

UNINSURED MOTORIST LAW
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SERVICE OF PROCESS AND THE STATUTE OF
LIMITATIONS

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DARREN W. PENN
SCHERFFIUS, BALLARD, STILL & AYRES, LLP
1201 Peachtree Street, N.E.
400 Colony Square, Suite 1018
Atlanta, Georgia 30361

(404) 873-1220
Fax: (404) 876-4951

dwpenn@sbsalaw.com

Introduction

Uninsured Motorist insurance is first-party coverage in favor of the insured. This coverage protects an insured against the negligence of another person. The purpose of uninsured motorist coverage is to place the injured insured in the same position as if the negligent uninsured motorist tortfeasor had liability coverage. The injured insured can recover uninsured motorist insurance only when the “uninsured motorist” is found to be legally at fault or responsible for the insured’s injuries and damages.

Briefly, an uninsured motor vehicle means a motor vehicle, other than a motor vehicle owned by or furnished for the regular use of the name insured, the spouse of the named insured, and while residents of the same household, the relatives of either, as to which there is:

- (1) No bodily injury liability insurance and property damage liability insurance;
- (2) Bodily injury liability insurance and property damage liability insurance with available coverages which are less than the limit of the uninsured motorist coverage (underinsured);
- (3) Bodily injury liability insurance and property damage liability insurance in existence, but the insurance writing the insurance has legally denied coverage under its policy;
- (4) Bodily injury and property damage liability insurance in existence, but the insurance company writing the insurance is insolvent;
- (5) There is no bond of security deposit in lieu of bodily injury and property damage liability insurance; or

(6) If the owner or operator of the motor vehicle which causes bodily injury or property damage is unknown.¹

It is important to note that the definitions of “uninsured motor vehicle,” as defined in the Georgia Uninsured Motorist Act² includes true uninsured motorists, whether known and unknown, and those known motorists with liability coverage yet their coverage is less than the available uninsured motorist coverage.

This paper will cover service of process and the statute of limitations in uninsured motorist actions in the context of the Act and how these issues relate to uninsured motorists. These issues directly correlate to the statutory preconditions of coverage:

¹ "Uninsured motor vehicle" means a motor vehicle, other than a motor vehicle owned by or furnished for the regular use of the named insured, the spouse of the named insured, and, while residents of the same household, the relative of either, as to which there is:

(i) No bodily injury liability insurance and property damage liability insurance;

(ii) Bodily injury liability insurance and property damage liability insurance with available coverages which are less than the limits of the uninsured motorist coverage provided under the insured's insurance policy, but the motor vehicle shall only be considered to be uninsured for the amount of the difference between the available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle and the limits of the uninsured motorist coverage provided under the insured's motor vehicle insurance policy; and for this purpose available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle shall be the limits of coverage less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage;

(iii) Bodily injury liability insurance and property damage liability insurance in existence but the insurance company writing the insurance has legally denied coverage under its policy;

(iv) Bodily injury liability and property damage liability insurance in existence but the insurance company writing the insurance is unable, because of being insolvent, to make either full or partial payment with respect to the legal liability of its insured, provided that in the event that a partial payment is made by or on behalf of the insolvent insurer with respect to the legal liability of its insured then the motor vehicle shall only be considered to be uninsured for the amount of the difference between the partial payment and the limits of the uninsured motorist coverage provided under the insured's motor vehicle insurance policy; or

(v) No bond or deposit of cash or securities in lieu of bodily injury and property damage liability insurance.

O.C.G.A. § 33-7-11(b)(D)

² O.C.G.A. § 33-7-11

providing notice to the carrier, serving the uninsured tortfeasor, and obtaining a judgment against the uninsured tortfeasor before collecting the insurance proceeds. The discussion will begin with providing notice to the uninsured motorist carrier (hereinafter referred to as “UMC”) and the 1998 amendment to the Act providing a “safe harbor” for notifying the UMC and will continue with the issues of service of process on the defendant uninsured motorist as it relates to proceeding with a claim against the UMC.

