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Insurance

by Maximilian A. Pock*

I. INTRODUCTION

The big news for 1991 is the repeal of Georgia's No-Fault Act. The Dawkins/Taylor Bill,¹ which became law in April 1991 and effective on October 1, 1991, surgically excised all no-fault provisions from the Georgia Motor Vehicle Accident Reparations Act² and replaced them with an extensively revamped compulsory automobile liability insurance system.³ During its sixteen-year reign, Georgia's no-fault regime, embroidered by numerous amendments, has spawned an amount of litigation that rivals or surpasses that of the Uninsured Motorist Act.⁴ At least ten percent of all appellate judge-time was devoured by no-fault cases. Accordingly, the purveyors of no-fault, who captured our consumerite imaginations in the early seventies, now agree that a bad no-fault law is worse than none. Georgia's modified no-fault law suspended the torts system only in regard to no-fault limits.⁵ Although the statute permitted insurance consumers to purchase optional coverage⁶ beyond the basic five thousand dollar limit,⁷ the low five hundred dollar threshold for plugging

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1. 1991 Ga. Laws 1608.

2. O.C.G.A. §§ 33-34-1 to -16.3 (1990 & Supp. 1991) (repealed 1991). The Dawkins/Taylor Bill repeals and replaces the provisions previously found in O.C.G.A. §§ 33-34-2 to -17 with a new Chapter 34. To avoid confusion, all reference to the repealed version will be followed by a parenthetical, i.e., (repealed 1991).

3. *Id.* §§ 33-34-1 to -8 (Supp. 1991).

4. *Id.* § 33-7-11 (1990 & Supp. 1991). The litigation-proneness of uninsured and underinsured motorist coverage is a national phenomenon. See R.E. KEETON & A.I. WIDISS, INSURANCE LAW § 4.9(a) (1988).

5. See O.C.G.A. §§ 33-34-3(d)(1)(B) to -5(a)(3) (1990) (repealed 1991). The insurer's right to subrogation was commensurately limited except for two isolated instances. *Id.*

6. *Id.* § 33-34-5(A)(1) (repealed 1991). Up to an aggregate limit of \$50,000 per person. *Id.*

7. *Id.* § 33-34-4(a)(2) (repealed 1991).

into the torts system⁸ and obtaining compensation for noneconomic losses, such as pain and suffering, was unrealistically low. Georgia's no-fault law was truly an ersatz system, and few will mourn its demise.

The Dawkins/Taylor Bill is a piece of omnibus legislation containing a cornucopia of substantive and procedural changes. This Article addresses two of the most salient changes. The first change revises and strengthens the "Insureds' Bill of Rights,"⁹ which relates to the unlawful nonrenewal and cancellation of automobile or motorcycle insurance policies. The law now permits aggrieved insureds to vindicate their rights by obtaining a speedy hearing before the Commissioner of Insurance.¹⁰ The Commissioner is authorized to "order such penalties as he determines are appropriate in the event of an abusive nonrenewal or cancellation."¹¹

The second revision directs the Commissioner of Insurance to "provide by rule or regulation procedures for the expeditious and efficient settlement of first-party property damage claims under personal private passenger motor vehicle policies"¹² involving a variety of contentious issues, such as "[c]ost of repairs"¹³ and "[u]se of aftermarket parts."¹⁴

The past year has produced a bountiful harvest of well over 100 insurance cases.¹⁵ Rather than attempt to discuss them all within the necessary confines of this Article, an informed and perhaps random selection of cases has been made. In order to assure continuity, the cases selected for comment will be discussed in conformance with subject matter headings used in past years.

II. ASSIGNMENTS

The insurer's indiscriminate reliance upon contractual prohibitions of policy assignments without the insurer's written consent may have a high price. These prohibitions are redundant to the extent they relate to the assignment of the *policy* itself, because such assignment affects the risk assumed by the insurer and is therefore ineffective at common law. They are void to the extent they relate to the assignment of *proceeds* under a policy, because such an assignment does *not* affect the risk assumed by the insurer.

8. *Id.* § 33-34-2(13) (repealed 1991).

9. *Id.* § 33-24-45 (Supp. 1991).

10. *Id.*

11. *Id.*

12. *Id.* § 33-34-8.

13. *Id.* § 33-34-8(2).

14. *Id.* § 33-34-8(4).

15. The number of appellate cases dealing with insurance law increased from an annual average of 60 in the 1970s to an average of 90 in the 1980s. Significant variations, however, occurred from year to year.

In *Santiago v. Safeway Insurance Co.*,¹⁶ the insureds assigned the proceeds of a no-fault policy to their health care provider after they were injured in an automobile collision.¹⁷ A divided court held the assignment valid between the parties upon execution and perfected against the insurer upon notification.¹⁸ The prohibition was of no effect and "superfluous."¹⁹ Furthermore, the assignee could bring an action in his own name as the real party in interest²⁰ and not in the name of the assignor for the use of the assignee.²¹

In *Klempner v. Safeway Insurance Co.*,²² the court expanded the reach of *Santiago* by recognizing the insurers' liability to the assignee, not only for the proceeds but also for statutory bad faith penalties and attorney fees.²³ The statute expressly contemplates that benefits "may be paid . . . directly to persons . . . supplying . . . services . . . to the claimant" and allows "the person entitled to the benefits" to sue for benefits as well as penalties.²⁴ Accordingly, the reasonable meaning of the phrase "person entitled to the benefits" was not restricted to the original claimant.²⁵

The Author submits that this conclusion, whatever its effect upon the insurer's compliance with its obligations, is not necessarily supported by the quoted language. The phrase "may be paid" is permissive. It does not denote that those who "may" be paid are automatically "entitled" to be paid, which is a predicate for the recovery of penalties.

III. BINDER

*Green v. Progressive Insurance Co.*²⁶ shows that the complexities of insurance law can be a veritable minefield for unsophisticated consumers of insurance, a commodity that is affected with a public interest and simply indispensable in modern society. In *Green* an owner of an automobile applied to an independent agent for a liability policy. She made the required forty percent down payment on the policy and completed an ap-

16. 196 Ga. App. 480, 396 S.E.2d 506 (1990).

17. *Id.* at 480, 396 S.E.2d at 507.

18. *Id.* at 480-81, 396 S.E.2d at 508.

19. *Id.* at 481, 396 S.E.2d at 508.

20. O.C.G.A. § 9-11-17(a) (1982 & Supp. 1991).

21. This was the case under the former Code of Georgia. GA. CODE ANN. § 81-1307 (Harrison 1933) (repealed 1966).

22. 196 Ga. App. 639, 396 S.E.2d 527 (1990). *Klempner* aligned itself with the plurality opinion in *Santiago* that, having been adopted by a 4-1-4 vote, was technically devoid of precedential value. *Santiago*, 196 Ga. App. at 482, 396 S.E.2d at 509.

23. 196 Ga. App. at 639, 396 S.E.2d at 527-28.

24. O.C.G.A. § 33-34-6(b) (1990) (repealed 1991) (emphasis added).

25. 196 Ga. App. at 639, 396 S.E.2d at 528.

26. 196 Ga. App. 733, 397 S.E.2d 20 (1990).

plication that bound coverage at 12:30 p.m. that day. The application also stated that coverage would end at 12:30 p.m. on February 28, 1988. The insurer issued a policy that stated the coverage would end at 12:01 a.m. on February 28, 1988. The insured was involved in an accident which occurred after 12:01 a.m. and possibly before 12:30 p.m. on that date.²⁷ The court held that the insurer's denial of liability was justified because "the policy superseded any temporary binder of coverage which may have existed"²⁸ and "had expired by its own terms by the time the accident occurred."²⁹ However, the applicant never received the policy because the insurer sent it to the wrong address "[d]ue to an apparent transcription error made by the sales agent."³⁰

The intermediary, described as an "independent agent," was obviously not a "broker" acting solely as an agent for the applicant.³¹ Although an independent agent is an agent for the insured when advising the applicant on the selection of a proper policy, he becomes an agent for the specific insurer when he binds that insurer under a pre-existing representational agreement. The agent's knowledge acquired within the scope of his employment and his transcription errors are then imputed to the insurer.

Should the law permit the insurers to hide behind the expiration date in a policy that was never received due to the fault of its own agent? Are applicants charged with knowledge that binders are not effective beyond ninety days or superseded by policies that they never received?³² Although this hard-boiled common law view of the insured-agent-insurer triad, which is by no means limited to Georgia, may enhance predictability and reduce protracted and murky litigation, it may do so at the expense of equity.

In Georgia, conditional binding receipts provide temporary life insurance only if their terms so provide.³³ In *Robertson v. Life Insurance Co.*,³⁴ the court expressly rejected the notion, which has emerged in a number of

27. *Id.* at 733-34, 397 S.E.2d at 21.

28. *Id.* at 734, 397 S.E.2d at 21.

29. *Id.*

30. *Id.* (emphasis added).

31. *Id.*

32. O.C.G.A. § 33-24-33(b) (1990). The facts in *Green* should be distinguished from those in *Southern Gen. Ins. Co. v. Snipes*, 196 Ga. App. 727, 396 S.E.2d 808 (1990), which appropriately held that an applicant who had not paid or made a downpayment on the first premium upon receiving a binder or thereafter, had no coverage at all. *Id.* at 727-28, 396 S.E.2d at 808-09. Assuming, *arguendo*, that the binder provided coverage, its term would not extend beyond the statutory termination date. *Id.* at 728, 396 S.E.2d at 809.

33. *See, e.g., Woodmen of the World Life Ins. Soc'y v. Etheridge*, 223 Ga. 231, 154 S.E.2d 369 (1967), noted in M.A. Pock, *Insurance*, 20 MERCER L. REV. 132, 134-35 (1969).

34. 196 Ga. App. 294, 396 S.E.2d 35 (1990).

jurisdictions,³⁵ that application binders "accompanied by a prepaid premium"³⁶ provide interim life insurance "on the rationale that the insurer is otherwise unjustly enriched by its receipt of interest from the prepaid premium."³⁷

IV. CONSTRUCTION AND DEFINITIONS

A. Arising Out Of

The impressive body of Georgia case law applying the statutory conditions for entitlement to no-fault benefits has not simplified the task of prediction. Elusive factual nuances that do not lend themselves to rubric are often outcome-determinative. A juxtaposition of two recent cases provides a useful illustration.

