

# Insurance

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## I. INTRODUCTION

The Georgia Supreme Court reviewed, and reversed, two cases featured prominently in last year's Insurance survey article,<sup>1</sup> and it also held a key provision of tort reform preempted by federal law.

The Georgia Supreme Court reversed the decision in *Ryder Integrated Logistics, Inc. v. BellSouth Telecommunications, Inc.*<sup>2</sup> and held that an agreement to name another as an additional insured could not be used to salvage an invalid indemnification clause in the parties' contract.<sup>3</sup> The legislature amended Official Code of Georgia Annotated ("O.C.G.A.") section 13-8-2<sup>4</sup> to help avoid this type of litigation in the future.<sup>5</sup>

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1. See Stephen M. Schatz, Stephen L. Cotter & Bradley S. Wolff, *Insurance*, 58 MERCER L. REV. 181 (2006).

2. 277 Ga. App. 679, 627 S.E.2d 358 (2006), *rev'd*, 281 Ga. 736, 642 S.E.2d 695 (2007).

3. *Ryder Integrated Logistics, Inc. v. BellSouth Telecomms., Inc.*, 281 Ga. 736, 736, 739-40, 642 S.E.2d 695, 696, 698 (2007).

4. O.C.G.A. § 13-8-2 (1982 & Supp. 2007).

However, both appellate courts continued to show a propensity for finding additional insured coverage for entities with whom the named insured has agreed to provide such coverage in a separate contract, as long as a connection exists between (1) the claimed injury and (2) the scope of the work set forth in the contract.<sup>6</sup>

In another case, the supreme court reversed a pass given by the intermediate court to an automobile insurer; the insurer allegedly conspired with an appraisal service to systematically undervalue its policyholders' property damage claims.<sup>7</sup> In *McGowan v. Progressive Preferred Insurance Co.*,<sup>8</sup> the supreme court held that an appraisal and the insurer's subsequent payment of the difference between its valuation and the appraised value did not moot the insured's claims for damages other than the value of the car itself for claims such as fraud, breach of contract, and violation of the Georgia Racketeer Influenced and Corrupt Organizations Act<sup>9</sup> ("RICO").<sup>10</sup>

Both appellate courts held that Health Insurance Portability and Accountability Act<sup>11</sup> ("HIPAA") regulations preempted O.C.G.A. section 9-11-9.2,<sup>12</sup> the tort reform provision that requires a plaintiff to file an authorization for the release of medical records and permission for defense counsel to speak with treating physicians in a medical malpractice case.<sup>13</sup> The supreme court adopted and expanded upon the court of appeals' views in *Allen v. Wright*.<sup>14</sup>

Perhaps the most unanticipated decision of the survey period in the insurance law arena came from the court of appeals in *Abrohams v. Atlantic Mutual Insurance Agency*,<sup>15</sup> a decision that the supreme court declined to review.<sup>16</sup> In *Abrohams* the court held that a personal umbrella liability policy's coverage extended to uninsured motorists when the policy provided \$1 million in excess liability coverage over the

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5. See *id.* § 13-8-2(b) (Supp. 2007).

6. See *Ryder*, 281 Ga. at 736-37, 642 S.E.2d at 696; *BBL-McCarthy, LLC v. Baldwin Paving Co.*, 285 Ga. App. 494, 498-99, 646 S.E.2d 682, 686 (2007).

7. *McGowan v. Progressive Preferred Ins. Co.*, 281 Ga. 169, 170, 637 S.E.2d 27, 28 (2006).

8. 281 Ga. 169, 637 S.E.2d 27 (2006).

9. O.C.G.A. §§ 16-14-1 to -15 (2007).

10. *McGowan*, 281 Ga. at 172, 637 S.E.2d at 29.

11. Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.).

12. O.C.G.A. § 9-11-9.2 (2006).

13. *Allen v. Wright*, 282 Ga. 9, 10-11, 644 S.E.2d 814, 815-16 (2007); *Allen v. Wright*, 280 Ga. App. 554, 554-55; 634 S.E.2d 518, 519 (2006).

14. 282 Ga. 9, 644 S.E.2d 814 (2007).

15. 282 Ga. App. 176, 638 S.E.2d 330 (2006).

16. See *id.*

insureds' primary residence and motor vehicles, despite the fact that the umbrella policy itself specifically stated that it did not cover uninsured motorists.<sup>17</sup> If an award was given for the most creative lawyering in an insurance case, it would surely be awarded this year to the attorney or attorneys who crafted the winning arguments in this case.

## II. COMMERCIAL LIABILITY INSURANCE

### A. *The Effect of Contractual Indemnification and Insurance Clauses on Additional Insured Coverage*

In last year's annual survey, we discussed the court of appeals decision in *Ryder Integrated Logistics, Inc. v. BellSouth Telecommunications, Inc.* ("Ryder I")<sup>18</sup> and predicted that the supreme court would address the lower court's finding of additional insured coverage for BellSouth based upon the appellate court's very broad interpretation of the language "arising out of operations" in the policy's additional insured endorsement.<sup>19</sup> In *Ryder Integrated Logistics, Inc. v. BellSouth Telecommunications, Inc.* ("Ryder II"),<sup>20</sup> the supreme court reversed *Ryder I*, but not for the reasons we had anticipated.<sup>21</sup>

An employee of Ryder was injured while working at a BellSouth facility. The employee sued BellSouth and claimed that the company's sole negligence caused his injuries. BellSouth then tendered the suit to Ryder and Ryder's commercial general liability ("CGL") carrier. The contract between Ryder and BellSouth contained an indemnification clause in which Ryder agreed to indemnify and hold harmless BellSouth.<sup>22</sup> Because the clause did not expressly state that it applied to BellSouth's sole negligence, the lower court correctly held that the clause was void and unenforceable, and Ryder was not obligated to indemnify BellSouth.<sup>23</sup> However, as is typical in many construction agreements, the contract also contained a separate insurance provision that required Ryder to obtain CGL insurance with limits of at least \$1 million to cover BellSouth as an additional insured.<sup>24</sup> The insurance clause contained

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17. *Id.* at 177, 181-82, 638 S.E.2d at 332, 334.

18. 277 Ga. App. 679, 627 S.E.2d 358 (2006), *rev'd*, 281 Ga. 736, 642 S.E.2d 695 (2007).

19. Schatz, Cotter & Wolff, *supra* note 1, at 187-89.

20. 281 Ga. 736, 642 S.E.2d 695 (2007).

21. *See id.* at 740, 642 S.E.2d at 698.

22. *Id.* at 736-37, 642 S.E.2d at 696.

23. *Id.* at 737, 642 S.E.2d at 697.

24. *Id.*, 642 S.E.2d at 696.

the following language: “*NOTWITHSTANDING ANY OF THE ABOVE, NO LIMIT OF INSURANCE SHALL IN ANY MANNER SERVE AS A LIMITATION OF [RYDER’S] LIABILITY UNDER ANY PROVISION OF THIS AGREEMENT.*”<sup>25</sup>

The court of appeals interpreted this language to mean that Ryder itself had to indemnify BellSouth for any amount that exceeded the \$1 million limit provided by the insurance coverage.<sup>26</sup> The supreme court disagreed.<sup>27</sup> Because the indemnification clause was void and unenforceable, Ryder had no duty to indemnify BellSouth for BellSouth’s own negligence, and the insurance clause could not resurrect the void indemnification clause or create any separate obligation or greater liability.<sup>28</sup> Therefore, BellSouth was entitled to the additional insured coverage of \$1 million provided by Ryder’s CGL policy, but BellSouth was responsible for all liability to the injured Ryder employee in excess of the policy limit.<sup>29</sup> Only if the indemnification clause had been valid would Ryder have had a duty to indemnify BellSouth beyond the policy limit.<sup>30</sup>

*Ryder II* reinforces the principle that insurance clauses cannot be interpreted to create or increase one’s duty to indemnify another where no duty to indemnify exists under the separate indemnification clause.<sup>31</sup> An insurance clause, however, can create additional insured coverage for the indemnitee under the indemnitor’s liability policy, regardless of whether the indemnification clause is enforceable.<sup>32</sup>

In its 2007 session, the Georgia General Assembly amended O.C.G.A. section 13-8-2<sup>33</sup> to further clarify that a contractual party’s obligation to obtain insurance coverage in connection with a construction project is not affected by a void indemnification clause that applies to that same project.<sup>34</sup>

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25. *Id.* at 739, 642 S.E.2d at 697 (brackets in original).

26. *Id.*

27. *Id.* at 739-40, 642 S.E.2d at 698.

28. *Id.* at 737-38, 642 S.E.2d at 697.

29. *Id.* at 739-40, 642 S.E.2d at 698.

30. *Id.* at 739, 642 S.E.2d at 698.

31. *Id.* at 739-40, 642 S.E.2d at 698.

32. *Ryder I*, 277 Ga. App. at 686, 627 S.E.2d at 364.

33. O.C.G.A. § 13-8-2 (1982 & Supp. 2007).

34. *Id.* O.C.G.A. section 13-8-2(b), as amended, provides as follows:

A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named

*B. “Arising Out Of” Language Interpreted Very Broadly in Finding Additional Insured Coverage; Loss of Subrogation Rights if Insurer Settles Without Insured’s Consent*

Consistent with its ruling in *Ryder I*, the court of appeals established in *BBL-McCarthy, LLC v. Baldwin Paving Co.*,<sup>35</sup> that it will continue to take an expansive view of the phrase “arising out of” in an additional insured provision to determine if coverage exists.<sup>36</sup> BBL, a general contractor, subcontracted with Baldwin Paving and Magnum Development (the “subcontractors”) to perform work on a construction project. The indemnification clause in the subcontract required the subcontractors to defend, indemnify, and hold harmless BBL for all claims arising out of the performance of the subcontractors’ work. The insurance clause in the subcontract required the subcontractors to obtain liability insurance to cover claims arising out of the subcontractors’ work and for which BBL may be liable.<sup>37</sup> The subcontractors did obtain policies that named BBL as an additional insured, but the policies contained language limiting coverage to BBL for liability “arising out of” the subcontractors’ work or operations.<sup>38</sup> Following an auto collision near the construction project, the claimants brought lawsuits alleging that their injuries resulted from BBL’s negligent management of the project as well as BBL’s and the subcontractors’ negligent construction of the project.<sup>39</sup>

The court held that BBL qualified as an additional insured under the subcontractors’ policies, regardless of who was ultimately at fault for the

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indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers’ compensation or coverage or insurance specifically relating to workers’ compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner’s or contractor’s protective insurance, builder’s risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.

O.C.G.A. § 13-8-2(b) (Supp. 2007).

35. 285 Ga. App. 494, 646 S.E.2d 682 (2007).

36. *See id.* at 498-99, 646 S.E.2d at 686.

37. *Id.* at 495-96, 646 S.E.2d at 684.

38. *Id.* at 498, 646 S.E.2d at 685-86 (internal quotation marks omitted).

