought declaratory relief as to coverage and damages under [its] two Chubb contracts of all-risk property insurance for [the] remediation costs incurred upon converting its computer systems [to avoid] the Year 2000 ('Y2K') computer problem."[21] Chubb's policies provided all-risk personal property coverage "'for direct physical loss of, or damage to' covered property."[22] AFLAC's computer systems constituted covered property under the policies. Therefore, the issue for the court was whether costs incurred in anticipation of the Y2K problem constituted direct physical loss or damage.[23] Relying upon the relevant rules of insurance contract construction, the court of appeals determined that the term "direct physical loss or damage"[24] "contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so."[25] Because the inability of AFLAC's computer systems to process twenty-first century dates existed from the time the systems were created, and because the remediated computer systems successfully avoided any Y2K problems, the court determined that no

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18. *Id.* (citing Ga. Farm Bureau Mut. Ins. Co. v. Mikell, 126 Ga. App. 640, 642, 191 S.E.2d 557, 558 (1972); Lee v. Safeco Ins. Co., 144 Ga. App. 519, 521, 241 S.E.2d 627, 629 (1978); *Edwards*, 203 Ga. App. at 611, 417 S.E.2d at 413 (footnotes omitted)).

19. AFLAC, Inc. v. Chubb & Son, Inc., 260 Ga. App. 306, 307, 581 S.E.2d 317, 318 (2003) (quoting Chubb's International Commercial Policy).

20. 260 Ga. App. 306, 581 S.E.2d 317 (2003).

21. *Id.* at 306, 581 S.E.2d at 317.

22. *Id.* at 307, 581 S.E.2d at 318 (quoting Chubb's International Commercial Policy).

23. *Id.*

24. *Id.* (quoting Chubb's Financial Institutions Policy).

25. *Id.* at 308, 581 S.E.2d at 319.

direct physical loss or damage resulted from a fortuitous event.[26] Therefore, the trial court's denial of AFLAC's motion for summary judgment was affirmed.[27]

The ruling in *AFLAC* is not limited to claims for remediation costs related to the Y2K problem.[28] The ruling stands for the proposition that an insured is not entitled to coverage when it seeks "no more than an ordinary cost of doing business . . . ."[29] Business property policies do not afford coverage for costs incurred to improve or better business property when no loss or damage has occurred as a result of a fortuitous event.[30]

C. Application Misrepresentation Increasingly a Jury Question

In light of *Lively v. Southern Heritage Insurance Co.,*[31] insurance companies will find it more difficult to prevail on a motion for summary judgment based upon misrepresentations by an insured in the insurance application, particularly when the insurer does not treat the policy as void from its inception and does not refund all premiums to the insured. In *Lively* Southern Heritage moved for summary judgment based upon misrepresentations that the insureds made in their application for homeowner's insurance. Specifically, the application asked whether the insureds previously had any insurance declined, cancelled, or not renewed in the last three years and whether the insureds had any prior loss history. The insureds answered those questions negatively. However, the insureds had been refused a renewal of a previous homeowner's policy due to a fire within three years of the date of the application.[32]

Reversing the trial court's grant of summary judgment in favor of Southern Heritage, the court of appeals determined that Southern Heritage failed to "demonstrate both [that the insureds] made . . . misrepresentations and that the misrepresentations were material from the view of a prudent insurer."[33] The court of appeals reiterated:

> In order to void a policy of insurance for misrepresentation in the application, the insurer must show that the representation was false and that it was material in that it changed the nature, extent, or

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26. *Id.* at 308-09, 581 S.E.2d at 320.
27. *Id.* at 309, 581 S.E.2d at 320.
28. *See id.*
29. *Id.*
30. *Id.*
31. 256 Ga. App. 195, 568 S.E.2d 98 (2002).
32. *Id.* at 195, 568 S.E.2d at 99.
33. *Id.* at 196, 568 S.E.2d at 100.

> character of the risk. A material misrepresentation is one that would influence a *prudent insurer* in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance.[34]

Because the standard is objective, "the issue of materiality is ordinarily a question for the jury, unless the evidence excludes every reasonable inference except that it was material, in which case it becomes a question of law for the court."[35]

In support of its motion for summary judgment, Southern Heritage submitted the underwriter's affidavit "stating that she would not have approved the policy if she had known of the prior fire losses and the nonrenewal."[36] The court held that the affidavit did not effectively remove all genuine issues of material fact.[37] "The affidavit [did] not set forth any bright-line company policies stating that coverage [would be] denied if a prior nonrenewal or prior losses exist[ed]."[38] Instead, the affidavit "contain[ed] only the underwriter's blanket statements that she would not have issued the policy if she had known of the [insureds'] prior history."[39] In opposition to the motion for summary judgment, the insureds submitted "an expert's affidavit [for the proposition] that prior nonrenewals and losses do not automatically preclude coverage, but rather . . . insurance companies will consider [numerous] factors in determining whether to [issue a policy]."[40] Therefore, while the insurance application did contain false representations by the insureds, "a jury question [remained] on the issue of whether the false statements in the . . . application would be material to [the] prudent insurer."[41]

In addition, the court of appeals held that genuine issues of material fact existed concerning whether Southern Heritage waived its defense that the policy is void *ab initio*; therefore, summary judgment in favor of the insurance company was improper.[42] This holding was based on the fact that

> Southern Heritage [discovered] the misrepresentations in the application . . . shortly after the fire occurred, but it did not take the position

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34. *Id.* (quoting Jackson Nat'l Life Ins. Co. v. Snead, 231 Ga. App. 406, 410, 499 S.E.2d 173, 176 (1998)).
35. *Id.* (citing *Snead*, 231 Ga. App. at 410, 499 S.E.2d at 176).
36. *Id.* at 195-96, 568 S.E.2d at 100.
37. *Id.* at 196, 568 S.E.2d at 100.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 196-97, 568 S.E.2d at 100.
42. *Id.* at 198, 568 S.E.2d at 101.

