INSURANCE

By MAX A. POCK*

This survey follows the same general outline used in prior years. Although the survey formally embraces the period from June 1, 1968 to May 31, 1969, the reader's attention is called to the fact that for technical reasons the last case covered herein was decided in January 1969. Where certiorari has been applied for but not disposed of during the survey period, this fact will be indicated in the footnotes.

ACCIDENTAL DEATH

Not content to rely upon the formidable protection afforded by accident policies which typically insure against death "as a result, directly and independently of all other causes, of bodily injuries sustained . . . *solely* through violent, external and accidental means," insurers have added further bulwarks against liability by provisions which, among other things, exclude death "causes wholly or partly, directly or indirectly, by disease, or bodily or mental infirmity." Although further embroidery upon the core language which already insists that death must be *solely* caused by accidental means may appear a bit redundant, it serves its desired end by making the insurer's intent crystal clear and by thwarting endeavors at purposive or beneficent interpretations. Yet, one wonders whether such constructs still deserve the appellation "accident insurance" and whether such policies do not frustrate the layman's reasonable expectations, quite aside from precipitating evidentiary problems that are difficult of resolution.

This was brought into sharp relief by *Metropolitan Life Insurance Co. v. Abbot*.[1] At the trial uncontradicted evidence was adduced as to the following facts: the insured fell on steps at work and hit his head, thereafter he became incoherent and unconscious, was hospitalized, and before he died 21 days later was diagnozed as having pneumonia. The insured had pre-existing heart and lung diseases. Medical reports and opinions were that pneumonia, pulmonary emphysema, heart failure and cerebral concussion from the fall were all causes of death.

The Court of Appeals, under the doctrine of *Prudential Insurance*

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1. 118 Ga. App. 587, 164 S.E.2d 859 (1968).

Co. of America v. Keller,[2] was constrained to hold that the insurer was not liable since the pre-existing heart and lung diseases had at least in part contributed to the insured's death. It concluded that the same result would follow even if it were assumed that the pre-existing conditions did not precipitate the fall, and that the insured's pneumonia had its beginning after the fall. In so doing, the court rejected what one might denominate the "humanitarian" interpretation, adhered to by some states and even by the Court of Appeals itself in a prior decision, which finds liability whenever the accident can be classified as the "underlying essential proximate cause" of death.[3] Lest one deplore this stance, it must be remembered that the problem involved here is one of interpretation and not of public policy. Even if the "proximate cause" doctrine were adopted it would be easy for insurers to overcome its effect by simply redrafting their policies and negating liability in all cases where a pre-existing condition is a contributing cause even though the accident itself may be the proximate cause.

It must also be noted that the mere showing of a pre-existing condition is insufficient to avoid liability. If the evidence warrants a finding that neither the accident nor the death was contributed to by disease or infirmity, the insured is entitled to recover.[4]

ACTIONS—PARTIES

For obvious psychological reasons insurance companies do not wish to figure prominently as parties-plaintiff in actions based upon subrogation. To satisfy their understandable desire for anonymity they devised subrogation agreements which typically provide that the insurer be given permission to sue, settle, and execute instruments in the name of the insured. Whatever may be the efficacy of mere "loan receipts", it is certain that such subrogation agreements which attempt to combine elements of assignment with elements of agency are ineffectual in Georgia. Reversing the Court of Appeals, the Supreme Court stated most emphatically[5] that elaborate agreements of this nature, if concluded upon final settlement with the insured, will be treated according to their essential character as assignments of causes of

2. 213 Ga. 453, 99 S.E.2d 823 (1957).

3. *See* Hall v. Gen. Accident Assurance Corp., 16 Ga. App. 66, 85 S.E. 600 (1915) and Mr. Justice Cardozo's trenchant opinion in the milestone case of Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 171 N.E. 914 (1930).