39. *Id.* at 496, 646 S.E.2d at 684-85.

injuries.<sup>40</sup> Building upon *Ryder I*, the court broadly construed the phrase “arising out of” the subcontractors’ work or operations as meaning “arising out of a business transaction” with or “work performed” for BBL.<sup>41</sup> The court noted that it had similarly construed “arising out of” as meaning “had its origins in,” “grew out of,” or “flowed from,”<sup>42</sup> and, therefore, “[a]lmost any causal connection or relationship will do” in satisfying the “arising out of” requirement.<sup>43</sup> Because the injuries were allegedly related to the subcontractors’ work on the construction project, BBL qualified as an additional insured, regardless of whether actual liability for the injuries was attributable to BBL or to the subcontractors.<sup>44</sup>

The court’s reinforcement of how broadly it will interpret the “arising out of” language is a cautionary tale for insurers who refuse to defend a purported additional insured entity without first examining the contractual relationship between that entity and the named insured. While only a slight causal connection between the injuries alleged and the contractual scope of the work is required to find additional insured coverage, no relationship whatsoever between the scope of the work and the alleged injuries is required before an insurer can have confidence that additional insured coverage does not exist.<sup>45</sup>

*BBL* is important for a second reason. An entity that seeks additional insured coverage under a policy must “elect” such coverage by notifying the insurer of the claim and forwarding a copy of the complaint to that insurer.<sup>46</sup> However, if the insurer already has notice of the claim or suit—for example, from the named insured—then it cannot avoid coverage on the basis that the additional insured did not provide timely notice.<sup>47</sup>

*BBL* has potentially far-reaching implications for a third reason. According to O.C.G.A. section 33-7-12(a),<sup>48</sup> when an insurance company settles a claim or claims against the insured without the insured’s consent (which it is typically allowed to do under the terms of CGL and automobile policies), the insurer is deemed to be an independent

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40. *Id.* at 500-01, 646 S.E.2d at 687.

41. *Id.* at 498, 646 S.E.2d at 686 (internal quotation marks omitted).

42. *Id.* (quoting *Abercrombie v. Ga. Farm Bureau Mut. Ins. Co.*, 216 Ga. App. 602, 603, 454 S.E.2d 813, 814 (1995)).

43. *Id.* (quoting *Se. Fid. Ins. Co. v. Stevens*, 142 Ga. App. 562, 564, 236 S.E.2d 550, 551 (1977)).

44. *Id.* at 499, 646 S.E.2d at 686.

45. *Id.* at 498-99, 646 S.E.2d at 686.

46. *Id.*

47. *Id.*

48. O.C.G.A. § 33-7-12(a) (2000).

contractor.<sup>49</sup> As an independent contractor, instead of an insurer, an insurance company has no right of subrogation under its policy to recover from the tortfeasor the amount the company paid to settle the claims.<sup>50</sup> Therefore, if an insurer does not have an insured's (or additional insured's) consent when it settles a claim, it cannot "stand in the shoes" of its insured and subrogate against the wrongdoer.

As a practical application, if an insurer wishes to protect its subrogation rights in the future, then it will need to obtain the insured's consent to the settlement and include in the release explicit language indicating that it has such consent. Defense counsel for insureds should be cautious when preparing a general "form" release and should inquire, before settling a case, whether the insurer wishes to reserve the right to subrogate.

*C. Discrimination Does Not Constitute "Bodily Injury" or "Personal Injury"*

In *Auto-Owners Insurance Co. v. Robinson*,<sup>51</sup> the district court addressed whether coverage exists for a claim of race discrimination against the insured who allegedly refused to sell to a bi-racial couple land upon which they intended to build a home.<sup>52</sup> As is typical of CGL policies, Auto-Owners's policy had a section which provided coverage for "bodily injury" and a section which provided coverage for "personal

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49. *BBL-McCarthy*, 285 Ga. App. at 501, 646 S.E.2d at 688. O.C.G.A. section 33-7-12(a) provides as follows:

Any provision in a liability policy of insurance which provides that the insurer shall have the right to compromise or settle claims of third persons against the insured without the consent of the insured shall be deemed to create, as between the insurer and the insured, the relationship of an independent contractor so that the insured shall not be precluded from asserting a claim or cause of action against third persons, notwithstanding the settlement by the insurer of such claims of third persons, unless the insured shall previously have consented in writing to relinquish his claim or cause of action against third persons, provided in all cases where the insurer shall settle the claims of third persons against the insured without written consent that it shall be the duty of the insurer to inform the third persons in writing of the lack of consent of the insured and that the insured is not thereby precluded from the further assertion of claims against the third persons before taking from the third persons any release, covenant not to sue, or other settlement; and upon failure of the insurer to give the notice to the third persons of the lack of consent of the insured, the release, covenant not to sue, or other settlement shall be of no effect, null, and void.

O.C.G.A. § 33-7-12(a).

50. *BBL-McCarthy*, 285 Ga. App. at 501, 646 S.E.2d at 688.

51. No. 3:05-CV-109 (CDL), 2006 U.S. Dist. LEXIS 66551 (M.D. Ga. Sept. 6, 2006).

52. *Id.* at \*2-3.

injury.”<sup>53</sup> Bodily injury was defined by the policy as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at one time.”<sup>54</sup> The court confirmed that bodily injury requires some kind of physical injury to the claimants, and it does not include emotional or mental harm.<sup>55</sup> While the claimants allegedly suffered humiliation, embarrassment, and emotional distress as a result of the discrimination, they did not suffer any physical injuries, and therefore the bodily injury section of the policy did not apply.<sup>56</sup> Moreover, the court stated that any physical manifestations or consequences resulting from emotional or mental harm do not constitute bodily injury.<sup>57</sup>

The definition of personal injury included the “wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor.”<sup>58</sup> In holding the language unambiguous, the court, in a case of first impression, determined that “occupies” applies only to present occupancy, not future occupancy.<sup>59</sup> Because the discrimination claim alleged interference with the right of future occupancy of the land, there was no personal injury coverage.<sup>60</sup>

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53. *Id.* at \*6, \*10. Under the standard Insurance Services Office, Inc. (“ISO”) form for CGL policies, Coverage A provides coverage for “bodily injury” and “property damage” caused by an “occurrence,” and Coverage B provides coverage for “personal and advertising injury” caused by an offense arising out of the insured’s business. *See, e.g.*, Form CG 00 02 12 04.

54. *Auto-Owners*, 2006 U.S. Dist. LEXIS 66551, at \*6.

55. *Id.* (citing *O’Dell v. St. Paul Fire & Marine Ins. Co.*, 223 Ga. App. 578, 579, 478 S.E.2d 418, 420 (1996)).

56. *Id.* at \*7-8.

57. *Id.* Many current ISO forms for CGL policies amend the definitions of bodily injury to include mental anguish and other mental injury resulting from bodily injury. Following the rationale of *Auto-Owners*, mental and emotional harm would be covered by this amended definition only if such mental injury was caused by or resulted from a physical injury, but no coverage would exist for mental injury that itself caused physical injury or manifestations (such as heart palpitations, stress, nightmares, high blood pressure, etc.). *See id.*

58. *Id.* at \*10.

59. *Id.* at \*11.

60. *Id.* at \*11-12.

*D. Federal Courts Resistant to Declaratory Judgment Actions Brought on Insurer's Duty to Indemnify When Underlying Lawsuits Still Pending*

In *Erie Indemnity Co. v. Acuity*<sup>61</sup> and *Utility Service Co. v. St. Paul Travelers Insurance Co.*,<sup>62</sup> the United States District courts for the Northern District of Georgia and the Middle District of Georgia, respectively, refused to address in declaratory judgment actions whether insurers have a duty to indemnify under their policies when the underlying lawsuits against the insureds are still pending.<sup>63</sup> “The duty to indemnify, or provide coverage to, an insured party is triggered only when the insured is determined to be liable for damages within the policy’s coverage.”<sup>64</sup> Thus, in using its discretion<sup>65</sup> to decline to rule on the coverage issues, the district court observed that such a determination may be unnecessary, irrelevant, and a waste of judicial resources.<sup>66</sup> For example, if the insured defendants were to prevail at trial in the underlying actions, then no question of coverage would even arise.<sup>67</sup>

While the courts’ rationale is understandable, such refusal to decide a coverage dispute may put insurers in the unfortunate position of not knowing whether to contribute toward the settlement of an underlying suit before trial. For example, in *Erie* the coverage issue required the district court to determine which of two insurance policies issued by separate insurers provided primary coverage for a rental car’s damage caused by a collision.<sup>68</sup> Without clarification from the federal court concerning which policy provided primary coverage, neither insurer was likely to contribute a substantial amount toward the settlement of the underlying case. Thus, while the federal courts may save their judicial resources, their decisions may require that the court hear the underlying suit and expend even more resources.

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61. No. 1:06-CV-0174-TWT, 2006 U.S. Dist. LEXIS 52590 (N.D. Ga. July 19, 2006).

62. No. 5:06-CV-207(CAR), 2007 U.S. Dist. LEXIS 4634 (M.D. Ga. Jan. 22, 2007).

63. *Erie*, 2006 U.S. Dist. LEXIS 52590, at \*12; *Util. Serv. Co.*, 2007 U.S. Dist. LEXIS 4634, at \*11.

64. *Erie*, 2006 U.S. Dist. LEXIS 52590, at \*6-7; *Util. Serv. Co.*, 2007 U.S. Dist. LEXIS 4634, at \*10.

65. Both courts assumed, for purposes of their findings, that an “actual controversy” existed between the parties. *Erie*, 2006 U.S. Dist. LEXIS 52590, at \*5-6; *Util. Serv. Co.*, 2007 U.S. Dist. LEXIS 4634, at \*9.

66. *Erie*, 2006 U.S. Dist. LEXIS 52590, at \*8-9; *Util. Serv. Co.*, 2007 U.S. Dist. LEXIS 4634, at \*10.

67. *Erie*, 2006 U.S. Dist. LEXIS 52590, at \*9.

68. *Id.* at \*2-3.

## III. AUTOMOBILE INSURANCE

A. *Uninsured or Underinsured Motorist Insurance*

**1. Uninsured or Underinsured Motorist Coverage Found in Umbrella Liability Policy.** Under O.C.G.A. section 33-7-11(a)(1),<sup>69</sup> no “automobile liability policy or motor vehicle liability policy” may be issued in Georgia unless the policy provides uninsured or underinsured motorist (“UM”) coverage in at least the statutory minimum amount or, at the election of the insured, an amount equal to the liability coverage provided by the policy.<sup>70</sup> The insured may, however, affirmatively waive UM coverage by rejecting the coverage in writing.<sup>71</sup>

In *Abrohams v. Atlantic Mutual Insurance Agency*,<sup>72</sup> the issue was whether an insurer was required to provide UM benefits to its insureds under a personal umbrella liability policy, which provided \$1 million in excess liability coverage over the insureds’ primary residence and motor vehicle policies.<sup>73</sup> The umbrella policy specifically excluded UM coverage, stating that the insurer “won’t pay for Uninsured/Underinsured Motorists coverage or No-Fault benefits unless such coverage is specifically shown on the Declarations Page as an Umbrella Coverage.”<sup>74</sup> The policy declarations page did not list UM as an “Umbrella Coverage.”<sup>75</sup> The insurer never offered UM coverage as part of the insureds’ umbrella policy, and the insureds never rejected such coverage in writing.<sup>76</sup>

The Georgia Court of Appeals stated that O.C.G.A. section 33-7-11 does not define “automobile liability” or “motor vehicle liability” policies and that nothing in the statute excludes umbrella or excess liability policies from the requirement that automobile liability policies must provide UM coverage.<sup>77</sup> As a matter of first impression, the court interpreted the statute broadly to apply to all policies that provide some coverage for automobile liability.<sup>78</sup> The court concluded that to hold

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69. O.C.G.A. § 33-7-11(a)(1) (2000 & Supp. 2007).

70. *Id.*

71. *Id.* § 33-7-11(a)(3).

72. 282 Ga. App. 176, 638 S.E.2d 330 (2006).

73. *Id.* at 177, 638 S.E.2d at 331.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 178, 638 S.E.2d at 332 (internal quotation marks omitted).

