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**S. 281**

**STATUS INFORMATION**

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Summary: Transparency in Private Attorney Contracts Act

**HISTORY OF LEGISLATIVE ACTIONS**

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2/20/2015 Senate Referred to Subcommittee: Massey (ch), Coleman, Gregory

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**VERSIONS OF THIS BILL**

[1/13/2015](file:///p:\pprever\2015-16\281_20150113.docx)

**A** **BILL**

TO AMEND CHAPTER 7, TITLE 1 OF THE 1976 CODE, RELATING TO THE ATTORNEY GENERAL AND SOLICITORS, TO ENACT ARTICLE 2, THE “TRANSPARENCY IN PRIVATE ATTORNEY CONTRACTS ACT”, TO PROVIDE DEFINITIONS, TO PROVIDE THAT THE STATE MAY NOT ENTER INTO CONTINGENCY FEE CONTRACTS WITHOUT A WRITTEN DETERMINATION BY THE ATTORNEY GENERAL, TO SET THE MAXIMUM FOR CONTINGENCY FEE CONTRACTS, TO PROVIDE FOR CERTAIN REQUIREMENTS THAT MUST BE MET DURING THE TERM OF THE CONTRACT, AND TO PROVIDE THAT BY FEBRUARY FIRST OF EACH YEAR, THE ATTORNEY GENERAL SHALL SUBMIT A REPORT TO THE PRESIDENT PRO TEMPORE OF THE SENATE, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, AND THE GOVERNOR DESCRIBING THE USE OF CONTINGENCY FEE CONTRACTS WITH PRIVATE ATTORNEYS IN THE PRECEDING CALENDAR YEAR AND TO PROVIDE FOR THE CONTENTS OF THE REPORT; TO AMEND SECTION 15‑36‑100, RELATING TO ACTIONS FOR PROFESSIONAL NEGLIGENCE, TO PROVIDE THAT A DEFENDANT WHO FILES A COUNTERCLAIM ASSERTING A CLAIM FOR PROFESSIONAL NEGLIGENCE SHALL FILE THE REQUIRED AFFIDAVIT; TO AMEND CHAPTER 79, TITLE 15, RELATING TO MEDICAL MALPRACTICE ACTIONS, BY ADDING SECTION 15‑79‑135 TO PROVIDE THAT EVIDENCE OFFERED TO PROVE PAST MEDICAL EXPENSES SHALL BE LIMITED TO EVIDENCE OF THE AMOUNTS ACTUALLY PAID TO SATISFY THE BILLS THAT HAVE BEEN SATISFIED AND EVIDENCE OF THE AMOUNTS ACTUALLY NECESSARY TO SATISFY THE BILLS THAT HAVE BEEN INCURRED BUT NOT YET SATISFIED; TO AMEND CHAPTER 135, TITLE 44, RELATING TO THE ASBESTOS AND SILICA CLAIMS PROCEDURE ACT OF 2006, BY ADDING SECTION 44‑135‑65 TO DEFINE “ASBESTOS TRUST CLAIM”, TO PROVIDE THAT A CLAIMANT SHALL PROVIDE TO ALL OF THE PARTIES IN AN ASBESTOS TORT ACTION A SWORN STATEMENT BY THE CLAIMANT, UNDER PENALTY OF PERJURY, IDENTIFYING ALL EXISTING ASBESTOS TRUST CLAIMS MADE BY OR ON BEHALF OF THE CLAIMANT AND ALL TRUST CLAIMS MATERIAL PERTAINING TO EACH IDENTIFIED ASBESTOS TRUST CLAIM, AND TO PROVIDE THE MANNER IN WHICH A DEFENDANT MAY MAKE A MOTION TO STAY THE PROCEEDINGS OF AN ASBESTOS TORT ACTION AND OTHER PROCEDURES RELATED TO A DEFENDANT’S MOTION TO STAY THE PROCEEDINGS; AND TO AMEND SECTION 56‑5‑6540, RELATING TO ADMISSIBILITY AS EVIDENCE OF NEGLIGENCE IN A CIVIL ACTION, TO REMOVE THE PROVISION THAT A VIOLATION OF THIS ARTICLE IS NOT NEGLIGENCE PER SE OR CONTRIBUTORY NEGLIGENCE, AND IT IS NOT ADMISSIBLE AS EVIDENCE IN A CIVIL ACTION.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 7, Title 1 of the 1976 Code is amended by adding:

