Insurance

Maximilian A. Pock

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Insurance Law Commons

Recommended Citation


This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Insurance

by Maximilian A. Pock*

I. INTRODUCTION

The Georgia Supreme Court and Georgia Court of Appeals have handed down over eighty insurance cases during this past survey year.¹ A surprising number of these are cases of first impression. The Uninsured Motorist Act² spawned about thirteen percent of the total volume of decided cases, a fact which is not surprising if one keeps in mind that the general litigation proneness of uninsured and underinsured legislation is a well-documented national phenomenon.³ It is estimated that one of five drivers in this country is uninsured. This can hardly be the case in Georgia. Yet, one must remember that even under Georgia's compulsory liability regime, insureds often discover that their policies provide no coverage for specific cars or specific occurrences.⁴

The Georgia Motor Vehicle Accident Reparations Act,⁵ Georgia's ersatz version of no-fault legislation, cast a long shadow into the present, and managed to generate about nine percent of the total volume of

---

* Professor of Law, National Law Center, The George Washington University. University of Iowa (J.D., 1958); University of Michigan (S.J.D., 1962). Associate Professor of Law, Emory University (1961-65). Member, State Bar of Georgia.

¹ This Survey encompasses cases officially reported and made available in print between June 1, 1994 and May 31, 1995. It is difficult to speak of any discernible numerical trends. The number of appellate insurance cases increased from an average of 60 in the 1960s to an average of 90 in the 1980s and early 1990s. However, there were significant fluctuations from year to year with numbers reaching as many as 125.


³ See ROBERT E. KEETON & ALLAN I. WIDISS, INSURANCE LAW § 4.9(a) (1988) [hereinafter KEETON & WIDISS].

⁴ See, e.g., Noakes v. Atlanta Casualty Co., 215 Ga. App. 398, 450 S.E.2d 861 (1994) (holding that a newly acquired car was not covered because of late notification of the insurer).

decided cases. When one considers that the Act received a decent burial in 1991, this is a bit surprising.6

Eighteen of the eighty bills and resolutions introduced in the 143rd Georgia General Assembly became law. Since all are quite detailed and some are omnibus bills amending a host of different statutory provisions, a space-limited survey of this kind cannot begin to do them justice. Collectively, they bear testimony to the nonretrograde and orderly evolution of Georgia law as it relates to policy contents, intermediaries, and insurance institutions in general. Two examples will bear out this assertion. The first is the creation of the insurer-financed Special Insurance Fraud Fund “for the purpose of funding the investigation and prosecution of insurance fraud.”7 The second is the mandate that accident and sickness insurance carriers make available optional “coverage for bone marrow transplants for the treatment of breast cancer and Hodgkin’s disease.”8 With this simple stroke of the pen, the legislature put an end, at least in Georgia, to a highly contentious controversy that continues to plague many sister states. One last general observation is perhaps in order: User-friendly “easy reading” automobile policies and homeowner’s policies now definitely dominate appellate litigation. They are in the process of accumulating salubrious judicial gloss which refines their meaning without interpolation or evisceration and thus make them much more useful in the legal market place than the recondite and gnarled policies of yore.

To provide continuity and enhance readability, the cases selected for expatiation will, as far as possible, be organized and discussed under the chapter headings and rubrics employed during the past three decades.

II. ASSIGNMENTS

An assignee stands in the shoes of the assignor. Absent estoppel, waiver, or third party beneficiary clauses,9 the obligor may assert against the assignee all those defenses arising out of the underlying contract which it could have asserted against the assignor.

In Owens v. Allstate Insurance Co.,10 the victim of an automobile accident obtained a default judgment against the “guilty” party who had

---

9. Standard or Union Mortgage Clause specifically states that the insured’s “acts and neglect” cannot be asserted as defenses against the loss-payee/assignee.
totally ignored the lawsuit. Subsequently, the judgment debtor assigned to the victim any contractual claims he had against his liability insurer “for the amount of the judgment.” When the insurer denied liability, the victim brought an action against it for the amount of the default judgment as well as bad faith penalties and attorney fees. The court held that the judgment debtor’s abject failure to cooperate with his insurer by forwarding suit papers and assisting in the investigation of the occurrence served as a defense against the insured assignor and hence could be asserted against his assignee. The court also held that even in the absence of any such defense, the victim had no standing to collect statutory bad faith damages or attorney fees because the duty to pay such damages runs only to an insured who is a party to the contract and not to the victim, who is but a contingent third party beneficiary.

Furthermore, an assignment “of the judgment” or “for the amount of the judgment” does not furnish standing to recover statutory damages in excess of the amount assigned.

It should be noted that the court did not directly hold that the right to recover statutory damages was so personal as to thwart any attempts to assign it.

What are the jural relationships created by a post-occurrence assignment of claims under a health insurance policy to a health care provider? In North American Life & Casualty Co. v. Riedl, the court of appeals held that such transfer was but a partial assignment of prospective proceeds which created a joint interest and not a full assignment of the policy itself. As such, it created joint rights qualifying both the assignor and the assignee as real parties in interest. The Georgia Supreme Court disagreed. An assignment of proceeds effected by appropriate language of present transfer is nevertheless a valid assignment, even though it leaves the assignor’s rights in the underlying contract intact. As such it divests the

---

11. *Id.* at 651, 455 S.E.2d at 369.
12. *Id.* at 652, 455 S.E.2d at 370.
13. *Id.* at 651, 455 S.E.2d at 369 (paraphrasing and explaining O.C.G.A. § 33-4-6 (1990)).
14. *Id.*
15. By stressing the distinction between assignees and policyholders the court, one might contend, at least obliquely hints at the possible nonassignability of such personal claims. *Id.*
17. *Id.* at 884, 434 S.E.2d at 821-22.
18. *Id.* at 885, 434 S.E.2d at 822.
20. *Id.* at 397, 444 S.E.2d at 737.
assignor of the specific claim assigned and leaves the assignee as the only real party in interest entitled to assert the transferred claim.\textsuperscript{21} However, an action brought by the assignor should not be dismissed until the assignee has been given "a reasonable opportunity to ratify or join the action . . . or to be substituted for [the assignor]."\textsuperscript{22}

The supreme court distinguished this situation from cases involving a mere direction or authorization to the insurer-obligor to make direct payments to a third party, which does not rise to the dignity of an assignment.\textsuperscript{23} It also suggested in dicta that an assignor may still assert the assigned claim in his own name "if the assignee consented to the assignor bringing suit or . . . reassigned the benefits to the assignor or . . . refused or neglected to bring such an action."\textsuperscript{24}

\section*{III. CANCELLATION, NONRENEWAL, AND LAPSE OF INSURANCE}

Does a fire insurance carrier have to notify the insured and the designated lienholder loss-payee of the lapse of the policy and its nonrenewal for nonpayment of the renewal premium? In \textit{Southern General Insurance Co. v. Tippins Bank & Trust Co.},\textsuperscript{25} the court held that it does not.\textsuperscript{26} The 1984 amendment of section 33-24-46 of the Official Code of Georgia Annotated ("O.C.G.A.") on "cancellation or nonrenewal of certain property insurance policies" which struck the section in its entirety,\textsuperscript{27} defined "nonrenewal" as "a refusal by the insurer . . . to renew"\textsuperscript{28} and provided that "[n]o insurer shall refuse to renew a policy . . . unless a written notice of nonrenewal is mailed or delivered in person to the named insured."\textsuperscript{29} Gone was the former language defining "nonrenewal" as the "failure or refusal by an insurer

\begin{footnotes}
\item[21] The court overruled "several, sometimes conflicting rulings on this issue" to the extent that they were inconsistent with its opinion. \textit{Id.} at 398, 444 S.E.2d at 738, 739. By misreading a double negative on the last page of the first opinion in \textit{Riedl}, this writer erroneously concluded that the holding of the court of appeals was much more in line with the final holding of the supreme court than it actually was. Maximilian A. Pock, \textit{Insurance}, 46 \textit{Mercer L. Rev.} 261, 264 (1994). Apologies are hereby tendered.
\item[22] 264 Ga. at 398, 444 S.E.2d at 739 (quoting and relying upon O.C.G.A. § 9-11-17(a) (1990)).
\item[23] Such authorizations generally create mere powers of attorney. \textit{Id.} at 396, 444 S.E.2d at 737.
\item[24] \textit{Id.} at 396, 444 S.E.2d at 738.
\item[26] \textit{Id.} at 178, 444 S.E.2d at 333.
\item[28] 213 Ga. App. at 178, 444 S.E.2d at 332 (quoting O.C.G.A. § 33-24-46(b)(1) (1990)).
\item[29] \textit{Id.} (quoting O.C.G.A. § 33-24-46(d)) (emphasis supplied by court).
\end{footnotes}
to renew" and the former requirement for informing lienholders of "cancellation and nonrenewal" of policies. In view of the legislative history and the clear language of the 1984 amendment which focuses not on the "failure" (the fact of nonrenewal upon lapse of a policy) but on the insurer's affirmative "refusal" to renew (an expression of unwillingness to renew), the court concluded that "it is clear to us that the legislature intended to remove from the insurer the duty to send notice to either the insured or any lienholders that a policy was about to terminate unless it was an unwillingness or refusal on the insurer's part that resulted in termination or cancellation."

The effect of this decision seems hardly cataclysmic. It does not affect cancellations during the policy term or "affirmative" nonrenewals by the insurer. Furthermore, most policies are kept in escrow by lienholders which routinely monitor their status. The situation may be further alleviated by contract. Thus, the New York Standard Fire Policy, the grandfather of all fire policies, which has entered most states' regulatory scheme, provides that lienholders be given ten days written notice of cancellation. Similarly, the new standard "easy-reading" homeowner's policy provides that "if we decide to cancel or not renew this policy the mortgagee will be notified at least [ten] days before the date cancellation or renewal takes effect." The popular standard or union mortgage clause which gives the lienholder bullet-proof protection by providing that the mortgagee's insurance "shall not be invalidated by any act or neglect of the mortgagor" may also ease the situation. Yet, it should be noted that the language imposing a contractual requirement for notification in policies and standard mortgage clauses may pose some of the same issues as those raised in Tippins. Does it apply to automatic termination and nonrenewal upon lapse of the policy?

32. Id. at 178, 444 S.E.2d at 333 (relying on Webster's Ninth New Collegiate Dictionary 991 (1987) for a definition of refuse).
33. Id. (emphasis added).
35. 213 Ga. App. at 177, 440 S.E.2d at 332.
What is necessary for effective notification? In *Continental Insurance Co. v. State Farm Mutual Insurance Co.*, the court reaffirmed that a notice of cancellation need not be received. Evidence that the notice was mailed to the insured's last address of record and obtaining as a receipt a stamped "PORS" list from postal authorities is all that is required.

In *Moore v. Scottsdale Insurance Co.*, the supreme court had an occasion to establish the minimum requirements for such receipt from postal authorities. The O.C.G.A. sets up two requirements for effective notification. First, that the notice "shall be mailed to the last address of record and shall be dispatched by at least first-class mail." Second, that the sender obtain a "receipt provided by the United States Postal Service or such other evidence of mailing as prescribed or accepted by the United States Postal Service." There was evidence that the insurer had in fact mailed the notice to the last address of record. However, the receipt from the post office was but a rubber-stamped "computer-generated list of policy-holders to whom mailings were being sent" which identified the addressee by name and policy number but did not include his address. The supreme court held that the receipt was inadequate. The statute demanded a receipt certifying that the notice was sent to the addressee and was not satisfied by a receipt which just happened to comport with the internal regulations of the postal service.