In *Boykin v. State Farm Mutual Automobile Insurance Co.*,³⁸ the insured filled her car with gas at a service station, paid for the gas in the station, and proceeded to her car. As she reached for the door handle, "she slipped and fell on wet oily pavement" and sustained injuries.³⁹ She never made contact with her car. The court held she was not entitled to no-fault benefits.⁴⁰ Even if one concedes that she was "occupying" the vehicle, which is defined as being "engaged in the immediate act of entering into . . . the motor vehicle,"⁴¹ her injuries definitely did not arise "out of the operation, maintenance, or use of a motor vehicle."⁴² The connection between her injury and the vehicle was too tenuous and "remote" to raise a jury question.⁴³ The trial court had correctly denied her claim to coverage as a matter of law.⁴⁴

In *First Financial Insurance Co. v. Rainey*,⁴⁵ the insured sat on the passenger seat and thus obviously "occupied" the car. A four-inch thick

35. Probably the leading case representing this emerging view is *Smith v. Westland Life Ins. Co.*, 539 P.2d 433 (Cal. 1975).

36. 196 Ga. App. at 295, 396 S.E.2d at 35.

37. *Id.*, 396 S.E.2d at 35-36. Professor Williston explains that the benefit to the insurer resulting from the use of the applicant's premium is offset by the burdensome expenses accruing to the insurer in connection with the processing of applications, many of which, being mere contractual offers, are withdrawn while being processed. 7 S. WILLISTON, WILLISTON ON CONTRACTS § 902A (3d ed. 1963).

38. 195 Ga. App. 401, 393 S.E.2d 470 (1990).

39. *Id.* at 401, 393 S.E.2d at 471.

40. *Id.* at 402, 393 S.E.2d at 472.

41. O.C.G.A. § 33-34-2(8) (1990) (repealed 1991).

42. *Id.* § 33-34-2(1) (repealed 1991).

43. 195 Ga. App. at 402, 393 S.E.2d at 471.

44. *Id.*

45. 195 Ga. App. 655, 394 S.E.2d 774 (1990), *aff'd in relevant part*, *First Fin. Ins. Co. v. Rainey*, 261 Ga. 52, 401 S.E.2d 490 (1991).

limb fell from a tree onto the open door of the car, was deflected, and struck the insured on the back of the head.⁴⁶ The court held that the injuries arose out of the "operation, maintenance, or use of a motor vehicle as a vehicle"⁴⁷ and that the trial court properly granted the insured's motion for summary judgment.⁴⁸

After a discursive review of pertinent Georgia decisions resembling an *A.L.R.* annotation, the court concluded that the phrase "arising out of" did not equate with direct or proximate causation and that "'almost any causal connection or relationship will do.'"⁴⁹ If the victim was occupying the insured vehicle when the injury occurred, Georgia courts have applied the liberal rule that such causal nexus exists whenever the injury would not have occurred "'but for' the operation, maintenance or use of the [vehicle] . . ."⁵⁰ The court also confirmed that "this liberality has not abated" in recent years.⁵¹

These two cases suggest that the test of coverage, instead of stressing nexus and occupancy as coequal prerequisites, has subtly shifted from the former to the latter. In *Rainey* the victim was occupying the vehicle and using it as a passenger. The court concluded that "but for" his use the injury would not have happened.⁵² In *Boykin* the court conceded, albeit with some hesitation, that the victim might have been occupying her vehicle when she reached for its door handle.⁵³ If that was the case then she was also "using" her vehicle. Her injury would not have occurred "but for" her use of the vehicle as an occupant. The factual distinction between a passenger-occupant and a driver-occupant appears a bit metaphysical, clouding the relative precedential values of these two cases.⁵⁴

"Loading or unloading a motor vehicle by any person acting within the course of his employment in any business" is an activity expressly excluded from the reach of the terms "operation, maintenance or use of a motor vehicle."⁵⁵ In *Hernandez v. Liberty Mutual Insurance Co.*,⁵⁶ this

46. 195 Ga. App. at 655-56, 394 S.E.2d at 775.

47. O.C.G.A. § 33-34-2(9) (1990) (repealed 1991); see also *id.* § 33-34-2(1) (repealed 1991).

48. 195 Ga. App. at 658, 394 S.E.2d at 776.

49. *Id.* at 656, 394 S.E.2d at 775 (quoting *Southeastern Fidelity Ins. Co. v. Stevens*, 142 Ga. App. 562, 563-64, 236 S.E.2d 550, 551 (1977)).

50. *Id.* at 657, 394 S.E.2d at 776 (quoting *Franklin v. Southern Guar. Ins. Co.*, 160 Ga. App. 279, 282, 287 S.E.2d 274, 276 (1981)).

51. *Id.*

52. *Id.*

53. 195 Ga. App. 401, 402, 393 S.E.2d 470, 471 (1990).

54. See *Rainey*, 195 Ga. App. at 662, 394 S.E.2d at 780 (Birdsong, J., dissenting) (characterizing falling limbs as "acts of God").

55. O.C.G.A. § 33-34-2(9) (1990) (repealed 1991).

56. 197 Ga. App. 18, 397 S.E.2d 482 (1990).

exclusion was the nemesis of an employee who became unconscious and fell while "occupying" and "using" the vehicle in the course of "unloading" its cargo.⁵⁷ The language of the statute superseded the general rule construing coverage provisions broadly and exclusions narrowly.⁵⁸

B. Hit-And-Run Automobile

Phantom automobiles continue to bedevil victims who seek recoveries against their uninsured motorist carriers. The Georgia Code currently provides for such recoveries only when the tortfeasor is unknown and hence deemed uninsured, and when the offending vehicle is a hit-and-run automobile that has made "actual physical contact" with the victim's vehicle.⁵⁹ A narrow exception is carved out for those cases in which the accident is caused by a phantom automobile without actual contact if the victim manages to give a description "of how the occurrence occurred" and another eyewitness *corroborates* it.⁶⁰ Even a perfect description by the victim is of no avail if corroboration is inadequate, as was the case in *National Surety Corp. v. O'Dell*,⁶¹ where several witnesses saw the victim's truck turn over, but "no eyewitnesses corroborated, except by conjecture, [the victim's] claim that the accident was caused by the unknown vehicle."⁶² A more perplexing question arises if the facts are reversed and the corroboration is perfect, but the victim's description is spotty. Just how specific must the victim's description be?

In *Bell v. Coronet Insurance Co.*,⁶³ the court reiterated that a description must go beyond the facts of the accident (the result) and contain at least a reference to the unknown vehicle (the cause).⁶⁴ Thus, the most compelling eyewitness testimony is of no use when the victim testifies that she never saw the "burgundy LTD" that allegedly cut in front of the driver who actually struck her.⁶⁵

57. *Id.* at 18-19, 397 S.E.2d at 482-83.

58. *Id.* at 19, 397 S.E.2d at 483. The court noted that language which would have negated the exclusion was expressly deleted by the Georgia General Assembly. *Id.* Where a policy provides a broader substantive "loading and unloading" coverage than mandated by a subsequent statutory amendment, such amendment does not automatically effect or limit the broader coverage in the policy unless the policy itself is changed by an amendatory indorsement supported by consideration (e.g., by a premium reduction). *Rothnell v. Continental Casualty Co.*, 198 Ga. App. 545, 402 S.E.2d 293 (1991).

59. O.C.G.A. § 33-7-11(b)(2) (1990 & Supp. 1991).

60. *Id.*

61. 195 Ga. App. 374, 393 S.E.2d 504 (1990).

62. *Id.* at 375, 393 S.E.2d at 505.

63. 197 Ga. App. 211, 398 S.E.2d 242 (1990).

64. *Id.* at 212-13, 398 S.E.2d at 243.

65. *Id.* at 212, 398 S.E.2d at 243. The court relied on *Hoffman v. Doe*, 191 Ga. App. 319, 381 S.E.2d 546 (1989) in which the insured positively remembered there was no third vehi-

The holding in *Atlanta Casualty Insurance Co. v. Crews*⁶⁶ indicates that the description requirement can accommodate shades of grey and does not necessarily cut off meritorious claims with the precision of a guillotine. The victim testified: "I saw a blur come at me and I woke up in the hospital . . . [i]t was a dark blur."⁶⁷ The driver of the pickup truck that struck the victim's car and a disinterested third-party eyewitness testified that "a dark blue, or a black or dark car . . . stopped rapidly in front of [the driver] causing him to brake, lose control of his vehicle on the wet street, and crash into [the victim]."⁶⁸ The court held that substantial compliance with the description requirement is sufficient because the victim's deposition sufficiently implicated the phantom vehicle as a causal factor in the occurrence.⁶⁹ This fact was fully corroborated by the more specific but fully compatible testimony of the other witnesses. To conclude otherwise would be to impute to the legislature an intent "to create a rule which would arbitrarily preclude coverage, for example, of a victim injured so rapidly or so severely she could not testify as to how the occurrence happened, regardless of the number of competent witnesses . . ."⁷⁰

*Maxwell v. State Farm Mutual Automobile Insurance Co.*⁷¹ involved a curious twist rarely encountered in phantom car cases. The insurance policy concerned did not track the definitional language of the Uninsured Motorist Act.⁷² The policy dispensed with the victim's description and stated that "'the facts of the accident can be corroborated by an eyewitness to the occurrence other than [the claimant].'"⁷³ This clause in the policy saved the day for the victim who never saw the uninsured vehicle.

C. Pre-existing Condition

The 1943 New York fire insurance policy and its progeny have practically become the law of the land in that their language is widely mandated by regulatory statutes or voluntarily replicated in homeowners' pol-

cle on the road and thus contradicted the witnesses' testimony, a factual nuance not present in *Bell*. 197 Ga. App. at 213, 398 S.E.2d at 243.

66. 197 Ga. App. 48, 397 S.E.2d 466 (1990).

67. *Id.* at 49, 397 S.E.2d at 467.

68. *Id.* at 48, 397 S.E.2d at 467. The court noted that even drivers who are named as defendants in the case and who have a stake in the outcome may furnish corroborating evidence that a phantom vehicle caused the accident. The statute does not require witnesses to be disinterested. *Id.* at 49-50, 397 S.E.2d at 50 (citing *Universal Sec. Ins. Co. v. Lowery*, 257 Ga. 363, 359 S.E.2d 898 (1987)).

69. *Id.* at 50-51, 397 S.E.2d at 468-69.

70. *Id.* at 50, 397 S.E.2d at 468.

71. 196 Ga. App. 545, 396 S.E.2d 291 (1990).

