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# INSURANCE Insurance Generally: Provide for Limited Release of Settling Insurance Carrier and Insured Tortfeasor for Claims Arising out of Motor Vehicle Accidents Covered by Two or More Insurance Carriers

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# INSURANCE

***Insurance Generally: Provide for Limited Release of Settling Insurance Carrier and Insured Tortfeasor for Claims Arising out of Motor Vehicle Accidents Covered by Two or More Insurance Carriers***

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| CODE SECTION: | O.C.G.A. § 33-24-41.1 (amended) |
| BILL NUMBER: | HB 471 |
| ACT NUMBER: | 1171 |
| SUMMARY: | For claims arising out of motor vehicle accidents in which there is multiple insurance coverage, the Act provides that one carrier may settle with the claimant by paying its policy limits and thereby release itself and its insured from further liability except to the extent other insurance coverage may apply. The Act further provides that any carrier not settling shall continue to be liable to the extent of its policy limits. The Act maintains the status quo for bad faith and negligent refusal to settle. |
| EFFECTIVE DATE: | July 1, 1994 |

*History*

Georgia law previously required mandatory no-fault insurance coverage.[1] When mandatory no-fault insurance coverage was eliminated, individuals injured in automobile accidents were unable to receive funds immediately to compensate them for lost wages and to pay the costs of medical care.[2] The classic situation illustrating the need for this statute occurs when a tortfeasor's liability carrier has, for example, minimal policy limits of $15,000, and the claimant's underinsured motorist carrier has policy limits of $100,000.[3] If the claim is worth $30,000, the liability carrier want to settle, but the underinsured motorist carrier might not want to settle.[4] The claimant needs and deserves the proceeds from the liability carrier, but access to

1. O.C.G.A. § 33-34-4(a)(2) (1990), *repealed by* 1991 Ga. Laws 1608 (current version at O.C.G.A. § 33-34-4 (Supp. 1994); *see Legislative Review*, 8 GA. ST. U. L. REV. 99 (1992).

2. Telephone Interview with Rep. Ray Holland, House District No. 157 (July 8, 1994) [hereinafter Holland Interview]. Rep. Holland was the sponsor of HB 471. *Id.*

3. "Underinsured" will be used throughout this *Peach Sheet* to encompass both underinsured and uninsured motorist coverage.

4. Holland Interview, *supra* note 2.



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these funds is prohibited by the underinsured motorist carrier's failure to settle.[5]

In 1992, the Georgia General Assembly enacted Code section 33-24-41.1, which provided a mechanism allowing claimants to execute a limited release in favor of a tortfeasor's insurance carrier yet preserve a claim against the claimant's own underinsured motorist carrier.[6] However, the statute did not apply to any other instances in which there was stacked insurance coverage.[7] The tortfeasor was released from liability under this statute *only* to the extent of the payment made by the tortfeasor's liability insurer pursuant to the settlement. Basically, the amount paid by the tortfeasor's liability insurer would be deducted from a verdict against the tortfeasor.[8] Perhaps more importantly, former Code section 33-24-41.1 did not relieve the settling carrier of its duty to defend its insured.[9] Thus, there was no real incentive for the insurer to settle.[10]

Amended Code section 33-24-41.1 affects various vested interests and implicates sometimes tricky areas of the law, circumstances which warrant an evolutionary approach to solving the problem.[11] The General Assembly wanted to take small steps and carefully monitor the fallout along the way.[12] Representative Ray Holland introduced HB 471 to expand the application of the statute to any automobile accident case in which multiple insurance coverage was available and to relieve

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5. *Id.*; FRANK E. JENKINS III & WALLACE MILLER III, GEORGIA AUTOMOBILE INSURANCE LAW § 13-5 (1993). Often, even though a claimant may have reached an agreed settlement with a tortfeasor's insurer, the claimant's own underinsured motorist insurer may refuse to settle. The net effect of the underinsured motorist insurer's refusal is to preclude the claimant from settling with the tortfeasor's carrier because the settlement would potentially release the underinsured motorist carrier as well. Because an underinsured motorist carrier may insist the claimant obtain a judgment against the tortfeasor (i.e., a judgment in excess of the tortfeasor's liability insurer's policy limits) before fixing liability under an underinsured motorist policy, a stalemate ensued. JENKINS & MILLER, *supra.*

6. 1992 Ga. Laws 2514 (formerly found at O.C.G.A. § 33-24-41.1 (Supp. 1993)).

7. *Id.*

> In insurance law, the term "stacking" is used in a figurative sense as a way of determining the priority of payment of insurance benefits where two or more insurers provide insurance coverage for the same insured event. In a conceptual sense the primary policy forms the base and any other policies are "stacked" on top of the primary policy, each policy paying its benefits until exhausted in the order in which they are stacked.

JENKINS & MILLER, *supra* note 5, § 13-4.