4. Pippin v. Mut. Life Ins. Co., 108 Ga. App. 741, 134 S.E.2d 446 (1963).

5. Kurtz v. Parker Plumbing & Heating Co., 118 Ga. App. 130, 162 S.E.2d 755 (1968); *rev'd.*, Parker Plumbing & Heating Co. v. Kurtz, 225 Ga. 31, 165 S.E.2d 729 (1969).

action. The legal effect of such agreements will not be determined by their label or by the contradictory intent of the parties. It is therefore immaterial that the agreements may contain added provisions that would be redundant if the parties had intended mere assignments. If it is shown that the insured has no longer any interest in the cause of action after executing the subrogation agreement, the insurer is required to sue in his own name.

ASSIGNMENTS

The Georgia Credit Insurance Act[6] requires that each individual credit life insurance policy state that the benefits shall be paid to the creditor to reduce or extinguish the unpaid indebtedness. A creditor is defined as a "lender of money . . . or any successor to the right, title or interest of any such lender."[7] Applying this provision, the Court of Appeals held that a transfer of the indebtedness by assignment or negotiation identifies the transferee as a beneficiary under the statute. Hence, all contractual terms demanding that the policy itself be assigned and that assignments are to be ineffective until filed at the home office of the insurer are repugnant to the statute and therefore ineffectual.[8]

As a practical matter this means that the insurer is incapable of postponing the effective date of an assignment and may lose his right to assert against successor creditors set-offs that would be available against the original creditor, *e.g.* claims for unpaid premiums on other policies held by the original creditor.

ATTORNEY'S FEES AND STATUTORY PENALTIES

Cases assessing attorney's fees and bad faith penalties against insurers are infrequent. However, it would be quite misleading to judge the utility of Georgia's code provision[9] on bad faith by simply juxtaposing the few cases where recovery was granted and the plethora of cases where it was denied. The reason is that prayers for statutory penalties are often added as a matter of routine, and occasionally quite frivolously.

Although during the last survey period all attempts at securing

6. GA. CODE ANN. § 56-3306(2) (Rev. 1960).
7. GA. CODE ANN. § 56-3302(3) (Rev. 1960).
8. Universal Am. Life Ins. Co. v. Fin. Corp., 118 Ga. App. 160, 162 S.E.2d 813 (1968).
9. GA. CODE ANN. § 56-1206 (Supp. 1968).

penalties have failed, the cases themselves are of some interest because they have occasioned further delineation of the principles involved. One of these principles is that an insurer is not guilty of bad faith in refusing to pay claims unless the insured furnishes a proof of loss which shows the amount to which he is entitled under the policy.[10] A general demand for a lump sum which incorporates insured as well as uninsured losses without providing a key for segregating these two categories does not create in the insurer a present obligation to pay. In the absence of a duty, a refusal to perform cannot involve bad faith. Another principle is that an insurer is not guilty of bad faith in refusing to pay a portion of a claim which engenders a reasonable doubt regarding causation.[11] Thus, where the trial court properly found that there was a dispute as to whether damage to internal engine parts of an automobile had been caused by an impact, or by the insured himself in driving the automobile, after impact, with dirt and debris in the engine, it was correct to strike the prayer for penalties and to refuse submission of the issue of bad faith to the jury. A third principle is that an insurer is not guilty of bad faith in refusing to pay claims involving doubtful questions of law and close questions of interpretation that are intricate and difficult of solution.[12]

DEFINITIONS AND CONSTRUCTION

Actual Use Of An Automobile

Under the highly standardized language of the omnibus clause found in automobile liability policies the definition of the word "insured" includes "any person while using the automobile . . . provided the *actual* use of the automobile is by the named insured or spouse or with the *permission* of either." How does this clause affect the recurring case of the permitted user allowing another person to drive the automobile, or the perhaps less common case of the permitted user turning the wheel over to a person who had been expressly prohibited by the named insured from ever driving the automobile?

