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Advanced Coverage Analysis

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A. Collateral Source Rule

Most attorneys have been aware of the collateral source rule since evidence and torts classes in law school. The United States Supreme Court has noted that

> evidence of collateral benefits is readily subject to misuse by a jury. It has long been recognized that evidence showing the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.[1]

Georgia has recognized the rule for over 125 years. In *Western & Atlantic Railroad v. Meigs*, for example, our Supreme Court declined to allow a railroad company an offset for its wrongful death liability because of life insurance proceeds received by the decedent's widow.[2] Similarly, evidence of collateral benefits has been held inadmissible in the context of workers' compensation[3] and health insurance[4] benefits. As noted in *Bennett v. Haley*, the rule applies regardless of whether the benefit was paid for by the claimant or gratuitous, and therefore Medicaid and similar government-provided benefits are subject to the rule.[5] Nevertheless, one of the primary principles underpinning the rule is the idea that a tortfeasor should not reap the benefits of the claimant's foresight and prudence in obtaining a means to cover losses caused by a tortfeasor. This is consistent with the general principle that

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[1] Eichel v. New York Central R. Co., 375 U.S. 253, 255, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963) (internal citations and formatting omitted). See also Bennett v. Haley, 132 Ga. App. 512, 525, 208 S.E.2d 302 (1974) (discussing measure of medical special damages).

[2] Western & Atlantic Railroad v. Meigs, 74 Ga. 857, 868 (1885).

[3] Fred F. French Management Co. v. Long, 169 Ga. App. 702; 314 S.E.2d 666 (1983).

[4] Bennett v. Haley, 132 Ga. App. 512, 208 S.E.2d 302 (1974).

[5] Id.

compensation for reasonable and necessary medical expenses is the responsibility of the tortfeasor.[6]

The collateral source rule is not absolute, however, and may be waived where a party seeking to exclude such evidence opens the door to its introduction.[7] In *Arnsdorff v. Fortner*, for example, the claimant stated in his testimony that he was "on his own" as to medical expenses, and therefore the defense should have been allowed to examine him as to these issues even though it may have given rise to evidence of his receipt of collateral benefits.[8] The rule may also be inapplicable where the evidence sought to be introduced involves unrelated claims and the evidence is probative of a prior injury.[9] Finally, it should be noted that benefits provided by a tortfeasor are not, by definition, collateral benefits, and may be material in some cases.[10]

Despite this long-standing rule, in 1987 the Georgia legislature enacted a statute that attempted to permit the introduction of evidence of a plaintiff's recovery of collateral benefits. The provision, which, despite the subsequent developments that follow, remains codified in the Georgia Code, stated that

> In any civil action, whether in tort or in contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is otherwise introduced by the plaintiff, evidence of

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[6] See O.C.G.A. § 51-12-7.

[7] Arnsdorff v. Fortner, 276 Ga. App. 1; 622 S.E.2d 395 (2005).

[8] Id. The error was nevertheless found to be harmless because of references to Medicaid benefits contained within medical bills submitted as evidence. See also Luke v. Suber, 217 Ga. App. 84; 456 S.E.2d 598 (1995); Moore v. Sellars, 208 Ga. App. 69; 430 S.E.2d 179 (1993). *Moore v. Sellars* was overruled by *Warren v. Ballard* to the extent that the former case could be construed to allow impeachment on the issue of anxiety over payment for medical expenses, on the principle that such anxiety is not actionable nor material, and therefore not a proper subject for impeachment. Warren v. Ballard, 266 Ga. 408; 467 S.E.2d 891 (1996).

[9] Garrison v. Rich's, 154 Ga. App. 663; 269 S.E.2d 513 (1980).

[10] Candler Hospital v. Dent, 228 Ga. App. 421; 491 S.E.2d 868 (1997). The *Dent* court did not hold that the defendant hospital's "write off" of medical expenses was admissible, but rather that it may entitle the hospital to a pre-judgment offset under certain circumstances.

> all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact. The trier of fact, in its discretion, may consider such available benefits or payments and the cost thereof but shall not be directed to reduce an award of damages accordingly.[11]

The statute specifically did not *require* a jury to reduce an award, and presumably a jury could find that the collateral benefits should not be taken into account. Regardless, four years after the statute was enacted, the Georgia Supreme Court held it unconstitutional in *Denton v. Con-Way Southern Express*.[12] Therefore, evidence of collateral sources of recovery remain inadmissible today.

