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Insurance

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I. INTRODUCTION

During this Survey period, the courts in Georgia returned to the usual abundance of automobile and uninsured motorist (UM) cases, the summaries of which make up most of this annual update.[1] The courts decided three cases involving UM coverage limits that were less than the policies' liability limits and the claims of insureds that the carriers owed coverage equal to the liability limits. The insurers prevailed in all three cases. In a fourth case, the Georgia Court of Appeals determined that an insured could not sue a tortfeasor in the name of "John Doe," where the person's name was known but his whereabouts were unknown.[2] The court of appeals also decided that an insurance policy delivered in Georgia could be interpreted according to Kentucky law and considered, but did not decide whether a requirement that the insured notify the

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[1] For an analysis of insurance law during the prior survey period, see Bradley S. Wolff, Maren R. Cave, and Thomas D. Martin, *Insurance*, *Annual Survey of Georgia Law,* 71 MERCER L. REV. 117 (2019).

[2] Bell v. State Farm Mut. Auto. Ins. Co., 355 Ga. App. 82, 842 S.E.2d 530 (2020).

insurer of a proposed settlement was a substantive or remedial matter.[3] The case was therefore returned to the trial court on that issue.[4] In the liability insurance arena, there were a couple of important decisions concerning declaratory judgment actions, another involving the cooperation of an insured in a liability claim, and another concerning liability coverage under a homeowner's policy for injury claims relating to an incident involving a motor vehicle. In the property arena, the survey found both state and federal decisions on first-party issues like rescission, the duty to read, coverage under a "seepage and leakage" exclusion, and the legal effect of accepting premiums after a lapse in coverage.

II. AUTOMOBILE INSURANCE CASES

A. Duty to Offer Statutory Minimum UM Coverage Not Triggered by Increase in Liability Coverage

In *Hunter v. Progressive Mountain Insurance Co.*,[5] the Georgia Court of Appeals held that an insured's request for an increase in liability coverage under an existing automobile insurance policy does not *per se* trigger an insurer's duty under O.C.G.A. § 33-7-11(a)(1)[6] to offer the insured the mandated statutory minimum UM coverage.[7] After continuously renewing their Progressive Mountain Insurance Company (Progressive Mountain) automobile insurance policy for two years, the Hunters elected to increase their liability coverage from $50,000/person and $100,000/accident to $100,000/person and $300,000/accident. The couple did not request—and Progressive Mountain did not offer—a corresponding increase in their $25,000/person and $50,000/accident UM limits.[8] In addressing whether Progressive Mountain had a duty to offer the Hunters increased UM coverage, the court made clear that an insurer must offer the statutory minimum UM coverage only when (i) an insured first obtains UM coverage; or (ii) an insured requests an increase in UM coverage.[9] Because the Hunters' increase in liability coverage did not (i)

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[3] Helton v. United Servs. Auto. Ass'n, 354 Ga. App. 208, 840 S.E.2d 692 (2020).

[4] *Id.* at 213–14, 840 S.E.2d at 697.

[5] 353 Ga. App. 444, 838 S.E.2d 112 (2020).

[6] O.C.G.A. § 33-7-11(a)(1) (2020).

[7] *Hunter*, 353 Ga. App. at 444, 828 S.E.2d at 112–13; *see* O.C.G.A. § 33-7-11(a)(1) (2020) (outlining UM coverage requirements for Georgia automobile insurance policies).

[8] *Id.*

[9] *Id.* at 446, 838 S.E.2d at 114, (citing Government Employees Insurance Co. v. Morgan, 341 Ga. App. 396, 800 S.E.2d 612 (2017)), discussed in Bradley S. Wolff, Maren R. Cave & Stephen M. Schatz, *Insurance*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 117, 119 (2017).

create a new policy such that the policy was again "issued or delivered" within the meaning of O.C.G.A. § 33-7-11(a)(1); or (ii) constitute a requested increase in UM coverage,[10] the court found that Progressive Mountain had no duty to offer the Hunters an increase in UM coverage.[11] However, the court pointed out that its decision was based on the fact the Hunters had elected to "decouple" their liability and UM limits.[12] Where the limits were "still linked in some way," the result might well be different.[13]

B. Affirmative Choice of Unequal Limits Not Affected by 2008 "Added On" Amendment to O.C.G.A. § 33-7-11

O.C.G.A. § 33-7-11(a)(1) makes an automobile insurance policy's UM limits equal to the liability limits by default, though an insured may "affirmatively choose" lower UM limits.[14] In *Cline v. Allstate Property & Casualty Insurance*,[15] the Georgia Court of Appeals held that an affirmative choice for lower UM limits made prior to enactment of the "added on" amendment to O.C.G.A. § 33-7-11 in 2008[16] was not nullified by the amendment.[17] In 2003, the Clines entered into an Allstate automobile insurance policy with equal UM and liability coverage limits. In October 2008, before the "added on" amendment went into effect, Mrs. Cline increased the liability limit to $100,000 and completed a new coverage selection/rejection form, electing to keep the UM coverage of $25,000/person. The Clines continuously renewed the policy through 2016, when Mr. Cline was injured in an automobile accident. Mr. Cline argued that the "added on" amendment nullified the October 2008 affirmative election for lower UM coverage, requiring Allstate to provide him default UM coverage in an amount equal to the policy's $100,000

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[10] *Id.* at 447–48, 838 S.E.2d at 114.

