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# INSURANCE Chapter 7 Kinds of Insurance and Chapter 9 Regulation of Rates, Underwriting Rules, and Related Organizations: Amend Title 33 of the Official Code of Georgia Annotated, Relating to Insurance, so as to Limit Coverages Under Uninsured Motorist Provisions to Automobile and Motor Vehicle Liability Policies and Exclude Umbrella and Excess Liability Policies; Change the Definition of "Uninsured Motor Vehicle" to Allow Uninsured Motorists Coverage to be Stacked with Other Available Liability Coverages; Allow Insureds to Select More Restrictive Uninsured Motorist Coverages; Changes Standards

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## INSURANCE

***Chapter 7 Kinds of Insurance and Chapter 9 Regulation of Rates, Underwriting Rules, and Related Organizations: Amend Title 33 of the Official Code of Georgia Annotated, Relating to Insurance, so as to Limit Coverages Under Uninsured Motorist Provisions to Automobile and Motor Vehicle Liability Policies and Exclude Umbrella and Excess Liability Policies; Change the Definition of “Uninsured Motor Vehicle” to Allow Uninsured Motorist Coverage to be Stacked with Other Available Liability Coverages; Allow Insureds to Select More Restrictive Uninsured Motorist Coverages; Changes Standards Applicable to Making and Use of Rates; Changes Prior Approval Requirements Above Mandatory Minimum Limits; Provide for Related Matters; Provide for Effective Dates and Applicability; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTION:	O.C.G.A. § 33-7-11 (amended), O.C.G.A. § 33-9-4 (amended), and O.C.G.A. § 33-9-21 (amended)
BILL NUMBER:	SB 276
ACT NUMBER:	801
GEORGIA LAWS:	2008 Ga. Laws 1192
SUMMARY:	The Act provides that an uninsured motor vehicle includes a motor vehicle for which the available coverages are inadequate to cover a person’s bodily injury and property damage losses and that such motor vehicle shall be considered uninsured to the full extent of the limits of the uninsured motorist coverage provided under the insured’s motor vehicle insurance policy. The Act provides for related matters, repeals conflicting laws, and provides for other purposes.

EFFECTIVE DATE: O.C.G.A. § 33-7-11, January 1, 2009;  
 O.C.G.A. § 33-9-4, October 1, 2008;  
 O.C.G.A. § 33-9-21, October 1, 2008

## History

### *Stacking Uninsured Motorist Coverage*

Uninsured motorist (“UM”) coverage “pays victims of car crashes for medical bills and property damage when the at-fault driver either has no insurance, or their insurance coverage is so low that it doesn’t fully cover the costs.”<sup>1</sup> Georgia law governing UM coverage is codified in Code section 33-7-11.<sup>2</sup> The statute defines “uninsured motor vehicle” as encompassing, *inter alia*, “a motor vehicle [of a tortfeasor] . . . as to which there is . . . [b]odily 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.”<sup>3</sup> Georgia courts have interpreted this provision as limiting an insured accident victim’s recovery to “the difference between the limits of the coverage on the tortfeasor’s automobile and that of the insured’s motor vehicle policy.”<sup>4</sup> In other words, an accident victim’s coverage will not be applied in addition to, or “stack” on top of, the at-fault driver’s liability coverage.<sup>5</sup> Instead, “the other [at-fault] driver’s policy counts against, or eats into” the innocent driver’s UM coverage.<sup>6</sup>

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1. Georgia Watch, Uninsured Motorist Stacking, <http://www.georgiawatch.org/insurance.html> (last visited April 15, 2008). See also FRANK E. JENKINS III & WALLACE MILLER III, GA. AUTOMOBILE INSURANCE LAW § 29:1 (2007).

2. O.C.G.A. § 33-7-11 (Supp. 2008).

3. O.C.G.A. § 33-7-11(b)(1)(D)(ii) (Supp. 2008) (emphasis added).

4. State Farm Mut. Auto. Ins. Co. v. Hancock, 295 S.E.2d 359, 360 (Ga. Ct. App. 1982).

5. Although the current law does not allow an innocent driver to stack her UM coverage on top of an at-fault driver’s liability coverage, an innocent driver may stack all available UM coverage accessible to her (e.g. a spouse’s policy). See Crafter v. State Farm Ins. Co., 554 S.E.2d 571, 573 (Ga. Ct. App. 2001) (“Under Georgia law, uninsured motorist benefits are calculated by ‘stacking the limits of all the available uninsured motorist coverage and setting off the limits of the available liability coverage’”) (internal citation omitted).

