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Insurance

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by Dean A. Calloway*

I. INTRODUCTION

This survey period, from June 1, 2012 through May 31, 2013, proved eventful.[1] Over the past year, state and federal courts in Georgia had occasion to interpret key provisions of Georgia's Insurance Code,[2] address novel issues of first impression, and resolve disputes with significant policy implications for Georgia's insurance industry.

The following are among the more notable developments: (1) the Georgia Supreme Court formally extended application of the rule in *State Farm Mutual Automobile Insurance Co. v. Mabry* (the *Mabry* rule),[3] which is the requirement that an insurer compensate an insured for his vehicle's diminished value resulting from an automobile accident,[4] to real property insurance contracts;[5] (2) the supreme court held that Georgia's insurance commissioner exceeded his authority by promulgating Rule 120-2-20-.02 of Georgia's Comprehensive Rules and Regulations,[6] whereby he sought to extend the limitation period for first-party actions against insurers in connection with non-fire-related personal and real property losses to two years;[7] and (3) the fundamental premise of Georgia's Uninsured Motorist Act[8] was reaffirmed by the

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1. For an analysis of Georgia insurance law during the prior survey period, see Bradley S. Wolff et al., *Insurance, Annual Survey of Georgia Law*, 64 MERCER L. REV. 151 (2012).

2. O.C.G.A. §§ 33-1-1 to -64-8 (2000 & Supp. 2013).

3. 274 Ga. 498, 556 S.E.2d 114 (2001).

4. *Id.* at 509, 556 S.E.2d at 123.

5. Royal Capital Dev., LLC v. Md. Cas. Co., 291 Ga. 262, 263, 728 S.E.2d 234, 235 (2012) [hereinafter *Royal Capital I*].

6. GA. COMP. R. & REGS. 120-2-20-.02 (2012).

7. White v. State Farm Fire & Cas. Co., 291 Ga. 306, 309, 728 S.E.2d 685, 686 (2012).

8. O.C.G.A. § 33-7-11 (2000 & Supp. 2013).

Georgia Court of Appeals, holding that an injured party could not configure a settlement to recover compensation beyond the party's "actual injuries and losses."[9]

II. POLICY INTERPRETATION AND DEFINITIONS

Georgia courts had ample opportunity during the survey period to address issues involving interpretation of insurance policy provisions.

A. Faulty Workmanship Qualifies as an "Occurrence"

In *Maxum Indemnity Co. v. Jimenez*,[10] the court of appeals held that a loss resulting from faulty workmanship was covered as an "occurrence" under a standard commercial general liability (CGL) policy.[11] As recounted therein, the insured, a subcontractor, was engaged to install pipes in a dormitory construction project. Following the construction of the dormitory, a pipe burst, causing damage to several units. A jury trial ensued, and the subcontractor was found liable for $191,382.01 in damages attributable to his negligent work. The subcontractor's insurer, Maxum Indemnity Company (Maxum), filed an action for declaratory judgment, seeking a declaration that the claim against the subcontractor was not covered under the policy. The Superior Court of Gwinnett County granted judgment in the subcontractor's favor and Maxum appealed, arguing that the claim against the subcontractor was not covered as "property damage" under the policy because the judgment entered against the subcontractor in the underlying suit was for contractual indemnity and breach of contract, claims purportedly outside the scope of the policy's coverage for property damage arising out of tort liability.[12]

The court of appeals rejected Maxum's argument, noting that the underlying claims against the subcontractor—regardless of their configuration—were based upon the subcontractor's negligence, namely his defective workmanship, and the resulting property damage to the dormitory.[13] Consequently, the policy covered the underlying claims against the subcontractor.[14]

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9. Carter v. Progressive Mountain Ins., 320 Ga. App. 271, 274, 739 S.E.2d 750, 753 (2013).

10. 318 Ga. App. 669, 734 S.E.2d 499 (2012).

11. *Id.* at 669, 671, 734 S.E.2d at 501, 503.

12. *Id.* at 669-72, 734 S.E.2d at 501-03.

13. *Id.* at 673, 734 S.E.2d at 504.

14. *Id.*

B. *Intentional Conduct with Unforeseen Circumstances Does Not Constitute an "Accident"*

In *Capital City Insurance Co. v. Forks Timber Co.*,[15] the United States District Court for the Southern District of Georgia held that a CGL policy issued to a logging company by Capital City Insurance Company (Capital City) did not cover unforeseen losses resulting from an intentional act.[16] As described therein, Capital City filed an action seeking a declaration that it was not obligated to provide any coverage or defense in regard to a conversion claim by a bank against a logging company insured by Capital City. The bank's conversion claim against the logging company was based on the logging company's action in cutting down trees subject to the bank's pre-existing security interest. As the basis for its position that the logging company's action fell outside coverage, Capital City contended that the policy defined a covered occurrence as an "accident," while the logging company's decision to cut down the trees was intentional, and thus not an accident. The logging company argued that its decision to cut down the trees qualified as an accident because it resulted from its negligent failure to perform a title search.[17]

The district court rejected the company's argument and granted Capital City's motion for summary judgment, concluding that the company's conduct must have resulted in unintended real consequences, rather than simply legal consequences, in order to constitute an "accident."[18]

C. *"Use" Requires More Than a Tangential Connection*

In *State Farm Mutual Automobile Insurance Co. v. Myers*,[19] the guardian of a disabled woman filed suit in the Superior Court of Fulton County against the driver of a car, alleging that the driver was liable for a sexual assault on the disabled woman perpetrated by another passenger during the trip.[20] State Farm Mutual Automobile Insurance Company (State Farm Auto) thereafter filed an action seeking a declaratory judgment that the automobile liability insurance policy on the car did not cover the damages resulting from the sexual assault. The guardian and State Farm Auto filed cross motions for summary

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15. 2012 U.S. Dist. LEXIS 122395 (S.D. Ga. Aug. 28, 2012).
16. *Id.* at *19-20.
17. *Id.* at *3-4.
18. *Id.* at *19-20.
19. 316 Ga. App. 152, 728 S.E.2d 787 (2012).
20. *Id.* at 152, 728 S.E.2d at 788.

