



HANDLING COMPLEX AUTO INSURANCE COVERAGE DISPUTES

MAXIMIZE RECOVERY THROUGH STACKING
AUTOMOBILE INSURANCE POLICIES
AND UTILIZING UNINSURED MOTORIST OFFSETS

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Mr. McDaniel's representation extends throughout the Southeast, as he has successfully resolved disputes in Alabama, Florida, South Carolina, and Tennessee, as well as Georgia. He is admitted to the bar of the United States Supreme Court, the 3rd and 11th Circuit Courts of Appeals and the District Courts of Georgia, Northern and Middle, and New Jersey.

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I. Introduction

Too often there is an absence of adequate insurance coverage to compensate an injured party involved in a motor vehicle collision. This proposition holds true even though Georgia law mandates availability of uninsured motorist coverage; thus, the ability for an injured party to secure adequate compensation in the event of a catastrophic automobile collision, frequently turns on insurance coverage litigation.

This presentation addresses three areas of complex automobile insurance coverage litigation:

- 1) Stacking of commercial and personal liability policies;
- 2) Recovery against an uninsured motorist; and
- 3) Uninsured motorist offsets.

And, it serves as a guide for the practitioner, whether representing the injured party or the insurer, in ascertaining the availability of insurance coverage to compensate the injured party. This guide is founded upon three fundamental principles critical for resolving automobile insurance coverage disputes – read and understand the terms and conditions of the applicable policies; know the applicable statutory scheme, and learn the facts. While these principles sound fundamental, and appear self-evident, it is amazing how often they are forgotten, or overlooked. But, the holdings from the cited appellate decisions serve as a reminder that these three fundamental principles are significant in determining the avenues of recovery.

II. Stacking of Commercial and Personal Automobile Liability Policies

The omnibus coverage provision within the automobile liability policy usually insures a driver under more than one liability policy. This situation arises where liability coverage is afforded the driver of an automobile under the terms of the policy issued to him while operating a non-owned automobile with the permission of the owner, and also under the policy issued to the owner of the automobile that provides insurance coverage to any other person driving the

automobile with the permission of the insured owner. In this case, the non-owner driver is an additional insured under the policy insuring the automobile he is driving, as well as an insured under his own policy while driving the non-owned automobile. Georgia Automobile Insurance Law, § 15:2 (2012-2013 ed.) Consequently, in ascertaining the coverage afforded an alleged tortfeasor it is important to determine ownership of the vehicle, the status of the driver, and the coverage afforded under all potentially applicable policies. If more than one policy affords coverage, the issue becomes one of priority of coverage.

A. General Rule – Insurance Follows the Car

Resolution of the priority of coverage commences with the fundamental principle under Georgia law that “insurance ‘follows the car.’” *Georgia Casualty & Surety Co. v. Waters*, 146 Ga. App. 149, at 151, 246 S.E.2d 202 (1978). And, where two or more liability policies cover the same incident, the law of this state allocates the risk through the concept of stacking.

As noted by Jenkins and Miller Georgia Automobile Insurance Law (2012-2013 ed.), “the term ‘stacking’ is used in a figurative sense as a way of determining the priority of payment of insurance benefits where two or more insurers provide insurance coverage for the same insured event. In a conceptual sense, the primary policy forms the base and any other policies are ‘stacked’ on top of the primary policy, each policy paying its benefits until exhausted in the order in which they are stacked.” Georgia Automobile Insurance Law § 15:2 (2012-2013 ed.)

Stacking of liability coverage usually occurs where an insured, whose liability insurance covers his automobile, is liable for injuries arising out of the use of a non-owned automobile that is insured under a separate policy of insurance. Under this scenario, the insurer providing coverage for the automobile being operated at the time of the occurrence is usually the primary insurer and the insurer of the non-owned driver is secondary. *Georgia Mutual Ins. Co., Inc. v. Rollins, Inc.*, 209 Ga. App. 744, 434 S.E.2d 581 (1993). McGill was insured by Georgia Mutual. (Under the definition of “insured” within the Georgia Mutual policy, Rollins, the

employer, was an insured under the policy, along with the driver, McGill; thus Georgia Mutual was the primary insurer and obligated to defend and indemnify McGill, who was operating his personal vehicle within the course and scope of his employment, and his employer, Rollins. Scottsdale insured Rollins, but was excess to Georgia Mutual; since the case settled within Georgia Mutual's limits there was no exposure to Scottsdale.)

Thus, under Georgia law, the insurer issuing the primary policy is liable first, up to the limits of the policy, without apportionment among the other insurers. The insurer providing excess coverage, as, for example, for the insured while driving a non-owned automobile, is considered secondarily liable and the coverage afforded under the policy providing secondary coverage is not collectible insurance until the limit of liability of the primary policy is exhausted. *Commercial Union Ins. Co. v. Insurance Co. of North America*, 155 Ga. App. 786, 273 S.E.2d 24 (1980), citing *Chicago Ins. Co. v. American, etc., Ins. Co.*, 115 Ga. App. 799, 802(2), 156 S.E.2d 143 (1967) ("a policy issued to the owner of the vehicle is the 'primary' policy and the insurer issuing it is liable up to the limits of the policy without apportionment. The policy providing that it shall be excess insurance as to non-ownership coverage is not regarded as collectible insurance until the limit of liability of the primary policy is exhausted").

While this rule is rather straightforward, and in most situations easy to apply, there are factual scenarios where application of the rule is complex. Additionally, where there are multiple excess carriers proration is used. In *Northland Insurance Co. v. American Home Assurance Co.*, 301 Ga. App. 726, 689 S.E.2d 87 (2009) the Court of Appeals applied "the general rule under insurance law that 'any applicable deductible is relevant between the insurer and the insured only, and does not apply to proration.' [Cits.]" *Id.*, 731.

