Insurer's Duties to Defend and Indemnify: Georgia

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A Q&A guide to an insurer's duties to defend and indemnify claims and losses in Georgia under commercial general liability (CGL) policies. This Q&A addresses state laws, court cases, and customs that impact the duties to defend and indemnify, when the duties are triggered and what they encompass, the scope of the duties, notice requirements, policy interpretation, defense and attorneys' fees, and duration.

GENERAL

1. How does an insurer's duty to defend differ from the duty to indemnify in your jurisdiction? Specifically, please discuss:

- What the duties to defend and indemnify generally encompass.
- Whether the duty to defend is broader than the duty to indemnify.
- What the basis is for the duties to defend and indemnify. Is it contract law, common law, or statute?
- When each duty is triggered and when it arises.
- Whether the insured must tender the defense to the insurer and whether the insurer has the right to control the defense.

Under Georgia law, the obligation to indemnify for damages and the obligation to defend against third-party suits are separate and distinct (see *Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga. App. 421, 424 (2003)). While the duty to defend arises if the facts as alleged in the complaint "even arguably" are within the coverage of the indemnification provision in the policy, the duty to indemnify arises only if liability actually exists under the indemnification language (see *Nationwide Mut. Fire Ins. Co.*, 264 Ga. App. at 425-427; see also *Ashton Park Trace Apartments, LLC v. City of Decatur*, 2015 WL 11618243, at *4-5 (N.D. Ga. Oct. 21, 2015)).

WHAT THE DUTIES ENCOMPASS

In Georgia:

- The **duty to defend** encompasses the obligation of the insurer to defend any lawsuit brought against the insured that alleges and seeks damages for a claim that is even potentially covered by the policy.
- The **duty to indemnify** encompasses the obligation of the insurer to pay all covered claims and judgments against the insured that are actually covered by the policy.

Georgia law permits insurance companies to "fix the terms of [their] policies" (essentially, setting the scope of coverage) as they see fit, so long as the policies are not contrary to the law (*Georgia Farm Bureau Mut. Ins. Co. v. Smith*, 298 Ga. 716, 718-19 (2016)).

WHICH DUTY IS BROADER

In Georgia, the obligation to defend is usually broader than the obligation to indemnify because it may apply whether or not the third-party claim has merit (see *S. Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 676 (2004); see also *Cantrell v. Allstate Ins. Co.*, 202 Ga. App. 859, 859 (1992)). Accordingly, if there is no duty to defend there is no duty to indemnify.

BASIS FOR THE DUTIES

In Georgia, the basis for the duties to defend and indemnify is the insurance contract (see *Hurst v. Grange Mut. Cas. Co.*, 266 Ga. 712, 716 (1996) ("Insurance in Georgia is a matter of contract..."); see also *Nationwide Mut. Fire Ins. Co.*, 264 Ga. App. at 423-24).

WHEN THE DUTIES ARE TRIGGERED AND WHEN THEY ARISE

Duty to Defend

In Georgia, to determine if the duty to defend is triggered, compare the policy provisions to the allegations the third-party complaint raises against the insured (*Hoover v. Maxum Indem. Co.*, 291 Ga. 402, 407 (2012)). If the facts as alleged in the complaint even arguably bring the occurrence within the policy's coverage, the insurer has a duty to defend the insured in the action (*Hoover*, 291 Ga. at 407 (citing *BBL–McCarthy, LLC v. Baldwin Paving Co.*, 285 Ga. App. 494, 497 (2007)); see Question 3 and Question 4). Effectively, the insurer has a duty to defend unless the allegations in the complaint unambiguously exclude coverage (*BBL-McCarthy*, 285 Ga. App. at 497).

The insurer must provide a defense:

- Even if the allegations in the complaint against the insured are ambiguous or incomplete regarding insurance coverage.
- If the claim potentially falls within the policy. If there is doubt about whether the claim falls under the policy, it is resolved in favor of the insured.

(*Fireman's Fund Ins. Co. v. Univ. of Georgia Athletic Ass'n, Inc.*, 288 Ga. App. 355, 356 (2007).)

