

On the day of the accident, Mr. Mercenary visited his oncologist from whom he was receiving treatment for granulocytic leukemia. Since childhood Mr. Mercenary also had suffered a blood disorder known as idiopathic thrombocytopenic purpura (ITP), characterized by a low blood platelet count, a propensity for bruising and excessive bleeding. On that day Mr. Mercenary declined the advice of his oncologist to begin a regimen of steroid treatment to stem the symptoms of his ITP. A CT scan in the hospital revealed bleeding in Mr. Mercenary's brain, as well as a severely low blood platelet count. [Affidavit of Joye Indeth, M.D. and records attached thereto]

Ms. Mercenary submitted a claim for benefits under the group policy described above. In support of the claim she submitted the police accident report of the collision, the death certificate and a list of his physicians. After a review of these materials and the medical records from his hospitalization after the accident, GIA Life Insurance Co. referred the claim to a forensic physician, Joye Indeth, M.D., for an opinion whether Mr. Mercenary's death was within the coverage of the policy. [Affidavit of Myra Juster]

Dr. Indeth, in a report and a follow-up email to the claims examiner, gave the unequivocal opinion that Mr. Mercenary's pre-existing ITP disease played a substantial factor in his death, and well may have precipitated the automobile collision itself. [Affidavits of Myra Juster and Joye Indeth, M.D. and report and email attached thereto] Accordingly, GIA Life Insurance Company denied the claim. [Affidavit of Myra Juster]

Ms. Mercenary administratively appealed the denial of the claim, pursuant to the ERISA plan under which this policy was issued. She engaged her present counsel, who began corresponding with GIA Life Insurance Company in connection with the appeal. The appeals committee, considering the entire record before the claims representative and the subsequent correspondence and materials from Plaintiff's counsel, upheld the denial of the claim, and this was communicated by letter to Plaintiff's counsel by letter dated May 5, 2006. [Affidavit of Myra Juster, and correspondence attached thereto]

This action followed, filed on June 27, 2006, asserting claims under Georgia law for bad faith penalties and other relief, as well as the proceeds of the policy. [Complaint]

II. Facts Leading to Default.

The complaint was served on the registered agent for GIA Life Insurance Company on June 28, 2006. On June 29, 2006, while away from her office, Myra Juster, claims manager for GIA Claims Services, which adjusts claims for the defendant, received a copy of the Complaint by company mail. However, she did not receive any copy of a return of service or transmittal letter from the registered agent indicating the date of service upon GIA Life Insurance Company. [Affidavit of Myra Juster]

Ms. Juster contacted counsel to defend the case for GIA Life Insurance Company, Ann Attorney in Atlanta, by telephone upon her return to the office on July 6, 2006. [Affidavits of Myra Juster and Ann Attorney] Ms. Attorney previously had handled another case for Ms. Juster representing an affiliate company of GIA Life Insurance

Company involving a similar fact pattern and a similar coverage defense. Ms. Attorney had removed that action to federal district court where she successfully defended the suit. That was the instruction Ms. Juster gave to Ms. Attorney in transmitting the suit to her by mail dated July 7, 2006. [Affidavit of Myra Juster]

To her credit, Ms. Attorney acknowledges this undertaking in accepting the assignment to defend the suit from Ms. Juster. [Affidavit of Ann Attorney] However, she did not timely remove the case to federal court, nor did she file an answer to the complaint within thirty days after service. She felt that better practice dictated filing removal papers only after service of process (based upon case authority), and she understood that there was no indication that service had been perfected upon GIA Life Insurance Company as of the time of the assignment to her to defend. She made inquiry on two occasions whether Ms. Juster had become aware of service, and she requested authority from Ms. Juster to acknowledge service. Ms. Juster gave her that authority on August 11, 2006, beyond thirty days after service, but within the fifteen day period for opening a default as a matter of right. [Affidavit of Ann Attorney]

III. Communication with Plaintiff's Counsel while default could be opened as a matter of right.

On that same day, Friday, August 11, Ms. Attorney called plaintiff's counsel. She left him a voice mail advising of her representation, indicating that she was planning to remove the case, and offering to acknowledge service since she was not aware of any service of process. Mt. Hankey did not return that call. [Affidavit

of Ann Attorney] The last day to open the default as a matter of right was the following Monday, August 14, 2006, because the 45th day following service fell on Sunday, August 13, 2006. This was a fact unknown to Ms. Attorney, and Mr. Hankey knew this by virtue of her phone message announcing the fact, together with her offer to acknowledge service of process.

