Insurance

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I. INTRODUCTION

During this survey period, the Georgia General Assembly stepped in to clarify, if not expand, insurance carrier rights under uninsured motorist (UM) policies to more *limited* coverage. Insurance agents were the subject of increasing scrutiny for potential liability. The courts continued to struggle for clarity in the area of coverage for "construction defects."

II. COMMERCIAL LIABILITY INSURANCE

A. Interpretation of the Timely Notice Condition

In *Kay-Lex Co. v. Essex Insurance Co.*,[1] the Georgia Court of Appeals addressed whether an insured's notice to its independent agent constituted notice to its insurer as required by the condition of its

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1. 286 Ga. App. 484, 649 S.E.2d 602 (2007).

commercial general liability (CGL) insurance policy.[2] The claimant was killed on June 19, 2003 while operating a forklift at the insured's warehouse. The insured provided notice of the accident on the day it occurred to its independent agent, who procured the coverage through a surplus lines broker. The insurer, however, did not receive notice of the accident until it received a demand letter from the claimant's attorney one year later.[3] The CGL policy required the insured to provide notice of an occurrence "as soon as practicable."[4] The insurer filed a declaratory judgment action, contending that no coverage existed under the policy for the accident because the insured had breached the timely notice condition.[5]

In deciding that the insured had breached the timely notice condition, the court held that the insured's notice to its independent agent did not constitute notice to its insurer.[6] Under Georgia law, independent insurance agents or brokers are considered the agent of the insured, not the insurer.[7] Here, no evidence existed to suggest that the independent agent had apparent authority to receive notice from the insured on behalf of the insurer.[8] Moreover, in order for apparent authority to apply, the insured must have reasonably relied upon the representation of an agency relationship.[9] No evidence of such justiciable reliance was presented by the insured.[10]

The United States District Court for the Northern District of Georgia reached a similar conclusion in *Owners Insurance Co. v. Gordon*.[11] In October 2002 the claimant's attorney sent three letters to the insureds that accused them of copyright infringement and threatened to file suit. In August 2005 the insureds were served with a complaint for copyright infringement. A few days later, one of the insureds notified his independent insurance agent of the suit. The agent failed to provide notice to the insurer, and the insurer was not notified of the suit and the underlying claims until June 20, 2006.[12] The policy required the

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2. *See id.* at 488-89, 649 S.E.2d at 606-07.
3. *Id.* at 487-88, 649 S.E.2d at 606.
4. *Id.* at 488, 649 S.E.2d at 606.
5. *Id.* at 487, 649 S.E.2d at 606.
6. *See id.* at 490, 649 S.E.2d at 608.
7. *Id.* at 489, 649 S.E.2d at 607 (citing Se. Express Sys. v. S. Guar. Ins. Co. of Ga., 224 Ga. App. 697, 700, 482 S.E.2d 433, 435 (1997)).
8. *Id.*
9. *Id.* at 490, 649 S.E.2d at 607 (citing Kirby v. Nw. Nat'l Cas. Co., 213 Ga. App. 673, 678, 445 S.E.2d 791, 796 (1994)).
10. *Id.*, 649 S.E.2d at 607-08.
11. No. 1:07-CV-0369-JFK, 2008 U.S. Dist. LEXIS 14663 (N.D. Ga. Feb. 26, 2008).
12. *Id.* at *9-*12.

insureds to provide notice of an occurrence or offense that may result in a claim, as well as any suit, "as soon as practicable," and "immediately" send the insurer "copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'"[13]

In finding that the insureds breached the timely notice condition, the court first held that the three letters sent by the claimant's attorney in October 2002 gave the insureds reason to know that their conduct may have resulted in claims under the terms of their policy, requiring them to put their insurer on notice "as soon as practicable."[14] Second, the court held that the notice provided by the insureds to the independent agent of the lawsuit in August 2005 did not constitute notice to the insurer.[15] Therefore, the insureds' failure to provide the insurer with notice of the suit until June 2006 was an unreasonable delay as a matter of law.[16] Similar to *Kay-Lex*, no evidence was presented that the insurer placed the independent agent in a position of apparent authority to receive notice on the company's behalf.[17]

Contrast these two decisions with those decided in *Bowen Tree Surgeons, Inc. v. Canal Indemnity Co.*[18] and *Yeomans & Associates Agency, Inc. v. Bowen Tree Surgeons, Inc.*[19] In *Bowen* the court of appeals held that a question of fact existed on whether the independent agent served as the insurer's agent to accept notice because of the existence of two factors: (1) the agent customarily accepted premiums and notices of claims on the insurer's behalf, and (2) the insurer never voiced an objection to this custom.[20] In *Yeomans*, because the evidence demonstrated that the agent had previously accepted premiums and notices of claims on the insurer's behalf and no evidence indicated that the insurer had ever objected to this custom, a jury question existed regarding whether the agent was authorized to accept notices of claims on the insurer's behalf "as a fiduciary and a dual agent."[21]

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13. *Id.* at *7.

14. *Id.* at *23-*24. This ruling should serve as a warning to insureds that they should place their insurers on notice whenever they receive a letter threatening suit from a claimant.

15. *Id.* at *25.

16. *Id.* at *30.

17. *Id.* at *28-*29.

18. 264 Ga. App. 520, 591 S.E.2d 415 (2003) (discussed in Stephen M. Schatz, Stephen L. Cotter & Bradley S. Wolff, *Insurance*, 56 MERCER L. REV. 253, 269 (2004)).

19. 274 Ga. App. 738, 618 S.E.2d 673 (2005) (discussed in Stephen M. Schatz, Stephen L. Cotter & Bradley S. Wolff, *Insurance*, 58 MERCER L. REV. 181, 182-85 (2005)).

20. *Bowen*, 264 Ga. App. at 522, 591 S.E.2d at 417.

21. *Yeomans*, 274 Ga. App. at 745-46, 618 S.E.2d at 680.

B. Interpretation of Coverage in Construction Defect Claims

Several decisions by federal courts in Georgia addressed whether coverage exists for construction defect claims under CGL policies. The courts took varied approaches but reached the same result, with one exception. In *Hathaway Development Co. v. Illinois Union Insurance Co.*,[22] the insured was a general contractor for the construction of three apartment complexes that suffered damage as a result of the subcontractors' allegedly faulty workmanship on the projects.[23] The United States Court of Appeals for the Eleventh Circuit upheld the district court's determination that the subcontractors' work on the project did not constitute an "occurrence" as defined by the policy and, therefore, was not covered under the policy.[24] The subcontractors' defective work was not an accident but "'an injury accidentally caused by intentional acts.'"[25] The court's approach is consistent with the one first adopted by the Northern District of Georgia in *Owners Insurance Co. v. James*[26] in addressing whether coverage exists for an insured's defective work that results in damage to the project itself.[27] Although *Hathaway* suggests that the insured paid residents of the apartments for their damages,[28] the case is silent regarding whether any such payments would be considered resulting damage to other property and, thereby, covered by the policy.

