

Insurance

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I. INTRODUCTION

What constitutes an “occurrence,” as defined by a commercial general liability policy, was again a significant focus of the appellate courts during the survey year.¹ The Georgia Supreme Court finally resolved opposite positions taken by federal courts and state courts in Georgia, deciding that negligent faulty workmanship by a contractor resulting in damage to other property constitutes an occurrence.² However, when an insured acts negligently, but with foresight, expectation, or design, such conduct will not be a covered occurrence.³ The Georgia Court of Appeals also reinforced the correct legal standard to consider when

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1. For analysis of Georgia insurance law during the prior survey period, see Stephen L. Cotter, Stephen M. Schatz & Bradley S. Wolff, *Insurance, Annual Survey of Georgia Law*, 62 MERCER L. REV. 139 (2010).

2. See *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co.*, 288 Ga. 749, 752, 707 S.E.2d 369, 372 (2011).

3. *Id.*

deciding whether an insured is justified in failing to provide timely notice of a claim to its insurer.⁴

In the property insurance policy arena, the doctrines of implied waiver and estoppel based upon the conduct of an insurer or agent generally cannot create coverage under a policy where coverage does not otherwise exist.⁵ Moreover, courts continue to show their propensity to enforce policy language as clearly written, even if the insured contends such enforcement is unfair under the circumstances.⁶ Also, diminution of value is not a recoverable loss under commercial property policies.⁷ In addition, an assignment of a claim cannot overcome a forfeiture of coverage caused by the voluntary payment doctrine.⁸ Moreover, suit limitation clauses that are not less than two years are enforced and are not extended to the six-year statute of limitations for breach of contract claims.⁹ Lastly, a policy of title insurance covers a forged deed.¹⁰

With respect to auto insurance policies, a liability carrier's payment of a hospital lien does not reduce the limit of liability available to pay an uninsured motorist claim.¹¹ Courts remain split on whether an insurer must offer uninsured motorist coverage when doing so would conflict with sovereign immunity or with specific limitations of a statutorily-created insurance company.¹² The lack of timely notice defense is available to an automobile insurer when the insured does not provide notice, even though the carrier is aware of the accident through other sources.¹³ A renter of a vehicle who violates the rental agreement may

4. See *Forshee v. Emp'rs Mut. Cas. Co.*, 309 Ga. App. 621, 626, 711 S.E.2d 28, 33 (2011).

5. *Mahens v. Allstate Ins. Co.*, No. 1:10-CV-174-TWT, 2011 WL 1321578, at *4 (N.D. Ga. Apr. 1, 2011).

6. See *Thornton v. Ga. Farm Bureau Mut.*, 287 Ga. 379, 382, 695 S.E.2d 642, 645 (2010).

7. *Royal Capital Dev., LLC v. Md. Cas. Co.*, No. 1:10-CV-1275-RLV, 2010 WL 5105157, at *3 (N.D. Ga. Dec. 2, 2010).

8. *S. Mut. Church Ins. Co. v. ARS Mech., LLC*, 306 Ga. App. 748, 753, 703 S.E.2d 363, 367 (2010).

9. *Jenkins v. Allstate Prop. & Cas. Ins. Co.*, No. CV 110-043, 2011 U.S. Dist. LEXIS 31393, at *14-15 (S.D. Ga. Mar. 21, 2011).

10. *Fidelity Nat'l Title Ins. Co. v. Keyingham Invs., LLC*, 288 Ga. 312, 312, 702 S.E.2d 851, 852 (2010).

11. *State Farm Mut. Auto. Ins. Co. v. Adams*, 288 Ga. 315, 318-19, 702 S.E.2d 898, 901-02 (2010).

12. Compare *Ga. Interlocal Risk Mgmt. Agency v. Godfrey*, 305 Ga. App. 130, 134, 699 S.E.2d 377, 379 (2010), with *VHF Captive Ins. Co. v. Pleitez*, 307 Ga. App. 240, 242-43, 704 S.E.2d 476, 479 (2010).

13. *Lankford v. State Farm Mut. Auto. Ins. Co.*, 307 Ga. App. 12, 15-16, 703 S.E.2d 436, 440 (2010).

forfeit coverage provided by the rental company.¹⁴ Finally, in several factually diverse cases, courts addressed whether a driver who causes an accident qualifies as a permissive user thereby entitling the driver to coverage under an automobile liability policy.¹⁵

II. COMMERCIAL GENERAL LIABILITY POLICIES

A. “Occurrence” in Construction Defect Cases

As highlighted in last year’s survey, over the last several years federal and state courts in Georgia have been reaching seemingly opposite conclusions in interpreting what constitutes an “occurrence” under a commercial general liability (CGL) policy in construction defect cases where an insured’s faulty workmanship allegedly causes damages.¹⁶ Federal courts have taken the position that such damages do not constitute an occurrence because the allegedly defective work was not an accident, but rather an injury “accidentally caused by intentional acts.”¹⁷ Georgia courts have held that if negligent construction is alleged, then the negligent conduct constitutes an accident and is therefore an occurrence.¹⁸

The Georgia Supreme Court has now addressed the issue in *American Empire Surplus Lines Insurance Co. v. Hathaway Development Co.*¹⁹ Hathaway Development Co. (Hathaway), a general contractor, sued its plumbing subcontractor, Whisnant Contracting Co. (Whisnant), for allegedly negligent work performed on three projects.²⁰ On one project, Whisnant failed to install the correct size pipe as specified in the contract. On another project, Whisnant incorrectly installed a dishwasher supply line. On a third project, Whisnant improperly installed a pipe

14. See *Hix v. Hertz*, 307 Ga. App. 369, 369, 705 S.E.2d 219, 220 (2010).

15. See *Clayton v. S. Gen. Ins. Co.*, 306 Ga. App. 394, 394, 702 S.E.2d 446, 448 (2010); *Conklin v. Acceptance Indem. Ins. Co.* 306 Ga. App. 585, 587, 702 S.E.2d 727, 729 (2010).

16. See *Cotter et al.*, *supra* note 1, at 164, 166.

17. *Hathaway Dev. Co. v. Ill. Union Ins. Co.*, 274 F. App’x 787, 791 (11th Cir. 2008) (quoting *Owners Ins. Co. v. James*, 295 F. Supp. 2d 1354, 1364 (N.D. Ga. 2003)) (internal quotation marks omitted). For a discussion of the decision in *James*, see Stephen M. Schatz et al., *Insurance, Annual Survey of Georgia Law*, 56 MERCER L. REV. 253, 260-62 (2004).

18. 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, Inc. v. S. Guar. Ins. Co.*, 269 Ga. App. 493, 498-99, 604 S.E.2d 541, 546 (2004)). For a discussion of the decision in *SawHorse*, see Stephen M. Schatz et al., *Insurance, Annual Survey of Georgia Law*, 57 MERCER L. REV. 221, 230-32 (2005).

19. 288 Ga. 749, 707 S.E.2d 369 (2011).

20. *Id.* at 750, 707 S.E.2d at 370.

that later became detached under hydrostatic pressure.²¹ It is important to note that each of these acts or omissions caused damage to other adjacent property being built by Hathaway.²²

Whisnant's insurer, American Empire Surplus Lines, denied coverage under its CGL policy on the basis that the negligent workmanship was not an occurrence.²³ The policy defined occurrence as "an accident, including continuous or repeated exposure to substantially the same, general harmful conditions."²⁴ The trial court found that the claims against Whisnant were not an accident as contemplated by the policy and granted summary judgment to the insurer. The court of appeals reversed, holding that Whisnant's acts were occurrences because Whisnant's negligent workmanship caused damage to surrounding properties.²⁵

The supreme court analyzed the definition of accident set forth in *Black's Law Dictionary*²⁶ and Georgia case law, and confirmed that an accident is "an unexpected happening rather than one occurring through intention or design."²⁷ Accordingly, the court held that an occurrence can arise "where faulty workmanship causes unforeseen or unexpected damage to other property."²⁸ Such is true even though Whisnant's negligent workmanship was performed intentionally.²⁹ "[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly."³⁰ Therefore, the supreme court upheld the court of appeals reversal of summary judgment for the insurer.³¹

In his dissent, Justice Melton followed the rationale of the federal court cases.³² Because Whisnant's plumbing work was done intentionally, it could not be an accident.³³ Relying upon the plain language of

21. *Id.* at 752, 707 S.E.2d at 371-72.

22. *Id.* at 750, 707 S.E.2d at 370.

23. *Id.*

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

25. *Id.*

26. BLACK'S LAW DICTIONARY 16 (9th ed. 2009).

27. *Am. Empire*, 288 Ga. at 751, 707 S.E.2d at 371 (quoting *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, 231 Ga. App. 206, 208, 498 S.E.2d 782, 784 (1998)) (internal quotation marks omitted).

28. *Id.* at 752, 707 S.E.2d at 372.

29. *Id.*

30. *Id.* (alteration in original) (quoting *Lamar Homes v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007)) (internal quotation marks omitted).

31. *Id.*

32. *Id.* at 752-53, 707 S.E.2d at 372 (Melton, J., dissenting).