To determine whether to provide a defense, an insurer is entitled to base its decision on the facts alleged in the complaint giving rise to the claim. However, if the facts alleged in the complaint show no coverage, but the insured notifies the insurer of factual contentions that would place the claim within the policy coverage, the insurer:

- Has a duty to conduct a reasonable investigation of the facts presented by its insured.
- Must base its decision of whether to defend the claim or lawsuit on the "true facts" as revealed by its investigation, and not on the facts as alleged in the complaint.

(*Colonial Oil Indus. Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 & TO31504671*, 268 Ga. 561, 562 (1997).)

The duty to defend arises before litigation is completed, before the insured's liability has been determined.

Duty to Indemnify

In Georgia, the duty to indemnify is triggered when the insured's liability has been conclusively established (*Nationwide Mut. Fire Ins. Co.*, 264 Ga. App. at 426 (the court stating that Nationwide has a duty to indemnify for damages awarded as a result of property damage or bodily injury, if any, arising from an occurrence, as that term is defined in the policy)). The duty arises after the merits of the lawsuit have been determined by a court or after a settlement agreement has been reached.

TENDERING AND CONTROL OF THE DEFENSE

In Georgia, an insurer's duty to defend does not arise until the insured requests a defense by the insurer (*Elan Pharm. Research Corp. v. Employers Ins. of Wausau*, 144 F.3d 1372, 1381 (11th Cir. 1998); *O'Brien Family Tr. v. Glen Falls Ins. Co.*, 218 Ga. App. 379, 380-81 (1995)).

Most primary CGL insurance policies provide that the insurer has both the right and the duty to defend the policyholder. Accordingly, in Georgia, if an insurer has a duty to defend its insured, typically it also has the right to control the insured's defense. For an exception to this general rule, see Question 13.

DUTY TO DEFEND: NOTICE

2. Does the duty to defend require notice of claim or loss by an insured in your jurisdiction? Specifically, please discuss:

- Who may provide notice.
- Who the notice must be delivered to.
- When the insurer has not received notice, but has actual or constructive knowledge of a claim or loss.
- The effect of failure to provide notice.

Most insurance policies require notice to the insurer of one of the following as a condition precedent to the duty to defend:

- Claim.
- Potential claim.
- Loss.

Insurers require timely notice of each. This allows the insurer to:

- Investigate the facts and circumstances surrounding the occurrence while they are timely and witnesses are still available.
- Prepare for a defense, if necessary.
- Decide whether it is prudent to settle the claim.

(See *Kitt v. Shield Ins. Co.*, 240 Ga. 619, 620 (1978); *Hathaway Dev. Co., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 301 Ga. App. 65, 68 (2009).)

WHO CAN PROVIDE NOTICE

In Georgia, unless the policy specifically requires the insured to provide the notice, it does not matter who provides notice of a claim or loss to the insurer so long as notice is reasonable and timely (*Hathaway*, 301 Ga. App. at 68).

WHO MUST NOTICE BE DELIVERED TO

In Georgia, unless the policy specifically states who notice of claim or loss must be delivered to, notice may be delivered to:

- The insurer.
- A duly authorized agent of the insurer.
- An agent of the insurer with apparent authority, if the insured justifiably relies on the authority.

(See *Kitt*, 240 Ga. at 620; *Kay-Lex Co. v. Essex Ins. Co.*, 286 Ga. App. 484, 488-90 (2007).)

KNOWLEDGE OF INSURER

Actual Knowledge

In Georgia, the duty to defend is triggered only if reasonable and timely notice is given and the insurer has actual knowledge of the pendency of a claim or suit (*Hathaway*, 301 Ga. App. at 68).

Constructive Knowledge

In Georgia, constructive notice of a claim or loss is not sufficient to trigger the duty to defend (see, for example, *Buffalo Ins. Co. v. Star Photo Finishing Co.*, 120 Ga. App. 697, 704-05 (1969)).