I. SAFE HARBOR PROVISIONS AND RULES

A. Statutory Notice Requirement

To even begin a discussion of the 1998 safe harbor amendment and the statute of limitations in actions involving uninsured motorist coverage, one must note the statutory notice requirement that is a condition precedent to coverage. The notice requirement can be found in the service provisions of the uninsured motorist statute.³ An insured’s failure

³ “In cases where the owner or operator of any vehicle causing injury or damages is known, and either or both are named as defendants in any action for such injury or damages, and a reasonable belief exists that the vehicle is an uninsured motor vehicle under subparagraph (b)(1)(D) of this Code section, a copy of the action and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company were actually named as a party defendant. If facts arise after an action has been commenced which create a reasonable belief that a vehicle is an uninsured motor vehicle under subparagraph (b)(1)(D) of this Code section and no such reasonable belief existed prior to the commencement of the action against the defendant, and the complaint was timely served on the defendant, the insurance company issuing the policy shall be served within either the remainder of the time allowed for valid service on the defendant or 90 days after the date on which the party seeking relief discovered, or in the exercise of due diligence should have discovered, that the vehicle was uninsured or underinsured, whichever period is greater. The uninsured motorist carrier may conduct discovery as a matter of right for a period of not less than 120 days after service prior to any hearing on the merits of the action. If either the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe," and a copy of the action and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company were actually named as a party defendant; and the insurance company shall have the right to file pleadings and take other action allowable by law in the name of "John Doe" or itself. In any case arising under this Code section where service upon an insurance company is prescribed, the clerk of the court in which the action is brought shall have such service accomplished by issuing a duplicate original copy for the sheriff or marshal to place his or her return of service in the same form and manner as prescribed by law for a party defendant. The return of service upon the insurance company shall in no case appear upon the original pleadings in such case. In the case of a known owner or operator of such vehicle, either or both of whom are named as a defendant in such action, the insurance company issuing the policy shall have the right to file pleadings and take other action allowable by law in the name of either the known owner or operator or

to satisfy the statutory notice requirement bars an action on the insurance contract.

The fact that the tortfeasor is insured at the time the action is filed does not prevent the tortfeasor from becoming uninsured subsequent to the injury causing collision. Where the plaintiff has uninsured motorist coverage there always lies the possibility that the UMC may be liable for the amount such plaintiff “shall be legally entitled to recover” from an uninsured tortfeasor.⁴ For this reason, the UMC is entitled to statutory notice of the existence of an action in which it ultimately may be held financially responsible. A plaintiff will not be able to recover from the UMC unless such carrier is made aware of the existence of the action by timely service pursuant to the uninsured motorist statute.

Notice under the statute is effected through service of process on the UMC. The uninsured motorist statute contains specific provisions for obtaining service of process upon the UMC.⁵ These provisions provide the exclusive manner for service of process upon uninsured motorist insurers which in turn satisfies the statutory notice requirement.

Where the owner or operator of the uninsured motor vehicle is known and either or both are named defendants in an action for injury or damages, and a reasonable belief exists that the vehicle is an uninsured motor vehicle, a copy of the action and all pleadings must be served as prescribed by law upon the insurance company issuing the policy as though the company were actually named as a party defendant.⁶ The clerk of the court in which the action is brought is required to issue a duplicate original copy (often referred to as a “second original”) for the sheriff or marshal to place the return of

both or itself.”

O.C.G.A. § 33-7-11(d)

⁴ Yarbrough v. Dickinson et al., 183 Ga. App. 489, 359 S.E.2d 235 (1987); Bohannon et al. v. Futrell, 189 Ga. App. 340, 375 S.E.2d 637 (1988)

⁵ O.C.G.A. § 33-7-11(d)

⁶ Id.

service in the same form and manner as prescribed by law for a party defendant.

However, the return of service upon the UMC must not appear upon the original pleadings in the case. That is, since the UMC is not a named party defendant, it is not listed in the pleadings. The UMC should be named in the summons since it is the entity actually provided notice of the suit.

If either the owner or operator of the uninsured motor vehicle is unknown, an action may be instituted against the unknown defendant as “John Doe.”⁷ This is done by serving a copy of the action and all pleadings upon the UMC as though it were actually named as a party defendant. In accomplishing service upon the carrier under these circumstances, the same rules apply as in the case of a known uninsured motorist.⁸ This portion of the statute was designed solely for the purpose of providing notice of the suit to the UMC to provide the carrier the opportunity to investigate the claim and participate in the case if necessary.

