Insurance

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

I. INTRODUCTION

In this survey period from June 1, 2008 to May 31, 2009,[1] the courts stepped in to help those injured in motor vehicle incidents collect additional sums from uninsured motorist carriers even when the available uninsured motorist (UM) coverage may be equal to or less than the tortfeasor's liability coverage. Another notable development is found in a string of cases involving victims of mortgage fraud. The victims prevailed in all three cases.

II. AUTOMOBILE INSURANCE

Once again, uninsured motorist coverage provided the most significant developments in Georgia automobile insurance law during the survey period. The Georgia Supreme Court reversed a decision reported last

* Partner in the firm of Swift, Currie, McGhee & Hiers, LLP, Atlanta, Georgia. Vanderbilt University (B.A., cum laude, 1983); University of Georgia School of Law (J.D., cum laude, 1986). Member, State Bar of Georgia; Defense Research Institute; International Association of Defense Counsel.

** Partner in the firm of Swift, Currie, McGhee & Hiers, LLP, Atlanta, Georgia. Mercer University (B.A., 1971); Mercer University, Walter F. George School of Law (J.D., cum laude, 1974). Member, Mercer Law Review (1973-1974). Member, State Bar of Georgia; American Bar Association; Georgia Defense Lawyers Association; Defense Research Institute; International Association of Defense Counsel.

*** Partner in the firm of Swift, Currie, McGhee & Hiers, LLP, Atlanta, Georgia. University of Virginia (B.A., with distinction, 1985); University of North Carolina at Chapel Hill School of Law (J.D., 1988). Member, State Bar of Georgia (Member, Tort and Insurance Practice Section); Defense Research Institute.

1. For analysis of Georgia insurance law during the prior survey period, see Stephen L. Cotter et al., *Insurance, Annual Survey of Georgia Law*, 60 MERCER L. REV. 191 (2008).

year.[2] The Georgia Court of Appeals continued to modify UM practice with a pair of decisions concerning health care liens.[3] A variety of other issues were addressed, but no cases in this survey period dealt with the application of last year's overhaul of the UM statute.[4]

A. Uninsured Motorist Coverage

1. Joint Release Redux. When a husband and wife both bring personal injury claims arising from a collision and accept a liability insurer's single "per person" limit for bodily injury and jointly execute a limited liability release, are they eligible for additional recovery from their UM carrier, or have they barred such recovery by each accepting less than the total available liability coverage? That was the question answered by the supreme court in *Thompson v. Allstate Insurance Co*.[5]

As reported in last year's survey article,[6] "Richard and Laura Thompson . . . brought suit against Randall Bacon for physical injuries which they sustained as a result of a vehicular collision."[7] The Thompsons "also served Allstate Insurance Company and Georgia Farm Bureau Casualty Insurance Company . . . in their capacities as underinsured motorist (UM) carriers."[8] Bacon was covered by a liability insurance policy with bodily injury liability limits of $100,000 per person and $300,000 per accident.[9] Pursuant to section 33-24-41.1 of the Official Code of Georgia Annotated (O.C.G.A.)[10] and in exchange for $100,000 paid by the liability carrier, the Thompsons "individually and as husband and wife executed a limited release of Bacon and the liability insurer."[11] The Thompsons then sought to further pursue their claims for Mr. Thompson's injuries against the UM carriers.[12]

Allstate and Georgia Farm Bureau "filed motions for summary judgment on the ground that the release established that neither [of the Thompsons] had exhausted the available liability coverage" because they

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2. *See* Thompson v. Allstate Ins. Co., 285 Ga. 24, 673 S.E.2d 227 (2009), *rev'g* 291 Ga. App. 465, 662 S.E.2d 164 (2008), *cited in* Cotter et al., *supra* note 1, at 203–05.

3. *See* Adams v. State Farm Mut. Auto. Ins. Co., 298 Ga. App. 249, 679 S.E.2d 726 (2009); Toomer v. Allstate Ins. Co., 292 Ga. App. 60, 663 S.E.2d 763 (2008).

4. *See generally* Cotter et al., *supra* note 1, at 199–201.

5. 285 Ga. 24, 673 S.E.2d 227 (2009).

6. *See generally* Cotter et al., *supra* note 1, at 203–05.

7. *Thompson*, 285 Ga. at 24–25, 673 S.E.2d at 228.

8. *Id.* at 25, 673 S.E.2d at 228.

9. *Id.*, 673 S.E.2d at 229.

10. O.C.G.A. § 33-24-41.1 (2005).

11. *Thompson*, 285 Ga. at 25, 673 S.E.2d at 229.

12. *Id.*

jointly received only the amount available for bodily injury to one person.[13] The Thompsons argued that all of the payment was for Mr. Thompson's bodily injury claim and that Mrs. Thompson's bodily injury claim was abandoned.[14] "The trial court granted the motions for summary judgment as to Mrs. Thompson's claims . . . but denied the motions as to Mr. Thompson's claim."[15] The court of appeals reversed, holding that the "release unambiguously showed that Mrs. Thompson necessarily received at least a portion of the consideration for the release, thereby establishing that Mr. Thompson did not exhaust the liability coverage."[16] The supreme court reversed the judgment of the court of appeals.[17]

The supreme court reiterated that a party must exhaust available liability coverage (and execute a limited release in accordance with O.C.G.A. § 33-24-41.1 when the limits are paid in settlement) to recover under a UM policy.[18] The court held that the release was in compliance with the limited release statute and did not unambiguously show that Mr. Thompson settled for less than the bodily injury limit.[19] The supreme court noted that because loss of consortium claims are part of the spouse's bodily injury claim for the "per person" limit, the liability insurer's total payment for the husband's bodily injury and the wife's loss of consortium claim added together could have accounted for the payment of the per person limit.[20] In addition, the court concluded that the joint release did not necessarily indicate that Mrs. Thompson received a portion of the proceeds for her own claims.[21] "Instead, her promise to release all non-UM claims may have been in return for payment to her husband of the liability limits for his bodily injury claim . . . . Therefore, the release [was] ambiguous as to whether Mr. Thompson settled his bodily injury claim for less than the available liability coverage."[22] The Thompsons' parol evidence was held to be admissible to show that the payment was in fact only for Mr. Thompson's claims, and therefore, the judgment of the court of appeals was reversed.[23]

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13. *Id.* at 25–26, 673 S.E.2d at 229.
14. *Id.* at 25, 673 S.E.2d at 229.
15. *Id.*
16. *Id.* at 26, 673 S.E.2d at 229.
17. *Id.* at 29, 673 S.E.2d at 231.
18. *Id.* at 26, 673 S.E.2d at 229 (citing O.C.G.A. § 33-24-41.1).
19. *See id.*, 673 S.E.2d at 229–30.
20. *Id.* at 27, 673 S.E.2d at 230.
21. *Id.* at 28, 673 S.E.2d at 231.
22. *Id.*
23. *Id.* at 29, 673 S.E.2d at 231.

The court of appeals decision caused a bit of consternation about how to resolve claims with liability insurers that insisted upon a release from an uninjured spouse along with the injured spouse. The supreme court's decision, along with the use of careful wording in future release agreements, should alleviate further concerns in this practice area.

2. Medical Care Creates UM Exposure Despite Equal Limits. In 2004 the supreme court held in *Thurman v. State Farm Mutual Automobile Insurance Co.*[24] that a tortfeasor's liability insurance coverage is "reduced," and federal agencies or insurers have claims for reimbursement, if the injured claimant was a federal employee.[25] This decision was unusual but seemingly limited to a fairly rare set of facts. We say "unusual" because the fact that a federal health or workers' compensation insurer is entitled to repayment for the cost of treating an injury does not in any literal or logical sense "reduce" the tortfeasor's liability coverage. And we say "rare" because there are not many cases involving federal employees as plaintiffs injured in motor vehicle accidents.

The court of appeals, however, does not think the *Thurman* rule is either unusual or rarely applicable. In two cases decided this survey period, the court expanded *Thurman* to apply when (1) the injured claimant is a Medicare beneficiary, and (2) treatment costs are not paid by anyone and a health care lien is filed.

In *Toomer v. Allstate Insurance Co.*,[26] the issue was whether Medicare's right to reimbursement "reduced" the available liability insurance limit such that the claimant's UM carrier could be called upon to pay.[27] According to the court,

> Janie Toomer sued Edgar Rosenberry for injuries she suffered in an automobile collision that [she claimed] was his fault. She served her uninsured motorist . . . carrier, Allstate Insurance Company, with the complaint. Toomer later settled with Rosenberry's liability insurance carrier, [United States Automobile Association (USAA)], for the amount of his policy limit.[28]

Allstate moved to dismiss, arguing that because Toomer's UM policy limit was equal to Rosenberry's liability policy limit, there was no issue of an uninsured or underinsured motorist. The trial court granted

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24. 278 Ga. 162, 598 S.E.2d 448 (2004).
25. *Id.* at 165, 598 S.E.2d at 451.
26. 292 Ga. App. 60, 663 S.E.2d 763 (2008).
27. *Id.* at 61, 663 S.E.2d at 764.
28. *Id.* at 60, 663 S.E.2d at 764.