33. *Id.* at 753, 707 S.E.2d at 372.

the policy, coverage for an occurrence would only be provided “for injury *resulting from accidental acts*, but not for an injury *accidentally caused by intentional acts*.”³⁴ Justice Melton believed the majority’s opinion “improperly stretched the meaning of the insurance policy language beyond the plain terms of the agreement to include insurance against negligent acts as well.”³⁵

American Empire resolved the issue of whether negligent construction that causes damage to other property constitutes an occurrence under a CGL policy.³⁶ Presumably, federal courts in Georgia will begin following this position, despite prior decisions to the contrary.³⁷ The supreme court, though, leaves two important questions unanswered. First, what if the faulty workmanship gave rise to breach of contract or breach of warranty claims instead of a negligence claim? Does a breach of contract or breach of warranty claim arising out of faulty workmanship constitute an occurrence? The court of appeals has consistently found that breach of contract and breach of warranty claims are not occurrences.³⁸ In a case decided after *American Empire*, the court of appeals reinforced that breach of warranty claims and breach of contract claims are not considered covered occurrences.³⁹

Second, if the contractor’s faulty workmanship does not cause damage to other property, but only to the contractor’s own work, does such damage constitute an occurrence? The court of appeals has issued inconsistent rulings on whether an occurrence applies only to resulting damage to other property arising out of the faulty workmanship.⁴⁰ It remains to be seen how subsequent decisions rely upon *American Empire* to answer these questions. *Forster v. State Farm Fire & Casualty Co.*⁴¹ provides the first hint. The court of appeals focused on the damage to

34. *Id.* (quoting *James*, 295 F. Supp. at 1364) (internal quotation marks omitted).

35. *Id.*

36. *See id.* at 752, 707 S.E.2d at 372.

37. *See, e.g., Hathaway Dev. Co.*, 274 F. App’x at 791; *State Farm Fire & Cas. Co. v. Diner Concepts, Inc.*, 370 F. App’x 56, 58 (11th Cir. 2010); *Burt Co. v. Clarendon Nat’l Ins. Co.*, 385 F. App’x 892, 894 (11th Cir. 2010).

38. *See, e.g., Custom Planning & Dev.*, 270 Ga. App. at 10, 606 S.E.2d at 41. For a discussion of this decision, see Schatz et al., *supra* note 18, at 232.

39. *See Forster v. State Farm Fire & Cas. Co.*, 307 Ga. App. 89, 92, 704 S.E.2d 204, 206 (2010).

40. *Compare SawHorse*, 269 Ga. App. at 498-99, 604 S.E.2d at 546, *with QBE Ins. Co. v. Couch Pipeline & Grading, Inc.*, 303 Ga. App. 196, 199, 692 S.E.2d 795, 797 (2010). It should be noted that even if faulty workmanship that does not cause damage to other property is found to be an occurrence, such faulty workmanship is typically excluded under the “business risk” exclusions of a CGL policy. *See Sapp v. State Farm Fire & Cas. Co.*, 226 Ga. App. 200, 203-04, 486 S.E.2d 71, 74-75 (1997).

41. 307 Ga. App. 89, 704 S.E.2d 204 (2010).

other property requirement when it stated that the insurer “would have the obligation to provide coverage to the extent that any defects in the contractual work incidentally damaged other property not included in the construction project.”⁴²

B. “Occurrence” in a Wrongful Death Case

Under a different factual scenario, in *Rucker v. Columbia National Insurance Co.*,⁴³ the court of appeals addressed the interpretation of an occurrence in a liability policy.⁴⁴ Anthony Rucker sued Jefferson Taylor for wrongful death on the grounds that Taylor negligently failed to conduct a criminal background check on a service technician that Taylor hired to repair appliances at Rucker’s home. While at the home, the service technician killed Rucker’s wife and kidnapped his son. Had Taylor performed a criminal background check it would have revealed the service technician’s history of violent crime.⁴⁵ During discovery, Taylor testified that he did not perform a criminal background check on the service technician because he was a trainee, and he never performed such checks on trainees until he knew he would hire them on a permanent basis.⁴⁶

Similar to the policy in *American Empire*, Taylor’s liability policy with Columbia defined occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”⁴⁷ And like *American Empire*, the court stated that “an accident is an unexpected happening rather than one occurring through intention or design.”⁴⁸ The question of whether an act was without the insured’s foresight, expectation, or design is asked from the insured’s point of view.⁴⁹ In holding that no covered occurrence had been alleged, the court focused on the fact that Taylor intended to forego performing a criminal background check; therefore, such conduct took place with Taylor’s foresight, expectation, or design.⁵⁰

Compare the holding of *Rucker* to the holding of *American Empire*. Both addressed allegedly negligent conduct by the insured.⁵¹ In both,

42. *Id.* at 92, 704 S.E.2d at 206.

43. 307 Ga. App. 444, 705 S.E.2d 270 (2010).

44. *Id.* at 444, 705 S.E.2d at 271.

45. *Id.* at 444-45, 705 S.E.2d at 272.

46. *Id.* at 448, 705 S.E.2d at 274.

47. *Id.* at 445, 705 S.E.2d at 272 (internal quotation marks omitted).

48. *Id.* at 447, 705 S.E.2d at 273.

49. *Id.* at 447, 705 S.E.2d at 273-74.

50. *Id.* at 448, 705 S.E.2d at 274.

51. *See Am. Empire*, 288 Ga. at 750, 707 S.E.2d at 370; *Rucker*, 307 Ga. App. at 444-45, 705 S.E.2d at 271-72.

the courts focused on whether the conduct of the insured was accidental or intentional (from the insured's viewpoint), and not on whether the resulting injury or damage was accidental or intentional.⁵² In *American Empire*, the plumbing contractor's negligent workmanship was accidental—even though the contractor intended to do the plumbing work, he did not intend to do the work negligently.⁵³ In *Rucker*, the insured did intend to do the negligent work because he had a policy of never performing a criminal background check for a service technician trainee; thus, his negligent conduct was deliberate and by design.⁵⁴

C. *Timely Notice of Claim*

Nearly every year, we write about a recent appellate court decision addressing the condition in a CGL policy requiring the insured to provide its insurer with timely notice of an occurrence, claim, or lawsuit—and this year is no different.

In *Forshee v. Employers Mutual Casualty Co.*,⁵⁵ a woman fell in the parking lot of the insureds' gas station in November 2007. One of the owners of the gas station witnessed the woman on the ground and asked her if she needed any medical assistance, but the woman refused. The woman may have mentioned that she hurt her arm, but stated that she intended to go home. The insureds did not know the identity of the woman nor did they have any information that would allow them to determine her identity. The insureds never heard from the woman until nearly two years later when she filed suit. The insureds then gave immediate notice of the lawsuit to their insurer.⁵⁶

The insurer filed a declaratory judgment action, contending that the insureds breached the notice condition of the policy by failing to provide timely notice of the occurrence, and, therefore, the insurer owed no coverage or defense to the insureds. As it turned out, the woman who fell broke her arm and was admitted to the hospital on the date of the fall.⁵⁷ In granting summary judgment in favor of the insurer, the trial court focused on the severity of the injury and found that the incident was sufficiently significant to have required the insureds to report any information they had regarding the incident to their insurer.⁵⁸

52. See *Am. Empire*, 288 Ga. at 752, 707 S.E.2d at 372; *Rucker*, 307 Ga. App. at 447, 705 S.E.2d at 273.

53. *Am. Empire*, 288 Ga. App. at 752, 707 S.E.2d at 372.

54. *Rucker*, 307 Ga. App. at 448, 705 S.E.2d at 274.

55. 309 Ga. App. 621, 711 S.E.2d 28 (2011).

56. *Id.* at 621-22, 711 S.E.2d at 30.

57. *Id.* at 621-22, 711 S.E.2d at 29-30.

58. *Id.* at 624-25, 711 S.E.2d at 32.

The court of appeals reversed, holding that the trial court applied the wrong legal standard.⁵⁹ The correct legal standard to apply in determining whether an insured must give notice of an occurrence is to assess an insured's failure to give notice from "the perspective of a reasonable person in the circumstances in which the [insureds] found themselves, not that of an omniscient being having the benefit of full and accurate information that emerged only later and [with] the benefit of hindsight."⁶⁰ Further, "an insured is not 'required to foresee every possible claim, no matter how remote,' that might arise from an event and give notice of it to his insurer. Instead, the law only requires an insured 'to act reasonably under the circumstances.'"⁶¹ Finally, the court of appeals explained: "[I]t is the nature and circumstances of 'the accident' or 'the incident' and the immediate conclusions an ordinarily prudent and reasonable person would draw therefrom that determine whether an insured has reasonably justified his decision not to notify the insurer."⁶²

The court of appeals criticized the trial court's failure "to eliminate the distorting effects of hindsight when it based its reasonableness determination on how severe the injury turned out to be, rather than how severe it would have appeared to a reasonable person in the position of the [insureds]."⁶³ The court remanded the case to the trial court to determine, using the correct legal standard, whether the insureds' failure to provide timely notice of the incident was reasonable under the circumstances.⁶⁴

The court in *Forshee* did not create new law, but it did reinforce the importance of using the correct legal standard when judging the reasonableness of an insured's failure to provide timely notice of an occurrence. If an insured knew or should have known at the time of an occurrence that an incident merited being reported to its insurer in a timely fashion, then the insured must provide timely notice or coverage may be forfeited.⁶⁵ But if an insured had no reasonable basis to think that an incident would be grounds for a possible claim, then the insured's failure to provide timely notice may be justified.⁶⁶ This is a common sense approach because it would be unreasonable to require an

59. *Id.* at 626, 711 S.E.2d at 33.

60. *Id.*

61. *Id.* at 623, 711 S.E.2d at 31 (quoting *Guar. Nat'l Ins. Co. v. Brock*, 222 Ga. App. 294, 295, 474 S.E.2d 46, 48 (1996)).

62. *Id.* at 624, 711 S.E.2d at 31 (quoting *S. Guar. Ins. Co. v. Miller*, 183 Ga. App. 261, 263, 358 S.E.2d 611, 612 (1987)) (internal quotation marks omitted).

63. *Id.* at 625-26, 711 S.E.2d at 32.

64. *Id.* at 626, 711 S.E.2d at 33.

65. *See id.* at 623, 711 S.E.2d at 31.

66. *See id.*

insured to report every minor or trivial mishap, regardless of whether that mishap eventually turned out to be much more serious.