judgment.[21] The guardian argued that the driver's "use" of the car facilitated the assault against the woman, and thus the woman's damages were covered by the policy because the policy provided that State Farm Auto would "pay damages [that] an insured becomes legally liable to pay because of . . . bodily damages to others . . . caused by accident resulting from the . . . use of [the insured's] car."[22] The trial court granted summary judgment on the guardian's motion, State Farm Auto appealed, and the court of appeals reversed.[23]

Citing *Davis v. Criterion Insurance Co.*,[24] and *Payne v. Twiggs County School District*,[25] the court of appeals held that the driver's use of the car was "only tangentially connected to [the disabled woman's] injuries as the situs of the attack."[26] Accordingly, the court concluded that the woman's injuries did not result from the driver's actual "use" of the car and State Farm Auto's policy was not implicated.[27]

D. What Is "Use" of a Vehicle for "Compensation or a Fee?"

In *Progressive Premier Insurance Co. of Illinois v. Newell*,[28] the court of appeals resolved a question of first impression for Georgia courts.[29] In that case, Progressive Premier Insurance Company of Illinois (Progressive Premier) sought a declaratory judgment against a pizza delivery driver and the driver's employer following an accident involving the driver. Progressive Premier contended that it had no duty to provide any coverage or defense under a policy issued to the employer because (1) the policy excluded claims "arising out of the ownership, maintenance, or use of any vehicle or trailer while being used to carry persons or property for compensation or a fee," and (2) at the time of the accident, and the driver was being paid $1.20 per house for delivering pizzas, and the driver's accident arose out of his "use of [a] vehicle . . . to carry . . . property for compensation or a fee." The employer counterclaimed, seeking coverage and a defense for the employer. The parties filed cross motions for summary judgment, the Superior Court of Chatham County granted summary judgment in favor of the employer, and Progressive Premier appealed.[30] The court of appeals reversed.[31]

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21. *Id.*
22. *Id.* at 153, 728 S.E.2d at 788 (second alteration in original).
23. *Id.* at 152-53, 728 S.E.2d at 788.
24. 179 Ga. App. 235, 345 S.E.2d 913 (1986).
25. 269 Ga. 361, 496 S.E.2d 690 (1998).
26. *Myers*, 316 Ga. App. at 155, 728 S.E.2d at 789.
27. *Id.*
28. 320 Ga. App. 301, 739 S.E.2d 756 (2013).
29. *See id.* at 303, 739 S.E.2d at 758.
30. *Id.* at 301-02, 739 S.E.2d at 757.

In arriving at its decision, the court observed that Progressive Premier's inclusion of the term "compensation" rendered the language of its policy exclusion broader than language previously considered by the court of appeals in *First Georgia Insurance Co. v. Goodrum*,[32] where it deemed language excluding coverage for carriage of persons "for a fee" to be inherently ambiguous.[33] Noting that courts in other jurisdictions had declined to require coverage for claims related to accidents involving pizza delivery drivers where the relevant policy excluded claims arising out of "use" of a vehicle to carry property "for compensation or a fee," the court of appeals held that the employer's per-house payment to the driver qualified as "compensation" for the carriage of property, bringing the accident within the ambit of the policy exclusion and thus outside the scope of coverage.[34]

E. Questions Regarding Primary Residence

Another case involving the interpretation of policy provisions in an automobile insurance policy was *Parsons v. State Farm Mutual Automobile Insurance Co.*[35] In *Parsons*, an insured teen died during a traffic accident while riding in a car he owned. His mother appealed an order by the State Court of Rockdale County granting summary judgment to State Farm Auto and denying the mother's claim for uninsured/underinsured motorist benefits against a policy issued to the teen's aunt. The question of coverage turned on whether the teen resided "primarily" with his aunt, because the State Farm Auto policy excluded from coverage any vehicle "owned by or furnished for the regular use of . . . any relative," and "defined 'relative' to mean 'a person related to [the insured] . . . by blood, marriage or adoption who resides *primarily* with [the insured].'"[36] Noting that there was conflicting evidence regarding the teen's primary residence (namely that the teen maintained an apartment with his cousin but also maintained a bedroom at his aunt's home), the court of appeals reversed the trial court's order, holding that summary judgment was inappropriate under the circumstances.[37]

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31. *Id.*
32. 187 Ga. App. 314, 370 S.E.2d 162 (1988).
33. *Id.* at 316, 370 S.E.2d at 164.
34. *Newell*, 320 Ga. App. at 305-06, 739 S.E.2d at 759.
35. 319 Ga. App. 616, 737 S.E.2d 718 (2013).
36. *Id.* at 617, 737 S.E.2d at 719-20.
37. *Id.* at 618-19, 737 S.E.2d at 720. *But see* Estate of Maddox v. Metro. Prop. & Cas. Ins. Co., 2012 U.S. Dist. LEXIS 161283, at *4, 9 (S.D. Ga. Nov. 9, 2012) (granting insurer's motion for summary judgment and holding that a son did not qualify as an "insured" for purposes of his father's homeowner's policy because he maintained his own residence

III. APPLICATION AND CONSTRUCTION OF STATUTORY LANGUAGE

A number of cases reported during the survey period considered the application and construction of various provisions of Georgia's Insurance Code. Several of these cases have profound policy implications for Georgia insurance law.

A. *Extension of the Mabry* Rule

Royal Capital Development, LLC v. Maryland Casualty Co.[38] may be the most important case decided during the survey period. The United States Court of Appeals for the Eleventh Circuit was confronted with the question of whether the *Mabry* rule—the requirement that an insurer compensate an insured for his vehicle's diminished value resulting from an automobile accident in addition to the actual cost of the repairs[39]—extends to standard insurance contracts for buildings.[40]

The insured, a building owner, submitted a claim to its insurer, Maryland Casualty Company (Maryland Casualty), following damage to the building caused by construction activity on an adjacent property. In addition to the costs of repair, the owner sought coverage for post-repair diminution in value resulting from the damage. Maryland Casualty covered the costs of repair but refused to acknowledge responsibility for diminished value. The owner filed suit in the Superior Court of Fulton County, and Maryland Casualty removed the action to the United States District Court for the Northern District of Georgia. The owner moved for summary judgment, contending that the *Mabry* rule required Maryland Casualty to compensate the owner for its losses resulting from diminished value. Maryland Casualty filed its own motion for summary judgment, arguing that the *Mabry* rule only applied to automobile insurance policies and citing the fact that the real property policy it issued to the owner specifically excluded coverage for diminution-of-value damages. The district court granted summary judgment in favor of Maryland Casualty, and the owner appealed.[41]

On appeal, the Eleventh Circuit certified the following question to the Georgia Supreme Court:

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elsewhere and stayed at the father's residence rarely).