Northland Insurance Co. involved a dispute between several insurers and Wal-Mart, following a tractor-trailer accident. Wal-Mart hired Pro-Carriers, Inc. to transport a loaded trailer. Pro-Carriers leased a tractor owned by Williams, and hired Williams to drive. Williams was subsequently involved in a serious multi-vehicle accident. Pro-Carriers was insured by

Underwriters Insurance for \$1 million and also carried an excess policy with Lexington for \$1 million. Wal-Mart was insured by American Home for \$10 million, but the policy contained a \$5 million deductible, and Williams carried a \$1 million policy with Northland. The potential exposure was capped when the parties and carriers settled the underlying claims for \$4,534,000, with Wal-Mart paying \$2,534,000, Northland \$1 million, and Underwriters \$1 million. *Id.*, at 729.

In subsequent litigation, Northland argued that based on the language of the ‘other insurance’ provisions within their respective policies, Northland and American Home provided excess coverage, not primary liability coverage; therefore the coverage each owed should have been pro-rated. And, since Northland afforded only \$1 million in coverage and American Home afforded \$10 million, Northland argued it was only obligated to contribute one-eleventh of the settlement (\$321,273) and American Home owed the other ten-elevenths (\$3,212,727). *Id.*, at 729. The Court of Appeals agreed.

The key to the result was what “any other collectable insurance” meant within the meaning of the pro-rata sharing clauses of the competing policies. *Id.*, at 730-731. Even though the American Home policy contained a \$5 million deductible, the terms of the policy contemplated that American Home would make first dollar payments and then seek reimbursement from Wal-Mart. For this reason, the Georgia Court of Appeals construed the American Home policy to be first dollar insurance for pro-rata contribution purposes. *See Id.*, at 731. Hence, substantial deductibles will be treated as insurance, directly and indirectly, for excess pro-rata purposes.

B. Exception to General Rule

Georgia law provides an exception to the general rule that insurance coverage follows the car – the driver of a car owned by an automobile dealership is first afforded coverage under his personal policy, thus shifting coverage from the dealer’s insurer.ⁱ However, to shift coverage to the dealer’s insurer, the plain language of the statute must be met. In *Motors Insurance Company v. Auto-Owners Insurance Company*, 251 Ga. App. 661, 555 S.E. 2d 37 (2001) “the

dealer's car was being test-driven at the time of the accident by an employee of the dealer, the plain language of the statute shows that it did not operate to shift primary coverage to the driver's private automobile insurer. Regardless of whether the dealer's employee was acting within or outside the scope of employment, nothing in the statute could be construed to trigger its operation where the dealer's car was being driven by the dealer's employee. *Standard Guaranty Ins. Co. v. Grange Mutual Casualty Co.*, 182 Ga. App. 842, 844, 357 S.E. 2d 295 (1987). '[W]here the language of an Act is plain and unequivocal, judicial construction is not only unnecessary but is forbidden.' (Citations and punctuation omitted.) *Id.*, at 843. Accordingly, under the general rule that automobile insurance 'follows the car,' primary coverage for claims arising from the accident was afforded by the dealer's insurer, Motors Insurance, and excess coverage was afforded by the driver's insurer, Auto-Owners Insurance." *Id.*, at 662-663.

C. Exclusion for Operation of Personal Vehicle

Not only is it significant to understand the terms of competing policies regarding other insurance provisions, exclusions must also be examined. In a case of first impression, the Georgia Court of Appeals enforced an exclusion within an auto liability policy and reversed denial of summary judgment to the insurer in its declaratory judgment action. *Progressive Premier Insurance Company of Illinois v. Newell*, 320 Ga. App. 301, 739 S.E.2d 756 (2013) arose from an automobile accident between a Jeep Cherokee driven by Newell and an automobile occupied by Michael and Caitlin Lepper. At the time of the accident, Newell was delivering pizza for his employer, Papa John's. Progressive insured Newell and after the Leppers filed a personal injury action, Progressive filed a declaratory judgment action seeking a declaration that it had no duty to provide coverage under its policy. The basis for the question of coverage was Progressive's exclusion as follows:

Coverage under this Part I [liability to others], including our duty to defend, will not apply to any insured person for bodily injury or property damage arising out of the ownership, maintenance, or use of any vehicle or trailer while being used to carry persons or property for compensation or a fee. This exclusion does not apply to shared-expense – car pools.

The decision of the Court of Appeals turned on the language, “for compensation or a fee.” Contrary to the trial court, the Court of Appeals determined the exclusion was unambiguous. The Appellate Court further held that “it is undisputed that Newell was paid a different hourly wage while delivering pizzas and that he received a per delivery payment of \$1.20.” *Id.* at 306.

Interestingly, as with many Appellate Court decisions applying exclusions, the decision turns on the specific facts of a given case, and obviously *Progressive* is no exception. The Court specifically limited its holding to the facts of this case and cautioned courts from extending this holding to one involving a different factual scenario.

Determining and resolving stacking of commercial and personal policies requires analysis and application of the competing policies to the underlying facts, as well as consideration of any applicable statutory scheme. Only after command of these elements can the practitioner accurately determine the viable avenues of recovery from the tortfeasor

III. Uninsured Motorist Coverage

Georgia’s comprehensive statutory scheme for protection of the motoring public contemplates potential deficiencies in liability insurance, and mandates availability of uninsured motorist coverage. As with determining available coverage under liability policies, there are several rules applicable to uninsured motorist coverage. First, uninsured motorist litigation is governed by the Uninsured Motorist Statute, O.C.G.A. § 33-7-11;ⁱⁱ second, resolution of coverage disputes is governed by the terms and conditions of the policy.