“ARTICLE 2

TRANSPARENCY IN PRIVATE ATTORNEY

CONTRACTS ACT

Section 1‑7‑200. This article may be cited as ‘Transparency in Private Attorney Contracts Act’.

Section 1‑7‑210. As used in this article:

(1) ‘Government attorney’ means an attorney employed by the State in the Attorney General’s office.

(2) ‘Private attorney’ means any private attorney or law firm.

(3) ‘State’ means the State of South Carolina, including state officers, departments, agencies, boards, commissions, divisions, bureaus, councils, and any of its agents.

Section 1‑7‑220. (A) The State may not enter into a contingency fee contract with a private attorney unless the Attorney General makes a written determination prior to entering into a contract that contingency fee representation is both cost effective and in the public interest. Any written determination shall include specific findings for the following:

(1) whether there exists sufficient and appropriate legal and financial resources within the Attorney General’s office to handle the matter;

(2) the time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly;

(3) the geographic area where the attorney services are to be provided; and

(4) the amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney’s experience with similar issues or cases.

(B) The State may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee in excess of:

(1) twenty-five percent of any recovery less than $10 million; plus

(2) twenty percent of any portion of any recovery between $10 million and less than $15 million; plus

(3) fifteen percent of any portion of any recovery between $15 million and less than $20 million; plus

(4) ten percent of any portion of any recovery between $20 million and less than $25 million; plus

(5) five percent of any portion of any recovery $25 million or greater.

(C) The aggregate contingency fee for one action under this subsection may not exceed $50 million, excluding reasonable costs and expenses, without regard to the number of attorneys retained or the number of lawsuits filed.

(D) A contingency fee shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines.

(E) The State shall not enter into a contract for contingency fee attorney services unless the following requirements are met throughout the contract period and any extensions thereof:

(1) the government attorneys shall retain complete control over the course and conduct of the case;

(2) a government attorney with supervisory authority shall be personally involved in overseeing the litigation;

(3) the government attorneys shall retain veto power over any decisions made by outside counsel;

(4) any defendant that is the subject of the litigation may contact the lead government attorneys directly, without having to confer with contingency fee counsel;

(5) a government attorney with supervisory authority for the case shall attend all settlement conferences; and

(6) decisions regarding settlement of the case shall be reserved exclusively to the discretion of the government attorneys and the State.

(F) The Attorney General shall develop a standard addendum to contracts for contingent fee attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the State, including, but not limited to, the requirements listed in subsection (E) of this section.

(G) Copies of any executed contingency fee contract and the Attorney General’s written determination to enter into a contingency fee contract with the private attorney shall be posted on the Attorney General’s website for public inspection within five business days after the date the contract is executed and shall remain posted on the website for the duration of the contingency fee contract, including any extensions or amendments to the contract. Any payment of contingency fees shall be posted on the Attorney General’s website within fifteen days after the payment of the contingency fees to the private attorney and shall remain posted on the website for at least three hundred sixty-five days.

(H) Any private attorney under contract to provide services to the State on a contingency fee basis shall, from the inception of the contract until at least four years after the contract expires or is terminated, maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of the attorney services. The private attorney shall make all records available for inspection and copying upon request in accordance with the Freedom of Information Act. In addition, the private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the matter in increments of no greater than one tenth of an hour and shall promptly provide these records to the Attorney General, upon request.