Strickland v. Georgia Casulty & Insurance Co.[13] held that such cases were within the protection of the omnibus clause. The court reasoned

10. Reserve Life Ins. Co. v. Davis, 224 Ga. 665, 164 S.E.2d 132 (1968).

11. Witt v. Penn. Nat'l Mut. Cas. Ins. Co., 117 Ga. App. 838, 162 S.E.2d 251 (1968).

12. United States Fidelity & Guar. Co. v. Woodward, 118 Ga. App. 591, 164 S.E.2d 878 (1968).

13. 224 Ga. 487, 162 S.E.2d 421 (1968).

that the word "use" had two meanings. In one sense it related to the operation or physical driving of the vehicle. In the other sense it related to the purpose served by the vehicle. Whether the word "use" is to be taken in its more restrictive or extensive signification depends upon the purpose of the policy which was to insure against obligations arising from the negligent or unlawful operation of the described vehicle. This purpose would be completely subverted if the phrase "actual use with permission" related to the particular manner of operating the automobile. The insurer could simply immunize itself against liability by showing that the named insured had authorized the use of the vehicle but had prohibited or at least not permitted its negligent operation, a showing which would not be difficult to make in the average case. This indicates that the parties intend coverage in all cases where the use, purpose or movement of a vehicle is with permission of the insured, although the mode of its operation or its operation by a third person is not permitted or, for that matter, is expressly prohibited.

Causation

In *Underwood v. United States Fidelity & Guarantee Co.*[14] the insured sought recovery under a homeowner's policy which covered all risks of physical loss except, among other things, losses ". . . caused by, resulting from, contributed to or aggravated by any earth movement . . . ." He alleged that his loss was caused by the sinking of a bridge which was part of the driveway serving his residence, and that the sinking was in turn caused by the City of Atlanta's cutting the banks of the creek traversing his property and thus widening the creek on both sides of his bridge. It was held that the loss, under the language of the exclusion, was at least *contributed to* by an excepted natural agency. It was therefore immaterial that it may have been incipiently caused by a human agency. Although somewhat restrictive and perhaps even harsh, this conclusion comports with the prevailing view which focuses upon the last visible cause and denies liability where an excepted cause is in itself actuated by a cause which, standing alone, would be covered under the policy.

Collision

A parked automobile which slides down a boat ramp and into a river while its motor is turned off and its operator is absent is involved in a

14. 118 Ga. App. 847, 165 S.E.2d 874 (1968).

collision under the terms of a policy covering loss "caused by collision of the automobile with another object."[15] In the absence of a more restrictive definition in the policy, collision implies an impact, a sudden contact of a moving body with an obstruction in its line of motion. This obstruction may be a natural or artificial mass or body of water. Both the car and the object may be in motion, or one may be in motion and the other stationary.

Resident

Automobile liability policies extend coverage to relatives of the named insured who are residents of his household while using non-owned automobiles. Under this provision it was held that a named insured's 19-year-old son who had graduated from high school and was working and living in another town to save money for college but who was living in insured's house nearly every week-end could qualify as a resident of his father's household.[16] Since a person may, and many persons do have more than one residence, the term resident cannot denote *regular* residence. If the insurer had desired the latter meaning, it should have defined resident as "resident exclusively" or "resident for a greater part of the time."

Safe Burglary

In *United States Fidelity & Guarantee Co. v. Woodward*,[17] there was evidence that thieves, after failing to open a safe by force, had finally secured entry by simply manipulating the combination. The policy in question covered loss of money "by safe burglary or *attempt thereat*" and defined safe burglary as a felonious abstraction of insured property from within a safe provided "entry shall be made by actual force and violence . . ."

The insurer denied liability because entry had been accomplished without resort to force and violence. The court reasoned, however, that this interpretation would make meaningless and redundant the policy's reference to *attempt* because no loss could ever occur from an attempt alone which, by definition, would fall short of accomplishing the intended entry by force and violence. Concluding that the coverage clause and the definition created an ambiguity which had to be resolved in favor of the insured, the court held that the policy would cover any loss caused by forcible and violent entry, or, in the alternative, by an

15. Tuten v. First of Georgia Ins. Co., 117 Ga. App. 409, 410, 160 S.E.2d 903, 904 (1968).
16. Travelers Ins. Co. v. Mixon, 118 Ga. App. 31, 162 S.E.2d 830 (1968).
17. 118 Ga. App. 591, 164 S.E.2d 878 (1968).

attempt at forcible and violent entry followed by an actual entry accomplished by another and nonviolent means.

