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REGULATORY LIMITS ON CLAIMS HANDLING

Title 33 of the Official Code of Georgia Annotated contains the statutory provisions governing insurance in the state and is known as the “Georgia Insurance Code.”

Timing for Responses and Determinations

“Property insurance” is defined in O.C.G.A. § 33-7-6. It is “insurance on real or personal property of every kind and interest therein against loss or damage from any or all hazards or causes and against loss consequential upon such loss or damage other than noncontractual legal liability for any such loss or damage.” O.C.G.A. § 33-7-6(a). “No insurance contract on property or of any interest therein or arising therefrom shall be enforceable except for the benefit of persons having, at the time of the loss, an insurance interest in the things insured.” O.C.G.A. § 33-24-4(b).

O.C.G.A. §§ 33-32-1 through 33-32-6 specifically govern property insurance.

“Casualty insurance” is defined in O.C.G.A. § 33-7-3 and includes vehicle insurance as defined in Code Section 33-7-9, accident and sickness insurance as defined in § 33-7-2, as well as liability insurance and nine other types of insurance defined in § 33-7-3(1)-(10).

There is no specific time limit regarding the handling of a property insurance claim. However, O.C.G.A. § 33-6-34 governing “Unfair claims settlement practices” imposes certain requirements with respect to timing. O.C.G.A. § 33-6-34 requires an insurer to: “acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies” (O.C.G.A. § 33-6-34(2)), promptly investigate and settle claims (O.C.G.A. § 33-6-34(3,4)), affirm or deny coverage within a reasonable time after investigation (O.C.G.A. § 33-6-34(7)), not unreasonably delay investigation or payment of claims by requiring both a formal proof of loss and subsequent verification (O.C.G.A. § 33-6-34(9)), promptly provide a reasonable and accurate explanation of the basis for a claims denial or offer of compromise settlement (O.C.G.A. § 33-6-34(10)) and provide forms necessary to file claims within 15 calendar days (O.C.G.A. § 33-6-34(11)).

Time limits for payments under an accident and sickness policy are governed under O.C.G.A. § 33-29-3(b)(8). Per that section, benefits under such a policy “will be paid not later than at the expiration of each period of 30 days during the continuance of the period for which the insurer is liable and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of such proof.”

O.C.G.A. § 33-4-6 sets forth a cause of action for an insurer’s bad faith refusal to pay a claim within 60 days.

In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was made in bad faith, the

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insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or \$5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. O.C.G.A § 33-4-6(a).

With respect to motor vehicle liability policies, a claimant may recover bad faith penalties against an insurer (including attorney's fees) who, under certain conditions, refuses to settle within 60 days of a demand for an amount certain "and the claimant ultimately recovers an amount equal to or in excess of the claimant's demand." O.C.G.A § 33-4-7.

Standards for Determination and Settlements

O.C.G.A § 33-6-34 sets forth guidelines for insurers in settling actions by articulating what acts or omissions constitute "an unfair claims settlement practice." Some examples include: knowingly misrepresenting facts relating to coverage, failing to adopt and implement procedures for the "prompt investigation and settlement of claims," refusing to pay claims without conducting a reasonable investigation and unreasonably delaying the investigation or payment of claims in certain conditions. There is no private cause of action for unfair claims settlement practice. See O.C.G.A § 33-6-37. Instead, the Georgia Insurance Commissioner enforces such actions. See O.C.G.A § 33-6-35.

O.C.G.A § 33-4-6 sets forth a cause of action by an insured against its insurer for bad faith refusal to pay a claim. O.C.G.A § 33-4-7 governs bad faith by insurer in connection with motor vehicle liability policies.

PRINCIPLES OF CONTRACT INTERPRETATION

According to O.C.G.A. § 33-24-16, "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application made a part of the policy." See *Atlantic Specialty Ins. Co. v. City of College Park*, 851 S.E.2d 189 (Ga. Ct. App. 2020).

In Georgia, insurance contracts are governed by the rules of construction applicable to other contracts, and words in the policy must be given their usual and common signification and customary meaning. *Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 298 Ga. 716, 784 S.E.2d 422, 424 (2016). Construction of a contract is a question of law for the court. *Forsyth County v. Waterscape Servs., LLC*, 303 Ga. App. 623, 630 (2010) citing *Collier v. State Farm Mut. Auto. Ins. Co.*, 249 Ga. App. 865, 866 (2001). When the language of an insurance policy is unambiguous and capable of but one reasonable construction, the court must expound the contract as made by the parties. See *Liberty Surplus Ins. Corp. v. Norfolk S. Ry. Co.*, 2017 U.S. App. LEXIS 5763 (11th Cir. 2017) citing *Byrd v. United States Automobile Association*, 317 Ga. App. 280, 282, 729 S.E.2d 522 (2012); *Ins. Co. of Pa. v. APAC-Southeast, Inc.*, 297 Ga. App. 553, 557, 677 S.E.2d 734 (2009).

