I. INSURANCE COVERAGE CASES FROM GEORGIA COURTS

AMBIGUITY IN POLICY LANGUAGE MAY BE EXPLAINED BY PAROL EVIDENCE

RLI Ins. v. Highlands on Ponce, LLC
2006 WL 1827456 (Ga.App.), Court of Appeals No. A06A0726
July 5, 2006

Facts: Insurer and insured filed cross-motions for summary judgment in a suit where insured was seeking full coverage on a claim following a fire. Insurer limited coverage for soft costs and business income of $100,000. The trial court found the policy language explaining the coverage limits ambiguous and construed it against the insurer.
Holding: Reversed
Rationale: The Court of Appeals agreed with the trial court that the policy language regarding limits was ambiguous. However, the court found that construing the agreement against the drafter did not resolve the ambiguity. The court noted that there was a disagreement between the parties as to the circumstances surrounding the transaction and held this must be resolved by a jury. Evidence of intent, including parol evidence, is a factual matter for resolution by the jury and not a matter of law for determination by the court.

NO COVERAGE UNDER HOMEOWNERS POLICY FOR INSURED WHO DOES NOT RESIDE AT HOUSE INSURED BY THE POLICY

Varsalona v. Auto-Owners Insurance Co.
2006 WL 2691755 (Ga.App.), Court of Appeals No. A06A1371
September 21, 2006

Facts: Insured sued insurer for denial of a claim against the property coverage in their homeowner's policy. The policy provided coverage only if the dwelling was "used principally as your private residence." Insured admitted they never lived in or used the subject dwelling as their residence; instead the property was occupied by family members of insured. The trial court granted summary judgment to the insurer.
Holding: Affirmed
Rationale: Insured argued that at the time the policy was signed they intended to use the property as their residence and pointed out that the policy provided that "insured premises" means "any other premises you acquire during the policy term and which you intend to use as a residence premises." (Underlining supplied.) The court held that this language does not refer to the property the policy was intended to insure. The insured must use the premises as their private residence for coverage to apply.

LOWER DILIGENCE STANDARD APPLIED TO SERVICE BY PUBLICATION IN UNINSURED MOTORIST CASE
Luca v. State Farm Mutual Automobile Insurance Co.,
2006 WL 2729660 (Ga.App.), Court of Appeals No. A06A1008
July 5, 2006

Facts: Plaintiff attempted to serve defendant twice before the running of the two-year statute of limitations. Both attempts were unsuccessful, as defendant had returned to his native Mexico. Before expiration of statute, plaintiff filed a Motion for Service by Publication and served her UM carrier, State Farm. State Farm moved to dismiss on the basis that plaintiff failed to exercise "due diligence" in determining whereabouts of defendant. Trial court granted State Farm's motion; plaintiff appealed.
Holding: Reversed and remanded
Rationale: Trial court "misplaced reliance" on cases that dealt with the standard of due diligence for personal service beyond expiration of statute of limitations, which requires a showing Plaintiff "attempted to ascertain Defendant's location." Rather, the trial court should have applied the lower standard for due diligence set forth in the UM statute (O.C.G.A. Sec. 33-7-11(e)), which only requires plaintiff to determine if "the [uninsured motorist] is either out of state or avoiding service." The Court of Appeals found the diligence of the plaintiff to be within the lesser, applicable standard, and thus reversed and remanded.

COUNTY'S PURCHASE OF AUTO LIABILITY INSURANCE DOES NOT CONSTITUTE WAIVER OF SOVEREIGN IMMUNITY FOR TORT NOT RELATED TO USE OF AUTO
Scott v. City of Valdosta
2006 WL 1914614 (Ga.App.), 06 FCDR 2391, Court of Appeals No. A06A0128
July 13, 2006

Facts: Plaintiff erroneously arrested for outstanding warrant during a traffic stop. Trial court dismissed his claim for false arrest on the basis that purchase by city of auto liability insurance did not constitute a waiver of sovereign immunity for the tort of wrongful arrest.
Holding: Affirmed
Rationale: Plaintiff failed to establish that city had purchased auto liability insurance; however, even if city did purchase auto liability insurance, the tort of false arrest would not arise from "ownership, maintenance, operation or use of any motor vehicle." Thus waiver per O.C.G.A. Sec. 33-24-51 of sovereign immunity inapplicable.