6. Georgia Watch, *supra* note 1.

The limitations of UM coverage created by Code section 33-7-11(b)(1)(D)(ii) are illustrated by the following example: An innocent driver who has \$50,000 in UM coverage is hit by an at-fault driver who has \$50,000 in liability coverage.<sup>7</sup> Assume that the innocent driver incurs \$100,000 in medical expenses and property damage.<sup>8</sup> Under current Georgia law, the innocent driver only gets UM dollars that *exceed* liability coverage.<sup>9</sup> Here, the innocent driver's \$50,000 in UM coverage does not exceed the at-fault driver's \$50,000 liability coverage; therefore, the innocent driver gets zero of the UM benefits.<sup>10</sup>

Those proposing to allow for "stacking" of UM coverage indicate that consumers have been confused about the current limitations on coverage and perceive they are not getting the benefit of their bargain.<sup>11</sup> However, according to John Oxendine, Georgia's Insurance Commissioner, the aforementioned example misrepresents what the consumer is actually buying.<sup>12</sup> More accurately, when a consumer is shopping for automobile insurance, the insurance agent should ask how much coverage is needed in the event that the consumer is hit by someone with no insurance.<sup>13</sup> If, for example, the consumer wants \$50,000 of coverage, the insurance agent will sell \$50,000 of coverage.<sup>14</sup> The agent is not, however, selling the promise of \$50,000.<sup>15</sup> Therefore, if the consumer is hit by an at-fault driver with \$50,000 in liability coverage, the consumer gets the expected amount of coverage.<sup>16</sup> More importantly, the consumer is getting the

7. See Video Recording of House Judiciary Non-Civil Committee Meeting, Apr. 12, 2007 at 1 hr., 17 min., 19 sec. (remarks by Sen. Cecil Staton (R-18th)), [http://www.legis.state.ga.us/legis/2007\\_08/house/Committees/judiciaryNonCivil/judyncArchives.htm](http://www.legis.state.ga.us/legis/2007_08/house/Committees/judiciaryNonCivil/judyncArchives.htm) [hereinafter House Judy-NC Video]; see also Interview with Sen. Cecil Staton (R-18th) (Apr. 1, 2008) [hereinafter Staton Interview]; Interview with Bill Clark, Political Affairs Director, Georgia Trial Lawyers Association (Apr. 1, 2008) [hereinafter Clark Interview].

8. House Judy-NC Video, *supra* note 7; Staton Interview, *supra* note 7; Clark Interview, *supra* note 7.

9. *Phillips v. Gov't Employees Ins. Co.*, 654 S.E.2d 635, 637 n.2 (Ga. Ct. App. 2007).

10. See House Judy-NC Video, *supra* note 7; Staton Interview, *supra* note 7; Clark Interview, *supra* note 7.

11. Interview with Rep. Tom Knox (R-24th) (Apr. 1, 2008) [hereinafter Knox Interview].

12. See Interview with John Oxendine, Georgia Insurance Commissioner (Apr. 3, 2008) [hereinafter Oxendine Interview].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

benefit of their bargain because the insurance company sets UM prices with the expectation that most at-fault drivers will have some coverage.<sup>17</sup> In other words, the consumer pays less in premiums because UM prices reflect the fact that insurance companies tend to pay out less than the limit of UM coverage.<sup>18</sup>

### *Umbrella Coverage*

The Georgia Court of Appeals recently held that “umbrella and excess policies that provide motor vehicle or automobile liability coverage are subject to the requirements of O.C.G.A. § 33-7-11.”<sup>19</sup> Specifically, unless the insured rejects UM coverage in writing, all motor vehicle liability policies must provide either the mandatory minimum of UM coverage or optional UM coverage equal to the underlying liability coverage.<sup>20</sup> In *Abrohams v. Atlantic Mutual Insurance Agency*, innocent driver, Mr. Abrohams, sought to recover benefits under a \$1 million umbrella policy even though the terms of the umbrella policy<sup>21</sup> expressly excluded UM coverage.<sup>22</sup> The Court, in looking to its plain language, noted that Code section 33-7-11 neither specified nor excluded umbrella policies.<sup>23</sup> Moreover, “the language of the statute does not limit its application to primary policies” and “[h]ad the legislature intended to limit the application of [the statute] to primary policies only . . . it could easily have done so.”<sup>24</sup> Therefore, the Court found that the provision in Abrohams’ umbrella policy excluding UM coverage was void as conflicting with the plain terms of Code section 33-7-11.<sup>25</sup>

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17. *Id.*

18. See Oxendine Interview, *supra* note 12.

19. *Abrohams v. Atl. Mut. Ins. Agency*, 638 S.E.2d 330, 333 (Ga. Ct. App. 2006).

20. O.C.G.A. § 33-7-11(a)(1)(A)-(B) (Supp. 2008).

21. An umbrella policy is “coverage that extends the terms of a regular insurance policy once coverage limits for the regular policy have been reached.” National Association of Insurance Commissioners, Glossary of Terms, [http://www.naic.org/consumer\\_glossary.htm#T](http://www.naic.org/consumer_glossary.htm#T) (last visited Apr. 15, 2008).

22. *Abrohams*, 638 S.E.2d at 331.

23. *Id.* at 332.

24. *Id.*

25. *Id.* at 334.

