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Insurance

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Of the 45 "insurance" cases handed down during the current survey period less than half merit serious scrutiny and comment at this time. Of the remainder, some address themselves solely to procedural issues with "insurance" law providing but a fortuitous backdrop, while others involve only factual disputes raised largely in duels involving the grant or denial of motions and counter motions for summary judgment.

To preserve editorial continuity the cases decided during the current survey period will be discussed in conformance with the general outline and subject matter headings used in past years. Where certiorari to the supreme court has been applied for but not disposed of during this survey period, this fact will be so indicated in the footnotes.

I. Legislation

After several years of spirited and innovative legislative activity the 1976 General Assembly produced but one enactment of general interest. It provides that uninsured motorist insurance carriers must pay the damages sustained by their insureds and "shall not escape liability by pleading any phase of bankruptcy proceedings instituted by the uninsured motorist".[1]

II. Cooperation—Notice of Claim

One of the conditions of cooperation inserted in policies, often incorrectly described as duties of cooperation, is that written proof of claims must be given "promptly" or as soon "as practicable". *Erber v. Ins. Co. of North America*[2] shows again that this exhortation to speed is not to be taken too literally. Notice may be excused by waiver or estoppel and its timeliness may depend upon such factors as whether the insured was reasonably aware that the occurrence in question was more than trivial and could thus be productive of a claim, or, if he was aware that the claim might be covered by his insurance.[3] Nevertheless, such flexibility is not unlimited. A delay of 22 months in submitting a claim for medical expen-

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1. Ga. Laws, 1976, p. 1195, *amending* Ga. Code Ann. §56-407A(a) (1971).
2. 134 Ga.App. 632, 215 S.E.2d 528 (1975).
3. Gregory v. Allstate Ins. Co., 134 Ga. App. 461, 214 S.E.2d 696 (1975).

ses under an automobile policy was deemed fatal where the insured consulted an attorney nine months after the collision and learned that the policy in question provided coverage for the injuries sustained. The fact that the insured was in much pain and subject to medical ministrations may well have prevented him from giving serious thought to the availability of coverage and may have excused the delay for the first nine months until he received definite word from his attorney. Yet, it did not provide an excuse for his failure to make a claim during the remaining thirteen month period.

III. COVERAGE—EXCEPTIONS AND EXCLUSIONS

Exceptions and exclusions, while often used synonymously even in judicial opinions, nevertheless perform entirely separate and distinct functions. Exceptions describe those hazards or *causes* of loss for which the insurer assumes no liability. Exclusions describe the *subject* for which the insurer assumes no liability, in other words, the property, the persons, and the activities or conditions which are *not* covered at all. In *Georgia Farm Bureau Mutual Ins. Co. v. Alloway*[4] the insured confused these two coverage limitations when he sought recovery under a farm owners insurance policy for a horse that had died from a leg mangled by an unknown cause. He relied on a clause insuring "*all* farm personal property. . .except as hereinafter provided".[5] Farm personal property expressly included "livestock" which was further defined as including "horses". He contended essentially that since horses are specifically included in the "all property" coverage, and not excluded, he had made a prima facie case by showing that his horse had died of the circumstances alleged. This contention was rejected. The fact that a policy covers all manner of property does not mean that property is covered against all hazards. Unless the insurer has contracted to cover "all risks", the insured, in order to make a prima facie case, must not only show that the property in question was covered by the policy, but also that the occurrence causing its loss was within the specified types of hazards insured.[6]

In *Davis v. National Indemnity Co.*[7] the named insured, an automobile leasing company, under an automobile liability policy rented a car to Attaway who loaned it to his wife. The wife, as a permittee and thus an additional insured, negligently caused a collision and injured her mother-appellant, who was a passenger in the car. Was the insurer liable in light of the usual policy provision which excluded from coverage for

4. 134 Ga.App. 660, 215 S.E.2d 506(2)(1975) petition for cert. filed.

5. *Id.* at 661, 215 S.E.2d at 507 (emphasis supplied).

6. *See also,* Cole v. State Farm Mutual Automobile Ins. Co., 135 Ga.App. 557, 218 S.E.2d 279 (1975); Showers, v. Allstate Ins. Co., 136 Ga.App. 792, 222 S.E.2d 198 (1975).

