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Insurance

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I. INTRODUCTION

Courts continue to address the unique issues that arise with respect to uninsured motorist (UM) coverage, often finding that coverage exists.[1] In a case of first impression, the Georgia Supreme Court held that an insured may recover UM benefits from a policy, despite the partial sovereign immunity of the tortfeasor. An insured may be entitled to UM benefits after settling with the tortfeasor's liability carrier for the full policy limits, even though a limited liability release allocates the majority of the settlement amount to punitive damages. Further, courts continue to strictly adhere to the "case or controversy" requirement in order for a party to have standing to bring a declaratory judgment action on a coverage issue. An insured is precluded from bringing a bad faith action against its insurer where the insured breached the policy condition that requires obtaining the insurer's consent before settling a

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1. For an analysis of Georgia insurance law during the prior survey period, see Stephen L. Cotter, Stephen Schatz & Bradley S. Wolff, *Insurance, Annual Survey of Georgia Law*, 66 MERCER L. REV. 93 (2014).

claim. Courts found no waiver of, and therefore enforced, the policy conditions, including the requirements for the insured to file suit within one year of the date of loss and provide notice of a claim within a certain time period. In a case of first impression, paint was found not to constitute a pollutant as defined by a liability policy; therefore, the pollution exclusion did not apply to a claim arising out of the ingestion of lead paint.

II. UNINSURED MOTORIST COVERAGE

A. Partial Sovereign Immunity May Render a Vehicle "Uninsured"

In a case presenting a matter of first impression, the Georgia Supreme Court held in *First Choice in Commercial Insurance Co. v. McLendon Enterprises, Inc.*[2] that an insured may recover UM benefits for damages sustained in a collision with a school bus where the owner and operator of the bus had insurance and was entitled to sovereign immunity for any damages above the liability policy limits.[3] The case came to the supreme court as a certified question from the United States Court of Appeals for the Eleventh Circuit.[4] The case arose from a declaratory judgment action filed after a collision involving a truck owned by McClendon Enterprises and a school bus owned by Evans County. The driver and two passengers in the McClendon truck claimed injuries resulting from the accident. The Evans County Board of Education had an insurance policy with the Georgia School Board Association (GSBA) Risk Management Services with a $1 million limit for bodily injury liability. GSBA settled with the two passengers for $350,000 and paid the truck driver, Bobby Brooks Mitchell, the remaining $650,000. Alleging injuries exceeding the available GSBA policy limits, Mitchell filed suit against the school bus driver and the Board of Education. He also served First Choice Commerical Insurance (FCCI) as McClendon's UM carrier for UM benefits.[5]

FCCI then filed a complaint for declaratory judgment in district court. FCCI denied any liability under the UM policy, arguing that the tortfeasors' sovereign immunity[6] prevented Mitchell from being "legally entitled to recover" damages from the tortfeasors above the available

2. 297 Ga. 136, 772 S.E.2d 651 (2015).
3. *Id.* at 142, 772 S.E.2d at 655.
4. *Id.* at 136, 772 S.E.2d at 651.
5. *Id.* at 137, 772 S.E.2d at 652.
6. It was undisputed in the case that the bus driver and Board of Education were entitled to sovereign immunity from any liability claims exceeding the insurance policy limits. *Id.*

policy limits and that benefits under the policy required a legal entitlement to recovery.[7] The district court, relying on *Tinsley v. Worldwide Insurance Co.*,[8] found that an insured may recover UM benefits for injuries caused by a tortfeasor who was completely protected by sovereign immunity. The district court found *Tinsley* persuasive and applied its holding to this case involving partial sovereign immunity.[9]

FCCI appealed and the Eleventh Circuit, determining that neither the Georgia Court of Appeals nor the Georgia Supreme Court had addressed the issue, certified the question of whether an insured may recover UM benefits from a policy that requires the insured be "legally entitled to recover" damages despite the partial sovereign immunity of the tortfeasor.[10] The supreme court agreed with the district court that *Tinsley* provides the applicable rule.[11] The court reiterated that the purpose behind section 33-7-11 of the Official Code of Georgia Annotated (O.C.G.A.),[12] also known as the Uninsured Motorist Act, is to provide a means of recovery for injured parties who are unable to recover from their tortfeasors.[13] The court determined there was no reason why a UM carrier should be obligated to pay for damages where sovereign immunity completely protects the tortfeasor who caused the accident, but then allow the UM carrier to escape liability where only partial immunity applies.[14] Therefore, the court held that an insured may recover UM benefits from a policy that requires they be "legally entitled to recover" damages despite the partial sovereign immunity of the tortfeasor.[15]

B. Allocation of Settlement Funds to Punitive Damages Does Not Bar Recovery of UM Benefits

Reversing the Georgia Court of Appeals, the Georgia Supreme Court held in *Carter v. Progressive Mountain Insurance*[16] that an insured may be entitled to recover UM benefits after settling with the tortfeasor's liability carrier for the full policy limits; although, a limited liability release given by the insured allocates the majority of the settlement