FAILURE TO PROVIDE NOTICE

In Georgia, if an insurance policy includes a timely notice requirement as a condition precedent to coverage and the insured unreasonably fails to comply with this requirement, the insurer is not obligated to provide a defense or coverage (*Forshee v. Employers Mut. Cas. Co.*, 309 Ga. App. 621, 623 (2011)).

An insured is not required to foresee every possible claim that might arise from an event and give notice of it to the insurer. The law requires only that an insured act reasonably under the circumstances. Accordingly, in certain instances, the failure to provide timely notice may not be a bar to coverage. (*Forshee*, 309 Ga. App. at 623.)

In Georgia, generally, the question of whether an insured gave notice of an event or occurrence "as soon as practicable," as required by an insurance policy, is a question of law. Whether the excuse or justification for the late notice was sufficient and whether the insured acted diligently in giving notice are generally questions of fact to be determined by the jury. (*Plantation Pipeline Co. v. Royal Indem. Co.*, 245 Ga. App. 23, 25 (2000).)

POLICY AND COMPLAINT INTERPRETATION

3. In your jurisdiction, in determining whether there is a duty to defend, how do courts typically construe the insurance policy and the complaint? Specifically, please discuss:

- How courts resolve ambiguities in the insurance policy.
- Whether courts apply the four- or eight-corners rule and whether they consider extrinsic evidence.
- Whether courts consider amendments to the complaint.

INTERPRETATION OF INSURANCE POLICIES

The provisions and the language of the insurance policy govern the duty to defend. In Georgia, the interpretation of an insurance policy is subject to the general rules of contract construction, the most important of which is to determine and carry out the intent of the parties. In determining intent, courts consider the insurance policy as a whole, including any:

- Rider.
- Endorsement.
- Application made a part of the policy.

(O.C.G.A. § 33-24-16.)

In construing insurance policies, Georgia courts:

- Attempt to harmonize the policy provisions with each other and not render any provisions meaningless.
- Read the policy as a layman would read it, with the reasonable expectations of the insured when possible.
- Strictly construe ambiguities in the policy against the insurer.
- Strictly construe policy exclusions against the insurer in favor of coverage.

Georgia law provides that insurance companies are generally free to set the terms of their policies, including policy exclusions, as they see fit, provided they do not violate either:

- The law.
- Judicially cognizable public policy.

(*Nat'l Cas. Co. v. Georgia Sch. Boards Ass'n-Risk Mgmt. Fund*, 304 Ga. 224, 228–29 (2018) (citing various Georgia cases).)

In Georgia, the insurer has the burden of showing that a fact situation falls within an exclusionary clause of an insurance policy. If the insurance policy provisions are clear and unambiguous they must be given effect, even if beneficial to the insurer and detrimental to the insured. (*Kay-Lex Co.*, 286 Ga. App. at 487.) Effectively, the insurer has a duty to defend unless the allegations in the complaint unambiguously exclude coverage (*BBL-McCarthy*, 285 Ga. App. at 497).

POLICY AMBIGUITIES

In Georgia, if an insurance policy is ambiguous, courts generally:

- Strictly construe the ambiguities against the insurer.
- Strictly construe exclusions from coverage against the insurer.
- Read the policy according to the reasonable expectations of the insured when possible.

(*Blue Ridge Auto Auction v. Acceptance Indem. Ins. Co., Inc.*, 343 Ga. App. 319, 320 (2017).)

In Georgia, insurance policies are viewed as contracts and are subject to the rules of contract interpretation. Under these rules, ambiguities in any contract are construed against the drafter (O.C.G.A. § 13-2-2(5)). Accordingly, if an insurance policy provision is susceptible to more than one meaning, even if each meaning is logical and reasonable, the provision is ambiguous and is construed strictly against the insurer and in favor of the insured (O.C.G.A. § 13-2-2(5); see also *Georgia Farm Bureau Mut. Ins. Co.*, 298 Ga. at 718-19).

FOUR CORNERS AND EXTRINSIC EVIDENCE

In Georgia, to determine the parties' intent regarding insurance coverage (including the duty to defend), courts consider the four corners of the agreement and the surrounding circumstances (*W. Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 681 (2004)).

