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The Employer’s/Insurance Carrier’s Right to Subrogation Under the Georgia Workers’ Compensation Act (O.C.G.A. Section 34-9-11.1): How Long Will It Last?

Workers’ Compensation laws require an employer to pay workers’ compensation benefits to any covered employee injured within the scope of employment regardless of fault.¹ This obligation is unaffected by the fact that the injury requiring the employer to pay benefits is often caused by the negligence of a third party unrelated to the employment relationship. For this reason, most Workers’ Compensation Acts provide the innocent employer or insurance carrier a right of subrogation against the recovery from any responsible third party tort feasor to the extent of benefits paid to the injured employee.² This type of reimbursement scheme prevents double recovery on the part of the employee,³ allows

the injured worker to begin receiving compensation immediately after injury, and also provides "for some amount of cost containment by recompensing the employer, while still ensuring the employee receive[s] compensation for all injuries."6

Although the result may be the same, states have found different ways to grant a party liable to pay benefits the right to recover against any responsible third party tort feasor. At present, only one state, Ohio, fails to provide an employer or insurance carrier the right to subrogation in the event a compensable injury is caused by a third party.6 Eight states require an injured employee to elect to pursue either a common law action against the third party or to receive benefits under the applicable Workers' Compensation Statute, in which case the filing of a claim against the employer for workers' compensation benefits subrogates the employer to all rights the injured employee has against the negligent third party.7 All other states allow an injured worker to receive benefits as well as recover damages from any responsible third party, but provide some method of allowing the employer to seek reimbursement of benefits paid. For example, a few states grant the party paying benefits a subrogation lien against any damages received by the employee from the

6. OHIO REV. CODE ANN. § 4123.82(A) (Baldwin 1992); Ledex, Inc. v. Heatbath Corp., 461 N.E.2d 1299 (Ohio 1984) (employer who paid benefits to employee may not recover damages from responsible third party absent a contract between the employer and third party).
7. COLO. REV. STAT. ANN. § 8-41-203(1) (Supp. West 1994) (payment of compensation benefits operates as an assignment of cause of action against third party to the party liable for payment of benefits); KY. REV. STAT. ANN. § 342.700(1) (Michie/Bobbs-Merrill 1993) (employee may bring action against employer, third party or both, but may only recover from one; employee's receipt of compensation benefits allows party paying benefits to bring third party action); MINN. STAT. ANN. § 176.061(3) (West 1993) (payment of compensation subrogates employer or special compensation fund to the rights of the employee and allows them to bring action against third party); NEV. REV. STAT. § 616.560(b) (Supp. 1993) (if employee accepts benefits under the Workers' Compensation Act, then the party paying benefits may bring action against the third party); N.M. STAT. ANN. § 52-5-17(B) (Michie 1991) (acceptance of benefits operates as an assignment of the third party action to the party paying such benefits); OKLA. STAT. ANN. tit. 85, § 44 (West 1992) (if the employee elects to take benefits under the Workers' Compensation Act, the cause of action against the third party is assigned to the insurance carrier liable for payment of compensation); VA. CODE ANN. § 65.2-309(A) (Michie 1991) (claim under Workers' Compensation Act operates as an assignment to the employer of any right to recover damages which the injured employee or personal representative may have against any third party); WASH. REV. CODE ANN. § 51.24.050(1) (West 1990) (election to proceed against insurer operates as assignment to the department or self-insurer).
third party, but do not allow the subrogee to bring an action against the nonemployee. On the other hand, even more states allow both the party paying benefits and the injured employee to maintain an action against the third party tortfeasor. And finally, a majority of states

8. Haw. Rev. Stat. § 386-8 (1985) (if third party action is not brought by the employee within nine months from the date of injury against the third party, person paying compensation is subrogated to the rights of the injured employee); Mass. Gen. Laws Ann. ch. 118E, § 22 (Supp. West 1994) (commonwealth subrogated to all rights of the injured employee the extent of benefits paid); Neb. Rev. Stat. § 48-118 (1988) (when third party liable to employee or its dependents for injury, employer is subrogated to the rights the employee or dependents have against the third party); Or. Rev. Stat. § 656.593(1) (1989) (payment of benefits under the Workers' Compensation Act gives paying agency a lien against any damages recovered against third party); R.I. Gen. Laws § 28-35-58 (1986) (injured employee may recover both compensation and damages, but in the event he recovers damages he must reimburse the person who has paid compensation)); W. Va. Code § 23-2A-1(c) (1991) (party paying workers' compensation benefits has subrogation lien against any recovery by injured employee against third party tortfeasor, which lien remains effective until satisfied); Wyo. Stat. § 27-14-105(a) (1991) (if employee recovers or settles with third party tortfeasor, state is entitled to be reimbursed for compensation paid not to exceed one-third of total proceeds of recovery).

9. Ark. Code Ann. § 11-9-440(b)(1) (Michie 1987) (employer or insurer liable for compensation also has the right to bring action against third party but must notify claimant of his right to have private attorney to pursue any benefits to which claimant is entitled); Cal. Lab. Code § 3852 (Supp. West 1994) (both the insurer who pays compensation and the injured employee may maintain action against the third party tortfeasor); Conn. Gen. Stat. Ann. § 31-293 (Supp. West 1994) (both the employee and party paying benefits may bring action against third party, but whoever brings such action must notify the other of its right to join within thirty days of notification); Idaho Code § 72-223 (1989) (if compensation has been paid, the employer and employee may bring action against third party jointly, whereby the employee's failure to join gives the employer the sole right to bring the action); Ill. Rev. Stat. ch. 305 para. 11-22a (1993) (department may intervene or institute action themselves); La. Rev. Stat. Ann. § 23-10-1101(B) (West 1985) (party paying benefits, along with injured party, is given the right to proceed against third party); Md. Ann. Code § 9-1004(a) (1994) (upon payment of compensation to a covered employee, the fund is subrogated to the rights of the uninsured employer and may bring any third party action); Miss. Code Ann. § 71-3-71 (1989) (both the employee and employer may bring the third party action; if employee brings the action, he must give notice to the employer or insurer of his right to join); Mo. Rev. Stat. § 287.150(1) (Supp. 1994) (employer may bring action against third party as well); N.H. Rev. Stat. Ann. § 31-293(a) (Supp. 1994) (both injured employee and employer who has paid or is obligated to pay compensation may bring action against third party); Pa. Stat. Ann. tit. 77, § 671 (1992) (employer is subrogated to rights employee has against third party and may bring action independently); S.D. Codified Laws Ann. § 62-4-40 (1993) (once employer has paid or has become liable to pay compensation, the employer may bring action against any responsible third party and shall hold amount in excess of compensation paid for the benefit of the employee); Tex. Lab. Code Ann. § 417.001(b) (West 1994) (if employee claims benefits, insurance carrier is subrogated to all rights of injured employee and may enforce liability of the third party); Utah Code Ann. § 35-1-62(2) (1994) (once compensation is paid, the employer or insurance carrier becomes the trustee of the cause of action against the third
grant the employer or insurance carrier a subrogation lien to the extent of benefits paid against any recovery of damages by the injured employee from the third party but give the employee a limited amount of time to bring the action before it is assigned to the party paying benefits.10

party and may bring action in its own name or that of the employee; WIS. STAT. ANN. § 102.29(1) (Supp. West 1994) (both the injured worker and the party paying benefits may bring third party action).

10. ALA. CODE § 25-5-11(d) (1992) (if the injured employee fails to bring third party claim within the period specified by law, the employer or insurance carrier has additional six months to bring action); ALASKA STAT. § 23.30.015(b) (1990) (acceptance of workers' compensation operates as an assignment to the employer of all rights the injured employee has against the third party unless the employee commences action within one year); ARIZ. REV. STAT. ANN. § 23-1023(B) (1983) (if claim is not brought within one year by employee, the cause of action is assigned to the insurance carrier or party paying benefits); DEL. CODE ANN. tit. 19, § 2362(a) (1985) (if employee or personal representative fails to commence action within 260 days from occurrence of injury, then employer or insurance carrier may commence action); FLA. STAT. ANN. § 440.39 (West 1991) (employee's failure to bring third party action within one year operates as an assignment if the employer or insurance carrier gives notice to the employee and his counsel); O.C.G.A. § 34-9-11.1(c) (1992) (employee's failure to bring action against third party within one year from the date of injury operates as an assignment to the employer or its insurer, who has an additional year to bring action after the assignment); IND. CODE ANN. § 22-3-2-13 (West 1989) (employee's failure to institute third party action within 2 years after accrual of cause of action gives party paying benefits the right to bring the action for one year notwithstanding any statute of limitations to the contrary); IOWA CODE ANN. § 85.22(2) (West 1984) (failure of employee to bring action within 90 days gives employer or carrier the right to enforce third party action); KAN. STAT. ANN. § 44-504(b) (1993) (employee has one year from the date of injury while personal representative has 18 months; failure to bring action within specified time operates as an assignment); ME. REV. STAT. ANN. tit. 39-A, § 107 (Supp. West 1994) (employee's failure to bring third party claim 30 days after demand from employer subrogate employer to the rights of the insured and entitles the employer to bring action against the third party; MICH. COMP. LAWS ANN. § 418.827 (Supp. West 1994) (employee or dependents have one year from the date of injury to commence action against third party, then employer or carrier may commence action within time specified for commencement of action by statute); MONT. CODE ANN. § 39-71-414(3) (1994) (employee's failure to institute action within one year from date of injury gives insurer the right to institute action in name of employee); N.D. CENT. CODE § 65-01-09 (Supp. 1993) (if employee does not institute action 60 days after date of injury, the bureau may bring the action, and 60 days after both the employee and the bureau have failed to bring the action, the insurer may bring action); N.J. STAT. ANN. § 34:15-40(f) (West 1988) (if the employee fails to settle or commence action within one year of the accident, the employer or insurance carrier may thereafter commence settlement or action against third party provided it gives 10 days written demand to injured employee); N.Y. WORK. COMP. LAW § 29(1) (McKinney 1993) (failure to bring action within 6 months of the awarding of compensation operates as an assignment only if insurance carrier notifies claimant in writing at least 30 days prior to the expiration of the 6 month period); N.C. GEN. STAT. § 97-10.2(b) (1991) (employee has exclusive right to bring action for one year after which time both have the right to bring the action; 60 days prior to the expiration of the statute of limitations, all rights revert back to the employee); S.C. CODE ANN. § 42-1-560 (Law Co-
“Under all forms, however, the ultimate result of following the statutory procedure is approximately the same: reimbursement of the payor of compensation, with any excess — or most of the excess — going to the employee.”