The issue of a tortfeasor's liability insurance is a related but separate issue. Unlike the collateral source rule's entirely common-law source, the rule regarding liability insurance is now codified in the Georgia code at O.C.G.A. § 24-4-411 and precludes the introduction of "evidence that a person was or was not insured against liability," subject to statutory exceptions when the evidence is offered for a "relevant purpose, including, but not limited to, proof of agency, ownership, or control" in cases where the court concludes that the "danger of unfair prejudice is substantially outweighed by the probative value of the evidence." On the other hand, in many cases the practical effect of this rule may be minimal. As the late Georgia Court of Appeals (and later U.S. District Court) Judge Robert Hall wrote in his concurrence in *Young v. Carter*, "Any juror who doesn't know that there is liability insurance in the case by this time should probably be excused by virtue of the fact that he or she is an idiot."[13]

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[11] O.C.G.A. § 51-12-1(b).

[12] Denton v. Con-Way S. Express, 261 Ga. 41; 402 S.E.2d 269 (1991).

[13] Young v. Carter, 121 Ga. App. 191, 173 S.E.2d 259 (1970).

B. Advanced Policy/Coverage Analysis

Among the most important aspects of investigating a tort case is determining the extent of available coverage or other recoverable assets. In some cases, particularly involving large corporate defendants, the issue of insurance coverage may not be a major concern because the company's general assets would be more than sufficient to cover the loss.[14] In many others, however, the tortfeasor's personal or business assets may not cover the maximum potential loss, and, as a practical matter, the extent of available insurance could dictate the viability or ultimate recovery in any particular case. This section will discuss several types of tort claims and the legal principles involved in determining when particular coverage may apply or become available for those claims.

Automobile collisions

All vehicles operating on the public roadway are required to carry at least $25,000 per person and $50,000 per collision in liability insurance coverage.[15] Unfortunately, many vehicles carry *only* this minimum amount of coverage, and therefore other types of coverage may become relevant, including uninsured/underinsured motorist ("UM") and Medical Payments ("MedPay") coverages. Additionally in some cases, additional liability coverage may be available by virtue of an agency relationship, a resident relative, or simply another policy covering the operator of the vehicle. Each of these issues is discussed below.

Liability insurance: The general rule in Georgia is that liability insurance "follows the car," and the insurance covering a motor vehicle will usually deem

[14] On the other hand, recent history has shown a number of apparently solvent corporations to be in dire financial condition, sometimes resulting in bankruptcy, and therefore coverage issues may always be relevant.

[15] O.C.G.A. §§ 33-7-11, 33-34-4, 40-9-37. Other minimum limits are applicable for commercial vehicles. For example, a general minimum of $750,000 in liability coverage is required for many motor carriers, with increased minimums for vehicles transporting passengers and hazardous materials. See 49 C.F.R. § 389.303. But see Georgia Dept. of Public Safety, Trucking Rulebook Part 387.

anyone driving the vehicle with permission to be an insured.[16] The owner of any vehicle operated on the public roads is required to maintain the minimum required liability coverage on that vehicle. The car's coverage is considered primary over any other coverage in most cases.[17]

Regardless, the car's primary liability coverage may present only one of several layers of coverage. Unfortunately, it is not uncommon for parties or counsel to fail to discover additional layers of liability insurance that could increase the claimant's recovery. For example, if the at-fault driver is not the vehicle's owner and has his or her own vehicle, that vehicle's insurance will generally provide coverage for a loss, albeit as secondary coverage. Additionally, regardless of whether the at-fault driver is the vehicle's owner, that driver may be considered an insured under another liability policy for a variety of reasons: the driver may have another vehicle insured separately, in which case that vehicle's insurance insurance could apply to the subject collision; the driver may have a household resident relative with a policy that defines the driver as an insured, regardless of what vehicle is being driven, or the driver may be driving the vehicle for a "family purpose" such that the vehicle's owner (or co-owner) could be deemed a tortfeasor with potential additional coverage or assets.[18] Similarly, if the at-fault driver is operating the vehicle within the course and scope of employment or at the direction of another, there may be insurance available that covers the employer for the driver's negligence.[19] Finally, other individuals, including, but not limited to, employers and family members, may be liable under theories of negligent entrustment, training, or retention, which could

[16] Ga. Farm Bureau Mut. Ins. Co. v. Martin, 264 Ga. 347, 444 S.E.2d 739 (1994).