If the insurer contends that the policy and complaint provide that there is no duty to defend, but the insured had notified the insurer of certain facts that, if taken into consideration, would have required the insurer to defend, Georgia courts will consider the extrinsic evidence in determining whether the duty exists. If the true facts were known or ascertainable to the insurer at the outset, then the insurer is obligated to defend the suit. Specifically, Georgia courts:

- **Will consider extrinsic evidence** presented by the insured that would require the insurer to provide coverage if the evidence or factual contentions had been presented to the insurer and the insurer failed to conduct a reasonable investigation (see *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 224 Ga. App. 557, 563 (1997), affirmed *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 268 Ga. 564 (1997); see also *Lawyers Title Ins. Corp. v. Stribling*, 294 Ga. App. 382, 385-86 (2008)).
- **Will not consider extrinsic evidence** presented by the insurer to disprove or deny its duty to defend (see *Penn-Am. Ins. Co.*, 224 Ga. App. at 563).

AMENDMENTS TO COMPLAINT

Georgia courts will consider amendments to the complaint as well as certain additional pleadings in determining whether a duty to defend exists (see, for example, *Lima Delta Co. v. Glob. RI-022 Aerospace, Inc.*, 338 Ga. App. 40, 44-45 (2016) (holding that the duty to defend did not exist since the claim that may have provided for coverage was not included in insured's original or amended counterclaim); see also *Omni Health Sols., LLC v. Zurich Am. Ins. Co.*, 2017 WL 5473456, at *4 (M.D. Ga. Nov. 14, 2017)).

4. In your jurisdiction, will the duty to defend exist even if allegations in the complaint are fraudulent or groundless?

In Georgia, an insurance policy imposes a duty to defend even if allegations of the complaint are groundless, false, or fraudulent. As long as a liability covered by the policy is asserted, the insurer has a duty to defend (see *Penn-Am. Ins. Co.*, 268 Ga. at 564; *Auto-Owners Ins. Co. v. State Farm Fire & Cas. Co.*, 297 Ga. App. 751, 754 (2009)).

The duty to defend might also extend to the situations in which the allegations of the complaint falsely indicate non-coverage. In that situation, courts in Georgia look to whether the insurer knows or can ascertain the true facts showing coverage. If the insurer knows or can ascertain those facts at the outset of the suit, then it has a duty to defend the insured. (*Penn-Am. Ins. Co.*, 268 Ga. at 565.)

5. In your jurisdiction, who has the burden of proof in establishing the duty to defend?

In Georgia, the insured has the initial burden of proving that a claim falls within the coverage of the policy (see *Georgia Farm Bureau Mut. Ins. Co. v. Hall Cty.*, 262 Ga. App. 810, 812 (2003)). The insurer then has the burden of showing that a loss or claim falls within an exception to coverage under the insurance policy, and accordingly, that it does not have a duty to defend (*Kay-Lex Co.*, 286 Ga. App. at 487).

6. What are the consequences if an insurer fails to defend a claim that is covered under the policy in your jurisdiction?

An insurer that refuses to indemnify or defend based on a belief that a claim against its insured is excluded from a policy's scope of coverage rather than defending under a reservation of rights, does so at its risk. If the insurer is incorrect, it bears the consequences, legal or otherwise, of its breach of contract. (*Southern Guar. Ins. Co.*, 278 Ga. at 676; see also *Occidental Fire & Cas. of N. Carolina v. Goodman*, 339 Ga. App. 427, 431 (2016).) If the underlying claim against the insured is outside the policy's scope of coverage, then a liability insurer's refusal to indemnify or defend is justified (*Southern Guar. Ins. Co.*, 278 Ga. at 676).

In Georgia, when coverage is questionable, the most common and procedurally safe course is for the insurer to provide a defense under a reservation of rights and to file a declaratory judgment action to determine its coverage obligations (*Colonial Oil Indus.*, 268 Ga. at 562).

WRONGFUL FAILURE AND BAD FAITH

If the insurer wrongfully fails to defend its insured, it may be liable for damages sustained by the insured that naturally flow from the breach of the contract to defend, which may exceed the policy limits (see, for example, *Khan v. Landmark Am. Ins. Co.*, 326 Ga. App. 539, 544-45 (2014)).