7. 135 Ga.App. 793, 219 S.E.2d 32 (1975).

personal injury or property damage "(1) the spouse or any *parent*, son, or daughter of the insured, or (2) the named insured. . ."?[8] The insurer contended that the exclusion precluded liability to *any* parent of *any* person insured under the policy either as a named insured or an additional omnibus insured. The court found that this language did not exclude the appellant from being able to seek recovery. It based its holding on the new prevalent "severability of interests" clause which has been standardized to read as follows: "The term 'the insured' is used *severally and not collectively*, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability."[9] This clause was inserted to make certain that the named insureds and the omnibus or additional insureds are to be treated separately, and that exclusions or other coverage limitations should apply only to the *particular* insureds seeking coverage.[10] Consequently, the appellant may proceed against the insurer, because although she was a "parent" of Mrs. Attaway, she was not one of Mr. Attaway's parents, therefore the exclusion clause did not operate as to her.

IV. Death By Accidental Means

Reading a case like *Interstate Life & Accident Ins. Co. v. Upshaw*[11] one is tempted to conclude that any attempt to recover for death caused by *accidental means*, described by one author as the most litigation-prone language found in insurance policies,[12] is little more than a quixotic venture.

The cestui, under an accidental death policy involving a princely premium of no less than forty (40) cents weekly, died in 1968. After eight years and two appearances before the court of appeals, the claim is still in limbo because the beneficiary has applied for certiorari from an adverse ruling.

The policy contained the usual language requiring that the bodily injuries resulting in death must have been effected "*solely* through violent, external and *accidental means*", that such bodily injuries must have caused death "*directly and independently of all other causes*"[13] and that no idemnity was to be payable for death resulting "*directly or indirectly from bodily or mental infirmity or disease in any form*. . ."[14]

8. *Id.* at 794, 219 S.E.2d at 33 (emphasis supplied).

9. *Id.* at 795, 219 S.E.2d at 34 (emphasis supplied).

10. The "severability" clause or "severability of interests" clause has not always fared so well in other jurisdictions. *See, e.g.*, Fuchs v. Cheeley, 285 Minn. 356, 173 N.W.2d 358 (1969).

11. 134 Ga.App. 394, 214 S.E.2d 675 (1975) petition for cert. filed.

12. E. Patterson, Essentials of Insurance Law 243 (2d ed. 1957).

13. Some policies substitute language to the effect that death must be caused "solely and exclusively" by accident. This variation has not produced differences in construction. See Beneficial Standard Life Ins. Co. v. Usalavage, 136 Ga.App. 328, 332, 221 S.E.2d 457, 460 (1975).

14. 134 Ga.App. at 395, 214 S.E.2d at 676 (emphasis in original).

Eye witnesses saw the deceased fall from a log truck to the ground, a distance of about eight feet. The autopsy revealed a slight bruise on the forehead and a coronary embolism caused by a dislodged thrombus which had been in the artery for probably three or four years. The evidence was in dispute as to whether the fall was caused by the coronary embolism or was accidental. There was also a dispute as to whether the fall, if accidental, could have dislodged the thrombus and thus caused the embolism. In holding that the insurer should have been granted a motion for judgment notwithstanding the verdict, the court of appeals acted on two premises: *First,* the chronology of events (fall-embolism-death or embolism-fall-death) was irrelevant, because, if an established arterial disease or infirmity either contributed to the fall or was itself activated or aggravated by the fall, the resulting death cannot be described as brought about solely, directly and independently of other causes by accidental means. *Second,* the burden of proof was upon the claimant to show that death came within the terms of the policy. To meet such burden he would have had to establish not only that death was proximately caused by the accicental fall but also that it was not in any way connected with a physical infirmity or disease.

The same reasoning also doomed the beneficiary's claim in *Allstate Ins. Co. v. Holcombe*[15] when the case made its second appearance before the court of appeals.[16] In this case the evidence was in conflict as to whether an infarction of the small bowel, which ended in the death of the insured, was caused by an impact with an automobile steering column suffered in an accidental collision, or by arteriosclerosis, a condition from which the insured had been suffering for several years. The trial judge, presiding as a trier of fact without a jury, had found as a matter of fact that the injuries suffered in the collision had *contributed* to the infarction of the small bowel and to the insured's death and held for the beneficiary. The court of appeals reversed, reasoning that no less than a finding that death was *exclusively* caused by accident was necessary to sustain recovery.