[17] This rule may be abrogated in some cases, as with rental and loaner cars, such that the driver's insurance is considered primary. See O.C.G.A. §§ 40-9-102, 33-34-3(d); Zurich American Ins. Co. v. General Car & Truck Leasing System, Inc., 258 Ga. App. 733, 574 S.E.2d 914 (2002). Nevertheless, the vehicle owner is still required to maintain the statutory minimum coverage, regardless of the priority of coverage. See, e.g., Hendrix v. Universal Underwriters Ins. Co., 263 Ga. App. 589, 588 S.E.2d 761 (2003).

[18] See, e.g., Phillips v. Dixon, 236 Ga. 271, 223 S.E.2d 678 (1976).

[19] See, e.g., Broadnax v. Daniel Custom Construction, 315 Ga. App. 291; 726 S.E.2d 770 (2012).

establish independent theories of liability with the potential for additional insurance coverage.[20]

Because of the numerous circumstances that may trigger coverage, locating all available coverage may be a challenge. O.C.G.A. § 33-3-28 requires insurers to provide coverage information upon request.[21] Insurers typically comply with the statute, but often provide only the exact information requested. For example, if coverage information is specifically requested from "ABC Insurance Company," the insurer may decline to disclose a liability insurance policy provided by its subsidiary "ABC Fire & Casualty Company" even if it is aware of the additional coverage because the request was only to the specific company. Therefore, as a general matter, it is best to submit such a request in the broadest terms that are reasonably possible. Therefore, the author's policy is to submit a request containing language similar to the following:

> This request is specifically intended to encompass any and all coverages underwritten by [insurer] as well as any parent, subsidiary, affiliate, or other related company that may have underwritten any liability insurance that would provide coverage for this loss arising from the acts of [at fault driver], regardless of whether [at fault driver] was a named insured. This specifically includes any liability coverage for the vehicle at issue, a [car make/model/year], Vehicle Identification Number [VIN], in force on [date of loss]. Furthermore, this specifically includes any excess, umbrella, or similar policies. In short, we are requesting any coverage of which you are aware underwritten by you or any of your related companies that could provide any coverage to any person for acts connected with the automobile collision on [date].

[20] See, e.g., Cherry v. Kelly Services, Inc., 171 Ga. App. 235, 319 S.E.2d 463 (1984).

[21] The requirements of the statute should be reviewed carefully, as some insurers require absolute compliance with its provisions, including that the request be made under oath and submitted via certified mail.

Although O.C.G.A. § 33-3-28 does not itself provide for a cause of action against an insurer or insured violating its provisions,[22] the Court of Appeals *has* held that, where an insurer fails to disclose available insurance coverage, the insurer may be liable, under certain circumstances, for damages for that failure to disclose, which may include including punitive liability for fraud and RICO violations.[23] Moreover, the Supreme Court earlier this year ordered a new trial following a defense verdict where a defendant failed, in discovery, to disclose the existence of excess insurance coverage.[24] Although this latter case involved the right of the plaintiff to qualify the jury as to insurance coverage and therefore would only specifically apply to cases in litigation, it, combined with O.C.G.A. § 33-3-28 and the potential for liability under *Merritt* for failure to disclose, provides substantial motivation for full disclosure, assuming the appropriate request is made by claimant's counsel.

Even the most diligent insurer can only disclose insurance it (or an affiliated company) has actually underwritten, however, and therefore the procedures discussed above provide only a partial solution to the problem of locating all insurance coverage. Although O.C.G.A. § 33-3-28 also contains a provision requiring an insured tortfeasor to disclose the identity of *all* relevant liability carriers, he or she may either be unaware of, or unwilling to provide information about, additional insurance coverage aside from the primary insurance. In some cases, particularly where an investigation reveals that it is unlikely other insurance actually exists, an affidavit of coverage may be sufficient, wherein the tortfeasor attests to the lack of additional insurance personally, and also affirms that certain circumstances, such as a resident relative with separate insurance, do not exist.[25] In other cases, there

[22] Parris v. State Farm Mut. Auto. Ins. Co., 229 Ga. App. 522, 494 S.E.2d 244 (1997).