B. 1998 Amendment

Effective July 1, 1998, the uninsured motorist statute was amended to require service on the UMC only when “a reasonable belief” exists that the defendant is uninsured.⁹ If, after suit has been filed, facts arise creating a reasonable belief that a vehicle is an uninsured motor vehicle under the Act, and no such reasonable belief existed before suit was filed, and the complaint was timely served on the defendant, the UMC can be brought into the pending case regardless of the statute of limitations.¹⁰ The UMC “shall be served within either the remainder of the time allowed for valid service on the

⁷ Id.

⁸ Id.

⁹ O.C.G.A. § 33-7-11(d)

¹⁰ Id.

defendant or 90 days after the date on which the insured discovered, or in the exercise of due diligence should have discovered, that the vehicle was uninsured or underinsured, whichever period is greater.”¹¹ The UMC is then given the right to conduct discovery for a period not less than 120 days before any hearing on the merits of the action. This 1998 amendment provides a “safe harbor” for pursuing an UMC beyond the statute of limitations applicable to the underlying case and significantly changed the rules for statutory notice.

C. The Bohannon Rule

Before the 1998 amendment, it was judicially recognized as the responsibility of all plaintiffs to serve the UMC in every action arising out of every motor vehicle incident. This former rule was established in *Bohannon v. Futrell*.¹² There, the Georgia Court of Appeals set forth the protective procedure of serving the plaintiff’s UMC in all motor vehicle accident cases, regardless of whether it appeared that the tortfeasor was or would become an uninsured motorist. Bohannon was a passenger in a vehicle driven by Wilson and hit by Futrell in February 1985. Futrell’s employer was let out of the suit on summary judgment and, as a result, the UMCs for Bohannon and Wilson were served in June 1987 and August 1987 respectively. The Court of Appeals affirmed the grant of summary judgment in favor of the UMCs because they were not served within the two year statute of limitations for injury suits.¹³

The Court said:

Therefore, it behooves a plaintiff who suffers injury as a result of the operation, maintenance, or use of a motor vehicle to have his UMC served

¹¹ Id.

¹² 189 Ga. App. 340, 375 S.E.2d 637 (1988)

¹³ Id.

with a duplicate original of the action filed against the owner/operator of the injury-causing motor vehicle at the time the action against the owner/operator is filed, in order to protect his ability to collect insurance proceeds from the [carrier] should the tortfeasor be or become an uninsured motorist.¹⁴

The decision of the Georgia Court of Appeals in *Bohannon v. Futrell* was affirmed by the Georgia Supreme Court in *Bohannon v. J.C. Penney Casualty Ins. Co.*¹⁵ In that case, the Georgia Supreme Court made a case for the legislature to get involved with the potential unjust results. It said:

[W]e have previously held that the uninsured motorist carrier must be served within the time allowed for valid service on the defendant in the tort action. It would be possible to formulate an exception for cases where the negligent motorist's insurance carrier defends the suit and it is later determined that coverage does not apply. Such a rule might allow a plaintiff to serve process within a reasonable time after it is legally determined that the negligent motorist is uninsured. But, fashioning such a rule is a task that is better left to the legislature.¹⁶

Before the 1998 amendment changing this rule, the uninsured motorist statute did not provide that the UMC could be served after a “reasonable belief” existed that an uninsured motor vehicle was involved. It required that the insurance company issuing the policy containing uninsured motorist coverage be served as prescribed by law in cases where the owner or operator of any vehicle is known and either or both are named as defendants in any action for injuries or damages. This resulted in the requirement that the UMC had to be served within the two-year statute of limitations for injury claims or the insured’s claim was forever barred regardless of whether it was known that an uninsured motor vehicle was involved. Some examples of how the statute was interpreted before the 1998 amendment are illustrative.

¹⁴ *Id.* at 342, 375 S.E.2d at 640.

¹⁵ 259 Ga. 162, 377 S.E.2d 853 (1989)

¹⁶ *Id.* at 163, 377 S.E.2d at 853.

In *Yarbrough v. Dickinson et al.*,¹⁷ the Georgia Court of Appeals hinted that even though summary judgment was granted in favor of the UMC because the defendant was not an uninsured motorist under the facts as they existed, and the statute of limitations had expired, that the insured could bring the UMC back into the case in the event the tortfeasor later became an uninsured motorist. This was the case because the insured had complied with the statutory notification rights by serving the UMC within the two year statute.¹⁸

In *Dewberry v. State Farm Ins. Co.*,¹⁹ the plaintiff's UM coverage was equal to the tortfeasor's liability coverage. Both had coverage in the amount of \$25,000 per person, \$50,000 per accident. The Georgia Court of Appeals held that the UMC was allowed out of the case because it had been served and thereby put on notice of the claim. If the tortfeasor became uninsured due to the insolvency of the liability carrier or denial of coverage, the UMC could be brought back into the case.