[11] *Id.* at 447–48, 838 S.E.2d at 115.

[12] *Id.*

[13] *Id.*

[14] O.C.G.A. § 33-7-11(a)(1)(B)(2020).

[15] 354 Ga. App. 415, 841 S.E.2d 63 (2020).

[16] Ga. S. Bill 276, Reg. Sess., 2008 Ga. Laws 801 (codified as amended at O.C.G.A. § 33-7-11). Prior to the 2008 amendment, all Georgia UM policies were "reduced by" policies, "under which the UM limits of liability [were] reduced by any amount that the insured received from the tortfeasor's insurer." *Cline*, 354 Ga. App. at 416–17, 841 S.E.2d at 65 (quoting Allstate Fire & Cas. Ins. Co. v. Rothman, 332 Ga. App. 670, 672, 774 S.E.2d 735, 738 (2015)). "The 2008 amendment introduced [the option of] "added on" [UM] coverage, "which provides that the applicable limits of liability are available to cover any damages an insured suffers which exceed the tortfeasor's policy limits," and made "added on" coverage the default, absent an insured's written request for "reduced by" coverage. *Id.* at 417, 841 S.E.2d at 65 (quoting *Rothman*, 332 Ga. App. at 672, 774 S.E.2d at 737).

[17] 354 Ga. App. at 416, 841 S.E.2d at 65.

liability limit.[18] The Georgia Court of Appeals held that the "added on" amendment did not affect Mrs. Cline's right to affirmatively choose unequal UM and liability limits; but it did result in the UM coverage being converted from "reduced by" to "added on."[19]

C. Selection of Unequal Limits by Pre-Filled Application with Disclaimer Constitutes Affirmative Choice

The United States Court of Appeals for the Eleventh Circuit also addressed what it means for an insured to "affirmatively choose" lower UM limits under O.C.G.A. § 33-7-11(a)(1).[20] In *State Auto Property & Casualty Insurance Co. v. Jacobs*,[21] Jacobs signed a pre-filled automobile insurance application specifically requesting $25,000 in UM coverage. The application also contained a disclaimer acknowledging that UM coverage had been offered and explained to him and that he selected the limits shown in the application.[22] The court held that Jacobs affirmatively chose the $25,000 UM limit, and that it was inconsequential that Jacobs's signature and election came in a pre-filled application rather than a separate, written statement because Jacobs had a duty to read and understand the policy.[23]

D. Insured Cannot Sue Known Tortfeasor as "John Doe"

Under Georgia's UM statute, a plaintiff may only institute an action against a "John Doe" defendant when the owner or operator of a vehicle is unknown.[24] When the owner or operator is known, he or she must be named as a defendant; service by publication is authorized if the person resides out of the state, has departed from the state, cannot after due diligence be found within the state, or avoids service.[25] In *Bell v. State Farm Mutual Automobile Insurance Co.*,[26] the Georgia Court of Appeals made clear that its decision in *Smith v. Phillips*[27] did not allow a plaintiff to sue a defendant as John Doe when she knew her tortfeasor's identity, although she did not know where the tortfeasor may be found.[28]

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[18] *Id.* at 416, 841 S.E.2d at 64.

[19] *Id.* at 417, 841 S.E.2d at 65.

[20] State Auto Property & Casualty Insurance Co. v. Jacobs, 791 F. App'x. 28 (11th Cir. 2019).

[21] *Id.* at 30.

[22] *Id.* at 31.

[23] *Id.* at 31–32.

[24] O.C.G.A. § 33-7-11(d) (2020).

[25] O.C.G.A. § 33-7-11(e).

[26] 355 Ga. App. 82, 842 S.E.2d 530.

[27] 172 Ga. App. 459, 323 S.E.2d 669 (1984).

[28] *Bell*, 355 Ga. App. at 83, 842 S.E.2d at 531.

Bell was in an automobile accident with Brown in California. Bell knew Brown and communicated with him following the accident. When Bell filed suit in Georgia, however, she named John Doe, not Brown, as the defendant. Bell served her UM insurer, State Farm, with a copy of the complaint, but did not attempt to locate or serve Brown. The trial court granted summary judgment to State Farm on the ground that Bell did not serve Brown before the expiration of the statute of limitations, preventing her from obtaining a judgment against Brown and therefore precluded her from obtaining UM benefits from State Farm.[29]

On appeal, Bell quoted a line from the decision in *Smith*: "a motorist or vehicle owner against whom a claim is pending, but who cannot be located, is treated as an uninsured motorist, since 'whereabouts unknown' is now equal to 'identity unknown' and 'identity unknown' is equal to 'uninsured motorist' under O.C.G.A. § 33-7-11(d)."[30] Bell argued that because there was no accident report, she did not have Brown's date of birth, address, or other identifying information that could be used to determine where he lived. Therefore, she argued Brown's whereabouts were unknown, which "equals" his identity being unknown, permitting her to sue "John Doe" in lieu of service on Brown before proceeding against State Farm.[31]