[23] See Merritt v. State Farm Fire & Cas. Co., 247 Ga. App. 442, 544 S.E.2d 180 (2000). Cf. Parris, supra; Cross v. Tokio Marine & Fire Ins. Co., 254 Ga. App. 739, 563 S.E.2d 437 (2002) (discussing possibility of insurer liability for failure to disclose coverage but finding none under specific factual situations presented).

[24] Ford Motor Co. v. Conley, 294 Ga. 530; 757 S.E.2d 20 (2014).

[25] A sample affidavit is included at the end of this paper.

may be no way to truly confirm that there is no additional coverage short of filing suit and engaging in discovery intended to probe these issues. A properly-drafted limited liability release[26] can permit a claimant to obtain the known insurance proceeds while retaining the right to seek additional coverage through litigation, although doing so will generally eliminate a potential third-party bad faith claim against any other insurer because the insured will have been released from personal liability.[27]

Uninsured/underinsured motorist coverage: Uninsured and underinsured motorist (UM) claims in Georgia are governed by O.C.G.A. § 33-7-11, which establishes requirements for insurers writing Georgia automobile insurance policies.[28] All automobile insurance policies must offer, as a default coverage, $25,000 per person and $50,000 per collision UM coverage, or coverage in the amount of liability coverage if that amount is greater.[29] Insureds can, however, either reject the coverage entirely, or elect to purchase a different form of UM coverage in which the amount of coverage is reduced by the liability insurance coverage available to an underinsured at-fault driver, but such election or rejection must be in writing.[30]

Uninsured motorist coverage is an important consideration in any case where the liability coverage may not be sufficient to cover the losses of the claimant, whether because of the extent of the injuries and amount of coverage, or because the

[26] See O.C.G.A. § 33-24-41.1.

[27] Cf. State Farm Mut. Auto. Ins. Co. v. Smoot, 381 F.2d 331 (5th Cit. 1967); Southern General Ins. Co. v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992)(discussing principles of third-party bad faith liability for failure to settle).

[28] Georgia law deems underinsured motorists to be uninsured to the extent a claimant's damages exceed available liability coverage, and, as such, the analysis is generally the same. Therefore, in this paper, the term uninsured (or "UM") is used to refer generally to both uninsured and underinsured motorist coverage.

[29] O.C.G.A. § 33-7-11(a)(1).

[30] O.C.G.A. § 33-7-11(a)(3) and (b)(1)(D)(ii).

liability coverage is exhausted because of other claims. Significantly, uninsured motorist coverage can apply in cases that are not readily apparent, including to:

- The named insureds, and relative residents of the named insureds, for injuries caused by an uninsured motorist, regardless of whether the claimant is in the insured vehicle, or even in a vehicle at all

- Any individuals while in the insured vehicle

Therefore, two broad categories of insureds are created by the statute: named insureds and resident relatives in the first, and anyone in the insured vehicle in the second. As to the first category, the critical question is simply whether the claim arose from the acts of an uninsured motorist. If so, it does not matter whether the claimant was in someone else's vehicle or in his or her own, and even pedestrians and bicyclists are considered insureds. As to the second category, these insureds are only covered when injured while in the vehicle to which the UM policy applies.

Because of the potentially broad scope of this coverage available, an attorney investigating such a claim should carefully examine the possibility that someone with whom the claimant lives has an automobile insurance policy, even if that policy has no connection whatsoever to the loss. If so, then the policy should be investigated to determine whether it provides applicable UM coverage. This should be done quickly, however, because many UM policies require that the insurer be notified within a reasonable time of the collision (sometimes stating a specific number of days) of the fact of the loss or else the coverage may be precluded.[31]

Another word of caution with respect to UM policies: the law governing uninsured and underinsured motorist coverage can vary drastically from state to state, and, in general, the operation of UM coverage is governed by the law of the state in which the insurance contract was entered, even if the wreck occurred in Georgia. In some states, certain procedural requirements not present under Georgia

