

Insurance

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I. INTRODUCTION

For the second year in a row, Georgia appellate courts have emphasized that even if the slightest doubt exists as to whether a liability insurance policy provides coverage for a loss, an insurer should provide a defense to the insured for the lawsuit or face potentially detrimental consequences out of the insurer's control, which the insurer will have little or no ability to alter after a judgment has been rendered against the insured. Several other recent decisions have made significant changes to insurance law as well. Some of the decisions indicate that it is becoming increasingly difficult for an insurer to prevail on the defense of a lack of timely notice as a matter of law. In other cases, the courts have interpreted the phrases "arising out of" and "using" in insurance policies very broadly to find coverage. In one interesting case, a divided court of appeals upheld the enforceability of appraisal provisions in auto policies, distinguishing them from invalid arbitration clauses and further

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held that an insurer's payment of the appraised value of the auto precluded claims of fraud, breach of contract, and RICO violations.

In other insurance developments, Georgia's Insurance Commissioner promulgated emergency regulations barring an insurance company from using a twelve-month suit limitation and imposing two years as the minimum time for bringing suit on a policy. These emergency regulations have changed the longstanding prior practice that had been consistently enforced by the courts.

II. COMMERCIAL LIABILITY INSURANCE

A. *Insurers Can Be Bound By Acts of Dual Agent and Have Duty to Defend Even Though Undisputed Facts Show No Duty to Indemnify*

In *Yeomans & Associates Agency, Inc. v. Bowen Tree Surgeons, Inc.*,¹ the Georgia Court of Appeals tackled two noteworthy issues: (1) an agent's relationship to an insurer under the dual agency doctrine and (2) an insurer's duty to defend an insured against groundless allegations, even though it is undisputed that the company will have no duty to indemnify under the policy at the conclusion of the lawsuit.² The insured, Bowen, and its employee, Black, were sued for Black's alleged negligence in causing a collision. The suit alleged that Black was acting within the scope of his employment at the time of the collision, making Bowen liable under the doctrine of respondeat superior. However, the undisputed "true fact" was that Black was driving his own car on personal business outside the scope of his employment when the collision occurred. Bowen provided notice of the lawsuit to its independent insurance agency, Yeomans. Bowen had auto liability insurance and commercial general liability insurance. The agent notified the auto liability carrier of the suit but did not provide any notice to the commercial general liability carrier, Canal Indemnity Company. In the past, when Yeomans received a claim from Bowen that could be covered under Canal's policy, Yeomans would forward the claim to the brokerage firm that had issued the policy on behalf of Canal, and the brokerage firm would then send the claim to Canal. In this case, however, Canal did not receive notice from Yeomans and therefore did not provide a defense for this lawsuit. In addition, the auto liability carrier disclaimed coverage.³ As a result, the trial court entered a default judgment against Bowen and Black. Bowen then filed suit against Yeomans and

1. 274 Ga. App. 738, 618 S.E.2d 673 (2005).

2. *Id.* at 740-42, 618 S.E.2d at 677-78.

3. *Id.* at 738-40, 618 S.E.2d at 675-76.

Canal for failing to provide coverage and a defense, seeking the amount of the default judgment plus attorney fees and bad faith penalties. After a jury trial, the court entered a judgment against Yeomans and Canal for joint and several liability in the amount of \$1,550,000.⁴

With respect to the dual agency doctrine, Canal contended that it was entitled to a directed verdict because no agency relationship existed between Canal and Yeomans.⁵ The court disagreed, holding that the evidence presented at trial justified the jury finding an agency relationship between Yeomans and Canal.⁶ The court also held that Canal received constructive notice of the claim because Yeomans received notice of the claim from Bowen.⁷ The court so ruled despite the fact that, as Judge Andrews pointed out in his dissent (joined by Judge Johnson), Yeomans had no contractual relationship with Canal authorizing Yeomans to accept notice on Canal's behalf.⁸ Instead, Yeomans had a contract with Canal's broker, had obtained coverage only through the broker and not through Canal directly, and in the past had sent notices of claims to the broker, not Canal.⁹ In ruling in Bowman's favor, the court focused on Yeomans's role as a dual agent for the insured and insurer.¹⁰ Because the evidence demonstrated that Yeomans had accepted premiums and notices of claims on Canal's behalf in the past, and because no evidence indicated that Canal had ever objected to this "custom," a jury question existed as to the extent of Yeomans's authorization to accept notices of claims on Canal's behalf "as a fiduciary and a dual agent."¹¹

Yeomans has serious potential ramifications for insurers who disclaim coverage on the basis of the insured's breach of the timely notice condition. If there is even the slightest indication that an independent agent has sent notice or premiums to the insurer or the insurer's broker in the past which were accepted by the insurer without any objection,

4. *Id.* at 740-41, 618 S.E.2d at 676-77. Canal's exposure was limited under the judgment to \$1 million based upon prior agreement with the plaintiff. *Id.* at 741 n.2, 618 S.E.2d at 677 n.2.

5. *Id.* at 746, 618 S.E.2d at 680. The court of appeals had previously held that Canal was not entitled to summary judgment on this same issue in *Bowen Tree Surgeons, Inc. v. Canal Indemnity Co.*, 264 Ga. App. 520, 591 S.E.2d 415 (2003), which was discussed in our 2004 insurance survey article. See Stephen M. Schatz, Bradley S. Wolff & Stephen L. Cotter, *Insurance*, 56 MERCER L. REV. 253, 269 (2004).

6. *Yeomans*, 274 Ga. App. at 746, 618 S.E.2d at 680.

7. *Id.*

8. *Id.* at 754, 618 S.E.2d at 685 (Andrews, P.J., dissenting).

9. *Id.*, 618 S.E.2d at 685-86.

10. *Yeomans*, 274 Ga. App. at 746, 618 S.E.2d at 680.

11. *Id.* at 745-46, 618 S.E.2d at 680.

then the court will likely conclude that a question of fact exists as to whether the agent is a dual agent. Under such circumstances, insurers would be better served by providing a defense under a reservation of rights and bringing a declaratory judgment action on the issue of whether any agency relationship exists. If the jury concludes that an agency relationship exists, then the insurer can pursue a separate action against the agent for its failure to provide the insurer actual notice of the claim.¹²

With respect to the second issue—an insurer’s broad duty to defend its insured—Canal’s policy excluded bodily injury that arose out of the use of an automobile by any “insured” (“the auto exclusion”). The policy defined “insured” as an employee of the named insured (Bowen) if the employee (Black) was acting within the scope of his employment at the time of the “occurrence” (the collision). It was undisputed that Black was not acting within the scope of his employment with Bowen at the time of the collision and was not an “insured” under the policy.¹³ Therefore, the court concluded that the auto exclusion did not apply, and Canal had a duty to defend Bowen because the plaintiffs had alleged bodily injury caused by an occurrence in their complaint.¹⁴ The court so held despite the fact that none of this would be at issue if the underlying case had not gone into default. If there were no default judgment, Bowen would not have been liable under the doctrine of respondeat superior, and therefore Canal would have had no duty to indemnify Bowen under the policy.¹⁵ In doing so, the court emphasized that an insurer’s duty to defend is separate from its duty to indemnify under the policy, and the insurer must consider whether the alleged claim falls within policy coverages, regardless of whether the insured could actually be held liable to the plaintiffs.¹⁶ Also important to the court’s decision was the insurer’s duty to conduct a “reasonable investigation” into the insured’s contentions to determine whether a duty to defend had been triggered.¹⁷ Therefore, even though the four corners

12. For a good discussion of the dual agency doctrine in Georgia, see *Home Materials, Inc. v. Auto-Owners Insurance Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983). “Dual agency is proper where the agency is known to the principals and the principals do not repudiate it. Further, dual agency does not in and of itself relieve the agent of responsibility to either of the principals.” *Id.* at 602, 300 S.E.2d at 142.

13. *Yeomans*, 274 Ga. App. at 742, 618 S.E.2d at 678.

14. *Id.*

15. *Id.* at 742-43, 618 S.E.2d at 678.

16. *Id.* at 742, 618 S.E.2d at 678 (citing *Penn-Am. Ins. Co. v. Disabled Am. Veterans*, 224 Ga. App. 557, 563, 481 S.E.2d 850, 852 (1997)).

