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Insurance

Stephen L. Cotter

C. Bradford Marsh

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by Stephen L. Cotter*
and
C. Bradford Marsh**

I. INTRODUCTION

Although last year the Georgia General Assembly actively worked on managed care and the appellate courts stymied subrogors, legislation was light and appellate litigation routine this survey year. Many appellate opinions were reminders of coverage processing requirements (send the sixty-day "bad faith" demand for payment). Other opinions applied established insurance law principles to particular fact patterns (does every road wreck in Georgia have an appellate coverage decision?). All concerned are having some difficulty adjusting to Georgia's gradual departure from the traditional "four corners" coverage test analysis. The supreme court did breathe life into the hope for liability coverage for sexual harassment, ebbing the tide of adverse coverage opinions.

II. HOMEOWNERS

In a dozen cases, the court of appeals refined the meanings of the "intentional act" exclusion and the "business pursuits" exclusion while also enforcing other terms and conditions of homeowners' policies, given the evidentiary records presented.

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

** Partner in the firm of Swift, Currie, McGhee & Hiers, Atlanta, Georgia. University of Georgia (B.A., 1981; J.D., 1984). Member, State Bar of Georgia; Georgia Defense Lawyers Association; Defense Research Institute; American Bar Association.

Georgia Farm Bureau Mutual Insurance Co. v. Garzone[1] defined "a builders' risk" policy when no previous Georgia case or statute offered a definitive meaning.[2] Garzon, a builder, had a speculative home destroyed by fire. Garzon demanded the insurer pay the face amount of the policy under section 33-32-5(a) of the Official Code of Georgia Annotated ("O.C.G.A."), which mandates such payment for the total loss of a residential structure while exempting a builder's risk policy.[3] Finding the contractor's speculative dwelling was still under construction, the court deemed the policy a builders' risk policy.[4] It is not necessary in Georgia for a builders' risk policy to have a "permission to complete" clause in the policy.[5]

Two decisions enforced, as a matter of law, the "intentional act" exclusion. First, in *Georgia Farm Bureau Mutual Insurance Co. v. Vanuss*,[6] a complaint alleging intentional, repeated violations of riparian rights was sufficient as a matter of law to demand a declaration of noncoverage.[7] While stressing that *City of Atlanta v. St. Paul Fire & Marine Insurance Co.*[8] extends an insurer's obligation to consider facts beyond the four corners of the complaint if the insured notifies the insurer of such additional facts, the court found that the insured had not put the carrier on notice of any mitigating facts.[9] This decision points out the advisability of tendering early not only the suit papers, but also the insured's side of the story, so an insurer's duty to defend might be extended and invoked, if appropriate. Second, the court of appeals in *Brown v. Ohio Casualty Insurance Co.*[10] again enforced intentional act policy terms creating a joint obligation between coinsureds in a difficult fact pattern.[11] Plaintiff, Louise Brown, had her home and its contents damaged by her estranged husband, Johnny Mack Brown. Both Johnny and Louise Brown were on the deed and the mortgage.[12] The insured, Louise Brown, argued that the intentional act clause, which excluded intentional acts "by or at the direction of an insured" did not apply because her estranged husband had quit-claimed his interest in the

1. 240 Ga. App. 304, 523 S.E.2d 386 (1999).
2. *Id.* at 305, 523 S.E.2d at 387.
3. O.C.G.A. § 33-32-5(a) (1996).
4. 240 Ga. App. at 304-05, 523 S.E.2d at 386.
5. *Id.* at 306, 523 S.E.2d at 388.
6. 243 Ga. App. 26, 532 S.E.2d 135 (2000).
7. *Id.* at 27, 532 S.E.2d at 136.
8. 231 Ga. App. 206, 498 S.E.2d 782 (1998).
9. 243 Ga. App. at 27, 532 S.E.2d at 136.
10. 239 Ga. App. 251, 519 S.E.2d 726 (1999).
11. *Id.* at 254, 519 S.E.2d at 728-29.
12. *Id.* at 252, 519 S.E.2d at 727.

property.[13] The court found that by reason of continued joint exposure on the mortgage, Johnny Brown did have an insurable interest, and, hence, the consequences of his intentional acts were excluded.[14] The court followed *Fireman's Fund Insurance Co. v. Dean*,[15] which held that the phrase "*an* insured" created a joint obligation.[16] The court in *Fireman's Fund* distinguished *Richards v. Hanover Insurance Co.*[17] because the latter held that an intentional act clause employing a different phrase, "the insured," created a several obligation, which would not penalize the innocent coinsured.[18]

The courts further defined the term "business pursuit" in the absence of policy definitions. In *Larson v. Georgia Farm Bureau Mutual Insurance Co.*,[19] the insurer denied coverage under the homeowner's policy of an electrical engineer and owner of a machine-shop fabrication business that built hydraulic cable lifts for automobiles and motorcycles. The insured based the claim on exposure relating to his first and only cable car system. The electrical engineer constructed the cable car system for cost plus twenty percent, and numerous aspects of the insured's ongoing business were involved in the fabrication and construction.[20] As in the seminal case of *Brown v. Peninsular Fire Insurance Co.*,[21] the homeowners' policy lacked a definition of "business pursuits." Following *Brown*'s use of the *Webster's New International Dictionary* definition of a business as "'a usu[al] commercial or mercantile activity,'" the court found that this insured's "principal vocation consisted of machine work and building lifts."[22] Hence, the "business pursuits" exclusion applied to deny coverage.[23] The court distinguished *Southern Guaranty Insurance Co. v. Duncan*,[24] wherein an auto mechanic's auto racing activities were not incident to the usual mechanic's work, and *Brown*, wherein a real estate broker was not