CHOICE OF LAW

"When a choice-of-law question arises in a contract action brought in Georgia, substantive matters such as the validity and construction of the contract are governed by the substantive law of the state where the contract was made (or is to be performed, if that is a different state); but procedural and remedial matters are governed by the law of Georgia, the forum state." *Allstate Insur. Co. v. Duncan*, 218 Ga. App. 552, 462 S.E.2d 638 (1995) citing *Federal Ins. Co. v. Nat. Distrib. Co.*, 203 Ga. App. 763, 765-766, 417 S.E.2d 671 (1992). An important exception to the choice-of-law rule is that Georgia will not enforce contracts "made and performed in another state" if the

foreign “state's laws are contrary to the public policy of” Georgia. See generally *Howard v. Doe*, 174 Ga. App. 415, 416, 330 S.E.2d 370, 371 (1985).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

In general, an insurer’s duty to defend is determined by the insurance contract. See *Owners Ins. Co. v. James*, 295 F. Supp. 2d 1354, 1361 (N.D. Ga. 2003). In determining whether an insurer owes its insured a duty to defend a particular lawsuit, Georgia law directs courts to “compare the allegations of the complaint, as well as the facts supporting those allegations, against the provisions of the insurance contract.” *Elan Pharm. Research Corp. v. Employers Ins. of Wausau*, 144 F.3d 1372, 1375 (11th Cir. 1998) citing *Great Am. Ins. Co. v. McKemie*, 244 Ga. 84, 85-86, 259 S.E.2d 39 (1979)(reversed on other grounds). If the claims against the insured might potentially or arguably fall within the policy’s coverage, the insurer must provide a defense. See *SavaSeniorCare, LLC v. Beazley Ins. Co.*, 195 F. Supp. 3d 1293, 1298 (N.D. Ga. 2016) citing *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, 231 Ga. App. 206, 207 (1998). Any doubt as to an insured’s duty to defend should be resolved in favor of the insured. See *Penn-America Ins. Co. v. Disabled Am. Veterans*, 268 Ga. 564, 565-566 (1997). An insurer’s duty to defend is excused only if the petition unambiguously excludes coverage under the policy. See *Id.*

2. Issues with Reserving Rights

In Georgia, “the proper course for an insurer to follow, if in doubt as to its obligation to provide a defense, is to enter into a defense of the insured under a reservation of rights and to proceed with a declaratory judgment action seeking a determination of its rights and obligations.” *Richmond v. Georgia Farm Bureau Mutual Ins. Co.*, 140 Ga. App. 215, 231 S.E.2d 245 (1976); see also *Hoover v. Maxum Indem. Co.*, 291 Ga. 402, 730 S.E.2d 413 (2012); *N. Am. Specialty Ins. Co. v. Bull River Marina, LLC*, 158 F. Supp. 3d 1351, 1357-58 (S.D. Ga. 2016). However, an insurer’s filing of a declaratory judgment action disputing coverage under an insured’s policy does not insulate the insurer from a counterclaim filed by the insured under O.C.G.A. § 33-4-6 for bad faith refusal to pay. See *Great Southwest Express Co. v. Great Am. Ins. Co.*, 665 S.E.2d 878 (Ga. App. 2008). An insurer may also be liable in a breach of contract action based upon its refusal to defend the insured against a third-party claim. See e.g., *Landmark Am. Ins. Co. v. Khan*, 307 Ga. App. 609 (2011); *Farlow v. Vigilant Ins. Co.*, 165 Ga. App. 696 (1983). Under Georgia law, “A reservation of rights is not valid if it does not fairly inform the insured of the insurer’s position.” *Hoover v. Maxum Indem. Co.*, 291 Ga. 402, 405, 730 S.E.2d 413 (2012); *Wellons, Inc. v. Lexington Ins. Co.*, 566 Fed. Appx. 813, 821-22 11th Cir. 2014). Where an insurer assumes a defense without an effective reservation of rights, the insurer is deemed estopped from asserting the defense of noncoverage. See *World Harvest Church, Inc. v. Guideone Mut. Ins. Co.*, 287 Ga. 149, 156, 695 S.E.2d 6 (2010); *Builders Ins. v. Tenenbaum*, 327 Ga. App. 204, 210 (2014).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

Georgia courts recognize the “right of privacy” as “a fundamental constitutional right, having a value so essential to individual liberty in our society that its infringement merits careful scrutiny by the courts.” *Karpowicz v. Hyles*, 247 Ga. App. 292, 295 S.E.2d 51 (2000).

Numerous statutes prohibit the dissemination of “private” information, including, but not limited to, the following:

- Psychiatric records. See O.C.G.A. § 37-3-166;
- Medical records. See O.C.G.A. § 24-12-1(a); however such records may be released under certain circumstances articulated in O.C.G.A. § 31-12-2 (such as a court order or subpoena). Additionally, the privilege is waived in cases in which the patient “places his care and treatment or the nature and extent of his injuries at issue in any judicial proceeding. It is important to note that the Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-191 (“HIPAA”) expressly preempts any provision of State law that is contrary to its provisions. See 45 C.F.R. § 160.203. In Georgia, HIPAA has been ruled to preempt Georgia law in certain instances. See, e.g., *Northlake Medical Center, LLC v. Queen*, 280 Ga. App. 510, 634 S.E.2d 486 (2006); see also *Allen v. Wright*, 282 Ga. 9, 644 S.E.2d 814 (2007); see also *Moreland v. Austin*, 284 Ga. 730, 670 S.E. 2d 68 (2008).
- Records created regarding child support enforcement. See O.C.G.A. § 19-11-30;
- Certain library records. See O.C.G.A. § 24-12-30;
- HIV/AIDS diagnosis. See O.C.G.A. § 24-12-20;
- Healthcare “peer review” proceedings and investigations. See O.C.G.A. § 31-7-15;
- Reports of child abuse or of a child’s abuse of narcotics. See O.C.G.A. § 49-5-40;
- Family violence information. See O.C.G.A. § 33-6-4(b)(15)(C) (There are exceptions for the limited purposes of complying with legal obligations, verifying an individual’s claim to be a subject of family violence, cooperating with a victim of family violence in seeking protection from family violence, or facilitating the treatment of a family violence related medical condition. See *Id.*).