CONTRACT-FORMATION

Mutual benefit societies generally provide in their constitutions that a member is not eligible for benefits until a properly executed certificate of membership shall have been issued and until at least one monthly assessment in addition to the initiation fee shall have been paid before his death. These provisions are binding upon the applicant at least to the extent that they have been brought to his attention in the application for membership or otherwise. In *Nawcas Benevolent Auxiliary v. Levin*,[18] the Court of Appeals held that, where the language of the society's constitution supports such construction, the provision relating to the issuance of the certificate must be characterized as an exclusive mode of accepting the applicant's offer and as a condition precedent to the formation of the insurance contract itself. Thus, where neither a certificate is issued nor a monthly assessment paid before the member's death, there can be no liability because no contract has been consummated. It is equally obvious that receipt and retention of an assessment paid after the member's death cannot qualify either as a waiver or an estoppel in creating a contractual liability where none existed when the loss occurred. One cannot quarrel with the court's application of the principle that neither waiver nor estoppel are a ready substitute for a stipulated mode of acceptance. There are, however, other implications in the opinion which are worthy of note. For example, after correctly characterizing the provision relating to payment of at least one monthly assessment prior to the member's death as a condition precedent, not to the contract itself but merely to the inception of coverage under it, the court proceeds to ignore this distinction by suggesting that even if a certificate had been issued and a contract consummated during the member's life, the payment condition still could not have been eliminated by either waiver or estoppel occurring after the loss. This is not in keeping with the prevailing rule which recognizes that once the parties find themselves within four corners of a contract, conditions to liability may be excused, either by estoppel or by an election-waiver, after their breach.

18. 118 Ga. App. 165, 162 S.E.2d 738 (1968).

COVERAGE-DURATION

Unless there is an ambiguity on the face of the policy, there is no room for applying the rule that insurance contracts are construed in a manner most favorable to the insured.[19] An unambiguous time limitation in an employee group insurance contract will be strictly enforced to preclude recovery of expenses for medical treatment administered after its expiration. It is immaterial in this context that the medical treatment may have been protracted because of the severity of an injury sustained while coverage was still available.

CREDIT LIFE INSURANCE

Vulcan Life & Accident Insurance Co. v. United Banking Co.[20] illustrates graphically that credit life insurance is quite different from *ordinary* life insurance. After a debtor made out a promissory note to a bank in return for a $3,600 loan, the bank, acting as an agent for the insurer, issued a certificate of insurance in the amount of $3,600 on the life of the maker, naming the bank as creditor beneficiary. The bank also issued a certificate of insurance for the same amount to the endorser of the note.

The latter certificate was declared null and void under Georgia law[21] which restricts credit life insurance to the amount of the indebtedness and holds that the creditor has in the life of his debtor only an insurable interest which is strictly limited to indemnification against loss.[22]

One interesting issue was left unresolved by the case: viz the group policy authorized co-makers and endorsers to elect to divide insurance coverage equally among themselves and to pay separate premiums for their respective shares on condition that the total amount of insurance thus provided did not exceed the face amount of the indebtedness. The controlling Georgia statute,[23] on the other hand, limits coverage to a debtor only, who is defined as "a borrower of money or a purchaser or lessee of goods, services, property rights, or privileges for which payment is arranged through a credit transaction."[24]

19. Duckett v. Piedmont S. Life Ins. Co., 118 Ga. App. 3, 162 S.E.2d 531 (1968).
20. 118 Ga. App. 36, 162 S.E.2d 798 (1968).
21. GA. CODE ANN. § 56-3304 (Rev. 1960).
22. Exch. Bank of Macon v. LOH, 104 Ga. 446, 31 S.E. 459 (1898).
23. GA. CODE ANN. § 56-3303 (Rev. 1960).
24. GA. CODE ANN. § 56-3302 (Rev. 1960).