13. *Id.* at 253, 519 S.E.2d at 727 (emphasis in orignal).
14. *Id.* at 254, 519 S.E.2d at 728-29.
15. 212 Ga. App. 262, 441 S.E.2d 436 (1994).
16. 239 Ga. App. at 254, 519 S.E.2d at 729 (citing *Fireman's Fund*, 212 Ga. App. at 264, 441 S.E.2d at 43) (emphasis in original).
17. 250 Ga. 613, 299 S.E.2d 561 (1983).
18. 212 Ga. App. at 264, 441 S.E.2d at 437 (citing *Richards*, 250 Ga. at 615-16, 299 S.E.2d at 563-64).
19. 238 Ga. App. 674, 520 S.E.2d 45 (1999).
20. *Id.* at 674, 520 S.E.2d at 46.
21. 171 Ga. App. 507, 320 S.E.2d 208 (1984).
22. 238 Ga. App. at 675, 520 S.E.2d at 47 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 302 (1961)).
23. *Id.* at 676, 520 S.E.2d at 47.
24. 131 Ga. App. 761, 206 S.E.2d 672 (1974).

considered customarily engaged in property development.[25] In *Nationwide Mutual Fire Insurance Co. v. Erwin*,[26] the court held that an occupation, within the meaning of the business pursuits exclusion, could be nothing more than attempting to find a job.[27] After the insured had been terminated from her position with a law firm, her former employer asserted defamation claims against her, all of which allegedly arose out of matters following termination.[28] Keying in on *Jefferson Insurance Co. of New York v. Dunn*,[29] the court stressed that the focus must be on the acts themselves and their connection to furthering the insured's business *at the time of their commission*.[30] The court specifically noted that "[n]one of the alleged tortious acts arose out of or was logically connected with her looking for a job."[31] Hence, posttermination statements and actions would not seem to be barred by the business pursuits exclusion under the *Erwin* ruling.

The court of appeals further refined the "negligent entrustment" exclusion for motorized land vehicles, having previously held that this exclusion was not vague or ambiguous.[32] In *Georgia Farm Bureau Mutual Insurance Co. v. Huncke*,[33] an ATV operated by a nonrelative, nonresident of the insured caused injury four hundred yards from the insured's residence.[34] The only arguable exception to the exclusion of the entrustment by the insured of a motorized land conveyance was exception four, which stated that the entrustment exclusion did not apply to a "conveyance not subject to motor vehicle registration which is . . . used to service an insured's residence."[35] The court found that an ATV used for children's recreation and to scout fields was not "used to service an insured's residence."[36] While recreational use may be a benefit to the insured, the exception applies when the recreational benefit is related to the residence.[37]

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25. 238 Ga. App. at 676, 520 S.E.2d at 47.
26. 240 Ga. App. 816, 525 S.E.2d 393 (1999).
27. *Id.* at 818, 525 S.E.2d at 394.
28. *Id.* at 817, 525 S.E.2d at 396.
29. 269 Ga. 213, 496 S.E.2d 696 (1998).
30. 240 Ga. App. at 818, 525 S.E.2d at 395.
31. *Id.* at 818, 525 S.E.2d at 393-95.
32. Nalley v. Nationwide Mut. Fire Ins. Co., 221 Ga. App. 537, 539, 472 S.E.2d 82, 84 (1996).
33. 240 Ga. App. 580, 524 S.E.2d 302 (1999).
34. *Id.* at 580, 524 S.E.2d at 302.
35. *Id.* at 581, 524 S.E.2d at 303.
36. *Id.*
37. *Id.*

The courts considered a variety of conditions to homeowners' policies. In *Parks v. State Farm General Insurance Co.*,[38] the court enforced an unwritten clause requiring the insured to bring any actions against the insurer within one year of the loss.[39] Because the coverage was provided as a binder, or temporary insurance, it was governed by O.C.G.A. section 33-24-33 and "'deemed to include all the usual terms of the policy.'"[40] Testimony was uncontradicted that State Farm would have incorporated such a clause in a written policy.[41]

In *Williams v. Mayflower Insurance Co.*,[42] another insured unsuccessfully attempted to avoid a "nonassignment" clause. The insured tried to avoid the clause by asserting that premiums had been paid and, therefore, the insured performed his obligations under the policy.[43] The appeals court refused to consider this issue because it was not raised in the lower court, despite substantive support for the avoidance of a nonassignment clause in such circumstances.[44] Insureds fared better with giving notice of the occurrence. In *Newberry v. Cotton States Mutual Insurance Co.*,[45] a year after a physical altercation occurred, an intentional tort claim was filed against insured Newberry. Cotton States received timely notice of the lawsuit, but it claimed that the insured's delay of more than a year in giving notice of the occurrence breached his obligation to provide timely notice.[46] As is customarily the case in this area, the court found a jury question existed, noting that the insured raised two excuses sufficient to submit the issue to a jury: 1) the insured's belief that the matter would be handled under a workers' compensation claim; and 2) the insured's belief that the policy would not afford coverage for the given factual situation.[47] While the first justification for not reporting a remote tort liability theory is clearly established in Georgia law, the second justification seems to legitimize a plea of ignorance that previously has not been considered a justification for failing to report the occurrence.[48]

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38. 238 Ga. App. 814, 520 S.E.2d 494 (1999).
39. *Id.* at 816, 520 S.E.2d at 495.
40. *Id.* (quoting O.C.G.A § 33-24-33 (1996)).
41. *Id.*
42. 238 Ga. App. 581, 519 S.E.2d 506 (1999).
43. *Id.* at 583, 519 S.E.2d at 508.
44. *Id.* (citing Mail Concepts, Inc. v. Foot & Davies, Inc., 200 Ga. App. 778, 781, 409 S.E.2d 567, 569 (1991)).
45. 242 Ga. App. 784, 531 S.E.2d 362 (2000).
46. *Id.* at 784, 531 S.E.2d at 362.
47. *Id.* at 785-86, 531 S.E.2d at 363.
48. *See, e.g.*, Protective Ins. Co. v. Johnson, 256 Ga. 713, 714, 352 S.E.2d 760, 761 (1987) (holding that mere ignorance of the terms of a policy is not a justification).