1. Criminal Sanctions

Under O.C.G.A. § 33-2-24, the Commissioner of Insurance has broad authority to enforce Georgia’s laws under Title 33, including recommending criminal prosecution. Per § 33-2-24 (d), “The Commissioner may institute actions or other legal proceedings as may be required for the enforcement of any provisions of this title. If the Commissioner has reason to believe that any person has violated any provision of this title for which criminal prosecution is provided, he shall so inform the prosecuting attorney in whose circuit or jurisdiction such violation may have occurred.”

2. The Standards for Compensatory and Punitive Damages

Under O.C.G.A. § 51-12-2 Georgia law allows for both general damages and special damages. General damages are defined as “those which the law presumes to flow from any tortious act; they may be recovered without proof of any amount” and would include damages such as pain and suffering. Special damages include “those which actually flow from a tortious act” and “they must be proved in order to be recovered.” Special damages include medical bills, lost wages, property damage, etc.

For punitive damages, Georgia law holds that they “may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.” O.C.G.A. § 51-12-5.1. Punitive damages “must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made.” O.C.G.A. § 51-12-5.1 (d)(1). It is important to note that Georgia law caps punitive damages at \$250,000 unless the jury finds “specific intent to cause harm” (O.C.G.A. § 51-12-5.1(f)) or if the case being tried is a products liability case. O.C.G.A. § 51-12-5.1(e).

3. State Arbitration and Mediation Procedures

A contract for insurance, as defined by O.C.G.A. § 33-1-2 is a “contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specified amount or benefits upon determinable contingencies”. A contract for insurance may not require arbitration per O.C.G.A. § 9-9-2(c)(3). However, §9-9-2(c)(3) does allow for arbitration between and among insurance companies.

4. State Administrative Entity Rule-Making Authority

O.C.G.A. § 33-2-9 provides that the Georgia Commissioner of Insurance “shall have full power and authority to make rules and regulations” for the following purposes:

- To organize the department and to assign duties to members of the staff;
- To promulgate any rules and regulations as are reasonably necessary to implement this title;
- To promulgate any rules and regulations as are reasonably necessary to conform with the requirements of the federal Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, as said federal Act existed on January 1, 1997;
- To issue interpretative rulings or to prescribe forms required to carry out the responsibilities of his or her office; or
- To govern the procedure to be followed in the proceedings before the department.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

1. First Party

As previously noted herein, O.C.G.A § 33-4-6 sets forth a cause of action by an insured against its insurer for bad faith refusal to pay a claim. Statutory penalties for an insurer’s bad faith refusal to pay are not authorized where the insurer “has any reasonable ground to contest the claim and where there is a disputed question of fact.” *Bell v. Liberty Mut. Fire Ins. Co.*, 319 Ga. App. 302, 307, 734 S.E.2d 894 (2012) citing *Rice v. State Farm Fire & Cas. Co.*, 208 Ga. App. 166, 430 S.E.2d 75, 78 (1993); see also *Henderson v. Ga. Farm Bureau Mut. Ins. Co.*, 328 Ga. App. 396, 402-403 (2014).

2. Third-Party

Under Georgia law, a claim for statutory penalties for bad faith cannot be made by anyone other than the insured. See *Sumitomo Marine & Fire Ins. Co. of America v. Southern Guar. Ins. Co. of Georgia*, 337 F. Supp. 2d 1339, 1356-57 (N.D. Ga. 2004); *Canal Indem. Co. v. Greene*, 265 Ga. App. 67, 593 S.E.2d 41 (2003).

O.C.G.A § 33-4-6 specifically sets forth the damages that an insured can recover in a successful action for bad faith. In addition to the loss, the insured may recover penalties of not more than 50 percent of the liability of the insurer for the loss or \$5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. See O.C.G.A § 33-4-6(a).

Fraud

O.C.G.A §§ 51-6-1 and 51-6-2 articulate the statutory elements for fraud. The tort of fraud has five elements. These are: (1) a false representation made by the defendant; (2) scienter; (3) intent to induce the plaintiff to act or refrain from acting based upon the representation; (4) justifiable reliance by the plaintiff; and (5) damages. *Sewell v. Cancel*, 331 Ga. App. 687, 694 (2015); *Stewart v. SunTrust Mortgage, Inc.*, 331 Ga. App. 635, 636-37 (2015); *Mecca Constr., Inc. v. Maestro Invs., LLC*, 320 Ga. App. 34, 41 (2013).

An insured may bring an independent tort action against its insurer where the insurer's fraudulent acts caused the insured to sustain damages other than those covered by the insurance contract. See *Delancy v. St. Paul Fire & Marine Ins. Co.*, 947 F.2d 1536 (11th Cir. 1991). Additionally, an insurer's fraud may serve as the basis for a tortious failure to settle claim. *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, 297 Ga. 38, 42 (2015) citing *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 870 (1984). "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 Gen. Ins. Co. v. Wellstar Health Sys.*, 315 Ga. App. 26, 29 (2012) citing *Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 268 (1992); see also *Owners Ins. Co. v. Parsons*, 2014 U.S. Dist. LEXIS 175293 (N.D. Ga. 2014).