IV. CONSTRUCTION AND DEFINITIONS

Construction of writings, although presenting a mixed question of law and fact, is for historical reasons a bench decision. Thus, the court held in *Allstate Insurance Co. v. Brannon* that a judge's instruction to the jury "that an exclusionary provision in an insurance contract is to be construed strictly against the insurer, but it is equally true that the

---

40. Id. at 843, 443 S.E.2d at 512.
41. Id. at 842, 443 S.E.2d at 511-12 (citing O.C.G.A. § 33-24-44(b) (1990)).
42. 264 Ga. 808, 450 S.E.2d 198 (1994).
43. Id. at 810, 450 S.E.2d at 199 (citing O.C.G.A. § 33-22-13(c) (1992)).
44. Id.
45. Id. at 809, 450 S.E.2d at 199 (quoting O.C.G.A. § 33-22-13(c) (1992)) (emphasis added).
46. Id. at 808, 450 S.E.2d at 198.
47. Id. at 810, 450 S.E.2d at 199.
48. Id.
construction must be a reasonable construction\textsuperscript{50} was reversible error. It would be otherwise “where the meaning of obscurely written words is involved, and where there is evidence that the meaning of such words was differently understood in one way or another by the parties to the contract.”\textsuperscript{51}

A. Complications of Pregnancy

\textit{Lemieux v. Blue Cross & Blue Shield of Georgia, Inc.}\textsuperscript{52} involved a single-person health plan intended to provide only limited benefits in connection with pregnancies. Although providing coverage for “complications of pregnancy . . . from conditions requiring hospital confinement when the pregnancy is not terminated and whose diagnoses are distinct from pregnancy but are adversely affected by pregnancy or are caused by pregnancy,” it explicitly withheld coverage for “benefits for a normal or difficult delivery.”\textsuperscript{53} Did the plan cover a cesarean delivery section? The court held that it definitely did not. The term “terminate” in common parlance means “the ending of pregnancy by abortion or miscarriage.”\textsuperscript{54} Since all pregnancies end “in some fashion”\textsuperscript{55} it was absurd for the insurer to urge upon the court a construction of “terminate” which would make pregnancy complication benefits available only “where the pregnancy never ‘terminates.’”\textsuperscript{56} In principle, coverage for complications was thus still available even though the pregnancy “terminated” when the child was delivered.\textsuperscript{57} It was not, however, available in this case. The cesarean section here was not the result of “complications . . . from conditions . . . whose diagnoses are distinct from pregnancy.” It was rather the result of the pregnancy itself and thus outside of the compass of coverage.\textsuperscript{58}

B. Loss Caused by Theft

When a car is stolen and not recovered, the loss to the insured owner is the cash value of the car\textsuperscript{59} at the time of its abstraction regardless

\textsuperscript{50} Id. at 300, 447 S.E.2d at 668 (quoting the instructions).
\textsuperscript{51} Id. at 301, 447 S.E.2d at 668 (quoting \textsc{California Ins. Co. v. Blumberg}, 101 Ga. App. 587, 591-92, 115 S.E.2d 266, 269 (1960)).
\textsuperscript{53} Id. at 230, 453 S.E.2d at 750 (quoting the policy, with emphasis supplied by court).
\textsuperscript{54} Id. at 231, 453 S.E.2d at 751.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 232, 453 S.E.2d at 751, 752.
\textsuperscript{59} A number of automobile insurance companies, including the Kemper Insurance group, have pioneered “replacement value” policies which, of course, do not provide
of its sentimental value. What is the insured's loss when the car is recovered in damaged condition?

In Brown v. Southeastern Security Insurance Co., the insured claimed the theft had caused substantial damage to the car's engine. She did not assert her claim until several months after the car's recovery and after it had been driven over 10,000 miles. The policy at issue merely declared that "(l)oss(es) caused by . . . theft . . . are comprehensive losses." The court held that this theoretically obligated the insurer to compensate the insured for all damage originating between the date of the car's abstraction and the date of its recovery according to the generally accepted principles of causation. Practically, however, the insured was out of luck because in the premises she had failed to show by specific evidence that there was the requisite causal nexus between the theft and the proven damage to the engine.

This suggests that insureds should have their stolen and recovered cars thoroughly inspected and subjected to diagnostic tests in order to perfect their claims against their insurers for "hidden" damage.

C. Professional Services

Misconduct which transcends the periphery of well or poorly rendered professional services is, like pornography, easy to recognize but hard to define. In St. Paul Fire & Marine Insurance Co. v. Alderman, a case of first impression, the court appears to bear out this observation. Reduced to their essentials, the allegations reveal the following scenario: A patient sought out a physician with a complaint about a superficial "marble-sized cyst, which was under the skin between her vagina and right leg." Despite having been told that the cyst was superficial, the physician "inserted his finger into (her) vagina and began rubbing up and down as if he were trying to excite (her)." Although told that the cyst was not in the vagina, he "began massaging her clitoris" and acting "as if he was having a sexual experience . . . until she . . . pulled away from him."

The insurer sought a judicial declaration that it did not have to defend the patient's tort action under the malpractice policy it had issued to the

---

61. Id. at 234, 454 S.E.2d at 158 (quoting the policy) (emphasis added).
62. Id.
63. Id. at 235, 454 S.E.2d at 159.
65. Id. at 777, 455 S.E.2d at 852.
66. Id.
67. Id. at 777-78, 455 S.E.2d at 853.
The policy furnished “protection against ‘professional liability claims’ which might be brought against him in his practice as a physician or surgeon” and “covered him for damages resulting from his providing or withholding of ‘professional services.’”

Obviously, malpractice policies cover the tortious rendition of professional services. If it were otherwise, there would be no need for them at all. It was therefore necessary to determine whether the allegations spoke to the tortious rendition of professional services or to matters outside the compass of such services.

In the absence of hard Georgia authority, the court relied heavily on a palette of polyphyletic foreign decisions for parameters and factors in order to piece together a meaningful and serviceable definition of "professional services." Its conclusions may be paraphrased as follows: “Professional services” derive their character from the “nature of the act” performed and not from the situational status (or professional title) of the actor; they do not encompass all acts “flowing from mere employment,” but only those which involve the “use or application of special learning or attainments;” they include only tortious acts that are inextricably intertwined with their very rendition.

Viewed in light of these confining factors, the sexual assault or battery alleged was physically outside the perimeter of the professional services demanded by an examination of the patient’s cyst and served “solely for the satisfaction of [the actor’s] prurient interests.” Accordingly, the insurer was under no obligation to furnish a defense.

D. Total Disability

Although generalizations are risky, it is probably fair to say that disability policies come in two varieties: those which define disability as incapacity to follow a “particular” occupation and those which define it

68. Id. at 778, 455 S.E.2d at 853 (quoting and paraphrasing the policy).
70. 216 Ga. App. at 779, 455 S.E.2d at 853-54.
71. Id. (because of the profusion of foreign case authority relied upon, individual citations are omitted).
72. Id., 455 S.E.2d at 854.
73. Presiding Judge McMurray’s dissent held out for a more liberal test focusing on whether the tortious conduct occurred during or in the course of the medical examination at issue. Id. at 780, 455 S.E.2d at 854 (McMurray, J., dissenting).
as incapacity to follow "any" occupation. The latter and more common variety has certain in terrorem qualities about it. An innocent reader may well be forgiven for believing that she would literally have to qualify as a quadriplegic in order to collect benefits. Fortunately, reality is not as stark as all that. Long before the advent of Naderite consumerism, Georgia has followed a moderate line in interpreting disability policies which seems to produce results that are fair to all parties in carrying out their implicit intent.

This is again evidenced by *Equicor, Inc. v. Stamey* involving a policy of the "any" occupation variety. An Atlanta motorcycle police officer and nineteen-year veteran of the force retired because of permanent disability after he had severely injured his knee. The group life and accident policy in question required the insurer to make sixty monthly payments in fixed amounts in case the officer became "totally disabled by injury or disease" and thus "not able, presumably for life, to do any work for compensation or gain." Undisputed medical testimony showed that the officer was incapable of performing "any activities relating to police work." There was also evidence that the officer had a good deal of formal education. He held a law degree, although he had not passed the bar and was no longer qualified to take it; he also held an accounting degree and a graduate degree in government administration. Yet he had no practical work experience in any of these areas. The insurer's vocational rehabilitation expert painted an optimistic picture of his prospects for holding sedentary but lucrative jobs in "middle management positions" and "supervisory or teaching jobs in security." The court perceived these options as chimerical. The officer had absolutely no experience in these fields and his modest career in the police department—he had failed the examination for sergeant—suggested that "he has problems translating his education into viable work experience." The trial court's finding, in a bench trial, that the officer was totally disabled, therefore, accorded with settled

74. See EDWIN W. PATTERSON, ESSENTIALS OF INSURANCE LAW 240-242 (2d ed. 1957) (hereinafter PATTERSON); JERRY, supra note 38, § 64(a); WILLIAM R. VANCE, HANDBOOK ON THE LAW OF INSURANCE § 205 (3d ed. 1951).

75. See, e.g., Prudential Ins. Co. v. South, 179 Ga. 653, 177 S.E. 499 (1934) (a railroad switchman requiring amputation of an arm may be considered totally disabled).


77. Id. at 376, 454 S.E.2d at 551-52.

78. Id. (quoting the policy, with emphasis added).

79. Id. at 378, 454 S.E.2d at 553 (quoting testimony).

80. Id. at 376, 454 S.E.2d at 552.

81. Id. at 378, 454 S.E.2d at 553 (quoting testimony).

82. Id.

83. Id.
Georgia law which requires only that the insured be unable to perform substantial portions of his ordinary employment or any other employment approximating the same livelihood as he might fairly be expected to follow, given his personal circumstances. In view of the settled nature of Georgia law in this area, the insurer's refusal to pay the claim could be seen as stubbornly litigious and thus warranted the trial court's award of attorney fees and litigation expenses. Furthermore, the trial court was justified in awarding nonpenal prejudgment interest because the disability payments were liquidated and their dates of accrual were fixed.

E. Vacant Land

In Cotton States Mutual Insurance Co. v. Smelcer, a homeowner's policy included within the purview of insured locations "vacant land, other than farm land, owned by or rented to an insured." It contained no definition of the term "vacant." The insured homeowner owned a separate tract of land located at some distance from the home he occupied "on which was located his maternal family's abandoned old house and abandoned old country store." Vandals set fire to the old house and a fire fighter was killed while trying to put out the fire. Did the policy cover his death? The court held that it did not. The term vacant modified the term land. It was not ambiguous and thus precluded application of contra proferentem. In the understanding of the average policyholder, the term vacant denotes "empty or deprived of contents or without inanimate objects" and not merely untenanted or unoccupied by human beings. Such restrictive meaning is also consonant with the purpose of the policy which involves classification of risks. Obviously, empty land in its natural state poses a different loss risk than improved or built-up land, a reality to which "[t]his case bears tragic witness." The court observed that its conclusion would have been different had the policy referred to vacant structures rather than

---

84. Id. at 377, 454 S.E.2d at 552 (relying upon the test enunciated by Mutual Life Ins. Co. v. Barron, 198 Ga. 1, 9, 30 S.E.2d 879, 884 (1944)).
85. Id. at 378, 454 S.E.2d at 553 (citing O.C.G.A. § 13-6-11 (1982 & Supp. 1994)).
86. Id. at 379, 454 S.E.2d at 553 (citing O.C.G.A. § 7-4-15 (1989)).
88. Id. at 376, 441 S.E.2d at 788 (quoting the policy).
89. Id.
90. Id. at 377, 441 S.E.2d at 789 (citing and relying on the encyclopedic California decision in Bianchi v. Westfield Ins. Co., 191 Cal. App. 3d 287, 236 Cal. Rptr. 343 (4th Dist. 1987)).
91. Id.
vacant land. In that case the old house would have been covered so long as it was empty of contents.92

V. EXCEPTIONS AND EXCLUSIONS

Exceptions and exclusions detract from and reduce the protection afforded by the general coverage clause. They are strictly construed against the insurer. Practically they affect the burden of proof. Insureds have the burden of proving that an occurrence fits the language of the coverage clause. Insurers have the burden of proving that it fits one of the exceptions or exclusions.93

