# Insurance

by Stephen M. Schatz\* Stephen L. Cotter\*\* and Bradley S. Wolff\*\*\*

#### I. Introduction

Several decisions rendered by the Georgia Court of Appeals which we discussed (and a few of which we criticized) in last year's survey¹ were further clarified or overruled by the Georgia Supreme Court. As has been the pattern over the years, Georgia courts during this survey period reinforced that when any ambiguity exists in an insurance contract, courts will construe the contract in favor of finding coverage for the insured. However, when no ambiguity exists on the face of the insurance contract, courts will strictly enforce the provisions as written, and will rarely find any public policy preventing enforcement. One exception is interpretation of uninsured motorist ("UM") coverage, where the courts typically hold that the statutory interpretation of UM coverage prevails over the language of the policy, unless such interpretation would allow double recovery for the insured. The court of appeals also applies another exception, finding certificates of insurance to be

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<sup>1.</sup> Stephen M. Schatz, Stephen L. Cotter & Bradley S. Wolff,  $Insurance,\,56$  Mercer L. Rev. 253 (2004).

persuasive evidence of intent in contract interpretation. Continuing the pattern over the years, the courts reiterated that insurers place themselves in jeopardy of being assessed a variety of damages if they improperly disclaim coverage when they should have provided a defense under a reservation of rights and filed a declaratory judgment action. This assessment of damages includes being bound by a good faith settlement entered into between the insured and the injured party without the insurer's consent.

## II. COMMERCIAL LIABILITY INSURANCE

# A. Insurer Estopped From Challenging Insured's Settlement, But Not Estopped From Challenging Coverage

Once an insurer denies coverage under a policy, that refusal estops an insurer from later attempting to avoid coverage on the grounds that the insured subsequently settled with the injured party. However, the refusal does not prevent the insurer from arguing that its decision to deny coverage was correct in the first place.<sup>2</sup> In Southern Guaranty Insurance Co. v. Dowse,3 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, stipulating that 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. Therefore, their obligation would not include the settlement agreement that the injured party and the insured entered into without the insurer's consent.4

The court of appeals disagreed with the insurer and stated:

When an insurer denies coverage and absolutely refuses to defend an action against an insured, when it could do so with reservation of its

<sup>2.</sup> S. Guar. Ins. Co. v. Dowse, 278 Ga. 674, 676-77, 605 S.E.2d 27, 29 (2004).

<sup>3. 278</sup> Ga. 674, 605 S.E.2d 27 (2004).

<sup>4.</sup> *Id.* at 674-75, 605 S.E.2d at 27-28. This is the insurer's argument as characterized by the court of appeals in *Dowse v. Southern Guaranty Insurance Co.*, 263 Ga. App. 435, 438, 588 S.E.2d 234, 237 (2003). The supreme court's characterization of the insurer's argument was more blunt: "Furthermore, [the insurer] is essentially arguing that simply because its insured agreed to settle a claim for which [the insurer] refused to provide either coverage or a defense, [the insurer] is relieved of its obligation to pay under the policy." *Dowse*, 278 Ga. at 676, 605 S.E.2d at 28.

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.<sup>5</sup>

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In upholding the lower court's ruling, the supreme court noted that while liability policies generally include provisions prohibiting the insured from settling claims without the insurer's approval, the insurer has a "correlative duty" to defend its insured against all claims that are covered under a policy.<sup>6</sup>

An insurer that refuses to indemnify or defend based upon a belief that a claim against its insured is excluded from a policy's scope of coverage "[does] so at its peril, and if the insurer guesses wrong, it must bear the consequences, legal or otherwise, of its breach of contract."

In our treatment of the court of appeals decision in last year's survey, we noted that the insurer should still be entitled to rely upon its defenses to coverage, but if its decision is wrong, then it would have to pay the amount of the settlement agreement.<sup>8</sup> Similarly, the supreme court emphasized that even though an insurer is bound by the settlement amount of the agreement, "the insurer is not estopped from arguing that the claims brought against its insured are not covered under the policy's terms." If the claim is not covered by the policy, then the insurer's refusal to indemnify or defend was justified, and the insurer is not obligated to pay the settlement amount.<sup>10</sup>

Thus, if an insurer is correct in its reasons for disclaiming coverage, then the insurer is not obligated to pay the settlement amount. However, the insurer can only rely upon the policy defenses that supported the disclaimer and cannot assert, as an additional policy defense, that the insured entered into the settlement without the insurer's consent. The court's decision shows that an insurer who refuses to defend a claim faces the very real danger that the decision

<sup>5.</sup> Dowse, 263 Ga. App. at 439, 588 S.E.2d at 237 (quoting Ga. S. & Ry. Co. v. United States Cas. Co., 97 Ga. App. 242, 244, 102 S.E.2d 500, 502 (1958)).

<sup>6.</sup> Dowse, 278 Ga. at 676, 605 S.E.2d at 29.

<sup>7.</sup> Id. (quoting C.T. Drechsler, Annotation, Consequences of Liability Insurer's Refusal to Assume Defense of Action Against Insured Upon Ground That Claim Upon Which Action Is Based Is Not Within Coverage of Policy, 49 A.L.R.2d 694 at (I)(2b) (2005) (brackets in original)).

<sup>8.</sup> Schatz, supra note 1, at 268-69.

<sup>9.</sup> Dowse, 278 Ga. at 674, 605 S.E.2d at 28.

<sup>10.</sup> Id. at 676-77, 605 S.E.2d at 29. The court remanded the case to the trial court to determine whether the CGL policy provided coverage for the claim and whether the insurer's refusal to defend was justified. Id. at 677, 605 S.E.2d at 29.

could later lead to a settlement between the insured and an injured party, the amount of which may ultimately be binding upon the insurer if its coverage decision was unjustified.<sup>11</sup> The safer course of action is for the insurer to defend the claim under a reservation of rights and file a declaratory judgment action. This will allow the insurer to control the underlying litigation and prevent the insured from entering into a settlement agreement with the injured party for an amount over which the insurer has no control.<sup>12</sup>

# B. Insurer Cannot Reverse its Breach of Contract by Defending The Insured Under Reservation of Rights After Initially Disclaiming Coverage

Once an insurer issues a disclaimer of coverage and refuses to defend the insured, the insurer cannot avoid a breach of contract action for a wrongful refusal by later reversing its decision and defending the insured under a reservation of rights, absent special circumstances.<sup>13</sup> In Vara v. Essex Insurance Co., 14 the insurer initially hired an attorney to defend the insureds in the lawsuit brought against them without issuing a reservation of rights letter. Several months later, the insurer notified the insureds that no coverage existed and that it had instructed the defense attorney to withdraw his representation. The insureds then filed a third-party complaint against the insurer for breach of the insurance contract. Thereafter, the insurer unilaterally resumed providing a defense to the insureds under a reservation of rights. The trial court granted the insurer's motion for summary judgment on the third-party complaint, accepting the insurer's argument that the insureds had not been prejudiced during the time they defended the suit themselves.15

In reversing the grant of summary judgment, the court of appeals pointed out several flaws in the insurer's decisions. When the insurer, with full knowledge of the facts, initially provided a defense to the insured without a reservation of rights, the insurer became estopped to later assert that no coverage existed under the policy. Then, when

<sup>11.</sup> This assumes, of course, that the settlement agreement was entered in "good faith" by the parties. If it was entered in bad faith or as an attempt to collude against the insurer, and the settlement amount is not reflective of the injury, then the insurer can challenge the settlement agreement. *Id.* at 676, 605 S.E.2d at 28-29.

<sup>12.</sup> Id., 605 S.E.2d at 29.

<sup>13.</sup> Vara v. Essex Ins. Co., 269 Ga. App. 417, 418, 604 S.E.2d 260, 261 (2004).

<sup>14. 269</sup> Ga. App. 417, 604 S.E.2d 260 (2004).

<sup>15.</sup> Id. at 418, 604 S.E.2d at 261.

<sup>16.</sup> See id. at 418-21, 604 S.E.2d at 261-63.