III. ACCIDENT, HEALTH, AND LIFE INSURANCE

Last year's legislative activity in the area of managed care/health insurance has not yet brought cases to the appellate courts. Only one follow-up piece of legislation[49] was passed, which requires public access to updated provider lists every sixty days.[50] Senate Bill 464[51] declares discrimination against a victim of "family violence" in accepting an application, insuring, renewing, or terminating a policy as unfair.[52] It also disallows inquiry into or the disclosure or transfer of information regarding an applicant's or insured's status as a victim of family violence.[53]

A. *Health Insurance*

In the area of health insurance case law, several interesting opinions of the court of appeals discussed and decided how and to what extent providers could be paid or were restricted in receiving payments. In *Health Horizons, Inc. v. State Farm Mutual Automobile Insurance Co.*,[54] the court, through Judge Eldridge, dispatched several technical defenses offered by State Farm to a fraud suit filed by Health Horizon, Inc., a provider.[55] In a long analysis of the consequences of failing to obtain a certificate of authority, the court held that the purpose behind O.C.G.A. section 14-2-1502(a), which requires the certificate, is satisfied by compelling the issuance of a certificate of authority at some time in the litigation.[56] Perhaps more significantly, the court clearly held that not only did State Farm lack the authority to raise the defense that a business corporation was improperly practicing one of the so-called "learned professions" (this defense could only be raised by the composite State Board of Medical Examiners), but that nothing prohibits a provider, having earned its fees for professional services, "from assigning such choices in action to a for-profit corporation for purposes of administration, billing, and collection of such fees."[57] Those adminis-

49. S. 432, 145th Leg. (Ga. 2000).
50. *Id.* § 2(a)(4).
51. S. 464, 145th Leg. (Ga. 2000).
52. *Id.* § 1.
53. *Id.*
54. 239 Ga. App. 440, 521 S.E.2d 383 (1999).
55. *Id.* at 440-41, 521 S.E.2d at 384-85.
56. *Id.* at 443, 521 S.E.2d at 386 (citing O.C.G.A. § 14-2-1502(a) (1994)). Late registration does not bar suit by a foreign corporation because late registration amounts to "substantial compliance with the statutory scheme." *Id.*
57. *Id.* at 447-48, 521 S.E.2d at 389.

trative activities apparently are thought not to interfere with the physician-patient relationship—specifically, "The corporation is not practicing medicine under such limited circumstances."[58] This opinion gives apparent license for many types of professional fee collection arrangements, some of which seem abusive as applied in practice. By limiting the enforcement of such prohibition on the practice of the learned professions to one state agency, except in the most blatant and known circumstances, timely and effective enforcement seems improbable.

Another provider, a hospital, won in its attempt to recover fully the face amount, $786.10, of its hospital bill in the form of a lien, even though the hospital agreed to charge and accepted its flat fee, $216 from Kaiser Permanente Insurance.[59] The injured party and insured was faced with the "voluntary payment" doctrine. She had satisfied the lien in full without then objecting thereto.[60] The court distinguished several persuasive authorities wherein the challenge to a hospital's alleged inappropriate lien was timely preserved by timely initiating or participating in interpleader or debt actions to recoup the alleged inappropriate increment.[61] To add insult to injury, the court rejected the insured's claim for a reduction by a pro rata share of attorney fees she incurred in obtaining reimbursement.[62] The court noted that it is well established that each litigant is generally obliged to bear her own attorney fees and, in any event, the litigant waived this position by not paying under protest.[63] The decision seems to invite objection, protest, and timely initiation of litigation to preserve these positions.

B. Life Insurance

In the area of life insurance, the appellate courts continued to interpret and apply terms of life insurance policies as unambiguous, as a matter of law, and without the aid of jury interpretation. To avoid an apparently unintended windfall to the surviving spouse of a deceased partner, the court of appeals looked to the intent of two deceased partners to resolve an ambiguity as to the ownership of a life insurance policy.[64] The first partner, Dunn, died in an automobile accident. The remaining partner, Erhardt, received the proceeds of a life insurance

58. *Id.*
59. Watts v. Promina Gwinnett Health Sys., 242 Ga. App. 377, 530 S.E.2d 14 (2000).
60. *Id.* at 378, 530 S.E.2d at 15.
61. *Id.* at 379-80, 530 S.E.2d at 15-16.
62. *Id.*
63. *Id.* at 381, 530 S.E.2d at 17.
64. Dunn v. Royal Maccabees Life Ins., 242 Ga. App. 903, 531 S.E.2d 761 (2000).