A. Automobile Policies

In General Car & Truck Leasing System v. Woodruff,94 a rental agreement which potentially provided for primary insurance95 excluded such coverage “while the vehicle is used, operated or driven in violation of any of the [agreement’s] provisions.”96 One such provision prohibited “the renter from operating the vehicle ‘in violation of any law, ordinance, rule or regulation of any governmental agency or body.’”97 The lessor/insurer contended, inter alia, that the renter had forfeited such coverage as he might have had because he had been cited and paid a fine for the “crime” of following another vehicle too closely.98 The court held that such “blanket” blunderbuss exclusion was violative of public policy even though the renter had other insurance coverage available.99 The court held that an exclusion encompassing all manner of traffic violations was untenable because “we can think of no reason why one would need liability insurance unless there is a possibility of liability such as ... running a red light or following too closely.”100

Whether an exclusion from liability in an automobile insurance contract runs afoul of Georgia public policy is an issue which compels a

92. Id.
93. Construction of written contracts is a bench and not a jury decision. When a policy is nonambiguous it is error to instruct the jury on the maxims of contract construction. Allstate Ins. Co. v. Brannon, 214 Ga. App. 300, 447 S.E.2d 666 (1994).
95. Id. at 201-02, 447 S.E.2d at 99.
96. Id. at 203, 447 S.E.2d at 100 (quoting the agreement with emphasis added).
97. Id. (quoting the agreement, with emphasis added).
98. Such conduct is in violation of O.C.G.A. § 40-6-49(a) (1994).
100. Id. at 204, 447 S.E.2d at 100 (relying on dicta in Cotton States Mut. Ins. Co. v. Neese, 254 Ga. 335, 338, 329 S.E.2d 136, 139 (1985)).
discrete case-by-case evaluation.\textsuperscript{101} \textit{Federated Mutual Insurance Co. v. Dunton}\textsuperscript{102} serves as a paradigmatic case on this point. The employee of a corporation was involved in a collision while driving one of the corporation's trucks. Before getting into the cab, he asked his employer whether the truck was covered by insurance and was given an affirmative answer and shown an insurance card. When the injured driver of the other vehicle brought an action against the employee and his employer, they discovered the employer was bankrupt and the truck was not covered by insurance. To add insult to injury, the employee was also refused coverage by his own personal automobile liability carrier because of a specific exclusion in his policy.\textsuperscript{103} The exclusion, which is part of the "new" 1985 standard personal auto policy,\textsuperscript{104} in pertinent part, states that "[w]e do not provide . . . Coverage for any person: . . . Maintaining or using any vehicle while that person is employed or otherwise engaged in any 'business' (other than farming or ranching)."\textsuperscript{105} Facially, the court conceded, this precluded coverage because the employee drove the employer's truck (a non-owned truck from the vantage point of the employee) in the employer's business.\textsuperscript{106} This, however, was not the end of the story. Georgia's mandatory insurance regime "has the dual purpose of protecting both 'the innocent victim of the negligent members of the motoring public . . . [and] the insured from unfair exposure to unanticipated liability.'"\textsuperscript{107} In the present case "both . . . interests implicated are unprotected."\textsuperscript{108} Enforcing the exclusion literally means that the victim cannot collect from the employee's own insurer or from the now bankrupt employer. It also means that the employee who had done his best to make certain that he was not getting into an uninsured vehicle is now personally exposed to liability.\textsuperscript{109} It follows that the exclusion is violative of Georgia policy

\textsuperscript{103} Id. at 148, 444 S.E.2d at 124.
\textsuperscript{104} See KIT, supra note 37, at 3 Part A (Exclusions).
\textsuperscript{105} 213 Ga. App. at 150, 444 S.E.2d at 125 (quoting the policy in part with emphasis added).
\textsuperscript{106} Id. at 151, 444 S.E.2d at 126.
\textsuperscript{107} Id. at 149, 444 S.E.2d at 124 (quoting Stepho v. Allstate Ins. Co., 259 Ga. 475, 476, 383 S.E.2d 887-88 (1989)).
\textsuperscript{108} Id.
\textsuperscript{109} Id., 444 S.E.2d at 124.
to the extent that it allows the insurer to escape responsibility for the minimum amount of liability coverage compelled by law.\textsuperscript{110}

B. Business and Comprehensive Catastrophic Liability Policies

In Lumbermens Mutual Casualty Co. v. Plantation Pipeline Co.,\textsuperscript{111} a case of first impression, the insured bulk petroleum transmission company discovered a leak in one of its underground pipelines in the Piedmont region of South Carolina. The leak required expensive recovery and clean-up work extending over a number of years. The court had to decide whether the calamity was covered despite a primary exclusion which, in pertinent part, stated that the policy did not cover property damage "arising out of the discharge, dispersal, release or escape of . . . contaminants or pollutants . . . into . . . any watercourse or body of water" and provided that "this exclusion . . . does not apply if such discharge . . . is sudden and accidental."\textsuperscript{112} It also had to decide whether there was coverage despite a supplementary exclusion which stated, in pertinent part, that the policy did not cover damage for "discharge . . . of oil or other petroleum substance or derivative . . . into . . . any watercourse or body of water" regardless of whether it is "sudden and accidental."\textsuperscript{113}

The court held that there was coverage under the "exclusion from the primary exclusion" because the discharge was "sudden and accidental."\textsuperscript{114} The phrase did not denote abrupt or instantaneous but merely "unexpected and unintended."\textsuperscript{115} There was also coverage despite the supplementary exclusion because the groundwater, which was admittedly contaminated, did not constitute a "watercourse or body of water" within the intendment of the policy as applied to the particular location affected.\textsuperscript{116} Expert testimony explained that groundwater systems are characterized as extensive quantities "of water sufficient to supply water to wells and springs" with horizontal bedded aquifers (water-bearing rock formations) and "confining beds."\textsuperscript{117} In the Piedmont region, the

\textsuperscript{110} The court distinguished Kilgore v. Southern Gen. Ins. Co., 210 Ga. App. 434, 436 S.E.2d 547 (1993), holding that where the insured has actual or constructive notice at the very inception of the fateful trip that there was no coverage. 213 Ga. App. at 150, 444 S.E.2d at 125.


\textsuperscript{112} Id. at 26, 447 S.E.2d at 91 (quoting the policy, with emphasis added).

\textsuperscript{113} Id., 447 S.E.2d at 91-92 (quoting the policy, with emphasis added).

\textsuperscript{114} Id., 447 S.E.2d at 91.

\textsuperscript{115} Id. (citing Claussens v. Aetna Casualty Ins. Co., 259 Ga. 333, 380 S.E.2d 686 (1989)).

\textsuperscript{116} Id. at 28, 447 S.E.2d at 93.

\textsuperscript{117} Id. (summarizing and quoting the expert's testimony in part).
location of the calamity, the groundwater consisted only of “water held
in the small openings between sand grains and clay particles in the soil . . . or the small fractures in the underlying bedrock.” The court
held that in the premises “groundwater” did not equate with “body of
water” and dismissed as inapplicable some contrary decisions in western
states which dealt with different geological realities.

By way of contrast, in American States Insurance Co. v. Zippro
Construction Co., the court decided that the absolute pollution
exclusion in a commercial liability policy covering a construction
contractor barred coverage for asbestos damage caused in the course
of repairing a termite-infested kitchen floor. The policy excluded
coverage for damage “arising out of the actual, alleged, or threatened
discharge, dispersal, seepage, migration, or release of pollutants” and
defined “pollutants” as “any solid, liquid, gaseous, or thermal irritant or
contaminant.” The court’s apodictic and pithy response to the
insured was that “[t]here is little question that asbestos constitutes a
pollutant as unambiguously defined in the exclusion.”

C. Homeowner’s Liability Floater

Georgia courts treat general “violation of law” exclusions with some
suspicion—but there are exceptions. Horace Mann Insurance Co. v.
Drury involved a scenario which, but for the nonhumorous finale,
reminds one of a Keystone Kops sequence. A passenger in the front seat
of a car lit a “jumping jack” firecracker and threw it out the window.
The firecracker immediately reentered the car through the rear window
where it set fire to 2000 jumping jacks and caused an explosion. As a
result the passenger in the rear seat was injured. Did the culprit’s
liability floater in his homeowner’s policy provide coverage despite an
exclusion of liability-creating conduct “which constitutes a violation of

\[\text{References}\]

118. Id. (summarizing and quoting the expert’s testimony in part).
119. Id. (citation omitted).
121. Id. at 499, 455 S.E.2d at 134.
122. Id. at 500, 455 S.E.2d at 135 (quoting the policy).
123. Id. at 501, 455 S.E.2d at 135. See Bold Corp. v. National Union Fire Ins. Co., 216
exclusion found in a manufacturer’s all-risk policy); see also Kirby v. Northwestern Nat’l
exclusion in a comprehensive general liability (CGL) policy issued to an adult entertain-
ment establishment).
125. Id. at 321, 445 S.E.2d at 273.
any criminal law or statute.” Exploding, possessing, or transporting
fireworks is unlawful and is expressly declared to be a misdemeanor. The court brushed aside the victim’s contention that “criminal
law or statute” was limited “to mean only felonies of a serious nature,
like robbery and murder.” An encyclopedic inquiry into the etymo-
logical range of “crime” revealed that it included “a misdemeanor, felony,
or act of treason”, but did not include “a petty violation of municipal
regulation.” This, the court concluded, also comported with the
common and popular understanding of the term. The exclusion
therefore applied. Moreover, Georgia public policy posed no impedi-
ment to the exercise of party autonomy in this respect.

VI. GENERAL COMMERCIAL LIABILITY POLICIES

Shelby Insurance Co. v. Ford is a ringing reaffirmation of the
principle, originally developed by Roman law, that corporations are
juristic persons or legal entities entirely distinct from the individuals
who own their stock. It sends a cautionary message to attorneys who
assist their clients in making business planning decisions.

126. Id. (quoting the policy, with emphasis supplied by court).
127. Id., 445 S.E.2d at 273-74 (citing O.C.G.A. § 25-10-2 (1982)).
128. Id., 445 S.E.2d at 274 (citing O.C.G.A. § 25-10-8 (1982)).
129. Id.
130. Id. (relying on WEBSTER’S NEW THIRD INTERNATIONAL DICTIONARY 536 (1976 ed.)).
131. Id.
132. Id.
133. Id. at 323, 455 S.E.2d at 274 (distinguishing Cotton States Mut. Ins. Co. v. Neese, 254 Ga. 335, 329 S.E.2d 136 (1985) on the grounds that Neese, unlike the present case, involved compulsory insurance statutes which impart more confining parameters).


A child was injured on the premises of a day care center operated by a subchapter S corporation. The president, owner, and sole shareholder of the corporation had obtained a general commercial liability (GCL) policy which covered her as named insured "but only with respect to the conduct of a business of which [she was] the sole owner." Did this policy cover the corporation? The supreme court held that it did not. Ownership of a business could not be equated with ownership of "a corporate entity which operates a business." Here the child care center was owned by the corporation and not by the named insured as an individual. The policy therefore could not "be enlarged by the court to include as a named insured a wholly distinct legal entity." Accordingly, the corporation, although formed and totally controlled by the named insured, was not covered under the policy.

VII. HOMEOWNER'S POLICIES—IDENTIFICATION AND RESIDENCE CLAUSES

Do holders of homeowner's policies lose their coverage when they move from their homes and cease to "reside" in them? The answer depends on the precise formulation of the insurance contract at issue and engages courts in a good deal of case parsing and flogging of surprisingly nonstandard policy clauses.