Intentional or Negligent Infliction of Emotional Distress

In Georgia, an action for intentional infliction of emotional distress is a common law tort. Its elements are: (1) intentional or reckless conduct (2) which is extreme and outrageous (3) caused the emotional distress and (4) said distress is severe. See *Abdul-Malik v. AirTran Airways, Inc.*, 297 Ga. App. 852, 855-56 (2009); *Conley v. Dawson*, 257 Ga. App. 665, 572 S.E.2d 34 (2002). "Extreme and outrageous conduct is that which is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Jefferson v. Houston Hospitals, Inc.*, 336 Ga. App. 478, 484 (2016); *Canziani v. Visiting Nurse Health Sys.*, 271 Ga. App. 677, 679 (2005). Furthermore, the distress inflicted must be "so severe that no reasonable man could be expected to endure it." *Id.*; *ComSouth Teleservices, Inc. v. Liggett*, 243 Ga. App. 446, 448 (2000).

Georgia recognizes claims for negligent infliction of emotional distress; however, such claims generally have to satisfy Georgia's "impact rule." "In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury." *Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 53 (2000) citing *Ryckley v. Callaway*, 261 Ga. 828 (1992). However, when a parent and their child are both physically injured as a direct result of another's negligence, the parent may recover for negligent infliction of emotional distress from witnessing the child's suffering and death. *Id.* This

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expansion of the generally recognized “impact rule” does not apply where a parent seeks to recover for witnessing a child’s suffering of non-fatal injuries. *McCunney v. Clary*, 259 Ga. App. 260, 261-262 (2003).

Georgia law does recognize a pecuniary loss rule, though. Under this rule, a class for emotional distress may be had where a pecuniary loss occurs “as a result of a tort involving an injury to the person even though this injury may not be physical.” *Ob-Gyn Assocs. of Albany v. Littleton*, 386 S.E.2d 146, 149 (Ga. Ct. App. 1989). An example of a non-physical injury could be damage to one’s reputation (*Id.*) or aggravation of a preexisting mental illness. *Nationwide Mut. Fire Ins. Co. v. Lam*, 546 S.E.2d 283, 285 (Ga. Ct. App. 2001).

State Consumer Protection Laws, Rules and Regulations

The Fair Business Practices Act, O.C.G.A § 10-1-390 *et seq.*, does not apply to “[a]ctions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States.” O.C.G.A § 10-1-396(1). O.C.G.A Title 33, the Georgia Insurance Code, specifically authorizes insurance transactions in Georgia. It creates the Insurance Department of the State of Georgia and the office of the Commissioner. *See* O.C.G.A § 33-2-1. Therefore, pursuant to O.C.G.A § 10-1-396, the Fair Business Practices Act does not apply to insurance transaction. *See Ferguson v. United Life Ins. Co. of America*, 163 Ga. App. 282, 293 S.E.2d 736 (1982). Unfair trade practices in the insurance industry are governed by Chapter 6 of Title 33, entitled “Unfair Trade Practices”. O.C.G.A § 33-6-30 *et seq.* governs “Unfair Claims Settlement Practices.”

For the same reasoning as expressed in *Ferguson, supra*, insurance transactions are also exempted from Georgia’s Uniform Deceptive Trade Practices Act (UDTPA), codified as O.C.G.A. § 10-1-370, *et seq.* *Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc.*, 297 Ga. App. 28, 34, 676 S.E.2d 428 (2009).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” O.C.G.A § 9-11-26(b)(1). The information sought must be “relate[d] to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” O.C.G.A § 9-11-26(b)(1). Therefore, claims files are generally discoverable subject to appropriate privileges such as work-product (O.C.G.A § 9-11-26(b)(3)) and attorney-client (O.C.G.A § 24-5-501 (a)(2)). An order requiring a liability insurer to produce its entire claims file was proper where privileged material was specifically excluded and the insurer did not contest the relevancy of the material. *See Internat’l Indem. Co. v. Saia Motor Freight Line*, 223 Ga. App. 544 (1996)(discovery sought by first-party insured in bad faith case); *compare Cone v. Nat’l Gen. Assur. Co.*, 2015 U.S. Dist. LEXIS 154629 (S.D. Ga. 2015); *contrast State Farm Mut. Auto. Ins. Co. v. Howard*, 296 F.R.D. 692 (S.D. Ga. 2013).

The work-product exception extends to parties and their representatives, such as attorneys, consultants, sureties, indemnitors, insurers, or agents. *See Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787 (1975), *overruled on other grounds, Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E.2d 768 (1985). The statement of a party or other witness to an accident, if taken by an insurer in anticipation of a claim being filed against its insured, is considered work product, even if taken before litigation is filed. *See Copher v. Mackey*, 220 Ga. App. 43, 467 S.E.2d 362 (1996); *Lowe’s of Ga. v. Webb*, 180 Ga. App. 755, 350 S.E.2d 292 (1986).

Discoverability of Reserves

O.C.G.A § 9-11-26(b)(1) allows for the general discovery of relevant information that is not privileged. An argument can be made, however, that reserves represent confidential, proprietary business information and are, therefore, privileged.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

O.C.G.A § 9-11-26(b)(2) specifically addresses insurance agreements. It states:

A party may obtain discovery of the existence of the contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

Recent case law has reaffirmed the discoverability of insurance agreements and identity of insurers for legitimate purposes including juror qualification. *Ford Motor Co. v. Conley*, 294 Ga. 530 (2014) (granting motion for new trial for plaintiffs where defendant corporation failed to disclose its insurers); *see also Mordecai v. Cain*, 338 Ga. App. 526 (2016).

