Insurance

by Maren R. Cave*

Stephen Schatz**

and Bradley S. Wolff***

I. INTRODUCTION

A number of matters of first impression in Georgia were addressed during this survey period, including who bears the burden of establishing whether a vehicle is "uninsured," whether the use of a formula in establishing diminished value is bad faith, and what the trigger date is for coverage for claims of malicious prosecution and negligent repair. Additionally, the Georgia Supreme Court squarely and definitely addressed whether lead-based paint is a "pollutant" for purposes of a pollution exclusion in a Commercial General Liability (CGL) Policy.[1]

* Partner in the firm of Swift, Currie, McGhee & Hiers, Atlanta, Georgia. St. Olaf College (B.A., 1997); Mercer University, Walter F. George School of Law (J.D., 2000). Member, State Bar of Georgia; Atlanta Bar Association; The CLM Alliance; Defense Research Institute; Georgia Defense Lawyers Association; Lawyers Club of Atlanta; Order of Barristers.

** Partner in the firm of Swift, Currie, McGhee & Hiers, Atlanta, Georgia. University of Virginia (B.A., with distinction, 1985); University of North Carolina at Chapel Hill School of Law (J.D., 1988). Member, State Bar of Georgia (Member, Tort and Insurance Practice and Litigation); Defense Research Institute.

*** Partner in the firm of Swift, Currie, McGhee & Hiers, Atlanta, Georgia. Vanderbilt University (B.A., cum laude, 1983); University of Georgia School of Law (J.D., cum laude, 1986). Member, State Bar of Georgia.

1. For an analysis of Georgia insurance law during the prior survey, see Bradley A. Wolff, Stephen Schatz & Maren R. Cave, *Insurance, Annual Survey of Georgia Law*, 67 MERCER L. REV. 73 (2015).

II. UNINSURED MOTORIST COVERAGE

A. Does the Insured or the Insurer Bear the Burden of Proving Whether a Liability Insurer's Denial of Coverage was "Legally Sustainable"?

In last year's survey,[2] we reported on the Georgia Court of Appeals decision holding that where a tortfeasor's liability carrier has denied coverage, and where the Uninsured Motorist (UM) policy defines an "uninsured motor vehicle" to include one for which the liability carrier has "legally denied" coverage, it is the UM carrier's burden to prove such denial was not "legally sustainable" to avoid coverage.[3] In *Travelers Home & Marine Insurance Co. v. Castellanos*,[4] the Georgia Supreme Court reversed that decision.[5] The court held that because "an insured claiming an insurance benefit 'has the burden of proving that a claim falls within the coverage of the policy,'"[6] the insured in the case bore "the burden of presenting evidence that [the tortfeasor's] vehicle was an uninsured motor vehicle under the UM provisions of the Travelers policy."[7]

The relevant policy provided coverage for damages caused by motor vehicles "to which a liability bond or policy applies at the time of the accident but the bonding or insurance company . . . legally denies coverage,"[8] and the court held that "coverage [cannot] be said to have been legally denied unless the denial is, under applicable law, legally sustainable."[9] Thus, where the UM claim was premised on the liability carrier's denial of coverage, the insured "must show that this denial was legally sustainable."[10]

---

2. *Id.* at 77.

3. Castellanos v. Travelers Home & Marine Ins. Co., 328 Ga. App. 674, 678-79, 760 S.E.2d 226, 230 (2014).

4. 297 Ga. 174, 773 S.E.2d 184 (2015).

5. *Id.* at 174, 773 S.E.2d at 185.

6. *Id.* at 176, 773 S.E.2d 186 (quoting *Castellanos*, 328 Ga. App. at 681, 760 S.E.2d at 232) (McMillian, J., dissenting).

7. *Id.* at 177, 773 S.E.2d at 186.

8. *Id.* at 176, 773 S.E.2d at 186 (quoting *Castellanos*, 328 Ga. App. at 681, 760 S.E.2d at 232) (McMillian, J., dissenting)).

9. *Id.* at 177, 773 S.E.2d at 186 (quoting *Castellanos*, 328 Ga. App. at 681, 760 S.E.2d at 232) (McMillian, J., dissenting)).