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7. *Id.* at 137-38, 772 S.E.2d at 652.
8. 212 Ga. App. 809, 442 S.E.2d 877 (1994).
9. *FCCI*, 297 Ga. at 137-38, 772 S.E.2d at 652.
10. *Id.* at 137-38, 772 S.E.2d at 652-53.
11. *Id.* at 138, 772 S.E.2d at 653.
12. O.C.G.A. § 33-7-11 (2014).
13. *FCCI*, 297 Ga. at 141, 772 S.E.2d at 654.
14. *Id.*
15. *Id.* at 142, 772 S.E.2d at 655.
16. 295 Ga. 487, 761 S.E.2d 261 (2014).

amount to punitive damages.[17] In the underlying tort action, Velicia Carter sued Claudino Oliviera for injuries sustained in a collision. Oliviera was allegedly driving under the influence of alcohol. Carter served her UM carrier, Progressive. Oliviera's liability insurer, GEICO, settled with Carter, paying its policy limit of $30,000; $1000 of that amount was designated as compensatory damages while $29,000 was designated as punitive damages.[18]

Progressive moved for summary judgment on Carter's UM claim, arguing that by allocating $29,000 for punitive damages, Carter failed to exhaust Oliviera's policy limits.[19] The trial court and court of appeals agreed, both holding that Carter forfeited the opportunity to recover UM benefits by allocating the majority of the liability limits to punitive damages because the limited liability release statute, O.C.G.A. § 33-24-41.1,[20] allows an insured to settle with a liability carrier and still recover UM benefits only for "actual injuries or losses and not [for] punitive damages."[21]

While the supreme court agreed with the court of appeals that an insured must exhaust the tortfeasor's liability insurance coverage before being entitled to recover UM benefits and, also, that UM carriers are not obligated to pay awarded punitive damages because of the tortfeasor's conduct, the supreme court held that the court of appeals erred in holding that O.C.G.A. § 33-24-41.1 only requires paying compensatory damages to exhaust the tortfeasor's liability limits.[22]

In rejecting both Progressive's argument and the court of appeals' concern—that Carter's allocation of the settlement amount to punitive damages actually shifted the payment of punitive damages indirectly to the carrier—the court held that under O.C.G.A. § 33-24-41.1(d)(2),[23] the entire amount, not merely the amount attributed to compensatory damages, paid with the limited release is evidence of the UM carrier's entitlement to an offset.[24] This amount effectively keeps the UM carrier in the same position it would have been in had the full settlement amount been designated as compensatory damages.

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17. *Id.* at 494, 761 S.E.2d at 267.

18. *Id.* at 488, 761 S.E.2d at 263.

19. *Id.*

20. O.C.G.A. § 33-24-41.1 (2013).

21. *Carter*, 295 Ga. at 488-89, 761 S.E.2d at 263 (quoting Carter v. Progressive Mountain Ins., 320 Ga. App. 271, 274, 739 S.E.2d 750, 753 (2013)).

22. *Id.* at 489, 761 S.E.2d at 264.

23. "[T]he amount paid [under a limited release] shall be admissible as provided by law as evidence of the offset against the liability of an uninsured motorist carrier and as evidence of the offset against any verdict of the trier of fact." O.C.G.A. § 33-24-41.1(d)(2).

24. *Carter*, 295 Ga. at 490-91, 761 S.E.2d at 264-65.

C. Does the Insured or the Insurer Bear the Burden of Proving Whether a Liability Insurer's Denial of Coverage Was "Legally Sustainable"?

Where a liability insurer denies coverage based on the tortfeasor's failure to cooperate by attending the trial and the injured party then brings a claim for UM benefits under a policy that provides a motorist may become "uninsured" if the liability carrier's denial is legally sustainable, which party must prove whether the tortfeasor is uninsured? In *Castellanos v. Travelers Home & Marine Insurance Co.*,[25] the court of appeals held that where known facts and law support the liability carrier's denial the UM insurer bears the burden of proving the necessary facts to justify its denial of coverage once the insured meets a threshold burden of showing entitlement to benefits.[26]

The underlying facts of the case arose from a collision between vehicles driven by Luis Castellanos and Jose Santiago. At the time, Castellanos was a named insured under a Travelers policy held by Lucrecia Arias, and Santiago held liability insurance through United Automobile Insurance. Castellanos sued Santiago, and United provided his defense. Castellanos also served the complaint and summons with Travelers. Santiago, however, failed to participate in, or attend, the trial. A jury awarded Castellanos compensatory damages, punitive damages, and costs.[27]

United refused to pay the awarded amount, alleging that Santiago violated the terms of his policy by failing to cooperate in his own defense.[28] Georgia law permits such "cooperation clauses" where an insured's failure to participate in their defense forms the basis of a legal denial of coverage.[29] This denial of coverage, in turn, renders the tortfeasor an uninsured motorist and allows the injured party to seek compensation from their UM carrier.[30] Thus, Castellanos demanded that Travelers pay the judgment.[31]