In Georgia, an insurer that denies coverage and refuses to defend an action against its insured, when it could have done so with a reservation of its rights of coverage both:

- Waives the provisions of the policy against a settlement by the insured.
- Becomes bound to pay the amount of any settlement within a policy's limits made in good faith, plus expenses and attorneys' fees.

(*Southern Guar. Ins. Co.*, 278 Ga. at 676; see Question 9.)

If an insurer's refusal to indemnify for a covered loss is made in bad faith, the insurer may be subject to penalties (in addition to the loss) equal to the greater of:

- Not more than 50% of the insurer's liability for the loss.
- $5,000.

(O.C.G.A. § 33-4-6; see also *Howell v. S. Heritage Ins. Co.*, 214 Ga. App. 536, 536 (1994) (stating that the penalties contained in O.C.G.A. § 33-4-6 are the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds).)

Georgia courts, however, recognize that O.C.G.A. § 33-4-6 is not the exclusive remedy for an insurer's bad faith failure to settle claims (see *Camacho v. Nationwide Mut. Ins. Co.*, 188 F. Supp. 3d 1331, 1355 (N.D. Ga. 2016). If an insurer refuses in bad faith to settle a claim, an insured may seek both:

- Compensatory damages in the amount of an excess verdict.
- Punitive damages.

(*Camacho*, 188 F. Supp. 3d at 1350, 1355.)

The issue of bad faith is generally a question for the jury to decide (*Binns v. Metro. Atlanta Rapid Transit Auth.*, 250 Ga. 847, 848 (1983)).

7. In determining whether a duty to indemnify exists, how does your jurisdiction interpret insurance policies? Specifically, please discuss:

- The general rules of contract construction that courts apply.
- How courts handle ambiguities in the insurance policy.
- If courts consider the reasonable expectations of the insured.
- Whether coverage will be denied if the insured does not provide timely notice of a loss or claim.

The provisions and the language of the insurance policy govern the duty to indemnify. For more information about how Georgia courts interpret insurance policies, the general rules of contract construction, ambiguities in the insurance policy, and reasonable expectations, see Question 3.

FAILURE TO PROVIDE TIMELY NOTICE

In Georgia, if the insurance policy requires timely notice of a loss or claim, the insurer may deny coverage if the policy either:

- Expressly states that a failure to provide this notice will result in a forfeiture of the insured's rights.
- Uses language that otherwise clearly expresses the intention that the notice provision be treated as a condition precedent.

(*Progressive Mountain Ins. Co. v. Bishop.*, 338 Ga. App. 115, 117-18 (2016).)

A general provision is sufficient to create a condition precedent; for example, "no action will lie against the insurer unless the insured has fully complied with the terms of the policy" (see *Lankford v. State Farm Mut. Auto. Ins. Co.*, 307 Ga. App. 12, 14 (2010)).

Where a notice provision is a condition precedent to coverage, an insurer is not required to show that it was prejudiced by the insured's failure to give notice (see *Se. Exp. Sys., Inc. v. S. Guar. Ins. Co. of Georgia*, 224 Ga. App. 697, 701 (1997)).

If an insured provides justification for failing to provide timely notice, Georgia courts may require the insurer to provide coverage under the policy (see *Progressive Mountain Ins. Co.*, 338 Ga. App. at 118-19).

DUTY TO DEFEND: SCOPE AND DURATION

8. In your jurisdiction, is the insurer required to defend against all claims in a suit even if they are not all covered claims (also sometimes referred to as "mixed claims")?

Although not addressed by a Georgia court, federal courts have held that under Georgia law, if an insurer has a duty to defend a single claim the complaint presents, it has a duty to defend all of the claims asserted (see *HDI-Gerling Am. Ins. Co. v. Morrison Homes, Inc.*, 701 F.3d 662, 666 (11th Cir. 2012); *Capitol Specialty Ins. Corp. v. PTAV, Inc.*, 331 F. Supp. 3d 1329 (N.D. Ga. 2018)).