This raises the problem as to whether there is a conflict between the policy provision and the statute. Given the narrow definition of debtor as a "borrower," it is questionable whether an endorser's life is insurable in the place of the maker's life, or whether both lives can be concurrently insured, so long as the total amount does not exceed the indebtedness. Although noting that such questions may well arise, the court found it unnecessary to resolve them in order to dispose of the case.

FRAUD

In *Motors Insurance Corp. v. Morgan*[25] the insured who executes a general release to a collision insurer by relying upon its agent's unkept promise to turn the general release into a partial release and to preserve the insured's rights against other parties by deleting all portions of the general release form which related to personal injuries does not have a cause of action for fraud against the insurer. Fraud requires intentional misstatements of present or past facts.[26] It cannot be predicated upon statements which relate to future acts and are therefore promissory in their nature.

Endeavors at lessening the harshness of this principle by bringing the transaction within the doctrine of incipient fraud are frequently unavailing. This doctrine, although only vaguely articulated, seems to cover situations where detrimental reliance is induced through the medium of a promise which the promisor does not intend to keep. It is therefore based upon a misrepresentation of the promisor's state of mind as a present and objectively ascertainable fact. In order to affix liability upon the insurer on the theory of incipient fraud in the *Morgan* case, the plaintiff would had to have satisfied the added requirement of showing that the agent's promise was enforceable at the time of its utterance and that insurer as a principal was bound by it.

INSURABLE INTEREST-PROPERTY

In *Shield Insurance Co. v. Kemp*,[27] the insured had taken out a fire policy covering his one-half undivided interest in a gasoline station, after executing a warranty deed to his father which purported to convey

25. 117 Ga. App. 654, 161 S.E.2d 382 (1968).

26. *See* Pock, *Insurance, Annual Survey of Georgia Law*, 18 MERCER L. REV. 110, 116, 117, 118 (1966).

27. 117 Ga. App. 538, 160 S.E.2d 915 (1968).

all his interest in the same station. He claimed that the instrument was no more than a "dummy" or "bogus" deed and admitted freely that it was executed solely for the purpose of defrauding his judgment creditor. There was a conflict in the evidence as to whether the deed was ever delivered to his father. It was held that the insured's case hinged solely upon the issue whether he owned a one-half undivided interest in the insured property. In order to establish the absence of such interest, the insurer could not avail itself of the doctrine that a grantor of a deed made for the purpose of hindering, delaying, or defrauding his creditors cannot be heard to question the validity of such deed. However thorny this doctrine may prove in other contexts, it was easy of application here because it did not come into play until a formally valid conveyance was executed and the deed delivered. Since there was a conflict in the evidence whether such delivery to the father ever took place, this issue was properly submitted to the jury.

The court also foreclosed recourse to a more general theory of estoppel. It rejected the contention that the insured's dealings with others, which in a sense negated his insurable interest, should prevent him from asserting his interest as against the insurer. Fraud as to a particular parcel of land practiced upon one person may well create an estoppel regarding that person, but it does not create an estoppel as to others who are not privies in estate.

LIFE INSURANCE—NEGLIGENT DELAY IN ACTING UPON APPLICATION

By virtue of the decision in *Watkins v. Coastal States Life Insurance Co.*,[28] Georgia has now definitely joined the ranks of those states which deny any tort liability for failing to act upon an application for life insurance within a reasonable time after its receipt. Since Georgia adheres to the private contract theory of insurance which holds that applications for life insurance contracts are mere offers that may be freely accepted or rejected by the insurer, there is room for spelling out a legal duty to act or a right to have the application acted upon. Hence there can be no tort. By analogy this reasoning also applies to inaction on the part of the insurer's solicitors and agents.