In Hill v. Nationwide Mutual Fire Insurance Co., an insured home suffered fire damage two months after the policyholders moved out. The insurer denied coverage. The policy in question covered "the dwelling on the residence premises shown on the Declarations" and defined "residence premises" as "the one- or two-family dwelling... ; or that part of any other building where you live, shown as the residence premises on the Declarations." It contained no explicit exclusion from coverage in case the residence was vacant. The court held that there was coverage. It reasoned that the use of the semi-colon and the disjunctive "or" in separating the first clause from the second fairly indicated to a lay reader that the words "where you live" only modified the words "that..."
part of any other building" and were inserted in the policy solely to identify that part of a multi-unit dwelling which was selected for coverage.\textsuperscript{143} It was thus only an identifying statement and not a descriptive warranty mandating continued actual residence as a condition of coverage. Had the insurer's intent been otherwise it would have positioned the language relating to residence so as to modify the first clause as well.\textsuperscript{144} The insurer relied on two superficially similar prior cases which found that continued residence was a requirement for coverage. In \textit{Epps v. Nicholson},\textsuperscript{146} the policy at issue defined residence premises as "the one or two family dwelling . . . or that part any other building where you reside."\textsuperscript{146} In \textit{Georgia Farm Bureau Mutual Insurance Co. v. Kephart},\textsuperscript{147} the court defined residence premises as "a. the one family dwelling . . . ; or b. that part of any other building; where you reside."\textsuperscript{148} The court held that these cases were clearly distinguishable because the punctuation as well as the "language and sentence structure"\textsuperscript{149} of the definitions under consideration clearly linked the phrase where you reside to any and all enumerated insured premises and thus made residence a condition of continued coverage.\textsuperscript{150}

Beneficent construction has its limits where the policy, as in \textit{Kephart}, although not in \textit{Nationwide}, contains an "exclusive residence" clause in addition to its identification clause.\textsuperscript{151} Thus, in \textit{Georgia Farm Bureau Mutual Insurance Co. v. Roland},\textsuperscript{152} the named insureds under a homeowner's policy, a married couple resided in their home until October 1990 when they separated, the wife moved out and ultimately obtained a divorce.\textsuperscript{153} In March 1991 the home was destroyed by fire.\textsuperscript{154} The policy contained a "special provision" requiring that "the residence premises [must be] the only premises where the named insured or spouse maintains a residence other than business or farm properties."\textsuperscript{155} The

\textsuperscript{143} Id. at 717, 448 S.E.2d at 749.
\textsuperscript{144} Id., 448 S.E.2d at 748-49.
\textsuperscript{146} 214 Ga. App. at 717, 448 S.E.2d at 748-49.
\textsuperscript{148} 214 Ga. App. at 718, 448 S.E.2d at 749. Kephart also contained an "only" or "exclusive" residence clause.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} 211 Ga. App. at 426, 439 S.E.2d at 684.
\textsuperscript{153} Id. at 835, 452 S.E.2d at 550.
\textsuperscript{154} Id. at 837, 452 S.E.2d at 551.
\textsuperscript{155} Id. at 835, 452 S.E.2d at 550 (quoting the policy, with emphasis supplied by court).
court held that the wife was simply out of luck. The special provision unambiguously required her to continue residence at the described premises and was in fact a continuing representation which had to be kept good throughout the term of the policy. Although "the result in this case appears harsh, it is the agreement contracted for by the parties." It did not violate public policy because the language was in general conformance with the Insurance Commissioner's standard fire insurance form as contemplated by statute.

VIII. INCONTESTABLE CLAUSES

Incontestable clauses mandated by statute, once the reservat of life insurance, have in recent decades foliated to include accident and health policies as well as certain annuity contracts. They can be justified in a life insurance integument as the product of a public policy decision to protect insureds and their presumably innocent beneficiaries against stale defenses asserted when the insured is no longer around to refute them. They are less persuasively justified in other contexts, although the standard explanation seems to be that we want to penalize lax insurers for failing to investigate the insurability of their applicants without undue delay.

Blue Cross & Blue Shield of Georgia, Inc. v. Sheehan, a case of first impression in several respects, shows that the incontestable clause works with the precision of a guillotine in cutting off the insurers' defenses and other remedies. An HIV positive applicant lied about his condition in his application and had not made any claims (which might have revealed his condition) for the requisite two year term. The court held that the insurer could not rescind or reform the policy after expiration of the incontestable period, or affirmatively recover for deceit.

156. Id. at 838, 452 S.E.2d at 552.
157. Id. See Patterson, supra note 74, at 402-06.
158. 215 Ga. App. at 836, 452 S.E.2d at 551.
159. Id., 452 S.E.2d at 550-51 (construing O.C.G.A. § 33-32-1(a) (1990)). See thought-provoking dissent by Judge McMurray arguing that the policy at issue sought to debase the coverage mandated by statute. Id. at 838, 452 S.E.2d at 552 (McMurray, J., dissenting).
160. O.C.G.A. § 33-25-3(a)(2) (1990) (individual life policies); Id. § 33-27-3(a)(2) (group life policies).
161. Id. § 33-29-3(b)(A).
163. See Keeton & Widiss, supra note 3, at §§ 3.3(c)(3), 6.6(d).
165. Id. at 229, 450 S.E.2d at 229.
and obtain damages for sums fraudulently obtained.\textsuperscript{166} It decided that the health policy's easy reading incontestable clause,\textsuperscript{167} which accurately paraphrased the statutory mandate,\textsuperscript{168} clearly cut off any defense based on misrepresentation.\textsuperscript{169} Although it noted that there was some foreign authority suggesting that the insurer might avoid the policy for post-application deceit, such as where the insured “fraudulently posed as independent verifier of his health”\textsuperscript{170} in the course of the insurer's post-application investigation, it found that this was not the case here.\textsuperscript{171} The applicant in question had not made any “self-exposing” claims during the incontestable period because he had no such claims.\textsuperscript{172} He had thus taken no affirmative steps to perpetuate the deception.\textsuperscript{173}

The court also made short shrift of the insurer's contention that incontestability clauses in health policies imposed less of an obligation to investigate the applicant than those in life policies because health insureds would, in ordinary course, be expected to file claims which would tend to disclose their prior deception.\textsuperscript{174} It concluded that the obligation to make a prompt investigation was the same under all incontestable clauses.\textsuperscript{175} Despite some foreign authority to the contrary,\textsuperscript{176} the fraud claim for damages was also deftly disposed of.\textsuperscript{177} Such claim “would merely provide a different means to challenge the validity of the insurance contract”\textsuperscript{178} and thus represent an impermissible contest.\textsuperscript{179}

\textsuperscript{166} Id. at 230, 450 S.E.2d at 230.
\textsuperscript{167} Id. at 228, 450 S.E.2d at 229.
\textsuperscript{169} 215 Ga. App. at 229, 450 S.E.2d at 230.
\textsuperscript{170} Id. at 230-31, 450 S.E.2d at 231 (paraphrasing Unity Mut. Life Ins. Co. v. Moses, 621 F. Supp. 13 (E.D. Pa.), aff'd, 780 F.2d 1017 (3d Cir. 1985)).
\textsuperscript{171} Id. at 231, 450 S.E.2d at 231.
\textsuperscript{172} The insured had a $1,000 deductible and had received his AZT medication for free. Id. at 231 n.3, 450 S.E.2d at 231 n.3.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 230, 450 S.E.2d at 230.
\textsuperscript{175} Id. at 231, 450 S.E.2d at 231.
\textsuperscript{177} 215 Ga. App. at 231, 450 S.E.2d at 231.
\textsuperscript{178} Id. (quoting Bankers Sec. Life Ins. Soc'y v. Kane, 885 F.2d 820, 822 (11th Cir. 1989)).
\textsuperscript{179} Id. at 231-32, 450 S.E.2d at 231. The court rejected the logomachy involved in contending that a fraud claim was a technical “affirmance” of the contract rather than a “disaffirmance” or avoidance and thus did not represent an impermissible contest. Id.
However, given the fact that the case was partially one of first impression, the insurer's denial of coverage did not expose it to liability for attorney fees and penalties.\textsuperscript{180}

IX. KEY EXECUTIVE INSURANCE

A promise, for a consideration, to pay a sum of money upon the promisee's death is not necessarily a life insurance contract. In \textit{Primus Pharmaceuticals, Inc. v. Glovier},\textsuperscript{181} a drug company promised its chief executive officer orally that it would pay his estate one fifth of the proceeds of a "key man" or key executive life insurance policy which it had taken out on his life. This was meant to be part of his employment benefits package.\textsuperscript{182} The court held that such an arrangement simply created a contingent monetary obligation out of a fund "which happened to be a portion of the proceeds of a policy of which [the obligor] was beneficiary."\textsuperscript{183} It did not qualify the employer as an insurer\textsuperscript{184} nor the contract as a life insurance policy.\textsuperscript{185} Hence, the specific statutory requirement that life insurance contracts had to be evidenced by a writing was not applicable. Furthermore, the contract was not unenforceable under the one-year rule of the general statute of frauds because it was by its own terms capable of performance in one year or less.\textsuperscript{186}

X. LIABILITY INSURER'S OBLIGATION TO DEFEND CLAIMS

A liability insurer's breach of its contractual duty to defend its insured may make the insured vulnerable to a greater liability than would have been imposed had the insurer kept its word. It is settled Georgia law that the breach entitles the insured to such damages as are traceable to the insurer's conduct. Assessment of such damages is a question for the jury.\textsuperscript{187}

\textsuperscript{180} \textit{Id.} at 232, 450 S.E.2d at 231 (citing O.C.G.A. § 33-4-6 (1992)).
\textsuperscript{182} \textit{Id.} at 411, 450 S.E.2d at 832.
\textsuperscript{183} \textit{Id.} at 412, 450 S.E.2d at 834.
\textsuperscript{184} \textit{Id.} (citing O.C.G.A. § 33-1-2(4) (1992)).
\textsuperscript{185} \textit{Id.} (citing O.C.G.A. § 33-25-1 (1990)).
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.} at 412, 450 S.E.2d 458, 460 (1989). Liability carriers are contractually required to defend their insureds against actions alleging covered events whether or not the actions are "groundless, false, or fraudulent." \textit{Id.} This standard phrase is found in automobile policies, CGL policies, and in homeowner's floaters. \textit{See, e.g.,} \textit{Keeton, supra note 36, at 662 App. H (1971) (1963 revision of the Family Combination Automobile Policy).
Does the same result arise where the failure to defend is not asserted by the insured but by the injured party who has obtained a judgment against the insured by default or otherwise? This novel question surfaced in *Georgia Farm Bureau Mutual Insurance Co. v. Martin*¹⁸⁸ in which the court of appeals held that the result was the same.¹⁸⁹ The insurer was not protected by the limits in its policy. Instead, a jury would have to determine the extent of its liability which could be potentially as large as the amount of the judgment secured by the injured party against the insured.¹⁹⁰

The supreme court reversed the court of appeals.¹⁹¹ It found that the insured and the injured party occupy entirely different positions.¹⁹² The insured may actually have suffered harm because of the insurer’s breach while the injured party would be hard-pressed to prove any harm “since, even if the insurer had done its duty, its maximum liability would have been the limits of the insurance policy.”¹⁹³ It followed that the insurer’s liability to the injured party could not exceed the policy limits.¹⁹⁴

XI. LIFE INSURANCE—RIGHTS OF BENEFICIARIES

In *Stephens v. Adkins*,¹⁹⁵ the plaintiff brought an action seeking damages and a declaration that her brother, a co-beneficiary under a policy on the life of their deceased father, was not entitled to benefit from the policy because he had been convicted “for the voluntary manslaughter of the deceased.”¹⁹⁶ She submitted a certified copy of the jury’s verdict. This was countered by her brother’s affidavit in which he averred that the killing was partially in self-defense and partially caused by accident.¹⁹⁷ The court held that the posture of the case at this stage warranted a partial summary judgment in favor of the plaintiff on the issue of entitlement.¹⁹⁸ Georgia law specifically deprives those who commit murder, voluntary manslaughter, or conspire with another to commit murder any benefits they might otherwise claim