10. *Id.*

B. Non-duplication Clauses do not Preclude Recovery for Uncompensated Losses Although Workers' Compensation and Medical Expense Benefits Paid Exceed UM Limits

In *Mabry v. State Farm Mutual Automobile Insurance Co.*,[11] the Georgia Court of Appeals held that an insured who had recovered workers' compensation benefits and medical expense payments that exceeded UM policy limits was still entitled to recover under the UM policies despite provisions in the policies against the payment of damages "paid or payable" under workers' compensation or those paid under the medical payments coverage of the same or a similar policy.[12] State Farm contended it was entitled to a set-off for amounts already paid, and because those amounts exceeded the UM limits of the insured's policies, it had no UM exposure.[13] The trial court agreed with this argument and granted summary judgment.[14]

In reversing, the court of appeals held State Farm was not entitled to set off the amounts paid to the extent the insured still had uncompensated losses and that the UM coverage extended "to the entire gap between his losses and his relevant recovery" up to the available limits.[15] Those uncompensated losses included categories of damages, such as pain and suffering, future medical expenses and future lost income, for which no payment had been made, as well as the difference between the actual amounts of the insured's past medical expenses and lost wages and the amounts paid by insurance.[16] Accordingly, "the policies obligated State Farm to pay for Mabry's personal injury damages that were not compensated (up to the UM policy limits)."[17]

C. Priority of Coverage Where the Insured is a Limited Liability Company

In a matter of first impression, the Georgia Court of Appeals decided in *Sentinel Insurance Co. v. USAA Insurance Co.*[18] that a personal automobile policy issued to the injured party's spouse provided primary cov-

11. 334 Ga. App. 785, 780 S.E.2d 533 (2015).
12. *Id.* at 789-90, 780 S.E.2d at 536-37.
13. *Id.* at 786, 780 S.E.2d at 534.
14. *Id.*
15. *Id.* at 789, 780 S.E.2d at 536.
16. *Id.*
17. *Id.* at 790, 780 S.E.2d at 537.
18. 335 Ga. App. 664, 782 S.E.2d 718 (2016).

erage ahead of a commercial automobile policy issued to a limited liability company of which the injured person was a co-owner. The insured vehicle involved in the underlying accident was driven by Thomas, an owner of JK Lakeside, a Georgia LLC, and was insured by Sentinel under a commercial policy. JK Lakeside was the only named insured and the LLC co-owned the vehicle (with Thomas) and paid the premiums for the policy. United Services Automobile Association (USAA) issued a personal auto policy to Thomas' spouse and she, but not the LLC or the vehicle, was covered as an insured under that policy.[19]

In order to determine the priority of the policies, the court employed the "more closely identified with" test because Thomas did not pay premiums for either policy.[20] The issue to be decided was whether Thomas was more closely identified with the policy insuring her business and the vehicle she co-owned or with the policy issued to her spouse.[21]

In its analysis, the court looked to *Southern Guaranty Insurance Co. v. Premier Insurance Co.*,[22] a case that also dealt with priority of coverage between a family and a business policy.[23] There, the court determined that the plaintiff more closely identified with the business policy, rather than the policy of her spouse, because she was the sole proprietor of her business, and because obligations or benefits incurred by her business were individual in nature, and were in fact her obligations or benefits individually.[24] The court of appeals held the plaintiff's business "simply was not a distinct entity capable of being the true named insured on the contract," so it would "def[y] logic to hold that she shared a closer relationship with her husband than with herself."[25]

In contrast, in *Travelers Indemnity Co. v. Maryland Casualty Co.*,[26] the plaintiff was injured in the course of her employment while driving a vehicle owned by her employer, was insured by her employer's business policy, and was also covered under her mother's household family policy. That court concluded the plaintiff more closely identified with her mother's policy than her with her employer's, where the employer was a separate legal entity.[27] In *Sentinel*, the court of appeals held a limited

19. *Id.* at 664-65, 782 S.E.2d at 718-19.

20. *Id.* at 665, 782 S.E.2d at 720.

21. *Id.*

22. 219 Ga. App. 413, 465 S.E.2d 521 (1995).

23. *Sentinel*, 335 Ga. App. at 666, 782 S.E.2d at 720.

24. *Id.*

25. *Id.* (quoting S. Guar. Ins. Co. v. Premier Ins. Co., 219 Ga. App. 413, 415, 465 S.E.2d 521, 523 (1995)).

26. 190 Ga. App. 455, 379 S.E.2d 183 (1989).

