

# Insurance

by **Stephen L. Cotter**<sup>\*</sup>  
**Stephen M. Schatz**<sup>\*\*</sup>  
and **Bradley S. Wolff**<sup>\*\*\*</sup>

## I. INTRODUCTION

This survey year, from June 1, 2009 to May 31, 2010,<sup>1</sup> brought significant developments to a broad array of insurance fields. Both the Georgia Supreme Court and the United States Court of Appeals for the Eleventh Circuit held that a cancellation notice for nonpayment of a premium can also contain an offer to reinstate upon payment in the “grace” period. The supreme court has strictly enforced basic concepts of “offer and acceptance” in the context of time-limit policy demands containing less than complete release and indemnity terms, thereby appearing to put insurers in “catch 22” situations with their insureds. A “safe harbor” is getting more difficult to find. An oral reservation of rights can be valid, but an insurer’s failure to sufficiently reserve its rights, while undertaking the insured’s, waives those rights. Complex

---

\* Partner in the firm of Swift, Currie, McGhee & Hiers, 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.

\*\* Managing Partner in the firm of Swift, Currie, McGhee & Hiers, 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 and Litigation Section); Defense Research Institute.

\*\*\* Partner in the firm of Swift, Currie, McGhee & Hiers, 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.

1. For analysis of Georgia insurance law during the prior survey period, see Bradley S. Wolff, Stephen L. Cotter & Stephen M. Schatz, *Insurance, Annual Survey of Georgia Law*, 61 MERCER L. REV. 179 (2009).

preemption issues were addressed in various courts, perhaps heralding more to come from recent attempts to federalize health insurance.

## II. AUTOMOBILE INSURANCE

During the survey period, the courts decided several cases important to practitioners handling automobile cases. Among these are decisions involving the issues of who is an “insured,” how many “accidents” arise out of multiple impacts, and the effect of a limited release on an uninsured motorist carrier’s (UMC) right to subrogation. We begin with a discussion of the uninsured motorist (UM) cases, focusing on previously unexplored questions addressed in cases involving UM coverage.

### A. Uninsured Motorist Coverage

**1. Who Is an “Insured” in a Policy Issued to a Corporation?** We discussed in last year’s article the court of appeals decision in *Staton v. State Farm Automobile Insurance Co.*,<sup>2</sup> which allowed the stacking of policies issued to a corporation.<sup>3</sup> The Georgia Supreme Court granted certiorari in *State Farm Mutual Automobile Insurance Co. v. Staton*<sup>4</sup> and reversed the court of appeals decision.<sup>5</sup>

Staton was driving a vehicle owned and insured by Smyth & Helwys Publishing, Inc. (Smyth & Helwys), his employer, when he was injured in a car wreck. State Farm insured this vehicle and two other vehicles owned by Smyth & Helwys. The UM policy limit for each vehicle was \$100,000. Staton wanted to stack all three policies to recover up to \$300,000 in UM coverage.<sup>6</sup> State Farm argued that Staton could not stack the policies because he was not the “named insured” on any of the policies.<sup>7</sup> The insurance policies stated that the named insured was the “first person named” on the declarations page.<sup>8</sup> The first and only name on the declarations page was the corporation’s name, Smyth & Helwys.<sup>9</sup>

The court of appeals held that Staton could stack the policies because Staton was the named insured on all three policies.<sup>10</sup> The court reasoned that the term “named insured” was ambiguous because “(1) the

---

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

3. *Id.* at 213, 669 S.E.2d at 168; *see also* Wolff et al., *supra* note 1, at 187-88.

4. 286 Ga. 23, 23, 685 S.E.2d 263, 264 (2009).

5. *Id.* at 26, 685 S.E.2d at 266.

6. *Id.* at 23-24, 685 S.E.2d at 264.

7. *Id.* at 24, 685 S.E.2d at 264-65.

8. *Id.* at 24, 685 S.E.2d at 265.

9. *Id.* at 23-24, 685 S.E.2d at 264-65.

10. *Id.* at 24, 685 S.E.2d at 265.

‘named insured’ was defined as ‘the first person named in the declarations’; (2) the policy defined a ‘person’ as a ‘human being’; and (3) Smyth & Helwys, the corporate entity named as insured on the declarations page, was not a human being.”<sup>11</sup> The court held that Staton was a named insured because Staton was the first *person* identified in the declarations—he was named as the first licensed driver. The court also held that the evidence showed Staton reasonably expected the policies to be stacked.<sup>12</sup>

In a 5-2 decision, the supreme court reversed the court of appeals and rejected its analysis.<sup>13</sup> The majority opinion which was written by Justice Thompson, held “that the term ‘named insured’ is not ambiguous.”<sup>14</sup> In reaching its decision, the supreme court explored general rules of contract interpretation.<sup>15</sup> For example, one rule of contract interpretation that the court explored is that an ambiguity exists if a term is “subject to more than one reasonable interpretation.”<sup>16</sup> Furthermore, if an ambiguity exists, it will be construed against the insurer.<sup>17</sup> However, when only one reasonable construction of the language is possible, there is no ambiguity, and the contract must be interpreted as written.<sup>18</sup> Under these rules, the supreme court held that the term “named insured” was not ambiguous because only “Smyth & Helwys” appeared on the declarations page, which made it clear that Smyth & Helwys was the named insured.<sup>19</sup> The court further explained that written words, such as the name appearing in the declarations, prevail when they conflict with preprinted portions of policies, such as the definition of “person” as a “human being.”<sup>20</sup> Justice Carley and Chief Justice Hunstein dissented and argued in favor of affirming the court of appeals decision.<sup>21</sup>

One month after the decision was issued in *Staton*, in *Banks v. Brotherhood Mutual Insurance Co.*,<sup>22</sup> the court of appeals applied the

---

11. *Id.*

12. *Id.*

13. *Id.* at 25-26, 685 S.E.2d at 265-66.

14. *Id.* at 25, 685 S.E.2d at 266.

15. *See id.* at 25-26, 685 S.E.2d at 265-66.

16. *Id.* at 25, 685 S.E.2d at 265.

17. *Id.*

18. *Id.* at 25, 685 S.E.2d at 266 (quoting *Cotton States Mut. Ins. Co. v. Bowden*, 136 Ga. App. 499, 500, 221 S.E.2d 832, 833 (1975)).

19. *Id.*

20. *Id.*

21. *Id.* at 26, 685 S.E.2d at 266 (Carley, P.J., dissenting).

22. 301 Ga. App. 101, 686 S.E.2d 872 (2009).

supreme court's *Staton* holding.<sup>23</sup> Banks, a City of Toccoa (City) employee and the pastor of a church, was injured in an automobile collision while driving a service truck owned by the City. Banks recovered workers' compensation benefits from the City and sought to recover UM coverage from Brotherhood Mutual Insurance, which insured a church van that Banks was permitted to drive. The insurance policy's declarations page listed "Hollywood Church of God Inc." as the named insured.<sup>24</sup> The policy provided that "[i]f the named insured is '[a] partnership, limited liability company, corporation or any other form of organization,' then anyone occupying the covered vehicle is insured."<sup>25</sup>

Banks argued that the named insured, Hollywood Church of God Inc., was a nonexistent entity and that an ambiguity therefore existed as to who the named insured was.<sup>26</sup> Banks cited the general rule that all ambiguities must be construed against the insurer and construed liberally to provide coverage, and argued that pursuant to this rule he should be considered the named insured under the policy.<sup>27</sup>

The court of appeals determined that under the terms of the policy, which read that "[i]f the Named Insured is designated in the Declarations as . . . [a] form of organization, then . . . [a]nyone occupying a covered auto" is to be considered an insured, the term "organization" was to be assigned its dictionary meaning.<sup>28</sup> The court further held that the church could be considered "a form of organization"; thus, the court determined that the policy was clearly intended to show that the church was the named insured.<sup>29</sup> Accordingly, because Banks was not occupying the insured vehicle at the time of the incident, he was not entitled to UM coverage under the policy.<sup>30</sup>

**2. Limited Release Does Not Affect Subrogation Rights of a Carrier.** A decision on the question involved in *Ramos-Silva v. State Farm Mutual Insurance Co.*<sup>31</sup> has been long awaited. The limited liability release statute<sup>32</sup> was enacted in 1992,<sup>33</sup> but it took until 2009

---

23. *See id.* at 102-03, 686 S.E.2d at 874-75.

24. *Id.* at 101-02, 686 S.E.2d at 874.

25. *Id.* at 102, 686 S.E.2d at 874 (second alteration in original).

26. *Id.*

27. *Id.* at 103, 686 S.E.2d at 874-75.

28. *Id.* at 103-04, 686 S.E.2d at 875 (first alteration in original).

29. *Id.* at 104, 686 S.E.2d at 875.

30. *Id.*

31. 300 Ga. App. 699, 686 S.E.2d 345 (2009).

32. O.C.G.A. § 33-24-41.1 (2005).

33. Ga. H.R. Bill, Reg. Sess., § 1, 1992 Ga. Laws 2514, 2514-16 (codified at O.C.G.A. § 33-24-41.1).

to get an answer as to whether an injured party's release of a tortfeasor precludes subrogation against the tortfeasor by the injured person's UMC.<sup>34</sup>

The question at issue in *Ramos-Silva* arises because a limited liability release acts as a personal release of the tortfeasor, thus the release only allows additional claims to be prosecuted by the injured person against insurance carriers.<sup>35</sup> However, pursuant to section 33-7-11(f) of the Official Code of Georgia Annotated (O.C.G.A.),<sup>36</sup> a UMC that pays its insured is entitled to subrogation against the tortfeasor.<sup>37</sup> Since a subrogation claim requires the UMC to “stand[] in the shoes’ of [its] insured,”<sup>38</sup> and because the insured injured party is precluded from any recovery from the tortfeasor after executing a limited release,<sup>39</sup> the limited release may have the effect of precluding a UMC's subrogation claim. However, in *Ramos-Silva*, the court of appeals held there is no such preclusion.<sup>40</sup>

The facts of *Ramos-Silva* were as follows: Mary Reddy was injured in a motor vehicle collision involving Ramos-Silva. Ramos-Silva's liability insurer paid Reddy its \$25,000 policy limit in exchange for a limited liability release.<sup>41</sup> In signing the release, Reddy agreed “to the provisions set forth in [O.C.G.A.] § 33-24-41.1.”<sup>42</sup> The agreement released Ramos-Silva's liability insurer completely and released Ramos-Silva from personal liability except to the extent other insurance coverage was available that covered Reddy's claims against Ramos-Silva. State Farm paid Reddy \$75,000 under the UM coverage of her policy.

---

34. See *Ramos-Silva*, 300 Ga. App. at 699, 686 S.E.2d at 346.

35. See O.C.G.A. § 33-24-41.1(b)(2).

36. O.C.G.A. § 33-7-11(f) (2000 & Supp. 2010).

37. *Id.* Section 33-7-11(f) provides UM insurers with a right to subrogation. The statute provides that “[a]n insurer paying a claim under the [required UM] endorsement or provisions . . . shall be subrogated to the rights of the insured to whom the claim was paid against the person causing such injury, death, or damage to the extent that payment was made . . .” *Id.*

38. *Landrum v. State Farm Mut. Auto. Ins. Co.*, 241 Ga. App. 787, 788, 527 S.E.2d 637, 638 (2000).

39. O.C.G.A. § 33-24-41.1(b)(2).

40. *Ramos-Silva*, 300 Ga. App. at 700, 686 S.E.2d at 347.

41. *Id.* at 699, 686 S.E.2d at 346.

42. *Id.* Under § 33-24-41.1(b)(1), the limited release releases “the settling carrier from all liability from any claims of the claimant” and releases “the insured tort-feasor covered by the policy of the settling carrier from all personal liability . . . except to the extent other insurance coverage is available which covers such claim or claims.” O.C.G.A. § 33-24-41.1(b)(1). Under § 33-24-41.1(c), a UMC cannot prohibit its insured from settling any claim with a tortfeasor's liability insurer, nor can a UMC require its permission to settle any claim. O.C.G.A. § 33-24-41.1(c).

State Farm then sued Ramos-Silva to recover the \$75,000 paid to Reddy. The trial court denied Ramos-Silva's motion for summary judgment, which asserted that the limited release barred State Farm's action.<sup>43</sup> The court of appeals affirmed.<sup>44</sup>

The court of appeals applied the rules of statutory construction and concluded that the subrogation right created in O.C.G.A. § 33-7-11(f) survives the execution of a limited liability release under O.C.G.A. § 33-24-41.1.<sup>45</sup> The court provided three reasons for this result. First, granting Ramos-Silva's motion would render O.C.G.A. § 33-24-41.1(d)(3) meaningless because it "provides that the execution of a limited release does not in any way affect the duty that the settling insurer otherwise has to defend its insured in a subrogation action."<sup>46</sup> Second, construing O.C.G.A. § 33-24-41.1 as extinguishing the subrogation right granted in O.C.G.A. § 33-7-11(f) would create a conflict between the statutes.<sup>47</sup> Finally, this result is consistent with the equitable purpose of subrogation, which is to deter wrongdoing by placing responsibility for payment on the tortfeasor.<sup>48</sup> Therefore, the court of appeals held that State Farm could sue Ramos-Silva for recovery of the \$75,000 UM payment made to its insured.<sup>49</sup>

**3. Insured Must Obtain a Judgment Against the Uninsured Motorist, but Requirement Can Be Waived.** During this survey period, two uninsured motorist coverage cases dealt with whether an insured's claims against his insurer were barred by O.C.G.A. § 33-7-11 when the insured had not first obtained a judgment of liability against the uninsured motorist. A third case involving the same principle involved a procedural remedy for the protection of insureds.