38. *Royal Capital I*, 291 Ga. 262, 728 S.E.2d 234 (2012); *see also* Royal Capital Dev., LLC v. Md. Cas. Co., 659 F.3d 1050 (11th Cir. 2011) [hereinafter *Royal Capital II*] (certifying question to Georgia Supreme Court).

39. *Mabry*, 274 Ga. at 509, 556 S.E.2d at 123.

40. *Royal Capital II*, 659 F.3d at 1052.

41. *Id.*

> For an insurance contract providing coverage for "direct physical loss of or damage to" a building that allows the insurer the option of paying either "the cost of repairing the building" or "the loss of value," if the insurer elects to . . . repair the building, must it also compensate the insured for the diminution in value of the property resulting from stigma due to its having been physically damaged[?][42]

The Georgia Supreme Court, in a unanimous opinion, answered the question affirmatively, holding that the *Mabry* rule applied to the insurance contract at issue.[43] As the basis for its decision, the supreme court revisited its holding in *Mabry*, wherein it opined that

> value, not condition, is the baseline for the measure of damages in a claim under an automobile insurance policy in which the insurer undertakes to pay for the insured's loss from a covered event, and that a limitation[-]of[-]liability provision affording the insurer an option to repair serves only to abate, not eliminate, the insurer's liability for the difference between pre-loss value and post-loss value.[44]

Noting that this principle has long been applied under Georgia law in cases involving the proper determination for measuring damages to real property, the supreme court observed that Georgia law "has consistently held that the measure of damages in such cases is intended to place an injured party, as nearly as possible, in the same position it would have been if the injury had never occurred,"[45] even where application of that principle requires compensation for diminished value.[46] Based on the supreme court's pronouncement, the Eleventh Circuit reversed, remanding the case for further proceedings in accordance with the supreme court's opinion.[47]

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42. *Id.* at 1055.

43. *Royal Capital I*, 291 Ga. at 267, 728 S.E.2d at 238 (2012) (answering question certified from Eleventh Circuit).

44. *Id.* at 264, 728 S.E.2d at 236 (quoting *Mabry*, 274 Ga. at 506, 556 S.E.2d at 121).

45. *Id.*

46. *Id.* at 264-65, 728 S.E.2d at 236. The supreme court qualified its holding, stating that whether damages for diminution in value are recoverable under an insurance contract depends on the specific language of the contract itself, to be resolved through application of the general rules of contract construction. *Id.* at 267, 728 S.E.2d at 238.

47. Royal Capital Dev., LLC v. Md. Cas. Co., 688 F.3d 1285, 1287 (11th Cir. 2012) [hereinafter *Royal Capital III*] (remanding after receiving answer to certified question).

B. Georgia Insurance Commissioner Exceeds His Authority in Promulgating Rule Contrary to Statutory Language

Another case with significant implications for policy holders in Georgia was *White v. State Farm Fire & Casualty Co.*[48] The Eleventh Circuit was confronted with a dispute concerning the enforceability of an insurance policy's requirement that a lawsuit against the insurer be brought "within one year of the date of loss or damage" notwithstanding regulatory authority purporting to require a minimum limitations period of two years for all first-party actions based on an insurer's failure to cover loss or damages to real or personal property. As presented by the Eleventh Circuit and revealed in the record, the insured, a Georgia resident, purchased a homeowner's insurance policy from State Farm Fire & Casualty Company (State Farm Fire & Casualty).[49] The policy was "a first-party insurance contract that provided multiple-line coverage, including coverage for loss [attributable to] fire and theft."[50] The policy also contained a provision requiring the insured to commence any action against State Farm Fire & Casualty "within one year of the date of loss or damage."[51] After his home was burglarized in 2008, the insured filed a claim against the policy for $135,000.[52]

State Farm Fire & Casualty denied coverage, determining that the insured had made material misrepresentations in connection with his claim. In June 2009, approximately fifteen months following the date of the burglary, the insured filed a complaint against State Farm Fire & Casualty, alleging claims for breach of contract, bad faith, and fraud. State Farm Fire & Casualty removed the complaint to the United States District Court for the Northern District of Georgia and filed a motion for summary judgment, contending that the the policy's one-year limitations period barred the insured's claims. The insured responded by pointing to Rule 120-2-20-.02 of Georgia's Comprehensive Rules & Regulations.[53] Promulgated by Georgia's insurance commissioner in 2006, Rule 120-2-20-.02 provides:

> No property . . . insurance policy providing first party insurance coverage for loss or damage to any type of real or personal property shall contain a contractual limitation requiring commencement of a

48. 664 F.3d 860 (11th Cir. 2012) [hereinafter *White I*] (certifying two questions to Georgia Supreme Court).

49. *Id.* at 862.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; *see also* GA. COMP. R. & REGS. 120-2-20-.02 (2012).

> suit or action within a specified period of time less favorable to the insured than that specified in the "Standard Fire Policy" promulgated by the Commissioner in Chapter 120-2-19-.01 of these Rules and Regulations.[54]

The Standard Fire Policy described in Rule 120-2-19-.01[55] provides a two-year limitations period for any action to recover on a claim.[56]

Relying on the Georgia Court of Appeals decision in *Fireman's Fund Insurance Co. v. Dean*,[57] the district court ruled that the policy's one-year limitation period violated Georgia law because it applied to coverage for fires and reformed the policy to extend the limitation period to two years.[58] The district court concluded, however, that the policy's one-year limitation period remained valid as it applied to coverage for theft and granted State Farm Fire & Casualty's motion for summary judgment as to its insured's claim for breach of contract.[59]

On appeal, the Eleventh Circuit certified the following two questions to the Georgia Supreme Court:

> (1) Did the Georgia Insurance Commissioner act within his legal authority when he promulgated Ga. Comp. R. & Regs. [120-2-20-.02], such that a multiple-line insurance policy providing first-party insurance coverage for theft-related property damage must be reformed to conform with the two-year limitation period provided for in Georgia's Standard Fire Policy, Ga. Comp. R. & Regs. 120-2-19-.01? (2) Is this action barred by the [p]olicy's one-year limitation period?[60]

In regard to the first question, the Georgia Supreme Court held that the commissioner had exceeded his authority, determining that the requirements of Rule 120-2-20-.02 were at odds with the language of section 33-32-1(a) of the Official Code of Georgia (O.C.G.A.),[61] which only require that the terms of the Standard Fire Policy be incorporated

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54. GA. COMP. R. & REGS. 120-2-20-.02.

