INSURANCE

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This survey follows the same general outline used last year. The only major change, aside from changes naturally resulting from additions or omissions of subject matter, is the amalgamation into one section of the formerly separate sections on CONSTRUCTION, INTERPRETATION, and DEFINITIONS. This was done because these subjects defy precise delineation. Although the survey formally extends from April 1966 to June 1967, the reader's attention is called to the fact that for technical reasons the last case covered herein was decided in February 1967.

ACTIONS—INTERFERENCE WITH ATTORNEY-CLIENT RELATIONSHIP

In *Bankers Health & Life Ins. Co. v. Fryhofer*[1] an attorney filed a suit for actual and punitive damages against an insurer for persuading his client to cancel a contingent fee contract by alluding, among other things, to the self-seeking greediness of the practicing bar.

The Georgia Court of Appeals recognized that he had a substantive cause of action in principle but decided against him on the familiar ground that he had failed to prove his loss.

Proper damages were to be measured, or at least delimited, by the percentage of the recovery, as specified in the contingent fee contract, to which the client was entitled under the provisions of the policy. To this end the plaintiff should have pleaded and proved: (1) the provisions of the policy; (2) the facts showing a right of his client to recover thereunder; and (3) the amount of his entitlement.

In denying recovery the decision is undoubtedly correct since the plaintiff had addressed himself neither to the first nor to the second requirement. However, the third requirement, stated in such deceptively simple and abstract manner, would still have posed practically unsurmountable difficulties. The contingent fee contract provided for graduated fees dependent on whether recovery was had before filing suit, after filing suit, or after trial. In order to prove the appropriate percentage due from the client's recovery, how was the attorney to establish whether the insurer would have settled, and whether the case would have proceeded to trial, let alone determine what the recovery would have been at any of these stages?

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1. 114 Ga. App. 107, 150 S.E.2d 365 (1966).

In this context the court issued only a negative guideline; the plaintiff cannot establish his case by relying upon the recovery in a prior case against the same company, involving an identically worded policy and identical injuries. Such evidence is inadmissable as it is based upon the untenable assumption that the insurer had an invariable practice to refuse demands for payment and, what is worse, to do so in bad faith.[2]

The case brings into sharp relief the perplexing and recurring problem of tortfeasors who are allowed to hide behind the uncertainty regarding damages which their very wrongdoing has engendered. Thus the tort serves a dual function—it creates a right to compensation in the victim in the abstract, and nullifies his remedy in practice. The opinion should be carefully scrutinized. It is noteworthy both for the questions it solves and for those it leaves unanswered.

Appraisal—Limitation in Policy—Time for Suit

The court of appeals, in *Yates v. Cotton States Mut. Ins. Co.*,[3] held that the arbitration clause in the standard fire insurance policy represents nothing more than a contractual method for appraising the amount of the loss and does not relate to the core question of liability. Such appraisement, even if completed, constitutes neither common law nor statutory arbitration, since there is no agreement by the insurer to pay the amount of loss found by the appraisers. It follows that an action upon the appraisers' "award" must be viewed as an action solely upon the policy and therefore subject to its limitations; particularly the condition subsequent which cuts off the right to bring an action "unless commenced within twelve months next after the inception of the loss."

Attorney's Fees and Statutory Penalties

A demand under the code provision on damages and attorney's fees[4] need not comply with any formal requirements. An oral threat of a lawsuit "if you won't pay me" in response to an adjuster's emphatic "we won't pay you anything" is sufficient.[5] However, it must be remembered that a demand, no matter how formal, has to be made at a time when the insured has a right to exact present payment. Hence a mere showing that a proof of loss has been properly filed does not, standing alone, constitute a demand.[6]

The court of appeals again reiterated and clarified the two core principles that control findings of bad faith: (1) The faith of the insurer must

2. It must be noted that the plaintiff made the added mistake of relying on a case that was later reversed.
3. 114 Ga. App. 360, 151 S.E.2d 523 (1966).
4. Ga. Code Ann. §56-1206 (1960 Rev.).
5. Cotton States Mut. Ins. Co. v. Clark, 114 Ga. App. 439, 151 S.E.2d 780 (1966).
6. National Cas. Co. v. Dixon, 114 Ga. App. 362, 151 S.E.2d 539 (1966).