A. Stacking and Priority of Coverage

With respect to stacking of uninsured motorist coverage there is a different rule for identifying the primary and secondary insurers where two or more policies provide uninsured motorist coverage. “When more than one source of UM coverage is available, Georgia law allows the policies to be stacked to satisfy a judgment. *Dairyland Insurance Co. v. State Farm Automobile Insurance Co.*, 289 Ga. App. 216, 217, 656 S.E.2d 560 (2008); *Canal Ins.*

Co. v. Merchant, 225 Ga. App. 61, 62, 483 S.E.2d 311 (1997); O.C.G.A. § 33-7-11(b)(1)(D)(ii).

Georgia courts employ three tests in determining the order in which the available policies should be stacked:

[T]he “receipt of premium” test, the “more closely identified with” test, and the “circumstances of the injury” test. Under the “receipt of premium” test, the insurer that receives a premium from the injured insured is deemed to be primarily responsible for providing coverage. Under the “more closely identified with” test, the policy with which the injured party is most closely identified must provide primary coverage. If neither of those tests is helpful in a particular case, the courts look to the circumstances of the injury to see which policy provides primary coverage.

[Cits.]” *Progressive Classic Insurance Company v. Nationwide Mutual Fire Insurance Company*, 294 Ga. App. 787, 670 S.E. 2d 497 (2009). “Where one of the three tests for determining priority of UM coverage resolves the issue, Georgia courts have deemed it inappropriate to prorate stackable coverage as between uninsured motorist carriers. . . . But where none of the three tests resolves the issue of priority, proration may be appropriate.” *Id.*, at 789.

B. Issues of Selection/Rejection of Uninsured Motorist Coverage

Before coverage can be sought or stacked, it must be secured by the insured. Much of the recent case law addressing issues related to uninsured motorist coverage involves interpretation of the amendments to the uninsured motorist statute, and the selection/rejection provisions. The Supreme Court recently issued a decision answering two certified questions from United States District Court for the Northern District of Georgia addressing uninsured motorist coverage, and the Georgia Court of Appeals issued two decisions dealing with rejection of uninsured motorist coverage.

In *Wilson v. Automobile Insurance Company of Hartford, Connecticut*, 744 S.E.2d 732 (2013), the Georgia Supreme Court ruled that the offer/rejection requirements of the Georgia Uninsured Motorist Act, O.C.G.A. § 33-7-11 do not apply to a policy of umbrella insurance renewed on or after January 1, 2009. The Supreme Court further held that the notice requirement set forth in O.C.G.A. § 33-7-11(b)(1)(D)(ii)(III) does not apply to a policy of umbrella insurance.

The insureds, Wilson, argued the 2008 Amendment to O.C.G.A. §33-7-11 should not apply to their policy because it is a renewal of a policy originally issued before the adoption of the Amendment, and for which uninsured motorist coverage previously was implied by operation of law. In rejecting the Wilsons' argument, the Supreme Court held that the amendment to the statute "merely relieves the insurer of an umbrella policy from the mandatory coverage requirements of the uninsured motorist statute, leaving the insurer and Insured free to negotiate the terms of the renewal as they see fit, subject to any contractual obligations or other statutory requirements that might pertain to such a renewal." *Id.*, at 734. Therefore, the Supreme Court did not mandate application of the offer/rejection requirement of the uninsured motorist statute to an umbrella policy renewed on or after January 1, 2009.

In the second certified question, the Wilsons argued that the insurer was required to provide notice of various coverage options for uninsured motorist coverage, just as primary insurers are required to do. The Supreme Court again rejected the argument on the basis that the statute excludes umbrella policies from the requirements to offer UM coverage at all, and therefore "it would be nonsensical to require an insurer to provide an insured with notice of the types of UM coverage options that the insurer was not obligate to provide." *Id.*

In *St. Paul Fire & Marine Insurance Company v. Hughes*, 321 Ga. App. 738, 742 S.E.2d 762 (2013) the Court of Appeals held that St. Paul was obligated to provide uninsured motorist coverage under its excess policy because the named insured failed to reject UM coverage in writing. In supporting its holding, the Court of Appeals noted that at the time this incident arose, the uninsured motorist statute applied to umbrella and excess liability policies, in addition to a primary insurance policy. And, the facts clearly demonstrated that the named insured, the plaintiff's employer, did not reject uninsured motorist coverage for the commercial umbrella liability policy secured with St. Paul.

St. Paul's argument was that Indiana law controlled the question of uninsured motorist coverage because the policy was delivered in Indiana. This argument was rejected, because

St. Paul is licensed in Georgia, and the plaintiff was driving a truck principally used and garaged in Georgia. As the court noted, "it was, [therefore] reasonable for the parties to assume that Georgia was the principal location of risk and to expect that Georgia law, rather than Indiana law, would be determinative on the issue of whether the policy provides UM coverage." *Id.*, at 742.