policy on Dunn that was purchased to allow Dr. Erhardt to buy out the partnership interests that had devolved on Dunn's wife. When Erhardt later died, both Mrs. Dunn and Mrs. Erhardt claimed onwership of a policy on Erhardt's life. Mrs. Dunn pointed to correspondence and evidence in the application that showed Mr. Dunn as the owner of the policy on Erhardt.[65] The court discounted that troublesome evidence and found Mrs. Erhardt to be the owner.[66] Thus, the court prevented Mrs. Dunn from benefiting from both policies, a result it concluded was unintended by both partners.[67]

In *Barnes v. Greater Georgia Life Insurance Co.*,[68] the court found that D.U.I. constitutes a crime sufficient to meet the "crime" exclusion of a life insurance policy.[69] The deceased perished in a two-car accident while driving in a near alcohol coma (.27 blood alcohol level) and with an unspecified amount of marijuana in his blood. The insurer successfully avoided paying benefits under the policy's accidental death provision based on an exclusion: "The Insurer will not pay for any loss caused directly or indirectly, wholly or partly, by . . . committing, or attempting to commit a crime."[70] The court of appeals held that the word "crime" is unambiguous.[71] It looked to statutory law for the definition of crime: "'a violation of a statute . . . in which there is a joint operation of an act or omission to act and an intention or criminal negligence.'"[72] The court was unpersuaded by a Sixth Circuit decision that found the word "crime" ambiguous because the insured is likely to understand it as meaning no more than such felonies as burglary, armed robbery, or murder.[73]

IV. AUTOMOBILE

A. Uninsured Motorist Coverage

The court of appeals articulated the correct legal standard for due diligence for service by publication under O.C.G.A. section 33-7-11(e) in

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65. *Id.* at 905, 531 S.E.2d at 763.
66. *Id.* at 905-06, 531 S.E.2d at 763.
67. *Id.*
68. 243 Ga. App. 149, 530 S.E.2d 748 (2000).
69. *Id.* at 149, 530 S.E.2d at 748.
70. *Id.*, 530 S.E.2d at 749.
71. *Id.* at 150, 530 S.E.2d at 750.
72. *Id.* (quoting O.C.G.A. § 16-2-1 (1999)).
73. *Id.* (citing American Family Life Assurance Co. v. Bilyeu, 91 F.2d 87, 88-90 (6th Cir. 1990)).

Wilson v. State Farm Mutual Automobile Insurance Co.[74] and *Brown v. State Farm Mutual Automobile Insurance Co.*[75] Wilson sued Strong, an uninsured motorist for injuries sustained in a motor vehicle collision. Wilson timely served a copy of the complaint on her uninsured motorist carrier, State Farm, but was never able to perfect personal service on Strong. After a showing of diligence on her part and of concealment to avoid service on Strong's part, Wilson obtained an order allowing service by publication. State Farm, answering in its own name, moved to set aside the order and to dismiss the lawsuit on the grounds that Wilson had not acted diligently in attempting personally to serve Strong.[76] The court of appeals found that the correct legal standard for due diligence for service by publication under O.C.G.A. section 33-7-11(e) was "diligence in determining that Strong was either out of state or avoiding service and not the standard of diligence for relation back of personal service obtained after the statute of limitation has run."[77] The record showed substantial, repeated, and prolonged efforts not only to locate defendant Strong, but also to serve her as soon as possible.[78] These efforts satisfied the requirement of due diligence under O.C.G.A. section 33-7-11(e) according to the court.[79] A strongly worded dissent by Judge Marion T. Pope indicated that from the time of the order for service by publication until the court's dismissal order ten months later, plaintiff made no effort to locate defendant Strong.[80] The dissent took the view that the plaintiff must remain diligent in attempting to personally serve the alleged tortfeasor despite service by publication.[81]

In *Brown* State Farm was successful on a motion to dismiss for plaintiff's failure to obtain personal service on the uninsured motorist. Five days before the running of the statute of limitations, Brown brought suit against Snow for injuries arising from a car accident. Although Brown served State Farm, her uninsured motorist carrier, she never served Snow. After three months State Farm filed a motion to dismiss claiming that plaintiff had failed properly to serve defendant. Brown did not move for service by publication until a month after the motion.[82] The court found no evidence of any effort to locate or serve defendant Snow for three months between the initial failed attempt and State

74. 239 Ga. App. 168, 520 S.E.2d 917 (1999).
75. 242 Ga. App. 313, 529 S.E.2d 439 (2000).
76. 239 Ga. App. at 168, 520 S.E.2d at 917.
77. *Id.* at 171, 520 S.E.2d at 920.
78. *Id.*
79. *Id.*
80. *Id.* at 174, 520 S.E.2d at 922 (Pope, J., dissenting).
81. *Id.* at 175, 520 S.E.2d at 923.
82. 242 Ga. App. at 314, 529 S.E.2d at 441.

Farm's motion to dismiss.[83] The court cited *Wilson* for the proposition that the plaintiff must show due diligence in determining whether the defendant was either out of state or avoiding service under O.C.G.A. section 33-7-11(e).[84]

Brown also unsuccessfully argued that it was against public policy to allow the uninsured motorist carrier to move to dismiss the action based on failure to serve defendant when the action had been properly served on the carrier.[85] The court of appeals, finding no merit to Brown's argument, indicated that the "purpose of uninsured motorist legislation is to require some provision for first-party insurance coverage to facilitate indemnification for injuries to a person who is legally entitled to recover damages from an uninsured motorist, and thereby to protect innocent victims from the negligence of irresponsible drivers."[86] While the known motorist is deemed uninsured when he cannot be personally served, a plaintiff is not "legally entitled to recover damages from the uninsured motorist" unless he serves the defendant by publication and reduces his claim against the defendant to a judgment.[87]