Contrast *Forshee* with the decision by the United States District Court for the Northern District of Georgia in *Illinois Union Insurance Co. v. Sierra Contracting Corp.*,⁶⁷ also decided during the survey year. In *Illinois Union Insurance*, the insured was a contractor who built a residential condominium project. Water intrusion problems and leaks were reported to the insured almost immediately upon construction and continued for the next year and a half before the insured finally gave notice to its CGL carrier.⁶⁸ Giving the insured all possible inferences in its favor, the court determined that the almost nine-month delay in giving notice was unreasonable as a matter of law.⁶⁹ Because the insured did not offer any justification for its delay in providing notice of the water intrusion, the court held that the delay violated the policy condition that the insured provide notice “as soon as practicable.”⁷⁰

D. Coverage for Treble Damages

In *Alea London, Ltd. v. American Home Services, Inc.*,⁷¹ the insured was sued for violating the Telephone Consumer Protection Act of 1991 (TCPA)⁷² by sending unsolicited faxes.⁷³ The TCPA permits an award of treble damages for each violation if the violation was willful or knowing.⁷⁴ Violation of the TCPA was covered under the insured’s CGL policy as an “advertising injury.”⁷⁵ The insurer that issued the CGL policy brought a declaratory judgment action seeking a declaration that treble damages were not covered pursuant to the exclusion for punitive and exemplary damages in the policy.⁷⁶ The exclusion did not define punitive or exemplary damages.⁷⁷ And the TCPA does not identify whether treble damages are considered compensatory or

67. 744 F. Supp. 2d 1349 (N.D. Ga. 2010).

68. *Id.* at 1350.

69. *Id.* at 1352-53.

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

71. 638 F.3d 768 (11th Cir. 2011).

72. 47 U.S.C. § 227 (2006).

73. *Alea London*, 638 F.3d at 771-72.

74. 47 U.S.C. § 227(b)(3).

75. *Alea London*, 638 F.3d at 772. For a discussion of how a violation of the TCPA constitutes a covered advertising injury, see *Hooters of Augusta v. American Global Insurance Co.*, 272 F. Supp. 2d 1365, 1371-72 (S.D. Ga. 2003). See also Schatz et al., *supra* note 17, at 258-60.

76. *Alea London*, 638 F.3d at 772.

77. *Id.* at 776.

punitive in nature.⁷⁸ The United States Court of Appeals for the Eleventh Circuit held that treble damages were compensatory for the purpose of deciding whether they were covered under the CGL policy or excluded by the punitive damages exclusion.⁷⁹

In reaching its conclusion, the court held that the punitive damages exclusion was ambiguous, thereby requiring the court to interpret the language in favor of coverage, pursuant to the rules of insurance contract construction in Georgia.⁸⁰ The court noted that if the insurer intended to exclude treble damages, then it could have drafted the exclusion accordingly to clear up any ambiguity.⁸¹ It remains to be seen whether courts will apply the rationale of *Alea London* to other types of statutory damages, such as a violation of the Clean Water Act,⁸² the Fair Credit Reporting Act,⁸³ the Anticybersquatting Consumer Protection Act,⁸⁴ the Lanham Act (addressing trademarks),⁸⁵ or other similar laws.⁸⁶

III. HOMEOWNER'S INSURANCE

In *Holloway v. Travelers Indemnity Co.*,⁸⁷ the United States District Court for the Northern District of Georgia rejected another attempt by an insured to personally sue employees of a carrier for the carrier's alleged failure to deliver contractual benefits.⁸⁸ Here, the plaintiff sued the insured after a slip and fall at the insured's home, and the insured allowed the matter to go into default before submitting it to Travelers Indemnity Company (Travelers), the insured's homeowner's insurance carrier. The submission was met by a reservation of rights letter and later transmitted to in-house counsel. Travelers had several interactions with the insured, but, ultimately, in-house counsel refrained from

78. See 47 U.S.C. § 227(b)(3).

79. *Alea London*, 638 F.3d at 779.

80. *Id.*; O.C.G.A. § 13-2-2(5) (2010) ("If the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obligation is generally to be preferred.")

81. *Alea London*, 638 F.3d at 779.

82. 33 U.S.C. §§ 1251-1387 (2006).

83. 15 U.S.C. §§ 1681-1681x (2006).

84. 15 U.S.C. § 1125(d) (2006).

85. 15 U.S.C. ch. 22 (2006).

86. For CGL policies that do not contain a punitive damages exclusion, it is well established in Georgia that if the underlying cause of action upon which punitive damages are assessed is covered under the policy, then the punitive damages are also covered. See *Lunceford v. Peachtree Cas. Ins. Co.*, 230 Ga. App. 4, 9, 495 S.E.2d 88, 92 (1997).

87. 761 F. Supp. 2d 1371 (N.D. Ga. 2010).

88. *Id.* at 1373-74.

representing the insured. The insured then sued not only Travelers but also the claim and in-house counsel personnel for a number of causes of action, all emanating from the insurance relationship.⁸⁹ The court determined that the individual defendants were fraudulently joined, and, hence, complete diversity of citizenship existed.⁹⁰ In so doing, the court reiterated the substantive rule that, where there are no allegations that the employees did anything other than function within the scope of their employment, “[i]t is well settled that mere failure to perform a contract does not constitute a tort. A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches *an independent duty* imposed by law.”⁹¹ This holding is consistent with others that uphold complete diversity of citizenship and non-liability of insurance employees for the contractual commitments of their employers.

Several recent cases rejected insureds’ attempts to avoid policy provisions plainly appearing in their policies. In *Mahens v. Allstate Insurance Co.*,⁹² Mahens was never a resident of the property that he bought and claimed was his home. The property suffered a water leak.⁹³ Mahens insurance coverage was expressly limited to “where [he] reside[d] and which [was] principally used as a private residence,” neither of which conditions were satisfied.⁹⁴ The insured argued doctrines of implied waiver and estoppel against the carrier because the carrier had initially agreed to pay for repair work and later attempted to settle.⁹⁵ The United States District Court for the Northern District of Georgia rejected this argument because “[t]he doctrines of implied waiver and estoppel, based upon the conduct or action of the insurer, or its agent, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom.”⁹⁶ Hence, while conditions and exclusions may be forfeited by a carrier, implied waiver or estoppel coverage cannot affirmatively be created by the conduct of an insurer.⁹⁷

89. *Id.* at 1372-73.

90. *Id.* at 1374-75.

91. *Id.* at 1374 (emphasis added) (quoting *USF Corp. v. Securitas Sec. Servs. USA, Inc.*, 305 Ga. App. 404, 408-09, 699 S.E.2d 554, 558 (2010)).

92. No. 1:10-CV-174-TWT, 2011 WL 1321578 (N.D. Ga. Apr. 1, 2011).

93. *Id.* at *1.

94. *Id.*

95. *Id.* at *4.

96. *Id.* (alteration in original) (quoting *Danforth v. Gov’t Emps. Ins. Co.*, 282 Ga. App. 421, 427, 638 S.E.2d 852, 858-59 (2007)) (internal quotation marks omitted).

97. *Id.*

Similarly, in *Thornton v. Georgia Farm Bureau Mutual Insurance Co.*,⁹⁸ the supreme court rejected a homeowner's "injustice" argument.⁹⁹ Here, the policy contained independent terms—one providing a one-year time-to-sue clause and another providing a sixty-day loss payment period.¹⁰⁰ The insured claimed that the latter tolled the former. However, no such provision appeared in the policy. The insured went on to argue that the one-year time-to-sue clause should be tolled due to unfairness that would otherwise result.¹⁰¹ The court disagreed with out-of-state precedent that seemed to rewrite insurance policies to get a "fair resolution," noting that the court needs to enforce the policies as written rather than "making policy calls that are properly left to individual parties drafting their contracts and to the General Assembly and the Insurance Commissioner in establishing the standard policy."¹⁰²

Lastly, in *Jenkins v. Allstate Property & Casualty Insurance Co.*,¹⁰³ the court considered a creative argument to the effect that where the face of a homeowner's policy provided a one-year time-to-sue clause and Georgia law allowed a minimum two-year time-to-sue clause, the suit limitation was void, and the six-year statute of limitations applied.¹⁰⁴ The court ultimately ordered reformation of the homeowner's policy to provide for a two-year time-to-sue clause, which is mandated under Georgia law.¹⁰⁵ The court relied on *Fireman's Fund Insurance Co. v. Dean*¹⁰⁶ in reaching its holding.¹⁰⁷ The court in *Dean* ruled that the "insurance contract must be reformed to conform with the minimum coverage provided in the Standard Fire Policy."¹⁰⁸ That being the case, Allstate's non-conforming policy was reformed to conform to the minimum two-year contractual suit limitation mandated in the Standard

98. 287 Ga. 379, 695 S.E.2d 642 (2010).

99. *Id.* at 382, 695 S.E.2d at 645.

100. *Id.* at 380, 695 S.E.2d at 643.

101. *Id.* at 383, 695 S.E.2d at 645.

102. *Id.* at 384, 388, 695 S.E.2d at 646, 648 (quoting *Peloso v. Hartford Fire Ins. Co.*, 267 A.2d 498, 501 (1970)) (internal quotation marks omitted).

103. No. CV 110-043, 2011 U.S. Dist. LEXIS 31393 (S.D. Ga. Mar. 21, 2011).

104. *Id.* at *10.

105. *Id.* at *12-13; O.C.G.A. § 33-32-1(a) (2005) (stating that fire insurance policies must "conform[] . . . to all provisions and the sequence of the standard or uniform form prescribed by the Commissioner . . ."); GA. COMP. R. & REGS. 120-2-19-.01 (2006) (stating that a plaintiff is entitled to bring suit against a fire insurance provider "within two . . . years" of the loss).

106. 212 Ga. App. 262, 441 S.E.2d 436 (1994).

107. *Jenkins*, 2011 U.S. Dist. LEXIS 31393, at *10-11.

108. *Dean*, 212 Ga. App. at 265, 441 S.E.2d at 438.