Not receiving a return call, Ms. Attorney again called Mr. Hankey on Tuesday, August 15, 2006, and left him a second voicemail to the same effect as the first. Mr. Hankey returned this call at about 8:00 p.m. the following day, August 16, 2006 by voicemail to Ms. Attorney. He did not advise that service had been perfected in this voicemail. ***Neither did he mention that on the day before, the day of her second call, he had filed a motion for entry of default judgment.*** Rather, he suggested that she send him a notice of appearance, as though that were a prerequisite for him to speak with her on the case, and that he was difficult to reach because he was preparing for a hearing. Upon receiving that voicemail the next morning, Ms. Attorney faxed him a letter, again advising of her representation and offering to acknowledge service for her client. [Affidavit of Ann Attorney and letter attached thereto]

By letter dated the same day, August 17, but sent by facsimile the following day, Mr. Hankey responded to Ms. Attorney, mentioning for the first time since hearing from her a week earlier, the default of the defendant. Again he suggested that he needed a filed notice of appearance in order to be able to communicate with her. ***Even in that letter he did not mention that he had filed a motion for default judgment three days earlier, after she had called him***

twice. [Affidavit of Ann Attorney and letter from Mr. Hankey attached thereto]

Upon receiving the motion for default judgment through service on the registered agent (**and not by any service by mail upon its counsel**), GIA Life Insurance Company engaged separate counsel to respond to this motion and seek to have its default set aside.

ARGUMENT AND CITATION OF AUTHORITY

I. Standard for setting aside default: OCGA § 9-11-55(b).

OCGA § 9-11-55(b) provides that: "At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened." This is an appropriate case in which default should be opened.

In the present case the Court should set aside the default of GIA Life Insurance Company on two of the three grounds provided in the statute: for excusable neglect, and because a "proper case" has been made for the default to be opened.

A. Liberal construction of "excusable neglect" as a ground for opening default.

The rule prescribing the circumstances for opening a default is to be liberally construed so as to permit cases to be heard on the merits where justice permits. Ewing v. Johnston, 174 Ga. App. 760, 334 S.E.2d 703 at 706 (Ga. App.1985). In Ewing the Court of Appeals held that "the rule permitting opening of default is remedial in nature and should be liberally applied, for default judgment is a

drastic sanction that should be invoked only in extreme situations." Further, "[w]henver possible cases should be decided on their merits, for default judgment is not favored by law." Id. Applying this "policy of liberality" by which Georgia courts "have resolved doubts in favor of the party seeking relief so that the case may be heard on the merits," the Court of Appeals affirmed the trial court's decision to open default entered against the defendant. Id.

In an earlier case applying the same policy promoting liberal application of Rule 55, the Georgia Court of Appeals praised the trial judge's opening of default, stating that his order "gives the parties their 'day in court'" and "allows the case to be heard on its merits-which is what our system of justice is all about." Houston v. Lowe's of Savannah, Inc., 136 Ga. App. 781, 222 S.E.2d 209 (Ga. App. 1975).

The paramount significance of fairness in determining whether to set aside a default is evident from the decision in First National Insurance Co. v. Thain, 107 Ga. App. 100, 129 S.E.2d 381 (Ga. App. 1962). There the court quoted extensively from Bass v. Doughty, 5 Ga.App 458, 460, 63 S.E. 516, 517:

"Punctuality is a virtue of high order, but truth and justice are even more exalted. Hence the demand for punctuality in pleading should not be so strict as to prevent inquiry into truth and to deny justice where the delinquency is reasonably excusable. Therefore, while the law makes requirements of punctuality in pleadings, it also usually makes provisions for relieving against the penalties imposed for a lack of this virtue when the interests of truth and justice require it."

First National Insurance Co. v. Thain, 129 S.E. 2d at

In addition to promoting equity by reaching the merits of a case where feasible, other policies underlie the liberal

interpretation of the term "excusable neglect." One of these is to promote business relations by enabling parties to rely upon the word of his fellow business person. In Cobb County Fair Assoc., Inc. v. Boyle, 143 Ga. App. 754, 240 S.E.2d 143 (Ga. App. 1977), simply stated, the defendant tendered a lawsuit to an insurer for a defense, and then tendered it to another entity that owed indemnity to the defendant. That entity accepted the case and turned it over to its own insurer, assuring the defendant that its interest would be protected. In reliance on the undertaking of its indemnitor, the defendant did not undertake separately to retain counsel or answer the complaint. However, due to a misunderstanding on the part of the indemnitor's insurer, the case went into default.