The Georgia Court of Appeals rejected Bell's argument, noting that the line from *Smith* was taken out of context.[32] The court explained that, in *Smith*, the plaintiff filed a complaint against a non-resident tortfeasor for injuries arising from an automobile accident.[33] The plaintiff's UM carrier participated in the suit under the tortfeasor's name rather than its own.[34] The trial court entered judgment against the UM carrier,[35] and the Georgia Court of Appeals reversed on the grounds that (i) the plaintiff needed to obtain at least a nominal judgment against the tortfeasor for judgment to be entered against the UM carrier, and (ii) the UM carrier was not a named party, so no judgment could be entered against it.[36] The *Smith* court used the language quoted by Bell to explain that the trial court could not exercise personal jurisdiction over the non-resident tortfeasor; but should have allowed an action to proceed against him so

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[29] *Id.* at 82, 842 S.E.2d at 530–31.

[30] Brief for Appellant at *9–10, Bell v. State Farm Mut. Auto. Ins. Co., 842 S.E.2d 530 (2020) (No. A20A0342), 2019 GA APP. CT. BRIEFS LEXIS 2800 (quoting *Smith v. Phillips*, 172 Ga. App. at 462–63, 323 S.E.2d at 673).

[31] Brief for Petitioner at *9, Bell v. State Farm Mut. Auto. Ins. Co., 842 S.E.2d 530 (2020) (No. A20A0342).

[32] *Bell*, 355 Ga. App. at 83, 842 S.E.2d at 531.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

that the plaintiff could satisfy the condition precedent to seeking judgment against his UM carrier.[37] Bell, on the other hand, never sued Brown in his own name and never attempted to serve him. Thus, there was never a claim pending against Brown and *Smith* did not apply.[38]

E. A Policy Delivered In Georgia Could Be Considered A Kentucky Policy, Yet Georgia Law May Apply To A Particular Provision If It Is Remedial

As discussed in the 2018 Survey,[39] in *Newstrom v. Auto-Owners Insurance Co.*,[40] the Georgia Court of Appeals held that when an insured under a Georgia policy is injured out of state but seeks to recover UM benefits in Georgia, Georgia law controls as to "procedural and remedial matters," like the effect of a release.[41] In *Helton v. United Services Automobile Association,*[42] the court left open whether an out-of-state's notice provision regarding settlement is a substantive or remedial matter when an insured is injured in Georgia and seeks to recover UM benefits in Georgia.[43]

The Heltons entered into an automobile insurance policy in Kentucky with United Services Automobile Association (USAA) but had the policy delivered to their new home in Georgia. Mrs. Helton was subsequently involved in an automobile accident in Georgia. Without notifying USAA, she settled with the other driver's liability carrier and executed a "Limited Liability Release Pursuant to O.C.G.A. § 33-24-41.1." She then turned to USAA to recover her alleged remaining uncompensated damages.[44]

USAA moved for summary judgment, pointing to a policy provision excluding coverage where the insured failed to provide prior written notice to USAA of a proposed settlement as required by Kentucky law. Mrs. Helton argued that because the policy was delivered in Georgia, Georgia law governed the policy, including the effect of the release. Citing *Amica Mutual Insurance Co. v. Bourgalt*,[45] the trial court found that delivery in Georgia did not control, and because the policy said it covered vehicle garaged in Kentucky, was written on Kentucky forms, and used

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[37] *Id.*

[38] *Id.*

[39] *See* Thomas D. Martin, Bradley S. Wolff, & Maren R. Cave, *Insurance*, *Annual Survey of Georgia Law*, 70 MERCER L. REV. 111, 112–13 (2018).

[40] 343 Ga. App. 576, 807 S.E.2d 501 (2017).

[41] *Id.* at 578, 807 S.E.2d at 503.

[42] 354 Ga. App. at 208, 840 S.E.2d at 693.

[43] *Id.* at 210–11, 840 S.E.2d at 695

[44] *Id.* at 209, 840 S.E.2d at 694.

[45] 263 Ga. 157, 429 S.E.2d 908 (1993).

Kentucky rates, it would be considered a Kentucky policy. The court therefore granted summary judgment for USAA.[46]

On appeal, the Georgia Court of Appeals agreed with the trial court's conclusion on the delivery argument.[47] It noted, however, that Mrs. Helton had asserted an additional argument: that even if Kentucky substantive law applied to the policy generally, Georgia law governed the particular coverage issue at hand—whether Mrs. Helton took the steps necessary to assert a UM claim under the policy—as a "procedural and remedial matter."[48] The court stated that this argument could not be resolved by *Amica*, because *Amica* concerned the enforceability of an exclusion that turned on a circumstance of the collision itself; while Mrs. Helton's argument concerned whether UM coverage was properly denied for failure to comply with a policy notice provision after her accident.[49] Because the trial court only broadly concluded that Kentucky substantive law governed the policy without addressing this particular argument, the court vacated the judgment and remanded the case.[50]

