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## INSURANCE Insurance Generally: Provide Provisions and Definitions Relating to Insurance, Recovery for Personal Injury from a Third Party, Settlement of Claims, Right of Reimbursement for Medical Expenses and Disability Payments, Set-Offs, Subrogation for Conflicting Provisions, Confidentiality Provisions, and Provisions for Notice to Third Parties

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## INSURANCE

*Insurance Generally: Provide Provisions and Definitions  
Relating to Insurance, Recovery for Personal Injury from a  
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Conflicting Provisions, Confidentiality Provisions, and  
Provisions for Notice to Third Parties*

CODE SECTION: O.C.G.A. § 33-24-56.1 (new)  
BILL NUMBER: SB 280  
ACT NUMBER: 259  
GEORGIA LAWS: 1997 Georgia Laws 668  
SUMMARY: The Act relates to personal injury cases against third parties brought by or on behalf of a person to whom an insurance provider has paid medical benefits. The Act provides general provisions and definitions of insurance, including notice requirements, and provides for reimbursement of medical benefits paid to benefit providers when an injured person has been fully compensated for all economic and non-economic benefits. The Act further allows for allocations in a settlement or judgment among categories of damages. Additionally, the Act provides for a determination of attorney's fees and expenses associated with litigation.

EFFECTIVE DATE: July 1, 1997

### *History*

Prior to the introduction of SB 280, an insured who collected under his or her insurance policy would have to reimburse the insurance company for that amount if the insured subsequently collected from another party, regardless of the amount.<sup>1</sup> Because the insured would have to pay the insurance company back any money he or she recovered, the payment would in essence be a loan from the insurance company, rather than compensation for injury.<sup>2</sup> Also, prior law rendered it difficult for both plaintiffs and defendants to settle cases because the insured was left with virtually nothing after attorney's fees

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1. See Telephone Interview with Aubrey Villines, Georgia Trial Lawyer's Association (May 29, 1997) [hereinafter Villines Interview].

2. See *id.*

and excess hospital bills, so the insured would take the risk of going ahead with trial rather than settle the case.<sup>3</sup>

On March 17, 1997, days before the General Assembly passed SB 280, the Supreme Court of Georgia held that certain types of reimbursement contracts were against public policy.<sup>4</sup> In *Duncan v. Integon General Insurance Corp.*, a woman brought a suit for damages arising out of an automobile accident, and sued her insurance company under her uninsured motorist policy for \$5000.<sup>5</sup> She subsequently settled her case with the tortfeasor for \$15,000.<sup>6</sup> The insurance company then sued her for reimbursement of the \$5000, even though she had not been completely compensated for her injuries.<sup>7</sup> The court held that because the insurance contract did not specifically provide otherwise, the insured had to be completely compensated before the insurance company could seek reimbursement because Georgia public policy favors this interpretation.<sup>8</sup> Thus, under the complete compensation rule, an insured must be completely compensated for her losses before the insurer can exercise a right of subrogation or receive reimbursement for the payment of medical benefits, unless the contract provides otherwise.<sup>9</sup>

### SB 280

The version of SB 280 that passed was very different from the version introduced.<sup>10</sup> When drafted and presented to the Senate Insurance and Labor Committee, the bill originally provided certain changes to provisions relating to insurable interests and personal insurance.<sup>11</sup> The existing law provided that a corporation had an

3. *See id.*

4. *See Duncan v. Integon Gen. Ins. Corp.*, 267 Ga. 646, 482 S.E.2d 325 (1997) (reversing Court of Appeals decision, *Integon v. Thompson*, 220 Ga. App. 731, 469 S.E.2d 346 (1996) (holding that under terms of insured's policy, insurance company was entitled to be reimbursed for payments it made regardless of whether insured was completely compensated for his or her losses)).

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.* at 646, 482 S.E.2d at 326.

9. *See id.* The Court held that:

Where the insurer or the insured must go unpaid to some extent, the loss should be borne by the insurer, since the insurer has already been paid a premium for assuming this risk and would have been obligated to pay medical expenses regardless of . . . whether a culpable third party could have been found.

*Id.*

10. Compare SB 280, as introduced, 1997 Ga. Gen. Assem., with O.C.G.A. § 33-24-56.1 (Supp. 1997).

11. *See* SB 280, as introduced, 1997 Ga. Gen. Assem.

insurable interest in the life or physical or mental ability of any of its directors, officers, employees, or any other person who might cause financial loss to the corporation.<sup>12</sup> Included in this provision were contractual arrangements with any shareholder concerning his or her death or disability, which would allow the corporation re-acquisition of his or her shares, or any contract obligating the corporation as a guarantor or surety, or relating to a compensation arrangement on the life of the obligor.<sup>13</sup> The trustee of a trust established by the corporation providing benefits<sup>14</sup> to employees or affiliates would then stand in a fiduciary capacity with respect to those people and the corporation would have an insurable interest in their lives.<sup>15</sup>