Smith v. Allstate Ins. Co.,²⁰ is an example of the harshness of the old rule. On October 29, 1983 the plaintiffs were passengers on a bus that rolled down an embankment. In December 1985, the tortfeasor's liability carrier became insolvent in its home state and was recognized as insolvent in Georgia on April 1, 1986. In March 1986, the plaintiffs notified Allstate, their UMC, of potential UM claims. On May 20, 1986 the plaintiffs served Allstate with complaints for UM coverage. The trial court granted summary judgment to Allstate due to the expiration of the two year statute of limitations.

¹⁷ 183 Ga. App. 489, 359 S.E.2d 235 (1987)

¹⁸ *Id.* (the plaintiff insured had uninsured motorist benefits of \$10,000 per person, \$20,000 per accident and the tortfeasor had liability coverage of \$300,000).

¹⁹ 197 Ga. App. 248, 398 S.E.2d 266 (1990)

²⁰ 199 Ga. App. 264, 404 S.E.2d 593 (1991)

The Court of Appeals affirmed summary judgment stating that Allstate was entitled to notice, that is, service within the two year statute of limitations.

United States Fidelity & Guaranty Ins. Co. v. Myers,²¹ added another twist to the interpretation of the statute. There, the auto accident occurred on June 20, 1990. Suit was filed against the tortfeasor and his employer on August 20, 1991. The tortfeasor alleged that a Phantom driver was involved during his deposition on December 21, 1992. On January 19, 1993, the plaintiff filed a motion to add “John Doe” as a defendant, and the motion was granted by the trial judge on March 30, 1993. The UMC was served with the complaint on April 13, 1993. The Court of Appeals held that UMC should have been dismissed because it was not served, and thereby was not notified, within the two year statute of limitations.

In Georgia *Farm Bureau Mut. Ins. Co. v. Kilgore*,²² the auto accident occurred on May 31, 1990. The insured filed a cross-claim against the tortfeasor on February 15, 1991. After discovering that the tortfeasor was uninsured, the insured gave suit papers to the sheriff on May 15, 1992. Service was not perfected until June 2, 1992 because Georgia Farm Bureau’s registered agent was out of town. The Georgia Supreme Court held that, under these circumstances, the trial court was authorized to find that the failure to serve Georgia Farm Bureau within the applicable period of limitations was not the result of the insured’s lack of diligence, but the result of the unavailability of the registered agent and affirmed the Court of Appeals’ decision finding that the trial court did not abuse its discretion in denying Georgia Farm Bureau’s motion to dismiss.

²¹ 214 Ga. App. 851, 449 S.E.2d 359 (1994)

²² 265 Ga. 836, 462 S.E.2d 713 (1995)

The Georgia Supreme Court began to carve out an exception for serving the UMC in *USF&G Co. v. Reid*.²³ This decision served to extend the *Hobbs v. Arthur*²⁴ rationale of allowing a plaintiff the opportunity to erase diligence in service concerns by voluntarily dismissing a complaint after proper service is perfected and then refiling under the renewal statute. In *Reid*, the plaintiff filed suit against the defendant in 1991. When the suit was filed, the plaintiff did not serve their UMC, USF&G, due to the fact that the defendant had liability coverage and was not an uninsured motorist. However, during the pendency of the suit and more than two years after the date of the collision, the liability carrier was declared insolvent. The plaintiff's counsel then served USF&G. Before USF&G answered, the plaintiff voluntarily dismissed the suit and refiled within the six month renewal period. USF&G claimed that the original suit was void because the two year statute of limitations had expired before it was served, and therefore, the renewal action could not be pursued. The court did not agree. Liberally construing the renewal statute as in *Hobbs v. Arthur*, the Court held that the suit against USF&G was merely voidable and not void because the trial judge had not ruled on the asserted affirmative defense of the expiration of the statute of limitations.