### *Offsets*

In November 2007, the Georgia Supreme Court overruled three lower court decisions in holding that Code section 33-7-11(i) does not authorize an insurer to offset an innocent victim's UM benefits for amounts received by other sources for personal injury.<sup>26</sup> In *Dees v. Logan*, a jury awarded innocent driver Dees a total of \$149,939 for lost wages, reimbursement due under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA),<sup>27</sup> pain and suffering, and loss of consortium.<sup>28</sup> Prior to the jury's award, Dees had received \$178,256 from other sources—namely \$83,200 in workers' compensation benefits; \$70,056 in social security disability benefits; and \$25,000 from at-fault driver's liability coverage.<sup>29</sup> Relying on earlier decisions, Dees' UM insurance provider successfully argued to both the trial court and the appeals court that its "nonduplication of benefits" policy was enforceable, thereby reducing its liability by the amounts already received to zero.<sup>30</sup>

In reversing the judgment, the Georgia Supreme Court looked to the text of Code section § 33-7-11(i) which provides in pertinent part that UM policies "may contain provisions which exclude any liability of the insurer *for injury or destruction of property of the insured for which he has been compensated by other property or physical damage insurance.*"<sup>31</sup> The Court determined that the plain meaning of the statute expressly authorizes setoffs for property loss but is silent as to personal injury; furthermore, rules of construction provide that "omitted things must be regarded as having been deliberately excluded."<sup>32</sup> Thus, the Court held that the nonduplication clause of

26. *Dees v. Logan*, 653 S.E.2d 735, 736–37 (Ga. 2007) (overruling *Ferqueron v. State Farm Mut. Auto. Ins. Co.*, 610 S.E.2d 184 (Ga. Ct. App. 2005); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 455 S.E.2d 91 (Ga. Ct. App. 1995); and *Northbrook Property & Casualty Ins. Co. v. Merchant*, 450 S.E.2d 425 (Ga. Ct. App. 1994).

27. Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C.A. § 1162 (2008). Congress enacted this legislation to allow "a qualified beneficiary of an employer's group health plan to obtain continued coverage under the plan when he might otherwise lose that benefit for certain reasons, such as the termination of employment." *Geissal v. Moore Medical Corp.* 524 U.S. 74, 76 (1998).

28. *Dees*, 653 S.E.2d at 736.

29. *Id.*

30. *Id.* at 736–37.

31. *Id.* at 737 (quoting O.C.G.A. § 33-7-11(i)) (Supp. 2008) (emphasis added).

32. *Id.*

the UM policy was void and unenforceable as applied to offset Dees' UM coverage by other amounts received for personal injury.<sup>33</sup>

### *Rate Regulation*

Presently, Georgia regulates UM policy rates under a "prior approval" scheme as provided under subsection (b) of Georgia Code section 33-9-21.<sup>34</sup> Under a prior approval scheme, UM insurance providers must file rate changes, both increases and decreases, with the Insurance Commissioner and provide an actuarial justification for the change.<sup>35</sup> A provider may then only begin using the rate after receiving approval from the Commissioner, or after forty-five days of filing where the Commissioner has not disapproved the rate.<sup>36</sup>

### *Bill Tracking of SB 276*

#### *Consideration and Passage by the Senate*

As introduced, SB 276 provided for an amendment of Chapter 7 of Title 33 of the Georgia Code to change the definition of an uninsured motor vehicle to include those which are inadequately insured to cover damages and losses resulting from an accident.<sup>37</sup> The change in the definition of uninsured motor vehicle would allow the insured motorist to access the entirety of the uninsured motorist coverage provided by his insurance policy.<sup>38</sup> Senators Cecil Staton (R-18th), Seth Harp (R-29th), David Shafer (R-48th), Jack Murphy (R-27th), Jeff Mullins (R-53rd), and others sponsored SB 276.<sup>39</sup> On March 1, 2007, the Senate first read SB 276.<sup>40</sup> The same day, Lieutenant

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33. *Id.* at 738.

34. O.C.G.A. § 33-9-21(b) (2000).

35. *Id.*; Oxendine Interview, *supra* note 12.

36. O.C.G.A. § 33-9-21(b)(1) (2000).

37. *See* SB 276, as introduced, 2007 Ga. Gen. Assem.

38. *Id.*

39. *Id.*

40. State of Georgia Final Composite Status Sheet, SB 276, Mar. 1, 2007 (Apr. 4, 2008).



Governor Casey Cagle assigned it to the Senate Insurance and Labor Committee.<sup>41</sup>

Senator Staton presented the bill to the Senate Insurance and Labor Committee when it convened on March 15, 2007.<sup>42</sup> The focus of the committee discussion was clarification of the proposed definition of “uninsured motor vehicle” as the term is used in the relevant Code sections.<sup>43</sup> After hearing presentations both in opposition and support of the bill, the Senate Insurance and Labor Committee passed the bill unanimously.<sup>44</sup> The Senate Insurance and Labor Committee favorably reported SB 276 on March 19, 2007.<sup>45</sup>

The second read occurred on March 20, 2007.<sup>46</sup> Then on March 27, 2007, SB 276 was read in the Senate for the third time.<sup>47</sup> Senator Staton presented the bill to the Senate.<sup>48</sup> Senator Staton stressed that the bill, if passed, would not result in an increase in cost for UM coverage.<sup>49</sup> He also presented the first Senate floor amendment which would give an effective date of July 1, 2007 for SB 276.<sup>50</sup> Senator Emanuel Jones (D-10th) presented the second Senate floor amendment.<sup>51</sup> Senator Jones explained that the second Senate floor amendment “changes the policy that an insurance company does not have to cover any claims in the event that the insured does not cooperate in the investigation” following an accident.<sup>52</sup> The Senate adopted the first Senate floor amendment by a vote of 34 to 0 and the second Senate floor amendment by a vote of 20 to 12.<sup>53</sup> SB 276 was passed by the Senate by a vote of 46 to 3 on March 27, 2007.<sup>54</sup>

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41. Video Recording of Senate Proceeding, Mar. 1, 2007 at part 1a, 2 min., 00 sec. (remarks by Secretary of the Senate and Lt. Gov. Casey Cagle), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682316,00.html).