---

¹⁸⁹. Id. at 239, 433 S.E.2d at 317.
¹⁹⁰. Id.
¹⁹². Id. at 348, 444 S.E.2d at 740-41.
¹⁹³. Id. at 351, 444 S.E.2d at 742.
¹⁹⁴. Id.
¹⁹⁶. Id. at 653, 448 S.E.2d at 734.
¹⁹⁷. Id. at 653-54, 448 S.E.2d at 734.
¹⁹⁸. Id. at 654, 448 S.E.2d at 734.
under a policy on the life of the deceased. 199 “The statute also provides that a plea of guilty or a judicial finding of guilt not reversed or otherwise set aside as to the crime is prima facie evidence of guilt in determining the rights under this Code section.” 200 Hence, the defendant’s admissions and exculpatory “conclusionary statements” in his affidavit did not “present a genuine issue of material fact” as to his guilt so as to overcome the prima facie evidence presented. 201

XII. LOAN RECEIPT—PROOF OF LOSS

“Loan receipts,” it has been said, resemble loans in the same sense that prairie dogs resemble dogs. Under a loan receipt, the insured borrows the full amount of compensation for her loss from the insurer and promises to repay the loan only to the extent of any recovery from the alleged tortfeasor. The insured remains a real party in interest and the insurer can bask in its anonymity, because there is no formal assignment of the underlying cause of action. Jurors dislike insurer subrogees, and subrogation itself may be invalid as an attempt at assigning a claim for personal injuries. 202 At any rate, many states including Georgia find nothing wrong with the loan receipt even though they acknowledge it to be a bit of a fiction. 203

In Powers v. Latimer, 204 a homeowner brought a torts action against the owner of an airplane which crashed into her home. She sought damages for property losses and personal injuries suffered by her and members of her family. Her homeowner’s carrier paid her about $70,000 under a loan receipt which required repayment “to the extent she recovers payment from anyone else” and “that any suit would be prosecuted in her name under the exclusive direction and control,” of her carrier. 205 She also signed a proof of loss swearing that the sum received represented her whole property loss. 206

Subsequently, the homeowner’s carrier settled the property claim with the alleged tortfeasor’s insurer for about $60,000 and released both “from all liability claims arising from the accident.” 207

199. Id. (citing O.C.G.A. § 33-25-13 (1990)).
200. Id. (paraphrasing and relying upon O.C.G.A. § 33-25-13 (1990)).
201. Id., 448 S.E.2d at 734-35.
202. See section on Subrogation and Contribution, infra note 292.
203. See JERRY, supra note 38, at § 96(j).
205. Id. at 245, 450 S.E.2d at 297 (paraphrasing the policy) (emphasis added).
206. Id.
207. Id.
What is the effect of these documents? The court found that the loan receipt was valid despite its manichean qualities. It was not a subrogation agreement or an assignment, and thus allowed the insured to press the claim in her own name. The insurer’s right to direct and control litigation does not detract from that. It was but a “mechanism through which the insurance company can protect its own interest in any recovery.”

The statement in the proof of loss that the sum received from the insurer represented the insured’s entire property loss was, at most, an admission against interest; it did not preclude an action against the alleged tortfeasor, particularly an action for losses that may not have been covered by the homeowner’s policy.

The release of the alleged tortfeasor and his insurer, executed by the homeowner’s carrier in its individual capacity, could not effect the insured’s right to press a property claim against the alleged tortfeasor. She did not sign the document that had for its sole purpose a release of the alleged tortfeasor and his insurer “as to any stake” her homeowner’s carrier might have in her claim. The insured may therefore bring her action against the alleged tortfeasor, but “she is not entitled to a double recovery.” Accordingly, any judgment obtained against the alleged tortfeasor “must be reduced by the amount of [her insurer’s] interest in the case.”

It should be noted in passing that neither the insured’s daughter nor the insured suing on behalf of her daughter was entitled to recover for negligent infliction of emotional harm. Georgia law still holds that “recovery is allowed only where there has been some impact on the plaintiff that results in a physical injury.”

XIII. MOTOR COMMON CARRIER—DIRECT ACTION

Georgia’s limited direct action statutes, in identical provisions, expressly authorize injured persons to join motor common carriers or motor contract carriers with their respective liability insurance

---

208. Id. at 246, 450 S.E.2d at 297.
209. Id. (emphasis added).
210. Id., 450 S.E.2d at 298.
211. Id. at 247, 450 S.E.2d at 298. The writings involved did not affect the insured’s right to press her claim for personal injuries because such claims are nonassignable.
212. Id.
213. Id. (relying upon Hall v. Helms, 150 Ga. App. 257, 257 S.E.2d 349 (1979)).
214. Id. at 248, 450 S.E.2d at 299 (relying upon Richardson v. Hennly, 209 Ga. App. 868, 434 S.E.2d 772 (1993)).
215. O.C.G.A. § 46-7-12(e) (1982).
216. Id. § 46-7-58(e).
carriers "in the same action, whether arising in tort or in contract."\textsuperscript{217} In \textit{Westport Trucking Co. v. Griffin},\textsuperscript{218} the supreme court held that such actions were not only allowed against intrastate motor contract carriers but also against contract carriers that were engaged solely in interstate commerce.\textsuperscript{219} In \textit{Williams v. Southern Drayage, Inc.},\textsuperscript{220} decided during the current survey period, the court found that on a parity of reasoning and because of the identity of the statutory provisions, the same rule also applied to interstate motor common carriers.\textsuperscript{221} This despite the fact that as interstate carriers they are only required to obtain local registration permits and identification stamps and do not have to possess a certificate of public convenience and necessity from the Georgia Public Service Commission.\textsuperscript{222}

XIV. NEWLY ACQUIRED AUTOMOBILES

Automobile policies automatically cover newly acquired automobiles if the insured "notifies the company . . . within [30] days after the date of such acquisition of his election to make this . . . policy . . . applicable to such automobile."\textsuperscript{223} In \textit{Noakes v. Atlanta Casualty Cos.},\textsuperscript{224} the insured bought a broken down Jeep on February twenty-first. After the Jeep was made operational again it was involved in a collision on March twenty-eighth while being taken for a test ride.\textsuperscript{225} The insured did not obtain a certificate of title until March twenty-sixth. She admitted candidly that she did not notify her insurer during the thirty day period following the purchase because she did not want to "pay a premium until she determined whether her husband could repair the Jeep."\textsuperscript{226} In an argument which deserves an "A" for ingenuity, she contended that the notice period did not begin to run until she became an owner of the Jeep, which did not occur on the date of purchase, but on either the date when

\begin{itemize}
\item \textsuperscript{217} Id. \textsection 46-7-12(e), 58(e). Only three states and two United States territories have limited direct action statutes allowing claimants to join alleged tortfeasors and their liability carriers before establishing the tortfeasor's liability by judgment or otherwise. See JERRY, supra note 38, \textsection 84(b).
\item \textsuperscript{218} 254 Ga. 361, 329 S.E.2d 487 (1985).
\item \textsuperscript{219} Id. at 363, 329 S.E.2d at 489 (holding that O.C.G.A. \textsection 46-7-5(e) (1982) applies to interstate and intrastate carriers).
\item \textsuperscript{220} 213 Ga. App. 895, 446 S.E.2d 758 (1994).
\item \textsuperscript{221} Id. at 896, 446 S.E.2d at 759 (construing O.C.G.A. \textsection 46-7-12(e) (1982)).
\item \textsuperscript{222} Id. at 895, 446 S.E.2d at 759 (citing O.C.G.A. \textsection 46-7-16(a) (1982)).
\item \textsuperscript{223} See KEETON, supra note 36, at 662 App. H, Part I, Definitions - "owned automobile" (c)(2) (1963 revision of the Family Combination Automobile Policy).
\item \textsuperscript{224} 215 Ga. App. 398, 450 S.E.2d 861 (1994).
\item \textsuperscript{225} Id. at 398, 450 S.E.2d at 862.
\item \textsuperscript{226} Id.
\end{itemize}
the Jeep was again operational or the later date when she obtained a certificate of title. The court made short shrift of these contentions.227 “The key to coverage under the policy was the date [the insured] became the owner, not the date the car came into service as a means of transportation.”228 Furthermore, the statute dealing with registration formalities states that “as between the parties a transfer by an owner is not effective” until the purchaser obtains “from the transferor the certificate of title thereto.”229 It so happened that the insured did obtain a certificate from the transferor on February twenty-first, the date of the purchase. The certificate of title subsequently issued by the state merely “shows registration of the certificate of title already transferred by the seller,” and is but one of the methods of proving existing ownership.230 Moreover, the statute applies as between the parties and not, as in the present case as between the purchaser and her insurer.231 Accordingly, the Jeep was not covered at the time of the collision.232

XV. OMNIBUS CLAUSE AND “PERMITTEES”

Automobile policies in their old iteration covered members of the insured's household who were relatives of the insured as well as the insured's bailees or “permittees.” The 1955 standard automobile policy provides coverage for “any person while using the automobile . . . provided that the actual use of the automobile is by the named insured or such spouse or with the permission of either.”233 A cognate but etymologically quite different version provides coverage for “any . . . person while using the owned motor vehicle, provided the operation and actual use . . . are with the permission of the named insured.”234 The 1963 family combination automobile policy provides coverage for any other person using such automobile with the permission of the named

227. Id. at 399, 450 S.E.2d at 862.
228. Id.
229. Id. (quoting O.C.G.A. § 40-3-32(d) (1982)) (emphasis supplied by court).
230. Id., 450 S.E.2d at 863.
231. Id., 450 S.E.2d at 862-63.
232. Id., 450 S.E.2d at 863.
233. See J. AUSTIN & N. RISJORD, AUTOMOBILE LIABILITY INSURANCE CASES STANDARD PROVISIONS and app. 19 (1964) (emphasis added); see also Strickland v. Georgia Cas. & Sur. Co., 224 Ga. 487, 162 S.E.2d 421 (1968) (holding that there is coverage if an authorized “user” turns the wheel over to an “operator” without specific authorization).
234. See DeWorken v. State Farm Mut. Ins. Co., 151 Ga. App. 248, 249, 259 S.E.2d 490, 491-92 (1979) (emphasis different from original) (holding that a permittee's permittee was not covered because both “operation” and “use” had to be authorized).
insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission.\textsuperscript{235}

The 1985 standard personal auto policy, one of a spate of new-wave easy reading policies that are now beginning to percolate through our appellate system, marks a departure in substance and structure from old iterations. It includes in its coverage clause as additionally insured "[a]ny person using your covered auto,"\textsuperscript{236} but then excludes "any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so."\textsuperscript{237} The old versions, regardless of variant embroidery, have one issue in common: they focus on the named insured and the circumstances surrounding the grant of permission. The new version focuses on the subjective state of mind of the permittee as measured by the objective standard of reasonableness.

Two cases dealt with the new version. In \textit{Miller v. Southern Heritage Insurance Co.},\textsuperscript{238} the insured held a policy covering a car that was mainly used by his son. The car was involved in a collision while it was being driven by a fifteen-year old who held only a learner's permit and was not accompanied by an adult as mandated by law.\textsuperscript{239} The fifteen-year old had been allowed to operate the car by the son, the authorized user of the car. Despite this fact, the court held that the driver was excluded from coverage under the new 1985 policy.\textsuperscript{240} "As a matter of law, [the fifteen-year old] cannot be considered to have had any 'reasonable belief' that he was entitled to drive the car."\textsuperscript{241} In a similar vein, the court held in \textit{Cincinnati Insurance Co. v. Plummer}\textsuperscript{242} that the same exclusion also applied to close relatives of the insured who were members of the insured's household.\textsuperscript{243} There was no coverage where a fourteen-year old without a license clandestinely obtained the car keys while her parents were asleep, rolled the car silently out of the

\textsuperscript{235} See \textit{Keeton & Widiss supra} note 3, at 1117 app. H(1). The use of the disjunctive "or" suggests that the permittee's permittee may be covered if the vehicle is "used" by (i.e. dedicated to the purpose of) the "permittee," at least in the absence of an express prohibition.
\textsuperscript{236} \textit{Id.} at 1122 app. H(2) Insuring Agreement 2.
\textsuperscript{237} \textit{Id.} at 1123 app. H(2) Exclusions A.8.
\textsuperscript{239} \textit{Id.} at 173, 450 S.E.2d at 433 (citing O.C.G.A. § 40-5-24(a) (1982)).
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.} at 176, 450 S.E.2d at 435. It should be noted that this was but one of several different issues raised in the case.
\textsuperscript{243} \textit{Id.} at 266, 444 S.E.2d at 380.
driveway, and then started careening around the neighborhood until she collided with an embankment at 5:00 a.m.\textsuperscript{244}

Finally, two cases had to cope with different but not disparate new versions of commercial automobile insurance.  