Allstate's motion.[29] Toomer appealed, claiming that the trial court "erred because the proceeds of her settlement with USAA [would] be reduced by the amount of a Medicare lien."[30] The court of appeals agreed and reversed.[31]

Allstate argued that UM exposure is calculated by

> subtract[ing] the total liability coverage available to the injured party from the total UM coverage. Because Toomer's UM policy limit was the same as Rosenberry's liability policy unit, Allstate argued that it had no UM exposure. Toomer responded that Medicare had paid approximately $8,600 of her collision-related medical bills and was now asserting a lien against her settlement with USAA to recover those payments.[32]

The court of appeals relied upon the supreme court's decision in *Thurman* and held there was "no meaningful distinction" between Toomer's situation and the facts in *Thurman*.[33] In both cases, federal law required the injured party to repay the benefits provider, resulting in the injured party retaining an amount less than the party's UM policy limit.[34] Allstate argued that *Thurman* should not apply because there was no evidence that Toomer had repaid Medicare, but the court rejected this argument.[35] The court held that "[w]hether Medicare [had] been or [would] be repaid, and in what amount, [were] questions of fact that the trial court did not, and could not, resolve on a motion to dismiss."[36] The court held Toomer could take credit for the "reduction" in available liability limits by the amount of the Medicare lien and seek additional benefits from her UM insurer.[37]

Thurman and *Toomer* were further expanded by the court of appeals in *Adams v. State Farm Mutual Automobile Insurance Co.*,[38] in which the court left the realm of federal reimbursement rights and held that a state-created lien for health care also "reduces" a tortfeasor's liability limits and creates or expands exposure to a UM policy.[39] In *Adams* the court considered whether a payment made by the tortfeasor's liability

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29. *Id.* at 60–61, 663 S.E.2d at 764.
30. *Id.* at 61, 663 S.E.2d at 764.
31. *Id.*
32. *Id.*
33. *Id.* at 63, 663 S.E.2d at 765.
34. *Id.*, 663 S.E.2d at 766.
35. *Id.*
36. *Id.*
37. *See id.* at 61, 663 S.E.2d at 764.
38. 298 Ga. App. 249, 679 S.E.2d 726 (2009).
39. *Id.* at 249–50, 679 S.E.2d at 727.

insurer to Grady Hospital to satisfy a lien for services provided to Adams constituted "payment of other claims" under O.C.G.A. § 33-7-11(b)(1)(D)-(ii)[40] and, therefore, reduced the maximum amount payable under the limits of the liability coverage.[41] The court held that the payment constituted the "payment of other claims" under the statute.[42]

The court rejected State Farm's argument that a Georgia lien for health care is different from a lien created under federal statutes and, based on the prior decisions in this area, remanded the case to the trial court with instructions to grant Adams's motion for summary judgment.[43] Thus, the court allowed the liability carrier's payment in satisfaction of the lien to "reduce" the amount of liability coverage and increase the uninsured motorist coverage exposure pro rata.[44]

Based on the cases already decided, the Authors expect to soon see decisions further expanding *Thurman* and its progeny to apply in cases when medical bills are paid by an employer-provided health insurance policy (for example, under the Employee Retirement Income Security Act),[45] and possibly when a private health insurer has a right of reimbursement or subrogation written into its policy. While this development is consistent with a recent trend to maximize recovery from UM carriers, it appears to be plainly inconsistent with the Georgia General Assembly's intent in the UM statute, because no tortfeasor's liability insurance is truly "reduced" by paying claims for the injured person's medical care.[46] Such payments do not render the tortfeasor either "uninsured" or "underinsured," as those terms were consistently understood before *Thurman*.

3. Stacking and Twisting. The court of appeals will search high and low for a way to avoid prorating UM policies' priority of coverage.[47] So far only one reported decision has allowed UM carriers to prorate their exposure among policies,[48] despite the fact that the standard

40. O.C.G.A. § 33-7-11(b)(1)(D)(ii) (2005 & Supp. 2009).
41. *Adams*, 298 Ga. App. at 250, 679 S.E.2d at 727.
42. *Id.* at 253, 679 S.E.2d at 729.
43. *Id.*
44. *See id.*
45. 29 U.S.C. §§ 1001-1461 (2006).
46. *See, e.g.*, Dees v. Logan, 282 Ga. 815, 821, 653 S.E.2d 735, 740 (2007); *see also* Bradley S. Wolff et al., *Insurance, Annual Survey of Georgia Law*, 59 MERCER L. REV. 195, 204–08 (2007); Stephen M. Schatz et al., *Insurance, Annual Survey of Georgia Law*, 57 MERCER L. REV. 221, 233–37 (2005) (analyzing recovery from UM carriers and indicating a trend to maximize recovery).
47. *See generally* Cotter et al., *supra* note 1, at 202–03.
48. *See* Dairyland Ins. Co. v. State Farm Auto. Ins. Co., 289 Ga. App. 216, 656 S.E.2d 560 (2008).

insurance policy used in Georgia contains an "other insurance" clause that provides for proration in the event of multiple policies covering the same loss.[49]

The issue arose again in *Progressive Classic Insurance Co. v. Nationwide Mutual Fire Insurance Co.*,[50] a case involving three policies covering vehicles owned by members of a family. The underlying case involved the wrongful death of William Alexander. He was allegedly killed when he was run over by a vehicle driven by Sterling A. Jackson. William's parents, Clifford and Judy Alexander, filed the wrongful death action.[51] "Jackson was insured under a Nationwide automobile liability policy with $25,000 in liability coverage."[52] William Alexander was the named insured on a different Nationwide policy with a $300,000 UM limit. No issue of priority was involved with these two policies. The three policies in question were: (1) a Nationwide policy listing Clifford Alexander as the insured with $300,000 in UM coverage; (2) a Nationwide umbrella policy issued to Clifford Alexander with $2 million in UM coverage; and (3) a Progressive policy with $500,000 in UM coverage that was initially issued to William Alexander's sister but later amended to add Clifford Alexander as a named insured and Judy Alexander as an additional insured.[53] Clifford Alexander paid the premiums on all three policies.[54]

The two insurers filed cross-motions for summary judgment to determine the priority of coverage among the three policies. Progressive argued that the policies should be prorated or, in the alternative, that its policy should come last in priority. Nationwide argued that Progressive's policy should come second in line after William's policy because more family members were named as insureds on the Progressive policy, making William have more connections to it. The trial court found that the only significant differences among the policies were the identity of the first named insured and the fact that one policy was an umbrella policy. The trial court refused to prorate the policies because it found that the "more closely identified with" test applied. It found that William was more closely identified with his parent than with his sister, and the court further held that automobile policies have higher priority than umbrella policies. The trial court, therefore, determined

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49. *See* FRANK E. JENKINS III & WALLACE MILLER III, GEORGIA AUTOMOBILE INSURANCE LAW app. A, 1029 (2008-2009 ed.).

50. 294 Ga. App. 787, 670 S.E.2d 497 (2008).

51. *Id.* at 787, 670 S.E.2d at 499.

52. *Id.*

53. *Id.* at 787–88, 670 S.E.2d at 499.

54. *Id.* at 789, 670 S.E.2d at 500.

that Clifford Alexander's automobile policy would be next in line after William's own policy, followed by the Progressive policy, and that the Nationwide umbrella policy would be last in priority. Both insurers appealed.[55]

After reciting the general rule against the proration of stackable UM coverage and citing the sole case when proration was allowed, the court of appeals turned to an examination of whether any of the three tests for determining priority would apply.[56] The court of appeals agreed with the parties that the "receipt of premium" test did not apply because Clifford Alexander paid the premiums on all three policies.[57] The court then turned to the "more closely identified with" test and agreed with the trial court that a child is more closely identified with a parent than with a sibling and that William was therefore more closely identified with the two Nationwide policies maintained in Clifford Alexander's name alone than the Progressive policy initially issued to his sister.[58] The court disagreed with the trial court, however, about whether umbrella policies must always come after automobile liability policies in priority.[59] Instead, the court held that after its decision in *Abrohams v. Atlantic Mutual Insurance Agency*,[60] an umbrella policy provides UM coverage just like any other policy subject to O.C.G.A. § 33-7-11.[61] However, the Nationwide umbrella policy specifically required the insured to maintain an underlying policy with certain UM limits and provided that its coverage would be in excess of the underlying policy.[62] Therefore, the court held that the Nationwide umbrella policy would follow the Nationwide automobile liability policy in priority and that the Progressive policy would be last in line.[63] The court reiterated that the "other insurance" clauses of UM policies do not affect the application of the priority tests the court has developed.[64] Finally, the court quoted the language of the *Dairyland Insurance Co. v. State Farm Automobile Insurance Co.*[65] case that "'[c]ourts may also look to other insurance clauses in the contracts for resolution of the priority issue,'" but the

55. *Id.* at 788–89, 670 S.E.2d at 499–500.
56. *See id.* at 789, 670 S.E.2d at 500.
57. *Id.*
58. *Id.* at 789–90, 670 S.E.2d at 500.
59. *Id.* at 790, 670 S.E.2d at 501.
60. 282 Ga. App. 176, 638 S.E.2d 330 (2006).
61. O.C.G.A. § 33-7-11 (2000 & Supp. 2009); *Progressive Classic*, 294 Ga. App. at 790, 670 S.E.2d at 501 (citing *Abrohams*, 282 Ga. App. at 181, 638 S.E.2d at 334).
62. *Progressive Classic*, 294 Ga. App. at 791, 670 S.E.2d at 501.
63. *Id.*
64. *Id.*
65. 289 Ga. App. 216, 656 S.E.2d 560 (2008).

court disapproved of this language to the extent of any conflict with this case.[66]

When UM policies are issued to a corporation, may an employee of the corporation stack UM coverage under multiple policies when injured in an accident while driving one of the corporation's insured vehicles? According to the court of appeals decision in *Staton v. State Farm Automobile Insurance Co.*,[67] the answer might depend on the "reasonable expectations" of the insured, even when the "insured" is the injured employee.[68]

Staton was injured when his vehicle was hit by an underinsured driver. Staton's vehicle was owned by his employer, Smyth & Helwys Publishing, Inc. (S&H). Staton was an officer and the majority shareholder of the corporation. S&H insured the vehicle Staton was driving, as well as two other vehicles it owned, under three separate State Farm insurance policies that each included UM coverage of $100,000 per person. Staton sought to stack the UM coverage of the three policies to provide him with $300,000 in UM coverage. State Farm filed a motion for partial summary judgment, arguing that Staton could only collect under the UM policy covering the vehicle he was using at the time of the incident because he was not an "insured" under the other policies for this accident. Staton argued that the policies' definition of *insured* was ambiguous and that he might be entitled to coverage under the rules of contract construction.[69]

Under O.C.G.A. § 33-7-11(b)(1)(B), there are at least two types of insureds: "(1) the named insured and persons related to him or her in a specified way, and (2) persons occupying the insured vehicle at the time of the incident."[70] Typically, this requirement is met by defining *insured* as *you*, "that is, the named insured, his or her spouse, and their resident relatives."[71] State Farm's policies, however, had a broader definition of *insured*, which included

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66. *Progressive Classic*, 294 Ga. App. at 791–92, 670 S.E.2d at 501–02 (alteration in original) (internal quotation marks omitted) (quoting *Dairyland*, 289 Ga. App. at 217, 656 S.E.2d at 562).