<sup>17.</sup> Id. at 419, 604 S.E.2d at 262.

the insurer disclaimed coverage and withdrew its defense, it "fixed its rights and duties" under the policy.<sup>18</sup> "Therefore, [the insurer] cannot subsequently, unilaterally assert that it will defend under a reservation of rights and thereby negate its breach of contract; such action of defending would only serve to mitigate its damages regarding its duty under the insurance contract to defend." The court rejected the argument that the insureds had not been prejudiced during the time they defended themselves, presumably because they did not incur any significant attorney fees and expenses. However, the court concluded that the insureds were prejudiced on the basis that the insurer's breach of contract alone, if proven, entitled the insureds to recover at least the nominal damages for which section 13-6-6 of the Official Code of Georgia Annotated ("O.C.G.A.")<sup>21</sup> provides.<sup>22</sup>

Vara, similar to *Dowse*, demonstrates the potential perils to an insurer who denies coverage and refuses to defend, rather than providing a defense under a reservation of rights and filing a declaratory judgment action. If the insurer's coverage position is incorrect, the disclaimer can prevent an insurer from attempting to cure a breach of contract by subsequently providing a defense under a reservation of rights and filing a declaratory judgment action. The insurer may subsequently decide to provide a defense in an attempt to limit the ultimate amount of attorney fees and expenses for which it may be potentially held liable, but such conduct will not cure the breach of contract.<sup>23</sup>

<sup>18.</sup> *Id.* The court relied heavily on *Drawdy v. Direct General Insurance Co.*, 277 Ga. 107, 586 S.E.2d 228 (2003), which held that once an insurer decides to deny coverage, its rights and duties under the policy are fixed so that there exists no uncertainty that would permit the insurer to bring a declaratory judgment action and defend under a reservation of rights. *Id.* at 110, 586 S.E.2d at 230-31. *Drawdy* was discussed in last year's survey. *See* Schatz, *supra* note 1, at 270-71.

<sup>19.</sup> *Vara*, 269 Ga. App. at 419, 604 S.E.2d at 262.

<sup>20.</sup> Id. at 420-21, 604 S.E.2d at 262-63

<sup>21.</sup> O.C.G.A. § 13-6-6 (1982 & Supp. 2005).

<sup>22.</sup> Vara, 269 Ga. App. at 420-21, 604 S.E.2d at 263.

<sup>23.</sup> Neither Vara nor Drawdy have overturned Colonial Insurance Co. v. Progressive Casualty Insurance Co., 252 Ga. App. 391, 556 S.E.2d 486 (2001), which held that an insurer can change its mind after issuing a disclaimer of coverage and provide a defense under a reservation of rights, provided the disclaimer is "qualified"—i.e., invites the insured to provide further information related to the insurer's coverage position and provides new facts that were not available to the insurer when it made its decision to disclaim coverage. Colonial, 252 Ga. App. at 392-93, 556 S.E.2d at 488. See Drawdy, 277 Ga. at 109, 586 S.E.2d at 230; Vara, 269 Ga. App. at 419, 604 S.E.2d at 262.

## C. Injured Party Has Standing to Bring a Garnishment Action Against Insurer

As discussed in last year's survey,<sup>24</sup> the court of appeals 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 undetermined issues of coverage exist.<sup>25</sup> In Ross v. St. Paul Reinsurance Co.,<sup>26</sup> the supreme court reversed that decision.<sup>27</sup> When a tort claim against the insured has been reduced to judgment, then the insured's assets—the benefits to be paid on the insured's behalf under an insurance contract—are subject to a garnishment action against the insurer.<sup>28</sup> Once confronted with a garnishment action by the judgment creditor, the insurer can assert that no coverage existed under the policy as a defense.<sup>29</sup>

However, any claims separate from the issue of coverage under the policy, such as the insurer's bad faith or negligent failure to settle, cannot be brought against the insurer in a garnishment action.<sup>30</sup> As stated by the court in *Dowse* and reiterated in *Ross*, the "question of whether the policy provides coverage for the claim is separate from the legal consequences of an insurer's refusal to indemnify or defend."<sup>31</sup>

This is the correct decision. An injured party who holds an unsatisfied judgment against the insured does have standing to bring a direct action against the insurer. Therefore, it makes sense that the direct action can be brought in a garnishment, where, for the sake of judicial efficiency and economy, a court can now decide the issues of coverage and liability for a debt in the same action.

## D. Notice Untimely as a Matter of Law When Default Judgment Entered and No Viable Excuse

In *Auto-Owners Insurance Co. v. Karan, Inc.*, <sup>32</sup> the insured, who held a commercial general liability ("CGL") policy, failed to notify its liability insurer of the lawsuit brought against the insured until after a default

<sup>24.</sup> Schatz, supra note 1, at 267-68.

<sup>25.</sup> St. Paul Reinsurance Co. v. Ross, 266 Ga. App. 75, 78, 596 S.E.2d 193, 196 (2004).

<sup>26. 279</sup> Ga. 92, 610 S.E.2d 57 (2005).

<sup>27.</sup> Id. at 94, 610 S.E.2d at 59.

<sup>28.</sup> Id. at 93-94, 610 S.E.2d at 58-59.

<sup>29.</sup> *Id.* at 94, 610 S.E.2d at 59.

<sup>30.</sup> Id.

<sup>31.</sup> Id. (quoting Dowse, 278 Ga. at 677, 605 S.E.2d at 29).

<sup>32. 272</sup> Ga. App. 620, 612 S.E.2d 920 (2005).

judgment had been entered in the case.<sup>33</sup> The policy required the insured to notify its carrier of a lawsuit "as soon as practicable."<sup>34</sup> As an excuse, the insured argued that it did not have notice of the suit earlier because the complaint had been improperly served upon one of its temporary employees. The insured filed a motion to open the default on the grounds of insufficiency of service, but the state court denied the motion.<sup>35</sup>

The court of appeals held that by denying the motion to open default, the state court determined that the insured failed to prove improper service of the complaint, which then collaterally estopped the insured from arguing that improper service was an excuse for failing to provide timely notice in the subject case.<sup>36</sup> Therefore, the insured was left without any viable excuse for not notifying the insurer before default was entered, the insured's notice was untimely as a matter of law, and summary judgment for the insurer was appropriate.<sup>37</sup>

The dissent argued that the doctrine of collateral estoppel was inapplicable because the state court proceeding and the subject proceeding had different parties and different causes of action, and also because there had been no judgment on the merits of the insured's notice. The majority addressed the dissent, stating that the issue the majority decided was whether there was any evidence of record that would create a question of fact as to whether the insured gave notice of the suit as soon as practicable. Because it was undisputed that the insured failed to give notice of the suit until after default was entered and because the insured was without any viable excuse, there was no question of fact regarding whether the insured failed to give notice "as soon as practicable."

In light of *Karan*, insurers will be justified in seeking summary judgment in support of their decision to deny coverage when an insured does not provide notice of a lawsuit until after default judgment has been entered, the default judgment has not been opened, and the insured has no other excuse. However, in those cases in which the insured has been successful in opening the default judgment or has a viable excuse

<sup>33.</sup> Id. at 621, 612 S.E.2d at 921.

<sup>34.</sup> Id.

<sup>35.</sup> Id.

<sup>36.</sup> Id. at 622, 612 S.E.2d at 922.

<sup>37.</sup> Id.

<sup>38.</sup> Id. at 624-25, 612 S.E.2d at 923 (Barnes, J., dissenting).

<sup>39.</sup> Karan, 272 Ga. App. at 621, 612 S.E.2d at 921.

<sup>40.</sup> Id. at 622-23, 612 S.E.2d at 922.

of improper service that has not been foreclosed by the state court, a question of fact will exist as to whether notice was timely.<sup>41</sup>

## E. Agent's Authority to Bind Coverage for Additional Insured

Certificates of insurance issued by an agent authorized to bind coverage for an additional insured provide compelling evidence of the agent's authority and intent to bind such coverage. In Sumitomo Marine & Fire Insurance Co. v. Southern Guaranty Insurance Co., the developer of a housing project hired a general contractor to perform work on the project. The developer required that the general contractor provide the developer with additional insured status under the general contractor's liability policies. Homeowners near the project later filed suit against the developer and general contractor for property damage due to water runoff. A dispute then ensued as to whether the developer was an additional insured under the general contractor's liability policies. In the developer was an additional insured under the general contractor's liability policies.

The agent who obtained insurance for the general contractor issued certificates of insurance, which stated that the developer was a named additional insured under the general contractor's policies. However, the liability insurers never issued an endorsement that would have extended additional insured status to the developer. Moreover, the certificates of insurance contained disclaimer language indicating that the certificate was issued for information only; that it conferred no rights to the certificate holder (developer); that it did not amend, extend, or alter coverage under the policies; and that the insurance provided by the policies was subject to all terms, exclusions, and conditions of the policy. The agent testified that his intent was to make the developer an additional insured under the liability policies, that he had authority from both of the general contractor's insurers to issue certificates of insurance, and that he sent copies of the certificates of insurance to the insurers. Pursuant to the agency agreements with the liability insurers, the agent had authority to bind coverage on behalf of the insurers, subject only to the companies' underwriting rules. 45

Judge Moye held that the agent had actual authority from the liability insurers through their agency agreements to create additional insured

<sup>41.</sup> See generally Thomas v. Atlanta Cas. Co., 253 Ga. App. 199, 558 S.E.2d 432 (2001).

<sup>42.</sup> Sumitomo Marine & Fire Ins. Co. v. S. Guar. Ins. Co., 337 F. Supp. 2d 1339, 1353 (N.D. Ga. 2004).

<sup>43. 337</sup> F. Supp. 2d 1339 (N.D. Ga. 2004).

<sup>44.</sup> Id. at 1342-43.