[31] See, e.g., Lankford v. State Farm Mut. Auto. Ins. Co., 307 Ga. App. 12, 703 S.E.2d 436 (2010) (analyzing case law on insurance notice provisions).

law may preclude coverage if not expressly and diligently followed. One common example involves the requirement, not present under Georgia law, that the UM carrier consent to settlement with the at-fault driver in order to permit recovery of UM proceeds. Georgia courts have held that if the law of a foreign state provides for this requirement, failure to comply will allow the UM carrier to avoid coverage.[32]

Medical Payments coverage: Many automobile insurance policies include Medical Payments, or "MedPay," coverage. O.C.G.A. § 33-34-2(1) states that:

> "Medical payments coverage" includes any coverage in which the insurer agrees to reimburse the insured and others for reasonable and necessary medical expenses and funeral expenses incurred as a result of bodily injury or death caused by a motor vehicle accident, without regard to the insured's liability for the accident. Coverage shall be available to the named insured, resident spouse, and any resident relative while occupying the covered motor vehicle, and to any other person legally occupying a covered motor vehicle.

Although not required by the statute, some policies extend the coverage to those individuals in any vehicle or as a pedestrian. As a first-party coverage, MedPay provisions generally require insureds to comply with specific terms in order to obtain the coverage. MedPay coverage is usually considered to be primary to health insurance, and, because subrogation/reimbursement claims are governed by the made-whole provisions of O.C.G.A. § 33-24-56.1, this may result in a more favorable overall result for the claimant. On the other hand, a recent change to the UM statute may entitle an insurer that provides both UM and MedPay coverage to receive an offset in the amount of UM coverage involved.[33] It is unclear, however,

[32] See, e.g., Terry v. Mays, 161 Ga. App. 328, 291 S.E.2d 44 (1982). See also Amica Mut. Ins. Co. v. Bourgault, 263 Ga. 157, 429 S.E.2d 908 (1993)(discussing application of foreign contract law to UM policies).

[33] See O.C.G.A. § 33-7-11(i).

how such an offset would be calculated. This issue will be discussed in further detail later in the paper.

Other issues and sources of insurance: Beyond the specific categories of insurance and insureds discussed above, other entities or individuals may be subject to liability as a result of an automobile collision. As noted above, employment or other agency relationships may give rise to liability. In the motor carrier context, shippers or brokers may be subject to liability and may have independent liability and independent coverage that provide additional sources of recovery. Where mechanical defects caused or contributed to a collision, the owner of a vehicle may be liable under a negligent maintenance theory (in addition to any other theories such as negligent entrustment or an agency relationship), as may the person or garage performing the maintenance. This could be true, for example, where a defective tire was placed on a vehicle and subsequently failed, assuming it could be proven that the shop installing the tire knew or should have known of the defect. Where alcohol is involved, the Dram Shop statute may establish the liability of a person or entity providing alcohol to a driver who subsequently injures another as a result of intoxication.[34]

Non-automobile Torts

For non-automobile tort claims, the extent and priority of a defendant's coverage is likely to be governed by the insurance policy language because, outside of the motor vehicle context, liability insurance is generally not compulsory. One effect of this fact is that policy exclusions are more likely to be enforced, whereas with automobile insurance the compulsory rules evidence a public policy weighing heavily in favor of coverage in any case where an innocent third-party is injured.[35]

[34] O.C.G.A. § 51-1-40. See also Flores v. Exprezit! Stores 98-Georgia, LLC, 289 Ga. 466, 713 S.E.2d 368 (2011).

[35] Nevertheless, in all cases, exclusions must be unambiguous in order to be given effect. See, e.g., Jefferson Ins. Co. v. Dunn, 269 Ga. 213, 496 S.E.2d 696 (1998).

Regardless, the same broad principles governing liable parties may be applicable in non-auto cases, and therefore care should be taken to analyze all legal theories under which a person or entity might be liable and to investigate possible insurance coverage, even if the person or entity has the ability to pay a possible judgment. As noted earlier in this paper, O.C.G.A. § 33-3-28 contains a provision requiring individuals to identify their liability coverage upon request, which may be more commonly invoked in non-auto cases where the insurer is not readily discernible as it would be from reviewing a police report of a car collision.[36]

Medical Payments coverage may be available in other personal injury tort situations beyond auto cases. Many homeowners policies contain such provisions (although they typically do not apply to the named insureds or family members, unlike automobile insurance MedPay), as do some commercial policies covering retail businesses. This coverage should be inquired into upon contact with a prospective defendant or insurer, since it may provide an immediate and additional source of recovery.