Fire Policy.¹⁰⁹ Additionally, Allstate's policy specifically addressed a remedy for such potential conflicts, "the [policy] provisions are amended to conform to such [mandatory state] statutes."¹¹⁰

IV. PROPERTY INSURANCE

A commercial property insurer avoided a *State Farm Mutual Auto Insurance Co. v. Mabry*¹¹¹ déjà vu in the context of alleged diminution of value to non-automotive property.¹¹² Here, the loss payment clause explicitly provided the insured the option of paying either loss of value or the cost of replacement.¹¹³ The carrier selected the latter, thereby invoking express policy language that precluded the coverage that the State Farm policy in *Mabry* apparently left dangling.¹¹⁴ This decision is limited by the language contained in the policy.¹¹⁵ It will be interesting to learn if other commercial property policies will be similarly tested.

The need for careful handling and documentation was reinforced in *Southern Mutual Church Insurance Co. v. ARS Mechanical, LLC*,¹¹⁶ when a church's fire loss was paid, but under the documentation, neither an effective assignment nor right to subrogation was created.¹¹⁷ The claims person paying this six-figure loss eventually testified that there was no first-party coverage to begin with.¹¹⁸ Hence, Southern Mutual backed up, in the face of a "voluntary payment" defense, and claimed its case against the allegedly responsible party (ARS) was really based on an assignment.¹¹⁹

However, the court of appeals did not entertain this argument, especially since the carrier did not seek an assignment until well after the loss.¹²⁰ In short, when there is no basis for the assignment of a claim, other than purported insurance coverage, and the carrier had no insurance obligation to begin with, the carrier's attempt to recover from another what it did not owe can be defended on the merits by reason of

109. *Jenkins*, 2011 U.S. Dist. LEXIS 31393, at *12-13.

110. *Id.* at *13.

111. 274 Ga. 498, 556 S.E.2d 114 (2001).

112. *See Royal Capital Dev., LLC v. Md. Cas. Co.*, No. 1:10-CV-1275-RLV, 2010 WL 5105157, at *2-3 (N.D. Ga. Dec. 2, 2010).

113. *Id.* at *1.

114. *Compare id.*, with *Mabry*, 274 Ga. at 502-09, 556 S.E.2d at 118-23.

115. *Royal Capital*, 2010 WL 5105157, at *3.

116. 306 Ga. App. 748, 703 S.E.2d 363 (2010).

117. *Id.* at 748-49, 703 S.E.2d at 364.

118. *Id.* at 752, 703 S.E.2d at 366.

119. *Id.* at 751, 703 S.E.2d at 365.

120. *Id.* at 753-54, 703 S.E.2d at 367.

the voluntary payment doctrine.¹²¹ This case evinces the importance of proper documentation and the need to determine what is actually owed on a given claim.¹²²

In another two-year suit limitation case, *Stone Mountain Collision Center v. General Casualty Co.*,¹²³ yet another insured lost on a two-year contractual suit limitation clause that plainly appeared in the policy.¹²⁴ Significant history of negotiation over nearly two years did not relieve this insured of the binding effect of the two-year suit limitation clause.¹²⁵ Despite back-and-forth offers and demands, the court noted that the last communication concerning the November 2005 loss occurred in May 2007 and that the insured had a thirty-day time limit for performance.¹²⁶ The court enforced the limitation because there was no specific evidentiary proof suggesting the insured was fraudulently lulled into reasonably believing the suit limitation would not be enforced.¹²⁷

“Collapse” was again considered in *Mount Zion Baptist Church v. GuideOne Elite Insurance Co.*,¹²⁸ and again, the precise policy language controlled.¹²⁹ In this case, collapse was defined in the policy to mean:

the actual abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended use Moreover, a building that is standing or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shirking, or expansion.¹³⁰

Unquestionably, the condition of the church, as demonstrated by the factual and expert evidence, probably would have met the test for collapse if the insurance policy did not define the term collapse, as was the case in *Nationwide Mutual Fire Insurance Co. v. Tomlin*.¹³¹ However, due to the *Tomlin* experience and its progeny carriers, such as

121. *Id.* at 753-54, 703 S.E.2d at 367-68.

122. *Compare id.*, with *Rabun & Assoc. Constr., Inc. v. Berry*, 276 Ga. App. 485, 490, 623 S.E.2d 691, 696 (2005) (holding the insured was entitled to full loss payments from its insurer and able to recover the entire loss from the responsible party, thereby legally achieving a double recovery).

123. 307 Ga. App. 394, 705 S.E.2d 163 (2010).

124. *See id.* at 394, 705 S.E.2d at 164.

125. *See id.* at 394-95, 705 S.E.2d at 164.

126. *Id.* at 396-97, 705 S.E.2d at 165.

127. *Id.* at 397, 705 S.E.2d at 166.

128. No. 1:10-CV-609-RWS, 2011 WL 1497385 (N.D. Ga. Apr. 19, 2011).

129. *Id.* at *4.

130. *Id.* at *3 (internal quotation marks omitted).

131. 181 Ga. App. 413, 414, 352 S.E.2d 612, 614 (1986).

GuideOne in this case, have tweaked their policies to expressly provide what is and is not covered.¹³²

V. ERISA AND DISABILITY POLICIES

In *Alcorn v. Appleton*,¹³³ the court of appeals continued to draw the fine line of preemption under the Employee Retirement Income Security Act (ERISA)¹³⁴ in its decision.¹³⁵ In *Alcorn*, a divorce led to a settlement agreement between Alcorn and Appleton that gave each party the right to choose a beneficiary of their own life insurance policies. Alcorn died without designating a beneficiary for his 401(k) plan and left Appleton as a beneficiary of his life insurance policy.¹³⁶ Following *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*,¹³⁷ proceeds were directly paid by the administrator to Appleton.¹³⁸ However, *Kennedy* did not decide whether the plan proceeds after distribution by the ERISA plan administrator could be reached or whether they were preempted by ERISA.¹³⁹ The court of appeals held that ERISA preemption stops at the point the ERISA plan administrator distributes the funds.¹⁴⁰ Hence, the deceased's beneficiaries could pursue the 401(k) and life insurance proceeds in the hands of Appleton.¹⁴¹

A pair of recent district court decisions reflect careful policing of gamesmanship at the district court level. First, in *Zorn v. Principal Life Insurance Co.*,¹⁴² the District Court for the Southern District of Georgia wrestled with when and to what extent post-record discovery would be allowed in conjunction with the court's conducting a de novo review of the ERISA administrator's decision.¹⁴³ Usually, only the administrative record is used.¹⁴⁴ To make an exception, the applicant for such discovery "must show a reasonable chance that the requested

132. See *Mount Zion Baptist Church*, 2011 WL 1497385, at *3.

133. 308 Ga. App. 663, 708 S.E.2d 390 (2011).

134. 29 U.S.C. ch. 18 (2006).

135. *Alcorn*, 308 Ga. App. at 663, 708 S.E.2d at 390-91.

136. *Id.* at 663-64, 708 S.E.2d at 391.

137. 555 U.S. 285 (2009).

138. *Alcorn*, 308 Ga. App. at 664, 708 S.E.2d at 391.

139. *Id.* at 664 n.1, 708 S.E.2d at 391 n.1 (quoting *Kennedy*, 555 U.S. at 299 n.10).

140. *Id.* at 665, 708 S.E.2d at 392.

141. *Id.*

142. No. CV 609-081, 2010 WL 3282982 (S.D. Ga. Aug. 18, 2010).

143. *Id.* at *3.

144. *Id.* at *2.

discovery will satisfy the good cause requirement.”¹⁴⁵ Here, the carrier claimed that Zorn was still overstating the disability he was claiming; hence, contemporaneous discovery and proof would go to this continuing issue—“continuing disability.”¹⁴⁶ While the court noted the presumption to “try the case on paper,” this set of ongoing facts met the exception.¹⁴⁷

Similarly, in *Hall v. United of Omaha Life Insurance Co.*,¹⁴⁸ the District Court for the Northern District of Georgia upheld the carrier’s right to a post administrative record independent medical exam (IME) request.¹⁴⁹ The claimant filed a long-term disability claim but was notified that his benefits would be terminated because his mental health benefits were limited to a maximum of twenty-four months. The claimant then submitted an application for long-term disability benefits based on physical impairment, but it was denied. The claimant’s resulting appeal contained four hundred pages of medical records. That review led to a request for an IME by an orthopedic surgeon, which was rejected by the claimant as untimely.¹⁵⁰ The court reviewed the Eleventh Circuit’s requirement of exhausting administrative remedies prior to suit but noted that there were exceptions when the exhaustion requirement “would be an empty exercise in legal formalism.”¹⁵¹ Here, as a practical matter, the IME could not have been requested as a part of the administrative presuit process given the manner in which the claimant presented the appeal and proceeded to court.¹⁵² Thus, the district court ordered the claimant to undergo an IME at his insurer’s request.¹⁵³

VI. LIFE INSURANCE

In a sequel to *J.M.I.C. Life Insurance Co. v. Toole*,¹⁵⁴ another credit life/disability insurance company failed on all its arguments in *Resource Life Insurance Co. v. Buckner*.¹⁵⁵ In *Buckner*, the plaintiffs brought a

145. *Id.* at *4 (quoting *Rubino v. Aetna Life Ins. Co.*, 07 Civ. 377, 2009 WL 910747, at *4 (E.D.N.Y. Mar. 31, 2009)).

146. *Id.* at *5.

147. *Id.* at *6 (internal quotation marks omitted).

148. 741 F. Supp. 2d 1348 (N.D. Ga. 2010).

149. *Id.* at 1354.

150. *Id.* at 1350-53.

151. *Id.* at 1353 (quoting *Perrino v. S. Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1318 (11th Cir. 2000)).

152. *Id.* at 1353-54.

153. *Id.* at 1359.

154. 280 Ga. App. 372, 634 S.E.2d 123 (2006).