<sup>45.</sup> Id. at 1345.

status for the developer.<sup>46</sup> This actual authority bound the insurers to the additional insured coverage provided by the agent.<sup>47</sup> At a minimum, the agent was a "dual agent" authorized to act on behalf of both the insured and the insurer.<sup>48</sup> Additionally, under the circumstances of this case, the undisputed facts showed that the agent expressed an actual authority to create additional insured status for the developer.<sup>49</sup>

The court further held that even if the agent did not have actual authority, he had apparent authority by issuing certificates of insurance naming the developer as an additional insured.<sup>50</sup> The liability insurers held out the agent as having the authority to act on their behalf, and the developer reasonably relied upon that authority, particularly when the agent signed the certificates of insurance as the "authorized representative" of the insurers.<sup>51</sup>

By issuing certificates of insurance naming the developer as an additional insured, the agent, as the insurer's authorized agent, "manifested the intent to incorporate the [c]ertificates of [i]nsurance into [the general contractors'] policies. Thus, [the developer] was made an additional insured under [the general contractors'] policies . . . with coverage to the extent of the policies as they existed at that time." The court further noted that the liability insurer's recourse, if any, for having been bound to provide additional insured coverage, where the policies stated that additional insured status could only be obtained by endorsement and no such endorsement had been issued, would have been a cause of action against the agent for breaching the agency agreement by exceeding his authority. <sup>53</sup>

It is tempting to conclude that *Sumitomo* stands for the proposition that certificates of insurance issued by an agent naming a third party as an additional insured automatically create additional insured coverage for the third party. *Sumitomo* does not represent this notion because such an interpretation would contradict authority stating that certificates of insurance do not themselves create coverage.<sup>54</sup> Instead, certificates of insurance are evidence, albeit strong evidence, of the agent's authority and intent to bind coverage for an additional insured.

<sup>46.</sup> Id. at 1352.

<sup>47.</sup> Id. at 1350, 1352.

<sup>48.</sup> *Id.* at 1352.

<sup>49.</sup> Id. at 1352-53.

<sup>50.</sup> Id. at 1354.

<sup>51.</sup> Id. at 1353.

<sup>52.</sup> Id. at 1355.

<sup>53.</sup> Id. at 1350.

See, e.g., Investors Nat'l Life Ins. Co. v. Norsworthy, 160 Ga. App. 340, 341, 287
S.E.2d 66, 67 (1981).

If the agent had no authority to bind coverage or issue certificates of insurance, the result may have been different because the court would then look to a variety of factors to determine the parties' intent, including the policy language requiring that the insurer issue an endorsement before the third party is entitled to additional insured coverage.

To interpret *Sumitomo* otherwise would disregard prior decisions by the court in which it refused to conclude that an insurer was bound to a change in coverage due to actions of an independent agent who had an agency agreement with the insurer. Instead, the court determined that a condition in the policy stating that its terms can be amended or waived only if the insurer endorses the amendment or waiver is clear, unambiguous, and enforceable.<sup>55</sup> However, *Sumitomo* will likely make it difficult in the future for insurers to meet their burden of proving that certificates of insurance do not create coverage for additional insureds. This will be the case particularly because a court will have justification for ruling that any dispute the insurer has regarding the coverage provided by certificates of insurance should be addressed to the agent, not the additional insured.

## F. Interpretation of "Occurrence" in Construction Defect Claims

In our survey article last year, we discussed the potentially farreaching implications of *Owners Insurance Co. v. James*, <sup>56</sup> in which the District Court for the Northern District of Georgia held that damages 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 that was performed.<sup>57</sup> The court based its decision upon the fact that the subcontractor who actually performed the defective construction work intended such work, even if it did not intend the consequences of this work.<sup>58</sup> Therefore, any damages resulting from the intended work were not caused by an accident or occurrence, and consequently, the policy did not cover those damages.<sup>59</sup>

In SawHorse, Inc. v. Southern Guaranty Insurance Co., 60 the court of appeals contradicted the holding of Owners. SawHorse, Inc. ("Saw-

<sup>55.</sup> See, e.g., Sandner, Inc. v. Centennial Ins. Co., 189 Ga. App. 277, 279, 375 S.E.2d 611, 613 (1988).

<sup>56. 295</sup> F. Supp. 2d 1354 (N.D. Ga. 2003).

<sup>57.</sup> Id. at 1364-65; see also Schatz, supra note 1, at 260-62.

<sup>58.</sup> Owners, 295 F. Supp. 2d at 1364.

<sup>59.</sup> Id. at 1364-65.

<sup>60. 269</sup> Ga. App. 493, 604 S.E.2d 541 (2004).

Horse") was a contractor hired to construct a new second floor onto an existing one-story house. A subcontractor retained by SawHorse did not install the required beams to the renovation project, causing significant damage to the second-story addition and alleged damage to the existing first floor of the home. Southern Guaranty Insurance Company of Georgia ("Southern Guaranty"), SawHorse's liability carrier, denied coverage because, *inter alia*, the damage was not caused by an occurrence. As in *Owners*, Southern Guaranty's policy defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In rejecting Southern Guaranty's argument that faulty workmanship cannot constitute an occurrence under a CGL policy, the court noted that the insurer had not cited to any Georgia authority supporting its contention and pointed to no evidence that SawHorse intended for the defective construction to occur. Moreover, Southern Guaranty's argument "runs counter to case law finding that policies with similar 'occurrence' language provide coverage for 'the risk that . . . defective or faulty workmanship will cause injury to people or damage to other property." 65

It is difficult to reconcile the holdings of *Owners* and *SawHorse*. On one hand, *Owners* ruled as a matter of law that when a subcontractor intends to perform the work that later is discovered to be defective, the conduct does not constitute an occurrence, even if it was negligent and caused damage to other property. On the other hand, *SawHorse* makes a broad proclamation that the reasoning supporting the finding in *Owners* is contrary to case law holding that negligent construction that causes damage to other property does constitute an occurrence. The key distinguishing fact between the two cases is that the insured in *Owners* was the subcontractor who actually performed the faulty work and, therefore, had the ability to intend its work, while SawHorse was the general contractor that only hired and oversaw the faulty work done by the subcontractor. However, we do not anticipate that, in the future, Georgia courts will adopt this distinction in their reasoning, as *SawHorse* presents strong precedence for the broad proposition that

<sup>61.</sup> Id. at 494, 604 S.E.2d at 543.

<sup>62.</sup> Id. at 498, 604 S.E.2d at 543.

<sup>63.</sup> Id.

<sup>64.</sup> Id. at 499, 604 S.E.2d at 546.

<sup>65.</sup> *Id.* (quoting Glen Falls Ins. Co. v. Donmac Golf Shaping Co., 203 Ga. App. 508, 511, 417 S.E.2d 197, 200 (1992)).

<sup>66.</sup> See Owners, 295 F. Supp. 2d 1354.

<sup>67.</sup> See SawHorse, 269 Ga. App. at 499, 604 S.E.2d at 546.

claims of negligent construction that cause damage to other property necessarily constitute an occurrence under the policy.<sup>68</sup>

Custom Planning & Development, Inc. v. American National Fire Insurance Co. 69 is the first case that relied upon the rationale of SawHorse. The court of appeals addressed the issue of whether the failure of a retaining wall constituted an occurrence if an arbitration for the wall failure claim awarded damages on the basis of breach of implied warranty and breach of contract. In reliance upon SawHorse and Georgia Farm Bureau Mutual Insurance Co. v. Hall County, which was discussed in last year's survey, the court held that there was no covered occurrence as a matter of law because the arbitration award was based upon breach of implied warranty and breach of contract, and not upon negligent construction. However, had faulty workmanship caused damage to other property because of the contractor's negligence, it could create an issue of fact as to whether the conduct was an accident or occurrence.

Custom Planning provides some insight as to how Georgia courts will interpret an occurrence in construction defect cases in the future. If the alleged damage is to the defective work performed by the contractor and if such damage constituted a breach of warranty, breach of contract, or both, then the court likely will find no occurrence under the policy. If the alleged damage, caused by the defective work performed by the contractor, is to other property and if such damage was due to the contractor's negligence, then the court likely will find an occurrence under the policy. What remains unresolved is how the court will interpret an occurrence if the damage is to the defective work itself but arose out of the contractor's negligence.

<sup>68.</sup> Even though the claim of negligent construction was an "occurrence" under the policy, <code>SawHorse</code> held that the "business risk" exclusions in the policy prevented any coverage for the damage to the second-story renovation project itself, which began evidencing property damage before SawHorse completed the project. However, a question of fact remained as to whether the business risk exclusions applied to the alleged damage to the existing first floor because it was not clear from the record whether the allegedly defective workmanship caused damage to the first floor. <code>SawHorse</code>, 269 Ga. App. at 495-98, 604 S.E.2d at 544-46. The business risk exclusions would not have applied if the faulty workmanship to the second floor caused damage to the first floor because such damage would constitute resulting damage to other property. <code>Id</code>. at 498, 604 S.E.2d at 546.