\textit{Massachusetts Bay Insurance Co. v. Wooten}\textsuperscript{245} involved a policy which extended coverage to "[a]nyone [other than you] while using with your \textit{permission} a covered ‘auto’ you own," but apparently did not include a "reasonable belief" exclusion. One of the insured’s employees had taken a company car after business hours for a bit of pub-crawling at 8:40 p.m. and was involved in a collision at 2:00 a.m. in which he was killed. He was, at that time, in a highly inebriated state.\textsuperscript{247} Despite some contradictory evidence, the insurer, in the court’s view, presented a prima facie case that the employee “was driving the vehicle for a personal use . . . and that such personal use was \textit{expressly forbidden} by the employer.”\textsuperscript{248} This authorized a jury finding of noncoverage, and thus made it error for the trial court to direct a verdict for the administrator of the employee’s estate. The court also found that permission clauses have been consistently upheld as comporting with public policy at least in those cases which involved express prohibitions.\textsuperscript{249} This despite the 1977 compulsory insurance regime which introduced the policy that “innocent persons who are injured should have adequate recourse for the recovery of their damages.”\textsuperscript{250} It was therefore error for the trial court to direct a verdict “on the ground that the permission clause is violative of public policy.”\textsuperscript{251}

The court conceded in passing that, in cases “where an expressly forbidden use is not involved,”\textsuperscript{252} the pro-compensation bias of the compulsory insurance regime may arguably require the adoption of the first instance permission ("hell or high water") rule which covers virtually any deviation so long as initial permission to use a vehicle is

\footnotesize{244. \textit{Id.} at 265, 444 S.E.2d at 379. The minor in this case lacked permission, express or implied. In fact, permission had been explicitly refused in the past. \textit{Accord} Cincinnati Ins. Co. v. Mullinax, 215 Ga. App. 331, 450 S.E.2d 336 (1994) (involving two 15-year olds).}


246. \textit{Id.} at 387, 450 S.E.2d at 858-59 (quoting the policy) (emphasis added).

247. \textit{Id.}, 450 S.E.2d at 859.

248. \textit{Id.} at 388, 450 S.E.2d at 859 (emphasis supplied by court).

249. \textit{Id.} at 387, 450 S.E.2d at 858-59.


251. \textit{Id.} at 387, 450 S.E.2d at 859.

252. \textit{Id.} at 386, 450 S.E.2d at 858 (emphasis supplied by court).}
given by the insured, and thus partially voids permission clauses. This, however, was for another case and another time.

*Williams v. Georgia Farm Bureau Mutual Insurance Co.* involved a hybrid policy providing coverage for "anyone else while using with your permission a covered 'auto,'" but excluding the use of "a vehicle without . . . express permission . . . or if permission is granted, acting outside of the scope of said permission." A business owner allowed an occasional employee to take an insured Chevrolet van to pick up the employee's cousins "to perform some work for [the owner]." When the day's work was done the employee took his cousins home. He stayed there for an hour and then used the van to go to a pizza restaurant and to stop at a liquor store for a major purchase. Both errands involved a "detour from his direct route home." There was conflict in the evidence about whether permission to pick up his cousins carried with it permission to take them home. But, even assuming that such permission was present, there was no doubt that his peregrinations "deviated substantially from the scope of his permission to use the vehicle." Hence, the trial court's grant of summary judgment for the insurer demanded affirmance.

**XVI. Procedure—Reformation in Equity and Declaratory Relief**

*Cotton States Mutual Insurance Co. v. Woodruff* is a pastiche which has about it the uncomfortable realities of accepted modern behavior. An insured bought coverage for his three vehicles. Subsequently, he had one of the vehicles, a Toyota pickup truck, deleted from the policy. After he collided with a bicyclist while driving the Toyota, he requested his insurer to add the Toyota back to the policy without enlightening the insurer about his mishap. The insurer issued an amended declaration and, according to its standard practice, backdated it to 12:01 a.m. on the date of issue. Literally this meant that the insured was now covered because the accident had occurred exactly

---

253. *Id.* at 386-87, 450 S.E.2d at 858.
254. *Id.* at 388, 450 S.E.2d at 859 ("we need not reach the question of whether the first instance permission rule should be adopted as the law of this state").
256. *Id.* at 129, 443 S.E.2d at 712 (quoting the policy) (emphasis supplied by court).
257. *Id.* at 128, 443 S.E.2d at 712.
258. *Id.* at 129, 443 S.E.2d at 712.
259. *Id.* at 130, 443 S.E.2d at 713.
260. *Id.*
262. *Id.* at 511, 451 S.E.2d at 107.
nineteen minutes after 12:01 a.m. on the date of issue. The insurer was granted reformation in equity so as to give the policy only prospective effect. The court explained that there was no mutual mistake, but there was an actionable unilateral mistake on the part of the insurer. The insured's failure to disclose the accident, coupled with the fact that he should have known that he would not be able to secure coverage for an accident that had already occurred, constituted "inequitable conduct" and demanded reformation on behalf of the insurer.

Declaratory judgments abound in insurance litigation, but they are not all-purpose remedies, as is demonstrated by *Miller v. Southern Heritage Insurance Co.* After an automobile collision engineered by a fifteen-year old driver, the presumed liability carrier made a preliminary payment of about $11,000 to cover the victim's medical expenses. When settlement negotiations broke down it filed an action against the victim seeking, inter alia, a declaration that it was not obligated to pay for any of the medical expenses by law or contract. It had simply made the payment under the mistaken assumption that it could not rely upon the unauthorized driver exclusion in its policy because it was, under any circumstances, compelled to furnish the minimum coverage of up to $15,000 as mandated by statute. Its decision to pay had been informed by judicial precedent of uncertain compass. The court made a declaration of its own when it held that this was a misuse of the declaratory judgment, which was designed "to permit determination of a controversy before obligations are repudiated or rights are violated." Since the insurer did "not need guidance" for actions already taken, the declaratory judgment was only advisory, and a solution of an artificial controversy which was created, not by the underlying facts, but by the very filing of the declaratory judgment action itself. The insurer should either have filed its action before making the payment or

---

263. *Id.* at 513, 451 S.E.2d at 108.
264. *Id.* at 512, 451 S.E.2d at 107 (the insurer's backdating practice risked such result).
265. *Id.*
266. *Id.*
267. *Id.* (quoting O.C.G.A. § 23-2-32(b) (1982)). There was also no evidence whatsoever of prejudice on the part of the insured.
269. *Id.* at 173, 450 S.E.2d at 433.
271. 215 Ga. App. at 174, 450 S.E.2d at 434 (citations omitted).
272. *Id.* (citing O.C.G.A. § 9-4-1 (1982)).
274. *Id.*
sought vindication of its "right" to reimbursement by filing an action for restitution after making the payment.\textsuperscript{275} Accordingly, the trial court's grant of the insurer's motion for summary judgment was in error to the extent that it spoke to the insurer's "liability for sums already paid," and was thus subject to partial reversal.\textsuperscript{276}

XVII. PROPERTY INSURANCE—COVERAGE AND INSURABLE INTEREST

Divorce may wreak havoc upon the legal relationships of unsuspecting parties. \textit{Cotton States Mutual Insurance Co. v. Haire}\textsuperscript{277} is a paradigmatic case justifying this observation. A husband and wife owned a home jointly but had it insured solely in the wife's name. The husband was an additional insured as his wife's relative residing in her household.\textsuperscript{278} Subsequently, they divorced and a settlement agreement incorporated in the decree required the wife to convey to her former husband "all her rights, title, and interest in the property known as the marital residence,"\textsuperscript{279} in return for "one half (1/2) of the net equity not to exceed $1,500.00,"\textsuperscript{280} if and when the home was sold. The wife conveyed her share as required and moved out. Subsequent to the divorce and after the husband had moved back into the home as its sole resident, the home was totally destroyed by fire. The insurer paid the mortgagee as loss payee, presumably under a standard or union mortgage clause, and paid the former wife's equity of $1,500.\textsuperscript{281}

Could the husband collect his equity in the home of which he was now the sole owner? The court held emphatically that he could not.\textsuperscript{282} Although he obviously had an insurable interest in his property at the time of the casualty, he was no longer an additional insured under his former wife's policy because he no longer qualified as her relative. He should have made a timely request of the insurer to substitute his name

\textsuperscript{275} \textit{Id.} at 175, 450 S.E.2d at 435. Restitution is not a remedy incidental or ancillary to declaratory relief. The law of restitution was tailored by Lord Mansfield in Moses v. Macferlan (Macpherlan), K.B. 1760, W.BL. 219, 96 Eng. Rep. 120 (K.B. 1760). Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760). Although based on equitable principles ("ex aequo et bono"), it is generally enforced by actions at law seeking purely monetary relief ("indebitatus assumpsit") and only rarely by traditional equitable relief, such as specific restitution (equitable replevin) or cancellation to prevent unjust enrichment.

\textsuperscript{276} \textit{Id.} at 177, 450 S.E.2d at 435.


\textsuperscript{278} \textit{Id.} at 800, 450 S.E.2d at 162.

\textsuperscript{279} \textit{Id.} (quoting the settlement agreement).

\textsuperscript{280} \textit{Id.} (quoting the settlement agreement).

\textsuperscript{281} \textit{Id.}

\textsuperscript{282} \textit{Id.} at 801, 450 S.E.2d at 163.
for that of his former wife as the named insured. What is sad about this case is that the husband "never saw the policy . . . [and] just took it for granted that [he] was on the policy," which is certainly not an uncommon scenario.

XVIII. STACKING OF COVERAGES

Whether pyramiding, aggregating, or stacking of coverage is available or even required when two or more policies are present upon the same risk depends upon the particular line or type of insurance, upon legislative policy and its perception, and upon the language of the policies at issue. In Georgia Farm Bureau Mutual Insurance Co. v. Shook, an insurer had issued three separate liability policies on three separate family automobiles. Each of them provided that "[i]f this policy and any other auto . . . policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit under any one policy." Pretermitting the question whether the policies were in fact present upon the risk when one of the members of the insureds' family had an accident, the court held that the provision had to be given a literal construction. Under no circumstances could the insurer's liability exceed $25,000, the maximum liability provided in each policy. But for this language, stacking of coverages up to the amount of the insured's expenses would have been allowed because it does not contravene Georgia law.

The court also held that the insurer's failure to rely specifically upon this policy provision in its motion for summary judgment did not waive the issue for purposes of the present appeal. The policies in question were all made part of the record below and it was now up to the court of appeals to construe them as a matter of law.

283. Id. (distinguishing Republic Ins. Co. v. Martin, 182 Ga. App. 390, 355 S.E.2d 694 (1987) where an attempt to do so was made).
284. Id. at 800, 450 S.E.2d at 162.
287. Id. at 67, 449 S.E.2d at 659 (quoting the policies) (emphasis added).
288. Id.
289. Id. Stacking or aggregating beyond the amount of the loss sustained would, of course, violate the indemnity principle.
290. Id. at 67-68, 449 S.E.2d at 659.
291. Id. at 68, 449 S.E.2d at 659-60.
XIX. SUBROGATION AND CONTRIBUTION

Can an insured recover from a car dealer for defective repairs after she has been paid her collision losses by her first-party insurance carrier? This simple but surely not uncommon question surfaced in *Nalley Northside Chevrolet, Inc. v. Herring*. The court held that the insured had standing to sue the dealer because the insurer had only paid her for loss to the car caused by the other driver and not for damages she might have subsequently suffered at the hands of the dealer. To the extent that the insurer had any rights to subrogation, they were only available against the other driver. Since the case is a veritable A.L.R. Annotation on the array of substantive and procedural errors that may impede or derail effective insurance litigation, it seems worthwhile to catalogue some of them by way of an advisory.