III. LIABILITY INSURANCE CASES

A. Timing and Purpose of Declaratory Judgment Actions

The Georgia Court of Appeals issued two decisions clarifying the purpose and timing for declaratory judgment actions in Georgia. In *United Specialty Insurance Co. v. Cardona-Rodriguez*,[51] the Georgia Court of Appeals reminded us that declaratory judgments should be utilized for instances of actual uncertainty regarding a policy's coverage.[52] After an employee of a car wash company injured a patron, the insurer of the car wash company, United Specialty Insurance Company (United Specialty), rejected a $100,000 time-limited demand because the at-fault employee was not licensed. When the injured patron later filed suit, United Specialty initiated a declaratory judgment action to determine whether its available coverage was $25,000 (under the endorsement for unlicensed drivers) or $100,000.[53]

In vacating the trial court's entry of summary judgment for the injured patron and applying the $100,000 limits of the policy, the Georgia Court of Appeals specifically focused on the language of the reservation of rights

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[46] *Helton*, 354 Ga. App. at 210, 840 S.E.2d at 695.

[47] *Id.* at 212, 840 S.E.2d at 695–96.

[48] *Id.*, 840 S.E.2d at 696.

[49] *Id.*

[50] *Id.* at 213–14, 840 S.E.2d at 697.

[51] 352 Ga. App. 299, 835 S.E.2d 1 (2019).

[52] *Id.* at 305, 835 S.E.2d at 6.

[53] *Id.* at 301, 835 S.E.2d at 3.

letter sent by United Specialty.[54] Specifically, the court noted the letter sent by United Specialty did not assert it was "uncertain" as to its rights or the policy or unclear on how to proceed.[55] In fact, the letter mentioned United Specialty had rejected the previous $100,000 demand and offered $25,000.[56] The court held that "[h]ad United [Specialty] indicated in any of its correspondence . . . that it was uncertain as to its obligation under the policy," the court's decision would have been different, but United Specialty "has asserted all along–with *absolute certainty*–that coverage under the policy was limited to $25,000."[57] The court concluded United Specialty was "not in need of any direction from the court with respect to future conduct on its part."[58] Moreover, the court reiterated that an insurer "may not refuse to pay (under its policy) and then use declaratory judgment procedure as a means of avoiding bad faith penalties."[59] The Georgia Court of Appeals concluded that the trial court was without jurisdiction to render a declaratory judgment and that the petition was invalid.[60]

In *Southern Trust Insurance Company v. Mountain Express Oil Company*,[61] the Georgia Court of Appeals held an insurer was obligated to file a declaratory judgment action in order to protect itself from liability for breach of contract and for bad faith when an insured objected to the scope of the insurer's defense.[62] After Mountain Express Oil Company (MEX) was sued for breach of contract, injunctive relief, and libel/slander by a rival company, Southern Trust Insurance Company (Southern Trust) informed MEX that it was denying coverage on the non-libel/slander claims and agreed to reimburse MEX's legal fees for the defense of the libel/slander claims. MEX sent Southern Trust a letter disputing the decision on the non-libel/slander claims asserting its belief that the policy provided coverage for all matters set forth in the lawsuit.[63]

When the lawsuit against MEX settled, MEX demanded Southern Trust pay for the entirety of its legal fees and subsequently filed suit against Southern Trust for breach of contract and for bad faith, contending Southern Trust had a duty to defend the entire suit. Southern Trust moved for summary judgment, claiming that it fulfilled its duty

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[54] *Id.* at 303, 835 S.E.2d at 4.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 303–04, 835 S.E.2d at 4 (emphasis in original).

[58] *Id.* at 304, 835 S.E.2d at 5.

[59] *Id.* at 305, 835 S.E.2d at 6.

[60] *Id.* at 306, 835 S.E.2d at 6.

[61] 351 Ga. App. 117, 828 S.E.2d 455 (2019).

[62] *Id.* at 123, 828 S.E.2d at 459.

[63] *Id.* at 118–19, 828 S.E.2d at 457.

under the insurance contract. MEX responded that Southern Trust's failure to file a declaratory judgment to determine its duty to defend precluded it from challenging its obligation to pay the full amount of fees. The trial court concluded Southern Trust was under an obligation to defend the entire suit and that its failure to file a declaratory judgment action waived all of its defenses.[64]

Following Southern Trust's appeal, the Georgia Court of Appeals affirmed the trial court's decision, concluding that Southern Trust was obligated to defend the suit in its entirety and that its failure to do so breached the Southern Trust policy.[65] Moreover, the court confirmed there was no unequivocal acceptance by MEX of Southern Trust's partial defense since MEX notified the insurer "that it did not accept the refusal to defend the entire suit."[66] According to the court, Southern Trust "was required to file a declaratory action to preserve its defenses and protect itself from liability for breach of contract and bad faith."[67]