The Court of Appeals held that any neglect by the defendant in failing to answer was excusable, stating:

The law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust the parties with whom they deal. Likewise, a litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened.

B. The "proper case" for opening default.

Even absent excusable neglect, as that term has been broadly applied to defaults similar to the present case, the statute affords an even broader discretionary ground for the opening of a default: "where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened." As the language itself suggests, this is an extremely broad justification encompassing every reason that the judge may consider fair for

opening the default. The "proper case" standard is much broader than the excusable neglect standard, and lies firmly in the discretion of the judge. Houston v. Lowe's of Savannah, 136 Ga. App. 781, 222 S.E.2d 209, 210 (Ga. App. 1975); see also Clements v. United Equity Corp., 125 Ga. App. 711, 188 S.E.2d 923 (Ga. App. 1972).

The breadth of the rule permitting opening of default for a "proper case" is eloquently articulated in Axelroad v. Preston, 232 Ga. 836, 209 S.E.2d 178 (Ga. 1974). There the court ruled that the statute:

conveys very ample powers as to opening defaults; not only providential cause, which is broad, and excusable neglect, which is still broader, but finally, as if reaching out to take in every conceivable case where injustice might result if the default were not opened.

II. "Excusable Neglect" and "Proper Case" grounds as applicable to the facts of this case

A. Excusable Neglect

The principles of equity, fairness and public policy favoring business relations that the courts have addressed in these cases all dictate opening the default in the present case. Justice will be served by permitting the defendant to plead its case and to defend against the plaintiff's allegations on their merits, with no prejudice to the plaintiff's ability to prove her own case by opening the default. Conversely, entry of a default judgment would exalt form over substance and arbitrariness over fairness in

the judicial process. It would work an injustice to the defendant and a windfall to the plaintiff. Although such a ruling would punctuate the need for promptness in pleading, it would do so at the expense of far weightier considerations under the circumstances of this case.

Myra Juster retains lawyers as a regular part of her job, and she had retained Ann Attorney in an earlier case under virtually indistinguishable circumstances. She had every reason to believe that the case would be timely removed, and at all events that her company's interest would be protected by engaging this attorney who accepted the undertaking to do so. By the same token, **she had absolutely no reason** to think that the attorney would not honor this undertaking, in that she knew this attorney as a professional well versed in litigation of cases *precisely* like this one.

In Powell v. Eskins, 193 Ga. App. 144, 387 S.E.2d 389 (Ga. App. 1989), the Georgia Court of Appeals found that the trial court *abused its discretion* in failing to open a default in a case where such excusable neglect was evident. There, the defendant was served through the Secretary of State and actually received the summons and complaint some eleven days later. The next day, he had the summons and complaint delivered to Jones, an employee of his insurer. Jones began investigating the claim and neglected to forward the complaint to defense counsel until more than two months after the complaint had been served. Within two weeks, the defense counsel filed an appearance and a motion to set aside default, which was denied by the trial court.

The appellate court, while recognizing the high level of deference to be afforded the trial court judge, reversed the trial court, finding that he had abused his discretion by not ruling that these circumstances constituted excusable neglect. *Id.* at 390.

The present case is even more compelling, in that the claims manager Ms. Juster ***did*** timely engage counsel to remove the case. She did everything that reasonably can be expected of a defendant in insuring that its interest is adequately protected in a lawsuit.

As in Cobb County Fair Assoc. v. Boyle, *supra*, opening the default in this case will promote the policy of encouraging trust among the parties to business relations. Myra Juster's justifiable reliance on the representation of attorney Ann Attorney, that the interest of GIA Life Insurance Company would be protected, is a more compelling circumstance than the court addressed in Cobb County Fair Assoc. v. Boyle, *supra*. In that case the persons involved had a mere business relationship; here, an indisputable fiduciary relation between an attorney and client existed on the subject matter of the representation. Many other appellate decisions involving facts less compelling than the present case have held that the trial court abused its discretion in failing to open a default. In addition to Cobb County Fair Assoc. v. Boyle, *supra*, see, Sears, Roebuck & Co. v. Ramey, 170 Ga. App. 873, 318 S.E.2d 740 (Ga. App. 1984) [indemnitor failed to forward to insurer as it had promised]; American Erector, Inc. v. Hanie, 157 Ga. App. 687, 278 S.E.2d 196 (Ga. App. 1981) [insurance