72. O.C.G.A. § 33-7-11(b)(2) (1990 & Supp. 1991).

73. 196 Ga. App. at 547, 396 S.E.2d at 392 (quoting the insurance policy).

icies.⁷⁴ Such standardization is not found in health insurance policies which, arguably, affect spheres of human interest that extend dramatically beyond concerns about property losses. Exclusions for pre-existing conditions are particularly puriform.

*Liberty National Insurance Co. v. Davis*⁷⁵ involved one straightforward variant that excluded coverage for a medical condition "which manifested itself, or for which medical advice was given or treatment recommended by or received from a physician within two years before the effective date."⁷⁶ This language posed no difficulty for the court. Because the language was nonambiguous it resisted beneficent construction through *contra proferentem*. The terms "manifested," "advice," and "treatment" were obviously used in the disjunctive and thus triggered the exclusion (treatment for fibrocystic breast disease) if any of the three alternative events occurred.⁷⁷

*Bergan v. Time Insurance Co.*⁷⁸ involved a variant of the policy in *Liberty* that omitted the term "manifested" and excluded only coverage for "an illness or injury for which medical care, treatment, medicine or advice was received during the six-month period immediately prior to the effective date"⁷⁹ The insured complained about what she thought was a bladder infection and was told by her general practitioner to see a gynecologist for an ultrasound examination. The gynecologist recommended that she "seriously consider" undergoing an exploratory laparotomy" to evaluate a pelvic abnormality which he had discovered.⁸⁰ The laparotomy, which was performed shortly after the claimant's insurance became effective, revealed for the first time that she was suffering from low grade cancer. The claimant contended she was covered because her illness was not diagnosed until after the effective date of her policy. Whatever advice she had received previously did not relate to that particular illness.⁸¹ The court rejected this contention, explaining that the otherwise undefined term "advice," understood in its "plain, ordinary, and popular sense"⁸² basically denotes a "recommendation offered as a guide

74. See W.R. VANCE, HANDBOOK ON THE LAW OF INSURANCE 808 (3d ed. 1951). One suspects that insurers, although normally averse to regulation, welcomed this specific regulation because it prevented unethical insurers from engaging in unfair competition by flooding the market with debased and presumably cheaper insurance products.

75. 198 Ga. App. 343, 401 S.E.2d 555 (1991).

76. *Id.* at 343, 401 S.E.2d at 555 (quoting the insurance policy) (emphasis added).

77. *Id.*

78. 196 Ga. App. 78, 395 S.E.2d 361 (1990).

79. *Id.* at 79, 395 S.E.2d at 362 (quoting the insurance policy).

80. *Id.*

81. *Id.* at 78-80, 395 S.E.2d at 362-63.

82. *Id.* at 80, 395 S.E.2d at 363.

to action'⁸³ Two physicians "advised" the claimant in regard to the very illness which was later identified as cancer. Accordingly, her claim was barred by the clear import of the exclusion.⁸⁴

The Author submits that the court's rationale is less than apodictic. The claimant did not secure advice for a specific illness but for a condition which caused her discomfort. The advice she did receive was to explore whether her condition amounted to an illness. In light of the long standing maxim that exclusions are to be narrowly construed, the court might well have been persuaded to accept the claimant's argument that she had never received advice for the illness, which was only subsequently identified as such.

D. Sickness

*Combined Insurance Co. v. Rea*⁸⁵ provides an example of the troublesome issues that can arise when insurance policy definitions depart from commonly accepted definitions of risks. The insured became totally disabled as a result of allergic sensitization caused by the city's accidental discharge of toxic fumes into her florist shop. The medical disability policy in question provided five year coverage for disability resulting from sickness and extended coverage for disability resulting from accident. Her physician certified that her disability had resulted from sickness. Accordingly, the insurer stopped payments when the initial five-year coverage period terminated.⁸⁶ The physician had been unaware of the fact that the policy defined "sickness" as "illness or disease causing Total Disability which commences while this Policy is in force"⁸⁷ The insured was saved by her physician's subsequent affidavit explaining that he had used the term "sickness" in its accepted medical signification as "a condition of deviation from the normal health state."⁸⁸ This "deviation" had not simply commenced as defined by the policy, but had been the direct result of an injury or accident that made the insured eligible for continued disability benefits under the extended coverage provisions of the policy.⁸⁹

83. *Id.* (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)).

84. *Id.* Compare *Freeman v. Mid-South Ins. Co.*, 197 Ga. App. 445, 398 S.E.2d 727 (1990), in which the court held that an exclusion of pre-existing conditions for which drugs were prescribed by a physician during the twelve month period preceding the policy's effective date applied to drugs prescribed earlier and for which refills were procured without any further prescription. *Id.* at 445-46, 398 S.E.2d at 727-28.

85. 195 Ga. App. 701, 394 S.E.2d 624 (1990).

86. *Id.* at 701-02, 394 S.E.2d at 625.

87. *Id.* at 702, 394 S.E.2d at 625 (emphasis added) (quoting the insurance policy).

88. *Id.* (quoting physician's affidavit).

89. *Id.*

V. DEFENSE—INSURER'S DUTY TO EXTEND

The court in *Macon-Bibb County Hospital Authority v. Continental Insurance Co.*,⁹⁰ a case of first impression in Georgia, determined "whether ordinary negligence in maintaining [an insured ambulance] which then breaks down, delaying transport and treatment of a patient waiting for the . . . ambulance, but never transported in it"⁹¹ was an insured event under a comprehensive business policy carried by the hospital that operated the ambulance.⁹² The policy provided in pertinent part that the insurer was obligated to pay damages "caused by an accident and resulting from the ownership, maintenance, or use of a covered auto [and that the insurer had] no duty to defend suits for bodily injury . . . not covered by this endorsement."⁹³ Two endorsements expressly excluded coverage for liability due to "rendering or failure to render any medical, surgical, dental, x-ray or nursing service or treatment."⁹⁴ The court reiterated Georgia's long standing rule that an insurer's duty to defend is predicated almost exclusively upon the "allegations of the complainant."⁹⁵ The court held that these allegations did not actuate the malpractice/professional services exclusions nor the coverage itself.⁹⁶ The claimant alleged that "non-use or lack of availability for use" caused her injuries.⁹⁷ She should have alleged an accident caused by the use of the insured vehicle to come within the policy's coverage.⁹⁸ To hold that the policy covered non-use "would lead to a bizarre result: [A] patient who is mistreated in an insured ambulance while being transported would be denied coverage due to the professional malpractice exclusion . . . but a patient who never entered the ambulance and whose treatment was delayed, with consequent damages, would be covered."⁹⁹

The Author submits that the court's conclusions are not as self-evident as its syllogisms suggest. Although non-use does not equate with use, it does not necessarily follow that non-maintenance or negligent maintenance does not equate with maintenance. The court's construction of "caused by an accident and resulting from . . ." practically limits coverage to collisions and other mishaps involving the vehicle in a direct and

90. 196 Ga. App. 399, 396 S.E.2d 50 (1990).

91. *Id.* at 401, 396 S.E.2d at 51.

92. *Id.*

93. *Id.* at 400, 396 S.E.2d at 51 (quoting the insurance policy).

94. *Id.*

95. *Id.* at 402, 396 S.E.2d at 52 (citing *Presidential Hotel v. Canal Ins. Co.*, 188 Ga. App. 609, 610, 373 S.E.2d 671, 672 (1988)).

96. *Id.* at 401-02, 396 S.E.2d at 52.

97. *Id.* at 402, 396 S.E.2d at 52.

98. *Id.*

99. *Id.* at 401-02, 396 S.E.2d at 52.

physical sense. If one remembers the purpose for which ambulances are maintained, perhaps it would have been possible to apply *contra proferentem* and to hold that the complainant's misadventure was an accident resulting from the ambulance being negligently maintained.

VI. GROUP INSURANCE

Group administrators and intermediaries are really fiduciaries sui generis. They resist traditional agency classifications since they are not in any realistic sense subject to the control of their principals (the insureds or the group insurer), which is the touchstone for agency relationships.¹⁰⁰ Yet, so long as agency classifications prevail, the Georgia rule seems preferable to those adopted in many other jurisdictions that dogmatically treat the intermediary either as agent solely for the insureds or as agent solely for the group insurer throughout the entire relationship.¹⁰¹ Such myopic unitary characterization is avoided by the Georgia rule, which holds that the intermediary acts as agent for the insureds in structural matters, such as the procurement, modification, termination, and replacement of group insurance.¹⁰² Once a given policy is in effect, the intermediary acts as agent for the insurer in routine matters, such as adding individuals to the policy as beneficiaries.¹⁰³

The court in *Miles v. Great Southern Life Insurance Co.*¹⁰⁴ reaffirmed and applied this rule when it held that an employer/group administrator acted solely as agent of the insurer when it, or its designate, processed an employee's application for a family group insurance participation certificate under a previously issued and existing master policy.¹⁰⁵ Since the group insurer, like any other insurer, does not owe a fiduciary duty to its insureds when dealing with them through its agents, an alleged breach of its obligations under the participation certificate and the master policy will only make it vulnerable to breach of contract action.¹⁰⁶ In the absence of extraordinary circumstances creating a confidential relationship, the breach cannot be tortured into an action sounding in tort.¹⁰⁷

100. See KEETON & WIDISS, *supra* note 4, at § 2.5(d).

101. See ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW § 121 (1987).

102. 196 Ga. App. at 639, 396 S.E.2d at 527-28.

103. See, e.g., *Dawes Mining Co. v. Callahan*, 246 Ga. 531, 272 S.E.2d 267, *aff'g*, 154 Ga. App. 229, 267 S.E.2d 830 (1980); *Calhoun v. Kut-Kwick Corp.*, 172 Ga. App. 511, 323 S.E.2d 699 (1984).

104. 197 Ga. App. 540, 398 S.E.2d 772 (1990).

105. *Id.* at 541, 398 S.E.2d at 774.

106. For a recent insightful article on the *desiderata* and the drawbacks of restructuring the insured-insurer relationship, see William T. Barker, Paul E.B. Glad & Steven M. Levy, *Is an Insurer a Fiduciary to its Insureds?*, 25 TORT & INSURANCE L.J. 1 (1989).

107. 197 Ga. App. at 542, 398 S.E.2d at 774.