Travelers failed to pay the judgment within sixty days, and Castellanos then filed a bad faith action against Travelers for its failure to pay. Both parties moved for summary judgment, arguing on whether United's refusal to pay the judgment was legally sustainable. The trial court

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25. 328 Ga. App. 674, 760 S.E.2d 226 (2014).
26. *Id.* at 677-79, 760 S.E.2d at 229-30.
27. *Id.* at 675, 760 S.E.2d at 227-28.
28. *Id.* at 677, 760 S.E.2d at 229.
29. *Id.*
30. *See id.* at 676-77, 760 S.E.2d at 228-29.
31. *Id.* at 677, 760 S.E.2d at 229.

granted Travelers' motion for summary judgment, finding that Castellanos failed to produce evidence that established Santiago's failure to participate was unreasonable or willful. By this reasoning, Travelers did not have to pay Castellanos because Santiago was not an uninsured motorist.[32]

The court of appeals reversed, holding that the trial court improperly allocated the burden of proof to Castellanos.[33] The court of appeals characterized the "legally sustainable denial" argument as an affirmative defense, reasoning that under O.C.G.A. § 33-4-6,[34] United would bear this burden if it had been sued for bad faith.[35] When Castellanos met the "threshold burden" of demonstrating entitlement to UM coverage, Travelers then assumed United's burden to show that the denial of liability coverage was sustainable.[36] The court determined that the evidence failed to "establish that Santiago's absence from the trial was involuntary or excused or that his failure to cooperate with United did not prejudice the defense" and, therefore, reversed the trial court's grant of summary judgment.[37] Judge McMillian dissented, arguing that, as established in *Williams v. Safeway Insurance Co.*,[38] Castellanos bore the burden of proving that Santiago was an uninsured motorist to recover UM benefits.[39] To hold otherwise, Judge McMillian said, would essentially presume that Santiago was uninsured, which would violate well-settled law.[40]

Note that one day after the current survey period ended, the Georgia Supreme Court reversed the court of appeals.[41]

D. Correlating the Liability Limit Set-off with "Added-On" Coverage Policies in the Stack

In *Donovan v. State Farm Mutual Automobile Insurance Co.*,[42] the court of appeals answered a question posed by the authors of *Georgia*

32. *Id.* at 675-76, 760 S.E.2d at 228.
33. *Id.* at 680, 760 S.E.2d at 231.
34. O.C.G.A. § 33-4-6 (2014 & Supp. 2015).
35. *Castellanos*, 328 Ga. App. at 677-78, 679, 760 S.E.2d at 229, 230.
36. *Id.* at 679, 760 S.E.2d at 230.
37. *Id.* at 679-80, 760 S.E.2d at 230.
38. 223 Ga. App. 93, 476 S.E.2d 850 (1996).
39. *Castellanos*, 328 Ga. App. at 680, 760 S.E.2d at 231 (McMillian, J., dissenting).
40. *Id.*
41. *See* Travelers Home & Marine Ins. Co. v. Castellanos, 297 Ga. 174, 174, 180, 773 S.E.2d 184, 185 (2015).
42. 329 Ga. App. 609, 765 S.E.2d 755 (2014).

Automobile Insurance Law[43] about how to determine which UM policy is entitled to a set-off for the payment by the tortfeasor's liability insurer where multiple UM policies are stacked, and both the "added-on" and the "reduced-by" policies are in the stack.[44] The treatise's authors correctly predicted the outcome of this case.[45] Plaintiff Lara Donovan was injured in a collision with Jonathan McMillon and claimed to have suffered damages in excess of $100,000. At the time of the accident, Donovan had been living with her mother. She sued McMillon and three UM carriers, including her mother's insurer, State Farm. Two of the policies, through Grange Mutual Casualty Company and General Motors Acceptance Corporation, were excess (added-on) policies with limits of $25,000 each. The State Farm policy was a difference-in-limits (reduced-by) policy, also with a limit of $25,000.[46] As such, it "provides for UM coverage only for the amount of the difference between the available liability insurance and the limits of the insured's UM coverage" pursuant to O.C.G.A. § 33-7-11(b)(1)(D)(ii)(II).[47] The tortfeasor's carrier paid Donovan the $25,000 limit of his liability insurance policy. State Farm then moved for summary judgment, arguing that it was entitled to a set-off for the same amount and therefore owed no benefits to Donovan.[48] The trial court granted the motion, and the court of appeals affirmed.[49]

On appeal, Donovan contended that because her policies were primary over her mother's and did not allow a set-off for liability insurance payments, she should recover the total amount of the limits of all three stacked policies in addition to the liability insurer's payment.[50] The court disagreed, holding that the usual priority tests did not apply to State Farm because it was the only difference-in-limits policy at issue.[51] Because excess policies are not entitled to set-offs for liability policy payments, State Farm alone was entitled to that set-off.[52] The set-off equaled the amount of State Farm's policy limits, so its exposure was reduced to zero, and it was entitled to summary judgment.[53]

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43. FRANK E. JENKINS III & WALLACE MILLER III, GEORGIA AUTOMOBILE INSURANCE LAW § 39:5 (2014-2015 ed.).
44. *Id.*
45. *Id.* at § 39:5(a) & n.1; *see Donovan*, 329 Ga. App. at 612, 765 S.E.2d at 758.
46. *Donovan*, 329 Ga. App. at 609-10, 765 S.E.2d 756-57.
47. *Id.* at 611, 765 S.E.2d at 757.
48. *Id.* at 609-10, 765 S.E.2d at 757.
49. *Id.* at 610, 765 S.E.2d at 757.
50. *Id.*
51. *Id.* at 611, 765 S.E.2d at 758.
52. *Id.* at 612, 765 S.E.2d at 758.
53. *Id.*

III. COVERAGE UNDER OTHER POLICIES

A. Motor Vehicle Exclusions

The Georgia Court of Appeals addressed whether an all-terrain vehicle (ATV) and a golf cart were subject to "motor vehicle" exclusions in an insurance policy in two separate decisions, both favoring the homeowner. In *Partin v. Georgia Farm Bureau Mutual Insurance Co.*,[54] the court of appeals determined that a jury question existed on whether the "motor vehicle" exclusion in a farm policy excluded an ATV.[55] The insured testified that he used the ATV to feed his cows and check on his livestock and fences, and that he primarily drove it on the dirt roads on his 100-acre farm. After a fourteen-year-old girl was injured while using the ATV on the property and the insured property owner was sued, Georgia Farm Bureau brought a declaratory judgment action, claiming the motor vehicle exclusion in its policy excluded the ATV from coverage.[56] The trial court affirmed summary judgment to Farm Bureau, but the court of appeals reversed, holding that a jury could find the vehicle was "mobile equipment" and a "farm implement" and, thus, not subject to the exclusion.[57] The court of appeals agreed with the insured that the ATV could be considered "mobile equipment" because it is "other farm machinery" used off public roads and in the insured's farm business.[58] Furthermore, the court of appeals agreed with the insured that the ATV could be construed as a "farm implement" after relying on the dictionary definition of the word "implement"[59] and decisions from Alabama and North Dakota where courts considered self-propelled motor vehicles used on a family farm to be farm implements.[60]

In *American Strategic Insurance Corp. v. Helm*,[61] the Georgia Court of Appeals affirmed summary judgment in favor of a homeowner and

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54. 331 Ga. App. 897, 770 S.E.2d 38 (2015).

55. *Id.* at 897, 770 S.E.2d at 40.

56. *Id.* at 897, 898, 770 S.E.2d at 39-40.

57. *Id.* at 897, 770 S.E.2d at 40.

58. *Id.* at 897, 899, 770 S.E.2d at 40, 41.

59. *Id.* at 902, 770 S.E.2d at 42 (quoting Merriam-Webster.com, "implement," http://www.merriam-webster.com/dictionary/implement) (defining "implement" as "a device used in the performance of a task")).

60. *See id.* at 902, 770 S.E.2d at 42-43 (citing Heitkamp v. Milbank Mut. Ins. Co., 383 N.W.2d 834, 836 (N.D. 1986) (pick-up truck qualified as "farm implement") and Garrett v. Alfa Mut. Ins. Co., 584 So. 2d 1327, 1331 (Ala. 1991) (Ford Bronco primarily used to perform farm related tasks was a farm implement)).

61. 327 Ga. App. 482, 759 S.E.2d 563 (2014).

agreed a motor vehicle exclusion that excluded golf carts was ambiguous and subject to at least two reasonable interpretations.[62] After a four-seat golf cart was involved in an accident in Peachtree City, Georgia, and suit was filed against the insured, American Strategic Insurance Corp. filed a declaratory judgment, claiming the allegations were excluded under the motor vehicle exclusion.[63] The court of appeals agreed with the insured, who claimed a reasonable reading of the base policy would have excluded two-seater golf carts, but under the special endorsement, a two-seater golf cart (and any cart with capacity in excess of two) would be covered and a one-person cart would remain excluded.[64] The court of appeals determined that when examining the policy as a whole, the exclusion was ambiguous and "subject to at least two reasonable interpretations, one providing coverage for the accident and one excluding coverage."[65]

B. Declaratory Judgments

Three decisions—one from the United States Court of Appeals for the Eleventh Circuit and two from Georgia district courts—reinforce that an actual controversy or dispute must actually exist with respect to insurance coverage before a court can and will entertain such claims. In *Owners Insurance Co. v. Parsons*,[66] the United States Court of Appeals for the Eleventh Circuit rejected what it characterized as an "advisory opinion" regarding Owners Insurance Company's potential exposure to future, bad faith litigation.[67] Owners' insured was involved in a vehicle accident, and the claimant sent Owners a time limited demand for policy limits, to which Owners did not timely respond. After a lawsuit was later filed against its insured, Owners offered to settle the case for policy limits, but the offer was rejected and the claimants made a demand that was twelve times the policy limit.[68] Owners initiated a declaratory

62. *Id.* at 486, 759 S.E.2d at 566.

