

Insurance

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I. INTRODUCTION

Across the board, courts strictly applied insurance contracts as they were written. Typical of this survey year, insureds went zero for five in attempts to escape from their responsibility to read their policies. Public policy arguments did not seem to work. At the end of the survey year, the Georgia Court of Appeals further clarified the application of coverages in complex areas of insurance for “advertising injury” and “construction defects.”

II. HOMEOWNER’S INSURANCE

Those responsible for a passenger death resulting from a motorbike’s operation off their property could not obtain liability coverage from any one of three carriers in *Harkins v. Progressive Gulf Insurance Co.*¹ The court of appeals rejected an intriguing and sophisticated interpretation of Progressive’s automobile policy language regarding “an insured,”

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1. 262 Ga. App. 559, 586 S.E.2d 1 (2003).

holding that the court should effectuate each provision of the policy and interpret the policy in a way that harmonizes the provisions.² With respect to Mr. Harkins, he received no coverage because he was not operating the vehicle.³ Likewise, with respect to Great Northern's homeowner's policy in favor of Larry Harkins, the court of appeals rejected the argument that the clear "motorized land vehicle" exclusion would yield when there was an alternative "covered" theory of liability, such as negligent supervision.⁴

Distinguishing *Guaranty National Insurance Co. v. Brock*,⁵ wherein the enforcement of an exclusion would have deprived the policyholder of all coverage, thereby defeating the underlying purpose of that policy, the court in *Harkins* explained that the Great Northern policy afforded coverage for such motorized land vehicles in a variety of circumstances, including while the vehicle was in storage and while the vehicle was used on the resident's premises.⁶ Hence, enforcement of the motorized land vehicle exclusion⁷ did not frustrate the purpose of the policy.⁸ The court of appeals further held, under the Federal Insurance Company's ("Federal") excess liability policy,⁹ that a "motor bike" was a "motorcycle" in the face of an argument that a motorcycle, for licensure purposes, would have certain safety equipment that was not on this motor bike.¹⁰ The Federal policy did not adopt the motorcycle definitions found in Georgia licensure law.¹¹ Finally, the court declined to read out the requirement in Barbara Harkins's USAA automobile policy, that the involved vehicle be a covered automobile.¹² A valiant effort was made on behalf of Harkins, but the court did not accept Harkins's arguments.¹³

Several Georgia appellate decisions dealt with public policy arguments, rejecting them in the context of the cases in which they arose. In *Manning v. USF&G*,¹⁴ a case of first impression, Georgia deter-

2. *Id.* at 561, 586 S.E.2d at 6.

3. *Id.*

4. *Id.* at 562, 586 S.E.2d at 4.

5. 222 Ga. App. 294, 474 S.E.2d 46 (1996).

6. *Harkins*, 262 Ga. App. at 561, 586 S.E.2d at 3.

7. *Id.*

8. *Id.* at 563, 586 S.E.2d at 1.

9. *Id.*, 586 S.E.2d at 4.

10. *Id.*, 586 S.E.2d at 5.

11. *Id.*, 586 S.E.2d at 4-5.

12. *Id.* at 564, 586 S.E.2d at 5.

13. *Id.*

14. 264 Ga. App. 102, 589 S.E.2d 687 (2003).

mined, along with the majority of states,¹⁵ that a homeowner's policy excluding events "arising out of the use of a motor vehicle" excludes coverage even when an alternative theory of liability existed, for example, dramshop liability, which was not explicitly excluded.¹⁶ The court noted that Georgia courts had repeatedly rejected the "concurrent cause" analysis¹⁷ urged in this context in decisions such as *Dynamic Cleaning Service, Inc. v. First Financial Insurance Co.*¹⁸ By the policy's express terms, which the court would enforce as unambiguous, the exclusion focused on "the genesis of [the client's] claims—if those claims arose out of [that partner's] culpable conduct . . . coverage need not be provided."¹⁹

In *Baldwin v. State Farm Fire & Casualty Co.*,²⁰ the court of appeals, honoring freedom of contract and public policy interests, rejected an attempt to read out of the policy the "resident of the household" exclusion located in the homeowner's policy.²¹ The mother of the deceased, who was also the defendant's former spouse, sought to recover for the wrongful death of her son due to an accident at defendant father's home. The mother argued that the standard resident of the household exclusion in a homeowner's policy should not be enforced on the grounds of public policy. She drew support from *GEICO v. Dickey*,²² a compulsory automobile liability insurance decision.²³ The court in *Baldwin* held that there was no similar expression of public policy with respect to homeowner's insurance.²⁴ The court declined to extend the trump of public policy, noting that "the parties are left free to contract in a manner that leaves gaps in coverage . . ."²⁵ Such a decision is consistent with the national trend to reject similar public

15. David B. Harrison, Annotation, *Construction and Effect of Provision Excluding Liability For Automobile—Related Injuries or Damage from Coverage of Homeowner's or Personal Liability Policy*, 6 ALR 4th 555 (2004) (including neighboring Alabama, *Alfa Mut. Ins. Co. v. Jones*, 555 So. 2d 77 (Ala. 1989), and Florida, *Am. Sur. & Cas. Co. v. Lake Jackson Pizza, Inc.*, 788 So. 2d 1096 (Fla. 2001)).

16. *Manning*, 264 Ga. App. at 103, 589 S.E.2d at 688.

17. *Id.* at 104, 589 S.E.2d at 689.

18. 208 Ga. App. 37, 38, 430 S.E.2d 33, 34 (1993).

19. *Manning*, 264 Ga. App. at 106, 589 S.E.2d at 690.

20. 264 Ga. App. 229, 590 S.E.2d 206 (2003).

21. *Id.* at 231, 590 S.E.2d at 208.

22. 255 Ga. 661, 340 S.E.2d 596 (1986).

23. *Baldwin*, 264 Ga. App. at 231, 590 S.E.2d at 208.

24. *Id.*

25. *Id.*

policy arguments outside the context of when they truly apply, compulsorily automobile insurance.²⁶

In *MacIntyre & Edwards, Inc. v. Rich*,²⁷ a decision concerning the duty to read, the court refused to excuse an insured's failure to examine a renewal policy that did not contain unlimited replacement cost coverage, but imposed new specific limits on coverage.²⁸ The insured argued that the exception to the duty to read, established by *Wright Body Works v. Columbus Interstate Insurance Agency*,²⁹ which involved a co-insurance clause, did not apply when the change was readily apparent, plain, and unambiguous. Additionally, there was no showing

26. Six jurisdictions have considered striking the Household Exclusion from a homeowner's policy; all six rejected it, each specifically distinguishing between homeowner's and auto liability policies. *Roberts v. Farmers Ins. Co.*, 1999 U.S. App. LEXIS 30483 (10th Cir. 1999) (affirming summary judgment based on Household Exclusion in homeowner's policy because "[t]he logic of [striking the household exclusion from a homeowners policy] does not apply here because Oklahoma has not mandated the purchase of homeowner's insurance"); *Groff v. State Farm Fire & Cas. Co.*, 646 F. Supp. 973 (E.D. Pa. 1986) (rejecting insured's argument that household exclusion is "contrary to public policy" as "puzzling" because "I am unaware of any public policy interests which would be served by mandating insurance of parents against personal injury claims brought by their minor children"); *Salviejo v. State Farm Fire & Cas. Co.*, 958 P.2d 552, 553 (Haw. Ct. App. 1998) (affirming summary judgment for insurer, refusing to strike household exclusion: "Although similar exclusions in automobile insurance policies have been invalidated, the cases which so hold have relied upon public policies expressed in statutes regulating automobile insurance . . . we have not been referred to any similar public policy basis for invalidating this type of exclusion in a homeowner's policy"); *Saltzman v. Broussard*, 736 So. 2d 243 (La. Ct. App. 1999); *Suba v. State Farm Fire & Cas. Co.*, 498 N.Y.S.2d 656 (App. Div. 1986); *Neil v. Allstate Ins. Co.*, 549 A.2d 1304, 1307 (Pa. Super. Ct. 1988) (specifying that cases voiding Household Exclusion from auto policies are "not analogous" to cases involving homeowner's policies).

All jurisdictions that considered the validity of the household exclusion in a homeowner's policy have enforced it. No jurisdictions found it *per se* against public policy. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Warren*, 87 F. Supp. 2d 904 (E.D. Mo. 1999); *Mitroff v. United Servs. Auto. Ass'n*, 72 Cal. App. 4th 1230 (Ct. App. 1999) ("The concept of a household exclusion is a common one which has long enjoyed judicial support."); *Allstate Ins. Co. v. Brettman*, 657 N.E.2d 70 (Ill. App. Ct. 1995) (enforcing household exclusion in homeowner's policy); *Vierkant by Johnson v. AMCO Ins. Co.*, 543 N.W.2d 117 (Minn. 1996) (enforcing household exclusion in homeowner's policy); *American Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113 (Minn. 1983); *Foley v. Foley*, 414 A.2d 34, 35 (N.J. Super. Ct. App. 1980) (enforcing household exclusion in homeowner's policy); *State Farm General Ins. Co. v. Emerson*, 687 P.2d 1139, 1143 (Wash. 1984) (enforcing household exclusion in homeowner's policy); *Rich v. Allstate Ins. Co.*, 445 S.E.2d 249 (W. Va. 1994) (enforcing household exclusion in homeowner's policy); *Rabas v. Claim Mgmt. Servs., Inc.*, 556 N.W.2d 410 (Wis. 1996), *review dismissed*, 560 N.W.2d 278 (Wis. 1996).

27. 267 Ga. App. 78, 599 S.E.2d 15 (2004).

28. *Id.* at 79-80, 599 S.E.2d at 17.

29. 233 Ga. 268, 271, 210 S.E.2d 801, 803-04 (1974).

of reliance on the agent's expertise to minutely examine the nuances of such a policy.³⁰ While the rule in *Wright Body Works* imposes responsibility on an agent for minute examination of nuances of coverage, the court in *MacIntyre* properly held that the exception to the duty to read would not be expanded to eliminate the duty to read most normally encountered and understandable insurance terms.³¹

In *Tripp v. Allstate Insurance*,³² the court enforced the "intentional act" exclusion,³³ employed by Allstate in its standard form policies, in Georgia and elsewhere.³⁴ Tomlinson, putative insured, admitted that he intended to buy marijuana and was holding a pistol grip twelve-gauge shotgun in his hand when he walked in the restaurant's back door. He also claimed he did not know the gun was loaded, it discharged accidentally, and he lacked the subjective intent to harm anyone.³⁵ This type of scenario is often repeated when a tortfeasor seeks coverage despite an intentional act exclusion.³⁶ Allstate's policies provide for exclusion stating: "We do not cover any bodily injury or property damage intended by or which may reasonably be expected to result from the intentional acts or omissions of any insured person which are crimes"³⁷

The court reviewed numerous opinions of other states involving identical Allstate policy language, determining that the courts generally upheld this exclusion as a matter of law.³⁸ The Georgia court in *Tripp* followed, affirming summary judgment and concluding that one "who holds a shotgun in his arms for intimidation or perceived personal need for protection—loaded or unloaded—must anticipate that some bodily injury is likely to result to somebody."³⁹ Though the Allstate policy language is a bit stronger for the carrier, the court's decision is consistent with the Georgia Supreme Court's teaching in *Roe v. State Farm*.⁴⁰ The court has limited patience and tolerance for incredulous assertions apparently made only for purposes of obtaining coverage.