155. 304 Ga. App. 719, 698 S.E.2d 19 (2010).

certified class action lawsuit to secure refunds allegedly wrongfully withheld by the carrier, Resource Life.¹⁵⁶ Resource Life unsuccessfully argued that it could require written notice prior to making refunds for unearned premiums on policies terminated prior to the end of the term.¹⁵⁷ Due to discovery abuses involving the withholding of Loan Termination Dates, the trial court sanctioned, through a rebuttal presumption, that all class members whom Resource Life could not prove did receive a refund were presumed to have been terminated early and owed a refund.¹⁵⁸ This presented Resource Life a worst facts environment, in terms of dollar exposure. The court then rejected Resource Life's argument that it could require prior written notice for early termination.¹⁵⁹ The court reasoned that, generally, "a notice provision in an insurance policy is not considered a condition precedent unless it expressly states that a failure to provide such notice will result in a forfeiture of the insured's rights"¹⁶⁰

In *American General Life & Accident Insurance Co. v. Johnson*,¹⁶¹ the District Court for the Middle District of Georgia found insufficient proof of the minimum amount in controversy needed for diversity of citizenship jurisdiction.¹⁶² Due to alleged material misrepresentations, the carrier sought to rescind a \$50,000 increase in the face amount of a life insurance policy.¹⁶³ An amount in controversy exceeding \$75,000 is presently required for federal diversity jurisdiction.¹⁶⁴ While echoing the weight of authority affording the inclusion of both the alleged bad faith penalty (up to fifty percent) and reasonable attorney fees as part of the amount in controversy, as provided by section 33-4-6 of the Official Code of Georgia Annotated (O.C.G.A.),¹⁶⁵ Judge Lawson found that the pleadings and proof in this particular case evinced insufficient proof of at least \$75,000 in controversy.¹⁶⁶

The court emphasized that the statutory bad faith penalty claim was stated to be "as much as fifty percent (50%) of the denied benefit. . ."—that is, *up to* \$25,000, rather than \$25,000.¹⁶⁷ Additionally, the

156. *Id.* at 719, 698 S.E.2d at 22-23.

157. *Id.* at 726, 698 S.E.2d at 27.

158. *Id.*

159. *Id.* at 726-27, 698 S.E.2d at 27.

160. *Id.*

161. No. 7:10-CV-00136(HL), 2011 WL 1336554 (M.D. Ga. Apr. 7, 2011).

162. *Id.* at *3.

163. *Id.* at *1.

164. 28 U.S.C. § 1332(a) (2006).

165. O.C.G.A. § 33-4-6 (Supp. 2011).

166. *Johnson*, 2011 WL 1336554, at *3.

167. *Id.* at *2.

carrier provided no factual basis for the amount of reasonable attorney fees, and the court would not speculate or presume any such amount.¹⁶⁸ The court correctly noted that federal courts are courts of limited jurisdiction.¹⁶⁹ It is incumbent upon the party seeking to establish diversity jurisdiction to present sufficient information regarding the full amount in controversy requirement.¹⁷⁰

VII. TITLE INSURANCE

Finally, there is a title insurance opinion of significant financial import to the bar. In *Fidelity National Title Insurance v. Keyingham Investments, LLC*,¹⁷¹ a unanimous Georgia Supreme Court, speaking through Justice Nahmias, held that, for purposes of O.C.G.A. § 33-7-8,¹⁷² a forged deed equals a defective title.¹⁷³ The court in *Keyingham*, relying upon an old court of appeals opinion, *Glass v. Stewart Title Guaranty Co.*,¹⁷⁴ argued that a forged deed that is void ab initio does not create a property interest that title insurance can insure.¹⁷⁵ Echoing the court of appeals opinion in this case, the supreme court held that the insurer's argument "ignores that one of the very purposes of title insurance is to protect a party from the consequences of forgery in the chain of title"¹⁷⁶ Hence, until and unless a title insurance commitment plainly and explicitly excludes coverage for forgery, defective title includes forged title.¹⁷⁷

VIII. AUTOMOBILE INSURANCE

A. Uninsured Motorist Coverage

1. "Thurman's March to the Sea"¹⁷⁸ Halted at the Hospital. As described in previous survey articles, since the Georgia Supreme Court's

168. *Id.* at *3.

169. *Id.* at *2.

170. *Id.* (quoting *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir. 2003)).

171. 288 Ga. 312, 702 S.E.2d 851 (2010).

172. O.C.G.A. § 33-7-8 (2000).

173. *Keyingham*, 288 Ga. at 313, 702 S.E.2d at 853.

174. 181 Ga. App. 804, 354 S.E.2d 187 (1987).

175. *Keyingham*, 288 Ga. at 313, 702 S.E.2d at 852-53.

176. *Id.* at 313, 702 S.E.2d at 853 (quoting *Keyingham Invs., LLC v. Fid. Nat'l Title Ins. Co.*, 298 Ga. App. 467, 471, 680 S.E.2d 442, 445 (2009)).

177. *Id.* at 314, 702 S.E.2d at 853.

178. FRANK E. JENKINS III & WALLACE MILLER III, *GEORGIA AUTOMOBILE INSURANCE LAW* § 32:3(7) (2009-2010 ed. 2009).

decision in *Thurman v. State Farm Mutual Automobile Insurance Co.*,¹⁷⁹ an uninsured motorist (UM) insurance carrier's exposure in any given case may depend upon how the injured insured was insured for medical coverage.¹⁸⁰ In *Thurman*, the court held that the liability insurer's payments to the injured party's federal workers' compensation carrier and group health carrier were payments "of other claims or otherwise" that reduced the liability limits available to the injured party, increasing the injured party's UM carrier's exposure.¹⁸¹

The court of appeals extended *Thurman* to a liability carrier's payment of Medicare liens, in *Toomer v. Allstate Insurance Co.*,¹⁸² and to the payment of hospital liens, in *Adams v. State Farm Mutual Automobile Insurance Co.*¹⁸³ In *Floyd v. American International South Insurance Co.*,¹⁸⁴ the court of appeals even extended *Thurman* to existing hospital liens that had not yet been paid.¹⁸⁵ Considering the potential future expansion of *Thurman* to all manner of liens and subrogation claims, the authors of *Georgia Automobile Insurance Law* coined the phrase "Thurman's march to the sea" and wondered what lien, if any, would withstand the offensive.¹⁸⁶ The answer came from the Georgia Supreme Court, which reversed both *Adams* and *Floyd* in two opinions authored by Justice Melton during this survey period.¹⁸⁷

In *State Farm Mutual Automobile Insurance Co. v. Adams*,¹⁸⁸ the supreme court reversed the court of appeals and held that a liability carrier's payment of a hospital lien did not reduce the limits of liability coverage available to pay the claim of the injured party.¹⁸⁹ State Farm's insured was involved in an automobile accident and subsequently brought suit against the tortfeasor, who was insured with Nationwide. Nationwide and the insured settled for the liability policy limit of \$25,000. Of that amount, \$9,217.66 was paid to Grady Memorial

179. 278 Ga. 162, 598 S.E.2d 448 (2004).

180. See Cotter et al., *supra* note 1, at 148-50; Wolff et al., *Insurance, Annual Survey of Georgia Law*, 61 MERCER L. REV. 179, 184 (2009).

181. *Thurman*, 278 Ga. at 163, 598 S.E.2d at 450; O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I) (Supp. 2011).

182. 292 Ga. App. 60, 63, 663 S.E.2d 763, 765-66 (2008).

183. 298 Ga. App. 249, 253, 679 S.E.2d 726, 729 (2009), *rev'd*, 288 Ga. 315, 702 S.E.2d 898 (2010).

184. 298 Ga. App. 771, 681 S.E.2d 216 (2009), *rev'd*, 288 Ga. 322, 704 S.E.2d 755 (2010).

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

186. JENKINS & MILLER, *supra* note 178.

187. See *State Farm Mut. Auto. Ins. Co. v. Adams*, 288 Ga. 315, 320, 702 S.E.2d 898, 902 (2010); *Am. Int'l S. Ins. Co. v. Floyd*, 288 Ga. 322, 323, 704 S.E.2d 755, 755-56 (2010).

188. 288 Ga. 315, 702 S.E.2d 898 (2010).

189. *Id.* at 320, 702 S.E.2d at 902.

Hospital to satisfy its lien. The insured had \$100,000 UM coverage with State Farm. State Farm paid \$75,000 and claimed a credit for the \$25,000 paid by Nationwide. The case then centered on whether Nationwide's payment of the Grady Hospital lien reduced the coverage available to satisfy the insured's claim. The trial court granted summary judgment to State Farm, and the insured appealed. The court of appeals reversed, holding that State Farm was not entitled to a credit pursuant to the rationale of *Thurman*.¹⁹⁰

The supreme court considered both the "bedrock principles" of uninsured motorist coverage and the "fundamental nature" of a hospital lien in conducting its analysis.¹⁹¹ The purpose of the uninsured motorist statute, the court held, "is to place the injured insured in the same position as if the offending uninsured motorist were covered with liability insurance."¹⁹² A hospital lien "allows the hospital to step into the shoes of the insured for purposes of receiving payment from the tortfeasor's insurance company for economic damages represented by the hospital bill."¹⁹³ The existence of the lien does not create a new cause of action against the tortfeasor or the liability insurer.¹⁹⁴

Therefore, the court held that a liability carrier's payment of a hospital lien is a payment of a portion of the injured party's economic damages and not payment of "other claims or otherwise" under O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I).¹⁹⁵ The lien "is merely a part of [the injured party's] claim, and its payment represents partial satisfaction of [that] claim."¹⁹⁶ The court distinguished *Thurman* on the grounds that no subrogation rights of another insurer are involved when a hospital bill has gone unpaid—and, thus, the full compensation rule is inapplicable—and because the federal statutes at issue in *Thurman* made reimbursement by the tortfeasor's insurer mandatory, whereas the hospital lien in *Adams* attached to, and became part of, the injured party's cause of action.¹⁹⁷

In *American International South Insurance Co. v. Floyd*,¹⁹⁸ the supreme court adopted its contemporaneous decision in *Adams* and held

190. *Id.* at 315, 702 S.E.2d at 899-900.