Like most Workers' Compensation schemes, the Georgia Workers' Compensation Act provides an injured employee an exclusive remedy against its employer in the case of a work-related injury. However, the exclusive remedy against the employer does not prevent the injured worker from maintaining a common law action against any negligent third party responsible for the injury, as long as the third party is not an employee of the same employer. The employee's potential double recovery illustrates the need to give the innocent employer, or whoever pays benefits, a right of recovery equivalent to the amount of compensation it has paid against the negligent third party. Despite this, Georgia employers have not always enjoyed the right to subrogation. As enacted in 1920, the Georgia Workers' Compensation Act failed to provide the employer any right to subrogation. However, the Georgia General Assembly saw fit to amend the Act in 1922, thereby allowing the injured worker to receive benefits from its employer as well as maintain actions against any responsible third party, while at the same time subrogating the party paying benefits to the rights of the employee to the extent of benefits paid. The right to subrogation remained in

op. 1985) (if the employee fails to bring action within one year from the date in which the carrier accepts liability or 30 days prior to the expiration of when the action may be brought, the right of action passes by assignment to the carrier provided the carrier gives 20 days notice to the employee or the party entitled to bring the action); TENN. CODE ANN. § 50-6-112(d)(2) (1991) (failure of employee to bring action within one year from date of injury operates as assignment to employer of any cause of action in tort the employee may have against the third party); 1994 VT. LAWS 225 (amending VT. STAT. ANN. tit. 21, § 624(a)) (if employee or personal representative fail to commence action within one year from date of injury, the employer or carrier may commence the action within the time required by the applicable statute of limitations); 33 U.S.C. § 933(b) (1986) (acceptance of compensation operates as an assignment to employer of all right to recovery unless action is commenced against third party within six months after acceptance of benefits).

11. LARSON, THE LAW OF WORKERS' COMPENSATION § 74.00.
13. Id. § 34-9-11(a).
14. Id.
15. 1920 Ga. Laws 167; Atlantic Ice & Coal Corp. v. Wishard, 30 Ga. App. 730, 19 S.E. 429 (1923) (holding the employer has no right to subrogation where it is not provided for by statute within the Georgia Workmen's Compensation Act).
effect until repealed in 1972.\textsuperscript{17} This inequity was the apparent result of the Georgia Legislature’s reasoning that the statutory balance of rights, requiring the employer to pay benefits without regard to fault in exchange for tort immunity, warranted stripping the innocent employer of any right to reimbursement for benefits it paid an employee as the result of an injury it did not cause.\textsuperscript{18} Twenty years later, in 1992, the legislature once again granted a party paying workers’ compensation benefits a right to subrogation, but in a form never seen before in Georgia.\textsuperscript{19}

Under the Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-11.1, an injured employee, or those to whom his right of action survives, suffering a work related injury as the result of third party negligence may pursue a common law tort action against the negligent third party,\textsuperscript{20} so long as the third party is not an employee of the same employer.\textsuperscript{21} However, should the employee recover from the third party, the employer or its insurer shall have a subrogation lien equivalent to the amount of compensation paid.\textsuperscript{22} While the employer or insurer is also granted the right to intervene in any such action in order to protect its lien, it may only recover the amount of disability and medical benefits paid so long as the employee has been fully compensated after receiving benefits and third party damages.\textsuperscript{23}

However, the employee, or those to whom his right of action survives, is only given one year from the date of injury in which to file the third party claim.\textsuperscript{24} Failure to institute action within this time operates as an assignment to the employer or its insurance carrier.\textsuperscript{25} Should the employer or insurer recover damages from the third party, it is not entitled to retain any amount over and above the compensation it has paid.\textsuperscript{26} In any event, the employer, or its insurer, has only one year

\textsuperscript{17} 1972 Ga. Laws 3, 4.  
\textsuperscript{19} O.C.G.A. § 34-9-11.1 (1992). To date, § 34-9-11.1 has only been cited twice: Maryland Cas. Ins. Co. v. Glomaki, 210 Ga. App. 759, 437 S.E.2d 616 (1993) (holding that § 34-9-11.1 applied since Georgia was the place were the tort occurred, despite the fact that claimant had previously recovered workmen' compensation under Illinois law); Government Employees Ins. Co v. Hirsh, 211 Ga. App. 374, 439 S.E.2d 59 (1993) (illustrating the expansion of subrogation and assignment rights in Georgia).  
\textsuperscript{21} Id. § 34-9-11.  
\textsuperscript{22} Id. § 34-9-11.1(b).  
\textsuperscript{23} Id.  
\textsuperscript{24} Id. § 34-9-11.1(c).  
\textsuperscript{25} Id.
after the assignment within which to commence the cause of action against the third person.\textsuperscript{27}

As recognized by one noted commentator, the present status of section 34-9-11.1 "leaves more questions than answers."\textsuperscript{28} The purpose of this Article is to attempt to point out and analyze some of these problems, particularly those created by the assignment of the cause of action to the employer or insurer if the employee fails to bring action within one year from the date of injury.\textsuperscript{29} Initially, the Article will attempt to reconcile the assignment provision with Georgia’s prohibition against the assignment of personal injury actions.\textsuperscript{30} Second, the Article will analyze the potential viability of a possible equal protection challenge on behalf of injured employees receiving workers’ compensation, since the time for bringing any third party action is limited to one year from the date of injury rather than the two year period allowed for ordinary personal injury plaintiffs.\textsuperscript{31} Next, the Article examines the uncertain effect the assignment provision has on the expert affidavit requirement in professional malpractice cases.\textsuperscript{32} Finally, the Article will examine the only case to address even one of the many questions presented by section 34-9-11.1, which limits the employer’s or insurer’s recovery to the amount of disability benefits and medical expenses actually paid.\textsuperscript{33} Given the lack of judicial or legislative interpretation underlying section 34-9-11.1, this Article will rely heavily on statutes and cases from foreign jurisdictions in an effort to illustrate potential legal justifications for section 34-9-11.1 as well as recommend a solution which obviates the problems discussed in this Article.

\textsuperscript{27} Id. However, if the cause of action described in subsection (a) of this Code section arises in a jurisdiction other than Georgia which has a statute of limitations greater for personal injury or wrongful death actions than the statute of limitations provided in this Code section, then the court hearing the cause of action shall apply the statute of limitation which provides the injured employee or those to whom his right of action survives the greatest amount of time in which to instigate an action. Id.

\textsuperscript{28} Potter & Heirs, Worker’s Compensation Law and Practice § 8-4 Subrogation (Supp. 1994).

\textsuperscript{29} See O.C.G.A. § 34-9-11.1(c).


\textsuperscript{31} See O.C.G.A. § 9-3-33 (1982) (providing a two year statute of limitations for personal injury actions).

\textsuperscript{32} See O.C.G.A. § 9-11-9.1 (1993) (requiring a party bringing an action for professional malpractice to file an expert affidavit contemporaneously with the complaint).

I. THE ASSIGNMENT PROVISION CONFLICTS DIRECTLY WITH O.C.G.A. SECTION 44-12-24, PROHIBITING THE ASSIGNMENT OF PERSONAL INJURY ACTIONS

In its present form, the assignment provision in section 34-9-11.1 will inevitably be challenged as violating O.C.G.A. section 44-12-24.34 Pursuant to section 44-12-24, "[a] right of action for personal torts or for injuries arising from fraud to the assignor may not be assigned."

This provision is basically the codification of the common law principle prohibiting the assignment of personal injury actions.35 In contrast, section 34-9-11.1 (c) provides that "[failure] on part of the injured employee . . . to bring [any third-party] action within the one-year period shall operate as an assignment to the employer or such employer's insurer of any cause of action in tort which the injured employee . . . may have against any other person . . . ."36 Therefore, section 34-9-11.1 (c), by its express terms, is in direct conflict with section 44-12-24. Obviously, this conflict must be reconciled if the employer is to retain the right to subrogation as it presently exists.