In *Harden v. State Farm Mutual Automobile Insurance Co.*,<sup>50</sup> plaintiffs Harden and Chambers, both State Farm insureds, were injured in two unrelated collisions involving uninsured motorists. State Farm offered to pay UM benefits and settle in both cases but sought a set-off for payments made under the medical-payments coverage of the policies. Harden refused State Farm's offer and brought suit against the carrier but did not file suit against the uninsured motorist. Chambers accepted

---

43. *Ramos-Silva*, 300 Ga. App. at 699, 686 S.E.2d at 346.

44. *Id.* at 700, 702, 686 S.E.2d at 347, 348.

45. *Id.* at 700-02, 686 S.E.2d at 347.

46. *Id.* at 700-01, 686 S.E.2d at 347; *see also* O.C.G.A. § 33-24-41.1(d)(3).

47. *Ramos-Silva*, 300 Ga. App. at 701, 686 S.E.2d at 347.

48. *Id.* at 702, 686 S.E.2d at 348 (quoting *Landrum*, 241 Ga. App. at 790, 527 S.E.2d at 639).

49. *See id.*

50. 339 F. App'x 897 (11th Cir. 2009).

State Farm's UM payment and dismissed his suit against the uninsured motorist with prejudice.<sup>51</sup>

The plaintiffs filed a class action against State Farm, alleging breach of their insurance contracts.<sup>52</sup> They asserted that pursuant to the Georgia Supreme Court's decision in *Dees v. Logan*,<sup>53</sup> State Farm was not entitled to reduce the UM benefits it owed by payments made for medical expenses under a separate coverage. State Farm had the case removed to the United States District Court for the Northern District of Georgia, and the plaintiffs then sought a certification of the question to the Georgia Supreme Court.<sup>54</sup>

The suit was dismissed in the district court because the plaintiffs failed to meet a condition precedent to suit against the insurer—"the insured [must] first sue *and recover a judgment against* the uninsured motorist, whether known[] or unknown."<sup>55</sup> The plaintiffs argued that this requirement did not apply to their claim against the insurer for breach of contract.<sup>56</sup> The Eleventh Circuit disagreed and affirmed the district court's dismissal,<sup>57</sup> holding that an insured must obtain a judgment against the tortfeasor before a UM carrier can be held liable to the insured for damages.<sup>58</sup> In so doing, the Eleventh Circuit distinguished cases in which a direct action against a UM carrier was allowed for declaratory judgment or coverage interpretation.<sup>59</sup> In addition, the Eleventh Circuit concluded that neither plaintiff had alleged that State Farm waived the condition precedent or misled the plaintiffs by negotiating settlements so as to give rise to estoppel.<sup>60</sup>

Less than one month after the Eleventh Circuit's decision in *Harden*, the United States District Court for the Northern District of Georgia, with Judge Forrester writing the opinion, decided a case involving a similar issue but found the facts warranted the opposite result.<sup>61</sup> In *Yeagley v. Allstate Insurance Co.*,<sup>62</sup> plaintiff John Yeagley brought suit

---

51. *Id.* at 898-99.

52. *Id.* at 899.

53. 282 Ga. 815, 653 S.E.2d 735 (2007).

54. *Harden*, 339 F. App'x at 900.

55. *Id.* at 900-01 (quoting *Cohen v. Allstate Ins. Co.*, 277 Ga. App. 437, 440, 626 S.E.2d 628, 631 (2006)) (internal quotation marks omitted).

56. *Id.* at 898.

57. *Id.* at 898, 903.

58. *Id.* at 901 (quoting *Cohen*, 277 Ga. App. at 441, 626 S.E.2d at 632).

59. *Id.* at 901 n.2.

60. *Id.* at 902-03.

61. *See Yeagley v. Allstate Ins. Co.*, No. 1:09-CV-19-JOF, 2009 WL 2486320 (N.D. Ga. Aug. 12, 2009).

62. No. 1:09-CV-19-JOF, 2009 WL 2486320 (N.D. Ga. Aug. 12, 2009).

to recover under his UM policy for injuries sustained in a car accident and named Allstate, his UMC, as the defendant. Yeagley had two policies with Allstate, a primary auto policy with UM coverage and an umbrella policy.<sup>63</sup>

Yeagley accepted an offer of the policy limits of the tortfeasor's policy and agreed to execute a full release. Yeagley also demanded the policy limits of the UM coverage under his primary policy with Allstate, which Allstate agreed to pay. Allstate required Yeagley to execute a release that specified the policy number of the primary policy as the contract at issue in the release.<sup>64</sup> Allstate's proposed release originally contained a disclaimer of any settlement with the tortfeasor, but after being informed of the settlement with the liability carrier, and at the insured's request, the release was amended to provide that "[t]his release in no way waives the rights of the insured, [John Yeagley], to recover under his umbrella policy."<sup>65</sup>

Allstate then denied the plaintiff's claim under the umbrella policy, contending that his general release of the tortfeasor precluded any recovery of UM benefits. The plaintiff brought suit, arguing that by its participation in the settlement agreements, including its inclusion of the "no waiver under the umbrella policy" language, Allstate had waived its right to raise the coverage defense based on the settlement with the tortfeasor.<sup>66</sup>

The district court agreed and held that Allstate had waived its defense based upon its failure to satisfy O.C.G.A. § 33-24-41.1<sup>67</sup>—the condition precedent of obtaining a judgment against the tortfeasor.<sup>68</sup> The district court reasoned that Allstate had waived its defenses because it knew the plaintiff was executing a full release of the tortfeasor.<sup>69</sup> Furthermore, Allstate knew the plaintiff was releasing the primary UM claim when Allstate drafted the release, which provided that the plaintiff's right to recover under the umbrella policy would not be waived.<sup>70</sup> The district court determined that Allstate's conduct was inconsistent with an intent to require compliance with the condition precedent, stating that Allstate was not entitled to rely upon that condition as a defense.<sup>71</sup>

---

63. *Id.* at \*1.

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

65. *Id.* at \*2 (internal quotation marks omitted).

66. *Id.*

67. *Id.* at \*8.

68. *Id.* at \*6.

69. *Id.* at \*8.

70. *Id.*

71. *Id.*

The third case in this subject area involves a limited release, a loss of consortium claim, and the failure to obtain a judgment against the tortfeasor, which all impacted the insureds' UM claim. In *Mullinax v. State Farm Mutual Automobile Insurance Co.*,<sup>72</sup> the plaintiff, Shirley Mullinax, sued David English for injuries she sustained during a car accident. Mullinax's husband, James, sued English for loss of consortium. The Mullinaxes served pleadings on their UMC, State Farm, which cross-claimed against English for any sums State Farm became obligated to pay. The Mullinaxes settled with English for the \$25,000 policy limit of his liability insurance policy and released English and his insurer pursuant to O.C.G.A. § 33-24-41.1. The limited release provided that \$20,000 was allocated to settle Shirley's claim and that \$5,000 was allocated to James's claim. One month later, the Mullinaxes filed a dismissal with prejudice against David English. The dismissal only applied to claims against English and not to the claims against their UMC, State Farm.<sup>73</sup>

State Farm moved for summary judgment on the grounds that the Mullinaxes could not recover UM benefits because of their failure to exhaust English's liability coverage limits by settling for less than the policy limit.<sup>74</sup> Under O.C.G.A. § 33-24-41.1, an injured party is permitted to settle with a tortfeasor's liability insurer and proceed with a claim against the injured party's UMC.<sup>75</sup> However, the statute as construed in *Holland v. Cotton States Mutual Insurance Co.*<sup>76</sup> requires that the injured party exhaust all available liability coverage before recovering under a UM policy.<sup>77</sup>

The court of appeals held that the plaintiffs exhausted the available liability coverage and could proceed against their UMC.<sup>78</sup> The court relied on *Thompson v. Allstate Insurance Co.*,<sup>79</sup> a case we discussed in last year's article,<sup>80</sup> which held that a liability insurer's payments for both the husband's bodily injury claim and the wife's loss of consortium claim exhausted the limit of coverage for bodily injury to a single person

---

72. 303 Ga. App. 76, 692 S.E.2d 734 (2010).

73. *Id.* at 76, 692 S.E.2d at 735.

74. *Id.*

75. *Id.* at 78, 692 S.E.2d at 736; *see also* O.C.G.A. § 33-24-41.1(b)(2).

76. 285 Ga. App. 365, 646 S.E.2d 477 (2007).

77. *Mullinax*, 303 Ga. App. at 78, 692 S.E.2d at 736 (citing *Holland*, 285 Ga. App. at 366, 646 S.E.2d at 478).

78. *Id.* at 79, 692 S.E.2d at 736.

79. 285 Ga. 24, 673 S.E.2d 227 (2009).

80. *See generally* Wolff et al., *supra* note 1, at 180-82.

and allowed the plaintiffs to pursue a UM claim.<sup>81</sup> Pursuant to the supreme court's decision in *Thompson*, the court of appeals concluded the liability insurer's total liability for personal injury to Mrs. Mullinax and loss of consortium to Mr. Mullinax exhausted the applicable policy limit.<sup>82</sup>

State Farm also argued that the Mullinaxes could not further proceed against State Farm because their claims against English were dismissed *with prejudice* without any judgment having been entered.<sup>83</sup> Pursuant to O.C.G.A. § 9-11-60(g),<sup>84</sup> the Mullinaxes asked the trial court to rescind the dismissal, claiming that their attorney made a clerical error and that the dismissal should have been *without prejudice*. The trial court denied the request and held the dismissal with prejudice was an error of law, not a clerical error.<sup>85</sup> The court of appeals held that the trial court abused its discretion in denying a rescission of the dismissal and entered a dismissal without prejudice so as to allow a refiling of the complaint.<sup>86</sup>

**4. Hospital Liens and Insurance Implications.** A hot topic in UM litigation has been the application and expansion of the rule in *Thurman v. State Farm Mutual Automobile Insurance Co.*<sup>87</sup> to other fact patterns.<sup>88</sup> While the issue will soon be resolved by the supreme court,<sup>89</sup> the court of appeals has continued the pattern of expanding *Thurman* to find potential UM exposure because of nonparty claims for medical expense reimbursement.<sup>90</sup> In *Floyd v. American International South Insurance Co.*,<sup>91</sup> the court of appeals decided that even an unpaid

---

81. See *Thompson*, 285 Ga. at 24-27, 673 S.E.2d at 228-30; Wolff et al., *supra* note 1, at 181.

82. *Mullinax*, 303 Ga. App. at 79, 692 S.E.2d at 736.

83. *Id.* at 76, 692 S.E.2d at 735.

84. O.C.G.A. § 9-11-60(g) (2006).

85. *Mullinax*, 303 Ga. App. at 77, 692 S.E.2d at 735-36.

86. *Id.* at 80, 692 S.E.2d at 737.

87. 278 Ga. 162, 598 S.E.2d 448 (2004).

88. See generally FRANK E. JENKINS III & WALLACE MILLER III, GEORGIA AUTOMOBILE INSURANCE LAW § 32:3 (2009-2010 ed.).

89. The Georgia Supreme Court granted certiorari in *Adams v. State Farm Mutual Automobile Insurance Co.*, 298 Ga. App. 249, 679 S.E.2d 726 (2009), on January 11, 2010. The issue before the supreme court is whether the court of appeals erred in extending the rationale of *Thurman* to the satisfaction of a hospital lien by the tortfeasor's liability insurer. See generally *id.* at 251-54, 679 S.E.2d at 728-29.

90. See *Floyd v. Am. Int'l S. Ins. Co.*, 298 Ga. App. 771, 681 S.E.2d 216 (2009); *Adams*, 298 Ga. App. at 251-54, 679 S.E.2d at 728-29.

91. 298 Ga. App. 771, 681 S.E.2d 216 (2009).

hospital lien can reduce available liability coverage and create UM exposure.<sup>92</sup>

Donna Floyd was injured in an automobile wreck. The owner and driver of the other vehicle were named insureds in a policy issued by United Automobile Insurance Company (United). In exchange for a limited release, United paid Floyd its \$25,000 policy limit. Floyd sued the owner and driver for additional damages and served her UM carrier, American International South Insurance Company (American).<sup>93</sup>

American moved for summary judgment, claiming that Floyd's UM policy limits were equal to the \$25,000 coverage limit of the tortfeasor's liability policy, which was previously paid to Floyd.<sup>94</sup> Floyd argued that because an outstanding hospital lien reduced the liability coverage available, the tortfeasor was underinsured.<sup>95</sup>

Pursuant to O.C.G.A. § 33-7-11(b)(1)(D)(ii),<sup>96</sup> an "uninsured motor vehicle" can include a vehicle that is insured but has policy limits less than the insured's UM limits (an underinsured vehicle) and

for this purpose available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle shall be the limits of coverage *less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage.*<sup>97</sup>

The trial court found the tortfeasor "was not 'uninsured' . . . because the 'difference between the available coverages under the bodily injury liability insurance and property damage liability insurance coverages . . . and the limits of the uninsured motorist coverage provided under the insured's motor vehicle insurance policy' was zero."<sup>98</sup> Floyd appealed.<sup>99</sup>

---

92. *See id.* at 773, 681 S.E.2d at 218.