42. GA. SENATE, GA. SENATE WEEKLY REPORT, No. 6, at 13 (2007).

43. *Id.*

44. *Id.*

45. State of Georgia Final Composite Status Sheet, SB 276, Mar. 19, 2007 (Apr. 4, 2008).

46. *Id.*

47. *Id.*

48. GA. SENATE, GA. SENATE DAILY REPORT, No. 30, at 10 (2007).

49. *Id.*

50. *Id.*; SB 276 (SFA) (07 AM 28 0779) 2007 Ga. Gen. Assem.

51. GA. SENATE, GA. SENATE DAILY REPORT, No. 30, at 10 (2007); SB 276 (SFA) (07 AM 21 3494) 2007 Ga. Gen. Assem.

52. GA. SENATE, GA. SENATE DAILY REPORT, No. 30, at 10 (2007).

53. *Id.*

54. *Id.*; Georgia General Assembly, SB 276, Bill Tracking, [http://www.legis.state.ga.us/legis/2007\\_08/sum/sb276.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb276.htm) (last visited June 3, 2008).

*Consideration and Passage by the House*

On March 28, 2007, the House of Representatives first read SB 276.<sup>55</sup> After the second read, which occurred the next day, Speaker of the House Glenn Richardson (R-19th)<sup>56</sup> assigned SB 276 to the House Judiciary Non-Civil Committee.<sup>57</sup> The House Judiciary Non-Civil Committee worked with Senator Cecil Staton (R-18th) to draft a proposed Committee Substitute.<sup>58</sup> Senator Staton presented the Committee Substitute to the full House Judiciary Non-Civil Committee on April 12, 2007.<sup>59</sup>

The Committee Substitute amends subsection (a) of Code section 33-7-11 to provide that umbrella or excess liability policies are exempt from the requirements under this statute unless expressly indicated in those policies.<sup>60</sup> The Committee Substitute also amends subsection (b) of Code section 33-7-11 by limiting the insured's total recovery to an amount equal to "all economic and noneconomic losses sustained by the insured"; permitting the consumer to select among the stacking or non-stacking types of uninsured motorist coverage or to reject uninsured motorist coverage entirely; and requiring insurers to notify consumers of their options with respect to uninsured motorist coverage.<sup>61</sup> Further, the Committee Substitute revises subsection (i) of Code Section 33-7-11 permitting an uninsured motorist insurance endorsement or policy provisions to reduce the liability of the insurer by any amounts which other insurance policies (property, medical, worker's compensation, etc.) have previously compensated the insured.<sup>62</sup>

In addition to the provisions related to uninsured motorist coverage the Committee Substitute amends several other Code sections relating to the making and approval of private passenger motor vehicle

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55. State of Georgia Final Composite Status Sheet, SB 276, Mar. 28, 2007 (Apr. 4, 2008).

56. Speaker Glen Richardson is an alum of the Georgia State University College of Law.

57. State of Georgia Final Composite Status Sheet, SB 276, Mar. 29, 2007 (Apr. 4, 2008).

58. House Judy-NC Video, *supra* note 7, at part 2, 1 hr., 13 min., 38 sec. (remarks by Committee Chairman David Ralston (R-7th)).

59. *Id.*

60. SB 276 (HCS), 2008 Ga. Gen. Assem.

61. *Id.*

62. *Id.*

insurance.<sup>63</sup> Revisions to paragraph 2 of Code section 33-9-4 expand the definition of “excessive” as it relates to insurance rates to include those which are made in the absence of a “reasonable degree of competition.”<sup>64</sup> The House Committee Substitute amends subsection (b) of Code section 33-9-21 to limit the prior approval of insurance rates and rate increases by the Insurance Commissioner to only those policies which provide the mandatory minimums required by Georgia law and to permit insurance rates and rate increases for coverages in excess of the mandated minimums to be effective upon filing, without prior approval by the Insurance Commissioner.<sup>65</sup>

Georgia Insurance Commissioner John Oxendine spoke to the House Judiciary Committee regarding his concerns with the bill.<sup>66</sup> He urged the members of the committee to seriously weigh the potential costs that could result from the passage of the bill.<sup>67</sup> Specifically, he was concerned that the proposed change would unfairly raise the rates for those purchasers of UM coverage who have been calculating properly in the past.<sup>68</sup> The House Judiciary Non-Civil Committee favorably reported the Committee Substitute on April 13, 2007.<sup>69</sup> Because time was running out for the 2007 Session, SB 276 was withdrawn and recommitted to the House Judiciary Non-Civil Committee on April 20, 2007.<sup>70</sup>

On March 3, 2008, both the subcommittee and the full House Judiciary Non-Civil Committee unanimously passed the House Committee Substitute.<sup>71</sup> The House Judiciary Non-Civil Committee favorably reported the House Committee Substitute on March 4, 2008.<sup>72</sup> After the third read on March 6, 2008, Representative Tom

63. *Id.*

64. *Id.*

65. *Id.*

66. House Judy-NC Video, *supra* note 7, at part 2, 1 hr., 31 min., 36 sec. (remarks by Georgia Insurance Commissioner John Oxendine).