<sup>69. 270</sup> Ga. App. 8, 606 S.E.2d 39 (2004).

<sup>70.</sup> Id. at 8-9, 606 S.E.2d at 40-41.

<sup>71. 262</sup> Ga. App. 810, 586 S.E.2d 715 (2003).

<sup>72.</sup> Schatz, supra note 1, at 262-63.

<sup>73.</sup> Custom Planning, 270 Ga. App. at 10, 606 S.E.2d at 41.

<sup>74.</sup> Id.

As discussed above, we anticipate that the court will rely on *SawHorse* to find an occurrence, almost as a matter of course, when there is an allegation of negligence and when there is no proof that the insured intended for the faulty workmanship to occur.<sup>75</sup> The court will then move to the next step in its analysis and likely find that the business risk exclusions apply to property damage of the faulty work itself.

## III. AUTOMOBILE INSURANCE

## A. Uninsured | Underinsured Motorist Coverage

1. Uninsured/Underinsured Motorist Insurance Carrier Liable for Death of Person Who Was Not Covered Under the Policy. In last year's survey, we discussed the court of appeals decision in *Atlanta Casualty Co. v. Gordon*, <sup>76</sup> holding that an insurer is not required to pay an insured for the death of a person who is not covered under the policy. <sup>77</sup> The supreme court took the case on certiorari review and reversed. <sup>78</sup>

In *Gordon* the insured's son was killed in an auto accident when struck by an uninsured motorist.<sup>79</sup> The insured's policy with Atlanta Casualty Company ("Atlanta Casualty") provided underinsured/uninsured motorist ("UM") coverage for injury or damage "sustained by a covered person and caused by an accident."<sup>80</sup> At the time of the accident, the deceased son was living with his mother, not with his father (the insured), and was not covered under the father's policy. The parents sued the uninsured motorist for wrongful death and served Atlanta Casualty as the UM carrier.<sup>81</sup>

The insurer moved for summary judgment on the grounds that the insured's son was not a covered person under the policy. The trial court denied the motion, holding that Georgia's UM statute, which requires a UM insurer to pay the insured "all sums which [the] insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle," trumped the coverage defined

<sup>75.</sup> See SawHorse, 269 Ga. App. at 499, 604 S.E.2d at 546.

<sup>76. 266</sup> Ga. App. 666, 598 S.E.2d 70 (2004).

<sup>77.</sup> Id. at 666, 598 S.E.2d at 71.

<sup>78.</sup> Gordon v. Atlanta Casualty Co., 279 Ga. 148, 149, 611 S.E.2d 24, 25 (2005).

<sup>79.</sup> *Id.* at 148, 611 S.E.2d at 25.

<sup>80.</sup> Id.

<sup>81.</sup> Id.

<sup>82.</sup> Id.

by the policy.<sup>83</sup> By a majority vote, the court of appeals reversed, holding that the statute cannot be read to require an insurer to pay damages for the death of an uncovered person.<sup>84</sup>

The supreme court reversed the court of appeals, holding that the plain language of the UM statute clearly requires coverage. 85 The court cited Judge Barnes's dissent from the court of appeals: "All that the statute requires is that the insured person be 'legally entitled to recover damages.' A court cannot by construction 'add to, take from, or vary the meaning of unambiguous words in the statute." The court held that because the insured was entitled to recover damages from the uninsured motorist based on his son's wrongful death, the insured was therefore entitled to recover those damages from his insurer. 87

2. Guest Passenger May Not Stack Vehicle Owner's Policies. In Beard v. Nunes, 88 Beard and her daughter were involved in a car accident with Nunes. The Beards were driving a vehicle owned by Cordle, which was one of five vehicles owned by Cordle and insured by State Farm. 89 Nunes had liability insurance of \$25,000. Beard sought to stack all five of the UM policies insuring Cordle under O.C.G.A. section 33-7-1190 because she felt her daughter's injuries exceeded the amount of Nunes's coverage. The trial court ruled that Beard was not entitled to stack all of the policies because neither she nor her daughter were beneficiaries of the policies other than the policy on the vehicle involved in the loss. Beard appealed. 91

Ms. Beard argued that under  $Ford\ v$ .  $Georgia\ Farm\ Bureau\ Mutual\ Insurance\ Co.,$   $^{92}$  she should be allowed to stack all five policies. In Ford the court of appeals held that a spouse or relative who was a resident of the same household as the named insured could stack coverage under three policies, even though a spouse or relative was the named insured on just one of them.  $^{93}$  The court in Beard distinguished

<sup>83.</sup> Id. at 148-49, 611 S.E.2d at 25 (quoting O.C.G.A. § 33-7-11(a)(1) (2001 & Supp. 2005)).

<sup>84.</sup> Id. at 149, 611 S.E.2d at 25.

<sup>85.</sup> Id.

<sup>86.</sup> *Id.*; *Gordon*, 266 Ga. App. at 671, 598 S.E.2d at 74 (Barnes, J., dissenting) (quoting Brooks v. Brooks, 185 Ga. 549, 554, 195 S.E. 869, 871-72 (1938)).

<sup>87.</sup> Gordon, 279 Ga. at 149, 611 S.E.2d at 25.

<sup>88. 269</sup> Ga. App. 214, 603 S.E.2d 735 (2004).

<sup>89.</sup> The total of these policies' uninsured motorist coverage amounted to \$125,000. *Id.* at 215,603 S.E.2d at 736.

<sup>90.</sup> O.C.G.A. § 33-7-11.

<sup>91.</sup> Beard, 269 Ga. App. at 214-15, 603 S.E.2d at 736.

<sup>92. 191</sup> Ga. App. 735, 382 S.E.2d 659 (1989).

<sup>93.</sup> Id. at 737, 382 S.E.2d at 661.

Ford from the present facts, noting that Beard was neither a named insured nor living in the same residence as Cordle.<sup>94</sup> Thus, Beard would fall into a second category under section 33-7-11(b)(1)(B), which allows coverage for a permitted user or guest, but only for the policy covering the vehicle actually used.<sup>95</sup> Because Beard was not a named insured and not eligible for coverage under the policies for the four vehicles not involved in the accident, the court of appeals affirmed the decision preventing her from stacking the policies of all five vehicles.<sup>96</sup>

**3.** UM Carrier Entitled to Set Off for Medical Payments Made Under The Policy. In *Georgia Farm Bureau Mutual Insurance Co. v. Harper*, 97 Harper obtained a judgment of \$50,000 against uninsured motorists and sought payment from Georgia Farm Bureau ("GFB") under her UM insurance policy. GFB paid her the \$50,000, less the amount it previously paid out to cover her medical expenses related to the accident. Harper sued to recover the full amount and won at trial. 98

GFB appealed, arguing that it was entitled to set off medical expenses based on language in sections B (medical coverage provision) and C (UM coverage provision) of the policy. Because Harper sought recovery under section C, which does not specifically allow setoff for medical payments, the trial court found that the setoff was improper. The court of appeals reversed, concluding that section C contained language that allowed the carrier to reduce benefits by "all sums" paid as a result of bodily injury by persons or organizations legally responsible, which the court held to include payments by GFB itself under the med-pay portion of the policy. An interpretation of the policy that precludes recovery under the UM coverage for medical expenses that have already been paid by the carrier furthers the general public policy of preventing double recovery. Therefore, the court reversed the trial court and allowed for setoff of the medical expenses paid by GFB.

4. Uninsured/Underinsured Motorist Carrier Entitled to Reduce Benefits for Workers' Compensation Received by Insured. In Ferqueron v. State Farm Mutual Automobile Insurance

<sup>94.</sup> Beard, 269 Ga. App. at 216, 603 S.E.2d at 737.

<sup>95.</sup> Id.

<sup>96.</sup> Id.

<sup>97. 272</sup> Ga. App. 536, 612 S.E.2d 861 (2005).

<sup>98.</sup> Id. at 536, 612 S.E.2d at 862.

<sup>99.</sup> Id. at 537-38, 612 S.E.2d at 863.

<sup>100.</sup> Id. at 538-39, 612 S.E.2d at 864.

<sup>101.</sup> Id. at 538, 612 S.E.2d at 864.

<sup>102.</sup> Id. at 540, 612 S.E.2d at 864-65.

