

# Enforceable Vertical Exhaustion Clauses Effectively Barred Bad Faith Claim in Uninsured Motorist Claims in Georgia

AUTHOR: SANDBERG PHOENIX

**Summary:** Gary Coker was injured in a car accident after a vehicle driven by Donald Woodall crossed the center line and hit Coker head-on. Coker was driving a vehicle owned by his employer, Ansko & Associates. After filing suit against Woodall, Coker obtained a \$5.5 million consent judgment. However, Woodall's automotive insurance policy provided limits of only \$25,000. Under Georgia law, which controlled in this case, Woodall qualified as an underinsured motorist due to his low policy limits.

## *Coker v. American Guarantee and Liability Insurance Company*

Because the vast majority of Coker's \$5.5 million dollar judgment went unsatisfied, Woodall's status as underinsured allowed Coker to turn to his employer's insurance policies for recovery. Ansko & Associates purchased five separate insurance policies. Its primary policy provided \$5 million in coverage and was issued by Liberty Mutual Insurance Company. It also purchased the following umbrella and excess policies: a Westchester Fire Insurance Company umbrella policy providing \$10 million in coverage; a Great American Insurance Company excess policy providing \$10 million in coverage; an American Guarantee & Liability Insurance Company excess policy providing \$25 million in coverage; and an Endurance American Specialty Insurance Company excess policy providing \$25 million in coverage. The three excess policies all contained vertical exhaustion requirements which conditioned coverage on the policy providing the layer of coverage immediately preceding the excess policy to be completely exhausted (for example, the Great American excess policy provided coverage only if the Westchester umbrella policy paid its full policy limits and the American Guarantee excess policy only provided coverage if the Great American excess policy paid its full limits).

There was no dispute Coker qualified as an insured under each of these policies. In March 2012, Coker settled with Liberty Mutual, Ansco's primary insurer, for a confidential amount. Then in June, Coker settled with Westchester Fire Insurance Company, Ansco's umbrella insurer, for a confidential amount. Despite these settlements, a substantial portion of Coker's \$5.5 million judgment was outstanding. While the specific amounts were not revealed, it was clear neither policy was exhausted. Coker then demanded indemnity from the three excess insurers (Great American, American Guarantee, and Endurance), but the demand was refused by all three.

Coker then filed suit for breach of contract and bad faith. The trial court granted Coker's motion for summary judgment as to the breach of contract claim, but denied it as to the bad faith claim. The three excess insurers appealed.

The Eleventh Circuit Court of Appeals reversed, holding that even though the excess policies were required to provide underinsured motorist (UM) coverage, the vertical exhaustion requirements were enforceable.

Although Georgia law does not typically allow courts to interpret contracts in a way that creates a new contract, insurance policies must be interpreted in a manner that complies with Georgia law. At the time, the Georgia Insurance Code made UM coverage mandatory; unless the insurer obtained a written refusal from the insured rejecting UM coverage, the policy automatically provided such coverage in an amount equal to the policy limit for bodily injury. This statute applied to primary insurance policies as well as excess and umbrella policies. Because Ansco, Coker's employer, did not reject UM coverage in writing for any of the excess policies, the Georgia Insurance Code required the Eleventh Circuit to find UM coverage for each of them.

Nonetheless, the court held coverage was properly denied because the vertical exhaustion clauses of the excess policies were enforceable even on UM claims. The court first acknowledged the nature of an excess policy necessarily requires the limits of the underlying policy to be completely exhausted before coverage is applied. In an attempt to circumvent the unambiguous language of the excess policies, as well as the well-settled case law, Coker argued the vertical exhaustion requirements violated the public policy behind mandatory UM coverage. Coker relied on a prior Georgia Supreme Court decision which announced the purpose of mandatory UM coverage as "protect[ing] the insured as to his actual loss, *within the limits of the policy*."

The Eleventh Circuit refused to allow the mandatory UM coverage statute to undermine the defining characteristic of an excess policy: that coverage only exists once the underlying policy is completely exhausted. To hold otherwise, the court reasoned, would eliminate the market for excess UM coverage because all excess policies would essentially be converted into primary policies. Without the vertical exhaustion requirement, claimants could turn to an excess policy for recovery in much the same way they would turn to a primary policy.

The court also noted that enforcing the vertical exhaustion clauses does not undermine the purpose of mandatory UM coverage because it does not prohibit the insured from being fully compensated for his injuries. The only reason Coker was unable to fully satisfy his consent judgment was because he accepted a settlement for less than the limits of the primary and umbrella policies. This was a product of his own volition rather than application of any law.

The Court's ruling effectively foreclosed *Coker* from pursuing his bad faith claim.

By Aaron French & Brett Simon

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~~Brett Simon~~ found or type unknown