In *Stout v. Cincinnati Ins. Co.*,²⁵ the Georgia Court of Appeals again recognized the injustices of the *Bohannon* rule but nevertheless applied the rule to the detriment of the plaintiff. The suit was filed in 1994 and the UMC was not served with a copy of the summons and complaint in that case. The liability insurer became insolvent in September, 1995, after the statute of limitations had expired. The plaintiff voluntarily

²³ 268 Ga. 432, 491 S.E.2d 50 (1997)

²⁴ 264 Ga. 359, 444 S.E.2d 322 (1994)

²⁵ 226 Ga. App. 220, 486 S.E.2d 195 (1997)

dismissed her suit without ever attempting to serve her UMC. Three days after the dismissal, the plaintiff filed a renewal action and had the UMC served. The UMC moved to dismiss based upon the expiration of the statute of limitations. The Court of Appeals affirmed the dismissal and held that because the UMC had not been served in the original action and had never been served within the statute of limitations period, the renewal statute could not be used to add the UMC to the case, approximately one and a half years after the expiration of the statute of limitations. Further, the Court distinguished the case from *Reid* as merely voidable at the time of its dismissal because the UMC had been served, albeit belatedly. The concurring opinion of Judge Johnson asked that the Supreme Court fashion a rule allowing service upon the insurer within a reasonable time after it is determined that the defendant is uninsured.

The Georgia Supreme Court granted certiorari to address two questions: 1) whether the statute of limitations for serving a UMC pursuant to O.C.G.A. § 33-7-11 should be the same as that for serving the defendant, even though the defendant does not qualify as uninsured under the statute until after the applicable statute of limitations has run, and 2) whether service on a UMC of an original action is necessary in order to allow for service in a properly filed renewal action.²⁶ The Supreme Court answered the first question in the affirmative and the second in the negative.

This in effect created a new rule that a plaintiff who does not serve a UMC prior to the expiration of the statute of limitations may voluntarily dismiss the original action, still having not obtained service on the UMC, and then file a renewal action and obtain legally valid service on the UMC and avoid the statute of limitation bar. The reason for this is

²⁶ *Stout v. Cincinnati Ins. Co.*, 269 Ga. 611, 502 S.E.2d 226 (1998)

that a UMC should not have greater rights than the uninsured motorist. Therefore, the issue of service was related solely to proper service on the defendant uninsured motorist. As long as service as to the uninsured motorist was proper, the UMC could be served for the first time in the renewal suit.

*Allstate Ins. Co. v. Baldwin*²⁷ is an example of how the interpretation of the rules could get confusing to the detriment of the plaintiff. Here, the plaintiff attempted to take advantage of the recent decisions from the Georgia Supreme Court extending the *Hobbs v. Arthur* rationale. However, the plaintiff forgot one very important element: the defendant tortfeasor. The plaintiff, after learning the tortfeasor was now uninsured, voluntarily dismissed the case and then refiled. The “renewal” action, however, failed to name the tortfeasor and instead only named the UMC in the style of the case. Likewise, only the UMC was served within the six month renewal period. The Georgia Court of Appeals held that this was an improper renewal and dismissed the case against the UMC.

In *Malave v. Allstate Ins. Co.*,²⁸ the Georgia Court of Appeals followed the Georgia Supreme Court’s decisions in allowing the renewal of an action and service of the UMC for the first time. Following *Stout v. Cincinnati*, the Court of Appeals held that service on an UMC in a valid renewal action filed after the running of the statute of limitation is valid even though the carrier was not served in the original action. This is true even if the plaintiff knew the tortfeasor was uninsured in the original action. The Court of Appeals reasoned, to allow an UMC to obtain a dismissal in the renewal action when the tortfeasor could not, would put the UMC in a better position. The fact that the plaintiff knew that the tortfeasor was uninsured while the first action was pending does not change

²⁷ 244 Ga. App. 664, 536 S.E.2d 558 (2000)

²⁸ 246 Ga. App. 783, 541 S.E.2d 420 (2000)

this reasoning.