Attorney/Client Communications

Georgia's Attorney-client privilege rule is codified as O.C.G.A § 24-5-501 (a)(2). For many years, the privileged nature of attorney-client communications has been well-established and broadly recognized under Georgia law. It is equally well-established that this privilege applies in the insurance context. *See Bank of Am., N.A. v. Ga. Farm Bureau Mut. Ins. Co.*, 2014 U.S. Dist. LEXIS 136914 (M.D. Ga. 2014) *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994); *Southern Guaranty Ins. Co. of Ga. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579 (1989).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Georgia law does allow an insurer to rescind an insurance contract based on misstatements or omissions by an insured under certain conditions. According to O.C.G.A § 33-24-7(b):

Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:

- Fraudulent;
- Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
- The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

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Under Georgia law, in order for an insurer to deny coverage based upon an insured's misrepresentations, it must appear that the insured's false statements were made willfully and intentionally for purpose of defrauding insurer. *Fiveash v. Allstate Ins. Co.*, 2015 U.S. App. LEXIS 2760 (11th Cir. 2015) citing *Ga. Farm Bureau Mut. Ins. Co. v. Richardson*, 217 Ga. App. 201 (1995); see also *Nationwide Mut. Fire Ins. Co. v. Wiley*, 220 Ga. App. 442 (1996); *Blitch Ford, Inc. v. MIC Property and Cas. Ins. Corp.*, 90 F. Supp. 2d 1377 (M.D. Ga. 2000).

Failure to Comply with Conditions

A notice provision expressly made a condition precedent to coverage is valid and must be complied with, absent a showing of justification. *Triad Constr. Co. v. Robert Half Int'l*, 2017 U.S. App. LEXIS 2190 (11th Cir. 2017) citing *Eells v. State Farm Mut. Auto. Ins. Co.*, 324 Ga. App. 901, 903 (2013). The issue of whether notice is timely and meets the policy provisions is usually a question of fact for the jury. *Advocate Networks, LLC v. Hartford Fire Ins. Co.*, 296 Ga. App. 338, 340 (2009) citing *Holbrook-Myers Co., Inc. v. Transportation Ins. Co.*, 354 F. Supp. 2d 1349, 1354 (N.D. Ga. 2005). However, the court can make a determination in certain circumstances that a significant delay was unreasonable as a matter of law. *Id.*

The cooperation clause in a policy is a material condition of liability; a breach of this condition by the insured relieves the insurer of its duty to defend. *JC&C Inc. v. Peerless Indem. Ins. Co.*, 2013 U.S. Dist. LEXIS 48069 (N.D. Ga. 2013) citing *Hurston v. Georgia Farm Bureau Mut. Ins. Co.*, 148 Ga. App. 324, 325 (1978). "Under Georgia law, an insurer may require its insured to abide by the terms of the policy and cooperate with the insurer's investigation, as a precondition to recovery [in a suit by insured against insurer]." *Hall v. Liberty Mut. Fire Ins. Co.*, 2009 U.S. App. LEXIS 2075, at *6 (11th Cir. 2009). See also *State Farm Fire & Cas. Co. v. King Sports, Inc.*, 827 F. Supp. 2d 1364, 2011 U.S. Dist. LEXIS 140441 (N.D. Ga. 2011). An insured must act in good faith to cooperate with the insurer and to give complete and truthful disclosures as to the claim they are making with the insurance company. See *Byrd v. Atlanta Cas. Co.*, 294 B.R. 808, 813 (Bankr. M.D. Ga. 2003).

Challenging Stipulated Judgments: Consent and/or No-Action Clause

Georgia law allows for no-action clauses in insurance contracts. An example of such language was discussed in *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, 297 Ga. 38, 771 S.E.2d. 864 (2015). The language of the clause read:

No action shall be taken against the insurer unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, and the amount of the insureds' obligation to pay shall have been finally determined either by judgment against the insureds after actual trial, or by written agreement of the insureds, the claimant and the insurer.

The no-action clause was relevant in *Piedmont Office* where the insured sought consent from its excess carrier to settle a claim. The insurer only gave consent to settle the matter for \$1 million; however, the insured settled the case at mediation for \$4.9 million. The insured then brought a bad faith action against the insurer, and the Eleventh Circuit certified the question to the Georgia Supreme Court of whether an "insured who seeks (but fails) to obtain the insurer's consent before settling is flatly barred — whether consent was withheld reasonably or not — from bringing suit for breach of contract or for bad-faith failure to settle?" *Id* at 40.

The Georgia Supreme Court found in the affirmative and held that in a policy with a no-action clause:

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that the insurer may not be sued unless, as a condition precedent, the insured complies with all of the terms of the policy and the amount of the insured's obligation to pay is determined by a judgment against the insured after a trial or a written agreement between the claimant, the insured, and the insurer. In light of these unambiguous policy provisions, we hold that [the insured] is precluded from pursuing this action against [the insurer] because [the insurer] did not consent to the settlement and [the insured] failed to fulfill the contractually agreed upon condition precedent.

Id. 41-42.

Preexisting Illness or Disease Clauses

According to O.C.G.A. § 33-24-26(a), “No group accident and sickness insurance policy...shall be issued in this state, which policy limits or restricts payment of benefits for any preexisting illness or condition not otherwise excluded from the group policy for a period in excess of 12 months following the date of the issuance of the certificate covering the insured person.” O.C.G.A. § 33-30-15 also discusses coverage for preexisting conditions in the context of group accident and sickness insurance.