In *Manzi v. Cotton States Mutual Insurance Co.*,[88] the court of appeals upheld the dismissal of an uninsured motorist suit based upon the insured's failure to comply with the notice provision in her insurance policy.[89] Manzi filed suit against an uninsured motorist and served Cotton States Mutual Insurance Co., her uninsured motorist carrier, with the lawsuit more than six months after the accident. The complaint was Cotton States' first notice of the accident.[90] Cotton States' policy included a provision, "Duties After an Accident or Loss" providing "we must be notified promptly, but in no event later than sixty days, of how, when and where the accident or loss happened."[91] The court of appeals held that this notice provision applied to all claims under the policy, including uninsured motorist claims.[92] The court concluded that the policy language requiring prompt notice of "how, when and where the accident or loss occurred," clearly implied that the sixty-day period would begin on the date of the accident or loss.[93]

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83. *Id.*
84. *Id.* (citing *Wilson*, 239 Ga. App. at 171, 520 S.E.2d 920).
85. *Id.*
86. *Id.* at 315, 529 S.E.2d at 441.
87. *Id.*
88. 243 Ga. App. 277, 531 S.E.2d 164 (2000).
89. *Id.* at 277, 531 S.E.2d at 165.
90. *Id.* at 277-78, 531 S.E.2d at 165.
91. *Id.* at 277, 531 S.E.2d at 166.
92. *Id.* at 278, 531 S.E.2d at 166.
93. *Id.* at 280, 531 S.E.2d at 166.

B. Uninsured Motorist Subrogation

The Georgia Court of Appeals was presented with an issue of first impression in this state: Does the two-year statute of limitations for a personal injury claim apply to an insurer who brings a subrogation action under O.C.G.A. section 33-7-11(f)[94] to recover for the uninsured motorist personal injury payments it made to its insured, or does section 33-7-11(f) create a statutory right of subrogation that gives the insurer, pursuant to O.C.G.A. section 9-3-22,[95] twenty years from the date of the collision to file a suit?[96] The court of appeals decided that under the "plain and unequivocal" language of O.C.G.A. section 33-7-11(f) the insurer is bound by the two-year statute of limitations applicable to the insured to whom the insurer is subrogated.[97] Safeco paid its insured, Richmond, for damages sustained as a result of a collision with Whirl, an uninsured motorist. More than two years after the collision, Safeco instituted a subrogation action against Whirl to recover both the property damage and personal injury uninsured motorist benefits paid to Richmond. Whirl timely answered and raised the two-year statute of limitations for personal injuries. Safeco argued that the uninsured motorist statute created a statutory right of action and, thus, a twenty-year statute of limitations would apply.[98] The court of appeals held that under the uninsured motorist statute, the insurer's rights, limitations, and defenses are the same as the insured's.[99] Accordingly, the insurer as subrogee stands in the shoes of the insured and is bound by the two-year statute of limitations for personal injury action.[100]

Landrum v. State Farm Mutual Automobile Insurance Co.[101] also dealt with uninsured motorist subrogation. King sued Landrum for damages arising out of an automobile accident. King's uninsured motorist carrier, State Farm, filed a cross claim against Landrum for indemnity or repayment of any award King collected from State Farm under King's uninsured motorist coverage. Prior to the trial, Landrum's automobile liability insurer tendered its policy limits to King. After a jury award to King and after the jury was released, the trial court entered judgment for State Farm against Landrum on State Farm's cross

94. O.C.G.A. § 33-7-11(f) (2000).
95. O.C.G.A. § 9-3-22 (1982).
96. Whirl v. Safeco Ins. Co., 241 Ga. App. 654, 527 S.E.2d 262, 263 (1999).
97. *Id.* at 658, 527 S.E.2d at 265-66.
98. *Id.* at 657-58, 527 S.E.2d at 262-64.
99. *Id.* at 656, 527 S.E.2d at 264-65.
100. *Id.* at 658, 527 S.E.2d at 266.
101. 241 Ga. App. 787, 527 S.E.2d 637 (2000).

claim. Landrum argued that because plaintiff King did not receive full compensation, State Farm could not assert subrogation rights against Landrum.[102] After much discussion of the right of subrogation and the full compensation rule, the appellate court indicated that State Farm had not sought reimbursement from King, the injured party, nor had it claimed any portion of the amount awarded to King.[103] State Farm was exercising its statutory subrogation rights pursuant to O.C.G.A. section 33-7-11(f) and sought reimbursement from the tortfeasor for the amount it paid to King.[104] The court of appeals found that the full compensation rule did not defeat State Farm's subrogation rights under the circumstances.[105] The court was persuaded by some key facts: The release signed by King for money received from Landrum's carrier specifically reserved State Farm's rights to make a claim against Landrum.[106] Because of the release, King had no further claim against Landrum, so State Farm would not be depriving King of any compensation he could get from Landrum.[107]

C. *Policy Construction*

The Georgia Court of Appeals required Georgia Farm Bureau to pay an accidental death benefit to a mother for the death of her child under a policy on a car that was not involved in the accident that killed her child.[108] Jackson, the insured, had two vehicles, a Taurus and a Geo, insured under separate policies. Only the policy on the Geo had an accidental death benefit. Jackson's child was struck by another vehicle on the driver's side door and killed while Jackson was driving the Taurus. Jackson made a claim under the Geo policy for the accidental death benefit.[109] The accidental death benefit was contained in a separate endorsement and provided:

> The company will pay insured's injury coverage benefits for . . . "accidental death benefit" incurred with respect to "bodily injury" sustained by an "eligible injured person" caused by an accident . . . . When used in reference to this coverage "accidental death benefit" means death resulting directly and independently of all other causes

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102. *Id.* at 788, 527 S.E.2d at 638.
103. *Id.* at 787-88, 527 S.E.2d at 638.
104. *Id.* at 789, 527 S.E.2d at 639.
105. *Id.* at 788, 527 S.E.2d at 638.
106. *Id.* at 787, 527 S.E.2d at 638.
107. *Id.* at 789, 527 S.E.2d at 639.
108. Georgia Farm Bureau Mut. Ins. Co. v. Jackson, 240 Ga. App. 127, 130, 522 S.E.2d 716, 719 (1999).
109. *Id.* at 127, 522 S.E.2d at 717.