63. *Id.* at 482, 759 S.E.2d at 564.

64. *Id.* at 485, 759 S.E.2d at 565-66. The base policy's exclusion provided that there was no coverage for "motor vehicle liability" unless the "motor vehicle" is a "motorized golf cart that is owned by an 'insured,' designed to carry up to 4 persons, not built or modified after manufacture to exceed a speed of 25 miles per hour on level ground." *Id.* at 484, 759 S.E.2d at 565. The special endorsement replaced the above language with the following: "A motorized golf cart: (1) Owned by an insured; (2) Designed to carry up to 2 persons; (3) Designed to carry 2 golf club bags; (4) Not built or modified after manufacture; and (5) Which does not exceed the speed of 25 miles per hour on level ground." *Id.*

65. *Id.* at 486, 759 S.E.2d at 566.

66. No. 14-15778, 2015 U.S. App. LEXIS 8321 (11th Cir. May 20, 2015).

67. *Id.* at *7.

68. *Id.* at *1-2.

judgment action, seeking a declaration from the court that the initial demand failed to comply with *Southern General Insurance Co. v. Holt*[69] and that Owners' failure to meet the initial demand should not expose it to any liability beyond the policy limits.[70] The district court dismissed the declaratory judgment action for lack of standing, and the Eleventh Circuit affirmed.[71] The Eleventh Circuit noted that no bad faith action had been filed, or even contemplated, by either Owners' insured or the claimant (by assignment), and any of Owners uncertainty with regard to settlement strategy and the "potential" for bad faith was not a "legal injury" requiring the court's involvement or jurisdiction.[72]

In an inverse scenario, the United States District Court for the Middle District of Georgia found that an insured cannot file suit against its own carrier for potential breach of an insurance contract or possible bad faith. In *Standard Contractors, Inc. v. National Trust Insurance Co.*,[73] after a subcontractor received notice from his general contractor threatening litigation over an alleged improper pool renovation, the insured (Standard Contractors) put its insurance company (National Trust) on notice, and National Trust later informed Standard that there was no coverage for the claim. Meanwhile, Standard Contractors repaired the pool and sent a demand to National Trust for reimbursement of the repair costs. Standard Contractors filed suit, alleging breach of contract and bad faith against National Trust, and National Trust filed a motion to dismiss.[74] The court granted the motion to dismiss and found that National Trust had neither a duty to defend nor to indemnify Standard Contractors.[75] No suit had ever been filed against Standard Contractors, and the court rejected Standard Contractors' claim that National Trust "anticipatorily breached" the insurance contract by denying coverage and refusing to reimburse for the pool repairs.[76] Specifically, National Trust had no duty to indemnify Standard Contractors because the insurance contract obligated National Trust to indemnify only for "sums that [Standard Contractors] becomes legally obligated to pay."[77]

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69. 262 Ga. 267, 416 S.E.2d 274 (1992).
70. *Parsons*, 2015 U.S. App. LEXIS 8321, at *2-3.
71. *Id.* at *3, *8.
72. *Id.* at *5-6.
73. No. 7:14-CV-66(HL), 2014 U.S. Dist. LEXIS 135651 (M.D. Ga. Sept. 26, 2014).
74. *Id.* at *1-3, *3-4.
75. *Id.* at *10, *13.
76. *Id.* at *9-10.
77. *Id.* at *10 (quoting the insurance contract).

In the 2012 decision, *Royal Capital Development, LLC v. Maryland Casualty Co.*,[78] the Georgia Supreme Court allowed diminution in value of real property as a possible measure of damages an insurer is obligated to pay.[79] During this survey period, in *Thompson v. State Farm Fire & Casualty Co.*,[80] two insureds attempted to certify a class of homeowners insurance policyholders who sought a declaratory judgment that their policies provided coverage for diminished value and required the insurer to pay for diminished value, even if not requested by the insureds. The attempt was unsuccessful. The insureds suffered water damage to their townhouse, and the insurer paid for the repairs. Rather than seeking a class action and declaratory relief based upon damages they and other policyholders suffered, the insureds sought a class action and declaratory relief based upon losses they may suffer in the future for diminished value of property.[81] The court rejected the insureds' motions because no case or controversy existed that would give the court subject matter jurisdiction.[82] The mere possibility that the insureds' townhouse would suffer damages in the future was too remote, hypothetical, or conjectural to justify granting the court jurisdiction to determine whether the insurance policy would provide coverage for diminution in value for possible future injury.[83]