It is suggested that such restrictively literal construction is completely at variance with the expectations created by accidental death policies or by "double indemnity" clauses in ordinary life policies; expectations which are carefully nurtured by insurers, who are aided in no small degree by the emotive content of the phrase "accidental death" and its evocative qualities. Surely, insurers cannot be heard to say that their true intent in marketing this coverage is to limit recoveries only to accidental deaths involving those few insureds who qualify as perfect specimens of the human race!

Aside from this, the above cases also seem to run counter to the rationale of *Hall v. General Accident Assurance Corp.*[17] which states that:

15. 136 Ga.App. 328, 221 S.E.2d 457 (1975).
16. *See* Pock, *Annual Survey of Georgia Law: Insurance*, 27 MER. L. REV. 121, 134 (1975).
17. 16 Ga.App. 66, 85 S.E. 600 (1915).

> [I]f the injury, by aggravating the disease, accelerated the death of the assured, then it resulted "directly, independently and exclusively of all other causes." In other words, if death would not have occurred when it did *but for* the injury resulting from the accident, it was the direct, independent, and exclusive cause of death *at that time,* even though the death was hastened by the diseased condition.[18]

This indicates that the trier of fact may predicate recovery upon a finding that the accident was the efficient, dominant and proximate cause of death if it accelerated death from a pre-existing condition and if death would not have occurred when it did but for the accident. A finding that the accident may have *contributed* to death, in the sense that a healthy person would not have succumbed to the injury affected by it, does not negate the conclusion that the accident was the proximate cause of death.[19]

V. Definitions And Construction

A. *"Business Pursuits"*

Homeowners' policies, allowing for minor variations in language, typically exclude coverage for "activities in connection with a business . . . . except such acts as are ordinarily incident to non-business pursuits or activities. . . ." *Nationwide Mutual Fire Ins. Co. v. Collins*[20] held that an insured acting as a babysitter for two small children by caring for them and feeding them in her own home under a more or less continuing arrangement which paid her five dollars per day was not engaged in a business pursuit and was thus covered when one of the children burned her hand on a hot floor furnace grill. The insured had never offered or advertised nursery services, was not licensed to do so, and had only cared for the two children involved. She was babysitting for pin money, which is hardly a commercial business. Even if it were assumed, *arguendo,* that the insured's services amounted to a business activity within the exclusionary clause of the policy, she would still be covered under the above quoted language, because maintenance of a floor furnace in her home to provide heat for herself and her family was certainly an activity "ordinarily incident to a non-business pursuit".

B. *"Household"*

The phrase "resident of the same household" and its variants, whether appearing in the extended coverage provisions mandated by the Uninsured

18. *Id.*

19. The insurer seems to have a more persuasive case if it can rely upon an additional buttressing clause negating liability . where death results "directly or indirectly from bodily or mental infirmity. . . ." See Interstate Life & Accident Ins. Co. v. Upshaw, 134 Ga.App. 394, 214 S.E.2d 675 (1975) petition for cert. filed.

20. 136 Ga.App. 671, 222 S.E.2d 828 (1975) petition for cert. filed.

Motorist Statute,[21] the Omnibus clause or surfacing in other parts of the automobile policy, continues to elude precise delineation. There is no dearth of judicial gloss, yet each interpretive decision appears causistic, limited to the particular permutation of facts *sub judice* and provides at best only rough guidelines of minimal precedent value in other situations. *Cotton States Mutual Ins. Co. v. McEachern*[22] is a case in point. The son and daughter-in-law of the named insured moved into a home about a mile and a half from the father's house after they had made their marital residence with the father for nearly a year. They continued to eat most of their meals at the father's house and to receive substantial financial support. The court held that a separate household had been established. While financial support, or independence therefrom, may be an important factor in determining whether relatives residing under the same roof have established separate households under a different head or management, financial support to relatives living in a different home does not extend the curtilage of the benefactor to that second home.