VII. INSURABLE INTEREST—PROPERTY

Does a recorded conveyance, unaccompanied by any change in possession, under an agreement that contemplated an immediate conveyance and that was carried out thirteen days later before any fire loss occurred, violate a change-of-interest clause in a property insurance policy and allow the insurer to avoid coverage? Does the fact that the conveyance had for its sole purpose the fraudulent concealment of assets from the insured's creditors allow the insurer to avoid coverage on grounds of public policy? The court in *Georgia Farm Bureau Mutual Insurance Co. v. Brown*¹⁰⁸ held that the change-of-interest clause, which provided the policy was to be "null and void in case of any change in interest, title or possession,"¹⁰⁹ was indeed violated. Yet, this violation suspended the policy only temporarily, and the policy was revived when the violation ceased.¹¹⁰ The outcome would be otherwise if a loss had occurred during the violation, or if the violation had increased the risk and a loss had resulted from the increased risk, or if the loss had occurred during the period when the risk was increased.¹¹¹ Neither was the case here. Furthermore, public policy does "not strip the alleged perpetrator of the fraud of all contractual rights with third parties."¹¹² This conduct, while reprehensible, presents an issue that is "properly addressed in another action by another litigant."¹¹³

VIII. INTERMEDIARIES—INDEPENDENT AGENTS AND BROKERS

*Byrne v. Reardon*¹¹⁴ illustrates that negligent insurance professionals may expose themselves to liability in tort that may encompass draconian punitive damages even when actual damages are fairly negligible.¹¹⁵ It makes no difference whether these professionals are brokers, who are merely given a license to hunt for a suitable insurer, or media-touted independent agents, who are empowered to bind various insurers under

108. 260 Ga. 160, 390 S.E.2d 586 (1990), *aff'g* 192 Ga. App. 504, 385 S.E.2d 87 (1989).

109. 260 Ga. at 160, 390 S.E.2d at 587 (quoting the insurance policy).

110. *Id.* at 161, 390 S.E.2d at 587 (citing *Home Ins. Co. v. Johnson*, 181 Ga. 139, 143-44, 182 S.E. 41, 43 (1935)).

111. *Id.* at 162, 390 S.E.2d at 587-88. This includes losses which occur after the violation has formally ceased but before the increased risk has abated.

112. *Id.*

113. *Id.*

114. 196 Ga. App. 735, 397 S.E.2d 22 (1990).

115. *Id.* at 735, 397 S.E.2d at 23.

pre-existing representational contracts.¹¹⁶ However, the specific relationship between these intermediaries and their clients makes a difference.

In *Frageau v. Hall*,¹¹⁷ an applicant for insurance learned that her existing policy on two buildings would not be renewed because the underwriter had ceased doing business in the state. She requested a broker to obtain quotes on replacement coverage in a specified amount. The broker examined the existing policy and "obtained quotes for the same coverage from several carriers."¹¹⁸ The applicant selected the least expensive quote, and a policy was procured. When one of the buildings collapsed, the insurer justifiably denied liability because its policy did not provide collapse coverage.¹¹⁹ Was the broker liable for negligent failure to provide full coverage? The court answered this question with a resounding "No!"¹²⁰ The applicant, by her own testimony, had requested the broker to provide specific coverage.¹²¹ This created "an arms-length business relationship between the parties" that imposed upon the broker a routine ministerial duty to comply with the precise request.¹²² This relationship did not relieve the applicant of her duty to read the policy or, if the policy was unavailable before the loss, to read the application, which in this case "clearly indicates the type of coverage to be provided."¹²³ Her failure to do so and to obtain timely rectification negated the broker's possible negligence in complying with her request.¹²⁴ "[T]he agent may be held liable . . . even if the insured fails to examine the policy"¹²⁵ only when the insured's agent holds herself out "as an expert in the field of insurance"¹²⁶ and the applicant relies upon her for the performance of additional services that leave scope for discretion and expertise, "such as de-

116. See *Wright Body Works, Inc. v. Columbus Interstate Ins. Agency*, 233 Ga. 268, 210 S.E.2d 801 (1974) (discussed in Maximilian A. Pock, *Insurance*, 27 *MERCER L. REV.* 121-22 (1975)).

117. 196 Ga. App. 493, 396 S.E.2d 241 (1990).

118. *Id.* at 493, 396 S.E.2d at 242.

119. *Id.* at 494, 396 S.E.2d at 242.

120. *Id.* at 494-95, 396 S.E.2d at 243.

121. Some dispute as to the type but not as to the amount of the coverage requested existed. No dispute in regard to the contents of the application was present. *Id.* at 494, 396 S.E.2d at 242.

122. *Id.* at 495, 396 S.E.2d at 243.

123. *Id.* at 494, 396 S.E.2d at 243. The failure, on the part of the insured, to read and rectify a policy which is in the insured's possession antecedent to an uninsured loss bars any torts recovery against an intermediary who negligently failed to perform a ministerial duty to procure a "same coverage" replacement policy. See *England v. Georgia-Florida Co.*, 198 Ga. App. 704, 402 S.E.2d 783 (1991).

124. 196 Ga. App. at 494, 396 S.E.2d at 243.

125. *Id.*, 395 S.E.2d at 242 (relying upon the rationale in *Etheridge v. Assoc. Mutuals*, 160 Ga. App. 687, 288 S.E.2d 58 (1981)).

126. *Id.*

termining the amount of insurance required."¹²⁷ Simply stated, this decision means that Georgia law does not require the purchaser to look over the agent's shoulders when the agent chooses a policy for the purchaser. The law requires otherwise when the agent is told what specific policy to get.

IX. LIFE INSURANCE—CONSENT

Insurable interest,¹²⁸ a state-imposed requirement to prevent wagering, is not subject to the dispensations of waiver or estoppel.¹²⁹ Can the same be said of the requirement that the *cestui que vie* give her consent to the issuance of the policy on her life?

In *Time Insurance Co. v. Lamar*,¹³⁰ a mother obtained insurance on her adult son's life after placing her son's signature on the application "in the presence of and at the direction of the insurance agent."¹³¹ After her son's death, the insurer denied liability because the decedent, as *cestui*, never gave his consent to the policy.¹³² The court noted that Georgia's statutory consent requirement is more restrictive than that at common law, which is satisfied by showing that the policy was issued either with the knowledge or the consent of the *cestui*.¹³³ Georgia requires that an adult *cestui* either apply for the policy in person or consent "in writing to the contract."¹³⁴ In light of this unambiguous language, the court was constrained to find that the policy was void *ab initio*, despite the fact that the insured had a clear insurable interest in her son's life.¹³⁵

X. LOSS PAYEE

What is the legal posture of a mortgagee under a deed to secure debt, when it is discovered that the mortgagor complied with a covenant in the deed to carry fire and extended coverage insurance on the premises, but violated a covenant to name the mortgagee as loss payee? *Georgia Farm*

127. *Id.*

128. O.C.G.A. § 33-24-3(a) (1990 & Supp. 1991).

129. *Id.*

130. 195 Ga. App. 452, 393 S.E.2d 734 (1990).

131. *Id.* at 452, 393 S.E.2d at 734.

132. *Id.* at 453, 393 S.E.2d at 734.

133. This requirement is the "generic" common law rule, but the issue is far from settled. See EDWIN W. PATTERSON, *ESSENTIALS OF INSURANCE LAW* 167 (1957).

134. O.C.G.A. § 33-24-6(a) (1990). This general consent requirement is subject to significant exceptions. See, e.g., O.C.G.A. § 33-24-6(a)(1) (spouses may obtain insurance upon each other's lives without consent) and O.C.G.A. § 33-24-6(a)(2) (persons having an insurable interest in the life of a minor may obtain insurance upon the minor's life without consent).

135. 195 Ga. App. at 454, 393 S.E.2d at 735.

*Bureau Mutual Insurance Co. v. Alma Exchange Bank & Trust*¹³⁶ supplies a partial answer to this question. When the mortgagee discovered after a fire loss that it had not been named as loss payee in the policy, it contacted the insurer and received a promise that its name would be included on all checks issued in payment for the loss. Subsequently, the insured mortgagor sued the insurer. To avoid protracted litigation, the insurer settled with the mortgagor and received a release in which the mortgagor promised indemnity against potential third party claims under the policy. When the insurer was sued by the mortgagee for breach of promise to recognize the mortgagee's loss-payee status when paying claims under the policy, the insurer contended that the promise was unenforceable for lack of consideration.¹³⁷ The court disagreed.¹³⁸ Although the mortgagee was not initially a third party beneficiary under the policy, it had a lien on the insured property and hence an equitable lien on the insurance proceeds.¹³⁹ The mortgagee had a right to intervene in the action brought by the mortgagor against the insurer or to sue the insurer directly.¹⁴⁰ The mortgagee's forbearance from suit in reliance upon the insurer's promise constituted sufficient consideration.¹⁴¹

It should be noted that the mortgagee had no rights as a third party beneficiary under the policy. Nor could it seek reformation of the policy unless the insurer had been subject to a tripartite agreement to issue a policy naming the mortgagee as loss payee. Its equitable lien to the proceeds could not have been asserted against the insurer had the insurer settled with the mortgagor without notice of the lien. The mortgagee's rights derived solely from the insurer's subsequent promise.

XI. NO-FAULT INSURANCE

Georgia's No-Fault Act, despite its demise on October 1, 1991,¹⁴² is likely to cast a long shadow into the future. Quite a few cases will yet begin to wend their way through our court system, and it will be years before the last of them will have reached a conclusion. Therefore, no-fault cases will continue to be a feature in these pages for some time to come.

136. 195 Ga. App. 103, 392 S.E.2d 320 (1990).

137. *Id.* at 104, 392 S.E.2d at 321.

138. *Id.*, 392 S.E.2d at 322.

139. *Id.*, 392 S.E.2d at 321.

140. *Id.*

141. *Id.* The court here uses the term "consideration" in its nontechnical sense as "promissory estoppel or detrimental reliance" that is an alternative to or substitute for consideration in the traditional "bargain or exchange" sense.

142. The No-Fault Act remains in effect as to all policies in existence on October 1, 1991, until they are modified at the request of the insured or until their renewal dates. 1991 Ga. Laws 1608, § 3.1.

In *Cannon v. Lardner*,¹⁴³ the supreme court held that "aggregating" or "stacking" of basic injury protection ("PIP") coverages was authorized in principle.¹⁴⁴ Yet, before this exercise can be undertaken, the claimant must first qualify as an insured under all policies that are potentially present upon the risk.