be judged solely by the case made at the trial. Thus an out-of-state insurance company which had failed on the trial of a case to introduce any Iowa statutes or otherwise to develop the proposition that domestic law did not obtain cannot establish its good faith by claiming on appeal that its refusal to pay the policy had been based on its reasonable assumption that it was an Iowa contract not amenable to Georgia law.[7] (2) If the evidence adduced at the trial is in such conflict that a finding in accordance with the contentions of the insurer would have been authorized, a finding of bad faith is precluded even if the insured recovers in full. This applies to conflicts in the evidence as to the cause of loss,[8] as well as to bona fide disputes as to the amount of the loss. However, in the latter class of cases the principle is somewhat modified by the requirement that the difference between the amounts claimed and conceded must be found to be substantial. Such a finding was warranted in a case where the proof of loss was for $2,350, a suit was brought for $1,400 but the verdict returned was for $1,000.[9]

In suits involving complex valuations with their attendant conflicts of opinion, the penalty provision is, as a practical matter, of limited utility to the insured because the introduction of a single expert witness testifying to a substantially lower amount will generally preclude a finding of bad faith.[10]

The court of appeals was again forced to come to grips with the problem of whether attorney's fees are authorized under verdicts which omit the imposition of a penalty. In *Hartford Accident & Indem. Co. v. Grant* the verdict merely stated: "We find for the plaintiff a total of $5,056, of which $1,500 is attorney fee."[11] Normally this case would have been controlled by *Piedmont S. Life Ins. Co. v. Gunter*,[12] which held, in connection with an identically worded verdict, that mere silence did not negate a finding of bad faith if there was sufficient evidence to authorize such a finding. However, in the *Hartford* case the record further disclosed that the court, upon receiving the verdict, specifically asked the jury if there was any penalty award to which the foreman replied, "No." This added circumstance, the court concluded, was tantamount to an express statement incorporated in the verdict itself. This brought the case within the somewhat uncertain ambit of *Union Cent. Life Ins. Co. v. Cofer*,[13] holding that a verdict which expressly states that no bad faith or penalty is found necessarily nullifies the award of attorney's fees.

7. Iowa State Travelers Mut. Ass'n v. Cadwell, 113 Ga. App. 128, 147 S.E.2d 461 (1966).
8. St. Paul Fire & Marine Ins. Co. v. Postell, 113 Ga. App. 862, 149 S.E.2d 864 (1966).
9. Georgia Farm Bureau Mut. Ins. Co. v. Boney, 113 Ga. App. 459, 148 S.E.2d 457 (1966).
10. *See, e.g.*, United States Fidelity & Guar. Co. v. Biddy Lumber Co., 114 Ga. App. 358, 151 S.E.2d 466 (1966).
11. 113 Ga. App. 795, 149 S.E.2d 712 (1966).
12. 108 Ga. App. 236, 132 S.E.2d 527 (1963).
13. 103 Ga. App. 355, 119 S.E.2d 281 (1963).

Binding Receipts

Life insurance companies are naturally reluctant to vest in eager soliciting agents authority to bind them to risks that can only be adequately evaluated by the cumulative expertise of the home office. At the same time they recognize the need for enhancing the sales appeal of their policies by affording to their applicants something akin to immediate protection. From these conflicting pulls there has emerged the litigation-prone "binding receipt" which, if one is to believe the companies' own contentions, provides but an illusion of coverage and little more than a means for collecting premiums studiously avoided by a wording that is replete with "semantic puzzles."[14] Typically the receipt recites that coverage "shall be in effect from the date of the completion of the application" and that it is conditioned upon payment of the first premium and upon the applicant's insurability as a standard risk upon the date the application is completed. If the applicant dies before his application is acted upon by the home office, the insurer is tempted to contend that the receipt coupled with the application constituted a mere offer by the applicant which the insurer simply had not accepted, or to contend that the receipt was a contract subject to ascertainment of the applicant's insurability as a condition precedent, a condition which had not been satisfied before the applicant's untimely demise.

Confronted with such contentions, the court of appeals in *Etheridge v. Woodmen of the World Life Ins. Soc.*,[15] held that cases of this kind involve two severable offers: (1) an offer by the applicant to purchase a policy of life insurance and (2) an offer by the insurer to provide interim insurance pending the company's consideration of the applicant's prior offer. The second offer is accepted by the applicant's payment of the first premium. Furthermore the stipulation regarding the applicant's insurability at the time the application is completed is not a condition precedent to interim coverage, but a condition subsequent. Hence the insurer has the burden of showing by proper pleading and proof that the applicant was not an insurable risk at the crucial date.

Coverage-Duration

The code section requiring the insertion of provisions for grace periods in individual accident and sickness insurance policies[16] is considered part of all contracts that are constructively executed in Georgia. If the insured dies during the grace period, liability under the contract attaches at once,

14. As characterized by Mr. Justice Hall in New York Life Ins. Co. v. Whitfield, 113 Ga. App. 266, 147 S.E.2d 829 (1966).
15. 114 Ga. App. 807, 152 S.E.2d 773 (1966).
The supreme court granted certiorari in this case, but its decision had not been handed down by the end of the period covered in this survey.
16. Ga. Code Ann. §56-3004 (3) (1960 Rev.).

and it is no defense to the insurer that the premium was neither tendered nor paid unttil after the grace period has expired.[17]

DEFINITIONS AND CONSTRUCTION

CONTINUOUS CONFINEMENT

Literally applied the continuous confinement clause, one of the most restrictively worded provisions in disability policies, relegates the insured to the status of a prisoner. He may leave his home only if he visits his physician or goes to a hospital for treatment and then only, according to a prevalent version of that clause, if "such treatment cannot be administered in the home of the insured."

United Ins. Co. of America v. Murray[18] held that even under the most liberal application of the clause the insurer's capacity during a substantial portion of the time to leave his house, drive his own car, and attend to personal and business matters some of which were of a non-therapeutic nature indicated that he could not be afflicted with a house-confining illness. By framing its conclusion in this fashion the court of appeals has, despite its ample discussion of foreign authorities, obviated the necessity of indicating whether it subscribed to the "liberal" or "literal" construction of the clause. Nor did this point receive much clarification when the court held in *Continental Cas. Co. v. Stephenson*[19] that an insured's trips to a physician for treatment in a car driven by his wife did not lose their primarily therapeutic character by occasional stops at stores and lawyers' offices. Since the insured had remained in the car, these stops were deemed coincidental to the trips and primarily for the benefit of the wife and could not be treated as evidence warranting withdrawal of the case from the jury.

ENTIRE LOSS OF SIGHT

State Farm Mut. Auto. Ins. Co. v. Sewell,[20] illustrates the occasional judicial proclivity toward endowing isolated words with a magic potency and certitude which they do not possess in the functional context in which they appear.

Has a man who cannot see the blackboard even when sitting on the front row at school, cannot read the regular print of any textbook, and cannot count the fingers on a hand held up a few feet in front of his face suffered an "entire and irrevocable loss of sight"?

The court of appeals thought he did when it rejected the notion that the parties had contemplated only absolute blindness and thus aligned

17. Iowa State Travelers Mut. Ass'n v. Cadwell, 113 Ga. App. 128, 147 S.E.2d 461 (1966).
18. 113 Ga. App. 138, 147 S.E.2d 656 (1966).
19. 114 Ga. App. 555, 152 S.E.2d 5 (1966).
20. 223 Ga. 31, 153 S.E.2d 432 (1967).

itself with the prevailing authority which holds that the phrase connotes merely "entire loss of practical use of sight."[21]

The Georgia Supreme Court agreed that the insured might well have lost his eyesight for all practical purposes but felt itself constrained by the "invariable word entire" which "embraces all and leaves nothing."[22] It concluded, therefore, that nothing less than absolute blindness could satisfy the provision.

It is perhaps unfortunate that by invoking the "ambiguity-on-its-face" rule in this manner, and as the sole basis for contextual interpretation, courts frequently avoid interpretation altogether and "make a fortress out of the dictionary."[23]

In construing the word "may," which connotes discretion, as "shall," which connotes compulsion, Judge Frank addressed himself to this very point when he stated in his usual pithy manner: "Even if a word in a written agreement is not ambiguous on its face, the better authorities hold that its context, its 'environment,' must be taken into account in deciding what the parties mutually had in mind when they used that verbal symbol."[24]

FURNISHED FOR REGULAR USE OF THE INSURED

Automobile liability policies regularly exclude coverage for any automobile, other than that described in the contract, which is "owned by or furnished for the regular use" of the insured. Formerly this was construed as embracing two requirements: (1) that there must be a furnishing for regular use, and (2) that there must be regular use in fact.[25]

In *Cotton States Mut. Ins. Co. v. Falls*[26] the court of appeals eliminated the second requirement by resorting to a literal construction of the clause. It also held that the phrase "regular use" does not mean "exclusive use" in the sense that the insured must use such automobile to the exclusion of all others.

By focusing solely upon the purpose for which the automobile is furnished rather than upon its actual use the court has undoubtedly created an effective test which is easy to administer because it obviates murky inquiries into the quantum of use. Yet the test also leads to the unpalatable exclusion of automobiles that are only occasionally used in fact, just because they were originally furnished for regular use. This construction is open to the further objection that it cannot be reconciled with the "drive other

21. State Farm Mut. Ins. Co. v. Sewell, 114 Ga. App. 331, 151 S.E.2d 231 (1966); Georgia Life & Health Ins. Co. v. Sewell, 113 Ga. App. 443, 148 S.E.2d 447 (1966).
22. State Farm Mut. Auto Ins. Co. v. Sewell, 223 Ga. 31, 32; 153 S.E.2d 432, 433.
23. Judge Learned Hand in Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).
24. United States v. Lennox Metal Mfg. Co., 225 F.2d 302, 310 (2d Cir. 1955).
25. National Ben Franklin Ins. Co. v. Prather, 109 Ga. App. 459, 136 S.E.2d 499 (1964).
26. 114 Ga. App. 812, 152 S.E.2d 811 (1966); *accord,* Hale v. Southern Guar. Ins. Co., 115 Ga. App. 29, 153 S.E.2d 574 (1967).

cars" provision which is tailored to cover occasional and incidental use of other automobiles without the payment of an additional premium because such use entails no additional risk. As Mr. Justice Felton stated in his dissenting opinion,[27] this would seem to indicate that the insurer sought protection only against a material increase in the risk created by actual rather than contemplated regular use.

HOUSEHOLD

The household exclusion continues to elude a comprehensive test that is both easy to administer and so predictable in its results as to discourage frivolous litigation when the facts are uncontroverted. At present the test consists less of a definition than of an aggregate of "factors" which may or may not impel the conclusion that a member of the insured's family was living in the same household with the insured. *Keene v. State Farm Mut. Auto. Ins. Co.*[28] seems to have added a "convenience" factor to this aggregate by holding that a member of the family who, solely for his own convenience, slept in a detached structure located within the same curtilage when he was privileged to sleep in the house itself, was still a member of the household. His conduct, standing alone, did not evince an intent to sever the household connection.

OPERATION IN VIOLATION OF REGULATIONS

Standard aviation policies provide that they do not apply "to loss while the aircraft is in flight by or with the permission of the insured during or as the result of its operation . . . in violation of any regulations pertaining to Airman's Certificates." This amounts to an exclusion or a suspensive condition and not merely an exception or excepted cause of the insured event. Hence it is immaterial that the excluded use was not causal to the loss or that the insured was unaware of any violation because of his ignorance of the pilot's lack of qualifications.[29]

TOTAL AND PERMANENT DISABILITY

The proper test for total and permanent disability, which must be accurately reflected in the instructions to the jury, is whether the insured is incapacitated to perform *substantially all* of the duties of his employment rather than incapacitated to perform *any substantial part* of his ordinary duties.[30]

INSURABLE INTEREST

The new code definition of insurable interest in property which embraces "any actual, lawful, and substantial economic interest in the safety or

27. Cotton States Mut. Ins. Co., 114 Ga. App. 812, 814, 152 S.E.2d 811, 813 (1966).
28. 114 Ga. App. 625, 152 S.E.2d 577 (1966).
29. Girgsby v. Houston Fire & Cas. Ins. Co., 113 Ga. App. 572, 148 S.E.2d (1966).
30. Cloer v. Life & Cas. Ins. Co., 222 Ga. 798, 152 S.E.2d 857 (1966).

preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment"[31] is not broad enough to include the interest of a bona fide purchaser and possessor of a stolen automobile. Ironically enough, even though the automobile is "non-owned" in a very real sense, policy provisions for coverage of "non-owned" vehicles do not extend to it because they too are conditioned upon the insured's having some lawful interest in the subject matter of the insurance. Any other construction would convert the insurance contract into a gaming arrangement and render it void as a matter of public policy.[32]

Cotton States Mut. Ins. Co. v. Clark[33] held that under the standard fire insurance policy a lessee could recover the full cash value of improvements and betterments erected by him and that he was not limited to the rental or use value during the remainder of his leasehold.[34]

Mr. Justice Hall, in his special concurring opinion, agreed with this holding but predicated his conclusion upon a different rationale. The "nor in any event for more than the interest of the insured" clause, although limiting recovery to the value of the leasehold, is subordinate to the clause measuring recovery by the "actual cash value of the property at the time of the loss." It follows that the insured is prima facie entitled to actual cash value until the insurer pleads and proves the lesser interest and the amount by which recovery should be diminished. This the insurer had failed to do.

INTERESTS ON JUDGMENTS

Where a casualty insurer on entering upon trial, disputes the amount of loss claimed by the insured and the amount is not previously liquidated and determined in any of the ways provided in the policy, interest on the amount recovered begins only after entry of the judgment and not after the date of the loss. The same holds true where the insurer denies liability for a reason other than a dispute of the amount of the loss.[35]

RELEASE AND SATISFACTION

In *Pennsylvania Threshermen & Farmers Mut. Cas. Co. v. Hill*[36] a minor negligently damaged a car which he had borrowed from the insured without the latter's authority. When it developed that the amount offered by the insurer under a deductible collision policy would not defray the expense

31. GA. CODE ANN. §56-2405 (1960 Rev.).
32. Gordon v. Gulf Am. Fire and Cas. Co., 113 Ga. App. 755, 149 S.E.2d 725 (1966). For a criticism of this view see
    1 G. RICHARDS, INSURANCE §86 (5th ed. 1952);
    W. VANCE, INSURANCE 172 (3rd ed. 1951);
    E. PATTERSON, ESSENTIALS OF INSURANCE LAW 112 (2nd ed. 1957).
33. 114 Ga. App. 439, 151 S.E.2d 780 (1966).
34. *Compare* Fedorowicz v. Potomac Ins. Co., 7 App. Div.2d 330, 183 N.Y.S.2d 115 (1959).
35. Pacific Ins Co. v. Kimsey Cotton Co., 114 Ga. App. 411, 151 S.E.2d 541 (1966).
36. 113 Ga. App. 283, 148 S.E.2d 83 (1965).

of acquiring a comparable car of the same year and model, the tortfeasor's father, although not obligated to do so, made a payment "for the difference in what the insurance company would pay for restoring the car and the amount necessary to get Jan another Austin-Healey." Thereafter the insurer paid the insured and obtained customary assignment of the claim against the tortfeasor "for said loss as aforesaid, but only to the extent of the loss which was covered by said insurance and paid by said company." The insurer then sued the tortfeasor on the assigned claim and was allowed to recover against the contention that the payment had been made in full satisfaction of the claim and that the assignment to the insurer had been partial and consequently void. The court of appeals held that a partial payment by a third person to one having an unliquidated damage claim against his minor son may, as an abstract proposition, qualify either as an accord and satisfaction or as a pro tanto payment which satisfies the claim only in part. Whether it constitutes one or the other depends upon the terms upon which the payment is offered and accepted.

In the absence of any evidence in the record that the parties contemplated a full settlement, the payment must be treated as a partial satisfaction. It also held that when the insurer later settled with the insured it received in return an assignment of the total claim then existing. This could not be termed a partial assignment.

In *Roberts v. Goodwin*[37] the plaintiff's insurance company, as it was authorized to do by the terms of the policy, settled the defendant's claim arising out of an automobile collision without obtaining the plaintiff's consent. The defendant executed a release of all claims against the insured plaintiff and at the same time acknowledged that since the settlement had been made without the written consent of the insured he was "not to be precluded from the further assertion of claims against the undersigned."

The plaintiff then instituted an action for injuries arising from the collision and, when met with a counterclaim for property damages, filed a plea contending that the counterclaim was barred by the settlement between defendant and plaintiff's insurer. The defendant, in turn, filed a plea of accord and satisfaction contending that the settlement released all parties to the action.