8. JENKINS & MILLER, *supra* note 5.

9. Holland Interview, *supra* note 2; *see* 1993 Ga. Laws 91.

10. JENKINS & MILLER, *supra* note 5, § 13-5; Holland Interview, *supra* note 2.

11. Holland Interview, *supra* note 2.

12. *Id.*


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the insurer of its duty to defend in some instances.[13] In so doing, Representative Holland carefully crafted the bill to avoid constitutional problems.[14] The General Assembly cannot impair the obligation of contracts,[15] and insurance contracts provide for the insurer's duty to defend.[16] Thus, the bill avoids violating the Georgia Constitution by relieving the tortfeasor of all liability except to the extent other coverage may apply.[17] With no exposure, there is nothing for the settling carrier to defend.[18]

*HB 471*

The Act amends Code section 33-24-41.1 substantially. First and foremost, Code section 33-24-41.1, as amended, allows one insurance carrier to settle while allowing a claimant to preserve claims against another carrier regardless of whether the non-settling carrier provides underinsured motorist coverage or liability coverage.[19] The Act does so by allowing the claimant to accept a carrier's tender of the policy limits and then issue a limited release "applicable to the settling carrier and its insured . . . ."[20] The Act applies to any instance in which there are "two or more insurance carriers" covering the same claim.[21] The scope of the statute is therefore expanded significantly.[22]

Second, the limited release provided for in the Act releases the tortfeasor from "all personal liability from any and all claims arising from the occurrence on which the claim is based" except to the extent other insurance coverage may apply.[23] The net effect of this provision is to release the settling carrier of its duty to defend the underlying

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13. *Id.*
14. *Id.*
15. GA. CONST. art. I, § 1, ¶ 10.
16. Holland Interview, *supra* note 2.
17. *See* O.C.G.A. § 33-24-41.1(b)(2) (Supp. 1994); *cf.* 1992 Ga. Laws 2514 (relieving tortfeasor from liability only to the extent of the consideration paid by the tortfeasor's liability carrier).
18. Holland Interview, *supra* note 2.
19. O.C.G.A. § 33-24-41.1 (Supp. 1994).
20. *Id.*
21. *Id.*
22. *See supra* text accompanying note 7.
23. *Id.* § 33-24-41.1(b)(2) (Supp. 1994). Formerly, O.C.G.A. § 33-24-41.1 released the insured tortfeasor *only* to the extent of payments made in a settlement. Thus, the insured tortfeasor would remain liable if a judgment was obtained that exceeded the tortfeasor's policy limits. JENKINS & MILLER, *supra* note 5, § 13-5(d). This Act, by contrast, releases the tortfeasor of all personal liability except to the extent other insurance coverage is applicable, and thus provides the incentive for the tortfeasor's insurer to settle that was lacking under the 1992 statute. Holland Interview, *supra* note 2; *cf.* JENKINS & MILLER, *supra* note 5, § 13-5(a).


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claim.[24] Because the tortfeasor no longer has liability exposure, the settling carrier has nothing to defend, however any remaining carrier's duty to defend remains unaffected.[25] This provision accomplishes indirectly what the General Assembly could not accomplish directly due to constitutional limitations on the General Assembly's ability to impair the obligation of contracts.[26] The incentive for the settling carrier to settle is uninhibited by its continuing duty to defend because that duty is essentially eliminated.[27] However, the non-settling carrier's duty to defend remains intact.[28]

The original version of the bill abolished the underinsured motorist carrier's right of subrogation against the defendant.[29] However, there was no consensus on that particular provision.[30] Rather than subject the bill to probable defeat, HB 471 was amended to preserve the right of subrogation as well as the carrier's duty to defend a subrogation claim brought against its insured.[31]

Subsection (f) preserves a claimant's right to pursue claims against an insurance carrier for the negligent or bad faith refusal to settle.[32] As noted above, under the limited release provisions of subsection (b)(2), the tortfeasor is released from all personal liability except to the extent other coverage may apply.[33] In Georgia, a claim for negligent or bad faith refusal to settle accrues to the policyholder.[34] Frequently, a claimant acquires this right by virtue of assignment in consideration for a promise not to enforce an excess judgment against the tortfeasor.[35] However, because under HB 471 the tortfeasor is relieved of all personal liability, the General Assembly was concerned that the right of action for negligent or bad faith refusal to settle could be construed by the courts to have been abolished.[36] Thus, subsection (f) was added to preserve the status quo regarding the claimant's right to pursue claims or an insurance company's obligation to pay claims based on negligent or bad faith refusal to settle theories.[37]

*Stephen R. Chance*

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24. Holland Interview, *supra* note 2.
25. *Id.*
26. *Id.; see* GA. CONST. art. I, § 1, ¶ 10.
27. Holland Interview, *supra* note 2.
28. *Id.*
29. HB 471, as introduced, 1994 Ga. Gen. Assem.
30. Holland Interview, *supra* note 2.
31. O.C.G.A. § 33-24-41.1(d)(3) (Supp. 1994).
32. *Id.* § 33-24-41.1(f) (Supp. 1994).
33. *Id.* § 33-24-41.1(b)(2) (Supp. 1994).
34. JENKINS & MILLER, *supra* note 5.
35. *Id.*
36. Holland Interview, *supra* note 2.
37. *Id.*


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