In this context, the Georgia statutory scheme mandates that under any given policy PIP benefits must be made available to the named insured and all additional insureds whenever the vehicle that is specifically designated as the insured vehicle is involved in an accident.¹⁴⁵ PIP benefits must also be made available to the named insured and certain additional insureds whenever a different vehicle is involved in an accident, but only "when such . . . vehicle is not *similarly insured*;"¹⁴⁶ that is, when the owner of the vehicle does not carry the required PIP coverage.¹⁴⁷

In *Georgia American Insurance Co. v. Bursed*,¹⁴⁸ the claimant was injured while riding as a passenger in a car whose owner carried basic PIP coverage.¹⁴⁹ The court held that he was not permitted to stack the basic PIP coverage under the policy insuring his own car.¹⁵⁰ Since the car in which he was injured was "similarly insured" to his own car, he did not qualify as an insured under his own policy.¹⁵¹ No "stackable" coverage was available.¹⁵²

In *Worsham v. Pickeral*,¹⁵³ appellant contended the trial court improperly reduced her damage award against a tortfeasor by five thousand dollars for basic PIP benefits that she never received and to which she was never "entitled."¹⁵⁴ She claimed that, as a result of her agent's fraud, she had no automobile insurance coverage at the time of her accident. The court was sympathetic, but still held that she was eligible for coverage.¹⁵⁵

143. 258 Ga. 332, 368 S.E.2d 730 (1988) (discussed in Maximilian A. Pock, *Insurance*, 41 *MERCER L. REV.* 221, 221-22 (1989)).

144. "Stacking" is also authorized as to uninsured motorist coverage if more than one policy is present upon the risk. "Stacking" is not authorized within a single policy which contains separate coverages. *Jenkins v. Lanigan*, 196 Ga. App. 424, 396 S.E.2d 28 (1990).

145. See O.C.G.A. § 33-34-2(5) (1990) (repealed 1991).

146. *Id.* Additional insureds in this context does not include permittees.

147. See *id.* § 33-34-4.

148. 196 Ga. App. 626, 396 S.E.2d 793 (1990).

149. *Id.* at 626, 396 S.E.2d at 794.

150. *Id.* at 627, 396 S.E.2d at 794.

151. *Id.*

152. *Accord Slack v. Superior Ins. Co.*, 198 Ga. App. 281, 401 S.E.2d 307 (1991) (Minor struck by a car similarly insured to his father's car did not qualify under his father's policy.).

153. 195 Ga. App. 330, 393 S.E.2d 488 (1990).

154. For a general synopsis of proper procedures for post verdict write offs, see *Bonds v. Burch*, 196 Ga. App. 125, 395 S.E.2d 379 (1990).

155. 195 Ga. App. at 330, 393 S.E.2d at 488-89.

The court explained that the No-Fault Act generally suspended access to the tort system for those who were "eligible" for its basic economic loss benefits.¹⁵⁶ "Any person eligible" for no-fault benefits included "any person who is required" to obtain automobile insurance and was not limited to "any person" who had actually obtained such insurance, as appellant contended.¹⁵⁷

Is a carrier under an automobile owner's policy required to extend PIP coverage in regard to a truck that is not owned, but only leased by its insured? The court in *Ryder Freight Systems v. Williams*¹⁵⁸ answered this question in the negative. Only the owner is required to provide PIP coverage.¹⁵⁹ The carrier may appropriately provide such coverage "[o]nly [for] those autos . . . [the insured] own[s] [,] which are required to have No-Fault benefits in the state where they are licensed or principally garaged."¹⁶⁰

Carriers providing basic or optional PIP coverage are only entitled to subrogation when at least one of the vehicles involved in an accident weighs "more than 6,500 pounds unloaded"¹⁶¹ or when they extend optional PIP coverage for property damage to an insured motor vehicle.¹⁶² Is this right to subrogation available against a liability insurer even when it is shown that PIP benefits provide less than full compensation for the victim? The court in *Southern Guaranty Insurance Co. v. Georgia Farm Bureau Mutual Insurance Co.*¹⁶³ held that subrogation was available in this case at least in principle.¹⁶⁴ "[C]omplete compensation of the injured insured is a condition precedent to . . . subrogation only in the event that the tortfeasor is uninsured and is not a self insurer."¹⁶⁵ Nevertheless, subrogation was unavailable since the liability insurer had in good faith settled with the victim for the full policy limits.¹⁶⁶ All subrogation rights against the liability insurer were extinguished because permitting subrogation after exhaustion of the liability limits in the policy "would necessarily constitute an unauthorized attempt to increase or en-

156. *Id.*, 393 S.E.2d at 489 (citing *Davidson v. Bradford*, 248 Ga. 8, 11, 262 S.E.2d 780, 783 (1980)); O.C.G.A. § 33-34-9(b) (1990) (repealed 1991).

157. 195 Ga. App. at 330, 393 S.E.2d at 489 (relying on the supreme court's construction of O.C.G.A. § 33-34-4 (1990) in *Davidson*, 245 Ga. at 8, 262 S.E.2d at 780).

158. 196 Ga. App. 802, 397 S.E.2d 152 (1990).

159. See O.C.G.A. § 33-34-4(a) (1990) (repealed 1991).

160. 196 Ga. App. at 804, 397 S.E.2d at 153 (quoting the insurance policy).

161. O.C.G.A. § 33-34-3(d)(1)(A) (1990) (repealed 1991).

162. *Id.* § 33-34-3(d)(1)(B) (repealed 1991).

163. 195 Ga. App. 784, 395 S.E.2d 264 (1990).

164. *Id.* at 785, 395 S.E.2d at 265.

165. *Id.* (quoting *Southern Gen. Ins. Co. v. Cotton States Mut. Ins. Co.*, 193 Ga. App. 240, 240-41, 387 S.E.2d 435, 436 (1989)).

166. *Id.*

large the limits of that policy."¹⁶⁷ This apparent catch-22 situation raises the question of whether, as a practical matter, a liability insurer can ever be vulnerable to claims for subrogation. The answer is provided by *Southern General Insurance Co. v. Cotton States Mutual Insurance Co.*,¹⁶⁸ in which the court explained that "a liability carrier that settles with the injured party for less than the policy limits does so at its own risk and remains potentially liable for the no-fault carrier's subrogation claim up to the policy limits."¹⁶⁹

XII. OMNIBUS CLAUSE

Bailees or "permittees" of motor vehicles are covered as additional insureds under the omnibus clause in the owner's liability policy. Since they are third party beneficiaries and not parties, they generally have to make an express "election" to assert coverage under such a policy.¹⁷⁰ The supreme court in *Cotton States Mutual Insurance Co. v. Starnes*¹⁷¹ held that a bailee who has no automobile insurance policy of his own cannot refuse to make such an election.¹⁷² Georgia's public policy of requiring liability insurance "not only for the benefit of the insured but to ensure compensation for innocent victims of negligent motorists" compelled this conclusion.¹⁷³ The court brushed aside the insurer's argument that this result would force parties "into a contractual relationship despite their mutual desire to the contrary" by pointing out that "insurance law occasionally requires parties to enter into relationships that are contractual in nature."¹⁷⁴

It should be noted that the court's application and redefinition of the "rule of election" is limited to situations in which the additional insured has no insurance. The court does not specifically address the situation of an additional insured whose own insurance has lower liability limits than those of the insurance available to him by election. This issue will have to await future litigation.

167. *Id.*, 395 S.E.2d at 266.

168. 193 Ga. App. 240, 387 S.E.2d 435 (1989).

169. *Id.* at 241, 387 S.E.2d at 437.

170. *Hicks v. Continental Ins. Co.*, 146 Ga. App. 124, 245 S.E.2d 482 (1978).

171. 260 Ga. 235, 392 S.E.2d 3, *aff'g Starnes v. Cotton States Mut. Ins. Co.*, 194 Ga. App. 320, 390 S.E.2d 419 (1990).

172. 260 Ga. at 238, 392 S.E.2d at 5. The driver "affirmatively renounced any intention to seek coverage" under his employer's liability policy because he evidently felt that to do so "would be to shirk individual responsibility for his own actions." 194 Ga. App. at 323, 390 S.E.2d at 421.

173. 260 Ga. at 237, 392 S.E.2d at 4 (quoting *Cotton States Mut. Ins. Co. v. Neese*, 254 Ga. 335, 337, 329 S.E.2d 136, 139 (1985)).

174. *Id.*, 392 S.E.2d at 5.

The new-wave "simple English" or "easy reading" automobile policies are now beginning to percolate through our court system. They provide in awkward but clear terms that no person shall be considered an insured person if that person uses "a vehicle without a reasonable belief"¹⁷⁶ of having permission to use the vehicle. The court of appeals had two occasions to delineate the reach of this exclusion.

In *Omni Insurance Co. v. Harps*,¹⁷⁶ the husband of the named insured, who was himself an additional insured under the policy's omnibus clause, took his wife's keys while she was asleep, drove off in her car, and was involved in a collision. No one disputed that his wife had given him the keys only "for safekeeping in case she lost her set."¹⁷⁷ He had no driver's license, and it was understood that he was not to use the car without first securing permission. Prior to the collision, he had occasionally violated this understanding. These violations had always resulted in arguments. At no time had his wife ratified his use without permission. In fact, he admitted that he had not bothered to wake her before his last and fateful escapade because he had been drinking and knew she would never give him permission to use the car.¹⁷⁸ The court held that although he was an additional omnibus insured under the policy, the operation of the exclusion would not be affected.¹⁷⁹ He was uninsured if he lacked a "reasonable belief" that he obtained either implied or express permission to use the vehicle.¹⁸⁰ This objective standard would not be met by a unilateral subjective belief.¹⁸¹ While "[a] reasonable belief that one has implied permission to drive his or her spouse's automobile may otherwise be inferred from the mere existence of the marital relationship and from possession of a set of keys . . . such an inference has clearly been rebutted in the instant case."¹⁸² Therefore, summary judgment was granted for the insurer.¹⁸³

In *Samples v. Southern Guarantee Insurance Co.*,¹⁸⁴ the driver of a vehicle involved in a collision spent a social evening at a friend's house. While there he became intoxicated and fell asleep. After awakening and

175. For a typical exclusion of this type see, e.g., the 1986 Personal Auto Policy. ("Using a vehicle without a reasonable belief that that person is entitled to do so.") ALLIANCE OF AMERICAN INSURERS, 1989 POLICY KIT FOR STUDENTS OF INSURANCE 4 (1989).

176. 196 Ga. App. 340, 396 S.E.2d 66 (1990).