> that the policy was void as a result of those misrepresentations until after suit was filed one year later . . . . In the interim, Southern Heritage continued to investigate the claim, while purporting to reserve all defenses.[43]

The investigation included a request that the insureds produce documentation to support their claim, in reliance upon the conditions set forth in the policy.[44] Moreover, the court held that a genuine issue of material fact existed regarding the insurer's waiver because Southern Heritage did not refund the premium once it determined that the policy was void *ab initio*.[45] "[T]he failure to return premiums is a factor . . . in determining whether an insurance company has waived [a] defense by treating the policy as an enforceable contract."[46]

The decision in *Lively* has significant ramifications for insurance companies seeking to hold a policy void *ab initio* as a result of application fraud. To prevail on a motion for summary judgment using the application fraud defense, the insurer must submit an affidavit by its underwriter, which is very specific and shows that the misrepresentations would be material to a prudent insurer.[47] In addition, once the company discovers that misrepresentations have been made in the application, the decision should be made, at that time, to treat the policy as void.[48] Any further investigation into the claim can potentially create a waiver, even if the company reserves its rights under the policy.[49] Moreover, an insurance company would be well-advised to refund the full premium once it determines that material misrepresentations have been made in the application.[50]

The decision in *Lively* only addresses one of the three bases for finding a policy void for application fraud: *i.e.*, that the misrepresentation was material. The Official Code of Georgia Annotated ("O.C.G.A.") sec-

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43. *Id.*

44. *Id.*

45. *Id.* at 198-99, 568 S.E.2d at 101.

46. *Id.* at 197, 568 S.E.2d at 101. The court noted, however, that when the insurer contends the insured has committed fraud in proving his claim, as opposed to applying for insurance, the insurer is not required to refund the premium. "Under those circumstances, . . . the insurer had earned the premiums because it had assumed the risk of coverage of all legitimate claims." *Id.* at 199, 568 S.E.2d at 102 (citing Mass. Bay Ins. Co. v. Hall, 196 Ga. App. 349, 395 S.E.2d 851 (1990)).

47. *Id.* at 196, 568 S.E.2d at 100.

48. *Id.* at 197, 568 S.E.2d at 100 (citing Columbian Nat'l Life Ins. Co. v. Mulkey, 146 Ga. 267, 91 S.E. 106 (1916)).

49. *Id.* at 198, 568 S.E.2d at 101.

50. *Id.* at 197, 568 S.E.2d at 101 (citing Thompson v. Permanent Gen. Assurance Corp., 238 Ga. App. 450, 519 S.E.2d 249 (1999)).

tion 33-24-7(b)[51] provides three types of misrepresentations that can void a policy:

> (1) [f]raudulent; (2) [m]aterial either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) [t]he insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.[52]

While the first two bases are typically questions for a jury, the third basis may provide insurance companies with stronger grounds for obtaining summary judgment. The insurance company will still need to show that the misrepresentation was material.[53] However, if it can prove the applicability of the third basis, the company has a solid argument that, by the very nature of the type of misrepresentation, the company has satisfied its burden of showing the misrepresentation was material.[54] The company's argument is strengthened if the underwriter's affidavit is uncontradicted by the insured.[55]

Lively also ignores previous decisions, which held that misrepresentations regarding previous claim history and insurance cancellations are material as a matter of law.[56] Therefore, absent the waiver issue, the court could have held that summary judgment in favor of the insurer was proper.

III. AUTOMOBILE INSURANCE

A. Uninsured Motorist Insurance

1. Stacking UM Coverage. Under the Georgia uninsured motorist ("UM") statute,[57] UM insurers are obligated "to pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits

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51. O.C.G.A. § 33-24-7(b) (1996).
52. *Id.*
53. *See* Nappier v. Allstate Ins. Co., 961 F.2d 168, 169 (11th Cir. 1992).
54. *Id.*
55. *See* Graphic Arts Mut. Ins. Co. v. Pritchett, 220 Ga. App. 430, 432-33, 469 S.E.2d 199, 202 (1995).
56. *See* Brannon v. Allstate Ins. Co., 120 Ga. App. 467, 171 S.E.2d 319 (1969); State Farm Mut. Auto. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144 (1963).
57. O.C.G.A. § 33-7-11 (2000 & Supp. 2003).

[as required by the statute or policy]."[58] Insureds are allowed to "stack" or add together the UM limits of all available policies up to the amount of their damages.[59] In *Horace Mann Insurance Corp. v. Mercer*,[60] the Georgia Court of Appeals held that the UM statute allows such stacking of coverage even when the applicable policies specifically limit the total coverage to the highest limit of liability available under a single policy.[61] Plaintiff was insured by four policies of UM coverage, each containing the following limitation clause: "'If two or more policies issued by us to you apply to the same accident, the total limit of liability under all such policies shall not exceed that of the policy with the highest limit of liability.'"[62] While insurance companies are free to contract for limitations of coverage and may even bar the stacking of coverage within a single policy, the limitations may not limit or deny coverage required by law.[63] In *Horace Mann* the court of appeals held that the purported prohibition against stacking contained in the multiple policies of UM coverage violated the UM statute by attempting to "thwart the insured's ability to recover 'all sums' the insured is legally entitled to recover."[64] The court pointed out, however, that when a single insurance policy covering different vehicles is involved, the insurer may prohibit stacking of multiple coverages contained within the single policy.[65]

2. UM Stacking—Priority of Coverage. In another case involving the stacking of UM insurance policies, the court of appeals decided the priority of coverage between two UM policies with the same named insured.[66] When more than one policy of UM coverage is available to an injured insured, "the priority of the multiple UM [policies] must be determined."[67] Two tests have been developed to determine priority among UM policies: the "receipt of premium" test and the "more closely identified with" test.[68] If the insured paid the premiums for one of the available policies, but not the other(s), then the carrier that received the

58. *Id.* § 33-7-11(a)(1).
59. Horace Mann Ins. Corp. v. Mercer, 257 Ga. App. 278, 570 S.E.2d 589 (2002).
60. 257 Ga. App. 278, 570 S.E.2d 589 (2002).
61. *Id.* at 280, 570 S.E.2d at 590.
62. *Id.* at 278, 570 S.E.2d at 589 (emphasis omitted).
63. *See* McCombs v. State Farm Mut. Auto. Ins. Co., 200 Ga. App. 28, 406 S.E.2d 549 (1991).
64. *Horace Mann*, 257 Ga. App. at 279, 570 S.E.2d at 590.
65. *Id.*, 570 S.E.2d at 589.
66. Canal Ins. Co. v. Merchant, 225 Ga. App. 61, 483 S.E.2d 311 (1997).
67. *Id.* at 62, 483 S.E.2d at 312.
68. *Id.*

premium from the insured must provide primary coverage.[69] Otherwise, the primary policy will be the one more closely identified with the insured.[70] But what happens when both policies providing coverage are issued to the same named insured and the insured paid the premiums for both policies?

