

# GEORGIA AUTO INSURANCE CLAIMS LAW SEMINAR

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**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).

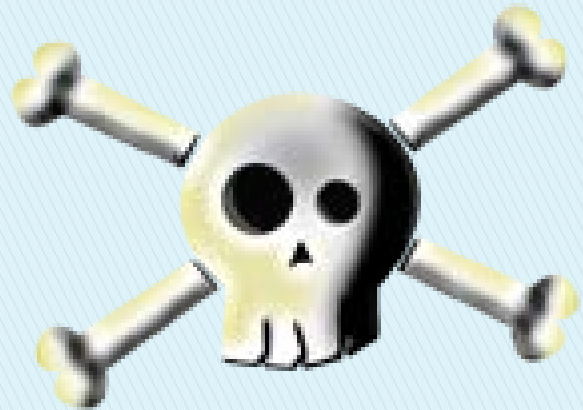
# §37:1 UM carrier's defense election

- 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.

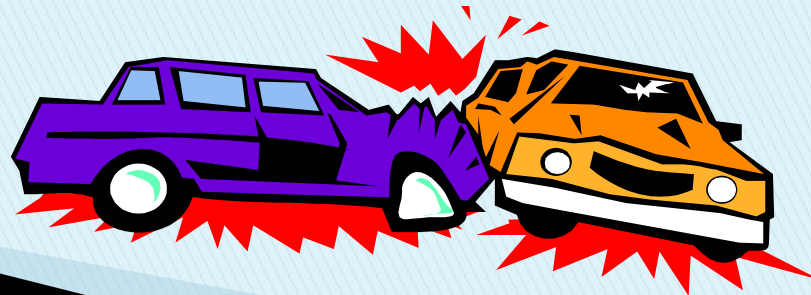
See §§39:2 and 39:3.

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).



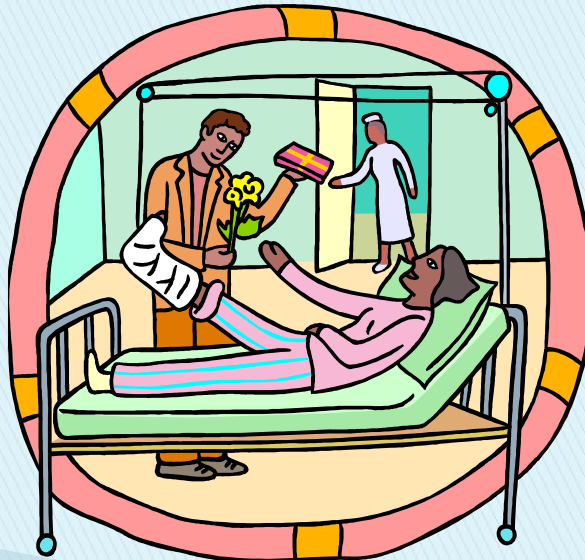
Wife owns a Jeep insured by State Farm, with \$25,000 UM coverage. Husband and wife reside together.

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

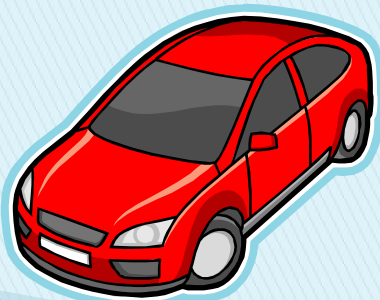
WIFE'S JEEP: \$ 25,000 UM (State Farm)

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



# 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.**

**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.**

**McCall v. Allstate Insurance Company, 251 Ga. 869,  
310 S.E.2d 513 (1984)**

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.”

Cotton States Mutual Insurance Company v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003); 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); Fortner v. Grange Mutual Insurance Company, 286 Ga. 189, 686 S.E.2d 93 (2009)

“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)

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

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)

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 arise only upon failure of the insurer 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 in failing to settle.

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)



# 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)

## 1<sup>st</sup> 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 should move to stay the underlying tort suit pending resolution of the DJ action.