C. Pollution Exclusion

In a matter of first impression, the Georgia Court of Appeals held in *Smith v. Georgia Farm Bureau Mutual Insurance Co.*[84] that paint was not a "pollutant" within the meaning of a pollution exclusion in a Commercial General Liability policy.[85] An insured was sued when a tenant's minor child ingested lead-based paint in a rental home, and as a result, Georgia Farm Bureau, the insurance company, filed a declaratory judgment action seeking a determination that it had no coverage for the claims because they came within the policy's pollution exclusion.[86] The Georgia Court of Appeals held the claims were not excluded because the policy's definition of "pollutant" did not include the

78. 291 Ga. 262, 728 S.E.2d 234 (2012). For a discussion of *Royal Capital Development*, see Bradley S. Wolff, Stephen Schatz & Stephen L. Cotter, *Insurance, Annual Survey of Georgia Law*, 64 MERCER L. REV. 151, 153-54 (2012).

79. *Royal Capital Dev., LLC*, 291 Ga. at 263, 728 S.E.2d at 235.

80. No. 5:14-CV-32 (MTT), 2015 U.S. Dist. LEXIS 63113 (M.D. Ga. May 14, 2015).

81. *Id.* at *1, *2, *3-4.

82. *Id.* at *16.

83. *Id.* at *15-16.

84. 331 Ga. App. 780, 771 S.E.2d 452 (2015).

85. *Id.* at 784-85, 771 S.E.2d at 455-56.

86. *Id.* at 780-81, 771 S.E.2d at 453.

words "lead," "lead-based paint," or even "paint."[87] Noting there was a conflict in other states on whether lead paint could be considered a "pollutant," the court agreed with a decision from another jurisdiction, which held coverage should not be excluded for injuries arising out of the ingestion or inhalation of lead-based paint under similar or identical exclusions.[88] The court of appeals held that if Georgia Farm Bureau had intended to exclude injuries caused by lead-based paint, "it was required, as the insurer that drafted the policy, to specifically exclude lead-based paint injuries from coverage."[89]

D. Consent to Settle

In a companion case addressed in this Survey last year,[90] *Piedmont Office Realty Trust, Inc. v. XL Specialty Insurance Co.*,[91] a Georgia district court again addressed an insurer's consent to a settlement clause and whether an insured's failure to obtain the insurer's consent precluded a subsequent bad faith action against the insurer.[92] In a certified question from the United States Court of Appeals for the Eleventh Circuit, the Georgia Supreme Court held that an insured was precluded from pursuing a bad faith action against its insurer because the insurer did not consent to the settlement and the insured failed to follow a required condition in the policy.[93]

Piedmont Office Realty Trust (Piedmont) was named as a defendant in a securities class action suit and ultimately sought consent from XL Specialty Insurance Company (XL), its excess carrier, to settle the claim for the remaining $6 million under the excess policy. XL only agreed to contribute $1 milllion towards the settlement and nothing further. Without providing further notice to XL or obtaining XL's consent, Piedmont nonetheless agreed to settle with the plaintiffs for $4.9 million, and XL refused to provide coverage for this settlement amount. Piedmont filed suit for breach of contract and bad faith, and after the district court granted XL's motion to dismiss, Piedmont appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit certified the following questions to the Georgia Supreme Court:

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87. *Id.* at 784, 771 S.E.2d at 455.

88. *Id.* at 784-85, 784 n.15, 771 S.E.2d at 455-56, 455 n.15 (citing Sullins v. Allstate Ins. Co., 667 A.2d 617 (Md. 1995)).

89. *Id.* at 785, 771 S.E.2d at 456.

90. *See* Cotter et al., *supra* note 1, at 117.

91. 11 F. Supp. 3d 1184 (N.D. Ga. 2014).

92. *See id.* at 1193; *see also* Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co., 297 Ga. 38, 39-40, 771 S.E.2d 864, 865 (2015).

93. *Piedmont*, 297 Ga. at 40, 41-42, 771 S.E.2d at 865, 866.

(1) whether Piedmont was "legally obligated to pay" the settlement amount under the policy, and (2) if an insurance contract contains a "consent-to-settle" clause that provides an insurer's consent "shall not be reasonably withheld," can a court determine that an insured who unsuccessfully seeks consent before settling is barred as a matter of law from bringing a bad faith failure to settle a claim against the insurer.[94]

Relying on its decision in *Trinity Outdoor, LLC v. Central Mutual Insurance Co.*,[95] the Georgia Supreme Court held that the "plain language of the insurance policy does not allow the insured to settle a claim without the insurer's written consent" and the insurer "shall only be liable for a loss which the insured is 'legally obligated to pay.'"[96] Furthermore, the supreme court held that because the policy contained a "no action" clause that prohibits an action against an insurer unless the insured complies with all policy terms, Piedmont was precluded from pursuing its bad faith action against XL because Piedmont failed to fulfill its contractually agreed upon condition precedent.[97]