67. *Id.* at part 2, 1 hr., 35 min., 12 sec. (remarks by Georgia Insurance Commissioner John Oxendine).

68. *Id.* at part 2, 2 hr., 00 min., 18 sec. (remarks by Georgia Insurance Commissioner John Oxendine).

69. State of Georgia Final Composite Status Sheet, SB 276, Apr. 13, 2007 (Apr. 4, 2008).

70. Press Release, Georgia Trial Lawyers Association, Georgians Don't Always Get What They Pay For (Mar. 3, 2008) (on file with Georgia State Law Review).

71. *Id.*

72. State of Georgia Final Composite Status Sheet, SB 276, Mar. 4, 2008 (Apr. 4, 2008).

Knox (R-24th) presented the bill to the House.<sup>73</sup> Rep. Knox declined to answer any questions.<sup>74</sup> Speaker of the House Glenn Richardson (R-19th), having been involved in negotiations with the trial lawyers and the insurance industry over the details of the bill, answered a few questions from House members.<sup>75</sup> Without further discussion, the House of Representatives passed SB 276 by a vote of 141 to 3 and immediately transmitted it to the Senate.<sup>76</sup>

Senator Staton presented the House version of SB 276 to the Senate on March 6, 2008.<sup>77</sup> Senator David Shafer (R-48th) and Senator Steve Thompson (D-33rd) voiced their concerns regarding the deregulation of automobile insurance policies for amounts and coverages in excess of those mandated by the state of Georgia.<sup>78</sup> A Floor Amendment was presented by Senator Shafer proposing to change the effective year of SB 276 from 2008 to 2018.<sup>79</sup> The Floor Amendment lost by a vote of 9 to 43.<sup>80</sup> The Senate then passed SB 276 by a vote of 43 to 10.<sup>81</sup> Governor Sonny Perdue signed the bill into law on May 14, 2008.<sup>82</sup>

### *The Act*

The Act amends certain Code sections in Title 33 dealing with kinds of insurance and the regulation of rates, underwriting rules, and related organizations.<sup>83</sup> The Act seeks to exempt umbrella and excess liability policies from the requirements of the Act;<sup>84</sup> to expand the

73. Video Recording of House of Representatives Proceedings, Mar. 6, 2008 at 5 min., 8 sec. (remarks by Rep. Tom Knox (R-24th)), [mms://mediam1.gpb.org/ga/leg/2008/ga-leg-house-3\\_6\\_2008-12\\_13PM.wmv](mms://mediam1.gpb.org/ga/leg/2008/ga-leg-house-3_6_2008-12_13PM.wmv) [hereinafter House Floor Video].

74. *Id.* at 17 min., 8 sec. (remarks by Rep. Tom Knox (R-24th)).

75. *Id.* at 19 min., 13 sec. (remarks by Speaker of the House Glenn Richardson (R-19th)).

76. *Id.* at 23 min., 47 sec. (remarks by Speaker of the House Glenn Richardson (R-19th)); Georgia House of Representatives Voting Record, SB 276 (Mar. 6, 2008).

77. Video Recording of Senate Proceedings, Mar. 6, 2008 (time stamp unavailable, CD on file with Georgia State University Law Review) (remarks by Sen. Cecil Staton (R-18th)) [hereinafter Senate Floor Video].

78. *Id.* (remarks by Sen. David Shafer (R-48th) and Sen. Steve Thompson (D-33rd)).

79. *Id.* (remarks by Sen. David Shafer (R-48th) and Lt. Gov. Casey Cagle (R)).

80. Georgia Senate Voting Record, SB 276 (Mar. 6, 2008).

81. *Id.*

82. State of Georgia Final Composite Status Sheet, SB 276, May 14, 2008 (Apr. 4, 2008).

83. See generally O.C.G.A. §§ 33-7-11, 33-9-4, 33-9-21 (Supp. 2008).

84. O.C.G.A. § 33-7-11(a) (Supp. 2008).

definition of “uninsured motor vehicle”;<sup>85</sup> to permit the stacking of UM coverages with other available liability coverages;<sup>86</sup> to allow Georgia consumers to have the option to select either the stacking or non-stacking UM coverage or no UM coverage coverages.<sup>87</sup> Further, the Act expands the definition of “excessive” as it relates to insurance rates to include those which are made in the absence of a “reasonable degree of competition”;<sup>88</sup> removes the prior approval requirements for coverages above mandatory minimum limits;<sup>89</sup> and provides for the effective dates and applicability of the Act.<sup>90</sup>

The Act revises the language of subsection (a) of Code section 33-7-11 to exempt umbrella and excess liability policies from the requirements of the Act.<sup>91</sup> The Act further revises Code section 33-7-11, subsection (b) to change the definition of “uninsured motor vehicle” as that term is used in the Code section.<sup>92</sup> Of particular importance is the change to include those vehicles for which there is inadequate liability insurance and not limit the term to those vehicles for which no liability insurance is provided.<sup>93</sup> Subsection (b) is further amended by the Act to permit the individual with UM coverage to apply the full amount of the at-fault driver’s liability coverage and then stack the full amount of their own UM coverage on top of the at-fault driver’s liability coverage amount to compensate them for their injuries and property damages.<sup>94</sup>

The Act further revises Code section 33-7-11, subsection (b) to allow consumers to select between three options regarding UM coverages: the new stacking UM coverage, the previously available non-stacking UM coverage, or no UM coverage at all.<sup>95</sup> Additionally, the Act provides the process by which insurance companies must

85. O.C.G.A. § 33-7-11(b) (Supp. 2008).

86. *Id.*

87. *Id.*

88. O.C.G.A. § 33-9-4 (Supp. 2008).

89. O.C.G.A. § 33-9-21(b)-(c) (Supp. 2008).

90. 2008 Ga. Laws 1192.