Georgia adopts a case-by-case review, examining the language of the specific policy at issue in order to determine the scope of the exclusion. *See, e.g., Bergan v. Time Ins. Co.*, 196 Ga. App. 78, 80, 395 S.E.2d 361, 363 (1990) (although not diagnosed with cancer prior to the effective date of other policy, plaintiff was advised to have follow-up examinations; in light of policy exclusion for “illness or injury for which medical care, treatment, medicine, or advice was received prior to the effective date of coverage,” the court found plaintiff had received “advice,” and claim was thus subject to preexisting disease clause of policy); *see also Lee v. Chrysler Life Ins. Co.*, 204 Ga. App. 550, 419 S.E.2d 727 (1992) (recent cancer, although in remission, should have been disclosed pursuant to policy provision asking whether the insured had been “attended” to for cancer).

Statutes of Limitations and Repose

In Georgia, the statute of limitations for actions on written contracts is six years. *See* O.C.G.A. § 9-3-24. This applies to contracts of insurance unless the policy contains a provision expressly limiting the time in which an action thereon may be filed. *See Pridgen v. Auto-Owners Ins. Co.*, 204 Ga. App. 322, 323, 419 S.E.2d 99 (1992); *Childs v. Armour Food Co.*, 175 Ga. App. 455, 333 S.E.2d 377 (1985). With regard to a breach of contract action based on refusal to defend, the cause of action arises when the insurer wrongfully refuses to undertake the defense of the insured, not when actual damage to the insured results. *See Hall v. Allstate Ins. Co.*, 880 F.2d 394, 1989 U.S. App. LEXIS 11889 (11th Cir. 1989) *citing Argonaut Ins. Co. v. Atlantic Wood Indus., Inc.*, 187 Ga. App. 471, 370 S.E.2d 765 (1988), *rev'd on other grounds*, 258 Ga. 800, 375 S.E.2d 221 (1989).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

In the context of property damage, products liability and mass torts, five different “coverage triggers” have been applied to determine liability coverage in Georgia. *See Arrow Exterm., Inc. v. Zurich Amer. Ins. Co.*, 136 F. Supp. 2d 1340, 1345 (N.D. Ga. 2001). These are: an “exposure” trigger, an “injury in fact” trigger, a “manifestation” trigger, a “continuous” trigger and a “multiple” trigger. In the context of property damage claims, “exposure” trigger is where coverage is triggered when “when the injury-producing agent first makes contact with the property.” *Id.* *citing* Martin J. McMahon, Annotation, *Event Triggering Liability Insurance Coverage as Occurring Within Period of*

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Time Covered by Liability Insurance Policy Where Injury or Damage is Delayed -- Modern Cases, 14 A.L.R.5th 695, 724 (1993)). “Injury in fact” trigger is where coverage is triggered “at the point in time when actual injury first occurs.” *Id.* at 1346 *citing* McMahon at 729. The “manifestation” trigger is where coverage is triggered “only when damage occurs and is discovered, that is ‘manifests’ itself as readily obvious, within the policy period.” *Id. citing* McMahon at 725. The “continuous” trigger is where “all liability policies in effect from the exposure to manifestation provide coverage and are responsible for the loss. *Id. citing* McMahon at 727. The only difference between “continuous” trigger and “multiple” trigger is that with a “multiple” trigger, “all the other individual trigger tests (exposure, injury in fact, and manifestation) are combined in a notion of continuity rather than singularity.” *Id. citing* James M. Fischer, *Insurance Coverage for Mass Tort Claims: the Debate over the Appropriate Trigger Rule*, 45 Drake L.Rev. 625, 646-47 (1997).

See also *Lee v. Universal Underwriters Ins. Co.*, 2014 U.S. Dist. LEXIS 192471, *10-15 (N.D. Ga. 2014).

Allocation Among Insurers

In order to determine allocation among insurers where the coverage trigger is in question, Georgia courts have applied general principles of contract construction and interpretation. See *Arrow*, 136 F. Supp. 2d at 1348. “Interpretation of contracts, including insurance policies, is ordinarily a question of law for the Court to resolve.” *Id. citing* O.C.G.A. § 13-2-1 and *Hartford Cas. Ins. Co. v. Banker’s Note, Inc.*, 817 F. Supp. 1567, 1571 (N.D. Ga. 1993), *aff’d*, 53 F.3d 1287 (11th Cir. 1995).

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In 2005, Georgia enacted the Tort Reform Act, which, among other reforms, amended Georgia’s joint liability and apportionment of damages statutory provisions. See O.C.G.A. §§ 51-12-31 and 51-12-33. The latter code section apportions damages among the persons who are liable according to the percentage of fault of each person.

At common law, contribution between joint tortfeasors was not allowed. See *Powell v. Barker*, 96 Ga. App. 592, 101 S.E.2d 113 (1957). However, the contribution statute, O.C.G.A. § 51-12-32, enacted in 1863, changed the common law rule, and specifically allowed contribution. The contribution statute, O.C.G.A. § 51-12-32, was not amended or repealed during the Tort Reform Act of 2005 and continues to exist.

O.C.G.A. § 51-12-32(a) provides:

Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

The only mention of contribution in O.C.G.A. § 51-12-33 is in subsection (b), which provides, in part: “Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.”