30. *MacIntyre*, 267 Ga. App. at 81-82, 599 S.E.2d at 18.

31. *Id.* at 82, 599 S.E.2d at 18.

32. 262 Ga. App. 93, 584 S.E.2d 692 (2003).

33. *Id.* at 95, 584 S.E.2d at 692.

34. *Id.*

35. *Id.* at 94, 584 S.E.2d at 694.

36. *Id.* at 95, 584 S.E.2d at 694.

37. *Id.*

38. *Id.* at 96, 584 S.E.2d at 695.

39. *Id.*

40. 259 Ga. 42, 376 S.E.2d 876 (1989) (applying the intentional act exclusion, as a matter of law, to deny child molestation).

III. COMMERCIAL GENERAL LIABILITY INSURANCE

A. Coverage for “Advertising Injury”

Unsolicited facsimiles sent in violation of a consumer protection statute, which violate the recipient’s right of privacy, constitute covered “advertising injury” under the standard commercial general liability (“CGL”) policy.⁴¹ In *Hooters of Augusta, Inc. v. American Global Insurance Co.*,⁴² Hooters sought to recover damages from its excess commercial liability carriers for their denial of coverage for a judgment against Hooters arising out of unsolicited fax advertisements it had sent to Georgia business owners’ fax machines. In the judgment the court determined Hooters violated the Telephone Consumer Protection Act (“TCPA”)⁴³ and held Hooters liable for treble damages.⁴⁴

The policies provided coverage for “advertising injury,” which was defined as “injury arising solely out of [the insured’s] advertising activities as a result of . . . [o]ral or written publication of material that violates a person’s right of privacy”⁴⁵ In determining whether the TCPA violation constituted an “advertising injury,” the court used the following three-prong test: (1) whether the alleged conduct constitutes an “advertising injury” within the meaning of the insurance policy; (2) if so, whether the insured engaged in advertising activity; and (3) if so, whether a “causal connection” existed between the advertising activity and the resulting injury.⁴⁶ In affirming that the alleged conduct satisfied all three prongs of the test, the court held that the facsimiles were sent as part of Hooters’ advertising activity and did violate the recipients’ “right of privacy.”⁴⁷ Because “right of privacy” was not defined by the policy, the court interpreted the phrase according to its common usage to mean “freedom from an unauthorized intrusion” or the “right to be let alone.”⁴⁸ The court rejected the insurers’ contention

41. *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365, 1371 (S.D. Ga. 2003).

42. 272 F. Supp. 2d 1365 (S.D. Ga. 2003).

43. 47 U.S.C.A. § 227 (West 2001). The TCPA makes it “unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send unsolicited advertisement to a telephone facsimile machine” *Id.* § 227(b)(1)(C).

44. *Hooters*, 272 F. Supp. 2d at 1375.

45. *Id.* at 1371.

46. *Id.* (citing *Hyman v. Nat’l Mutual Fire Ins. Co.*, 304 F.3d 1179 (11th Cir. 2002)).

47. *Id.* at 1371, 1373.

48. *Id.* at 1372. It must be noted, however, that the underlying complaint against Hooters did not allege any cause of action for invasion of the right of privacy, and the jury did not address such issue in the underlying action. Moreover, plaintiffs in the underlying

that “right of privacy” refers to torts constituting an “invasion of privacy” and, instead, adopted the common understanding of the phrase.⁴⁹ The court then determined that the requisite “causal connection” existed because the advertising itself caused the injury for which coverage was sought; that is, the sending of the facsimiles caused the invasion of the recipients’ right of privacy.⁵⁰

To avoid coverage, the insurers relied heavily upon an exclusion in their policy that stated “no coverage is provided for an [a]dvertising injury . . . [a]rising out of the willful violation of a penal statute or ordinance committed by or with the consent of the [i]nsured.”⁵¹ The insurers argued that the exclusion applied to prevent coverage because Hooters had been assessed treble damages for willful violation of the TCPA.⁵² In rejecting such arguments, the court used the following three-part test, established by the Eleventh Circuit in *United States v. NEC Corp.*,⁵³ to determine whether a statute is penal, as opposed to remedial in nature: (1) whether the purpose of the statute is to redress individual wrongs, or more general wrongs to the public; (2) whether recovery under the statute should be given to the harmed individual or the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.⁵⁴ The court concluded that the TCPA was remedial for the following reasons: (1) the purpose of the TCPA is to redress harms to individuals who are forced to incur the costs associated with receiving unsolicited faxes; (2) the damages provided by the TCPA are issued to the recipient of the faxes, and not to the public; and (3) precedential case law indicates that disproportionate statutory damages and even multiplied damages do not necessarily make a statute penal.⁵⁵

action could not, as a matter of law, have a viable claim for invasion of privacy under Georgia law. *See, e.g.*, *Cabaniss v. Hisley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966); *Davis v. Gen. Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950). Thus, the court appears to have read into the TCPA a tort of invasion of privacy where none would otherwise exist under Georgia law. The court’s decision is contrary to decisions in other jurisdictions holding that torts identified under the “advertising injury” clause of a liability policy must be read in their common law context and that coverage extends only for common law tort claims and not statutory enactments that may indirectly redress such conduct. *See, e.g.*, *Bank of the West v. Super. Ct.*, 833 P.2d 545 (Cal. 1992).

49. *Hooters*, 272 F. Supp. 2d at 1372.

50. *Id.* at 1374.

51. *Id.* at 1375.

52. *Id.* at 1374-75.

53. 11 F.3d 136 (11th Cir. 1993).

54. *Hooters*, 272 F. Supp. 2d at 1375.

55. *Id.* at 1375-76. *Contra* *Horace Mann Ins. Co. v. Drury*, 213 Ga. App. 321, 445 S.E.2d 272 (1994) (holding that an insured’s violation of a criminal statute constitutes a

Finally, the court rejected the insurers' contention that the treble damages award against Hooters, under the TCPA, constituted an award of punitive damages, which was not covered under the policy.⁵⁶ In doing so the court relied upon the well established Georgia law, as set forth in *Lunceford v. Peachtree Casualty Insurance Co.*,⁵⁷ that if the underlying cause of action, upon which punitive damages are assessed, is covered under the insurance policy, then the punitive damages are likewise covered, absent an explicit exclusion to the contrary.⁵⁸

Hooters illustrates how technological advances in advertisement, such as faxes and internet spam, may be interpreted by courts to constitute covered "advertising injury." To the extent such advertisements violate consumer protection acts, they will not be excluded from coverage as a violation of a penal statute. Moreover, *Hooters* may open the door for more insureds to seek coverage for an alleged violation of a consumer protection act, under the definition of "advertising injury," when the act prohibits an invasion of privacy, even when the claimant does not specifically allege any common law tort for invasion of privacy against the insured.

B. Interpretation of "Occurrence" in Construction Defect Claims

Damages allegedly resulting from a contractor or subcontractor's defective construction work do not constitute an "occurrence" and are not covered under a CGL policy when the contractor or subcontractor intended the work to be done. In *Owners Insurance Co. v. James*,⁵⁹ the insurer sought a declaratory judgment that it had no duty to defend or indemnify its insured subcontractor under the policy for claims of defective application of synthetic stucco cladding ("EIFS") on a residence. The claims against the subcontractor included theories of breach of contract, breach of warranty, and negligence for damage to the EIFS and resulting water penetration behind the EIFS to other portions of the home.⁶⁰ The CGL policy provided that the insurance would only apply to property damage if the property damage was caused by an "occurrence."⁶¹ The policy defined occurrence as "an accident, including

willful violation of a penal statute, which is excluded under an insurance policy).

56. *Hooters*, 272 F. Supp. 2d at 1377.

57. 230 Ga. App. 4, 5, 495 S.E.2d 88, 89 (1997).

58. *Hooters*, 272 F. Supp. 2d at 1377.

59. 295 F. Supp. 2d 1354 (N.D. Ga. 2003).

60. *Id.* at 1357.

61. *Id.* at 1363.

continuous or repeated exposure to substantially the same general harmful conditions.”⁶²

The court held that the insurer did not have the duty to defend or indemnify its insured because the alleged conduct was not an “accident” and, therefore, not an occurrence.⁶³ The court’s holding relied on Georgia case law, which construed “accident” to mean “an unintended happening rather than one occurring through intention or design.”⁶⁴ In other words, when an act is intentional, it cannot constitute an accident as that term is applied in an insurance policy. Because the insured actually installed the EIFS at the residence, rather than subcontract the work to another, such installation was an intended act and not an accident; therefore, any damage allegedly resulting from that work was not covered under the policy.⁶⁵

The court rejected the homeowner’s argument that coverage should apply because, while the subcontractor may have intended his acts, he did not intend the consequences of his acts, such as causing water to penetrate the EIFS, which resulted in damage to other parts of the home.⁶⁶ Georgia courts have construed CGL policies to “cover only injury *resulting from accidental acts* and not injury *accidentally caused by intentional acts*.”⁶⁷ Because the subcontractor’s act of installing the EIFS, which caused the alleged injury, was intentional, the alleged injury was not covered by the policy.⁶⁸

Owners has the potential to tremendously impact the Georgia insurance industry for those insurers who write CGL policies for contractors and subcontractors. In the past insurers assumed that as long as negligence was alleged against their insureds, the alleged

62. *Id.*

63. *Id.* at 1364-65.

64. *Id.* at 1363 (citing *Allstate Ins. Co. v. Grayes*, 216 Ga. App. 419, 421, 454 S.E.2d 616, 618 (1995); *Thrif-Mart, Inc. v. Commercial Union Assurance Cos.*, 154 Ga. App. 344, 346, 268 S.E.2d 397, 400 (1980)).

65. *Id.* at 1363-64.

66. *Id.* at 1364.