B. Insured's Duty to Cooperate

Cooperation and the disclosure of information by an insured to its insurer was the focus of *Lloyd's of London v. Navicent Health, Inc.*,[68] where the United States District Court for the Middle District of Georgia analyzed the insured's obligation to disclose information requested by the insurer.[69] After a former Navicent Health employee filed a *qui tam* action alleging that, as an employee of Navicent, he was directed to "upcode" Medicare billing to charge more for non-emergency ambulance transportation, the government began investigating Navicent. Navicent, in turn, forwarded a copy of the government's demand to its insurer, Lloyd's of London (Lloyd's), requesting that Lloyd's indemnify Navicent for expenses relating to the alleged "wrongful acts."[70] Under the terms of the Lloyd's policy, Navicent was required to:

> co-operate with [Lloyd's of London] in all investigations, including regarding the application and coverage under [the] Policy, . . . in all aspects of the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization.[71]

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[64] *Id.* at 119–20, 828 S.E.2d at 457–58.

[65] *Id.* at 121, 828 S.E.2d at 459.

[66] *Id.* at 123, 828 S.E.2d at 460.

[67] *Id.*

[68] No. 5:18-cv-00133, 2019 U.S. Dist. LEXIS 172208, at *1 (M.D. Ga. Oct. 3, 2019).

[69] *Id.* at *6.

[70] *Id.*

[71] *Id.* at *3.

Furthermore, Lloyd's had the right to (i) "effectively associate with [Navicent] in the investigation, defense and settlement of any Claim," and (ii) "conduct any investigation deemed necessary."[72]

During settlement negotiations, the government and Navicent each presented to the other details concerning Navicent's alleged violations and Navicent's own findings—information that Lloyd's requested from Navicent on multiple occasions but was refused. Lloyd's also requested memoranda, documents, and interview notes from Navicent which Navicent either refused to provide on the grounds of privilege or provided only after significant redacting. Once Navicent and the government settled, Navicent demanded indemnification from Lloyd's. Lloyd's responded by reiterating its previous demands only to be refused again.[73] Navicent asserted that the documents it provided "were 'more than sufficient to enable the Underwriters to conclude their investigation.'"[74]

Lloyd's initiated a declaratory judgment action, seeking a declaration that Navicent breached by the policy by failing to cooperate with Lloyd's document demands.[75] Both parties moved for summary judgment but the District Court denied the cross-motions, concluding that the sufficiency of Navicent's compliance and the explanation given by Navicent for its refusals were jury issues.[76] The district court concluded that "Navicent cooperated to some degree with Lloyd's [of London's] requests, and [that] there [was] evidence that Navicent had some explanation for the documents it did not produce, namely that the documents [were] either privileged or do not exist."[77] "Whether these explanations and Navicent's partial compliance were sufficient to satisfy," the cooperation language in the policy were "questions for [the] jury."[78] The district court specifically rejected Navicent's claim that Lloyd's had to prove prejudice to its investigation due to Navicent's alleged failure to cooperate.[79] According to the district court, if the information requested by Lloyd's was material, then "Navicent's failure to produce it [was] prejudicial as a matter of law." [80] While the court agreed with Navicent that Lloyd's failure to subpoena the requested documents during litigation cast some doubt on the materiality of the requests, the court concluded that

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[72] *Id.*

[73] *Id.* at *3–7.

[74] *Id.*

[75] *Id.* at *8. Lloyd's also sought a declaratory judgment that Navicent breached the Policy's "knowledge provision," arguing Navicent had knowledge of the Wrongful Act prior to the Continuity date.

[76] *Id.* at *10.

[77] *Id.* at *17–18.

[78] *Id.* at *18.

[79] *Id.*

[80] *Id.* at *16–17.

whether Lloyd's was diligent in its own efforts to secure the documents was also an issue to be decided by the jury. [81]

C. Motor Vehicle Exclusion in Homeowner's Policy

In *Wilkinson v. Georgia Farm Bureau Mutual Insurance Co.*,[82] the Georgia Court of Appeals rejected an insurer's interpretation of the term "use" as it related to a homeowner's policy exclusion for loss arising out of the "use" of a motor vehicle.[83] Mr. and Ms. Wilkinson visited a family friend, Mr. Buchanan, to "look at" a pickup that Buchanan recently purchased. Buchanan moved the truck on his inclined driveway so that Mr. and Ms. Wilkinson could walk around it. The truck was in neutral, was idling, and was facing down the drive toward the street with the emergency brake engaged. When Buchanan and Mr. Wilkinson decided to examine the engine, Buchanan asked Ms. Wilkinson to release the truck's hood latch, warning her not to release the parking brake. Ms. Wilkinson reached under the dash for the hood latch but released the brake instead. The truck lurched forward, knocking her down, rolling over her, causing multiple injuries. Mr. and Ms. Wilkinson sued Buchanan. Buchanan's insurer, Georgia Farm Bureau Mutual Insurance Company (GFB), filed a declaratory judgment action to determine whether it was obligated to defend Buchanan.[84]

The GFB policy excluded coverage for injuries arising out of the "use" of a motor vehicle but did not define "use."[85] The trial court granted summary judgment for GFB, finding that Buchanan's truck was in "use" at the time of the accident because it was "being used . . . to demonstrate its function and operability," which resulted in Ms. Wilkinson's injuries.[86]

In reversing the trial court, the Georgia Court of Appeals acknowledged that the truck was at or near the location of the accident, that the accident was caused by Ms. Wilkinson releasing the emergency brake, and that the truck's components were being examined at the time of the accident.[87] Still, the court noted that, "while the term 'use' of a motor vehicle does extend beyond actual physical contact, it does not imply remoteness, and the term contemplates use of the motor vehicle *as a vehicle* at the time of the injury."[88] Ultimately, the court concluded that

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[81] *Id.* at *17.