Finally, in *McGraw v. IDS Property & Casualty Insurance Company*, -- Ga. App. --, -- S.E.2d -- (813A0547 2013), the Georgia Court of Appeals reversed the trial court and held that IDS was obligated to provide McGraw with the default amount of coverage specified under O.C.G.A. § 33-7-11(a)(1). In finding in favor of McGraw, the Court noted that "when a vehicle insurance policy limits UM coverage to an amount less than the policy's bodily liability limits without the insured having affirmatively chosen that lesser amount, the policy is not in compliance with O.C.G.A. § 33-7-11(a)(1);" consequently the statute controls. *Id.*

IDS argued that it was not required to obtain McGraw's choice in writing, but the Court of Appeals noted that "the lack of writing requirement does not absolve IDS of its burden of showing that McGraw did in fact make an affirmative choice of lesser coverage in support of its position that the term setting forth lesser coverage should be enforced instead of the statutory default coverage." *Id.* In addition to the complete absence of any evidence that McGraw affirmatively chose a lesser amount, the Court of Appeals also noted that the prior year's policy, by default, provided the higher amount of UM coverage. Therefore, IDS could not renew that policy with a lesser amount of coverage; citing O.C.G.A. § 33-24-45(b)(2).

C. Policy Definition of Insured Controls Stacking

The Georgia Supreme Court granted certiorari in *State Farm Mutual Automobile Insurance Co. v. Staton*, 294 Ga. App. 208, 669 S.E. 2d 164 (2008) and reversed the decision. 286 Ga. 23, 685 S.E. 2d 263 (2009). The decision turned on the definition of insured within the policy.

Staton was driving a vehicle owned and insured by Smyth & Helwys Publishing, Inc.

(Smyth & Helwys), his employer, when he was injured in a motor vehicle collision. State Farm insured this vehicle and two other vehicles owned by Smyth & Helwys, and afforded uninsured motorist coverage for each vehicle in the sum of \$100,000. Staton sought to stack all three policies to recover up to \$300,000 in uninsured motorist benefits, but State Farm argued that Staton could not stack the policies because he was not the "named insured" on any of the policies. *Id.*, at 24. The insurance policies stated that the named insured was the "first person named" on the declarations page. *Id.*, at 24. The first and only name on the declarations page was the corporation's name, Smyth & Helwys. *Id.*, at 23-24.

The Court of Appeals held that Staton could stack the policies because he was the named insured on all three policies. *Id.*, 24. The Court reasoned that the term "named insured" was ambiguous because "(1) the 'named insured' was defined as 'the first person named in the declarations'; (2) the policy defined a 'person' as a 'human being'; and (3) Smyth & Helwys, the corporate entity named as insured on the declarations page, was not a human being." *Id.* The Court then held that Staton was a named insured because Staton was the first person identified in the declarations--he was named as the first licensed driver. The Court also noted that the evidence showed Staton reasonably expected the policies to be stacked. *Id.*

The Supreme Court rejected this reasoning of the Court of Appeals and reversed. *Id.*, at 25-26. The opinion held "that the term 'named insured' is not ambiguous" because only "Smyth & Helwys" appeared on the declarations page, which made it clear that Smyth & Helwys was the named insured. *Id.* The court further explained that written words, such as the name appearing in the declarations, prevail when they conflict with preprinted portions of policies, such as the definition of "person" as a "human being." *Id.*

The Court of Appeals subsequently applied the Supreme Court's *Staton* holding in *Banks v. Brotherhood Mutual Insurance Co.*, 301 Ga. App. 101, 686 S.E.2d 872 (2009). Banks, a City of Toccoa (City) employee and the pastor of a church, was injured in an automobile collision while driving a service truck owned by the City. Banks recovered workers' compensation benefits from

the City and sought to recover uninsured motorist coverage from Brotherhood Mutual Insurance, which insured a church van. The insurance policy's declarations page listed "Hollywood Church of God Inc." as the named insured. *Id.*, at 101-02. The policy provided that "[i]f the named insured is '[a] partnership, limited liability company, corporation or any other form of organization,' then anyone occupying the covered vehicle is insured." *Id.*, at 102.

Banks argued that the named insured, Hollywood Church of God Inc., was a nonexistent entity and that an ambiguity therefore existed as to who the named insured was. *Id.* Banks cited the general rule that all ambiguities must be construed against the insurer and construed liberally to provide coverage, and argued that pursuant to this rule he should be considered the named insured under the policy. *Id.*, at 103.

The Court of Appeals determined that under the terms of the policy, which read that "[i]f the Named Insured is designated in the Declarations as . . . [a] form of organization, then . . . [a]nyone occupying a covered auto" is to be considered an insured, the term "organization" was to be assigned its dictionary meaning. *Id.*, at 103-04. The Court further held that the church could be considered "a form of organization"; thus, the Court determined that the policy was clearly intended to show that the church was the named insured. *Id.*, at 104. Accordingly, because Banks was not occupying the insured vehicle at the time of the incident, he was not entitled to uninsured motorist coverage under the policy. *Id.*

D. Exhaustion of Underlying Liability Limits

Pursuant to *O.C.G.A. § 33-7-11(b)(1)(D)(ii)*, an "uninsured motor vehicle" can include a vehicle that is insured but has policy limits less than the insured's uninsured motorist limits (an underinsured vehicle) and for this purpose available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle shall be the limits of coverage less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage. Georgia's appellate courts have interpreted and applied the intent of the

statutory language, “by reason of payment of other claims or otherwise,” and afforded coverage for uninsured motorist benefits in some instances but not in all.

In *Thurman v. State Farm Mutual Automobile Insurance Co.*, 278 Ga. 162, 598 S.E.2d 448 (2004), the Supreme Court used Georgia's public policy of complete compensation to reason that payments made by the tortfeasor's insurer effectively reduced the available coverages, and thus uninsured motorist benefits were afforded the injured party. According to the reasoning of the Supreme Court, “the legislature has provided the means [to effectuate the public policy of complete compensation] by its use of the phrase ‘reduced by payment of claims or otherwise’ to describe payments that reduce the amount of ‘available coverages’ under the tortfeasor's liability policy. Accordingly, we conclude that when a federal employee is required by FECA or FEHBA to reimburse the provider of benefits and the federal employee has not been fully compensated for injuries sustained, the amount reimbursed to the benefits providers constitutes a reduction in the “limits of coverage [of the tortfeasor's liability insurance] ... by reason of ... or otherwise.” *Id.*, at 164.