67. *Id.* (italics in original). *See, e.g.*, *Allstate Ins. Co. v. Grayes*, 216 Ga. App. 419, 421, 454 S.E.2d 616, 618-19 (1995); *Winters v. Reliance Standard Life Ins. Co.*, 209 Ga. App. 369, 370, 433 S.E.2d 363, 363-64 (1993); *Georgia Farm Bureau Mut. Ins. Co. v. Meriwether*, 169 Ga. App. 363, 363, 312 S.E.2d 823, 823-24 (1983).

68. 295 F. Supp. 2d at 1364-65. At the time of publication of this Article, the Georgia Court of Appeals had recently issued *SawHorse, Inc. v. Southern Guaranty Insurance Co. of Georgia*, No. A04A1232, 2004 WL 1700478 (Ga. App. July 30, 2004). Although decided after the period of time covered by this survey, the case does suggest that Georgia courts are resistant to find lack of occurrence when the policy provides coverage for the risk that defective or faulty workmanship will cause injury to people or damage to other property. A full treatment of this case will be included in next year’s survey.

improper construction constituted an occurrence under the policy. Instead, insurers have focused on whether the alleged “property damage” fell within one of the “business risks” exclusions. Now, before even considering the application of the business risks exclusions, carriers will first seek to determine whether their insureds’ alleged conduct in constructing the property was an intentional act and, therefore, not covered. When insured builders actually perform construction acts, rather than subcontract them, insurers may take a much more aggressive stance in denying any coverage for damages arising out of the defective construction.

C. Interpretation of “Occurrence” in Breach of Contract Claims

If the allegations of the complaint include intentional conduct arising out of a breach of contract, such allegations do not constitute an occurrence and no coverage is afforded under the CGL policy, even if the allegations also include theories of negligence.⁶⁹ In *Georgia Farm Bureau Mutual Insurance Co. v. Hall County*,⁷⁰ the insured owned real property subject to a condemnation petition filed by Hall County. Thereafter, the insured contracted with the injured party, a timber removal company, to sell timber on the property subject to a condemnation petition. After Hall County obtained the condemnation judgment, the injured party removed the timber, causing Hall County to sue the injured party for trespass and conversion. The injured party then brought a third-party complaint against the insured that sought indemnification, breach of contract, unjust enrichment, ordinary and gross negligence, and punitive damages for failing to advise the injured party of the existence of the condemnation petition.⁷¹

The court held that the CGL insurer had no duty to defend or indemnify the insured for the third-party complaint brought against the insured because such alleged conduct was not a covered occurrence.⁷² Occurrence was defined by the policy as an accident, which in Georgia means “an event which takes place without one’s foresight or expectation or design.”⁷³ Even though the third-party complaint alleged negligence and gross negligence, in addition to breach of contract, the court held that the “only reasonable inference to be drawn from the alleged facts”

69. *Georgia Farm Bureau Mut. Ins. Co. v. Hall County*, 262 Ga. App. 810, 813, 586 S.E.2d 715, 718 (2003).

70. 262 Ga. App. 810, 586 S.E.2d 715 (2003).

71. *Id.* at 811, 586 S.E.2d at 716.

72. *Id.* at 813, 586 S.E.2d at 718.

73. *Id.*, 586 S.E.2d at 717 (citing *O’Dell v. St. Paul Fire & Marine Ins. Co.*, 223 Ga. App. 578, 580, 478 S.E.2d 418, 420 (1996)).

was that the insured's failure to inform the injured party of the condemnation petition was not an accident.⁷⁴ The insured's decision to enter into the contract for the sale of timber "was a deliberate, intentional act to which the damages were a natural and expected consequence."⁷⁵ Moreover, by seeking punitive damages, the third-party complaint explicitly alleged that the act was intentional or at least evidenced an expectation of harm.⁷⁶ "Deliberate acts with expected consequences are simply not covered by the policy."⁷⁷

Hall County represents an aggressive approach to coverage by the court of appeals. Typically, the court will look to the "four corners" of the complaint to determine whether any coverage exists. Because negligence was alleged, one would expect the court to conclude that nonintentional conduct had been alleged. However, the court in *Hall County* determined that if the allegations of the complaint make it clear that the act had to be intentional and no other inference could be drawn, despite the negligence cause of action, no coverage exists because no occurrence has been alleged.⁷⁸ Insurance companies may also attempt to rely on the court's decision in *Hall County* for the proposition that when the "true facts" beyond the four corners of the complaint indicate that no coverage would be provided, insurance companies do not have a duty to defend or indemnify the insured.⁷⁹ In the past the court has held that if "true facts" beyond the four corners of the complaint trigger coverage, then the insurance company has a duty to investigate those facts and, if coverage is triggered, provide a defense and indemnification.⁸⁰ However, the court has never held that an insurance company can look to the "true facts" to find that no coverage exists. This result may represent a factual first in Georgia.

D. Interpretation of "Occurrence" in False Imprisonment Claims

In what is clearly becoming a pattern, the court of appeals has held that a claim of false imprisonment does not constitute an occurrence, even if the complaint alleges that such conduct is negligent.⁸¹ In *Pilz v. Monticello Insurance Co.*,⁸² the insured, a daycare center, was sued

74. *Id.*

75. *Id.*, 586 S.E.2d at 718.

76. *Id.* at 814, 586 S.E.2d at 718.

77. *Id.*

78. *Id.* at 813, 586 S.E.2d at 718.

79. *See id.* at 812, 586 S.E.2d at 717.

80. *See, e.g., Colonial Oil Indus., Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 and TO31504671*, 268 Ga. 561, 491 S.E.2d 337 (1997).

81. *Pilz v. Monticello Ins. Co.*, 267 Ga. App. 370, 373, 599 S.E.2d 220, 222-23 (2004).

82. 267 Ga. App. 370, 599 S.E.2d 220 (2004).

for injuries a child sustained in its care when an employee of the insured verbally and physically attacked the child. In the complaint plaintiff alleged claims of assault and battery, negligent performance of a contractual obligation, negligent false imprisonment, negligence per se, negligent retention, and intentional infliction of emotional distress.⁸³ The court determined that none of the claims were covered under the applicable CGL policy.⁸⁴

Regarding the false imprisonment claim, the court relied upon the following definition of occurrence located in the policy: "an accident, including continuous or repeated exposure to substantially the same general harmful condition[s]."⁸⁵ Because false imprisonment is an intentional act and not an accident, it did not constitute a covered occurrence, even though plaintiff alleged that the false imprisonment was done negligently.⁸⁶

With respect to the assault and battery and other related claims, the policy contained an exclusion for any bodily injury "arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such act."⁸⁷ The court held that the exclusion clearly and unambiguously applied to the assault and battery claim.⁸⁸ The court then went one step further and concluded that because the negligence claims "arose out of" the alleged assault and battery, they too were excluded.⁸⁹ Because the exclusion focused on the origin or genesis of the claims, none of the negligence claims would have arisen "but for" the alleged assault and battery; therefore, no coverage existed under the policy for any of the claims.⁹⁰

With the decisions this past year in *Owners*, *Hall County*, and *Pilz*, the courts have demonstrated that, while determining if coverage exists, courts will not focus on the theories of recovery alleged. Instead, courts will look at the complaint as a whole and evaluate whether the conduct of the insured was intentional in nature. If so, then the court will find coverage does not exist, even if the complaint alleges nonintentional theories of recovery, such as negligence.

83. *Id.* at 371, 599 S.E.2d at 221.

84. *Id.* at 373, 599 S.E.2d at 223.

85. *Id.*, 599 S.E.2d at 222.

86. *Id.*, 599 S.E.2d at 223.

87. *Id.* at 371, 599 S.E.2d at 221.

88. *Id.* at 372, 599 S.E.2d at 222.

89. *Id.*, 599 S.E.2d at 223.

90. *Id.* (discussing *Cont'l Cas. Co. v. HSI Fin. Servs.*, 266 Ga. 260, 466 S.E.2d 4 (1996); *Jefferson Ins. Co. of N.Y. v. Dunn*, 269 Ga. 213, 496 S.E.2d 696 (1998)).

E. Interpretation of "Occurrence" When the Alleged Acts are Not Clearly Intentional

If the allegations in the complaint do not clearly demonstrate that the insured's conduct was intentional in nature, the court will determine coverage under a duty to defend by the CGL insurer.⁹¹ In *Nationwide Mutual Fire Insurance Co. v. Somers*,⁹² the insured, an owner of a cemetery, was sued for breach of a perpetual care contract and desecration of a grave site with the use of cigarette butts, animal feces, and other trash. The policy contained the same definition of occurrence found in *Owners, Hall County*, and *Pilz*.⁹³

The court held that the insurer had a duty to defend because the complaint did not demonstrate that the insured intentionally desecrated the grave.⁹⁴ "[T]he complaint contains no allegations from which one could reasonably conclude that the actions that caused the desecration were not an occurrence."⁹⁵ "Where the claim is one of potential coverage, doubt as to liability and insurer's duty to defend should be resolved in favor of the insured."⁹⁶

Somers is not inconsistent with the courts' decisions in *Owners, Hall County*, and *Pilz*. If the complaint clearly alleges an intentional act, despite how the claims are identified, then the court will find no coverage exists. If the complaint creates a question regarding whether the act was intentional, then the court will give the insured the benefit of the doubt and find that the insurer's duty to defend has been triggered.

F. No Standing by Injured Party to Bring Direct Action Against the Insurer

Absent an unsatisfied judgment against the insured or an assignment of claim from the insured, an injured third party has no standing to file

91. *Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga. App. 421, 424, 591 S.E.2d 430, 433 (2003) (citing *City of Atlanta v. St. Paul Fire & Ins. Co.*, 231 Ga. App. 706, 707, 498 S.E.2d 782, 784 (1998)).

92. 264 Ga. App. 421, 591 S.E.2d 430 (2003).

93. *Id.* at 426, 591 S.E.2d at 435.

94. *Id.* at 425, 591 S.E.2d at 434.