The court of appeals held that the plain meaning of the statute which provides in case of such settlements "that the insured shall not be precluded from asserting a claim . . . against third persons . . . unless the insured shall previously have consented thereto in writing" and that "such third persons shall not plead such . . . settlement in bar of any action or claim asserted by the insured,"[38] demanded that only the defendant's counterclaim be barred. To hold that the plaintiff by relying upon the settlement

37. 113 Ga. App. 630, 149 S.E.2d 420 (1966).
38. GA. CODE ANN. §56-408.1 (Supp. 1966).

ratified and became bound by it would deprive her of the benefit of the statute which unequivocally gave her such right to rely without appending any qualifications or conditions.

Not unmindful of the administrative burden placed upon insurers by the fact that their insureds can independently settle their own claims against other persons without obtaining a release from those persons of actions their insurers are obligated to defend, the court suggested as a remedy that the insurers might consider solving the problem by offering clear, prominent, and reasonable contract provisions requiring that they be notified of proposed settlements.

SUBROGATION

Extensions of the doctrine of subrogation, described by one authority as "conceived unilaterally, nurtured unilaterally, and cast upon the courts for the unilateral interest of insurers generally"[39] do not seem to commend themselves to the courts of this state. *Wrightman v. Hardware Dealers Mut. Fire Ins. Co.*[40] involved a subrogation clause which specified that "in the event of any payment under the Medical Expense Coverage of this policy, the company shall be subrogated to all rights of recovery therefor which the injured person . . . may have against any person or organization and such (injured) person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. . . ."

The court held that this amounted to no more than a promise to assign an unassignable right of action for a personal tort and was therefore void. Hence the insured from whom the promise was exacted could recover without alleging compliance with the clause. Although not addressing itself to this precise point, the decision appears to thwart any attempts to obtain 'conventional' subrogation to claims predicated upon personal injuries, whatever the language that may be employed. This is all the more significant since medical payments policies, unlike life and disability policies, are in some measure contracts of indemnity and hence not incompatible with the principle of subrogation.[41]

UNINSURED MOTORIST COVERAGE

Before its recent amendment, the Uninsured Motorist Act[42] posed vexing problems of construction because if its infelicitous language and puzzling omissions.

In *State Farm Mut. Auto Ins. Co. v. Girtman*[43] the court of appeals

39. 2 G. RICHARDS, INSURANCE §183 (5th ed. 1952).
40. 113 Ga. App. 306, 147 S.E.2d 860 (1966).
41. Note that the Uninsured Motorist Act provides for subrogation to personal injury claims. GA. CODE ANN. §56-407.1 (e) (Supp. 1966).
42. GA. CODE ANN. §56-407.1 (Supp. 1966).
43. 113 Ga. App. 54, 147 S.E.2d 364 (1965).

had to resolve the threshold problem of whether recovery of a judgment against a known uninsured motorist was a condition precedent to an action against the insurance carrier. Since a literal reading discloses no such prerequisite, the legislative intent had to be pieced together from various sections of the Act, particularly the provision which measures and limits the insurer's liability by the amount which the insured is "legally entitled" to recover from the owner or operator of the uninsured motor vehicle. The court held that the phrase "legally entitled" does not merely connote an unliquidated claim in the abstract, but one established and recognized by a competent court of law. Since the cause of action against the insurer does not arise until after entitlement is thus established, a suit against the known motorist must be implied as a condition precedent. Any other conclusion would also render ineffectual the insurer's right to subrogation because he would be compelled to relitigate the entire case in a subsequent action against the uninsured motorist with all its attendant risks of different conclusions as to liability reached by different juries.

