INSURANCE COVERAGE CASES FROM GEORGIA COURTS
OCTOBER 1, 2006 - MARCH 31, 2006

STATUTORY AMENDMENT REQUIRING INSURERS TO OFFER UM COVERAGE EQUAL TO LIABILITY COVERAGE DID NOT INCREASE AMOUNT OF UM COVERAGE ON EXISTING POLICIES EVEN UPON A SUBSEQUENTLY ADDED VEHICLE.

Soufi v. Haygood, 282 Ga. App. 593, 639 S.E.2d 395 (Nov. 29, 2006)

FACTS: Named insured's wife suffered injuries while driving her Toyota Sequoia and served their UM carrier, Nationwide, seeking $300,000 of UM coverage, an amount equal to the liability coverage offered under the policy instead of amount of UM coverage shown on declarations page. Prior to the accident, the named insured placed all the family cars under one policy which had initially been issued in 1998. That policy carried liability coverage of $300,000 per person with a cap of $300,000 per occurrence. On January 9, 1998, the named insured signed a form electing UM coverage in the amount of $100,000 per person and $300,000 per occurrence. The named insured's wife never signed any UM election form in conjunction with any policies. On August 20, 2001, the insureds added the Sequoia to the policy and paid an additional premium.

HELD: The 2001 amendment to O.C.G.A. § 33-7-11 requiring insurers to offer UM coverage in an amount equal to liability coverage unless the insured selects otherwise did not increase the amount of UM coverage in a policy issued prior to the statutory amendment's effective date. The addition of a new vehicle to the policies after the amendments effective date did not entitle the insureds to additional UM coverage. The insurer was not required to obtain a separate election form from the named insured's spouse.

RATIONALE: The Court of Appeals reasoned that the 2001 amendment to O.C.G.A. §33-7-11 was intended to make the policy's liability limits the default provision for UM coverage unless the insured affirmatively elected UM coverage in a lesser amount, and it retained the insured's option to reject all UM coverage. The statute as amended expressly states that it is not applicable where the insured named in the policy rejects the coverage in writing, need not be provided in a renewal policy where a named insured has previously rejected coverage, and need not be increased upon renewal of the policy from the amount shown on the declarations page for coverage existing prior to July 1, 2001.

INTRA-FAMILY EXCLUSION IN SUPPLEMENTAL LIABILITY POLICY IS NOT AGAINST PUBLIC POLICY.

Hoque v. Empire Fire & Marine Ins. Co., 281 Ga. App. 810, 637 S.E. 2d 465 (Oct. 6, 2006)

FACTS: Decedent rented automobile from Thrifty Car Rental receiving the minimum mandatory liability insurance coverage through National Casualty. In addition, decedent elected supplemental liability insurance coverage of $1,000,000. This supplemental policy included a provision excluding such supplemental liability insurance coverage for losses resulting from claims brought by family members of the insured. Subsequently, the decedent crashed into a concrete barrier at approximately 100 mph killing himself, his wife, and both of his children. The administrator of the decedent's wife's estate received the policy limits of the minimum mandatory liability insurance policy and sued her husband's estate and Empire claiming that the policy's intra-family exclusion in the supplemental policy was void as contrary to public policy.

HELD: The Court of Appeals affirmed the trial court's grant of Empire's motion to dismiss on the grounds that Empire's intra-family exclusion did not prevent recovery of the compulsory minimum insurance amount as required by the Legislature which sets public policy.

RATIONALE: The Court of Appeals discussed a line of cases which hold that Georgia's compulsory insurance law does not establish public policy as to sums greater than those required by law. Since the intra-family exclusion in the Empire policy did not prevent the decedent's wife's estate from collecting the minimum mandatory amount of liability coverage, it did not violate public policy.

NO FAULT INSURANCE REQUIRED FOR SCHOOL CHILDREN RIDING SCHOOL BUSES IS SATISFIED MORE APPROPRIATELY BY MEDICAL PAYMENTS COVERAGE AND ITS LIMITS, NOT LIABILITY COVERAGE LIMITS.

Coregis Ins. Co. v. Nelson, 282 Ga. App. 488, 639 S.E. 2d 365 (Nov. 20, 2006)

FACTS: A student was seriously injured while exiting from the rear of a school bus. The bus engine backfired spewing flames, carbon, hot tar, and exhaust gases from the tailpipe onto the student's face, neck, and ear. The Houston County Board

of Education's insurer, Coregis, issued a policy providing liability insurance coverage in the amount of $1,000,000 per accident with a separate provision providing medical payments coverage of $5,000 per person. The trial court denied Coregis' motion for summary judgment holding that the liability limits of $1,000,000 were applicable to the School Board's obligations to provide no-fault insurance pursuant to O.C.G.A. § 20-2-1090. The case proceeded to trial where the jury awarded almost $100,000 in damages.

HELD: The trial court erred in denying summary judgment to Coregis. Medical payments coverage of $5,000 satisfied the statute.

RATIONALE: O.C.G.A. § 20-2-1090, which requires that School Boards maintain no-fault insurance on school children riding school buses in an amount "within the discretion of the respective Boards," is a statute mandating no-fault accident coverage for school children, the proceeds of which are recoverable without proof of liability. In this case, the medical payments provision of the policy met the requirements of § 20-2-1090, and it was error for the Court to find that the liability limits were applicable.

INSURERS FOR OWNER AND PROPERTY MANAGER WERE CO-PRIMARY AND SHARED INDEMNITY AND DEFENSE COSTS ON 50-50 BASIS.

Graphic Arts Mut. Ins. Co. v. Essex Ins. Co., 465 F.Supp. 2d 1290 (N.D.Ga. Dec. 8, 2006)

FACTS: Owner's insurer defended both owner and additional insured property manager in bodily injury suit filed by tenant. Property manager's insurer did not contribute to defense costs, but it did pay 50% of the settlement with plaintiff.

HELD: Owner's insurer and property manager's insurer were co-primary with regard to coverage for property manager. Even though property manager's insurer did not insure owner, the settlement and defense costs would be shared on a 50-50-basis. Owner's insurer had a right to sue the property manager's insurer for contribution of defense costs.

RATIONALE: The owner's insurer and the property manager's insurer were co-primary on the property manager's coverage, because the property manager was not an additional insured by endorsement. It was an additional insured under the

"Who is an Insured" section of the basic policy. Therefore, according to the other-insurance provision in the basic policy, the two insurers were co-primary and were required to pay indemnity coverage on a 50-50 basis. The court refused to allocate the settlement on a 75-25 basis, even though it was undisputed that the property manager's insurer did not cover the owner. The court did not want to allocate fault between the owner and the property manager. The owner's insurer had a right to sue the property manager's insurer for contribution on defense costs, because the similarity in the other-insurance clauses in the two policies constituted "a sufficient contractual arrangement to allow [owner's insurer] to seek contribution from [property insurer.]" Barton and Ludwig v. Fidelity and Deposit Co. of Md., 570 F. Supp. 1470, 1472 (N.D.Ga. 1983) is distinguished.

INSURER DOES NOT WAIVE THE ONE YEAR CONTRACTUAL LIMITATIONS PERIOD BY INVESTIGATING CLAIM OR MAKING SETTLEMENT OFFER THAT IS REJECTED.

Georgia Farm Bureau Mut. Ins. Co. v. Pawlowski, 2007 WL 465765 (Ga. App.) (Court of Appeals No. A06A2011)(Feb. 14, 2007)

FACTS: A pipe burst in the insureds' home in October of 2002 causing considerable property damage. In March of 2003, Farm Bureau forwarded a settlement check for approximately $7,200 which was rejected as insufficient to cover the damages. Thereafter, the insureds notified Farm Bureau that it had identified elevated levels of mold within the residence. Farm Bureau took no additional action on the claim after July of 2003. The insureds sued Farm Bureau on July 8, 2004, in contract and tort alleging that its failure to repair the water damage resulted in toxic mold growth causing deterioration of their physical and mental health. The trial court denied Farm Bureau's motion for summary judgment which was based on its one-year contractual limitation period in the policy.

HELD: The trial court erred in denying Farm Bureau's motion for summary judgment. The one-year contractual limitation period was enforceable, and Farm Bureau did not waive it.

RATIONALE: The Court of Appeals found no evidence of any fraudulent inducement by Farm Bureau which lead the insureds to believe that it had waived the one-year contractual limitation. The mere fact that Farm Bureau investigated and offered to settle the claim did not suggest that it tried to trick the insureds into

believing that it intended to extend the one-year period of limitation. Auto Owners Ins. Co. v. Ogden was factually distinguishable.

AUTOMOBILE POLICY DID NOT PROVIDE LIABILITY COVERAGE FOR VEHICLE WHERE INSURED HAD PURCHASED ONLY PROPERTY COVERAGE.

Simalton v. AIU Ins. Co., 2007 WL 738761 (Ga. App.) (Court of Appeals No. A06A1878)(March 13, 2007)

FACTS: The insured drove a Camry in a business pursuit in which his company transported individuals to medical and related appointments. The business did not have automobile insurance, and the Camry was insured under a personal automobile policy which listed six different cars. However, the declarations page reflected that, unlike the other cars, "no coverage" was purchased for the Camry for liability, medical payments, or UM coverage. Instead, the Camry was only covered under Part D entitled, "Coverage for Damage to Your Auto." The trial court granted summary judgment to the insurer finding no coverage under the policy for claims asserted against the insured by one of his passengers during a business pursuit.

HELD: The Court of Appeals affirmed the grant of summary judgment holding that the insurer owed no duty to defend or indemnify the insured in the action brought by the passenger.

RATIONALE: The Court of Appeals rejected appellant's argument that the policy was ambiguous as to whether it provided liability coverage for the Camry citing the declarations page as the means by which the insurer tailors the standard form policy and establishes the types of coverages actually purchased. The Court also rejected the argument that the policy must be read to include the minimum limits of liability as required by O.C.G.A. § 33-34-3(a)(1). In this case, the policy complied with the statute. However, nothing in the statute or the policy mandated that the insurer require its insureds to elect liability coverage for every auto listed on the policy. The insurer is not obligated to provide the insured ". . . with coverage which, although available, he chose not to purchase."

WITHOUT CORROBORATING WITNESS, UM COVERAGE NOT AFFORDED FOR LADDER LEFT IN THE ROAD.

Hohman v. State Farm Fire & Casualty Auto. Ins. Co., 283 Ga. App. 430, 641 S.E. 2d 650 (Court of Appeals No. A06A2107)(Feb. 5, 2007)

FACTS: Plaintiff was injured when she swerved to avoid a vehicle which drove into her path to avoid a ladder in the highway. She brought a John Doe action against State Farm alleging that an unknown motorist had negligently allowed a ladder to be left in the roadway. The trial court granted summary judgment in favor of the insurer.

HELD: The grant of summary judgment was affirmed where no eyewitness existed who could testify that a negligently secured ladder fell from a phantom vehicle into the roadway.

RATIONALE: The Court of Appeals rejected the insured's argument that a jury could infer that a ladder fell from a vehicle onto the highway. The Court distinguished this case from a situation in which an "integral part" of an unknown vehicle obstructs the roadway. The mere fact that an unknown object is upon a highway is not sufficient to support a negligence claim against an unknown driver without a corroborating witness as required by O.C.G.A. § 33-7-11(b)(2).

INSURER IS NOT ESTOPPED FROM DENYING COVERAGE FOR DELETED VEHICLE AFTER STATING THAT COVERAGE EXISTS.

