

GEORGIA AUTO INSURANCE CLAIMS LAW SEMINAR

Frank E. Jenkins, III
JENKINS & BOWEN, P.C.
15 South Public Square
Cartersville, Georgia 30120
(770) 387-1373

Wallace Miller, III
WALLACE MILLER, III, LLC
509 Forest Hills Road
Macon, Georgia 30209
(478) 474-4145



PROSECUTING AND DEFENDING UNINSURED
MOTORIST CLAIMS, INCLUDING STACKING OF
UNINSURED MOTORIST COVERAGE

§29-1 What is uninsured motorist coverage?

It is “insurance against lack of insurance.”

§34-3 Requirement of judgment against uninsured motorist

§36:5 When to serve UM carrier?

- Reasonable belief
- Renewal statute and late service generally
- Renewal statute and late service on UM carrier

§36:6 How to serve UM carrier?

“[S]erved . . . upon the insurance company . . . as though the insurance company were actually named as a party defendant.”

O.C.G.A. §33-7-11(d).

§37:1 UM carrier's defense election

- Generally
- *Moss* – party-defendant
- Election not irreversible

§37:20 Proving uninsured status of tortfeasor

§37:21 Proving existence of UM coverage

**§38:4 Punitive damages
are not recoverable
under UM coverage.**



WHAT IS AN UNDERINSURED MOTORIST?

Assume the tortfeasor has liability coverage in the amount of \$25,000.

Assume the plaintiff has UM coverage in the amount of \$100,000.

Result. The tortfeasor is **underinsured** to the tune of \$75,000.

\$ 100,000 UM coverage

– 25,000 Liability coverage

\$ 75,000 Underinsured

TWO CLASSES OF INSURED

- (1) Named insured and resident relatives are covered “while in a motor vehicle *or otherwise*.”
- (2) Any person who uses the insured motor vehicle with the expressed or implied consent of the named insured.

See §30:1.

WHEN CAN YOU “STACK” UM COVERAGES?

Only when there are multiple policies.

Not when there are multiple UM coverages under the same policy.

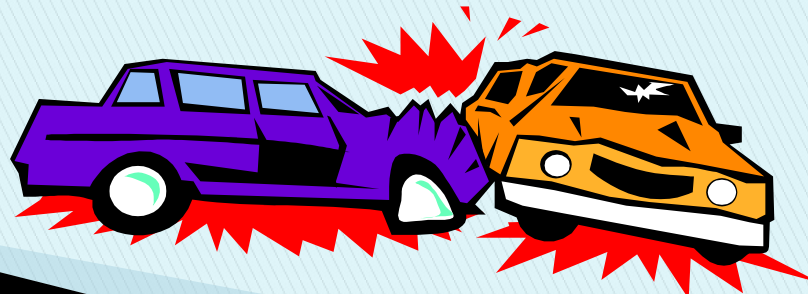
See §§39:2 and 39:3.

You are a passenger in my car.

We are struck by a tortfeasor.

You are injured and are the plaintiff.

Your claim is worth \$30,000.



INJURY: \$ 30,000 Value

TORTFEASOR: \$ 25,000 Liability

HOST DRIVER: \$ 25,000 UM (Ga. Farm)

PLAINTIFF: \$ 25,000 UM (State Farm)

Who pays first?

The tortfeasor's liability coverage pays first.

But, that's only \$25,000 of the \$30,000 claim.

Who pays the remaining \$5,000?

Your carrier, State Farm, pays the remaining \$5,000.

Why?

Because State Farm received the premium from you, the plaintiff.

Under the “receipt of premium” test, the plaintiff’s personal UM policy is primary.

See §39:7.



The plaintiff is driving her employer's vehicle and is injured by a tortfeasor.

Assume the claim is worth \$100,000.

TORTFEASOR: \$ 25,000 Liability

EMPLOYER: \$ 40,000 UM (Travelers)

MOM: \$ 50,000 UM (Maryland)

Who pays first?

Who pays second?

Who pays third?

Who gets the set-off?

The tortfeasor's liability coverage pays first.

Mom's UM coverage with Maryland Casualty is the primary UM coverage, so it pays second.

The employer's UM coverage with Travelers is the secondary UM coverage. It pays last.

Why is mom's UM coverage with Maryland Casualty primary?

Because the claimant is “more closely identified with” her mom's policy than with her employer's policy.

See §39:8.

Since Travelers is the “last in line” UM carrier, i.e., secondary, it gets the credit or set-off for the tortfeasor’s liability coverage of \$25,000.

Thus, Travelers pays only \$15,000 ($\$40,000 - \$25,000 = \$15,000$).

The total recovery is \$90,000.

EXAMPLE

Claimant resides with her sister and grandmother.