Co., <sup>103</sup> Ferqueron was injured in an automobile accident with Hernandez. Ferqueron then settled with Hernandez's insurer for the \$15,000 policy limit. At the time of the accident, Ferqueron was driving his employer's car and received (or was owed) \$33,044.68 in workers' compensation benefits. Ferqueron was insured under three State Farm policies providing total UM coverage of \$45,000, as well as a Zurich policy, which covered the vehicle he was driving at the time of the accident, providing \$40,000 of UM coverage. <sup>104</sup>

At trial, the jury awarded Ferqueron \$50,000. The trial court ruled that the insurer was entitled to offset the amount of workers' compensation benefits that had been paid to Ferqueron, leaving a judgment in favor of Ferqueron for \$1,955.32. Ferqueron appealed the reduction of his award in the amount of the workers' compensation benefits, arguing that the general verdict form precluded the trial court from determining what sums the jury was paying for which alleged injuries or damages.<sup>105</sup>

The court of appeals affirmed the trial court, determining that the State Farm policies expressly allowed for setoff of workers' compensation benefits and that Ferqueron expressly agreed to the use of the general verdict form. <sup>106</sup> It was Ferqueron's responsibility to object to the form or bring any alleged defect of the form to the court's attention before the jury was dismissed, and he failed to do so. <sup>107</sup> The court had no record upon which it could make a determination as to what portion of the jury's award was for pain and suffering. <sup>108</sup> Therefore, the court was required to give deference to the trial court and affirm. <sup>109</sup>

**5.** UM Coverage Implicated by Federal Subrogation Claims. In *Thurman v. State Farm Mutual Automobile Insurance Co.*, <sup>110</sup> Thurman, a United States postal worker, was injured on the job when her mail truck was struck by Brown. Thurman settled with Brown for the limits of Brown's coverage less the amount paid to the postal service for damages to the mail truck. Prior to settling, Thurman received workers' compensation benefits through the Federal Employees Compensation Act ("FECA")<sup>111</sup> and benefits from her employer's group medical insurance

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103. 271 Ga. App. 572, 610 S.E.2d 184 (2005).
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<sup>104.</sup> Id. at 573, 610 S.E.2d at 185.

<sup>105.</sup> Id.

<sup>106.</sup> Id. at 573-74, 610 S.E.2d at 185-86.

<sup>107.</sup> Id. at 574, 610 S.E.2d at 185.

<sup>108.</sup> Id. at 575-76, 610 S.E.2d at 186-87.

<sup>109.</sup> Id.

<sup>110. 278</sup> Ga. 162, 598 S.E.2d 448 (2004).

<sup>111. 5</sup> U.S.C. §§ 8101-8150 (1996 & Supp. 2005).

plan. Both the workers' compensation carrier and the group insurance carrier claimed subrogation rights to the proceeds from the settlement with Brown and received a total of \$34,666.32 from the settlement, leaving Thurman with \$60,887.87. Thurman then turned to her UM carrier (State Farm), claiming Brown was under-insured because Thurman's net proceeds from Brown were less than the \$75,000 policy limit of her UM coverage. The trial court granted summary judgment to State Farm, and the court of appeals affirmed, holding that the payment of the subrogation claims did not constitute "payment of other claims" because the subrogation parties stood in Thurman's shoes regarding the liability insurance proceeds. The state of the proceeds of the subrogation parties are stood in Thurman's shoes regarding the liability insurance proceeds.

The supreme court reversed the court of appeals, holding that when a federal employee reimburses the government for benefits paid under FECA or Federal Employees Health Benefits Act ("FEHBA"),<sup>114</sup> the amount of reimbursement constitutes a reduction in the limits of the tortfeasor's liability coverage so as to allow for the insured employee to recover under her UM insurance.<sup>115</sup> The court emphasized Georgia's long-standing public policy of complete compensation as the basis for allowing UM coverage when federally mandated reimbursements have left the insured with less than a full recovery.<sup>116</sup>

**6. Family Immunity Does Not Bar Minimal Recovery After Death.** In *Johnson v. Georgia Farm Bureau Mutual Insurance Co.*, <sup>117</sup> Johnson's ex-wife was killed in a car accident that also injured Johnson's two children. Georgia Farm Bureau ("GFB") issued insurance policies to Johnson's ex-wife and her husband, which included both liability and UM coverage. <sup>118</sup> The trial court held, and the court of appeals affirmed, that the policy provisions prohibited Johnson's stacking of the policies and that liability coverage for his claim as the children's guardian was limited to \$25,000. <sup>119</sup>

The policy's family member exclusion provision limits coverage for bodily injury sustained by a family member if intrafamily tort immunity does not apply. The court of appeals held that the doctrine of intrafamily tort immunity does not apply because there is no longer any

<sup>112.</sup> Thurman, 278 Ga. at 162-63, 598 S.E.2d at 449-50.

<sup>113.</sup> Id. at 163, 598 S.E.2d at 450.

<sup>114. 5</sup> U.S.C. §§ 8901-8913 (1996 & Supp 2005).

<sup>115.</sup> Thurman, 278 Ga. at 165, 598 S.E.2d at 451.

<sup>116.</sup> Id.

<sup>117. 273</sup> Ga. App. 623, 616 S.E.2d 459 (2005).

<sup>118.</sup> Id. at 623-24, 616 S.E.2d at 459.

<sup>119.</sup> Id. at 624-25, 616 S.E.2d at 459.

<sup>120.</sup> Id. at 625, 616 S.E.2d at 461.

need to preserve familial harmony between the deceased and either her children or her ex-husband. Thus, liability on Johnson's claim cannot exceed \$25,000 under the policy. Furthermore, a policy provision barring anyone from receiving duplicate payments for the same elements of loss was sufficient to prevent Johnson's stacking of the policies because each policy provided coverage for the same accident. 123

GFB appealed the trial court's decision, which stated that the family exclusion provision in the contract did not limit Johnson's coverage based on his individual claims for the recovery of medical expenses and loss of services due to the children's injuries. <sup>124</sup> The court held that because Johnson is an ex-husband and not a family member and because he brought the claims as an individual and not on behalf of his children, the family member exclusion provision did not apply. <sup>125</sup>

## B. Stacking Policies: How Many Policies Does the Insured Have?

In Smith v. Allstate Insurance Co., 126 the plaintiffs sued Nathaniel and his insurers after the truck Nathaniel was driving collided with the plaintiffs' car, injuring the plaintiffs' children. Nathaniel had seven vehicles insured by Allstate Insurance Company ("Allstate"). controversy here was over whether Nathaniel had only one policy, or two policies with coverage of up to \$100,000 each, so as to allow the plaintiffs to stack the policies. Nathaniel was issued two separate declarations pages by Allstate and two separate policy numbers. The plaintiffs pointed to this as evidence of two separate policies. 127 The court of appeals, however, examined the contract as a whole and concluded that the cover letter enclosed with Nathaniel's policy stated that because Allstate's declaration pages could only list up to four vehicles, Allstate had to use two separate declarations to list all of Nathaniel's vehicles. 128 The cover letter stated that "[i]n effect, [the insured had] one policy with two policy numbers." 129 Also, the coverage for all seven of Nathaniel's vehicles was renewed on the same day, was paid with one bill, and was treated as one policy for actuarial and rating purposes. 130 Taking all of this into account and emphasizing the language in the

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121. Id.
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<sup>122.</sup> Id.

<sup>123.</sup> Id. at 626, 616 S.E.2d at 461.

<sup>124.</sup> Id.

<sup>125.</sup> Id.

<sup>126. 268</sup> Ga. App. 229, 603 S.E.2d 302 (2004).

<sup>127.</sup> Id. at 229, 603 S.E.2d at 303.

<sup>128.</sup> Id. at 230, 603 S.E.2d at 304.

<sup>129.</sup> Id.

<sup>130.</sup> Id.

policy referring to "one policy" as plain and unambiguous, the court held that there was only one policy, and thus, there was no other policy for the plaintiffs to stack.<sup>131</sup>

# C. Coverage Based on Filing With the Public Service Commission, Despite the Policy Itself

Hartford Casualty Insurance Co. v. Smith 132 is a companion case arising out of the same facts as Smith v. Allstate Insurance Co. 133 Here, the issue was whether the truck driven by Nathaniel at the time of the accident was covered by Hartford Casualty Insurance Co. ("Hartford"). First, the court had to discern whether the named insured under the policy was the driver or the company. The policy named the insured as James Nathaniel d/b/a JRJ Limousine Services and excluded coverage for any vehicles owned by the insured, but not listed on the policy. Although Nathaniel owned the truck involved in the accident, the truck was not listed on the policy. Nathaniel argued that the business, and not him personally, was the insured. This was demonstrated by the Damage Liability Certificate of Insurance form sent by Hartford to the Secretary of State. The policy extends coverage to vehicles not owned by the insured if they were being used in the course of the company's business as a common carrier at the time of the accident.134

The court noted that the certificate Hartford registered with the state is intended to benefit those who may have a cause of action against the insured motor carrier. Therefore, the court held that Hartford could not now plead mistake and try to claim that the business was erroneously listed on the certificate of insurance and that Nathaniel was actually the insured. The contract naming the insured consisted of both the policy and the certificate of insurance. Therefore, the company, not Nathaniel, was the named insured on the Hartford policy, even though the actual policy says differently. Because the company was the named insured, the truck was a non-owned vehicle under the policy. The contract named insured the policy.

Hartford then argued that Nathaniel was not using the truck for a business purpose at the time of the accident. Nathaniel stated, however,

<sup>131.</sup> Id. at 230-31, 603 S.E.2d at 303-04.

<sup>132. 268</sup> Ga. App. 224, 603 S.E.2d 298 (2004).