9. How is the insurer's duty to defend affected by a reservation of rights letter in your jurisdiction? Please discuss:

- The requirements for a valid reservation of rights letter.
- How a reservation of rights letter differs from a non-waiver agreement.
- Whether an insurer can reserve the right to be reimbursed for defense costs.
- Any relevant statutes and cases in your state.

A valid reservation of rights letter allows an insurer to provide a defense to its insured while still preserving the option to later litigate and ultimately deny coverage (*Am. Safety Indem. Co. v. Sto Corp.*, 342 Ga. App. 263, 267 (2017) (citing *Hoover*, 291 Ga. at 405)).

REQUIREMENTS FOR A VALID RESERVATION OF RIGHTS LETTER

In Georgia, a valid reservation of rights letter must:

- At a minimum, fairly inform the insured that, notwithstanding the insurer's defense of the action, it disclaims liability and does not waive the defenses available to it against the insured.
- Inform the insured of the specific basis for the insurer's reservations about coverage.
- Be unambiguous. An ambiguous reservation of rights letter is strictly construed against the insurer and liberally in favor of the insured.

(*World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 287 Ga. 149, 152-53 (2010).)

RESERVATION OF RIGHTS VERSUS NON-WAIVER AGREEMENT

While a reservation of rights letter is a unilateral document issued by the insurer, a non-waiver agreement is an agreement between the insurer and the insured. In a non-waiver agreement, the insured generally agrees that the insurer:

- Will investigate the claim or undertake the defense.
- Reserves the right to contest coverage in the future.

(*State Farm Fire & Cas. Co. v. Walnut Ave. Partners, LLC*, 296 Ga. App. 648, 653-54 (2009).)

RESERVING FOR DEFENSE COSTS

Georgia courts have not ruled on whether an insurer can reserve the right to recover defense costs. However, a federal court predicted that the Georgia Supreme Court would follow the approach taken by most jurisdictions and permit the insurer to recover defense costs when the insurer has:

- Timely and explicitly reserved its right to recoup the costs.
- Provided specific and adequate notice of the possibility of reimbursement.

(*Illinois Union Ins. Co. v. NRI Const. Inc.*, 846 F. Supp. 2d 1366, 1374 (N.D. Ga. 2012).)

Additionally, the Northern District of Georgia has held that an insurer is not entitled to recover previously paid defense costs in the absence of a provision requiring reimbursement (see *Transportation Ins. Co. v. Freedom Elecs., Inc.*, 264 F. Supp. 2d 1214, 1220-21 (N.D. Ga. 2003)).

10. In your jurisdiction, if there are multiple insurers covering the insured, which one will have the duty to defend? Please also discuss how courts allocate costs when more than one policy is triggered and whether excess carriers ever have a duty to defend.

In Georgia, if the insured carries more than one policy issued by more than one insurer that potentially provide coverage:

- Courts look to the provisions of each policy to determine which insurer(s) is responsible for the defense of the claim (see, for example, *U.S. Fire Ins. Co., Inc. v. Capital Ford Truck Sales, Inc.*, 257 Ga. 77, 83 (1987)).
- Each insurer (whether a primary or excess insurer) has a duty to defend if the facts alleged arguably bring the claim within the coverage of the respective policies (see *Home Indem. Co. v. Godley*, 122 Ga. App. 356, 363-64 (1970)).

Liability insurance policies typically include "other insurance" clauses. These clauses establish how losses (including defense costs) are allocated or apportioned amongst insurers when multiple policies cover the same loss (see, for example, *St. Paul Fire & Marine Ins. Co. v. Valley Forge Ins. Co.*, 2009 WL 789612, at *10 (N.D. Ga. Mar. 23, 2009); see also *Graphic Arts Mut. Ins. Co. v. Essex Ins. Co.*, 465 F. Supp. 2d 1290, 1297-99 (N.D. Ga. 2006)).