The Supreme Court, however, refused to indiscriminately extend *Thurman*. In *Floyd v. American International South Insurance Co.*, 288 Ga. 322, 704 S.E.2d 755 (2010) and *Adams v. State Farm Mutual Automobile Insurance Co.*, 288 Ga. 315, 702 S.E.2d 898 (2010), the Court held that liens imposed pursuant to *O.C.G.A.* § 44-14-470(b) did not qualify as “payment of other claims or otherwise” under *O.C.G.A.* § 33-7-11(b)(1)(D)(ii), and, as a result, these liens could not be used to reduce a tortfeasor's available coverage and increase the coverage of an insured's uninsured motorist carrier.” *Floyd*, at 323.

Donna Floyd was injured in an automobile wreck. The owner and driver of the other vehicle were named insureds in a policy issued by United Automobile Insurance Company (United). In exchange for a limited release, United paid Floyd its \$25,000 policy limit. Floyd sued the owner and driver for additional damages and served her uninsured motorist carrier, American International South Insurance Company.

The trial court found the tortfeasor “was not ‘uninsured’ . . . because the ‘difference between the available coverages under the bodily injury liability insurance and property damage liability insurance coverages . . . and the limits of the uninsured motorist coverage provided under the insured’s motor vehicle insurance policy’ was zero.” *Id.*, at 322. The Court of Appeals reversed. *Id.*

Similarly, in *Adams*, the Court of Appeals held that there is a reduction in the available liability coverage “by reason of payment of other claims or otherwise” when part of a tortfeasor’s insurance proceeds are used to pay a hospital lien. *Adams*, at 315. The Court of Appeals held that the facts in *Floyd* were similar to those in *Adams*, even though the hospital lien in *Floyd* had not been paid by anyone, because the hospital may recover the amount of its lien directly from Floyd if it shows that the tortfeasor paid Floyd damages.

In reaching its holdings in *Floyd* and *Adams* that reversed the Court of Appeals, the Supreme Court noted that “the Georgia uninsured motorist statute ‘is designed to protect the insured as to his actual loss, within the limits of the policy or policies of which he is a beneficiary.’” *State Farm Mutual Automobile Insurance Co. v. Murphy*, 226 Ga. 710, 714, 177 S.E.2d 257 (1970). Georgia Automobile Ins. Law § 32:3 (2010 ed.). It is this underlying purpose, not Georgia’s full compensation rule, which must guide this case because no subrogation rights of *an insurer* are associated with a hospital lien.” *Adams*, at 317.

Most recently, the Georgia Court of Appeals rejected a novel method a plaintiff used to seek uninsured motorist benefits in *Carter v. Progressive Mountain Insurance*, 320 Ga. App. 7271, 739 S.E.2d 750 (2013). Carter was injured in an automobile accident and settled with the tortfeasor’s insurer for the \$30,000.00 limits of liability coverage. The settlement was pursuant to a limited release under O.C.G.A. § 33-24-41.1, but in crafting the terms and conditions of the release language, Carter allocated \$29,000.00 of coverage toward payment of punitive damages and \$1,000.00 toward payment of compensatory damages.

Carter then sued the tortfeasor and served her uninsured motorist carrier, Progressive, with the Complaint. Progressive moved for summary judgment on the basis that the imposed condition of allocating the liability coverage to punitive damages was impermissible under O.C.G.A. § 33-24-41.1. Carter asserted that the allocation exhausted the available liability coverage in the tortfeasor's insurance policy, and thus, underinsured motorist coverage was available.

This effort was rejected by the Court of Appeals, which held that "the allocation of punitive damage to force exhaustion of liability coverage does not advance the purpose of underinsured motorist coverage to increase available compensation for actual injuries and losses; and directly shifts payment of punitive damages from the liability carrier to the underinsured motorist carrier, contrary to the purpose of underinsured motorist coverage; and would ultimately increase underinsured motorist coverage premiums as a result of tortfeasor's wrongs." *Id.*

III. Uninsured Motorist Off-Sets

The 2008 amendment to the uninsured motorist statute addressed any thought that the Georgia Supreme Court's decision in *Dees v. Logan*, 282 Ga. 815, 653 S.E.2d 735 (2007) prohibited a policy provision that provides for a reduction or set-off for medical payments benefits against an insured's recovery of uninsured motorist benefits for bodily injury. The statute provides that for or all policies issued, delivered, or renewed on and after January 1, 2009, "an endorsement or the provisions of the policy providing the coverage required by [O.C.G.A. § 33-7-11] ... may contain provisions which exclude any liability of the insurer for personal or bodily injury or death for which the insured has been compensated pursuant to 'medical payments coverage,' as such term is defined in [O.C.G.A. § 33-34-2(1)]. ... " O.C.G.A. § 33-7-11(i).

As there are no appellate rulings addressing the exclusionary provision authorized by O.C.G.A. § 33-7-11(i), Jenkins and Miller offer insight into its potential application. Georgia Automobile Insurance Law § 38:8 (2012-2013 ed.) The application of any such exclusion may

entail compensation received by the insured under *any* medical payments coverage and is not limited to medical payments benefits received under the *same policy* that provides the uninsured motorist coverage.

Jenkins and Miller assert that a workers' compensation exclusionary provision under the 2008 revision of *O.C.G.A. § 33-7-11(i)* is not restricted to workers' compensation benefits paid under the *same policy* that provides the uninsured motorist coverage. To conclude otherwise would be totally illogical for several reasons.