Before the 1998 amendment, a plaintiff did not need to have a cause of action against the UMC in order to serve the carrier. The former service requirement of the statute had been interpreted as a prerequisite that a plaintiff must have fulfilled in order to collect uninsured motorist benefits from the insurance carrier following a tort judgment in favor of the plaintiff. Nevertheless, the requirement of service on the UMC still remains an absolute statutory requirement before the plaintiff can recover benefits. The difference, however, is that it is not necessary to serve the UMC until there is a reasonable belief that the offending vehicle is an uninsured motor vehicle. If the plaintiff has a reasonable belief that there is an uninsured motor vehicle at the time the suit is filed, the plaintiff should obviously serve the UMC with the duplicate original at that time and within the statute of limitations. If, however, the tortfeasor is not an uninsured motorist until the discovery of facts after suit was filed, the plaintiff is required to serve the UMC within the greater of the time remaining on the original statute of limitations to serve the defendant or 90 days. This applies whether it is an original action or a renewal action. Unfortunately, no decisions have been rendered since the 1998 amendment dealing with the new 90 day service provisions.

D. Contractual Notice Requirements

In addition to the statutory notice requirement, there is often a contractual notice requirement in the insurance policy. Nearly every insurance policy providing uninsured motorist coverage contains a contractual provision requiring “prompt notice” or notice within a specified time period. One would be well served to notify the UMC as soon as the case is brought into the office and at the same time the liability carrier is notified of

the claims.

In *Manzi v. Cotton State Mut. Ins. Co.*,²⁹ the Court of Appeals affirmed the dismissal of the UMC due to the insured plaintiff's failure to follow the contractual notice requirements. The plaintiff filed suit against an uninsured motorist and served her UMC with the lawsuit more than six months after the accident but well within the two year statute of limitations. The complaint was the UMC's first notice of the incident. The insurance policy included a provision providing that the UMC must be notified promptly, but in no event later than sixty days after the collision. The Court of Appeals held that this notice provision applied to uninsured motorist claims under the policy and allowed the dismissal of the complaint against the UMC.

In *Tambone v. Indiana Ins. Co.*,³⁰ the insured was hit as a pedestrian and suit was filed and the UMC served UMC eighteen months later, well within the two year statute of limitations. The UMC sought summary judgment on the failure to "promptly" notify them of the claim as required by the insurance policy. The trial court granted the motion and the Court of Appeals upheld.

The lesson from these two cases is to ALWAYS provide notice to the UMC as soon as you are aware of the accident whether it appears they will be involved or not. Do not fool around with it. Send them a representation letter notifying them of the accident and injuries to satisfy the contractual notice provisions.

E. Practical Considerations

Generally, the UMC's right to be timely served is independent of any service considerations that may apply to the uninsured tortfeasor. Under O.C.G.A. § 33-7-11(d)

²⁹ 243 Ga. App. 277, 531 S.E.2d 164 (2000)

³⁰ 229 Ga. App. 198, 493 S.E.2d 578 (1997)

the UMC is not required to be served until a reasonable belief exists that the offending vehicle is an uninsured motor vehicle. When such belief is discovered, the plaintiff has the greater of 90 days or the remaining time within which the defendant may be served to serve the UMC.

As a practical matter, the UMC should be notified at the very beginning of the claim just as the liability carrier is notified and served with a second original at the time suit is filed. This should not be subject to debate. It is something that should be done in every case as a rule.

Even though the 1998 amendment gives plaintiffs “safe harbor” from having UM coverage vanish under harsh circumstances, it is still prudent to serve the UMC in every suit. This is especially true with the new waiver provisions of O.C.G.A. § 9-11-4. The waiver can be mailed to the carrier’s registered agent thereby saving the costs of service. The carrier can then be voluntarily dismissed with its agreement to waive service and the statute of limitations if it is discovered that the coverage will apply. Pursuant to such consent motion and agreement, the UMC is subject to being voluntarily brought back into the case should facts later arise that operated to defeat or diminish the availability of the tortfeasor’s liability coverage.

II. SERVICE ON THE DEFENDANT (UNINSURED MOTORIST)

A. Must Serve Defendant

It is well settled that the insured must first obtain a judgment against the uninsured motorist before they are entitled to collect against the UMC under the policy.³¹ In order for the insured to recover under his uninsured motorist coverage, they must establish

³¹ O.C.G.A. § 33-7-11(j); Lewis v. Cherokee Ins. Co., 258 Ga. 839, 375 S.E.2d 850 (1989)

legal liability on the part of the owner or operator of the uninsured motor vehicle.³²