67. 294 Ga. App. 208, 669 S.E.2d 164 (2008).

68. *See id.* at 213, 669 S.E.2d at 168.

69. *Id.* at 208–09, 669 S.E.2d at 165–66.

70. *Id.* at 211, 669 S.E.2d at 167; *see also* O.C.G.A. § 33-7-11(b)(1)(B).

71. *Staton*, 294 Ga. App. at 212, 669 S.E.2d at 167. When a corporation is the named insured on such a policy, employees of the corporation are not entitled to stack such policies because they are neither the named insured nor the spouse or family member of the named insured. Hogan v. Mayor & Aldermen of Savannah, 171 Ga. App. 671, 672, 320 S.E.2d 555, 557 (1984).

> 1. the first person . . . named in the declarations; 2. his or her spouse; 3. their relatives; and 4. any other person while occupying: . . . your car [or a non-owned vehicle] . . . driven by the first person named in the declarations or that person's spouse and within the scope of the owner's consent.[72]

Person was defined in the policies as a "human being."[73] But here, the only named insured was the corporation, S&H. Because a corporation is not a human being and can have neither a spouse nor relatives, Staton argued that the policies should be read to say that the insured was the first person—that is, human being—reported to State Farm as a licensed driver of the vehicle—here, Staton.[74] The court of appeals agreed that the policies were susceptible to this construction and the definition of *insured* was therefore ambiguous.[75]

The court then went on to construe the ambiguity against the drafter (State Farm) and "'in accordance with the reasonable expectations of the insured.'"[76] This construction, of course, led to a determination that Staton was individually an insured under all three policies and was entitled to stack their UM coverage because his reasonable expectation included an understanding that "the UM coverages would stack in the event of a catastrophic accident, such as occurred in this case."[77] Accordingly, the decision of the trial court granting State Farm summary judgment on this issue was reversed.[78]

4. What is a "Renewal Policy"? Under O.C.G.A. § 33-7-11(a), UM policy limits, by default, are equal to the policy's liability limits unless the insured rejects UM coverage or selects a different coverage limit.[79] If an insured made an election or rejection of UM coverage in a prior policy, the carrier is not required to offer the same coverage again or offer it in different amounts in a "renewal policy."[80] But what happens when a policy (1) is issued by a different but related insurance company, (2) bears a different policy number, and (3) indicates on the document

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72. *Staton*, 294 Ga. App. at 210–11, 669 S.E.2d at 166–67.
73. *Id.* at 210, 669 S.E.2d at 166.
74. *Id.* at 211–12, 669 S.E.2d at 167–68.
75. *Id*. at 212, 669 S.E.2d at 168. The court did not explicitly say so, but it must have implicitly held that any other construction would mean the coverage was illusory because the named insured did not meet the definition of *insured*. *See id.*, 669 S.E.2d at 167–68.
76. *Id.* at 212–13, 669 S.E.2d at 168 (quoting Fireman's Fund Ins. Co. v. Univ. of Ga. Athletic Ass'n, 288 Ga. App. 355, 357, 654 S.E.2d 207, 210 (2008)).
77. *Id.* at 213, 669 S.E.2d at 168.
78. *Id.*
79. O.C.G.A. § 33-7-11(a)(1), (3).
80. *Id.* § 33-7-11(a)(3).

that it is a renewal policy? In this situation, is an insured who was not offered a selection or rejection with the new policy entitled to UM benefits in the default amount equal to the liability limit, or only the amount of UM coverage afforded under the prior policy issued by the original insurer? In *Zurich American Insurance Co. v. Beasley*,[81] the court of appeals held that a policy can be a renewal when the insurer indicates that it is a renewal and the policy serves the purpose of continuing the obligation to insure.[82]

After an automobile collision, Melvin Beasley sought UM benefits under his Zurich American Insurance Company policy. In cross-motions for summary judgment, Beasley and Zurich contested the amount of coverage. According to Zurich, the renewal policy provided the insured with $75,000 in UM coverage. Beasley argued that the policy was not a renewal policy and that Zurich was required to provide $1 million in coverage because he did not reject the higher amount in writing as required by O.C.G.A. § 33-7-11(a). The trial court granted Beasley's motion for summary judgment and denied the motion filed by Zurich.[83] The court of appeals reversed.[84]

The court of appeals determined that "this case turn[ed] on whether the policy issued by Zurich in September 2003 was a renewal of [a] policy originally issued by Maryland Casualty in September 2001."[85] The original policy issued by Maryland Casualty indicated that it was a new policy. However, subsequent policies—one issued by Maryland Casualty and then two issued by Zurich—indicated that they were renewal policies.[86] The first Zurich policy also had a different number than the previous Maryland Casualty policies.[87] The court held that the language of the insurance contracts was entitled to deference in determining the parties' intent.[88] The fact that the name of the insurer had changed was not dispositive, nor did the fact that the Zurich policy had a different number or different endorsements automatically make the policy a new policy rather than a renewal.[89] Thus, the court concluded that the policy Zurich issued in 2003 was a renewal and, accordingly, no new selection or rejection by the insured was required.[90]

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81. 293 Ga. App. 8, 666 S.E.2d 83 (2008).
82. *Id.* at 10–11, 666 S.E.2d at 85.
83. *Id.* at 8–9, 666 S.E.2d at 83–84.
84. *Id.* at 9, 666 S.E.2d at 84.
85. *Id.* at 10, 666 S.E.2d at 85.
86. *Id.*
87. *Id.* at 9, 666 S.E.2d at 84.
88. *Id.* at 11, 666 S.E.2d at 85.
89. *Id.*
90. *Id.*

B. Coverage Cases Involving "Road Rage" and Other Violent Incidents

This survey period included several decisions about injuries caused in vehicle-related incidents when the injuries were not caused directly by vehicles. In each of the cases, the courts found no insurance coverage under an auto policy.

In *Lancer Insurance Co. v. United National Insurance Co.*,[91] bad conduct by two truck drivers resulted in a death and injury to others and no liability under the motor vehicle policy. In the underlying incident, Donald Goode was driving a truck on Interstate 75 for his employer, Dahlonega Transport. He passed a truck driven by William Porter, who then accelerated and pulled in front of Goode. The truck drivers continued to trade aggressive maneuvers as they moved along the highway. When Goode called Porter on the CB radio to complain about Porter's driving, Porter told Goode to pull over and then stopped his own truck on the side of the highway. Goode pulled off, stopping in front of Porter. Goode got out of his truck and walked toward Porter's vehicle. Porter, however, abruptly pulled back onto the highway, causing an approaching vehicle to lose control and crash into an embankment. An occupant of the vehicle, John Werner, was seriously injured, and his wife was killed in the crash. Werner sued several entities, including Goode, Dahlonega Transport, and Lancer Insurance Company, Dahlonega Transport's commercial automobile insurance carrier. Werner later joined United National Insurance Company, Dahlonega Transport's general liability carrier, claiming that if the Lancer policy did not cover the incident, United National's general liability policy would provide coverage.[92]

After settling with Werner with a reservation of the right to litigate coverage, Lancer then filed a declaratory judgment action against United National.[93] The Lancer commercial automobile policy provided as follows: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'"[94] The parties filed cross motions for summary judgment to determine whether Lancer's policy covered the claims, and the trial court granted summary judgment to

91. 294 Ga. App. 261, 668 S.E.2d 865 (2008).
92. *Id.* at 261–62, 668 S.E.2d at 866.
93. *Id.* at 262, 668 S.E.2d at 866.
94. *Id.* (internal quotation marks omitted).

United National.[95] The trial court found coverage under Lancer's policy because Goode's vehicle was still being "used" at the time of the crash and because the injuries and death "flowed from and grew out of the incident between the two tractor-trailer drivers during the use of the vehicles."[96]

The court of appeals disagreed.[97] The court acknowledged that Goode's vehicle was being "used" during the interplay between the drivers.[98] At the time of the crash, however, the truck was parked, Goode was out of the vehicle, and the truck was not being "used" for any purpose.[99] Therefore, the crash was too remote from the ownership, maintenance, or use of the insured vehicle to be covered under the policy.[100]

A different road rage incident was at the heart of the court of appeals decision in *Kinzy v. Farmers Insurance Exchange*.[101] In *Kinzy* the court held that injuries sustained from being punched by another driver (while both drivers were out of their vehicles) did not qualify for UM coverage because the injuries did not arise out of the ownership, maintenance, or use of a motor vehicle.[102]

In *Travco Insurance Co. v. Williams*,[103] an unintended gun shot originating from a parked truck struck the occupant of another vehicle. Shelly Williams was struck by a stray bullet while in a vehicle in a parking lot. At another vehicle in the same parking lot, a drug deal had turned into a robbery attempt, and a gun went off when it was used to strike one of the participants in the head. Williams and her husband made claims against the liability insurer of the other vehicle and against their own UM carrier.[104] "Under the terms of both policies, coverage depended on whether the bodily injury arose 'out of the ownership, maintenance or use' of the vehicle."[105] The United States Court of Appeals for the Eleventh Circuit, like the Georgia Court of Appeals, held that although the incident may have involved a vehicle, the vehicle's

95. *Id.* at 261, 668 S.E.2d at 866.
96. *Id.* at 262, 668 S.E.2d at 866–67 (internal quotation marks omitted).
97. *Id.*, 668 S.E.2d at 867.
98. *Id.*
99. *Id*. at 262–63, 668 S.E.2d at 867.
100. *See id.* at 263, 668 S.E.2d at 867.
101. 293 Ga. App. 509, 667 S.E.2d 673 (2008).
102. *Id.* at 510–11, 667 S.E.2d at 675.
103. 297 F. App'x 949 (11th Cir. 2008).
104. *Id.* at 950.
105. *Id.*

causal connection to the injuries was too remote to find the incident within the intended coverage of the automobile insurance policies.[106]

III. COMMERCIAL LIABILITY INSURANCE

A. Contribution of Defense Costs Among Insurers

In *St. Paul Fire & Marine Insurance Co. v. Valley Forge Insurance Co.*,[107] the United States District Court for the Northern District of Georgia addressed a dispute between insurance companies regarding their duty to defend the same insured.[108] Two of the issues in the case were whether one insurer could seek contribution of defense costs from another insurer and how defense costs were to be allocated.[109] The general contractor for a construction project was the named insured under St. Paul's commercial general liability (CGL) policy. The general contractor was an additional insured under Valley Forge's CGL policy. When an arbitration demand was filed seeking damages related to the project, St. Paul provided a defense to the general contractor. Valley Forge refused St. Paul and the general contractor's demand that Valley Forge provide a defense to the general contractor in the arbitration because Valley Forge believed that its policy was excess to St. Paul's policy. St. Paul then sued Valley Forge for a judicial declaration that Valley Forge had a duty to defend the general contractor, that Valley Forge must contribute to the cost of defending the general contractor, and that Valley Forge must reimburse St. Paul for an equitable amount of the defense costs it incurred in defending the general contractor.[110]

After concluding that Valley Forge had a duty to defend the general contractor under its policy (because it was not a true "excess policy"), the court addressed an issue of first impression under Georgia law: whether Georgia recognizes a cause of action by one insurer for contribution of defense costs against another insurer.[111] While Georgia courts have recognized the rights of an insurer to seek contribution from another insurer for the cost of indemnifying on behalf of an insured under its policy, they have not done so with respect to the cost of defense.[112] The United States District Court for the Northern District of Georgia previously addressed contribution for defense costs on the basis of

106. *Id.* at 951.
107. No. 1:06-CV-2074-JOF, 2009 WL 789612 (N.D. Ga. Mar. 23, 2009).
108. *See id.* at *4.
109. *Id.*
110. *Id.* at *1–3.
111. *Id.* at *8.
112. *Id.*

contract law, holding that an insurer has a contractual duty to defend its insured, independent of any other insurance coverage that may be available to the insured.[113] Therefore, an insurer cannot seek contribution for its defense costs, "'absent a special contractual agreement to that effect.'"[114] After comparing the two lines of reasoning (an independent duty to defend and right to seek indemnification costs), the court found "the holdings of the Georgia courts with respect to contribution in indemnity to be the greatest predictors of Georgia law regarding the right to contribution for defense costs."[115] Therefore, the court found that St. Paul had a cause of action for contribution of defense costs against Valley Forge.[116] "Absent a right to contribution, an insurer has no incentive to perform its duty to defend when it knows that the insured has another primary insurer."[117]

The court was then faced with the question of how to allocate defense costs between the insurers.[118] Under the "equal basis" method, the two insurers would split defense costs equally.[119] Under the "defense follows indemnity" approach, Valley Forge would pay the same percentage of defense costs as the percentage it would pay for the insured's indemnity.[120] Under the "time on the risk" method, the insurers would look at the number of policies in effect over the total coverage period, determine the period over which both insurers' policies covered the general contractor, and apportion accordingly.[121] After reviewing the "methods of sharing" clauses in St. Paul's and Valley Forge's respective policies,[122] the court decided that the defense costs should be allocated on an equal basis.[123]

In *St. Paul*, the court provides a road map for how multiple insurers should share and allocate defense costs when obligated to defend the same insured.[124] The court also provides a cautionary tale to any insurer who does not share in the defense, absent solid contractual grounds for doing so. The court likely was motivated by its perception

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113. *Id.* at *9 (citing Barton & Ludwig, Inc. v. Fidelity & Deposit Co. of Md., 570 F. Supp. 1470, 1472 (N.D. Ga. 1983)).
114. *Id.* (quoting *Barton & Ludwig, Inc.*, 570 F. Supp. at 1472).
115. *Id.* at *10.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at *11.
120. *Id.*
121. *See id.*
122. *Id.* at *12–13.
123. *Id.* at *13.
124. *See id.* at *11–13.

of fairness.[125] In recognizing a cause of action in Georgia for contribution of defense costs, the court relied upon "principles of equity that underlie the rule of contribution with respect to the ultimate loss."[126] However, when determining a method for allocation of defense costs, the court relied upon "the provisions of the contracts [the insurers] have made."[127]

B. Additional Insured Coverage Under Excess Policies

In *Insurance Co. of Pennsylvania v. APAC-Southeast, Inc.*,[128] the Georgia Court of Appeals extended additional insured coverage to a general contractor, APAC-Southeast, Inc. (APAC), under an excess liability policy, even though the terms of a separate contract between the general contractor and the subcontractor did not require the subcontractor to obtain excess liability coverage.[129] In the subcontract, the subcontractor was required to obtain a commercial general liability (CGL) policy with policy limits of at least $1 million. The subcontract also specified that "[a]ll policies, except for worker's compensation policies, shall name [APAC] as an additional insured."[130] The subcontractor obtained a CGL policy with limits of $1 million that contained an additional insured endorsement under which APAC would qualify as an additional insured if the subcontractor was obligated "by written agreement" to procure such additional insured coverage. The subcontractor also obtained an excess policy with limits of $10 million, although it was not required to do so under the subcontract. The excess policy was silent about additional insured coverage but contained a "follow form" provision, which had the effect of incorporating the additional insured endorsement of the CGL policy into the excess policy.[131] APAC was sued for injuries arising out of the construction project. The CGL insurer provided a defense to APAC as an additional insured. The excess insurer denied that APAC was an additional insured under its policy because the additional insured endorsement incorporated into its policy extended additional insured coverage only to the extent the subcontractor was required to do so "by written agreement." Because the subcontract did not require the subcontractor to obtain liability coverage in excess of $1 million, the excess insurer asserted that APAC

125. *See id.* at *10.
126. *Id.*
127. *Id.* at *12.
128. 297 Ga. App. 553, 677 S.E.2d 734 (2009).
129. *Id.* at 560, 677 S.E.2d at 740.
130. *Id.* at 554, 677 S.E.2d at 736 (second alteration in original).
131. *Id.* at 554–55, 677 S.E.2d at 736–37.

did not qualify as an additional insured under the additional insured endorsement.[132]

While the court of appeals agreed that the subcontract did not require the subcontractor to procure excess liability coverage, it held that the subcontract required the subcontractor to procure additional insured coverage on an excess policy if the subcontractor chose in its discretion to obtain such a policy.[133] The use of the phrase "[a]ll policies . . . shall name [APAC] as an additional insured" in the subcontract would include any excess policy and was not limited to the CGL policy the subcontractor was specifically required to obtain.[134] The court held that, at a minimum, the language of the additional insured endorsement was ambiguous about whether it extended additional insured coverage when the subcontract did not require the subcontractor to obtain an excess policy but did require additional insured coverage for any excess policy that was procured.[135] Therefore, the court resolved the ambiguity in favor of extending additional insured coverage to APAC under the excess policy.[136]

This decision is a further example of the pronounced trend by courts over the last several years to aggressively find additional insured coverage under a variety of policies and circumstances.[137] To do so, courts have shown that they will look to agreements and documents beyond the language of the policy itself to find an intent by the parties to obtain additional insured coverage.[138]

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132. *Id.* at 556–57, 677 S.E.2d at 737–38.

133. *Id.* at 557, 677 S.E.2d at 738.

134. *Id.* at 557–58, 677 S.E.2d at 738 (emphasis omitted) (second alteration in original).

135. *Id.* at 560, 677 S.E.2d at 740.

136. *Id.*

137. *See St. Paul*, 2009 WL 789612, at *13 (holding that Valley Forge had a duty to defend the general contractor as an additional insured because the insurer's decision to defend the named insured indicated that it believed the claims arguably fell within the policy and its contention that its policy was "excess" was not a valid ground to deny coverage); *see also* Grange Mut. Cas. Co. v. Snipes, 298 Ga. App. 405, 408–09, 680 S.E.2d 438, 441 (2009); BBL-McCarthy, LLC v. Baldwin Paving Co., 285 Ga. App. 494, 502, 646 S.E.2d 682, 688 (2007); Ryder Integrated Logistics, Inc. v. Bellsouth Telecomm., Inc., 277 Ga. App. 679, 684, 627 S.E.2d 358, 363 (2006), *rev'd on other grounds*, 281 Ga. 736, 736, 642 S.E.2d 695, 696 (2007).

138. *See, e.g.,* Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co. of Ga., 233 F. Supp. 2d 1339, 1355 (N.D. Ga. 2004).

C. No Bad Faith Failure to Settle When No Judgment in Excess of Limits

In *Trinity Outdoor, LLC v. Central Mutual Insurance Co.*,[139] the Georgia Supreme Court was asked a certified question from the United States District Court for the Northern District of Georgia with respect to "whether an action for negligent or bad faith failure to settle a case requires that a judgment be entered against an insured in excess of the policy limits before the action can be asserted."[140] The supreme court answered in the affirmative.[141]

Central Mutual provided a defense to the insured after the insured was sued for injuries when a billboard it owned fell during installation. The plaintiffs made a demand for the policy limits in Central Mutual's policy. The insured demanded that Central Mutual accept the settlement to avoid exposure for a verdict in excess of policy limits. Rather than accept the demand, Central Mutual filed a motion for summary judgment on the insured's behalf and asserted what it believed were valid and strong arguments that the insured was not liable. The insured subsequently agreed to contribute toward the settlement of the case without Central Mutual's approval and then sought to recover the amount of its contribution against Central Mutual, alleging that Central Mutual breached the policy and refused to settle in bad faith.[142]

Central Mutual's liability policy contained language providing that Central Mutual would only pay those sums that the insured was legally obligated to pay, that the insured could not make a voluntary payment without Central Mutual's prior consent, and that the insured could only sue to "recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial."[143] When interpreting these provisions as clearly and unambiguously written, the court held that the insured made a voluntary payment toward the settlement without Central Mutual's consent, that the voluntary payment did not constitute a sum the insured was legally obligated to pay, that the voluntary payment was not an agreed settlement, and that the payment was not a final judgment obtained after a trial.[144] Therefore, the court held

139. 285 Ga. 583, 679 S.E.2d 10 (2009).
140. *Id.* at 583, 679 S.E.2d at 11.
141. *Id.*
142. *Id.* at 583–84, 679 S.E.2d at 11.
143. *Id.* at 585, 679 S.E.2d at 12.
144. *Id.* at 585–86, 679 S.E.2d at 12.

that the insured could not maintain an action against Central Mutual for bad faith failure to settle in absence of a jury verdict.[145]

The court distinguished its ruling in *Southern Guaranty Insurance Co. v. Dowse*,[146] in which it held that an insurer who denies coverage and refuses to defend an action against its insured waives the provision in the policy preventing an insured from making a voluntary payment without the insurer's consent.[147] Unlike the insurer in *Dowse*, Central Mutual provided the insured with a defense.[148] Therefore, the insured was obligated to comply with the terms of the policy.[149]

Although the court answered the certified question presented to it, it did so on the basis of contract interpretation, without delving into the history and legal rationale of bad faith failure to settle cases in Georgia.[150] In light of *Trinity Outdoor*, so long as the insurer is providing a defense, the insured cannot settle the case on its own.[151] The insured must wait until the case goes to trial to see if the jury renders a verdict in excess of the policy limits before it has any recourse against the insurer.[152] While this places the insured in an unenviable position and ties the hands of an insured who believes the case should be settled and the insurer is refusing to settle in bad faith,[153] the "voluntary payment" provision in a policy does "'serve to prevent potential fraud, collusion[,] and bad faith on the part of insureds.'"[154]

D. Insurer Estopped from Noncoverage, But Insured Must Prove Prejudice

In *World Harvest Church, Inc. v. GuideOne Mutual Insurance Co.*,[155] the CGL insurer provided a defense to its insured for eleven months without any reservation of rights before the insurer informed the insured there was no coverage under the policy and withdrew its defense.[156] It was undisputed that the policy did not provide coverage.[157] The

145. *Id.* at 587, 679 S.E.2d at 13.
146. 278 Ga. 674, 605 S.E.2d 27 (2004). For further discussion about the *Dowse* decision, see Schatz et al., *supra* note 46, at 222–24.
147. *Dowse*, 278 Ga. at 676, 605 S.E.2d at 29.
148. *Trinity*, 285 Ga. at 587, 679 S.E.2d at 13.
149. *See id.*
150. *See id.* at 584–86, 679 S.E.2d at 12.
151. *See id.* at 587, 679 S.E.2d at 13.
152. *See id.*
153. *See id.*
154. *Id.* at 586, 679 S.E.2d at 12–13 (quoting *Dowse*, 278 Ga. at 676, 605 S.E.2d at 29).
155. No. 1:07-CV-1675-RWS, 2008 WL 5111218 (N.D. Ga. Dec. 2, 2008).
156. *Id.* at *1.
157. *Id.* at *3.

insured asserted that the insurer was estopped from denying coverage, though, because it defended the insured without issuing a reservation of rights. The insurer contended that estoppel cannot be used to create coverage when coverage does not exist under a contract of insurance.[158]

The United States District Court for the Northern District of Georgia held that an insurer's failure to issue a reservation of rights while defending the insured with knowledge of defenses to coverage is an exception to the rule that estoppel cannot be used to create liability under a policy where no coverage otherwise exists.[159] However, for this exception to apply, the insured must prove that the insurer's participation in the defense of the insured without a reservation of rights prejudiced the insured's defense of the suit.[160] Because the insured could not prove any prejudice, the insurer was not estopped from denying coverage under the policy.[161]

In finding no prejudice, the court appears to have been influenced by the fact that the insured was aware of the coverage issue when the insurer provided the defense, despite the lack of a reservation of rights.[162] The holding in this case demonstrates that estoppel is not automatic when the insurer defends the insured without issuing a reservation of rights.[163] The insured must show that it was somehow prejudiced as a result[164]—for example, because the insurer did not provide as complete a defense as it reasonably should have or because assigned defense counsel did not provide satisfactory or adequate service.

E. Pollution Exclusion Unambiguously Applies to an "Irritant" or "Contaminant"

As discussed in last year's Annual Survey of Georgia Law, the Georgia Court of Appeals, in a case of first impression, held that bodily injury caused by the release of carbon monoxide inside a residence is clearly and unambiguously excluded by the plain language of the pollution exclusion in a CGL policy.[165] In *Reed v. Auto-Owners Insurance Co.*,[166] the supreme court affirmed, concluding that carbon monoxide gas was a "pollutant" as defined by the policy—that is, a matter acting

158. *Id.* at *2–3.
159. *Id.* at *5.
160. *Id.*
161. *Id.*
162. *See id.*
163. *See id.*
164. *Id.*
165. Cotter et al., *supra* note 1, at 196–97 (discussing Auto-Owners Ins. Co. v. Reed, 286 Ga. App. 603, 605, 649 S.E.2d 843, 845 (2007)).
166. 284 Ga. 286, 667 S.E.2d 90 (2008).

as an "irritant or contaminant." [167] The majority chastised the dissent for trying to determine the reasonable expectation of the insured by exploring—through "extra-textual" sources—the purpose and historical evolution of the pollution exclusion, instead of focusing on the text of the exclusion as plainly written.[168] The decision in *Reed* reflects the trend of courts to interpret pollution exclusions to apply to various types of irritants or contaminants, and not only to traditional environmental pollution.[169]

F. Professional Services Exclusion Interpreted Broadly

In *Auto-Owners Insurance Co. v. State Farm Fire & Casualty Co.*,[170] the Georgia Court of Appeals addressed the application of similar professional services exclusions in two CGL policies.[171] Both provisions excluded bodily injury and property damage due to rendering or failing to render any professional services. The description of professional services included, but was not limited to, services such as engineering, drafting, surveying, and supervisory or inspection services.[172] The claimant sued the insureds under the policies for electrical burns allegedly caused when the supervisor at a construction site miscommunicated to the claimant that a conduit did not contain live wires.[173] The court held that the professional services exclusion unambiguously applied to the bodily injury because such injury was related to the alleged failure to properly supervise and manage the construction project.[174] A task does not automatically become a "professional

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167. *Id.* at 288, 667 S.E.2d at 92 (internal quotation marks omitted).

168. *Id.*

169. Kruger Commodities v. U.S. Fid. & Guar., 923 F. Supp. 1474, 1479 (M.D. Ala. 1996) ("[T]he overwhelming majority of courts have found [an absolute pollution exclusion] to bar coverage for all types of pollution claims."); *see also* Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co., 162 F.3d 821, 823 (4th Cir. 1998) (welding fumes); U.S. Liab. Ins. Co. v. Bourbeau, 49 F.3d 786, 787 (1st Cir. 1995) (lead paint); Nova Cas. Co. v. Waserstein, 424 F. Supp. 2d 1325, 1334 (S.D. Fla. 2006) (living organisms, microbial populations, airborne and microbial contaminants, and indoor allergens); Gulf Ins. Co. v. Holland, No. 1:98-CV-774, 2000 WL 33679413, at *6 (W.D. Mich. Apr. 3, 2000) (chlorine gas); E. Quincy Servs. Dist. v. Cont'l Ins. Co., 864 F. Supp. 976, 977, 979 (E.D. Cal. 1994) (e. coli and other sewage-borne bacteria); Larson v. Composting Concepts, Inc., No. A07-976, 2008 WL 2020489, at *1 (Minn. App. May 13, 2008) (living organisms, mold, bacteria, and bioaerosols from a composting site); Landshire Fast Foods of Milwaukee, Inc. v. Employers Mut. Cas. Co., 676 N.W.2d 528, 532 (Wis. App. 2004) (listeria monocytogenes bacteria).

170. 297 Ga. App. 751, 678 S.E.2d 196 (2009).

171. *See id.* at 753, 678 S.E.2d at 199.

172. *Id.*

173. *Id.* at 752–53, 678 S.E.2d at 198–99.