Sister has policy with Allstate that provides \$25,000 in UM coverage.

Grandmother has policy with State Farm that provides \$25,000 in UM coverage.

Claimant is injured by totally uninsured motorist.

Value of claim is \$30,000.

Who pays what?

Rules of Intestacy Inheritance

O.C.G.A. §53-2-1(c)

Siblings of a decedent are in the third degree.

Grandparents of a decedent are in the fourth degree.

Progressive Classic Ins. Co. v. Nationwide Mut. Fire Ins. Co., 294 Ga. App. 787, 670 S.E.2d 497 (2008); see §39:8(f).

PAYMENT BREAK OUT:

Sister's UM coverage (Allstate)	\$ 25,000
Grandma's UM coverage (State Farm)	\$ 5,000
Total Recovery	\$ 30,000

Uninsured motorist negligently drove into the path of a dump truck operated by plaintiff, causing a collision from which plaintiff sustained injuries.

Great Divide Ins. Co. v. Safeco Ins. Co., 260 Ga. App. 531, 580 S.E.2d 313 (2003).

See §39:8(e).

The Great Divide policy described the dump truck as an insured vehicle and was issued to plaintiff “d/b/a” his trucking business -- a sole proprietorship.

The Safeco policy was issued to plaintiff and described plaintiff’s personal vehicle.

Plaintiff paid premiums to both UM carriers.



Great Divide



Safeco



But, how do you determine the priority of UM coverage, where there are two policies issued to the injured person as the named insured.

When it created the “more closely identified with” test, the Georgia Court of Appeals said that the controlling factor is “**the relationship of *the injured plaintiff to the policy* rather than *the circumstances of the injury to the policy.*”**

Under these facts, the courts
“*must* look at *the circumstances
of the injury* to determine
priority of coverage.”

Since plaintiff was “operating his dump truck in furtherance of his pecuniary interests at the time of the accident,” plaintiff was more closely identified with the Great Divide policy.



That policy -- which specifically covered the dump truck involved in the collision -- was primary, and the Safeco policy was secondary.

Thus, a sub-set of the “more closely identified with” test has emerged as a third, sequential test to be applied in determining UM coverage priority.

This third test is the “circumstances of the injury” test.

“As a matter of law, there can be no proration of stackable uninsured motorist coverage.”

Continental Ins. Co. v. Southern Guar. Ins. Co., 193 Ga. App. 395, 397(3), 388 S.E.2d 16 (1989).

See §39:10(a) (second paragraph).

Wife owns a Jeep insured by State Farm, with \$25,000 UM coverage. Husband and wife reside together.

Husband owns a Chevrolet Impala insured by State Farm, with \$25,000 UM coverage.

Husband also owns a Harley-Davidson motorcycle insured by Dairyland, with \$25,000 UM coverage.



Wife, while driving her Jeep, is struck and injured by a tortfeasor, with \$25,000 in liability coverage.



WIFE'S INJURY: \$100,000 Value

TORTFEASOR: \$ 25,000 Liability

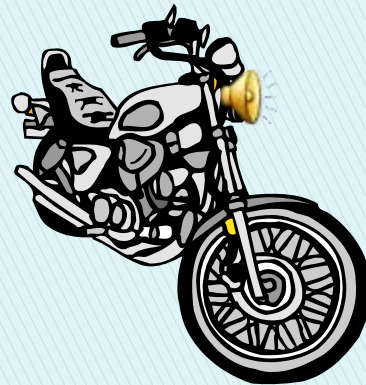
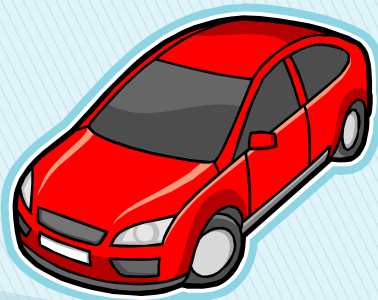
WIFE'S JEEP: \$ 25,000 UM (State Farm)

HUSBAND'S
IMPALA: \$ 25,000 UM (State Farm)

HUSBAND'S
HARLEY: \$ 25,000 UM (Dairyland)

Who gets the \$25,000 set-off for the tortfeasor's liability coverage?

State Farm or Dairyland?



The court recognized proration in *Dairyland Ins. Co. v. State Farm Auto. Ins. Co.*, 289 Ga. App. 216, 656 S.E.2d 560 (2008).

See §39:10.

The last test is proration.

See §39:10.

“ADDED ON” versus “REDUCED”

UM COVERAGE

EXAMPLE

Tortfeasor fails to stop at a red light, hits your car and causes you to have \$175,000 in damages.

Tortfeasor has \$50,000 in liability coverage.

You have \$100,000 in UM coverage.