The existing law provided that an "employee" included any former employee, but only for the purpose of replacing existing life insurance that will be surrendered in exchange for new life insurance in an amount not above the surrendered amount.<sup>16</sup> The original version of SB 280 added to this language by stating that, alternatively, upon cessation of premium payments, the former employee or trustee could elect to use the cash value under the policy to restructure the term, face amount, or investment options under the policy, even if the restructuring would result in an increase in the amount of life insurance.<sup>17</sup> This language was amended on the Senate floor by allowing the new life insurance amount to exceed the insurance being surrendered.<sup>18</sup> This was allowed if the application of the cash surrender value from the old insurance as a premium under the new life insurance contract requires a larger amount of insurance to qualify as life insurance or not to be treated as a modified endowment contract for federal income tax purposes.<sup>19</sup>

SB 280 was originally introduced as HB 35 and then withdrawn.<sup>20</sup> Then, it was reintroduced as HB 553.<sup>21</sup> HB 553 was engrossed in the House and was substantially modified and passed in the Senate after numerous negotiations with the insurance industry.<sup>22</sup> However, HB 553 could not be accepted in the House because of the engrossment rules, so on the last day of the session, SB 280 became a vehicle for HB

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12. *See* 1995 Ga. Laws 776 (codified at O.C.G.A. § 33-24-3(1) (1996)).

13. *See id.*

14. Benefits include life, health, disability, and retirement. *See id.* (codified at O.C.G.A. § 33-24-3(c) (1996)).

15. *See id.*

16. *See id.*

17. *See* SB 280, as introduced, 1997 Ga. Gen. Assem.

18. *See* SB 280 (SFA), 1997 Ga. Gen. Assem.

19. *See id.*

20. *See* Final Composite Status Sheet, Mar. 28, 1997.

21. *See id.*

22. *See id.*

553.<sup>23</sup> It passed the Senate as a Senate Substitute, and became SB 280, which passed in the final hours of the 1997 General Assembly.<sup>24</sup>

The final version of SB 280 adds new Code section 33-24-56.1,<sup>25</sup> which defines the terms "benefit provider"<sup>26</sup> and "injured party."<sup>27</sup> Generally, it provides for reimbursement of payment received for medical benefits to benefit providers in the event an insured injured person has already been fully compensated.<sup>28</sup>

### *Personal Injury Claims*

In the event of recovery for personal injury by the injured party or on behalf of a person for whom any benefit provider has paid medical expenses, the benefit provider may be reimbursed<sup>29</sup> by the injured person if the amount of the recovery is more than the sum of all economic and non-economic losses incurred as a result of the injury.<sup>30</sup> Further, the amount of the reimbursement claim must be reduced by a pro rata amount of attorneys' fees and expenses of litigation incurred by

23. SB 280 was also being used as a vehicle for the "Pink Lining Bill," a bill concerning domestic violence and insurance. Telephone Interview with Rep. Barbara Mobley, House District No. 69 (June 13, 1997) [hereinafter Mobley Interview]. Representative Mobley explained that the state encourages victims of domestic violence to report the cause of their injuries so that they may be referred to the appropriate services and leave their abusive relationships. *Id.* Research shows that when victims report the source of their injuries as domestic violence, some insurers limit, restrict, or deny coverage. *See id.* Thus, the victims of domestic violence are subjected to a differentiation of rates and fees. *See also Lawmakers '97* (GPTV broadcast, Mar. 18, 1997) (remarks by Rep. Barbara Mobley) (videotape available in Georgia State University College of Law Library). The Pink Lining Bill would have covered victims of domestic violence at the same rate as others, regardless of the source of injury. Mobley Interview, *supra*. The Pink Lining Bill passed the Senate but not the House due to opposition to language contained in the bill. *See id.*

24. *See* Final Composite Status Sheet, Mar. 28, 1997.

25. O.C.G.A. § 33-24-56.1 (Supp. 1997).

26. *Id.* "Benefit provider" is:

[A]ny insurer, health maintenance organization, health benefit plan, preferred provider organization, employee benefit plan, or other entity which provides for payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments, or any other benefits under a policy of insurance or contract with an individual or group.

*Id.*

27. *Id.* "Injured party" is "a person who alleges that he or she has been injured by the acts or omissions of a third party and who has received benefits from a benefit provider." *Id.*

28. *See id.*

29. The amount that will be reimbursed is up to the amount allocated to those categories of damages in the settlement documents or judgment. *See id.* § 33-24-56.1(b).

30. *See id.*

the injured party in bringing the action.<sup>31</sup> If the personal injury claim is tried in court, the court or jury can allocate the amounts paid among the categories of damages.<sup>32</sup>

In the event of a settlement, the benefit provider may seek reimbursement if the agreement expressly indicates the insured has been made whole.<sup>33</sup> If the injured party claims the amount of recovery does not exceed the sum of all economic and non-economic losses, and the settlement does not provide that the insured has been made whole, the benefit provider may seek a declaratory judgment<sup>34</sup> in order to determine to what extent it may equitably share in the settlement.<sup>35</sup>