[82] 351 Ga. App. 891, 833 S.E.2d 579 (2019).

[83] *Id.* at 894, 833 S.E.2d at 582.

[84] *Id.*

[85] *Id.* at 892, 833 S.E.2d at 581.

[86] *Id.*

[87] *Id.* at 894, 833 S.E.2d at 582.

[88] *Id.* (quoting Wingler v. White, 344 Ga. App. 94, 101, 808 S.E.2d 901, 907 (2017)).

because Buchanan's truck was "parked in [the] driveway," and "was [not] in use as a vehicle at the time of the accident," the trial court erred in determining that GFB was not obligated to Buchanan in the suit against him.[89]

IV. PROPERTY INSURANCE CASES

A. Waiver of Rescission

In *Grange Mutual Casualty Company v. Bennett*,[90] the issue before the Georgia Court of Appeals was whether Grange Mutual Casualty Company (Grange Mutual) properly rescinded a policy of workers' compensation insurance issued to McCormick Enterprises (McCormick).[91] McCormick was a greenhouse repair and maintenance company that previously had coverage with Liberty Mutual but switched coverage to Grange Mutual. The dispute arose concerning the accuracy of information in the application for the Grange Mutual policy. The application indicated that McCormick provided janitorial services, worked only in Georgia, and did not work at elevations above fifteen feet.[92]

After the policy was issued, McCormick submitted a claim for an incident that occurred in Louisiana. The incident prompted further investigation.[93] Following the investigation, an underwriter with Grange Mutual concluded that Grange Mutual would not have issued the policy if it had known that McCormick operated in thirty states and that McCormick's employees were cleaning windows at heights above fifteen feet. Grange Mutual conferred with counsel about rescinding the policy but ultimately decided to cancel the policy.[94] Grange Mutual issued "a cancellation notice on December 18, 2014, with [a cancellation] date of March 8, 2015."[95] On March 7, 2015, another employee of McCormick filed a workers' compensation claim for an incident in New York.[96]

Following an ALJ hearing on the New York incident, Grange Mutual submitted a brief arguing against coverage on several grounds. The ALJ found in favor of McCormick. On appeal to the Board, Grange Mutual argued for rescission under O.C.G.A. § 33-24-7, among other grounds. The Board upheld the ALJ's findings, concluding that it was unnecessary

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[89] *Id.* at 895, 833 S.E.2d at 583.

[90] 350 Ga. App. 608, 829 S.E.2d 834 (2019).

[91] *Id.* at 611, 829 S.E.2d at 836; *see* O.C.G.A. § 33-24-7 (2020).

[92] *Id.* at 610–11, 829 S.E.2d at 835–36.

[93] *Id.* at 610, 829 S.E.2d at 835.

[94] *Id.*

[95] *Id.*

[96] *Id.*, 829 S.E.2d at 836.

to address rescission under O.C.G.A. § 33-24-7; thus prompting an appeal and a remand back to the Board. Ultimately, the Board held that Grange Mutual waived the rescission under O.C.G.A. § 33-24-7, which was affirmed by the Superior Court. Grange Mutual appealed the waiver issue.[97]

Before the Georgia Court of Appeals, Grange Mutual argued the merits of a rescission under O.C.G.A. § 33-24-7.[98] However, the court concluded that it did not have to reach the merits of the rescission defense because Grange Mutual waived the defense.[99] Reaffirming its holdings in previous cases, the court reiterated that "an insurer seeking to rescind a policy must" announce its intent in a "timely fashion, as soon as the facts supporting the claim for rescission are discovered."[100] If, instead of rescission, an insurer issues a denial of coverage or cancels the policy, the right of rescission is waived.[101] Citing *Loeb v. Nationwide Mutual Fire Insurance Co.*,[102] the court held that "because the insurer canceled the policy and retained the premium, the policy was not void from its inception."[103]

B. Duty to Read and Examine the Policy

In *Martin v. Chasteen*,[104] Mark Martin (Martin) procured insurance coverage in December 2011 through his agent, Thomas Chasteen (Chasteen), for various structures located on Martin's farm. The policy was renewed each December and Martin received declarations pages outlining the structures that were covered.[105] "In 2013 and 2014, Martin built a new horse barn on [his] property."[106] Martin and Chasteen discussed coverage for the horse barn but it was never added to the policy.[107] "In February [of] 2016, the [horse] barn was struck by lightning and destroyed."[108] Martin sued Chasteen for failing to add the horse barn to

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[97] *Id.*

[98] *Id.*

[99] *Id.* at 612, 829 S.E.2d at 837.