174. *Id.* at 755, 678 S.E.2d at 200.

service" because it is performed by a professional; instead, "the task must arise out of the acts specific to the individual's specialized knowledge or training."[175] Moreover, the proper inquiry is not whether the insured actually drew upon his professional knowledge, experience, and training, but whether the insured should have done so.[176] Because the construction supervisor should have drawn on his knowledge, experience, and training to determine if the conduit contained live wires, his conduct was an excluded professional service.[177]

In *Auto-Owners* the court provides welcomed guidance for how the professional services exclusion should be interpreted, particularly with respect to insureds involved in construction. The decision potentially broadens the application of the exclusion to a variety of entities who are sued because they made incorrect decisions by drawing on or failing to draw on their specialized knowledge. Such insureds would need to obtain professional liability insurance to provide a layer of coverage for those scenarios under which their CGL policy will not apply.

G. Another Year, Another Notice Decision

It would not be an annual survey if there was not at least one decision addressing the insured's duty to comply with the notice provision in an insurance policy. In *Trinity Universal Insurance Co. v. Georgia Casualty & Surety Co.*,[178] the CGL policy contained the standard notice condition, requiring the insured to provide prompt notice to the insurer of an occurrence, claim, or suit.[179] The policy also contained an endorsement stating that the insured's rights afforded under the policy "shall not be prejudiced if you fail to give us notice of an occurrence, offense, claim or suit solely due to your reasonable and documented belief that the bodily injury or property damage is not covered under the policy."[180] The insured received a letter from a claimant indicating that equipment manufactured by the insured caused a fire that resulted in significant damages. The insured did not forward the letter to its insurer until approximately six months after receiving it because the insured did not think it was liable for the loss.[181]

The United States District Court for the Northern District of Georgia held that the insured breached the notice condition as a matter of law

175. *Id.* at 756, 678 S.E.2d at 201.
176. *Id.* at 757, 678 S.E.2d at 201.
177. *Id.*
178. No. 1:08-CV-1332-JOF, 2009 WL 1174659 (N.D. Ga. Apr. 28, 2009).
179. *Id.* at *1.
180. *Id.* (internal quotation marks omitted).
181. *Id.* at *1–2.

and, therefore, was not entitled to coverage under the policy.[182] The letter from the claimant was sufficient to notify "a reasonable person that an 'occurrence' had occurred which necessitated action."[183] The court further found that the endorsement in the policy did not excuse the insured from providing timely notice because the insured did not have a reasonable and documented belief that the alleged fire was not covered under the policy.[184] Instead, the insured's sole excuse for not providing timely notice was its belief that it was not liable for the fire.[185] Generally, an insured is not justified in failing to provide prompt notice by claiming it determined that it had no liability for the incident.[186]

The holding in *Trinity Universal Insurance Co.* once again stresses the importance of an insured quickly notifying its insurer of an occurrence when it receives a letter from a potential claimant indicating that the insured's conduct has caused damages or injuries. The insured's belief that it is not liable for the damages or injuries is not a viable legal excuse for not providing notice.[187] An endorsement similar to the one contained in the policy in *Trinity Universal Insurance Co.* will likely be upheld as providing a contractual excuse for not providing notice, but only if the insured can adequately prove that its failure to provide notice was due solely to its reasonable and documented belief that the policy did not provide coverage for the incident.[188]

IV. CONDOMINIUM INSURANCE

In House Bill 1121,[189] the Georgia General Assembly rewrote the insurance requirements for condominium associations.[190] Among the pertinent changes are the doubling of the liability limits to $1 million per occurrence and $2 million aggregate, and mandating coverage on certain defined common elements regardless of the actual legal boundaries of the particular condominium units.[191] These changes represent further maturing of the condominium concept in Georgia.

182. *Id.* at *6.
183. *Id.* at *5.
184. *Id.* at *6.
185. *Id.*
186. *Id.* at *5.
187. *See id.* at *6.
188. *See id.*
189. 2008 Ga. Laws 1030 (codified at O.C.G.A. § 44-3-107 (1991 & Supp. 2009)).
190. *See id.*
191. *Id.* § 1.

V. HOMEOWNER'S INSURANCE

In *Perry v. State Farm Fire & Casualty Co.*,[192] the Georgia Court of Appeals again emphasized the distinction between an "accidental occurrence" and an "accidental injury."[193] The facts underlying this court's analysis included a sexual assault undertaken at the perpetrator's home after he had been drinking alcohol. The victim sued for battery, invasion of privacy, loss of consortium, and punitive damages. In an amended complaint, the victim also alleged that the insured's voluntary intoxication caused the insured to fail to take reasonable steps to ensure that the plaintiff consented.[194] This claim arguably would have deprived the perpetrator of the requisite intent—hence, making his conduct merely "negligent conduct."[195] State Farm's policy provided coverage for an "occurrence," defined in the policy as "an accident."[196] Though *accident* was not defined in this policy, settled Georgia law provides that an accident must be "'an event which takes place without one's foresight or expectation or design.'"[197] The court stressed what such a policy covers—namely, "bodily injury 'caused by' an accidental occurrence."[198] The focus is on the nature of the occurrence—not the injury—because an accidental injury is one that is unexpected and may (and often does) arise from a conscious, voluntary act.[199] Whether the analysis concerns a construction defect, fight, or sexual tort (such as in this case), the proper focus is on the accidental nature of the event, not the particular injury, which may or may not have been anticipated or intended.[200] The court easily dismissed the insured's eleventh-hour attempt to obscure his admitted intent to do the act because the insured had previously admitted intent.[201] This opinion is consistent with a steady line of Georgia precedent and clarifies that the proper focus for the evaluation of an occurrence vel non is on the nature of the event, not the injury.[202]

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192. 297 Ga. App. 9, 676 S.E.2d 376 (2008).
193. *Id.* at 11, 676 S.E.2d at 378.
194. *Id.* at 9–10, 676 S.E.2d at 377.
195. *See id.*
196. *Id.* at 11, 676 S.E.2d at 378.
197. *Id.* (quoting Crook v. Ga. Farm Bureau Mut. Ins. Co., 207 Ga. App. 614, 614, 428 S.E.2d 802, 803 (1993)).
198. *Id.*
199. *Id.*
200. *See id.* at 11–12, 676 S.E.2d at 378–79.
201. *See id.* at 12, 676 S.E.2d at 379.
202. *See id.* at 11 & n.15, 676 S.E.2d at 378–79 & n.15.

In *Mason v. Allstate Insurance Co.*,[203] a case of first impression concerning the meaning of *in connection with the residence premises*, the court of appeals examined persuasive precedent nationwide and reviewed two earlier court of appeals opinions consistent with its ultimate holding, but which did not explicitly deal with the "in connection with" policy language.[204] In *Mason* several birthday party guests were injured in an all-terrain vehicle (ATV) accident occurring in a field fifteen miles from the insured premises. The insureds had previously used the field to ride the ATV and to fish and hunt. They had no ownership interest in the property.[205] The Allstate policy contained an exclusion typically found in policies, which excluded the use of "'any motor vehicle designed principally for recreational use off public roads' when 'that vehicle is owned by an insured person and *is being used away from an insured premises*.'"[206] The term *premises* included "the residence premises" and "any premises used by an insured person *in connection with the residence premises*."[207]

The court noted its prior decisions in *Georgia Farm Bureau Mutual Insurance Co. v. Huncke*[208] and *McCullough v. Reyes*,[209] which involved occurrences on premises that had no ties to the insured premises and were some 400 and 200 yards away, respectively.[210] The court proceeded to review persuasive precedent involving all manner of vehicles and occurrences at locations not immediately adjacent to the insured premises, all of which failed to connect those physically separate locations despite pleas of connected activities.[211] The court found it unnecessary to adopt the most severe of these tests—whether the premises were "integral to the use,"[212]—adopted by the Massachusetts Appeals Court in *Massachusetts Property Insurance Underwriting Ass'n v. Wynn*.[213] Because the property was neither adjacent to the insured premises nor owned or leased by the insureds, it did not qualify as being connected with the residence premises.[214] A possible rationale for the

203. 298 Ga. App. 308, 680 S.E.2d 168 (2009).
204. *See id.* at 311–12, 680 S.E.2d at 171–72.
205. *Id.* at 309–10, 680 S.E.2d at 170.
206. *Id.* at 311, 680 S.E.2d at 171.
207. *Id.*
208. 240 Ga. App. 580, 524 S.E.2d 302 (1999).
209. 287 Ga. App. 483, 651 S.E.2d 810 (2007).
210. *Mason*, 298 Ga. App. at 312–13, 680 S.E.2d at 172.
211. *Id.* at 313–16, 680 S.E.2d at 172–75.
212. *Id.* at 316, 680 S.E.2d at 174.
213. 806 N.E.2d 447, 452 (Mass. App. Ct. 2004).
214. *Mason*, 298 Ga. App. at 316, 680 S.E.2d at 174.

court's ruling was concern over how to regulate premises other than "the residence premises" with a test other than a proximity test.[215]

In *Nationwide Mutual Fire Insurance Co. v. Kim*,[216] by intentionally underpleading the character of the conduct alleged, the insured was able to secure a defense, given Georgia's liberal duty to defend law, which favors the insured.[217] Kim was alleged to have "unlawfully, intentionally, and without provocation or justification" thrown an ice cream scooper at the plaintiff in a karaoke bar.[218] An amendment followed, watering down the allegation to negligence.[219] While noting "the potential for abuse" whereby amendments alleging mere negligence could conceivably bring in every loss,[220] the Georgia Court of Appeals declined to examine the bona fides of the changes and held that "'[a]n insurer's duty to defend is determined by comparing the allegations of the complaint with the provisions of the policy.'"[221] By so doing here, there was a duty to defend.[222] The potential for abuse invites a challenge to a hard-and-fast rule that encourages underpleading. Ironically, another division of the opinion found that punitive damages might well be covered under the standard *damages* definition employed in most similar policies, which does not expressly exclude punitive damages.[223] Though the gravamen of the amended complaint was limited to negligence rather than intentional conduct,[224] punitive damages are often awarded for intentional conduct, albeit down to a conscious indifference to the consequences at times.