agent falsely represented he had forwarded suit to carrier that was defending]; Pinehurst Baptist Church v. Murray, 215 Ga. App. 29, 450 S.E.2d 307 (Ga. App. 1994) [insurance carrier took an extension and failed to answer within extension]; Lanier v. Foster, 133 Ga. App. 149, 210 S.E.2d 326 (Ga. App. 1974) [insurance adjuster received suit and resigned before assigning counsel and left suit in file] These cases need not be discussed in detail, in that ample grounds for excusable neglect and for a proper case appear in the record of this case.

B. Proper Case: Plaintiff's counsel sandbagged Ann Attorney, and plaintiff should not be permitted to profit from it at the expense of reaching the merits of this case.

Whatever one may say about the responsibility of an attorney to determine from a source other than the client the date of service of process in the absence of information from the client, Ann Attorney was lulled by Plaintiff's counsel into letting the period expire for opening a default as a matter of right. She very forthrightly announced to him the fact of her representation, and also, unwittingly, her lack of knowledge about service on her client. She did this on the Friday before the Monday that she could have opened the default.

Plaintiff's counsel, rather than forthrightly return the call, deliberately did not do so **even as** he was preparing to file a motion for entry of default judgment at the first moment of opportunity, August 15, 2006. Even after her second call on that day he waited until the night of the following day to leave her a voicemail suggesting that she send a "notice of appearance" and

reciting his unavailability to talk because of his preparation for a hearing. He did not mention the default or that he had filed a motion for default judgment, apparently for the purpose of prolonging her lack of awareness of the facts and to goad her into making a formal appearance in the case in the face of his motion.

Even worse, after receiving her letter announcing again her lack of awareness of the service upon the defendant, Mr. Hankey wrote her again professing that a formal notice of appearance was a prerequisite to discussing the case. For the first time he mentioned the date of service, but still did not mention the motion for default judgment he had filed at least two days earlier.

This is not the kind of trust among business relations the Court of Appeals had in mind when deciding County Fair Assoc. v. Boyle, *supra*. Granted, a plaintiff has no obligation to aid a defendant's attorney in representing her client. Nevertheless, it was at best disingenuous for Mr. Hankey in timing his responses to Ms. Attorney's overtures to acknowledge service; in affirmatively indicating his unavailability by phone while he must have been preparing a motion to take advantage of her announced lack of awareness of her client's precarious position on the verge of default which could not be opened as a matter of right; and in laying off his failure to serve her with that motion on a professed need for a formal notice of appearance in order to speak with her about the case.

The closeness in time between GIA Life's default, the motion for entry of default judgment set for hearing on damages on

November 6, 2006 and the present motion to open default speaks not only to the lack of any prejudice to the plaintiff in permitting the case to be heard on its merits. It also speaks to the unclean hands of plaintiff's counsel in taking unfair advantage of a counterpart whose unawareness of her client's peril is offering the professional courtesy to acknowledge service.

If ever there were a proper case for the opening of a default, this is it.

II. GIA Life Insurance Co. has meritorious defenses to the plaintiff's claim.

A. The plaintiff's claim is not covered under the group policy of accidental death and dismemberment insurance issued by GIA Life Insurance Co.

By her affidavit in support of this motion, Dr. Joye Indeth, a renowned forensic pathologist, rendered her medical opinion that Mr. Mercenary's preexisting ITP disease at a minimum substantially contributed to his death, and may even have precipitated the automobile collision when he turned left into the path of another car. She rendered this opinion after her study of (a) the hospital records of Mr. Mercenary; (b) the police accident report; (c) the proof of loss by Ms. Mercenary; (d) the death certificate; and (e) the policy language limiting coverage to "injury resulting directly and independently of all other causes."

Her opinion stands uncontradicted in the record of this case during the claims process and administrative appeal thereof, and in the record of this lawsuit.

The death certificate entry for "cause of death" is not probative of the issue whether the death is a covered injury under a group accidental death and dismemberment insurance policy. Notably, *only* the death certificate and none of the actual medical records forming the basis of Dr. Indeth's opinion, or for that matter the death certificate, were attached to the complaint. Neither was Ms. Mercenary's claim that the death was covered supported by any separate medical opinion at the claims level, the administrative appeal level, or to defendant's knowledge, at the present time.