[100] *Id.* at 611–12, 829 S.E.2d at 837 (quoting American Safety Indem. Co. v. Sto Corp., 342 Ga. App. 263, 271, 802 S.E.2d 448, 455 (2017)).

[101] *Id.* at 612, 829 S.E.2d at 837.

[102] 162 Ga. App. 561, 562, 292 S.E.2d 409, (1982).

[103] *Grange Mutual*, 350 Ga. App. at 612, 829 S.E.2d at 837.

[104] 354 Ga. App. 518, 841 S.E.2d 157 (2020).

[105] *Id.* at 518–19, 841 S.E.2d at 159.

[106] *Id.* at 519, 841 S.E.2d at 159.

[107] *Id.* at 519–20, 841 S.E.2d at 160.

[108] *Id.* at 519, 841 S.E.2d at 159.

the policy. Chasteen obtained summary judgment from the trial court. Martin appealed.[109]

On appeal, Martin argued that his duty to read the policy did not authorize summary judgment because there was a question of fact whether he possessed a copy of the entire policy rather than just the policy declarations.[110] The Georgia Court of Appeals disagreed.[111] Relying upon a previous decision, the court reiterated its general rule that

> [I]nsureds are charged with knowledge of the insurance policy's contents, and are bound by those contents even if they do not have physical possession of the policy. Martin alleged the existence of a policy, [he was charged] with knowledge of its contents. Insured persons under an insurance policy are presumed to know its conditions if they intend to rely upon its benefits, or else they must find out those conditions. That is particularly true when, as in this case, the policy in issue is a renewal policy.[112]

Having resolved the delivery issue in favor of the agent, the Georgia Court of Appeals went on to rule in the agent's favor under the duty to read and its exceptions.[113] The court acknowledged and discussed exceptions to the duty to read but noted that the exceptions do not apply where "an examination of the policy would have made it readily apparent that the [requested] coverage was not issued."[114] Further, the court found that Martin failed to present evidence of the existence of a confidential or unusual relationship between he and Chasteen that would have prevented or excused him from exercising ordinary diligence for his own protection.[115] The fact that Martin and Chasteen had worked together for years on insurance matters and had "come to repose trust and confidence in each other as the result of such dealings" was not sufficient, in and of itself, to conclude that a confidential relationship existed between

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[109] *Id.*

[110] *Id.* at 520, 841 S.E.2d at 160.

[111] *Id.* at 519, 841 S.E.2d at 159.

[112] *Id.* at 520, 841 S.E.2d at 160 (quoting Burkett v. Liberty Mut. Fire Ins. Co., 278 Ga. App. 681, 682–83, 629 S.E.2d 558, 560 (2006)); *See, e.g.,* Southeastern Security Ins. Co. v. Empire Banking Co., 230 Ga. App. 755, 757, 498 S.E.2d 282 (1998); Wells Fargo Home Mtg. v. Allstate Ins. Co., No. 06-12380, 2006 U.S. App. LEXIS 26065, at *915 (11th Cir. 2006) (Under Georgia law, "an insured without a copy of the policy must make an effort to ascertain the policy's terms.").

[113] *Id.* at 520–21, 841 S.E.2d at 160–61.

[114] *Id.* at 521, 841 S.E.2d at 161 (quoting MacIntyre & Edwards Inc. v. Rich, 267 Ga. App. 78, 81, 599 S.E.2d 15, 18 (2004)).

[115] *Id.* at 521, 841 S.E.2d at 161.

them.[116] Accordingly, the Georgia Court of Appeals affirmed summary judgment in favor of Chasteen.[117]

C. "Seepage or Leakage" Exclusion in Homeowner's Policy

In an unpublished decision from the Eleventh Circuit, insurers received some guidance on an issue that frequently comes up but often does not result in written opinions. In *Landrum v. Allstate Insurance Co.*,[118] the Eleventh Circuit interpreted a "seepage or leakage" exclusion.[119] The policyholder, Landrum, had a water leak in a supply line to her refrigerator ice maker, which resulted in mold. Landrum submitted a claim with Allstate.[120] Allstate denied Landrum's claim based upon a "continuous or repeated seepage or leakage" exclusion in the Allstate policy that defined "seepage" as meaning a "continuous or repeated seepage or leakage over a period of weeks, months, or years of water."[121] In the district court, Landrum argued that incident was a sudden loss, rather than a seepage; that the exclusion was ambiguous; and that, even if not ambiguous, Allstate should cover the damages that occurred during the first thirteen days of the leak since the exclusion only applied to leaks that occurred over a period of "weeks." The district court rejected the arguments and granted summary judgment to Allstate.[122]

On appeal, Landrum argued that the exclusion applied only to slow-moving releases of water, but the Eleventh Circuit disagreed.[123] Because Landrum's policy excluded seepage or leakage, the use of the disjunctive "or" indicated that the terms seepage and leakage should be treated separately.[124] Since the policy did not define those terms, the court used an ordinary dictionary meaning to conclude that "leakage" did not have a speed component.[125] Therefore, Landrum's policy excluded slow seepage or sudden or slow leakage and, "the district court did not err by interpreting the exclusion to include '*any* escape of water, including that which is slow-moving and that which is not.'" [126]

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[116] *Id.* at 521–22, 841 S.E.2d at 161 (quoting Canales v. Wilson Southland Ins. Agency, 261 Ga. App. 529, 531, 583 S.E.2d 203, 205 (2003)).