That question was answered, at least in part, in *Great Divide Insurance Co. v. Safeco Insurance Co*.[71] The insured paid premiums to both Safeco and Great Divide. The Safeco policy was issued to the insured as a household policy, and the Great Divide policy was issued to the insured for his trucking business. The insured paid the premiums on and was equally closely identified with each policy.[72] The court of appeals held that the tie would be broken by the circumstances of the incident in which the injury occurred.[73] Because the insured was operating a dump truck for business purposes at the time of the accident, the court of appeals affirmed the trial court's summary judgment.[74] The court of appeals held that the insured was more closely identified with the policy issued to the trucking business than with the household policy.[75] Therefore, the Great Divide policy was primarily responsible for any damages sustained in the collision.[76]

3. UM Limits—Whether Subrogation Claims Reduce Insurance "Available." In *Thurman v. State Farm Mutual Automobile Insurance Co.*,[77] the court of appeals held that payments by a liability insurance carrier to subrogees of the injured plaintiff did not reduce the coverage "available" to the UM insured plaintiff, a United States postal carrier who was injured in a collision.[78] The insured tortfeasor had a $100,000 total liability limit policy. The tortfeasor's insurer paid for the property damage to the postal truck in the amount of $4,445.81. Plaintiff and her husband settled with the tortfeasor's insurer for the remaining balance of the policy, $95,554.19. As a result of her on-the-job injury, plaintiff received $34,666.32 in workers' compensation benefits from the United States Postal Service and group medical insurance benefits. The postal service and health insurer were subrogated to the injured party's claims,

69. *Id.*
70. *Id.*
71. 260 Ga. App. 531, 580 S.E.2d 313 (2003).
72. *Id.* at 531, 580 S.E.2d at 313.
73. *Id.* at 532, 580 S.E.2d at 313.
74. *Id.*, 580 S.E.2d at 314.
75. *Id.*
76. *Id.*
77. 260 Ga. App. 338, 579 S.E.2d 746 (2003).
78. *Id.* at 340, 579 S.E.2d at 748.

and the tortfeasor's carrier paid the subrogation claims jointly to plaintiff and the subrogees. This left $60,887.87 in net proceeds to plaintiff. Plaintiff had three policies of UM insurance issued by State Farm. The policies, stacked together, provided $75,000 in UM benefits. Plaintiff contended that she was entitled to $14,112.13 from State Farm because the payments to the subrogees reduced the amount of coverage available under the tortfeasor's policy.[79] O.C.G.A. section 33-7-11(b)(1)(D)(ii) "defines an '[u]ninsured motor vehicle' as one where . . . the [tortfeasor's] '*available coverages*' . . . are less than the limits of the uninsured motorist coverage provided under the insured's insurance policy . . . ."[80] "The statute [further] define[s] 'available coverages' as the policy limits 'less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage.'"[81]

The court of appeals then questioned "whether the two subrogation payments constitute 'payments of other claims or otherwise' that have reduced the 'maximum amounts payable under [the] limits of coverage.'"[82] The court found this to be a question of first impression in Georgia and held that the phrase "payments of other claims" meant only the payment of claims by the tortfeasor's insurer to other persons who sustained damages in the same accident.[83] Because the subrogees' claims were made in place of the injured party, those payments did not qualify as payments of other claims under the statute.[84] Although plaintiff had UM insurance limits greater than the amount she was able to recover directly from the tortfeasor's insurer, because the payments made to *and* on behalf of the injured party exceeded the UM limits, the tortfeasor was not underinsured.[85]

4. UM Practice and Procedure—Default. In *Williams v. Safeway Insurance Co.*,[86] the court of appeals held that when a UM carrier answers and defends a case in its own name, the plaintiff has "the threshold burden to prove '(1) the existence of a policy of liability insurance containing uninsured motorist protection, and (2) that [the

79. *Id.* at 338-39, 579 S.E.2d at 747.
80. *Id.* at 339, 579 S.E.2d at 747 (quoting O.C.G.A. § 33-7-11(b)(1)(D)(ii) (2000 & Supp. 2003)).
81. *Id.* (quoting O.C.G.A. § 33-7-11(b)(1)(D)(ii) (emphasis added)).
82. *Id.* (quoting O.C.G.A. §§ 33-7-11(b)(1)(D)(ii)).
83. *Id.*
84. *Id.* at 340, 579 S.E.2d at 747-48.
85. *Id.*
86. 223 Ga. App. 93, 94, 476 S.E.2d 850, 851 (1996).

defendant driver] was an uninsured motorist at the time of the [collision].'"[87] In *Anthony v. Larrios*,[88] the court of appeals addressed whether the plaintiff is relieved of his burden when he specifically pleads that the defendant driver was uninsured at the time of the accident, that allegation is deemed admitted by the driver's failure to answer, and a default judgment is entered against him.[89] Generally, admissions made by the default of an uninsured motorist do not bind an uninsured motorist carrier.[90] Thus, the court held in *Anthony* that although plaintiff specifically pleaded that the tortfeasor was uninsured, and this allegation was admitted by the tortfeasor by virtue of his default, that admission did not relieve plaintiff of the burden of proving the tortfeasor was uninsured at the time of the collision.[91] Moreover, "'courts cannot presume that the tortfeasor was an uninsured motorist.'"[92] Therefore, plaintiff's failure to introduce evidence showing the tortfeasor was uninsured at the time of the collision resulted in affirmation of judgment notwithstanding the verdict granted to the UM carrier after a jury returned a verdict against the insurer and defendant driver.[93]

5. Declaratory Judgment—Practice and Procedure. In *Morgan v. Guaranty National Cos.*,[94] the Georgia Supreme Court held that an insurer may not bring a declaratory judgment action when it has denied coverage for a collision and refused to provide a defense, because the "insurer needs no declaration to guide it as to any future action."[95] However, in *Colonial Insurance Co. v. Progressive Casualty Insurance Co.*,[96] the court of appeals held that when an insurer denies collision coverage, yet proceeds to defend the insured under a reservation of rights, a declaratory judgment action may be appropriate to determine whether the insurer is required to provide coverage to the insured.[97]

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87. *Id.* at 94, 476 S.E.2d at 851 (quoting Hartford Accident & Indem. Co. v. Studebaker, 139 Ga. App. 386, 387, 228 S.E.2d 322, 323 (1976)).