27. *Id.* at 457, 379 S.E.2d at 186.

liability company, even one whose business is operated by a single owner, is a separate legal entity from the owner and more like the corporation in *Travelers* than the sole proprietorship in *Southern Guaranty*.[28] Therefore, "Thomas was more closely identified with her family policy than with the business policy."[29]

D. Ambiguous Notice Provision Construed Against Insurer

The Georgia Court of Appeals found an ambiguity in a policy's requirement that the insured give the company prompt notice of an accident where the injured person was a resident relative and not a named insured. In *King-Morrow v. American Family Insurance Co.*,[30] Melissa King-Morrow was involved in an accident and perfected service on her insurer, American Family Insurance Company (AFIC), when she sued the other driver. At the time of the accident, King-Morrow lived with her daughter, whose policy with AFIC covered relatives living in the policyholder's household. AFIC did not learn of the accident until two years after its occurrence and disclaimed coverage due to King-Morrow's failure to comply with the required notice condition under the policy.[31]

The policy required prompt notice if you have an accident, and the term "you" was defined as the policyholder and the policyholder's spouse.[32] The policy also provided that "[e]ach person claiming any coverage of this policy must also . . . cooperate with us and assist us in any matter concerning a claim or suit."[33] The court held that, "given the policy's limited definition of 'you,'" a covered relative could understand the policy to require only policyholders and their spouses to provide prompt notice of an accident and that the notice provision was ambiguous.[34] The court therefore construed the provision in favor of King-Morrow, even though it acknowledged that it was "very likely" AFIC had "intended its notice provision to apply to anyone claiming coverage."[35]

28. *Sentinel*, 335 Ga. App. at 667, 782 S.E.2d at 721.
29. *Id.*
30. 334 Ga. App. 802, 780 S.E.2d 451 (2015).
31. *Id.* at 802-03, 780 S.E.2d at 452.
32. *Id.* at 804, 780 S.E.2d at 453.
33. *Id.*
34. *Id.*
35. *Id.* at 805, 780 S.E.2d at 454.

E. Physical Contact with Cargo on a Vehicle is not Physical Contact with a Vehicle

In *American Alternative Insurance Co. v. Bennett*,[36] the insured's windshield was struck by a log carried by a passing unidentified logging truck. No one else witnessed the accident. Bennett served his employer's insurer, American Alternative Insurance Company (AAIC), with his suit for damages caused by the shattered glass.[37] The court of appeals held for AAIC, "because no actual physical contact between the trucks occurred and no eyewitness was present to corroborate Bennett's account of the incident,"[38] so Bennett could not satisfy the requirements of Official Code of Georgia Annotated (O.C.G.A.) section 33-7-11(b)(2).[39] The court emphasized the clear language of the statute, which mandates, absent eyewitness corroboration of the accident, that there must be "actual physical contact" between the vehicle owned or operated by the unknown tortfeasor and the person or property of the insured for there to be coverage.[40] The court of appeals distinguished the facts of this case from one involving contact with an "integral part" of an unknown vehicle[41] and found it to be more like several other cases where "this Court repeatedly has declined to extend coverage to . . . situations not involving actual physical contact" with a vehicle but contact with something secured to or falling from a vehicle.[42]

III. OTHER AUTOMOBILE INSURANCE ISSUES

A. Thirteen Month Delay in Providing Notice to Insurer Found to be "Unreasonable as Matter of Law"

In *Progressive Mountain Insurance Co. v. Cason*,[43] the United States Court of Appeals for the Eleventh Circuit determined that where an insured fails to notify his liability carrier of an accident for thirteen months and notice "as soon as practicable" is a condition precedent to coverage,

36. 334 Ga. App. 713, 780 S.E.2d 686 (2015).

37. *Id.* at 713-14, 780 S.E.2d at 687.

38. *Id.* at 714, 780 S.E.2d at 687.

39. *Id.* at 714-15, 780 S.E.2d at 687-88; O.C.G.A. § 33-7-11(b)(2) (2014).

40. *Bennett*, 334 Ga. App. at 714-15, 780 S.E.2d at 687-88 (quoting Yates v. Doe, 190 Ga. App. 367, 368, 378 S.E.2d 739, 740 (1989)).

41. State Farm Fire & Cas. Co. v. Guest, 203 Ga. App. 711, 417 S.E.2d 419 (1992).

42. *Bennett*, 334 Ga. App. at 715, 780 S.E.2d at 688.

43. 626 F. App'x 916 (11th Cir. 2015).

the delay is unreasonable as a matter of law and is a breach of the contract.[44] Anderson, driving his business partner's truck, struck another truck driven by Cason. Anderson did not own the vehicle involved in the accident, and Progressive did not insure that vehicle. Progressive insured a different truck, which was also owned by Anderson's partner. Anderson did not give Progressive notice of the accident until thirteen months after the accident and approximately three months after suit was filed.[45]