A. Georgia Case Law

Georgia case law interpreting section 44-12-24 strictly prohibits any subrogation provision assigning a cause of action for injuries to the person. For instance, in Wrightsman v. Hardware Dealers Mutual Life Insurance Co.,38 the Georgia Court of Appeals held that a provision of an automobile medical expense insurance policy, purporting to subrogate anyone paying pursuant to the policy to all "rights of recovery" the insured may have against any person, was in violation of Georgia Code Annotated section 85-1805 (now O.C.G.A. section 44-12-24).39 The court in Wrightsman determined that the subrogation provision amounted to

no more than an agreement that the injured person or persons covered under the provisions of the policy providing insurance for medical expenses shall, in the event of any payment thereunder, assign to the insurance company his claim against any third party tortfeasor inflicting the injuries resulting in the medical expenses.40

35. Id.
39. Id. at 306, 147 S.E.2d at 861.
40. Id. at 307, 147 S.E.2d at 861.
As such, the subrogation provision was void in view of section 85-1805 (now O.C.G.A. section 44-12-24). Therefore, any subrogation provision assigning the right to bring a "cause of action" is void in light of section 44-12-24.

Subsequently, the Georgia Court of Appeals, in Government Employees Insurance Co. v. Hirsh, nullified a subrogation provision in an automobile insurance policy that allowed anyone paying under the policy to sue any responsible third party as violating section 44-12-24, thereby reaffirming its holding in Wrightsman. Although Hirsh solidifies the principle that any provision purporting to assign the right to bring an action for personal injuries is a violation of Georgia law, the decision is important for other reasons. Although the court was unpersuaded, the defendant in Hirsh, Government Employees Insurance Company ("GEICO"), relied on section 34-9-11.1 to illustrate a trend in Georgia to expand subrogation and assignment rights. However, in doing so, GEICO failed to recognize that although section 34-9-11.1 appears to do just that, it has yet to be determined whether section 34-9-11.1 is, itself, in violation of the principle codified in section 44-12-24. Perhaps this is why the court failed to accept GEICO's argument and refused to expand assignment rights by not enforcing the subrogation provision.

It is important to note that Georgia courts will uphold a subrogation provision as long as it does not assign the right to bring a cause of action for personal injury. In Shook v. Pilot Life Insurance Co., the Georgia Court of Appeals faced a challenge to an insurance policy that subrogated the insurer paying under the policy to the "right of recovery" the insured had against another person. The court looked to the language of the subrogation provision, merely subrogating the insurer to "the right of recovery", to find that the provision did not effect an assignment of a cause of action in violation of section 44-12-24, but rather created a valid and enforceable right of subrogation. In doing so, the court defined the word "assign" as "transfer[ing] so as to vest title in the recipient and allow such person to sue directly." In addition, the court reasoned that in order to effect an assignment rather

41. Id.
43. Id. at 375, 439 S.E.2d at 60.
44. Id.
47. Id. at 714, 373 S.E.2d at 814.
48. Id. at 715, 373 S.E.2d at 814.
49. Id. (quoting McLanahan v. Keith, 135 Ga. App. 117, 119, 217 S.E.2d 420 (1975)).
than create a right to subrogation, the agreement must not merely transfer the insured's "rights of recovery," but also his "right of action." The court also distinguished Wrightsman as creating an assignment rather than a right to subrogation, because the subrogation provision it involved "required the insured to 'execute and deliver [such] instruments and papers and to do whatever else is necessary to secure such rights [and do] nothing after loss to prejudice such rights." In other words, the provision in Wrightsman assigned the right to bring the cause of action rather than merely giving the insurer the right to be reimbursed for benefits paid the insured. Since no such language was present in Shook, the subrogation provision created a valid right of subrogation rather than an assignment of a personal injury action. Therefore, as long as the subrogation provision does not assign the cause of action, it is valid and does not violate section 44-12-24.

The distinction recognized by the Georgia Court of Appeals in Shook will be of no benefit to a party seeking to defend section 34-9-11.1 (c) as not violating the prohibition against assignment of a personal injury action. As you will recall, the result in Shook was not only dependent upon the language of the subrogation provision, but also the characterization of an assignment as the transferring of title to the recipient so as to allow him to sue directly. The express language of section 34-9-11.1 (c) provides that "[failure on part of the injured employee . . . to bring [any third party] action within the one-year period shall operate as assignment to the employer or such employer's insurer of any cause of action in tort . . . ." Therefore, section 34-9-11.1, by its own admission, assigns the cause of action to the employer or insurer, who, in turn, has the right to bring the action. As such, it would appear to be in violation of the principle codified in section 44-12-24.

From all indications, the only apparent distinction between the right of subrogation provided in section 34-9-11.1 and the subrogation provisions struck down in Wrightsman and Hirsh is that the right under section 34-9-11.1 obviously arises by statute rather than by contract. Although there is a distinction, there appears to be no reason why the same rationale should not be extended to section 34-9-11.1, especially in light of the fact that the legislature has seen fit to codify Georgia's public policy of forbidding the assignment of personal injury actions. If so, the party defending the statute will likely have to rely on the argument that

51. Id., 373 S.E.2d at 814-15.
52. Id. at 715, 373 S.E.2d at 814.
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section 34-9-11.1 is a statutory exception to section 44-12-24. The only
problem with that argument is that section 44-12-24 expressly provides
for exceptions, none of which includes section 34-9-11.1 or any other
provision of the Georgia Workers' Compensation Act. 54

B. A Variety of Foreign Jurisdictions Have Judically Altered the
Express Terms of Similar Statutes in Order to Reconcile the Conflict
Between Subrogation Provisions That Assign a "Cause of Action" and
the Prohibition Against Assignment of Personal Injury Actions

A variety of foreign jurisdictions confronted with the contradiction
between subrogation provisions that expressly assign a cause of action
to the employer or insurance carrier and the principle prohibiting the
assignment of personal injury actions have found different ways to
justify the conflict.

Courts confronted with the issue under the workers' compensation
laws of New York have justified this conflict by looking to the intent
behind the subrogation provision in order to alter the express language
of the statute. 55 For instance, in Zurich General Accident & Liability
Insurance Co. v. Ackerman Brothers, Inc., 56 the Court of Errors and
Appeals of New Jersey applied New York's subrogation provision despite
its conflict with New Jersey law prohibiting an assignment of a personal
injury action. 57 In Ackerman Brothers, an employee received workers'
compensation benefits under New York law and, by failing to bring
action against the responsible third party within one-year from the date
of injury, 58 assigned the cause of action to the insurance carrier that
had paid benefits. The carrier, as assignee, brought action against the
third party allegedly liable for the injuries in New Jersey. The court, in
determining whether the assignment provision under New York law was
against the public policy of New Jersey and, therefore, inapplicable,
recognized the well established law of New Jersey forbidding "assign-
ment of choses in action arising from tortious injury to the
person." 59 In reconciling the inherent conflict, the court looked to the object of the
act, to protect the rights of both the injured workman and the insurance

54. See O.C.G.A. § 44-12-24 (1982) providing: "Except for those situations governed by
Code Sections 11-2-210 and 11-9-402, a right of action is assignable if it involves, directly
or indirectly, a right of property. A right of action for personal torts or from injuries
arising from fraud to the assignor may not be assigned."
56. 11 A.2d 52 (N.J. 1940).
57. Id. at 52-53.
59. Ackerman Bros., 11 A.2d at 53.
carrier, in order to circumvent the express language of the New York statute:

We are not unmindful of the language of the New York statute . . . wherein it does use the word ‘assignment,’ but taking the object of the act into consideration, the title and its context, it seems clear to us that the use of the word is merely a matter of phraseology and not an assignment within the meaning of our cases.\(^{60}\)

Therefore, the court held that New York's assignment provision, despite its express language, created a new cause of action, the right to subrogation, rather than an outright assignment of the insured's claim for personal injuries.\(^{61}\)

Since 1916, New York courts, like the court in *Ackerman Brothers*, have reconciled the conflict created by the New York assignment provision by judicially altering the express language of the statute. In *United States Fidelity & Guaranty Co. v. New York Rys. Co.*,\(^{62}\) an employee injured within the scope of his employment sought workers' compensation benefits from his employer. At the time the action was brought, section 29 of the Workers' Compensation Law of New York provided that the employee's election to receive benefits from the employer operated as an “assignment” to the employer of any cause of action the employee had against any responsible third party.\(^{63}\) The court recognized that under both the common law as well as the “Personal Property Law” of New York, a claim for personal injury was not transferable.\(^{64}\) However, in order to uphold the assignment provision, the court applied principles of statutory construction to harmonize section 29 with the previously enacted provision prohibiting the assignment of a personal injury claim.\(^{65}\) Looking to the intention of the act to modify and alter the words of the statute, the court held that since the purpose of section 29 was to establish a self-supporting state insurance fund to compensate employees in certain classes of employment while at the same time fixing the lowest possible premium rates for employers, section 29 had to be construed as only impliedly repealing or modifying the law regarding non-transferability of a personal injury action.\(^{66}\) As a result, subsequent courts recognized section 29 as creating special statutory authority for the assignment of

\(^{60}\) *Id.*

\(^{61}\) *Id.*

\(^{62}\) 93 Misc. 118 (1916).

\(^{63}\) See *id.* at 119.

\(^{64}\) *Id.* at 123.

\(^{65}\) *Id.* at 123-24.