55. GA. COMP. R. & REGS. 120-2-19-.01 (2006).

56. GA. COMP. R. & REGS. 120-2-19-.01 ("No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within two (2) years next after inception of the loss.").

57. 212 Ga. App. 262, 265, 441 S.E.2d 436, 438 (1994) ("In Georgia, the clear mandate of O.C.G.A. § 33-32-1(a) requires that the language of Fireman's Fund's insurance policy be as favorable to the insured as the language in the Standard Fire Policy.").

58. *White I*, 664 F.3d at 863.

59. *Id.*

60. *Id.* at 865.

61. O.C.G.A. § 33-32-1(a) (2013).

into the fire coverage provisions of a multiple-line policy.[62] As to the second question, the supreme court concluded that the insured's action was barred because the one-year limitation period contained in the State Farm Fire & Casualty policy was enforceable.[63] Accordingly, the Eleventh Circuit affirmed the district court's ruling.[64]

C. *Place of Delivery of Insurance Policy Is Not Dispositive*

The case of *St. Paul Fire & Marine Insurance Co. v. Hughes*[65] is also likely to significantly impact Georgia insurance law in the coming years. In that case, an employee filed suit against St. Paul Fire & Marine Insurance Company (St. Paul), his employer's commercial umbrella liability insurer, seeking uninsured motorist benefits for injuries he suffered while operating a truck insured under the policy. The employee resided in Georgia, the accident occurred in Georgia, and the truck was principally garaged and used in Georgia. However, the policy, which specifically excluded coverage of uninsured motorist benefits, was issued and delivered to the employer in Indiana, which did not require uninsured motorist coverage at the time the policy was issued.[66] The Superior Court of Bacon County granted summary judgment in the employee's favor, St. Paul appealed, and the Eleventh Circuit Court of Appeals affirmed.[67]

As the basis for its decision, the court noted that Georgia's uninsured motorist statute specifically prohibited insurers from issuing or delivering automobile or motor vehicle liability policies "*upon any motor vehicle then principally garaged or principally used*" in Georgia without "an endorsement or provisions undertaking to pay the insured all sums [that] said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle."[68] While recogniz-

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62. White v. State Farm Fire & Cas. Co., 291 Ga. 306, 308-09, 728 S.E.2d 685, 687 (2012) [hereinafter *White II*] (answering two questions certified by the Eleventh Circuit).

63. *Id.* at 309, 728 S.E.2d at 687.

64. White v. State Farm Fire & Cas. Co., 694 F.3d 1199 (11th Cir. 2012) [hereinafter *White III*] (affirming the district court after receiving answers to questions certified to the Georgia Supreme Court). The decision in *White* appears to have already affected litigation strategy in insurance coverage disputes. For example, in *Dalton v. State Farm Fire & Casualty Co.*, 2013 U.S. Dist. LEXIS 40877 (N.D. Ga. Mar. 22, 2013), State Farm Fire & Casualty Company moved to dismiss a claim for breach of contract under a homeowner's policy on the ground that its insureds failed to file suit within one year from the date their home exploded. *Id.* at *3-4. The insureds moved for leave to amend their pleadings "to more clearly allege that the losses [at issue] were caused by fire." *Id.* at *4.

65. 321 Ga. App. 738, 742 S.E.2d 762 (2013).

66. *Id.* at 739, 742 S.E.2d at 763-64.

67. *Id.* at 738-39, 742 S.E.2d at 763.

68. *Id.* at 740, 742 S.E.2d at 764 (quoting O.C.G.A. § 33-7-11(a)(1)).

ing that Georgia conflict-of-laws rules generally require insurance contracts to be governed by the law of the place where they are delivered,[69] the court observed that none of the authority relied upon by St. Paul addressed a situation where "a Georgia resident was injured in an accident while driving a vehicle that was principally garaged and used in Georgia."[70] Under such circumstances, the court concluded, "it was reasonable for the parties to assume that Georgia was the principal location of risk and to expect that Georgia law, rather than Indiana law, would be determinative on the issue of whether the [p]olicy provides [uninsured motorist] coverage."[71]

D. A Cargo Insurance Policy Does Not Qualify as a Motor Vehicle Liability Insurance Policy

In *Equipco International, LLC v. Certain Underwriters at Lloyd's, London*,[72] the Georgia Court of Appeals was confronted by the question of whether a cargo liability insurance policy might qualify as a motor vehicle liability insurance policy under O.C.G.A. § 33-4-7,[73] which imposes affirmative duties upon issuers of motor vehicle liability insurance policies to settle certain losses with third parties.[74] As recounted therein, Certain Underwriters at Lloyd's, London (the Underwriters) issued a policy to a motor common carrier (the Carrier).[75] The policy provided coverage for "legal liability for cargo 'in transit,'" and defined "in transit" as "the time the goods are in the exclusive custody and control of the 'carrier' and continuously until the transporting vehicle arrives at the destination premises and [the goods] are transferred to the exclusive custody and control of the consignee, warehousemen, or receiver."[76] Equipco International, LLC (Equipco) hired the Carrier to transport a forklift, which was subsequently damaged when the Carrier's driver hit an overpass. The Underwriters thereafter rescinded the policy on the ground that the Carrier had made material misrepresentations to the Underwriters, and Equipco filed an action for bad faith against the Underwriters pursuant to O.C.G.A. § 33-

69. *See, e.g.*, Colony Ins. Co. v. 9400 Abercorn, LLC, 2012 U.S. Dist. LEXIS 131839, at *34 (S.D. Ga. Sept. 12, 2012) ("Under the Georgia conflict-of-laws rule the place of the delivery of the insurance contract controls.").