In Georgia, when multiple policies that include "other insurance" clauses cover the same loss, the costs of defense are allocated:

- According to the "other insurance" clauses if the clauses can be reconciled and are a sufficient contractual relationship (see *Graphic Arts Mut. Ins. Co.*, 465 F. Supp. 2d at 1297-99).
- Pro-rata if the clauses cannot be reconciled (see *St. Paul Fire & Marine Ins. Co.*, 2009 WL 789612, at *10).

11. When is the duty to defend terminated in your jurisdiction? Specifically, please discuss:

- Whether an insurer's tender of policy limits ends the duty to defend.
- Whether the insurer must defend through the finality of the action.
- Whether an insurer's settlement of the third-party claim against the insured terminates the duty to defend.
- Whether the duty to defend is terminated if the insured breaches a provision of the insurance contract.

In Georgia, generally the insurer is not relieved of its duty to defend until either:

- The insured's case is settled or there has been a judgment.
- The insured agrees that the insurer is relieved of the duty.

(See *Anderson v. U.S. Fid. & Guar. Co.*, 177 Ga. App. 520, 521 (1986).)

TENDER OF POLICY LIMITS

In Georgia, the insurer:

- May not terminate its duty to defend by paying the policy limits into the court or to an excess carrier without the insured's consent, before judgment or settlement.
- Is relieved of its duty to defend when it tenders the policy limits in payment of a judgment or settlement.

(See *BBL-McCarthy*, 285 Ga. App. at 499; *Anderson*, 177 Ga. App. at 521.)

FINALITY OF ACTION

The duty to defend continues until the underlying lawsuit is concluded or it has been determined that there is no coverage under the policy. Georgia courts have not ruled on whether the duty to defend extends to the appeal of verdicts against the insured.

SETTLEMENT OF THE THIRD-PARTY CLAIM

In Georgia, an insurer is relieved of its duty to defend when the insured's case is settled or there has been a judgment (*Anderson*, 177 Ga. App. at 521).

INSURED'S BREACH OF CONTRACT

In Georgia, an insurer may be relieved of its duty to defend if the insured breaches a provision of the insurance contract (see, for example, *State Farm Fire & Cas. Co. v. King Sports, Inc.*, 489 F. App'x 306, 311-12 (11th Cir. 2012) and *Hurston v. Georgia Farm Bureau Mut. Ins. Co.*, 148 Ga. App. 324, 326 (1978) (both holding that the insured's breach of the contract's cooperation provision relieved the insurer of its coverage obligations)).

12. In your jurisdiction, when, if ever, are insurers permitted to withdraw their defense?

In Georgia, generally, if the insurer has undertaken the duty to defend a claim, it may not abandon the defense of the claim midcourse to the prejudice of the insured, even if policy limits have been exhausted (*Gibson v. Preferred Risk Mut. Ins. Co.*, 216 Ga. App. 871, 873 (1995)). However, an insurer may withdraw its defense if it has:

- Reserved the right to withdraw its defense under a valid reservation of rights letter.
- Been determined that the insurer has no duty to defend.

(See *Illinois Union Ins. Co.*, 846 F. Supp. 2d at 1373.)

DEFENSE AND COSTS

13. In your jurisdiction, does an insured have the right to independent counsel?

In Georgia, if there is a conflict of interest between the insurer and the insured regarding the conduct of the defense of the action, the insured can:

- Refuse to accept the counsel selected by the insurer.
- Seek independent counsel paid for by the insurer.

(*Am. Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co.*, 885 F.2d 826, 831 (11th Cir. 1989).)

14. In your jurisdiction, can an insurer recover defense costs that are spent defending uncovered claims?

The rule adopted by most courts, including a federal district court in Georgia, is that an insurer may recover defense costs from its insured only where:

- The insurer agrees to provide a defense under an express reservation of the right to reimbursement.
- The insured accepts the defense.
- A court subsequently finds that the insurer did not owe the insured a defense.

(*Arch Ins. Co. v. Brennan, Harris, & Rominger, LLP*, 2007 WL 9710782, at *3 (S.D. Ga. Feb. 7, 2007).)