91. O.C.G.A. § 33-7-11(a) (Supp. 2008).

92. O.C.G.A. § 33-7-11(b) (Supp. 2008).

93. Compare O.C.G.A. § 33-7-11(b)(1)(D)(ii) (Supp. 2008) with O.C.G.A. § 33-7-11(b)(1)(D)(ii) (2000).

94. O.C.G.A. § 33-7-11(b) (Supp. 2008).

95. *Id.*; House Floor Video, *supra* note 73, at 13 min., 29 sec. (remarks by Rep. Tom Knox (R-24th)).

notify policyholders of the changes in UM coverages.<sup>96</sup> The Act requires the insurance company to notify the policyholder 45 days prior to renewal of the policy.<sup>97</sup>

The Act amends Code section 33-9-4 to change the standards under which an increased rate for personal private passenger motor vehicle insurance shall be considered excessive.<sup>98</sup> Under the new standard, the rate will not be considered excessive unless it is “unreasonably high” and “*a reasonable degree of competition does not exist.*”<sup>99</sup> Code section 33-9-21 is amended to require that insurance companies submit their proposed rates, rating plans, rating systems or underwriting rules to the Insurance and Fire Safety Commissioner for approval prior to the same becoming effective for those automobile policies providing only the mandatory minimum limits required for Georgia drivers.<sup>100</sup> Code section 33-9-21 is further amended to allow rates for private passenger motor vehicle insurance coverages other than the minimum coverages required by law, to be effective immediately upon filing rather than being subject to prior approval by the Insurance and Fire Safety Commissioner.<sup>101</sup>

Finally, the Act provides that changes made to Code section 33-7-11 shall become effective on January 1, 2009 and shall be applicable “to all policies issued, delivered, issued for delivery or renewed” in Georgia after January 1, 2009.<sup>102</sup> The changes made to Code sections 33-9-4 and 33-9-21 shall become effective on October 1, 2008.<sup>103</sup>

### *Analysis*

#### *Stacking Uninsured Motorist Coverage*

The Act allows consumers the choice of purchasing UM coverage to “stack” on top of an at-fault driver’s liability coverage, not to

96. *Id.*

97. O.C.G.A. § 33-7-11(b)(1)(D)(ii)(III) (Supp. 2008).

98. O.C.G.A. § 33-9-4(2) (Supp. 2008); House Floor Video, *supra* note 73, at 9 min., 35 sec. (remarks by Rep. Tom Knox (R-24th)).

99. *Id.* (emphasis added).

100. O.C.G.A. § 33-9-21(b)(1) (Supp. 2008).

101. *Id.* at § 33-9-21(b)(2).

102. 2008 Ga. Laws 1192.

103. *Id.*

exceed the sum of losses sustained by the innocent driver.<sup>104</sup> According to Senator Staton (R-18th) and Representative Tom Knox (R-24th), this “stacking” provision was added to assuage consumer frustration and confusion because most constituents have mistakenly believed they would be able to access the entire amount of their UM coverage (up to their total economic loss).<sup>105</sup> Senator Staton, having suffered an automobile accident a few years ago, learned first-hand about the limitations of UM coverage which prompted his interest to introduce corrective legislation.<sup>106</sup>

Insurance Commissioner Oxendine was opposed to the proposed “stacking” provision as originally introduced because there was no consumer choice written into the language.<sup>107</sup> Absent such a choice, all consumers would have seen their rates increase.<sup>108</sup> Since the Act was amended to make “stacking” optional, Commissioner Oxendine does not foresee potential problems for price-conscious consumers.<sup>109</sup> Although the Act will likely increase rates for those wanting to “stack” their UM coverages, consumers have the option of buying less expensive coverage similar to that under the current law (no “stacking”) or to forego UM coverage altogether.<sup>110</sup> Moreover, by allowing stacking of UM coverage, the Act gives Georgia consumers an option shared by more than twenty states, including South Carolina, Florida, and Alabama.<sup>111</sup>

### *Umbrella Coverage*

The Act amends subsection (a) of Code section 33-7-11 to provide that umbrella or excess liability policies are exempt from the

104. O.C.G.A. § 33-7-11(b)(1)(D)(ii) (Supp. 2008).

105. Staton Interview, *supra* note 7; Knox Interview, *supra* note 11; House Floor Video, *supra* note 73, at 6 min., 57 sec. (remarks by Rep. Tom Knox (R-24th)). According to Bill Clark, the Political Affairs Director for the Georgia Trial Lawyers Association, the bill was introduced because trial lawyers consistently found that their clients were confused about their UM coverage. Clark Interview, *supra* note 7.

106. Staton Interview, *supra* note 7.

107. Oxendine Interview, *supra* note 12.

108. *Id.*

109. *Id.*; *see also*, Staton Interview, *supra* note 7 (agreeing that the choice provision, although not part of his original legislation, is better for consumers).