The facts establishing that Mr. Mercenary's death did not result from "bodily injury caused by an accident occurring while this policy is in force . . . and **resulting directly and independently of all other causes in a covered loss**", render the claim outside the scope of coverage under the policy, contrary to the material allegations of the complaint. In addition, the evidence that in fact his injury and death resulted in substantial part from his ITP place the claim squarely within the exclusion from coverage for

any loss caused in whole or in part by, or resulting in whole or in part from, the following: . . . 2. sickness, disease or infections of any kind; except bacterial infections due to an accidental cut or wound, botulism or ptomaine poisoning

Although an unreported decision of a federal district court in this state does not constitute binding authority on this court, the decision by Hon. Pine Forrester in the prior case handled by

Ann Attorney at the instance of Myra Juster is germane to this case for that reason. [That opinion and order is attached as an exhibit to the affidavit of Myra Juster filed in support of this motion.] It also happens to be substantively instructive. Judge Forrester exhaustively examined all of the federal law under ERISA under facts materially indistinguishable from the present case in granting summary judgment for the affiliate GIA Life Insurance Company.

B. The claims for extra-contractual relief under Georgia law are preempted by ERISA.

The complaint asserts an entitlement to a bad faith penalty pursuant to O.C.G.A. §33-4-6, and attorney fees pursuant to O.C.G.A. §13-11. Those elements of recovery clearly are preempted by the "complete preemption" by ERISA of state law claims and remedies. See [Aetna Health Inc. v. Davila](#), 542 U.S. 200, 124 S.Ct. 2488, 2495, 159 L.Ed.2d 312 (2004).

[Any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted.

Id., 542 U.S. at 200. See also See [Ervast v. Flexible Products Co.](#), 346 F.3d 1007, 1014 (11th Cir.2003)

Although ERISA has its own provision for the award of attorney fees to either party in the discretion of the trial court, 29 U.S.C. §1132, there is a set of criteria to be employed in making this determination, and it is not determined solely by

filing a complaint that goes unanswered. [Wright v. Hanna Steel Corp.](#), 270 F.3d 1336, 1344 (11th Cir.2001).

There is no provision for a penalty similar to the fifty percent penalty under O.C.G.A. §33-4-6, and this remedy simply is unavailable to the plaintiff even on the face of the complaint and the attached policy.

III. Defendant has met all five of the formal and substantive conditions required by O.C.G.A. § 9-11-55(b) to open a default.

- A. **Payment of costs:** See Certificate of Payment of Court Costs filed contemporaneously herewith.
- B. **Showing made under oath:** See Affidavits of Myra Juster, Ann Attorney and Joye Indeth, M.D. filed contemporaneously herewith.
- C. **Meritorious defense:** See Affidavits of Myra Juster, Ann Attorney and Joye Indeth, M.D. filed contemporaneously herewith.
- D. **Offer to plead instanter:** See Defendant's Motion to Set Aside Default and proposed Answer attached to that motion.
- E. **Announcement of ready to proceed with trial:** See Defendant's Motion to Set Aside Default.

For all of the foregoing reasons, Defendant requests that the Court grant its motion to set aside the default, allow the filing of its proposed answer, and schedule the case for a trial on the merits, in the interest of justice.

Respectfully submitted,

CALLAWAY, BRAUN, RIDDLE &
HUGHES, P.C.

BY: _____
Edward M. Hughes
State Bar No. 375560

P.O. Box 9150
Savannah, Georgia 31412-9150
(912) 238-2750

DUNCAN & MANGIAFICO, P.C.

BY: _____
Edgar S. Mangiafico, Jr.
State Bar No. 468775

7000 Central Parkway
Suite 220
Atlanta, GA 30328
(770) 698-4560

IN THE SUPERIOR COURT OF YOUR COUNTY
STATE OF GEORGIA

Mary Ann Mercenary,)
)
 Plaintiff,)
)
 vi.) Civil Action File
) No.
 GIA LIFE INSURANCE COMPANY,)
)
 Defendant.)

CERTIFICATE OF SERVICE

This is to certify that I have this date served all parties to this action with a copy of **BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE DEFAULT** by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereon and addressed as follows:

Barry A. Hankey, Esq.

This _____ day of September, 2006.

DUNCAN & MANGIAFICO, P.C.

BY: _____
Edgar S. Mangiafico, Jr.
State Bar No. 468775

7000 Central Parkway
Suite 220
Atlanta, GA 30328
(770) 698-4560