On the other hand, in *Essex Insurance Co. v. H & H Land Development Corp.*,[29] the United States District Court for the Middle District of Georgia rejected the analysis of *Owners Insurance Co. v. James*,[30] stating that "if the logic of [*James* was] universally applied, the 'occurrence' based policy would essentially provide coverage only from

22. 274 Fed. App'x 787 (11th Cir. 2008).
23. *Id.* at 788-89.
24. *Id.* at 791.
25. *Id.* (quoting Owners Ins. Co. v. James, 295 F. Supp. 2d 1354, 1364 (N.D. Ga. 2003)).
26. 295 F. Supp. 2d 1354 (N.D. Ga. 2003) (discussed in Stephen M. Schatz, Stephen L. Cotter & Bradley S. Wolff, *Insurance*, 56 MERCER L. REV. 253, 260-62 (2004)).
27. *Id.* at 1363. The court in *Hathaway* also held that no coverage existed under the insurance policy, because (1) the insured breached the condition of the policy requiring timely notice of the incidents when it waited eight, five, and four months respectively after the damage events took place at the three complexes before reporting them to the insurer; (2) the insured breached the conditions of the policy prohibiting the insured from voluntarily making payments when it undertook repairs without the insurer's consent; and (3) the recall exclusion, mold and fungi exclusion, and business risk exclusion applied to the defective work. 274 Fed. App'x at 791-92.
28. 274 Fed. App'x at 791.
29. 525 F. Supp. 2d 1344 (M.D. Ga. 2007).
30. 295 F. Supp. 2d 1354 (N.D. Ga. 2003).

random events that involve no element of intent or conscious action."[31] Furthermore, the court noted that "[a]lmost every conceivable accident for which an insured could be held liable involves some intentional action at some point in the chain of causation."[32] In *Essex*, the insured developed property adjacent to the claimant's property, allegedly causing an increase in excess storm water, silt, sediment, and debris to run-off onto claimant's property.[33] The court held that summary judgment in favor of the insurer on the basis of lack of an "occurrence" would be inappropriate: "Although the construction work was intentional, the runoff that occurred was not intentional. It was the unintentional runoff, not the intentional construction, that caused injury to the neighboring property owners."[34] *Essex* was decided before the Eleventh Circuit's unpublished opinion in *Hathaway*. Therefore, it remains to be seen whether federal courts in the future will continue to follow the "occurrence" analysis adopted by *James* and *Hathaway*.

The Northern District of Georgia took a different approach in determining whether defective workmanship was covered in *Massachusetts Bay Insurance Co. v. Sunbelt Directional Drilling, Inc.*[35] The insured was a contractor who hired a subcontractor to perform drilling work to install underground cable. In performing its work, the subcontractor caused damage to the road.[36] In concluding that such defective workmanship did not constitute a covered "occurrence" under the policy, the court analyzed whether the insured's liability arose in contract or arose in tort.[37] The court relied upon the Georgia Court of Appeals decisions in *McDonald Construction Co. v. Bituminous Casualty Corp.*[38] and *SawHorse, Inc. v. Southern Guaranty Insurance Co.*[39] for the proposition that a CGL policy only covers damage caused by faulty workmanship when the damage is to property other than the work itself and when the insured's liability for such damage arises in tort or negligence, not in breach of contract.[40] Because the insured's obligation to repair the road caused by the defective drilling arose in contract, as

31. *Essex*, 525 F. Supp. 2d at 1350-51.
32. *Id.* at 1351.
33. *Id.* at 1345.
34. *Id.* at 1351.
35. No. 1:07-CV-0408-JOF, 2008 U.S. Dist. LEXIS 20066 (N.D. Ga. Feb. 14, 2008).
36. *Id.* at *1-*2.
37. *Id.* at *8-*9.
38. 279 Ga. App. 757, 632 S.E.2d 420 (2006).
39. 269 Ga. App. 493, 604 S.E.2d 541 (2004) (discussed in Stephen M. Schatz, Stephen L. Cotter & Bradley S. Wolff, *Insurance*, 57 MERCER L. REV. 221, 230-32 (2005)).
40. *Massachusetts Bay*, 2008 U.S. Dist. LEXIS 20066, at *9-*10.

part of the project work itself, the cost of such repairs was not covered under the policy.[41]

The Northern District of Georgia took a similar, but slightly different, approach in *Johnson Landscapes, Inc. v. FCCI Insurance Co.*[42] As it did in *Massachusetts Bay*, the court relied on *McDonald*, but instead of focusing on whether the defective construction was an occurrence or an accident, the court addressed whether the insured was "'legally obligated to pay as damages sums resulting from . . . property damage for which the policy provided coverage,'" as set forth in the insuring agreement of the policy.[43] Even if the defective work is considered an accident, there is no "property damage" if the damage arose out of the insured's contractual obligations and not from tort liability arising outside the construction contract.[44] The insured was a contractor who built a retaining wall that subsequently collapsed. Because the cost to reconstruct the retaining wall arose out of the insured's contractual obligations, the court held that the cost did not result from property damage and was not covered by the policy.[45]

Although these cases apply differing theories in addressing coverage for construction defect claims, they all share a common theme: if the damage caused by the insured is to its own work or project, then no coverage exists under a CGL policy for the damage.

C. Definition of "Pollutant" is Broad and Unambiguous

In a case of first impression, *Auto-Owners Insurance Co. v. Reed*,[46] the court of appeals held that poison from carbon monoxide contained within a residence and not released into the environment is excluded by the absolute pollution exclusion in a CGL policy.[47] Auto-Owners' policy excluded bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants."[48] "Pollutants" was defined by the policy, in pertinent part, as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis,

41. *Id.* at *14-*15.
42. No. 1:06-CV-2525-WSD, 2007 U.S. Dist. LEXIS 88859 (N.D. Ga. Nov. 30, 2007).
43. *Id.* at *13 (quoting *McDonald*, 279 Ga. App. at 761, 632 S.E.2d at 423).
44. *Id.* at *13-*14.
45. *Id.* at *14-*15. The court also held that even if the costs to purchase the retaining wall had constituted property damage, the costs would be excluded from coverage under the "your work" exclusion. *Id.* at *16-*20.
46. 286 Ga. App. 603, 649 S.E.2d 843 (2007).
47. *Id.* at 605, 649 S.E.2d at 845.
48. *Id.* at 604, 649 S.E.2d at 844.

chemicals and waste."[49] The claimant alleged she was injured as a result of the discharge of carbon monoxide inside the insured's property.[50] The court held that because carbon monoxide is a "fume and a gaseous irritant or contaminant," it constituted a "pollutant," and therefore, the claimant's injuries were clearly and unambiguously excluded under the pollution exclusion.[51] In a lengthy dissent, Judge Ellington argued that the pollution exclusion is ambiguous because the definition of "pollutants" can reasonably be interpreted to apply in two different ways: (1) to the existence of any substance or chemical irritant or (2) to what is traditionally considered environmental pollution when the irritant or contaminant has been released or discharged into the environment.[52] The different arguments in the dissent and majority opinions show how courts across the country are split on the issue of whether the pollution exclusion applies to "any irritant" or only applies to environmental pollution.[53] The decision in *Auto-Owners* places Georgia in the "any irritant" camp.[54]

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49. *Id.*

50. *Id.*

51. *Id.* at 605, 649 S.E.2d at 845.

52. *Id.* at 607, 649 S.E.2d at 846 (Ellington, J., dissenting).

53. Both the main opinion and the dissent in *Auto-Owners* cite to numerous cases in other jurisdictions that adopt conflicting interpretations of "pollutant." *Id.* at 606, 649 S.E.2d at 845 (majority opinion); *Id.* at 611-12, 614-15, 649 S.E.2d at 848-51 (Ellington, J., dissenting).

54. *See also* Am. States Ins. Co. v. Zippro Constr. Co., 216 Ga. App. 499, 501, 455 S.E.2d 133, 135 (1995) (holding that asbestos fibers in floors that contaminated only the insured's home were pollutants). A previous court of appeals case, though, held that the pollution exclusion was ambiguous with respect to the release of titanium tetrachloride that remained contaminated within the confines of a facility and never escaped into and polluted the environment. Kerr-McGee Corp. v. Ga. Cas. & Sur. Co., 256 Ga. App. 458, 458-59, 568 S.E.2d 484, 485-86 (2002). Moreover, at least one federal court case interpreting Georgia law has also sided with the "any irritant" interpretation of the pollution exclusion. *See* Owners Ins. Co. v. Farmer, 173 F. Supp. 2d 1330, 1334 (N.D. Ga. 2001) (upholding the application of the pollution exclusion to the spray of a diesel fuel mixture to an apartment complex because the unambiguous language of the exclusion did not exclude pollutants based on their source or location). However, a previous Eleventh Circuit opinion held that the pollution exclusion was ambiguous with respect to dichloromethane fumes emitted from an adhesive while the claimant was installing carpet. Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc., 73 F.3d 335, 338 (11th Cir. 1996). The court held that arguing for application of the pollution exclusion to preclude coverage for "a consumer's claim for damages arising out of the intended use of the insured product" was a "strained" position. *Id.* at 339. Because of these inconsistent rulings, insurers and insureds will need to await further guidance from federal courts before confidently predicting how a federal court will interpret the pollution exclusion for an irritant or contaminant that is not released into the environment.