C. Playing the Stacking and Offsets Game

Once the full extent of insurance policies and coverage has been ascertained, additional issues can arise regarding the priority of coverage and whether certain policies can be "stacked," as well as whether policies are subject to offsets because of other payments or benefits received. This area of law is enormously complex and has led to numerous articles and treatises. This final section will summarize some of the general concepts that arise with respect to the interplay between insurance policies.

Stacking: "Stacking" simply refers to the situation where multiple insurance policies apply to a single claim and the manner in which these various coverages are accessed. For example, the at-fault driver in an automobile collision may have

[36] As a practical matter, many insureds will simply forward such a request to their insurer rather than respond directly.

access to several layers of coverage, such as the vehicle's primary policy, the driver's own policy, and the driver's personal umbrella policy. In some cases, the policy terms may determine the order of coverage, while statutes or case law may establish the rule in others.[37] For liability policies in automobile cases, the rule that insurance "follows the car" applies except in the case of a rental or loaner/test drive car or where the primary insurer is insolvent.

One scenario where the courts have established priority rules is in uninsured motorist coverage. Because of the broad and statutorily-prescribed coverage required under UM rules, it is common for multiple UM policies to cover a particular loss. Once the UM coverage is reached (after exhaustion of liability coverage), the question becomes which UM policy applies first, and then the order in which the remaining policies must be applied if the damages exceed the first one.

The UM statute does not establish a priority order in this scenario. Therefore, the courts have developed three rules to determine priority:

> the "receipt of premium" test, the "more closely identified with" test, and the "circumstances of the injury" test. Under the "receipt of premium" test, the insurer that receives a premium from the injured insured is deemed to be primarily responsible for providing coverage. Under the "more closely identified with" test, the policy with which the injured party is most closely identified must provide primary coverage. If neither of those tests is helpful in a particular case, the courts look to the circumstances of the injury to see which policy provides primary coverage.[38]

In either an auto or non-auto case, where, by case law or statute, priority is not expressly established, the insurance contract generally controls. Insurance

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[37] See, e.g., Georgia Farm Bureau Mut. Ins. Co. v. Martin, 264 Ga. 347, 444 S.E.2d 739 (1994); Georgia Cas. & Surety Co. v. Waters, 146 Ga. App. 149, 246 S.E.2d 202 (1978)(discussing coverage priority issues).

[38] Progressive Classic Ins. Co. v. Nationwide Mut. Fire Ins. Co., 294 Ga. App. 787, 670 S.E.2d 497 (2008) (citing Dairyland Ins. Co. v. State Farm Automobile Ins. Co., 289 Ga. App. 216, 217, 656 S.E.2d 560 (2008)(overruled in part by *Progressive Classic*, supra)).

policies typically include clauses to deal with this issue, often using the heading "other insurance" or similar wording. These provisions can assist with sorting out the priority of coverage, subject to any statutory rules or case law. The coverage may provide for the policy to be primary for certain events but secondary for others. In some cases, clauses in two policies may simply be in conflict, in which case a court may have no choice but to resort to a pro-rata division of coverage or establish priority based on the connection of the loss with the policy. While this may result in the same net coverage, it can make settlement difficult even in cases where liability and the amount of damages are not in dispute.

In some cases, multiple insurance policies may be issued by a single insurer that could all theoretically provide coverage for a particular loss. Absent a provision to the contrary, there is no legal reason why all of the policies would not stack and apply. Nevertheless, insurers nearly always include a non-stacking provision that limits the ability of a claimant to do so, typically providing, at most, coverage in the amount of the largest single policy. A careful review of the policy will reveal whether and how such a limitation will be enforced. Note that this does not apply to umbrella or other excess policies, discussed further below, that are specifically intended to provide additional coverage.