\(^{66}\) *Id.* at 124-25.
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a cause of action against a third party despite the general rule prohibiting such assignments.\(^7\)

As another example, the assignment provision under Oklahoma's subrogation statute has been upheld although Oklahoma law prohibits the assignment of a personal injury action. In Oklahoma Natural Gas Co. v. Mid-Continental Casualty Co.,\(^68\) a workers' compensation carrier brought action against a third-party tortfeasor to recover benefits it paid its insured as the result of the third-party's negligence. Under Oklahoma's subrogation provision, the insurance carrier liable for payment of benefits is assigned any claim the employee has against another person once the employee elects to recover compensation.\(^69\) The United States Court of Appeals for the Tenth Circuit held, without explanation, that the workers' compensation carrier had an assignment by law of so much of the injured employee's claim against the third party as to reimburse the insurer for the amount it had paid.\(^70\) Such partial assignment was not affected by the general rule against assignment of a personal injury claim.\(^71\)

Finally, the Court of Appeals of Arizona, in Stirewalt v. P.P.G. Industries, Inc.,\(^72\) inadvertently addressed this issue in a unique challenge to its assignment provision\(^73\). In Stirewalt, plaintiff received workers' compensation benefits as the result of her husband's work-related death, and, pursuant to Arizona Revised Statutes section 23-1023(B),\(^74\) assigned her cause of action against the allegedly negligent third party after failing to bring action within one year after the action accrued. However, the insurance carrier reassigned the action to plaintiff, who filed the wrongful death claim against defendants one day after the one-year deadline.

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\(^68\) Oklahoma Natural Gas Co. v. Mid-Continental Cas. Co., 268 F.2d 509 (10th. Cir. 1959).


\(^70\) Mid-Continent, 268 F.2d at 511.

\(^71\) Id.

\(^72\) 674 P.2d 320 (Ariz. 1983).

\(^73\) ARIZ. REV. STAT. ANN. § 23-1023(B) (1983).

\(^74\) ARIZ. REV. STAT. ANN. § 23-1023(B), at the time, provided:

If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof.

\(^75\) Id.
before the two-year statute of limitations expired. Prior to trial, section 23-1023(B) was amended to expressly allow the insurer, as assignee of the employee’s cause of action against the third party, to reassign the action to the employee and to allow the action to be brought after reassignment as if it could have been filed in the first year following the injury. Defendants in the wrongful death action challenged the retroactivity of the reassignment provision in section 23-1023(B) as depriving them of the vested right to the common law defense of non-assignability of a personal injury action. Although addressing the issue of reassignment, the court held that “[d]efendants [had] no vested right in the common law defense of non-assignability of tort claims”, but did have “the right to assert the one year limitations statute of A.R.S. section 23-1023.” Therefore, the court impliedly asserted that if the defense of non-assignability of tort claims arose by statute, as is the case in Georgia, rather than by common law, the assignment provision of section 23-1023 would have been invalid.

Therefore, unless a party defending the assignment provision of section 34-9-11.1(c) can persuade the court to judicially alter the express language of the statute, as was the case previously discussed in Ackerman Brothers and United States Fidelity, the assignment of the cause of action to the employer under section 34-9-11.1(c) would seem to violate section 44-12-24. After all, section 34-9-11.1(c) expressly provides that “[f]ailure on part of the injured employee . . . to bring [any third-party] action within the one year period shall operate as an assignment to the employer or such employer’s insurer of any cause of action in tort which the injured employee . . . may have against another person . . . .” Hence, after the expiration of the one-year period in which the employee may bring the third party action, the employer or insurer may bring the action itself. Consistent with the Georgia Supreme Court’s holding in Shook, the employer’s right to “bring the cause of action” violates the prohibition of assignment of personal injury actions codified in section 44-12-24.

C. Should a Court Find That the Assignment to the Employer or Insurer Does Not Violate Section 44-12-24, the Action May Not Be Reassigned to the Employee

When a court finds that the assignment of the employee’s cause of action pursuant to section 34-9-11.1(c) is not a violation of section 44-12-
24, even more questions arise. It is inevitable, for whatever reason, that an employer or insurer, who has been assigned the employee's cause of action, will attempt to reassign the cause of action back to the employee. For this reason, it is necessary to determine whether the employer or insurer, as assignee, may reassign the claim to the employee. Since section 34-9-11.1 does not provide for reassignment, a court facing the issue is likely to find that the assignment back to the employer is in violation of section 44-12-24.

While there is an absence of Georgia law on the issue, an analysis of foreign jurisdictions addressing the issue indicates that once the claim is assigned by operation of law to the party paying benefits, the claim may not be reassigned to the employee unless explicitly authorized by statute. In *Ross v. Superior Court,* the Supreme Court of Arizona held that an insurance carrier who assigned a claim for personal injuries under Arizona's subrogation provision could not reassign the claim to the employee. In *Ross,* an employee, injured in the course of employment on July 23, 1979, received workers' compensation benefits from its employer's insurance carrier. On July 17, 1980, the insurance carrier assigned to the employee its interest in the claim for personal injuries against the third party one week prior to the time the claim would have been assigned to the carrier under Arizona Revised Statute section 23-1023(B). At the time of the action, section 23-1023(B) provided:

> If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for payment thereof.

The employee brought action against the third party on September 19, 1980, outside the one-year period in which he was allowed to bring the action under section 23-1023(B). Defendants in the action filed a motion for summary judgment on the grounds that section 23-1023(B) deprived the employee of an action to prosecute. The court noted that although an unliquidated claim for personal injuries was not assignable, the

80. Id. at 891.
81. Id. at 890 (quoting ARIZ. REV. STAT. ANN. § 23-1023 (1983)).
82. Id.
Arizona Legislature has the power to give the right to acquire an interest in the claim of another person, which it did in enacting section 23-1023(B). Therefore, the court held "that a claim assigned to the insurer by operation of [law] was neither assignable to a third person nor reassignable to the insurance claimant since the statute did not expressly authorize reassignment."

However, once section 23-1023 was amended to allow for reassignment, courts did not hesitate to uphold any reassignment from the insurance carrier to the employee. In Starks v. S.E. Rykoff & Co., the insurance carrier, who had been assigned the claim pursuant to section 23-1023 (B), reassigned the claim to the injured employee. After removal to federal court, the district court granted defendant's motion for summary judgment because the reassignment was invalid under Arizona law. While the case was pending on appeal, however, the Arizona Legislature amended section 23-1023(B) to expressly provide for reassignment. The court noted that prior to oral argument, the Arizona Supreme Court upheld the reassignment provision (and its retroactivity) as constitutional under the Arizona Constitution. As such, the court upheld the reassignment as valid. Therefore, a workers' compensation carrier, as assignee of a claim for personal injuries, may not reassign the claim to the injured worker unless specifically authorized by statute.

For the foregoing reasons, if the third party claim may be assigned to the employer or its insurer, the claim may not be reassigned to the injured employee. Unlike Arizona's statute, section 34-9-11.1(c) only provides for assignment to the employee or its insurer and does not provide that the claim may be reassigned to the employee. Therefore, any reassignment would certainly violate section 44-12-24.

83. Id. at 891.
84. Id.
85. 673 F.2d 1106 (9th Cir. 1982).
86. Id. at 1108.
88. 673 F.2d at 1108. See Chevron Chemical Co. v. Superior Court, 641 P.2d 1275 (Ariz. 1982).
89. Starks, 673 F.2d at 1108. See also Stirewalt v. P.P.G. Indus., Inc., 674 P.2d 320 (Ariz. 1983) (upholding the constitutionality of the reassignment provision in § 23-1023 (B)).
II. LIMITING THE INJURED EMPLOYEE'S TIME FOR BRINGING A PERSONAL INJURY ACTION AGAINST THE THIRD PARTY PROVIDES THE BASIS FOR AN EQUAL PROTECTION CHALLENGE

Under section 34-9-11.1, an injured employee suffering an injury compensable under the Workers' Compensation Act has only one year from the date of injury to bring action against any responsible third party, whereby "[f]ailure on the part of the injured employee or those to whom his right of action survives to bring such action within the one-year period ... operate[s] as an assignment" of the claim to the insurer or employer. For this reason, an injured worker receiving workers' compensation benefits is accorded different treatment than an ordinary personal injury plaintiff, who has two years from the time in which the cause of action accrues to file a personal injury action. As with any statute according different treatment to a specific class of persons, employers and insurance carriers will have to justify the classification created by section 34-9-11.1(c) under an equal protection analysis.

It is important to note that individuals covered under the Georgia Workers' Compensation Act receive protection from both the Georgia and United States Constitutions. Therefore, since a state constitution may provide greater protection than the guarantees embodied in its federal counterpart, it is necessary to analyze and justify the classification created by section 34-9-11.1(c) under both the Georgia and United States Constitutions.

A. There is Some Question as to Whether the Georgia Constitution Provides Greater Protection to its Citizens Than its Federal Counterpart

In its present form, the equal protection clause of the Georgia Constitution provides: "Protection to person and property is the paramount duty of the government and shall be impartial and complete. No person shall be denied the equal protection of the law." However, prior to the enactment of the 1983 Constitution, the Constitution of Georgia of 1976 did not include the second sentence of the present equal protection clause. It is therefore necessary to analyze the classification created by section 34-9-11.1(c) under both the Georgia and United States Constitutions.

91. Id. § 9-3-33.
92. Id. § 34-9-1.
94. Id. at 376, 418 S.E.2d 29 n.1.
95. GA. CONST. art. I, § I, para. II.
protection clause, but only provided: "Protection to person and property is the paramount duty of government and shall be impartial and complete."  

It was not until the enactment of the 1983 Constitution that the Georgia Legislature added the second sentence, specifically providing individuals "equal protection of the laws." As a result of the 1983 amendment, the question arises as to whether the Georgia Constitution provides its citizens greater protection than the Fourteenth Amendment of the United States Constitution.