TRADITIONAL OR “REDUCED” UM COVERAGE

Tortfeasor: \$ 50,000 Liability Coverage

Plaintiff: \$100,000 “Reduced” UM Coverage

Damages: \$175,000

PAYMENT BREAK OUT:

Tortfeasor's Liability Coverage	\$ 50,000
"Reduced" UM Coverage	\$100,000
Total Recovery	\$100,000
Amount Not Covered	\$ 75,000

“ADDED ON” UM COVERAGE

Tortfeasor: \$ 50,000 Liability

Plaintiff: \$100,000 “Added On” UM

Damages: \$175,000

PAYMENT BREAK OUT

Tortfeasor's Liability Coverage	\$ 50,000
"Added On" UM Coverage	\$100,000
Total Recovery	\$150,000
Amount Not Covered	\$ 25,000

EXAMPLE

Tortfeasor fails to stop at a red light, hits your car and causes you to have \$175,000 in damages.

Tortfeasor has \$100,000 in liability coverage.

You have \$25,000 in UM coverage.

“ADDED ON” UM COVERAGE

Tortfeasor: \$ 100,000 Liability

Plaintiff: \$ 25,000 “Added On” UM

Damages: \$ 175,000

PAYMENT BREAK OUT

Tortfeasor's Liability Coverage	\$100,000
"Added On" UM Coverage	\$ 25,000
Total Recovery	\$125,000
Amount Not Covered	\$ 50,000

STACKING “REDUCED” AND “ADDED ON” UM COVERAGES

Tortfeasor	\$25,000 Liability
Primary UM Carrier	\$25,000 “Reduced” UM
Secondary UM Carrier	\$25,000 “Reduced” UM
Tertiary UM Carrier	\$25,000 “Added On” UM

Which, if any, UM carrier gets the liability coverage set-off?

§39:5(d)

FINDING AND STACKING LIABILITY COVERAGE: DUTY OF PLAINTIFF'S AND DEFENDANT'S COUNSEL TO DISCOVER ALL LIABILITY INSURANCE COVERAGE

A person to be covered under an auto policy must be:

1. An insured under the policy,
2. Not contractually excluded from coverage, and
3. Not using an auto excluded from coverage.

1. Omnibus Insureds

- Named Insured
- Resident Relative
- Permissive User
- Vicarious Insured

2. Not contractually excluded from coverage

- Chapter 14

3. Using Auto Subject to Policy Exclusions Which Prevent Stacking:

- Another unlisted auto owned by a named insured
- Another unlisted auto furnished or available for a named insured's regular use
- Auto owned by a family member
- Auto furnished or available for the regular use of a family member

Public Policy:

- Public policy (financial responsibility laws) will trump contractual exclusions – §14.1

Cotton States Mutual Insurance Company v. Neese, 254 Ga.App. 335, 329 S.E.2d 136 (1985)

Public policy that “innocent persons who are injured should have an adequate recourse for the recovery of their damages.”

Anderson v. Southeastern Fidelity Insurance Company, 251 Ga. 556 (1983)

Policy exclusions generally enforced where other insurance available, including UM coverage.

Stacking Multiple Liability Policies

- Stacking is available where two or more liability policies cover the same loss
- Example: Where insured under a personal liability policy is driving a non-owned auto
- Example: Where driver is insured under one or more liability policies issued to a relative living in the same household

Primary Liability Coverage

The first rule of priority of coverage is laid down by decisional law: “Insurance follows the car.”

Georgia Casualty & Surety Co. v. Waters, 146 Ga.App. 149, 246 S.E.2d 202 (1978)

Contractual Rules of Stacking

Except as required by decisional and statutory law, insurers are free to establish their own rules of stacking as long as they do not violate the public policy.

See the “Other Insurance” Clause

Georgia Farm Bureau Mutual Insurance Company v. Shook, 215 Ga.App. 66, 449 S.E.2d 658 (1994)

Statutory Exceptions to “Insurance Follows the Car”

1. Auto Dealers, § 19.1
O.C.G.A. § 33-34-3(d)
2. Rental Car Agencies, § 19.8
O.C.G.A. § 40-9-102
3. Insolvent Insurers, Chapters 41-43
O.C.G.A. § 33-36-1 et seq.

Mutual Insurer's Anti-Stacking Provisions

Mutual insurance company policy will limit liability coverage to that covering the use of the auto listed on the policy.

Stock Liability Insurance Company's Anti-Stacking Provisions

Stock company liability policies limit coverage to that amount shown on the declaration page, regardless of the number of autos listed on the policy.

Counsel Has Duty to Find
All Coverage Available to
Client, Regardless of
Whether Client is Plaintiff
or Defendant.

Discovery

1. Do you live with a relative?
2. Does that relative have a motor vehicle?
3. Is there a policy insuring that vehicle?
4. Hand it over.

Example 1

A owns two cars insured by XYZ insurance company, a stock company with limits of \$25,000/\$50,000.

B, A's uncle, resides with A.

B owns one car insured by ABC insurance company, a stock company with limits of \$25,000/\$50,000.

A negligently causes an accident injuring one person while driving one of his cars.

How much liability coverage does A have?

Example 2

A owns two cars insured by XYZ insurance company, a stock company with limits of \$25,000/\$50,000.

B, A's sister, resides with A.

B owns one car insured by ABC insurance company, a stock company with limits of \$25,000/\$50,000.

A, while driving B's car, negligently causes an accident with another automobile and injures one person.

How much liability coverage does A have?

Example 3

A owns two cars, one insured by ABC insurance company and the other by XYZ insurance company, stock companies with limits of \$25,000/\$50,000 each.

B, A's son, resides with A and owns a car insured by Georgia Barn Bureau insurance company, a stock company with limits of \$25,000/\$50,000.

C, A's daughter, resides with A and B, but doesn't own a car. She negligently causes an accident while driving her boyfriend's auto from his apartment to her house and injures one person.

Her boyfriend's auto is covered by a liability policy issued by Smallstate insurance company, a stock company with liability limits of \$25,000/\$50,000.

How much liability coverage does C have?

PROSECUTING AND DEFENDING BAD FAITH CLAIMS: STATUTORY AND TORT BAD FAITH CLAIMS

The contractual right of an insured to compromise and settle a claim or action against the insured is found in the personal auto policy as follows:

We will settle or defend, as we consider appropriate, any claim or suit asking for these damages [bodily injury or property damage]

Personal Auto Policy, Part A – Liability Coverage

Subsection A

The insurer's duty to its insured is to exercise the proper degree of care to protect the insured's personal assets from liability arising out of a claim covered under the policy.

Baker v. Huff, 323 Ga.App. 357, 747 S.E.2d 1 (2013)

An insured's personal assets are subject to liability for the claim where the judgment against the insured is in excess of the policy limit payable by the insurer.

**If a judgment falls within the insurer's policy limits,
then the judgment is satisfied and no issue of bad
faith on the part of the insurer arises.**

Whether an insurer exercised the proper degree of care in protecting the insured's interest arises where the judgment against the insured is in excess of the policy limits.

Could the insurer have settled the claims against its insured within its policy limit? If so, what is the standard of care that an insurer will be held to in deciding whether to settle a claim within the policy limits?

An insurer may be liable for an excess judgment based on its bad faith or negligent refusal to settle within the policy limit.

Cotton States Mutual Insurance Company v. Brightman,
276 Ga. 683 580 S.E.2d 519 (2003)

Baker v. Huff, 323 Ga.App. 357, 747 S.E.2d 1 (2013)

Applying the ordinarily prudent insurer standard, an “insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk.”

Fortner v. Grange Mutual Insurance Company, 286 Ga. 189, 686 S.E.2d 93 (2009); Cotton States Mutual Insurance Company v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003); Baker v. Huff, 323 Ga.App. 357, 747 S.E.2d 1(2013)

“An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim.”

Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992)

In deciding whether to settle a claim within the policy limits, an insurer must give equal consideration to the interest of the insured as it does to its own interest.

Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992); Baker v. Huff, 323 Ga.App. 357, 747 S.E.2d 1 (2013)

“To promote equal consideration of these interests, the applicable standard of care requires that the insurer ‘must use such care as would have been used by an ordinarily prudent insurer with no policy limit applicable to the claim.’”

Baker v. Huff, 323 Ga.App. 357, 747 S.E.2d 1 (2013)

US Fidelity & Guaranty Co. v. Evans, 116 Ga.App. 93 (1967)

The mere refusal of an insurer to settle within its policy limits does not subject the insurer to liability for an excess judgment.

Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992) ; Baker v. Huff, 323 Ga.App. 357, 747 S.E.2d 1 (2013)

An insurer does not have a duty to make a counteroffer to every settlement demand that involves a condition beyond its control. But in facing a demand involving multiple insurers, an insurer can create a safe harbor from liability by meeting that part of the demand over which it has control.

Cotton States Mutual Insurance Company v. Brightman,
276 Ga. 683, 580 S.E.2d 519 (2003)

An insurer's tender of its policy limits may not absolve it of excess liability where it places a condition on acceptance of the policy limits, such as a general release. A jury may be authorized to consider whether the conditions imposed on a policy limits offer was a reasonable response to a settlement offer.

Fortner v. Grange Mutual Insurance Company, 286 Ga. 189, 686 S.E.2d 93 (2009)

An insurer does not have an affirmative duty to engage in negotiation in response to a settlement demand in excess of the insurer's policy limits.

Cotton States Mutual Insurance Company v.

Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003);

Cotton States v. Fields, 106 Ga.App. 740, 128 S.E.2d 358 (1962)

Baker v. Huff, 323 Ga.App. 357, 747 S.E.2d 1 (2013)

If an insurer appeals an excess judgment, it has an even higher duty to settle a claim if a demand for settlement is less than the policy limits.

US Fidelity & Guaranty Company v. Evans, 116

Ga.App. 93, 156 S.E.2d 809 (1967), *aff'd*, 223 Ga. 789, 158 S.E.2d 243 (1967)

An insurer may be liable for bad faith refusal to settle within its policy limits where it failed to reach a settlement within a time-limited deadline imposed by the claimant.

Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992)

An insured is not entitled to recover bad faith penalties under O.C.G.A. § 33-4-6 because the insurer does not have a contractual duty to settle a claim. Statutory bad faith penalties sound in tort and arise only upon failure of the insurer's negligent failure to meet a contractual obligation set forth in the policy.

The insurer's duty of care in negotiating the settlement of a claim is owed to its insured, not to the claimant.

Even if the claimant obtains a judgment against an insured in excess of the policy limits, it is not a party to the liability policy, does not have a fiduciary relationship with the insurer, nor is there privity of contract.

A claimant who is successful in obtaining an excess judgment against an insured does not have a cause of action against the insurer, only the insured has a claim for bad faith for the insurer's failure to settle within the policy limits.

Cotton States Mutual Insurance Company v. Brightman,
276 Ga. 683, 580 S.E.2d 519 (2003)

An insured may assign a bad faith claim to the claimant.

Cotton States Mutual Insurance Company v.

Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003)

A claim for bad faith refusal to settle sounds in tort and may give rise to a claim for punitive damages.

But the claim for punitive damages lies only with the insured and may not be assigned.

Empire Fire & Marine Insurance Company v. Driskell,
264 Ga.App. 646, 592 S.E.2d 80 (2008);

Southern General Insurance Company v. Holt, 262 Ga.
267, 416 S.E.2d 274 (1992)

In responding to a demand for settlement, if an insurer insists on a condition, such as a general release, that was not part of the demand, it is deemed a counteroffer and thus not a binding settlement offer.

Frickey v. Jones, 280 Ga. 573, 630 S.E.2d 374 (2006)

§ 9-11-67.1 OFFER TO SETTLE TORT CLAIM MUST BE IN WRITING

A time-limited demand for settlement prepared by or with the assistance of an attorney shall be in writing and contain the following material terms:

1. The time period within which such offer must be accepted but not less than 30 days from the receipt of the offer,
2. The amount of monetary payment,
3. The party the claimant will release if the offer is accepted,
4. The type of release, if any, the claimant will provide to each releasee, and
5. The claims to be released.

An offer to settle under this code section must be sent by certified mail or statutory overnight delivery, return receipt requested, and must specifically reference this code section (§ 9-11-67.1).

Recipients of a time-limited demand shall have the right to seek clarification, including liens, other claims, medical bills, and other relevant facts, and such requests shall not be deemed a counteroffer.

A demand under this code section may require payment within a specified time after acceptance, but not less than 10 days.

**Statute only applies to
causes of action arising
on or after July 1, 2013.**

STATUTORY BAD FAITH CLAIMS

- First Party Claims
O.C.G.A. § 33-4-6
- Third Party Property Damage Claims
O.C.G.A. § 33-4-7
- Uninsured Motorists Claims
O.C.G.A. § 33-7-11(j)

1st PARTY CLAIMS FOR BAD FAITH

1. Loss under Policy
2. Demand by Insured
3. 60 Days to Respond
4. Refusal in Bad Faith

BAD FAITH ATTORNEY'S FEES

1. Fees Determined by Jury
2. Based on Expert Evidence
3. Court May Increase or Decrease
4. Attorney's Contract Not Control

3RD PARTY PROPERTY DAMAGE CLAIMS – OCGA § 33-4-7

Imposes penalties on 3rd party liability insurer where insurer refuses in bad faith to settle property damage claim.

PROCEDURES (O.C.G.A. § 33-4-7)

1. Demand Letter
2. Settle for Amount Certain
3. Refuse to Settle
4. After 60 Days, File Suit
5. Lawsuit Served on Insurer without Name
6. Recover at Least Amount Demanded

BAD FAITH: 3RD PARTY PROPERTY DAMAGE CLAIM AFFIRMATIVE DUTIES

1. Adjust Fairly & Promptly
2. Reasonable Effort to Investigate
& Evaluate
3. Good Faith Effort to Settle
Where Liability Reasonably Clear

BAD FAITH ATTORNEY'S FEES

1. Fees Determined by Jury
2. Based on Expert Evidence
3. Court May Increase or Decrease
4. Attorney's Contract Not Control

UNINSURED MOTORIST BAD FAITH CLAIMS – OCGA § 33-7-11(j)

Imposes penalties on UM carrier that refuses in bad faith to pay UM benefits.

UM: PENALTIES FOR BAD FAITH REFUSAL TO SETTLE

- up to 25% of UM benefits
- all reasonable attorney's fees for prosecution of case

PROCEDURES FOR PERFECTING UM BAD FAITH PENALTIES

1. Demand for payment of UM benefits in certain amount
2. Demand may be made before or after suit filed against tort-feasor
3. Refusal of UM insurer to settle within 60 days of demand
4. In tort suit recover UM benefits of at least amount of demand
5. Must file separate action against UM insurer for bad faith penalties

UM BAD FAITH ATTORNEY'S FEES

1. Attorney's fees proved by expert witness
2. Based on reasonable values of services determined by time spent and legal and factual issues involved and prevailing fees in locality
3. If jury trial, court may increase or decrease award without affecting remainder of judgment
4. Amount of attorney's fees not controlled by attorney's fee contract

THE REIMBURSEMENT STATUTE

AND

ERISA REIMBURSEMENT CLAIMS

TYPICAL MED-PAY REIMBURSEMENT SCENARIO

Plaintiff is injured by a tortfeasor.

Tortfeasor has \$25,000 in liability coverage.

Plaintiff has med-pay coverage and is paid \$5,000 in med-pay benefits.

Tortfeasor's liability insurer settles plaintiff's personal injury claim for the \$25,000 liability limit.

Is plaintiff's med-pay insurer entitled to reimbursement?

See §28:9.

WHEN BENEFIT PROVIDER MAY REQUIRE REIMBURSEMENT

“In the event of recovery for personal injury from a third party . . . , the benefit provider . . . may require reimbursement from the injured party of benefits it has paid on account of the injury, *up to the amount allocated to those categories of damages in the settlement documents or judgment*, if:

(1). . . , and

(2)”

See §52:3.

“An ERISA plan overrides the make whole doctrine only if it includes language specifically allowing the plan the right of first reimbursement out of any recovery the participant was able to obtain, even if the participant were not made whole.”

Cagle v. Bruner, 112 F.3d 1510,
1522 (11th Cir. 1997).

“ . . . Congress authorized a [plan] participant or beneficiary to bring a civil action to enforce his rights under the terms of the plan, without reference to whether the relief sought is legal or equitable.”

“But Congress did not extend the same authorization to [ERISA plan] fiduciaries.”
Rather, only equitable relief is available to ERISA plans.

*Great-West Life & Annuity Ins.
Co. v. Knudson*, 534 U.S. 204,
221, 122 S.Ct. 708, 718, 151
L.Ed.2d 635 (2002).

See §53:4.

The *Knudson* decision prompted certain august legal circles to adopt the following mantra:

“SETTLE, DISBURSE, IGNORE!!”

See §53:4(i).

*Sereboff v. Mid Atlantic
Medical Services, Inc.*, 574
U.S. 1015, 126 S.Ct. 1869,
164 L.Ed.2d 612 (2006).

See §53:4(i).

Identifying self-funded ERISA plans

See §53:2.1.

FreeERISA.com

See §53:2.1(f).

**PRESERVING THE INSURER'S
COVERAGE DEFENSES:
RESERVATIONS OF RIGHT AND
DECLARATORY JUDGMENT ACTIONS**

Insurer Estopped to Deny Coverage

Where an insurer assumes and conducts a defense without notifying the insured that it is doing so with a reservation of right is deemed estopped from asserting non-coverage regardless of whether the insured can show prejudice.

World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.,
287 Ga. 149, 695 S.E.2d 6 (2010)

Waiver for Failure of Insured to Act Seasonably

An insurer must act seasonably to disclaim coverage and thus may not delay its decision on whether to accept or deny coverage to the point that it prejudices the ability of the insured to defend a damage suit.

Home Indemnity v. Godley, 122 Ga.App. 356, 177 S.E.2d 105 (1970)

Action of Insurer in Case of Coverage Defense

Where insurer knows a fact constituting a defense to coverage at the time an action is pending against its insured which requires the filing of a defense, the insurer has generally four alternative actions it may take:

1. An insurer may enter a defense on behalf of the insured without more, and thus waive policy defenses or claims of non-coverage.

2. The insurer may deny coverage and refuse to defend, thereby leaving the policy defenses open for future litigation.

3. The insurer may secure a mutual reservation of rights, provide a defense for the insured, and preserve the status quo, thereby allowing the insurer to raise the coverage issues in later litigation.