Excess/umbrella insurance: Excess coverage is a secondary liability coverage that provides indemnity for damages that exceed the primary liability policy. In the context of personal policies, such policies are often referred to as "umbrella" policies because they apply to various categories of losses (such as both homeowner's and automobile liability claims) and may provide more broad coverage than the underlying individual policies. These policies are not compulsory and their coverage is usually governed entirely by the provisions of the policies themselves.

Typically, an umbrella policy will "pick up" coverage after exhaustion of the underlying liability coverage or self-insured retention (which is simply an amount

for which the insured has agreed to be liable before liability insurance applies).[39] In some cases, the umbrella policy will pay only those amounts by which the damages exceed the primary policy (even if that coverage is for some reason excluded) while in others the umbrella/excess policy will fill in for any underlying coverage that does not apply. Once again, the policy terms will generally control. For large commercial defendants, there may be several (sometimes many) layers of excess coverage, and often a large self-insured retention. Where multiple insurers are involved, collateral arguments over priority of, or obligation to pay, indemnity payments may develop between insurers providing various layers of coverage.

Offsets: Another common issue involves insurers seeking to obtain offsets for various coverages based on payments from either other coverage afforded by the insurer or from another source. Such offsets can come in a variety of forms, but examples include a liability insurer claiming an offset for MedPay benefits and UM carriers seeking an offset for MedPay or workers' compensation benefits. This latter scenario is permitted by O.C.G.A. § 33-7-11(i).[40] The Georgia Court of Appeals has held, however, that the offset does not reduce the amount of available UM coverage available, but merely allows insurers to avoid double payment for damages attributable for specific categories of damages.[41] For example, in a case where the uninsured motorist carrier provided $100,000 in coverage, the carrier could, by contract, decline to cover any medical expenses that were the responsibility of an uninsured or underinsured motorist that were also covered by medical payments coverage. But the insurer would be required to provide up to $100,000 in coverage for any damages attributable to other categories of damages, such as general damages or special damages for lost income.

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[39] A deductible is a form of self-insured retention, though rarely referred to as such.

[40] Prior to a 2009 statutory revision, attempts to write such offsets into UM policies were held unenforceable. See Dees v. Logan, 282 Ga. 815, 653 S.E.2d 735 (2007). Under the rationale of *Dees*, offsets for any payments other than MedPay or workers' compensation benefits would appear to remain prohibited.

[41] Mabry v. State Farm Mut. Auto. Ins. Co., 334 Ga. App. 785, 780 S.E.2d 533 (2015).

AFFIDAVIT OF [AT-FAULT DRIVER]

State of Georgia

County of _____

Comes now, before the undersigned officer duly authorized to administer oaths, [AT-FAULT DRIVER], who, upon being duly sworn, state as follows:

1.

This affidavit is made on my personal knowledge.

2.

I am over eighteen years of age, am suffering under no legal disabilities, and if called to testify, will testify to the facts contained in this affidavit.

3.

I understand that this affidavit is executed under oath and under penalty of perjury.

4.

I understand that [CLAIMANT] is relying upon the sworn statements in this affidavit in making any potential decision to settle this matter short of taking a judgment against me.

5.

I am an insured under a policy of insurance issued by [NAME OF KNOWN INSURER] with liability limits of $XXXXX per person/$XXXXX per occurrence.

6.

There are no other policies of insurance issued to me or any other person by any [NAME OF KNOWN INSURER] entity or any other insurance company that would provide insurance coverage in addition to, or in excess of, the policy referenced above for any claims of [CLAIMANT] for injuries [CLAIMANT] sustained on [DATE OF LOSS]. This specifically includes any umbrella policy or other type of excess liability policy in my name or in the name of any other relative or other person that would cover me, regardless of whether I am a named insured or otherwise listed in the policy.

7.

There are no relatives by blood, marriage, or adoption that resided with me or were members of my household at the time of the wreck on [DATE OF LOSS] that were insured by [NAME OF KNOWN INSURER], other than under the policy identified in paragraph 5, or any other insurance company that may provide insurance coverage for the Plaintiffs for losses they sustained on [DATE OF LOSS].

_____
[AT-FAULT DRIVER]

Sworn to and subscribed before me
this ___ day of_____, 20____.

_____
Notary Public
My commission expires: