

GEORGIA

William J. Martin  
HAWKINS PARNELL THACKSTON  
& YOUNG, LLP  
303 Peachtree Street NE  
Suite 4000  
Atlanta, Georgia 30303-3243  
(404) 614-7549 (Telephone)  
(404) 614-7500 (Fax)  
[wmartin@hptylaw.com](mailto:wmartin@hptylaw.com)

Bates Lovett  
HUNTER MACLEAN EXLEY  
& DUNN, PC  
200 East Saint Julian Street  
Savannah, Georgia 31401  
(912) 236-0261 (Telephone)  
(912) 236-4936 (Fax)  
[blovett@huntermaclean.com](mailto:blovett@huntermaclean.com)

---

I. REGULATORY LIMITS ON CLAIMS HANDLING

Title 33 of the Official Code of Georgia is the statutory provision governing insurance in the state. It is known as the "Georgia Insurance Code."

A. 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. It includes vehicle insurance as defined in Code Section 33-7-9, accident and sickness insurance as defined in Code Section 33-7-2, as well as liability insurance and nine other types of insurance defined in Code Section 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).

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 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).

Moreover, 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.

#### **B. Standards for Determinations 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. 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 in insurer in connection with motor vehicle liability policies.

#### **C. Privacy Protections**

Title 33 of the Official Code of Georgia governing insurance does not set forth any specific rights of privacy between an insured and/or insurer. However, it does set forth limitations on collection, use and disclosure of information gathered by insurance companies. See O.C.G.A. § 33-39-1 et seq.

O.C.G.A § 33-39-4 prohibits an insurer from using "pretext interviews" to obtain information in connection with an insurance transaction. O.C.G.A § 33-39-6 requires an insurer to clearly specify those questions designed to

obtain information solely for marketing or research purposes.

O.C.G.A. § 33-39-7 prevents an insurer from utilizing as its disclosure authorization form a form or statement that authorizes the disclosure of personal or privileged information about an individual to the insurance institution unless it conforms to the requirements of O.C.G.A. § 33-39-7(1)-(8).

O.C.G.A. § 33-24-93 requires an insurer who uses credit information in underwriting or rating a customer to disclose that it may obtain credit information in connection with such application.

The disclosure of information that an insured or applicant is the subject of family violence is prohibited except under the circumstances articulated in O.C.G.A. § 33-6-4(b)(15)(C).

O.C.G.A. § 33-39-14 articulates the circumstances under which an insurer may disclose personal or privileged information about an individual collected or received in connection with an insurance transaction.

## **II. 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."

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. See Byrd v. United States Automobile Association, 317 Ga. App. 280, 282, 729 S.E.2d 522 (2012). Construction of a contract is a question of law for the court. See Id. 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 Ins. Co. of Pa. v. APAC-Southeast, Inc., 297 Ga. App. 553, 557, 677 S.E.2d 734 (2009); Collier v. State Farm Ins. Co., 249 Ga. App. 865, 867-868, 549 S.E.2d 810 (2001).

## **III. 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).

## **IV. DUTIES IMPOSED BY STATE LAW**

### **A. 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 (11<sup>th</sup> 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 Colony Ins. Co. v. Corrosion Control, Inc., 390 F. Supp. 2d 1337, 1339 (M.D. Ga. 2005), citing Penn-America Ins. Co. v. Disabled Am. Veterans, 268 Ga. 564, 565-566, 490 S.E.2d 374 (1997). Any doubt as to an insured's duty to defend should be resolved in favor of the insured. See id. 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). 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., 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). 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).

### **B. Duty to Indemnify**

Under Georgia law, an insurer's duty to pay and its duty to defend are separate and independent obligations. See Burt v. Great Northern Ins. Co., 290 Fed. Appx. 297, 299 (11<sup>th</sup> Cir. Aug. 21, 2008); see also Yeomans & Assocs. Agency, Inc. v. Bowen Tree Surgs., Inc., 274 Ga. App. 738, 742, 618 S.E.2d 673 (2005). An insurer may be liable in a breach of contract action where it refuses to pay for a covered loss. See Aetna Ins. Co. v. Walker, 98 Ga. App. 456, 459, 105 S.E.2d 917 (1958).

### **C. 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 (11<sup>th</sup> 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 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.

## **V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES**

### **A. Bad Faith**

#### **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)).

#### **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).

#### **3. Damages**

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).

#### **B. 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. See Mecca Constr., Inc. v. Maestro Invs., LLC, 320 Ga. App. 34, 41, 739 S.E.2d 51 (2013); Internat'l Business Machines Corp. v. Kemp, 244 Ga. App. 638, 640, 536 S.E.2d 303 (2000).

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 (11<sup>th</sup> Cir. 1991). Additionally, an insurer's fraud may serve as the basis for a tortious failure to settle claim. See Francis v. Newton, 43 S.E.2d 282, 284 (1947). "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, 726 S.E.2d 488 (2012) citing Southern Gen. Ins. Co. v. Holt, 262 Ga. 267, 268, 416 S.E.2d 274 (1992); see also Owners Ins. Co. v. Parsons, 2014 U.S. Dist. LEXIS 175293 (N.D. Ga. 2014).

#### **C. 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) and caused the emotional distress (4) which is severe. See Pyle v. City of Cedartown, 240 Ga. App. 445, 447, 524 S.E.2d 7 (1999); see also Conley v. Dawson, 257 Ga. App. 665, 572 S.E.2d 34 (2002). As to element of "extreme and outrageous" conduct, "[l]iability has been found only where the conduct has been 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." Canziani v. Visiting Nurse Health Sys., 271 Ga. App. 677, 679, 610 S.E.2d 660 (2005). Furthermore, the distress inflicted must be "so severe that no reasonable man could be expected to endure it." ComSouth Teleservices, Inc. v. Liggett, 243 Ga. App. 446, 448, 531 S.E.2d 190 (2000).

The common law tort of negligent infliction of emotional distress is recognized in Georgia. "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, 533 S.E.2d 82 (2000) citing Ryckley v. Callaway, 261 Ga. 828, 412 S.E.2d 826 (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.; see also Bennett v. Moore, 312 Ga. App. 445, fn 11, 718 S.E.2d 311 (2011). This 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, 576 S.E.2d 635 (2003).

#### **D. State Consumer Protection Laws**

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).

### **VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS**

#### **A. Discoverability of Claims Files Generally**

O.C.G.A § 9-11-26 deals with general provisions regarding discovery in Georgia. "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 "reasonably calculated to lead to the discovery of admissible evidence." 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, 478 S.E.2d 776 (1996).

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, 218 S.E.2d 921 (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).

#### **B. 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.

**C. 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.

O.C.G.A § 9-11-26(b)(2).

**D. Attorney-Client Communications**

Georgia recently changed its evidence code to more closely parallel and coincide with the Federal Rules of Evidence. Attorney-client privilege is now codified as O.C.G.A § 24-5-501 (a)(2). Even prior to these changes, the privileged nature of attorney-client communications was 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).

**VII. DEFENSES IN ACTIONS AGAINST INSURERS**

**A. 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:

(1) Fraudulent;

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(3) 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 under either by the application for the

policy or contract or otherwise.

O.C.G.A § 33-24-7(b).

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, 457 S.E.2d 181 (1995); see also Nationwide Mut. Fire Ins. Co. v. Wiley, 220 Ga. App. 442, 469 S.E.2d 302 (1996); Blitch Ford, Inc. v. MIC Property and Cas. Ins. Corp., 90 F. Supp. 2d 1377 (M.D. Ga. 2000).

#### **B. 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. Eells v. State Farm Mut. Auto. Ins. Co., 324 Ga. App. 901, 903, 752 S.E.2d 70 (2013) citing Federated Mut. Ins. Co. v. Ownbey Enterprises, Inc., 278 Ga. App. 1, 3, 627 S.E.2d 917 (2006), cert. denied. The issue of whether notice is timely and meets the policy provisions is usually a question of fact for the jury. See 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. See 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. See Hurston v. Georgia Farm Bureau Mut. Ins. Co., 148 Ga. App. 324, 325, 250 S.E.2d 886 (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 (11<sup>th</sup> 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).

#### **C. Statute of Limitations**

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 undertake the defense of the insured, 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).

### **VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS**

### **A. Trigger of Claims**

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 Time Covered by Liability Insurance Policy Where Injury or Damage is Delayed -- Modern Cases, 14 A.L.R.5<sup>th</sup> 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).

### **B. 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. 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 (11<sup>th</sup> Cir. 1995).

## **IX. Contribution Actions**

### **A. 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."

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*. See Zurich American Insur. Co. v. Heard, 321 Ga. App. 325, 330, 740 S.E.2d 429 (2013).

#### **B. 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), 629 S.E.2d 11 (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), 240 S.E.2d 864 (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 (1) 410 S.E.2d 154 (1991).