177. *Id.* at 341, 396 S.E.2d at 67.

178. *Id.*

179. *Id.* at 343, 396 S.E.2d at 68-69.

180. *Id.* at 342, 396 S.E.2d at 68.

181. *Id.*

182. *Id.*

183. *Id.* at 343, 396 S.E.2d at 69.

184. 197 Ga. App. 258, 398 S.E.2d 220 (1990).

finding the keys left in the ignition lock, he drove away in his friend's car. He was never told that he could drive his friend's car, nor was he ever told that he could not. He merely assumed that his friend would not mind.¹⁸⁵ The court held that such subjective belief was not reasonable as a matter of law.¹⁸⁶ While *Harps* conceded that a reasonable belief of implied permission to use a spouse's car may be inferred from the existence of the marital relationship, no such belief may be inferred from "the existence of merely a friendly relationship and from non-permissive access to a set of keys to that automobile."¹⁸⁷ The court again granted a summary judgment in favor of the insurer.¹⁸⁸

XIII. PRIMARY AND EXCESS CARRIERS

An apparent ambiguity is eliminated as a matter of law if the court finds that seemingly divergent parts of a contract are capable of reconciliation.¹⁸⁹ Hence, no occasion to present the question of the contract's meaning to the jury or to resolve it by recourse to *contra proferentem* exists. In *Southeast Atlantic Cargo Operators, Inc. v. First State Insurance Co.*,¹⁹⁰ the policy provided in its declarations that it was to be "in excess of . . . [t]he amount recoverable under the underlying insurance."¹⁹¹ In the text of the agreement, the policy provided, in pertinent part, that the insurer would indemnify its insured for "ULTIMATE NET LOSS . . . in excess of RETAINED LIMIT, as herein stated."¹⁹² The insurer's liability was "only for the ULTIMATE NET LOSS in excess of . . . the INSURED'S: . . . UNDERLYING LIMIT — an amount equal to the *limits of liability indicated beside the underlying insurance listed . . . plus the applicable limits of any other underlying insurance collectible by the INSURED . . .*"¹⁹³ When the primary insurer became insolvent, the excess insurer claimed it was only liable for amounts in excess of the primary's listed limit of five hundred thousand dollars, even though that amount was not "recoverable." The court agreed.¹⁹⁴ It explained that, even if one concedes, *arguendo*, that "[w]hen an excess insurer uses the term "collectible" or "recoverable" it is agreeing to drop down in the event the primary coverage becomes uncollectible or unrecov-

185. *Id.* at 259, 398 S.E.2d at 220.

186. *Id.*, 398 S.E.2d at 221.

187. *Id.*

188. *Id.* at 260, 398 S.E.2d at 221.

189. See statutory rules of construction O.C.G.A. § 13-2-2 (1990).

190. 197 Ga. App. 371, 398 S.E.2d 264 (1990).

191. *Id.* at 371, 398 S.E.2d at 265 (quoting the insurance policy) (brackets in original).

192. *Id.* at 372, 398 S.E.2d at 265 (quoting the insurance policy).

193. *Id.* (quoting from policy).

194. *Id.* at 373, 398 S.E.2d at 266.

erable'¹⁹⁶ This was not the case here. The single reference to "recoverable" in the declarations page did not modify or negate the specific liability limits set forth in the policy itself, which clearly precluded such drop-down coverage.¹⁹⁶

This decision is a bit puzzling because drop-down coverage was not only referred or alluded to in the declarations, but also in the body of the policy itself. The very language upon which the court relies for its conclusion modified "underlying insurance" by using the word "collectible," a synonym for the word "recoverable" as used in the declaration.

Southern General Insurance Co. v. Boerste,¹⁹⁷ a case of first impression in this state, involved two aviation liability insurance policies that were potentially present upon the risk. The first policy was issued to the airplane's owner. It contained no "other insurance" clause. The second policy was issued to the company supplying the pilot.¹⁹⁸ This policy contained an "other insurance" clause which provided that "[i]f an Insured . . . has other insurance against a loss covered by . . . this policy, this insurance shall be excess insurance only over any other valid and collectible insurance with respect to such Insured."¹⁹⁹ The court held that the "principles of automobile liability insurance law"²⁰⁰ that have already been extended to motor boats by analogy should also be the policy issued to the airplanes and aviation insurance.²⁰¹ Therefore, the policy issued to the airplane's owner is generally the primary policy "and the insurer issuing it is liable up to the limits of the policy without apportionment."²⁰² The excess policy is unavailable until the primary policy is exhausted.²⁰³

XIV. PUNITIVE DAMAGES

Punitive damages against an uninsured motorist carrier ("UMC") can deter a known tortfeasor who is subject to the jurisdiction of the court because the carrier, having paid its insured victim, may assert a subrogation claim against the tortfeasor. This factor persuaded the court of ap-

195. *Id.* (quoting *United States Fire Ins. Co. v. Capital Ford Truck Sales, Inc.*, 257 Ga. 77, 81, 355 S.E.2d 428, 431 (1987)) (brackets in original).

196. *Id.*

197. 195 Ga. App. 665, 394 S.E.2d 566 (1990).

198. *Id.* at 665, 394 S.E.2d at 567.

199. *Id.* at 666, 394 S.E.2d at 567-68 (quoting the insurance policy).

200. *Id.* at 667, 394 S.E.2d at 568.

201. *Id.* (citing *State Farm Fire & Casualty Co. v. Holton*, 131 Ga. App. 247, 205 S.E.2d 872 (1974)).

202. *Id.* (quoting *Georgia Mut. Ins. Co. v. Southern Gen. Ins. Co.*, 181 Ga. App. 238, 240, 351 S.E.2d 658, 660 (1986)).

203. *Id.*

peals in *State Farm Mutual Automobile Insurance Co. v. Weathers*²⁰⁴ to hold that punitive damages in these cases were permissible.²⁰⁵ The plain statutory language requires UMCs "to pay the insured *all sums* which he shall be legally entitled to recover."²⁰⁶ Because the Uninsured Motorist Statute²⁰⁷ is remedial, it precluded a court-created exception for punitive damages.²⁰⁸

In *Roman v. Terrell*,²⁰⁹ the court of appeals closely examined the statute and found its conclusion in *Weathers* to be incorrect.²¹⁰ The Uninsured Motorist Statute requires an uninsured motorist carrier "to compensate its insured for all sums the insured could recover from the tortfeasor *because of bodily injury or property damage*."²¹¹ The court determined that this language did not include punitive damages.²¹² The court also re-examined its rationale in *Weathers* and concluded that the potential deterrent effects of punitive damages upon known tortfeasors because of subrogation "is ephemeral at best," since "most uninsured motorists are judgment proof."²¹³ Raising their premiums would not deter known tortfeasors either because they carry no liability insurance by definition.²¹⁴ The supreme court followed the court of appeals in *Roman* and reversed *Weathers*.²¹⁵ Therefore, the Uninsured Motorist Statute, pending legislative intervention, does not allow punitive damages, regardless of whether the uninsured motorist is unknown and eludes the grasp of the court, or whether the motorist is identified and subject to its jurisdiction.

XV. RES JUDICATA

In *Helmuth v. Life Insurance Co.*,²¹⁶ claimant brought an action against an insurer for proceeds under a life insurance policy that named her beneficiary. When she brought suit, she mistakenly assumed that the

204. 193 Ga. App. 557, 388 S.E.2d 393 (1989), *rev'd*, 260 Ga. 123, 392 S.E.2d 1, *vacated*, 195 Ga. App. 736, 394 S.E.2d 921 (1990).

205. 193 Ga. App. at 559, 388 S.E.2d at 394.

206. *Id.* at 558, 388 S.E.2d at 393 (quoting O.C.G.A. § 33-7-11(a)(1) (Supp. 1991)) (emphasis added).

207. O.C.G.A. § 33-7-11 (1990 & Supp. 1991).

208. 193 Ga. App. at 558, 388 S.E.2d at 394.

209. 195 Ga. App. 219, 393 S.E.2d 83 (1990).

210. *Id.* at 221, 393 S.E.2d at 85.

211. *Id.*

212. *Id.*

213. *Id.* at 222, 393 S.E.2d at 86.

214. *Id.*

215. *State Farm Mut. Auto. Ins. Co. v. Weathers*, 260 Ga. 123, 392 S.E.2d 1 (1990). The supreme court had denied a writ of certiorari in *Roman*. 195 Ga. App. at 221, 393 S.E.2d at 85.

216. 194 Ga. App. 685, 391 S.E.2d 412 (1990).

policy was valid and limited her pleadings and proof to breach of contract. After a judgment for the insurer on the grounds that the policy was invalid, claimant brought a new action against the insurer in tort. She asserted that the insurer was vicariously liable because its agent's imputable fraud had caused the issuance of the invalid policy.²¹⁷ The court barred the second action because claimant knew all the facts surrounding the alleged fraud claim when she filed her first action, but neither pleaded nor proved a tort in that action.²¹⁸ Claimant asserted that "because she did not know the contract was invalid," she could not have included the tort claim in the prior action.²¹⁹ The court rejected this argument as "spurious."²²⁰ After *Helmuth* claimants against insurers are well advised to plead and prove every theory of recovery that the facts may conceivably yield, even if this means pleading in the alternative.

XVI. STANDARD OR UNION MORTGAGE CLAUSE

The facts in *Southern General Insurance Co. v. Key*²²¹ demand simplification to facilitate comprehension. A mortgaged his house to B. Subsequently, A mortgaged his house to C (by a second security deed). After A died, C obtained a policy on the house that listed A as the insured and B and C as loss payees under the standard or union mortgage clause. Later, X, who was not the appointed administrator of A's estate, purported to act for the estate and obtained a policy from the same insurer, listing A as the insured and B as the only loss payee. Neither the insurer nor the mortgagees knew of A's death when the insurer issued the policies.²²²

The insurer contended that both policies were void because A, having died, lacked capacity to contract.²²³ The court held that A was only the "nominal insured" and "not the contracting party for either policy."²²⁴ The first policy was valid because when C purchased the policy, he had an insurable interest in the house as a lienholder.²²⁵ The second policy was valid because it was purchased by X on behalf of A's estate which also had an insurable interest in the house. Even assuming that the estate could not recover under the policy²²⁶ because of X's unauthorized intervention, the policy was at least valid in regard to B, who had an insurable

217. *Id.* at 685, 391 S.E.2d at 413.

218. *Id.* at 686, 391 S.E.2d at 413-14.