D. Declaratory Judgment Action Under Georgia Law May Include Duty to Indemnify

In *ALEA London Ltd. v. Woodcock*,[55] the court of appeals held that declaratory judgment actions filed in Georgia state courts are appropriate procedural avenues not only for deciding whether an insurer has a duty to provide a defense to an insured under its policy for an underlying lawsuit but also for deciding whether an insurer has a duty to indemnify an insured under its policy, even though no judgment or verdict has yet been rendered against the insured in the underlying lawsuit.[56] This decision presents a marked contrast to the recent trend of federal court decisions addressing whether declaratory judgment actions are appropriate for determining an insurer's duty to indemnify an insured when the underlying lawsuit has not been concluded.[57] In the past two years, the Northern and Middle Districts of Georgia have refused to address, in a declaratory judgment action, whether an insurer has a duty to indemnify when the underlying lawsuit against the insured is still pending.[58] The Northern District rationalized that prematurely determining the issue of an insurer's duty to indemnify may be "unnecessary and irrelevant and, thus, a waste of judicial resources."[59] While recognizing that an insurer's duty to indemnify is an independent contractual obligation from its duty to defend an insured, the court of appeals suggested that addressing the duty to indemnify at the same time as the duty to defend would be an efficient use of its judicial resources if the "true facts" relating to the application of the coverage defenses had been revealed through discovery and presented in the declaratory judgment action.[60]

In last year's annual survey, the Authors noted that the federal courts' refusal to rule upon an insurer's duty to indemnify in a declaratory judgment action may place insurers in a difficult position of being unable to determine whether coverage truly exists under their policies.[61] This uncertainty may potentially discourage insurers from contributing

55. 286 Ga. App. 572, 649 S.E.2d 740 (2007).

56. *Id.* at 579, 649 S.E.2d at 747.

57. *Id.*

58. *See* Erie Indem. Co. v. Acuity, No. 1:06-CV-0174-TWT, 2006 U.S. Dist. LEXIS 52590 (N.D. Ga. Jul. 19, 2006); Util. Serv. Co. v. St. Paul Travelers Ins. Co., No. 5:06-CV-207 (CAR), 2007 U.S. Dist. LEXIS 4634 (M.D. Ga. Jan. 22, 2007).

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

60. *ALEA London*, 286 Ga. App. at 579, 649 S.E.2d at 746-47.

61. Bradley S. Wolff, Stephen L. Cotter & Stephen M. Schatz, *Insurance*, 59 MERCER L. REV. 195, 203 (2007).

toward settlement of underlying lawsuits.[62] The decision in *ALEA London* may encourage insurers to pursue declaratory judgment actions in state court to obtain a decision on both the duty to defend and the duty to indemnify the insureds. This litigation strategy would allow the insurer to obtain full and final clarification of the coverage defenses without having to later file a separate declaratory judgment action on the duty to indemnify if the court determines the insurer had a duty to defend.[63]

III. AUTOMOBILE INSURANCE

The most significant development in the field of automobile insurance during this survey period is the overhaul of Georgia's uninsured motorist (UM) statute, Official Code of Georgia Annotated (O.C.G.A.) § 33-7-11.[64] The Georgia General Assembly's rewrite of the UM statute legislatively superceded two of the most significant UM cases to come down in recent years and, even more significantly, changed the nature of UM insurance coverage so that most insured drivers in Georgia will have UM benefits available to them for every automobile-related injury.[65]

A. Uninsured Motorist Insurance Coverage

1. Statutory Revision. The 2007-2008 General Assembly revised O.C.G.A. § 33-7-11 by Senate Bill 276.[66] This bill will change automobile insurance law in four important ways. First, the General Assembly modified the UM statute to eliminate the "unintended" UM insurance found in umbrella and excess insurance policies by the Georgia Court of Appeals in *Abrohams v. Atlantic Mutual Insurance Agency*.[67] The new statute will only require UM coverage in traditional automobile liability insurance policies, although it can be included at the option of the insured in other types of policies: "The coverage required under paragraph (1) of this subsection excludes umbrella or excess liability

62. *Id.*

63. In *ALEA London*, the court of appeals chastised the trial court for submitting the issue of whether coverage existed under the policy to the jury. *ALEA London*, 286 Ga. App. at 576, 649 S.E.2d at 744-45. Instead, it was the trial court's duty to construe the policy and only present the issue of coverage to the jury if an ambiguity remained after the court applied all applicable rules of contract construction. *Id.*

64. O.C.G.A. § 33-7-11 (2000 & Supp. 2008).

65. *See* Ga. S. Bill 276, Reg. Sess. (2008).

66. Ga. S. Bill 276, Reg. Sess. (2008).

67. *Id.*; 282 Ga. App. 176, 638 S.E.2d 330 (2006) (declining to create a judicial exemption without express legislative intent).

policies unless affirmatively provided for in such policies or in a policy endorsement."[68]

Second, the General Assembly addressed the Georgia Supreme Court's holding in *Dees v. Logan*.[69] In *Dees* the supreme court held that UM carriers are not entitled, despite the express terms of the policy, to offset workers' compensation, disability, or other benefits received by the insured on account of the injury from an award of damages.[70] Newly revised O.C.G.A. § 33-7-11(i)[71] provides, in part, that a UM policy "may contain provisions which exclude any liability of the insurer for personal or bodily injury or death for which the insured has been compensated pursuant to 'medical payments coverage,' . . . or compensated pursuant to workers' compensation laws."[72]

Third, the UM statute was significantly changed to require "stacking" UM insurance as the default for policies issued after the effective date.[73] At present, a driver is "uninsured" if there is either no liability coverage available or if there is liability coverage, but the limits of such coverage are less than the UM limits available to the injured person (an "underinsured" driver).[74] The liability limits available to the tortfeasor, if any, reduce the UM limits available to the injured person dollar for dollar because the tortfeasor is only uninsured to the extent there is UM coverage in excess of liability coverage.[75] This may be referred to as "non-stacking" UM. As amended this year, UM policies in Georgia will provide coverage that "stacks" on top of all available liability coverage so that injured persons will have available insurance limits equal to all available liability insurance plus all available UM insurance.[76] Thus, tortfeasors will be considered uninsured to the extent the damages they cause exceed the liability limits they have available, even when those limits exceed the limits of the injured person's UM policy.[77] As stated above, while this "stacking" UM coverage will be the default, insureds may elect in writing to maintain non-stacking UM coverage.[78] These three changes take effect on January 1, 2009.[79]

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68. O.C.G.A. § 33-7-11(a)(3) (Supp. 2008).
69. 282 Ga. 815, 653 S.E.2d 735 (2007).
70. *Id.* at 816, 653 S.E.2d at 737.
71. O.C.G.A. § 33-7-11(i) (Supp. 2008).
72. *Id.*
73. O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I) (Supp. 2008).
74. O.C.G.A. § 33-7-11(b)(1)(D)(i)-(ii) (2000).
75. *Id.* § 33-7-11(b)(1)(D)(ii).
76. O.C.G.A. § 33-7-11(b)(1)(D) (Supp. 2008).
77. *Id.*
78. *Id.*
79. Ga. S. Bill 276 § 5(a).