The Eleventh Circuit, in finding for Progressive, noted that the terms of the policy were not at all ambiguous; the terms stated that in order for coverage to apply, an insured "must promptly report each accident or loss even if an insured is not at fault" and "the accident or loss must be reported . . . as soon as practicable."[46] The court went on to note Georgia courts' repeated rulings to the effect that compliance with any "reasonable time" or as soon as practicable language in policy notice provisions is a condition precedent to coverage.[47] To hold in any other manner "would allow an insured to delay notifying the insurer for an indefinite period of time, 'so long as the insured thought that other insurance existed to cover the loss.'"[48] The court further held that, even if the as soon as practicable language gives insureds "some leeway in providing notice of a claim or suit" to an insurer, any "lengthy, unjustifiable delay may be found as a matter of law to have been so unreasonable as to foreclose coverage."[49] Here, it found the thirteen-month delay to be "an unreasonable delay as a matter of law."[50]

B. Who is an Employee Where Term "Employee" is not Defined in the Policy

In two cases decided during the survey period, the insurance policies at issue excluded coverage for injuries to employees of the insureds but did not define the term "employee." The courts looked to different authorities to determine whether or not the injured person was an employee of the insured.

---

44. *Id.* at 920.

45. *Id.* at 916-17, 919-20.

46. *Id.* at 918.

47. *Id.*

48. *Id.* at 919.

49. *Id.* (quoting Park Pride of Atlanta v. City of Atlanta, 246 Ga. App. 689, 695, 541 S.E.2d 687, 691-92 (2000)).

50. *Id.*

Royal v. Georgia Farm Bureau Mutual Insurance Co.[51] involved a corn-hauler who was hired by a farmer to transport corn for two weeks during harvest period. The driver, Royal, drove one of the farmer's trucks, and the farmer paid for the insurance, gas, and maintenance of the truck. A few days after he began work, Royal sustained serious injuries in an accident while hauling a load of corn in the farmer's truck. Royal made a claim against the farmer's Georgia Farm Bureau Farm Package Policy and Auto Policy, and Georgia Farm Bureau filed a declaratory judgment action to resolve a disagreement over Royal's coverage under the Auto Policy.[52]

The Auto Policy excluded from coverage any bodily injury to "an employee of the 'insured' arising out of and in the course of employment by the 'insured'"[53] but did not define the term "employee."[54] Royal argued that he was an independent contractor and not an employee, in part on the ground that truck driving is a highly skilled job and he received little instruction or supervision.[55] The court held the term employee in the insurance contract should be given its "usual and common meaning," determined by:

> [W]hether the employer, under the contract, whether oral or written, has the right to direct the time, the manner, the methods, and the means of the execution of the work . . . . The right to control the manner and method means the right to tell the employee how he shall go about doing the job in every detail, including what tools he shall use and what procedures he shall follow.[56]

Reciting the "undisputed facts" showing that "Williams [the farmer] controlled the time, manner, method, and means of execution of Royal's work," with "Royal simply follow[ing] the instructions of Williams or Williams's lead driver," the court held Royal was an employee and Georgia Farm Bureau was entitled to summary judgment.[57]

The Eleventh Circuit decided a case only months later, *Progressive Mountain Insurance Co. v. Madd Transportation, LLC*,[58] that closely mirrored the analysis of the court of appeals in *Royal*. A driver for Madd, a

---

51. 333 Ga. App. 881, 777 S.E.2d 713 (2015).

52. *Id.* at 881-82, 777 S.E.2d at 714.

53. *Id.* at 882, 777 S.E.2d at 715.

54. *Id.*

55. *Id.* at 884, 777 S.E.2d at 715-16.

56. *Id.* at 883, 777 S.E.2d at 715 (quoting RBF Holding Co. v. Williamson, 260 Ga. 526, 526, 397 S.E.2d 440, 441 (1990)).

57. *Id.*

58. 633 F. App'x 744 (11th Cir. 2015).

Georgia interstate trucking company, was severely injured at an IPSCO facility in Pennsylvania. When a legal guardian for the driver filed suit approximately one year later alleging negligence on the part of IPSCO, IPSCO joined Madd as a third-party defendant and asserted it had negligently trained and supervised the driver. Madd notified Progressive of the action and sought coverage under its commercial auto insurance policy.[59] Progressive sought a declaration of its rights, "contending that it had no duty to defend or indemnify Madd under the policy" due to the policy's "employee exclusion," which provided in pertinent part that "coverage . . . does not apply to bodily injury to Madd's 'employees.'"[60] Madd and IPSCO responded that the employee exclusion did not apply in the present action because the driver was not an employee, but an independent contractor.[61] Like the policy in *Royal*, Progressive's policy did not define the term "employee."[62]