DUTY TO INDEMNIFY: CAUSATION

15. Do courts in your jurisdiction require a duty to indemnify if a loss has multiple causes, one or more of which is excluded from coverage? Please address whether a policy exclusion is effective whether or not there is any causal connection between the excluded risk and the loss.

An insurance policy may be drafted to specifically exclude coverage for losses with multiple causes or for concurrent causation. Although Georgia courts have not addressed multiple causes contributing to an accident under a liability policy, the issue has been analyzed under first-party property policies. Under this type of policy, if at least one of the causes of loss is covered and at least one is excluded, and neither the policy or the policy exclusions address the issues of multiple causes or concurrent causation, courts apply the "efficient proximate cause rule" to determine if coverage exists.

The efficient proximate cause rule provides that:

- If the dominant or predominant cause of the loss **is a covered peril**, then coverage exists for the entire loss, even though other concurrent causes are not covered under the policy.

- If the dominant or predominant cause of the loss **is a policy exclusion**, coverage is not provided for the entire loss, even though other concurrent causes are covered by the policy.

(See *Burgess v. Allstate Ins. Co.*, 334 F. Supp. 2d 1351, 13662 (N.D. Ga. 2003); see also *Dunbar v. Davis*, 32 Ga. App. 192 (1924).)

DUTY TO INDEMNIFY: SCOPE

16. Discuss whether your jurisdiction permits insurance companies to provide coverage and indemnification for:

- Punitive damages.
- Intentional damage or injury.

PUNITIVE DAMAGES

In Georgia, insurance companies may provide coverage and indemnification against punitive damages. Coverage and indemnification for punitive damages are not against public policy in Georgia (see *Fed. Ins. Co. v. Nat'l Distrib. Co., Inc.*, 203 Ga. App. 763, 768 (1992)). An insurer may, however, expressly exclude punitive damages from coverage under the contract.

INTENTIONAL INJURY

Most liability policies include an exclusion for damage or injury intended by the insured (see, for example, *Bates v. Guar. Nat. Ins. Co.*, 223 Ga. App. 11, 12 (1996)).

17. How does your jurisdiction view policy provisions that limit coverage if the insured has other insurance available?

Georgia courts generally accept provisions in primary policies (such as excess clauses) that limit coverage if the insured has other insurance available. Although primary policies are intended to provide primary coverage, insureds often carry more than one primary policy.

EXCESS CLAUSES IN PRIMARY POLICIES

An excess clause included in a primary policy:

- Essentially provides that in the event of a loss, the insurer will only pay after other primary available insurance is exhausted.
- Precludes the insured from double recovery if the insured has multiple primary policies.

(See *St. Paul Fire & Marine Ins. Co.*, 2009 WL 789612, at *4; see also *Southern Home Ins. v. Willoughby*, 124 Ga. App. 162, 166 (1971); *Home v. Great Am. Ins. Co.*, 109 Ga. App. 24, 29-30 (1964).)

If each of the policies that the insured carries include an excess clause, the clauses cancel each other out and the insurers must share the loss pro-rata (see *St. Paul Fire & Marine Ins. Co.*, 2009 WL 789612, at *4; see also *Southern Home Ins.*, 124 Ga. App. at 166; *Home*, 109 Ga. App. at 29-30.)

18. In your jurisdiction, can an insurer deny coverage of a settlement entered into by the insured on the grounds that the settlement was not authorized by the insurer?

In Georgia, if the policy provides for the indemnification of sums that the insured is legally obligated to pay, the insurer can deny coverage of a settlement the insured entered into (see, for example, *Trinity Outdoor, LLC v. Cent. Mut. Ins. Co.*, 285 Ga. 583, 584-87 (2009) (holding that an insurer can deny coverage if the insured entered into a settlement without the insurer's consent in violation of a consent to settle provision)).

OTHER ISSUES

19. Are there any other statutes, rules, cases, or issues in your jurisdiction that insurers or insureds should be aware of in determining whether a duty to defend or duty to indemnify exists?

There are no other statutes, rules, cases, or issues particular to Georgia that insurers or insureds should review or consider when determining whether a duty to defend or duty to indemnify exists.

12-19