191. *Id.* at 315, 702 S.E.2d at 900.

192. *Id.* at 316, 702 S.E.2d at 900.

193. *Id.* at 318, 702 S.E.2d at 901.

194. *Id.*

195. *Id.* (internal quotation marks omitted); O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I).

196. 288 Ga. at 318, 702 S.E.2d at 901.

197. *Id.* at 317 & n.1, 702 S.E.2d at 900 & n.1.

198. 288 Ga. 322, 704 S.E.2d 755 (2010).

that it likewise applies to a hospital lien that has not been paid by the tortfeasor's liability insurer.¹⁹⁹

2. Alphabet Soup – What do GIRMA and CICA have to say about UM? Two cases decided during the survey period involved conflicts between the requirement that UM coverage be offered and included in every motor vehicle insurance policy unless rejected by the insured and another Georgia statute affecting the carrier or insured. Diverging decisions resulted.

The Uninsured Motorist Act,²⁰⁰ requires every motor vehicle insurance policy “issued or delivered in this state” to include a minimum amount of UM coverage, unless the insured rejects such coverage in writing.²⁰¹ The Georgia Interlocal Risk Management Agency (GIRMA) operates a self-insurance program authorized by statute for municipalities and counties.²⁰² Georgia municipalities are entitled to sovereign immunity except in limited circumstances including where a municipality has purchased insurance to cover a loss, but only to the extent of the insurance coverage.²⁰³

The city of Newnan participates in GIRMA. The GIRMA contract provides the statutory minimum amount of uninsured motorist coverage, but it does not provide underinsured motorist coverage or allow covered individuals the option of selecting additional coverage.²⁰⁴ In *Georgia Interlocal Risk Management Agency v. Godfrey*,²⁰⁵ the court of appeals held that requiring GIRMA to provide underinsured coverage would run afoul of Newnan's sovereign immunity and that municipalities have the discretion to decide what coverage they offer.²⁰⁶

Daniel Godfrey, a Newnan police officer, was struck and injured by a motor vehicle with minimum liability limits. Godfrey and his wife sued the tortfeasor and served GIRMA with their complaint as an uninsured/underinsured motorist carrier. GIRMA filed a declaratory judgment action, asserting it had no obligation to provide underinsured motorist benefits because its contract did not provide such benefits and

199. *Id.* at 323, 704 S.E.2d at 755-56.

200. O.C.G.A. § 33-7-11 (2011).

201. O.C.G.A. § 33-7-11(a)(1), (3).

202. O.C.G.A. § 36-85-1(7) (2006).

203. GA. CONST. art. IX, § 2, para. 9; O.C.G.A. § 33-24-51(b) (2005); O.C.G.A. § 36-92-2(b) (2006).

204. *Ga. Interlocal Risk Mgmt. Agency v. Godfrey*, 305 Ga. App. 130, 131, 699 S.E.2d 377, 377-78 (2010).

205. 305 Ga. App. 130, 699 S.E.2d 377 (2010).

206. *Id.* at 133-34, 699 S.E.2d at 379.

was not required to provide them.²⁰⁷ The trial court granted summary judgment to the Godfreys, holding the O.C.G.A. § 33-7-11²⁰⁸ applied because GIRMA was the equivalent of an insurance company.²⁰⁹

The court of appeals reversed, holding that, because the municipality was not required to purchase any insurance covering its motor vehicles it thus enjoyed sovereign immunity except to the extent of coverage it elected to purchase, and that the municipality had the discretion to decide what coverage it would offer.²¹⁰ In addition, the court found it significant that the insurance commissioner reviewed and approved the GIRMA plan, and the commissioner was given the sole authority to determine whether the plan complied with the requirements of the statute and the regulations.²¹¹

The requirement of the Uninsured Motorist Act that every motor vehicle insurance policy “issued or delivered in this state” must include UM coverage, unless rejected by the insured in writing, appears to apply to all policies of motor vehicle insurance.²¹² However, the Georgia Captive Insurance Company Act (CICA)²¹³ restricts captive insurers from insuring against certain risks, including those resulting from “[a]ny personal, familial, or household responsibilities” and those which do not result from the insured’s business.²¹⁴ These statutes potentially conflict because the UM statute defines “insured” to include members of the policyholder’s household, whether injured in a vehicle or otherwise.²¹⁵ Whether this potential conflict prohibits a captive insurer from offering UM coverage was a question of first impression answered by the court of appeals in *VFH Captive Insurance Co. v. Pleitez*.²¹⁶

Pleitez was a taxi cab driver who was struck and seriously injured by another vehicle while changing a tire on I-85. Pleitez received the policy limits from the other driver’s insurance company and sought UM benefits from his insurer. The insurer, VFH Captive Insurance Company, insures only vehicles for hire. VFH denied that the policy included UM coverage and argued that it was prohibited from offering UM because of the limitations imposed by CICA.²¹⁷

207. *Id.* at 131, 699 S.E.2d at 377-78.

208. O.C.G.A. § 33-7-11 (2000).

209. *Godfrey*, 305 Ga. App. at 131, 699 S.E.2d at 378.

210. *Id.* at 134, 699 S.E.2d at 379.

211. *Id.* at 133-34, 699 S.E.2d at 379.

212. *See* O.C.G.A. § 33-7-11(a)(1), (3).

213. O.C.G.A. tit. 33, ch. 41 (2005 & Supp. 2011).

214. O.C.G.A. § 33-41-3(c)(1)(A)-(B).

215. O.C.G.A. § 33-7-11(b)(1)(B).

216. 307 Ga. App. 240, 704 S.E.2d 476 (2010).

217. *Id.* at 240, 704 S.E.2d at 477.

The court of appeals found no direct conflict in the statutes because nothing in CICA expressly prohibits captive insurers from offering uninsured motorist coverage.²¹⁸ To the contrary, CICA requires policies issued by captive insurers to “be in conformity with all minimum requirements for coverages and coverage amounts established by the state”²¹⁹ However, the court noted that portions of the Uninsured Motorist Act may, in fact, be inconsistent with the CICA: “[T]o the extent the uninsured motorist provisions are inconsistent with CICA, those provisions would not apply to captive insurance companies”²²⁰ The case before the court dealt with a taxi driver who was injured while on the job, and, thus, did not implicate the conflicting CICA restrictions.²²¹ Because Pleitez never rejected UM coverage, the court of appeals affirmed the trial court’s grant of summary judgment and held that he was entitled to UM coverage.²²²

3. Rejection of UM Can Be Done by an Agent of the Insured. As stated previously, O.C.G.A. § 33-7-11 requires UM coverage in every motor vehicle insurance policy except “where any insured named in the policy shall reject the coverage in writing.”²²³ The question raised in *Ace American Insurance Co. v. Townsend*²²⁴ was whether an effective rejection could be made by someone other than a named insured and in a manner other than by the selection/rejection form provided by the insurer with the policy.²²⁵ The District Court for the Southern District of Georgia found that a broker, acting as an agent of the named insured, could affect a rejection of UM coverage on the insured’s behalf when submitting proposals for coverage to potential carriers.²²⁶

In 2007, SABIC Innovative Plastics (SABIC) hired Richard Inserra as a consultant to assist it in selecting and purchasing several policies, including general liability, automobile liability, and workers’ compensation. Based on Inserra’s recommendation, SABIC engaged a broker, Marsh, to obtain insurance proposals from various carriers. Marsh requested a proposal from Ace American Insurance Co. (Ace American)

218. *Id.* at 242, 704 S.E.2d at 478.

219. *Id.* (internal quotation marks omitted); O.C.G.A. § 33-41-3(b).

220. *Pleitez*, 307 Ga. App. at 242, 704 S.E.2d at 479. The court cited *Godfrey*, for the proposition that other statutes may restrict the otherwise universal application of the uninsured motorist act. *Id.* (citing *Godfrey*, 305 Ga. App. at 132-33, 699 S.E.2d at 378-79).

221. *Id.* at 243, 704 S.E.2d at 479.

222. *Id.*

223. O.C.G.A. § 33-7-11(a)(3).

224. No. CV409-101, 2011 WL 3348378 (S.D. Ga. Mar. 11, 2011).

225. *Id.* at *2-3.

226. *Id.* at *4.

and stated in the proposal that SABIC intended to reject UM coverage. Ace American made a proposal that did not include uninsured motorist coverage. SABIC purchased its insurance from Ace American, and the final policy did not include uninsured motorist coverage.²²⁷

When it issued the policy, Ace American sent SABIC forms for the selection or rejection of UM coverage. SABIC's treasurer had Mr. Inserra complete the forms and indicate on the forms that SABIC was rejecting the coverage. The forms were signed by the treasurer. One form was mailed to Marsh, the other to Ace American. The form mailed to Marsh indicated that uninsured motorist coverage was rejected, but the form mailed to Ace American neither selected nor rejected UM coverage.²²⁸

Sometime thereafter, a SABIC employee, Townsend, died as a result of an automobile accident. The employee's wife requested payment of uninsured motorist coverage under the SABIC policy, but Ace American denied coverage on the ground that SABIC had rejected UM coverage when it purchased the policy. Townsend's wife filed a suit for damages, and Ace American filed a declaratory judgment action.²²⁹

In the declaratory judgment action, the parties filed cross motions for summary judgment.²³⁰ The court, relying on *American Liberty Insurance Co. v. Sanders*,²³¹ first noted that a rejection of UM coverage contained in an application for insurance is an effective rejection under the statute.²³² Ace American argued that Marsh's submission on SABIC's behalf, seeking a proposal from Ace American, contained a rejection of UM coverage.²³³ Against Mrs. Townsend's argument that Marsh's submission was "nothing more than a request for a conditional insurance quote[.]" the court stated that "the focus [should be] less on the name of the document and more on the purpose of the document."²³⁴ The court found that the submission from Marsh to Ace American seeking a policy proposal was the equivalent of an application for insurance, which amounted to a rejection of UM coverage because the submission was made for the purpose of inducing Ace American to issue SABIC a policy.²³⁵

227. *Id.* at *1.