70. *Hughes*, 321 Ga. App. at 741-42, 742 S.E.2d at 765.

71. *Id.* at 742, 742 S.E.2d at 765.

72. 320 Ga. App. 345, 739 S.E.2d 797 (2013).

73. O.C.G.A. § 33-4-7 (Supp. 2013).

74. *Equipco Int'l, LLC*, 320 Ga. App. at 345, 739 S.E.2d at 798 (discussing O.C.G.A. § 33-4-7).

75. *Id.*

76. *Id.* at 346, 739 S.E.2d at 798.

4-7, ostensibly hoping to force the Underwriters to extend coverage for Equipco's loss notwithstanding its status as a third party.[77] The Superior Court of Cobb County granted the Underwriters' motion to dismiss Equipco's claim, and Equipco appealed.[78]

On appeal, Equipco argued that the trial court erred because "the ordinary and everyday meaning of the term 'motor vehicle liability insurance policy' include[d] the cargo liability policy because the policy covered liability for damage to cargo carried by a motor vehicle."[79] The court of appeals rejected Equipco's attempt to conflate the Underwriters' cargo insurance policy with a motor vehicle liability insurance policy, observing that the former "covered more than simply . . . liability for damage to the cargo while the cargo was being carried by a motor vehicle," and that the cargo insurance policy did not include those elements necessary to satisfy the standards for motor vehicle liability insurance policies under Georgia law.[80] Noting that "[n]othing in O.C.G.A. § 33-4-7 indicates that the legislature intended the phrase 'motor vehicle liability insurance policy' to have a new and different meaning in that Code section so as to include policies that did not meet the coverage requirements imposed upon all motor vehicle liability insurance policies in Georgia," the court concluded that Equipco's claim for bad faith was improper.[81]

E. Corroboration Not Required Where Direct Evidence Exists

The case of *Reaves v. State Farm Mutual Automobile Insurance Co.*[82] also merits specific examination. In *Reaves*, a wife filed suit against State Farm Auto for uninsured motorist benefits after her husband died following an accident while operating a truck owned by his employer. According to a witness, the accident occurred when an unknown vehicle

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77. *Id.* at 345, 739 S.E.2d at 798-99. Section 33-4-7(a) of Georgia's Insurance Code provides:

> In the event of a loss because of injury to or destruction of property covered by a motor vehicle liability insurance policy, the insurer issuing such policy has an affirmative duty to adjust that loss fairly and promptly, to make a reasonable effort to investigate and evaluate the claim, and, where liability is reasonably clear, to make a good faith effort to settle with the claimant potentially entitled to recover against the insured under such policy.

O.C.G.A. § 33-4-7(a).

78. *Equipco Int'l, LLC*, 320 Ga. App. at 347, 739 S.E.2d at 799.

79. *Id.* at 348, 739 S.E.2d at 799.

80. *Id.* at 348, 739 S.E.2d at 798-99; *see also* O.C.G.A. § 33-34-3(a)(1) (2013) ("All policies of motor vehicle liability insurance issued in this state must be in accordance with the requirements of this chapter.").

81. *Equipco Int'l, LLC*, 320 Ga. App. at 349-50, 739 S.E.2d at 800-01.

82. 319 Ga. App. 426, 734 S.E.2d 773 (2012).

swerved into the lane in which the decedent was driving, causing his truck to lose control and collide with a highway barrier. While the witness could not state whether the unknown vehicle and the truck actually collided, post-accident statements made by the decedent to his physician and his employer and during a deposition indicated that contact had taken place.[83] State Farm Auto nevertheless moved for summary judgment, citing O.C.G.A. § 33-7-11(b)(2) for the proposition that coverage might only attach where there was "actual physical contact" between the unknown vehicle and the decedent's truck.[84] The State Court of Henry County granted State Farm Auto's motion, holding that the evidence presented by the decedent's wife was circumstantial and thus required additional corroboration under O.C.G.A. § 33-7-11. The trial court, however, did not consider the issue of whether the decedent's statements were admissible.[85]

The court of appeals reversed, observing that the trial court had framed the issue incorrectly: "While it is clear that O.C.G.A. § 33-7-11(b)(2) requires eyewitness corroboration in the event that there is *no* physical contact, the issue squarely before us is whether corroboration is required where there is direct evidence of actual physical contact."[86] Because the decedent's statements would constitute direct evidence of actual physical contact if admissible, the court held that corroboration was not required, and that summary judgment in the insurer's favor was therefore inappropriate.[87]

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83. *Id.* at 427, 734 S.E.2d at 774.

84. *Id.* at 427-28, 734 S.E.2d at 775. Section 33-7-11(b)(2) of Georgia's Insurance Code provides:

> A motor vehicle shall be deemed to be uninsured if the owner or operator of the motor vehicle is unknown. In those cases, recovery under the endorsement or provisions shall be subject to the conditions set forth in subsections (c) through (j) of this Code section and, in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle [that] causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured. Such physical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant.

O.C.G.A. § 33-7-11(b)(2).

85. *Reaves*, 319 Ga. App. at 428, 734 S.E.2d at 774-75.

86. *Id.* at 428, 734 S.E.2d at 775.

87. *Id.* at 428-30, 734 S.E.2d at 775-76.