78. *See id.* at 179, 638 S.E.2d at 332.

umbrella or excess policies exempt from the UM statute would contravene the legislature's intent to provide payment for all actual losses for which the insured is legally entitled to recover.<sup>79</sup> Thus, the court held that umbrella and excess policies that provide for motor vehicle or automobile liability coverage are subject to O.C.G.A. section 33-7-11.<sup>80</sup>

Additionally, the court rejected the insurer's argument that it was entitled to summary judgment because the policy was a renewal policy and therefore exempt from the UM statute.<sup>81</sup> In rejecting this argument, the court noted that O.C.G.A. section 33-7-11(a)(3) merely provides that an insurer is not required to increase UM coverage in renewal policies.<sup>82</sup> That statutory provision does not exempt an umbrella policy from UM requirements.<sup>83</sup> Because the insureds made no election regarding UM coverage, the limit of coverage was equal to the liability limit of the policy.<sup>84</sup> Lastly, the court held that the provisions in the insureds' umbrella policy that specifically excluded UM coverage conflicted with Georgia's insurance statutes and were thus void.<sup>85</sup> The supreme court denied the insurer's petition for certiorari in February 2007.<sup>86</sup>

Although the court rendered its decision based on the particular type of insurance policy before it, the rationale of the decision in *Abrohams* appears to apply equally to commercial general liability policies as well as any liability policy that provides coverage for damages caused in the use or maintenance of a motor vehicle. The legislature has considered bills directed toward addressing the effect of the decision in *Abrohams*, and further attempts to legislatively reverse this decision should be expected.

**2. UM Carrier Entitled to Set-Offs for Social Security and Workers' Compensation Benefits.** In *Dees v. Logan*,<sup>87</sup> the court of appeals upheld an insurer's right to set off benefits received by the insured from special damages awarded for lost wages and gave practitioners some guidance on how to handle other categories of damages.<sup>88</sup> The plaintiffs in *Dees*, husband and wife, sued the defen-

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79. *Id.* at 179-80, 638 S.E.2d at 333.

80. *Id.* at 180, 638 S.E.2d at 333.

81. *Id.*, 638 S.E.2d at 333-34.

82. *Id.* at 181, 638 S.E.2d at 334 (citing O.C.G.A. § 33-7-11(a)(3)).

83. *Id.* at 181 nn.24 & 28, 638 S.E.2d at 334 nn.24 & 28.

84. *Id.*

85. *Id.* at 181-82, 638 S.E.2d at 334.

86. *See Abrohams*, 282 Ga. App. 176, 638 S.E.2d 330.

87. 281 Ga. App. 837, 637 S.E.2d 424 (2006).

88. *Id.* at 840-41, 637 S.E.2d at 428.

dant driver and their uninsured motorist carrier (“UMC”) for injuries sustained by the husband and for additional damages, including loss of consortium and punitive damages. The plaintiffs settled with the defendant driver before trial and executed a limited release; the result being that the underinsured motorist claim would go to trial.<sup>89</sup> The jury awarded damages for past lost wages, reimbursement of Consolidated Omnibus Budget Reconciliation Act of 1985<sup>90</sup> (“COBRA”) payments, past pain and suffering, and loss of consortium. The trial court granted the UMC’s postjudgment motion to preclude recovery under the UM policy because previous worker’s compensation, social security disability, and other benefit payments to the plaintiffs could be used by the UMC to offset its obligation to pay the damages awarded by the jury. The plaintiffs appealed on several grounds.<sup>91</sup>

First, the plaintiffs claimed that the trial court erred in granting the UMC’s motion *in limine* to exclude evidence that the defendant driver was under the influence of crack cocaine and might have crossed the center line intentionally. The plaintiffs argued that the excluded evidence constituted an aggravating circumstance relevant to the issue of punitive damages.<sup>92</sup> The court of appeals disagreed, holding that none of the parties at trial were responsible for paying a punitive damage award because (1) the plaintiffs had negotiated a settlement with the tortfeasor that released her from liability except to the extent of other available insurance, and (2) a UM carrier is not liable for punitive damages.<sup>93</sup> Thus, the evidence of aggravating circumstances was properly excluded.<sup>94</sup>

Second, the plaintiffs argued that the trial court erred in reducing their damages by any amount through a set-off of the workers’ compensation, social security disability, and other benefits paid to the husband.<sup>95</sup> The plaintiffs maintained that O.C.G.A. section 33-7-11(a) required the UMC to pay, within applicable policy limits, “all sums which [the] insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.”<sup>96</sup> The court disagreed in part, holding that the husband’s damages for lost wages had been properly set off by workers’ compensation and disability

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89. *Id.* at 837, 637 S.E.2d at 425.

90. 29 U.S.C. § 1161 (2000).

91. *Dees*, 281 Ga. App. at 837, 637 S.E.2d at 425-26.

92. *Id.* at 837-38, 637 S.E.2d at 426.

93. *Id.* at 838, 637 S.E.2d at 426.

94. *Id.*

95. *Id.* at 838-39, 637 S.E.2d at 427.

96. *Id.* at 839, 637 S.E.2d at 427 (brackets and alteration in original) (citing O.C.G.A. § 33-7-11(a)(1)).

benefits because the policy expressly provided for such a set-off.<sup>97</sup> Relying on *Ferqueron v. State Farm Mutual Automobile Insurance Co.*<sup>98</sup> and *Northbrook Property & Casualty Insurance Co. v. Merchant*,<sup>99</sup> the court ruled that when an uninsured motorist insurance policy's language provides for a set-off against damages awarded to the extent that workers' compensation, disability, or other similar benefits have been paid to the insured, such policy language is enforceable in Georgia.<sup>100</sup> The court also found support for this holding in the public policy interest of preventing double recovery through an uninsured motorist policy.<sup>101</sup>

In the alternative, the plaintiffs argued that the set-off was nevertheless erroneous to the extent that the benefits were used to reduce the jury's award for damages other than those for lost wages.<sup>102</sup> The court agreed, holding that when a special verdict is concerned, a set-off may not extend to areas of damages that are unrelated to the benefits received.<sup>103</sup> Here, the UMC remained obligated to pay the jury's award for those damages that were not covered by the benefits received by the plaintiffs, including damages for past pain and suffering, COBRA reimbursement, and loss of consortium.<sup>104</sup>

Lastly, the court dealt with the allocation of the pre-trial settlement from the tortfeasor.<sup>105</sup> The trial court had failed to allocate the settlement amount among the categories of damages awarded to the plaintiffs, which the court held was error.<sup>106</sup> Because the jury returned a special verdict rather than a general verdict, a pro rata allocation of the settlement was required to reduce each element of the special verdict award to evenly distribute the settlement against the entire verdict.<sup>107</sup> The court then provided a mathematical formula for making a pro rata reduction and remanded the case to the trial court for entry of judgment accordingly.<sup>108</sup>

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97. *Id.*

98. 271 Ga. App. 572, 610 S.E.2d 184 (2005).

99. 215 Ga. App. 273, 450 S.E.2d 425 (1994).

100. *Dees*, 281 Ga. App. at 839, 637 S.E.2d at 427 (citing *Ferqueron*, 271 Ga. App. at 573-74, 610 S.E.2d at 185-86; *Merchant*, 215 Ga. App. at 275, 450 S.E.2d at 426-27).

101. *Id.* (citing *Anderson v. Mullinax*, 269 Ga. 369, 497 S.E.2d 796 (1998); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 216 Ga. App. 541, 455 S.E.2d 91 (1995)).

102. *Id.*

103. *Id.*

104. *Id.* at 839-40, 637 S.E.2d at 427.

105. *Id.* at 840, 637 S.E.2d at 427-28.

106. *Id.*, 637 S.E.2d at 428.

107. *Id.*

108. *Id.* at 840-41, 637 S.E.2d at 428.

Certiorari was initially denied by the Georgia Supreme Court on February 5, 2007.<sup>109</sup> Upon a motion for reconsideration, the supreme court vacated its original order and granted certiorari with the following question to be addressed on review: “Whether the Court of Appeals properly ruled that, under the provisions of [the plaintiff’s] uninsured motorist policy, the jury’s award of past lost wages to [the plaintiff] could be reduced by the amount of workers’ compensation and other similar benefits paid to [the plaintiff]. See O.C.G.A. [section] 33-7-11.”<sup>110</sup> Oral argument was scheduled for June 2007.<sup>111</sup>

**3. The Addition of a Vehicle is Not the Issuance of a New Policy Requiring Separate Selection or Rejection of UM Coverage.** In *Soufi v. Haygood*,<sup>112</sup> the court of appeals ruled that an insurer is not required to obtain a new select-or-reject form from the insured when a new vehicle is added to an existing policy.<sup>113</sup> In *Soufi* the plaintiff insured appealed the grant of the defendant insurer’s motion for summary judgment. The insured argued that when a new vehicle was added to her policy, the insurer was required to obtain a selection or rejection of UM coverage from the insured to avoid the application of the statutory default.<sup>114</sup>

The 2001 amendments to O.C.G.A. section 33-7-11 provide that if an insured in a new policy does not either elect a lesser amount of UM coverage or reject UM coverage altogether, the amount of UM coverage defaults to equal the amount of liability coverage provided by the policy.<sup>115</sup> However, this default provision does not apply to renewal policies issued before the amendments.<sup>116</sup>

In *Soufi* the insureds added a new vehicle to their existing policy in August 2001, which was after the July 1 effective date of the amendments. The insurer did not obtain a new select-or-reject form when the new vehicle was added, and the policy declarations provided that all vehicles on the policy were covered by UM benefits in the amount of \$100,000 per person or \$300,000 per accident as selected by the named insured in 1998. In September 2002 the insured was involved in an

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109. *Dees*, 281 Ga. App. 837, 637 S.E.2d 424.

110. Supreme Court of Georgia, 2007 Granted Certioraris, [http://www.gasupreme.us/granted\\_certs/gc\\_07.php](http://www.gasupreme.us/granted_certs/gc_07.php) (last visited Sept. 26, 2007).

111. *Id.*

112. 282 Ga. App. 593, 639 S.E.2d 395 (2006).

113. *Id.* at 596-97, 639 S.E.2d at 398-99.

114. *Id.* at 593-94, 639 S.E.2d at 396-97.

115. See *Abrohams*, 282 Ga. App. at 181 nn.24 & 28, 638 S.E.2d at 334 nn.24 & 28.

116. O.C.G.A. § 33-7-11(a)(3); *Tice v. Am. Employers’ Ins. Co.*, 275 Ga. App. 125, 619 S.E.2d 797 (2005).

accident while driving the vehicle added to the policy in August 2001. The insured and the insurer disagreed on the amount of UM coverage available to satisfy the insured's claim for damages, and the insured filed suit.<sup>117</sup> The trial court granted summary judgment to the insurer, and the court of appeals affirmed.<sup>118</sup> The court held that the addition of a vehicle does not constitute the issuance of a new "policy," and therefore, the insurer was not required to notify the insureds of the change in O.C.G.A. section 33-7-11 or to secure a separate UM election at the time the vehicle was added to the insured's policy.<sup>119</sup>

**4. Ladder in the Road Does Not Satisfy "John Doe" Requirement.** From time to time, cases reach the court of appeals concerning motorists' collisions with, or because of, objects in the roadway instead of collisions with other motor vehicles. The plaintiffs in these cases usually claim that they are entitled to recover UM benefits from their insurers because their collisions were caused by the negligence of an unknown "John Doe" motorist who left the object in the roadway.<sup>120</sup> In *Hohman v. State Farm Fire & Casualty Automobile Insurance Co.*,<sup>121</sup> the insured alleged that due to the negligence of "John Doe," a ladder laid in the highway, which caused another driver to swerve into her path, setting off a chain of events that resulted in a collision and injuries. The insurer contended that the claim was fatally defective under O.C.G.A. section 33-7-11.<sup>122</sup> The insurer maintained that under the statute, recovery is only permitted when either (1) actual physical contact occurs between the unknown vehicle and the insured or (2) when the insured's description of how the accident occurred is corroborated by an eyewitness. The insurer further contended that, here, although witnesses could corroborate the insured's version of the events leading to and including the collision, no witness—including the insured—could testify that the ladder had fallen into the roadway from a vehicle. The insurer thus concluded that no evidence was submitted that could satisfy the insured's burden to show the existence and liability of a phantom

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117. *Soufi*, 282 Ga. App. at 593-94, 639 S.E.2d at 396-97.