95. *Id.*

96. *Id.* (citing *Penn-Am. Ins. Co. v. Disabled Am. Veterans*, 268 Ga. 564, 565-66, 490 S.E.2d 374, 376 (1997)). The court ruled the policy did not cover plaintiff's claims for emotional distress or injured feelings because such did not constitute "bodily injury" as defined by the policy. Unless otherwise specifically provided by the policy, "bodily injury" does not include nonphysical, emotional, or mental harm. *Id.* at 427, 591 S.E.2d at 435.

a direct suit against the insurer.⁹⁷ In *Capitol Indemnity Corp. v. Fraley*,⁹⁸ the CGL insurer issued a reservation of rights letter to its insured for claims made by a person allegedly injured by the insured. The CGL insurer also filed a declaratory judgment action seeking a declaration that no coverage existed under the policy. In the declaratory judgment action, the injured party brought a direct action against the insurer, arguing that the insurer was estopped from asserting the defense of noncoverage because the insurer did not issue the reservation of rights letter to the insured in a timely fashion.⁹⁹

The court held that in the absence of a judgment against the insured, the injured party had no rights under the policy and, therefore, could not sue the insurer directly.¹⁰⁰ In concluding that the injured party lacks standing to assert the defense of estoppel against the insurer for failing to provide a timely notice of reservation of rights, the court relied upon the general rule that “an injured party has no standing to file a direct suit against the insurer of a party alleged to have caused the injury absent an unsatisfied judgment against the insured.”¹⁰¹ This general rule is based upon the fact that the injured party is not in privity of contract with the insurer under a liability insurance policy.¹⁰² The insurer’s right to deny coverage flows only to its insured, and the injured party may not complain about the insurer’s failure to provide a timely reservation of rights notice.¹⁰³ Although the insurer named the insured person in the declaratory judgment action, this did not alter the court’s analysis. Had the insurer not joined the insured party in the declaratory judgment action as codefendant, no judgment would have been binding on the injured party and would have subjected the insurer to the possibility of further litigation from the same coverage issues.¹⁰⁴

Fraley has the potential to have a detrimental effect on injured parties’ ability to argue that coverage exists in a declaratory judgment action. Insurers may use this case to argue that under no circumstances can an injured party contend that coverage exists in a declaratory judgment action. Because an injured party is bound by the judgment of a court in a declaratory judgment action, fairness dictates that an injured party should be allowed to argue that coverage exists, especially

97. *Capital Indem. Corp. v. Fraley*, 266 Ga. App. 561, 597 S.E.2d 601 (2004).

98. 266 Ga. App. 561, 597 S.E.2d 601 (2004).

99. *Id.* at 562-63, 597 S.E.2d at 602.

100. *Id.* at 563, 597 S.E.2d at 603.

101. *Id.*, 597 S.E.2d at 602.

102. *Id.*, 597 S.E.2d at 603.

103. *Id.* at 564, 597 S.E.2d at 603.

104. *Id.*

because the outcome will have a direct impact on the injured's financial interests. It remains to be seen whether future courts will distinguish between situations when the injured party brings a direct action against the insurer arguing that coverage exists and situations when the injured party forgoes a direct action and merely argues that coverage exists as a defense in a declaratory judgment action.

G. No Standing by Injured Party to Bring a Garnishment Action Against Insurer

In *St. Paul Reinsurance Co. v. Ross*,¹⁰⁵ the court held that an injured party who is a judgment creditor of the insured tortfeasor has no standing to bring a garnishment action against the insurer if an undetermined issue of coverage exists.¹⁰⁶ In *St. Paul* the injured party obtained a final judgment against the insured tortfeasor with the insured's consent. The injured party, as a judgment creditor of the insured, then filed a direct garnishment action against the insurer to obtain the proceeds of the CGL policy. However, when the injured party brought his garnishment action, a coverage dispute between the insurer and its insured had yet to be adjudicated. In fact, the insured had neither asserted nor assigned any claim against the insurer.¹⁰⁷

In determining that the injured party had no standing to bring a garnishment action against the insurer, the court held that a garnishment action requires a fixed and certain debt.¹⁰⁸ The alleged debt, such as insurance coverage, was in dispute and, therefore, could not be "fixed and certain" until the insurer had been adjudicated liable to its insured. The dissent, however, noted that "[g]arnishment is a clean, efficient method of deciding coverage, especially when, as here, the issue is one of law"¹⁰⁹

Similar to *Fraley*, *St. Paul* has the potential to have a detrimental effect on injured parties. An injured party who holds an unsatisfied judgment against the insured does have standing to bring a direct action against the insurer. One would think that for the sake of judicial efficiency and economy, a court would want to decide the issues of coverage and liability for a debt in a garnishment action. However, in the future, when the issue of coverage has not yet been adjudicated, a garnishment action against the insurer will be an improper procedural vehicle for seeking recovery of the insurance policy proceeds. Instead,

105. 266 Ga. App. 75, 596 S.E.2d 193 (2004).

106. *Id.* at 78, 596 S.E.2d at 196.

107. *Id.*

108. *Id.*

109. *Id.* at 79-80, 596 S.E.2d at 197.

an unsatisfied judgment creditor will need to obtain an assignment of the insured's claim and then bring a direct action for recovery against the insured based upon the insurer's allegedly improper denial of coverage.

H. Insurer Estopped From Challenging Insured's Settlement

Once an insurer denies coverage under the policy, that refusal estops an insurer from asserting that any settlement that the insured made with the injured party relieves it of its obligation under a CGL policy.¹¹⁰ In *Dowse v. Southern Guaranty Insurance Co.*,¹¹¹ the insurer denied coverage for a claim asserted by the injured party against the insured. The injured party and the insured then entered into a settlement agreement in which the parties consented to a default judgment against the insured, and the injured party agreed to seek recovery for the judgment against the insurer rather than the insured. In response to the direct action filed against it by the injured party, the insurer contended that the injured party was not entitled to recover under the policy because the policy only provided coverage for damages that the insured was legally obligated to pay, which would not include the settlement agreement entered into by the injured party and the insured without the insurer's consent.¹¹²

The court disagreed with the insurer and stated:

[W]hen an insurer denies coverage and absolutely refuses to defend an action against an insured, when it could do so with reservation of its rights as to coverage, the legal consequence of such refusal is that it waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement made in good faith plus expenses and attorney[] fees.¹¹³

In holding that the insurer was estopped from arguing that the settlement prevented coverage under the policy, the court relied on the principle that the insured has a right to protect itself against the bad faith conduct of its insurer.¹¹⁴

If an insurer has a good faith basis for disclaiming coverage, then the insurer is not obligated to pay the settlement amount. Rather, the insurer can only rely upon the policy defenses that supported the

110. *Dowse v. S. Guar. Ins. Co.*, 263 Ga. App. 435, 439, 588 S.E.2d 234, 237 (2003).

111. 263 Ga. App. 435, 588 S.E.2d 234 (2003).

112. *Id.* at 438, 588 S.E.2d at 237.

113. *Id.* at 439, 588 S.E.2d at 237. This assumes, of course, that the insurer's denial of coverage was unjustified.

114. *Id.*

disclaimer, and cannot assert, as an additional policy defense, that the insured entered into the settlement without the insurer's consent. The safer course of action, which will prevent any estoppel associated with the insured entering into a settlement with the injured party, is for the insurer to defend the action under a reservation of rights and file a declaratory judgment action.

I. Notice to an Independent Agent

Under certain circumstances an insured's notification of a loss to an independent agent can be deemed proper notice to the insurer.¹¹⁵ In *Bowen Tree Surgeons, Inc. v. Canal Indemnity Co.*,¹¹⁶ the insured provided notice to his independent insurance agent of a lawsuit arising out of an automobile accident but not to his insurer. The independent agent then failed to notify the insurer of the lawsuit. The insurer denied coverage under the liability policy because the insured failed to provide the insurer with timely notice of the suit.¹¹⁷

Concluding that a question of fact existed regarding whether notice to an independent agent constituted notice to the insurer under agency principles, the court held that "[w]hile an independent insurance agent or broker is normally considered the agent of the insured, it can also[, depending on the specific facts of each case,] be a dual agent for both the insurer and the insured."¹¹⁸ The court noted two factors as bearing on whether an independent agent can serve as the insurer's agent when accepting notice of a suit.¹¹⁹ These factors include: (1) whether the agent customarily accepted premiums and notices of claims on the insurer's behalf and (2) whether the insurer ever voiced an objection to this custom.¹²⁰ "In essence, the duty imposed upon the insurance agency to forward notice of suits could not exist unless the insurance agency, through the custom, had also received at least some limited authority to receive such notice."¹²¹

115. *Bowen Tree Surgeons, Inc. v. Canal Indem. Co.*, 264 Ga. App. 520, 523, 591 S.E.2d 415, 417 (2003).

116. 264 Ga. App. 520, 591 S.E.2d 415 (2003).

117. *Id.* at 522, 591 S.E.2d at 416-17.

118. *Id.*, 591 S.E.2d at 416 (citing *Byrne v. Reardon*, 196 Ga. App. 735, 736, 397 S.E.2d 22, 24 (1990)).

119. *Id.* at 523, 591 S.E.2d at 417.

120. *Id.*

121. *Id.*

IV. TITLE INSURANCE—ARBITRATION

The Federal Arbitration Act¹²² does not preempt the Georgia Arbitration Code,¹²³ inasmuch as the Georgia Arbitration Code excludes from its coverage arbitration provisions in insurance contracts. In *McKnight v. Chicago Title Insurance Co.*,¹²⁴ the title insurance policy contained a clause providing the parties with a right to arbitration in the event of a dispute between the title company and the insured. Following the denial of the claim, the insured filed suit against the title company. The title company then moved to compel arbitration.¹²⁵

The Georgia Arbitration Code excludes arbitration of disputes arising out of an insurance contract between an insurer and insured.¹²⁶ The title company argued that the Federal Arbitration Act preempted the Georgia Arbitration Code, and therefore, the insurer had a right to demand arbitration. Interpreting the statutory language, the court disagreed and upheld the denial of the title company's motion to compel arbitration.¹²⁷ Consequently, it remains the law in Georgia that a mandatory arbitration clause in an insurance policy is invalid and unenforceable.

V. AUTOMOBILE INSURANCE

A. *Liability Insurance*

1. Declaratory Judgment—Semantics and Timing. In last year's survey,¹²⁸ we discussed the court of appeals decision in *Direct General Insurance Co. v. Drawdy*,¹²⁹ wherein the court held that an insurer, which had denied coverage for a collision and filed an action seeking a declaratory judgment on its coverage defense, but which nevertheless undertook the defense of a lawsuit seeking damages for injuries allegedly caused in the collision subject to a reservation of

122. 9 U.S.C. §§ 1-14 (2000 & Supp. 2001).

123. O.C.G.A. §§ 9-9-1 to -84 (1982 & Supp. 2004).

124. 358 F.3d 854 (S.D. Ga. 2004).

125. *Id.* at 856.

126. O.C.G.A. § 9-9-2(c) (1993 & Supp. 2004).

127. *McKnight*, 358 F.3d at 859.