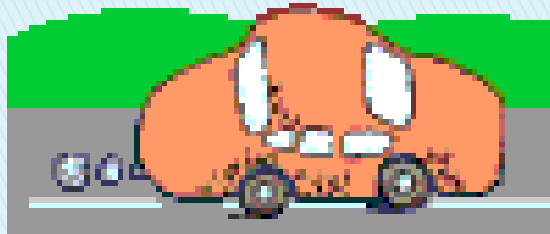
Landmark American Insurance Company v. Khan,  
307 Ga.App. 609, 705 S.E.2d 707 (2011)

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

including

*“Thurman’s March to the Sea”*



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).

# *Thurman v. State Farm*

See §32:3(c), et seq.

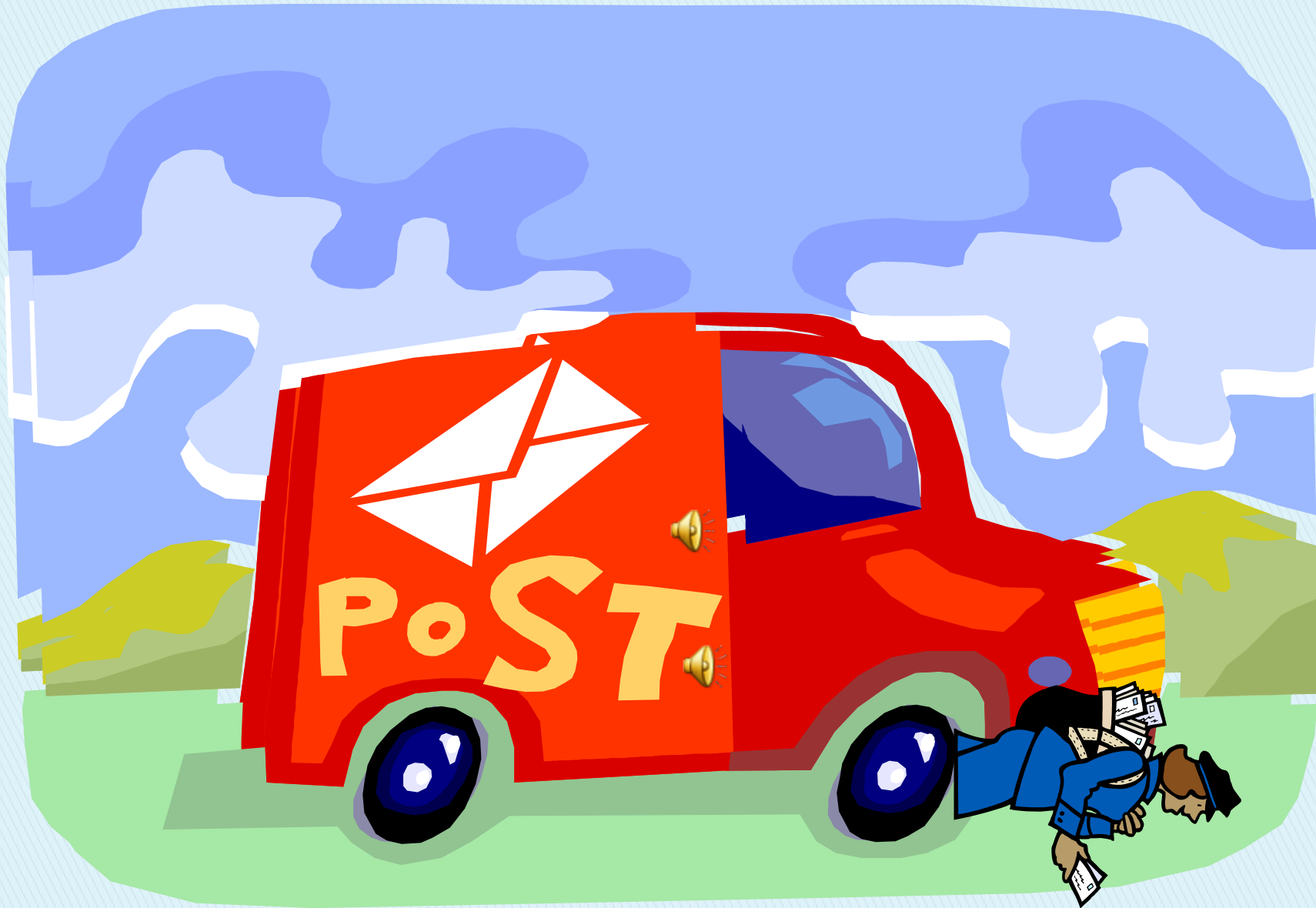
Underinsured motor vehicle under  
O.C.G.A. §33-7-11(b)(1)(d)(ii):

When tortfeasor's liability  
coverage is reduced or exhausted  
by "payment of other claims **or**  
**otherwise.**"

Tortfeasor has \$100,000 in liability coverage.