118. *Id.* at 593, 639 S.E.2d at 396.

119. *Id.* at 596-97, 639 S.E.2d at 398-99.

120. *See, e.g.*, *Hambrick v. State Farm Fire & Cas. Co.*, 260 Ga. App. 266, 581 S.E.2d 299 (2003); *Torstenson v. Doe*, 257 Ga. App. 389, 571 S.E.2d 432 (2002); *Murphy v. Ga. Gen. Ins. Co.*, 208 Ga. App. 501, 431 S.E.2d 147 (1993); *State Farm Fire & Cas. Co. v. Guest*, 203 Ga. App. 711, 417 S.E.2d 419 (1992); *Scott v. Allstate Ins. Co.*, 200 Ga. App. 296, 407 S.E.2d 492 (1991).

121. 283 Ga. App. 430, 641 S.E.2d 650 (2007).

122. *Id.* at 430-31, 641 S.E.2d at 651 (citing O.C.G.A. § 33-7-11(b)(2) (Supp. 2007)).

vehicle operator.<sup>123</sup> The court agreed and then rejected the insured's argument that a jury could infer that the ladder fell from a vehicle onto the highway.<sup>124</sup> In rejecting this argument, the court observed that because a ladder is not an "integral part" of a motor vehicle, the rule of *State Farm Fire & Casualty Co. v. Guest*,<sup>125</sup> which affords an insured an inference that the integral part came from a motor vehicle, did not apply.<sup>126</sup> Thus, the court of appeals affirmed the trial court's grant of summary judgment to the insurer.<sup>127</sup>

**5. Relaxed Standard for Seeking Publication Service Before Expiration of Limitations.** Last year's survey included the usual cases in which a trial court found that a plaintiff failed to exercise the appropriate due diligence in locating a tortfeasor, which is required to toll the limitations period, and the court therefore dismissed the plaintiffs' complaints.<sup>128</sup> This year, in *Luca v. State Farm Mutual Automobile Insurance Co.*,<sup>129</sup> a trial court employed similar reasoning in dismissing the case, but the court of appeals reversed because of particular facts concerning timing issues before trial.<sup>130</sup>

Luca filed a negligence action in December 2003 against defendant Castro because of an automobile collision in May 2003 and timely served her UM carrier. The plaintiff attempted to serve the defendant in December 2003 and March 2004, but the sheriff's office reported on both occasions that the defendant was in Mexico. The plaintiff made three requests for permission to serve the defendant by publication before the limitations period expired, but the period expired while the last request was pending. On the UM carrier's motion to dismiss, the trial court found that the plaintiff had failed to exercise proper diligence to ensure that Castro was located and served as quickly as possible,<sup>131</sup> and relying on *Brown v. State Farm Mutual Automobile Insurance Co.*,<sup>132</sup> the trial court granted the UM carrier's motion to dismiss the lawsuit.<sup>133</sup> The court of appeals reversed based on the distinction between

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123. *Id.* at 430-32, 641 S.E.2d at 651.

124. *See id.* at 432, 641 S.E.2d at 651.

125. 203 Ga. App. 711, 417 S.E.2d 419 (1992).

126. *Hohman*, 283 Ga. App. at 432, 641 S.E.2d at 651 (citing *Guest*, 203 Ga. App. at 713-14, 417 S.E.2d at 422).

127. *See id.* at 433, 641 S.E.2d at 652.

128. *See* Schatz, Cotter & Wolff, *supra* note 1.

129. 281 Ga. App. 658, 637 S.E.2d 86 (2006).

130. *Id.* at 662, 637 S.E.2d at 89.

131. *Id.* at 658-59, 637 S.E.2d at 86-87.

132. 242 Ga. App. 313, 529 S.E.2d 439 (2000).

133. *Luca*, 281 Ga. App. at 660, 637 S.E.2d at 87.

a plaintiff's duty before and after the expiration of the limitations period.<sup>134</sup> Prior to expiration of the statute of limitations, and in accordance with O.C.G.A. section 33-7-11(e), the plaintiff is required only to show that the defendant driver has either departed the state or cannot, after due diligence is exercised, be found within the state.<sup>135</sup> After the statute of limitations expires, a higher due diligence standard is used to determine whether service accomplished outside the limitations period relates back to the time of filing and thus tolls the statute of limitations.<sup>136</sup> In this case, all three of the plaintiff's requests were made within the two-year limitations period and consequently, the court of appeals reversed the trial court's dismissal because it had erroneously applied the higher due diligence standard.<sup>137</sup>

*B. Appraisal Clause Does Not Preclude Insurer's Liability for Alleged Scheme to Defraud Policyholders*

In last year's annual survey, the authors reported that in *McGowan v. Progressive Preferred Insurance Co.*,<sup>138</sup> the Georgia Court of Appeals upheld the enforceability of appraisal provisions commonly found in Georgia automobile insurance policies.<sup>139</sup> Affirming the trial court's decision, the court of appeals held that payment for the full appraisal value of the insured's vehicle mooted the insured's claims for fraud, breach of contract, and Georgia RICO violations against the insurer.<sup>140</sup> The Georgia Supreme Court granted certiorari to review the issue and reversed the court of appeals pro-insurer decision in *McGowan*.<sup>141</sup>

The case arose out of the plaintiff Mary Walker's claim<sup>142</sup> that State Farm Mutual Insurance Company ("State Farm") had conspired with CCC Information Services ("CCC"), a company that provides loss valuations to insurance companies, to intentionally undervalue automobile property damage claims. The trial court ordered the enforcement of an appraisal provision in the State Farm insurance contract, which resulted in a total-loss valuation that was greater than the amount initially determined by State Farm. State Farm paid the

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134. *Id.* at 663, 637 S.E.2d at 90.

135. *Id.*; O.C.G.A. § 33-7-11(e).

136. *Luca*, 281 Ga. App. at 660, 637 S.E.2d at 88 (citing *Cohen v. Allstate Ins. Co.*, 277 Ga. App. 437, 439, 626 S.E.2d 628, 631 (2006)).

137. *Id.* at 663, 637 S.E.2d at 89-90.

138. 274 Ga. App. 483, 618 S.E.2d 139 (2005), *rev'd*, 281 Ga. 169, 637 S.E.2d 27 (2006).

139. *Id.* at 483, 618 S.E.2d at 141-42.

140. *Id.*

141. *McGowan v. Progressive Preferred Ins. Co.*, 281 Ga. 169, 637 S.E.2d 27 (2006).

142. Companion claims filed by Harry McGowan and Dorothy Dasher were withdrawn prior to the supreme court's decision. *Id.* at 170 n.1, 637 S.E.2d at 28 n.1.

higher valuation determined from the appraisal process, and the trial court dismissed Walker's fraud, breach of contract, and RICO claims. The court found that these issues were rendered moot in light of the appraisal process and the resulting higher payment for the value of Walker's vehicle. The court of appeals affirmed.<sup>143</sup>

The Georgia Supreme Court analyzed the appraisal clause in the insurance contract and determined that by its own language, the purpose of the appraisal clause was only to provide a method by which the insurer and the insured could make a final determination regarding the actual cash value of a totaled car when there was a dispute concerning the car's value.<sup>144</sup> The court concluded that the clause did not attempt to provide a means of addressing broader issues, such as the insurer's potential liability to an insured for other claims made in a lawsuit.<sup>145</sup> Here, the fraud, breach of contract, and RICO claims concerned more than just a determination of the actual cash value of the vehicle. Based on the allegations in Walker's complaint, this case included not only a good faith dispute over the amount State Farm was required to pay Walker for the totaled vehicle, but also a pre-existing scheme between State Farm and CCC to ensure that no one would be paid properly under State Farm insurance contracts. The damages actually resulting from the alleged fraudulent scheme and breach of contract included the value of the car, the expense that the plaintiff incurred by not having use of a car, and the expense that the plaintiff incurred in being forced to hire an appraiser to show that the car was being undervalued. Because the issues raised in Walker's claim reached beyond the actual cash value of the vehicle, the appraisal clause, which simply addressed the issue of value, could not render other issues of liability moot.<sup>146</sup> The court further explained that expanding the scope of the appraisal clause beyond the issue of value is tantamount to converting the appraisal clause into an arbitration clause, and arbitration clauses are impermissible in contracts between insurers and insureds.<sup>147</sup> Because the decision by the trial court and the court of appeals impermissibly expanded the scope of State Farm's appraisal clause, the supreme court reversed.<sup>148</sup>

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143. *Id.* at 170, 637 S.E.2d at 28.

144. *Id.* at 171, 637 S.E.2d at 28.

145. *Id.*

146. *Id.* at 172, 637 S.E.2d at 29.

147. *Id.* at 172-73, 637 S.E.2d at 29 (citing O.C.G.A. § 9-9-2(c)(3) (2007)).

148. *Id.* at 173, 637 S.E.2d at 29-30.

*C. Insurer Not Entitled to Declaratory Judgment Regarding Second Insurer's Obligations*

In *State Farm Automobile Insurance Co. v. Metropolitan Property & Casualty Insurance Co.*,<sup>149</sup> the court of appeals held that the trial court should have dismissed an insurer's petition for declaratory judgment because the insurer impermissibly sought a ruling concerning a second insurer's obligations when the first insurer had no uncertainty about its own obligations that would warrant declaratory relief.<sup>150</sup> Prior to the instant case, Jodie Gilbert, the insured decedent, was killed in an automobile accident, and the Pelhams, who were also involved in the accident, filed a personal injury action against her estate. Metropolitan, one of the decedent's insurers, filed a separate action for a declaratory judgment concerning State Farm, another insurer, and its obligations to the decedent's estate. In its petition, Metropolitan admitted that it had issued a personal liability policy that covered the decedent and obligated it to defend the personal injury action against the decedent's estate. However, Metropolitan sought a declaratory judgment that State Farm also had liability coverage for the decedent and the accident.<sup>151</sup>

Metropolitan claimed that it was exposed to uncertainty with regard to State Farm's duty to defend and pay any judgment against the decedent's estate. Metropolitan then claimed that it was also exposed to uncertainty regarding the extent of coverage available to pay claims against the decedent's estate—information it needed to make a reasonable assessment of how to resolve potential settlement demands. According to Metropolitan, this information was necessary to ensure (1) that the insured was not subjected to an excess verdict and (2) that Metropolitan was not subjected to penalties and damages for bad faith in not settling the claim. State Farm answered by denying liability coverage for the decedent and stating that Metropolitan was not entitled to a declaratory judgment. State Farm claimed that Metropolitan's action was not a proper subject matter for declaratory relief because Metropolitan was not seeking guidance regarding its own liability, but rather it was seeking a determination of another insurance company's liability.<sup>152</sup>

The trial court granted summary judgment to Metropolitan, but the court of appeals reversed.<sup>153</sup> The court held that although the declara-

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149. 284 Ga. App. 430, 643 S.E.2d 895 (2007).

150. *Id.* at 432, 434, 643 S.E.2d at 897-99.

151. *Id.* at 430-31, 643 S.E.2d at 896-97.

152. *Id.* at 431-33, 643 S.E.2d at 897-98.

153. *Id.* at 432, 643 S.E.2d at 897.

tory judgment statute states that it should be liberally construed, the statute was never intended to apply to every question arising from any justiciable controversy.<sup>154</sup> Further, the court held that Metropolitan had neither shown any facts or circumstances whereby it was in a position of uncertainty or insecurity caused by the dispute over State Farm's coverage, nor had Metropolitan shown it had to take some future action which, without direction from the court, might reasonably be jeopardized.<sup>155</sup> The court noted that State Farm denied coverage in the underlying lawsuit, and Metropolitan conceded its obligation to defend the personal injury action.<sup>156</sup> Because the amount and existence of liability was one of the issues to be determined in the underlying tort action, Metropolitan did not show that an adjudication of State Farm's obligations prior to trial of the personal injury action was necessary to relieve Metropolitan from any risk of taking undirected action that would jeopardize its interest.<sup>157</sup> Nor was Metropolitan's concern about its obligation to negotiate a settlement if a demand were made in excess of its limits sufficient to authorize a declaratory judgment.<sup>158</sup> Indeed, the court cited *Cotton States Mutual Insurance Co. v. Brightman*<sup>159</sup> and noted that the supreme court held that an insurer does not have an affirmative duty to engage in negotiations for settlements that exceed the insurance policy limits or to make a counteroffer to every settlement demand constituting a condition beyond the insurer's control.<sup>160</sup>

*D. Local Government Insurers' Liability for Injuries Caused by School Bus Can Be Limited to Medical Payments Coverage*

School boards are statutorily required to acquire no-fault insurance coverage insuring the children transported by school buses against bodily injury or death.<sup>161</sup> The amount of this insurance is left to the school board's discretion.<sup>162</sup> In a dispute over which provision in a school board's insurance policy should be construed as the required no-fault accident coverage, the court of appeals held in *Coregis Insurance*

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154. *Id.*

155. *Id.* at 433, 643 S.E.2d at 897-98.

156. *Id.*, 643 S.E.2d at 898.

157. *Id.*

158. *Id.*

159. 276 Ga. 683, 580 S.E.2d 519 (2003).

160. *Metropolitan*, 284 Ga. App. at 433-34, 643 S.E.2d at 898 (citing *Brightman*, 276 Ga. at 684, 580 S.E.2d at 521).

161. O.C.G.A. § 20-2-1090 (2005).

162. *Id.*

*Co. v. Nelson*<sup>163</sup> that the medical payments (“med-pay”) coverage, not the liability coverage of the policy, applies to a student’s injury.<sup>164</sup> In *Coregis* a middle-school student was burned and disfigured by a backfiring bus. The child’s mother made a claim, and the insurer paid the \$5,000 limit of its policy’s med-pay coverage. The policy also had a provision for liability insurance in the amount of \$1 million. The mother contended the liability limits were available to pay additional sums for the child’s injury, and the insurer denied any obligation to pay more than the med-pay limit. When the mother brought a lawsuit, the insurer filed a motion for summary judgment on the coverage issue. The trial court denied the motion and found that the med-pay provision of the policy did not satisfy the no-fault requirements of the statute and that the separate liability coverage provision of the policy afforded the statutory coverage. The case then went to trial solely on the question of damages, and the trial court entered a judgment in accordance with the verdict of almost \$100,000 (giving the insurer a \$5,000 credit for its prior payment of medical expenses).<sup>165</sup>

The court of appeals vacated the judgment and held that the plain language of the policy clearly showed that the med-pay coverage was intended to serve as the no-fault accident coverage required by the statute.<sup>166</sup> The policy provided that the insurer “will pay reasonable expenses incurred for necessary medical and funeral services to or for an insured who sustains bodily injury caused by an accident” and did not condition the recovery of proceeds on legal liability.<sup>167</sup> In contrast, the liability coverage required the insurer to “pay all sums an insured *legally must pay as damages* because of bodily injury . . . to which this insurance applies.”<sup>168</sup> The court did not reach the question of whether the policy was required to provide coverage for more than medical or funeral expenses, but it noted that even if the medical payments provision did not provide the full coverage required by the statute, the outcome would be the same because the insurer’s liability was capped by the amount of *no-fault* coverage offered by the policy.<sup>169</sup> Because recovery under that provision was capped at \$5,000, which had already

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163. 282 Ga. App. 488, 639 S.E.2d 365 (2006).

164. *Id.* at 492, 639 S.E.2d at 369.

165. *Id.* at 488-89, 639 S.E.2d at 366-67.

166. *Id.* at 491, 639 S.E.2d at 368.

167. *Id.* (internal quotation marks omitted).

168. *Id.* (first alteration in original) (emphasis added) (internal quotation marks omitted).

169. *Id.* at 491-92, 639 S.E.2d at 369.

been paid to the child, the court held that summary judgment should have been awarded to the insurer.<sup>170</sup>

*E. Intra-Family Exclusion for Amounts Over Statutory Minimum Upheld*

In *Hoque v. Empire Fire & Marine Insurance Co.*,<sup>171</sup> the court of appeals affirmed a trial court's determination that an insurer's intrafamily liability exclusion was not void as against public policy.<sup>172</sup> The decedent driver rented a car and received mandatory liability insurance from National Casualty Insurance ("National") as part of the transaction. The driver also elected coverage under a supplemental liability insurance policy issued by Empire Fire and Marine Insurance Co. ("Empire"). The policy excluded coverage for losses resulting from claims brought by family members of the insured. When the decedent and his wife were subsequently killed while driving, the administrator of the wife's estate received the proceeds of the mandatory liability policy from National. Empire, citing the policy exclusion for claims brought by family members, refused payment under the excess policy. The wife's estate sued and claimed the exclusion was void as contrary to public policy.<sup>173</sup>

Because Georgia does not require liability insurance in every case, "exclusions are not per se prohibited but must be individually evaluated to determine whether they are against public policy."<sup>174</sup> Exclusions are upheld when they do not unfairly penalize an innocent victim or expose the insured to unanticipated liability.<sup>175</sup> The Georgia Supreme Court refused to enforce an intrafamily exclusion in *GEICO v. Dickey*,<sup>176</sup> but that exclusion was contrary to public policy only to the extent that it conflicted with Georgia's compulsory insurance law.<sup>177</sup> Similarly, in *Stepho v. Allstate Insurance Co.*,<sup>178</sup> an intrafamily exclusion was held to violate public policy because it left the victim unprotected by insurance coverage.<sup>179</sup> In *Hoque* the court of appeals held that the intrafamily exclusion did not conflict with Georgia's

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170. *Id.* at 492, 639 S.E.2d at 369.

171. 281 Ga. App. 810, 637 S.E.2d 465 (2006).

172. *Id.* at 811, 637 S.E.2d at 466.

173. *Id.*

174. *Id.* (quoting *S. Guar. Ins. Co. v. Preferred Risk Mut. Ins. Co.*, 257 Ga. 355, 356, 359 S.E.2d 665, 667 (1987)).

175. *Id.*

176. 255 Ga. 661, 340 S.E.2d 595 (1986).

177. *Id.* at 662, 340 S.E.2d at 596.

178. 259 Ga. 475, 383 S.E.2d 887 (1989).

179. *Id.* at 477, 383 S.E.2d at 889.

compulsory insurance law because the decedent driver was insured, and the wife's estate was compensated under National's liability policy for the full amount required by the compulsory insurance statute.<sup>180</sup> Therefore, Empire's intrafamily exclusion did not violate public policy because it did not prevent recovery of the compulsory minimum amount.<sup>181</sup> Because the decedent consented to the exclusion, and public policy did not invalidate it, the exclusion was enforced.<sup>182</sup>

*F. "Second Permitee Doctrine" Precludes Coverage for Family Use of Employer's Vehicle*

In *Hamrick v. American Casualty Co.*,<sup>183</sup> Judge Robert Vining applied the substantive state law of Georgia to evaluate an insurance policy issued by American Casualty to its insured, Georgia Piping, and determined that the insurer owed no duty to a family member of the insured's employee who used the employer's vehicle.<sup>184</sup> Georgia Piping gave permission to its employee to drive its pick-up truck to and from work. The employee allegedly gave permission to his stepson to drive the truck on an errand, and the truck collided with the plaintiffs' vehicle. After obtaining a judgment against the stepson and acquiring assignment of the stepson's rights against American Casualty, the plaintiffs filed suit against American Casualty and alleged breach of the insurance policy covering the stepson.<sup>185</sup> To determine whether American Casualty had a duty to pay for the stepson's liability under its policy with Georgia Piping, the court applied Georgia's "second permittee doctrine," which provides that permissive use occurs when a third person uses a vehicle via another person who did have permission to use the vehicle, so long as the use falls within the scope of the original permission.<sup>186</sup>

The test for determining whether a third party's use falls within the scope of permission is "(1) whether the owner's permission to the first permittee included the use to which the third person put the [vehicle], and (2) whether the scope of the permission the third person received

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180. *Hoque*, 281 Ga. App. at 812, 637 S.E.2d at 466 (citing O.C.G.A. § 33-7-11(a)(1)(A)).

181. *Id.*, 637 S.E.2d at 467.

182. *Id.* at 812-13, 637 S.E.2d at 467.

183. No. 4:06-CV-032-RLV, 2007 U.S. Dist. LEXIS 8823 (N.D. Ga. Feb. 7, 2007).

184. *Id.* at \*9-10.

185. *Id.* at \*2-3.

186. *Id.* at \*5 (internal quotation marks omitted).

from the first permittee exceeded the scope of permission given the first permittee by the owner.”<sup>187</sup>

The plaintiffs argued against the defendant’s summary judgment motion by alleging that material facts were in dispute regarding the stepson’s permission from his father.<sup>188</sup> The court disagreed, holding that the proper determination is the scope of permission given by the owner to its employee—an issue that was not materially in dispute.<sup>189</sup> To establish that the stepson’s use was not within the scope of permission given by Georgia Piping to its employee, the defendant presented evidence of frequent meetings informing employees of use restrictions on company vehicles and produced a policy document that the father had signed acknowledging his responsibility to limit use of the truck to authorized personnel.<sup>190</sup> According to the court, the plaintiffs’ evidence of the numerous times the father let his stepson drive the truck and affidavits establishing the father and other Georgia Piping employees used work trucks for personal errands, merely established how the work truck was actually used rather than the scope of permission given by Georgia Piping.<sup>191</sup> Because the stepson used the truck to run a personal errand, which was not within the scope of permission given by Georgia Piping, the court held there was no coverage for the stepson’s liability under the American Casualty policy.<sup>192</sup>

#### IV. HOMEOWNER’S INSURANCE

Because the courts consistently enforce contractual suit limitations contained in homeowner’s insurance policies, the Georgia Insurance Commissioner lengthened the contractual suit limitations permitted by regulation from one year to two years, rejecting four years as was originally proposed.<sup>193</sup> Following a consistent line of Georgia precedent, the court of appeals, in *Georgia Farm Bureau Mutual Insurance Co. v. Pawlowski*,<sup>194</sup> concluded that a one-year contractual suit limitation was binding and that the insured’s claims of fraudulent inducement

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187. *Id.* at \*6 (quoting *Prudential Prop. & Cas. Ins. Co. v. Walker*, 219 Ga. App. 84, 85, 464 S.E.2d 230, 231 (1995)).

188. *Id.* at \*8-9.

189. *Id.* at \*8.

190. *Id.* at \*6.

191. *Id.* at \*7.

192. *Id.* at \*10.

193. GA. COMP. R. & REGS. 120-2-19-.01, -19-.03, -20-.01 to -.03 (2006) (effective on four policies written or renewed after June 20, 2006).

194. 284 Ga. App. 183, 643 S.E.2d 239 (2007).

were factually insufficient.<sup>195</sup> Additionally, the court was quick to rule out a letter from Rimkus Consulting Group—referring to mold causing injury to people—as incompetent evidence and inadmissible hearsay.<sup>196</sup> The court specifically rejected the claim that *res ipsa loquitur* could establish the link between mold and injury.<sup>197</sup>

In another mold case, *Balkcom v. USAA Casualty Insurance Co.*,<sup>198</sup> the United States District Court for the Northern District of Georgia enforced a one-year suit limitation, even though the claimant alleged that the limitation did not begin to run until the insured was subjectively aware of the latent mold damage.<sup>199</sup> The court quoted an Indiana State Court: “The vast majority of courts that have considered this issue have held that the policy limitation runs from the date of the occurrence of the destructive event.”<sup>200</sup> This holding is consistent with Georgia precedent regarding the statute of limitations running from the date of injury in the property damage context, not the date of discovery.<sup>201</sup>

In another Northern District opinion, *Nguyen v. Allstate Insurance Co.*,<sup>202</sup> this time by Judge J. Owen Forrester, Allstate’s one-year suit limitation was summarily upheld and enforced.<sup>203</sup> In *Option One Mortgage Corp. v. Allstate Insurance Co.*,<sup>204</sup> a more lengthy opinion, Judge Forrester again applied Allstate’s suit limitation, this time in the face of a litany of alleged acts by Allstate that lulled the insured into a false sense of security, wherein the court did not find fraud of any type.<sup>205</sup> This collection of reported opinions enforcing the suit limitations makes it clear that, absent proof of unusual admissible facts constituting an insured’s waiver of a suit limitation, the limitations will be enforced as written in the contract, subject to the insurance commissioner’s approval of the length of that suit limitation.

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195. *Id.* at 184, 643 S.E.2d at 241.

196. *Id.* at 185-86, 643 S.E.2d at 242.

197. *Id.* at 186, 643 S.E.2d at 242.

198. No. 1:04-CV-2348-TCB, 2006 U.S. Dist. LEXIS 62754 (N.D. Ga. Aug. 31, 2006).

199. *Id.* at \*8.

200. *Id.* (quoting *Brunner v. Econ. Preferred Ins. Co.*, 597 N.E.2d 1317, 1318-19 (Ind. Ct. App. 1992)).

201. *See Corp. of Mercer Univ. v. Nat’l Gypsum Co.*, 258 Ga. 365, 366, 368 S.E.2d 732, 733 (1988) (holding that the statute of limitations for a property damage case begins to run “after the right of action accrues”).

202. No. 1:06-CV-0883-JOF, 2007 U.S. Dist. LEXIS 5084 (N.D. Ga. Jan. 16, 2007).

203. *Id.* at \*2-3.

204. No. 1:05-CV-0836-JOF, 2006 U.S. Dist. LEXIS 75658 (N.D. Ga. Aug. 3, 2006).

205. *Id.* at \*17-19.

Other homeowner's insurance opinions make it clear that courts literally enforce the policy agreement as is, rather than reaching beyond the four corners of the record. In *Varsalona v. Auto-Owners Insurance Co.*,<sup>206</sup> the Varsalonas secured an Auto-Owners insurance policy on the "resident premises" in which they did not ultimately reside.<sup>207</sup> The court of appeals concluded that construction of the contract was not required because there was no ambiguity and that the policy excluded the loss because the premises were never used as the insureds' residence.<sup>208</sup> Read your policy. In *Hattaway v. Conner*,<sup>209</sup> failure to include the document constituting a misrepresentation (if any) was fatal to the case and required that "an appellate court must assume that the judgment below was correct," and therefore, the trial court's grant of summary judgment was affirmed.<sup>210</sup> Check your record.

In *Cordell v. Pacific Indemnity*,<sup>211</sup> an extracontractual litigation, Judge Vining published several orders regulating the nuances of extracontractual practice.<sup>212</sup> On a motion to amend a breach of contract action into an extracontractual "negligent investigation" count, the court concluded that there were sufficient facts alleged to justify the right to amend in such a cause of action and that "leave shall be freely given."<sup>213</sup> The court was next asked to determine the proper line of demarcation between proper discovery and materials protected by Rule 26(b)(3)(a) of the Federal Rules of Civil Procedure<sup>214</sup> (materials prepared in anticipation of litigation).<sup>215</sup> The court ultimately held that merely having suspicion regarding a claim is not the same as taking action in the form of sending the file to the Special Investigative Unit.<sup>216</sup> With this determination, the court manifested recognition that the claim was headed to litigation.<sup>217</sup> The overt action taken seems to establish a reasonable bright line test for other courts to consider.

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206. 281 Ga. App. 644, 637 S.E.2d 64 (2006).

207. *Id.* at 644-45, 637 S.E.2d at 65-66.

208. *Id.* at 646, 637 S.E.2d at 67.

209. 281 Ga. App. 20, 635 S.E.2d 330 (2006).

210. *Id.* at 22, 635 S.E.2d at 332.

211. No. 4:05-CV-167-RLV, 2006 U.S. Dist. LEXIS 46859 (N.D. Ga. July 11, 2006).

212. *Id.* at \*14-15.

213. *Id.* at \*4, \*11-13 (internal quotation marks omitted).

214. FED. R. CIV. P. 26(b)(3)(a).

215. *Cordell v. Pac. Indem. Co.*, No. 4:05-CV-167-RLV, 2006 U.S. Dist. LEXIS 83604, \*2, \*9-10 (N.D. Ga. Nov. 13, 2006).

216. *Id.*

217. *See id.* at \*10.

## V. EXCESS AND UMBRELLA INSURANCE

The United States Court of Appeals for the Eleventh Circuit issued a clarifying discussion of true “excess” clauses in *American Casualty Co. v. MAG Mutual Insurance Co.*<sup>218</sup> MAG Mutual Insurance Co. (“MAG”) argued, and the district court agreed, that its professional liability policy, which contained a blanket employment endorsement that purportedly had its own “other insurance” clause, was excess over American Casualty’s policy.<sup>219</sup> However, after setting forth working judicial definitions in a detailed examination of the MAG policy, the Eleventh Circuit held that both policies were really primary policies.<sup>220</sup> “An ‘excess’ clause ‘provides that an insurer will pay a loss only after other available primary insurance is exhausted.’”<sup>221</sup> The court noted, “The general rule is that in cases of overlapping coverage, an excess clause will prevail over a pro-rata clause.”<sup>222</sup> Because American Casualty policy’s excess clause did not refer to “other *primary* insurance” and because the MAG policy was really a primary policy and not a true umbrella, that rule did not apply.<sup>223</sup> “[U]mbrella coverages . . . are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses.”<sup>224</sup> Because the court concluded that both policies were primary, the court held that the excess clauses cancelled each other and that pro rata payment was in order.<sup>225</sup> The opinion contains a meaningful discussion of concrete definitions and rules regarding how to apply excess clauses.<sup>226</sup>

In the umbrella area, discussed in detail elsewhere in this Article,<sup>227</sup> the court of appeals held in *Abrohams v. Atlantic Mutual Insurance Agency*<sup>228</sup> that the UM statute, O.C.G.A. section 33-7-11,<sup>229</sup> trumped

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218. 185 Fed. App’x 921 (11th Cir. 2006).

219. *Id.* at 923-24.

220. *Id.* at 926-27.

221. *Id.* at 925 n.2 (quoting 15 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 219:5 (3d ed. 1999)).

222. *Id.* at 926 (internal quotations omitted) (quoting *Garmany v. Mission Ins. Co.*, 785 F.2d 941, 947 n.6 (11th Cir. 1986)).

223. *Id.* (emphasis in original).

224. *Id.* at 927 (brackets and alteration in original) (emphasis omitted) (quoting *Atkinson v. Atkinson*, 254 Ga. 70, 77, 326 S.E.2d 206, 214 (1985)).

225. *Id.* at 926-27.

226. See *Cordell*, 2006 U.S. Dist. LEXIS 83604.

227. See *supra* Part III.A.1.

228. 282 Ga. App. 176, 638 S.E.2d 330 (2006).

229. O.C.G.A. § 33-7-11 (2000 & Supp. 2007).

an express provision of an umbrella policy which stated “[w]e won’t pay for Uninsured/Underinsured Motorists coverage or No-Fault benefits unless . . . shown on the Declarations Page.”<sup>230</sup> This created significant additional UM exposure because the insurer never offered optional UM coverage as a part of the umbrella policy.<sup>231</sup> The opinion brings back the *Jones v. State Farm Mutual Automobile Insurance Co.*<sup>232</sup> nightmare.<sup>233</sup>

In *Werner Enterprises v. Markel American Insurance Co.*,<sup>234</sup> the carrier was able to avoid a written commitment to not increase its rate for three years when the district court found that a merger clause in the insurance policy precluded consideration of the express and documented arrangement.<sup>235</sup> Additionally, because the agreement was not to be performed within one year, the Georgia statute of frauds precluded enforcement of the express undertaking.<sup>236</sup>

## VI. HEALTH INSURANCE

Georgia appellate courts have begun policing of Georgia Tort Reform in a series of opinions, all concerning inadequacies in O.C.G.A. section 9-11-9.2<sup>237</sup> due to HIPAA<sup>238</sup> preemption. In *Northlake Medical Center, LLC v. Queen*,<sup>239</sup> the court of appeals held that the claimant in a medical malpractice action was not required to file a medical record authorization in compliance with O.C.G.A. section 9-11-9.2.<sup>240</sup> This section contains a detailed analysis of HIPAA’s provisions pertaining to the integrity and confidentiality of patients’ information.<sup>241</sup> The court

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230. *Abrohams*, 282 Ga. App. at 177, 638 S.E.2d at 331 (brackets in original).

231. *See id.*

232. 156 Ga. App. 230, 274 S.E.2d 623 (1980), *overruled by* Atlanta Cas. Co. v. Flewellen, 164 Ga. App. 885, 300 S.E.2d 166 (1982).

233. In *Jones* the Georgia Court of Appeals held that noncompliance with a written offer or rejection of supplemental “no fault” coverage meant that tender of the supplemental insurance premium could cause acceptance, *ex post facto*, of the supplemental coverage. 156 Ga. App. at 233-35, 274 S.E.2d at 626-28. The court of appeals overruled *Jones* two years later in *Atlanta Casualty Co. v. Flewellen*, 164 Ga. App. 885, 890, 300 S.E.2d 166, 170 (1982) (holding that the court’s ruling in *Jones* was “contrary to the intent of the General Assembly”).

234. 448 F. Supp. 2d 1375 (N.D. Ga. 2006).

235. *Id.* at 1380.

236. *Id.*; O.C.G.A. § 13-5-30(5) (1982 & Supp. 2007).

237. O.C.G.A. § 9-11-9.2 (2006 & Supp. 2007).

238. Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.).

239. 280 Ga. App. 510, 634 S.E.2d 486 (2006).

240. *Id.* at 514, 634 S.E.2d at 490.