128. Stephen L. Cotter, Stephen M. Schatz & Bradley S. Wolff, *Insurance*, 55 MERCER L. REV. 277, 289 (2003).

129. 258 Ga. App. 149, 572 S.E.2d 629 (2002), *rev'd*, 277 Ga. 107, 586 S.E.2d 228 (2003), *vacated by* 264 Ga. App. 250 (2003).

rights, could properly pursue its declaratory judgment action.¹³⁰ In *Drawdy v. Direct General Insurance Co.*,¹³¹ the Georgia Supreme Court reversed that decision.¹³²

The supreme court granted certiorari in the case to consider:

[W]hether an automobile insurer, after expressly denying coverage without qualification or conditions, may bring an action for declaratory judgment to determine its contractual duties to its insured when no litigation is pending against the insured at the time the declaratory judgment action is filed but the insurer thereafter provides a defense to the insured under a reservation of rights.¹³³

The court's holding that declaratory judgment is not available when an insurance company has denied a claim was based on the fact that having denied the claim, the insurer is neither uncertain nor insecure in regard to its rights, status, or legal relations.¹³⁴ The supreme court distinguished this case from *Colonial Insurance Co. v. Progressive Casualty*,¹³⁵ upon which the court of appeals relied, on the ground that in *Colonial* the insurer had sent only a "qualified denial letter" to the insured, and the insurer did not file its declaratory judgment action until after the tort suit arising from the underlying collision, had been filed.¹³⁶ The court determined the declaratory judgment action, which was filed before the tort action, was invalid.¹³⁷ The court reasoned that Direct General had "required its insured to act to his detriment by putting him through the expense and trouble of defending the declaratory judgment action and responding to discovery."¹³⁸ Moreover, the court reasoned that an insured would presumably have to engage in an equal amount of discovery no matter which action was filed first.¹³⁹ Thus, Direct General's declaratory judgment action appears to have failed because it acted pro-actively in filing its action before the filing of the tort suit and because its denial letter was not "qualified," despite the fact that the insurer defended the tort suit once it was filed.

130. *Id.* at 151, 572 S.E.2d at 632.

131. 277 Ga. 107, 586 S.E.2d 228 (2003).

132. *Id.* at 110, 586 S.E.2d at 231.

133. *Id.* at 108, 586 S.E.2d at 229.

134. *Id.* at 109, 586 S.E.2d at 230.

135. 252 Ga. App. 391, 556 S.E.2d 486 (2001).

136. *Drawdy*, 277 Ga. at 109, 586 S.E.2d at 230.

137. *Id.* at 108, 586 S.E.2d at 229-30.

138. *Id.* at 110, 586 S.E.2d at 231.

139. *Id.*

2. Motor Carriers—Policy Cancellation. In answering certified questions from the Eleventh Circuit Court of Appeals, the Georgia Supreme Court, in *Progressive Preferred Insurance Co. v. Ramirez*,¹⁴⁰ held that an insurer that cancels a motor carrier's liability insurance policy for nonpayment of premiums, but fails to notify the Public Service Commission ("PSC") of that cancellation, continues to be liable for injuries caused by the carrier until thirty days after notice is provided to the PSC.¹⁴¹

In April 1999 Progressive issued the insured a policy that covered trucks used in his business. In compliance with Rule 1-8-1-.01¹⁴² of the PSC, Progressive sent a certificate of insurance, "Form E," to the PSC in July 1999. Progressive canceled the policy in July 1999. Progressive gave notice to the insured but did not give notice to the PSC until September 1999. Between the time of the cancellation notice to the insured and the notice to the PSC, one of the trucks covered by the policy was involved in a collision that resulted in the death of Ramirez's mother. Ramirez obtained a \$1 million wrongful death judgment against the insured and filed suit against Progressive seeking the \$500,000 limits of the policy. Progressive removed the case to the United States District Court for the Northern District of Georgia, which granted summary judgment to Ramirez. Progressive appealed to the Eleventh Circuit, which then certified two questions to the Georgia Supreme Court.¹⁴³

The first question was whether an insurer's failure to notify the PSC of cancellation results in the policy continuing to its limits or whether the continuation coverage is limited to the statutory minimums. The issue arose because, in this case, the insurer did not file the policy itself with the agency but filed only the form provided by the PSC, which states that the insurance policy provides coverage at or above the statutory minimums. Progressive argued that the certificate of insurance was a distinct legal entity and that when the policy itself was canceled by notice to the insured, the filing of Form E provided the coverage limits.¹⁴⁴ The Georgia Supreme Court disagreed, noting that because the certificate of insurance provides a place to enter the actual

140. 277 Ga. 392, 588 S.E.2d 751 (2003).

141. *Id.* at 394, 588 S.E.2d at 754.

142. Ga. Pub. Serv. Comm'n Rule 1-8-1-.01.

143. *Ramirez*, 277 Ga. at 392, 588 S.E.2d at 752.

144. *Id.* at 393-94, 588 S.E.2d at 753.

policy number, the policy itself remains completely in full force and effect until it is properly canceled by notice to the PSC.¹⁴⁵

The second question certified from the Eleventh Circuit concerned a limitation of liability provision within the policy. This limitation of liability, according to its language, applied when the insurer was required by law to provide coverage not otherwise provided by the policy, and the provision limited any such coverage to the statutory minimum amount.¹⁴⁶ Consistent with its answer to the first question, the supreme court held that because the policy itself remained in effect until proper notice was provided to the PSC, the coverage limitation in the policy was not an issue.¹⁴⁷

3. Bad Faith—Assignment of Claim. In its third appeal, the court in *Empire Fire & Marine Insurance Co. v. Driskell*¹⁴⁸ held that injured plaintiff parties, who took an assignment of the insured defendant's rights against an insurer, could not recover more than the policy limits of the coverage at issue on a claim for a bad faith failure to settle if the injured parties had never offered to settle for an amount within the limits of coverage.¹⁴⁹ The case involved a dispute between injured parties, as assignees of the insured, and an insurer that refused to defend the insured. The insured, Metro Courier Inc., had a \$1 million liability insurance policy with Empire. When the Harrises were injured in an accident with a Metro vehicle driven by a Metro employee, the Metro vehicle was not specifically listed as a covered auto in the policy. The insurer, therefore, refused to defend the suit, claiming that the vehicle was not covered. The injured parties and Metro arbitrated their claim, which resulted in a \$3.15 million award in favor of the injured parties. Metro consented to the entry of judgment in this amount and assigned its rights against Empire to the injured parties. The Harrises brought a suit against Empire to collect part or all of the judgment.¹⁵⁰

In previous proceedings the trial court and the court of appeals held Empire owed a duty to defend the case because rules promulgated by the Georgia Public Service Commission¹⁵¹ require that a motor carrier's policy must provide minimum coverage, regardless of whether a vehicle is specifically described in the policy. The mandatory coverage limits

145. *Id.* at 395, 588 S.E.2d at 754.

146. *Id.* at 395-96, 588 S.E.2d at 754-55.

147. *Id.* at 396, 588 S.E.2d at 754-55.

148. 264 Ga. App. 646, 592 S.E.2d 80 (2003).

149. *Id.* at 647, 592 S.E.2d at 81.

150. *Id.*

151. Ga. Pub. Serv. Comm'n Rule 1-8-1-.01.

were \$100,000 per person and \$300,000 per incident. Therefore, in the prior proceedings, the court of appeals held that the policy provided coverage up to \$200,000 for the accident in question. After that decision Empire paid the Harrises \$200,000 plus interest.¹⁵²

The Harrises, as assignees of Metro, sued Empire alleging breach of its duty to defend and a bad faith failure to settle within the policy limits. At trial the case went to a jury and the jury found for the Harrises on both claims, awarding \$9000 for failure to defend and \$6.48 million for failure to settle. The trial court directed a verdict for Empire on the Harrises' punitive damage claim. Both sides appealed.¹⁵³

The court of appeals agreed with Empire that the trial court erred in allowing the Harrises to recover more than \$200,000 in damages on the failure to settle the claim.¹⁵⁴ Initially, the Harrises had offered to settle the case for \$1 million, which was the liability limit on the face of the policy, but they never offered to settle the case within the applicable \$200,000 coverage limit. Reversing the trial court's entry of judgment for \$6.48 million, the court noted that because Empire had already paid the Harrises \$200,000 plus interest, the Harrises could not recover additional damages for the failure to settle the claim.¹⁵⁵

The court also affirmed the trial court's directed verdict against the Harrises on their punitive damages claim.¹⁵⁶ Relying on established law prohibiting the assignment of claims for punitive damages, the court held that because the Harrises sued Empire only as assignees of Metro, the Harrises could not recover punitive damages on the bad faith claims pursued in this case.¹⁵⁷

Similarly, in *Canal Indemnity Co. v. Greene*,¹⁵⁸ the court of appeals held that a claim against an insurer for a bad faith failure to settle under the statutory penalty provision of section 33-4-6 of the Official Code of Georgia Annotated ("O.C.G.A.")¹⁵⁹ is not assignable under Georgia law.¹⁶⁰ However, the court of appeals held that section 33-4-6 is not the exclusive remedy for an insurer's bad faith failure to

152. *Driskell*, 264 Ga. App. at 646, 592 S.E.2d at 81.

153. *Id.* at 647, 592 S.E.2d at 81.

154. *Id.* at 648, 592 S.E.2d at 82.

155. *Id.* at 649, 592 S.E.2d at 82.

156. *Id.*, 592 S.E.2d at 83.

157. *Id.*

158. 265 Ga. App. 67, 593 S.E.2d 41 (2003).

159. O.C.G.A. § 33-4-6 (Supp. 2004).

160. *Canal*, 265 Ga. App. at 72-73, 593 S.E.2d at 46.

settle.¹⁶¹ A common-law tort claim for compensatory damages for loss of property due to the failure to settle is an assignable claim.¹⁶²

4. Bad Faith-Failure to Pay Claim. In *Allstate Insurance Co. v. Smith*,¹⁶³ the insured made a claim on her auto policy for damages caused to her vehicle by theft. Allstate denied the claim, and the insured sued. The insured claimed that Allstate breached the terms of the policy and also sought statutory penalties under O.C.G.A. section 33-4-6 for bad faith refusal to pay. In the trial court, the jury awarded plaintiff \$16,000, an amount representing the entire market value of the car, plus penalties and attorney fees. However, the evidence at trial showed the vehicle was repairable and that the cost of repair was approximately \$7000.¹⁶⁴ The court of appeals affirmed the judgment based on the jury's verdict, concluding that the insurer breached its duty under the insurance policy.¹⁶⁵ However, the court reversed the damages award on the ground that the fair market value of the vehicle was an improper basis for compensating plaintiff when the vehicle was repairable.¹⁶⁶ The court also reversed the award of statutory penalties for bad faith because the court determined there were sufficient facts to suggest a reasonable basis for Allstate's belief that the insured may have been involved in a fraudulent claim, and "[p]enalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact."¹⁶⁷

5. Duty to Defend—Notice of Suit. Another issue in *Canal* concerned the insurer's duty to defend a suit when its insured failed to notify the insurer of the suit and allegedly failed to cooperate with the insurer by being unavailable. The case dealt with an automobile accident between Greene and the insured, Stephens. Stephens did not own the truck he was driving but had possession of the truck through an extended test drive from a car dealership. Greene filed suit against Stephens in July 2001. Greene forwarded a copy of the complaint, which included a handwritten notation of the civil action number assigned to the case and the clerk of court's note that the case had been filed on July 12, to the insurer's agent via certified mail and fax. No summons or return of service was sent to the insurer. The insurer then hired an

161. *Id.* at 73, 593 S.E.2d at 46.