The requirement of a prior law suit against the uninsured motorist and the corollary proposition that it is only necessary to show rendition of a judgment in such suit in order to fix liability upon the insurer created an additional problem of interpretation. Since insurers are compelled to include uninsured motorist coverage in their policies, the question of whether imposition of a liability solely predicated upon judgments in proceedings to which they are not parties violates due process. This issue is more than academic in cases where the judgments in question are entered by default against motorists whose casual attitude about insurance is matched only by their insouciance about defending law suits. In *State Farm Mut. Auto. Ins. Co. v. Glover*[44] the court of appeals held that due process objections could be satisfied by construing the statute so as to allow participation by the insurer in the original suit. Since the insurer must be afforded protection commensurate with his constitutional entitlement, the limits of this participation are not necessarily prescribed by technical intervention. Thus, the insurer may well be allowed to file pleadings and is not restrained by the rule that the intervenor takes the case as he finds it.[45]

In *Smith v. Allstate Ins. Co.*[46] the insured had made the mistake of joining both the uninsured motorist and his insurer in one action which resulted in a dismissal of the suit against the insurer on a general demurrer. After recovering a judgment against the uninsured motorist the insured filed another action against the insurer and was faced with a plea of res judicata. The court held that the action was not barred because the addi-

44. 113 Ga. App. 815, 149 S.E.2d 852 (1966).
45. State Farm Mut. Ins. Co. v. Brown, 114 Ga. App. 650, 152 S.E.2d 641 (1966). The rationale of this case was later extended to all cases and not just those involving default.
46. 114 Ga. App. 127, 150 S.E.2d 354 (1966).

tional allegation that a judgment had been obtained against the uninsured motorist related to a material fact that had come into being after the judgment on the demurrer and could not have been incorporated in the original petition by way of amendment.

WAIVER

A statement in a premium receipt or a notice of expiration of policy that "payment within ten days after due date will renew your policy and provide continuous protection" is not a contract for a "grace" period of the kind embodied in the original policy. It is instead a mere offer by the insurer which will ripen into a contract only if the insured accepts by payment within the time specified or by payment after the time specified coupled with a showing that lateness has been waived. In order to establish such waiver, the insured has to prove that in making the late payment he relied on a custom or, to be more precise, upon a course of dealing between himself and the insurer, characterized by acceptances of late payments after the expiration of policies. A single nonconforming payment cannot establish such custom, much less can it establish reliance upon such custom. It seems that at the very least there must be two payments to establish the custom and a third payment to show reliance.[47]

In *Beale v. Life & Cas. Ins. Co.*[48] the court of appeals held that a nonwaiver clause which states that "notice to or knowledge of the agent . . . is not notice to or knowledge of the Company" precludes a finding of an estoppel predicated upon the usual theory that the insurer has issued a voidable policy with knowledge, through the agent, of the facts making the contract unenforceable. Because of this clause, an oral statement to the agent that the applicant had Hodgkin's Disease which was not reflected in the written application attached to the policy was not imputed to the insurer. Although this literal construction enlarges the nonwaiver clause into a no-estoppel clause, which is open to certain theoretical objections,[49] it seems to accord with the weight of authority.[50]

A showing that a general agent knew of a claimant's secured interest in certain insured property and that he came to the claimant's office on several occasions in order to collect the premiums due on the policy is not sufficient to constitute a waiver of the provisions in the standard mortgage clause that "this entire clause is void unless name of mortgagee . . . is inserted on the first page of this policy in space provided under this caption." Nor is it sufficient to estop the insurer from relying on a provision

47. McClure v. State Farm Mut. Auto. Ins. Co., 113 Ga. App. 467, 148 S.E.2d 475 (1966).
48. 113 Ga. App. 506, 148 S.E.2d 474 (1966).
49. E. PATTERSON, ESSENTIALS OF INSURANCE LAW §94.5 (2d ed. 1957).
50. 3 G. RICHARD, INSURANCE §487 (5th ed. 1962).

in the policy that waivers to be valid must be "expressed in writing added thereto."[51]

Under the code,[52] insurers waive their right to require proof of loss if they fail to furnish forms either upon written request or upon written notice of loss.

In *Cotton States Mut. Ins. Co. v. Clark*[53] the insured after orally notifying the company of his loss, had furnished to regular and staff adjusters, a written inventory of the contents of the building destroyed by the fire and a written estimate of the cost of repairing the building obtained from a contractor. The insurer accepted and retained these but did not bother to provide the insured with proof of loss forms. The court found that the inventory and the estimate satisfied the statutory requirement of a "written notice" and held that the insurer had waived its entitlement to formal proof of loss.