The fourth significant change affects both UM and liability insurance policies, and it removes regulatory oversight on rate approvals from all except the most basic minimum coverage policies.[80] The General Assembly amended O.C.G.A. § 33-9-21(b)[81] to provide that "[f]or private passenger motor vehicle insurance providing only the mandatory minimum limits," any rate or underwriting rule must be approved by the Commissioner, or a period of forty-five days from the date of filing must have elapsed without the proposal having been disapproved by the Commissioner.[82] However, for any other policy covering "private passenger motor vehicles," any "such rate, rating plan, rating system, or underwriting rule . . . shall be effective upon filing and shall be implemented without approval of the Commissioner."[83] This subsection also applies to the entirety of a policy providing only the minimum limits for mandatory coverage required by statute if the policy also contains any commendatory coverage.[84] These changes took effect on October 1, 2008.[85]

2. Cases Decided. In last year's survey article,[86] the Authors reported on the court of appeals decision in *Dees v. Logan*,[87] in which the court held that a UM insurance carrier was entitled to reduce its liability to its insured for the portion of the judgment that reflected lost wages to the extent of workers' compensation benefits, Social Security disability benefits, or other wage replacement benefits received by the insured.[88] The court relied on language in the UM policy stating that "any amount payable under this coverage shall be reduced by any amount paid or payable to or for the insured: (a) under any workers' compensation, disability benefits or similar law," and held "[i]n Georgia, UM insurance policy language that provides for a set-off for damages awarded to the extent that workers' compensation has paid benefits to the insured is proper."[89]

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80. *See* O.C.G.A. § 33-9-21 (Supp. 2008).
81. O.C.G.A. § 33-9-21(b) (2000).
82. O.C.G.A. § 33-9-21(b) (Supp. 2008).
83. O.C.G.A. § 33-9-21(b)(2) (Supp. 2008).
84. *Id.*
85. Ga. S. Bill 276 § 5(b).
86. Bradley S. Wolff, Stephen L. Cotter & Stephen M. Schatz, *Insurance*, 59 MERCER L. REV. 195 (2007).
87. 281 Ga. App. 837, 637 S.E.2d 424 (2006), *rev'd*, 282 Ga. 815, 653 S.E.2d 735 (2007).
88. *Dees*, 281 Ga. App. at 838-39, 637 S.E.2d at 427.
89. *Id.* at 839, 637 S.E.2d at 427.

The supreme court granted certiorari and reversed, overruling several prior cases which all held that such a set-off was proper.[90] The court noted that O.C.G.A. § 33-7-11(i) allows a UM carrier to reduce its liability for property damage to the extent the insured has been compensated by other insurance.[91] Further, the court reasoned that if the General Assembly had intended to allow a similar reduction for the recovery of wage-loss replacement benefits, it would have said so.[92] In the absence of a specific provision allowing this reduction, the court held that the policy language conflicted with the statutory requirement that UM carriers pay "all sums" the insureds are entitled to collect from uninsured tortfeasors and, therefore, was void.[93] As discussed above, the decision in this case has been legislatively superceded, at least in part, for policies issued on or after January 1, 2009.[94]

In UM cases, it has long been the rule that multiple UM policies must "stack" according to a determination of priority, and "co-equal" policies cannot be prorated.[95] On this point, the court of appeals has held "[a]s a matter of law, there can be no proration of stackable uninsured motorist coverage."[96]

The two tests historically applied in such cases are known as the "receipt of premium" and the "more closely identified with" tests.[97] However, in 2003 and 2006 the court of appeals decided cases that could not be resolved by either of these two tests.[98] As a matter of necessity, the court created a "circumstances of the injury" test.[99] Even then, the court decreed there could be no proration of policies, stating that "the proration of coverage between uninsured or underinsured motorist carriers is inappropriate."[100] It seemed as though the court might continue creating new tests to avoid holding proration acceptable.

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90. *Dees*, 282 Ga. at 815-16, 653 S.E.2d at 736-37.
91. *Id.*
92. *Id.* at 817, 653 S.E.2d at 737.
93. *Id.* at 816-17, 653 S.E.2d at 737.
94. Ga. S. Bill 276 § 5(a).
95. Ga. Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 255 Ga. 166, 166, 336 S.E.2d 237, 238 (1985).
96. Cont'l Ins. Co. v. S. Guar. Ins. Co., 193 Ga. App. 395, 397, 388 S.E.2d 16, 18 (1989).
97. *See generally* JENKINS & MILLER, GEORGIA AUTOMOBILE INSURANCE LAW, INCLUDING TORT LAW § 39:7-8 (West 2007-08).
98. *See* Nationwide Mut. Fire Ins. Co. v. Progressive Bayside Ins. Co., 278 Ga. App. 73, 628 S.E.2d 177 (2006); Great Divide Ins. Co. v. Safeco Ins. Co., 260 Ga. App. 531, 580 S.E.2d 313 (2003).
99. *Nationwide*, 278 Ga. App. at 75, 628 S.E.2d at 179.
100. *Id.* at 74, 628 S.E.2d at 179.

Finally, however, the court encountered a case in which only proration among the carriers equitably accounted for their relative rights. In *Dairyland Insurance Co. v. State Farm Automobile Insurance Co.*,[101] the injured insured had coverage under four UM policies with two insurance companies. Two of the policies were issued to the injured person and her husband. The other two were issued only to the husband. The four policies combined to provide $100,000 in potential coverage. The tortfeasor had $25,000 in liability coverage, which was paid. State Farm paid the injured insured $50,000 from the two policies on which she was named, leaving $25,000 of UM benefits remaining because the carriers were entitled to set-off the $25,000 paid for the tortfeasor from the total $100,000 in coverage. The issue in the case was to decide which of the two policies issued exclusively to the husband was entitled to the set-off and which would be required to pay. Dairyland argued that it was entitled to all of the set-off because it insured only the husband and its policy only covered a motorcycle, neither of which was involved here, making it "most remote" from the circumstances of the accident.[102] However, State Farm's argument for proration prevailed. The trial court decided to prorate the policies and have each company pay $12,500 and receive an offset for $12,500.[103] The court of appeals affirmed, stating the trial court "fashioned a proper remedy in this case" necessary to "fill the void" when none of the existing rules resolved the issue.[104]

In *Allstate Insurance Co. v. Thompson*,[105] a husband and wife both sustained physical injuries in a rear end motor vehicle collision caused by another driver.[106] The couple executed a purported limited liability release of all claims, "individually, and as Husband and Wife," in exchange for payment of the tortfeasor's per-person liability insurance limit.[107] According to the court of appeals, the release conclusively established that the husband had not exhausted the tortfeasor's liability limit and therefore, no recovery could be had from either of his UM carriers.[108]

In *Thompson* the tortfeasor had liability insurance with limits of $100,000 per person and $300,000 per accident. The husband and wife

101. 289 Ga. App. 216, 656 S.E.2d 560 (2008).
102. *Id.* at 216-18, 656 S.E.2d at 561-62.
103. *Id.* at 218, 656 S.E.2d at 562.
104. *Id.*, 656 S.E.2d at 562-63.
105. 291 Ga. App. 465, 662 S.E.2d 164 (2008).
106. *Id.* at 465, 662 S.E.2d at 165.
107. *Id.* at 466, 662 S.E.2d at 165.
108. *Id.* at 468, 662 S.E.2d at 167.

sued the tortfeasor and served their two UM carriers, which had a total of five policies and $175,000 in coverage. The claims against the tortfeasor were settled by payment of $100,000. The plaintiffs signed a limited release, as husband and wife, of all claims for personal injuries and loss of consortium, and reserved any claims for UM benefits. The UM carriers then moved for summary judgment, arguing that the plaintiffs had not exhausted the liability coverage available ($100,000 per person for bodily injury) and, thus, were ineligible for UM benefits.[109] The insureds opposed the motion with an affidavit from their attorney stating that the injuries of the wife were "nominal" and "not worth pursuing," and the entire settlement was compensation for the husband's bodily injuries only.[110]

The trial court granted summary judgment on the wife's claims but held that an issue of fact was created by the attorney's affidavit on the husband's claims and denied summary judgment.[111] The court of appeals accepted the case for interlocutory review and reversed.[112] The court held that parol evidence is inadmissible to contradict the unambiguous terms of a release.[113] In this case, the release showed consideration was paid jointly to both the husband and wife for their release of all claims.[114]

Interestingly, the court's decision twice provides that if the wife received any of the payment as compensation for her loss of consortium claim, the payment would defeat the husband's ability to pursue UM benefits because he would not have received the full liability limit.[115] Because a claim for loss of consortium is subject to the same per-person liability limit as the claims of the physically injured spouse,[116] this decision appears to preclude UM benefits in any case where the consortium-claimant spouse receives, or is deemed to have received, consideration from the tortfeasor's liability carrier. To the extent the court intended this result, the decision does not appear consistent with

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109. *Id.* at 465, 662 S.E.2d at 165. Exhaustion of liability coverage "'is a condition precedent to a UM claim.'" *Id.* at 467, 662 S.E.2d at 166 (quoting Holland v. Cotton States Mut. Ins. Co., 285 Ga. App. 365, 366, 646 S.E.2d 477, 478 (2007)).

110. *Id.* at 466, 662 S.E.2d at 166.

111. *Id.* at 466-67, 662 S.E.2d at 166.

112. *Id.* at 465, 662 S.E.2d at 165.

113. *Id.* at 467, 662 S.E.2d at 166.

114. *Id.* at 468, 662 S.E.2d at 167.

115. *Id.* at 467, 662 S.E.2d at 166 ("[Husband] did not exhaust that limit if any of the $100,000 paid under the joint release went to [the Wife] to pay for her personal injury claim *or for her loss of consortium claim* . . . ." *Id.* (emphasis added)).

116. State Farm Mut. Auto. Ins. Co. v. Hodges, 221 Ga. 355, 357, 144 S.E.2d 723, 725 (1965).

the UM statute, which provides that a tortfeasor is "uninsured" when the liability limit has been reduced by the payment of other claims.[117]

Insurance companies are required by O.C.G.A. § 33-7-11(a)(1)[118] to offer UM coverage of not less than the minimum required limits, with additional coverage, at the option of the insured, up to the amount of the liability limits of the policy.[119] Subsection (a)(3) provides that an insured may reject UM coverage altogether, but this election must be made in writing.[120] In *Lambert v. Alfa General Insurance Corp.*,[121] however, the court of appeals held that an insured need not express his "affirmative choice" in writing to reduce his UM limits.[122]

According to O.C.G.A. § 33-7-11(a)(1)(B),[123] "the insured may affirmatively choose uninsured motorist limits in an amount less than the limits of liability."[124] The insured in *Lambert* had a policy with UM limits equal to his liability limit of $100,000 per person and $300,000 per accident.[125] The insured went to his agent's office and signed a statement stating, "Please change the U/M to 25/50/25 on my 95 Dodge Caravan effective 3-04-05."[126] The insurer subsequently issued a declaration dated March 4, 2005, reflecting UM limits of $25,000 per person and $50,000 per accident for bodily injury. On May 30, 2005, the insured was involved in a fatal collision. A passenger in the insured's vehicle at the time of the accident contended that the limits reduction was ineffective because the policy was ambiguous and that the insured's election did not comply with the requirements of O.C.G.A. § 33-7-11(a)(3).[127] The court held that subsection (a)(3) was inapplicable to an insured's election to reduce, rather than to eliminate, UM coverage.[128] According to the court, nothing in the statute requires that an election to reduce UM limits be made by a separate, signed writing; only evidence of an "affirmative election" is required.[129] Further, although the writing signed by the insured left off the zeroes and could be read as requesting limits of $25.00/$50.00/$25.00, the court held that such a

117. O.C.G.A. § 33-7-11(b)(1)(D)(ii).
118. O.C.G.A. § 33-7-11(a)(1) (2000 & Supp. 2008).
119. *Id.*
120. *Id.* § 33-7-11(a)(3).
121. 291 Ga. App. 57, 660 S.E.2d 889 (2008).
122. *Id.* at 60-61, 660 S.E.2d at 892.
123. O.C.G.A. § 33-7-11(a)(1)(B) (Supp. 2008).
124. *Id.*
125. *Lambert*, 291 Ga. App. at 57, 660 S.E.2d at 891.
126. *Id.*
127. *Id.* at 57-58, 660 S.E.2d at 891.
128. *Id.* at 60-61, 660 S.E.2d at 892.
129. *Id.*

reading would be unreasonable under Georgia law and, therefore, the election was not ambiguous.[130]

A UM policy purporting to exclude coverage when an insured is carrying persons or property for a fee is invalid and unenforceable because it contravenes the UM statute's requirement that an insurer pay "all sums" that an insured is entitled to recover as damages from an uninsured motorist.[131] In *Wagner v. Nationwide Mutual Fire Insurance Co.*,[132] the insured testified at her deposition that she was injured while driving a truck for her employer.[133] Nationwide insured the plaintiff's personal vehicle, and the policy contained an exclusion for the "'[u]se of any motor vehicle by an insured to carry persons or property for a fee.'"[134] In the insured's case against the tortfeasor in which her UM carriers were served, the trial court granted summary judgment to Nationwide based on the language of the exclusion.[135] The court of appeals reversed, reciting many cases holding that the UM statute's use of the "all sums" language means any purported exclusion from this coverage is invalid because it contravenes the remedial purpose of the UM statute.[136]

B. Liability Insurance Cases

The standard automobile policy provides insurance for damages caused by or arising out of the ownership, maintenance, or use of a motor vehicle.[137] Similarly, O.C.G.A. § 33-24-51[138] provides that local governments may purchase liability insurance for damages arising out of the government's "ownership, maintenance, operation, or use of any motor vehicle . . . under its management, control or supervision."[139] Further, the code provides a waiver of sovereign immunity for the negligent use of a covered motor vehicle to the extent of the insurance purchased.[140]

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130. *Id.* at 61, 660 S.E.2d at 892-93.

131. Wagner v. Nationwide Mut. Fire Ins. Co., 288 Ga. App. 132, 132-34, 653 S.E.2d 526, 527-28 (2007).

132. 288 Ga. App. 132, 653 S.E.2d 526 (2007).

133. *Id.* at 132, 653 S.E.2d at 527.

134. *Id.* (alteration in original).

135. *Id.*

136. *Id.* at 133, 653 S.E.2d at 528.

137. *See generally* JENKINS & MILLER, GEORGIA AUTOMOBILE INSURANCE LAW, INCLUDING TORT LAW Appendix A (West 2007-08).

138. O.C.G.A. § 33-24-51 (2005).

139. *Id.* § 33-24-51(a).

140. O.C.G.A. § 36-92-2 (2006).

What constitutes a "motor vehicle" and what constitutes "use" were questions addressed by the court of appeals in *Williams v. Whitfield County*,[141] a case that arose out of a motorcycle accident that occurred near an intersection with a closed road barricaded by a parked Caterpillar excavator. Williams and friends were riding motorcycles in Whitfield County and were unaware that the road they were riding on was closed ahead because of a county public works project. A private contractor doing the work parked its excavator partially in the closed portion of the roadway beyond a "road closed" sign. Williams's friends were able to stop their motorcycles without incident at the barricade, but Williams slid onto the shoulder of the road and off a steep embankment. Williams sued the county and employees of its public works department, claiming the road closure was negligently marked. The county moved for summary judgment, contending that it was not negligent in marking the road closure and had not waived sovereign immunity. The trial court granted the county's motion on the ground that sovereign immunity had not been waived because no motor vehicle (other than Williams's) was in use or involved in the accident.[142]

The evidence in the case showed that the Caterpillar excavator was insured under a general commercial and automobile liability insurance policy obtained by the contractor pursuant to its agreement with the county. For purposes of deciding the motion for summary judgment, the trial court had to determine whether the excavator constituted a "motor vehicle" and whether its use as a barricade constituted "use" within the meaning of the statute (and ultimately, the policy). The trial court determined that the excavator, which ran on tracks, was a "motor vehicle" within the meaning of O.C.G.A. § 33-24-51 for which liability insurance could be secured.[143] This decision was upheld by the court of appeals, primarily because such liability insurance had, in fact, been obtained on the excavator.[144]

The trial court's ruling that the excavator was not in "use" at the scene of the accident was also affirmed.[145] The court of appeals began its analysis by stating, "'[w]hether an event arises from the "use" of a motor vehicle depends largely on the circumstances, and a bright-line definition is elusive.'"[146] The court then stated that the question that must be

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141. 289 Ga. App. 301, 656 S.E.2d 584 (2008).
142. *Id.* at 301-02, 656 S.E.2d at 585-86.
143. *Id.* at 302-03, 656 S.E.2d at 586.
144. *Id.* at 303, 656 S.E.2d at 586-87.
145. *Id.* at 305, 656 S.E.2d at 587.
146. *Id.* at 304, 656 S.E.2d at 587 (alteration in original) (quoting Harry v. Glynn County, 269 Ga. 503, 504, 501 S.E.2d 196, 198 (1998)).

answered was whether the injury arose out of the use of the motor vehicle as a vehicle.[147] In that regard, the court agreed with the trial court that the excavator was being used only as a physical mass, not as a motor vehicle, when the accident occurred.[148] Further, the excavator was under the control of the contractor and not the county.[149] Therefore, the court affirmed the summary judgment granted to the county.[150]

The Federal Motor Carrier Safety Act (the Act)[151] contains a section establishing minimum financial responsibility standards for transporting passengers and requiring insurance or other guarantees of either $1,500,000 or $5,000,000, depending on the size of the vehicle.[152] Despite this controlling federal law, the defendant motor carrier in *Turner v. Gateway Insurance Co.*[153] maintained only $100,000/$300,000 liability insurance limits.[154]

The plaintiff, Turner, was injured when the medical transportation van he was riding in was involved in an accident. Turner and his wife sued the transportation company, its employees, and its insurer, Gateway. The Turners moved for partial summary judgment, arguing that federal law required Gateway's policy be reformed to provide limits in compliance with the Act.[155]

The trial court denied the plaintiffs' motion and granted summary judgment to Gateway on the policy reformation issue.[156] The court of appeals affirmed, holding that an insurance policy cannot be reformed "'for the purpose of making a new and different contract for the parties,'"[157] regardless of public policy establishing the minimum level of coverage that should be obtained, when the reformation would "provide ex post facto coverage in amounts that exceed what was actually contracted for and purchased by their insured."[158]

147. *Id.* (citing Saylor v. Troup County, 225 Ga. App. 489, 490, 484 S.E.2d 298 (1997)).
148. *Id.* at 305, 656 S.E.2d at 587.
149. *Id.*, 656 S.E.2d at 588.
150. *Id.*
151. 49 U.S.C. § 31138 (2000 & Supp. V 2005).
152. *Id.* § 31138(a).
153. 290 Ga. App. 737, 660 S.E.2d 484 (2008).
154. *Id.* at 738, 660 S.E.2d at 486.
155. *Id.*
156. *Id.* at 739, 660 S.E.2d at 486.
157. *Id.* (quoting Lee v. Am. Cent. Ins. Co., 241 Ga. App. 650, 652, 530 S.E.2d 727, 730 (1999)).
158. *Id.* at 739-40, 660 S.E.2d at 486.

In last year's survey article,[159] we reported on *Hamrick v. American Casualty Co.*,[160] a "second permittee" case.[161] In *Hamrick* the United States District Court for the Northern District of Georgia granted summary judgment to an insurance carrier and held that the carrier had no duty to indemnify the driver of a vehicle owned by his stepfather's employer because the driver's use of the vehicle for a personal errand exceeded the scope of the stepfather's permission to use the vehicle for work-related purposes.[162] Summary judgment was appealed, and the United States Court Appeals for the Eleventh Circuit affirmed in a per curiam, unreported decision.[163]

IV. HOMEOWNER'S INSURANCE

During this survey period, the Georgia courts drew lines defining who could directly benefit from a homeowner's insurance policy. While the undefined term "household" has often presented a fact question for a jury, as have related terms such as "residence,"[164] the Georgia Court of Appeals, in *McCullough v. Reyes*[165] squarely held that one household cannot live in two different houses on the same property.[166] The court was concerned that otherwise, related families living on a tract of land could pay a premium on one house and have two, six, or even twelve homes insured under that single premium.[167]

A common factual scenario is illustrated in *GuideOne Insurance Co. v. Hunter*.[168] A tenant, plagued by mold, unsuccessfully attempted to establish a direct cause of action against the owner's first-party property insurance carrier based upon the Restatement of Torts Section 324-(A)[169] gratuitous undertaking theory.[170] The court held that because the carrier did not assume responsibility for the repairs or select a contractor to do the work, the carrier did nothing more than evaluate the

159. *See* Bradley S. Wolff, Stephen L. Cotter & Stephen M. Schatz, *Insurance*, 59 MERCER L. REV. 195 (2007).

160. No. 4:06-CV-032-RLV, 2007 U.S. Dist. LEXIS 8823 (N.D. Ga. Feb. 7, 2007), *aff'd,* 245 F. App'x 891 (11th Cir. 2007).

161. *Id.* at *5.

162. *Id.* at *10.

163. Hamrick v. Am. Cas. Co., 245 F. App'x 891, 891-92 (11th Cir. 2007).

164. *See, e.g.*, Grange Mut. Cas. Co. v. Brinkley, 182 Ga. App. 273, 274, 355 S.E.2d 767, 768 (1987).

165. 287 Ga. App. 483, 651 S.E.2d 810 (2007).

166. *Id.* at 490, 651 S.E.2d at 816.

167. *Id.*

168. 286 Ga. App. 852, 650 S.E.2d 424 (2007).

169. RESTATEMENT (SECOND) OF TORTS § 324(A) (1965).

170. *GuideOne Mut. Ins. Co.*, 286 Ga. App. at 853, 855, 650 S.E.2d at 424-25, 427.

loss and discharge its obligation to pay.[171] The court's choice of words indicates that a contrary result might have been reached had the carrier been directly involved in the repair.[172]

In *Gaddis v. State Farm Fire & Casualty Co.*,[173] the United States District Court for the Middle District of Georgia liberally applied the growing body of Georgia insurance law interpreting the phrase "arising out of."[174] The case involved an automobile accident on the plaintiff's property that resulted in claims against the plaintiff's son for negligent driving as well as claims against the plaintiff for negligent maintenance of the premises and related charges.[175] The court, following *Manning v. USF&G Insurance Co.*,[176] held that the insured's use of the automobile was at least partly involved in the calamity.[177] Therefore, the assertion of theories of liability other than automobile operation did not defeat the policy exclusion that plainly barred claims "arising out of" the ownership, use, or loading of the motor vehicle.[178]

In addition, the courts clarified various conditions precedent to a plaintiff's commencement of an action against his insurer.[179] In *Hall* another insured learned that an insured does have to comply with her insurance company's reasonable request for pertinent records regarding proof of the insured's loss.[180] The case involved an insured who failed to provide his insurance company with any records, not even a Proof of Loss form and, hence, was barred from recovery.[181]

The practitioner should also note that "stonewalling" an insurance company on a first-party record request is often fatal.[182] In *State Farm Casualty Co. v. Brewer*,[183] Bishop Paulk's "stonewalling" of an insurance company under the guise of his privilege against self-incrimination under the Fifth Amendment[184] resulted in his loss of any

171. *Id.* at 855, 650 S.E.2d at 427.

172. *See* Carter v. Allstate Ins. Co., 197 Ga. App. 738, 399 S.E.2d 500 (1990) (holding that a carrier can become contractually involved in remedial work).

173. No. 4:07-CV-173 (CDL), 2008 U.S. Dist. LEXIS 41966 (M.D. Ga. May 29, 2008).

174. *Id.* at *9-*10.

175. *Id.* at *3-*9.

176. 264 Ga. App. 102, 589 S.E.2d 687 (2003).

177. *Gaddis*, 2008 U.S. Dist. LEXIS 41966, at *12.

178. *Id.*

179. *See* Hall v. Liberty Mut. Fire Ins. Co., No. CV4:06-218, 2008 U.S. Dist. LEXIS 22509, at *6 (S.D. Ga. Mar. 21, 2008).

180. *Id.*

181. *Id.* at *8-*9.

182. *See* State Farm Cas. Co. v. Brewer, No. 1:06-CV-2296-RWS, 2008 U.S. Dist. LEXIS 11602, at *18-*21 (N.D. Ga. Feb. 15, 2008).

183. No. 1:06-CV-2296-RWS, 2008 U.S. Dist. LEXIS 11602 (N.D. Ga. Feb. 15, 2008).

184. U.S. CONST. amend. V.

potential insurance coverage.[185] This case involved long-term sexual liaisons that the plaintiff engaged in while in his insured home and was initially fought on the "intentional act" exclusion.[186] The court's reasoning is noteworthy for the balancing of the contractual rights of the parties under the insurance contract with the insured's claimed Fifth Amendment privilege against self-incrimination.[187] In *Brewer* Bishop Paulk suggested that at least some of his liaisons may have been under the influence of alcohol and, hence, within the exception to the exclusion illustrated by *State Farm Fire & Casualty Co. v. Morgan*.[188] Paulk invoked his Fifth Amendment privilege and refused to provide information or testimony regarding the specifics of his factual defense, including alleged alcohol intoxication.[189] In response, the court stated that "Paulk may not wield [his] Fifth Amendment privilege as a shield and a sword by demanding coverage and a defense under the insurance contract, while at the same time refusing to answer questions material to determining [the insurer]'s duties under the contract," and thus, rejected Paulk's attempt to defeat summary judgment on Fifth Amendment grounds.[190]

The outcome of this, or any similar case, could have been affected by how the insured played his cards. This delicate interplay between the compelling rights of the Fifth Amendment and freedom of contract is also illustrated in *Pervis v. State Farm Fire & Casualty Co.*[191] and *Anderson v. Southern Guaranty Insurance Co. of Georgia*.[192]

V. PROFESSIONAL LIABILITY

In a case of first impression concerning legal "professional services," the Georgia Court of Appeals was persuaded by a line of cases from other jurisdictions holding that professional liability insurance policies do not cover claims arising solely from contract disputes.[193] In *Garland, Samuel & Loeb PC v. American Safety Casualty Insurance Co.*,[194] the insurance claim arose out of the insured's alleged failure to pay a

185. *Brewer*, 2008 U.S. Dist. LEXIS 11602, at *20-*21.
186. *Id.* at *1-*5.
187. *See id.* at *18-*21.
188. *Id.* at *14-*17; 185 Ga. App. 377, 379, 364 S.E.2d 62, 64 (1987).
189. *Brewer*, 2008 U.S. Dist. LEXIS 11602, at *20-*21.
190. *Id.* (alterations in original) (internal quotation marks omitted).
191. 901 F.2d 944 (11th Cir. 1990).
192. 235 Ga. App. 306, 508 S.E.2d 726 (1998).
193. *See* Garland, Samuel & Loeb, P.C. v. Am. Safety Cas. Ins. Co., 287 Ga. App. 254, 257-58, 651 S.E.2d 177, 179-80 (2007).
194. 287 Ga. App. 254, 651 S.E.2d 177 (2007).

referral fee to Florida attorneys.[195] The Garland firm had coverage with American Safety for errors and omissions "'resulting from the performance of Professional Services.'"[196] The court held that professional services "necessarily entails an application of special learning unique to the insured's profession."[197] According to the court, a business agreement incidental to the firm's business did not involve liability resulting from the firm's acts or omissions in rendering professional services; it is the nature of the act, rather than the profession of the actor, that controls.[198] However, when professional services are implicated in the mortgage bankers errors and omissions context, the Northern District has construed "arising out of" not to mean proximate cause but rather has stated that "almost any casual connection or relationship will do."[199]

Another carrier successfully rescinded a professional services policy under O.C.G.A. § 33-24-7(b)[200] due to a material misrepresentation that changed the nature, extent, or character of the risk.[201] In *Medmarc Casualty Insurance Co. v. The Reagan Law Group, PC*,[202] extreme facts, including payment of $700,000 in American Express bills and ninety overdraft checks written in a single month, convinced the court that the insured's misrepresentations were material as a matter of law.[203] Hence, rescission of the policy under O.C.G.A. § 33-24-7(b) was proper.[204]

A Directors and Officers (D&O) carrier failed in its attempt to reform a policy because its factual proof did not establish that the insured actually knew of any facts that would constitute a material misrepresentation in *Executive Risk Indemnity, Inc. v. AFC Enterprises, Inc.*[205] The omnibus controversy arose out of the renewal of AFC's D&O policy and a restatement of earnings issued shortly thereafter.[206] After discussing the relevant details of financial reporting, the district court

195. *Id.* at 255, 651 S.E.2d at 178.
196. *Id.* (emphasis omitted).
197. *Id.* at 258, 651 S.E.2d at 180.
198. *Id.* at 257, 651 S.E.2d at 179.
199. *See* U.S. Money Source, Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 1:07-CV-0682-WSD, 2008 U.S. Dist. LEXIS 2966, at *11 (N.D. Ga. Jan. 15, 2008).
200. O.C.G.A. § 33-24-7(b) (2005).
201. *See* Medmarc Cas. Ins. Co. v. The Reagan Law Group, P.C., 525 F. Supp. 2d 1334 (N.D. Ga. 2007).
202. 525 F. Supp. 2d 1334 (N.D. Ga. 2007).
203. *Id.* at 1340, 1343.
204. *Id.* at 1343.
205. 510 F. Supp. 2d 1308, 1326-28, 1331 (N.D. Ga. 2007).
206. *Id.* at 1310-11.

determined that under the wording of the policy, what mattered was what *the insured* knew and what was certified under the various policy documents.[207] The insurer failed to prove by a preponderance of the evidence that the insured knew that the financial statements submitted at the time of the application were false.[208] Full damages of $24,295,-890.40 were awarded, but because there were disputed issues of fact regarding its contractual obligation, the carrier avoided up to a fifty percent penalty for bad faith refusal to pay a loss covered by the policy.[209] This case reminds a practitioner to make certain one can prove a prima facie case applicable to *the insured*.

Significantly expanding insurance agent liability, the court of appeals extended the liability of insurance agents for negligent misrepresentation to include responsibility for inaccurate "policy summaries" furnished to a client.[210] In *Traina Enterprises, Inc. v. Cord & Wilburn Incorporated Insurance Agency*,[211] the insured, an owner and operator of boat sales and service facilities in several states, had a history of purchasing insurance with the agent. Accordingly, the insured only reviewed the agent's insurance program "summaries"—never the policies. The carrier cut back on the coverage, and the agent could not prove he pointed out that reduction to the insured.[212] As a general rule, the court held that an insured has a duty to read and understand an insurance policy.[213] However, the court explained that exceptions arise

> "'when the agent has held himself out as an expert and the insured has reasonably relied on the agent's expertise to identify and procure the correct amount or type of insurance, unless an examination of the policy would have made it "readily apparent" that the coverage requested was not issued.'"[214]

In addition, two other exceptions exist: when "'an agent intentionally misrepresents the existence or extent of coverage'"[215] and when the evidence demonstrates "'a special relationship of trust or other unusual circumstance which would have prevented or excused plaintiff of his