First, while a single act may constitute a breach of contract and a tort where there is a duty “independent of the contract” owed to the promisee, the mere negligent performance of a contract does not also constitute a tort. Hence, separate awards for breach of contract and for negligence in its performance amount to impermissible duplication of damages. However, compensatory or punitive damages for an intentional tort in connection with the contract, such as fraud, are permissible.

Second, while the admission of evidence is primarily left to the sound discretion of the trial court, it was improper to admit testimony “concerning past fraudulent parts conversion” by the dealer because the specific allegations of fraud in this case did not even allude to any automotive parts conversion.

Third, it was improper for the trial court to instruct the jury on constructive fraud in a case seeking only legal relief in the form of monetary damages. Constructive fraud is an equitable doctrine available in connection with equitable relief.

---

293. Id. at 186, 450 S.E.2d at 454.
294. Id.
295. Id. at 188, 450 S.E.2d at 456.
296. Id.
297. Id. at 189, 450 S.E.2d at 456.
298. Id.
299. Id. at 186, 450 S.E.2d at 454.
300. Id. at 187, 450 S.E.2d at 455.
301. Id.
Fourth, it was improper for the trial court to instruct the jury on civil conspiracy in the absence of any evidence in the record indicating such conspiracy. Evidence that the dealership, as a corporation, may have engaged in harmful conduct in collaboration with one of its employees does not amount to evidence of conspiracy unless it is also shown that the employee had stepped outside the scope of his agency, "because a corporation cannot conspire with itself." 303

Insurers still have to tread gingerly when they seek subrogation for payments of personal injury claims. Despite compelling authority and arguments to the contrary, 304 subrogation agreements that are somehow bottomed upon assignments of an underlying personal injury claim, no matter how deftly and defensively drafted, 305 are frequently unenforceable or at least suspect. 306

In Georgia they are in violation of statute, 307 as is again evidenced by Southern General Insurance Co. v. Ezekiel. 308 An auto insurer, who had paid its insured under the medical expense rider of its policy, sought subrogation against the other insured and its liability insurer. 309 The easy reading policy in question provided in pertinent part that "we are entitled to all the rights of recovery which the person to whom payment was made may have against another person," 310 and required the insured to complete all legal documents to effectuate that right. 311 The court held that this was an impermissible assignment and thus precluded the insurer from suing the alleged tortfeasor and his insurer as posing as a real party in interest. 312 An identical decision had been reached in a previous case in which the language involved read that "we have the right to sue or otherwise recover the loss from anyone else who

---

302. Id. at 188, 450 S.E.2d at 455.
303. Id.
306. See Keeton & Widiss, supra note 3, § 3.10(a)(7) for three distinct judicial views regarding the assignment of personal injury claims.
309. Id. at 665, 445 S.E.2d at 807.
310. Id., 445 S.E.2d at 808 (quoting the policy) (emphasis added).
311. Id.
312. Id. at 665-66, 445 S.E.2d at 808.
may be responsible." This decision was found controlling because the language of the subrogation provisions was essentially the same. Attempts at distinguishing "rights to sue or otherwise recover" from "rights of recovery", and torturing the latter into a mere right to reimbursement, were no more than "flights of semantic fancy."

It is an old axiom that subrogation (or restitution) is not available to a volunteer. Nevertheless, cases keep surfacing where the factual matrix appears to bemuse their protagonists. Allianz Insurance Co. v. State Farm Fire & Casualty Co. involved a lessor's policy which concededly provided excess insurance to the lessor beyond the primary insurance policy purchased by the lessee of a Mercedes Benz which designated the lessor as an additional insured loss payee. After the primary insurer denied a theft claim on the grounds that its investigation disclosed that the lessee had "conspired to cause or caused the damage to the vehicle," the lessor's excess insurer paid the lessor's claim for loss in an amount approximating $110,000. Was the lessor's excess insurer entitled to subrogation against the primary insurer? The court answered this question in the negative because the excess insurer was not legally obligated to make the payment, and thus occupied the position of a mere volunteer. This conclusion was further buttressed by an exclusion in the excess insurance contract which stated "[w]e will not pay the 'loss' if the lessee's insurance company fails to pay the actual cash value of the 'leased auto.'"

XX. TEMPORARY INSURANCE—BINDERS

An oral or written binder is issued by general or independent agents with limited underwriting authority. It provides temporary insurance pending the processing of the application for permanent insurance. In Georgia, a binder is not "valid beyond the issuance of the policy with

314. Id.
315. Id. at 665-66, 445 S.E.2d at 808 (emphasis added).
317. Id. at 666, 449 S.E.2d at 5.
318. Id.
319. Id. at 667, 449 S.E.2d at 6.
320. Id. (quoting the policy); see also Carden v. Burckhalter, 214 Ga. App. 487, 448 S.E.2d 251 (1994) (an insured could not lodge a claim for contribution against alleged joint tortfeasors based on payments which his liability carrier had made to the victims without the insured's consent. Such payments were made in the capacity of independent contractor).
What happens to an already issued binder when the insured’s check for the first premium bounces? This depends on the language of the binder. In *McDuffie v. Criterion Casualty Co.*, an insurer issued a binder in response to a general application for insurance which, in pertinent part, provided that “check drafts, and money orders are accepted subject to collection only” and that the applicant agreed, “if my premium remittance is not honored by the bank, no coverage will exist.” The court held that dishonor of the applicant’s premium check by her bank made the binder void ab initio. Although payment of the first premium is not normally a condition precedent to the validity of an insurance contract, it can be raised to the level of a condition by the contract itself. Binders are “created for the convenience of the insured” and are “governed by the ordinary rules of contract construction.” Despite a judicial preference for construing conditions as subsequent rather than precedent because of the less devastating effect of the former, the particular language of the condition at issue made it a condition precedent. Since the exercise of party autonomy in this context was not contrary to Georgia law, the condition precedent was enforceable. Accordingly, dishonor of the check voided coverage at its very inception.

In *Southern Guaranty Insurance Co. v. Ragan Insurance Agency, Inc.*, the court dealt with the duration of the coverage provided by binders. Shorn of their extraneous detail, the facts showed that a building contractor had applied for three-year business automobile policies on his vehicles, received a written binder from the insurer’s agent, and signed a premium finance agreement leaving it to the agent to fill in certain blanks when precise figures on total premiums,

---

323. *Id.* at 819, 449 S.E.2d at 134 (quoting the application) (emphasis added).
324. *Id.* at 821, 449 S.E.2d at 136.
325. *Id.* at 820, 449 S.E.2d at 135 (quoting Fort Valley Coca-Cola Co. v. Lumbermen’s Mut. Cas. Co., 69 Ga. App. 120, 124, 24 S.E.2d 846, 849 (1943)).
326. *Id.*
327. *Id.* at 821, 449 S.E.2d at 136.
328. *Id.*, 449 S.E.2d at 135-36.
330. *Id.* at 691, 442 S.E.2d at 873. The agent was probably an “independent agent” with representational contracts furnishing underwriting authority for two or more insurers, rather than an “insurance broker” who represents the insurance consumer and has but a “hunting license” to secure or place suitable insurance for his principal. The opinion is not clear on this point.
down payment, and the like would become known. The agent received the permanent policies from the insurer and completed the premium finance documents. After several attempts to collect the down payment by mail and in person proved futile, the agent sent the policies back to the insurer. The contractor did not know about the agent's receipt of the policies and admitted candidly in his testimony that he did not "believe that he had obtained permanent coverage." The court held that there was no coverage for an accident involving one of the contractor's vehicles which occurred more than ninety days after the binder was issued. The binder had expired by its own terms and the permanent policies had not become effective.

XXI. TITLE INSURANCE

Title insurance is a hybrid and a curiosity. It is barely regulated. It does not fit any of the three traditional and now somewhat obsolescent insurance classifications which contemplate insurance against loss-producing contingent events that occur after formation of the insurance contract. Title insurance relates to past events in the sense that it encompasses information deficiencies concerning rights that have their origins in the past. It is the loss-producing assertion or discovery of such rights after the contract is formed which may be viewed as the covered contingent event.

In Chicago Title Insurance Co. v. Investguard, Ltd., a case of first impression, the court faced the issue whether the discovery that insured land was located in a flood plain revealed a title defect amounting to unmarketability of title and was thus covered by a title insurance policy. The court aligned itself with foreign precedents which held that there was a clear distinction between "economic . . . marketability, which relates to physical conditions affecting the use of the property,

331. Id. at 691-92, 442 S.E.2d at 873.
332. Id. at 693, 442 S.E.2d at 874.
333. Id.
334. Id.
335. Id. (citing O.C.G.A. § 33-24-33(b) (1990)).
337. In Georgia the field of title insurance rates a seven-line definition (O.C.G.A. § 33-7-8 (1992)) and occasional reference (e.g., O.C.G.A. § 33-39-2(d) providing that the information and disclosure act is not applicable to title insurance).
338. These are life, fire and marine, and casualty insurance. See KEETON, supra note 36, § 1.3(a), 1.3(h).
340. Id. at 121, 449 S.E.2d at 682.
and title marketability, which relates to defects affecting legally recognized rights and incidents of ownership. Accordingly, it held that although the land in question may be valueless by virtue of its location, this fact did not affect its legal marketability.

XXII. UNINSURED AND UNDERINSURED COVERAGE

The Georgia Uninsured Motorist Act has again proved reliably litigation prone. It swallowed up about thirteen percent of all appellate judge time allocated to insurance cases.

A. Nonduplication of Benefits Clauses and Setoffs

In Northbrook Property & Casualty Insurance Co. v. Merchant, a case of first impression, the court addressed the question whether an uninsured motorist carrier ("UMC") could enforce a provision in its policy which reduced payments of uninsured motorist benefits "by the amount of benefits an 'insured' is entitled to receive for the same elements of loss under any workers' compensation law." The court held that, despite legislative silence on this issue, such contractual setoffs did not violate Georgia public policy because they did not frustrate the object of the Uninsured Motorist Act, which was to protect insureds only to the extent of their actual losses.