162. *Id.*

163. 266 Ga. App. 411, 597 S.E.2d 500 (2004).

164. *Id.* at 412, 597 S.E.2d at 502.

165. *Id.* at 411, 597 S.E.2d at 501.

166. *Id.*

167. *Id.* at 413, 597 S.E.2d at 502.

attorney to represent Stephens. The complaint was served on Stephens in September 2001. Stephens never notified the insurer of the service of the suit. Neither Stephens nor the attorney ever responded to any pleadings in the case, and a default judgment in the amount of \$500,000 was entered against Stephens.¹⁶⁸

Stephens assigned his claims against the insurer, Canal, to Greene, and Greene filed an action against Canal the following year. Canal moved for summary judgment, arguing that it did not receive proper notice of Greene's suit against Stephens because Greene did not provide a copy of the summons or any return of service to Canal.¹⁶⁹ The court of appeals affirmed the trial court's denial of this motion, determining that Greene substantially complied with the statutory requirement.¹⁷⁰ The court concluded all the information in the summons could have been gleaned from the information on the complaint, and Canal failed to show it was deprived of an opportunity to make a timely and adequate investigation.¹⁷¹ Finally, the court of appeals affirmed the denial of Canal's motion for summary judgment on the failure to cooperate issue, noting that material issues existed regarding whether Stephens had been uncooperative.¹⁷² In particular the court noted that Greene's attorney did not have any apparent difficulty in contacting Stephens or in gaining his cooperation, Canal never asked Greene's attorney where to locate Stephens, and Canal did not follow the recommendations of its own adjuster with regard to locating Stephens.¹⁷³

6. Policy Rescission for Material Misrepresentation. According to the court of appeals decision in *Liberty Insurance Corp. v. Ferguson*,¹⁷⁴ the public policy requiring mandatory liability insurance trumps an insurer's right to rescind a policy for fraud or misrepresentation by the insured.¹⁷⁵ Liberty filed a declaratory judgment action seeking a determination that it did not have to provide coverage for a collision because the insured concealed material facts on the policy application. The primary insured failed to list her son, who was living with her and had free use of one of her vehicles, on her insurance application. Her son had a variety of serious traffic violations, including

168. *Canal*, 265 Ga. App. at 68, 593 S.E.2d at 43.

169. *Id.* at 69, 593 S.E.2d at 43.

170. *Id.*

171. *Id.* at 71, 593 S.E.2d at 45.

172. *Id.*

173. *Id.* at 72, 593 S.E.2d at 45.

174. 263 Ga. App. 714, 589 S.E.2d 290 (2003).

175. *Id.* at 715-16, 589 S.E.2d at 291.

two DUIs, on his record.¹⁷⁶ The application contained the following language, "I further agree that this policy shall be null and void if these answers are false or given with the intent to deceive or materially affect the acceptance of the risk assumed by Liberty Mutual."¹⁷⁷ In its arguments, Liberty relied on O.C.G.A. section 33-24-7,¹⁷⁸ which provides that:

[M]isrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy . . . unless (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 . . . not have issued the policy . . . if the true facts had been known to the insurer as required either by the application for the policy . . . or otherwise.¹⁷⁹

Although Liberty provided the affidavit of an underwriter stating that if the son had been listed on the policy application, Liberty would not have issued the policy, the court held that Liberty could not rely on this code section to avoid its obligation under the policy, and the policy could not be voided retrospectively because the Georgia Supreme Court had previously held that this statute did not apply to compulsory insurance, such as automobile liability insurance.¹⁸⁰ The court also held that the existence of other insurance available to pay the damages, such as an uninsured motorist coverage plan, was immaterial to whether the liability policy could be voided for misrepresentation.¹⁸¹

7. Loaner Cars—Excess Insurance. When an auto dealer's customer is driving a loaner car, O.C.G.A. section 33-34-3(d)¹⁸² provides that the customer's own liability insurance provides primary coverage and the dealer's policy provides excess insurance.¹⁸³ In *Hendrix v. Universal Underwriters Insurance Co.*,¹⁸⁴ the court of appeals resolved a dispute concerning the amount of a dealer's excess insurance coverage for a loaner car.¹⁸⁵ The dealer's policy in this case provided liability insurance of \$300,000 with an additional umbrella

176. *Id.* at 714, 589 S.E.2d at 290.

177. *Id.*

178. O.C.G.A. § 33-24-7 (1996).

179. *Id.*

180. *Liberty Ins.*, 263 Ga. App. at 715-16, 589 S.E.2d 291-92.

181. *Id.* at 716, 589 S.E.2d at 292.

182. O.C.G.A. § 33-34-3(d) (Supp. 2004).

183. *Id.*

184. 263 Ga. App. 589, 588 S.E.2d 761 (2003).

185. *Id.* at 592-93, 588 S.E.2d at 763.

coverage of \$6 million for certain insureds. However, for customers of the dealership, the policy provided only the minimum statutory limits and stated that when other insurance provided coverage, the most the insurer would pay was \$5000. When a customer was involved in a collision while driving a loaner car owned by the dealership, the driver of the other car sued the customer and filed a declaratory judgment action against the insurer to determine the amount of liability coverage available. Plaintiff argued that the policy's limitation to mandatory minimum limits or \$5000 was a violation of subsection (d) because it eliminated the excess coverage and that \$6.3 million in liability should be available. Conversely, the insurer argued that it was entitled to limit its coverage to \$5000 because the customer had his own liability insurance that at least covered the minimum required amount.¹⁸⁶ The court of appeals held that both parties were wrong.¹⁸⁷ Although the court held the customer was not within the definition of an "insured" for the purpose of benefitting from the larger policy limits afforded to certain insureds,¹⁸⁸ the court also held that the policy language limiting the excess coverage to \$5000 was void under O.C.G.A. section 33-34-3(d) and that the insurer was liable up to the statutory minimums as of the date of the accident.¹⁸⁹

8. Insured's Duty to Read Policy. In *Canales v. Wilson Southland Insurance Agency*,¹⁹⁰ the court of appeals reaffirmed that an insured has a duty to read his insurance policy and cannot generally rely on an agent's alleged representations to provide coverage in derogation of the policy language.¹⁹¹ The insured filed a claim with his insurer based on an accident that occurred in Mexico, despite the fact that the policy explicitly stated that it applied only to losses occurring in the United States or Canada. The insured then sued the insurance agency alleging fraud and breach of fiduciary duty. Although there was a dispute regarding what representations were made by the insurance agent, there was no dispute that the policy explicitly provided no coverage for losses occurring in Mexico.¹⁹² Because the insured was unable to prove that he relied on the agent's expertise in selecting an appropriate policy for him, that there was any confidential relationship between the agent and

186. *Id.* at 590-91, 588 S.E.2d at 762.

187. *Id.* at 591-92, 588 S.E.2d at 762-63.

188. *Id.* at 591, 588 S.E.2d at 762.

189. *Id.* at 591-92, 588 S.E.2d at 762-63.

190. 261 Ga. App. 529, 583 S.E.2d 203 (2003).

191. *Id.* at 531, 583 S.E.2d at 205.

192. *Id.* at 532, 583 S.E.2d at 205.

the insured, or that the agent's alleged misrepresentations of coverage prevented the insured from reading the policy, the court of appeals affirmed the trial court's summary judgment in favor of the insurance agency.¹⁹³

B. Uninsured Motorist Coverage

1. Increased Risk for Insureds Traveling in Florida. Florida is a no-fault state, and to pursue a suit for damages on account of personal injury resulting from a motor vehicle accident, the injured person must show permanent injury or death.¹⁹⁴ Because Georgia applies the doctrine of *lex loci delicti*, the law of the place where the tort occurred controls. When a Georgia resident is injured in a motor vehicle accident, but not seriously enough to qualify for the exemption to Florida's no-fault statute, the injured person can recover uninsured motorist ("UM") benefits from the policy issued in Georgia.¹⁹⁵ In *Georgia Farm Bureau Mutual Insurance Co. v. Williams*,¹⁹⁶ the court of appeals dealt with these circumstances as a matter of first impression.¹⁹⁷ The insured was involved in a car accident in Florida and was unable to claim damages from the other driver due to Florida's no-fault statute. When the insured made a claim for benefits under her own UM coverage, her insurer denied the claim. The insured sued her insurer and sought to recover both her damages and a penalty under O.C.G.A. section 33-4-6 for the insurer's bad faith failure to provide coverage. The insurer contended that no benefits were due because the tortfeasor was insured, and the policyholder could not establish the tortfeasor's liability.¹⁹⁸ The court of appeals held that when the insured is involved in an accident in a jurisdiction that does not allow recovery of damages from the tortfeasor, the insured's UM coverage is triggered, just as it would be if the tortfeasor were discharged in bankruptcy or protected by sovereign immunity.¹⁹⁹ However, because this was a case of first impression, the court concluded that the insurer could not be held liable for bad faith and reversed the trial court's denial of summary judgment on that issue.²⁰⁰

193. *Id.* at 533-34, 583 S.E.2d 206-07.

194. FLA STAT. ch. § 627.737(2) (1995).

195. *Georgia Farm Bureau Mut. Ins. Co. v. Williams*, 266 Ga. App. 540, 541, 597 S.E.2d 430, 431 (2004).

196. 266 Ga. App. 540, 597 S.E.2d 430 (2004).

197. *Id.* at 541, 597 S.E.2d at 431.

198. *Id.* at 540, 597 S.E.2d at 431.

199. *Id.* at 541-42, 597 S.E.2d at 431-32.

200. *Id.* at 542, 597 S.E.2d at 432.