F. Joint Tenancy Does Not Foreclose Right to Recover Entire Value of Loss

In *Georgia Farm Bureau Mutual Insurance Co. v. Franks*,[88] a homeowner filed suit against his insurer, Georgia Farm Bureau Mutual Insurance Company (GFB), following the insurer's decision to pay out one-half of the policy limits after the homeowner's house was destroyed by fire.[89] Even though the homeowner was listed as the only insured on his policy, GFB contended that the homeowner was only entitled to one-half share of the insurance proceeds because he had "executed a warranty deed, conveying the property to himself and to his domestic partner . . . 'as joint tenants with survivorship and not as tenants in common.'"[90] The Superior Court of Floyd County denied the parties' cross motions for summary judgment, but granted the insurer's motion for interlocutory appeal.[91] The court of appeals affirmed the trial court's decision.[92]

Quoting its prior decision in *Sams v. McDonald*,[93] the court of appeals observed that as joint tenants, the homeowner and his partner shared "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."[94] Accordingly, the court reasoned that, "although ownership is shared, the title and interest are not divided into fractional shares . . . [thus, the homeowner's] title and interest in the insured property [were] undivided, that is, 100[%]."[95]

G. Third-Party Claimant Does Not Have Standing to Bring a Claim Without First Obtaining a Judgment

In *Tiller v. State Farm Mutual Automobile Insurance Co.*,[96] the United States District Court for the Northern District of Georgia had occasion to consider third-party property damage claims for diminished value arising out of automobile accidents filed on behalf of a putative

88. 320 Ga. App. 131, 739 S.E.2d 427 (2013).
89. *Id.* at 131-33, 739 S.E.2d at 428-30.
90. *Id.* at 132-33, 739 S.E.2d at 429-30.
91. *Id.* at 131, 739 S.E.2d at 428.
92. *Id.*
93. 117 Ga. App. 336, 160 S.E.2d 594 (1968).
94. *Franks*, 320 Ga. App. at 135, 739 S.E.2d at 431 (quoting *Sams*, 117 Ga. App. at 340, 160 S.E.2d at 598).
95. *Id.*
96. 2013 U.S. Dist. LEXIS 15726 (N.D. Ga. Feb. 5, 2013).

class.[97] Specifically, the plaintiffs in *Tiller* sought a declaratory judgment that the method State Farm Auto used to determine diminished value was contrary to Georgia law.[98] State Farm Auto moved to dismiss the complaint, arguing that the plaintiffs' claim for declaratory judgment was barred under O.C.G.A. § 33-4-7,[99] which requires a third-party claimant to obtain a judgment against an insured before bringing an action against his insurer.[100] Noting the plaintiffs' failure to comply with the requirements of O.C.G.A. § 33-4-7 before filing suit against State Farm Auto and the absence of any allegations suggesting any urgency with respect to the declarations sought, the district court granted State Farm Auto's motion, holding that the plaintiffs lacked standing and that their claim was designed to prompt the court into making a premature "legal determination about the extent of State Farm's liability under the guise of a declaratory judgment."[101]

IV. WAIVER

The issue of waiver continues to be a hot topic. In a series of cases decided during the survey period, Georgia courts continued to clarify the rules governing how and when an insurer might waive its right to contest coverage.

A. Insurer Cannot Deny a Claim and Reserve Its Right to Assert Other Defenses at a Later Date

In *Hoover v. Maxum Indemnity Co.*,[102] the Georgia Supreme Court held that an insurer could not deny coverage yet reserve its right to assert additional bases for denying coverage at a later date.[103] In that case, an injured employee filed a lawsuit against his employer, who copied the complaint to Maxum, its insurer. Maxum responded by disclaiming coverage and refusing to defend, citing an employer liability exclusion contained in the policy issued to the employer. Maxum also purported to reserve the right to assert late notice and included

97. *Id.* at *1.

98. *Id.* at *7. The plaintiffs also alleged that State Farm Auto engaged in fraud, that State Farm Auto was unjustly enriched at the plaintiffs' expense, that State Farm Auto violated the covenant of good faith and fair dealing, and that State Farm Auto should be required to provide plaintiffs with information so that they might adequately determine the amount they were owed under their diminished value claims. *Id.* at *7, 23. The district court dismissed each of these claims. *Id.* at *23-24.

99. *Id.* at *7.

100. O.C.G.A. 33-4-7(a)-(c).

101. *Tiller*, 2013 U.S. Dist. LEXIS 15726, at *7-10.

102. 291 Ga. 402, 730 S.E.2d 413 (2012).

103. *Id.* at 405, 730 S.E.2d at 416-17.

boilerplate language to reserve any other defense that might arise. After the employee obtained judgment against his employer, the employer assigned its claims against Maxum to the employee and the employee filed suit against Maxum, asserting breach of the duty to defend and seeking indemnification. The Superior Court of Cobb County granted Maxum's motion for summary judgment, finding that the employer failed to provide timely notice of the accident. The trial court also granted the employee's motion for partial summary judgment, holding that Maxum breached its duty to defend the underlying tort action.[104] The court of appeals affirmed the trial court's order on the timely notice issue but reversed on the issue of Maxum's duty to defend.[105]

The supreme court "granted certiorari to determine whether the [c]ourt of [a]ppeals properly analyzed the claim that Maxum waived its right to assert a defense based on untimely notice and whether timely notice of the occurrence was a prerequisite to Maxum having a duty to defend in the underlying tort action."[106] Upon review, the supreme court held that Maxum had waived its right, concluding that the appellate court erred when it held that Maxum "could both deny the claim and reserve its right to assert other defenses later."[107] As the court opined:

> The disclaimer language in Maxum's denial letter purporting to reserve its rights to assert certain defenses later was *not* a reservation of rights in the sense that term is used in the insurance industry . . . . [T]he standard and acceptable procedure for an insurer to determine its rights is to *agree to defend* under a reservation of rights and then file a declaratory judgment action.[108]

Accordingly, having determined that Maxum waived its right to assert a defense based on untimely notice, the supreme court held that the court of appeals erred when it reversed the trial court's order holding that Maxum breached its duty to defend.[109]

Similarly, in *Moon v. Cincinnati Insurance Co.*,[110] the lessees of a residence filed suit against Cincinnati Insurance Company (Cincinnati), their lessor's insurer, on the ground that Cincinnati's refusal to defend the lessees in an action arising out of a child's drowning in a swimming pool, pursuant to a homeowner's policy issued to the lessor, constituted

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104. *Id.* at 402-04, 730 S.E.2d at 415-16.
105. *Id.* at 402, 730 S.E.2d at 415.
106. *Id.* at 403, 730 S.E.2d at 415.
107. *Id.* at 405, 730 S.E.2d at 416-17.
108. *Id.* at 405-06, 730 S.E.2d at 417.
109. *Id.* at 405, 730 S.E.2d at 416-17.
110. 920 F. Supp. 2d 1301 (N.D. Ga. 2013).