In 1991, the Supreme Court of Georgia, in *Denton v. Con-Way Southern Express, Inc.*, held that the equal protection clause of the Georgia Constitution provided its citizens protection over and above that guaranteed by the Fourteenth Amendment. In *Denton*, the court faced an equal protection challenge to O.C.G.A. section 51-12-1(b), admitting a plaintiff’s collateral sources of recovery in any action seeking special damages for tortious injury. While finding section 51-12-1(b) in violation of the equal protection guarantees of the Georgia Constitution, the court recognized the effect of the 1983 Amendment to Georgia’s equal protection clause.

The court rejected the appellant’s argument that the addition of the second sentence, guaranteeing that “[n]o person shall be denied the equal protection of the laws,” merely codified the court’s previous interpretation of the clause in its old form, i.e. that the Georgia Constitution states in other language the same principle guaranteed by the United States Constitution. In doing so, the court found that to accept the appellant’s argument would render the first sentence of the equal protection clause “inoperative,” “idle,” and

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96. GA. CONST. OF 1976, art. I, § I, para. II.
98. Id. at 45, 402 S.E.2d at 271.
99. O.C.G.A. § 51-12-1(b) (Supp. 1995) provides:
   In any civil action, whether in tort or in contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is sought to be introduced by the plaintiff, evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, or disability benefits or payments available to an insured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact. The trier of fact, in its discretion, may consider such available benefits or payments and the cost thereof but shall not be directed to reduce an award of damages accordingly.

Id.
100. Denton, 261 Ga. at 43-44, 402 S.E.2d at 271.
101. Id.
"nugatory." In effect, the court recognized the distinctive language within the Georgia Constitution, requiring statutes to be "impartial and complete," and held that, as such, "the Georgia Constitution offers Georgia citizens greater rights and more benefits than the Federal Constitution." Therefore, after Denton, a Georgia statute not only had to withstand scrutiny under the Fourteenth Amendment of the Federal Constitution, but also the stricter "impartial and complete" standard of the Georgia Constitution.

However, a plurality of the same court, in Grissom v. Gleason, subsequently abandoned the rationale it applied in Denton and limited the "impartial and complete" standard of the Georgia Constitution to provide no greater protection than that provided by the Fourteenth Amendment. In Grissom, the plurality faced an equal protection challenge to a provision of the Georgia Motor Carrier Act, allowing an injured person to sue both the motor and insurance carrier in the same action. In upholding the statute, the plurality abandoned the standard supposedly set forth in Denton, and held that the protection provided by Georgia's equal protection clause was coextensive with the protection guaranteed by the Fourteenth Amendment. Specifically disapproving of Denton "to the extent it suggest[ed] a new equal protection analysis," the plurality reasoned that Denton failed not only to provide any standard for application of the "impartial and complete" standard, but did not explain "what the provision means, to whom it applies, or how it offers more protection than the explicit guarantee of equal protection immediately following it." In addition, the plurality found that the legislative history failed to support giving a new meaning to the "impartial and complete" standard. Therefore, since no fundamental right or suspect class was involved, the plurality...

103. Denton, 261 Ga. at 45, 402 S.E.2d at 271.
104. Id.
105. Id. (citations omitted).
107. Id. at 376, 418 S.E.2d at 29.
108. O.C.G.A. § 46-7-12(e) (1992) provides:

   It shall be permissible under this article for any person having a cause of action arising under this article in tort or contract to join in the same action the motor carrier and its surety, in the event a bond is given. If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action, whether arising in tort or contract.

Id.
110. Id.
111. Id.
112. Id. at 377, 418 S.E.2d at 29-30.
upheld the statute under the rational relationship test, which permits classifications that are based on rational distinctions bearing a direct relationship to the purpose of the statute.113

As a result of the plurality in Grissom, it appears that the protection provided Georgia citizens under the Georgia Constitution is basically the same protection provided by the United States Constitution. It is important to note that the plurality in Grissom did not, however, "foreclose the possibility that [the Georgia Supreme Court] may interpret the equal protection clause in the Georgia Constitution to offer greater rights than the federal equal protection clause as interpreted by the U.S. Supreme Court."114 In addition, special concurrences in Grissom by Justices Bell, Benham and Sears-Collins, as well as the dissent by Justice Weltner, lend support to the proposition that the separate analysis formerly required by Denton may yet still apply.115

B. Two States Have Upheld Similar Classifications Under the Fourteenth Amendment to the United States Constitution

The Fourteenth Amendment to the United States Constitution provides in part that "no state shall . . . deny to any person within its jurisdiction the equal protection of its laws."116 Therefore, any state providing an employer or insurer the right to subrogation in the event it pays compensation benefits as the result of an injury caused by a third party must comply with the equal protection requirements of the Fourteenth Amendment.117 To date, research has uncovered only two equal protection challenges to state subrogation statutes that also assign the employees cause of action against the third party to the employer or insurer after a certain period of time.118

In Stephens v. Textron, Inc.,119 the widow of a deceased employee, who suffered a work-related death on April 22, 1975, recovered workers' compensation benefits under Arizona law. The widow failed to comply with Arizona Revised Statute section 23-1023(B),120 requiring the

113. Id., 418 S.E.2d at 30.
114. Id. at 377 n.1 (citations omitted).
115. Id. at 377-78, 418 S.E.2d at 30.
117. See Williamson v. Lee Optical, 348 U.S. 483 (1955) (subjecting state legislation to an equal protection challenge under the Fourteenth Amendment).
120. ARIZ. REV. STAT. ANN. § 23-1023 (B) (1983) provides:
employee or his dependents to bring action against any responsible third party within one year after the cause of action accrues before the claim is assigned to the insurance carrier. On April 22, 1977, the State Workers’ Compensation Fund, to whom the cause of action was assigned on April 22, 1976, brought action within the two year statute of limitations for wrongful death.121 Subsequently, the widow entered into an agreement with the State Compensation Fund reassigning the action to her, intending the reassignment to be retroactive to the date of filing of the original complaint.122 After the trial court granted appellee’s summary judgment motion on the ground that the widow’s claim was barred by the statute of limitations, the widow challenged the assignment of the action to the employer under section 23-1023 as violating the Equal Protection Clause of the Fourteenth Amendment. Since the classification drawn by the state did not involve a suspect class of persons or a constitutionally protected interest, the court applied low scrutiny, whereby a statute does not violate equal protection as long as the classification is not wholly unrelated to the objectives of the state’s action.123 In applying this standard, the court noted that the Arizona Workers’ Compensation Act was enacted “primarily for the benefit of the injured employee and his dependents . . . and secondarily for the benefit of the employer,” and backed by “[t]he public policy . . . [of] protect[ing] the employee whose injury arose in and out of the course of his employment” as well as “protect[ing] the compensation fund administered by the commission, which indirectly benefits the employer.”124 As a result, the court upheld the statute and the classification by holding that the assignment under section 23-1023(B) “provides a means by which the solvency of the Compensation Fund may be maintained consistent with lower premiums to the insured employers.”125 Therefore, the different treatment accorded injured employees under section 23-1023(B) was justified.

122. Stephens, 619 P.2d at 736.
123. Id. at 738 (citing Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978)).
124. Id. (quoting State v. Pressley, 250 P.2d 992 (Ariz. 1952)).
125. Id. at 739.
Also, the Supreme Court of Tennessee, in *Dobbins v. Terrazzo Machine & Supply Co.*, 126 upheld an assignment provision in a previous form of its subrogation statute.127 However, the challenge to the former Tennessee statute128 was unique because the statute discriminated in favor of the employee. In *Dobbins*, defendant in a products liability action challenged the application of Tennessee Code Annotated section 50-914, allowing an injured employee to commence a products liability action within one year *from the date of injury*, while those not subject to the Workers' Compensation statute had to commence action one year *from the date of purchase*.129 To justify the statute under both the Tennessee and United States Constitutions, the court noted that section 50-914 was, in effect, a subrogation statute, where a compensable injury or death was a condition precedent to the bringing of an action.130 Therefore, the different treatment accorded employees was consistent with the legislatively enacted purpose of section 50-914, allowing the injured worker to recover workers' compensation while at the same time maintaining a common law tort action.131

C. Given the Asserted Purpose of Section 34-9-11.1, the Classification May Not Create a Problem

As recognized in *Stephens* and *Dobbins*, employers and insurance carriers can possibly justify the disparate treatment accorded employees under section 34-9-11.1 as long as the purpose of the provision can be ascertained. Unless the employee challenging the statute on equal protection grounds can persuade the court to revert back to its analysis in *Denton*, it appears that the Georgia Constitution provides no greater protection than its federal counterpart. If that is in fact the case, the

126. 479 S.W.2d 806 (Tenn. 1972).
127. *Id.* at 810.
128. TENN. CODE ANN. § 50-914 (now § 50-6-112) provided in pertinent part:

> When the injury or death for which compensation is payable under the Workmen' Compensation Law was caused under circumstances creating a legal liability against some person other than the employer to pay damages, the injured workman, or his dependents, shall have the right to take compensation under such law, and such injured workman, or those to whom his right of action survives at law, may pursue his or their remedy by proper action in a court of competent jurisdiction against such other person. Such action against such other person by the injured workman, or those to whom his right of action survives, must be instituted in all cases within one (1) year from the date of injury.