C. *"Replacement Automobile"*

The definition of "owned automobile" in liability policies typically embraces not only the described insured vehicle but also (1) an automobile acquired to *replace* the owned automobile and (2) an automobile acquired *in addition* to the owned automobile. In the latter case, however, coverage is extended only for a limited period of time in order to afford the insured an opportunity to obtain additional insurance, but only if all other vehicles owned by the insured are covered by the same insurer.

In *Greene v. Commercial Union Ins. Co.*[23] the insured's Chevrolet broke down and had to be placed in a garage for extensive repairs. Two weeks after parting with her car the insured bought a Dodge for her own use which was totally destroyed four days later. After a "down time" of about four months her Chevrolet was eventually restored to service. Did her Dodge "replace" the Chevrolet under the terms of policy? The court held that it did not. Replacement means a permanent progression by which the insured parts with one vehicle and elects to put another in its place. A substitute automobile owned and used by the insured while the insured vehicle is being stored or repaired cannot qualify as a *replacement* so long as *ownership* of the insured vehicle is being retained. On a parity of reasoning, a mere intention to sell the insured vehicle after it is repaired and thus eventually to use the newly acquired second vehicle as a replacement also does not qualify as a present replacement.[24]

21. GA. CODE ANN. §56-407.1 (1971).

22. 135 Ga.App. 628, 218 S.E.2d 645 (1975).

23. 136 Ga.App. 346, 221 S.E.2d 479 (1975).

24. Note that the insured could not take advantage of the coverage extended for a newly acquired *additional* automobile because her third car, put at the disposal of her son, was

D. *"Temporary Substitute Automobile"*

The term "owned automobile", used in standard liability policies, encompasses "temporary substitute automobile", which is further defined as "any private passenger, farm or utility automobile *not owned by the named insured,* while temporarily used as a substitute for the owned automobile when it is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. . . ."

If I buy a truck in my own name, insure it in my own name, and receive a policy which lists me prominently as the only "Named Insured" in its declarations, may I not assume that my wife's car which is lent to me while repair work is being done on my truck qualifies as a temporary substitute automobile? *Cotton States Mutual Ins. Co. v. Bowden*[25] holds that I may not. Although the declarations mention only my name and my address next to the words "Named Insured" printed in large letters, I am also informed in very small letters in the body of the policy that the term "Named Insured" means the individual named in the declarations and also his *spouse,* if a resident of the same household. By this legerdemain the borrowed car which I do not own is transmogrified into an owned automobile, owned by a named insured and thus excluded from coverage.

" 'When *I* use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' "[26] These words come whimsically to mind when one peruses a policy in which the insurer has succeeded—with the court's imprimatur—to define an "owned" automobile as an "unowned" automobile, and an "unnamed" insured as a "named insured". It seems somehow unsatisfactory to say, as did the court, that a careful reading of the definition discloses no ambiguity and hence provides no basis for applying *Contra Proferentem*.

As Justice Evans points out in his trenchant dissent the majority opinion also ignored the following policy language: ". . . provided, however, that a private passenger . . . automobile owned by a relative shall not be a *temporary substitute automobile except as to actual operation by the named insured*. . . ."[27] Being more specific, this language should govern and restrict the more general definition of temporary substitute automobile. Even perceived as equally general this language would at least create an ambiguity justifying *Contra Proferentem*.

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insured with a different company. Nor could she claim that the Dodge was a temporary substitute automobile, because coverage for substitute automobiles is restricted to vehicles that are *not owned* by the insured.

25. 136 Ga.App. 499, 221 S.E.2d 832(1975) petition for cert. filed.

26. L. CARROLL, THROUGH THE LOOKING GLASS, Chapter VI.

27. 136 Ga.App. 499, 501, 221 S.E.2d 832, 834 (1975).

VI. Group Insurance

In *Provident Life & Accident Ins. Co.* v. *Wiles*[28] the decedent was insured under an employee group life and health insurance policy which provided that he became eligible on "the date the employee completes three months of activie service with the group policy holder. . . ," and that his insurance would terminate on "the date the employee's active employment. . .is terminated, except that employees may be considered as remaining in active employment . . . during temporary lay-off or leave of absence . . . but not for a longer period than three months. . . ."[29] Later he was discharged and rehired within three months. Upon his re-employment he completed a new insurance enrollment form just as if he were a new employee. Less than two months after his re-employment he died. It was held, perhaps somewhat harshly, that he was not covered under the original policy. His discharge described as "permanent" in a deposition by his employer's vice president did not become a "temporary" lay-off just because he was actually removed from the payroll for a very brief period. Discharge and lay-off, as used in the policy, are thus construed as words of art. Whether one is discharged or only laid off is determined by the intent accompanying the separation and not by its duration or other subsequent events.