“Legal liability” means the securing of a judgment against the uninsured motorist, and the judgment may be based on a consent judgment or “confession of judgment” by the uninsured motorist.³³ Where the UMC answers the tort action in its own name, however, the insured can recover a judgment against the carrier for the amount of the judgment against the tortfeasor subject to the applicable limit of the UM coverage.³⁴

B. John Doe and Service by Publication

If either the owner or operator of an uninsured motor vehicle is unknown, an action may be instituted against the unknown defendant as “John Doe,” and a copy of the summons and complaint is to be served upon the UMC as though it were actually named a party defendant.³⁵ Obviously, any judgment obtained against a “John Doe” would not be an in personam judgment. A “John Doe” action is merely a procedural device designed to allow the claimant-insured to satisfy the condition precedent of obtaining a judgment against the uninsured tortfeasor.³⁶ Under these circumstances, the plaintiff must serve the UMC in a timely manner in accordance with the statute of limitations or the 1998 amendment.

The Uninsured Motorist Coverage Act provides for service by publication upon the owner or operator of an uninsured vehicle, where either the owner or operator is named as a defendant in the action but resides out of the state, has departed from the state, cannot after due diligence be found in the state, or conceals himself to avoid the service

³² O.C.G.A. § 33-7-11(a)(1)

³³ Cook v. State Farm Mut. Auto. Ins. Co., 237 Ga. App. 400, 514 S.E.2d 48 (1999)

³⁴ Moss v. Cincinnati Ins. Co., 154 Ga. App. 165, 268 S.E.2d 676 (1980); Maxwell v. State Farm Mut. Auto. Ins. Co., 291 Ga. App. 545, 396 S.E.2d 291 (1990)

³⁵ O.C.G.A. § 33-7-11(d)

³⁶ Finch v. Doe, 247 Ga. App. 298, 543 S.E.2d 105 (2000); Smith v. Doe, 189 Ga. App. 264, 375 S.E.2d 477 (1988)

of summons.³⁷ A known motorist is deemed uninsured when he cannot be personally served.³⁸ Though the motorist cannot be served, the injured party must reduce their claim against the motorist to a judgment in order to establish the amount they are legally entitled to recover from the uninsured motorist carrier.³⁹ Under these circumstances, the uninsured motorist statute allows service by publication upon a showing of due diligence.⁴⁰ Service on the missing tortfeasor, whether by publication or otherwise, is a condition precedent for recovery against the uninsured motorist carrier.⁴¹ A plaintiff must exercise due diligence in locating a missing uninsured motorist to effect service.

C. Limitations of actions

An action brought under the Georgia Uninsured Motorist Act is governed by the same statute of limitations that governs the underlying claim against the owner or operator of the uninsured motor vehicle.⁴² While this is the general rule, the 1998 amendment to the uninsured motorist statute provides an exception in cases where no reasonable belief exists that the case involves an uninsured motor vehicle. Once the plaintiff becomes aware of facts indicating that an uninsured motor vehicle is involved, the provisions of the statute must be followed.

While not actually a party defendant at the time of service, the UMC has a strong financial interest in the pendency of the action due to the fact that the UMC may be called upon to pay the judgment of any uninsured tortfeasor. The Georgia Court of

³⁷ O.C.G.A. § 33-7-11(e)

³⁸ Brown v. State Farm Mut. Auto. Ins. Co., 242 Ga. App. 313, 529 S.E.2d 439 (2000); Smith v. Commercial Union Assur. Co., 246 Ga. 50, 52, 268 S.E.2d 632 (1980)

³⁹ Id.; Boles v. Hamrick, 194 Ga. App. 595, 596, 391 S.E.2d 418 (1990)

⁴⁰ OCGA § 33-7-11(e)

⁴¹ Swanson v. State Farm Mut. Auto. Ins. Co., 242 Ga. App. 616, 530 S.E.2d 516 (2000)

⁴² Vaughn v. Collum, 236 Ga. 582, 224 S.E.2d 416 (1976); State Farm Mut. Auto. Ins. Co. v. Harris, 207 Ga. App. 8, 427 S.E.2d 1 (1992).

Appeals has applied this principle to affirm summary judgments granted to insurers on whom service was not made within the period of limitation and for the plaintiff's failure to serve the uninsured motorist within the period of limitation.

