Consumer & Commercial Law State Bar of Texas

# GA Law Holds Insurer Liable for Consent Judgment After Refusal to Defend

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In a recent decision, the 11th Circuit affirmed that a commercial general liability (CGL) policy provided coverage for an unallocated consent judgment. The case involved an insured's alleged negligence that allowed or failed to prevent the theft of its customer's materials. This ruling raises the potential liability for unallocated damage awards where a court finds the CGL insurer wrongfully refused to defend both covered and uncovered claims.

In ***Barrs v. Auto-Owners Insurance Company*****,** the district court held that the general contractor's insurer wrongfully refused to defend or participate in the underlying lawsuit. The claimant then sought indemnification under the general contractor's CGL policy for a consent judgment entered against the general contractor. This consent judgment did not allocate the damages between covered and non-covered claims. It largely tracked the language of a negotiated *Coblentz*-style settlement agreement. In this agreement, the insured general contractor admitted liability for negligence-based claims and assigned claimant its rights under the CGL policy.

On appeal, the 11th Circuit initially determined that despite following the rule of *lex loci contractus* (the law of the place the contract was made), Georgia courts would not consider another state's law unless a statute or decision interpreting a statute applied. The court ruled that even though the insurer issued and delivered the policy to the general contractor in Alabama, Georgia law applied to the coverage dispute.

The 11th Circuit held that because negligent acts qualify as accidents, the general contractor's negligent acts and failure to prevent the theft qualified as an "occurrence." The 11th Circuit further determined that the expected or intended injury, impaired property, and the damage to property in the care, custody, or control exclusions did not apply.

In turn, the insurer was held liable for the entire unallocated consent judgment that complied with the procedures established in ***Coblentz v. American Safety Company of New York***. While *Coblentz* was determined in 1969 under Florida law, the 11th Circuit based its affirmance, in part, on the fact that there was no Georgia authority preventing the enforcement of unallocated consent judgments. Beyond this, the 11th Circuit made little effort to explain why this Florida doctrine should be extended to cases decided under Georgia law.

The court also based its ruling on the principle that a federal court sitting in diversity must proceed with caution in making pronouncements about state law. The 11th Circuit stated that holding unallocated consent judgments unenforceable would improperly shift the burden to the insured to prove the application of exclusions.

**Key Takeaways**

- Where an insurer wrongfully refuses to defend a lawsuit involving both covered and uncovered claims, it may be liable for a consent judgment under a settlement agreement based on solely covered, negligence-based claims.

- Unless a statute is at play, Georgia courts should apply Georgia law to the interpretation of an insurance policy, regardless of where it was issued and delivered.
- Under Georgia law, insurers may owe coverage for an insured's negligent acts although the loss involves a third party's intentional acts.

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