The Eleventh Circuit did not look to common law to determine whether Madd's driver was an employee; it found that coverage depended on "whether independent contractors qualify as 'employees' under the policy's employee exclusion."[63] The court looked to the federal motor carrier regulations, under which "'employee' includes 'an independent contractor while in the course of operating a commercial motor vehicle.'"[64] Therefore, whether the driver was a common-law employee or an independent contractor, he was a statutory employee and Progressive was relieved of any obligation to defend or indemnify Madd in the underlying action.[65]

C. Subjective Use of 17(c) Formula is not Basis for Third-Party Bad Faith Claim Absent Additional Evidence of Bad Faith

In *Amica Mutual Insurance Co. v. Sanders*,[66] the insurer argued that its adjuster's use of the "17(c) formula"[67] could not be characterized as a bad faith effort on its part to settle the claim for the diminished value of the plaintiffs' car, which had been struck by Amica's insured.[68] Amica's

59. *Id.* at 745.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 746.
64. *Id.* at 745, 746 (quoting 49 C.F.R. § 390.5 (2015)).
65. *Id.* at 747.
66. 335 Ga. App. 245, 779 S.E.2d 459 (2015).
67. *Id.* at 245, 779 S.E.2d at 460. As readers of this annual article will know, the 17(c) formula derives from the *Mabry* diminished value litigation. *See* State Farm Mut. Auto. Ins. v. Mabry, 274 Ga. 498, 556 S.E.2d 114 (2001).
68. *Sanders*, 335 Ga. App. at 246, 779 S.E.2d at 461.

adjuster, in estimating the cost of repair and diminished value on the Sanders' vehicle, employed a 17(c) formula. When Sanders and Amica could not agree on a settlement figure, Sanders filed a bad faith claim against the insurer under O.C.G.A. § 33-4-7,[69] the third-party bad faith statute.[70]

The court of appeals discussed how bad faith has been defined in other cases,[71] and said when "the issue of liability is close" or when "no evidence of unfounded reason for the nonpayment" is present, courts "should disallow imposition of bad faith penalties."[72] The court also reiterated:

> Although the Insurance Commissioner's 2008 directive indicates that, because finding the amount of diminished value is a subjective process, more is required than merely relying on any particular formula or method in making that evaluation, *no Georgia statute, insurance regulation, or common law precedent requires that an insurer use an independent appraiser or otherwise specifies the requirements of that subjective process.*[73]

Because the court found Amica's adjuster applied the 17(c) formula as part of a subjective determination in his estimation of the lost value of the Sanders' vehicle, it concluded that Amica's adjustment of the Sanders' diminished value claim "was reasonable and provided it with good cause as a matter of law for its refusal to pay the amount demanded" by the Sanders.[74]

IV. COVERAGE UNDER OTHER POLICIES

A. Commercial General Liability (CGL) Policies Generally

The United States Court of Appeals for the Eleventh Circuit and the Georgia Court of Appeals each addressed when coverage could be initially triggered in a sequence of events under an insurance policy. In *Zook v. Arch Specialty Insurance Co.*,[75] the Georgia Court of Appeals, in a matter

---

69. O.C.G.A. § 33-4-7 (2014 & Supp. 2016).

70. *Sanders*, 335 Ga. App. at 248, 779 S.E.2d at 462.

71. *Id.* at 250, 779 S.E.2d at 463.

72. *Id.* (quoting King v. Atlanta Cas. Ins. Co., 279 Ga. App. 554, 557, 631 S.E.2d 786, 788 (2006)). "An insurer thus having any reasonable factual or legal ground for contesting a claim is entitled to summary judgment under either O.C.G.A. § 33-4-6 or § 33-4-7." *Sanders*, 335 Ga. App. at 250, 779 S.E.2d at 463.

73. *Sanders*, 335 Ga. App. at 250-51, 779 S.E.2d at 464 (quoting Miles v. State Farm Fire & Cas. Co., No. A12A1166, slip op. at 9 (Ga. Ct. App. July 27, 2012)).

74. *Id.* at 251, 779 S.E.2d at 464.