VII. Insurers' Liability For Judgments In Excess Of Policy Limits

Georgia follows the usual "equal thought" test which requires that in order to avoid liability to its insured the insurer must accord his insured the same faithful consideration it gives to its own interest in determining whether to effect a settlement within policy limits or defending the action to its denouement and risking a judgment in excess of the policy limits.[30]

Nationwide Mutual Ins. Co. v. Turner[31] reiterates that this duty to use ordinary care and good faith in the administration of claims arises out of contract and particularly out of the duty to defend suits against the insured. There is no privity of contract and hence no fiduciary relationship between insurers and persons injured by their policy holders nor between insurers and persons who injure their policy holders. The fact that the Uninsured Motorist Act allows insurers to file defensive pleadings in suits against known or unknown uninsured motorists does not transmute such motorists into *insureds* to whom any fiduciary duty is owed.

It is submitted that this decision is formalistic but not fair. Instead of

28. 134 Ga.App. 490, 215 S.E.2d 27 (1975).

29. *Id.* at 490, 215 S.E.2d at 28.

30. This test, couched in language of disarming simplicity, must have completed the rout of many a juror who reflected that the interests of the insured and the insurer are really incompatible.

31. 135 Ga.App. 551, 218 S.E.2d 276 (1975) petition for cert. filed.

basing the duty upon privity of contract it would be more satisfactory to base it upon the expanding notion in the law of torts that anyone who takes charge of a situation fraught with foreseeable dangers to others should be at least minimally careful to avert harm. Since the consequences of a judgment in excess of policy limits are both foreseeable and dire, it would not be too much to expect an insurer, who *de facto* orchestrates and perhaps even monopolizes the defense of a suit against a *known* uninsured motorist, to at least notify and consult with the dfendant whenever settlement within the policy becomes a distinct possibility. Liability or nonliability would thus be determined by the particular scenario and the total conduct of the insurer and not by *a priori* assumptions about technical privity.

VIII. Limitation In Policy—Time For Suit

Property insurance policies typically contain "private" statutes of limitations requiring insureds to bring suits on a contract claim within 12 months of the occurrence of the incident giving rise to the claim. Other provisions allow the insurer a specified number of days in which to consider a claim before making payment. Thus the cause of action against the insurer does not arise and no suit is sustainable until expiration of such period. In spite of this hiatus, the plain meaning of the 12 months "time for suit" stipulation requires that the time be computed from the date the incident occurred, and not from the date of the delayed accrual of a technical cause of action under other provisions of the policy.[32]

IX. Omnibus Clause—Scope Of Permission

Georgia has consistently rejected the "hell or high water" rule which holds that so long as permission to use an automobile is *initially* granted, the user or operator qualifies as an additional or omnibus insured even if he is in flagrant violation of the terms of his permission.[33] Two cases decided during the current survey period confirm that Georgia hews close to the midway house position on this point. In *Rosenbaum v. Dunn*[34] a U-Drive-It car rented from Hertz for one week in Florida was involved in a collision in Georgia about seven weeks past the agreed return date. It was held that the bailee-operator had converted the car to his own use and thus terminated the permission orginally granted for operation of the car. Termination of permission also terminated insurance coverage under Hertz's public liability policy.

32. Pennsylvania Millers Mutual Ins. Co. v. Thomas Milling Co., 137 Ga.App. 430, 224 S.E.2d 55(1976) petition for cert. filed.

33. *See, e.g.*, Odolecki v. Hartford Acc. & Indem. Co., 55 N.J. 542, 264 A.2d 38 (1970).

34. 136 Ga.App. 870, 222 S.E.2d 596 (1975) petition for cert. filed.