As a general rule, the statute of limitation begins to run on the date the claim first can be brought. Yet, in an uninsured motorist claim for personal injuries, while the statute of limitation may begin to run on the day of the accident as to the uninsured motorist, that date does not necessarily control when the UMC may be timely served with process in that action. As previously discussed, the UMC is not required to be served until a "reasonable belief" exists that the offending vehicle is an uninsured motor vehicle. Specifically, once such reasonable belief is discovered, the plaintiff is afforded the greater of 90 days thereafter or the remainder of the time allowed for valid service on the tortfeasor in which to serve the UMC. Some examples of service issues in uninsured motorist cases follow.

In *Beasley v. Parks*,⁴³ the insured filed an action against a known uninsured motorist and provided his UMC a "courtesy" copy of the pleadings without perfecting service by legal process. The important fact in light of the 1998 amendment is that the plaintiff knew the tortfeasor was uninsured at the time suit was filed. The court held that timely formal service upon the UMC within the statute of limitations was a precondition for recovery. Settlement negotiations with the insured did not waive this condition or estop the UMC from asserting the statute of limitations in the absence of a clear showing that the insured was in fact "misled to believe [the] claim would be paid without litigation," which amounts to constructive fraud. Since the insured could not establish this was the

⁴³ 204 Ga. App. 482, 420 S.E.2d 3 (1992)

case, the UMC was properly dismissed and the same result would occur under the 1998 amendment.

In *Lowes v. Allstate Ins. Co.*,⁴⁴ the insured filed a complaint against two known uninsured motorists and served a duplicate copy upon the UMC a few days before the expiration of the statute of limitations. The plaintiff was unable to serve the defendants because they had left for California. The insured did not seek authorization for, or perfect service, by publication as provided by the Act. The court held that the UMC was not liable because the insured had failed to meet the statutory precondition for recovery by neglecting to serve the defendants. The UMC did not waive this condition when it filed an answer in its own name asserting defenses to liability and conducted discovery. However, the court seemed to suggest that such waiver might be found if the UMC had answered in the defendants' names in order to assert its defenses. Perhaps this is why nearly all UMC's answer in their own names.

In *Brown v. State Farm Mut. Auto. Ins. Co.*,⁴⁵ State Farm, the UMC, was successful on a motion to dismiss for the plaintiff's failure to obtain personal service on the uninsured motorist. The plaintiff brought the suit five days before the expiration of the statute of limitations. The plaintiff served her UMC but never served the defendant. After three months, State Farm filed a motion to dismiss claiming that plaintiff had failed to properly serve the defendant. The plaintiff moved for service by publication a month after State Farm's motion. The court found no evidence of any effort to locate or serve the defendant for three months between the initial failed attempt and State Farm's motion to dismiss. The Court of Appeals held that the plaintiff must show due diligence in

⁴⁴ 204 Ga. App. 148, 418 S.E.2d 465 (1992)

⁴⁵ 242 Ga. App. 313, 529 S.E.2d 439 (2000)

determining whether the defendant was either out of state or avoiding service. The Court of Appeals continued by reiterating the principle that while the known motorist is deemed uninsured when he cannot be personally served, a plaintiff is not legally entitled to recover damages from the uninsured motorist unless he serves the defendant personally or by publication and reduces his claim against the defendant to judgment.

Conclusion

When considering the applicability of UM coverage for your clients, there are some basic rules that must be followed to ensure the success of reaching the coverage. The statutory and contractual notice requirements must be adhered to. Statutory notice is accomplished through service of the UMC and contractual notice can be accomplished by sending a representation letter to the UMC as soon as you receive the case. The plaintiff must obtain a valid legal judgment against the uninsured motorist, whether known or unknown “John Doe” before the plaintiff can collect against the UMC. Therefore, the uninsured motorist and the UMC must be served before the plaintiff can collect. The uninsured motorist must be served within the statute of limitations period applicable to their claims. The UMC must be served once the plaintiff has a “reasonable belief” that an uninsured vehicle is involved. This translates to serving the UMC within the statute of limitations period in all situations where it is found that either a known or unknown uninsured motorist is the responsible tortfeasor. If, after suit is filed, facts are discovered indicating that an uninsured motorist is involved, the plaintiff must serve the uninsured motorist, whether known or unknown, within the greater of the time remaining to serve the defendant or 90 days. The 1998 amendment provided the needed flexibility to avoid the harsh results obtained under the *Bohannon* rule.