17. *Id.* at 745, 618 S.E.2d at 680 (citing *Colonial Oil Indus. v. Underwriters*, 268 Ga. 561, 562, 491 S.E.2d 337, 338-39 (1997)).

of the complaint indicated that the auto exclusion should apply, Canal's duty to defend was triggered when Bowen told Yeomans that Black was not acting within the scope of his employment.¹⁸

Judge Blackburn's dissent suggests that the decision does not give due consideration to the intent of the insured and insurer as reflected by the clear and unambiguous language of the auto exclusion.¹⁹ Neither Bowen nor Canal should have reasonably expected coverage under the commercial general liability policy because the alleged injury occurred outside the scope of Black's employment while he was in his personal automobile.²⁰ Instead, the parties would reasonably expect for coverage to fall entirely under Black's personal auto liability policy.²¹

Despite Judge Blackburn's dissent, *Yeomans* provides a clear warning to insurers as to how they should proceed in such claims in the future. An insurer should provide a defense to the insured under a reservation of rights. As pointed out by the court, this course of action gives the insurer the opportunity to prove that the insured was not liable under respondeat superior, thereby satisfying the insurer's "duty to seek that favorable decision on its insureds' behalf."²² If the jury (or court on motion for summary judgment) agrees that the driver was not acting within the scope of his employment, then the insured employer will not be held liable, and the insurer will have no duty to indemnify and will have incurred only the cost of defense. If, on the other hand, the jury determines that the driver was acting within the scope of his employment, then the auto exclusion will apply to prevent any duty to indemnify the insured for an adverse verdict. The insurer should also make sure the driver's personal liability carrier is on notice of the claim because in the event the driver was not acting within the scope of his employment, the personal auto policy typically will provide primary coverage.

B. Insurance Broker's Liability Limited by Policy Limits

In *J. Smith Lanier & Co. v. Southeastern Forge, Inc.*,²³ the Georgia Supreme Court held that an insurance broker cannot be held liable for damages suffered by a client in excess of the policy limits based upon the

18. *Id.*, 618 S.E.2d at 679-80.

19. *Id.* at 755, 618 S.E.2d at 686 (Blackburn, P.J., dissenting).

20. *See id.* at 756-57, 618 S.E.2d at 687.

21. *See id.*

22. *Yeomans*, 274 Ga. App. at 743, 618 S.E.2d at 678 (citing *Penn-Am.*, 224 Ga. App. at 558-59, 481 S.E.2d at 851).

23. 280 Ga. 508, 630 S.E.2d 404 (2006).

broker's breach of contract to obtain insurance coverage.²⁴ Last year, prior to this holding, the court of appeals in *J. Smith Lanier & Co. v. Acceptance Indemnity Insurance Co.*²⁵ held that a broker's liability for failing to procure coverage for an insured was not limited to the amount of the policy limits that were the subject of the failure to procure a coverage claim.²⁶ In *Southeastern Forge*, the Georgia Supreme Court reversed that ruling.²⁷ Southeastern Forge, Inc. ("Southeastern") was a client of J. Smith Lanier ("Lanier"), an independent insurance broker who agreed to procure commercial general liability insurance for Southeastern. When applying for the insurance, Lanier failed to list a prior loss involving Southeastern. After the policy was issued, a Southeastern product caused serious injuries that resulted in a lawsuit and subsequent settlement well in excess of the policy limits. Meanwhile, the insurer learned of the prior loss and obtained a judgment that its policy was void *ab initio*, leaving Southeastern without adequate insurance coverage and facing a large uninsured loss. Southeastern sued Lanier, seeking the total amount of its uninsured loss.²⁸

The supreme court noted, "Under Georgia law, the potential liability of an insurance broker is limited to the terms of the insurance policy it negligently failed to procure."²⁹ Therefore, if Lanier were to be found to have breached its agreement to obtain insurance coverage, Southeastern could not recover any more than the liability limits of the policy Lanier had agreed to procure.³⁰ The supreme court held that the court of appeals had erroneously equated the measure of damages for the broker to that of an insurer who is liable for damages in excess of policy limits for its bad faith refusal to settle a claim.³¹

It is important to note that there was no dispute that the broker was solely the insured's agent and not a dual agent for the purposes of obtaining insurance. If the broker or agent had authority to bind insurance on behalf of the insurer, the outcome may have been different. If such an agent has knowledge of a prior loss or some other material fact, that knowledge may affect whether the application for insurance would be accepted or whether the policy would have been issued in a different form or at a different premium. In that situation, a question

24. *Id.* at 508, 630 S.E.2d at 405.

25. 272 Ga. App. 789, 612 S.E.2d 843 (2005).

26. *Id.* at 797-98, 612 S.E.2d at 851.

27. 280 Ga. at 508, 630 S.E.2d at 405.

28. *Id.* at 508-09, 630 S.E.2d at 405-06.

29. *Id.* at 509, 630 S.E.2d at 406.

30. *Id.* at 510-11, 630 S.E.2d at 407.

31. *Id.* at 510, 630 S.E.2d at 407.

of fact will exist as to whether the insurer is deemed to have constructive knowledge of that material fact. If the insurer has constructive knowledge of that material fact, it is prohibited from voiding the policy *ab initio*,³² and the insurer's recourse is a suit against the agent for its failure to notify the insurer of the material fact.

C. "Arising Out Of" Language Interpreted Broadly in Determining Additional Insured Coverage

In *Ryder Integrated Logistics, Inc. v. Bellsouth Telecommunications, Inc.*,³³ the Georgia Court of Appeals demonstrated how broadly it will interpret the phrase "arising out of operations" in determining whether a person or entity qualifies as an additional insured under a commercial general liability policy.³⁴ A Ryder employee was injured while working at a Bellsouth facility pursuant to a contract between Ryder and Bellsouth. The claimant sued Bellsouth, alleging that the employee was injured as a result of Bellsouth's sole negligence in failing to maintain the premises. Bellsouth did not dispute that the claim was based upon its sole negligence nor did Bellsouth contend that Ryder did anything to contribute to the alleged injuries. Bellsouth tendered a defense to Ryder and Ryder's commercial general liability carrier, Republic. The contract between the parties required Ryder to obtain commercial general liability coverage in which Bellsouth would be named as an additional insured with respect to work performed under the agreement. Republic's commercial general liability policy contained an additional insured endorsement that named as an insured any organization for which Ryder was obligated by written agreement to provide liability insurance, "but . . . only with respect to liability arising out of [Ryder's] operations."³⁵

Ryder and Republic argued that no liability arose out of Ryder's operations because (1) the complaint alleged that Bellsouth was solely negligent in maintaining the premises and (2) maintenance of the premises was not part of Ryder's operations. Ryder and Republic concluded by arguing that Bellsouth should not be afforded additional insured coverage for the claim.³⁶ The court disagreed.³⁷ It held that "arising out of your operations" meant arising out of a "business transaction" or work performed by Ryder, regardless of whether Ryder's

32. See, e.g., *Jarriel v. Preferred Risk Mut. Ins. Co.*, 115 Ga. App. 136, 138-39, 270 S.E.2d 238, 241 (1980).

33. 277 Ga. App. 679, 627 S.E.2d 358 (2006), cert. granted.

34. *Id.* at 685, 627 S.E.2d at 364.

35. *Id.* at 684, 627 S.E.2d at 363 (omission in original).

36. *Id.*

37. *Id.*

work or the business transaction itself was responsible for the injuries.³⁸ Because the claimant was a Ryder employee performing work at the Bellsouth facility pursuant to Ryder's "business transaction"—that is, pursuant to the contract with Bellsouth—Bellsouth qualified as an additional insured under the policy.³⁹ The court adopted the majority rule from other jurisdictions, which has been articulated as "where as here, the insurer grants coverage for liability 'arising out of' the named insured's work, the additional insured is covered without regard to whether the injury was attributable to the named insured or the additional insured."⁴⁰ In particular, the court cited with approval a California case which concluded that "[t]he fact that the defect [that caused the injury] was attributable to [the additional insured's] negligence is irrelevant, since the policy language does not purport to allocate coverage according to fault."⁴¹

This case shows how broadly the court of appeals will interpret "arising out of operations" to find additional insured coverage. While Georgia courts have historically interpreted "arising out of" language in an insurance policy broadly, they have also held that the phrase requires a causal nexus between the wrongful conduct and the injury alleged.⁴² In *Carver v. Empire Fire & Marine Insurance Co.*,⁴³ the court noted, "In reviewing an insurance policy, [the Georgia] Supreme Court has interpreted an event 'arising out of' a person's action to constitute an event that would not have occurred but for the person's action."⁴⁴ In fact, during the same timeframe addressed by this survey, the court of appeals again applied the "but for" analysis in interpreting the phrase "arose out of" in the context of a professional liability insurance policy

38. *Id.* at 684-85, 627 S.E.2d at 363-64.

39. *Id.*, 627 S.E.2d at 363.

40. *Id.* at 685, 627 S.E.2d at 364.