Danforth v. GEICO, 282 Ga. App 421, 638 S.E. 2d 852 (Nov. 16, 2006)(cert. denied, Feb. 5, 2007)

FACTS: The insured purchased a car for her 19 year old son and listed it on her policy. On April 3, 2003, she telephoned GEICO requesting that her son's auto be deleted from her policy and added to a new policy. A month later the son was involved in an accident with Danforth. In June, GEICO sent affidavits of coverage for both policies (the insured and her son). Thereafter, GEICO paid the property damage claim and submitted a second set of affidavits stating again that coverage existed under both policies. In September of 2003, GEICO sent a letter denying coverage under the mother's policy based on the mother's earlier deletion. The trial court granted summary judgment in favor of GEICO in its declaratory judgment action.

HELD: Summary judgment affirmed. GEICO's affidavits of coverage and other acts did not constitute waiver of any provisions of the policy, and it was not estopped from denying coverage under the mother's policy.

RATIONALE: GEICO's failure to mail notice of the deletion of the son's vehicle from the mother's policy did not prevent it from relying upon the deletion where the mother was clearly aware of the deletion since she requested it. Further, her request to delete the vehicle was supported by consideration because a refund check was sent, and a new policy was issued. The doctrine of implied waiver and estoppel based on the conduct or action of the insurer was not available to bring within the coverage of the policy risks not covered by its terms.

DECLARATORY JUDGMENT ON INDEMNITY IS PREMATURE BEFORE THERE IS A JUDGMENT AGAINST THE INSURED; REFUSING TO SETTLE A CASE AT MEDIATION DUE TO LACK OF COVERAGE DOES NOT EQUATE WITH REFUSING TO DEFEND A CASE; COURT REFUSES TO DISMISS INSURED'S REQUEST FOR PAYMENT OF INDEPENDENT COUNSEL'S ATTORNEY'S FEES

Utility Service Co. v. St. Paul Travelers Ins. Co., 2007 WL 188237 (N.D.Ga. January 22, 2007)

FACTS: Liability carrier agreed to defend insured under a reservation of rights and chose defense counsel to defend insured. At mediation, the liability carrier announced that its policy did not cover the underlying suit and refused to contribute to a settlement. Insured then retained independent counsel to help it defend the case. Insured then filed declaratory judgment action against insurer and asked the court to declare that liability carrier had duty to indemnify insured and sought attorneys' fees for its independent counsel.

HELD: Refusing to contribute to a settlement, due to lack of coverage, but continuing to defend the insured did not constitute a withdrawal of its duty to defend. The request for declaratory judgment on indemnity coverage was premature. A motion to dismiss claim for independent counsel's fees was dismissed due to lack of legal authority.

RATIONALE: The duty to defend and duty to indemnify are separate. The duty to indemnify is triggered only after the insured becomes obligated to pay damages. The court would not declare a duty to indemnify until a judgment

against an insured had been rendered. Refusing to contribute to a settlement did not constitute withdrawal of the defense, when the insurance company was still paying defense lawyers to defend the insured.

Significantly, the court refused to dismiss the insured's request for payment of its independent counsel's fees. The insured's request was based on *American Family Life Assurance Co. of Columbus, Ga. v. U.S. Fire Ins. Co.* 885 F.2d 826 (11th Cir. 1989). This is potentially significant since other states have held that insurers have to pay the insured's independent counsel, when they elect to defend under a reservation of rights.

MISREPRESENTATIONS IN THE APPLICATION MATERIAL TO THE RISK ARE SUFFIENT TO VOID COVERAGE.

T. J. Blake Trucking, Inc. v. Alea London, Ltd., 2007 WL 602392 (Court of Appeals No. A06A1916)(Feb. 28, 2007)

FACTS: Blake applied for insurance on two dump trucks responding "no" to the question of whether there had been any accidents or theft losses in the last five years. Thereafter, an unlisted driver was involved in an accident. Blake called the carrier to request that the driver be added to the policy four minutes before the accident was reported. The driver was cited as violating the maximum gross weight authorized for the truck and disobeying a traffic control device. His driving record showed numerous violations, including a suspended license and reckless driving charges. It was undisputed that the insured had been involved in previous accidents and a theft loss within five years of the application. The trial court granted summary judgment in favor of the insurer.