241. *See id.* at 510-11, 634 S.E.2d at 488-89 (citing O.C.G.A. § 9-11-9.2).

applied a two-step analysis to determine whether the provisions of the authorization requirement were preempted.<sup>242</sup> First, it determined that state law was contrary to HIPAA because the Georgia statute did not require a description of the information to be used or disclosed in a specifically meaningful fashion, and additionally, the statute did not provide for a required expiration date or notice of the right to revoke the authorization.<sup>243</sup> Second, the court determined that none of the exemptions to preemption applied.<sup>244</sup> The court rejected the dissent's plea for a saving construction of the statute, holding "[i]t is not the court's function to rewrite statutes."<sup>245</sup>

In *Crisp Regional Hospital, Inc. v. Sanders*,<sup>246</sup> a panel of the court of appeals, citing *Queen*, held the part of O.C.G.A. section 9-11-9.2 that required the plaintiff to file an authorization "allowing the defendant's attorney the right to discuss her care and treatment with all of her treating physicians" was also, without the plaintiff's presence and without prior notice to the plaintiff's attorney, preempted by HIPAA.<sup>247</sup>

In *Allen v. Wright*,<sup>248</sup> the Georgia Supreme Court granted certiorari and issued an authoritative opinion approving all of the above discussed court of appeals actions.<sup>249</sup> The supreme court held that O.C.G.A. section 9-11-9.2 did not sufficiently comply with HIPAA and, hence, was preempted by HIPAA with respect to the section's failure to give notice of the patient's right to revoke the authorization, failure to require a specific and meaningful identification of the information to be disclosed, and failure to provide for an expiration date.<sup>250</sup> Inasmuch as the Georgia statute designated that certain aspects of the medical authorization form "shall provide," the court could not interpret the statute to also require the insertion of HIPAA-required provisions.<sup>251</sup> Specifically, "Georgia law provides that the express mention of one thing in an Act or statute implies the exclusion of all other things."<sup>252</sup> In contrast, the dissent argued that O.C.G.A. section 9-11-9.2 could be construed with the technical requirements of HIPAA to structure an authorization

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242. *Id.* at 513, 634 S.E.2d at 490.

243. *Id.*

244. *Id.* at 514, 634 S.E.2d at 490.

245. *Id.*

246. 281 Ga. App. 393, 636 S.E.2d 123 (2006).

247. *Id.* at 393 n.1, 636 S.E.2d at 124 n.1.

248. 282 Ga. 9, 644 S.E.2d 814 (2007).

249. *See id.*

250. *Id.* at 12-13, 644 S.E.2d at 817.

251. *Id.* at 11-12, 644 S.E.2d at 816.

252. *Id.* at 13, 644 S.E.2d at 817 (quoting *Abdulkadir v. State*, 279 Ga. 122, 123, 610 S.E.2d 50, 52 (2005)).

consistent with HIPAA.<sup>253</sup> The General Assembly had an opportunity to correct its work, as critiqued by the court of appeals, but the General Assembly apparently decided to wait for the supreme court's final word, given in *Allen* in May 2007.<sup>254</sup> We anticipate careful construction of a HIPAA-compliant statute during the next session of the General Assembly.

Over the survey period, consumers of health insurance benefits continued to not fair well in Georgia courts. In *Unified Government of Athens-Clarke County v. McCrary*,<sup>255</sup> the supreme court held that retirees having "a vested right in free health insurance at whatever level they had at the time they retired" did not have a retirement right to a free Preferred Provider Organization ("PPO") plan versus a free Health Management Organization ("HMO") plan.<sup>256</sup> The court held that "Level of coverage" does not reach the underlying source of the insurance benefits, but rather connotes the amount or extent from some source of insurance coverage.<sup>257</sup>

The court carefully read the fine print in *Rountree v. Washington National Insurance Co.*<sup>258</sup> to apply the promised eight percent increase in benefits that would be enhanced from the date of the policy's inception only as a part of the daily benefit increase option, rather than the maximum amount benefits.<sup>259</sup> The court suggested that the plaintiff's remedy may be with the insurance agent, an increasingly popular target of claims.<sup>260</sup>

The court of appeals, in *White v. American Family Life Assurance Co.*,<sup>261</sup> held that an insured's good faith in making incorrect statements on an insurance application did not matter.<sup>262</sup> The court also did not accept the argument that the signature certifying that the statements "were 'complete and true to the best of [the insured's] knowledge and belief'" limited the responsibility for a good faith, yet incorrect, representation.<sup>263</sup> The clause only had the legal significance of precluding the signer from relying on others for the source of the

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253. *Id.* at 16, 644 S.E.2d at 819 (Hunstein, J., concurring in part and dissenting in part).

254. *See id.* at 9-10, 644 S.E.2d at 815 (majority opinion).

255. 280 Ga. 901, 635 S.E.2d 150 (2006).

256. *Id.* at 901, 904, 635 S.E.2d at 151, 153.

257. *Id.* at 902-04, 635 S.E.2d at 152-53.

258. No. 607CV014, 2007 U.S. Dist. LEXIS 36921 (S.D. Ga. May 21, 2007).

259. *Id.* at \*9-10.

260. *See id.* at \*14.

261. 284 Ga. App. 58, 643 S.E.2d 298 (2007).

262. *Id.* at 61, 643 S.E.2d at 300.

263. *Id.*, 643 S.E.2d at 300-01.

information in the application—it did not excuse inaccurate information.<sup>264</sup>

#### VII. LIFE AND DISABILITY INSURANCE

With the exception of *Riggins v. Phoenix Life Insurance Co.*,<sup>265</sup> an extreme factual scenario coupled with insufficient precedent to resolve the issue as a matter of law during this survey period, the courts consistently applied life and disability policies as written and without regard for the equities.

In *Lake v. Young Harris Alumni Foundation, Inc.*,<sup>266</sup> the court of appeals held that there was less than “substantial compliance” with the terms of policy assignment requirements despite some evidence of a desire to change the annuity policy beneficiary by Young Harris Alumni Foundation.<sup>267</sup> The annuity owner had advised the carrier’s agent that she desired to change the beneficiary, but she failed to return the written forms with her signature.<sup>268</sup> This failure to complete was her failure, rather than the failure of some third-party beyond her control, which might have been considered substantial compliance because the final unperformed future act would have been beyond her control.<sup>269</sup>

Similarly, when the policy clearly defined the “policy date” and required payment of the premium before the policy was effective, the carrier was able to successfully assert a suicide provision.<sup>270</sup> In *Adams v. West Coast Life Insurance Co.*,<sup>271</sup> the policy date was listed as July 26, 2002.<sup>272</sup> However, the policy defined the policy date as the effective date of coverage, which specifically included “the payment of the premium due,” which occurred on August 10, 2002.<sup>273</sup> Ms. Adams died from suicide on August 4, 2004. The issue was whether the suicide was within the two-year suicide provision that ran from the policy date.<sup>274</sup> The court noted that “[a]n insurance company may validly

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264. *Id.* at 61-62, 643 S.E.2d at 300-01.

265. No. CV205-138, 2006 U.S. Dist. LEXIS 40102 (S.D. Ga. June 15, 2006).

266. 283 Ga. App. 409, 641 S.E.2d 628 (2007).

267. *Id.* at 411, 641 S.E.2d at 630.

268. *Id.* at 409, 641 S.E.2d at 628.

269. *Id.* at 412, 641 S.E.2d at 630.

270. *Adams v. W. Coast Life Ins. Co.*, No. 1:05-cv-1304-GET, 2006 U.S. Dist. LEXIS 53423, at \*14 (N.D. Ga. Aug. 2, 2006).

271. No. 1:05-CV-1304-GET, 2006 U.S. Dist. LEXIS 53423 (N.D. Ga. Aug. 2, 2006).

272. *Id.* at \*8.

273. *Id.*

274. *Id.* at \*4-6.

define conditions precedent to liability,<sup>275</sup> and thus concluded that the payment of the premium was a clear condition precedent set forth in the policy.<sup>276</sup>

In *Dalrymple v. Protective Life Insurance Co.*,<sup>277</sup> the court held that an application for a life insurance policy did not constitute an issued policy because the application contained numerous misrepresentations and omissions.<sup>278</sup> Additionally, the conditional receipt agreement terms had not been met because medical tests had not been performed.<sup>279</sup>

In *Riggins v. Phoenix Life Insurance Co.*,<sup>280</sup> perhaps due to strong facts and uncertain law, Judge Anthony Alaimo's opinion granted grace to the insured in the form of a jury question when premiums were not paid on time.<sup>281</sup> Phoenix Life asserted it had mailed a premium notice to the plaintiff's last known address and subsequently claimed its policy had lapsed due to nonpayment. The carrier argued that despite a twenty-year history of providing notice of the annual premium due, it did not have a contractual duty to give notice. The plaintiff did not contact the carrier for eleven months to inquire about the notice because the post office failed to forward the plaintiff's mail.<sup>282</sup>

The court distinguished the 1886 Georgia Supreme Court case of *Grant v. Alabama Gold Life Insurance Co.*<sup>283</sup> and stated that *Grant* was the only authority remotely similar to the facts in this case.<sup>284</sup> In *Grant* the court held that delays of six and fifteen months before contacting the carrier are unreasonable as a matter of law and suggested two or three months of delay in contacting regarding annual premiums, absent some "overpowering providential cause," should constitute intent to decline continued coverage.<sup>285</sup> Here the issue concerned where the notice was sent, not how it was sent.<sup>286</sup> Additionally, the court deemed

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275. *Id.* at \*6 (quoting *Sw. Life Ins. Co. v. Middle Ga. Neurological Specialists*, 262 Ga. 273, 275, 416 S.E.2d 496, 498 (1992)).

276. *Id.* at \*11.

277. No. 1:05-CV-01774-JEC, 2007 U.S. Dist. LEXIS 6051 (N.D. Ga. Jan. 26, 2007).

278. *Id.* at \*12.

279. *Id.* at \*23.

280. No. CV205-138, 2006 U.S. Dist. LEXIS 40102 (S.D. Ga. June 15, 2006).

281. *Id.* at \*1-2, 12.

282. *Id.* at \*1-2.

283. 76 Ga. 575 (1886).

284. *Riggins*, 2006 U.S. Dist. LEXIS 40102, at \*7.

285. *Grant*, 76 Ga. at 582-83.

286. *Riggins*, 2006 U.S. Dist. LEXIS 40102, at \*9.

the plaintiff's explanation potentially sufficient to qualify as "providential cause," should a jury so determine.<sup>287</sup>

In *Thornton v. UNUM Life Insurance Co. of America*,<sup>288</sup> the United States District Court for the Northern District of Georgia discussed commonly encountered threshold issues to insurance litigation and allowed the trimmed-down diversity case to proceed.<sup>289</sup> The court first addressed the \$75,000 amount in controversy issue often encountered in diversity extracontractual litigation.<sup>290</sup> The amount of the policy benefit was either \$50,000 or \$51,000.<sup>291</sup> The court used the latter amount, as well as the plaintiff's bad faith penalty of up to fifty percent, to conclude that the jurisdictional amount in controversy was satisfied, with the court noting that when attorney fees are allowable, they too may be included in assessing the jurisdictional amount.<sup>292</sup> Georgia's insurance bad faith remedy includes a penalty of up to fifty percent and reasonable attorney fees.<sup>293</sup> While the court allowed the plaintiff's insurance contract claim to proceed, it ordered the negligence and O.C.G.A. section 13-6-11<sup>294</sup> attorney fees claims to be dismissed,<sup>295</sup> the court concluded that there was no special arrangement to suggest more than breach of contract and that O.C.G.A. section 33-4-6<sup>296</sup> was the exclusive remedy for bad faith including attorney fees.<sup>297</sup>

In *American General Life & Accident Insurance Co. v. Ward*,<sup>298</sup> the Northern District pruned an aggressive counterclaim.<sup>299</sup> The carrier brought an action for declaratory judgment and alleged a strange scenario of facts supporting forgery and material misrepresentation charges.<sup>300</sup> Judge Julie Carnes thoughtfully considered the omnibus counterclaim the carrier drew, and in writing for the court, she identified potentially viable claims and terminated groundless ones.<sup>301</sup> The court dispatched as insufficient claims for criminal violations, conversion,

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287. *Id.* at \*10-11.