*Id.*

129. 479 S.W.2d at 809 (emphasis added). See also TENN. CODE ANN. 28-3-104 (1994) (products liability action must be brought within one year from the date of purchase).
130. *Dobbins*, 479 S.W.2d at 809.
131. *Id.*
employer or insurer defending the statute will only have to withstand a low scrutiny analysis since the statute does not involve a suspect class or constitutionally protected interest. Therefore, as recognized in Grissom, the statute will stand as long as the classification is based on a rational distinction bearing a direct relationship to the purpose of the statute.132

Given the rationale and justification set forth in Stephens, employers may not have a very difficult time satisfying this test. As already indicated, the apparent purpose of Georgia's provision is to "provide for some amount of cost-containment by recompensing the employer, while still ensuring the employee receive[s] compensation for all injuries."133 By assigning the third party claim to the employer after the employee fails to bring the action within one year from the date of injury, section 34-9-11.1 ensures that the employer will have an opportunity to bring the action within the two year statute of limitations for personal injury actions in Georgia.134 This furthers the purpose of providing "for some amount of cost-containment by recompensing the employer" since the burden of compensation is shifted to the culpable third party and the employer can protect its subrogation rights by initiating the action itself rather than passively hoping the employee does. In addition, the Georgia Legislature has found a way to provide for cost-containment without depriving the employer of the right to receive benefits under the Act or to maintain an action in tort. In other words, this section protects the employee's rights as well. The employee still has a limited amount of time to bring the action and is still protected should he fail to do so. After all, any recovery by the employer over and above the amount of compensation paid must be paid to the employee.135 The fact that these precautionary measures exist to protect the employee's rights make the subrogation provision even more reasonable. Therefore, the subrogation scheme encompassed in section 34-9-11.1 most likely bears a rational relationship to the purpose of lowering the cost of the workers' compensation system carried by the employers while at the same time allowing the injured employee to obtain complete recovery for all injuries. However, until someone takes the time and pays the expense

132. See supra text accompanying note 61.
to bring a challenge, the question as to whether section 34-9-11.1 (c) is in violation of the equal protection guarantees of either the Georgia or United States Constitutions will remain unanswered.

III. THE ASSIGNMENT CREATES ADDITIONAL UNANSWERED QUESTIONS REGARDING THE EXPERT AFFIDAVIT REQUIREMENT OF SECTION 9-11-9.1, THEREBY GENERATING ADDITIONAL EQUAL PROTECTION CONCERNS

Along with the foregoing problems, the assignment provision of section 34-9-11.1 presents unanswered questions regarding the expert affidavit requirement of O.C.G.A. section 9-11-9.1,136 thereby generating additional equal protection concerns. Section 9-11-9.1(a) requires any party bringing an action for professional malpractice to file an expert affidavit contemporaneously with the complaint, setting forth at least one negligent act or omission on the part of the defendant.137 However, under subsection (b), the contemporaneous filing requirement may be excused if the claim is filed within ten days from the expiration of the applicable period of limitation, in which case plaintiff has forty-five days from the date of filing the complaint to supplement the pleadings by filing the necessary affidavit.138 Despite this, section 9-11-9.1 “shall not be construed to extend any applicable period of limitation.”139 The question that arises is whether the “applicable period of limitation” referred to in section 9-11-9.1(b) includes the one year limitation period for the employee to bring a third party action created by the assignment provision of section 34-9-11.1(b)?

A. Does the “Applicable Period Of Limitation” in Section 9-11-9.1 (b) Include the One Year Limitation in Section 34-9-11.1 (c)?

To date, Georgia courts have only granted a plaintiff the benefit of the forty-five day grace period in section 9-11-9.1 (b) where the claim is filed within ten days from the expiration of the applicable statute of limitations. In Legum v. Crouch,140 plaintiff, as administratrix of deceased’s estate, filed a complaint on June 22, 1991, for the wrongful death of her husband, averring a claim for medical malpractice. Although the deceased died on March 6, 1991, plaintiff was not appointed administratrix of his estate until June 3, 1991. Plaintiff failed to file an expert affidavit, as required by section 9-11-9.1, but alleged in

136. Id. § 9-11-9.1.
137. Id. § 9-11-9.1(a).
138. Id. § 9-11-9.1(b) (emphasis added).
139. Id. § 9-11-9.1(d).
the complaint that the claim was filed within ten days from the applicable two year statute of limitation for wrongful death actions,\textsuperscript{141} thereby attempting to invoke the forty-five day filing delay in section 9-11-9.1(b). Subsequently, plaintiff filed an amended complaint within the forty-five day period.\textsuperscript{142} In filing the original complaint, plaintiff relied on O.C.G.A. section 9-3-71, whereby the two year statute of limitation for wrongful death emanating from medical malpractice runs from the date of death.\textsuperscript{143} Plaintiff did not consider whether the statute of limitation was tolled by O.C.G.A. section 9-3-92,\textsuperscript{144} tolling the applicable statute of limitation from "[t]he time between the death of a person and the commencement of representation upon his estate."\textsuperscript{145} Finding that section 9-3-92 tolled the statute of limitations by operation of law, the court denied plaintiff the benefit of the forty-five day extension in section 9-11-9.1 (b) since the claim was actually not filed within ten days from expiration of the applicable "statute of limitations."\textsuperscript{146} Therefore, as recognized by the Georgia Court of Appeals, the "applicable period of limitation" in section 9-11-9.1 (b) is the applicable statute of limitations.

1. Under Georgia Law, the Assignment does not Create a New Statute of Limitations. Therefore, according to \textit{Legum}, whether an employee who files a malpractice action against any potentially liable third party within ten days from the time when the action would be assigned to the employer or insurance carrier under section 34-9-11.1(b), would be allowed to take advantage of the forty-five day filing extension provided in section 9-11-9.1(b) depends on whether the assignment of the claim to the employer or insurer is regarded as the applicable statute of limitations.

Section 34-9-11.1 provides that the employee's failure to instigate action against any responsible third party, within one year from the date of injury, operates as assignment of the cause of action to the employer or its insurer.\textsuperscript{147} After any assignment, the employer or insurer is given one year to commence the action against the third party as well.\textsuperscript{148} Obviously, the statute allows the employee to bring the action any time during the first year after the injury, while the employer or insurer obtains the right in the second year. Therefore, regardless of

\begin{itemize}
\item \textsuperscript{141} O.C.G.A. § 9-3-71 (1993).
\item \textsuperscript{142} \textit{Legum}, 208 Ga. App. at 185, 430 S.E.2d at 361-62.
\item \textsuperscript{143} O.C.G.A. § 9-3-71 (1993).
\item \textsuperscript{144} \textit{Id.} § 9-3-92.
\item \textsuperscript{145} \textit{Legum}, 208 Ga. App. at 187-88, 430 S.E.2d at 363.
\item \textsuperscript{146} \textit{Id.} at 189, 430 S.E.2d at 364.
\item \textsuperscript{147} O.C.G.A. § 34-9-11.1(c) (1992).
\item \textsuperscript{148} \textit{Id.} § 34-9-11.1.
\end{itemize}
who brings the action, any third party action under section 34-9-11.1
only survives for two years after the injury. Note the two year period
allowed in section 34-9-11.1(c) is consistent with the two year statute of
limitations for personal injury actions provided in section 9-3-33.149

In its conflict of law provision, section 34-9-11.1(c) expressly provides
that it creates a statute of limitations:

[II]f the cause of action described in subsection(a) . . . arises in a
jurisdiction other than Georgia which has a statute of limitations for
personal injury or wrongful death actions greater than the statute of
limitations provided in this Code section, then the court hearing the
cause of action shall apply the statute of limitation which provides the
injured employee or those to whom his right of action survives the
greatest amount of time in which to institute an action.150

Although, section 34-9-11.1(c) purports to create a statute of limiting-
tions, the assignment in and of itself does not create a statute of
limitations. The Georgia Supreme Court has held that any statute not
intended as a general statute of limitation which attempts to place
restrictions on the two year statute of limitations for personal injury
actions is not controlling.151 In Daniel v. American Optical Corp.,152
the United States Court of Appeals for the Eleventh Circuit certified a
question to the Supreme Court of Georgia to determine what statute of
limitation applied to a claim based on a theory of strict liability in tort.
The conflict was created when the Georgia Legislature amended
O.C.G.A. section 51-1-11(b),153 Georgia's strict liability statute, to
provide that no action shall be brought under section 51-1-11 more than
ten years from the date of sale of the product.154 However, O.C.G.A.
section 9-3-33155 requires that any action for injury to the person must
be brought within two years from the date of injury. In holding that
section 9-3-33 applied, the Supreme Court of Georgia reasoned that
section 51-1-11(b) "was not a traditional statute of limitations which
typically declares 'that no suit shall be maintained on such cause of
action unless brought within a specified period after the right ac-

149. See O.C.G.A. § 9-3-33 (1982) (requiring any action for injury to the person be
brought within two years from the date of injury).
152. Id.
The court found that the 1978 Amendment to section 51-1-11(b) merely placed time restrictions on the bringing of a cause of action under section 51-1-11 and was not intended as a general statute of limitations. In addition, since section 9-3-33 was a general statute of limitation in which the scope of its application was determined by "the nature of the injury sustained rather than the legal theory underlying the claim," section 9-3-33 applied. Hence, a party may legitimately argue that section 9-3-33, providing a two year statute of limitations for personal injury actions, is the applicable statute of limitations.