Contractual suit limitations in policies continue to be topics of litigation. In *Morrill v. Cotton States Mutual Insurance Co.*,[225] the court of appeals decided that the two-year limitation on legal action would only be applied to policies written or renewed on or after June 20, 2006, and not to policies written before that date.[226] The court also rejected the argument of waiver by conduct during negotiations, noting

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215. *See id.*
216. 294 Ga. App. 548, 669 S.E.2d 517 (2008).
217. *Id.* at 551–52, 669 S.E.2d at 520.
218. *Id.* at 549, 669 S.E.2d at 519 (internal quotation marks omitted).
219. *Id.* at 550, 669 S.E.2d at 519.
220. *Id.* at 552 n.3, 669 S.E.2d at 520 n.3.
221. *Id.* at 551, 669 S.E.2d at 520 (quoting Fireman's Fund Ins. Co. v. Univ. of Ga. Athletic Ass'n, 288 Ga. App. 355, 356, 654 S.E.2d 207, 209 (2008)).
222. *Id.* at 551–52, 669 S.E.2d at 520.
223. *Id.* at 554, 669 S.E.2d at 522.
224. *See id.* at 551–52, 669 S.E.2d at 520.
225. 293 Ga. App. 259, 666 S.E.2d 582 (2008).
226. *Id.* at 261, 666 S.E.2d at 584; *see also* GA. COMP. R. & REGS. 120-2-19-.01 (2006) (noting effective date of amendment was June 20, 2006).

that mere negotiation for settlement was insufficient to constitute waiver.[227] Rather, the insured must "'show that negotiations for a settlement [had] led the insured to believe that the claim would be paid by the insurer, without a suit.'"[228] Here, the insured was expressly informed, months before the expiration of the time period, that the claim would not be paid.[229] Of procedural importance was the court's holding that merely failing to assert the contractual defense in the answer or in the pretrial order did not constitute a waiver.[230]

In the context of crop insurance, in *Bullington v. Blakely Crop Hail, Inc.*,[231] the court of appeals examined whether an arbitration proceeding constituted "legal action" for purposes of a twelve-month suit limitation clause.[232] The insured initially claimed Georgia's six-year statute of limitations for actions on simple contracts in writing, found in O.C.G.A. § 9-3-24,[233] governed his claim for crop insurance benefits.[234] The court easily rejected that argument, reasoning it well established that an insurance policy can place a shorter time limitation, thereby trumping the general statute of limitations in Georgia.[235] However, due to a determination of the Risk Management Agency of the United States Department of Agriculture, which broadly defines legal action as both litigation and arbitration,[236] the court held that the initiation of arbitration within the one-year legal action limitation was sufficient to allow Bullington's claim to proceed.[237]

VI. LIFE AND HEALTH INSURANCE

A. Rescission by Insurer

In *American General Life Insurance Co. v. Schoenthal Family, LLC*,[238] the United States Court of Appeals for the Eleventh Circuit clarified the terms upon which an insurer could rescind under O.C.G.A.

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227. *Morrill*, 293 Ga. App. at 263, 666 S.E.2d at 585.

228. *Id.* at 262, 666 S.E.2d at 585 (alteration in original) (quoting Ga. Farm Bureau Mut. Ins. Co. v. Nolan, 180 Ga. App. 28, 29, 348 S.E.2d 554, 555 (1986)).

229. *Id.*

230. *Id.* at 263, 666 S.E.2d at 585–86.

231. 294 Ga. App. 147, 668 S.E.2d 732 (2008).

232. *See id.* at 150, 668 S.E.2d at 735.

233. O.C.G.A. § 9-3-24 (2007).

234. *Bullington*, 294 Ga. App. at 150, 668 S.E.2d at 735.

235. *Id.*

236. U.S.D.A. FAD-013 (Apr. 23, 2002), *available at* http://www.rma.usda.gov/regs/533/fad-013.html.

237. *Bullington*, 294 Ga. App. at 151, 668 S.E.2d at 736.

238. 555 F.3d 1331 (11th Cir. 2009).

§ 33-24-7(b),[239] an independent basis of rescission from that contained in the text of the policy.[240] The insured misrepresented his net worth to be $10.7 million when it was actually $160,000, and his annual income to be over $150,000 when it was actually $7200. The eighty-two--year-old applicant was helped in securing this policy by various entity-plaintiffs that worked together to finance what the insured would otherwise have been unable to afford, reserving for themselves the vast majority of the expected payout.[241] The beneficiaries argued that American General was required to prove actual reliance on the misrepresentation.[242]

The Eleventh Circuit, however, held that the test for material misrepresentation under this code section was objective; the test was "'one that would influence a *prudent insurer* in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance.'"[243] The Eleventh Circuit upheld the district court's finding of materiality and reliance on the Swiss Re Underwriting Guidelines,[244] viewed as "a model of reasonable insurance practices," and the uncontroverted testimony of an expert witness.[245] The court held that O.C.G.A. § 33-24-7(b) provides an entirely independent basis for rescission, apart from permissive statements of an insured in the actual contract.[246] Additionally, consistent with controlling Georgia law, the court held that American General's initial prayer to implead the policy premium alleviated the need to immediately tender the returned premium, and hence, its retention for eighteen months (until receiving court permission to deposit the funds) did not constitute waiver.[247]

B. Interpleader Actions

Insurers faired well in interpleader actions this survey period. In *American General Life & Accident Insurance Co. v. Vance*,[248] the Georgia Court of Appeals upheld the insurer's right to use O.C.G.A.

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239. O.C.G.A. § 33-24-7(b) (2005).
240. *See Schoenthal*, 555 F.3d at 1335.
241. *Id.* at 1336.
242. *Id.* at 1340.
243. *Id.* (internal quotation marks omitted) (quoting Lively v. S. Heritage Ins. Co., 256 Ga. App. 195, 196, 568 S.E.2d 98, 100 (2002)).
244. These guidelines are only available to Swiss Re clients. *See* Swiss Re Guidelines, http://www.swissre.com/pws/business%20services/reinsurance/life%20and%20health/underwriting/guidelines/guidelines.html (last visited Oct. 28, 2009).
245. *Schoenthal*, 555 F.3d at 1340–41.
246. *Id.* at 1341.
247. *Id.* at 1342.
248. 297 Ga. App. 677, 678 S.E.2d 135 (2009).

§ 23-3-90[249] to interplead claims over which the insurer was a disinterested stakeholder.[250] The court reasoned that interpleader is remedial in nature and, therefore, should be liberally construed.[251]

Alice Vance's policy during her marriage listed her husband, Cornelius, as the beneficiary. But after their divorce, Alice and Cornelius made competing claims to ownership of the policy and for reimbursement of premiums. American General filed an interpleader requesting that it be discharged and that Alice and Cornelius be left to resolve their dispute amongst themselves. In the process, Cornelius filed a counterclaim against American General and claimed this made American General something other than a disinterested stakeholder and, therefore, made the interpleader action infirm.[252] The court of appeals reviewed the text and remedial purpose of O.C.G.A. § 23-3-90, which states that a disinterested holder of property in dispute need not decide close questions amongst competing claimants; rather, the holder may interplead the contested property and leave the competing claimants to litigate ownership.[253] This opinion enforces the remedial nature of the Georgia interpleader statute.

Likewise, in *National Life Insurance Co. v. Alembik-Eisner*,[254] the United States District Court for the Northern District of Georgia allowed a life insurance carrier to use the federal interpleader action so that the competing claimants could resolve their disputes.[255] The carrier received reimbursement of all its attorney fees and expenses in bringing the interpleader action.[256]

Abraham Madenfrost applied for a life insurance policy from National Life in January 1990, the proceeds of which were to be paid into a family trust. Over the next fifteen years, there were various and sundry changes in the personal circumstances of several potential beneficiaries, some of whom lived in foreign countries. One of the beneficiaries, Victoria Alembik-Eisner, in September 2006 made a demand for payment of the funds, despite a lack of clarity regarding a notice of revocation from Madenfrost and the possibility of Madenfrost having additional children. Hence, National Life, faced with claims of multiple

249. O.C.G.A. § 23-3-90 (1982).
250. *Vance*, 297 Ga. App. at 678, 678 S.E.2d at 136.
251. *Id.*
252. *Id.* at 677–78, 678 S.E.2d at 135–36.
253. *Id.* at 678, 678 S.E.2d at 136.
254. 582 F. Supp. 2d 1362 (N.D. Ga. 2008).
255. *Id.* at 1369.
256. *Id.* at 1372.

liability, initiated an interpleader action. The court granted National Life's request to deposit $273,535.22 into the registry of the court.[257]

First, the court held that actual competing claims are not required.[258] The federal interpleader statute, 28 U.S.C. § 1335,[259] provides that interpleader can be used when "[t]wo or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property."[260] There must be some real and reasonable fear of exposure to double liability, and the court found that National Life had been faced with four competing claimants, which required National Life to interpret at its peril the meaning of the Trust document regarding the validity of the claimed revocation and to determine whether there were additional concerned offspring.[261] The fact that during the course of the litigation factual developments allowed these determinations to be made did not alter the fact that National Life had bona fide concerns at filing, using foresight, about possible double exposure.[262] Hence, jurisdiction was proper under the federal interpleader statute.[263] The court also considered how the interpleader action interacted with state law bad faith claims, noting that the "filing of the interpleader action does not 'immunize' [an] insurer from state law [bad faith] counterclaims."[264] Here, however, there was a factual failure of the bad faith claim.[265] The court reviewed the Georgia courts' standard analysis of Georgia's insurance bad faith statute, O.C.G.A. § 33-4-6,[266] and stated that "'[a]lthough the question of good or bad faith is ordinarily for the jury, the insurer is entitled to judgment as a matter of law if it has reasonable grounds to contest the claim or the question of liability is close.'"[267] The court, having found that National Life did not act in bad faith in filing the interpleader action, likewise held that the carrier did not act in bad faith in refusing to pay without a determination from the court as a result of an interpleader action.[268]

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257. *Id.* at 1364–65.
258. *Id.* at 1366.
259. 28 U.S.C. § 1335 (2006).
260. 28 U.S.C. § 1335(a)(1).
261. *Alembik-Eisner*, 582 F. Supp. 2d at 1367.
262. *See id.*
263. *Id.* at 1369.
264. *Id.*
265. *Id.* at 1371.
266. O.C.G.A. § 33-4-6 (2000 & Supp. 2009).
267. *Alembik-Eisner*, 582 F. Supp. 2d at 1370 (quoting Atl. Title Ins. Co. v. Aegis Funding Corp., 287 Ga. App. 392, 393, 651 S.E.2d 507, 508 (2007)).
268. *Id.* at 1371.