bad faith failure to settle, breach of contract, and statutory bad faith.[111] Cincinnati initially provided a defense following the lessees' execution of bilateral non-waiver agreements, but subsequently denied coverage and ceased defending them, stating as the basis for the denial that the lessees were not insureds under the lessor's policy. The action was removed to federal court in the United States District Court for the Northern District of Georgia, and the parties filed cross motions for summary judgment.[112] In evaluating the parties' motions, the district court focused on the question of whether the insurer was limited to the coverage defenses specifically set forth in its denial letter, or whether it might assert other defenses.[113] Relying on *Hoover*, the district court rejected the possibility that Cincinnati might assert additional defenses, noting that Cincinnati "chose to deny coverage outright as opposed to seeking a declaratory judgment action after filing its reservation of rights."[114] The district court further opined: "[T]he reservation of rights was extinguished when Cincinnati denied coverage because a reservation 'does not exist so that an insurer who has *denied coverage* may continue to investigate to come up with additional reasons on which the denial could be based.'"[115] Consequently, the district court concluded that Cincinnati had, "failed to properly reserve its rights [to assert additional defenses] when it denied [the insured's] claims on [specific grounds] and refused to undertake a defense," and therefore was limited to the defenses specifically described in its letter denying coverage.[116]

B. Insurer Cannot Knowingly Settle Non-Covered Claims Absent Specific Reservation of Rights

In *Facility Investments, LP v. Homeland Insurance Co. of New York*,[117] the court of appeals held that the insurer, Homeland Insurance Company of New York (Homeland), failed to reserve its rights under the uncovered-loss-allocation provision of a policy it issued to a nursing home, and was thus obliged to cover the full cost of a settlement though a portion of the settlement was based on non-covered claims.[118]

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111. *Id.* at 1302-03.
112. *Id.* at 1303.
113. *Id.* at 1304.
114. *Id.* at 1305.
115. *Id.* (quoting *Hoover*, 291 Ga. at 406, 730 S.E.2d at 417).
116. *Id.* at 1305-06 (alterations in original) (quoting *Hoover*, 291 Ga. at 405, 730 S.E.2d at 417).
117. 321 Ga. App. 103, 741 S.E.2d 228 (2013).
118. *Id.* at 104, 110, 741 S.E.2d at 230, 234.

As described therein, the nursing home was sued by a patient, who alleged claims for negligence, fraud, and intentional misconduct. Homeland reserved its rights to deny coverage for losses arising out of allegations of fraud, malice, and regulatory violations, but failed to reserve its rights to pursue claims for breach of contract, contribution, or recoupment, with respect to any uncovered portion of the loss. During discovery, the patient made a settlement demand to the nursing home for the $1 million policy limit. Homeland agreed to settle for the policy limit if the nursing home contributed 50% of the amount. The nursing home objected, prompting Homeland to tender a second letter, this time reserving its right to pursue claims against the nursing home under the policy's uncovered-loss-allocation provision. Following settlement, Homeland sued the nursing home to recover that portion of the settlement attributable to non-covered claims.[119] The State Court of Fulton County denied the nursing home's motion to dismiss, but the court of appeals reversed, holding that Homeland waived its right to pursue recovery of uncovered amounts of the settlement payment when it settled the underlying claims with knowledge of the grounds for non-coverage.[120]

In arriving at its decision, the court of appeals observed that Homeland had two options once the nursing home refused Homeland's settlement conditions—it could either deny coverage or seek declaratory relief.[121] However, because Homeland defended the case without specifically reserving its rights with regard to the uncovered-loss-allocation provision, and thereafter settled the underlying suit with knowledge of the uncovered claims instead of denying coverage or seeking declaratory relief, Homeland waived any right to seek reimbursement for uncovered amounts of the settlement.[122]

V. SETTLEMENT

Several cases during the survey period focused on the issue of settlement, helping to reshape and redefine the contours of a valid settlement under state law.

119. *Id.* at 104-05, 741 S.E.2d at 230-31.
120. *Id.* at 105-06, 741 S.E.2d at 231.
121. *Id.* at 109, 741 S.E.2d at 233.
122. *Id.* at 110, 741 S.E.2d at 234.

A. *Allocating Settlement Proceeds Pursuant to Uninsured Motorist Provisions*

One of the more intriguing cases reported during the survey period was *Carter v. Progressive Mountain Insurance Co.*[123] In that case, the claimant was injured in an automobile accident in which the other driver was allegedly under the influence of alcohol.[124] The claimant sued the other driver in the State Court of Cobb County pursuant to O.C.G.A. § 33-24-41.1,[125] eventually agreeing to settle the matter with the other driver and his insurer for payment of the $30,000 limit of liability coverage on condition that $29,000 of the coverage limit be allocated to payment of punitive damages and that $1000 be allocated towards payment of compensatory damages.[126] The purpose of the claimant's condition was plain—because uninsured and underinsured motorist coverage under O.C.G.A. § 33-7-11 applies only to compensatory damages and excludes coverage for punitive damages, the claimant sought to exhaust the coverage limits of the other driver's insurance policy before making a claim for underinsured motorist benefits under her own policy with Progressive so that she might increase her recovery.[127] Following service by the claimant on Progressive Mountain Insurance Company (Progressive Mountain), her underinsured benefits carrier, Progressive Mountain cross-claimed for any amount required to be paid to the claimant on its underinsured motorist coverage. The trial court granted Progressive Mountain's motion for summary judgment, ruling that the claimant had failed to comply with the provisions of O.C.G.A. § 33-24-41.1, which is necessary for the recovery of benefits.[128] The claimant appealed and the court of appeals affirmed.[129]

In reaching its decision, the court looked first to the purpose behind § 33-24-41.1:

> To facilitate settlements, the limited release provisions of O.C.G.A. § 33-24-41.1 were enacted to provide a statutory framework for a claimant injured in an automobile accident to settle with the tortfea-

123. 320 Ga. App. 271, 739 S.E.2d 750 (2013).
124. *Id.* at 272, 739 S.E.2d at 751-52.
125. O.C.G.A. § 33-24-41.1 (2013).
126. *Carter*, 320 Ga. at 272, 739 S.E.2d at 752.
127. *Id.* at 272-73, 739 S.E.2d at 752-53; *see also* Daniels v. Johnson, 270 Ga. 289, 290, 509 S.E.2d 41, 42 (1998) ("The court of appeals correctly held that a party must exhaust available liability coverage before recovering under [an uninsured motorist] policy.").
128. *Carter*, 320 Ga. at 272, 739 S.E.2d at 752.
129. *Id.* at 272, 739 S.E.2d at 751.