> from "bodily injury" caused by an accident while "occupying" or *being struck by a "motor vehicle."*[110]

Georgia Farm argued that the phrase "struck by a motor vehicle" referred to being struck while a pedestrian.[111] Relying upon the often stated rule that the test is what a reasonable person in the shoes of the insured would understand, the court of appeals held that being struck by an automobile while occupying another automobile was sufficient to invoke the coverage.[112] The court of appeals also held that Georgia Farm was subject to the imposition of a twenty-five percent penalty for nonpayment within sixty days of demand, finding that the refusal was in bad faith when the company did not raise the doubtful question until many months after the initial claim was made.[113]

D. Permissive Use

In *Hartford Insurance Co. v. Nationwide Mutual Insurance Co.*,[114] the court of appeals found that a question of fact remained on the scope of permission in a "second permittee" situation.[115] Hartford sued Nationwide and each claimed that the other provided coverage for the subject incident. Nationwide's policy extended coverage to persons who use the insured automobile with the policyholder's permission. Nationwide's insured allowed her employee to use a vehicle insured by Nationwide, and the employee allowed another to drive the vehicle. After an accident with Hartford's insured, Nationwide claimed that the driver did not have permission to use the vehicle and, therefore, was not an insured. Hartford claimed otherwise as this was a "second permittee" situation.[116] The court of appeals repeated the rule:

> where a third person uses a vehicle with a consent of another person who has permission from the owner, the fact that the third person did not have express or implied permission from the owner is irrelevant. "As long as the use falls within the scope of the permission then it is permissive within the policy terminology."[117]

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110. *Id.*, 522 S.E.2d at 717-18.
111. *Id.* at 128, 522 S.E.2d at 718.
112. *Id.* at 129, 522 S.E.2d at 718.
113. *Id.* at 130, 522 S.E.2d at 719.
114. 240 Ga. App. 228, 523 S.E.2d 71 (1999).
115. *Id.* at 228, 523 S.E.2d at 71.
116. *Id.* at 229, 523 S.E.2d at 72.
117. *Id.* (quoting Allstate Ins. Co. v. Wood, 211 Ga. App. 662, 663, 440 S.E.2d 78, 80 (1994)).

However, the court of appeals held that the scope of the permission was unclear, and thus, no questions of fact existed for a jury to resolve.[118]

D. Reimbursement Provision / Complete Compensation Rule

In *Davis v. Kaiser Foundation Health Plan of Georgia*[119] the supreme court claimed it cleared up any lingering questions dealing with the state's public policy on complete compensation.[120] The court held:

> [I]t is now clear that the public policy of this state will not permit insurers to require an insured to agree to a provision that permits the insurer, at the expense of the insured, to avoid the risk for which the insurer has been paid by requiring the insured to reimburse the insurer whether or not the insured was completely compensated for the covered loss.[121]

Davis was injured in an automobile collision and suffered damages in excess of $100,000. Davis settled her claim against the other driver for the limits of his policy, $15,000, and collected $85,000 from her own uninsured motorist carrier. Her health insurance carrier, Kaiser, sought reimbursement for the amounts paid for Davis' medical expenses of $40,361.42.[122] While the court of appeals found no problem with the contract provision requiring reimbursement of the insurer without regard to whether the insured was completely compensated, the supreme court found otherwise.[123] Adopting the reasoning of an Alabama Supreme Court decision, the Georgia Supreme Court held that Kaiser's reimbursement provision was unenforceable as violative of public policy.[124] This decision along with O.C.G.A. section 33-24-56.1[125] removes any doubt that the insured must be completely compensated before any reimbursement provision will be applicable.

E. Fraud

In *Infinity Insurance Co. v. Martin*,[126] the insured was awarded damages for fraud, conversion, attorney fees, and expenses of litigation

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118. *Id.* at 230, 523 S.E.2d at 73.
119. 271 Ga. 508, 521 S.E.2d 815 (1999).
120. *Id.* at 508, 521 S.E.2d at 815.
121. *Id.* at 510, 521 S.E.2d at 818.
122. *Id.* at 508-09, 521 S.E.2d at 816.
123. *Id.* at 509, 521 S.E.2d at 817.
124. *Id.* at 511, 521 S.E.2d at 818 (citing Powell v. Blue Cross & Blue Shield, 581 So. 2d 772, 777 (Ala. 1990)).
125. O.C.G.A. § 33-24-56.1 (Supp. 2000).
126. 240 Ga. App. 609, 524 S.E.2d 294 (1999).

arising out of alleged fraud in the sale and cancellation of an auto liability insurance policy. Martin applied for an Infinity insurance policy through Ragan Insurance Agency. She paid a premium and signed the application. After receipt of the application, Infinity adjusted her insurance premium upward on two occasions. While she paid the first premium increase, she did not pay the second premium increase. Some months later, Infinity canceled her insurance for nonpayment of the second increase.[127] The court of appeals concluded that the jury could have found misrepresentation by the insurance company for failure to give Martin a reasonable explanation for the premium increase.[128]