88. 256 Ga. App. 248, 568 S.E.2d 135 (2002).

89. *Id.* at 248, 568 S.E.2d at 136.

90. *Id.*

91. *Id.* at 248-49, 568 S.E.2d at 136-37.

92. *Id.* at 249, 568 S.E.2d at 137 (quoting *Hartford Accident*, 139 Ga. App. at 388, 228 S.E.2d at 323).

93. *Id.*

94. 268 Ga. 343, 489 S.E.2d 803 (1997).

95. *Id.* at 344, 489 S.E.2d at 805.

96. 252 Ga. App. 391, 556 S.E.2d 486 (2001).

97. *Id.* at 391, 556 S.E.2d at 487.

The court's decision in *Colonial* was reaffirmed during the survey period in *Direct General Insurance Co. v. Drawdy*.[98] In *Drawdy* the insurer had written letters to the insured denying coverage for the underlying collision because the insured vehicle was driven by a nonpermissive user during a high-speed chase while evading the police. Despite the position taken by the insurer in its letters, when the accident victim filed an action for damages, the insurer defended the suit under a reservation of rights. The insurer filed a complaint for declaratory judgment, seeking a determination of the viability of the nonpermissive use clause in its policy. The trial court granted the insured's motion for summary judgment and the insurer appealed.[99] Relying on *Colonial*, the court of appeals reversed and held that the declaratory judgment action was proper.[100]

Also in *Drawdy*, discovery revealed that the vehicle owner, knowing the driver had no license, allowed the driver to use the car. The insurer then amended its complaint for declaratory judgment, contending that it could deny coverage because of an unlicensed driver exclusion in the policy.[101] The court of appeals held that "a declaratory judgment action [may be] amend[ed] to add a different ground for relief from that relied on in the original complaint."[102]

IV. LIFE, HEALTH & DISABILITY INSURANCE

A. Life Insurance

In a case of first impression, the United States Court of Appeals for the Eleventh Circuit held that "a variable life insurance policy is a 'covered security' under the Securities Litigation Uniform Standards Act of 1998 ('SLUSA')."[103] In *Herndon v. Equitable Variable Life Insurance Co.,*[104] a fifteen-year-old had been issued a variable life insurance policy. She was charged higher premiums because she had used tobacco and sought to prosecute a class action in state court. The case was removed and then dismissed pursuant to SLUSA.[105] The Eleventh

98. 258 Ga. App. 149, 572 S.E.2d 629 (2002).
99. *Id.* at 149-50, 572 S.E.2d at 630-31.
100. *Id.* at 151, 572 S.E.2d at 632.
101. *Id.* at 149, 572 S.E.2d at 631.
102. *Id.* at 151, 572 S.E.2d at 632. *See* Peterson v. Am. Int'l Life Assurance Co., 203 Ga. App. 745, 747, 417 S.E.2d 402, 404 (1992).
103. Herndon v. Equitable Variable Life Ins. Co., 325 F.3d 1252, 1253 (11th Cir. 2003); 15 U.S.C. §§ 77p(c), 78bb(f) (2000); 28 U.S.C. §§ 1331, 1367, 1441, 1446 (2000).
104. 325 F.3d 1252 (11th Cir. 2003).
105. *Id.* at 1253.

Circuit noted that several circuits have held that variable annuities, without a life insurance component, were covered securities under SLUSA.[106] Consistent with the district court's decision and three other district court decisions,[107] the Eleventh Circuit held that "a variable life insurance policy account add[ing] a life insurance component to the investment does not negate the fact that the statutory requirements of SLUSA have been met with regard to the annuity component . . . ."[108] Hence, plaintiff's purported class action alleging fault with the life insurance component of a variable life insurance policy was subject to dismissal under SLUSA.[109]

In a creditor-friendly decision with a wealth of legislative and regulatory support, a panel of the Georgia Court of Appeals held in *Printis v. Bankers Life Insurance Co.,*[110] that the "indebtedness" upon which life insurance could be based included not only the principal but also the anticipated interest.[111] The court of appeals affirmed the trial court's awarding judgment on the pleadings to Bankers Life and held that Georgia law allowed Bankers Life to base its insurance premium on the total indebtedness, including finance charges, over the life of the loan, rather than just the principal.[112] The court held that the O.C.G.A. section 33-31-1[113] definition of indebtedness was consistent with the Federal Consumer Credit Protection Act[114] because both defined indebtedness as the total amount payable in the schedule of payments.[115] The Motor Vehicle Sales Finance Act,[116] which limits the ability to collect unearned interest, does not require a different result.[117]

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106. *Id.* at 1254.

107. *Id. See* Araujo v. John Hancock Life Ins. Co., 206 F. Supp. 2d 377, 382 (E.D.N.Y. 2002); *In re* Lutheran Bhd. Variable Ins. Prod. Co. Sales, 105 F. Supp. 2d 1037, 1040 (D. Minn. 2000); Lasley v. New England Variable Life Ins. Co., 126 F. Supp. 2d 1236, 1239 (N.D. Cal. 1999).

108. *Herndon*, 325 F.3d at 1254.

109. *Id.*

110. 256 Ga. App. 266, 568 S.E.2d 85 (2002).

111. *Id.* at 268, 568 S.E.2d at 87.

112. *Id.* at 267, 568 S.E.2d at 87.

113. O.C.G.A. § 33-31-1 (2000).

114. *See generally* 15 U.S.C. §§ 1601-1693(r) (2000).

115. *Printis*, 256 Ga. App. at 268, 568 S.E.2d at 87.