110. Knox Interview, *supra* note 11.

111. House Judy-NC Video, *supra* note 7, at 1 hr. 21 min. 26 sec. (remarks by Sen. Cecil Staton (R-18th)).

requirements under this statute unless expressly indicated in those policies.<sup>112</sup> This provision of the Act was intended to address the recent Court of Appeals interpretation of the statute as requiring *all* insurance policies, including “umbrella” or “excess” policies, to provide the Code’s specified UM coverage or obtain a written rejection of such coverage.<sup>113</sup> Representative Knox indicated that before the *Abrohams* case, UM coverage under an umbrella policy was optional but “[t]he court said . . . they do have to cover all of the automobile liabilities unless the policy specifically says that it doesn’t.”<sup>114</sup> By expressly providing that the UM coverage requirements do not apply to umbrella or excess policies, unless affirmatively indicated in the policy, the Act “set[s] out [a choice for providers] in the Code so that there’s not a question about that to be before the court.”<sup>115</sup>

### *Offsets*

The Act amends subsection (i) of Code Section 33-7-11 to allow insurers to offset UM coverage benefits by compensation received by the innocent driver from workers compensation and medical payments coverage (“med pay”).<sup>116</sup> Med pay is medical coverage under a no-fault law which allows an insured to access coverage immediately rather than waiting until fault is established.<sup>117</sup> The legislative intent for this provision was to address a recent Georgia Supreme Court case interpreting the statute to allow offsets for property damage but not bodily injury.<sup>118</sup> According to Bill Clark, Political Affairs Director for the Georgia Trial Lawyers Association (“GTLA”), the insurance industry headed into this session intent on overturning *Dees* with a statutory provision allowing offsets for any benefit from any source.<sup>119</sup> The Speaker of the House, Representative Glenn Richardson (R-19th), agreed with GTLA’s position that such a

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112. O.C.G.A. § 33-7-11(a)(3) (Supp. 2008).

113. *Abrohams v. Atlantic Mut. Ins. Agency*, 638 S.E.2d 330, 333 (Ga. Ct. App. 2006).

114. House Floor Video, *supra* note 73, at 8 min., 35 sec. (remarks by Rep. Tom Knox (R-24th)).

115. *Id.*

116. O.C.G.A. § 33-7-11(i) (Supp. 2008).

117. Clark Interview, *supra* note 7.

118. *Id.*; Knox Interview, *supra* note 11.

119. Clark Interview, *supra* note 7.



law would eviscerate UM coverage, rendering such policies worthless.<sup>120</sup> Therefore, Speaker Richardson brokered discussions between GTLA and the insurance industry resulting in a compromise allowing offsets for workers compensation and medical pay coverage.<sup>121</sup>

According to Mr. Clark, GTLA is comfortable with this provision of the Act because there is fairness in allowing offsets for both workers compensation and medical pay.<sup>122</sup> First, workers compensation benefits include a “made whole” provision where the employer’s carrier has a right of subrogation, or right to be repaid compensation if the injured driver is “made whole” for all damages on a third-party claim.<sup>123</sup> However, under Georgia law, there is no such right of subrogation if the injured driver is not fully compensated.<sup>124</sup> Therefore, if insurers are allowed to offset UM benefits for workers compensation under the statute, the injured driver is, by definition, not made whole on the third-party claim.<sup>125</sup> Essentially, the injured driver is allowed to receive compensation from both workers compensation and UM coverage rather than “getting double whacked due to subrogation of the auto claim.”<sup>126</sup> Additionally, offsetting UM benefits for med pay makes sense because the same insurance company is paying for this medical coverage.<sup>127</sup>

### *Rate Regulation*

A controversial provision of the Act eliminates prior approval of rates for insurance coverages in excess of state mandated minimums in favor of a “Use & File” scheme.<sup>128</sup> Under such a regulatory

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Clark Interview, *supra* note 7.

126. *Id.*

127. *Id.*

128. Senate Floor Video, *supra* note 77, (remarks by Sen. Cecil Staton (R-18th) and Sen. David Shafer (R-48th)) (time stamp unavailable, CD on file with Georgia State University Law Review). Compare Knox Interview, *supra* note 11 and Oxendine Interview, *supra* note 12. Representative Knox described the new rate scheme as “File & Use.” But, according to Insurance Commissioner Oxendine,

scheme, insurers file a rate at the same time they start using it.<sup>129</sup> Then, after insurance providers begin using this rate, the Commissioner of Insurance is given the opportunity to approve the rate or reject it as unfairly excessive or inadequate.<sup>130</sup> Rather than eliminating all prior approval in favor of a complete open market system, S.B. 276 establishes a parallel system requiring prior approval for mandatory coverage rates while eliminating prior approval for all rates in excess of the mandatory coverage limits.<sup>131</sup> According to Representative Knox, bills have been introduced in previous sessions to move to a complete open market system and were supported by consumer advocates such as Clark Howard and Georgia State University insurance experts.<sup>132</sup> However, because Georgia requires drivers of private passenger vehicles to carry a minimum amount of coverage, the open market model does not apply to these consumers.<sup>133</sup> Therefore, according to Representative Knox, this bill creates a unique approach which could become a model for other states because it continues to regulate the rates for mandated coverages but allows competitive forces to work for all additional coverages.<sup>134</sup>

Although this rate provision was not included in the original bill, Senator Staton (R-18th) is “not unhappy with it” because he favors a free market approach.<sup>135</sup> According to Representative Knox, prior approval created inefficiencies and, consequentially, higher rates for consumers because insurance providers were forced to seek prior

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under a “File & Use” model, the insurer is required to file a rate and allow an opportunity for the Insurance Commissioner to object before the insurer can use the rate. Under the Act, there is no such waiting period and thus the scheme is more accurately described as “Use & File.”