B. Phantom Cars and Hit-and-Run Vehicles

A 1983 amendment of the Uninsured Motorist Act dispensed with the actual physical contact requirement for UM coverage whenever "the description by the claimant of how the occurrence occurred [sic] is corroborated by an eyewitness to the occurrence other than the claimant." This has produced tons of judicial gloss and still clamors for fine-tuning. In Meridith v. Nationwide Mutual Fire Insurance Co., the contract/corroboration test was met even though the corroborating affidavit diverged in some respects from the UM insured's own

341. Id. at 123, 449 S.E.2d at 683 (relying upon Chicago Title Ins. Co. v. Kumar, 506 N.E.2d 154 (1987)).
342. Id.
345. Id. at 275, 450 S.E.2d at 427 (quoting the policy) (emphasis added).
346. Id.
deposition.\textsuperscript{349} So long as the eyewitness implicates the unidentified vehicle "as a causal factor in the . . . occurrence,"\textsuperscript{350} it did not matter that his evidence may in some respects fail to support the UM insured's description or even contradict it. Such discrepancies are for the jury to sort out and could not serve as a basis for a grant of summary judgment to the insurer.\textsuperscript{351} The same test was not met in Bone \textit{v. State Farm Mutual Insurance Co.}\textsuperscript{352} where the eyewitness observed the allegedly implicated fast moving unidentified Volkswagen just before the crash and saw the results of the crash shortly thereafter. However, she did not see the Volkswagen cross the center line or observe the crash itself,\textsuperscript{353} and was thus unable to "corroborate how the occurrence occurred."\textsuperscript{354}

C. Release and Settlement

The UMC's obligation to pay benefits is triggered by establishing that the insured is legally entitled to compensation from the tortfeasor.\textsuperscript{355} It is measured by the "difference between the available coverages under . . . liability insurance . . . and the limits of the uninsured motorist coverage."\textsuperscript{356} An UMC paying benefits is "subrogated to the rights of the insured . . . against the person causing . . . injury, death, or damage to the extent that payment was made."\textsuperscript{357}

What is the posture of affairs when the UM insured, after an accident, releases the alleged tortfeasor and his liability carrier for a small sum, which presumably constitutes the limit of the liability policy available, and then proceeds to file an action against the alleged tortfeasor in order to recover his actual and presumably much larger damages? This scenario, which was curiously enough a case of first impression in this state, engaged the court in \textit{Darby v. Mathis}.\textsuperscript{358} An examination of the document signed by the UM insured revealed that it was an omnibus release and settlement covering "any and all claims, demands, rights, and causes of action, of whatsoever kind or nature."\textsuperscript{359} Hence, the

\textsuperscript{349} Id. at 288, 450 S.E.2d at 324.
\textsuperscript{350} Id. at 287, 450 S.E.2d at 324 (quoting and relying upon Garrett \textit{v. Standard Guar. Ins. Co.}, 201 Ga. App. 251, 252, 410 S.E.2d 806, 807 (1991)).
\textsuperscript{351} Id. at 287-88, 450 S.E.2d at 324.
\textsuperscript{353} Id. at 783, 452 S.E.2d at 524.
\textsuperscript{354} Id.
\textsuperscript{356} Id. § 33-7-11(b)(1)(D)(ii).
\textsuperscript{357} Id. § 33-7-11(f) (emphasis added).
\textsuperscript{358} 212 Ga. App. 444, 441 S.E.2d 905 (1994).
\textsuperscript{359} Id. at 445, 441 S.E.2d at 906 (quoting the release).
insured's claim that it was but a partial release applying only to "negligence and not to any wilful or intentional act." It was disingenuous. The vehicular and comprehensive language produced a total and general release of the alleged tortfeasor as well as his liability insurer and barred any action against them. Did it also bar the UM insured from any recovery from his UMC which was duly served in the torts action? The court held emphatically that it did. The UMC was only liable for benefits if its insured showed that he was "legally entitled to recover" from the uninsured motorist. "It [was] therefore a condition precedent to the action against [the] uninsured motorist carrier 'that a suit shall have been brought and judgment recovered against the uninsured motorist.'" The court observed that the UM insured would have achieved his aim had he settled for a partial release "conditioned on the reservation of whatever rights and interests the (UMC) . . . might have or claim thereafter against the tortfeasor."

One might note in passing that Georgia now has a limited release statute which allows the UM insured to settle with a single liability carrier for the full policy limit when two or more such carriers are present upon the risk. Such limited settlement releases the settling carrier and its insured from all claims and all personal liability "except to the extent other insurance coverage is available which covers such claim." UMCs are expressly enjoined from prohibiting such limited settlements in their policies. The statute has yet to be construed. It appears to be a bit infelicitously drafted and may thus yield a few judicial surprises in the future.

D. Service upon the UMC

Georgia Farm Bureau Mutual Insurance Co. v. Kilgore involved the following simplified scenario: An injured UM insured filed an action against the alleged tortfeasors a little over seven months after an
automobile collision. She then waited another fifteen months to serve a duplicate original of the complaint upon her UMC. This service, although initiated more than two weeks before the expiration of the statute of limitations on the claim against the alleged tortfeasors, could not be perfected by the sheriff until two days after the expiration because the UMC's "registered agent was out of the country." The court reaffirmed that late service after the claim is time-barred is curable and relates back to the date of the timely filed action unless it is caused by the plaintiff's lack of diligence. This requires a fact specific inquiry into the plaintiff's conduct between the date the action is filed and the date it is served. The plaintiff contended that the delay in service was justified because she did not know that she had a claim against her UMC until the alleged tortfeasor's liability carrier had established noncoverage in a pending declaratory judgment action. This fallacy was roundly rejected. She had not been diligent. A lack of diligence, however, would have been irrelevant had she filed and served her complaint within the limitation. Under the facts of this case, her failure to perfect timely service, despite timely attempts to do so, was not due to her lack of diligence, but to the unavailability of the UMC's process agent. Hence, the trial court was authorized, in the exercise of its discretion, to deny the UMC's motion to dismiss for untimely service.

E. Sovereign Immunity

Is it necessary for insureds to obtain a judgment against known or unknown uninsured motorists in order to perfect their rights against their UMCs? The answer is generally yes. Yet, in Tinsley v. Worldwide Insurance Co., the court precisely defined the available exceptions. After suffering injuries in a collision with a police cruiser, the insured filed a torts action against the City of Valdosta, its police department, and the officer involved. After summary judgment

---

371. Id. at 387, 454 S.E.2d at 589.
372. Id. at 386, 454 S.E.2d at 589 (citing and relying upon Williams v. Colonial Ins. Co., 199 Ga. App. 760, 406 S.E.2d at 99 (1991)).
373. Id. (not only between the date the claim became time-barred and the date of service, as the trial court had assumed).
374. Id.
375. Id.
376. Id. at 386-87, 454 S.E.2d at 589.
377. Id. at 387, 454 S.E.2d at 589.
for defendants on the grounds of sovereign and official immunity, the
UMC, which had been properly served with a copy of the action, received
a grant of summary judgment on the grounds that its insured had failed
to obtain a judgment establishing his entitlement to compensation.\footnote{380}
The court held that summary judgment in favor of the UMC was
error.\footnote{381} While a judgment against the uninsured motorist is normally
a condition precedent to the UMC's liability, there are situations where
the law makes it impossible to secure such judgment. One such
situation confronted the supreme court in \textit{Wilkinson v. Vigilant
Insurance Co.},\footnote{382} where a specific section in the Bankruptcy Code\footnote{383}
barred a judgment against the uninsured motorist.\footnote{384} The supreme
court held that the Uninsured Motorist Act created a mechanism “for the
adjudication of the [UMC's] liability to the insured under the contract of
insurance,” in which the UMC “is the real party in interest and not the
uninsured motorist.”\footnote{385} Allowing the UMC to escape liability simply
because the uninsured motorist had gone bankrupt “would be contrary
to the purpose of the Act.”\footnote{386} Accordingly, it held that “the action
should have been allowed to proceed as though it were a John Doe action
[thus authorizing] the insured [to] establish 'all sums which he shall be
legally entitled to recover as damages'.”\footnote{387}

In \textit{Worldwide}, the court of appeals concluded that the defense of
sovereign immunity has the same effect as a discharge in bankrupt-
cy.\footnote{388} It bars recovery of a judgment as a matter of law, and actions
against the immune defendant should thus be treated as prescribed by
\textit{Wilkinson} - as John Doe actions formally fixing the extent of the UMC's
liability.\footnote{389} The current state of Georgia law in this context can
therefore be summarized as follows: securing a judgment against the
wrongdoer as a condition of the UMC's liability is still required where
the insured is legally capable of securing such judgment but is prevented
from doing so because of his own “inaction or procedural misstep,”\footnote{380}

\begin{itemize}
\item \footnote{380}{Id. at 809, 442 S.E.2d at 878. O.C.G.A. § 33-7-11(a)(1) (1992) requires the UMC
“to pay the insured all sums which he shall be legally entitled to recover as damages.”}
\item \footnote{381}{212 Ga. App. at 811, 442 S.E.2d at 879.}
\item \footnote{382}{236 Ga. 456, 224 S.E.2d 167 (1976).}
\item \footnote{383}{11 U.S.C. § 524(a) (1994).}
\item \footnote{384}{Now codified as the “bankruptcy exception” in O.C.G.A. § 33-7-11(a)(4) (1992).}
\item \footnote{385}{212 Ga. App. at 810, 442 S.E.2d at 878 (quoting Wilkinson v. Vigilant Ins. Co., 236
Ga. 456-57, 224 S.E.2d 167-68 (1976)).}
\item \footnote{386}{Id. (quoting Wilkinson, 236 Ga. at 456, 224 S.E.2d at 167).}
\item \footnote{387}{Id. (quoting Wilkinson, 235 Ga. at 456, 224 S.E.2d at 167).}
\item \footnote{388}{Id., 442 S.E.2d at 879.}
\item \footnote{389}{Id. at 811, 442 S.E.2d at 879.}
\item \footnote{390}{Id. (Beasley, J., concurring specially).}
\end{itemize}
or other misdirected conduct. It is not required where such judgment is barred by law.

F. Use of the Uninsured Motor Vehicle

The facts of Abercrombie v. Georgia Farm Bureau Mutual Insurance Co. have about them some of the blood-curdling realities of the ten o'clock news. After a two car collision there was an altercation and shots were exchanged between the vehicles. One of the shots hit a driver and killed him. A wrongful death action against the wrongdoer established that no liability coverage was available because the shot in question had been intentionally fired and had thus triggered the exclusion for intentional acts in the wrongdoer's liability policy. As a result, he was uninsured. Was the victim's UMC liable for UM benefits under a policy which promised to pick up the wrongdoer's liabilities for damages if they "result from the ownership, maintenance, or use of the 'uninsured motor vehicle'? In a six to three opinion, the court held that it was indeed liable. The tragedy had as its origin the collision, which arose out of the use of the motor vehicles. The altercation and gun duel were the direct outgrowth of the collision, and the fatal gunshot was fired by the wrongdoer using one of the vehicles as a moving gun platform in the ensuing chase. This furnished the required nexus between the use of the vehicle and the fatality.

391. Id., 442 S.E.2d at 879-80 (Beasley, J., concurring specially). Examples of such inaction or procedural missteps would be late service upon the alleged tortfeasor or the UMC, or a premature and unconditional release of the alleged tortfeasor.

392. Id.


394. Id. at 602, 454 S.E.2d at 813.

395. Id. at 603, 454 S.E.2d at 814.

396. Id. (quoting the policy) (emphasis added).

397. Id. at 604, 454 S.E.2d at 814.

398. Id. at 603, 454 S.E.2d at 814.

399. Id. at 606, 454 S.E.2d at 816 (Andrews, J., dissenting) (relying largely upon Insurance Co. of N. Am. v. Dorris, 161 Ga. App. 46, 288 S.E.2d at 856 (1982)). The dissenting judges contended that the wrongdoers' deliberate intervening act broke such chain of causation as might be found to exist. Nationwide there is a cleavage of authority on this issue. The question is basically whether gun battles and knife fights can be fairly classified as "motoring risks" assumed by the insurer. Compare Allstate Ins. Co. v. Gillespie, 455 So.2d 617, Fla. 2d DCA 1984 (yes—assault was "inexorably tied" to use of an automobile) and Foss v. Cignarella, 482 A.2d 954 (1984) (no—assault was not in reasonable contemplation of parties as a "motoring risk").
XXIII. CONCLUSION

Although this observation has surfaced before in these pages it bears repeating: A clear thread of consistency runs through Georgia jurisprudence in insurance. It is the respect accorded to the enactments of the General Assembly and the provisions of the insurance contract. Public policy, when used to strike down exclusions and other parts of the insurance contract, is usually made of whole cloth, and restricted to thwarting insurers’ attempts to etiolate mandated coverages. It is based upon legislative intent, painstakingly identified from legislative history, preambles, and other legitimate sources.

Even when deciding cases of first impression, courts tend to reason along the vectors of established core principles and to work within the logical constraints imposed by analogy, juxtaposition, and contrast, which leaves little play for purely personal preferences. They do not treat the judicial process as a sentimental exercise in social engineering or rampant consumerism which views statutes and contracts merely as circumstances to be considered in reaching a pre-ordained telic decision. Obviously, this self-restraint leaves some litigants disappointed, yet it is the price we pay for keeping our judicial and legislative functions separate.


401. It should be noted that the General Assembly has on several occasions responded with alacrity to court-exposed deficiencies or inequities in its statutes by legislative “gap filling.” Of course, this is of little consolation to the original litigants.