4. If the insured rejects a reservation of rights agreement, an insurer may send a unilateral notice of reservation of rights, enter a defense, and immediately seek declaratory judgment.

Richmond v. Georgia Farm Bureau Insurance Company, 140 GA.App. 215 (1976)

In Hoover v. Maxum Indemnity Company, 291 Ga. 402 (2012), the court listed only the first three options.

The Insured's Choices in Face of a Request for Reservation of Right

When an insured is presented with a reservation of rights, it generally has two choices:

1. It may accept the reservation of right and allow the insurer to provide a defense leaving open the question for later determination of whether coverage obtains under the applicable policy.
2. Reject a mutual reservation of rights and insist on unconditional defense and coverage.

Discovery of Coverage Defense after Filing an Answer

An insurer is not barred from asserting non-coverage where it failed to obtain a reservation of rights before undertaking a defense of the insured where the defense of non-coverage was not known until after the answer was filed.

Daniel v. Safeway Ins. Co., 199 Ga.App. 833, 406 S.E.2d 266 (1991)

THIS MAY NO LONGER BE THE RULE.

Defense of Insured in Declaratory Judgment Action

An insurer is not obligated to provide a defense to the insured in its declaratory judgment action.

Boatright v. Old Dominion Ins. Co., 304 Ga.App. 119, 695 S.E.2d 408 (2010)

A reservation of rights only available to insurer that undertakes a defense while questions remain as to coverage.

Hoover v. Maxum Indemnity Company, 291 GA 402 (2012)

Necessary Content of Reservation of Rights

“ ‘The insurer can avoid estoppel by giving timely notice of its reservation of rights which fairly informs the insured of the insurer's position.’ [Cit.]” That notice cannot be only a “statement of future intent....” [Cit.] Furthermore, a “mere allegation that the insurer contended that [the insured] was not covered by the policy, without more, [does] not show any reservation on its part of a right to insist that the coverage of the policy was not extended to him.” [Cit.] At a minimum, the reservation of rights must fairly inform “the insured that, notwithstanding [the insurer's] defense of the action, it disclaims liability and does not waive the defenses available to it against the insured.” [Cit.] The reservation of rights should also inform the insured of the specific “basis for [the insurer's] reservations about coverage, [Cit.]”

World Harvest Church, Inc. v. Guideone Mutual Insurance Company,
287 Ga. 149, 695 S.E.2d 6 (2010)

Where issue of coverage obtains, standard and acceptable procedure for insurer to determine its rights is to defend under reservation of rights and then file a declaratory judgment action.

Hoover v. Maxum Indemnity Company, 291 Ga. 402 (2012)

Insurer's Duty in Filing Declaratory Judgment

If insured does not object to reservation of rights, insurer is not required to file a declaratory judgment action.

Kay-Lex Co. v. Essex Ins. Co., 286 Ga.App. 484, 649 S.E.2d 602 (2007)

QUESTIONABLE VALIDITY TODAY.

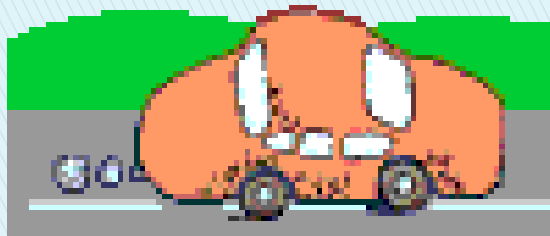
Stay of Tort Suit

An insurer may move to stay the underlying tort suit pending resolution of the DJ action.

Landmark American Insurance Company v. Khan,
307 Ga.App. 609, 705 S.E.2d 707 (2011)

Georgetown Mortg., Inc. v. OHIC Ins. Co., 267
Ga.App. 318, 599 S.E.2d 282 (2004)

RECENT DEVELOPMENTS IN AUTO INSURANCE AND TORT LAW



The 2001 amendment requires insurers to offer insureds the option of obtaining either:

- (1) Minimum UM coverage; or
- (2) UM coverage equal to the limits of the liability coverage under the policy (if such liability coverage exceeds the minimum limits).

If the insurer does not obtain a written rejection of optional UM coverage -- where the liability coverage exceeds the minimum limits -- the 2001 amendment triggers a statutory default provision that engrafts the liability coverage limits as the policy's UM coverage limits.

This rule applies to policies issued on and after July 1, 2001.

Georgia Farm Bureau Mut. Ins. Co. v. North,
311 Ga. App. 281, 714 S.E.2d 428 (2011).

See §29:5(f).

Trier of fact must apportion damages among all at fault persons, even though the plaintiff bears no fault for the injury or damages claimed.

See § 48:3(c).