116. O.C.G.A. § 10-1-30 (2000).

117. *Id.*

B. Health Insurance

In a detailed Rule 23[118] analysis opinion from the United States District Court for the Northern District of Georgia, Judge Julie Carnes ultimately granted class certification to a national class of female Wal-Mart employees covered by Wal-Mart's health insurance plan who had used prescription contraceptives, for which the plan wrongfully denied reimbursement.[119] In *Mauldin v. Wal-Mart Stores, Inc.,*[120] plaintiff sought to redress Wal-Mart's discriminatory failure to reimburse prescription contraceptives as a part of Wal-Mart's health insurance. Rather than denying class treatment, the court substantially narrowed the proposed class to enable the class action mechanism to deal with the alleged improper discrimination in the most efficient and effective manner.[121] Trimmed from the proposed class were those who "'wish[ed] to use' prescription contraceptives . . .," spouses of Wal-Mart employees, and others.[122] This opinion and certification is consistent with *Erickson v. Bartell Drug Co.*,[123] in which a district court in Washington similarly certified a class action for female employees who used prescription contraceptives while enrolled under their employer's health insurance plan.[124]

C. Disability

Using the Georgia Supreme Court's response to a certified question, the United States Court of Appeals for the Eleventh Circuit noted in *Hallum v. Provident Life & Accident Insurance Co.*[125] that one "who unexpectedly suffers from carpal tunnel syndrome brought on by years of intentional repetitive hand motions,"[126] still sustains an "accidental bodily injur[y]"[127] within the meaning of a disability policy and is entitled to a lifetime of coverage.[128] Whether the carpal tunnel syndrome was classified as an "injury" or "sickness" under Provident's

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118. FED. R. CIV. P. 23.
119. Mauldin v. Wal-Mart Stores, Inc., No. 1:01-CV-2755-JEC, 2002 U.S. Dist. LEXIS 21024, at *1, *54 (N.D. Ga. Aug. 23, 2002).
120. No. 1:01-CV-2755-JEC, 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Aug. 23, 2002).
121. *Id.* at *52.
122. *Id.* at *24.
123. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).
124. *Id.* at 1268.
125. 326 F.3d 1374 (11th Cir. 2003).
126. *Id.* at 1375.
127. *Id.*
128. *Id.* at 1376.

policy made the difference between a lifetime of coverage and merely four years of benefits.[129]

In a case of first impression, the Georgia Court of Appeals discussed, in *Winters v. Reliance Standard Life Insurance Co.,*[130] the distinction between insurance coverage for accidental injuries and those caused by accidental means.[131] An accidental injury is unexpected but may arise from a conscious voluntary act.[132] A contrasting term, not used in the Provident policy, is "accidental means," in which both the injury and the act causing the injury must be involuntary and unintentional.[133] The court of appeals noted disallowance of coverage under similar language when the injury was caused by the voluntary ingestion of alcohol.[134] The Provident Life policy focused on the injury, not the means which actually caused the injury.[135] This result would seem to pave the way for broader disability coverage for carpal tunnel syndrome and/or modification of policy language.

In another case of first impression in Georgia, the court of appeals held in *Corbin v. Regions Bank*[136] that "a creditor is obligated to seek payment under a credit disability insurance policy sold"[137] as a part of the credit transaction.[138] The court reversed the trial court's grant of summary judgment to Regions Bank because the creditor had an affirmative duty to seek payment under a credit disability insurance policy sold as a part of the credit transaction before repossessing the vehicle.[139] Earl Corbin purchased a truck from Duvall Ford, and, as part of that transaction, paid over $1000 for credit disability insurance. Corbin was unable to make full payments after a series of serious illnesses. He received a notice of repossession from Regions, relinquished the vehicle, and advised Regions that he was disabled. He defended against a deficiency suit based upon the creditor's failure to seek payment under the credit disability insurance.[140] The court of appeals rejected the trial court's finding that Corbin had submitted

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129. Hallum v. Provident Life & Accident Ins. Co., 289 F.3d 1350, 1351 (11th Cir. 2002).
130. 209 Ga. App. 369, 433 S.E.2d 363 (1993).
131. *Id.* at 369, 433 S.E.2d at 363.
132. *Id.* at 370, 433 S.E.2d at 364.
133. *Id.*
134. *Id.*
135. *Hallum*, 289 F.3d at 1353.
136. 258 Ga. App. 490, 574 S.E.2d 616 (2002).
137. *Id.* at 494, 574 S.E.2d at 620.
138. *Id.*
139. *Id.* at 492-93, 574 S.E.2d at 619.
140. *Id.* at 490-92, 574 S.E.2d at 617-18.

voluntarily to repossession.[141] Additionally, the court held that "a jury could find that no default occurred [because] the [original] agreement contemplated that the credit disability insurance would remedy Corbin's [possible] inability to pay" the indebtedness.[142] Hence, creditors in Georgia and elsewhere are held to a higher standard of diligence, requiring them to seek payment under credit disability insurance policies that are part of the original indebtedness they are seeking to enforce.[143] However, the trial court disallowed Corbin's state court defamation claim.[144] The court of appeals held that "[t]he Federal Fair Credit Reporting Act[[145]] preempts state defamation laws to the extent that [they] are inconsistent with . . . the [federal act]."[146] The federal act[147] requires not only that false information be furnished, but also that the "information [be] furnished with malice or wilful intent to injure [the] consumer."[148]

V. EXTRA-CONTRACTUAL LIABILITY

A. Bad Faith or Negligent Failure to Settle—A Limited Safe Harbor Created

In a case of first impression, the Georgia Supreme Court addressed whether an insurer is liable for bad faith and negligent refusal to settle a claim or lawsuit against its insured when the insurer failed to tender its policy limits because plaintiff's demand contained a condition beyond the insurer's control.[149] In *Cotton States Mutual Insurance Co. v. Brightman*,[150] the court held

> that an insurance company in a case involving multiple insurers may be liable to its insured [for] bad faith [and negligent refusal to settle a] claim when it fails to tender its policy limits in response to a settle-

141. *Id.* at 495, 574 S.E.2d at 621.