As a practical matter, a well-pled interpleader should work to free a carrier from further pursuit by the combatants. These interpleader opinions add to a continuing body of law upholding the use of interpleader actions in bona fide situations of uncertainty faced by carriers.

C. Class Actions

In *Fortis Insurance Co. v. Kahn*,[269] the Georgia Court of Appeals afforded the trial court's determinations considerable deference in upholding class certification when the plaintiffs alleged that the defendants had misrepresented their insurance policies to be group insurance policies even though each one of these separate policies was in fact an individual policy.[270] Daniel Kahn, like other class members, sought to procure health insurance on a group basis from his agent. Upon renewal of his policy (as well as the policies of each of the other 5757 Georgia policyholders who were issued the same type of insurance), the premium was not based upon group experience, but rather upon his own. Hence, Kahn's quarterly premiums went from $833.55 to $1736.43, even after he cancelled his family coverage. When the trial court certified the class, this appeal ensued.[271]

On appeal, multiple attacks on the trial court's finding of commonality under O.C.G.A. § 9-11-23[272] were rejected.[273] The insurer argued that the reliance aspect of misrepresentations was an individual determination which could not be made with respect to a class as a whole.[274] While seemingly agreeing that oral misrepresentations should be so treated, the court of appeals upheld the trial court's finding that uniform written misrepresentations regarding the policy, coupled with class-wide circumstantial evidence that renewals were based thereon, properly made this a common question of fact.[275] Next, the insurer argued that differing defenses would defeat the commonality requirement, noting that class representative Kahn knew of his fraud claim as of March 1998 and might be time barred by the four-year statute of limitations.[276] The court of appeals, relying on precedent from the United States Court of Appeals for the Second Circuit, held that slightly differing defenses do not necessarily destroy commonality,

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269. No. A09A0486, 2009 WL 1532515 (Ga. App. June 3, 2009).
270. *See id.* at *1.
271. *Id.* at *1–2.
272. O.C.G.A. § 9-11-23 (2006).
273. *Fortis*, 2009 WL 1532515, at *3–4.
274. *Id.*
275. *Id.*
276. *Id.* at *4.

and it is sufficient that a "'constellation of common issues binds class members together.'"[277] Lastly, the court rejected the insurer's claim that individualized proof made the class unmanageable.[278] This argument dealt with proof of injury and damages.[279] Here, the insurer was caught by its own uniform assessment of renewal premium increases on all policyholders in seventeen states, without even looking at each policyholder's individual characteristics. It now argued that individual assessments were required in each case.[280] The trial and appellate courts were satisfied with the uniform methodology proposed for calculating damages and rejected this last argument.[281]

The court of appeals wisely noted that class certifications are inherently tentative and subject to revision and modification as developments occur.[282] However, as a practical matter, class certification often leads to settlement of such cases because the stakes vastly multiply for the defendant.

VII. PROFESSIONAL LIABILITY

Though unpublished, in *USMoney Source, Inc. v. American International Specialty Lines Insurance Co.*,[283] the United States Court of Appeals for the Eleventh Circuit issued a helpful clarifying opinion about exclusions that arise out of described happenings. In an action in the United States District Court for the District of Nebraska, USMoney was found liable for negligence and breach of contract because of its failure to repay loans to TierOne. The Nebraska court entered a judgment in the amount of $1,625,630.71.[284] USMoney filed this declaratory judgment proceeding based on its Mortgage Banker/Mortgage Broker's Errors and Omissions Policy, which excluded coverage for any claim "arising out of any defective deed or title."[285] The Eleventh Circuit evaluated existing Georgia precedent on the "arising out of" clause, noting that "[a] claim arises out of a circumstance if, without the existence of that circumstance, the claim could not exist."[286] Two of the underlying claims could be maintained independently regardless of

277. *Id.* (quoting *In re* Nassau County Strip Search Cases, 461 F.3d 219, 225 (2d Cir. 2006)).
278. *Id.* at *5.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at *6.
283. 288 F. App'x 558 (11th Cir. 2008).
284. *Id.* at 559.
285. *Id.* at 560 (internal quotation marks omitted).
286. *Id.* (internal quotation marks omitted).

any issue with the title and, hence, were not barred by the "arising out of" exclusion.[287] The result is helpful to those victims of mortgage fraud schemes who are searching for resources to defray losses.

VIII. TITLE INSURANCE

Litigation over mortgage fraud schemes has generally yielded financial relief for the victims. In *Keyingham Investments, LLC v. Fidelity National Title Insurance Co.*,[288] the Georgia Court of Appeals demonstrated that the precise words used can be outcome determinative. The plaintiff–appellant agreed to loan funds to a person it thought was Michael Shanahan and later received a commitment from Fidelity National Title to insure the property against defects in title, subject to certain conditions.[289] The relevant commitment condition provided that "[d]ocuments satisfactory to the Company creating the interest in the land and/or mortgage to be insured must be signed, delivered[,] and recorded."[290] An imposter forged Shanahan's signature and, hence, the lenders lost their anticipated security interest still held in the property by the real Shanahan. Fidelity refused to issue its "long form" title, which would have covered the loss.[291] Fidelity claimed that its title commitment was controlled by *Glass v. Stewart Title Guaranty Co.*,[292] but the title commitment in *Glass* required the execution by a particular person.[293] In contrast, Fidelity's commitment only required "[d]ocuments satisfactory to the Company," and the company's attorneys found that the imposter's documents were satisfactory.[294] The court emphasized that the very purpose of title insurance is to protect against the consequences of forgery and, absent clear policy language to the contrary, that purpose would be fulfilled by the courts.[295]

In *United States v. Shefton*,[296] a case of first impression in the Eleventh Circuit, the court joined the majority of circuits to hold that a constructive trust can serve as a superior legal interest to invalidate a criminal forfeiture order.[297] This mortgage fraud scheme entailed Stacey Shefton obtaining nearly $800,000 from Long Beach Mortgage

287. *Id.* at 562.
288. 298 Ga. App. 467, 680 S.E.2d 442 (2009).
289. *Id.* at 468, 680 S.E.2d at 443.
290. *Id.*
291. *Id.* at 468–69, 680 S.E.2d at 443.
292. 181 Ga. App. 804, 354 S.E.2d 187 (1987).
293. *Keyingham*, 298 Ga. App. at 470, 680 S.E.2d at 444.
294. *Id.* at 468, 470–71, 680 S.E.2d at 443, 444.
295. *Id.* at 470, 680 S.E.2d at 444.
296. 548 F.3d 1360 (11th Cir. 2008).
297. *Id.* at 1365.

Company in a scheme that relegated Long Beach's supposed first security interest to a subordinate one. Attorneys Title Insurance Fund, Inc. (ATIF) paid under its title policies and pursued Shefton's assets for repayment (being subrogated to the interests of Long Beach), asserting a constructive trust against Shefton's properties. In the meantime, Shefton's properties had been forfeited as a result of criminal proceedings.[298] This required ATIF to petition, pursuant to 21 U.S.C. § 853 (n)(2),[299] to establish its interest in the properties.[300] The Government claimed that the term *legal interest*, not having been defined by Congress, should not include a constructive trust that arises from a voluntary transfer of money.[301] Applying Georgia law, the Eleventh Circuit held that a constructive trust existed under Georgia law because Long Beach had been defrauded.[302] ATIF was not resigned to remission in the discretion of the Attorney General of the United States because that remedy was not as complete or effective.[303] The majority of the federal circuits had held that a constructive trust can, as a "superior legal interest," invalidate a forfeiture order.[304]

The Eleventh Circuit considered and rejected the contrary analysis in *United States v. BCCI Holdings (Luxembourg), S.A.*,[305] in which the United States Court of Appeals for the District of Columbia Circuit held that a constructive trust is merely a remedy in court and not a superior legal interest in property that existed at the time of the transgression.[306] The Eleventh Circuit held that the constructive trust arose upon the transfer of Long Beach's funds to the perpetrator, Shefton.[307] Contrary to the decision in *BCCI Holding*, ATIF's interest did not have to be superior to the Government's interest—only superior to the "*defendant's* interest in the forfeited property."[308] Thus, the court's decision in *Shefton* provides victims of mortgage fraud an additional opportunity to recoup losses.

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298. *Id.* at 1361–62.
299. 21 U.S.C. § 853(n)(2) (2006).
300. *Shefton*, 548 F.3d at 1362.
301. *Id.* at 1363.
302. *Id.* at 1365.
303. *Id.* at 1364–65.
304. *Id.* at 1366.
305. 46 F.3d 1185 (D.C. Cir. 1995).
306. *Shefton*, 548 F.3d at 1365–66 (discussing *BCCI Holdings*, 46 F.3d at 1190–91).
307. *Id.* at 1366.
308. *Id.*