The court was unpersuaded by Piedmont's claim that XL unreasonably withheld its consent to settle simply because the settlement agreement between Piedmont and the plaintiffs was approved by the district court.[98] Instead, the court noted that Piedmont could not settle the underlying lawsuit without XL's consent—and in breach of the insurance policy—and then claim the district court's approval of the settlement somehow imposed a distinct legal obligation upon XL to nonetheless pay the settlement on Piedmont's behalf.[99] The Georgia Supreme Court concluded that the district court did not err in dismissing Piedmont's bad faith complaint.[100]

E. Recoupment of Costs

Whether an insurance carrier can recoup defense costs and expenses has not been squarely addressed by any Georgia appellate court. However, a Georgia federal district court has, for the second time, addressed the issue and, this time, ruled in favor of the insured. In *Essex Insurance Co. v. Sega Ventures, LLC*,[101] Essex attempted to withdraw from defending an assault and battery matter and recoup its

94. *Id.* at 39-40, 771 S.E.2d at 865.
95. 285 Ga. 583, 679 S.E.2d 10 (2009).
96. *Piedmont*, 297 Ga. at 41-42, 771 S.E.2d at 866.
97. *Id.*
98. *Id.* at 42, 771 S.E.2d at 867.
99. *Id.* at 42-43, 771 S.E.2d at 867.
100. *Id.* at 43, 771 S.E.2d at 867.
101. No. CV 413-253, 2015 U.S. Dist. LEXIS 42932 (S.D. Ga. Mar. 31, 2015).

costs beyond a $25,000 coverage limitation. Essex previously issued a reservation of rights letter stating to its insureds that it would discontinue its representation once the underlying suit's costs reached the policy's coverage limit. Essex later filed a declaratory judgment action, claiming it had no duty to further defend or indemnify its insureds because the policy's coverage limit had been reached.[102]

Essex also sought to recoup costs from its insured beyond the $25,000 supplement.[103] Essex claimed it had "expressly reserved its right to seek recoupment" in its reservation of rights letter, relying on the United States District Court for the Northern District of Georgia's decision in *Illinois Union Insurance Co. v. NRI Construction Inc.*,[104] which Essex claimed entitled it to recoup defense costs from its insured.[105] Sega Ventures, LLC, Essex's insured, claimed the reservation of rights letter was ineffective because the policy itself did not provide for recoupment of costs and coverage was afforded up to a certain limit.[106] The court closely reviewed the language of the reservation of rights letter sent by Essex and concluded there was "no question that the policy provides at least some coverage for the claims in the underlying suit" up to a certain financial threshold.[107]

The court determined this coverage was in direct contrast to the situation in *Illinois Union Insurance* "where there was no coverage whatsoever for the defended claims."[108] The court, therefore, concluded that the reservation of rights letter "could reasonably indicate" to Sega Ventures that Essex "reserved only a right to recoup its costs where the underlying claims [were] entirely uncovered by the policy."[109] The court held that any such ambiguities in the reservation of rights letter were in favor of Sega Ventures and rejected Essex's effort to recoup its costs.[110]

F. Enforcement of Suit Limitation Provision

In 2012, the Georgia Supreme Court answered a certified question, holding that a one-year suit limitation provision in a homeowner's insurance policy is enforceable for claims not involving a fire loss to

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102. *Id.* at *3-4, *4-5.
103. *Id.* at *16.
104. 846 F. Supp. 2d. 1366 (N.D. Ga. Feb. 28, 2012).
105. *Essex Ins. Co.*, 2015 U.S. Dist. LEXIS 42932, at *16-17.
106. *Id.* at *17-18.
107. *Id.* at *18-19.
108. *Id.* at *19.
109. *Id.*
110. *Id.*

property.[111] During this survey period, in *Alexander v. Allstate Insurance Co.*,[112] the district court enforced a one-year suit limitation provision in an automobile policy.[113] Conditions in the auto policy required the insureds to submit to examinations under oath, if requested, and prohibited a suit against the carrier "unless there is full compliance with all policy terms and such action is commenced within one year after the date of loss."[114]

After the insureds made a claim for theft of their vehicle, the insurer requested that the insureds submit to examinations under oath on numerous occasions, but the insureds failed to appear. In its communications with the insureds, the insurer demanded strict compliance with the policy conditions, reserved all rights related to the claim, and stated that no communication should be deemed a waiver of any conditions. Three days prior to the expiration of the one-year suit limitation period, the insurer sent a letter to the insureds denying their claim because they breached the condition of the policy requiring them to submit to examinations under oath.[115] Nearly two years after the loss, the insureds filed suit, alleging that the insurer told the police that the insureds had conspired to cause the theft to fraudulently obtain insurance proceeds, knowing that the insureds "would not appear for an examination under oath while criminal charges were pending against them."[116]

The court granted summary judgment to the insurer because of the one-year suit limitation provision.[117] In rejecting the insureds' argument that the insurer had waived compliance with the policy conditions, the court pointed out that the carrier informed the insureds, in writing and at least nine times, that it was not waiving compliance with policy terms; that it was reserving all rights and defenses under the policy; and that it would "continue to insist upon strict compliance" with the terms of the policy.[118] "[A]n insurer's investigation and continued correspondence with an insured up to, and after, expiration of a policy's limitation period, without more, is not sufficient to constitute a waiver of the policy's limitation period."[119]

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111. *See* White v. State Farm Fire & Cas. Co., 291 Ga. 306, 306, 309, 728 S.E.2d 685, 686, 687 (2012). For a discussion of *White*, see Wolff et al., *supra* note 78, at 154-55.