142. *Id.* at 493, 574 S.E.2d at 619-20 (citing Rogers v. Farmers & Merchs. Bank, 247 Ga. App. 631, 632, 545 S.E.2d 51, 53 (2001)).

143. *Id.*

144. *Id.*

145. 15 U.S.C. § 1681(t) (2000).

146. *Corbin*, 258 Ga. App. at 497, 574 S.E.2d at 622 (quoting Gibson v. Decatur Fed. Sav. & Loan Ass'n, 235 Ga. App. 160, 164, 508 S.E.2d 788, 792 (1998)).

147. 15 U.S.C. § 1681(h)(e) (2000).

148. *Corbin*, 258 Ga. App. at 497, 574 S.E.2d at 622 (quoting *Gibson*, 235 Ga. App. at 164, 508 S.E.2d at 792).

149. Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003).

150. 276 Ga. 683, 580 S.E.2d 519 (2003).

> ment offer solely because the offer also seeks the policy limits from other insurers.[151]

Because *Cotton States* and *Southern General Insurance Co. v. Holt*[152] will become the seminal cases on the issue of an insurer's bad faith failure to settle, the facts forming the basis of the court's decisions merit detailed discussion.

> Brightman was seriously injured . . . when [a] van owned by Martin and driven by Cumbo struck his car as he was turning left at an intersection . . . . Police charged Brightman with failure to yield the right of way and charged Cumbo with speeding and causing serious injury by a vehicle. Police later charged Cumbo with driving under the influence . . . .[153]

At the time of the collision, Martin had an automobile liability insurance policy from Cotton States with a liability limit of $300,000. On January 31, 1994, Brightman's counsel offered in writing to settle Brightman's claims against Martin and Cumbo for payment by Cotton States of $300,000.[154] "The letter [stated] that Brightman had sustained traumatic brain injury and attached medical bills totaling $329,457.20."[155]

> On April 20, 1994, Cotton States declined to accept the [settlement offer] citing a police officer's testimony that Brightman caused the accident, the company's inability to discover how a second officer [determined] Cumbo's speed, and its desire to await the outcome of Cumbo's DUI case. [Consequently,] Brightman withdrew his offer to settle.[156]

Shortly thereafter, Brightman sued Martin and Cumbo. Through discovery, the parties learned that Cumbo also had a personal automobile liability policy, with a limit of $100,000, through State Farm Mutual Automobile Insurance Company.[157] "The investigating officers testified in depositions that the collision was caused by [a combination of] Brightman's failure to yield the right of way and Cumbo's speeding and driving under the influence."[158] In January 1995, a nonbinding

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151. *Id.* at 683, 580 S.E.2d at 520.
152. 262 Ga. 267, 416 S.E.2d 274 (1992).
153. *Cotton States*, 276 Ga. at 683, 580 S.E.2d at 520.
154. *Id.* at 683-84, 580 S.E.2d at 520.
155. *Id.* at 683, 580 S.E.2d at 520.
156. *Id.*
157. *Id.* at 683-84, 580 S.E.2d at 520.
158. *Id.* at 684, 580 S.E.2d at 520.

arbitration panel found in Brightman's favor and awarded him $2 million.[159]

Following the arbitration award, Brightman, on January 30, 1995, again offered to settle the case if Cotton States would pay its policy limits of $300,000 within ten days. However, Brightman's written offer was contingent upon State Farm also tendering its limits of $100,000. Neither Cotton States nor State Farm tendered its policy limits before the offer's ten-day period expired.[160] On March 17, 1995, Cotton States reconsidered its position and offered "to pay its policy limits . . . in exchange for a general release . . . and a dismissal of the complaint with prejudice."[161] State Farm did not accept the terms, so Brightman declined Cotton States's offer.[162]

At trial, the jury awarded Brightman damages for personal injury in the amount of $1,787,500.[163] Cotton States then paid its policy limits of $300,000, and State Farm paid its policy limits of $100,000, "leaving an excess judgment of $1,387,500 against Martin and Cumbo."[164] Martin then assigned her claim against Cotton States for its bad faith and negligent refusal to settle the action within the policy limits to Brightman. Brightman sued Cotton States, and the jury returned a verdict awarding Brightman over $2 million in principal and interest.[165]

Relying on authority in Georgia and other jurisdictions throughout the country, the court of appeals in a majority decision, held that Cotton States had an "affirmative duty . . . to engage the injured party in discussions regarding an initial settlement demand in excess of policy limits."[166] The court determined that the evidence supported the jury's finding that Cotton States was negligent or acted in bad faith in failing to settle the personal injury action because Cotton States did not "respon[d] to Brightman's conditional offer with a counteroffer [to settle the case]."[167]

Cotton States appealed on the grounds that the ruling made "an insurer liable for failing to offer its policy limits in response to a

159. *Id.* at 687, 580 S.E.2d at 522.
160. *Id.* at 684, 580 S.E.2d at 520.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 684, 580 S.E.2d at 521.
166. Cotton States Mut. Ins. Co. v. Brightman, 256 Ga. App. 451, 454, 568 S.E.2d 498, 500-01 (2002) (citing Yeomans v. Allstate Ins. Co., 324 A.2d 906 (N.J. Super. Ct. App. Div. 1974); Young v. Am. Cas. Co., 416 F.2d 906 (2d Cir. 1969)).
167. *Id.* at 454, 568 S.E.2d at 500.

contingent demand that cannot be accepted. It argue[d] that it never had the opportunity to settle . . . because the plaintiff's demand contained a condition beyond its control."[168] Courts in Georgia and throughout the country have generally held that when an insurer could not have successfully effectuated a settlement within the policy limits even if it had attempted to do so, then it cannot be held liable in bad faith for failure to promptly attempt to negotiate a settlement within policy limits.[169]

In reaching its conclusion, the supreme court cited the well-established principle that "[a]n insurance company [can] be liable for the excess judgment entered against its insured based on the insurer's bad faith or negligent refusal to settle a . . . claim within the policy limits."[170] An "insurer is negligent in failing to settle if the ordinar[y] prudent insurer would [believe that] choosing to try the case [instead of settling it] created an unreasonable risk"[171] to the insured which would not adequately take into account the best interests of the insured.[172] "The rationale is that the interests of the insurer and insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy."[173] While "[t]he insured is interested in protecting [him]self against an excess judgment[,] the insurer [does not have the same]

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168. Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. at 686, 580 S.E.2d at 521-22.