<sup>133. 268</sup> Ga. App. 229, 603 S.E.2d 302 (2004).

<sup>134.</sup> Hartford, 268 Ga. App. at 226, 603 S.E.2d at 300.

<sup>135.</sup> *Id.* at 227, 603 S.E.2d at 301.

<sup>136.</sup> Id. at 227-28, 603 S.E.2d at 301.

<sup>137.</sup> Id. at 228, 603 S.E.2d at 302.

<sup>138.</sup> *Id*.

that he was using the truck to buy food for a dinner he was giving in appreciation for those who referred customers and supported his business venture. Hartford failed to offer any rebuttal evidence. Therefore, the policy applied to the accident as a non-owned vehicle being used for a business purpose. <sup>139</sup>

## D. Contract Construction: Who Is "You"?

In Simpson v. Infinity Select Insurance Co., 140 Simpson was driving a car that belonged to his girlfriend's mother when he had a wreck, causing severe and permanent injuries to his girlfriend. Her parents sued him, and a default judgment of \$13 million was entered against him when he failed to answer. Simpson sued Infinity Select Insurance Company ("Infinity"), his stepfather's insurance company, for breach of contract, bad faith refusal to settle, and punitive damages. Infinity denied liability and moved for summary judgment on the grounds that Simpson was not covered by the policy. Simpson argued that the contract was ambiguous and should be construed to provide coverage. The trial court granted summary judgment for Infinity. 141

The court of appeals affirmed, reasoning that one must examine the contract as a whole in determining whether the alleged ambiguities exist. Therefore, the only person insured by the policy in the use of a non-owned car is "you," which is defined by the policy "as the 'policyholder named in the [d]eclaration and [the] spouse if living in the same household."

# E. Bad Faith Refusal to Settle: What Triggers the Insurer's Duty to Settle?

In Kingsley v. State Farm Mutual Automobile Insurance Co., 144 the plaintiff's husband died when his motorcycle was struck by a car driven by Beam, the insured. Beam had a policy with State Farm Mutual Automobile Insurance Company ("State Farm") that provided liability coverage of up to \$25,000. During the investigation of the claim, State Farm requested several documents from the plaintiff's attorneys regarding the deceased's estate and the identity of its administrator, but the requested information was never provided. Approximately one month after the accident, the plaintiff's attorney requested information

<sup>139.</sup> Id.

<sup>140. 269</sup> Ga. App. 679, 605 S.E.2d 39 (2004).

<sup>141.</sup> *Id.* at 679-80, 605 S.E.2d at 40-41.

<sup>142.</sup> Id. at 682, 605 S.E.2d at 42.

<sup>143.</sup> Id.

<sup>144. 353</sup> F. Supp. 2d 1242 (N.D. Ga. 2005).

on Beam's policy limits from State Farm. State Farm disclosed this information promptly. Approximately three weeks later, the plaintiff filed suit against Beam without making a settlement demand. Approximately one month after the suit was filed, State Farm offered to pay the policy limits of \$25,000. The plaintiff rejected that offer and never made a counter offer. At trial, the plaintiff testified that she rejected the offer because her mind was made up to take the case to trial, obtain an excess judgment against Beam, and sue State Farm for failing to offer the policy limits prior to suit being filed. The plaintiff won a four million dollar judgment at trial and subsequently sued State Farm after taking an assignment of Beam's legal claims against State Farm. 145

In the suit against State Farm, the plaintiff alleged a tortious refusal to settle. In response, State Farm argued that it was entitled to summary judgment because its duty to settle could only arise after an offer to settle within the policy limits was made by the plaintiff. The plaintiff made no such offer. Additionally, State Farm contended that the plaintiff's claims should fail because she could not show that State Farm knew or reasonably should have known that the case could have been settled within the policy limits before the complaint was filed. 146

The District Court for the Northern District of Georgia rejected State Farm's first argument, noting that no precedent in Georgia law supported the assertion. The court followed *Delancy v. St. Paul Fire & Marine Insurance Co.*, which held that Georgia law does not require an offer of settlement to trigger the insurer's duty, but does require proof that settlement within the policy limits was possible and that the insurer knew that such a settlement was possible in order to establish bad faith. The court then considered the next part of State Farm's argument that State Farm had no knowledge, nor could it reasonably have known, that the plaintiff would settle within the policy limits. The court distinguished this case from *Cotton States Mutual Insurance Co. v. Brightman* be cause of the plaintiff's "secret deadline" and unwillingness to offer or counter offer. In *Brightman* the plaintiff did make an offer to settle within the policy limits and gave the

<sup>145.</sup> Id. at 1243-44.

<sup>146.</sup> *Id.* at 1248-49.

<sup>147.</sup> Id. at 1248.

<sup>148. 947</sup> F.2d 1536 (11th Cir. 1991).

<sup>149.</sup> Id. at 1550.

<sup>150.</sup> Kingsley, 353 F. Supp. 2d at 1249-50.

<sup>151. 276</sup> Ga. 683, 580 S.E.2d 519 (2003).

<sup>152.</sup> Kingsley, 353 F. Supp. 2d at 1251.

insurer a specific deadline through which the offer was open.<sup>153</sup> Here, the plaintiff never indicated to State Farm that she would settle within the policy limits, and she never communicated her intent to file suit on a specific date.<sup>154</sup>

Thus, the court held that under Georgia law,

[a]n insurer will be exposed to a judgment in excess of its policy limits only where there is some certainty regarding the settlement posture of the parties . . . . There must be some triggering event . . . that puts the insurer on notice that it must respond or risk liability for an excess judgment . . . . To find liability for tortious refusal to settle there must be something the insurer was required to "refuse."  $^{155}$ 

# F. Insured's Follow-Up With Insurer Necessary to Establish "Excusable Neglect" and Open Default

In *Wright v. Mann*, <sup>156</sup> Wright sued Mann over a car accident and served Mann on April 19, 2004. Mann claimed that she faxed the service documents to her insurer, but never confirmed that they were received. The insurer claimed it never received the documents, the complaint went unanswered, and the trial court entered a default judgment in favor of Wright. On July 12, 2004, Mann moved to set aside the default judgment. The trial court granted the motion based on excusable neglect, and Wright appealed. <sup>157</sup>

The court of appeals reversed the trial court's decision to set aside the default judgment, following *Ellis v. Five Star Dodge*. <sup>158</sup> which stated:

[A] defendant's unconfirmed belief that her insurer had timely received suit papers and was preparing a defense on the defendant's behalf is not sufficient to constitute excusable neglect that would authorize the trial court to set aside a default judgment . . . . [T]he defendant must demonstrate her own diligence and the insurer's assurance that it is handling the case. 159

Mann could not prove that she forwarded the documents or that she ensured the claim had been received and was being acted upon.

<sup>153.</sup> Brightman, 276 Ga. at 683, 580 S.E.2d at 519-20.

<sup>154.</sup> Kingsley, 353 F. Supp. 2d at 1251.

<sup>155.</sup> Id. at 1252.

<sup>156. 271</sup> Ga. App. 832, 611 S.E.2d 118 (2005).

<sup>157.</sup> Id. at 832, 611 S.E.2d at 119.

<sup>158. 242</sup> Ga. App. 474, 529 S.E.2d 904 (2000).

<sup>159.</sup> Wright, 271 Ga. App. at 833, 611 S.E.2d at 120 (citing Ellis, 242 Ga. App. at 476, 529 S.E.2d at 905).

Therefore, she failed to show either of the elements required under Ellis. <sup>160</sup>

#### IV. HOMEOWNER'S INSURANCE

Both the court of appeals, en banc, and the supreme court declined to review Judge Ruffin's opinion in Cunningham v. Middle Georgia Mutual Insurance Co., 161 which further limited the "business pursuits" exclusion in Georgia. 162 Heretofore, Georgia precedent 163 restricted business pursuits to the primary full-time vocation of the insured. Cunningham was ordinarily a roofing crew supervisor and quality control inspector who would fill in as a laborer only by necessity. 164 When a fire emanated from his pastor's home where he did a roofing job "as a favor," yet also for \$500 "to cover expenses," the court followed national precedent, holding that this was not his customarily engaged-in commercial activity, nor was it for profit. 165 His financial gain was a mere possibility and was not dispositive. 166 The court of appeals may have been tipped toward the insured on this issue, given the carrier's position that roofing was a "profession," which the court ultimately rejected. 167 The policy did not define that term, but it did define "business" as "'includ[ing] trade, profession[,] or occupation.'"168 This definition seemingly admitted that profession did not necessarily apply under such a vaguely written policy, thereby possibly losing some credibility with the court. 169

Nationally, the majority of states apply a two-part test when evaluating a business pursuit, which includes "continuity" and "profit motive." Persuasive precedent included a variety of "part-time" activities that were not deemed to be business pursuits. <sup>171</sup> Apparently, performing physical labor as a roofer was deemed a part-time commercial activity, which was not customarily engaged in by Cunningham, a

<sup>160.</sup> Id.