STATUTES

The Uninsured Motorist Act[54] was amended to incorporate the holding of *State Farm Mut. Auto. Ins. Co. v. Glover*[55] as enlarged by *State Farm Mut. Auto. Ins. Co. v. Brown.*[56] The amendment specifies that in the case of known owners or operators the insurer "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."[57] It also provides that in all cases involving either known or unknown motorists service upon the insurer shall be accomplished by issuing a duplicate original copy for return by the process server and that the return of service must under no circumstances appear upon the original pleading.[58] It also clarifies the status of certain motorists under the Act by an express exclusion of motor vehicles the owners or operators of which have made a deposit of security pursuant to law.[59]

A comprehensive amendment of the code section governing cancellation of insurance policies[60] has added specialized provisions for the cancellation and failure to renew automobile liability and physical damage insurance contracts. Although the new provisions are quite voluminous, close scrutiny reveals that they can hardly be described as the motorist's Magna Carta.

51. Pacific Ins. Co. v. Kimsey Cotton Co., 114 Ga. App. 411, 151 S.E.2d 541 (1966). Although expressing no formal opinion, the court indicated that the claimant might have recourse to an equitable lien upon the proceeds in the hands of the insured.
52. GA. CODE ANN. §56-2427 (1960 Rev.).
53. 114 Ga. App. 439, 151 S.E.2d 780 (1966).
54. GA. CODE ANN. §56-407A (1960 Rev.).
55. 113 Ga. App. 815, 149 S.E.2d 852 (1966).
56. 114 Ga. App. 650, 152 S.E.2d 641 (1966).
57. Ga. Laws 1967, p. 463 at 464.
58. *Id.*
59. *Id.*
60. GA. CODE ANN. §56-2430 (1960 Rev.).

They do, however, furnish minimal procedural due process by curtailing flagrant arbitrariness.

Cancellations are ineffective unless they are based on specific reasons which must be disclosed to the insured. There are no less than twenty-five such reasons of which some are stated in generic terms.[61] Since they are largely descriptive of current business practices in the automobile insurance field they neither impose a substantive burden upon the insurance carrier nor enlarge "the right to continued insurance."

Nevertheless, the improvements that can be envisaged are by no means insignificant. Faced, as it were, with a "bill of particulars" accompanying his cancellation the insured may be able to frame a satisfactory explanation persuasive either to his insurer or some other insurer to whom he may apply for a policy. Since the statute is read into nonconforming policies he may file a law suit against the insurer for breach of contract in which, presumably, he has the burden of establishing that the reasons assigned were unwarranted in fact. By the same token the Insurance Commissioner will be afforded a better opportunity to police the practices of insurers and to ascertain the adequacy of their procedures for the gathering and assessment of information bearing upon cancellation. The amendment also immunizes insurance companies, their agents as well as their informers, against liability for statements in the cancellation notice or for furnishing relevant information.[62]

Presumably this immunity embraces not only slander and libel but also the torts of interfering with advantageous relationships, contracts, and unfair competition.[63] Other enactments during the past survey period are technical and of little general interest. They are amendments relating to crop adjusters,[64] municipal taxes on life insurance companies,[65] rates,[66] health insurance plans for employees of county boards of health,[67] and deposits by foreign and alien insurers.[68]

61. Ga. Laws 1967, p. 653 at 655, 656, 657. Some are also obscurely drafted, *e.g.*, (g) "is *or becomes* subject to epilepsy or heart attacks." (emprasis added).
62. Ga. Laws 1967, p. 659.
63. The immunity clause is somewhat elliptical. In its present wording it immunizes three classes of persons: insurers, their agents, and "any firm, person, or corporation furnishing to the insurer information as to the reasons for cancellation or nonrenewal." However, the immunity extends only "for any statement made by any of them in any written notice of *cancellation,* for the providing of information pertaining thereto." Since the informer makes his statements to the insurer and not in the notice of cancellation, the sentence, to be meaningful, should read ". . . notice of cancellation, *or* for the providing. . . ." Similarly it appears that although immunity was probably intended for statements and information pertaining to the notice of intention not to renew, a literal construction would restrict it to cancellations only.
64. Ga. Laws 1967, p. 630.
65. Ga. Laws 1967, p. 631.
66. Ga. Laws 1967, p. 684.
67. Ga. Laws 1967, p. 738.
68. Ga. Laws 1967, p. 765.