Plaintiff, a postal worker, was injured by tortfeasor in a motor vehicle collision.

Plaintiff received \$40,000 in combined benefits from the postal service's workers' compensation carrier and group medical insurance carrier.



Gail Thurman post accident

Plaintiff then settled with tortfeasor's liability insurer for the \$100,000 policy limit.

Of that \$100,000 settlement amount, \$40,000 was paid to the federal government in satisfaction of its statutory subrogation claims -- leaving plaintiff with a net recovery of \$60,000 in liability coverage.

\$ 100,000 (gross liability coverage)

- 40,000 (federal subrogation liens)

\$ 60,000 (net liability coverage)



Plaintiff has UM coverage with State Farm under three separate policies that stack to total \$75,000.

Does State Farm have any underinsured motorist coverage exposure?

Or, in other words . . .

Should payments of statutory subrogation claims be counted in determining how much liability coverage is available for the purpose of computing UM coverage exposure?

*Thurman v. State Farm* says “yes.”

\$ 75,000 (in stacked UM coverage)

– 60,000 (net liability coverage)

\$ 15,000 (underinsured coverage)

*Thurman* covers Medicare liens.



*Toomer v. Allstate Ins. Co.*, 292  
Ga. App. 60, 663 S.E.2d 763  
(2008); see §32:3(h).

*Thurman* does not cover hospital liens.

*State Farm Mut. Auto. Ins. Co. v. Adams*, 288 Ga. 315, 702 S.E.2d 898 (2010), rev'g *Adams v. State Farm Mut. Auto. Ins. Co.*, 298 Ga. App. 249, 679 S.E.2d 726 (2009).

See § 32:3(h)(3).

*Thurman* does cover Medicaid  
liens.



# *Thurman* litmus test:

- (1) Payment of medical benefits and
- (2) resulting subrogation lien enforceable by subrogee against liable third party.

# What about an ERISA reimbursement claim?

See § 32:3(h)(4).

*Safeco Ins. Co. v. Smarr*, (Case No. A09A2334, decided March 2, 2010) (Rule 36 affirmance without opinion).

See § 32:3(h)(10), pp. 431 – 432.

# Facts in *Smarr*

Unmarried adult son severely injured by tortfeasor.

Incurs \$750,000 in medical bills and dies from injuries several months after collision.

Claim for wrongful death by parents and claim for medical bills and conscious pain and suffering by estate.

# COVERAGE PICTURE IN *SMARR*

Liability coverage:	\$100,000 per person
UM coverage:	\$100,000 per person

\$99,900 of liability coverage paid to settle wrongful death claim: **General Release.**

\$100 of liability coverage paid to settle estate's claim: **Limited Release.**

UM claim by the estate for \$99,900 ????

*Erturk v. GEICO General Ins. Co.*

Georgia Court of Appeals

Case No. A11A1751

# COVERAGE PICTURE IN *ERTURK*

- ▶ Liability Coverage : \$100,000 per person
- ▶ UM Coverage (“Reduced”) : \$ 25,000 per person
- ▶ Under a limited release:
  - ▶ \$99,000 of liability coverage was allocated to settle the wrongful death claim; and
  - ▶ \$ 1,000 of liability coverage was allocated to settle the estate’s claim.



*Thompson v. Allstate Ins. Co.*,  
285 Ga. 24, 763 S.E.2d 227  
(2009):

Parol evidence admissible to show  
who was paid and what was  
released.

See § 34:4(d).

# EFFECT OF 2008 AMENDMENT ON THURMAN CLAIMS

*Thurman* claims are viable against “reduction” (“reduced”) UM coverage but do not engage “excess” (“added on”) UM coverage.

See §32:3(j).

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 (11<sup>th</sup> 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.