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Under the plain language of O.C.G.A. § 51-12-32 and due to the fact that the Code Section was not repealed, contribution is still allowed under Georgia law under certain circumstances. However, O.C.G.A. § 51-12-33(b) forecloses contribution as to “[d]amages apportioned by the trier of fact.” The right of contribution exists under O.C.G.A. § 51-12-32 between settling joint tortfeasors where there has been no apportionment of damages by the trier of fact. *Gold Cross EMS, Inc. v. Children's Hosp. of Ala.*, 648 Fed. Appx. 976, 978 (11th Cir. 2016) *citing Zurich American Insur. Co. v. Heard*, 321 Ga. App. 325, 330 (2013).

Elements

The right of contribution exists under O.C.G.A. § 51-12-32 between settling joint tortfeasors where there has been no apportionment of damages by the trier of fact pursuant to O.C.G.A. § 51-12-33. “Where no judgment finding both tortfeasors liable has been entered, a right of contribution still exists, but the party seeking contribution must prove that his own negligent actions and those of the alleged joint tortfeasor jointly caused the harm.” *Suggs v. Hale*, 278 Ga. App. 358, 360-361 (2) (2006). The test for determining joint tortfeasors is whether “the separate and independent acts of negligence of two or more persons or corporations combine naturally and directly to produce a single indivisible injury.” *Zimmerman's, Inc. v. McDonough Constr. Co.*, 240 Ga. 317, 320 (1) (1977).

“Contribution claims are separate and distinct from the claims asserted in the underlying litigation, and they are not extinguished by release, dismissal, or judgment in the underlying litigation and are not barred by failure to assert them in the underlying litigation.” *Progressive Elec. Servs. v. Task Force Construction, Inc.*, 327 Ga. App. 608, 616, 760 S.E.2d 621 (2014).

In *Progressive Elec.*, appellants sought to preclude contribution claims made against them by arguing that (1) the claims were waived by the failure to cross-claim in the underlying action, and (2) the claims were precluded under res judicata by the dismissal with prejudice by the plaintiff in the underlying case. The Court of Appeals rejected both of these arguments, emphasizing the “separate and independent” nature of a party’s right to contribution.

Furthermore, claims for contribution do not have to be brought as counterclaims or cross-claims, but instead may be brought by filing a separate action after judgment has been entered in the original tort action. *See Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 33 (1991).

DUTY TO SETTLE

A number of Georgia cases have considered claims that an insurer was negligent or acted in bad faith in rejecting a policy-limits offer from the plaintiff in the underlying action or by failing to offer the limits of a policy to settle the case against its insured. *See Kingsley v. State Farm Mut. Auto Ins. Co.*, 353 F. Supp. 2d 1242, 1251 (N.D. Ga. 2005), *aff'd* 153 Fed. Appx. 555 (11th Cir. 2005). An insurer will be exposed in excess of its policy limits only where there is some certainty regarding the settlement posture of the parties in the underlying lawsuit. *See Id.* at 1252. “There must be a triggering event -- something that puts the insurer on notice that it must respond or risk liability for an excess judgment.” *Id.* An insured states a cause of action for tortious failure to settle if the insured can show that settlement within the policy limits was possible, the insurer knew or reasonably should have known of this fact, and the insurer failed to effect a settlement within a reasonable time. *See Id.*; *see also Ogle v. Nationwide Ins. Co. of*

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Am., 2006 U.S. Dist. LEXIS 8188, 2006 WL 418148 (N.D. Ga. Feb. 21, 2006).

“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 Ins. Co. v. Holt*, 262 Ga. 267, 268 (1992) citing *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 870 (1984). “In deciding whether to settle a claim within policy limits, the insurance company must give equal consideration to the interests of the insured.” *Id.* citing *Great American Ins. Co. v. Exum*, 123 Ga. App. 515, 519 (1971). “An insurance company does not act in bad faith solely because it fails to accept a settlement offer within the deadline set by the injured person’s attorney.” *Id.* at 269 (citation omitted). Instead, under *Holt* and its progeny, an insurer must consider the best interests of its insured, whether there is clear liability, and the amount of special damages. *Id.*; *Baker v. Huff*, 323 Ga. App. 357, 363-365, 747 S.E.2d 1 (2013); *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 580 S.E.2d 519 (2003).

Whereas the *Holt* and *Brightman* cases both dealt with situations where the alleged special damages exceeded policy limits, the Court of Appeals in *Baker* made it clear that those cases “cannot be construed as holding that it is always reasonable for an insurer not to respond to a time-limited offer to settle within the policy limits when special damages do not exceed the policy limits.” *Baker, supra* at 365.

A recent decision from the Georgia Supreme Court touches on the importance of considering the precise terms and conditions of a policy limits demand in complying with a duty to settle and avoiding bad faith liability. *Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848 (2017), applies O.C.G.A. § 9-11-67.1 (enacted 2013) to a case where a clerical error resulted in payment from the insurer arriving after the deadline specified in the accepted demand letter. In its opinion, the Court specifically acknowledged the statute’s implications for bad faith claims and held that acceptance could be conditioned upon forcing the offeree to perform a certain act. In this case, the offer required payment to be received within 10 days of acceptance. *Id.*

LH&D BENEFICIARY ISSUES

According to O.C.G.A. § 33-24-3(b), “An individual has an unlimited insurable interest in his or her own life, health, and bodily safety and may lawfully take out a policy of insurance on his or her own life, health, or bodily safety and have the policy made payable to whomsoever such individual pleases, regardless of whether the beneficiary designated has an insurable interest.”