2. Statutory Construction Results in No Coverage. O.C.G.A. section 33-7-11(a)(1),²⁰¹ Georgia's UM statute, provides that no policy of automobile liability insurance shall be issued in the state "unless it contains an endorsement or provisions undertaking 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"²⁰² In *Atlanta Casualty Co. v. Gordon*,²⁰³ five of the court of appeals judges construed this statutory provision contrary to what "appears clear on its face"²⁰⁴ and held that a UM carrier is not obligated to pay benefits to an insured on account of the wrongful death of the insured's son because the son lived with his mother and was, thus, not himself an insured under the policy.²⁰⁵

In this case the insured's son, a minor, was struck and killed by an uninsured motorist. The parents were separated, and the son lived with his mother at the time of the incident. The parents sued the driver for wrongful death and sought to recover under the father's UM policy. The insurer was denied summary judgment by the trial court and pursued an interlocutory appeal.²⁰⁶ The court of appeals reversed, holding that the legislature did not intend to require insurers to pay damages for the deaths of people not insured by the policy.²⁰⁷

This case is particularly interesting for the lengthy and vigorous dissent written by Judge Barnes and joined by Judge Eldridge.²⁰⁸ The dissenters argued that the majority opinion represents an "activist interpretation of an unambiguous statute."²⁰⁹ The dissent further chides the majority, "our job as members of the judiciary does not start by deciding what we think the legislature means."²¹⁰ Judge Barnes takes the majority to task for their construction of the statute, writing:

As the majority notes, the language in this case *is* clear on its face. The majority then, through some sort of judicial clairvoyance, engrafts what it believes the legislature must have intended. This approach, of course, assumes that the legislature was incapable of understanding the meaning of "all," and that the General Assembly did not want

201. O.C.G.A. § 33-7-11(a)(1) (Supp. 2004).

202. *Id.*

203. 266 Ga. App. 666, 598 S.E.2d 70 (2004).

204. *Id.* at 667, 598 S.E.2d at 71.

205. *Id.*

206. *Id.* at 666, 598 S.E.2d at 71.

207. *Id.*

208. *Id.* at 669, 598 S.E.2d at 73 (Barnes, J., dissenting).

209. *Id.* (Barnes, J., dissenting).

210. *Id.* (Barnes, J., dissenting).

insureds to be able to recover for *all* damages caused by uninsured motorists, but only for certain damages that the majority proceeds to define.²¹¹

Applying the normal rules of statutory construction, the dissent argued that the statute at issue was not susceptible to an interpretation contrary to its plain meaning and that if the legislature meant something different from a requirement that UM carriers must “pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured vehicle,” the legislature can and should rewrite the statute.²¹² Instead, Judge Barnes wrote that the majority has amended the statute to add language which she bracketed, as follows: “UM carriers must ‘pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an insured vehicle [for bodily injury or property damage to an insured or covered person]’”²¹³ Finally, the dissent argued that even if there was some ambiguity in the statute, the court would be required to construe it broadly to provide coverage for the innocent insured, the father, who is legally entitled to recover wrongful death damages from an “irresponsible insured driver.”²¹⁴

3. Circumstantial Evidence Insufficient. In *Dawkins v. Doe*,²¹⁵ a father filed a wrongful death action against an unidentified driver after his son’s body was found by the side of an interstate highway with a headlight cover, turn signal cover, and parts of a rear view mirror near the body. The mother’s UM insurer answered the complaint and filed a motion for summary judgment, which the trial court granted.²¹⁶ The court of appeals affirmed the summary judgment based on a lack of evidence that the unidentified driver was negligent or that his actions caused the decedent’s death.²¹⁷ The court based its ruling on affidavits and testimony of state troopers and crime scene investigators who could not determine whether the decedent had been struck in the travel lanes of the roadway or in the emergency lane or whether the vehicle parts had actually made contact with the decedent.²¹⁸ Because the circum-

211. *Id.* at 670, 598 S.E.2d at 74 (Barnes, J. dissenting) (emphasis in original, internal footnote omitted).

212. *Id.* at 669, 598 S.E.2d at 73 (Barnes, J., dissenting).

213. *Id.* at 671, 598 S.E.2d at 74 (Barnes, J., dissenting).

214. *Id.* at 672, 598 S.E.2d at 75 (Barnes, J., dissenting).

215. 263 Ga. App. 737, 589 S.E.2d 303 (2003).

216. *Id.* at 737-38, 589 S.E.2d at 304-05.

217. *Id.* at 738, 589 S.E.2d at 305.

218. *Id.* at 739, 589 S.E.2d at 305-06.

stantial evidence on causation gave rise to no more than conjecture, the court held that summary judgment for the insurer was proper.²¹⁹

4. Procedural Faults, Not Immunity, Lead to No Recovery. In *Ward v. Allstate Insurance Co.*,²²⁰ the insured's failure to preserve the ability to recover from the tortfeasor through a series of procedural missteps prevented his recovery from either the tortfeasor or his UM carrier. Plaintiff collided with a sheriff's deputy during a police chase. He attempted to sue the deputy in his personal capacity, but the suit was barred by the deputy's official immunity. When he attempted to sue the deputy in his official capacity, the statute of limitations had already run, and the court granted summary judgment. Plaintiff then sought to recover from his UM carrier.²²¹ The trial court granted summary judgment for the insurer, and the court of appeals affirmed, because plaintiff could not show that he was "legally entitled to recover" damages from the deputy.²²² Although plaintiff could have made a valid claim for UM benefits if the tort claim had been totally barred by official immunity, here the official capacity claim against the deputy failed only because the statute of limitations had run. Thus, plaintiff's procedural errors, and not the deputy's immunity, prevented recovery of damages from the alleged tortfeasor. Under O.C.G.A. section 33-7-11,²²³ the UM carrier had no obligation to pay benefits where the insured could not establish a legal entitlement to recovery from the tortfeasor.²²⁴ The motorist could not recover against his insurer and the exception to the rule did not cover this situation because plaintiff could have recovered against the deputy were it not for his own error.²²⁵

5. Multiple Tortfeasors, Liability Insurance Setoff. In *Nationwide Mutual Insurance Co. v. Boylan*,²²⁶ the court of appeals applied the rationale of *Jones v. Cotton States Mutual Insurance Co.*²²⁷ and held that insureds are entitled to collect UM benefits, without a setoff for one tortfeasor's liability insurance, when an uninsured joint tortfeasor contributes to the accident.²²⁸ This case involved an acci-

219. *Id.* at 740, 589 S.E.2d at 306.

220. 265 Ga. App. 603, 595 S.E.2d 97 (2004).

221. *Id.* at 603, 595 S.E.2d at 97-98.

222. *Id.*, 595 S.E.2d at 98.

223. O.C.G.A. § 33-7-11 (Supp. 2004).

224. *Ward*, 265 Ga. App. at 604-05, 595 S.E.2d at 98-99.

225. *Id.* at 605, 595 S.E.2d at 99.

226. 263 Ga. App. 723, 589 S.E.2d 280 (2003).

227. 185 Ga. App. 66, 363 S.E.2d 303 (1987).

228. *Boylan*, 263 Ga. App. at 724, 589 S.E.2d at 281.

dent with three vehicles. An unidentified driver and his vehicle interacted with the vehicle driven by the other tortfeasor, causing that tortfeasor to lose control and strike the vehicle of the insureds. Therefore, John Doe and the named tortfeasor were joint tortfeasors in the collision. The UM insurer sought to offset its UM coverage with the payments made by the named tortfeasor's liability insurance.²²⁹ The court of appeals affirmed the trial court's summary judgment in favor of the insureds, holding the UM insurer was liable for up to the full limits of its policy, \$25,000 per insured for bodily injury, despite the fact that each insured had received \$100,000 from the named tortfeasor's liability insurer.²³⁰ The court said this result put the insureds in the same position as they would have been in if the John Doe driver had been known and insured, since the insureds would have been able to recover from that driver in addition to the recovery they received from the known tortfeasor.²³¹

6. Primacy of Policies. A controversial issue in UM cases can be determining which among two or more policies of UM coverage, provides primary coverage and, therefore, must pay benefits first. The Georgia courts have developed two tests which, when properly applied, resolve the question of priority in most cases: the "receipt of premium" test and the "more closely identified with" test.²³² These tests do not easily resolve the issue in every case, and the Georgia Supreme Court has held that stackable policies of UM coverage can not be prorated, thus leaving the courts to sometimes struggle with distinguishing between apparently indistinguishable relationships between policyholders and policies.²³³ Such was the case in *Clarendon National Insurance Co. v. Sledge*.²³⁴ The insured had a personal insurance policy, which included UM coverage, and his sole proprietorship business also had an insurance policy with UM coverage. The insured was involved in an accident while driving a vehicle insured under his personal policy, but while he was towing a car for his business. Because the business was an unincorporated sole proprietorship, the insured paid the premiums for both policies, and his relationship to each policy was equally close. The trial court thus determined the policies afforded equal priority of UM

229. *Id.* at 723, 589 S.E.2d at 280.

230. *Id.* at 724, 589 S.E.2d at 281.

231. *Id.* at 726, 589 S.E.2d at 282.

232. *Canal Ins. Co. v. Merch.*, 225 Ga. App. 61, 62, 483 S.E.2d 311, 312 (1997).

233. *Ga. Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 255 Ga. 166, 167, 336 S.E.2d 237, 238 (1985).

234. 261 Ga. App. 661, 583 S.E.2d 514 (2003).

coverage and should be prorated. The commercial insurer appealed.²³⁵ The court of appeals, recognizing that proration among stackable policies is not permitted, held that when the insured pays the premiums for both policies and is equally “identified” with both policies, the circumstances of the injury must be considered to determine the priority of coverage.²³⁶ In the circumstances of this case, the court determined that at the time of the accident, because the insured was towing a car in furtherance of his pecuniary interests, he was likely “more closely identified with” the commercial policy.²³⁷

VI. DISABILITY INSURANCE

Always erudite District Court Judge Avant Edenfield thoroughly evaluated important public policy issues presented by a disabled attorney. The legal question was whether his professional transgressions legally disabled him from receiving compensable factual disability.²³⁸ In *Massachusetts Mutual Life Insurance Co. v. Woodall*,²³⁹ Massachusetts Mutual insured Woodall, an attorney, for disability for many years. Starting in 1995, Woodall, in pursuit of a personal goal of a \$1 million fee, wrongfully inflated his attorney fees and after being ordered to account, refused to do so. Ultimately, he was disbarred. The obvious associated depression was stipulated to be “*principally and directly from his being subject to allegations of misconduct in the [Shiggs] case*” and his anticipation of bar actions later taken.²⁴⁰ Massachusetts Mutual had initiated disability benefit payments before disbarment. Upon disbarment Massachusetts Mutual issued a reservation of rights letter. This litigation determined whether this disbarred attorney, now a resident of Texas, in an effort to avoid Georgia’s contempt of court powers, could profit from his wrongdoing and, if so, to what extent.²⁴¹ The court engaged in a thorough discussion of the public policy considerations that Massachusetts Mutual claimed should be read into its policy.²⁴² The court then reviewed persuasive authority, drawing distinctions between legal disability, those not allowed to engage in activity, and factual disability, those who are

235. *Id.* at 661, 583 S.E.2d at 515.