75. 336 Ga. App. 669, 784 S.E.2d 119 (2016).

of first impression, considered whether a malicious prosecution claim fell within a CGL policy issued to a nightclub. The claimant, Zook, alleged in his underlying lawsuit that he was assaulted by a bouncer at the insured's nightclub in May 2009, but Zook himself was arrested for simple battery related to that altercation. Ten months later, Zook was formally charged with simple battery of the bouncer, though he was later found not guilty after a trial.[76] The CGL policy was in effect when the incident and arrest occurred in May 2009, but not when Zook was subsequently charged with simple battery.[77] The court of appeals acknowledged that no Georgia appellate court had ever addressed when a malicious prosecution claim arose for purposes of triggering coverage if the language of the insurance policy was silent.[78] After examining decisions from other jurisdictions, the court of appeals determined that, while Zook did not have a cause of action for malicious prosecution until favorable termination of the underlying criminal proceeding, the policy nonetheless covered injury arising out of malicious prosecution because the underlying offense was committed during the policy period.[79] Specifically, the court concluded that once the bouncer called 911 and gave the report to the responding officer, who in turn arrested Zook, the "legal machinery of the state was set into motion."[80]

The United States Court of Appeals for the Eleventh Circuit, in *Lee v. Universal Underwriters Insurance Co.*,[81] held that the policy definition of "occurrence" was ambiguous as to whether the date of a negligent repair to a vehicle potentially could be the trigger date for coverage, as opposed to the resulting vehicle accident, which was outside the policy.[82] Universal Underwriters issued a policy to a Ford dealership, which repaired a Ford Expedition in June 2005. Over three years later, in December 2008, the owner was involved in an accident. A subsequent inspection revealed the cruise control cable on the Ford was damaged during the 2005 repair, which caused the throttle stick to open and the owner to lose control of

76. *Id.* at 670-71, 784 S.E.2d at 120.

77. *Id.* at 673, 784 S.E.2d at 122.

78. *Id.* at 674, 784 S.E.2d at 122.

79. *Id.* at 675-76, 784 S.E.2d at 123-24.

80. *Id.* at 675, 784 S.E.2d at 123. The court cited a New Jersey appellate court's "finding that the 'essence of the tort is the wrongful conduct in making the criminal charge' in a case where the criminal complaint, arrest, and indictment all occurred before insurance coverage began." *Id.* at 675 n.16, 784 S.E.2d 12 n.16 (quoting Muller Fuel Oil Co. v. Ins. Co. of N. Am., 232 A.2d 168, 174 (N.J. Super. Ct. App. Div. 1967)).

81. 642 F. App'x 969 (11th Cir. 2016).

82. *Id.* at 970.

the vehicle causing the accident.[83] The district court found the insurance policy to be ambiguous as to what type of occurrence triggered coverage.[84] The Eleventh Circuit agreed and held the policy's plain language was ambiguous about "what type of 'occurrence' triggers coverage."[85] The Eleventh Circuit noted the policy did not clearly state that it applied only to injuries that occurred within the policy period, nor did it state what type of accident or event during the policy period might trigger coverage.[86] As a result, the Eleventh Circuit determined the policy could "[reasonably interpret it] as requiring either that the accident–here, the negligent repair–occur during the policy period, or that the injury resulting from the accident–here, the car crash–occur during the policy period."[87] As a result, following the tradition of construing an insurance policy against its drafter, the Eleventh Circuit concluded the policy covered the negligent repair and deemed it an occurrence within the policy.[88]

Whether certain claims for damages were covered under an insurance policy was also squarely addressed in two separate federal court decisions decided in favor of the insurance industry. In *Spivey v. American Casualty Co.*,[89] the United States District Court for the Southern District of Georgia concluded that a complaint alleging the intentional and malicious conversion of equipment was not a covered occurrence and granted American Casualty's motion.[90] The plaintiff filed suit against Dixie, the insured, alleging it had engaged in "'willful and malicious conversion of Plaintiffs' security interest or rights' in the equipment."[91] Dixie sought a defense under its liability policy with American Casualty, but American Casualty refused.[92] After a consent judgment was procured, an assignment was obtained from Dixie, and the plaintiff in the underlying case filed suit for bad faith against American Casualty.[93] American Casualty immediately filed a motion to dismiss, and the district court granted American Casualty's motion.[94] The court contrasted and distinguished

83. *Id.* The Universal policy was cancelled in June 2007, a year and a half before the accident. *Id.*

84. *Id.* at 971.

85. *Id.* at 973.

86. *Id.*

87. *Id.*

88. *Id.*

89. 128 F. Supp. 3d 1281 (S.D. Ga. 2015).

90. *Id.* at 1282.

91. *Id.* at 1283.