It is submitted that this decision is sound. *Duffy v. Bankers' Life Association of Des Moines*,[29] the leading case for the contrary view, seems at first glance more appealing. Under its rationale insurers differ from ordinary private contractors in the sense that they may only act

28. 118 Ga. App. 145, 162 S.E.2d 788 (1968).
29. 160 Iowa 19, 139 N.W. 1087 (1913).

under state franchises and are regulated for the protection of the public. Since they bear a resemblance to public utilities in many respects it is proper for courts to fashion models of liability suitable to public utilities.

This rationale does not bear close scrutiny. It is conceptually murky and casts courts into the fog-enshrouded sea of judicial policy-making. It ignores completely the comprehensive insurance codes which are constantly amended precisely for the purpose of creating and defining the duties which insurers owe to the public. There are gaps and many pro-insurer rules which powerful lobbies have managed to assimilate into the statutory scheme. However, there is no policy vacuum which courts are called upon to fill by judicial legislation according to their individual perceptions of the public interest.

PROOF OF LOSS-WAIVER

In order to perfect his right to recovery, the insured must either show that he has satisfied the condition precedent of filing a proof of loss or that the condition has been excused by waiver or estoppel.[30] Such waiver cannot be established by merely showing that the insurer has mailed and proffered to the insured a draft for payment of the claim in an amount less than that sought, particularly where the tender is accompanied by a statement that it did not constitute a waiver of policy provisions. Such transaction is to be characterized as nothing more than an offer of a compromise or a settlement. It may qualify as a waiver only if the amount of the settlement offer is so much less as to constitute a refusal to pay. It is true that in such a case an attempt to negate waiver, or to be more precise, to negate an estoppel by the insertion of a nonwaiver clause is ineffective. But in order to succeed by the waiver or estoppel theory, the insured must further show that the conduct amounting to a refusal to pay occurred before and not after the time for filing the proof of loss has expired.

REFORMATION

In *Birmingham Fire Insurance Co. of Pennsylvania v. Commercial Transportation, Inc.*,[31] the insured sought reformation of a complex long-haul motor truck cargo policy on the familiar ground that because of mutual mistake and accident the policy did not reflect the terms of

30. S. Ins. Co. v. Martin, 118 Ga. App. 608, 164 S.E.2d 887 (1968).
31. 224 Ga. 203, 160 S.E.2d 898 (1968).

an antecedent oral agreement hammered out with the insurer's general agent after considerable negotiation and after the agent had made an extensive analysis of the insured's trucking operation. The petitioner disclosed that he had been in possession of the policy for about eighteen months before certain losses occurred and that the variance had only been brought to his attention after he sought compensation for these losses. The Supreme Court of Georgia held that the time during which the petitioner had the policy in his possession and during which he had been inactive may be submitted to the jury as a circumstance bearing upon the truth of his allegations as to the actual intention of the parties and the content of the antecedent variant agreement. However, the insured's sustained failure to ascertain the contents of his policy did not amount to such *laches* as would debar him from having the policy reformed for mutual mistake. The court intimated that an insurance contract is in this respect *sui generis* by adopting the following statement: "In the insurer's promise to deliver an accurate policy, according to his oral agreement with the insured, the insured has a just expectation that there will be no designed variance. A man should not be permitted for his pecuniary advantage to impute it to another as gross negligence that the other trust to his fidelity to his promise."[32] As indicated by the court,[33] a similar conclusion had been adopted by the Connecticut court.[34]

STANDARD MORTGAGE CLAUSE

The protracted litigation involved in *Pennsylvania Millers Mutual Insurance Co. v. Employers' Fire Insurance Co.*,[35] is more significant for the dicta than for the decision which it produced. Comprehension of the case is facilitated more by reducing it to a simple hypothetical than by presenting the more complex facts actually involved. Suppose an agent representing a mortgagee-bank covered under a standard mortgage clause of a fire insurance policy, while acting within the scope of his authority, receives actual knowledge that the policy has been cancelled. Is this an efficient substitute for the statutory procedure which requires that "Notices of cancellation of policies protecting the interest of . . . any lienholder shall be delivered or mailed to . . . the lienholders shown in the policy and shall specify when, not less than

32. *Id.* at 207, 160 S.E.2d at 901.
33. *Id.*
34. Palmer v. Hartford Fire Ins. Co., 54 Conn. 488, 9 A. 248, 254 (1887).
35. 118 Ga. App. 655, 165 S.E.2d 309 (1968).