In a declaratory judgment action that focused on a "nonowned vehicle" exclusion, *Allstate Insurance Co. v. Czaplicki*[129] the court of appeals asserted that the task for determining coverage is whether the vehicle's use materially increased the insurer's risk without a corresponding increase in the insured's premium.[130] Allstate contended that an automobile insurance policy covering Czaplicki as a resident of his father's household excluded coverage for a wreck that occurred while Czaplicki drove his grandfather's van, a nonowned vehicle. Allstate argued that coverage under the father's policy was excluded by the following language: "'Allstate will not pay for any damages a person insured is legally obligated to pay because of . . . . a non-owned auto which is furnished or available for the regular use of a person insured.'"[131] Because the parties had stipulated that Czaplicki drove the van only occasionally, the nonowned auto exclusion did not apply.[132]

The court of appeals upheld a "rented to others" exclusion in *Empire Fire & Marine Insurance Co. v. State Farm Fire & Casualty Co.*[133] A passenger in a vehicle insured by Empire was injured in an auto collision and sued the driver of the other vehicle. After a default judgment was entered against the driver, State Farm was added as a defendant, because it insured the other vehicle. The owner and driver of the State Farm insured vehicle admitted that the driver rented the vehicle for a charge.[134] State Farm's policy included the following exclusion: "'There is no coverage: (1) while any vehicle insured under

127. *Id.* at 609-10, 524 S.E.2d at 295.
128. *Id.* at 612, 524 S.E.2d at 296.
129. 241 Ga. App. 247, 526 S.E.2d 78 (1999).
130. *Id.* at 248, 526 S.E.2d at 79.
131. *Id.* at 247, 526 S.E.2d at 78.
132. *Id.*
133. 241 Ga. App. 376, 525 S.E.2d 741 (1999).
134. *Id.* at 376, 525 S.E.2d at 741.

this section is (a) rented to others . . . for a charge.'"[135] Because it was undisputed that the vehicle was rented, no coverage existed.[136]

Cotton States Mutual Insurance Co. v. Coleman[137] was a declaratory judgment action regarding the following exclusion in an automobile policy:

> We do not provide liability coverage for "bodily injury" and "property damage" to you or any family members residing in your household. (1) If Intra-Familial Tort Immunity applies; or (2) To the extent the limits of liability of this coverage exceed the limits of liability required by law if Intra-Familial Tort Immunity does not apply.[138]

Coleman, a Cotton States insured, died in a collision while riding in his own vehicle being driven with Coleman's permission by Robert Reeves, who was not a member of Coleman's family. Coleman's heirs filed suit against Reeves alleging that Reeves was at fault in the collision. The administrator of Reeves' estate notified Cotton States of the suit and called upon it to defend and provide coverage for the claim of its own insured.[139] The court of appeals held that the exclusion was enforceable.[140] The court of appeals found that the exclusion was not camouflaged or unclear simply because it was within the "Amendatory Endorsement," which was a substantial five-page document listed on the typed declarations portion of the policy along with other documents as "applicable forms."[141] "'Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement or application made a part of the policy.'"[142]

The court of appeals also addressed Coleman's argument that the exclusion violated public policy because it limited liability coverage stated on the declarations page.[143] The court noted that "a claim which is made by an insured against a permissive driver of his own insured vehicle is not a liability claim by an innocent third party, but a

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135. *Id.*
136. *Id.* at 377, 525 S.E.2d at 742.
137. 242 Ga. App. 531, 530 S.E.2d 229 (2000).
138. *Id.* at 531, 530 S.E.2d at 230.
139. *Id.*
140. *Id.* at 531-32, 530 S.E.2d at 230 (citing Georgia Farm Bureau Mut. Ins. Co. v. Burch, 222 Ga. App. 749, 476 S.E.2d 62 (1996)).
141. *Id.* at 532, 530 S.E.2d at 231.
142. *Id.* (quoting O.C.G.A. § 33-24-16 (1996)).
143. *Id.*

claim on behalf of the insured against his own insurance policy."[144] Thus, the argument advanced by the Colemans failed.[145]

The court of appeals, in *Stephens v. Conyers Apostolic Church*,[146] made a determination as to which of two policies applied to an accident.[147] The court held that defendant had a sufficient insurable interest in the vehicle involved in the accident to authorize his decision to insure the vehicle under his personal liability policy, even though he did not own the vehicle.[148] The court held that no legal or equitable interest in the insured vehicle as property is necessary to support an insurable interest regarding liability insurance.[149]

In *Progressive Preferred Insurance Co. v. Aguilera*,[150] the court of appeals affirmed the trial court's judgment that Progressive was obligated to defend and provide coverage to Aguilera in a lawsuit pending against him.[151] Progressive unsuccessfully argued that Aguilera had intentionally misrepresented who would be driving the vehicle. Aguilera stated, by affidavit, that the Progressive agent told him that Progressive did not need other drivers' personal information in order to renew his policy. According to Aguilera, the agent reminded him that Progressive had paid a previous claim on an accident involving one of his employees not listed on the Progressive policy. Progressive's agent stated that she told Aguilera that no one else should drive the company vehicles until their personal information was added to the policy. The trial court, in a nonjury proceeding, held that Progressive should defend and provide coverage.[152] The court of appeals found that the evidence supported the trial court's judgment.[153]