[117] *Id.* at 522, 841 S.E.2d at 162.

[118] No. 19-14539, 2020 U.S. App. LEXIS 14908, at *606 (11th Cir. 2020).

[119] *Id.* at *607.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at *609.

[124] *Id.*

[125] *Id.* at *610 (citing *Seepage* and *Leakage*, THE OXFORD ENGLISH DICTIONARY (Online ed. 2020)).

[126] *Id.*

The Eleventh Circuit also rejected Landrum's argument in the district court that, because the exclusion applied only for losses that occurred "over a period of weeks," the exclusion would not apply to leaks occurring before the second week, between days one and thirteen.[127] Likewise, the court rejected Landrum's contention that she had "a covered water loss," during the first thirteen days of the leak and thus was entitled to mold remediation.[128] The Eleventh Circuit noted that the record of water usage for Landrum's home and the adjuster's testimony was unrefuted by Landrum.[129] For these reasons, the Eleventh Circuit affirmed summary judgement in Allstate's favor.[130]

D. Implied Waiver of Lapsed Policy

In another unpublished opinion, *Brannen v. Jackson National Life Insurance Co.*, the Eleventh Circuit also rejected an effort to reinstate a lapsed life insurance policy on the grounds of waiver.[131] Bishop Brannen's heirs sought to recover $2.3 million from a life insurance policy that lapsed before Brannen's death. The heirs' attorney sent a demand letter and check for the past-due premiums to Jackson National Life Insurance Company (Jackson) which were received on March 15, 2017. Jackson deposited the premium check on March 22, 2017. A Jackson employee later determined that the policy lapsed. Jackson refunded the premium to the heirs on March 27, 2017. The heirs sued in the United States District Court for the Middle District of Georgia. The district court granted summary judgment to Jackson.[132]

The heirs made two arguments on appeal. First, the heirs argued that Jackson waived the policy lapse by accepting the premium payment.[133] The Eleventh Circuit rejected this argument stating that Jackson did not improperly "retain" the premium so as to waive the lapsed coverage defense.[134] The Eleventh Circuit acknowledged that Georgia courts recognize that retaining premium payments after a lapse in coverage could imply a waiver of a lapsed policy.[135] However, the Eleventh Circuit referred back to its holding in *Rutland v. State Farm Mutual Auto Insurance Co.*,[136] where it held that retaining a premium payment for six

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[127] *Id.* at *608.

[128] *Id.*

[129] *Id. at* *609.

[130] *Id.* at *610.

[131] No. 19-14025, 2020 U.S. App. LEXIS 13038, at *702 (11th Cir. 2020).

[132] *Id.* at *703.

[133] *Id.* at *704.

[134] *Id.* at *704–05.

[135] *Id.* (citing Georgia Masonic Mut. Life Ins. Co. v. Gibson, 52 Ga. 640, 642–43 (1874)).

[136] No. 10-10734, 2011 U.S. App. LEXIS 9859, at *771 (11th Cir. 2011).

weeks "was not unreasonably long."[137] Moreover, the Eleventh Circuit distinguished another case, *Horace Mann Life Insurance Co. v. Lunsford*,[138] where a waiver was found when the insurer retained the belated payment for almost two months. [139]

The court also rejected the heirs' argument that, by endorsing and depositing the premium check, Jackson entered into a new contract for the policy.[140] The court noted, "[T]he Georgia Court of Appeals has held that '[t]the acceptance of premiums after default does not create a new contract, but merely continues the binding effect of the original policy.'"[141] The Eleventh Circuit warned that acquiescing to the heirs' reasoning "would mean that any insured could send a letter and check to their insurer and then bind the insurer to whatever 'offer' the letter purportedly described when the check is deposited."[142] For these reasons, the court concluded that the District Court did not err in granting summary judgment in Jackson's favor.[143]

V. CONCLUSION

Few of the insurance decisions during this survey period were groundbreaking or reflect significant changes in Georgia law. While the Georgia Court of Appeals continued to refine the intricacies of UM law in Georgia, many of the other court decisions reiterated long-standing principles in the property, liability, and automobile insurance arenas. While this survey included a few unpublished Eleventh Circuit or federal district court decisions, they were included because they reflected trends, arguments, or issues that practitioners may consider unique or important to an insurance practice.

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[137] *Brannen*, 2020 U.S. App. LEXIS 13038, at *704.

[138]172 Ga. App. 866, 324 S.E.2d 808 (1984).

[139] *Id.*

[140] *Brannen*, 2020 U.S. App. LEXIS 13038, at*702.

[141] *Id.* at *705 (quoting Union Cent. Life Insurance Co. v. Merrell, 52 Ga. App. 831, 184 S.E. 655, 657 (1936)).

[142] *Id.*

[143] *Id.*