First, workers' compensation coverage is typically written under a separate policy. Second, most automobile insurance carriers doing business in Georgia do not offer workers' compensation coverage. Third, such interpretation would restrict the workers' compensation exclusion to commercial policies. *Id.*

Therefore, as in the case of the workers' compensation segment of *O.C.G.A. § 33-7-11(i)*, it is reasonable to conclude that the medical payments segment of subsection (i) applies to medical payments compensation under *any policy*. Thus, where the policy contains such exclusionary provision, uninsured motorist carriers, through the discovery process, should flush out whether the plaintiff has received medical payments benefits under *any policy* and how much was paid thereunder. *Id.*

IV. Conclusion

Resolving automobile liability and uninsured motorist coverage disputes involve several fundamental principles and rules of law. But, ultimately the answer lies in the factual details. Therefore, know and understand the policies' terms and conditions, study the applicable statutory scheme and learn the critical facts of the dispute.

ⁱ **OCGA § 33-34-3(d)**

Each policy of liability insurance issued in this state providing coverage to motor vehicles owned by a person, firm, or corporation engaged in the business of selling at retail new and used motor vehicles shall provide that, when an accident involves the operation of a motor vehicle by a person who is neither the owner of the vehicle involved in the accident nor an employee of the owner and the operator of the motor vehicle is an insured under a

complying policy other than the complying policy insuring the motor vehicle involved in the accident, primary coverage as to all coverages provided in the policy under which the operator is an insured shall be afforded by the liability policy insuring the said operator and any liability policy under which the owner is an insured shall afford excess coverages. If the liability policy under which the owner is an insured and which affords excess coverage contains a provision which eliminates such excess coverage based on the existence of coverage provided in the operator's liability policy, such provision of the owner's liability policy shall be void.

ii § 33-7-11

(a)(1) No automobile liability policy or motor vehicle liability policy shall be issued or delivered in this state to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle then principally garaged or principally used in this state unless it contains an endorsement or provisions undertaking to pay the insured damages for bodily injury, loss of consortium or death of an insured, or for injury to or destruction of property of an insured under the named insured's policy sustained from the owner or operator of an uninsured motor vehicle, within limits exclusive of interests and costs which at the option of the insured shall be:

(A) Not less than \$25,000.00 because of bodily injury to or death of one person in any one accident, and, subject to such limit for one person, \$50,000.00 because of bodily injury to or death of two or more persons in any one accident, and \$25,000.00 because of injury to or destruction of property; or

(B) Equal to the limits of liability because of bodily injury to or death of one person in any one accident and of two or more persons in any one accident, and because of injury to or destruction of property of the insured which is contained in the insured's personal coverage in the automobile liability policy or motor vehicle liability policy issued by the insurer to the insured if those limits of liability exceed the limits of liability set forth in subparagraph (A) of this paragraph. In any event, the insured may affirmatively choose uninsured motorist limits in an amount less than the limits of liability.

(2) The coverages for bodily injury or death or for injury to or destruction of property of an insured person, as provided in paragraph (1) of this subsection, may be subject to deductible amounts as follows:

(A) For bodily injury or death, deductibles of \$250.00, \$500.00, or \$1,000.00, at the option of any named insured in the policy. Deductibles above \$1,000.00 may be offered, subject to approval of the Commissioner;

(B) For injury to or destruction of property of the insured, deductibles of \$250.00, \$500.00, or \$1,000.00, at the option of any named insured in the policy. Deductibles above \$1,000.00 may be offered, subject to the approval of the Commissioner;

(C) Deductible amounts shown in subparagraphs (A) and (B) of this paragraph may not be reduced below \$250.00;

(D) Deductible amounts shown in subparagraphs (A) and (B) of this paragraph shall be made available at a reduced premium; and

(E) Where an insurer has combined into one single limit the coverages required under paragraph (1) of this

subsection, any deductible selected under subparagraphs (A) and (B) of this paragraph shall be combined, and the resultant total shall be construed to be a single aggregate deductible.

(3) The coverage required under paragraph (1) of this subsection shall not be applicable where any insured named in the policy shall reject the coverage in writing. The coverage required under paragraph (1) of this subsection excludes umbrella or excess liability policies unless affirmatively provided for in such policies or in a policy endorsement. The coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to said insured by the same insurer. The amount of coverage need not be increased in a renewal policy from the amount shown on the declarations page for coverage existing prior to July 1, 2001. The amount of coverage need not be increased from the amounts shown on the declarations page on renewal once coverage is issued.

(4) The filing of a petition for relief in bankruptcy under a chapter of Title 11 of the United States Code by an uninsured motorist as defined in this Code section, or the appointment of a trustee in bankruptcy for an uninsured motorist as defined in this Code section, or the discharge in bankruptcy of an uninsured motorist as defined in this Code section shall not affect the legal liability of an uninsured motorist as the term “legal liability” is used in this Code section, and such filing of a petition for relief in voluntary or involuntary bankruptcy, the appointment of a trustee in bankruptcy, or the discharge in bankruptcy of such an uninsured motorist shall not be pleaded by the insurance carrier providing uninsured motorist protection in bar of any claim of an insured person as defined in this Code section so as to defeat payment for damages sustained by any insured person by the insurance company providing uninsured motorist protection and coverage under the terms of this chapter as now or hereafter amended; but the insurance company or companies shall have the right to defend any such action in its own name or in the name of the uninsured motorist and shall make payment of any judgment up to the limits of the applicable uninsured motorist insurance protection afforded by its policy. In those cases, the uninsured motorist upon being discharged in bankruptcy may plead the discharge in bankruptcy against any subrogation claim of any uninsured motorist carrier making payment of a claim or judgment in favor of an uninsured person, and the uninsured motorist may plead said motorist's discharge in bankruptcy in bar of all amounts of an insured person's claim in excess of uninsured motorist protection available to the insured person.