In *Allstate Ins. Co.* v. *Martin*[35] the borrower of a car was allowed "to take Ginny home", which involved a distance of no more than a mile and a half. Asked how long the trip would take, the borrower replied "Not long at all. I will be right back". The lender left his home before the borrower returned with the car and instructed a friend to get the keys from the borrower. On his return the borrower refused to deliver the keys to the friend and took off on a second trip, which finally ended in a tragic accident an estimated 30 miles from the lender's home. It was held that the specific terms of the bailment delineated the scope of permission in regard to geography as well as time. The borrower ceased being a permittee upon embarking upon the second trip and was thus denuded of coverage.

X. SUBROGATION

Lindsey v. Samoluk[36] reveals one of the more pernicious effects of subrogation. The insured's Porsche was involved in a collision with a Toyota. After negotiating unsuccessfully with the Toyota's owner and the owner's insurer for payment of damages for personal injuries, loss of wages and medical expenses as well as damages to his Porsche, "down time" while it was in the auto repair shop, and cost of a rental auto, the insured made a claim against his own insurer under his collision coverage for the amount of the repairs to his Porsche *only* in order to secure its release from the repair shop. He was paid $1940, the cost of repairs minus the $100 deductible and signed an agreement subrogating his insurer to all his claims for the loss *to the extent* of that payment. He then brought an action against the Toyota's owner for uncompensated property losses, such as depreciation and car rental, amounting to about $2400.

The supreme court summarily rejected the argument, amply supported by authority in other jurisdictions, that such agreements, despite their broad sweep, subrogate the insurer only pro tanto to the rights of its insured and that the insured retains that part of the claim which is in excess of the payment received. The court held that the entire claim was assigned, which presumably means that any action upon it could only be brought by the insurer.

This conclusion appears as unfortunate as it is unnecessary. It pits the insured, who may be in necessitous circumstances and hence under pressure to secure funds immediately, against the insurer which, since legally liable for only a part of the loss, may not be motivated to secure full compensation for its insured when suing upon the claim to which it is subrogated. One wonders why the tortfeasor and his insurer should benefit in this manner from an agreement between his victim and the victim's collision insurer, particularly in light of the fact that such an agreement is

35. 136 Ga.App. 257, 220 S.E.2d 732 (1975) petition for cert. filed.
36. 236 Ga. 171, 223 S.E.2d 147 (1976), reversing, 135 Ga.App. 852, 219 S.E.2d 464 (1975).

hardly voluntary, since it is demanded by the insurer as a condition to making partial reimbursement for the loss. Since a judicial *volte face* is unlikely, the situation commends itself for legislative intervention. The General Assembly should pass a simple statute converting broad subrogation agreements, under whatever rubric, into partial or pro tanto subrogation whenever only part of a sustained loss is covered and paid for by the insurer, and, providing that the insured and the insurer, as owners of part of the claim, each have a cause of action and may sue upon it by joining the other part owner.

XI. Third Party Rights

In *Reeves v. Reeves*[37] a property settlement agreement requiring the husband-father to maintain certain life insurance policies and name his minor children as beneficiaries was incorporated in and made part of a final divorce decree. After the divorce the insured failed to name his children as beneficiaries. Upon his remarriage, the insured named his second wife beneficiary in breach of the agreement. It was held that the insured, by entering into the settlement agreement, had estopped himself from invoking the contractual privilege of changing the beneficiary under the policy as fully as if the designation of his minor children had been set forth in an irrevocable clause in the policy. The children thus acquired a vested interest in the proceeds of the insurance contracts as those contracts existed on the date of entry of the court decree.

XII. Uninsured Motorist Act

The Uninsured Motorist Act, as amended[38] remains a fertile source of litigation. *Londeau v. Davis*[39] held that the statutory right to enter defenses on behalf of and in the name of the uninsured defendant does not allow the insurer to control the litigation contrary to the ordinary right of a litigant to do so. Thus, an uninsured defendant may desire to "settle" by *confessing judgment* to an amount less than the amount sued for by authorizing his own attorney to file a pleading admitting negligence. In the absence of any evidence of fraud or improper concert of action on the part of plaintiff or defendant, or both, the insurer is bound by such admission. The statutory authorization to "file pleadings, and take other action allowable by law in the name of the known. . . operator"[40] does not allow the insurer to file a denial of liability contrary to the wishes and desires of the defendant which are legally expressed by pleadings in court.