129. Oxendine Interview, *supra* note 12.

130. Senate Floor Video, *supra* note 77, (remarks by Sen. Cecil Staton (R-18th)) (time stamp unavailable, CD on file with Georgia State University Law Review). Commissioner Oxendine indicated that, although theoretically, the Commissioner’s office could deny rates and require providers to discontinue these rates, such after-the-fact action would be very, very difficult to do. Oxendine Interview, *supra* note 12.

131. O.C.G.A. § 33-9-21(b) (Supp. 2008); *see also* Knox Interview, *supra* note 11.

132. Knox Interview, *supra* note 11. *See also* Senate Floor Video, *supra* note 77 (time stamp unavailable, CD on file with Georgia State University Law Review) (remarks by Sen. Cecil Staton (R-18th)).

133. Knox Interview, *supra* note 11; *see* O.G.G.A. §§ 33-34-4, 40-9-37(a) (Supp. 2008) (requiring drivers to have liability insurance with at least the minimum coverage required by law).

134. Knox Interview, *supra* note 11.

135. Staton Interview, *supra* note 7.

approval even if they wanted to lower rates.<sup>136</sup> Senator Staton and GTLA's Bill Clark both mentioned New Jersey as a model for the consumer benefits associated with deregulation of insurance rates where "75% of drivers in New Jersey are now paying less . . . around 30% less than they were paying just three years prior to that deregulation."<sup>137</sup> Proponents of the rate provision are confident deregulation will provide similar rate decreases for Georgia drivers because there are currently more than 600 entities selling insurance.<sup>138</sup> Therefore, opponents who fear that deregulation will lead to haphazard rates are "by definition . . . rejecting the free market system."<sup>139</sup>

Insurance Commissioner John Oxendine, however, took issue with all the assumptions proffered by proponents of the rate provision, citing substantive and procedural problems.<sup>140</sup> Substantively, the Commissioner believes the Act's rate scheme puts the consumer at the mercy of the insurance companies.<sup>141</sup> Commissioner Oxendine likened the scheme to that currently used for health insurance which charges what the market will bear.<sup>142</sup> Furthermore, he finds the proponent's comparison of other deregulated states misplaced and unfounded because "there is no pattern for states that don't review rates."<sup>143</sup> For example, New Jersey completely restructured their program which had previously required providers to accept any customer regardless of their driving history—this overhaul, not elimination of prior approval, is what allowed rates to drop.<sup>144</sup> In contrast, Commissioner Oxendine indicated that the National Association of Insurance Commissioners ("NAIC") has conducted comparative analyses and found no correlation between open

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136. Knox Interview, *supra* note 11.

137. Senate Floor Video, *supra* note 77 (remarks by Sen. Cecil Staton (R-18th)); Clark Interview, *supra* note 7.

138. Senator Staton understood there are about 600 insurance companies in Georgia. Staton Interview, *supra* note 7. Bill Clark of GTLA indicated that "a conservative estimate is that there are 200 distinct insurance providers . . . however, with subsidiaries, there are close to 700 entities selling insurance." Clark Interview, *supra* note 7.

139. Clark Interview, *supra* note 7.

140. Oxendine Interview, *supra* note 12.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

competition and lower prices.<sup>145</sup> Moreover, he cites North Carolina as having some of the cheapest rates while simultaneously having some of the most restrictive review of rates.<sup>146</sup>

Procedurally, Commissioner Oxendine stated that this legislation “passed in a subversive and undemocratic manner.”<sup>147</sup> Specifically, the bill was not assigned to either the Senate or House Insurance Committee but rather the Judicial Non-Civil Committee (“Judy-NC”) which is supposed to handle criminal matters.<sup>148</sup> According to Commissioner Oxendine, the insurance industry has been trying to get rid of prior approval for the last ten years but could never get it out of the Insurance committee, and thus “it could only pass as a backroom deal.”<sup>149</sup> Commissioner Oxendine claims the bill passed Judy-NC after Representative Knox slipped the rate provision in as a secret amendment, and then he would not yield to colleagues on the House Floor for debate; thus, there was “no notice, no public hearing, and no chance to discuss.”<sup>150</sup> Oxendine cited the passage of SB 276 as “a prime example of what is fundamentally wrong with the government.” Commissioner Oxendine recommended that the Governor veto SB 276 due to its flaws, both substantive and procedural.<sup>151</sup>

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145. *Id.*

146. Oxendine Interview, *supra* note 12.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* Senator David Shafer (R-48th) was also upset that the rate provision and other subjects were added to the bill without any committee hearing and without time for the Senate to adequately consider the changes. Senate Floor Video, *supra* note 77.

151. Oxendine Interview, *supra* note 12.