(b)(1) As used in this Code section, the term:

(A) “Bodily injury” shall include death resulting from bodily injury.

(B) “Insured” means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise; any person who uses, with the expressed or implied consent of the named insured, the motor vehicle to which the policy applies; a guest in such motor vehicle to which the policy applies; or the personal representatives of any of the above. For policies issued or renewed on or after July 1, 2006, the term “insured” shall also mean a foster child or ward residing in the household of the named insured pursuant to a court order, guardianship, or placement by the Department of Family and Children Services or other department or agency of the state, while in a motor vehicle or otherwise.

(C) “Property of the insured” as used in subsection (a) of this Code section means the insured motor vehicle

and includes the personal property owned by the insured and contained in the insured motor vehicle.

(D) "Uninsured motor vehicle" means a motor vehicle, other than a motor vehicle owned by or furnished for the regular use of the named insured, the spouse of the named insured, and, while residents of the same household, the relative of either, as to which there is:

(i) No bodily injury liability insurance and property damage liability insurance;

(ii) Bodily injury liability insurance and property damage liability insurance and the insured has uninsured motorist coverage provided under the insured's motor vehicle insurance policy; the motor vehicle shall be considered uninsured, and the amount of available coverages shall be as follows:

(I) Such motor vehicle shall be considered uninsured to the full extent of the limits of the uninsured motorist coverage provided under the insured's motor vehicle insurance policies, and such coverages shall apply to the insured's losses in addition to the amounts payable under any available bodily injury liability and property damage liability insurance coverages. The insured's uninsured motorist coverage shall not be used to duplicate payments made under any available bodily injury liability insurance and property damage liability insurance coverages but instead shall be available as additional insurance coverage in excess of any available bodily injury liability insurance and property damage liability insurance coverages; provided, however, that the insured's combined recovery from the insured's uninsured motorist coverages and the available coverages under the bodily injury liability insurance and property damage liability insurance on such uninsured motor vehicle shall not exceed the sum of all economic and noneconomic losses sustained by the insured. For purposes of this subdivision, available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle shall be the limits of coverage less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage;

(II) Provided, however, that an insured may reject the coverage referenced in subdivision (I) of this division and select in writing coverage for the occurrence of sustaining losses from the owner or operator of an uninsured motor vehicle that considers such motor vehicle to be uninsured only for the amount of the difference between the available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle and the limits of the uninsured motorist coverages provided under the insured's motor vehicle insurance policies; and, for purposes of this subdivision, available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle shall be the limits of coverage less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage; and

(III) Neither coverage under subdivision (I) nor (II) of this division shall be applicable if the insured rejects such coverages as provided in paragraph (3) of subsection (a) of this Code section. For private passenger motor vehicle insurance policies in effect on January 1, 2009, insurers shall send to their insureds who have not rejected coverage pursuant to paragraph (3) of subsection (a) of this Code section a notice at least 45 days before the first renewal of such policies advising of the coverage options set

forth in this division. Such notice shall not be required for any subsequent renewals for policies in effect on January 1, 2009, or for any renewals for policies issued after January 1, 2009. The coverage set forth in subdivision (I) of this division need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage set forth in subdivision (I) of this division and selected the coverage set forth in subdivision (II) of this division in connection with a policy previously issued to said insured by the same insurer;

(iii) Bodily injury liability insurance and property damage liability insurance in existence but the insurance company writing the insurance has legally denied coverage under its policy;

(iv) Bodily injury liability and property damage liability insurance in existence but the insurance company writing the insurance is unable, because of being insolvent, to make either full or partial payment with respect to the legal liability of its insured, provided that in the event that a partial payment is made by or on behalf of the insolvent insurer with respect to the legal liability of its insured, then the motor vehicle shall only be considered to be uninsured for the amount of the difference between the partial payment and the limits of the uninsured motorist coverage provided under the insured's motor vehicle insurance policy; or

(v) No bond or deposit of cash or securities in lieu of bodily injury and property damage liability insurance.

(2) A motor vehicle shall be deemed to be uninsured if the owner or operator of the motor vehicle is unknown. In those cases, recovery under the endorsement or provisions shall be subject to the conditions set forth in subsections (c) through (j) of this Code section, and, in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, actual physical contact shall have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured. Such physical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant.

(c) If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, the insured, or someone on his behalf, or in the event of a death claim someone on behalf of the party having the claim, in order for the insured to recover under the endorsement, shall report the accident as required by Code Section 40-6-273.

(d) In cases where the owner or operator of any vehicle causing injury or damages is known, and either or both are named as defendants in any action for such injury or damages, and a reasonable belief exists that the vehicle is an uninsured motor vehicle under subparagraph (b)(1)(D) of this Code section, a copy of the action and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company were actually named as a party defendant. If facts arise after an action has been commenced which create a reasonable belief that a vehicle is an uninsured motor vehicle under subparagraph (b)(1)(D) of this Code section and no such reasonable belief existed prior to the commencement of the action against the defendant, and the complaint was timely served on the defendant, the insurance company issuing the policy shall be served within either the remainder of the time allowed for valid service on the defendant or 90 days after the date on which the party seeking relief discovered, or in the exercise of due diligence should have discovered, that the vehicle was uninsured or underinsured, whichever period is greater. The uninsured motorist

carrier may conduct discovery as a matter of right for a period of not less than 120 days after service prior to any hearing on the merits of the action. If either the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as “John Doe,” and a copy of the action and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company were actually named as a party defendant; and the insurance company shall have the right to file pleadings and take other action allowable by law in the name of “John Doe” or itself. In any case arising under this Code section where service upon an insurance company is prescribed, the clerk of the court in which the action is brought shall have such service accomplished by issuing a duplicate original copy for the sheriff or marshal to place his or her return of service in the same form and manner as prescribed by law for a party defendant. The return of service upon the insurance company shall in no case appear upon the original pleadings in such case. In the case of a known owner or operator of such vehicle, either or both of whom are named as a defendant in such action, the insurance company issuing the policy shall have the right to file pleadings and take other action allowable by law in the name of either the known owner or operator or both or itself.