V. COMMERCIAL GENERAL LIABILITY

A property insurer unsuccessfully sought appointment of a receiver to take charge of defendant's funds in *Chrysler Insurance Co. v. Dorminey*.[154] Chrysler Insurance paid its insured as a result of a fire loss to the insured's property. As subrogee of its insured, the insurance

144. *Id.* (citing Spivey v. SaFeco Ins. Co., 210 Ga. App. 775, 776-78, 437 S.E.2d 641, 644 (1993)).
145. *Id.*
146. 243 Ga. App. 170, 532 S.E.2d 728 (2000).
147. *Id.* at 172-73, 532 S.E.2d at 731.
148. *Id.* at 172, 532 S.E.2d at 731.
149. *Id.* at 172-73, 532 S.E.2d at 731.
150. 243 Ga. App. 442, 533 S.E.2d 448 (2000).
151. *Id.* at 446, 533 S.E.2d at 451.
152. *Id.* at 445, 533 S.E.2d at 450-51.
153. *Id.* at 446, 533 S.E.2d at 451.
154. 271 Ga. 555, 522 S.E.2d 232 (1999).

company filed a complaint against the insured's former comptroller alleging that the comptroller set the fire in order to conceal a fraudulent scheme to embezzle funds. Along with its complaint, the insurer asked for the appointment of a receiver to take charge of funds that the comptroller had received from the sale of her residence and other assets.[155] The Supreme Court of Georgia found that the receivership was not warranted.[156] The insurer was unable to show that its rights could not otherwise be protected.[157]

Lee v. American Central Insurance Co.[158] dealt with several interesting issues including the duty of the insurer to investigate the policy designations and questions of reformation of the insurance policy. Dr. Lee owned title to premises in Macon, Georgia. Lee was also president and majority stockholder of K. Lee Enterprises. K. Lee Enterprises leased property to the Thams, principal officers of Fortune Garden, Inc., for use as a Chinese restaurant. The lease required the Thams to maintain insurance on the building and provide K. Lee Enterprises with a copy of the insurance policy. Mrs. Tham obtained an insurance policy that listed Fortune Garden as a named insured and K. Lee Enterprises as the mortgagee from the Kaplan Agency. Thereafter, the building was totally destroyed by fire. The insurance company determined that the principals of Fortune Garden intentionally set the fire and denied the Thams' claim for coverage under the policy. The insurer also denied Lee's individual claim because he was not listed in any fashion on the policy. Lee claimed that the insurer negligently failed to investigate the policy designations and failed to determine the true owner of the property.[159] The court of appeals held that "[a]n insurance company that has had no business dealings with a third party to the insurance policy owes no duty to that party to investigate the accuracy of the policy's designation."[160] The court found no evidence that Lee, as an individual, had any interest in the insurance contract.[161] The court also refused to reform the insurance policy because it found no mistake that would allow for reformation.[162]

As to the claim against the agent for failing to follow instructions to add Lee as an additional insured, the court of appeals held that "an

155. *Id.* at 555, 522 S.E.2d at 233.
156. *Id.* at 556-57, 522 S.E.2d at 234.
157. *Id.* at 556, 522 S.E.2d at 234.
158. 241 Ga. App. 650, 530 S.E.2d 727 (1999).
159. *Id.* at 651, 530 S.E.2d at 729.
160. *Id.* at 651-52, 530 S.E.2d at 729-30.
161. *Id.* at 653, 530 S.E.2d at 730.
162. *Id.* at 652-53, 530 S.E.2d at 730.

insurance agent is not liable for failing to follow instructions where the mistake is readily apparent on the face of the policy and the insurer receives a copy and does not, prior to the loss, ask that the policy be changed."[163] Here, the court found it was readily apparent that the policy made no mention of Lee.[164]

The Supreme Court of Georgia answered a certified question from the Eleventh Circuit concerning coverage for claims of sexual harassment or retaliation under an umbrella policy with an exclusion for "'bodily injury' or 'personal injury' . . . to other employees 'arising out of or in the course of their employment.'"[165] The supreme court looked at the construction of the terms "in the course of" and "arising out of employment" in the context of workers compensation law and held that "the same reasoning used in workers compensation cases has been held to be applicable to general liability cases."[166] The supreme court concluded that because sexual harassment claims are construed under Georgia law as not having arisen out of employment, the exclusion does not preclude liability coverage for claims of sexual harassment.[167] This holding represents the first case in which sexual harassment claims were found to be covered by insurance in a long line of recent sexual harassment coverage opinions.[168]

From payment of an accidental death benefit to a finding that the nonowned vehicle exclusion did not apply, the appellate courts continued to find coverage when possible. Only in cases in which the policies were written in very clear language, such as the "rented to others" exclusion, and in cases in which the same exclusion had previously been upheld, did the courts find no coverage.

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163. *Id.* at 653, 530 S.E.2d at 731.

164. *Id.*

165. SCI Liquidating Corp. v. Hartford Fire Ins. Co., 272 Ga. 293, 293, 526 S.E.2d 555, 556 (2000).

166. *Id.* at 294, 526 S.E.2d at 557.

167. *Id.* at 294-95, 526 S.E.2d at 557.

168. *See, e.g.*, Roe v. State Farm Fire & Cas. Co., 259 Ga. 42, 42, 376 S.E.2d 876, 877 (1989) (holding that child molestation is excluded by the intentional act exclusion); Hain v. Allstate Ins. Co., 221 Ga. App. 486, 486-87, 471 S.E.2d 521, 522 (1996) (holding that accident insurance does not cover intentional acts, such as sexual harassment).

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