DISMISSAL OF UM CARRIER PROPER WHERE CARRIER NOT SERVED WITHIN 90 DAYS OF PLAINTIFF KNOWING DEFENDANT UNINSURED
Rebuelta v. Nkpa
2006 WL 2382783 (Ga. App.), 06 FCDR 2693, Court of Appeals No. A06A1654

August 18, 2006

<u>Facts:</u> Plaintiff sued defendant shortly before expiration of the two-year statute of limitations. Service was not perfected on defendant until five months later. Six months after serving the defendant, plaintiff served his own UM carrier, Allstate. Trial court granted Allstate's motion to dismiss based upon plaintiff's lack of due diligence in serving Allstate within the statute.
<u>Holding</u>: Affirmed.
<u>Rationale</u>: O.C.G.A. Sec. 33-7-11(d), as amended in 1998, requires plaintiff to serve his UM carrier within 90 days of forming a reasonable belief that defendant is uninsured, or within the time remaining to serve the defendant, which ever is longer. The record below did not show that the plaintiff served Allstate before the latter of these two time periods had expired, and thus the dismissal was affirmed.

REQUIREMENT TO OFFER UM COVERAGE APPLIES TO EXCESS AND UMBRELLA POLICIES

<u>Abrohams v. Atlantic Mutual Insurance Company</u>
2006 WL 2507052 (Ga.App.), Court of Appeals No. A06A1501
August 31, 2006

<u>Facts</u>: Plaintiff and his son were involved in a serious accident with an underinsured motorist. Plaintiff had policies with Atlantic Mutual for auto, home, and a "personal liability" umbrella policy in the amount of one million dollars. Plaintiff claimed he was entitled to $1 million in UM benefits under the personal liability policy, since Atlantic Mutual did not offer paintiff the opportunity to reject UM coverage on the application for the umbrella policy. Atlantic Mutual argued that the requirement to provide UM coverage unless it is rejected in writing does not apply to umbrella policies. The trial court entered summary judgment in favor of Atlantic Mutual.
<u>Holding</u>: Reversed and remanded.
<u>Rationale</u>: O.C.G.A. Sec. 33-7-11 "does not limit its application to primary policies." Thus, the umbrella policy afforded UM coverage unless the insured was given the opportunity, in the application, to specifically decline UM coverage. (Note: Atlantic Mutual made the secondary argument that the 2001 amendment to the UM statute (33-7-11(a)(3)) that exempted renewal polices from the increase in minimum UM limits should apply, making the amount of UM recoverable under the umbrella policy only $15,000. The Court of Appeals rejected this argument, saying the UM coverage under the umbrella policy was not in the minimum amount in the first instance.)

TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF PUNITIVE CONDUCT WHERE ONLY THE UM CARRIER'S LIMITS ARE EXPOSED

<u>Dees v. Logan</u>
2006 WL 2788403 (Ga.App.), Court of Appeals No. A06A0929
September, 12, 2006

<u>Facts:</u> Prior to trial, plaintiff settled with the defendant's liability insurer under the limited release statute (O.C.G.A. Sec. 33-24-41.1). Trial proceeded against the Defendant with only the UM limits of plaintiff's own policy exposed at trial. Trial court granted UM carrier's motion in limine to exclude evidence of defendant's punitive conduct.
<u>Holding</u>: Affirmed on this issue (Reversed on other issues – see below)
<u>Rationale:</u> UM Carrier could not be liable for paying punitive damages. Furthermore, Defendant could not be liable for additional damages since his insurer settled under a limited release. Thus, evidence of punitive conduct was not relevant to any material issue in the trial and was properly excluded.

UM OFFSET FOR PRIOR RECOVERY APPLIES ONLY TO DAMAGES IN THE SAME CATEGORY AS THE PRIOR RECOVERY

UM OFFSET FOR "UNALLOCATED SETTLEMENT" MUST BE APPLIED TO SPECIAL FORM VERDICT ON A "PRO RATA" BASIS
<u>Dees v. Logan</u>
2006 WL 2788403 (Ga.App.), Court of Appeals No. A06A0929
September, 12, 2006

<u>Facts:</u> Plaintiff was awarded a special form verdict against her UM carrier. Award was broken out into past lost wages, reimbursement of COBRA payments, past pain and suffering and (for plaintiff's wife) loss of consortium. UM carrier moved to have the award reduced to zero on the basis that monies received by plaintiff, before trial, from (1) workers comp, (2) Social Security disability and (3) an "unallocated settlement" with defendant's liability insurer, totaled more than the amount of the verdict against UM carrier. Trial court granted UM carrier's motion and reduced the award to zero. The two issues identified by the Court of Appeals relating to the offsets were: (1) do the offsets apply to all damages, regardless of category; and (2) how should the court offset the "unallocated settlement" made with the Defendant's liability carrier, given the special form of the verdict?
<u>Holding</u>: Reversed, on the offset issues.
<u>Rationale</u>: (1) The Court of Appeals determined that three of the categories of damages awarded – past pain and suffering, COBRA Reimbursement, and loss of consortium – were not subject to offset because the prior payments received by plaintiff did not fall in these categories. Conversely, since plaintiff had received more wage reimbursement through comp than was awarded by the jury, the award for wages was properly reduced to zero. (2) For the amounts that were not subject to the workers comp offset, the court applied a "pro rata" formula to allocate a portion of the liability carrier settlement to each category of the special verdict form.