228. *Id.*

229. *Id.*

230. *Id.*

231. 120 Ga. App. 1, 169 S.E.2d 342 (1969).

232. *Townsend*, 2011 WL 3348378, at *3.

233. *Id.*

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

235. *Id.*

Additionally, the court stated that the rejection does not have to be made by the insured itself if an agent of the insured has made the rejection; thus, Marsh, as an independent broker, effectively rejected UM coverage on behalf of SABIC.²³⁶ The court therefore granted summary judgment in favor of Ace American.²³⁷

4. Insured's Failure to Give Notice of Accident Dooms Claim Even Though the Carrier was Notified by Another Insured in the Same Accident. When an automobile insurance policy provides that the insured "must give us or one of our agents written notice of the accident or loss as soon as reasonably possible,"²³⁸ and the insured fails to give the insurer any notice of the loss, may the insurer assert the insured's failure to give notice as a basis for denying UM benefits even though the insured knew of the accident via another party to the accident? The court of appeals answered in the affirmative in *Lankford v. State Farm*.²³⁹

Bobby Lee Lankford was involved in an automobile collision with Charles Kaucky. Both individuals were insured with State Farm. Three days after the accident, Lankford received a letter from a State Farm claims representative referencing Kaucky's policy and the accident. One month later, Lankford's employer sent State Farm a letter indicating that it would seek a subrogation recovery for the workers' compensation benefits paid to Lankford and that Lankford's treatment was ongoing. Five months later, Lankford's attorney sought disclosure of Kaucky's policy limits from State Farm. Lankford later discussed his injuries and the workers' compensation claim with his State Farm agent and contended he was never told he needed to give that information in writing.²⁴⁰

Almost two years after the accident, Lankford filed suit and his attorney sent a copy of the complaint to State Farm with a letter.²⁴¹ State Farm was served with the complaint and moved for summary judgment on the ground that Lankford failed to provide notice "as soon as reasonably possible" after the accident.²⁴² The notice provision was made a condition of recovery against State Farm by the policy language that stated "[t]here is no right of action against [State Farm] . . . until

236. *Id.* at *4.

237. *Id.*

238. *See* *Lankford v. State Farm Auto. Ins. Co.*, 307 Ga. App. 12, 13, 703 S.E.2d 436, 438 (2010) (internal quotation marks omitted).

239. 307 Ga. App. 12, 15-16, 703 S.E.2d 436, 440 (2010).

240. *Id.* at 12-13, 703 S.E.2d at 438.

241. *Id.* at 13, 703 S.E.2d at 438.

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

all the terms of this policy have been met.”²⁴³ The trial court granted State Farm’s motion.²⁴⁴

The court of appeals affirmed, holding that the policy language required the insured to provide notice “as soon as reasonably possible” after the accident—not when the tortfeasor’s coverage was exhausted or when the insured perceived his own UM policies may be called upon for compensation.²⁴⁵ The failure to provide that notice for two years after an accident is an unreasonable delay as a matter of law.²⁴⁶

Although it was undisputed that Lankford did not provide written notice of the accident for two years, it was also undisputed that State Farm was fully aware of the accident and that Lankford was injured.²⁴⁷ However, the court held that notification of the incident by an unrelated third party referencing a different policy did not relieve Lankford of his own individual obligation, under his separate policy, to notify the insurer.²⁴⁸ Further, the court stated that no authority requires the insurer to cross-reference all parties to an accident and determine if an injured party may be its insured.²⁴⁹

B. Issues in Liability Coverage

1. Updates on Previously Reported Cases. In *Sapp v. Canal Insurance Co.*,²⁵⁰ the court of appeals held that a “Limitation of Use” endorsement that limited the insurance policy’s coverage to use of the insured vehicle within a fifty-mile radius of the insured’s location was valid and enforceable.²⁵¹ The Georgia Supreme Court granted the injured parties’ petition for writ of certiorari and reversed.²⁵²

In this declaratory judgment action, Canal Insurance Co. (Canal) sought a declaration that an accident involving its insured’s dump truck was not covered under the policy because the policy Canal issued had a fifty-mile radius-of-use limitation and the accident occurred outside of the fifty-mile radius. On cross-motions for summary judgment filed by Canal and the tort suit plaintiffs, the trial court granted Canal’s motion

243. *Id.* at 14, 703 S.E.2d at 438 (alteration in original) (internal quotation marks omitted).

244. *Id.* at 12, 703 S.E.2d at 437-38.

245. *Id.* at 14, 703 S.E.2d at 439.

246. *Id.* at 15, 703 S.E.2d at 439 (citing *Royer v. Murphy*, 277 Ga. App. 150, 151, 625 S.E.2d 544, 545 (2006)).

247. *Id.* at 15, 703 S.E.2d at 439-40.

248. *Id.* at 15-16, 703 S.E.2d at 440.

249. *Id.* at 16, 703 S.E.2d at 440.

250. 301 Ga. App. 596, 688 S.E.2d 375 (2009).

251. *Id.* at 597-98, 688 S.E.2d at 376-77. See also *Cotter et al.*, *supra* note 1, at 157.

252. *Sapp v. Canal*, 288 Ga. 681, 681, 706 S.E.2d 644, 646 (2011).

and dismissed all claims against it. The court of appeals affirmed and held that Canal's policy was a basic automobile insurance policy, and thus, the radius-of-use limitation was valid.²⁵³

On certiorari, the supreme court held that the Georgia Motor Carrier Act²⁵⁴ applied; therefore, the radius-of-use limitation was invalid.²⁵⁵ The court of appeals based its holding on the fact that the insured trucking company had never obtained a motor carrier permit and that there was no "Form F" endorsement to the policy.²⁵⁶

The supreme court held that these facts were not dispositive.²⁵⁷ Rather, it relied on the fact that the insured operated a dump truck business, hauling materials for others for compensation, thereby meeting the statutory definition of a motor carrier.²⁵⁸ Furthermore, at the time Canal issued the policy, Canal was aware of the facts upon which the insured's status as a carrier was determined, and the insured identified itself on the application as a "common carrier."²⁵⁹ Considering the public policy behind the Motor Carrier Act, protection of the public, the court held that the failure to comply with regulatory requirements should not insulate the insurer from liability, and any negative consequences that stem from noncompliance should fall on one or both of the noncompliant parties.²⁶⁰ Thus, the radius-of-use limitation was invalidated, and "Canal [was] subject to liability up to the policy limit"²⁶¹

In *State Auto Property & Casualty Co. v. Matty*,²⁶² a declaratory judgment action concerned an incident in which the insured's vehicle struck two bicyclists—the question was whether there was one accident, or two.²⁶³ Answering a certified question from the federal district court, the Georgia Supreme Court held that a jury question existed as to the number of accidents involved.²⁶⁴

In an opinion by Judge Clay Land of the United States District Court for the Middle District of Georgia, the court reported that a jury trial

253. *Id.*

254. O.C.G.A. tit. 46, ch. 7 (2004 & Supp. 2011).

255. *Sapp*, 288 Ga. at 681, 706 S.E.2d at 646.

256. *Sapp*, 301 Ga. App. at 597-98, 688 S.E.2d at 377.

257. *Sapp*, 288 Ga. at 681-82, 706 S.E.2d at 646.

258. *Id.* at 682, 706 S.E.2d at 647; *see also* O.C.G.A. § 46-1-1(9)(A) (Supp. 2011).

259. *Sapp*, 288 Ga. at 684, 706 S.E.2d at 648 (internal quotation marks omitted).

260. *Id.* at 685, 706 S.E.2d at 648-49.

261. *Id.* at 686, 706 S.E.2d at 649.

262. 286 Ga. 611, 690 S.E.2d 614 (2010).

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

264. *Id.* at 617, 690 S.E.2d at 619; *see also* Cotter et al., *supra* note 1, at 152.

was held and that the jury found two accidents occurred.²⁶⁵ Judge Land denied the insurer's motions for judgment as a matter of law and alternative motion for a new trial, finding sufficient evidentiary basis for the verdict and that the verdict was not contrary to the clear weight of the evidence.²⁶⁶

2. Rental Agency May Enforce Contract Exclusion and Avoid Liability as a Self-Insurer. As a matter of first impression, the Georgia Court of Appeals considered whether "a plaintiff in a garnishment action [can] recover insurance proceeds from a self-insured car rental agency when the defendant renter was driving in violation of the rental agreement when he caused the accident[.]"²⁶⁷ In *Hix v. Hertz Corp.*,²⁶⁸ the court affirmed the trial court's ruling that the renter/driver's violation of the rental agreement amounted to an exclusion of coverage, and the injured party could not recover a portion of the judgment obtained against the renter from the self-insured renter.²⁶⁹

Carson Bolt rented an SUV from Hertz. While driving the rented vehicle, Bolt was involved in a high-speed chase in which he was fleeing the police and driving under the influence of drugs. Bolt collided with Hix's vehicle, thereby injuring Hix and killing his wife. Hix sued Bolt and obtained a \$5.1 million consent judgment. Bolt was insured by Progressive Insurance Company, which paid its \$200,000 policy limit to Hix. Hix then filed a garnishment action against Hertz in which he sought to recover the remainder of his judgment from Hertz's \$10 million self-insurance plan. Hertz contended that, in driving in violation of various criminal laws, Bolt violated the rental agreement and was thereby excluded from coverage under Hertz's plan.²⁷⁰

The court stated that exclusions in insurance policies are generally enforceable unless they violate public policy and noted three public interests that control exclusions: "(1) as insureds, to limit the insurer's risks and thereby keep automobile insurance premiums as low as possible; (2) as members of the public in general to improve safety on the highways; and (3) as accident victims, to have access to insurance funds to satisfy their judgments."²⁷¹ The court noted that, while public policy

265. *State Auto Prop. & Cas. Co. v. Matty*, No. 4:08-CV-98(CDC), 2010 WL 5463088, at *1 (M.D. Ga. Dec. 29, 2010).