Cavalier Convenience, Inc. v. Sarvis, 305 Ga. App. 141, 699 S.E.2d 104 (2010).

McReynolds v. Krebs, 307 Ga. App. 330, 705 S.E.2d 214 (2010), cert. granted, May 16, 2011.

Did the Court of Appeals correctly construe OCGA §51–12–33 to require a trier of fact to apportion an award of damages among multiple defendants when the plaintiff is not at fault?

Bradley v. Sebelius, 621
F.3d 1330 (11th Cir. 2010).

Medicare was not entitled to any share of the proceeds of a Florida wrongful death settlement paid to surviving children of a Medicare recipient.

Only the estate's allocated share of the settlement proceeds was subject to Medicare's right to reimbursement.

Allocating punitive damages to liability coverage to facilitate recovery of compensatory damages under UM coverage

- ▶ Liability Coverage: \$25,000
 - \$ 1,000 (compensatory damages)
 - \$24,000 (punitive damages)
- ▶ *Carter v. Progressive Mountain Insurance*, 320 Ga. App. 271, 739 S.E.2d 750 (2013), cert. granted.

DUAL RESIDENCES AND UM COVERAGE

State Farm defined “relative” to mean “a person related to [the named insured] . . . by blood . . . who resides *primarily* with [the named insured].”

Parsons v. State Farm Mut. Auto. Ins. Co.,
319 Ga. App. 616, 737 S.E.2d 718 (2013).

§30:2(e)

APPORTIONMENT OF FAULT AMONG DEFENDANTS AND RECOVERY OF UM COVERAGE

- ▶ Plaintiff is a passenger in host driver's vehicle.
- ▶ Three-vehicle accident; plaintiff has \$250,000 in UM coverage.
- ▶ Plaintiff sues host driver and the other drivers.
- ▶ Host driver has \$100,000 in liability coverage.
- ▶ The two other drivers have \$25,000 each in liability coverage.
- ▶ Jury verdict for plaintiff in the amount of \$300,000.

Host driver was 20% at fault.

Driver X was 20% at fault.

Driver Y was 60% at fault.

Host driver owes \$60,000 ($\$300,000 \times .20 = \$60,000$).

Other two drivers are underinsured.

Driver X was underinsured to the tune of \$35,000. ($\$60,000 - \$25,000 = \$35,000$)

Driver Y was underinsured to the tune of \$155,000. ($\$180,000 - \$25,000 = \$155,000$)

A claimant is not required to exhaust the liability coverage available to all tortfeasors in order to pursue underinsured motorist coverage as against one such tortfeasor, where that tortfeasor's available liability coverage was exhausted and paid in consideration for a limited release.

Wade v. Allstate Fire and Cas. Co., ___ Ga. App. ___, 751 S.E.2d 153, 157 (2013).

This rule prevails notwithstanding a provision in the claimant's policy that purports to require the exhaustion of "the limits of liability for *all* liability protection in effect and applicable at the time of the accident," before the UM carrier is obligated to pay underinsured motorist insurance benefits.

Wade v. Allstate Fire and Cas. Co., ___ Ga. App. ___, 751 S.E.2d 153, 156 (2013).

- ▶ The fact that a personal injury claimant does not have any outstanding debt owed to the hospital, does not, in and of itself, absolve the hospital lien.

- ▶ *MCG Health, Inc. v. Kight*, ___ Ga. App. ___, 750 S.E.2d 813 (2013).

In the absence of federal preemption (e.g. Tricare) or a “no recourse” provision in the negotiated contract between the healthcare insurer and the hospital, the hospital’s lien remains viable up to *the difference between the reasonable charges for the hospital care and the amount paid by the healthcare insurer.*

MCG Health, Inc. v. Kight, ___ Ga. App. ___, 750 S.E.2d 813 (2013).

- ▶ Where the policy purports to limit UM coverage to an amount less than the policy's liability coverage limits, the lesser amount of UM coverage shown on the declarations page may be enforced *only if the named insured affirmatively chose such coverage amount.*
- ▶ *McGraw v. IDS Property & Cas. Ins. Co.*, 323 Ga. App. 408, 410, 744 S.E.2d 891, 893 (2013).

- ▶ An insured's rejection of UM coverage must be made in writing. But an insured's affirmative choice of UM coverage in an amount less than the policy's liability coverage need not be made in writing. Significantly, however, this lack of a writing requirement does not absolve the insurer of its burden of proving that the insured *did* in fact make an affirmative choice of lesser coverage in support of its position that the lesser coverage reflected on the declarations page should be enforced instead of the statutory default coverage.

- ▶ *McGraw v. IDS Property & Cas. Ins. Co.*, 323 Ga. App. 408, 410–411, 744 S.E.2d 891, 893 (2013).