II. INSURANCE COVERAGE CASES FROM FEDERAL COURTS INTERPRETING GEORGIA LAW

CANCELLATION OF MOTOR CARRIER POLICY EFFECTIVE, EVEN THOUGH INSURER DID NOT COMPLY WITH PSC RULES OR PREMIUM FINANCE CANCELLATION LAWS

Kolencik v. The Stratford Ins. Co.
2006 WL 182 (C.A. 11 (GA)), Slip Copy (Not selected for publication in Fed Reporter)

Facts: Plaintiff's wife was killed in MVA with two dump trucks owned by Yarbrough, d/b/a J&J Trucking. Stratford insured Yarbrough, but the premium finance company had cancelled his policy five months before the collision for non-payment of premiums. Plaintiff maintained that the cancellation was ineffective because (1) Stratford failed to notify the PSC within 30 days prior to the cancellation as required by Ga. PSC Rule 7-2.6(b); and, (2) the premium finance company did not follow the procedures outlined in O.C.G.A. Sec. 33-22-13(b) requiring 10 days written notice to the insured prior to cancellation. The district court was unconvinced by plaintiff's arguments and granted summary judgment to the insurer, Stratford.
Holding: Affirmed
Rationale: (1) As for Stratford's failure to notify the PSC prior to cancellation, the court noted that Yarbrough never registered with the PSC, and thus never obtained a permit to operate commercially in the state. It would have been futile for the insurer, Stratford, to put the PSC on notice. The court concluded that any such notice would have been rejected and returned to Stratford. "The law never requires a futile act." (2) As for the alleged failure of the premium finance company to comply with Georgia's premium finance statute cancellation provisions, any such failure would not create liability for Stratford. The "premium finance statute insulates Stratford from liability... 'No liability of any nature whatsoever shall be imposed on the insurer as a result of the failure…of the insurance premium finance company to comply with any of the requirements of this Code section'." Because Stratford had received written notice of cancellation from the premium finance company, it could rely upon such as absolute proof the cancellation was effective. (The court seemed to imply the premium finance company should have been a party defendant to the suit.)

OTHER-INSURANCE CLAUSES OF OPTOMETRIST'S PROFESSIONAL LIABILITY POLICIES CANCELLED EACH OTHER OUT, AND PRO RATA DISTRIBUTION OF LIABILITY WAS WARRANTED

The American Casualty Co. of Reading v. MAG Mutual Insurance Co.
185 Fed.Appx. 921, 2006 WL 1933806 (11th Cir.), Case No. 06-11110
July 13, 2006

Facts: After optometrist's liability carrier satisfied judgment against optometrist, it sued the optometrist's employer's professional liability carrier for contribution. Optometrist was covered

under his employer's policy under a blanket employee endorsement. The employer's carrier argued that its coverage was "true excess coverage." The district court granted summary judgment to the employer's carrier, reasoning that the other-insurance clauses in the two policies were not irreconcilable and that the employer's policy was true excess coverage.
Holding: Reversed and remanded
Rationale: The court found no distinction between the excess other-insurance clauses in the two policies. The blanket employee endorsement in the employer's policy was not written as umbrella or true excess coverage. Therefore liability should be pro rated according to policy limits.

A LETTER IS NOT A COLLATERAL AGREEMENT SURVIVING A MERGER CLAUSE IN THE SUBSEQUENT POLICY
Werner Enterprises, Inc. v. Markel American Insurance Co. and Investors Underwriting Managers, Inc.
2006 WL 2645110 (N.D.Ga.), Case No. 1:04-CV-1718-TCB
September 15, 2006

Facts: During negotiations of a commercial umbrella policy, an insurer sent a letter to the prospective insured stating the terms of the agreement for insurance, including a three-year term for the policy. Nine days later, the insurer issued a three-page binder for the policy reflecting a policy term of one year. The insured accepted the policy. During negotiations for a renewal of the policy, the insured inquired whether the insurer would commit to the same rate for the next year. The insurer stated that it would not renew the one-year policy. Insured sought damages incurred in obtaining replacement insurance coverage during the second and third years of the policy term as represented in the original letter.
Holding: Summary judgment for insurer
Rationale: The district court looked to the policy binder and policy and found no reference to a three-year rate guarantee. The court also noted that the policy contained an explicit merger clause, which stated in bold typeface, "[t]he terms and conditions may differ from the terms and/or conditions originally requested." Because the letter was inconsistent with the policy as to the time period, the court held that it could not be a collateral agreement that complemented the policy. The court also held that the letter did not fall within the statute of frauds, and that the insured was not entitled to a reformation of the policy.