169. *See, e.g.,* Gov't Employees Ins. Co. v. Gingold, 249 Ga. 156, 288 S.E.2d 557 (1982) (affirming trial court's grant of summary judgment to insurer in excess liability action when insured's deliberate disappearance made settlement of underlying action impossible); Cotton States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 128 S.E.2d 358 (1962) (holding that there was no cause of action based on the insurer's failure to solicit or make settlement offer at the insured's request); Gen. Cas. Co. v. Whipple, 328 F.2d 353 (7th Cir. 1964) (holding insurer's failure to settle a presumptively strong case and its failure to appeal judgment because its policy obligation had been completed was not bad faith conduct); Ranger Ins. Co. v. Home Indem. Co., 741 F. Supp. 716 (N.D. Ill. 1990) (holding primary carrier's refusal to initiate settlement offers within its policy limits was not proximate cause of excess carrier's liability); Oda v. Highway Ins. Co., 194 N.E.2d 489 (1st Dist. Ill. 1963) (holding insurer's conduct in multiple-party suit representing insurer and others and its failure to initiate negotiations was not negligence); Iowa Nat'l Mut. Ins. Co. v. Auto-Owners Ins. Co., 371 N.W.2d 627 (Minn. App. 1985) (holding primary insurer's refusal to offer settlement within its policy is good faith conduct when its insured's inability is unclear).

170. Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. at 684, 580 S.E.2d at 521 (citing McCall v. Allstate Ins. Co., 251 Ga. 869, 870, 310 S.E.2d 513, 514 (1984)).

171. *Id.* at 685, 580 S.E.2d at 521.

172. *Id.* (citing U.S. Fid. & Guar. Ins. Co. v. Evans, 116 Ga. App. 93, 156 S.E.2d 809, *aff'd*, 223 Ga. 789, 158 S.E.2d 243 (1967).

173. *Id.*

incentive to settle because litigation may result in a verdict [less than] the policy limits or a defense verdict."[174]

In *Cotton States* the supreme court relied heavily upon its decision in *Southern General Insurance Co. v. Holt*,[175] which addressed whether the insured had a bad faith claim against her insurance company for its failure to accept plaintiff's time-limited settlement offer within the policy limits.[176] In *Holt* the Georgia Supreme Court

> held that the insurer had a duty to its insured to respond to the plaintiff's deadline to settle the personal injury claim within policy limits when the insurer had knowledge of clear liability and special damages exceeding the policy limits. [The court's] holding in *Holt* was consistent with the general rule that the issue of an insurer's bad faith depends on whether the insurance company acted reasonably in responding to a settlement offer.[177]

Despite the fact that the settlement offer was a conditional demand, the court concluded that such a conditional demand did not entitle Cotton States to a directed verdict on the bad faith or negligent failure to settle claim at trial.[178] Instead, Brightman presented a jury question: Whether Cotton States had an adequate opportunity to settle and, therefore, acted unreasonably in refusing to tender its policy limits in response to the settlement offer.[179] Several facts influenced the court's decision.[180] First, Brightman presented expert testimony at trial that Cotton States had the opportunity to make an effective settlement offer by offering its limits before the ten-day deadline passed without determining whether State Farm would do so as well.[181] Second, the "industry experts [testified] that, in cases involving multiple defendants and insurance companies, one insurance company can offer its policy limits in response to a demand . . . and then let the plaintiff negotiate with the remaining insurers."[182] The court appears to have been particularly swayed by this testimony, as the testimony was confirmed by

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174. *Id.* (citing WILLIAM M. SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION § 1-07[2] (1993)).

175. *Id.*; 262 Ga. 267, 416 S.E.2d 274 (1992).

176. *S. Gen.,* 262 Ga. at 267, 416 S.E.2d at 274.

177. *Cotton States*, 276 Ga. at 685, 580 S.E.2d at 521 (citing *Holt*, 262 Ga. at 269, 416 S.E.2d at 276).

178. *Id.* at 687, 580 S.E.2d at 522.

179. *Id.*

180. *See id.* at 686, 580 S.E.2d at 522.

181. *Id.*

182. *Id.*

> Cotton States'[s] . . . tendering [of] its policy limits six weeks after the . . . deadline expired, despite State Farm's continuing refusal to pay. If Cotton States had tendered its policy limits while the plaintiff's offer was pending, it would have done everything within its control to accept the plaintiff's offer and thus protect its policyholder from an excess verdict.[183]

The court believed that had Cotton States tendered its policy limits, then it "would have given equal consideration to its insured's financial interests and fulfilled its duty to her."[184] Cotton States's action in tendering its policy limits after the deadline expired, despite State Farm's refusal to do so, showed that Cotton States had no excuse for not doing so within the ten-day deadline after the initial offer.[185]

The court further found sufficient "evidence to support the jury's verdict that Cotton States breached its duty . . . to settle [the] claim."[186] Such evidence included the facts that, "[b]y the time of the offer, Cotton States knew that the police had concluded that [Cumbo] was partially responsible for the collision, Brightman's damages exceeded the limits of [the] policy . . ., and a court-ordered arbitration panel had rendered a[n] . . . award of $2 million in Brightman's favor."[187]

However, the supreme court ruled that the court of appeals went too far in describing an insurer's duty to settle.[188] Contrary to the court of appeals ruling, an insurance company does not have "an affirmative duty . . . to engage in negotiations concerning a settlement demand [solely because the demand] is in excess of the insurance policy's limits."[189] Moreover, insurers do not have

> a duty . . . to make a counteroffer to every settlement demand that involves a condition beyond their control. Instead, . . . an insurance company faced with a demand involving multiple insurers can create a safe harbor from liability for an insured's bad faith claim under *Holt* by meeting the portion of the demand over which it has control, thus doing what it can to effectuate the settlement of the claims against its insured.[190]

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183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 687, 580 S.E.2d at 522.
187. *Id.*
188. *Id.*
189. *Id.* (citing Cotton States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 742, 128 S.E.2d 358, 359 (1962)).
190. *Id.*