219. *Id.*, 391 S.E.2d at 413.

220. *Id.*

221. 197 Ga. App. 290, 398 S.E.2d 237 (1990).

222. *Id.* at 291, 398 S.E.2d at 238.

223. *Id.*

224. *Id.*

225. *Id.*

226. This was not an issue in this appeal. *Id.* at 292, 398 S.E.2d at 238.

interest in the house as a lienholder.²²⁷ The customary provision in standard or union mortgage clauses "provide[s] that the mortgagee's right to recover will not be affected or invalidated by any act or omission of the mortgagor."²²⁸ Under Georgia law, such language creates "a separate contract between the mortgagee and the insurer."²²⁹

While undoubtedly correct as to C's status, this decision is puzzling in its implications relating to B's status. Acts or omissions by the mortgagor that occur after he has secured a valid policy cannot detract from the mortgagee's rights.²³⁰ Yet, the decision in *Key* seems to go beyond that. The holding in *Key* implies that even acts or omissions at the very inception of the policy that prevent the formation of a contract between the insurer and the mortgagor cannot prevent the formation of a separate contract between the insurer and the mortgagee. Perhaps the court assumed sub silentio that B's assertion of its rights as a loss payee ratified X's actions in procuring the policy.

XVII. SUBROGATION AND INDEMNITY

First-party insurers learned long ago that equitable subrogation is too open-textured for their perceived needs. Hence, first-party policies invariably contain conventional subrogation clauses that establish procedures for subrogation.²³¹ Yet even these often fail of their intended purpose because they lack precision and specificity.

*Nationwide Mutual Insurance Co. v. Kershaw Manufacturing Co.*²³² serves as a paradigmatic case on this point. In *Kershaw* the insurer, after paying its insured for the total loss of a piece of industrial equipment, sought reimbursement as a subrogee against the seller and manufacturer of the equipment on the theory of negligence, breach of warranty, and strict liability.²³³ The policy subrogated the insurer "to all the insured's rights of recovery against any person or organization."²³⁴ This language entitled the insurer to recover the proceeds of an action brought by the insured.²³⁵ The language did not assign the insured's right of action, allowing the insurer to sue in its own right as a subrogee or assignee.²³⁶

227. *Id.*

228. *Id.*

229. *Id.*

230. See KEETON & WIDISS, *supra* note 4, § 4.2(b).

231. Conventional subrogation is particularly prevalent in those areas in which equitable subrogation is generally unavailable, such as subrogation to contract rights of the insured.

232. 198 Ga. App. 153, 401 S.E.2d 23 (1990).

233. *Id.* at 153, 401 S.E.2d at 24.

234. *Id.* at 154, 401 S.E.2d at 24 (emphasis added).

235. *Id.* at 154-55, 401 S.E.2d at 24-25.

236. *Id.* at 154, 401 S.E.2d at 24.

Kershaw also reminds insurers they are at some risk when they pay claims that are not clearly covered by their policies. If the court determines such payments were voluntary the court may deny subrogation.²³⁷ Being a species of restitution to prevent unjust enrichment, subrogation is not available to mere volunteers.²³⁸

An insurer cannot get subrogation against its own insured. It cannot shift back to the insured the very loss the insured paid it to assume.²³⁹ It can be tempting to lose sight of this simple principle when more than one insured is involved, and when the policy poses surface complexities. In *Curles v. United States Fidelity & Guaranty Co.*,²⁴⁰ the lessor sued the lessee of a trailer for property damage to the trailer. The lessor's insurer paid for the damage under its first-party collision rider and sought subrogation against the lessee. The lessee contended that he was an additional insured under the liability portion of the policy. In response, the insurer directed the trial court's attention to the insured's policy.²⁴¹ "The policy expressly excluded from liability coverage 'Property damage' to property owned or transported by the 'insured' or in the 'insured's' care, custody or control."²⁴² The trial court held that the lessee did not occupy the status of an additional insured when he damaged the lessor's trailer. The lessee, therefore, was subject to subrogation like any other third-party tortfeasor. The court of appeals disagreed.²⁴³ The trial court had overlooked the policy's coverage of the lessee, who had "[p]resumably . . . paid in his leasing fee some or all of the premium applicable to this trailer."²⁴⁴ The lessor's collision rider also covered the lessee as an additional insured.²⁴⁵ His status as a co-insured under the collision rider, rather than his status as a co-insured under the liability coverage, immunized him against any attempts at subrogation.²⁴⁶

In *United States Fidelity & Guarantee Co. v. Saylor Marine Corp.*,²⁴⁷ a leased tractor injured the lessee's employee while the employee was using the tractor. The employee brought an action for negligence against the lessor. The lessor's liability insurer settled the action and obtained a release. The insurer then sought indemnity from the lessee under a clause

237. *Id.* at 155, 401 S.E.2d at 25.

238. *Id.* For a criticism of the so-called "volunteer doctrine," see KEETON & WIDISS, *supra* note 4, § 3.10(d)(3).

239. See JERRY, *supra* note 101, § 96(g).

240. 198 Ga. App. 857, 403 S.E.2d 458 (1991).

241. *Id.* at 857, 403 S.E.2d at 459.

242. *Id.* (quoting from policy).

243. *Id.* at 858, 403 S.E.2d at 459.

244. *Id.* at 857, 403 S.E.2d at 459.

245. *Id.* at 857-58, 403 S.E.2d at 459.

246. *Id.*

247. 196 Ga. App. 850, 397 S.E.2d 188 (1990).

in the lease that, in essence, required indemnification for harm caused by a combination of the lessor's and lessee's negligence.²⁴⁸ The court held that the insurer stated a cause of action for indemnity.²⁴⁹ Settlement of the tort claim against the insured was not an admission that the insured was the sole tortfeasor who "bore all liability for the injuries alleged in the claim."²⁵⁰ Accordingly, the settlement did not prejudice the insurer's indemnity claim.²⁵¹ Such prejudice would only occur if the insurer had entered into a consent judgment in the underlying tort action.²⁵²

XVIII. UNINSURED MOTORIST COVERAGE

A. General

In *Hall v. Canal Insurance Co.*,²⁵³ a case of first impression in this state, claimant was injured in an automobile accident and brought an action against the other driver. The driver's liability insurer filed an action against him for a declaratory judgment that its policy provided no coverage. Claimant's uninsured motorist carrier entered a defense for the driver in this action and won a judgment that liability coverage actually existed.²⁵⁴ The court held that the UMC could not recover legal expenses and attorney fees incurred in its successful defense of the declaratory judgment action.²⁵⁵ The statute provides in pertinent part that in cases where "the insurer denies coverage and it is determined by declaratory judgment . . . that there is in fact coverage, the insurer shall be liable to the insured for legal cost[s] and attorney's fees."²⁵⁶ The statutory language precluded any liability by the insurer to the UMC.²⁵⁷ Even if such telic construction would better serve the public good, the court was "not at liberty to disregard the plain wording of the statute simply to advance . . . [its] own notions of what the law ought to be."²⁵⁸

Is a self-insurer subject to a direct action or can it be joined in an action against the tortfeasor before the tortfeasor's liability is legally established? *National Services Industries, Inc. v. Great Global Assurance*

248. *Id.* at 850-51, 397 S.E.2d at 188.

249. *Id.* at 851, 397 S.E.2d at 189.

250. *Id.*, 397 S.E.2d at 188-89.

251. *Id.*, 397 S.E.2d at 189.

252. *Id.*

253. 195 Ga. App. 16, 392 S.E.2d 340 (1990).

254. *Id.* at 16, 392 S.E.2d at 341.

255. *Id.* at 17, 392 S.E.2d at 341-42.

256. *Id.*, 392 S.E.2d at 341 (quoting O.C.G.A. § 33-7-15(b.1) (Supp. 1991)) (brackets in original).

257. *Id.*

258. *Id.*

Co.²⁵⁹ addresses this issue in a somewhat offbeat litigation context. Plaintiffs brought a personal injury action against the driver of a vehicle who was allegedly responsible for a collision. Plaintiffs sued the self-insurer, *inter alia*, in its capacity as the driver's employer, which was vicariously liable for the alleged negligence, and in its capacity as self-insurer. Plaintiffs also served their two UMC's, which answered in their own names.²⁶⁰ Subsequently, the self-insurer received summary judgment on plaintiff's various tort claims, "such as respondeat superior and negligent entrustment," which plaintiffs had asserted against it.²⁶¹

The court explained that "a plan and certificate of self-insurance serves as the substantial equivalent of an insurance 'policy' for the purposes of [liability insurance]." ²⁶² Thus, self-insurers are no more vulnerable to a direct action before the plaintiff "has obtained a judgment against the tortfeasor"²⁶³ than are liability insurers. After resolution of the tort issues, the court should have dismissed the self-insurer from the case.²⁶⁴ The trial court, therefore, had no jurisdiction to hear further arguments and to rule that the self-insurer was "obligated . . . to pay the full amount of any judgment entered against . . . [the driver] and that the . . . [plaintiffs'] insurance carriers consequently had no potential liability under the . . . policies in question."²⁶⁵

An UMC, by filing defensive pleadings in its own name, "secures the right to seek an adjudication against its insured on coverage issues as well as to defend the claim against the uninsured motorist."²⁶⁶ However, filing these pleadings plainly does not secure "the right to obtain a declaratory judgment against another insurer that is not properly before the court as a party to the litigation."²⁶⁷ The court can only grant relief in a separate and independent action for a declaratory judgment that names the self-insurer and the original plaintiffs as defendants.²⁶⁸

B. Denial of Coverage by Liability Carrier

The Uninsured Motorist Act ("Act") provides that a motor vehicle is uninsured, *inter alia*, when there is "liability insurance in existence but the insurance company writing the insurance has legally denied coverage

259. 198 Ga. App. 258, 401 S.E.2d 286 (1990).

260. *Id.* at 258, 401 S.E.2d at 287.

261. *Id.* at 259, 401 S.E.2d at 287.

262. *Id.* (quoting *Twyman v. Robinson*, 255 Ga. 711, 712, 342 S.E.2d 313, 315 (1986)).

263. *Id.*, 401 S.E.2d at 288.

264. *Id.* at 259-60, 401 S.E.2d at 288.

265. *Id.* at 259, 401 S.E.2d at 287.

266. *Id.* at 260, 401 S.E.2d at 288.

267. *Id.* at 260-61, 401 S.E.2d at 288.