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207. *Id.* at 1325.
208. *Id.* at 1333-34.
209. *Id.* at 1334.
210. *See* Traina Enter., Inc. v. Cord & Wilburn Inc. Ins. Agency, 289 Ga. App. 833, 838-39, 658 S.E.2d 460, 464-65 (2008).
211. 289 Ga. App. 833, 658 S.E.2d 460 (2008).
212. *Id.* at 834-36, 658 S.E.2d at 462-63.
213. *Id.* at 837, 658 S.E.2d at 464.
214. *Id.* (quoting Heard v. Sexton, 243 Ga. App. 462, 463, 532 S.E.2d 156, 158 (2000)).
215. *Id.* (quoting Rogers & Sons, Inc. v. Santee Risk Managers, LLC, 279 Ga. App. 621, 627, 631 S.E.2d 821, 825 (2006)).

duty to exercise ordinary diligence to ensure that no ambiguity existed between the requested insurance and that which was issued.'"[216] The court decided that such an "unusual circumstance" existed in this case.[217] Furthermore, the court reasoned that *Canales v. Wilson Southland Insurance Agency*[218] was not persuasive, in as much as the Wilson agent had affirmatively told the insured of the coverage limitation.[219] In the case sub judice, the agent admitted that he might *not* have informed the insured of the carrier's cut-back of the coverage.[220] Instead, the court applied the holding of *Heard v. Sexton*,[221] a case in which the agent allegedly made express misrepresentations of coverage which did not exist.[222] The holding in *Traina* further wedges open the door to insurance agent professional responsibility. The Authors note that this may be a trend.[223]

In the nonprofit context, the University of Georgia Athletic Association was successful in obtaining a defense under a D&O type policy.[224] In *Fireman's Fund Insurance Co. v. University of Georgia Athletic Ass'n*,[225] the Association's employee, Wilder, failed to properly bind coverage for Bryant, a university football player, on a $500,000 disability policy. Bryant was injured and sued. The carrier refused to defend Wilder and the Association against the claim, relying on a "failure to effect or maintain insurance" exclusion.[226] However, the court of appeals held the exclusion to be ambiguous because there was not a conventional policy that the Association could have procured that would have covered the loss.[227] Therefore, the exclusion did not excuse the carrier from its obligation to defend the insured.[228] Another exclusion addressed was for anything "arising out of a bodily injury."[229] The court held that the nexus between the bodily injury and the negligence

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216. *Id.* (quoting *Heard*, 243 Ga. App. at 463, 532 S.E.2d at 158).
217. *Id.* at 838, 658 S.E.2d at 464-65.
218. 261 Ga. App. 529, 583 S.E.2d 203 (2003).
219. *Traina*, 289 Ga. App. at 838-39, 658 S.E.2d at 465.
220. *Id.* at 839, 658 S.E.2d at 465.
221. 243 Ga. App. 462, 532 S.E.2d 156 (2000).
222. *Traina*, 289 Ga. App. at 839, 658 S.E.2d at 465.
223. *See* Sumitomo Marine & Fire Ins. Co. of Ga. v. S. Guar. Ins. Co., 337 F. Supp. 2d 1339, 1355 (N.D. Ga. 2004) (holding that certificate of insurance provided by insured's authorized agent overrides conflicting policy terms).
224. *See* Fireman's Fund Ins. Co. v. Univ. of Ga. Athletic Ass'n, 288 Ga. App. 355, 654 S.E.2d 207 (2007).
225. 288 Ga. App. 355, 654 S.E.2d 207 (2007).
226. *Id.* at 359-60, 654 S.E.2d at 211-12.
227. *Id.* at 361-62, 654 S.E.2d at 212-13.
228. *Id.* at 362, 654 S.E.2d at 213.
229. *Id.*

claim against Wilder and the Association for failure to procure was too attenuated to show that the claim was clearly excluded by the policy terms.[230] A strong dissent, joined by three judges, argued that as a matter of law, neither provision was ambiguous.[231] Moreover, the dissent asserted that both exclusions applied because the claim would not have been presented "but for" the existence of the bodily injury, and failure to "effect" insurance clearly covered the insured's failure to obtain insurance for Bryant.[232] Importantly, this opinion was rendered in the context of the duty to defend, which is separate from, and significantly broader than, the duty to indemnify.

VI. LIFE AND DISABILITY INSURANCE

Several cases over the course of this survey period concern the "slayer's rule," which unfortunately continues to be popular in the area of life insurance law. In *Long v. Hewitt*,[233] the United States District Court for the Southern District of Georgia held that the fact that the plaintiff had been adjudicated "guilty by reason of insanity" in a criminal matter was not binding as far as the application of the slayer's rule in an insurance claim.[234] The parties were entitled to a *de novo* adjudication regarding the application of that rule.[235] In addition, *Bell v. Tolbert*[236] applied the extended slayer's rule to nonculpable parties.[237]

In *American General Life Insurance Co. v. Schoenthal Family, LLC*,[238] Judge Duffy clarified that the Georgia General Assembly had allocated the risk of material misrepresentations to the applicant for the insurance policy, not the insurance company.[239] The complicated opinion concerned an unconventional investment program that secured insurance policies on the lives of elderly individuals with proceeds going to investors. The parties involved in the investment scheme sought to impose responsibility on the carrier for failing to catch misrepresentations regarding Schoenthal's net worth ($10.7 million versus $160,000) and annual income ($160,000 versus $7,200) of the decedent.[240] The

230. *Id.* at 363-64, 654 S.E.2d at 213-14.
231. *Id.* at 365, 368, 654 S.E.2d at 216, 217 (Andrews, P.J., dissenting).
232. *Id.* at 366, 654 S.E.2d at 216.
233. No. 408CV014, 2008 U.S. Dist. LEXIS 41547 (S.D. Ga. May 23, 2008).
234. *Id.* at *3-*4.
235. *Id.* at *3.
236. No. 403CV016, 2008 U.S. Dist. LEXIS 27033 (S.D. Ga. Apr. 3, 2008).
237. *Id.* at *2.
238. 248 F.R.D. 298 (N.D. Ga. 2008).
239. *Id.* at 313.
240. *Id.* at 302.

United States District Court for the Northern District of Georgia held that under O.C.G.A. § 33-24-7,[241] the carrier—having proved obvious material misrepresentation of net worth and income—was relieved of responsibility in the end.[242] Moreover, the fact that the individual applicant had not lied, but had a sophisticated enterprise to convey material misrepresentations, did not matter.[243] Thus, the misrepresentations were chargeable to the insured.[244]

A series of disability claim cases helped further define policy terms. In *Pomerance v. Berkshire Life Insurance Co.*,[245] the Georgia Court of Appeals considered the insured's inability to perform material and "substantial" duties of the insured's occupation.[246] Following several courts around the country, the court of appeals held that "substantial duties" meant being unable to perform "a significantly great amount (i.e., most or a vast majority) of the material duties of the occupation."[247] Accordingly, the trial court's grant of summary judgment to the carrier was reversed.[248]

In *Gladstone, MD v. Provident Life & Accident Insurance Co.*,[249] the United States District Court for the Northern District of Georgia rejected an insured doctor's claim that he had established, as a matter of law, that he was unable to engage in "the substantial and material duties" of his regular occupation.[250] The doctor developed bilateral carpal tunnel, that caused him to cease practicing surgery and, as a result, to suffer greatly diminished income.[251] Hence, a factual determination of whether the insured is unable to perform most or a majority of the substantial, material duties of his regular occupation was required.[252] Typically, the question is a matter for the jury to decide.

241. O.C.G.A. § 33-24-7 (2005).
242. *Am. Gen. Life Ins. Co.*, 248 F.R.D. at 310.
243. *Id.* at 313.
244. *Id.* at 313-14.
245. 288 Ga. App. 491, 654 S.E.2d 638 (2007).
246. *See id.* at 494-95, 654 S.E.2d at 641.
247. *Id.* at 495, 654 S.E.2d at 641.
248. *Id.* at 496-97, 654 S.E.2d at 642-43.
249. 533 F. Supp. 2d 1227 (N.D. Ga. 2007).
250. *Id.* at 1229.
251. *Id.*
252. *Id.* at 1233.