However, more than likely, a court will find that section 34-9-11.1(c) does intend to provide a general statute of limitations. Under section 34-9-11.1(c), the injured employee has one year to bring any third party action. Should the employee fail to do so, the entire cause of action is assigned to the employer or insurer, who has one year to commence any such action. At that point, the cause of action ceases to exist. Therefore, not only does section 34-9-11.1(c) expressly assert that it creates a statute of limitations, it falls squarely within the definition for a general statute of limitations enunciated by the Georgia Supreme Court in Daniel, i.e., "that no suit shall be maintained on such cause of action unless brought within a specified period after the right accrued." Hence, because the cause of action ceases to exist after the expiration of the two year period provided in section 34-9-11.1(c), section 34-9-11.1(c), as a whole, provides a general two year statute of limitations, i.e., one year each for the employee and employer or insurer, respectively. Note this remains consistent with the two year statute of limitations for personal injury actions provided by section 9-3-33.

The proposition that section 34-9-11.1 provides a general two year statute of limitations for third party claims is not only supported by Daniel, but also the Tennessee Court of Appeals decision in Craig v. R.R. Street & Co. In Craig, the court was asked to determine which statute of limitations applied to an injured employee's third party claim.
for wrongful death, Tennessee Code Annotated section 50-6-112(b)\(^\text{163}\) of the Tennessee Workers' Compensation Act or section 28-3-104,\(^\text{164}\) providing a one year statute of limitations for wrongful death actions.\(^\text{165}\) Section 50-6-12 (b) provides that the employee's failure to bring action against any responsible third party within one year from the date of injury operates as an assignment of the claim to the employer, who, in turn, has six months after the assignment to bring the cause of action.\(^\text{166}\) The court held that section 50-6-112(b) was the governing provision and provided a general eighteen month statute of limitations i.e., one year for the employee and six months for the employer.\(^\text{167}\) Therefore, pursuant to the Tennessee Court of Appeals' rationale in Craig, O.C.G.A. section 34-9-11.1(c) provides a two year statute of limitations.

2. Foreign Jurisdictions Addressing the Issue Have Determined that the Assignment to the Employer has no Effect on the Statute of Limitations. According to foreign jurisdictions addressing the issue, the assignment of the third party claim to the employer after a certain amount of time has no affect on the statute of limitations. For instance, in Hartford Accident & Indemnity Co. v. Eastern Air Lines, Inc.\(^\text{168}\) the decedent was a passenger in an airplane owned and operated by defendant when he was killed in a crash in the District of Columbia. Plaintiff, the workers' compensation carrier of the decedent's employer, paid the decedent's widow workers' compensation benefits under New York law. After the widow failed to bring an action against defendant, the cause of action was assigned to the carrier,\(^\text{169}\) who subsequently commenced an action. After defendant asserted the statute of limitations defense, the court had to decide what effect, if any, the assignment had on the statute of limitations. In holding that the statute of limitations for wrongful death in the District of Columbia applied, the court recognized that the cause of action continued to be one for

\[163. \text{TENN. COD. ANN. § 50-6-112(b) (1991) (providing time in which injured workman may bring third party claims).}\]

\[164. \text{TENN. COD. ANN. § 28-3-104 (1991) (general statute of limitations for personal injury actions).}\]

\[165. \text{Craig, 794 S.W.2d at 357-58.}\]

\[166. \text{TENN. COD. ANN. § 50-6-112(b) (1991).}\]

\[167. \text{Craig, 794 S.W.2d at 358.}\]

\[168. \text{155 F. Supp. 263 (S.D.N.Y. 1957).}\]

\[169. \text{Workmen's Compensation Law N.Y. § 29 provided at the time that employee or its dependents must commence action within six months from the awarding of compensation, or not later than nine months after the enactment of a law creating a new or additional remedy. Hartford Accident, 155 F. Supp. at 264.}\]
wrongful death despite the assignment to the carrier.\textsuperscript{170} In effect, the court held that "[t]he Workmens' Compensation Law of New York does not create a new cause of action against third parties by reason of the death; it merely assigns such cause of action which may exist. Such act does not alter the period of limitations in the wrongful death act."\textsuperscript{171}

Also, in \textit{Stephens v. Textron, Inc.},\textsuperscript{172} the Supreme Court of Arizona held that the assignment to the employer of any third party claim only serves to divest the employee of any interest in the claim and does not effect the statute of limitations.\textsuperscript{173} In \textit{Stephens}, the decedent died in a helicopter crash while in the course of employment on April 22, 1975. The decedent's wife received workers' compensation benefits under Arizona law. However, the widow failed to bring action against the allegedly liable third party and therefore, pursuant to Arizona Revised Statutes Annotated section 23-1023(B), assigned the third party tort claim to the State Compensation Fund. On April 22, 1977, the State Compensation Fund, as assignee, brought action against the third party within the two year statute of limitations for wrongful death.\textsuperscript{174} On July 23, 1977, outside the two year period for bringing wrongful death actions, the widow and the State Compensation Fund entered into an agreement attempting to reassign the cause of action back to the widow and have the reassignment relate back to the date of the original filing.\textsuperscript{175} In holding the widow's action barred and the reassignment invalid, the court recognized that, under Arizona Revised Statutes Annotated section 1242, any action for personal injuries must be filed within two years from the date of injury.\textsuperscript{176} Since the widow failed to commence the action within one year from the date of injury, her cause of action was assigned to the State Compensation Fund pursuant to section 23-1023(B).\textsuperscript{177} In doing so, the court reasoned that the only effect of the assignment was to divest the widow of any interest in the cause of action for wrongful death, whereby the State Compensation Fund had become the owner of the claim.\textsuperscript{178} Therefore, the assignment

\begin{itemize}
\item \textsuperscript{170} \textit{Hartford Accident}, 155 F. Supp. at 265.
\item \textsuperscript{171} Id. (citations omitted).
\item \textsuperscript{172} 619 P.2d 736 (Ariz. 1980).
\item \textsuperscript{173} Id.; \textit{Grim v. Anheuser-Busch}, 740 P.2d 487 (Ariz. 1987) (assignment only divests claimant of interest in claim and has no effect on statute of limitations for wrongful death); \textit{Moir v. Toshiba Int'l Corp.}, 772 P.2d 28 (Ariz. 1989) (assignment only divests claimant of interest in claim and has no effect on statute of limitations).
\item \textsuperscript{174} \textit{ARIZ REV. STAT. ANN.} § 12-542 (1983).
\item \textsuperscript{175} \textit{Stephens}, 619 P.2d at 738.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id.
\end{itemize}
only served to divest the widow of any interest in the claim and had no
effect on the applicable two year statute of limitation.\textsuperscript{179}

It is important to note that defendants need to be aware of the proper
defense to a claim filed by an employee after expiration of the one year
period in section 34-9-11.1(c). The proper defense is not the statute of
limitations, which does not arise until two years after the date of injury
when the claim ceases to exist. The proper defense is that, after the
expiration of the one year period, the employee no longer has an interest
in the claim and, therefore, the claim should be dismissed.

B. \textit{Injured Employees Receiving Workers' Compensation Benefits are
Deprived of the Opportunity to Assert the 45 Day Filing Delay of
O.C.G.A. section 9-11-9.1(b)}

If the assignment provision in section 34-9-11.1(c) is not the applicable
statute of limitations, \textit{Legum} would seem to deprive an employee who
receives workers' compensation benefits as the result of an injury caused
by the negligence of a third party of any right to take advantage of the
forty five day filing delay in section 9-11-9.1(b). In other words, an
employee who files a malpractice action within ten days from the
expiration of the one year he has to bring the action before assignment
to the employer or insurer cannot hope to benefit from the forty-five day
grace period. Only the employer or insurer will be able to benefit from
the extension since it is the only party that is able to bring the action
within ten days from the expiration of the statute of limitations. Without
question, this deprivation of statutory benefits only serves to
decrease the likelihood that section 34-9-11.1(c) will withstand equal
protection scrutiny.\textsuperscript{180}

This author does recognize that it is entirely possible, if not reason-
able, that a judge may extend the "applicable period of limitation" in
section 9-11-9.1(b) to include the assignment provision in section 34-9-
11.1(c). However, as this Article attempts to point out, this question will
be answered only when brought before some court of competent
jurisdiction. Unfortunately, this takes time and money. Until then,
smart employees will not rely on the forty-five day grace period in
section 9-11-9.1(b) when they file malpractice claims ten days prior to
the assignment of the action to the employer.

\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{See supra} notes 91-134.
IV. **The Subrogation Lien Provided for in Section 34-9-11.1(b) Is Limited Only to the Amount of Disability Benefits and Medical Expenses Paid**

Under section 34-9-11.1, an injured employee, or those to whom his right of action survives, may receive workers' compensation benefits as well as pursue common law remedies in the event "injury or death for which compensation is payable under [the Workers' Compensation Act] is caused under circumstances creating a legal liability against some person other than the employer." Therefore, section 34-9-11.1 contemplates that a compensable injury under the Act may result in death, whereby the employer or insurer would be liable for death benefits and funeral expenses. If the employee receives recovery from the third party and the employer's liability is fully or partially paid, the employer or its insurance carrier has a subrogation lien against such recovery to the extent compensation has actually been paid. Given the fact that the lien is granted against any recovery from the third party to the extent of compensation actually paid, the employer's right to subrogation would appear to include the full scope of the employer's potential liability, including the payment of death benefits and funeral expenses. However, the statute goes on to provide that "the employer's or insurer's recovery . . . shall be limited to the recovery of the amount of disability benefits and medical expenses paid under [the Act]."