268. *Id.*

under its policy."²⁶⁹ In *Moore v. State Farm Mutual Automobile Insurance Co.*,²⁷⁰ a liability insurer, which had been defending its insured under a reservation of rights letter, instructed the attorney that it had applied to withdraw from the case. The insurer then notified plaintiff and his UMC that it was denying liability coverage on specified grounds.²⁷¹ The court held that this denial rendered the involved vehicle uninsured and thus triggered the uninsured motorist coverage.²⁷² The policy in question only required that "the insuring company den[y] coverage"²⁷³ instead of requiring that it *legally* deny coverage as mandated by the Act.²⁷⁴ Since UMCs may offer their insureds more liberal terms than those prescribed by the Act, and since the liability insurer's actions amounted to a denial within the policy limits, the policy, in effect, rendered the vehicle uninsured.²⁷⁵ Given the facts, the court expressly refrained from deciding whether the insurer's actions amounted to a legal denial under the procedure articulated in *Richmond v. Georgia Farm Bureau Mutual Insurance Co.*²⁷⁶

In *Southern General Insurance Co. v. Thomas*,²⁷⁷ the UMC argued that uninsured motorist coverage was only available when the insurer legally denies liability based on the absence of liability insurance when the collision occurs.²⁷⁸ Conversely, the coverage is not available when "there is a liability insurance in existence at the time of the collision and the insurer issuing that liability policy only subsequently denies coverage on the basis of its own insured's *breach of policy condition*."²⁷⁹ The court skewered this argument by saying that the Act "provides only for the liability carrier's legal denial of coverage to its insured and limits neither the timing of nor the specific basis for that legal denial."²⁸⁰ The court's reasoning comports with the purpose of uninsured motorist coverage. Any acts after the collision which denude insured motorists of coverage under

269. O.C.G.A. § 33-7-11(b)(1)(D)(iii) (Supp. 1991).

270. 196 Ga. App. 755, 397 S.E.2d 127 (1990).

271. *Id.* at 757, 397 S.E.2d at 129.

272. *Id.*

273. *Id.* (quoting the insurance policy).

274. *Id.* at 757-58, 397 S.E.2d at 128-29.

275. *Id.* at 757, 397 S.E.2d at 129.

276. *Id.* at 759, 397 S.E.2d at 128 (declining to apply *Richmond*, 140 Ga. App. 215, 231 S.E.2d 245 (1976)). Under *Richmond*'s procedure, the insurer's filing an action for a declaratory judgment against its insured satisfies the "legal denial" requirement. *Id.*

277. 197 Ga. App. 196, 397 S.E.2d 624 (1990).

278. *Id.* at 197, 397 S.E.2d at 625.

279. *Id.*

280. *Id.* (construing O.C.G.A. § 33-7-11(b)(1)(D)(iii) (Supp. 1991)).

their liability policies leave the victims in the same position they would have occupied had there never been any insurance at all.²⁸¹

C. Effect of Service Upon the UMC

What is a UMC's posture after being served? In *Hulsey v. Standard Guaranty Insurance Co.*,²⁸² plaintiff filed an action against an alleged tortfeasor. For reasons not made clear in the opinion, plaintiff also served defendant's UMC.²⁸³ The carrier provided defendant with counsel and filed an answer in defendant's name. Defendant later filed a counterclaim through his own counsel.²⁸⁴ The court concluded that the original plaintiff, who was uninsured, was responsible for the action and entered judgment against defendant's UMC.²⁸⁵ The court held that defendant (counterclaimant) was not entitled to a judgment against his UMC in the same action because plaintiff properly served the UMC, and because the UMC participated in the litigation.²⁸⁶ Service upon the carrier merely notified the carrier, allowing it, at its own election, to "file pleadings and take other action allowable by law in the name of either the known owner or operator or both or itself."²⁸⁷ Since it took none of these steps in its own name, the carrier avoided becoming a party to the action. Thus, the court could not enter a judgment against it in the original action.²⁸⁸ The insured will, therefore, have to seek his remedy in a separate action against the carrier.²⁸⁹

The court in *Maxwell v. State Farm Mutual Automobile Insurance Co.*²⁹⁰ clarified *Hulsey's* rationale. One should not read *Hulsey* as favoring form over substance. In *Maxwell* the UMC filed an answer that, although "denominated as being only that of John Doe," actually raised defenses to its own contractual liability under the uninsured motorist coverage.²⁹¹ The UMC became a named party to the John Doe action, which entitled it to contest John Doe's tort liability as well as its own contractual liability contracts.²⁹²

281. *Id.*, 397 S.E.2d at 625-26.

282. 195 Ga. App. 803, 395 S.E.2d 282 (1990).

283. *Id.* at 803, 395 S.E.2d at 283. Plaintiff served defendant's UMC as provided by O.C.G.A. § 33-7-11(d) (Supp. 1991). 195 Ga. App. at 803, 395 S.E.2d at 283.

284. 195 Ga. App. at 803-04, 395 S.E.2d at 283.

285. *Id.* at 804, 395 S.E.2d at 283.

286. *Id.*

287. *Id.* (quoting *J.C. Penney Casualty Ins. Co. v. Williams*, 149 Ga. App. 258, 260, 253 S.E.2d 878, 881 (1979) (quoting predecessor statute to O.C.G.A. § 33-7-11(d))).

288. *Id.*

289. *Id.*

290. 196 Ga. App. 545, 396 S.E.2d 291 (1990).

291. *Id.* at 545, 396 S.E.2d at 292.

292. *Id.* at 546, 396 S.E.2d at 292.

D. Time for Service Upon the UMC

Georgia's requirements for perfecting claims against the UMC in a timely manner are simple in theory and occasionally harsh in practice. The plaintiff must serve the UMC within the time required by law for service upon the uninsured motorist in the tort action.²⁹³ When the plaintiff files the complaint against the motorist before the expiration of the applicable limitation, but service is made after that time, the filing tolls the statute only when the plaintiff proves "that he acted in a reasonable and diligent manner in attempting to insure that a proper service was made as quickly as possible."²⁹⁴

The court in *Clark v. Safeway Insurance Co.*²⁹⁵ held that a timely complaint against the uninsured motorist did not toll the limitation because plaintiff's inability to locate and serve defendant did not explain or justify the fifteen-month delay in serving her insurer.²⁹⁶ The court reiterated that the time for serving the UMC runs from the date the cause of action against the motorist arises and not from the date the motorist is legally shown to be uninsured or underinsured.²⁹⁷

The holding in *Shepard v. Allstate Insurance Co.*²⁹⁸ illustrates the harshness of this time constraint. In *Shepard* liability insurance coverage simply vanished after the time for serving the UMC expired. A pedestrian who was struck by a taxicab brought an action against its driver. Since defendant had a valid liability policy, plaintiff did not perfect service upon his UMC. About ten months after the statute of limitations expired, defendant's liability insurer became insolvent. Plaintiff immediately perfected service upon his UMC.²⁹⁹ The court sided with the UMC and held that service was simply too late.³⁰⁰

Shepard and its antecedents remind attorneys to perfect service upon all their clients' UMCs as a matter of routine, no matter how remote the possibility that they may have to rely on the coverage afforded. *Dewberry v. State Farm Insurance Co.*³⁰¹ demonstrates how this precautionary step is not a futile gesture. In *Dewberry* a UMC, after actively participating in

293. *Vaughn v. Collum*, 236 Ga. 582, 224 S.E.2d 416 (1976).

294. *Forsyth v. Brazil*, 169 Ga. App. 438, 313 S.E.2d 138 (1984) (quoting *Childs v. Catlin*, 134 Ga. App. 778, 781, 216 S.E.2d 360, 362 (1975)).

295. 198 Ga. App. 282, 401 S.E.2d 72 (1991).

296. *Id.* at 282, 401 S.E.2d at 73.

297. *Id. Compare with Cotton States Mut. Ins. Co. v. Bogan*, 194 Ga. App. 824, 392 S.E.2d 33 (1990) (involving a 463-day delay under possibly extenuating circumstances, which warranted remand to the trial court).

298. 198 Ga. App. 144, 400 S.E.2d 682 (1990).

299. *Id.* at 144-45, 400 S.E.2d at 682.

300. *Id.* at 145, 400 S.E.2d at 682.

301. 197 Ga. App. 248, 398 S.E.2d 266 (1990).

a tort action, discovered that defendant carried enough liability coverage to preclude its own liability. Although plaintiffs could not prevent a summary judgment dismissing the UMC from the action, they nevertheless achieved their purpose.³⁰² By serving their UMC within the limitation period, plaintiffs "preserved their rights to reinstate their claim against the UMC if and when the defendant is found to be uninsured or underinsured."³⁰³

The court favored substance over form in *Southern Guaranty Insurance Co. v. Cook*.³⁰⁴ In *Cook* the carrier asserted the statute of limitations defense, because the insured served the carrier with a "Second Original" of the complaint rather than with a "Duplicate Original"³⁰⁵ before the limitation period expired. The court quickly dismissed this piece of sophistry and held that a "Second Original," in every respect identical to a "Duplicate Original" but lacking an original signature, served the notice purposes of the statute.³⁰⁶ A "Second Original," therefore, complied with the statute.³⁰⁷

XIX. CONCLUSION

While this year's far-ranging jurisprudence in insurance law eludes any attempt at a nutshell summary, some observations, uncluttered by anecdotal casuistry, are possible. One unifying theme noticed by this writer in his twenty-six years as a court watcher is the judicial respect and deference accorded to legislation. Georgia appellate courts will stretch words and sentences to their maximum etymological range in order to make them conform to the perceived legislative intent. They will not usurp the legislative function whatever temptations the exigencies of each case may pose. Instead, they are content to tell the General Assembly that, by explicitly demanding results or leaving gaps which are incompatible with the tenor and purpose of its laws, it may have stumbled here or there. On several occasions, this practice has caused the General Assembly to return to its drawing boards and make revisions. Montesquieu must have envisaged this process when he contended that a tripartite system of government was the best way to run a civilized society.

302. *Id.* at 248-49, 398 S.E.2d at 267.

303. *Id.* at 250, 398 S.E.2d at 268.

304. 194 Ga. App. 613, 391 S.E.2d 452 (1990).

305. *Id.* at 613, 391 S.E.2d at 452. O.C.G.A. § 33-7-11(d) (Supp. 1991) provides for service of a duplicate original copy upon the insurance company issuing the policy.

306. 194 Ga. App. at 614, 391 S.E.2d at 453.

307. *Id.*