> sor's liability insurance carrier for the liability coverage limit while preserving the claimant's pending claim for underinsured motorist benefits against the claimant's own insurance carrier.[130]

Noting that the plain language of the statute limited coverage to "injuries to . . . claimants," the court held that the claimant's condition regarding payment by the other driver's insurer was inconsistent with the statute's purpose because it purported to compensate the claimant beyond her actual injuries and losses, a result the legislature did not intend.[131] As the court concluded:

> The allocation of punitive damages to force exhaustion of liability coverage does not advance the purpose of underinsured motorist coverage to increase available compensation for actual injuries and losses; indirectly shifts payment of punitive damages from the liability carrier to the underinsured motorist carrier, contrary to the purpose of underinsured motorist coverage; and would ultimately increase underinsured motorist coverage premiums as a result of tortsfeasors' wrongs.[132]

B. Release Controls the Terms of Settlement

Carter was not the only case involving uninsured- and underinsured-motorist coverage settlements. In *Arnold v. Neal*,[133] an injured motorist sought to overturn an order enforcing the terms of a settlement agreement between the driver and his insurer, Allstate Insurance Company (Allstate).[134] As recounted therein, the motorist suffered injuries after the car operated by the other driver collided head-on with her vehicle. Several weeks after the accident occurred, the motorist's attorney offered to settle the matter for $100,000, the limits of the other driver's policy, in exchange for a limited release. Allstate's adjuster thereafter contacted the motorist's attorney ten days before the deadline contained in his letter, offering to settle the matter as described by the attorney and requesting information as to how to issue the check. The next day, Allstate's attorney sent the motorist's attorney a draft release and stated that he would work with the motorist's attorney in the event the specific language proposed in the release was not acceptable.[135] Allstate subsequently forwarded a check to the motorist's attorney containing the annotation: "Full [and] final settlement of any and all

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130. *Id.* at 273, 739 S.E.2d at 753.
131. *Id.* at 274, 739 S.E.2d at 753 (quoting O.C.G.A. § 33-24-41.1(b)(1)).
132. *Id.* at 274-75, 739 S.E.2d at 753.
133. 320 Ga. App. 289, 738 S.E.2d 707 (2013).
134. *Id.* at 292, 738 S.E.2d at 709-10.
135. *Id.* at 290-91, 738 S.E.2d at 708-09.

claims for bodily injury arising from [the motorist's] loss [on] 12/20/-10."[136] Two weeks later, the motorist's attorney filed suit against the other driver in the Superior Court of Clayton County and contacted Allstate's attorney, stating that Allstate's annotation amounted to a rejection of the settlement offer and rejecting Allstate's offer to issue another check without the annotation. Allstate responded by filing a motion for summary judgment to enforce the terms of the parties' settlement.[137] The trial court granted Allstate's motion and the court of appeals affirmed, ruling that the release tendered by Allstate complied with the terms dictated by the motorist's attorney regardless of whether the check contained a contrary annotation: "[T]he release that Allstate provided was limited in scope, exactly as [the motorist] had requested, and 'where the terms of a written release are clear and unambiguous, the court will look to the release *alone* to find the intention of the parties.'"[138]

VI. MISCELLANEOUS

Finally, a number of cases addressed a range of interesting but less notable issues. In *Garrison v. Jackson National Life Insurance Co.*,[139] the United States District Court for the Northern District of Georgia denied a life insurance company's motion to dismiss a beneficiary's claim for breach of contract where the company failed to relinquish complete control of insurance policy proceeds and instead deposited the proceeds in a checking account in the beneficiary's name.[140] In *Kovacs v. Cornerstone National Insurance Co.*,[141] the court of appeals confirmed Georgia's long-standing rule that an insurer may avoid coverage of a loss where an insured fails to include pertinent information in her application for insurance.[142] In *Silver v. Bad Boy Enterprises, LLC*,[143] the United States District Court for the Middle District of Georgia rejected the argument that O.C.G.A. § 33-3-28[144] requires a party to disclose the remaining insurance coverage available under an "eroding limits" policy, noting that O.C.G.A. § 33-3-28 only requires a party to provide

136. *Id.* at 291, 738 S.E.2d at 709 (quoting the letter regarding the limited-liability release).

137. *Id.* at 291-92, 738 S.E.2d at 709-10.

138. *Id.* at 293-94, 738 S.E.2d at 711 (quoting Carey v. Houston Oral Surgeons, LLC, 265 Ga. App. 812, 816, 595 S.E.2d 633, 637 (2004)).

139. 908 F. Supp. 2d 1293 (N.D. Ga. 2012).

140. *Id.* at 1295, 1305.

141. 318 Ga. App. 99, 736 S.E.2d 105 (2012).

142. *Id.* at 99-100, 736 S.E.2d at 106-07.

143. 2013 U.S. Dist. LEXIS 39140 (M.D. Ga. Mar. 21, 2013).

144. O.C.G.A. § 33-3-28 (2000).

"the name of the insurer, the name of each insured, and the limits of coverage," or "a copy of the declaration page of each such policy in lieu of providing such information."[145] And in *Camacho v. Nationwide Mutual Insurance Co.*,[146] the United States District Court for the Northern District of Georgia held that a plaintiff could discover communications exchanged between an insurer, its insured, and their counsel, under the joint-defense or common-interest privilege following the insured's assignment of his claims against his insurer to the plaintiff.[147]

145. *Silver*, 2013 U.S. Dist. LEXIS 39140, at *3 (quoting O.C.G.A. § 33-3-28(a)(1)).
146. 287 F.R.D. 688 (N.D. Ga. 2012).
147. *Id.* at 693.