37. 236 Ga. 209, 223 S.E.2d 147 (1976).
38. Ga.Code Ann. § 56-407 (1971).
39. 136 Ga.App. 25, 220 S.E.2d 43 (1975).
40. Ga.Code Ann. § 56-407.1(d) (1971).

In *Wilkinson v. Vigilant Ins. Co.*[41] the supreme court held that the statutory requirement that liability insurance policies shall contain "provisions undertaking to pay the insured all sums which he shall be *legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle"[42] did not necessarily mean that the injured party must in each case reduce his claim to judgment in order to establish the amount he is legally entitled to recover. A judgment against the uninsured may be dispensed with in order to carry out the intent and purpose of the statute, which is to adjudicate the liability of the insured *under the contract of insurance* whether the uninsured motorist be known or unknown. Where an uninsured motorist files a bankruptcy petition and is discharged by the referee in bankruptcy during the pendency of a law suit for damages growing out of a collision, the discharge may bar liability by the uninsured motorist but does not allow the uninsured motorist insurance carrier to escape liability under its contract. In such a case, since no liability can attach to the *known* uninsured, the action must be allowed to proceed as though it were a John Doe action enabling the insured to establish "all sums which he shall be legally entitled to recover as damages" caused by the uninsured motorist.[43]

Spence v. State Farm Mutual Automobile Ins. Co.[44] serves as a reminder that uninsured motorist coverage may apply even where the "other" vehicle involved in the collision is to some extent insured. The Act defines an uninsured motor vehicle in pertinent part as follows: ". . . as to which there is no . . . liability insurance . . . or as to which there is . . . liability insurance with limits less than the amounts specified (in the Uninsured Motorist Act), but it will be considered uninsured only for that amount between the limit carried and the limit *required* . . . ."[45] The Act requires the insurer to issue either a $10,000/20,000 uninsured motorist coverage or a "deluxe" package for no less than $25,000/50,000 at the option of the insured. The amount for which a given vehicle is deemed uninsured is determined by the difference between the liability insurance carried and the actual amount of uninsured motorist coverage which the insured has elected to purchase and which the insurer was required to furnish rather than lower amount which the insured might have elected as his option. Thus if an owner of a vehicle carrying $10,000 liability insurance negligently causes collision with an owner of a vehicle carrying $25,000 uninsured motorist insurance, the amount for which the first vehicle is deemed uninsured is $15,000.

Two cases dealt with the statute of limitations applicable under the Act.

41. 236 Ga. 456, 224 S.E.2d 167 (1976).

42. GA. CODE ANN. §56-407.1(a) (1971) (emphasis supplied).

43. This decision has been codified by the 1976 General Assembly. *See,* Ga. Laws, 1976, p. 1195 amending GA.CODE ANN. § 56-407A(a) (1971).

44. 136 Ga. App. 436, 221 S.E.2d 643 (1975) petition for cert. filed.

45. *Id.* at 437, 221 S.E.2d at 644.

Houston v. Doe[46] made short shrift of the novel argument that suits against uninsured motorists were subject to the 20 year limitation governing rights under legislative enactments.[47] This holding rested on the grounds that the Uninsured Motorist Act did not create "new" rights which would not exist but for some act of the General Assembly, but instead created merely a new procedure for enforcing "old" rights, a method for establishing losses caused by an uninsured tortfeasor and recovering these from one's own insurer. *Vaughn v. Collum*[48] held that the uninsured motorist carrier, because of its strong financial interest in the litigation, is entitled to notice of the pendency of an action against the uninsured motorist on the same basis as though it were an actual defendant. Notice in the form of service of a copy of the complaint and summons almost four years after the collision and over two and one half years after the suit was served on individual defendants, affords the uninsured motorist carrier the benefit of the bar of the two-year statute of limitations for torts.[49]

46. 136 Ga.App. 583, 222 S.E.2d 131 (1975).

47. GA.CODE ANN. § 3-704 (1975).

48. 136 Ga.App. 677, 222 S.E.2d 37 (1975) petition for cert. filed.

49. The court held that the applicable statute of limitation is that for torts (2 years) rather than that for contracts (6 years) despite the fact that the insurer comes into the case by way of contract.