### *Subrogation and Set-offs*

The Act prohibits subrogating the rights of an insured for medical expenses and disability payments by a benefit provider against a person at fault for an injury.<sup>36</sup> With property damage, an insured has the option to recover from the insurance company and then the insurance company may in turn file a lawsuit on behalf of the insured to recover in damages. Thus, with property damage, the insured may "contract away" his or her right to sue. The Act clarifies Georgia law pertaining to subrogation of personal injury claims. An insured does not have the option of contracting away his or her right to sue after being compensated by the insurer for medical expenses and disability payments.<sup>37</sup> Additionally, the benefit provider may not circumvent this prohibition by including an insurer seeking reimbursement as a co-payee of a payment of a settlement or judgment.<sup>38</sup>

Additionally, benefit providers cannot withhold or set off insurance benefits in order to enforce a claim for reimbursement, and neither can they reduce the amount for which they are liable under an insured party's coverage as a set-off against any claim for reimbursement.<sup>39</sup> The purpose of these prohibitions is to protect the insured from being penalized by the insurer for making a claim.<sup>40</sup> Thus, benefit providers are now prohibited from reducing the amount of their liability under an

31. *See id.* § 33-24-56.1(b)(2).

32. *See id.* § 33-24-56.1(d). The allocation by the court or jury is presumed reasonable. *See id.*

33. *See id.* § 33-24-56.1(c).

34. *See generally* 1945 Ga. Laws 137, § 1 (codified at O.C.G.A. § 9-4-2 (1996)).

35. *See* O.C.G.A. § 33-24-56.1(c) (Supp. 1997).

36. *See id.* § 33-24-56.1(e).

37. *See id.*

38. *See id.*

39. *See id.* § 33-24-56.1(f). This includes coverage for liability, uninsured motorist, disability, medical payments, or other benefits. *See id.*

40. *See* Villines Interview, *supra* note 1.

insured's policy as a set off against a claim made for reimbursement or to enforce their reimbursement claim.<sup>41</sup>

### *Notice to Third Parties*

A benefit provider's right of reimbursement is subject to notice provisions. When an action is brought by or on behalf of an insured, the person asserting the claim must provide notice of the existence of the claim<sup>42</sup> to any benefit provider the person reasonably believes has paid benefits relating to that injury.<sup>43</sup> This notice must be provided no later than ten days prior to settlement or commencement of trial.<sup>44</sup> Once the benefit provider receives this notice, the benefit provider must give actual notice for a claim for reimbursement as well as information regarding the existence of any claim by a benefit provider and an itemization of payments for which the benefit provider seeks reimbursement.<sup>45</sup> This notice must be provided prior to the commencement of trial or the consummation of a settlement agreement.<sup>46</sup> If notice is provided, a claim for reimbursement against an injured party will be enforceable.<sup>47</sup> Before settlement or trial, the claims may be supplemented as long as they also meet the notice requirements.<sup>48</sup> If notice is not provided, then a claim for reimbursement will be deemed waived.<sup>49</sup> If the plaintiff fails to provide notice as required under Code section 33-24-46.1(g), then Code section 33-24-56.1(h) shall not apply, and a claim under Code section 33-24-56.1(b)<sup>50</sup> will only be enforceable subject to other provisions.<sup>51</sup>

### *Conflicting and Confidentiality Provisions*

The Act does not allow benefit provider contracts or policies to be issued in Georgia that conflict with the provisions contained in the

41. *See id.*

42. The notice shall be by certified mail unless some other form of notice is agreed to by the designated recipient of the notice. *See* O.C.G.A. § 33-24-56.1(g) (Supp. 1997).

43. *See id.*

44. A shorter period of notice may be agreed to by the designated recipient of the notice. *See id.*

45. *See id.* § 33-24-56.1(h). This notice shall include the names of the payees, the dates of service or payment, or both, and the amounts. *See id.*

46. *Id.*

47. The claim will be enforceable provided the requirements set forth in subsection (g) are met. *See id.*

48. *See id.*

49. *See id.*

50. *Id.* § 33-24-56.1(b) (Supp. 1997) (providing recovery for personal injury from a third party).

51. *See id.* § 33-24-56.1(i).

Act.<sup>52</sup> The Act also disallows policy or contract provisions for subrogation or reimbursement with regard to claims or injuries.<sup>53</sup> Finally, any settlement including a confidentiality provision containing relevant information is not enforceable and the information will have to be disclosed.<sup>54</sup> The Act does not apply to the rights of the Department of Medical Assistance to recover under article 7 of chapter 4 of title 49<sup>55</sup> or the subrogation rights and obligations provided in Code section 34-9-11.1.<sup>56</sup>

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52. *See id.* § 33-24-56.1(j).

53. *Id.*

54. *See id.* § 33-24-56.1(k).

55. *See generally* 1963 Ga. Laws 616, § 1 (codified at O.C.G.A. § 49-4-7 (1996)) (stating receipt of compensation for residence sold by government auction is not to affect eligibility).

56. *See generally* 1992 Ga. Laws 1942, § 1 (codified at O.C.G.A. § 34-9-11.1 (1996)) (covering employee's or survivor's right of action against person other than employer; subrogation lien of employer; rights of employer or insurer upon failure of employee to bring action; attorney fees; and retroactive application).