41. *Id.* (quoting *Acceptance Ins. Co. v. Syufy Enters.*, 69 Cal. App. 4th 321, 328-29 (1999)) (alterations in original). For a good overview of cases throughout the country that have held that similar language provides coverage to an additional insured for its own negligence, see *McIntosh v. Scottsdale Insurance Co.*, 992 F.2d 251 (10th Cir. 1993). See also *Merchants Ins. Co. of N.H. v. U.S. Fidelity & Guar. Co.*, 143 F.3d 5, 10 (1st Cir. 1998) (finding a general contractor covered as an additional insured with regard to injury suffered by subcontractor employee because the injury "arose out of" subcontractor's operations, even though injury was due to the general contractor's negligence); *Cincinnati Ins. Co. v. Dawes Rigging & Crane Rental, Inc.*, 321 F. Supp. 2d 975 (C.D. Ill. 2004).

42. See, e.g., *Jefferson Ins. Co. of N.Y. v. Dunn*, 269 Ga. 213, 496 S.E.2d 696 (1998); *Cont'l Cas. Co. v. HSI Fin. Servs., Inc.*, 266 Ga. 260, 466 S.E.2d 4 (1996); *Carver v. Empire Fire & Marine Ins. Co.*, 270 Ga. App. 100, 605 S.E.2d 842 (2004); *Pilz v. Monticello Ins. Co.*, 267 Ga. App. 370, 599 S.E.2d 220 (2004).

43. 270 Ga. App. 100, 605 S.E.2d 842 (2004).

44. *Id.* at 102-03, 605 S.E.2d at 844-45.

in *Fidelity National Title Insurance Co. v. OHIC Insurance Co.*⁴⁵ However, the court in *Ryder* has arguably removed the requirement of a causal connection between the named insured's product, conduct, or business transaction and the injury, and replaced it with the requirement that there be any connection. The fact that the injured person was a Ryder employee and the fact that a contract existed between Bellsouth and Ryder was sufficient for the court to find a connection, even though Ryder's operations had no causal connection to the alleged injury.⁴⁶ If that is indeed what the court intended by its holding, it may lead to coverage for an additional insured in situations where neither the insurer nor the named insured ever intended there to be additional insured coverage. For example, if a named insured distributor entered into a contract with a retailer to supply merchandise to the retailer's store, and merchandise supplied by the named insured to the retailer fell on a customer's head as a direct result of how the retailer stacked it on a shelf, the retailer may rely on *Ryder* to argue that the contract with the distributor was a sufficient connection to qualify the retailer as an additional insured. Because the supreme court has granted certiorari,⁴⁷ the reader can anticipate that its ruling will be addressed in next year's survey article.

D. Timeliness of Notice to Insurer after Default Judgment Entered

In last year's annual survey,⁴⁸ we discussed the court of appeals decision in *Auto-Owners Insurance Co. v. Karan, Inc.* ("*Karan I*"),⁴⁹ which dealt with the breach of a timely notice condition in a commercial general liability policy. The decision stood for the proposition that an insured has breached the timely notice condition in a commercial general liability policy, as a matter of law, when (1) a default judgment against the insured is entered before the insured provides notice of the suit to the insurer and (2) there remains no question of fact that the insured had no viable excuse.⁵⁰ During this year's annual survey period, the Georgia Supreme Court reversed that decision in *Karan, Inc. v. Auto-Owners Insurance Co.* ("*Karan II*").⁵¹

45. 275 Ga. App. 55, 60, 619 S.E.2d 704, 707 (2005).

46. *Ryder*, 277 Ga. App. at 684-85, 627 S.E.2d at 363.

47. *Ryder Integrated Logistics, Inc. v. Bellsouth Telecomm., Inc.*, No. S06G1133, 2006 Ga. LEXIS 493, at *1 (July 14, 2006).

48. Stephen M. Schatz, Bradley S. Wolff & Stephen L. Cotter, *Insurance*, 57 MERCER L. REV. 221, 226-28 (2005).

49. 272 Ga. App. 620, 612 S.E.2d 920 (2005).

50. *Id.* at 622-23, 612 S.E.2d at 922.

51. 280 Ga. 545, 548, 629 S.E.2d 260, 264 (2006).

In *Karan II*, the insured failed to notify its liability insurer of the lawsuit brought against it until after a default judgment had already been entered in the case. The policy required the insured to notify its carrier of a lawsuit “as soon as practicable.”⁵² In response to the default judgment, the insured filed a motion to open the default on the grounds of insufficiency of service, but the state court denied the motion.⁵³ 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, consequently, collaterally estopped the insured from arguing that service was not proper as a valid excuse for failing to provide timely notice. Because the insured was left without any viable excuse for not notifying the insurer before default judgment was entered, the insured’s notice was untimely as a matter of law.⁵⁴ When the case came before the Georgia Supreme Court, the court held that “the [Georgia] Court of Appeals had misapplied the principles of *res judicata* and collateral estoppel to preclude inquiry into the issue of whether the insured provided timely notice.”⁵⁵ The supreme court explained, “The issue sought to be precluded must *actually have been litigated and decided in the first action* before collateral estoppel would bar it from being considered in the second action, or the issue *necessarily had to be decided in order for the previous judgment to have been rendered.*”⁵⁶ Because the issue of whether notice was timely was not decided by the entry of the default, and because the issue of timely notice did not necessarily have to be decided in order to enter the default, a question of fact still remained whether the insured had a viable excuse for not providing the insurer with notice until after default judgment was entered.⁵⁷

E. *Extent of Insured’s Duty to Provide Notice*

In *Federated Mutual Insurance Co. v. Ownbey Enterprises, Inc.*,⁵⁸ the Georgia Court of Appeals held that because the language of an insurance policy was ambiguous, the insured had no affirmative duty to make sure that its commercial general liability insurer actually received the notice of a lawsuit that the insured provided to its agent.⁵⁹ After a lawsuit

52. *Id.* at 545, 629 S.E.2d at 262.

53. *Id.*

54. *Karan I*, 272 Ga. App. at 623, 612 S.E.2d at 922.

55. *Karan II*, 280 Ga. at 545, 629 S.E.2d at 262.

56. *Id.* at 547, 629 S.E.2d at 263.

57. *Id.*

58. 278 Ga. App. 1, 627 S.E.2d 917 (2006), *cert. denied.*

59. *Id.* at 6, 627 S.E.2d at 921.

was served upon the insured corporation, the corporation mailed a copy of the suit to its agent at the address shown on the agent's business card. Both the agent and insurer denied receiving the notice. No answer was filed, and a default judgment was awarded. The commercial general liability policy contained a notice condition that stated if a claim is made or suit is brought, the insured "must see to it that . . . [the insurer] receive[s] written notice of the claim or 'suit' as soon as practicable."⁶⁰ In reliance on the "must see to it" language, the insurer contended that the insured was obligated to follow up with the insurer to confirm that suit papers were in fact received.⁶¹ The court disagreed, holding that the phrase was ambiguous because it is subject to more than one reasonable interpretation.⁶² The court reasoned that on the one hand, the phrase may be read to require the insured to "see to it" that the insurer received the written notice, but on the other hand, it can be read to require the insured to "see to it" that the notice of the suit is in writing.⁶³ The court concluded that because of the ambiguity, the language must be read to require that the insured "see to it" that the notice is in writing.⁶⁴ This decision follows the court's trend to enforce the notice condition as clearly and unambiguously written, and to reject attempts to interpret the language to place a greater duty upon the insured than the policy intended. The fact that the court found no other case in the country in which an insurer presented this rather unique argument likely influenced its decision.⁶⁵

III. AUTOMOBILE INSURANCE LAW

A. Appraisal Provisions

In *McGowan v. Progressive Preferred Insurance Co.*,⁶⁶ a divided court of appeals upheld the enforceability of the appraisal provisions commonly found in Georgia automobile insurance policies.⁶⁷ The court further held that the insurers' payment of the full appraised value of the

60. *Id.* at 4, 627 S.E.2d at 920. This policy language is common in commercial general liability policies and is found in CGL cover forms written by Insurance Services Offices, Inc. ("ISO").

61. *Id.*

62. *Id.* at 6, 627 S.E.2d at 921 (citing *Ga. Farm Bureau Mut. Ins. Co. v. Meyers*, 249 Ga. App. 322, 324, 548 S.E.2d 67, 69 (2001)).

63. *Id.*

64. *Id.*, 627 S.E.2d at 922.

65. *Id.*, 627 S.E.2d at 921.

66. 274 Ga. App. 483, 618 S.E.2d 139 (2005).

67. *Id.* at 486, 618 S.E.2d at 143.

insureds' automobiles mooted the insureds' claims for fraud, breach of contract, and RICO violations.⁶⁸ Three cases were brought by different insureds against their respective automobile insurers after each insured's vehicle was rendered a total loss and after each insurer paid (or offered) compensation for the property loss. Each lawsuit named CCC Information Services as a defendant, based upon the plaintiffs' allegation that each insurer based its property valuation upon inaccurate figures provided by CCC and that the insurers and CCC conspired to deliberately undervalue their property losses. Each suit was filed as a purported class action.⁶⁹

During the litigation, the trial court ordered an appraisal of the plaintiffs' vehicles in accordance with the appraisal provision of each insurer's policy. The appraisals were done and in each instance resulted in a valuation higher than originally determined by the insurer. The insurers paid the difference in the amount of loss. The trial court then held that all claims raised by plaintiffs had been mooted by payment of the appraised valuation of the vehicles because all claims made in the complaints arose out of the dispute over valuation.⁷⁰

On appeal, the plaintiffs claimed that the trial court had erroneously enforced the appraisals and allowed them to be determinative because enforcing the provisions converted them into arbitration provisions in violation of Official Code of Georgia Annotated ("O.C.G.A.") section 9-9-2(c)(3),⁷¹ which prohibits the enforcement of arbitration provisions in insurance policies.⁷² The court of appeals rejected this argument, holding that an appraisal is not equivalent to arbitration, primarily because an appraisal is a determination of the amount of a loss pursuant to a contractual agreement as to the method for resolution and is not the equivalent of an award, which could encompass questions of law and a determination of liability.⁷³ The court of appeals further affirmed the trial court's holding that fulfillment of the appraisal clause mooted all other claims that arose out of the allegedly improper valuations, despite the fact that the insureds had to file suit in order to recover the full amount of their losses.⁷⁴

68. *Id.* at 494, 618 S.E.2d at 148-49.

69. *Id.* at 483, 618 S.E.2d at 141.

70. *Id.* at 485, 618 S.E.2d at 143 (citing *Eberhardt v. Ga. Farm Bureau Mut. Ins. Co.*, 223 Ga. App. 478, 477 S.E.2d 907 (1996)); *see also* *S. Gen. Ins. Co. v. Kent*, 187 Ga. App. 496, 370 S.E.2d 663 (1998).

71. O.C.G.A. § 9-9-2(c)(3) (Supp. 2006).

72. *McGowan*, 274 Ga. App. at 486, 618 S.E.2d at 143.

73. *Id.* at 486-87, 618 S.E.2d at 143-44.

74. *Id.* at 491-94, 618 S.E.2d at 146-49.

The dissent, authored by Judge Barnes and joined by Judges Ellington and Bernes, took issue with the majority's holding that the claims related to the insurers' alleged conspiracy and bad faith in the claims resolution process could not survive the payment of the full amount of the property loss.⁷⁵ As succinctly stated by Judge Barnes:

An insured whose insurer systematically and fraudulently undervalues insured vehicles, only paying fair market value when the insured invokes a contractual appraisal clause, states a claim for relief that should not be dismissed on the insurer's motion. If it could be so dismissed, then an insurance company could consistently undervalue all of its claims, only pay full value to those insureds who have the time and resources to persevere through an additional procedural level, and never have to account to its underpaid customers.⁷⁶

The Georgia Supreme Court granted certiorari on February 13, 2006.⁷⁷ In its order, the supreme court identified those issues raised by the dissent as the issues that "particularly concerned" the court: "Whether the [Georgia] Court of Appeals correctly held that invocation of the appraisal clause in the insurance policies in this case mooted claims of fraud, breach of contract, and RICO asserted against the insurers."⁷⁸ Oral arguments were heard in October 2006.

B. What Is "Use" of a Vehicle?

The standard automobile insurance policy includes within the definition of "insured" any person "using" a covered vehicle. Whether a passenger who is merely riding in a covered vehicle at the time it is involved in a collision is "using" the vehicle became a question of first impression for the Georgia courts in *Padgett v. Georgia Farm Bureau Mutual Insurance Co.*⁷⁹

Padgett was a passenger in a vehicle being driven by a co-worker, Walker, and owned by Walker's father, their mutual employer. A collision occurred while Walker and Padgett were returning to a job site after running errands. The driver of the other vehicle, Caravella, sued Walker, Walker's father, and Padgett for injuries sustained in the collision. The claim against Padgett alleged that Padgett negligently entrusted the vehicle to Walker.⁸⁰

75. *Id.* at 495, 618 S.E.2d at 149 (Barnes, J., dissenting).

76. *Id.*

77. *McGowan v. Progressive Preferred Ins. Co.*, No. S05G2086, 2006 Ga. LEXIS 124, at *1 (Feb. 13, 2006).

78. *Id.*

79. 276 Ga. App. 796, 797, 625 S.E.2d 76, 77 (2005).

80. *Id.* at 796, 625 S.E.2d at 76-77.

Padgett sought a defense from Georgia Farm, which insured the Walker vehicle. Georgia Farm brought a declaratory judgment action, seeking a determination that Padgett was not an insured under the policy. The trial court agreed with Georgia Farm and granted it summary judgment.⁸¹

The court of appeals reversed, holding that the term “using,” which was not defined in the policy, is ambiguous and thus must be construed against Georgia Farm.⁸² The ambiguity, according to the court, lies in the fact that “using” could be understood to mean “operating,” but it could also mean “employing a vehicle for transportation.”⁸³ In fact, the court noted that the majority of other jurisdictions that have decided this question have held that a vehicle is being “used” by one who is traveling in it, even if that person is not operating the vehicle.⁸⁴ Because Georgia Farm drafted the insurance policy, the court construed the ambiguity in favor of Padgett and reversed the trial court’s summary judgment.⁸⁵

IV. UNINSURED MOTORIST CASES

A. Proration of Policy Limits

A recurrent issue in uninsured motorist (“UM”) cases is the question of priority among stackable policy limits. Application of the rules continues to confuse trial courts, and as illustrated below, new situations call for new rules.

1. Proration Not Allowed Under Georgia Law. In *Continental Insurance Co. v. Southern Guaranty Insurance Co.*,⁸⁶ a trial court once again failed to adhere to the unambiguous Georgia rule that UM insurance coverage is never prorated between carriers.⁸⁷ Instead, the law requires that one UM carrier must be primary and the other or others must be attributed with lower priority in a series.⁸⁸ In *Nationwide Mutual Insurance Co. v. Progressive Bayside Insurance Co.*,⁸⁹ the

81. *Id.*, 625 S.E.2d at 76.

82. *Id.* at 797-98, 625 S.E.2d at 77-78.

83. *Id.* at 798, 625 S.E.2d at 78.

84. *Id.*

85. *Id.*

86. 193 Ga. App. 395, 388 S.E.2d 16 (1989).

87. *Id.* at 396, 388 S.E.2d at 18.

88. *Id.* at 395-96, 388 S.E.2d at 17 (citing *Ga. Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 255 Ga. 166, 167, 336 S.E.2d 237, 238 (1985)); *see also* *Great Divide Ins. Co. v. Safeco Ins. Co.*, 260 Ga. App. 531, 532, 580 S.E.2d 313, 314 (2003).

89. 278 Ga. App. 73, 628 S.E.2d 177 (2006).

insured maintained UM policies with two different companies covering three different vehicles. The Progressive policy insured a motorcycle, which was the vehicle involved in the collision underlying the case. Nationwide's policy insured two automobiles. When the insured made a claim against both insurers seeking compensation for injuries he sustained in a collision, Nationwide filed a complaint for declaratory judgment against the insured and Progressive. Both insurers agreed that their coverage applied to the collision, but they disagreed as to how the coverage should be prioritized. Progressive argued that the coverage from each policy should be added together and prorated according to the ratio of policy limits to the total UM coverage available. The trial court agreed with Progressive and granted it summary judgment, declaring a proration between the two insurance companies.⁹⁰

The court of appeals reversed.⁹¹ After stating that proration of coverage between UM carriers was inappropriate,⁹² the court recited the two tests which are most commonly used to determine priority among carriers: (1) the "receipt of premium" test and (2) the "more closely identified with" test.⁹³ Neither test was determinative in this case, however, because the injured party was the named insured and the payor of premiums for both policies.⁹⁴ The court therefore looked to the circumstances of the collision, and because the insured was injured while operating his motorcycle insured by Progressive but not Nationwide, the court held that Progressive was the primary carrier.⁹⁵

2. Proration Allowed Under Foreign Law. According to *McGow v. McCurry*,⁹⁶ when a UM policy is issued to an insured residing in another state, and the insured is involved in a collision with an uninsured motorist in Georgia, the provisions of the UM policy may be enforced according to the laws of the state in which it was issued, even if the provisions of the policy would not be enforceable under Georgia law.⁹⁷ In *McGow* the Eleventh Circuit Court of Appeals applied Michigan law to determine the liability of three UM carriers for damages sustained by their insured—a resident of Michigan—injured in a collision in Georgia.⁹⁸ The Michigan policy included clauses that were

90. *Id.* at 73-74, 628 S.E.2d at 178-79.

91. *Id.* at 76, 628 S.E.2d at 180.

92. *Id.* at 74, 628 S.E.2d at 179.

93. *Id.* at 74-75, 628 S.E.2d at 179.

94. *Id.* at 75, 628 S.E.2d at 179-80.

95. *Id.*

96. 412 F.3d 1207 (11th Cir. 2005).

97. *See id.* at 1223.

98. *Id.* at 1218-22.

foreign to Georgia, including provisions that allowed one of the policies to escape liability entirely.⁹⁹ Although the applicable provisions of the Michigan policies demanded a result that could not be obtained in Georgia, the Eleventh Circuit held that because application of Michigan law would only determine which insurance company pays the insured and not act to deprive the insured of compensation for his injuries, Georgia public policy was not implicated by application of Michigan law.¹⁰⁰ Thus, in accordance with the provisions of the policies and Michigan law, the Eleventh Circuit determined that one of the insurers was entitled to judgment in its favor without liability and the other two insurers would be liable for the insured's damages on a pro rata basis in proportion to their coverage limits.¹⁰¹

B. Notice

Three noteworthy cases addressing the issue of notice occurred during the survey period. In two of these cases, the Georgia Court of Appeals held that an insured's failure to notify an insurer as required by the policy allowed the insurers to escape liability. In the third case, the insured's failure to notify the police of the collision barred an uninsured motorist claim.

1. Failure to Notify Insurer of the Accident. In *Royer v. Murphy*,¹⁰² the insurance policy at issue provided that "any person claiming coverage under this policy . . . must notify us as soon as practicable" by calling the claims office or a claims hotline.¹⁰³ The policy further provided that the insurer could not be sued "unless there is full compliance with all terms of [the] policy."¹⁰⁴ Nevertheless, the insured failed to notify the insurer, which insured two vehicles owned by her husband and not the vehicle involved in the collision, until suit was filed two years after the accident. The UM carrier moved for summary judgment on the ground that the insured had not given it timely notice of the accident, and the trial court granted the motion.¹⁰⁵ The court of appeals agreed, holding that the insured's failure to notify the insurer of the accident for almost two years amounted to an unreasonable delay as a matter of law, and because the notice requirement was a condition

99. *Id.* at 1218.

100. *Id.* at 1221-22.

101. *Id.* at 1223.

102. 277 Ga. App. 150, 625 S.E.2d 544 (2006).

103. *Id.* at 150-51, 625 S.E.2d at 545 (omission in original).

104. *Id.* at 151, 625 S.E.2d at 545 (brackets in original).

105. *Id.*

precedent to the assertion of any claim under the policy, the insured's failure to notify the carrier was fatal to her claim.¹⁰⁶

2. Failure to Notify the Insurer of Legal Action. In *Burkett v. Liberty Mutual Fire Insurance Co.*,¹⁰⁷ the insured failed to provide proper notice in two respects. First, the insured failed to promptly notify the carrier of the underlying collision. Second, it failed to notify the carrier of a declaratory judgment action brought by another carrier concerning its duty to provide coverage to a driver involved in the underlying collision.¹⁰⁸ Two UM policies applied to the collision. Both of the UM carriers' policies required any person seeking UM coverage to notify the carrier of a legal action brought in connection with the accident and to "promptly" send the carrier copies of suit papers if any action was brought in connection with the accident.¹⁰⁹ The trial court granted summary judgment in favor of the UM carriers.¹¹⁰ Because the insured failed to notify the two UM carriers of the declaratory judgment action (in which a potential liability carrier was granted summary judgment and thus UM coverage was implicated), and the notice provisions were conditions precedent to coverage, the court of appeals affirmed the trial court's grant of summary judgment to the UM carriers.¹¹¹

3. Failure to Notify Police of Hit and Run. Finally, in *Pender v. Doe*,¹¹² the insured was injured in a collision with a hit-and-run driver. The insured went to the hospital, had surgery, and was hospitalized for several days. The collision was not reported to the police for twenty-nine days. When the insured brought an action against his UM carrier, the insurer moved for summary judgment, asserting that the failure to report the collision to police immediately, as required by O.C.G.A. section 40-6-273,¹¹³ barred the insured's claim.¹¹⁴ The trial court granted summary judgment, and the court of appeals affirmed.¹¹⁵ The court

106. *Id.*

107. 278 Ga. App. 681, 629 S.E.2d 558 (2006).

108. *Id.* at 682-84, 629 S.E.2d at 559-60.

109. *Id.* at 683, 629 S.E.2d at 560.

110. *Id.* at 682, 629 S.E.2d at 559.

111. *Id.* at 683-84, 629 S.E.2d at 560-61.

112. 276 Ga. App. 178, 622 S.E.2d 888 (2005).

113. O.C.G.A. § 40-6-273 (2004). "The driver of a vehicle involved in an accident resulting in injury . . . shall immediately, by the quickest means of communication, give notice of such accident to the local police department . . ." *Id.*

114. *Pender*, 276 Ga. App. at 178, 622 S.E.2d at 889.

115. *Id.*

relied upon its decision in *Navarro v. Atlanta Casualty Co.*,¹¹⁶ in which it held that the statutory requirement of immediate notice to the police “cannot be stretched to include four or five days later” and that this notice requirement “is not a matter of abatement, but a condition precedent to recovery under uninsured motorist coverage.”¹¹⁷

C. *Can I Choose My Coverage Limits Now?*

During the survey period, two cases were decided by the court of appeals that involved insureds claiming they were entitled to retroactively increase their policies’ UM limits due to a 2001 amendment to the UM statute.

Prior to the 2001 amendment, O.C.G.A. section 33-7-11(a)(1)(B)¹¹⁸ provided that an insured must either reject UM coverage or opt for UM limits in an amount “not greater than” the liability limits of the policy.¹¹⁹ Otherwise, all policies of automobile insurance by default would include UM coverage equal to the minimum liability limits of \$15,000 per person and \$30,000 per accident for bodily injury or death.¹²⁰ When the minimum liability limits were increased in 2000, O.C.G.A. section 33-7-11(a)(1)(A) was similarly amended to raise the amounts of minimum UM coverage to \$25,000 per person and \$50,000 per accident.¹²¹

In 2001 the UM statute was amended again.¹²² The 2001 amendment changed the default scheme so that unless a different election was affirmatively made by the insured, all policies would provide UM coverage in an amount “equal to” the liability coverage limits of the policy, instead of only the mandatory minimum amounts.¹²³

In *Tice v. American Employers Insurance Co.*,¹²⁴ Mr. and Mrs. Tice were insured by two policies issued prior to the 2000 amendment. Each policy provided UM coverage in the statutory minimum amount but liability coverage of \$50,000 per person. When the policies renewed after the 2000 amendment, the UM coverage was increased in each policy to \$25,000 per person and \$50,000 per accident. No change was made to the policies following the 2001 amendment. In 2003 Mrs. Tice was

116. 250 Ga. App. 550, 552 S.E.2d 508 (2001).

117. *Id.* at 551, 522 S.E.2d at 509.

118. O.C.G.A. § 33-7-11(a)(1)(B) (2000).

119. *Id.*

120. *Id.*

121. 2000 Ga. Laws 1516.

122. 2001 Ga. Laws 1228.

123. *Id.* The current version of the statute is codified at O.C.G.A. section 33-7-11(a)(1)(B) (2000 & Supp. 2006).

124. 275 Ga. App. 125, 619 S.E.2d 797 (2005).

injured in an automobile accident with an uninsured motorist. The Tices filed a tort suit for damages arising from the collision and obtained a \$100,000 consent judgment. The Tices then brought a declaratory judgment action against their insurer, claiming that they were entitled to stack the UM coverage of \$50,000 from each of the two policies for a cumulative total of \$100,000 for the accident. The Tices argued that because of the 2001 amendment and their insurer's failure to obtain an election from the insureds for UM coverage less than the default amount (equal to the liability coverage), they were entitled to the new default amounts. The insurer, to the contrary, argued that although the Tices were entitled to stack the coverage from the two policies, they were only entitled to \$25,000 per policy for a cumulative total of \$50,000.¹²⁵

The court of appeals agreed with the insurer.¹²⁶ After reviewing the history of the UM statute concerning coverage limits from 1963 through 2001, the court held that “[n]othing in the 2001 amendment required the insurer to notify policyholders who had chosen the statutory minimum amounts of UM coverage that optional UM coverage now must be equal to the liability limits of the underlying policy.”¹²⁷ Thus, the court determined that although new policies issued after the 2001 amendment would default to UM limits equal to the liability limits, renewal policies that had minimum limits prior to 2001 would continue to renew with minimum limits unless the insured affirmatively changed the policy coverage.¹²⁸

A similar issue was presented to the court of appeals in *McKinnon v. Progressive Bayside Insurance Co.*¹²⁹ In that case, the insured's policy was originally issued with \$25,000/\$50,000 liability limits and \$15,000/\$30,000 UM limits. The policy was renewed in 2001 with UM insurance limits increased to \$25,000/\$50,000. In 2002 the policy was again renewed with liability limits increased to \$50,000/\$100,000 and the UM limits remaining at \$25,000/\$50,000. These same limits were used when the policy was renewed in 2003. The insured was involved in a collision in 2003. The insured brought a lawsuit for damages arising from the collision and served her UM carrier. The insurer moved for summary judgment to establish the limits of its coverage. The insured argued that because there was no evidence that she had made any election as to the amount of her UM coverage—whether to reject UM coverage, choose minimum limits, or to choose limits in any amount greater than the

125. *Id.* at 125, 619 S.E.2d at 798.

126. *Id.* at 127-28, 619 S.E.2d at 800.

127. *Id.* at 128, 619 S.E.2d at 800.

128. *Id.* at 127-28, 619 S.E.2d at 800.

129. 278 Ga. App. 429, 629 S.E.2d 100 (2006).

minimum—the insurer should be required to provide coverage in an amount equal to the liability limits.¹³⁰ The court of appeals, relying primarily on *Tice*, disagreed.¹³¹ Although in *Tice* the insured had elected minimum UM coverage when the policies were originally issued,¹³² the court held that this distinction did not make a difference because McKinnon's failure to elect UM coverage for an amount greater than the minimum resulted in a default selection of minimum limits.¹³³ The insurer had no obligation to change these limits after the statute was amended in 2001 or to notify the insured of the opportunity to elect coverage in a different amount.¹³⁴

D. Importance of a Judgment Against the Tortfeasor

A series of cases decided during the survey period illustrate the necessity for a judgment against the tortfeasor in order to collect from a UM carrier.

In *Laviano v. Travelers Insurance Co.*,¹³⁵ the insured brought a suit against an uninsured motorist and two UM carriers. A discovery dispute with Travelers resulted in the carrier being held in contempt. The trial court then struck Travelers's answer and held it in default. The uninsured motorist was also defaulted as a sanction for failure to respond to discovery. Because the remaining UM carrier was not in default, a jury trial was held and the jury found the uninsured motorist and remaining UM carrier not liable for the insured's injuries.¹³⁶

The insured filed a motion for a damages hearing against Travelers—the defaulted UM carrier—in order to liquidate the damages sustained in the accident. Following the jury's verdict of no liability in favor of the remaining defendants, the trial court denied the insured's request for a hearing on damages. The insured then appealed, claiming that because the UM carrier was defaulted, its liability had been determined and the only remaining issue was that of damages.¹³⁷ The court of appeals disagreed.¹³⁸ Following *Brown v. State Farm Mutual Automobile Insurance Co.*,¹³⁹ the court held that the insured had failed

130. *Id.* at 429-30, 629 S.E.2d at 101.

131. *Id.* at 431-32, 629 S.E.2d at 102.

132. *Tice*, 275 Ga. App. at 125, 619 S.E.2d at 798.

133. *McKinnon*, 278 Ga. App. at 431, 629 S.E.2d at 102.

134. *Id.* at 431-32, 629 S.E.2d at 102.

135. 276 Ga. App. 611, 624 S.E.2d 189 (2005).

136. *Id.* at 611-12, 624 S.E.2d at 189-90.

137. *Id.* at 612, 624 S.E.2d at 190.

138. *Id.* at 612-14, 624 S.E.2d at 190-91.

139. 242 Ga. App. 313, 315, 529 S.E.2d 439, 441-42 (2000).

to establish his entitlement to coverage under the policy because he was not legally entitled to recover damages from the uninsured motorist.¹⁴⁰

The court also indicated by its use of an extended quotation without explanatory analysis that the insured may have waived a right to a damages hearing against the defaulted UM carrier by proceeding to trial on the merits against the defaulted uninsured motorist and remaining UM carrier.¹⁴¹ A petition for writ of certiorari was denied on April 25, 2006.¹⁴²

In *Cohen v. Allstate Insurance Co.*,¹⁴³ two plaintiffs brought a lawsuit against a known defendant and Allstate as the plaintiffs' UM carrier. The plaintiffs had difficulty locating the tortfeasor and failed to serve him until almost two years after the lawsuit was initially filed and more than a year after the expiration of the statute of limitations. In the meantime, the plaintiffs had obtained an order for publication service and effected publication.¹⁴⁴

After the tortfeasor was served, he and Allstate brought a motion for summary judgment, claiming that the plaintiffs failed to exercise the necessary degree of diligence in locating and serving the defendant, and therefore the claims against him were barred by the statute of limitations. The UM carrier further argued that because the claims against the tortfeasor were due to be dismissed and the plaintiffs could not recover a judgment against the uninsured motorist, the carrier was also entitled to summary judgment in its favor. The trial court granted both motions.¹⁴⁵

The court of appeals affirmed, holding that when the trial court dismissed the claims against the tortfeasor on the merits, no judgment could be obtained against him "[a]nd such a judgment is required in order to obtain a judgment against the plaintiffs' uninsured motorist carrier."¹⁴⁶ The court of appeals also noted that although a judgment against the uninsured motorist could be a nominal judgment only, based upon publication service, a judgment against the uninsured motorist, even a nominal judgment, was still a condition precedent to recovery against the UM carrier.¹⁴⁷

140. *Laviano*, 276 Ga. App. at 613, 624 S.E.2d at 190-91.

141. *Id.*, 624 S.E.2d at 191.

142. No. S06C0697, 2006 Ga. LEXIS 333, at *1 (Apr. 25, 2006).

143. 277 Ga. App. 437, 626 S.E.2d 628 (2006).

144. *Id.* at 437-38, 626 S.E.2d at 629-30.

145. *Id.* at 437, 626 S.E.2d at 629.

146. *Id.* at 440, 626 S.E.2d at 631-32.

147. *Id.* at 440-41, 626 S.E.2d at 632.

The case of *Patel v. Sanders*¹⁴⁸ involved similar underlying facts but resulted in a different outcome. The plaintiffs were unable to locate and serve the known owner and operator of the tortfeasor vehicle and obtained an order for service by publication. The named defendants learned of the lawsuit and filed an answer, claiming that they had not been served and that the statute of limitations had expired. These defendants then filed a motion to dismiss or for summary judgment, which the trial court originally granted. The plaintiffs moved for reconsideration of that order, arguing that although the individual defendants were entitled to be dismissed and no in personam judgment could be rendered against them, the case could and should continue against the UM carrier, State Farm, based upon the publication service. The trial court agreed and entered an order dismissing the claims against the named defendants but allowing the claims to proceed against State Farm.¹⁴⁹ The court of appeals affirmed, holding that the named defendants were entitled to be dismissed but that based upon the publication service, the claims against the UM carrier could proceed and a judgment entered would be enforceable against the carrier.¹⁵⁰

The importance of the procedural issues involved in *Cohen* and *Patel* are highlighted by a case recently decided by the court of appeals just outside the survey period, but which should be noted due to its importance to practitioners in this field. *Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperardo P.L.*¹⁵¹ is a legal malpractice case brought against the law firm that represented the plaintiffs in a car crash case. As in *Cohen* and *Patel*, attempts at personal service on the tortfeasor were unsuccessful and the plaintiffs effected publication service. State Farm, the plaintiffs' UM carrier, was served. The tortfeasor was finally located and served nearly three years after the statute of limitations expired. The tortfeasor then brought a motion to dismiss or, in the alternative, for summary judgment based upon the belated service. The tortfeasor-defendant's motion was granted, terminating the litigation as in the *Cohen* case. The plaintiffs then brought an action against the lawyers, supported by an affidavit, which identified the failure to obtain a nominal judgment against the tortfeasor based upon the publication service as an act of malpractice because the lawyers failed to preserve a claim against the UM carrier.¹⁵² The trial court granted the attorneys' motion for summary

148. 277 Ga. App. 152, 626 S.E.2d 145 (2006).

149. *Id.* at 152-53, 626 S.E.2d at 147.

150. *Id.* at 154, 626 S.E.2d at 148.

151. 280 Ga. App. 207, 633 S.E.2d 614 (2006).

152. *Id.* at 207, 633 S.E.2d at 616.

judgment, but the court of appeals reversed.¹⁵³ The court of appeals held that summary judgment was improper because the attorneys may have breached the standard of care and proximately caused the plaintiffs' inability to recover for their injuries.¹⁵⁴ The attorneys might have breached the standard of care by (1) failing to dismiss the lawsuit after service upon the tortfeasor and refile it pursuant to O.C.G.A. section 9-2-61¹⁵⁵ or by (2) failing to proceed against the UM carrier based upon the publication service.¹⁵⁶ Because this has proven to be a recurring fact pattern in the last year, practitioners should be aware of the risks and alternatives when known tortfeasors are difficult to locate but are found while the UM case remains pending.

V. HOMEOWNER'S INSURANCE

An interesting trio of opinions used policy considerations—the collateral source doctrine, the federal doctrine of judicial estoppel, and the duty to disclose financial details where fraud is suspected—to regulate the flow of insurance proceeds, or lack thereof.

In *Rabun & Associates Construction, Inc. v. Berry*,¹⁵⁷ homeowners Berry and Squillante were able to successfully raise the collateral source rule (1) to retain the \$503,254.83 they received from Fireman's Fund, their homeowner's carrier, for a loss to their home caused by rainwater and (2) to recover for the same loss against the general contractor, Rabun, and others who allowed rainwater to damage the home.¹⁵⁸ Judge Bernes carefully evaluated alternative defenses by which the general contractor attempted to stave off a large property loss that it claimed the parties had contractually agreed would be borne by the homeowners' carrier.¹⁵⁹ While the court recognized the "mutual exculpation rule" originally established in Georgia in *Tuxedo Plumbing & Heating Co. v. Lie-Nielsen*,¹⁶⁰ the construction contract term in this case required the homeowners to "have fire, theft and liability insurance coverage."¹⁶¹ The clause did not include the peril (rainwater) involved in this case.¹⁶² Practitioners may wish to review such standard

153. *Id.* at 210, 633 S.E.2d at 618.

154. *Id.*

155. O.C.G.A. § 9-2-61 (1982 & Supp. 2006).

156. *Butler*, 280 Ga. App. at 210-11, 633 S.E.2d at 618.

157. 276 Ga. App. 485, 623 S.E.2d 691 (2005).

158. *Id.* at 486, 490, 623 S.E.2d at 693, 696.

159. *Id.* at 486-90, 623 S.E.2d at 694-96.

160. 245 Ga. 27, 28, 262 S.E.2d 794, 795 (1980).

161. *Rabun*, 276 Ga. App. at 487, 623 S.E.2d at 694.

162. *Id.*

“insurance” clauses in contracts to assure the parties’ full intent is clear. The court held that intent was clear and the parties intended to shift the risk of loss for the perils of fire, theft and general liability, but not rainwater damage.¹⁶³ The court expressly recognized that a different decision would result from a loss caused by fire or theft.¹⁶⁴

The court also rejected the general contractor’s attempts to benefit from the insurance, a collateral source.¹⁶⁵ The court rejected the argument that proof of loss language subrogating the homeowners’ carrier “to the *property* for which the claim is being made” could be extended to include subrogation to “the *claim* or the *right* to recover from the third-party,” citing a long list of Georgia precedents to that effect.¹⁶⁶ Moreover, the court held that the homeowners’ post-loss Release and Settlement Agreement with the homeowners’ carrier, wherein the carrier waived subrogation rights, was a novation of both the prior existing policy and proof of loss language by reason of the merger clause of the Release and Settlement Agreement.¹⁶⁷ Having run the gamut of arguments, the court applied the collateral source rule, allowing the homeowners to retain both the first-party insurance proceeds for the loss and their legal rights to recover again for the loss.¹⁶⁸

While a prior homeowner may be paid twice for the same loss, this was not the case in *Battle v. Liberty Mutual Fire Insurance Co.*,¹⁶⁹ where the homeowner, by reason of the federal doctrine of judicial estoppel, was not able to recover at all for a total loss.¹⁷⁰ Here, the homeowner did not list the real property on his bankruptcy schedule, and over \$100,000 of unsecured debt was discharged to the homeowner’s benefit. The homeowner unsuccessfully asserted that his current homeowner’s insurance carriers had not relied upon the bankruptcy proceedings and thus were not prejudiced by his prior conduct.¹⁷¹ The court reviewed the federal doctrine of judicial estoppel, long recognized in Georgia “to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies

163. *Id.*

164. *Id.* at 488 n.2, 623 S.E.2d at 694 n.2.

165. *Id.* at 490, 623 S.E.2d at 696.

166. *Id.* at 488-89, 623 S.E.2d at 695.

167. *Id.* at 489, 623 S.E.2d at 695.

168. *Id.* at 490, 623 S.E.2d at 696.

169. 276 Ga. App. 434, 623 S.E.2d 541 (2005).

170. *Id.* at 434, 623 S.E.2d at 542.

171. *Id.* at 436, 623 S.E.2d at 543.

of the moment.¹⁷² The trial court had discretion in determining where estoppel is to be applied, and the court reasoned that precedent existed in Georgia for applying the doctrine where the party seeking estoppel was not even prejudiced by the prior conduct.¹⁷³ The court emphasized that the federal doctrine of judicial estoppel is in the nature of a penalty, and its sole focus is on abuse of the judicial process, not the contractual commitments that might otherwise exist.¹⁷⁴

In *Farmer v. Allstate Insurance Co.*,¹⁷⁵ the court held that where the homeowner is suspected of fraud and the homeowner's policy language requires production of detailed documentation, it is insufficient for the homeowner merely to submit a sworn statement and unilaterally declare the additional documentation requested to be irrelevant.¹⁷⁶ In *Farmer* the homeowner's failure to provide adequate documentation constituted a material breach of the homeowner's contract, entitling Allstate to summary judgment.¹⁷⁷ Following a suspicious fire, Allstate required that the homeowner submit to examination under oath and requested financial, real estate, and related documentation, including cell phone records.¹⁷⁸ Basing its opinion on the clear terms of the Allstate policy, which specified that "you must . . . give us all accounting records, bills, invoices and other vouchers, or certified copies, which we may reasonably request to examine,"¹⁷⁹ Judge Thrash found a material breach in the terms of the policy and awarded summary judgment to Allstate.¹⁸⁰ This opinion is consistent with others, wherein the policy terms clearly authorized thorough investigations of suspicious circumstances and the insured's failure to comply resulted in coverage being forfeited altogether.¹⁸¹

172. *Id.* at 435, 623 S.E.2d at 543 (citing *Period Homes, LTD. v. Wallick*, 275 Ga. 486, 488, 569 S.E.2d 502, 504 (2002)). See *Southmark Corp. v. Trotter, Smith & Jacobs*, 212 Ga. App. 454, 455, 442 S.E.2d 265, 266-67 (1974) for the initial recognition and application of the doctrine by Georgia courts.

173. *Battle*, 276 Ga. App. at 435, 623 S.E.2d at 543 (citing *Southmark*, 212 Ga. App. at 455, 442 S.E.2d at 265).

174. *Id.*, 623 S.E.2d at 544.

175. 396 F. Supp. 2d 1379 (N.D. Ga. 2005).

176. *Id.* at 1382-83.

177. *Id.* at 1383.

178. *Id.* at 1380-81.

179. *Id.* at 1382.

180. *Id.* at 1382-83.

181. See generally *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 177 S.E.2d 819 (1970). However, often there are questions of fact regarding compliance where strict compliance is difficult. See generally *Diamonds & Denims, Inc. v. First of Ga. Ins. Co.*, 203 Ga. App. 681, 417 S.E.2d 440 (1992).

VI. LIFE, HEALTH & DISABILITY INSURANCE

Absent ambiguity in terms or a fully developed factual record showing a dispute, Georgia courts consistently enforce the literal terms of the policies, not how the courts would have preferred they had been written.

In *Guideone Life Insurance Co. v. Ward*,¹⁸² the deceased's son was tendered the premium the day after his father's death, during what would have been the thirty-one day "grace period." The son was given an opportunity to prove to a jury that multiple historical slight overpayments might have extended coverage for the \$250,000 life insurance benefit to the date of his father's death. The deceased's beneficiary was unable to satisfy the literal terms of the policy's thirty-one day grace period reinstatement, inasmuch as it required a late premium payment conditioned upon the signature of the deceased, who was obviously then unavailable to sign.¹⁸³

The court rejected the insured's attempt to negate the cancellation, which was based on the insurer's failure to notify under O.C.G.A. section 33-24-44.¹⁸⁴ The court reasoned that this code section does not relate to the insured's failure to act, as was the case here.¹⁸⁵ However, the insured crafted a winning argument by pointing to past slight overpayments, which were admitted to be at least \$20.10 and might have been as much as \$74.25. He only needed \$40.76 of historical overpayments, the amount of a monthly premium, to extend coverage to his father's death.¹⁸⁶ An easier win would have occurred had the reinstatement provision provided that the policy, once it had lapsed, would only be reinstated *as of the date of late payment*. The Authors have encountered reinstatement provisions to that effect and have successfully advanced much longer periods of coverage, as all of the reinstatements began on a later date, that is, the date of payment. The issue was so close that the court sustained the insurer's partial summary judgment on bad faith, such that the final decision at the hands of the jury will be for just what is owed under the contract.¹⁸⁷

In several opinions, carriers continue to successfully defend their right to pay life insurance proceeds in accordance with the terms of the contract, not in accordance with equities as perceived by third-parties.