236. *Id.* at 663, 583 S.E.2d at 516.

237. *Id.*

238. *Mass. Mut. Life Ins. Co. v. Woodall*, 304 F. Supp. 2d 1364, 1369 (S.D. Ga. 2003).

239. 304 F. Supp. 2d 1364 (S.D. Ga. 2003).

240. *Id.* at 1367-68 (emphasis in original).

241. *Id.* at 1368.

242. *Id.* at 1374.

unable to do so because of a factual condition.²⁴³ Many of these authorities were in opposite to Woodall's case, wherein the wrongful conduct occurred before the factual disability was established yet before the legal disability disbarment was adjudicated.²⁴⁴ Ultimately, the court made an "Erie guess" that Georgia courts would determine that when a legal disability consequence results from wrongful conduct, a "factfinder may disregard, on public policy grounds, the mere fact that the 'factual' disability preceded the legal disability."²⁴⁵ Massachusetts Mutual's failure to issue a reservation of rights letter regarding these issues until months after Woodall's disbarment led to more complications, which the court had to review and which drew attention to the scarcity of Georgia law on the subject of effectiveness and scope of reservation of rights.²⁴⁶ The court accepted Woodall's argument that Georgia law requires insurers to timely notify their insureds of the specific basis of their reservation of rights, and Massachusetts Mutual did not initially do so.²⁴⁷ Hence, the carrier was held to have made voluntary payments until that point in time when it did adequately reserve its rights.²⁴⁸ From that point forward, Massachusetts Mutual was entitled to withhold payment.²⁴⁹ This opinion is recommended to practitioners to use when benefits should be paid and there are both legal and factual disabilities.

In *City of Barnesville v. Littlejohn*,²⁵⁰ one insured successfully ran the gauntlet to obtain disability payments. Littlejohn's long history of back difficulties led the city to terminate his employment. Within a month of termination, Littlejohn was back in the city offices applying for disability. He had previously applied for Social Security disability, which he did not receive until several years later.²⁵¹ The city unsuccessfully defended this claim through the definition of disability, to wit: "A physical or mental disability of a participant who because of such disability becomes entitled to receive disability insurance benefits under the Federal Social Security Act, as amended."²⁵² The court quickly rejected the city's claim that the social security disability benefits must

243. *Id.* at 1375.

244. *Id.*

245. *Id.* at 1380.

246. *Id.* at 1381-82.

247. *Id.* at 1382.

248. *Id.*

249. *Id.*

250. 264 Ga. App. 185, 590 S.E.2d 376 (2003).

251. *Id.* at 186, 590 S.E.2d at 377-78.

252. *Id.* at 188, 590 S.E.2d at 378.

have been adjudicated before Littlejohn's employment was terminated.²⁵³ "Statutory construction must square with common sense and reasoning."²⁵⁴ The court rejected the associated argument, i.e., that the social security award must actually occur within one year of termination, for similar reasons.²⁵⁵

VI. LIFE INSURANCE

In *Slakman v. Continental Casualty Co.*,²⁵⁶ the Georgia Supreme Court, in response to a certified question from the United States Court of Appeals for the Eleventh Circuit, held that O.C.G.A. section 33-25-13²⁵⁷ does not bar an individual from receiving benefits under a murder victim's life insurance policy before the accused's right to a direct appeal has been exhausted.²⁵⁸ The supreme court took the middle ground. Some foreign statutes establish a *prima facie* defense upon mere conviction.²⁵⁹ *Slakman* argued for no such presumption until all potential collateral challenges to the criminal conviction were concluded. Upon exhaustion of direct appeals, the court held that a presumption should and does arise under O.C.G.A. section 33-25-13.²⁶⁰

*Livoti v. Aycock*²⁶¹ reminds us to carefully read and consider the forms insurers use, as "renewal" did not equal "replacement."²⁶² This viatical settlement exchanged \$144,000 for the insured's policy "and all renewals thereof," apparently anticipating an early demise and a continuation of the policy. Unknown to the parties, Aycock's employer, the Emory University School of Medicine, changed its group-life insurance program to a totally different "replacement" policy, which did not name the original purchasers.²⁶³ In a detailed analysis of contract construction, the court held that "renewal" meant extension of the first

253. *Id.*, 590 S.E.2d at 379.

254. *Id.*

255. *Id.* at 189, 590 S.E.2d at 380.

256. 277 Ga. 189, 587 S.E.2d 24 (2003).

257. O.C.G.A. § 33-25-13 (1996 & Supp. 2004). This statute provides for *prima facie* evidence of guilt without such a conviction. Upon a determination under an appropriate standard of proof, a murderer may be barred from receiving benefits under a life insurance policy.

258. *Slakman*, 277 Ga. at 190, 587 S.E.2d at 26.

259. *Id.* at 190-91, 587 S.E.2d at 26.

260. *Id.* at 191, 587 S.E.2d at 26-27.

261. 263 Ga. App. 897, 590 S.E.2d 159 (2003).

262. *Id.* at 899, 590 S.E.2d at 162.

263. *Id.* at 898, 590 S.E.2d at 162.

contract between the same parties, whereas “replacement” involved different terms between different parties.²⁶⁴

Through a string of opinions²⁶⁵ dealing with diverse subject matters, the courts enforced, as written, the terms of various life insurance policies. In *Bogard v. Inter-State Assurance Co.*,²⁶⁶ the class unsuccessfully attempted to recoup premiums for the period of no coverage, i.e., from time of payment until the policy was physically delivered and, therefore, first effective. In Bogard’s individual situation, this amounted to fifty-four days of premiums for which no coverage was afforded.²⁶⁷ The court concluded by stating, “[i]f, as a result of delay in the delivery [the] insured finds himself offered a less advantageous contract than he expected, he is free to refuse it.”²⁶⁸

This theme of contract enforcement continued in *TransAmerica Occidental Life Insurance Co. v. Miles*,²⁶⁹ wherein Judge Hunt declined to read out of the policy a provision that the policy shall not take effect until after “the owner has personally received the policy . . . and while the proposed insured is in good health.”²⁷⁰ The relevant timeline included TransAmerica’s August 31, 1999 approval of Dr. Miles’s application and its September 13 issuance of the policy, which was picked up by Dr. Miles on October 5, 1999, after Dr. Miles had experienced symptoms in early October and had been seen by Dr. Cohen, who diagnosed melanoma on October 4.²⁷¹ “The Court must enforce the policy as written.”²⁷²

In *Nash v. Ohio National Life Insurance Co.*,²⁷³ the court of appeals rejected another attempt at an exception to the duty to read responsibly. In *Nash* a sophisticated insured, advised by an accountant over a number of years, could not blame his agent for the consequences of not reading his own variable life policy.²⁷⁴ *Wright Body Works v. Columbus Interstate Insurance Agency*²⁷⁵ established the principle of acknowledg-

264. *Id.* at 906, 590 S.E.2d at 167.

265. *Travelers Ins. Co. v. Castro*, 341 F.2d 882 (1st Cir. 1965); *TransAmerica Occidental Life Ins. Co. v. Miles*, 317 F. Supp. 2d 1373 (N.D. Ga. 2003); *Bogard v. Inter-State Assurance Co.*, 263 Ga. App. 767, 589 S.E.2d 317 (2003).

266. 263 Ga. App. 767, 589 S.E.2d 317 (2003).

267. *Id.* at 768, 589 S.E.2d at 318.

268. *Id.* at 769, 589 S.E.2d at 319 (citing *Travelers Ins. Co. v. Castro*, 341 F.2d 882, 884 (1st Cir. 1965) (emphasis omitted)).

269. 317 F. Supp. 2d 1373 (N.D. Ga. 2003).

270. *Id.* at 1378.

271. *Id.* at 1375-76.

272. *Id.* at 1379.

273. 266 Ga. App. 416, 597 S.E.2d 512 (2004).

274. *Id.* at 419-20, 597 S.E.2d at 516-17.

275. 233 Ga. 268, 210 S.E.2d 801 (1974).

ing the responsibility of an agent to minutely examine nuances in the policy and advise the insured, who relies on such an agent.²⁷⁶ The insured's attempt to avoid the consequences of his own omission was rejected by the court for the following reasons: the passage of over a decade, the business sophistication of the alleged victim, the insured's accountant's own counseling, and the understandability of the policy that had been in his hands. The Georgia Supreme Court, in *Printis v. Bankers Life Insurance Co.*,²⁷⁷ allowed the finance charge to be included with the principal in ascertaining the credit life insurance premium on gross balance decreasing term coverage.²⁷⁸ Decisions referenced in this paragraph consistently reflect enforcement of the terms of life insurance, as written.

When life insurance was regulated by federal law, results were similar. In an apparent hope that a different set of laws might yield a different result, the issue of "undue influence" under the Serviceman's Group Life Insurance program was litigated in *Coursey v. Pudda*.²⁷⁹ Judge Alaimo,²⁸⁰ although uncertain whether the federal "undue influence" law or the Georgia version applied, was certain that both laws require some proof, as opposed to mere accusation, of undue influence.²⁸¹ There was none in the record. In *Liberty Life Assurance Co. v. Kennedy*,²⁸² the court held that, despite the apparent equities between the successive spouses, the Employee Retirement Income Security Act ("ERISA")²⁸³ could not be used to remedy the social situation.²⁸⁴

The insureds did get a glimmer of hope from the Eleventh Circuit in *Jones v. American General Life & Accident Insurance Co.*,²⁸⁵ wherein the Eleventh Circuit allowed, under ERISA, equitable estoppel under section 502(a)(1)(B),²⁸⁶ though the text of the insurance program was insufficient to afford a remedy to the insureds.²⁸⁷ After repeated promises of free lifetime group coverage from the predecessor, Indepen-

276. *Id.* at 271, 210 S.E.2d at 803.

277. 276 Ga. 697, 583 S.E.2d 22 (2003).

278. *Id.* at 700, 583 S.E.2d at 25.

279. 299 F. Supp. 2d 1368 (S.D. Ga. 2004).

280. *Tinsley v. Gen. Motors Corp.*, 227 F.3d 700, 704 (6th Cir. 2000).

281. *Coursey*, 299 F. Supp. 2d at 1371.

282. 358 F.3d 1295 (11th Cir. 2004).

283. 29 U.S.C. §§ 1001-1461 (2000).

284. *Kennedy*, 358 F.3d at 1300.

285. 370 F.3d 1065 (2004).

286. Employee Retirement Income Security Act (ERISA) § 502, 29 U.S.C. § 1132(a)(1)(B) (2000).

287. *Jones*, 370 F.3d at 1066-67.

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dent Life, and continued representations by the successor, American General, the retirement group was terminated in 2000.