93. *Id.* at 771-72, 681 S.E.2d at 217.

94. *Id.* at 772, 681 S.E.2d at 217.

95. *Id.* at 773, 681 S.E.2d at 218.

96. O.C.G.A. § 33-7-11(b)(1)(D)(ii) (2000 & Supp. 2010).

97. *Floyd*, 298 Ga. App. at 772, 681 S.E.2d at 217; *see also* O.C.G.A. § 33-7-11(b)(1)(D)(ii). The court of appeals noted that the current version of the statute, O.C.G.A. § 33-7-11(b)(1)(D)(ii) (2000 & Supp. 2010), only applies to insurance policies renewed or issued after January 1, 2009. *See Floyd*, 298 Ga. App. at 772 n.4, 681 S.E.2d at 217 n.4. In *Floyd* the insurance policy was issued to Donna Floyd prior to January 1, 2009. *See id.* at 771-72, 681 S.E.2d at 217.

98. *Floyd*, 298 Ga. at 772-73, 681 S.E.2d at 218.

99. *Id.* at 772, 681 S.E.2d at 217.

In *Adams v. State Farm Mutual Automobile Insurance Co.*,<sup>100</sup> the court of appeals held that there is a reduction in the available liability coverage “by reason of payment of other claims or otherwise” when part of a tortfeasor’s insurance proceeds are used to pay a hospital lien.<sup>101</sup> The court of appeals held that the facts in *Floyd* were similar to those in *Adams*, even though the hospital lien in *Floyd* had not been paid by anyone, because the hospital may recover the amount of its lien directly from Floyd if it shows that the tortfeasor paid Floyd damages.<sup>102</sup>

### B. Issues in Liability Coverage

**1. Multiple Separate Impacts May Be a Single “Accident.”** In *State Auto Property & Casualty Co. v. Matty*,<sup>103</sup> a 4-3 decision, the Georgia Supreme Court answered a certified question from the United States District Court for the Middle District of Georgia and adopted the “cause theory” to determine whether a series of events is a single accident or multiple accidents.<sup>104</sup> The following question was one of first impression in Georgia:<sup>105</sup>

Whether the liability insurance available for separate and distinct claims arising from an incident where the insured struck two claimants separately but in close temporal and spatial proximity to each other is limited to the single per “accident” limit in the policy when “accident” is not expressly defined in the policy.<sup>106</sup>

The tortfeasor, Griffin, struck and killed a bicyclist, Matty. Soon afterward, Griffin’s vehicle struck and seriously injured a second bicyclist, Davis. Georgia State Patrol investigators believed the passenger side of Griffin’s car was on the shoulder after the first impact and that Griffin corrected her vehicle to get back on the road. Investigators were unsure whether Griffin had control of her car after the first

---

100. 298 Ga. App. 249, 679 S.E.2d 726 (2009).

101. *See id.* at 250, 253, 679 S.E.2d at 727, 729 (emphasis added).

102. *Floyd*, 298 Ga. App. at 773, 681 S.E.2d at 218. Another interesting case decided by the court of appeals involving hospital liens is *MCG Health, Inc. v. Owners Insurance Co.*, 302 Ga. App. 812, 692 S.E.2d 72 (2010). In *MCG Health*, the court of appeals held that an underlying debt is required to support a hospital lien. *Id.* at 818, 692 S.E.2d at 78. However, when a hospital and a patient’s insurer agree by contract that covered persons will not be billed for services, no valid hospital lien can arise. *Id.* at 819, 692 S.E.2d at 79.

103. 286 Ga. 611, 690 S.E.2d 614 (2010).

104. *Id.* at 611, 690 S.E.2d at 616.

105. *See id.*

106. *State Auto Prop. & Cas. Co. v. Matty*, No. 4:08-CV-98(CDL), 2009 WL 2216605, at \*5 (M.D. Ga. July 20, 2009).

impact but suspected that the vehicle traveled between 95 and 115 feet after the first impact and then struck Davis.<sup>107</sup> Investigators estimated that if Griffin was traveling at 55 miles per hour when she struck Matty, and the second impact occurred 95 to 115 feet from the first impact, the time between the two impacts was “just over a second.”<sup>108</sup>

In an underlying tort suit, Matty’s widow and Davis sued Griffin. Griffin’s automobile insurance carrier, State Auto, filed a claim and sought a declaratory judgment to determine the scope of its liability under its policy.<sup>109</sup> State Auto’s policy contained a \$100,000 limit of liability for bodily injury for “each accident.”<sup>110</sup> The policy provided that for “each accident” \$100,000 “is the most [State Auto] will pay regardless of the number of: 1. ‘Insureds’; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident.”<sup>111</sup> The insurance policy did not define “accident.” State Auto argued this was one accident and that it was only responsible for a single \$100,000 payment. The plaintiffs claimed there were two accidents and that State Auto should be liable for two \$100,000 payments.<sup>112</sup>

Matty and Davis argued that the supreme court should look to dictionary and statutory definitions of the word “accident” and conclude that two accidents occurred.<sup>113</sup> In an opinion written by Justice Nahmias, the majority rejected the plaintiffs’ argument, concluding that their construction of the term “accident” was overly narrow.<sup>114</sup> The supreme court also determined that the claimants’ definition of “accident” ignored the clear intent of the insurance contract “to limit liability in accidents involving multiple vehicles.”<sup>115</sup> Instead, the court considered three different approaches followed in other jurisdictions: (1) the cause theory;<sup>116</sup> (2) the effect theory,<sup>117</sup> and (3) the event theory.<sup>118</sup> Ultimately, the court held that when the term “accident” is not

---

107. *Id.* at \*1 & n.3.

108. *Id.* at \*1 (internal quotation marks omitted)

109. *See id.*

110. *Matty*, 286 Ga. at 612, 690 S.E.2d at 616.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 611, 613, 690 S.E.2d at 617.

115. *Id.* at 612, 690 S.E.2d at 617.

116. *Id.* at 613-14, 690 S.E.2d at 617 (citing *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982)).

117. *Id.* at 614, 690 S.E.2d at 617 (citing *Anchor Cas. Co. v. McCaleb*, 178 F.2d 322, 324-35 (5th Cir. 1949)).

118. *Id.* at 614, 690 S.E.2d at 618 (citing *Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639, 643 n.6, 644 (W. Va. 1985)).

defined in an insurance contract, the cause theory will be applied to determine the number of accidents.<sup>119</sup> The court declined to determine whether there was one proximate cause that caused all of the damage.<sup>120</sup> Instead, this question was left to be determined by the United States district court.<sup>121</sup>

Under the cause theory, “the number of accidents is determined by the number of causes of the injuries, with the court asking if ‘[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.’”<sup>122</sup> When car accidents involve multiple vehicles, courts applying the cause test look at whether the driver regained control of his or her vehicle before the next impact.<sup>123</sup> If the driver failed to regain control, then there is only one accident.<sup>124</sup> However, if the driver regained control of the vehicle before the next accident, the court will find two accidents.<sup>125</sup>

Based on an examination of the contract as a whole, the supreme court determined the cause test was most consistent with the parties’ intent.<sup>126</sup> Specifically, the court stated that the term “each accident” in the policy’s limitation-of-liability section suggests there can be a single accident involving multiple vehicles and multiple injured parties with a single, “per accident” limit of liability.<sup>127</sup>

Justices Benham, Hunstein, and Carley dissented in *Matty*.<sup>128</sup> The dissenters suggested the majority could have answered the certified question by applying the rules of contract construction and that it did not need to adopt the cause theory.<sup>129</sup> They stated that the term “accident” was ambiguous because it was not defined and thus could reasonably be read to apply to one or two accidents.<sup>130</sup> Under the rules of contract construction, any ambiguity in an insurance contract must be construed against the insurer.<sup>131</sup> Thus, the dissenters reasoned that the insurer should provide coverage for two accidents.<sup>132</sup>

---

119. *Id.* at 616-17, 690 S.E.2d at 619.

120. *Id.* at 617, 690 S.E.2d at 619.

121. *Id.*

122. *Id.* at 613, 690 S.E.2d at 617 (alteration in original) (quoting *Appalachian*, 676 F.2d at 61) (internal quotation marks omitted).

123. *Id.* at 614, 690 S.E.2d at 617.

124. *See id.*

125. *See id.*

126. *Id.* at 615, 690 S.E.2d at 618.

127. *Id.* at 615-16, 690 S.E.2d at 618-19.

128. *Id.* at 617, 690 S.E.2d at 619 (Benham, J., dissenting).

129. *Id.* at 617-18, 690 S.E.2d at 620.

130. *Id.* at 618, 690 S.E.2d at 620.

131. *Id.* at 617, 690 S.E.2d at 620.

132. *See id.* at 617-18, 690 S.E.2d at 620.

**2. Can a Cancellation Notice Be Effective If It Includes an Opportunity for Reinstatement?** In *Reynolds v. Infinity General Insurance Co.*,<sup>133</sup> the supreme court decided whether a notice of cancellation for nonpayment of a premium was effective when the notice also provided that cancellation could be avoided by payment before the effective date.<sup>134</sup> On June 5, 2006, Russell Graham bought an insurance policy from Infinity General Insurance Company (Infinity) for commercial automobiles.<sup>135</sup> The premium was due on July 5, 2006, but Infinity did not receive any premium payment from Graham.<sup>136</sup> On July 10, 2006, Infinity sent a cancellation notice to Graham. The notice informed Graham that his insurance policy would cease at 11:59 p.m. on the cancellation date unless Infinity received payment before that date. The notice was titled “Cancellation Notice, Non-Payment of Premium,” and the cancellation date of July 25, 2006, was set forth in a small box at the top and bottom of the notice. Graham did not pay the premium, and the policy was cancelled as of July 25, 2006.<sup>137</sup> On August 2, 2006, Graham’s son, who was driving the insured vehicle, was involved in a collision that took the lives of his two passengers.<sup>138</sup>

The families of the passengers filed two underlying wrongful death and survivorship actions against Graham.<sup>139</sup> Infinity filed an interpleader action and declaratory judgment and claimed the July 10, 2006 Cancellation Notice was effective and “that the policy was not in force at the time of the collision.”<sup>140</sup> Perceiving no clear, controlling precedent in the decisions of Georgia courts,<sup>141</sup> the Eleventh Circuit certified the following question to the Georgia Supreme Court: “Is a notice of cancellation, properly given after the premium is past due, ineffective because it provides an opportunity for the insured to keep the policy in force by paying the past-due premium within the statutory ten-day period?”<sup>142</sup>

The requirements for cancelling an insurance policy are set forth in O.C.G.A. § 33-24-44.<sup>143</sup> “The statutory requirements were designed to

---

133. 287 Ga. 86, 694 S.E.2d 337 (2010).

134. *Id.* at 86, 694 S.E.2d at 338.

135. *Id.* at 87, 694 S.E.2d at 338.

136. *See id.* at 88, 694 S.E.2d at 339.

137. *Id.* at 87-88, 694 S.E.2d at 338-39.

138. *Id.* at 87, 694 S.E.2d at 338.

139. *Id.* at 87 n.2, 694 S.E.2d at 338 n.2.

140. *Id.* at 87, 694 S.E.2d at 338.

141. *Id.* at 88, 694 S.E.2d at 339.

142. *Id.* at 86, 694 S.E.2d at 338.

143. O.C.G.A. § 33-24-44 (2005).

give the insurer the responsibility of doing everything within its power to make certain that the insured is placed on notice that the insurance coverage is being cancelled.”<sup>144</sup> Under O.C.G.A. § 33-24-44(d), an insurer may terminate an automobile insurance policy because the insured did not pay premiums after delivering or mailing written notice of the cancellation to the insured at least ten days prior to the effective date of cancellation.<sup>145</sup> The statute does not provide any specific language required for cancellation.<sup>146</sup> However, in order to be effective, the cancellation notice must clearly state that cancellation is taking place.<sup>147</sup>

The supreme court’s initial inquiry was “whether [the cancellation notice] clearly, unambiguously, and unequivocally put[] the insured on notice that the insurance coverage at issue [was] ending.”<sup>148</sup> The claimants argued the notice was ineffective because it was conditional and not unequivocal in that the cancellation could be avoided by payment of the premium.<sup>149</sup> The supreme court, however, determined that the cancellation notice was effective.<sup>150</sup> The cancellation notice stated three times that coverage would cease at 11:59 p.m. on July 25, 2006, and the notice explained the policy would be cancelled due to Graham’s failure to pay the premium.<sup>151</sup> Thus, the court concluded the notice was neither misleading nor confusing.<sup>152</sup>

The supreme court distinguished earlier cases in which Georgia courts have held a cancellation notice was merely a demand for payment and ineffective to cancel the policy.<sup>153</sup> For example, in *Pennsylvania National Mutual Casualty Insurance Co. v. Person*,<sup>154</sup> the cancellation notice was ineffective because the insurer mailed the notice to the insured *before* the premium was due.<sup>155</sup> In *Reynolds* the notice was

---

144. *Reynolds*, 287 Ga. at 90, 694 S.E.2d at 340.

145. O.C.G.A. § 33-24-44(d).

146. *See* O.C.G.A. § 33-24-44; *Reynolds*, 287 Ga. at 91, 694 S.E.2d at 341.

147. *Reynolds*, 287 Ga. at 91, 694 S.E.2d at 341.

148. *Id.*

149. *See id.* at 91-92, 694 S.E.2d at 341.

150. *See id.* at 91, 694 S.E.2d at 341.

151. *Id.* at 87, 91, 694 S.E.2d at 338, 341.

152. *Id.* at 91, 694 S.E.2d at 341.

153. *Id.* at 92, 694 S.E.2d at 341-42 (citing *State Farm Mut. Auto Ins. Co. v. Drury*, 222 Ga. App. 196, 200, 202, 474 S.E.2d 64, 68-69 (1996); *Pa. Nat’l Mut. Cas. Ins. Co. v. Person*, 164 Ga. App. 488, 489, 297 S.E.2d 80, 82 (1982) (both holding that a cancellation notice was a demand for payment)).

154. 164 Ga. App. 488, 297 S.E.2d 80 (1982).

155. *Reynolds*, 287 Ga. at 92, 694 S.E.2d at 341 (citing *Person*, 164 Ga. App. at 489, 297 S.E.2d at 82).

sent after the premium was due, so there was nothing ambiguous about the notice.<sup>156</sup>

In addition, public policy concerns prevent a finding that a notice of cancellation is ineffective when delivered after the premium is overdue solely because it includes an option to reinstate coverage if payment is made.<sup>157</sup> States have an interest in ensuring that all vehicles are insured at all times and in preventing coverage gaps to protect the public, drivers, and passengers.<sup>158</sup> States want to encourage citizens to retain their automobile insurance coverage by giving insureds a grace period to obtain new insurance.<sup>159</sup>

Ultimately, the supreme court held that the cancellation notice was effective and that the policy was not in force at the time of the collision.<sup>160</sup> The court explained that “[t]he mere fact that the notice contain[ed] an option for the insured to avoid the imminent cancellation [did] not alter the clear statement to the policyholder that coverage [was] terminated because the premium was not timely paid.”<sup>161</sup>

**3. When Is a Tractor an “Auto”?** Whether a farm tractor is a “motor vehicle” has previously been the subject of appellate decision-making in the UM context.<sup>162</sup> In *McDuffie v. Coweta County*,<sup>163</sup> the question arose again, but was complicated by the fact that unlike the UM statute, the statute at issue was not remedial and liberally construed.

An inmate in the Coweta County Correctional Institute was working as an auto mechanic in the prison when a tractor tire exploded and killed him. The decedent’s supervising officer was in the restroom at the time of the explosion. The decedent’s estate sued Coweta County (County) for wrongful death and negligent supervision, arguing that the

---

156. *Id.* at 88, 694 S.E.2d at 339.

157. *Id.* at 94, 694 S.E.2d at 343.

158. *See id.*

159. *See id.*

160. *Id.* at 86-87, 91, 694 S.E.2d at 338, 341.

161. *Id.* at 91, 694 S.E.2d at 341.

162. *See Hinton v. Interstate Guar. Ins. Co.*, 267 Ga. 516, 516, 480 S.E.2d 842, 843 (1997). In *Hinton* the supreme court made the following ruling:

[W]e construe the term “motor vehicle” in [O.C.G.A.] § 33-7-11 broadly and remedially, and hold that it includes motor vehicles that, while designed primarily to operate off the public highways, are operating on the public highways at the time of an accident. Accordingly, the tractor in this case was a motor vehicle for purposes of the uninsured motorist statute.

*Id.* at 520, 480 S.E.2d at 845.

163. 299 Ga. App. 500, 682 S.E.2d 609 (2009).

death happened during the officer's negligent supervision.<sup>164</sup> The County argued it was entitled to sovereign immunity, and the trial court granted the County summary judgment on that basis.<sup>165</sup> The court of appeals held that the County had waived its sovereign immunity pursuant to O.C.G.A. § 33-24-51<sup>166</sup> because the County had motor vehicle liability insurance that covered the incident and the plaintiff's negligent supervision claims.<sup>167</sup>

The insurance policy provided coverage for "bodily injury . . . that results from the ownership, maintenance, use, loading or unloading of a covered auto."<sup>168</sup> The question before the court of appeals was whether the tractor was an "auto" under the definition in the policy so that the policy would meet the statutory requirement of O.C.G.A. § 33-24-51(a).<sup>169</sup> The court of appeals concluded the tractor constituted an "auto" because the policy was ambiguous, and the tractor was *capable* of being driven on public roads.<sup>170</sup>

"Auto" was defined in the policy "as 'any land motor vehicle, trailer or semi-trailer designed for travel on public streets or roads.'"<sup>171</sup> The County argued that a tractor does not qualify as "a vehicle 'designed for travel on public roads' because" tractors are not "made" for that purpose.<sup>172</sup> The plaintiffs argued that a tractor is an "auto" because

---

164. *Id.* at 501, 682 S.E.2d at 611.

165. *Id.* at 500-01, 682 S.E.2d at 611.

166. O.C.G.A. § 33-24-51 (2005). This accident occurred in 2003, so the previous version of O.C.G.A. § 33-24-51(b), O.C.G.A. § 33-24-51(b) (1996) (current version at O.C.G.A. § 33-24-51 (b) (2005)), applied. *McDuffie*, 299 Ga. App. at 502, 682 S.E.2d at 611-12. The previous version of O.C.G.A. § 33-24-51(b) provided the following:

Whenever a municipal corporation, a county, or any other political subdivision of this state shall purchase the insurance authorized by subsection (a) of this Code section to provide liability coverage for the negligence of any duly authorized officer, agent, servant, attorney, or employee in the performance of his official duties, its governmental immunity shall be waived to the extent of the amount of insurance so purchased. Neither the municipal corporation, county, or political subdivision of this state nor the insuring company shall plead governmental immunity as a defense; and the municipal corporation, county, or political subdivision of this state or the insuring company may make only those defenses which could be made if the insured were a private person.

O.C.G.A. § 33-24-51(b) (1996) (current version at O.C.G.A. § 33-24-51(b) (2005)); *McDuffie*, 299 Ga. App. at 502 n.2, 682 S.E.2d at 612 n.2.

167. *McDuffie*, 299 Ga. App. at 501-03, 682 S.E.2d at 611-12.

168. *Id.* at 502, 682 S.E.2d at 612 (internal quotation marks omitted).

169. *Id.* at 503, 682 S.E.2d at 612-13.

170. *Id.* at 504, 682 S.E.2d at 613.

171. *Id.*

172. *Id.*

it is *capable* of traveling on public roads.<sup>173</sup> The court of appeals determined that both arguments were reasonable, and as a result of this ambiguity, the court construed the term “auto” against the insurer.<sup>174</sup> The court concluded that because the tractor was capable of being operated on public roads, it was a covered “auto.”<sup>175</sup> Accordingly, there was insurance coverage for the incident, and the County’s sovereign immunity was waived.<sup>176</sup>

**4. Territorial Exclusion Upheld.** During this survey period, the court of appeals addressed the following question: may an insurer and insured contract for liability coverage limited to use of the insured vehicle within a specific geographic area?<sup>177</sup> In *Sapp v. Canal Insurance Co.*,<sup>178</sup> the court of appeals held that a “Limitation of Use” endorsement that limited the use to a fifty-mile radius was valid,<sup>179</sup> thus, when an accident occurred outside of the covered area, coverage was excluded.<sup>180</sup> The Sapps sued David Lamb and his employer for injuries arising out of an automobile wreck between Pamela Sapp’s vehicle and a dump truck that Lamb was driving. Canal Insurance Company, the defendants’ insurer, filed an action for declaratory judgment to resolve coverage issues.<sup>181</sup>

Canal’s automobile liability policy included an endorsement that limited coverage to a specific geographic area.<sup>182</sup> The endorsement provided that “[i]n consideration of the premium charged for policy to which this endorsement is attached, it is understood and agreed that insurance applies only while the respective vehicles are operated within the radius indicated for each vehicle.”<sup>183</sup> The endorsement then listed the dump truck as the vehicle, the location of the garage as Tifton, Georgia, and the coverage area as fifty miles. The named insured, Lamb’s employer, received an insurance premium reduction because of the limitation endorsement.<sup>184</sup> It was undisputed that the accident occurred outside the fifty-mile radius measured from the garage in

---

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.* at 502-04, 682 S.E.2d at 612-14.

177. *Sapp v. Canal Ins. Co.*, 301 Ga. App. 596, 688 S.E.2d 375 (2009).

178. 301 Ga. App. 596, 688 S.E.2d 375 (2009).

179. *Id.* at 598, 688 S.E.2d at 377.

180. *Id.* at 597, 688 S.E.2d at 376.

181. *Id.* at 596-97, 688 S.E.2d at 376.

182. *Id.* at 597, 688 S.E.2d at 376.

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

184. *Id.*

Tifton; thus, the trial court granted summary judgment in Canal's favor.<sup>185</sup>

The court of appeals rejected the claimants' argument that the exclusion was unenforceable.<sup>186</sup> The court determined the fifty-mile radius exclusion to be acceptable, reasoning that "[t]he parties contracted for th[e] exclusion, the exclusion is not prohibited by statute or public policy, and the Sapps still ha[d] access to their [UM] coverage" so that there would be a recovery for their losses.<sup>187</sup>

### III. COMMERCIAL GENERAL LIABILITY POLICY

#### A. *Bad Faith Failure to Settle*

In an important case with significant ramifications for future bad faith actions, the Georgia Supreme Court in *Fortner v. Grange Mutual Insurance Co.*<sup>188</sup> addressed the interpretation of the "safe harbor" doctrine espoused in *Cotton States Mutual Insurance Co. v. Brightman*<sup>189</sup> by the supreme court in 2003.<sup>190</sup> The plaintiff was injured in an automobile accident caused by the insured. The insured had a liability policy with Grange Mutual Casualty Company (Grange Mutual) with a limit of \$50,000, and his business had a liability policy with Auto Owners Insurance Company (Auto Owners) with a limit of \$1 million. The plaintiff offered to settle the claims for the limits under the Grange Mutual Policy, contingent upon a \$750,000 payment by Auto Owners.<sup>191</sup> Grange Mutual indicated that it would pay its limits "contingent upon [the plaintiff's] 'signing a full release with indemnification language' and dismissing his claim against [the insured] with prejudice."<sup>192</sup> The plaintiff proceeded to trial and obtained a \$7 million verdict against the insured.<sup>193</sup> The plaintiff then "brought a bad faith claim against Grange [Mutual]."<sup>194</sup> The question for the supreme court

---

185. *Id.*

186. *Id.* at 598, 688 S.E.2d at 377.

187. *Id.*

188. 286 Ga. 189, 686 S.E.2d 93 (2009).

189. 276 Ga. 683, 580 S.E.2d 519 (2003). See Cotter et al., *Insurance, Annual Survey of Georgia Law*, 55 MERCER L. REV. 277, 293-99 (2003) for a discussion of the decision in *Brightman*.

190. *Fortner*, 286 Ga. at 189, 686 S.E.2d at 94.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

was whether the jury charge given in that lawsuit accurately reflected the *Brightman* “safe harbor” provision.<sup>195</sup>

In holding that the jury charge was not consistent with the “safe harbor” provision as adjusted to the evidence of the case,<sup>196</sup> the supreme court reiterated the purpose behind the provision: “In short, *Brightman*’s ‘safe harbor’ provision protects an insurer from liability under the reasonableness standard based on an allegation that it failed to satisfy a settlement condition over which it had no control.”<sup>197</sup> In *Brightman* the supreme court held that

when a settlement offer contains a condition beyond an insurer’s control, the insurer can create a “safe harbor from liability for an insured’s bad faith claim . . . by meeting the portion of the demand over which it has control, thus doing what it can to effectuate the settlement of the claims against its insured.”<sup>198</sup>

In *Fortner*, had “Grange [Mutual] responded to the settlement condition beyond its control . . . by offering its policy limits,” it would have satisfied the a “safe harbor” standard.<sup>199</sup> Grange Mutual could not rely on a “safe harbor” in this case, though, because it conditioned its acceptance of the plaintiff’s offer on the plaintiff’s agreeing to a complete release of the insured with indemnification language and dismissing the plaintiff’s claim with prejudice against the insured, which would have potentially caused the plaintiff to forfeit his access to the \$1 million in limits under Auto Owners’ policy.<sup>200</sup> Grange Mutual’s conditions to settle were clearly within its control.<sup>201</sup> The supreme court noted that if it were to hold otherwise, then

if two or more insurers are involved in a case and the plaintiff makes a settlement offer to one insurer that conditions settlement on another insurer also settling, the first insurer could, as a matter of law, avoid a bad faith claim by offering its policy limits but making the offer contingent on unreasonable conditions that a plaintiff is guaranteed to reject.<sup>202</sup>

---

195. *Id.*

196. *Id.* at 189-90, 686 S.E.2d at 94.

197. *Id.* at 190-91, 686 S.E.2d at 95 (emphasis omitted).

198. *Id.* at 190, 686 S.E.2d at 95 (quoting *Brightman*, 276 Ga. at 687, 580 S.E.2d at 522).

199. *Id.* at 191, 686 S.E.2d at 95.

200. *Id.*

201. *Id.*

202. *Id.*

According to the court, the jury charge was defective because it did not allow the jury to consider whether the conditions Grange Mutual placed upon its response to the plaintiff's settlement demand were reasonable.<sup>203</sup>

The supreme court's decision in *Fortner* demonstrates that the "safe harbor" doctrine is not so safe when an insurer responds to a settlement demand with any contingencies beyond that demand, even though the insurer agrees to pay its limits. The key factor influencing the court's holding in *Fortner* was Grange Mutual's condition that the plaintiff enter into a release with indemnification language, which could have effectively prevented the plaintiff from continuing to pursue the limits under the insurer's policy.<sup>204</sup> *Fortner* potentially places insurers in a "catch 22" situation. On the one hand, it would be in the insured's best interest for the insurer to seek a full release of all claims, including indemnification for future claims by a third-party, thereby preventing any further exposure to the insured. Obtaining full releases is standard practice upon settlement of a liability case. On the other hand, to require such a full release risks a rejection by the plaintiff, thereby exposing the insurer to a verdict beyond policy limits.

*Fortner* begs the question of whether an insured could bring a bad faith action against an insurer if the insurer settles the case for policy limits without a full release and indemnification, and the insured is later sued by a third-party, leaving the insured exposed without any insurance for the third-party claim. Based on *Fortner*, the better practice is to pay the limits of the policy so long as doing so is reasonably justified under the evidence of the case. The insurer would have a strong argument that when the plaintiff has made a policy-limits demand, the risk of a verdict beyond policy limits outweighs the risk of a later lawsuit by a third-party against an insured for which the insured has no remaining insurance coverage.

Taking a somewhat different approach, the United States District Court for the Northern District of Georgia provided further cautionary guidance to insurers who add contingencies to a response to a settlement demand. In *Butler v. First Acceptance Insurance Co.*,<sup>205</sup> the plaintiff was injured by the insured when he was pinned against a garbage truck by the insured's vehicle. The insured's policy with First Acceptance had limits of \$25,000. The plaintiff made a time-sensitive settlement demand for the amount of the limits in exchange for a limited release.

---

203. *Id.*

204. *See id.*

205. 652 F. Supp. 2d 1264 (N.D. Ga. 2009).

First Acceptance responded that it would settle for its policy limits, contingent upon protection from hospital liens and a waiver of subrogation from the workers' compensation carrier of the plaintiff's employer. The plaintiff treated such contingencies as a counter offer and, therefore, a rejection of the settlement demand. The case went to trial, the plaintiff obtained a consent judgment for \$3.25 million, and the insured assigned her rights against the insurer to the plaintiff.<sup>206</sup>

With respect to First Acceptance's contention that common-law negligence theories conflict with Georgia-law standards for tortious failure to settle, the district court wrestled with the concept of an insurer's negligent failure to settle versus the concept of an insurer's bad faith failure to settle.<sup>207</sup> The district court acknowledged that Georgia law remains unsettled in regards to the difference between the torts of negligent and bad faith failure to settle but suggested that the difference may not matter in the end because the question was just a case of semantics with the same result.<sup>208</sup>

The district court then addressed whether First Acceptance's response to the plaintiff's settlement demand was a true counter offer and rejection.<sup>209</sup> In reliance upon *Frickey v. Jones*,<sup>210</sup> a breach of contract case that did not involve a tortious failure to settle, the district court held that the conditions First Acceptance placed on its response to the settlement demand were a counter offer.<sup>211</sup> A jury would have to determine from the evidence whether First Acceptance acted as an ordinarily prudent insurer or whether it placed its own interests above the interests of its insured by failing to accept the plaintiff's settlement demand.<sup>212</sup>

Although they used different means to reach the same result, *Fortner* and *Butler* both stand for the proposition that an insurer risks a potential claim for tortious failure to settle, bad faith failure to settle, or both when it does not accept a plaintiff's demand for policy limits at face value. When *Butler* is read in conjunction with *Fortner*, it follows that an insurer can only take advantage of *Brightman's* "safe harbor" if its acceptance of the plaintiff's settlement demand is "unequivocal[] and without variance of any sort."<sup>213</sup> This conclusion again places the

---

206. *Id.* at 1266-69.

207. *Id.* at 1273-76.

208. *Id.* at 1275-76.

209. *Id.* at 1277.

210. 280 Ga. 573, 630 S.E.2d 374 (2006).

211. *Butler*, 652 F. Supp. 2d at 1277.

212. *Id.*

213. *See id.* at 1276 (quoting *Frickey*, 280 Ga. at 574, 630 S.E.2d at 376).

insurer in a difficult position, as an insurer typically will want to make sure all hospital, medical, and workers' compensation liens are the responsibility of the plaintiff in order to protect its insured from any such outstanding liens. However, by doing so the insurer risks a potential revocation of the settlement demand and a claim that it did not protect its insured by exposing him to a judgment in excess of policy limits.

*B. Failure to Issue Timely Reservation of Rights*

In *World Harvest Church, Inc. v. GuideOne Mutual Insurance Co.*,<sup>214</sup> the insurer provided a defense to the insured in a lawsuit for over ten months. Subsequently, without issuing a reservation of rights, the insurer withdrew its defense because there was no coverage under the commercial general liability (CGL) policy. It was undisputed that the policy did not provide coverage. A sister company of the insurer had previously issued a written reservation of rights to the insured in a similar lawsuit under a separate policy. The United States District Court for the Northern District of Georgia held that the insurer could still raise coverage defenses to the subject lawsuit against the insured, and that the insurer had not waived such defenses by failing to issue a written reservation of rights when providing a defense to the insured because the insured had not shown it was prejudiced.<sup>215</sup> On appeal, the Eleventh Circuit certified the following questions applicable to our discussion:

- (1) Does an insurer effectively reserve its right to deny coverage if it informs the insured that it does "not see coverage," after the insured had received a written reservation of rights from the insurer's sister company in a similar lawsuit in another jurisdiction, or is a written or more unequivocal reservation of rights required?
- (2) When an insurer assumes and conducts an initial defense without notifying the insured that it is doing so with a reservation of rights, is the insurer estopped from asserting the defense of noncoverage only if the insured can show prejudice, or is prejudice conclusively presumed?<sup>216</sup>

---

214. 287 Ga. 149, 695 S.E.2d 6 (2010).

215. *Id.* at 150-51, 695 S.E.2d at 8-9. For a discussion of the district court's holding in *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, No. 1:07-CV-1675-RWS, 2008 WL 5111218 (N.D. Ga. Dec. 2, 2008), see Wolff et al., *supra* note 1, at 197-98.

216. *World Harvest Church*, 287 Ga. at 151, 695 S.E.2d at 9 (citing *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 586 F.3d 950, 961 (11th Cir. 2009)).

With respect to the first certified question, the supreme court held that an insurer's reservation of rights need not be in writing.<sup>217</sup> An oral reservation of rights can be effective, but it must fairly inform the insured as to the basis for reserving its rights and that it is not waiving its coverage defenses by providing the insured with a defense.<sup>218</sup> The insurer's statement to the insured "that it did not see coverage" was not effective and did not fairly inform the insured of the insurer's coverage position.<sup>219</sup> Along the same lines, the prior reservation of rights issued by the insurer's sister company to the insured in a similar lawsuit was ambiguous and ineffective because it reserved the rights of a different insurance company, in a different lawsuit, and under a different policy.<sup>220</sup>

As to the second certified question, the supreme court held that when "an insurer assumes and conducts an initial defense without effectively notifying the insured that it is doing so with a reservation of rights, the insurer is deemed estopped from asserting the defense of noncoverage regardless of whether the insured can show prejudice."<sup>221</sup> However, the court distinguished prior cases holding there was no prejudice for failing to provide a reservation of rights because the insurer's defense counsel had either merely entered an appearance and had not yet assumed and conducted a defense of the lawsuit,<sup>222</sup> or the insurer had not yet retained defense counsel.<sup>223</sup>

Therefore, if an insurer provides a defense without issuing a reservation of rights that fully informs the insured of the basis for the coverage defenses either orally or in writing, and defense counsel retained by the insurer does more in conducting a defense of the insured than merely

---

217. *Id.* at 152, 695 S.E.2d at 9.

218. *Id.* at 152, 695 S.E.2d at 9-10.

219. *Id.* at 152, 695 S.E.2d at 10.

220. *Id.* at 153, 695 S.E.2d at 10.

221. *Id.* at 156, 695 S.E.2d at 12.

222. *Id.* at 155, 695 S.E.2d at 11-12 (citing *Prescott's Altama Datsun, Inc. v. Monarch Ins. Co.*, 253 Ga. 317, 319 S.E.2d 445 (1984)).

223. *Id.* at 156, 695 S.E.2d at 12 (quoting *Adams v. Atlanta Cas. Co.*, 253 Ga. App. 288, 290, 509 S.E.2d 66, 68 (1998)). Compare *id.* with *Boatright v. Old Dominion Ins. Co.*, 304 Ga. App. 119, 123-24, 695 S.E.2d 408, 412-13 (2010). In *Boatright* the court of appeals held there was no estoppel of coverage defenses when the undisputed evidence showed that the insured did not assume the insured's defense before giving notice of its reservation of rights. *Id.* at 123, 695 S.E.2d at 412. "An insurer is not estopped from challenging policy coverage where, as here, counsel *not* provided by the insurer answers the underlying tort complaint on the insured's behalf prior to the insurer notifying the insured of its reservation of rights." *Id.* at 123-24, 695 S.E.2d at 412-13.

entering an appearance, prejudice to the insured will be presumed.<sup>224</sup> Regardless of an untimely or nonexistent reservation of rights, insurers can no longer contend that the insured must show prejudice, such as claiming that the insurer did not provide a reasonably complete defense or that retained defense counsel did not provide satisfactory or adequate service. While the supreme court did not establish a bright-line rule regarding the time within which a reservation of rights must be issued once the insurer decides to provide a defense, based upon *World Harvest Church*, it will behoove an insurer to issue a reservation of rights before or at the time retained counsel begins to undertake activities in conducting the insured's defense.<sup>225</sup>

### C. "Occurrence" in Construction Defect Cases

Since the United States District Court for the Northern District of Georgia decided *Owners Insurance Co. v. James*<sup>226</sup> in 2003, and since the Georgia Court of Appeals decided *SawHorse, Inc. v. Southern Guarantee Insurance Co.*<sup>227</sup> in 2004, federal and state courts in Georgia have reached seemingly opposite positions in the interpretation of an "occurrence" in construction defect cases when an insured's faulty workmanship causes damages. Under *James* and its progeny, federal courts have held that such damages were not caused by an "occurrence" because the defective work was not an accident, but rather an injury "accidentally caused by intentional acts."<sup>228</sup> Under *SawHorse* and its progeny, the court of appeals has held that if negligent construction is alleged, then the negligent conduct constitutes an accident and is therefore an "occurrence."<sup>229</sup>

---

224. *World Harvest Church*, 287 Ga. at 155, 695 S.E.2d at 11-12.

225. This suggestion is consistent with prior decisions holding that "[a] liability insurer is estopped to deny coverage unless it makes a reservation of rights prior to assuming and conducting the defense of the action brought against its insured." *State Farm Mut. Auto Ins. Co. v. Wheeler*, 160 Ga. App. 523, 526, 287 S.E.2d 281, 283 (1981) (emphasis omitted) (citing *State Farm Mut. Auto Ins. Co. v. Anderson*, 104 Ga. App. 815, 818, 123 S.E.2d 191, 193 (1961)); see also *Jacore Systems v. Central Mut. Ins. Co.*, 194 Ga. App. 512, 514-15, 290 S.E.2d 876, 878-79 (1990).

226. 295 F. Supp. 2d 1354 (N.D. Ga. 2003). See Schatz et al., *Insurance, Annual Survey of Georgia Law*, 56 MERCER L. REV. 253, 260-62 (2004) for a discussion of the decision in *James*.

227. 269 Ga. App. 493, 604 S.E.2d 541 (2004). See Schatz et al., *Insurance, Annual Survey of Georgia Law*, 57 MERCER L. REV. 221, 230-32 (2005) for a discussion of the decision in *SawHorse*.

228. See, e.g., *Hathaway Dev. Co. v. Ill. Union Ins. Co.*, 274 F. App'x 787, 791 (11th Cir. 2008) (quoting *James*, 295 F. Supp. 2d at 1364).

229. See, e.g., *Custom Planning & Dev., Inc. v. Am. Nat'l Fire Ins. Co.*, 270 Ga. App. 8, 10, 606 S.E.2d 39, 41 (2004) (citing *SawHorse*, 269 Ga. App. at 498-99, 604 S.E.2d at

The differing analyses of what constitutes an “occurrence” in construction defect cases was further highlighted in three cases decided during the survey year. In *Hathaway Development Co. v. American Empire Surplus Lines Insurance Co.*,<sup>230</sup> the court of appeals acknowledged that while breach of contract claims involving construction defects are not covered under CGL policies, “negligently performed faulty workmanship that damages other property may constitute an ‘occurrence’ under a CGL policy.”<sup>231</sup> In so holding, the court of appeals noted that *James* predates *SawHorse*, which is binding precedent for Georgia courts.<sup>232</sup>

In *QBE Insurance Co. v. Couch Pipeline & Grading, Inc.*,<sup>233</sup> the insured subcontractor was alleged to have negligently performed grading work.<sup>234</sup> Following the rationale of *SawHorse*, the court of appeals held the insured’s defective workmanship constituted an “occurrence.”<sup>235</sup> While the insured performed its grading work exactly as intended and expected, there was no evidence that the insured intended the alleged damages.<sup>236</sup> However, because the insured’s workmanship did not cause consequential damages to other property (the damages were only the insured’s defective workmanship itself), the court held the CGL policy’s “business risk” exclusions applied to prevent any coverage for the damages.<sup>237</sup> The decision in *QBE Insurance Co.* is significant because it stands for the proposition that an “occurrence” can happen even though there is no evidence the insured’s faulty workmanship caused damage to other property.<sup>238</sup> In *SawHorse* and *Hathaway Development Co.*, there was evidence of resulting damage to other property.<sup>239</sup>

On the other hand, in *State Farm Fire & Casualty Co. v. Diner Concepts, Inc.*,<sup>240</sup> the Eleventh Circuit continued to follow the rationale

---

546).

230. 301 Ga. App. 65, 686 S.E.2d 855 (2009).

231. *Id.* at 69, 686 S.E.2d at 860. The supreme court has granted certiorari on this precise issue in *American Empire Surplus Lines Insurance Co. v. Hathaway Development Co.*, No. S10C0521, 2010 Ga. LEXIS 380 (Ga. May 3, 2010). Therefore, the Authors anticipate addressing this issue once again in next year’s *Annual Survey of Georgia Law*.

232. *Hathaway*, 301 Ga. App. at 69-70, 686 S.E.2d at 861.

233. 303 Ga. App. 196, 692 S.E.2d 795 (2010).

234. *Id.* at 197, 692 S.E.2d at 796.

235. *See id.* at 199, 692 S.E.2d at 797.

236. *Id.*

237. *Id.*

238. *See id.* at 199-200, 692 S.E.2d at 797-98.

239. *See SawHorse*, 269 Ga. App. at 494, 604 S.E.2d at 543; *Hathaway*, 301 Ga. App. at 65-66, 73, 686 S.E.2d at 858.

240. 370 F. App’x 56 (11th Cir. 2010).

of *James* in holding that defective workmanship, which in this case caused an alleged breach of contract and warranty, does not constitute an “occurrence.”<sup>241</sup> In so holding, the Eleventh Circuit stated that “Georgia law is clear that accidental causes are unintended acts and are different from unintended injuries resulting from intentional acts.”<sup>242</sup> The alleged damage was caused by a knowing and intentional act—the delivery of a structure built to the wrong set of plans.<sup>243</sup> Therefore, there was no accident, no “occurrence,” and no coverage.<sup>244</sup>

So how can practitioners make sense of these divergent approaches to “occurrence?” Even though federal and state courts apply different theories to negligent construction defect cases, the end result is largely consistent when the insured’s work on a project causes damage to that work itself—no coverage exists under the CGL policy. Under that scenario, federal courts conclude that no “occurrence” has been alleged. State courts conclude that while an “occurrence” has been alleged, the builder’s risk exclusions apply to prevent coverage. Moreover, when the plaintiff alleges that the negligent construction gives rise only to a breach of contract action, both state and federal courts find no “occurrence” and no coverage. It is when the insured’s negligently defective work causes resulting damage to other property that federal and state courts’ opinions continue to reach inconsistent results. Federal courts find no coverage because no “occurrence” has been alleged. State courts find coverage because an “occurrence” has been alleged and because the builder’s risk exclusions do not apply. Whether these views will be reconciled in the coming years remains to be seen.

#### *D. Interpretation of Pollution Exclusion and Fungi or Bacteria Exclusion*

For the third year in a row, a Georgia court has addressed the interpretation of an absolute pollution exclusion in a CGL policy, which suggests that insurers are increasingly applying the exclusion to a variety of irritants and contaminants. In last year’s *Annual Survey of Georgia Law*, we discussed *Reed v. Auto-Owners Insurance Co.*,<sup>245</sup> in which the supreme court affirmed that carbon monoxide gas was a “pollutant” as defined by the policy because such gas acted as an

---

241. *Id.* at 58.

242. *Id.*

243. *Id.*

244. *Id.*

245. 284 Ga. 286, 667 S.E.2d 90 (2008).

“irritant or contaminant.”<sup>246</sup> This year the court of appeals in *Barrett v. National Union Fire Insurance Co.*<sup>247</sup> distinguished and limited the seemingly broad holding of *Reed* in interpreting whether natural gas acted as an “irritant or contaminant.”<sup>248</sup>

In holding that natural gas was not automatically a “pollutant” as defined by the policy, the court of appeals relied on the allegations in the complaint that the release of natural gas created a lack of oxygen, ultimately injuring the plaintiff.<sup>249</sup> The complaint did not allege the natural gas itself poisoned or harmed the plaintiff.<sup>250</sup> Natural gas itself is not an irritant or contaminant as long as it does not deprive the oxygen supply.<sup>251</sup> The court of appeals went a step further in holding that it would violate public policy for an insurer to sell a liability policy that excludes damages resulting from natural gas to an insured whose primary product is natural gas when exposure to natural gas takes place “during the normal course of an insured’s business.”<sup>252</sup>

In addition, even if natural gas had qualified as a “pollutant,” the pollution exclusion required that the alleged “injuries ‘arose out of’ the ‘discharge, dispersal, seepage, migration, release, or escape of’ natural gas.”<sup>253</sup> When the phrase “arising out of” is used in an exclusion, Georgia courts have applied a “but for” analysis to determine if the tort caused the injury.<sup>254</sup> Here, the allegations of the complaint did not establish definitively that the plaintiff’s injuries would have arisen but for the release of natural gas.<sup>255</sup> Many other factors, such as third party negligence, could have contributed to the injuries.<sup>256</sup>

The holding in *Barrett* is significant because it requires insurers who wish to apply the pollution exclusion to look beyond the nature of the offending substance to determine if it is an “irritant or contami-

---

246. *Id.* at 288, 667 S.E.2d at 92 (internal quotation marks omitted). See Wolff et al., *supra* note 1, at 198-99 for a discussion of the decision in *Reed*.

247. 304 Ga. App. 314, 696 S.E.2d 326 (2010).

248. *See id.* at 317-19, 696 S.E.2d at 329-30 (internal quotation marks omitted).

249. *Id.* at 318-19, 696 S.E.2d at 330.

250. *Id.* at 318, 696 S.E.2d at 330.

251. *Id.* at 319, 696 S.E.2d at 330.

252. *Id.* at 319-20, 696 S.E.2d at 330-31.

253. *Id.* at 320, 696 S.E.2d at 331.

254. *Id.* at 321, 696 S.E.2d at 332. On the other hand, when “arising out of” is used in a nonexclusionary coverage provision in the policy, Georgia courts construe the phrase broadly to require only a slight causal connection or relationship. *Id.* at 321, 696 S.E.2d at 331-32 (quoting *Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*, 285 Ga. App. 22, 30, 645 S.E.2d 536, 543 (2007)).

255. *Id.* at 321, 696 S.E.2d at 332.

256. *Id.* at 321-22, 696 S.E.2d at 332.

nant.”<sup>257</sup> Insurers must also determine if the characteristics of such substances are inherently dangerous, and if so, whether the plaintiff’s exposure to the substance itself was the single, primary cause of the plaintiff’s injuries, as opposed to the alleged negligent behavior of anyone else.<sup>258</sup> *Barrett* shows the importance of carefully reading the “four corners” of the complaint in determining whether the allegations trigger a defense under a liability policy. Had the complaint alleged that natural gas itself poisoned the plaintiff, the result may have been different. The court of appeals may have gone too far in finding that selling a policy that limits certain pollutants violates public policy, as courts have upheld pollution exclusions in liability policies issued to insurers whose businesses commonly generate claims involving traditional environmental pollution.<sup>259</sup>

In *Nationwide Mutual Fire Insurance Co. v. Dillard House, Inc.*,<sup>260</sup> the insurer took a different approach. Instead of applying the pollution exclusion to bacteria, it applied its CGL and umbrella policies’ fungi or bacteria exclusions to contend that it had no duty to defend or indemnify the insured against a lawsuit brought by a plaintiff who died from legionnaire’s disease, allegedly as a result of bathing in the insured’s hot tub.<sup>261</sup> The nearly identical provisions excluded, in pertinent part, injuries “which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any ‘fungi’ or bacteria on or within a building or structure.”<sup>262</sup> The exclusions contained an exception for “‘fungi’ or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.”<sup>263</sup> While the insured largely did not dispute that legionella bacteria in a hot tub falls within the general language of the exclusion, it did contend that the exception would apply to prevent the enforcement of the exclusion.<sup>264</sup> Thus, the district court had to interpret whether the water in the insured’s hot tub was a product or good intended for bodily consumption.<sup>265</sup>

---

257. *See id.* at 319-21, 696 S.E.2d at 330-32.

258. *See id.* at 321-22, 696 S.E.2d at 332.

259. *See, e.g.*, *Truit Oil & Gas Co. v. Ranger Ins. Co.*, 231 Ga. App. 89, 498 S.E.2d 572 (1998) (holding gasoline was a pollutant under a pollution exclusion when the insured was in the business of selling petroleum products).

260. 651 F. Supp. 2d 1367 (N.D. Ga. 2009).

261. *Id.* at 1369.

262. *Id.* at 1370.

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

264. *Id.* at 1375.

265. *Id.*

In interpreting the exceptions, the district court relied upon dictionary definitions.<sup>266</sup> After determining that water met the dictionary definition of a “good,” it considered whether water in a hot tub is intended for bodily consumption.<sup>267</sup> Turning once again to the multiple definitions of “consumption” in a dictionary, the district court concluded that water in a hot tub is intended for such consumption because it constitute “the utilization of economic goods in the satisfaction of wants.”<sup>268</sup> Therefore, the insurer had a duty to defend its insured in the underlying lawsuit.<sup>269</sup>

#### IV. HOMEOWNER’S INSURANCE

Two recent opinions illustrate the difference in consequences of misrepresentation in the application for insurance and misrepresentation in the presentation of a claim. In *Pope v. Mercury Indemnity Co.*,<sup>270</sup> the Georgia Court of Appeals provided a thorough analysis of the

---

266. *Id.* at 1376-79 & n.12.

267. *Id.* at 1376 n.12, 1379.

268. *Id.* at 1378 (internal quotation marks omitted).

269. *Id.* at 1379. The district court, though, held that the question of whether the insurer had a duty to indemnify the insured was premature. *Id.* at 1373. See Wolff et al., *Insurance, Annual Survey of Georgia Law*, 59 MERCER L. REV. 195, 203 (2007) for an analysis of why federal courts in Georgia find the duty to indemnify premature when an underlying lawsuit against the insured remains pending (discussing *Erie Indemnity Co. v. Acuity, A Mutual Insurance Co.*, No. 1:06-CV-0174-TWT, 2006 WL 2048310 (N.D. Ga. July 19, 2006), and *Utility Service Co. v. St. Paul Travelers Insurance Co.*, 5:06-CV-207 (CAR), 2007 WL 188237 (M.D. Ga. Jan. 22, 2007)).

On the other hand, Georgia courts have held that declaratory judgment actions filed in their courts are appropriate avenues for determining any insurer’s duty to indemnify, even if the underlying lawsuit against the insured is still pending. See *ALEA London, Ltd. v. Woodcock*, 286 Ga. App. 572, 649 S.E.2d 740 (2007). For a discussion of *ALEA*, see Cotter et al., *Insurance, Annual Survey of Georgia Law*, 60 MERCER L. REV. 191, 198-99 (2008). Along the lines of federal district courts finding procedural flaws that prevent jurisdiction of declaratory judgment actions involving coverage disputes, in *Auto-Owners Insurance Co. v. Hickory Springs Estates Homeowners Ass’n*, No. 5:08-CV-049 (HL), 2009 WL 1658507 (M.D. Ga. June 11, 2009), the United States District Court for the Middle District of Georgia sua sponte dismissed a declaratory judgment action. *Id.* at \*1. Because of the lack of any “actual controversy,” which resulted in voluntary dismissal of the underlying action, the question of the insurer’s duty to defend was not in dispute. *Id.* at \*2.

In *Auto-Owners Insurance Co. v. Scott*, No. 5:09-CV-166 (HL), 2009 WL 3011244 (M.D. Ga. Sept. 16, 2009), the district court dismissed the declaratory judgment action because the minimum jurisdictional amount in controversy (\$75,000) was not met. *Id.* at \*2. The underlying complaint did not demand a specific amount of damages, and the insurer did not provide a document clearly establishing the jurisdictional amount. *Id.* The district court stated that the amount of limits under the policy alone was irrelevant in measuring the jurisdictional amount in controversy. *Id.*

270. 297 Ga. App. 535, 677 S.E.2d 693 (2009).

profound consequences of misrepresentations made in the course of negotiation for an insurance policy.

The Popes applied for homeowner's insurance coverage through an independent agent, Woodworth, and in response Mercury sent a cancellation notice to the Popes due to its discovery that the Popes had a diving board and trampoline, which were unacceptable risks for Mercury. Nevertheless, Mercury agreed to reinstate coverage if the diving board was removed and a photograph of the pool after removal was received, which it was. There was a dispute in the testimony as to whether the insureds' agent advised the Popes that the replacement of the diving board would have voided *all* coverage or only coverage relating to the use of the diving board. The Popes' property was damaged by a tornado, and upon learning of the diving board's replacement before the tornado, Mercury sued for and obtained complete rescission of the policy.<sup>271</sup>

Complete rescission was affirmed on appeal<sup>272</sup> because under O.C.G.A. § 33-24-7,<sup>273</sup> once an insurer has shown misrepresentation material to the acceptance of the risk such that it would not have issued the policy, *all* coverage under the policy can be rescinded.<sup>274</sup> The court of appeals specifically ruled that "the fact that the Popes' loss was unrelated to their use of the diving board [was not] relevant in determining whether their misrepresentation regarding the board's removal should void coverage."<sup>275</sup> The result reached in this case underscores the importance of truthfulness in the negotiation for coverage, as the extent of rescission of coverage can be altogether unrelated to the extent of the misrepresentation.

In sharp contrast to *Pope* was the United States District Court for the Southern District of Georgia's analysis of the consequences of misrepresentation in the submission of a claim in *Scott v. Allstate Property & Casualty Insurance Co.*<sup>276</sup> In *Scott* the district court noted that a misrepresentation in an insurance application might have resulted in a more profound loss of coverage than was suffered by Scott.<sup>277</sup>

Allstate insured Scott's home in April 2007. Two months earlier, Scott had been incarcerated in the federal penitentiary in Coleman, Florida. Fire damaged the property, and thereafter, Scott's daughter, Baker,

---

271. *Id.* at 536-37, 677 S.E.2d at 695-96.

272. *Id.* at 535-36, 541, 677 S.E.2d at 695, 699.

273. O.C.G.A. § 33-24-7 (2005).

274. *Pope*, 297 Ga. App. at 537, 677 S.E.2d at 696; *see also* O.C.G.A. § 33-24-7(b)(2)-(3).

275. *Pope*, 297 Ga. App. at 539, 677 S.E.2d at 698.

276. No. 408CV236, 2010 WL 1254295 (S.D. Ga. Mar. 30, 2010).

277. *See id.* at \*5.

misrepresented herself to be Scott, thereby securing an insurance advance of \$2000. The total claimed loss was six figures. Allstate moved for summary judgment, alleging that as a result of the material misrepresentation that Scott was a resident of the premises, and of Baker's misrepresentation that she was Scott, a policy provision regarding concealment and fraud had been violated.<sup>278</sup>

The district court cited ample Georgia and out-of-state authority to support its first ruling that the residence of an inmate does not necessarily change to the inmate's place of incarceration.<sup>279</sup> Since the policy did not expressly state in the exclusion the consequence of failing to inform Allstate of a change in occupancy and residency of the residents, summary judgment was denied to Allstate because Scott failed to inform Allstate of the change of primary residence.<sup>280</sup> The court then considered material misrepresentation in the presentation of the claim.<sup>281</sup> Allstate's policy "would not cover any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstances."<sup>282</sup> While the district court found the misrepresentation was a violation of the policy, it also found that "Baker's misrepresentation, however, is not material to the settlement or adjustment of Scott's claims for personal property loss and structural damage."<sup>283</sup> In other words, while in *Pope* forfeiture of all coverage was demanded by O.C.G.A. § 33-24-7 for misrepresentation in the negotiation of a policy,<sup>284</sup> only a *pro tanto* forfeiture of coverage was mandated by the terms of the Allstate policy in *Scott*.<sup>285</sup>

A series of opinions clarified various aspects of Georgia homeowner's coverage law. In *Archer v. Cotton States Mutual Insurance Co.*,<sup>286</sup> the carrier received summary judgment when the purported insured transferred the property of the decedent to himself individually rather than pursuing the claim as the legal representative of the deceased.<sup>287</sup> Insurance claimants are frequently casual in the description of their status and capacity of pursuing claims; for example, they may attempt to pursue a coverage claim as an individual while really functioning as a trustee or a fiduciary. This case illustrates the need to carefully assess

---

278. *Id.* at \*1-3.

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

280. *Id.* at \*3.

281. *See id.* at \*3-4.

282. *Id.* at \*3 (internal quotation marks omitted).

283. *Id.* at \*4.

284. *Pope*, 297 Ga. App. at 537-38, 677 S.E.2d at 696-97.

285. *Scott*, 2010 WL 1254295, at \*5.

286. 303 Ga. App. 878, 695 S.E.2d 329 (2010).

287. *Id.* at 878, 695 S.E.2d at 330.

the correct status of the real party in interest before pursuing such a claim. In this instance, an assignment of the policy would likely have solved the claimant's problem.

In *Encompass Insurance Co. v. Friedman*,<sup>288</sup> the court of appeals considered the application of the contractual suit limitation commonly contained in homeowner's policies.<sup>289</sup> Here, the insured became aware of a water loss emanating from an HVAC system in early September 2005 yet did not know of the ensuing mold damage until October 2005. The insured's suit, initiated on September 15, 2006, was met with a motion for summary judgment based upon a one-year contractual suit limitation.<sup>290</sup> Inasmuch as the insured was claiming an "ensuing loss" from water damage, which was known to her as of September 6, 2005, the one-year suit limitation ran from *that* date, the date of loss, not from her subsequent discovery of the mold and mildew in October 2005.<sup>291</sup> Therefore, the court of appeals reversed and granted summary judgment in favor of the insurer.<sup>292</sup> Because mold damage is often not appreciated until weeks or months after an occurrence, counsel should hasten the filing of litigation to beat the anniversary of the date of loss.

In a firearm-related "intentional act exclusion" case, the court of appeals confirmed the proper application of this well-litigated exclusion to the plain and unfortunate facts of Neal's shooting in *Allstate Insurance Co. v. Neal*.<sup>293</sup> Here, Deputy Sheriff Neal was injured by the deceased, Frank Sheridan, during a gun battle, which ensued from the service of an arrest warrant. Sheridan's homeowner's carrier, Allstate, denied coverage.<sup>294</sup> The court of appeals agreed with the denial because the facts did not establish an "occurrence," which has been defined to be an "accident" by consistent Georgia law.<sup>295</sup> Neal contended that a jury question was presented as to Sheridan's intent because there was no evidence regarding his mental state or intentions.<sup>296</sup>

The court of appeals distinguished other fact patterns wherein there was some evidence to suggest at least ambiguity regarding intent, but the court held that the unequivocal evidence in this case that the gun was pointed and then shot at the injured party was sufficient to invoke

---

288. 299 Ga. App. 429, 682 S.E.2d 694 (2009).

289. *See id.* at 429, 682 S.E.2d at 695.

290. *Id.* at 429-31, 682 S.E.2d at 695-96.

291. *Id.* at 431, 682 S.E.2d at 696-97.

292. *Id.* at 429, 432, 682 S.E.2d at 695, 697.

293. 304 Ga. App. 267, 696 S.E.2d 103 (2010).

294. *Id.* at 267, 696 S.E.2d at 104.

295. *Id.* at 270, 682 S.E.2d at 106.

296. *Id.* at 268-69, 682 S.E.2d at 105.

the exclusion as a matter of law.<sup>297</sup> This case illustrates that in order to avoid this exclusion, affirmative evidence must be developed to create an ambiguity and, therefore, a jury question regarding an insured's expectation or intent.

In *Allstate Insurance Co. v. Harkleroad*,<sup>298</sup> the United States District Court for the Southern District of Georgia grappled with coverage contentions concerning torts and contractual theories of recovery arising out of Claxtons' failure to disclose termite damage during the course of his transfer of property to Harkleroad.<sup>299</sup> Even though the initial "duty to defend" analysis was limited to the "four corners" of the suit under *Great American Insurance Co. v. McKemie*,<sup>300</sup> due to the development of the facts during the course of the litigation, the district court considered the expanded factual contentions of the insured in its evaluation of coverage.<sup>301</sup> The district court eliminated coverage for either punitive damages or fraud because neither claim constituted an "occurrence."<sup>302</sup> Some potential remained for coverage for grossly negligent misrepresentation and possibly for breach of contract, potential questions to be decided by a jury.<sup>303</sup> However, the district court ultimately held that the "business activities exclusions" contained in the Allstate policies were sufficient to warrant exclusion of all coverage.<sup>304</sup>

The insured argued that the court of appeals decision in *Brown v. Peninsular Fire Insurance Co.*<sup>305</sup> applied, which involved an earlier form of a "business pursuits exclusion" that required the activity to have been the *primary* or usual business of the insured for the business activity to be excluded.<sup>306</sup> The district court pointed out that the Allstate exclusions were much broader than those employed in *Brown*.<sup>307</sup> Specifically, the Allstate exclusions applied to "*any full or part-time activity of any kind engaged in for economic gain.*"<sup>308</sup> This case illustrates the need to focus on the particular policy language rather than historical case law pertaining to common policy terms which may have been refined and enhanced due to experience.

---

297. *Id.* at 268-69 & n.9, 682 S.E.2d at 105 & n.9.

298. No. 409CV011, 2010 WL 2076941 (S.D. Ga. May 24, 2010).

299. *See id.*

300. 244 Ga. 84, 85-86, 259 S.E.2d 39, 40 (1979).

301. *Harkleroad*, 2010 WL 2076941, at \*4.

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

303. *Id.* at \*6 & n.5.

304. *Id.* at \*6-7.

305. 171 Ga. App. 507, 320 S.E.2d 208 (1984).

306. *Harkleroad*, 2010 WL 2076941, at \*7.

307. *Id.*

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

## V. HEALTH &amp; LIFE INSURANCE

“*Quando aliquid prohibetur et omne, per quod devenitur ad illud*”<sup>309</sup> was the moral of the story in *Lawson v. Life of the South Insurance Co.*<sup>310</sup> A credit life insurance carrier was foiled in its attempt to require the plaintiffs to submit their claims for refunds of unearned premium to arbitration per an arbitration agreement contained within a retail installment sales contract, which was executed at the same time the insurance certificate was signed.<sup>311</sup> As Judge Sands put it, the disposition of the motion to compel arbitration “involves the intersection of three statutes”:<sup>312</sup> the Federal Arbitration Act (FAA),<sup>313</sup> Georgia’s Arbitration Act,<sup>314</sup> and the McCarran-Ferguson Act (MFA).<sup>315</sup>

The first statute evidences a liberal federal policy encouraging arbitration;<sup>316</sup> the second is a state law exempting “[a]ny contract of insurance” from arbitration;<sup>317</sup> and the third precludes preemption by an act of Congress of any state law regulating insurance “unless such Act specifically relates to the business of insurance.”<sup>318</sup> The United States Court for the Middle District of Georgia noted that the FAA has broad application and thus does not specifically relate to the business of insurance.<sup>319</sup> After the court found there was no federal preemption,<sup>320</sup> the question became whether an arbitration clause in a retail installment contract that is contemporaneously executed with the certificate of insurance was within the ambit of “[a]ny contract of insurance.”<sup>321</sup>

Guided by the Georgia Supreme Court’s decision in *Love v. Money Tree, Inc.*,<sup>322</sup> the district court carefully considered precedent concerning the intended scope of the Georgia Arbitration Act.<sup>323</sup> In *Love* the

---

309. *Lawson v. Life of the S. Ins. Co.*, No. 4:06-CV-42 (WLS), 2010 WL 3719618 (M.D. Ga. Mar. 31, 2010) (quoting *Cummings v. Missouri*, 71 U.S. 277, 288 (1866)) (“[T]he maxim[] that what cannot be done directly cannot be done indirectly.”).

310. No. 4:06-CV-42(WLS) (M.D. Ga. Mar. 31, 2010).

311. *Id.* at \*1.

312. *Id.* at \*3.

313. 9 U.S.C. § 2 (2006).

314. O.C.G.A. § 9-9-2(c) (2007 & Supp. 2010).

315. 15 U.S.C. § 1012(b) (2006); *Lawson*, 2010 WL 1416551, at \*3-4.

316. *Lawson*, 2010 WL 1416551, at \*3; see 9 U.S.C. § 2.

317. *Lawson*, 2010 WL 1416551, at \*3; see also O.C.G.A. § 9-9-2(c).

318. *Lawson*, 2010 WL 1416551, at \*4; see also 15 U.S.C. § 1012(b).

319. *Lawson*, 2010 WL 1416551, at \*4.

320. *Id.*

321. See *id.* at \*5.

322. 279 Ga. 476, 614 S.E.2d 47 (2005).

323. *Lawson*, 2010 WL 1416551, at \*4.

supreme court considered an analogous fact pattern and ultimately held that a contract of insurance includes “a State law that prohibits the arbitration of *disputes involving insurance*.”<sup>324</sup> It was pivotal in the district court’s reasoning in *Lawson* that the sales contracts and insurance documentation were executed at the same time, again following supreme court precedent establishing “[w]here instruments are executed at the same time in the course of the same transaction, they should be read and construed together.”<sup>325</sup> To reiterate, the moral of the story is *quando aliquid prohibetur et omne, per quod devenitur ad illud*.

#### VI. ACCIDENT & HEALTH INSURANCE

Insurers and insureds continue the battle for the settlement dollar in personal injury actions. This survey year, insurers effectively used the Deemer Clause of the Employee Retirement Income Security Act (ERISA)<sup>326</sup> to trump O.C.G.A. § 33-24-56.1,<sup>327</sup> Georgia’s strong anti-subrogation or “make-whole” statute, which would otherwise prohibit a health insurer from recouping payments made from its insured after the insured recovers in tort.<sup>328</sup> In *Brown & Williamson Tobacco Corp. v. Collier*,<sup>329</sup> the United States District Court for the Middle District of Georgia sided with the United States Courts of Appeals for the Fourth, Fifth, Seventh and Tenth Circuits in holding that “other appropriate equitable relief” included a claim to money specifically identifiable as proceeds from tort recovery as reimbursement for medical benefits that were within the possession, custody, and control of the insured.<sup>330</sup> Generally, the Savings Clause of ERISA<sup>331</sup> would allow a state law, such as O.C.G.A. § 33-24-56.1, to escape federal preemption, but the Deemer Clause exempts from this Savings Clause “self-funded” ERISA plans, such as Brown & Williamson’s plan.<sup>332</sup> This is the exception, not the rule, in real life.