According to O.C.G.A. § 33-25-11(a), “Whenever any person residing in the state shall die leaving insurance on his or her life, such insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise.”

Change of Beneficiary

O.C.G.A. § 33-29-3 (b)(12) provides that for accident or sickness policies that “the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.” Similarly, with respect to life insurance, longstanding Georgia law holds that the insured has a right to change the beneficiary “to whomsoever he pleases.” *Quinton v. Millican*, 196 Ga. 175, 26 S.E.2d 435 (1943).

Effect of Divorce on Beneficiary Designation

Even in the event of a divorce decree and settlement agreement, the beneficiary of an insurance policy generally remains the same until a change of beneficiary is effected in accordance with the terms of the policy. *Ward v. Phoenix Mut. Life Ins. Co.*, 201 Ga. App. 307, 410 S.E.2d 795 (1991).

Although the beneficiary is not generally changed by the divorce itself, if the insured has done substantially all that is required of him, or all that he is able to do, to effect a change of beneficiary, and all that remains to be done is ministerial action of the insurer, the change will take effect though the details are not completed before the death of the insured. Some affirmative act, however, on the part of the member to change the beneficiary is required. *Id.*

INTERPLEADER ACTIONS

Availability of Fee Recovery

According to O.C.G.A. §23-3-90, “Whenever a person is possessed of property or funds or owes a debt or duty, to which more than one person lays claim of such a character to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead.” Furthermore, if the person bringing the action has to make or incur any expenses in so doing, including attorney’s fees, the amount so incurred shall be taxed in the bill of costs, with the court’s approval, the court in its discretion determining the amount of the attorney’s fees, and shall be paid by the parties cast in the action as other costs are paid. See O.C.G.A. § 23-3-90(b).

It is essential to the maintenance of a petition for interpleader that there be at least two persons, having conflicting claims, each apparently well founded, to a fund in the hands of a person having no interest in or claim thereon, and who, as between the conflicting claimants, is perfectly indifferent. See *Davis v. Davis*, 96 Ga. 136, 21 S.E. 1002, 1895 Ga. LEXIS 24 (1895). The general doctrine is, that interpleader lies, where two or more persons claim the same thing, under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the duty claimed, or to deliver the property claimed, is either molested by an action or actions brought against him, or fears he may suffer injury, from the conflicting claims of the parties against him. See *Johnson v. Harbison-Walker Min. Co.*, 181 Ga. 630, 183 S.E. 791, 1936 Ga. LEXIS 404 (1935).

Georgia litigation has centered on issues involving interpleader involving insurance issues. In a case involving a petition for interpleader brought by insurer, alleging that the insured changed the beneficiary named in the policy prior to his death, without alleging when or how the change was made, setting forth a copy of the policy, or stating whether or not the insured reserved to himself the right to change the beneficiary, was insufficient to inform the court of the nature, character, and foundation of the claim so as to enable the court to determine whether or not an interpleader was essential to the plaintiff’s protection, and the trial court erred in overruling the general demurrer to the petition. See *Lowery v. Independent Life & Acci. Ins. Co.*, 209 Ga. 753, 76 S.E.2d 5, 1953 Ga. LEXIS 394 (1953). Therefore, the doubt or danger that would authorize an interpleader must be reasonable. See *Daniel v. Citizens & Southern Nat’l Bank*, 182 Ga. 384, 185 S.E. 696, 1936 Ga. LEXIS 373 (1936).

Differences in State vs. Federal

Statutory interpleader under the Civil Practice Act broadens and liberalizes the rules relating to the remedy of interpleader so as to render the technicalities associated with the equitable remedy of a strict bill of interpleader no longer applicable to complaints tried under that section. Interpleader provisions should be liberally construed in order that their utilitarian purposes may be best effectuated. The right to statutory interpleader depends merely upon the stakeholder's good-faith fear of adverse claims, regardless of the merits of those claims or what the stakeholder bona fide believes the merits to be. See *Penland v. Corlew*, 248 Ga. App 564 547 S.E. 2d 306 (2001).

Interpleader under *Fed. R. Civ. P. 22* is an equitable procedure intended to protect a stakeholder from multiple liability and the vexation of defending multiple claims to the same fund. Therefore, the principle requirement for interpleader is a real and reasonable fear of double liability or vexatious, conflicting claims. The requirement that the claims for which interpleader is sought be adverse to each other is not satisfied where the stakeholder could be liable to both claimants. See *Washington Electric Cooperative, Inc. v. Paterson, Walke & Pratt*, 985 F. 2d 677, 679 (2d Cir. 1993). Therefore, the principle requirement for interpleader is "a real and reasonable fear of double liability or vexatious, conflicting claims." *Id.* (quoting *Indianapolis Colts v. Mayor of Baltimore*, 741 F.2d 954, 957 (7th Cir. 1984)). In the absence of a decision from the state's highest court, the Federal Courts must adhere to the decisions of the state's intermediate appellate courts unless there is some persuasive indication that the state's highest court would decide the issue otherwise. See *King v. Guardian Life Ins. Co.*, 686 F. 2d 894, 898 (11th Cir. 1982). The Federal Circuit Court of Appeals generally defers to an interpretation of state law by a Federal district judge sitting in that state, provided his interpretation appears to be reasonable and consistent with the state's law. See *Faser v. Sears Roebuck & Co.*, 674 F. 2d 856, 859 (11th Cir. 1982).