182. 275 Ga. App. 1, 619 S.E.2d 723 (2005).

183. *Id.* at 2, 619 S.E.2d at 726.

184. *Id.* at 2-3, 619 S.E.2d at 726; O.C.G.A. § 33-24-44 (2005).

185. *Guideone*, 275 Ga. App. at 4-5, 619 S.E.2d at 727-28.

186. *Id.* at 5-6, 619 S.E.2d at 728.

187. *Id.* at 7-8, 619 S.E.2d at 729.

*McReynolds v. Prudential Insurance Co.*¹⁸⁸ involved yet another ex-spouse trying to get to the proceeds of a life insurance policy claimed to be intended for her benefit.¹⁸⁹ Despite the ex-spouse's prior communications indicating an appreciation of her interest in the policy, the court rejected her promissory estoppel claim.¹⁹⁰ The court reasoned that Prudential could not have reasonably expected she would rely on its acknowledgment of her concerns and that her own reliance was unreasonable.¹⁹¹ The court reiterated that "[a]n insurance company that has had no business dealings with a third party to the insurance policy owes no duty to that party to investigate the accuracy of the policy's designations."¹⁹²

Similarly, in *Colonial Life & Accident Insurance Co. v. Heveder*,¹⁹³ the court held that the deceased's widow was properly paid the proceeds of the life insurance policy, even though she was alleged to be a conspirator in the deceased's murder.¹⁹⁴ The court concluded this despite the carrier's prepayment investigation indicating that the widow was a potential suspect and would not cooperate with authorities.¹⁹⁵ Expressly adopting the rationale of the Alabama Supreme Court in *Alfa Life Insurance Corp. v. Culverhouse*,¹⁹⁶ the court applied O.C.G.A. section 33-24-41¹⁹⁷ literally, which in pertinent part provides that payments shall fully discharge *the insurer* "unless, before payment is made, the insurer has received at its home office written notice [of the claimant's entitlement under the policy]."¹⁹⁸ The court determined that written notice was not timely provided.¹⁹⁹ Complaints should be taken up with "the General Assembly to consider, not [the] Court."²⁰⁰

Another insurer followed a safer and less controversial approach to such a dispute in *Cantera v. American Heritage Life Insurance Co.*,²⁰¹ an interpleader action. In *Cantera* the husband of the deceased was

188. 276 Ga. App. 747, 624 S.E.2d 218 (2005).

189. *Id.* at 747, 624 S.E.2d at 219.

190. *Id.* at 749-50, 624 S.E.2d at 221.

191. *Id.* at 750-51, 624 S.E.2d at 221-22.

192. *Id.* at 752, 624 S.E.2d at 222 (quoting *Lee v. Am. Cent. Ins. Co.*, 241 Ga. App. 650, 651-52, 530 S.E.2d 727, 729-30 (1999)).

193. 274 Ga. App. 377, 618 S.E.2d 39 (2005).

194. *Id.* at 377-80, 618 S.E.2d at 40-42.

195. *Id.* at 377-78, 618 S.E.2d at 40.

196. 729 So. 2d 325 (Ala. 1999) (reasoning that if the court were to agree with the appellee's argument, it would in effect be disregarding the statute's plain language).

197. O.C.G.A. § 33-24-41 (2005).

198. *Id.*; *Colonial Life*, 274 Ga. App. at 379, 618 S.E.2d at 41.

199. *Colonial Life*, 274 Ga. App. at 379, 618 S.E.2d at 41.

200. *Id.* at 380, 618 S.E.2d at 41.

201. 274 Ga. App. 307, 617 S.E.2d 259 (2005).

named as a beneficiary but was also a suspect in her murder. Even so, the widower sought to recover the insurance proceeds from his wife's life insurance policy, and he filed a motion for summary judgment. The trial court initially denied the widower's motion without explanation, but three years later, the widower moved for summary judgment again. In the affidavit accompanying his second motion for summary judgment, the widower averred that he did not kill his wife. This time, the trial court granted the widower's motion. The deceased's children appealed, arguing that their father was directly involved in their mother's death.²⁰² In this fact-intensive opinion, the court of appeals held that the husband's statements alleging that he did not kill his wife were insufficient to support a motion for summary judgment because they were self-serving and conclusory.²⁰³ The court identified sufficient disputed facts in the record to require jury consideration of the issues existing between the deceased's children and husband.²⁰⁴

In *Giddens v. Equitable Life Assurance*,²⁰⁵ the Eleventh Circuit gave the parties to this long-running disability dispute "the final answer." The court ultimately held that policy language concerning "[the insured's] inability due to injury or sickness to engage in the substantial and material duties of [his] regular occupation,"²⁰⁶ was ambiguous.²⁰⁷ The Eleventh Circuit carefully picked through Equitable's policy language,²⁰⁸ given the unique facts pertaining to this dentist and real estate developer, and dispatched of Dr. Giddens's Residual Disability Claim for the practice of general dentistry.²⁰⁹ Dr. Giddens gave up the practice in 1994, but he was not disabled until 1998, and the policy required that occupation be practiced "regularly" at the time of the disability.²¹⁰ Following the Eighth Circuit in *Dowdle v. Natural Life Insurance Co.*,²¹¹ the court held that the policy's failure to quantify, for purposes of Total Disability, the extent of the inability to engage in the substantial and material duties of regular occupation created an ambiguity.²¹² The medical evidence uncontrovertibly established that Dr. Giddens was unable to perform the majority of his then regular

202. *Id.* at 307-10, 617 S.E.2d at 259-61.

203. *Id.* at 311, 617 S.E.2d at 262.

204. *Id.* at 312, 617 S.E.2d at 262.

205. 445 F.3d 1286 (11th Cir. 2006).

206. *Id.* at 1293.

207. *Id.* at 1298.

208. *Id.* at 1292-93, 1297, 1298.

209. *Id.* at 1292-93.

210. *Id.*

211. 407 F.3d 967, 970 (8th Cir. 2005) (applying Minnesota law).

212. *Giddens*, 445 F.3d at 1298.

occupation of real estate development.²¹³ While Equitable interprets its policy language to mean that Giddens must be unable to perform all of his substantial and material duties before recovering under its policy, the court held that this does not render the language unambiguous.²¹⁴ The court did, however, acknowledge that Equitable's interpretation (inability to perform all) was reasonable.²¹⁵ The court also noted that Equitable's problem was that the insured also had a reasonable interpretation of the same policy language.²¹⁶ The insured interpreted the language to mean that an insured must have an inability to perform most or the majority of the substantial and material duties before an insured could claim total disability.²¹⁷ The court concluded that the provision was ambiguous and, therefore, must be interpreted against Equitable.²¹⁸ The "final answer" may well lead Equitable to revisit its policy language in such contracts.

VII. MISCELLANEOUS

In 2006 diligent consumers found it difficult to comply with policy requirements that called for consumers to bring suit within twelve months. In response, the Georgia Insurance Commissioner promulgated Temporary Emergency Regulations that changed the one-year suit requirement in the Standard Fire Policy and Unfair Claims Settlement Act and imposed a two-year minimum time limitation for filing suit on a policy.²¹⁹ These regulations were made permanent by order of Commissioner Oxendine on September 21, 2006. As illustrated by *Rain & Hail Insurance Services, Inc. v. Vickery*,²²⁰ this type of contractual provision that limits bringing insurance actions to "12 months of the date of denial of the claim" has been consistently enforced, yet strictly construed, because failure to comply results in a forfeiture of an otherwise paid-for policy benefit.²²¹ Indeed, in *Rain & Hail* the court strained to find factual issues for jury resolution as the insurer's construction of the *Rain & Hail* policy would have resulted in no coverage for any crop.²²² Additionally, the court in *Rain & Hail* joined

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. GA. COMP. R. & REGS. 120-2-19-.01-0.20 (2006); GA. COMP. R. & REGS. 120-2-20-0.21 (2006).

220. 274 Ga. App. 424, 618 S.E.2d 111 (2005).

221. *Id.* at 425, 618 S.E.2d at 113.

222. *Id.* at 425-32, 618 S.E.2d at 113-17.

the Eleventh Circuit's decision in *Williams Farms of Homestead, Inc. v. Rain & Hail Insurance Services, Inc.*²²³ and other courts in holding that a private insurer (though partially reinsured by the FCIC) does not enjoy the immunity-from-estoppel privileges granted the governmental agency.²²⁴

223. 121 F.3d 630, 635 (11th Cir. 1997).

224. *Rain & Hail*, 274 Ga. App. at 430-31, 618 S.E.2d at 116-17.