92. *Id.*

93. *Id.*

94. *Id.* at 1282.

prior decisions involving occurrences for deliberate acts with unintended damages and found those decisions were limited to faulty workmanship cases.[95] The court specifically noted the present case was "not even about the *unintended* legal consequences of an intentional act,"[96] but instead where the plaintiff had alleged that Dixie "willfully and maliciously converted Plaintiff's equipment."[97] Ultimately, the court concluded there was no coverage because the alleged willful and malicious conversion was not an "accident" under the policy, and the underlying complaint did not "seek a remedy for the unintended consequences of an intentional act, but rather for the 'willful and malicious' conversion itself."[98] The court concluded it was not an occurrence and therefore not covered under the policy.[99]

B. Diminution of Value and "Property Damage"

The United States Court of Appeals for the Eleventh Circuit, in *O'Dell v. Pacific Indemnity Co.*,[100] held that a claim for diminution in value of a residential property was not "property damage" caused by an occurrence and was not covered.[101] After a seller failed to disclose prior flooding at his residential home, the buyer filed suit for damages, including damages for diminution in the property caused by the flooding.[102] In part, the Eleventh Circuit concluded the district court properly determined that the claim for diminution in value (a "purely economic loss") was not covered property damage.[103] Specifically, the Eleventh Circuit concluded the diminution in value did not involve any physical injury to or destruction of tangible property and was therefore not covered.[104]

C. Vandalism and Malicious Mischief Coverage

In *Auto-Owners Insurance Co. v. Neisler*,[105] burglars vandalized a rental home insured through Auto-Owners before Neisler could find a

95. *Id.* at 1284-85. *See* Am. Empire Surplus Lines Ins. Co. v. Hathaway, 288 Ga. 749, 707 S.E.2d 369 (2011); Capital City Ins. Co. v. Forks Timber, 2012 U.S. Dist. LEXIS 122395 (S.D. Ga., Aug. 28, 2012).

96. *Spivey*, 128 F. Supp. 3d at 1285.

97. *Id.*

98. *Id.*

99. *Id.* at 1286.

100. 619 F. App'x 828 (11th Cir. 2015).

101. *Id.* at 832.

102. *Id.* at 830.

103. *Id.* at 831.

104. *Id.*

105. 334 Ga. App. 284, 779 S.E.2d 55 (2015).

tenant to rent the property.[106] Neither party disputed that the property policy did not provide coverage for the fixtures stolen from the dwelling. Neisler, though, claimed he was entitled to recover the cost of labor to replace the stolen fixtures and the cost of lost monthly rent.[107]

With respect to the cost of labor, the policy's "vandalism and malicious mischief" provision excluded losses from theft and burglary, but a separate provision covered "damage by burglars to the dwelling or other structures."[108] The Georgia Court of Appeals concluded that the two provisions were conflicting and ambiguous; therefore, Neisler was entitled to recover the damage caused by the burglars, including the cost of labor to replace the items that were removed.[109] The court found a question of fact as to whether Auto-Owners acted in bad faith with respect to this part of the claim, because correspondence between Auto-Owners and Neisler demonstrated that Auto-Owners was on notice of the ambiguities in the policy's coverage.[110]

With respect to the cost of lost monthly rent, the policy provided coverage for "loss of normal rents" caused by a covered loss while the premises is unfit for habitation.[111] The court determined the provision unambiguously provided coverage for lost rent only if the property is rented to a tenant at the time of the loss; therefore, Neisler was not entitled to recover for the lost monthly rent.[112] Because Auto-Owners had reasonable grounds for contesting the lost rent claim, it was entitled to summary judgment for bad faith on that portion of the claim.[113]

D. Business Risk Exclusions

In *Auto Owners Insurance Co. v. Gay Construction Co.*,[114] a case of first impression, the court of appeals addressed which party's scope of work—the general contractor or the subcontractor—should be considered when determining whether business risk exclusions apply to a general contractor's claim for first-party coverage as an additional insured under a subcontractor's CGL policy.[115] The court determined that when a subcontractor seeks first-party coverage under a CGL policy, courts consider the

106. *Id.* at 284, 779 S.E.2d at 58.
107. *Id.* at 284-85, 779 S.E.2d at 58.
108. *Id.* at 287, 779 S.E.2d at 60.
109. *Id.* at 287-88, 779 S.E.2d at 60-61.
110. *Id.* at 291, 779 S.E.2d at 62-63.
111. *Id.* at 289, 779 S.E.2d at 61.
112. *Id.*
113. *Id.* at 291, 779 S.E.2d at 62.
114. 332 Ga. App. 757, 774 S.E.2d 798 (2015).
115. *Id.* at 761, 774 S.E.2d at 801.

subcontractor's scope of work; when a general contractor seeks coverage under its own CGL policy, courts look at the general contractor's scope of work.[116]

Gay Construction Company (GCC) was the general contractor of a project that included constructing a terrace above restrooms; subcontractor Dai-Cole Waterproofing Company, Inc. (Dai-Cole) installed the waterproof membrane and drainage mat to prevent leakage into the restrooms under the terrace.[117] After a certificate of occupancy was issued, water began leaking into the restrooms under the terrace during and after heavy rains.[118] GCC determined that improper installation of the waterproofing membrane caused the leak.[119] After Dai-Cole unsuccessfully tried to fix the membrane, GCC repaired the work itself, which required removing and replacing the top concrete slab of the terrace.[120]