<sup>161. 268</sup> Ga. App. 181, 601 S.E.2d 382 (2004).

<sup>162.</sup> *Id.* at 183, 601 S.E.2d at 384.

<sup>163.</sup> See, e.g., Brown v. Peninsular Fire Ins. Co., 171 Ga. App. 507, 320 S.E.2d 208 (1984); S. Guar. Ins. Co. v. Duncan, 131 Ga. App. 761, 206 S.E.2d 672 (1974).

<sup>164.</sup> Cunningham, 268 Ga. App. at 184, 206 S.E.2d at 385.

<sup>165.</sup> Id.

<sup>166.</sup> Id.

<sup>167.</sup> Id. at 185, 206 S.E.2d at 385.

<sup>168.</sup> *Id* 

<sup>169.</sup> Id., 206 S.E.2d at 386.

<sup>170.</sup> David J. Marchitelli, Annotation, Construction and Application of "Business Pursuits" Exclusion Provision in General Liability Policy, 35 A.L.R. 5th 375, 411 (2005).

<sup>171.</sup> Cunningham, 268 Ga. App. at 183-84, 601 S.E.2d at 384-85.

supervisor. Perhaps if the activity had been "customarily engaged in" as Cunningham's "usual commercial activity," the profit motive test would have been met.<sup>172</sup> This opinion further weakens the business pursuits exclusion and requires a more in-depth factual analysis of the business activity sought to be deemed a business pursuit. The activity must be both customarily engaged in as the principal, usual commercial activity of the insured, and it must be for profit to satisfy the two-part test.<sup>173</sup>

Georgia courts continue to consistently enforce the "intentional act exclusion." In Harden v. State Farm Fire & Casualty Co., 174 the court of appeals applied the literal applicable terms of the insurance poli-The terms of the policy enforced the exclusion against an insured who was not accused of active misconduct in the form of sexual abuse of a child, but rather was charged with negligence in failing to properly supervise the victim, who was abused by the insured's husband. The controlling language in the policy stated that "the policy does not apply 'to bodily injury . . . which is either expected or intended by an insured [or to bodily injury] to any person . . . which is the result of willful and malicious acts of an insured." First, the court noted that the insured's husband entered an Alford<sup>178</sup> plea of guilt to child molestation, which was sufficient to establish a prima facie case of the applicability of the exclusion. 179 Ms. Harden simply did not rebut the prima facie evidence that sufficiently established the exclusion. 180 More importantly, the court rejected her claim that because the allegations against her sounded in negligence, the intentional act exclusion did not apply. 181 The court concluded that the key policy language, "the result of," barred any resulting claim "which has its genesis in or was 'the result of' those [intentional] acts." It was irrelevant that those intentional acts were the acts of another insured

<sup>172.</sup> Id. at 184, 601 S.E.2d at 385.

<sup>173.</sup> See Home Ins. Co. v. Aurigemma, 257 N.Y.S.2d 980 (1965), which is often cited as the originator of the two-part test.

<sup>174. 269</sup> Ga. App. 732, 605 S.E.2d 37 (2004).

<sup>175.</sup> Id. at 734, 605 S.E.2d at 38-39.

<sup>176.</sup> Id., 605 S.E.2d at 39.

<sup>177.</sup> Id. at 733, 605 S.E.2d at 38.

<sup>178.</sup> See North Carolina v. Alford, 400 U.S. 25 (1970). An Alford plea is one of guilt and can only be accepted by the court if there is a factual basis for a conclusion of guilt. Argot v. State, 261 Ga. App. 569, 571, 583 S.E.2d 246, 247 (2003).

<sup>179.</sup> Harden, 269 Ga. App. at 734, 605 S.E.2d at 38; see also State Farm Fire & Cas. Co. v. Moss, 212 Ga. App. 326, 327, 441 S.E.2d 809, 810 (1994).

<sup>180.</sup> Harden, 269 Ga. App. at 734, 605 S.E.2d at 38.

<sup>181.</sup> Id. at 734-35, 605 S.E.2d at 38-39.

<sup>182.</sup> Id. at 735, 605 S.E.2d at 39.

inasmuch as this particular policy exclusion applied to the acts "of an insured." This conclusion is consistent with established precedent, such as  $Sales\ v.\ State\ Farm\ Fire\ \&\ Casualty\ Co.,$  "84 which centered on the term "any" in the insured language and held that it created a joint obligation. 185

In Espanol v. Allstate Insurance Co., <sup>186</sup> we are again reminded that the exact text of the particular intentional act exclusion is often dispositive, and that Allstate Insurance Company ("Allstate") is establishing a very formidable court-tested intentional act exclusion in Georgia. <sup>187</sup> Allstate's insured, Churchwell, and his neighbors, the Espanols, had a series of confrontations, the last of which resulted in Churchwell shooting Francisco Espanol with a shotgun. <sup>188</sup> Before the shooting, Churchwell consumed twelve to eighteen light beers and Paxil, announcing, "I'm going to blow him in two." <sup>189</sup> He claimed he blacked out and had no recollection of the shooting. <sup>190</sup>

The court distinguished supreme court precedent, State Farm Insurance Co. v. Morgan, 191 in which a jury verdict was sustained in favor of the insured under analogous facts involving alcohol, drug abuse, and alleged resulting mental incapacity. However, in Espanol, Allstate's intentional act exclusion stated: "This exclusion applies even if: (a) such insured person lacks the mental capacity to appreciate the criminal nature or wrongfulness of the act or omission or to conform his or her conduct to the requirements of the law or to form the necessary intent under the law ...."193 Despite the very broadly written extension of the exclusion, which is not limited to "voluntary intoxication," the court expressly limited its holding in Espanol with respect to the inability to form intent caused by alcohol and took no position regarding the intent issue if caused by something other than voluntary intoxication. 194 Therefore, the practitioner should not only assess the facts of the particular claim, but should also consider the exact text of the particular intentional act exclusion that might be applicable because

<sup>183.</sup> Id. at 733, 605 S.E.2d at 38.

<sup>184. 849</sup> F.2d 1383 (11th Cir. 1988).

<sup>185.</sup> Id. at 1385.

<sup>186. 268</sup> Ga. App. 336, 601 S.E.2d 821 (2004).

<sup>187.</sup> See Schatz, supra note 1, at 257.

<sup>188.</sup> Espanol, 268 Ga. App. at 336, 601 S.E.2d at 821-22.

<sup>189.</sup> Id., 601 S.E.2d at 822.

<sup>190.</sup> Id. at 337, 601 S.E.2d at 822.

<sup>191. 258</sup> Ga. 276, 368 S.E.2d 509 (1988).

<sup>192.</sup> Id. at 276-77, 368 S.E.2d at 509-10.

<sup>193.</sup> Espanol, 268 Ga. App. at 338, 601 S.E.2d at 822-23.

<sup>194.</sup> Id. at 339-40, 601 S.E.2d at 824.

those particular terms are often outcome determinative in the intentional act context.

Although not strictly a homeowner's policy, we include in this discussion Western Pacific Mutual Insurance Co. v. Davies, 195 a home warranty case. The insurer's counsel seemed burdened with the vaguely written adhesion contract, which attempted to exclude virtually all risk of loss. 196 In such circumstances, ambiguous limited warranty language must be construed liberally in favor of the insured "in accordance with the reasonable expectations of the insured where possible." In Davies a warranty claim was submitted to Western Pacific Mutual Insurance Company ("Western Pacific") outside of the two-year warranty period when the insured first discovered termite infestation and moisture trapped in the walls. 198 The court of appeals went to great lengths to establish that moisture problems often do not occur until one to six years after completion of the home. 199 The court determined that the warranty provisions were ambiguous as to what the cause of the failure was or what a failure was, as neither term was defined by the policy.<sup>200</sup> The court looked to Georgia precedent, which, on the grounds of public policy, did not require the occupant to be placed in imminent risk of injury, and concluded that such an interpretation was repugnant to a contract of warranty.<sup>201</sup> Another purported exclusion for damage caused "directly or indirectly by insects" was dispatched as vague and ambiguous.<sup>202</sup> It appears that Western Pacific should either be more specific in its warranty language to spell out its intended restricted undertaking, or be less strident in its application of the terms of its present warranty, which is seemingly riddled with ambiguities.

## V. LIFE, HEALTH, AND DISABILITY INSURANCE

#### A. Life Insurance

In the life insurance context, litigants continue to learn that time limits are strictly enforced. In *Colonial Life & Accident Insurance Co.* 

<sup>195. 267</sup> Ga. App. 675, 601 S.E.2d 363 (2004).

<sup>196.</sup> Id. at 676, 601 S.E.2d at 365-66.

<sup>197.</sup> Id. at 681, 601 S.E.2d at 369 (quoting Home Ins. Co. v. Sunrise Carpet Indus., 229 Ga. App. 268, 271, 493 S.E.2d 641, 644 (1997)).