266. *Id.* at *2.

267. *Hix v. Hertz Corp.*, 307 Ga. App. 369, 369, 705 S.E.2d 219, 220 (2010).

268. 307 Ga. App. 369, 705 S.E.2d 219 (2010).

269. *Id.* at 369-70, 705 S.E.2d at 220-21.

270. *Id.*

271. *Id.* at 371, 705 S.E.2d at 221-22 (quoting *Fla. Int'l Indem. Co. v. Guest*, 219 Ga. App. 222, 225, 464 S.E.2d 847, 850 (1995)) (internal quotation marks omitted).

favors compensating Hix and his wife as innocent victims of a car accident, a series of Georgia decisions have upheld policy exclusions when they do not result in the injured party receiving less than the statutory minimum amount of liability insurance.²⁷² Because Hix received compensation in excess of the amount required by O.C.G.A. § 33-7-11(a)(1), the court held the exclusion of Bolt from Hertz's self-insurance would not violate public policy.²⁷³ Because Bolt himself is not entitled to Hertz's coverage, Hix, who is essentially standing in Bolt's shoes as a garnishor, is thereby not entitled to compensation from Hertz's self-insurance plan.²⁷⁴

3. Permissive Use and "Second Permittee" Cases. The "second permittee" doctrine provides that "the permission to use contained in an omnibus clause refers to the purpose for which permission was given and not to the operation of the vehicle."²⁷⁵ Where an employee of a car dealership considered buying a car, took the car home for a weekend test drive, and then allowed a friend to drive the vehicle to show it to a girl, the friend was not a second permittee and, therefore, was not entitled to coverage under the dealership's liability coverage for a collision he caused while driving the borrowed vehicle.²⁷⁶

In the case of *Conklin v. Acceptance Indemnity Insurance Co.*,²⁷⁷ Century Car Corporation (Century), a used car dealer, insured all its vehicles with a policy issued by Acceptance Indemnity Insurance Company (Acceptance). The policy provided coverage up to \$1 million for employees or permissive users and coverage up to \$25,000 if a customer was operating the vehicle. Michael Mincey was an employee of Century. Mincey was interested in buying one of Century's vehicles so he took the vehicle home for the weekend to test drive. Mincey allowed a friend, Chapman, to drive the vehicle and show it to a girl. Chapman had no intention of purchasing the vehicle. While driving the vehicle, Chapman was involved in an accident.²⁷⁸

Acceptance filed a declaratory judgment action, seeking a determination that its policy did not provide coverage to Chapman because, as he had no intentions of purchasing the vehicle, he was not a second

272. *Id.* at 371-72, 705 S.E.2d at 222.

273. *Id.* at 372, 705 S.E.2d at 222.

274. *Id.* at 374, 705 S.E.2d at 223.

275. *Conklin v. Acceptance Indem. Ins. Co.*, 306 Ga. App. 585, 588, 702 S.E.2d 727, 730 (2010) (quoting *Ga. Farm Bureau Mut. Ins. Co. v. Allstate Ins. Co.*, 190 Ga. App. 593, 594, 379 S.E.2d 619, 620 (1989)) (internal quotation marks omitted).

276. *Id.* at 586, 589, 702 S.E.2d at 728-30.

277. 306 Ga. App. 585, 702 S.E.2d 727 (2010).

278. *Id.* at 586, 702 S.E.2d at 728-29.

permittee nor a customer. The trial court granted Acceptance partial summary judgment, finding that a jury question remained as to whether Chapman was a second permittee, but also finding that Acceptance's coverage was limited to \$25,000.²⁷⁹ The court of appeals reversed.²⁸⁰

The second permittee doctrine allows the permission to use the vehicle given from the owner to the first permittee to be extended to a third person who is allowed to use the vehicle by the first permittee when "the owner's permission to the first permittee included the use to which the third person put the car."²⁸¹ Here, although there was no question that Chapman had actual permission from Mincey to drive the vehicle and Mincey had permission from Century, the court held Chapman could not be an insured second permittee because his use of the vehicle fell outside the scope of permission given by Century to Mincey, which was limited to a test drive for the purpose of evaluating the vehicle for purchase.²⁸² Therefore, Chapman was not a second permittee nor an insured under the policy.²⁸³

When an adult daughter borrows her mother's car for the restricted purpose of driving to her own home and then to work the next morning, and the daughter's boyfriend then takes the vehicle without the daughter's knowledge and allows his cousin to drive the vehicle from a nightclub, the boyfriend's cousin is not insured under the owner's insurance policy because the boyfriend and the cousin are not permissive users of the vehicle as defined in the policy nor covered as second permittees.²⁸⁴

In *Clayton v. Southern General Insurance Co.*,²⁸⁵ Gynetha Wooten insured a vehicle with Southern General Insurance Company (Southern General). When Ms. Wooten's daughter, Latoya Wooten, asked to borrow her mother's vehicle, Gynetha made clear that Latoya was only to drive the vehicle back to her own home and then to work the next morning. Latoya had several people at her house that evening. After Latoya went to sleep, her boyfriend, Wayne Neal, took Gynetha's car, unbeknownst to Latoya, and picked up his cousin. Neal and his cousin then drove to a nightclub, and on their way home, while the cousin was driving, they were involved in a collision. Passengers in the other car were injured.

279. *Id.* at 587, 702 S.E.2d at 729.

280. *Id.* at 589, 702 S.E.2d at 731.

281. *Id.* at 588, 702 S.E.2d at 730.

282. *Id.* at 589, 702 S.E.2d at 730.

283. *Id.*

284. *Clayton v. S. Gen. Ins. Co.*, 306 Ga. App. 394, 397-98, 702 S.E.2d 446, 449-50 (2010).

285. 306 Ga. App. 394, 702 S.E.2d 446 (2010).

Gynetha's insurance company sought a declaratory judgment that its policy excluded liability coverage for the collision because Neal and his cousin did not qualify as permissive users of the insured car. The trial court granted Southern General summary judgment.²⁸⁶

The court of appeals affirmed the judgment, holding the evidence undisputed that Gynetha gave Latoya limited permission to use the vehicle, which did not include allowing others to drive the vehicle, and that neither Neal nor his cousin received permission to use the vehicle from Gynetha or Latoya Wooten.²⁸⁷ On the undisputed facts, the court held it was clear that Neal and his cousin did not have a reasonable belief they were entitled to use the vehicle; but even if they did, they would not be covered because their use of the vehicle was outside the scope of permission given by Gynetha to Latoya, such that neither could have implied permission as a second permittee.²⁸⁸ The court also held that the fact that Latoya Wooten did not report her mother's car stolen did not create a question of fact as to whether or not Neal and his cousin had permission to use the vehicle.²⁸⁹

4. "Regular Use" Exclusion Enforced. A common feature of automobile liability insurance policies is an exclusion for the regular use of a vehicle that is not insured under the policy. In *State Automobile Mutual Insurance Co. v. Todd*,²⁹⁰ the policy excluded "[a]ny vehicle, other than 'your covered auto,' which is: a. owned by you, or b. furnished or available for your regular use."²⁹¹ Finding the evidence established that the insured regularly used her friend's vehicle as a matter of law, the court of appeals reversed a trial court's ruling that denied summary judgment to the insurer in this declaratory judgment action.²⁹²

The insured, Elizabeth Ann Todd, was involved in an automobile accident with another person's vehicle. Todd was driving her friend's vehicle at the time of the accident. Todd and the other driver were sued by a passenger in the other vehicle. Todd's insurance carrier brought a declaratory judgment action arguing that Todd's regular use of her friend's vehicle excluded coverage under its policy.²⁹³

286. *Id.* at 395, 702 S.E.2d at 448.

287. *Id.* at 397-98, 702 S.E.2d at 449-50.

288. *Id.*

289. *Id.* at 398, 702 S.E.2d at 450.

290. 309 Ga. App. 213, 709 S.E.2d 565 (2011).

291. *Id.* at 214, 709 S.E.2d at 566 (internal quotation marks omitted).

292. *Id.* at 213, 709 S.E.2d at 565.

293. *Id.*

The facts, as established by Todd's testimony, were that she had borrowed a friend's vehicle to go on vacation and was driving back from vacation when the collision occurred. Todd testified that her friend could not drive, so she also used the car to run errands for her friend. Todd had her own set of keys to the vehicle. Todd also stated that she would park the car at her home and that, while she did not use the car on a daily basis, she did use it regularly.²⁹⁴

The court of appeals held Todd's policy barred coverage on the basis that, as a matter of law, she was more than just an incidental user of the vehicle—the vehicle was available for Todd's regular use.²⁹⁵ Because Todd's use was not "occasional, incidental, casual or infrequent," the court held it was error for the trial court to deny the insurer's motion for summary judgment.²⁹⁶

This case evaluated the "regular use" exclusion of an insurance policy.²⁹⁷ The court strictly adhered to the language of the policy itself, holding that if an insured is regularly using a vehicle not covered by the policy and the policy contains a regular use exclusion, coverage is barred.²⁹⁸

294. *Id.* at 214, 709 S.E.2d at 566.

295. *Id.*

296. *Id.* at 215, 709 S.E.2d at 567 (internal quotation marks omitted).

297. *Id.* at 214-15, 709 S.E.2d at 566.

298. *Id.*