Contending that it was an additional insured under Dai-Cole's CGL policy with Auto Owners, GCC brought a first-party claim to recover the costs of repairing the defective terrace.[121] After Auto Owners denied the claim and GCC brought suit, the trial court denied Auto Owners' motion for summary judgment, concluding that the business risk exclusions in the policy did not apply to the claim because they only applied to Dai-Cole's work and not to GCC's work.[122]

The court of appeals reversed, finding that the claim was barred by the business risk exclusions because "there was no claim for damage to nondefective property not covered by GCC's or Dai-Cole's scope of work."[123] GCC's repairs "involved only corrections to and resulting repairs for faulty workmanship, which is precisely the type of claim generally barred by business risk exclusions."[124] As general contractor, GCC was responsible for all work done within its scope of work for the project.[125] The court noted, "To limit the business risk exclusions to only that work performed by Dai-Cole would permit GCC more coverage as an additional insured than that granted to Dai-Cole as policyholder and

116. *Id.*
117. *Id.* at 757, 774 S.E.2d at 798-99.
118. *Id.* at 757, 774 S.E. 2d at 799.
119. *Id.* at 758, 774 S.E.2d at 799.
120. *Id.*
121. *Id.* at 759, 774 S.E.2d at 799.
122. *Id.* at 759, 774 S.E.2d at 800.
123. *Id.* at 760, 774 S.E.2d at 800.
124. *Id.* at 761, 774 S.E.2d at 801.
125. *Id.* at 762, 774 S.E.2d at 801.

would effectively [have required] Auto Owners to financially guarantee Dai-Cole's work."[126]

E. Pollution Exclusion

Finally, in *Georgia Farm Bureau Mutual Insurance Co. v. Smith*,[127] the Georgia Supreme Court ruled that household lead paint was a "pollutant" for purposes of a pollution exclusion. In a matter of first impression, the Georgia Supreme Court squarely held that lead paint was a "pollutant" within the meaning of an absolute pollution exclusion in a CGL policy.[128] The court expressly disagreed with the court of appeals decision that lead-based paint was not a pollutant, and it reiterated the premise of its decision in *Reed v. Auto-Owners Insurance Co.*[129] several years earlier.[130] Georgia Farm Bureau issued a CGL policy to a landlord, who in turn rented a home with paint which was chipping, flaking, and peeling in every room of the rental home. The minor of the tenant ingested those paint chips that contained lead, became ill, and the family filed suit.[131] Georgia Farm Bureau filed a declaratory judgment action under its pollution exclusion, which excluded bodily injury from the disbursal, among other manners of pollutants.[132] The court of appeals reversed the trial court's decision and concluded that a reasonable insured would have understood the pollution exclusion to exclude coverage for injuries caused by industrial pollution, rather than the presence of leaded materials in a private residence.[133] In reversing the lower court, the Georgia Supreme Court discussed the origin of the pollution exclusion and the apparent shift over the years from applying the exclusion solely to traditional, industrial pollutants, to pollutants found in residential homes, such as carbon monoxide, asbestos, and gasoline.[134] The supreme court reiterated that it refused to adopt a strict approach, which only considered the purpose and historical evolution of the pollution exclusion, and instead looked at the "plain language of the clause itself."[135] The supreme

126. *Id.*

127. 298 Ga. 716, 784 S.E.2d 422 (2016).

128. *Id.* at 721, 784 S.E.2d at 426.

129. 284 Ga. 286, 667 S.E.2d 90 (2008).

130. *Smith*, 298 Ga. at 721, 784 S.E.2d at 426.

131. *Id.* at 716, 784 S.E.2d at 422.

132. *Id.* at 717, 784 S.E.2d at 423. The policy defined a "pollutant" as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalized, chemicals and waste." *Id.*

133. *Id.* at 718, 784 S.E.2d at 424.

134. *Id.* at 720, 784 S.E.2d at 425-26.

135. *Id.* at 720, 784 S.E.2d at 425.

court concluded the plaintiff alleged the child suffered lead poisoning and permanent injury from the ingestion of lead-based paint, and under the "broad definition" of the policy, the court held that "lead present in paint unambiguously qualifies as a pollutant,"[136] and the plain language of the policy's pollution exclusion excludes coverage.[137]

136. *Id.* at 721, 784 S.E.2d at 426.

137. *Id.*