10 days . . . the cancellation shall become effective'?[36] The court suggested, but did not decide, that actual notice to the agent, imputed to the mortgagee-principal, may well be considered equivalent to a written notice of cancellation under the provisions of the code. However, it could certainly accomplish no more than a formal written notice. As to the mortgagee-principal, it could not effect a cancellation until expiration of the 10-day period. It follows that if a casualty were to occur only five days after receipt of actual knowledge, the policy would still be in effect.

THIRD PARTY RIGHTS

A person who stores property with a bailee, who holds a homeowner's policy covering theft loss of unscheduled personality owned by others than the bailee, has no direct cause of action against the insurer in case of loss.[37] Georgia's third party beneficiary statute[38] which provides that "As a general rule, the action on a contract . . . shall be brought in the name of the party in whom the legal interest in such contract is vested . . ." cannot be stretched to create third party rights where none are intended. The test is not whether the bailor in this case would ultimately benefit by sharing in some manner in the proceeds of the insurance, but whether the insurer and the insured intended to create in him an enforceable right. The cardinal test for determining such intent is to ascertain to whom, by the terms of the policy, the contemplated performance is to run or, to put it more succinctly, to whom payment is to be made.

UNINSURED MOTORIST COVERAGE

Unlike a number of her sister states, Georgia explicitly excludes automobiles owned by the insured from the statutory requirement for uninsured automobile coverage.[39] In those cases where the omnibus clause of the insured's liability policy is broad enough to cover a permissive driver's liability against the insured, the above exclusion is not harmful. Subject to the infelicities of intra-family immunities, the insured would simply recover from his own liability insurer after establishing the liability of the permissive driver as "additional

36. GA. CODE ANN. § 56-2430 (Supp. 1968).
37. First of Ga. Ins. Co. v. Augusta Ski Club, 118 Ga. App. 731, 165 S.E.2d 476 (1968).
38. GA. CODE ANN. § 3-108 (Rev. 1962).
39. GA. CODE ANN. § 56-407.1(b) (Supp. 1968).

insured."[40] What, however, is the effect of the above statutory exception if the liability policy excludes bodily injury sustained by the insured or any member of his family residing in the same household as a result of the permissive operation of his automobile? The dire results produced by this combination of provisions was brought into sharp relief in *Barras v. State Farm Mutual Automobile Insurance Co.*[41] The insured was injured while riding in an automobile covered by a liability policy, when it was being driven with her permission by a friend who carried no insurance covering her use of the automobile. The omnibus clause, which is legal in Georgia, did not cover her injuries. Nor did her uninsured motorist coverage afford relief because it incorporated in essence the language of the statute which defines the term "uninsured motor vehicle" as "a motor vehicle other than a motor vehicle owned by or furnished for the regular use of the named insured, or the spouse of any such named insured."[42] The statutory scheme for providing uninsured motorist coverage thus reveals another significant gap which should be bridged legislatively, either by doing away with exclusions for owned automobiles or by requiring that liability policies extend to damage caused to the insured by the negligence of a permissive driver.