STAY IN FEDERAL DECLARATORY JUDGMENT WAS APPROPRIATE WHILE STATE COURT LITIGATION WAS PENDING
Auto-Owners Insurance Co. v. Kelley
2006 WL 2221742 (M.D.Ga.), Case No. 5:04-CV-119-CAR
August 2, 2006

Facts: Insurer brought federal declaratory judgment action against state court plaintiff who sued insured. Insurer sought ruling that it had no duty to defend or indemnify the defendants in the

underlying state court action. According to the court, the insurer obtained a stay in the state court proceedings, even though it was not a party to the case. The federal court then entered a stay of the declaratory action until the state court case was resolved. The state court then lifted its stay. The insurer then filed this motion to lift the stay in the federal court.
Holding: Motion to lift the stay denied.
Rationale: The district court considered several factors that may be used in determining whether to abstain from a declaratory judgment action in favor of a parallel state court action. The court concluded that the federal action should continue to be stayed, because the state court had the complete controversy before it, and the state court was the forum of choice for the federal court defendant/state court plaintiff. The court ruled that "allowing this case to proceed would amount to unnecessary and inappropriate 'gratuitous interference' with the more encompassing state court litigation."

INSURED VS. INSURED EXCLUSION APPLIES TO ELIMINATE COVERAGE WHERE DEFENDANT HOLDS TITLE SUFFICIENT TO SATISFY DEFINITION IN POLICY
Greenwich Insurance Co. v. Lecstar Corp.
2006 WL 2052375 (N.D.Ga.), Case No. A105-CV-3275-RLV
July 20, 2006

Facts: Insurer filed a declaratory judgment action seeking a ruling that coverage did not exist because of an Insured vs. Insured Exclusion. The insured argued that one of the state court action's defendants, on whose behalf the Insured vs. Insured Exclusion was asserted, held only a puffing title.
Holding: Declaratory judgment granted on behalf of insurer
Rationale: Unambiguous words must be given their plain meaning. The individual defendant in the state court action, who would have triggered the Insured vs. Insured Exclusion, was a corporate vice president, as identified in filings to the Securities and Exchange Commission. This title met the requirements of the policy's definition of "officer"; therefore, the exclusion applied.

DISTRICT COURT REFUSES TO HEAR DECLARATORY ACTION ASKING THE COURT TO DECLARE WHICH OF TWO CARRIERS IS PRIMARY
Erie Indemnity Co. v. Acuity, a Mutual Insurance Co.
2006 WL 2048310 (N.D.Ga.), Case No. 1:06-CV-0174-TWT
July 19, 2006

Facts: An individual was involved in an automobile accident while driving a rental car on a business trip. He was covered under both his personal auto insurance and his employer's business-auto coverage. His personal carrier defended him and then filed declaratory judgment action against his employer's carrier, arguing that the employer's coverage was primary.
Holding: Declaratory action dismissed

Rationale: The court exercised its discretion in refusing to hear the declaratory judgment action, because there was not yet a judgment against the insured. The court noted that many federal courts have refused to decide indemnity coverage, because such a decision may be unnecessary if the insured is found not liable. The decision does not discuss whether the personal auto carrier argued that it had no duty to defend, since its coverage was, arguably, excess to the other carrier's coverage.

INTERVENTION BY THIRD PARTY IN INSURER'S ACTION AGAINST INSURED FOR RESCISSION OF A POLICY IS INAPPROPRIATE

MedMarc Casualty Insurance Co. v. The Reagan Law Group, P.C.
2006 WL 2598250 (N.D.Ga.), Case No. 1:06-CV-00773-MHS
September 11, 2006

Facts: Insurer filed an action against its insured seeking a rescission of its professional liability policy, due to material misrepresentations made by the insured. A third party, which had filed a claim against the insured in state court, sought to intervene in the federal court proceeding.
Holding: Motion to intervene denied.
Rationale: The court found no common questions of law and fact. The third party's claim for coverage under the policy was at issue. This action concerned whether the insured's misstatements to its insurer made coverage unavailable. Additionally, the intervention would unduly prejudice and delay the resolution of the matter.