HELD: Summary judgment was affirmed where the uncontroverted evidence established that the misrepresentations within the application were material to the risk.

RATIONALE: Regardless of whether the application became a part of the policy, the misrepresentations therein violated O.C.G.A. § 33-24-7 which states that misrepresentations, etc., shall not prevent a recovery under a policy unless such conduct was fraudulent, material to the acceptance of the risk, or the insurer in good faith would not have issued the policy or would have charged a different premium. The uncontroverted testimony of an underwriter met the test of whether the misrepresentation was material, that is, whether there was a substantial increase in the risk.

DECLARATORY RELIEF NOT AVAILABLE TO ONE INSURER SEEKING TO ESTABLISH ANOTHER INSURER'S DUTY TO DEFEND AND INDEMNIFY

State Farm Automobile Ins. Co. v. Metropolitan Property and Casualty Ins. Co., 2007 WL 852367 (Ga. App.) (Court of Appeals No. A06A2429) (Mar. 22, 2007)

FACTS: Metropolitan filed a declaratory judgment action against State Farm seeking a declaration that State Farm provided excess liability coverage and had a duty to defend Gilbert, the at-fault deceased driver. At the time of the accident, Gilbert was driving a vehicle with primary liability insurance through Nationwide. Gilbert's step-father had two personal automobile liability policies which also allegedly provided liability coverage; Metropolitan and State Farm. Metropolitan acknowledged that its policy was in full force and effect and insured Gilbert while State Farm denied coverage. Metropolitan sought a ruling that State Farm had liability coverage for Gilbert and for the accident. Trial court denied State Farm's motion for summary judgment and entered a declaratory judgment that State Farm's policy afforded coverage to Gilbert and had a duty to defend.

HELD: The Court of Appeals vacated the judgment and remanded with direction to dismiss the case because a declaratory judgment was not authorized.

RATIONALE: Metropolitan failed to show that it was in a position of uncertainty or insecurity because of a dispute and in the position of having to take some future action that, without direction from the Court, might reasonably jeopardize its interest. Metropolitan admitted that it provided coverage and a duty to defend. It failed to show that an adjudication of its rights prior to trial was necessary to relieve it from the risk of taking undirected action which would jeopardize its interest. The mere receipt of a settlement demand in the underlying claim in excess of its policy limits did not create any such position of uncertainty or insecurity.

AN ASSAULT AND BATTERY EXCLUSION WAS NOT AMBIGIOUS AND BARRED COVERAGE FOR DAMAGES CLAIMS ARISING FROM SHOOTING ON THE INSURED'S PREMISES.

First Specialty Ins. Corp. v. Flowers, 2007 WL 900976 (Court of Appeals Case No. A06A2186)(March 27, 2007)

FACTS: Patron was attacked while exiting his car on insured's premises. The attacker produced a gun, robbed the patron, and then shot and killed him. The patron's estate brought a wrongful death action alleging that the insured failed to take reasonable steps to keep the premises safe. First Specialty's commercial general liability policy afforded coverage up to $1 million per "occurrence" but also contained an exclusion for assault and battery "of any nature whatsoever, whether or not committed by or at the direction of the insured, his employees, patrons, or any causes whatsoever." First Specialty filed a declaratory judgment action, and the trial court denied its motion for summary judgment seeking to enforce the exclusion.

HELD: The Court of Appeals reversed the trial court and held that the claim as set forth in the complaint unambiguously fell within the assault and battery exclusion.

RATIONALE: The Court looked to the allegations of the complaint and found that the claim was clearly a claim or "suit" for death caused by or arising directly or indirectly out of or from an assault or assault and battery. It rejected appellee's argument that the exclusion was ambiguous because it included the phrase "or any causes whatsoever." Appellee's claim that the complaint did not allege an assault and battery was also found to be without merit.