112. No. 1:13-CV-2426-WSB, 2014 U.S. Dist. LEXIS 114803 (N.D. Ga. Aug. 19, 2014).

113. *Id.* at *25.

114. *Id.* at *2-3.

115. *Id.* at *1, *2, *21.

116. *Id.* at *13 (quoting plaintiff's complaint).

117. *Id.* at *25.

118. *Id.* at *18.

119. *Id.* at *21.

G. *Timely Notice of Claim*

Over the years, we have written about numerous cases in which courts have enforced the condition contained in a variety of policies requiring the insured to provide timely notice of a claim. This year is no different. In *Joseph v. Northwestern Mutual Life Insurance Co.*,[120] the district court enforced the notice condition in an individual disability income insurance policy.[121] The policy required written notice of a claim within sixty days after the start of any covered loss, or as soon as reasonably possible, and required written proof of disability within ninety days after the end of each month for which benefits are claimed, or as soon as reasonably possible.[122]

The insured contended that he became disabled due to hearing loss in 2002. However, he did not notify the insurer of his claim until 2011 and waited an additional eighteen months before submitting his written proof of claim. The insured's excuses for not satisfying the notice requirements in a timely fashion included that he did not understand the terms of the policy and believed his hearing loss would improve.[123] The district court held that such excuses were not reasonable as a matter of law.[124] The insured also argued that the insurer waived the notice requirements by failing to send him a reservation of rights letter indicating that denial or limitation of his claim was a possibility.[125] In rejecting this argument, the district court stated that no Georgia case requires a disability insurer to reserve its rights.[126] The court granted summary judgment in the insurer's favor.[127]

H. *Professional Services Exclusion*

In *Auto-Owners Insurance Co. v. Unit Owners Ass'n of Riverview Overlook Condominium, Inc.*,[128] the district court added to the sparse number of cases interpreting the professional services exclusion in a

120. No. 7:13-CV-96 (HL), 2015 U.S. Dist. LEXIS 36427 (M.D. Ga. Mar. 24, 2015).
121. *Id.* at *15.
122. *Id.* at *2-3.
123. *Id.* at *19-20.
124. *Id.* at *19.
125. *Id.* at *21.
126. *Id.* at *21-22. This holding is consistent with case law addressing other types of first-party insurance policies in which courts have found no waiver by insurers who did not issue a reservation of rights. *See, e.g.*, Brazil v. Gov't Emps. Ins. Co., 199 Ga. App. 343, 344, 404 S.E.2d 807, 808-09 (1991); *see also* O.C.G.A. § 33-24-40 (2013).
127. *Joseph*, 2015 U.S. Dist. LEXIS 36427, at *24.
128. No. 1:13-CV-3012-TWT, 2014 U.S. Dist. LEXIS 152452 (N.D. Ga. Oct. 28, 2014).

liability insurance policy under Georgia law.[129] The excluded professional services in the policy included "supervisory, inspection, or engineering services."[130] The insureds had entered into a management agreement with owners of property that gave the insureds authority to hire, fire, and supervise the necessary contractors to operate and maintain the property, and to contract with others to repair and maintain the property. The agreement also required the insureds to manage and inspect renovation work. The property owner subsequently filed suit against the insureds, alleging damages as a result of the insured's management and renovation of the property.[131]

In determining whether the professional services exclusion applies, "the task must arise out of the acts specific to the individual's specialized knowledge or training."[132] The insureds contended that they were not acting in a supervisory capacity or as a general contractor and submitted affidavits in support.[133] The court rejected the insured's contentions and affidavits as irrelevant because the allegations of the complaint determine if an insurer has a duty to defend its insureds.[134] Because the complaint alleged that the insureds were acting in a supervisory capacity and using special construction knowledge to ensure the work was completed in a workmanlike manner and free from defects, the professional services exclusion applied to those activities, and, thus, the insurer had no duty to defend as a matter of law.[135]

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129. *See id.* at *7.
130. *Id.*
131. *Id.* at *2, *3.
132. *Id.* at *7 (quoting Auto-Owners Ins. Co. v. State Farm Fire & Cas. Co., 297 Ga. App. 751, 756, 678 S.E.2d 196, 201 (2009)).
133. *Id.* at *8.
134. *Id.*
135. *Id.* at *8-9.