(1) In cases where the owner or operator of a vehicle causing injury or damages is unknown and an action is instituted against the unknown defendant as “John Doe,” the residence of such “John Doe” defendant shall be presumed to be in the county in which the accident causing injury or damages occurred, or in the county of residence of the plaintiff, at the election of the plaintiff in the action.

(2) A motor vehicle shall not be deemed to be an uninsured motor vehicle within the meaning of this Code section when the owner or operator of such motor vehicle has deposited security, pursuant to Code Section 40-9-32, in the amounts specified in subparagraph (a)(1)(A) of this Code section.

(e) In cases where the owner or operator of any vehicle causing injury or damage is known and either or both are named as defendants in any action for such injury or damages but the person resides out of the state, has departed from the state, cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, and this fact shall appear by affidavit to the satisfaction of the judge of the court, and it shall appear either by affidavit or by a verified complaint on file that a claim exists against the owner or driver in respect to whom service is to be made and that he is a necessary or proper party to the action, the judge may grant an order that the service be made on the owner or driver by the publication of summons. A copy of any action filed and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company issuing the policy were actually named as a party defendant. Subsection (d) of this Code section shall govern the rights of the insurance company, the duties of the clerk of court concerning duplicate original copies of the pleadings, and the return of service. Following service on the owner or driver by the publication of the summons as provided in this subsection and service as prescribed by law upon the insurance company issuing the policy, the plaintiff shall have a continuing duty to exercise diligence in attempting to locate the owner or driver against whom the claim exists, but such obligation of diligence shall not extend beyond a period of 12 months following service upon the owner or driver by publication of the summons. However, regardless of such time limitations, should the plaintiff learn of the location of the owner or driver against whom the claim exists, the plaintiff shall exercise due diligence to effect service of process upon that owner or driver within a reasonable time period after receiving such information.

(f) An insurer paying a claim under the endorsement or provisions required by subsection (a) of this Code section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing such injury,

death, or damage to the extent that payment was made, including the proceeds recoverable from the assets of the insolvent insurer, provided that the bringing of an action against the unknown owner or operator as “John Doe” or the conclusion of such an action shall not constitute a bar to the insured, if the identity of the owner or operator who caused the injury or damages complained of becomes known, bringing an action against the owner or operator theretofore proceeded against as “John Doe”; provided, further, that any recovery against such owner or operator shall be paid to the insurance company to the extent that the insurance company paid the named insured in the action brought against the owner or operator as “John Doe,” except that the insurance company shall pay its proportionate part of any reasonable costs and expense incurred in connection therewith, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this Code section nor any other provision of law shall operate to prevent the joining in an action against “John Doe” or the owner or operator of the motor vehicle causing such injury as a party defendant, and joinder is specifically authorized.

(g) No endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any endorsement or provisions, nor may anything be required of the insured, subject to the other provisions of the policy or contract, except the establishment of legal liability; nor shall the insured be restricted or prevented, in any manner, from employing legal counsel or instituting legal proceedings.

(h) Before a motor vehicle shall be deemed to be uninsured because of the insolvency of an insurance company under division (b)(1)(D)(iv) of this Code section, an insurer under the uninsured motorists endorsement provisions of subsection (a) of this Code section must be given notice within a reasonable time by its insured of the pendency of any legal proceeding against such insurance company of which he may have knowledge, and before the insured enters into any negotiation or arrangement with the insurance company, and before the insurer is prejudiced by any action or nonaction of the insured with respect to the determinations of the insolvency of the insurance company.

(i) In addition to any offsets or reductions contained in the provisions of division (b)(1)(D)(ii) of this Code section, an endorsement or the provisions of the policy providing the coverage required by this Code section may contain provisions which exclude any liability of the insurer for injury to or destruction of property of the insured for which such insured has been compensated by other property or physical damage insurance and may contain provisions which exclude any liability of the insurer for personal or bodily injury or death for which the insured has been compensated pursuant to “medical payments coverage,” as such term is defined in paragraph (1) of Code Section 33-34-2, or compensated pursuant to workers' compensation laws.

(j) If the insurer shall refuse to pay any insured any loss covered by this Code section within 60 days after a demand has been made by the insured and a finding has been made that such refusal was made in bad faith, the insurer shall be liable to the insured in addition to any recovery under this Code section for not more than 25 percent of the recovery and all reasonable attorney's fees for the prosecution of the case under this Code section. The question of bad faith, the amount of the penalty, if any, and the reasonable attorney's fees, if any, shall be determined in a separate action filed by the insured against the insurer after a judgment has been rendered against the uninsured motorist in the original tort action. The attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services, based on the time spent and legal and factual issues involved, in accordance with prevailing fees in the locality where the action is pending. The trial court shall have the discretion, if it finds such jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend such portion of the verdict fixing attorney's fees without the necessity of disapproving the entire

verdict. The limitations contained in this subsection in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his attorney for the services of the attorney in the action against the insurer.