Cotton States will have substantial ramifications for the insurance industry. The supreme court has sought to achieve a balance between "protect[ing] the financial interests of policyholders in cases where continued litigation [will] expose them to a judgment exceeding their policy limits while [at the same time] protecting insurers from bad faith claims when there are conditions involved in the settlement demand over which they have no control."[191] The court kept intact the rule that an insurer, in considering whether to tender policy limits, has the right to investigate and analyze whether a potential verdict would exceed its limits (*i.e.*, the case in which there is no clear liability or in which the extent and value of the damages or injuries are less than the policy limits).[192] The question of bad faith or negligent failure to settle is determined by whether the insurer had reasonable and legitimate grounds in law or fact, as opposed to arbitrary and capricious grounds, to refuse to settle the third party's claim within policy limits.[193] The mere fact that the claim could have been settled within policy limits, that the insurer rejected such a demand by the plaintiff, or that the insured requested such a settlement, is not dispositive of the existence of bad faith or negligent failure to settle.[194] Such circumstances may be tendered at trial to further the insured's bad faith or negligence claims, but these alone do not decide the issue of whether the insurer acted in bad faith or was negligent.[195]

In the future, insurance companies will rely heavily upon the safe harbor language of the decision in *Cotton States*. When the insurer faces a *Holt* demand that is conditioned upon factors beyond its control, and the insurer has reasonably determined that the value of the claim is in *excess* of its policy limits, then it can rely upon the safe harbor to tender the policy limits to avoid any claims of bad faith or negligent failure to settle. On the other hand, when the insurer faces a *Holt* demand with conditions beyond its control, and the insurer has reasonably determined that the value of the claim *does not exceed* its policy limits, the insurer can again rely upon the safe harbor language in refusing to tender the policy limits, and thereby avoid liability for bad faith or negligent failure to settle.

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191. *Id.*

192. *See* Cotton States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 128 S.E.2d 358 (1962); Great Am. Ins. Co. v. Exum, 123 Ga. App. 515, 181 S.E.2d 704 (1971) (holding that an insurer is not required to give greater consideration to the interests of the insured over its own interest).

193. *See* Gingold v. Gov't Employees Ins. Co., 159 Ga. App. 410, 283 S.E.2d 614 (1981).

194. *Id.* at 410, 283 S.E.2d at 614.

195. *Id.*

B. Constitutional Regulation of Punitive Extra-Contractual Exposure—State Farm v. Campbell

Although not a Georgia-grown precedent, *State Farm Mutual Automobile Insurance Co. v. Campbell*[196] is controlling precedent, specifically applicable to an insurer's potential, punitive, extra-contractual exposure. A Utah appellate court reinstated a $145 million punitive award which had been reduced to $25 million by the trial court following a jury trial which also resulted in a $2.6 million compensatory award.[197] The United States Supreme Court noted that State Farm's actions "meri[t] no praise."[198] State Farm took a case of probable liability to trial, against the advice of its own personnel, and incurred an excess judgment in multiples of the coverage and the demands. Evidence from throughout the United States regarding State Farm's alleged national scheme to limit payments was admitted, over objection, as was claim-handling conduct dissimilar to that involved in *Campbell*.[199]

The Supreme Court granted certiorari and once again considered the measure of punishment, via punitive damages, available to a state in a civil case.[200] The Court, noting that *Campbell* is "neither close nor difficult,"[201] reversed and remanded.[202] Further, it carried forward from *BMW of North America, Inc. v. Gore*[203] the three guideposts governing de novo appellate review of the measure of punitive damages constitutionally sustainable: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[204]

In an extended discussion regarding the degree of reprehensibility, the Supreme Court made it clear that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."[205] Even if out-of-state conduct was probative regarding the deliberateness of the defendant's action, "[a] jury must be instructed . . . that it may not use

196. 123 S. Ct. 1513 (2003).
197. *Id.* at 1519.
198. *Id.* at 1521.
199. *Id.* at 1519.
200. *Id.* at 1517.
201. *Id.* at 1521.
202. *Id.* at 1526.
203. 517 U.S. 559 (1996).
204. 123 S. Ct. at 1520 (citing *BMW*, 517 U.S. at 575).
205. *Id.* at 1522 (citing *BMW*, 517 U.S. at 572).

evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[206] Moreover, the Court prohibited states from attempting to punish "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised."[207] It drew in the type of evidence admissible on punitive damages to that which was substantially similar to evidence affecting a particular plaintiff only if that conduct was not lawful where it occurred.[208] Out-of-state, dissimilar, and lawful conduct are not generally evidence of reprehensibility.[209]

Turning next to the proportionality guidepost, the Supreme Court again discussed the absence of a bright-line or ratio rule, and suggested that low single-digit ratios were instructive and perhaps limiting, except in those instances when "'a particularly egregious act has resulted in only a small amount of economic damages.'"[210] The Court suggested that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[211] The *Campbell* ratio, 145:1, was well beyond the outer limits of constitutionality.[212] Lastly, "[t]he third guidepost of . . . disparity between the punitive damages award and the 'civil penalties . . . in comparable cases'"[213] again identified a civil sanction of modest amount: $10,000 for an act of fraud.[214]

It appears that many courts, including the state appellate courts, are struggling to adjust to the Supreme Court's dampening of the historical punitive damage free-for-all. In cases following *BMW*, the Georgia appellate consideration of punitive awards' constitutionality seems to be characterized by ad hoc rationalizations for most awards entered. With time and the clarification in *Campbell*, refinements in this area should occur. The insurance practitioner has been blessed with the concrete United States Supreme Court application of the *BMW* guideposts in the insurance extra-contractual context. *Campbell* should make discovery, evidentiary rulings, jury consideration, and de novo court review of punitive damage exposures in the insurance context much easier.

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206. *Id.* at 1522-23 (citing *BMW*, 517 U.S. at 572-73).
207. *Id.* at 1523.
208. *Id.* at 1523-24.
209. *Id.* at 1522-24.
210. *Id.* at 1524 (quoting *BMW*, 517 U.S. at 582).
211. *Id.*
212. *Id.*
213. *Id.* at 1526 (quoting *BMW*, 517 U.S. at 575).
214. *Id.*