In the only case to address even one of the potential problems created by section 34-9-11.1, the United States District Court for the Northern District of Georgia held that the employer's right to subrogation did not include the amount of death benefits and funeral expenses paid by the employer or insurer. In *Bankhead v. Lucas Aerospace Limited*, the families of seven Lockheed employees, who died in an airplane crash at Dobbins Air Force Base on February 3, 1993, each received $24,000 from Lockheed's workers' compensation carrier and then brought action against Lucas Aerospace Limited, alleging that a part Lucas made for

182. Id. § 34-9-11.1(a).
183. Id. § 34-9-11.1(b).
184. Id.
185. Bankhead v. Lucas Aerospace Ltd., No. 1:94-CV-277 GET (issued October 20, 1994) (since this decision was issued on October 20, 1994, the opinion has been resubmitted to Judge Tidwell and no decision issued). See also Don J. DeBenedictis, *Judge Narrows, But Doesn't Nix Workers' Comp Subrogation*, FULTON COUNTY DAILY REPORT, Oct. 31, 1994, at 1 (discussing Bankhead).
the aircraft malfunctioned and caused the crash. As the suits against Lucas settled, Wausau, Lockheed's workers' compensation carrier, attempted to intervene in the case to enforce the lien granted in section 34-9-11.1(b) and recover the amounts it had paid the families. However, Wausau had only paid the families death benefits and funeral expenses. In denying Wausau the right to intervene, United States District Court Judge G. Ernest Tidwell found that the insurer had no lien rights to enforce and held that, pursuant to section 34-9-11.1(b), the amount of subrogation does not include death benefits or funeral expenses but only permits "recovery of the amount of disability and medical expenses paid."187 Therefore, in the event the injury triggering the employee's right to sue any responsible third party under section 34-9-11.1 results in death, as contemplated by subsection (a), the employer or insurer has subrogation rights only in the unlikely event that a portion of the benefits it paid the employee's survivors included disability benefits or medical expenses.

Limiting subrogation to the amount of disability benefits or medical expenses paid is in conflict with the Georgia Legislature's asserted purpose of providing the employer or insurer the right to subrogation.188 As contemplated by subsection (a), a compensable injury under section 34-9-11.1 may result in death,189 whereby the employer or insurer would be liable for death benefits and funeral expenses. However, after Bankhead, the employer is not recompensed for any death benefits or funeral expenses it has paid even though it did not cause the employee's death. If the purpose of section 34-9-11.1 is, in fact, to provide "for some amount of cost containment by recompensing the employer, while still ensuring the employee receive[s] compensation for all injuries,"190 the limitation on the employer's or insurer's right to reimbursement in subsection (b) makes ultimate achievement of the purpose impossible if the employee's injury results in death. Although the decision in Bankhead has been resubmitted to Judge Tidwell and no decision rendered as of December 2, 1994, the court's initial holding would appear to conflict with the statute's purpose. However, the court appears to have at least answered one of the many puzzling questions created by section 34-9-11.1, and illustrates the need for legislative reform.

188. See DeBenedictis, supra note 185.
189. O.C.G.A. § 34-9-11.1(a) (where death is caused by someone unrelated to the employment contract, the employee may bring a third party action).
190. See supra note 5.
V. SOLUTION: CONNECTICUT'S STATUTE ELIMINATES THESE PROBLEMS

This Article has attempted to illustrate some problems, potential challenges, and unanswered questions presented by the assignment provision of section 34-9-11.1(c). Having hopefully fulfilled one of the attempted goals of this Article, this author realizes that some foreign jurisdictions provide potential legal justifications for subrogation statutes similar, although not identical, to section 34-9-11.1. However, as recognized by one noteworthy commentator, the employer's or insurer's, right to subrogation under the Georgia Workers' Compensation Act, as it presently exists, "will likely be the subject of compromise and eventual litigation for clarification", and "until there is legislative or judicial clarification, [the] subrogation statute will likely force compromise in order to avoid or reduce costly litigation." Given this state of uncertainty and the need to maintain the employer's or insurer's right to subrogation in order to ensure the feasibility of the no-fault system, the Georgia Legislature should relieve injured workers, employers, and workers' compensation carriers of the costly burden of clarification by enacting a subrogation provision that does not create the problems previously illustrated, but still obtains the same objectives.

In order to do this, the legislature should follow the example of those states that allow both the injured worker and the employer or insurer, whichever has paid benefits, to prosecute a common law tort action against any negligent third party responsible for the employee's injury. Among those states allowing both the employee and the party paying benefits to bring an action, Connecticut's subrogation provision appears most ideal and provides:

When any injury for which compensation is payable under the provisions of [the Connecticut Workers' Compensation Statute] has been sustained under circumstances creating in a third person other than the employer a legal liability to pay damages for the injury, the injured employee may claim compensation under the provisions of [the Connecticut Workers' Compensation Statute], but the payment or award of compensation shall not affect the claim or right of action of the injured employee against the third person, but the injured employee may proceed at law against the third person to recover damages for the injury; and any employer having paid, or having become obligated to pay, compensation under the provisions of [the

192. See supra note 11.
193. See supra note 9.
Connecticut Workers' Compensation Statute] may bring an action against the third person to recover any amount he has paid or has become obligated to pay as compensation to the injured employee. If either the employee or the employer brings an action against the third person, he shall immediately notify the other, in writing, by personal presentation or by registered or certified mail, of the action and of the name of the court to which the writ is returnable, and the other may join as party plaintiff in the action within thirty days after such notification, and, if the other fails to join as a party plaintiff, his right of action against the third person shall abate.\(^{194}\)

In essence, the Connecticut provision allows both the employee and the party paying benefits to bring the action, but requires the party so doing to notify the other of its right to join within thirty days of notification. By allowing both parties to bring action against the third party and imposing a notification requirement as a condition subsequent to maintaining the action, Georgia will still accomplish the goals achieved by section 34-9-11.1. After all, the employee is still allowed to begin receiving compensation immediately after the injury by way of workers’ compensation benefits from the employer and is still allowed to recover common law damages from the culpable third party. However, the employer’s or insurer’s status as party plaintiff not only prevents the employee’s double recovery, but provides “for some amount of cost containment by recompensing the employer”\(^{195}\) for payment of benefits as the result of an injury it did not cause. In addition, the notification requirement only serves to protect the employee’s rights even more than section 34-9-11.1(c) supposedly does by actively notifying the employee of her right of action before the right abates by inaction.

More importantly, by following Connecticut’s example, Georgia will be able to accomplish these goals while at the same time obviating the problems illustrated by this Article. Although any statute according different treatment for a specific class of persons must withstand an equal protection challenge, the Connecticut statute eliminates several problems created by section 34-9-11.1. Despite the possibility that section 34-9-11.1(c) may withstand equal protection analysis in its present form, the Connecticut statute eliminates the problem regarding the one-year time limit imposed on injured workers for bringing third party claims. In other words, regardless of whether the injured worker has received workers' compensation, the injured worker has two years in which to bring the third party tort action, just like any other party seeking to recover for personal injury. Therefore, the Connecticut


\(^{195}\) See supra note 5.
statute stands an even greater chance of surviving an equal protection analysis.

In addition, the Connecticut statute will obviate the express conflict between section 34-9-11.1(c) and section 44-12-24, prohibiting the assignment of a personal injury action. In its present form, section 34-9-11.1(c) expressly provides that the employee's entire cause of action against the third party is assigned to the employer if the employee fails to bring action within one year from the date of injury. No such assignment occurs under the Connecticut statute since there is no express language calling for assignment and each party is guaranteed the right to notification. This is particularly true in light of the Georgia precedent allowing the assignment of the rights of recovery.196

Also, the Connecticut statute eliminates any problem that might arise regarding the statute of limitations, and its affect on section 9-11-9.1(b), providing a forty-five day grace period for filing the requisite expert affidavit in professional malpractice actions when the claim is filed within ten days of the applicable statute of limitations. Under Connecticut's provision, both parties possess the right to bring the action simultaneously and are, therefore, subject to the same period of limitation. Hence, the lack of any assignment provision provides either party the right to assert the forty-five day grace period in section 9-11-9.1(b) should they qualify.

Finally, by not expressly limiting the employer's or insurer's recovery to the amount of disability benefits and medical expenses paid, the Connecticut statute ensures the continued feasibility of the no fault system by reimbursing the employer regardless of what type of benefit is paid.

VI. CONCLUSION

In its present form, the right of subrogation provided to the employer or insurance carrier creates several questions and problems under Georgia law. "Until there is legislative or judicial clarification, [the] subrogation statute will likely force compromise in order to avoid or reduce costly litigation."197 Although these questions could possibly be answered and section 34-9-11.1 survive, the burden of clarifying these obvious questions should not rest on the injured worker, employer, and insurance carrier, who would be required to invest a substantial amount of time and money to have these questions answered by the courts. The burden should be shouldered by the Georgia Legislature, who created

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196. See supra notes 95-99.
197. See supra note 182.
the problem by hastily passing the statute on the last day of the 1992 legislative session. The Georgia Legislature could circumvent these problems by enacting a subrogation provision that allows both parties to bring the action, but requires the party that does to notify the other. By doing so, the Georgia Legislature will eliminate the uncertainty that presently exists and ensure the feasibility of the no fault system by protecting the employer's or insurer's right to subrogation.

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