<sup>198.</sup> Id. at 675-76, 601 S.E.2d at 365.

<sup>199.</sup> *Id.* at 679, 601 S.E.2d at 368 n.2.

<sup>200.</sup> Id. at 677-78, 601 S.E.2d at 366-67.

<sup>201.</sup> Id. at 678-79, 601 S.E.2d at 367.

<sup>202.</sup> Id. at 679-80, 601 S.E.2d 368.

v. Heveder, 203 upon interlocutory appeal, the court of appeals rejected the claimant's "should have known better" argument regarding competing claims under a policy where O.C.G.A. section 33-24-41<sup>204</sup> required the claimant to provide written notice of a claim to the insurer before payment was made. However, this does not foreclose any claims the insured may have against the claimed wrongdoer. 206

#### B. Health Insurance

In Hospital Authority of Houston County v. Bohannon, 207 the insurance provider's "failure to communicate" with its premiums-paying enrollee, Bohannon, resulted in the insurance provider being forced to pay for a major misunderstanding regarding coverage for a stem cell transplant.<sup>208</sup> After an extended discussion about why the limitation on this benefit should have been included in the applicable 2004 document, the court of appeals concluded that the insurance provider did not notify its premiums-paying enrollees of a limitation on coverage for transplants.<sup>209</sup> Courts have routinely enforced policy provisions and limitations, as written in cases cited throughout this Article and elsewhere. The court in Bohannon, however, refused to accept the waiver and estoppel arguments, stating, "we conclude that [the Hospital Authority] cannot enforce a limitation of coverage absent evidence it provided this enrollee notice of the limitation."210 A lengthy and vigorous dissent was issued by Judge Andrews, wherein he disagreed that the Hospital Authority failed to communicate the coverage limitations to Bohannon.211 More importantly, he argued that doctrines of waiver and estoppel cannot be used to expand coverage that is not present, even when dealing with the potential life-prolonging or lifesaving treatment being sought and the need for its timely medical intervention.212

<sup>203. 274</sup> Ga. App. 377, 618 S.E.2d 39 (2005).

<sup>204.</sup> O.C.G.A. § 33-24-41 (2005).

<sup>205.</sup> Heveder, 274 Ga. App. at 378-80, 618 S.E.2d at 40-41.

<sup>206.</sup> Id. at 379-80, 618 S.E.2d at 41-42.

<sup>207. 272</sup> Ga. App. 96, 611 S.E.2d 663 (2005).

<sup>208.</sup> Id. at 101, 611 S.E.2d at 668.

<sup>209.</sup> *Id*.

<sup>210.</sup> Id. at 102, 611 S.E.2d at 669.

<sup>211.</sup> Id. at 106, 611 S.E.2d at 671 (Andrews, J., dissenting).

<sup>212.</sup> Id. at 107, 611 S.E.2d at 672 (Andrews, J., dissenting).

## C. Disability Insurance

Under the complex alternative claims advanced by the insured in Giddens v. Equitable Life Assurance Society of the United States ("Equitable"), 213 Judge Story comprehensively dealt with the "occupational defense," anticipating how the Georgia courts would construe the phrase "regular occupation." Dr. Giddens practiced general dentistry until 1994 when he sold his practice with the intent to open another dental office in Macon. However, his health deteriorated. He cancelled his dental malpractice insurance but retained his dental license until 1999. He then engaged in real estate development until 1999 when he became unable to do so. Subsequently, Dr. Giddens submitted two claims to Equitable, his disability carrier. The first claim was due to his 1995 physical disability that prevented him from continuing with his practice of dentistry. The second claim was for disability occurring in 1999 due to significant declines in health, including mental capacity. 215

Judge Story promptly dispatched the 1995 disability claim by reason of enforceable policy language, which required written proof of loss within ninety days of the end of the monthly period for which the carrier is sought to be liable. 216 Furthermore, the policy stated that no claim may be brought more than three years from the time written proof of loss was required. Additionally, Judge Story pointed out that the lawsuit was barred by the six-year general statute of limitations applicable to contracts in writing. 217 To the extent that a "recurrent disability" was raised dating back to the 1995 claim, the claim was deemed insufficient.<sup>218</sup> However, in a careful opinion following the record before it, the court ultimately granted the plaintiff's motion for partial summary judgment with respect to the 1999 claim for Equitable's failure to establish a factual record contesting Dr. Giddens's disability from either the profession of dentistry or that of real estate develop-To do so, Judge Story was required to consider the proper construction of the policy term regular occupation. As of 1999, Dr. Giddens had not practiced dentistry for five years, yet was claiming disability from that occupation. 220 While the Georgia courts have yet

<sup>213. 356</sup> F. Supp. 2d 1313 (N.D. Ga. 2004).

<sup>214.</sup> Id. at 1317.

<sup>215.</sup> Id. at 1319-20.

<sup>216.</sup> Id. at 1323.

<sup>217.</sup> Id. at 1323-24; O.C.G.A. § 9-3-24 (1982 & Supp. 2005).

<sup>218.</sup> Giddens, 356 F. Supp. 2d at 1324-25.

<sup>219.</sup> Id. at 1331-32.

<sup>220.</sup> Id. at 1319.

to consider whether or not a regular occupation requires the insured to be actively engaged in the occupation at the time of disability, the court followed national persuasive precedent to hold that the insured need not actively be engaged in his regular occupation in order to have that occupation. <sup>221</sup>

The court found a jury question when testing Equitable's motion for summary judgment. From a standpoint of purported bad faith, the court sided with Equitable, emphasizing that at the time it made its denial decision, the so-called "occupational defense" had not yet been sufficiently developed by the courts around the country. Hence, it could not be said that Equitable's refusal was either frivolous or unreasonable. Ultimately, Equitable's failure to contest medical evidence doomed it on the plaintiff's motion for partial summary judgment on the 1999 claim, which was granted by the court under analysis of either the occupation of dentistry or that of real estate development.

In *Kocer v. New York Life Insurance Co.*, <sup>226</sup> another practitioner of the healing arts was less fortunate in meeting policy terms. The insured's seeming flights from disciplinary action and a need to do something to make a living stymied his attempts to meet policy provisions warranting payment. <sup>227</sup> The opinion is further evidence of the enforceability of clear contract terms regarding time limits. <sup>228</sup>

## VI. MEDICAL MALPRACTICE

In *McBee v. Benjamin*, <sup>229</sup> the court of appeals imposed responsibility concerning appropriate tendering of suit papers to the carrier in the default context. <sup>230</sup> When Dr. McBee was sued, he tendered the suit papers to Sterling Medical Corporation ("Sterling") rather than to its and his carrier, Everest Indemnity Insurance Company ("Everest"). Although Sterling's regional manager assured Dr. McBee that the matter would be taken care of, Everest did not receive the tender until after the

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221. Id. at 1326.
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<sup>222.</sup> Id. at 1326-29.

<sup>223.</sup> *Id.* at 1329-30.

<sup>224.</sup> Id.

<sup>225.</sup> Id. at 1332.

<sup>226. 340</sup> F. Supp. 2d 1351 (N.D. Ga. 2004).

<sup>227.</sup> Id. at 1352-53.

<sup>228.</sup> Id. at 1359.

<sup>229. 272</sup> Ga. App. 567, 612 S.E.2d 802 (2005).

<sup>230.</sup> Id. at 570, 612 S.E.2d at 804.

case went in default. $^{231}$  Applying the abuse of discretion standard of review, the court of appeals affirmed. $^{232}$ 

The court squarely held that excusable neglect can only be established when the insured delivered the pleadings "to his insurance carrier" and also reasonably believed the carrier was taking the necessary steps to defend the suit.<sup>233</sup> This holding, that the tender must be to the insurance carrier, is consistent with Georgia precedent.<sup>234</sup> Additionally, the court distinguished precedent on the grounds that Dr. McBee, upon learning of a default judgment, had no satisfactory explanation for a delay of almost a month in the filing of a motion that is time sensitive.<sup>235</sup> Opening a default can be very difficult. Promptness in doing so has long been appreciated and required. However, this court's brightline rule regarding to whom the insured must tender an order for it to possibly constitute excusable neglect now requires direct tender to the carrier.<sup>236</sup>

<sup>231.</sup> Id. at 568, 612 S.E.2d at 803.

<sup>232.</sup> Id. at 569, 612 S.E.2d at 803.

<sup>233.</sup> Id., 612 S.E.2d at 804 (emphasis in original).

<sup>234.</sup> *Id. See, e.g.*, Pinehurst Baptist Church v. Murray, 215 Ga. App. 259, 450 S.E.2d 307 (1994); Sears, Roebuck & Co. v. Ramey, 170 Ga. App. 873, 318 S.E.2d 740 (1984); Powell v. Eskins, 193 Ga. App. 144, 387 S.E.2d 389 (1989).

<sup>235.</sup> McBee, 272 Ga. App. at 570, 612 S.E.2d at 804.

<sup>236.</sup> Id. at 569, 612 S.E.2d at 804.