288. 445 F. Supp. 2d 1379 (N.D. Ga. 2006).

289. *Id.* at 1382.

290. *Id.* at 1381.

291. *Id.*

292. *Id.* at 1382 & n.1.

293. *Id.* at 1383 (citing O.C.G.A. § 33-4-6 (2000 & Supp. 2007)).

294. O.C.G.A. § 13-6-11 (1982 & Supp. 2007).

295. *Thornton*, 445 F. Supp. 2d at 1383.

296. O.C.G.A. § 33-4-6 (2000 & Supp. 2007).

297. *Thornton*, 445 F. Supp. 2d at 1383.

298. No 1:05-CV-3320-JEC, 2007 U.S. Dist. LEXIS 18420 (N.D. Ga. Mar. 12, 2007).

299. *See id.*

300. *Id.* at \*5.

301. *See id.* at \*6-33.

money had and received, fiduciary duty, and Georgia RICO violations.<sup>302</sup> The court found that the defendant deceased's personal representative could pursue civil rights actions, and upon a proper amendment under Rule 9(b) of the Federal Rules of Civil Procedure,<sup>303</sup> the fraud claims could stand.<sup>304</sup>

In *Gatt v. Continental Casualty Co.*,<sup>305</sup> the Northern District found insufficient factual proof to support a claim that the decedent's death was "caused by an accident."<sup>306</sup> Here, the coroner reported that Gatt's prescription for OxyContin at the time of death should have had six pills missing rather than twenty-one.<sup>307</sup> The Georgia Bureau of Investigation ("GBI") found a "significant amount of oxycodone" in Gatt's blood.<sup>308</sup> The group accidental death insurance coverage covered death "caused by an accident."<sup>309</sup> The court noted that there is a distinction between "accidental injuries" and "injuries resulting from accidental means."<sup>310</sup> An accidental injury is unexpected but arises from a volitional act, whereas an injury from "accidental means . . . must be the unexpected result of an unforeseen or unexpected act which was involuntarily and unintentionally done."<sup>311</sup>

In *Smith v. Life Insurance Co. of North America*,<sup>312</sup> an exhaustive opinion concerning both the Employee Retirement Income Security Act of 1974<sup>313</sup> ("ERISA") federal common law "make whole doctrine"<sup>314</sup> and Georgia's anti-subrogation statute,<sup>315</sup> the plaintiff was able to prohibit the plan administrator from taking a set-off for the fruits of a tort settlement.<sup>316</sup> While ERISA permits the plan to claim the first right of reimbursement out of any recovery, the plan's language must be specific and explicitly reject the make whole doctrine.<sup>317</sup> If the plan does not explicitly reject the concept, the make whole doctrine operates

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302. *Id.* at \*10-16.

303. FED. R. CIV. P. 9(b).

304. *Ward*, 2007 U.S. Dist. LEXIS 18420, at \*31.

305. No. 1:04-cv-3023-GET, 2006 U.S. Dist. LEXIS 64996 (N.D. Ga. Sept. 12, 2006).

306. *Id.* at \*8.

307. *Id.* at \*5.

308. *Id.* at \*6.

309. *Id.* at \*4.

310. *Id.* at \*6.

311. *Id.* at \*7 (quoting *Johnson v. Nat'l Life & Accident Ins. Co.*, 92 Ga. App. 818, 819, 90 S.E.2d 36, 36 (1955)).

312. 466 F. Supp. 2d 1275 (N.D. Ga. 2006).

313. 29 U.S.C. §§ 1001-1461 (2000).

314. See *Cagle v. Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997).

315. O.C.G.A. § 33-24-56.1 (2005).

316. *Smith*, 466 F. Supp. 2d at 1292.

317. *Id.* at 1286 (citing *Cagle*, 112 F.3d at 1521).

as a default rule as a part of the federal common law.<sup>318</sup> The court also found that Georgia's anti-subrogation statute was not preempted by ERISA and, hence, it too prohibited the administrator from taking such a set-off.<sup>319</sup> The court found that the anti-subrogation statute was exempt from ERISA plan regulation because it was a law deemed to "regulate insurance."<sup>320</sup> Thus, the court found that the statute was directed toward the insurance industry and substantially affected the risk pooling arrangement between the insurer and insured.<sup>321</sup> This opinion gives guidance to those who draft plans and consider taking set-offs.

The decision in *Putnal v. Guardian Life Insurance Co. of America*<sup>322</sup> also turned upon the policy language, this time a disability policy defining total disability as the inability to "perform the major duties of your occupation."<sup>323</sup> A pharmacist suffered a stroke and was left with residual limitations. The carrier claimed that for the pharmacist to collect benefits under the policy, the policy required that the pharmacist be unable to perform *all* of the major duties of his occupation, whereas the claimant asserted that being unable to perform just some of the major duties of his occupation was sufficient.<sup>324</sup> The United States District Court for the Middle District of Georgia found the contract to be ambiguous and, hence, interpreted it against the insurer.<sup>325</sup> Because a reasonable jury could conclude that the plaintiff was unable to perform "two or more major duties" of his occupation, the defendant's motion for summary judgment was denied.<sup>326</sup>

Four opinions were issued in this survey period concerning class action litigation against carriers failing to refund unearned insurance premiums owed under credit life and disability policies. In *J.M.I.C. Life Insurance Co. v. Toole*,<sup>327</sup> Toole purchased a credit life and disability insurance policy from J.M.I.C. Life Insurance Co. ("J.M.I.C.") yet satisfied his car loan within a year, more than four years prior to the

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318. *Id.* at 1285-86 (citing *Cagle*, 112 F.3d at 1521).

319. *Id.* at 1291-92.

320. *Id.* at 1291 (quoting 29 U.S.C. § 1144(b)(2)(A)).

321. *Id.* This satisfied the two requirements set forth by the United States Supreme Court in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003), that determine whether a law regulates industry and constitutes an exception to ERISA preemption. *Id.*; 29 U.S.C. § 1144(b).

322. No. 5:04-CV-130(HL), 2006 U.S. Dist. LEXIS 70931 (M.D. Ga. Sept. 29, 2006).

323. *Id.* at \*2.

324. *Id.* at \*11.

325. *Id.* at \*18-19.

326. *Id.* at \*21.

327. 280 Ga. App. 372, 634 S.E.2d 123 (2006).

expiration of the policy's term. Under O.C.G.A. section 33-31-9(c),<sup>328</sup> he was entitled to a refund of the unearned premium on the policy.<sup>329</sup> While noting that the statute was amended, effective May 2, 2005, to provide pre-suit notification of the carrier, the court of appeals held that filing the lawsuit against the carrier for the unearned premium was sufficient to satisfy any contractual condition precedent to the obligation to return the unearned premium.<sup>330</sup> The plaintiff was entitled to retain his tort claim, insofar as it was a breach of contract *and* a breach of duty imposed by law, rather than a mere breach of contract claim.<sup>331</sup> The court did not disturb the class certification, the primary issue there being whether "commonality" was shown.<sup>332</sup> The court distinguished a prior opinion denying class treatment where the subjective examination of each patient's account at a hospital would have been necessary to compute refunds.<sup>333</sup> Here, the plaintiff demonstrated to the trial court and the court of appeals that he could prove overpayments by electronic means which would objectively compute the amount of refunds of unearned premiums.<sup>334</sup>

Judge Clay Land heavily relied upon *J.M.I.C. Life Insurance Co.* in three orders issued in parallel federal litigation.<sup>335</sup> In *Baker v. American Heritage Life Insurance Co.*,<sup>336</sup> the defendant's motion to dismiss was denied, based on the opinion in *J.M.I.C. Life Insurance Co.*<sup>337</sup> In *Bishop's Property & Investments, LLC v. Protective Life Insurance Co.*,<sup>338</sup> Judge Land again cited to *J.M.I.C. Life Insurance Co.* and denied the defendant's motion to dismiss.<sup>339</sup> The court also declined to transfer venue to the Northern District of Alabama because the court found ample connection to the Middle District of Georgia to

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328. O.C.G.A. § 33-31-9(c) (2005).

329. *Toole*, 280 Ga. App. at 373, 634 S.E.2d at 125 (citing O.C.G.A. § 33-31-9(c)).

330. *Id.* at 374, 634 S.E.2d at 126-27.

331. *Id.* at 375, 634 S.E.2d at 127.

332. *See id.* at 376-77, 634 S.E.2d at 128.

333. *Id.* (citing *Winfrey v. Sw. Cmty. Hosp., Inc.*, 184 Ga. App. 383, 361 S.E.2d 522 (1987)).

334. *Id.* at 377, 643 S.E.2d at 128.

335. *Baker v. Am. Heritage Life Ins. Co.*, No. 4:05-CV-128 (CDL), 2006 U.S. Dist. LEXIS 62586, at \*5-6 (M.D. Ga. Sept. 1, 2006) (citing *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 634 S.E.2d 123 (2005)); *Bishop's Prop. & Invs., LLC v. Protective Life Ins. Co.*, No. 4:05-CV-126(CDL), 2006 U.S. Dist. LEXIS 62593, at \*10 (M.D. Ga. Sept. 1, 2006) (citing *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 634 S.E.2d 123 (2006)).

336. No. 4:05-CV-128(CDL), 2006 U.S. Dist. LEXIS 62586 (M.D. Ga. Sept 1, 2006).

337. *Id.* at \*5-6.

338. No. 4:05-CV-126(CDL), 2006 U.S. Dist. LEXIS 62593 (M.D. Ga. Sept 1, 2006).

339. *Id.* at \*12.

honor the plaintiff's choice of venue.<sup>340</sup> It also rejected the strained argument that the claim for a refund of the unearned premium fell under the proof of loss section of the policy, which would have required sixty days prior notice and an opportunity for resolution.<sup>341</sup>

Several months later, Judge Land rejected a defendant's claim that a matter had become moot due to payment to the class representative.<sup>342</sup> In reaching this decision, Judge Land applied the *Zeidman v. J. Ray McDermott & Co.*<sup>343</sup> "relation back" exception to the general rule that proposed class representative claims must remain live *throughout* the certification process.<sup>344</sup>

The 1981 United States Court of Appeals for the Fifth Circuit opinion in *Zeidman* is binding precedent in the Eleventh Circuit in accord with *Bonner v. City of Pritchard*.<sup>345</sup> Under *Zeidman*, where the class representative has filed a motion for class certification and vigorously pursued it, the class certification can and does relate back to the filing of the motion.<sup>346</sup> This is necessary in certain circumstances, especially where the claim might otherwise evade review.<sup>347</sup> The court in *Bishop's Property & Investments, LLC* found that the plaintiffs had diligently pursued class certification and, hence, the court found that the *Zeidman* exception should be employed.<sup>348</sup>

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340. *Id.* at \*6-8.

341. *Id.* at \*13.

342. *Bishop's Prop. & Invs., LLC v. Protective Life Ins. Co.*, 463 F. Supp. 2d 1375, 1382 (M.D. Ga. 2006).

343. 651 F.2d 1030 (5th Cir. 1981).

344. *Bishop's Prop. & Invs., LLC*, 463 F. Supp. 2d at 1378-79.

345. 661 F.2d 1206, 1209 (11th Cir. 1981).

346. *Bishop's Prop. & Invs., LLC*, 463 F. Supp. 2d at 1378 (citing *Zeidman*, 651 F.2d at 1036).

347. *See id.* at 1379 (citing *Zeidman*, 651 F.2d at 1048).

348. *Id.* at 1382.