Despite ERISA preemption, the insured argued that the Eleventh Circuit “make-whole” doctrine applied, but here the district court found

---

324. *Id.* (quoting *Love*, 279 Ga. at 479, 614 S.E.2d at 50) (internal quotation marks omitted).

325. *Id.* at \*5 (quoting *Hardin v. Great N. Nekoosa Corp.*, 237 Ga. 594, 597, 229 S.E.2d 371, 374 (1976)) (internal quotation marks omitted).

326. 29 U.S.C. § 1144(b)(2)(B) (2006).

327. O.C.G.A. § 33-24-56.1 (2005).

328. *See* O.C.G.A. § 33-24-56.1.

329. No. 5:09-cv-00125(HL), 2010 WL 1487772 (M.D. Ga. Apr. 13, 2010).

330. *Id.* at \*3-4 (internal quotation marks omitted).

331. 29 U.S.C. § 1144(b)(2)(A).

332. *Brown & Williamson*, 2010 WL 1487772, at \*4.

that under the Eleventh Circuit's rule, the ERISA plan could still override the make-whole default doctrine because Brown & Williamson's self-funded program explicitly rejected the make-whole doctrine.<sup>333</sup> This case demonstrates that a well-drafted, self-funded ERISA plan can avoid the make-whole doctrine, which would otherwise generally prevail in Georgia so as to prohibit subrogation from the insured.

In a somewhat similar case, *Zurich American Insurance Co. v. Keith O'Hara, Ross & Pines LLC*,<sup>334</sup> the Eleventh Circuit concluded that ERISA § 502(a)(3)<sup>335</sup> was an appropriate remedy for the carrier to use to recoup.<sup>336</sup> Additionally, the court held that when the plan provided for it, "regardless of whether [the] covered person has been fully compensated or made whole,"<sup>337</sup> the make-whole default doctrine was inapplicable and the plan must be enforced as written.<sup>338</sup> The court rejected the insured's public policy arguments, emphasizing several ERISA public policies: "to protect contractually defined benefits" and to encourage employers to offer "welfare benefit plans in the first place."<sup>339</sup> The court held that to "[r]esort to federal common law generally is inappropriate when its application would . . . discourage employers from implementing plans governed by ERISA."<sup>340</sup> The opinion did not expressly state this was a self-funded plan. Therefore, this ruling may have a further reach than its application to the facts in *Brown & Williamson*.

In *Capone v. Aetna Life Insurance Co.*,<sup>341</sup> the Eleventh Circuit set a high standard for the ERISA administrator who acted as both a claim evaluator and payor on the same claim.<sup>342</sup> Capone's claim arose out of a diving accident involving shallow water and alcohol.<sup>343</sup> Aetna claimed that coverage was avoided because Capone intentionally exposed himself to the risk by voluntarily diving as he did and that even if the

---

333. *Id.* at \*5 (citing *Cagle v. Bruner*, 112 F.3d 1510, 1520-22 (11th Cir. 1997)). "This applies whether or not you are made whole, or the settlement or recovery designates the recovery as including or excluding the Plan's medical expense." *Id.* at \*2.

334. 604 F.3d 1232 (11th Cir. 2010).

335. 29 U.S.C. § 1132(a)(3) (2006).

336. *Zurich*, 604 F.3d at 1239.

337. *Id.* at 1234.

338. *Id.* at 1236.

339. *Id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)) (internal quotation marks omitted).

340. *Id.* (quoting *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992)) (internal quotation marks omitted).

341. 592 F.3d 1189 (11th Cir. 2010).

342. *Id.* at 1194. The detailed facts and omissions in the administrator's factual investigation are set forth in detail in the opinion. *See id.* at 1192-94.

343. *Id.* at 1192-93.

injuries were the result of an accident, “no benefits were payable . . . [because of injuries resulting from] accidents caused or contributed to by the use of alcohol.”<sup>344</sup>

The Eleventh Circuit set forth a complicated, evolving, six-step analysis for reviewing the decision of an ERISA plan administrator.<sup>345</sup> Concluding that a “heightened arbitrary and capricious” review of the decision was appropriate due to the administrator’s conflict in this particular situation, the court applied the six-step analysis.<sup>346</sup> Applying Georgia law for the choice of law provision in the plan,<sup>347</sup> the court first determined the administrator did not sufficiently investigate the facts of the loss, such as the depth of the water at low tide, at high tide, the tidal conditions, or otherwise develop factual evidence regarding the occurrence.<sup>348</sup> This determination led to the Eleventh Circuit’s conclusion that the administrator’s “denial of benefits without proper investigation was *de novo* wrong.”<sup>349</sup>

Turning to the alcohol exclusion, again the Eleventh Circuit concluded that the administrator did not conduct a proper investigation.<sup>350</sup> The court stated that it was not enough to connect a decision to dive with alleged intoxication.<sup>351</sup> In order to deny benefits, the administrator must have evidence that the consumption of alcohol “caused or contributed to” the loss.<sup>352</sup> This opinion should encourage ERISA administrators to conduct more thorough and relevant factual investigations before making decisions on claims.

## VII. MISCELLANEOUS

*Northland Insurance Co. v. American Home Assurance Co.*<sup>353</sup> concerned a high-stakes excess coverage contribution question, which ultimately cost Wal-Mart over \$3 million following a tractor-trailer accident. The involved parties and carriers capped exposure for the trucking wreck by settling the claims for \$4,534,000, with Wal-Mart paying \$2,534,000<sup>354</sup> due to its \$5 million deductible on its \$10 million

---

344. *Id.* at 1193 (internal quotation marks omitted).

345. *Id.* at 1195.

346. *Id.* at 1194-95 (internal quotation marks omitted).

347. *Id.* at 1197.

348. *Id.* at 1199.

349. *Id.* at 1200.

350. *Id.*

351. *Id.*

352. *See id.*

353. 301 Ga. App. 726, 689 S.E.2d 87 (2009).

354. *Id.* at 729, 689 S.E.2d at 89.

policy with American Home.<sup>355</sup> The other excess carrier, Northland, only had a \$1 million excess policy and claimed it was only obligated to contribute one-eleventh of the settlement (\$321,273) and that American Home owed the other ten-elevenths (\$3,212,727).<sup>356</sup>

The key to the result was what “any other collectable insurance” meant within the meaning of the pro-rata sharing clauses of the competing policies.<sup>357</sup> By its terms, the American Home policy seemed to contemplate that American Home would make first dollar payments to later be reimbursed by Wal-Mart. For this reason, the Georgia Court of Appeals construed the American Home policy to be first dollar insurance for pro-rata contribution purposes.<sup>358</sup> Perhaps more importantly, the court of appeals followed the general rule “that [a]ny applicable deductible is relevant between the insurer and the insured only, and does not apply to proration.”<sup>359</sup> Hence, substantial deductibles will be treated as insurance, directly and indirectly, for excess pro-rata purposes.

On the other hand, in *Hancock Fabrics, Inc. v. Alterman Real Estate I, Inc.*,<sup>360</sup> the court of appeals held that in the context of an application of a waiver of subrogation clause, to receive the benefit of protection of the waiver, there must have been a payment beyond payments made under a deductible.<sup>361</sup> Hancock Fabrics (Hancock), the lessee, suffered property damage as a result of leaks in Alterman Real Estate’s, the lessor’s, roof.<sup>362</sup> The losses fell within Hancock’s property insurance policy deductible.<sup>363</sup> The waiver of subrogation clause in the lease was with respect to “perils insured against under any insurance policies maintained by the parties.”<sup>364</sup>

While the court of appeals decision in *E.C. Long, Inc. v. Brennan’s, Inc.*<sup>365</sup> required a waiver of subrogation “to the extent the injured party was reimbursed by insurance,”<sup>366</sup> *Hancock* was a case of first impres-

---

355. *Id.* at 727, 689 S.E.2d at 88.

356. *Id.* at 729, 689 S.E.2d at 89-90.

357. *See id.* at 730-31, 689 S.E.2d at 90-91.

358. *See id.* at 731, 689 S.E.2d at 91.

359. *Id.* (alteration in original) (internal quotation marks omitted).

360. 302 Ga. App. 568, 692 S.E.2d 20 (2010).

361. *See id.* at 571, 692 S.E.2d at 22.

362. *Id.* at 568, 692 S.E.2d at 20.

363. *Id.* at 570, 692 S.E.2d at 21.

364. *Id.* at 569, 692 S.E.2d at 21.

365. 148 Ga. App. 796, 252 S.E.2d 642 (1979).

366. *Hancock*, 302 Ga. App. at 571, 692 S.E.2d at 22 (quoting *E.C. Long*, 148 Ga. App. at 802, 252 S.E.2d at 646).

sion because the loss had not been paid by an insurer.<sup>367</sup> Looking to the New York case *The Gap, Inc. v. Red Apple Cos.*,<sup>368</sup> the court of appeals in *Hancock* concluded that there is no right to a subrogation waiver unless the claim had been paid.<sup>369</sup> Therefore, Hancock was not inhibited from bringing the claim for which no insurance reimbursement was available to him.<sup>370</sup> As this case demonstrates, insurers may wish to be more specific regarding what is waived when drafting such clauses.

The precise policy language *did* matter in *Those Certain Underwriters at Lloyds, London v. DTI Logistics, Inc.*<sup>371</sup> DTI bought motor truck cargo coverage from Underwriters that covered cargo owned by third parties for which a common carrier was liable. After three trailers were stolen, a claim was submitted for the contents owned by the customers for which DTI was liable. But by the time suit was initiated against Underwriters, DTI had not paid any claims, and all possible claims against DTI for the loss of the property were then barred by the statute of limitations.<sup>372</sup>

In requiring that the loss be paid, the court of appeals stressed that the precise policy language chosen by Underwriters dictated payment even though no payment was owed to third parties.<sup>373</sup> The court noted that Underwriters could have written the policy to require payment only when there was legal liability of the insured to third parties.<sup>374</sup> Again, the courts are parsing out justice in the insurance field based on the verbiage the parties have chosen, regardless of the equities.

In *Four Seasons Healthcare, Inc. v. Willis Insurance Services, Inc.*,<sup>375</sup> a divided court of appeals considered the application of shifting rules pertaining to failure to procure insurance, with the majority concluding that lack of coverage was “readily apparent.”<sup>376</sup> Hence, exceptions to the general rule that there is a duty to read the policy do not apply. Here, the insureds, holding two separate policies, ultimately were sued by shareholders holding more than 5% of the voting stock. AIG’s directors and officers (D&O) policy expressly excluded coverage for claims brought by shareholders owning more than 5%. Indeed, AIG’s

---

367. *Id.* at 571, 692 S.E.2d at 22.

368. 725 N.Y.S.2d 312 (2001).

369. *See Hancock*, 302 Ga. App. at 571-73, 692 S.E.2d at 22-23 (quoting *The Gap*, 725 N.Y.S.2d at 315).

370. *Id.* at 573, 692 S.E.2d at 23.

371. 300 Ga. App. 715, 686 S.E.2d 333 (2009).

372. *Id.* at 715-17, 686 S.E.2d at 334-35.

373. *Id.* at 718-19, 686 S.E.2d at 336-37.

374. *Id.* at 718, 686 S.E.2d at 336.

375. 299 Ga. App. 183, 682 S.E.2d 316 (2009).

376. *Id.* at 187, 682 S.E.2d at 319 (internal quotation marks omitted).

declination of coverage was not contested. The issue was that the insured failed to read the exclusion, which was considered unambiguous.<sup>377</sup>

The insured claimed the agent was responsible under *Atlanta Women's Club, Inc. v. Washburne*,<sup>378</sup> contending there was a fiduciary relationship between the insured and the agent who had held himself out as an expert in insurance and had performed an expert examination of the policy but failed to bring this coverage limitation to the insured's attention.<sup>379</sup> But if an examination would have made it "readily apparent" that coverage was not present, the insured cannot pursue the agent for lack of coverage.<sup>380</sup>

The court of appeals held the "5% major shareholder exclusion" was plain and unambiguous.<sup>381</sup> Additionally, the court concluded that the plaintiff had failed to submit sufficient evidence regarding proximate cause of alleged failure to procure because there was no proof the agent could have procured coverage without the 5% major shareholder exclusion.<sup>382</sup> Georgia courts have now considered a number of coverage nuances under the *Washburne* standards. For now, it seems that lack of coverage by reason of the 5% major shareholder exclusion is plain, unambiguous and readily apparent. Given the divided court, however, the exclusion is close to the dividing line.

---

377. *Id.* at 183-84, 682 S.E.2d at 317-18.

378. 207 Ga. App. 3, 427 S.E.2d 18 (1992).

379. *Four Seasons Healthcare*, 299 Ga. App. at 185-86, 682 S.E.2d at 318-19 (quoting *Washburne*, 207 Ga. App. at 4, 427 S.E.2d at 20).

380. *Id.* at 186, 682 S.E.2d at 319.

381. *Id.* at 187, 682 S.E.2d at 319 (internal quotation marks omitted).

382. *Id.* at 187, 682 S.E.2d at 320.