In *United Services Automobile Association v. Logue*[43] an automobile liability insurer sought to intervene in an action by its insured against an alleged uninsured motorist. While admitting that its policy did provide uninsured motorist coverage for the plaintiff in the action, the motion for intervention did not concede that the defendant was an uninsured motorist. It sought a judicial determination as to this issue. Furthermore, it sought to avoid liability by averring that the plaintiff-insured had broken certain conditions stated in his policy. The Court of Appeals held that the motion for intervention was properly stricken and reiterated the doctrine of *Continental Insurance Co. v. Smith*[44] which postulates that the insurer, as a condition to the privilege of intervention, must concede that it would be obligated, within the limits of the uninsured motorist coverage, to pay any judgment obtained against the defendant. It emphatically rejected the contention that a

40. *See* Chicago Ins. Co. v. Am. S. Ins. Co., 115 Ga. App. 799, 156 S.E.2d 143 (1967), discussed in Pock, *Insurance, Annual Survey of Georgia Law*, 20 MERCER L. REV. 132, 142 (1969).

41. 118 Ga. App. 348, 163 S.E.2d 759 (1968).

42. GA. CODE ANN. § 56-407.1(b) (Supp. 1968).

43. 117 Ga. App. 717, 162 S.E.2d 12 (1968).

44. 115 Ga. App. 667, 155 S.E.2d 713 (1967).

different result would have to follow under the Civil Practice Act[45] which became effective subsequent to the holding of the *Smith* case. Under this Act, intervention is permitted, "when the representation of the applicant's interest by existing parties is or may be inadequate or the applicant is or may be bound by a judgment in the action . . . ."[46]

While withholding an opinion whether this language may have broadened the general right to intervene in relation to prior law, the court held that at least in the context of uninsured motorist coverage it had not done so. The intervenor cannot claim that his interests may be prejudiced if denied intervention and, at the same time, negate the very basis for his claim by denying liability.[47]

STATUTES

The 1969 session of the General Assembly has produced an administrative counterpart to the code section providing for attorney's fees and bad faith penalties in private actions against insurers. The act[48] in question authorizes the insurance commissioner, after a hearing, to impose fines upon insurers if they are guilty, without just cause, of refusing to pay proper claims, coercing low settlements, or compelling insureds to have recourse to law suits to secure full payments. Fines may be imposed, however, if misconduct occurs with such frequency as to amount to a business practice. The Act differs from the section on bad faith penalties[49] in that it reaches not only misconduct against holders of insurance policies but also misconduct towards third persons who have a claim against the insurer under a policy. Once an unlawful business practice is established a fine of $1000 may be imposed for each individual act of misconduct, and a fine of $5000 for each individual act of *wilful* misconduct.

The General Assembly has also enacted comprehensive legislation authorizing and regulating the issuance of individual and group variable annuity contracts by insurers.[50] This enactment is cumulative of existing authority to issue group variable annuities in connection with pension, retirement, and profit sharing plans.[51]

45. GA. CODE ANN. § 81A-124(a) (1967).
46. *Id.*
47. For a discussion of the ramifications of this non-intervention rule see Pock, *Insurance, Annual Survey of Georgia Law*, 20 MERCER L. REV. 132, 144 (1969).
48. Ga. Laws, 1969, p. 585, *amending* GA. CODE ANN. § 56-317 (Rev. 1960).
49. GA. CODE ANN. § 56-1206 (Supp. 1968).
50. Ga. Laws, 1969, p. 723, *amending* GA. CODE ANN. tit. 56 (Rev. 1960).
51. GA. CODE ANN. § 56-1038 (Supp. 1968).

There have also been minor and technical amendments relating to investments,[52] group insurance,[53] licensing,[54] and surplus insurance.[55]

52. Ga. Laws, 1969, p. 23, *amending* GA. CODE ANN. § 56-1027 (Rev. 1960).

53. Ga. Laws, 1969, p. 32, *amending* GA. CODE ANN. tit. 56 (Rev. 1960); Ga. Laws, 1969, p. 430, *amending* GA. CODE ANN. § 56-2703(2) (Rev. 1960).

54. Ga. Laws, 1969, p. 489, *amending* GA. CODE ANN. § 56-808a (Rev. 1960); Ga. Laws, 1969, p. 583, *amending* GA. CODE ANN. § 56-805a (Supp. 1968).

55. Ga. Laws, 1969, p. 609, *amending* GA. CODE ANN. § 56-620 (Rev. 1960).