(I) By February first of each year, the Attorney General shall submit a report to the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Governor describing the use of contingency fee contracts with private attorneys in the preceding calendar year. At a minimum, the report shall:

(1) identify all new contingency fee contracts entered into during the year and all previously executed contingency fee contracts that remain current during any part of the year, and for each contract describe the:

(a) name of the private attorney with whom the department has contracted, including the name of the attorney’s law firm;

(b) nature and status of the legal matter;

(c) name of the parties to the legal matter;

(d) amount of any recovery; and

(e) amount of any contingency fee paid; and

(2) include copies of any written determinations made under subsection (A) of this section during the year.

Section 1‑7‑230. Nothing in this article shall be construed to expand the authority of any state agency or state agent to enter into contracts where no such authority previously existed.”

SECTION 2. Section 15‑36‑100(C) of the 1976 Code is amended to read:

“(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty‑five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

(3) A defendant who files a counterclaim asserting a claim for professional negligence shall file an affidavit as required by this section.”

SECTION 3. Chapter 79, Title 15 of the 1976 is amended by adding:

“Section 15‑79‑135. Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually connected.”

SECTION 4. Chapter 135, Title 44 of the 1976 Code is amended by adding:

“Section 44‑135‑65. (A) As used in this section, ‘asbestos trust’ means and encompasses all trust entities, claims agents, or claims processing facilities that are created pursuant to the jurisdiction of a United States bankruptcy court and section 524(g) of Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. 524(g), or other applicable provision of law and that are formed for the purpose of compensating claimants asserting eligible asbestos claims.

(B)(1)(a) Within thirty days after the commencement of discovery in an asbestos tort action that is not otherwise barred or deferred under applicable law or within thirty days of the effective date of this section with respect to an asbestos tort action that is pending on that effective date and in which discovery has commenced, a claimant shall provide to all of the parties in the action a sworn statement by the claimant, under penalty of perjury, identifying all existing asbestos trust claims made by or on behalf of the claimant and all trust claims material pertaining to each identified asbestos trust claim. The sworn statement shall disclose the date on which each asbestos trust claim against the relevant asbestos trust was made and whether any request for a deferral, delay, suspension, or tolling of the asbestos trust claims process has been submitted.

(b) The submission of the sworn statement under subsection (B)(1)(a) of this section shall be in addition to any disclosure requirements otherwise imposed by law, civil rule, court order or ruling, applicable agreement or stipulation, local rule, or case management order.

(2) If the claimant, subsequent to the submission of the sworn statement under subsection (B)(1)(a) of this section, files with or submits to any asbestos trust additional asbestos trust claims not previously disclosed, the claimant shall provide to all of the parties in the asbestos tort action an amendment updating the sworn statement and identifying the additional asbestos trust claims. The claimant shall provide any amendment under subsection (B)(2) of this section within thirty days of filing an additional asbestos trust claim with, or submitting an additional asbestos trust claim to, any asbestos trust.

(3) With respect to any asbestos trust claim that a claimant discloses under subsection (B)(2) of this section in an amendment to the sworn statement, the claimant shall provide to all of the parties in the asbestos tort action all trust claims material pertaining to each additional asbestos trust claim identified in that amendment.

The claimant shall provide the trust claims materials under subsection (B)(3) of this section within thirty days of filing or submitting each additional asbestos trust claim.

(C) Failure to provide to all of the parties in the asbestos tort action all trust claims material as required by this section in a timely manner shall constitute grounds for the court to decline to assign an initial trial date or extend the date set for trial in the action.

(D) Nothing in this section prevents a court of competent jurisdiction from requiring any disclosures in addition to the disclosures required under this section.

(E) Not less than seventy-five days prior to the commencement of trial, any defendant in an asbestos tort action may file a motion with the court, with notice to the claimant and to all of the parties in the action, for an order to stay the proceedings. A defendant’s motion to stay the proceedings shall set forth credible evidence that demonstrates all of the following:

(1) the identities of all asbestos trusts not previously disclosed by the claimant pursuant to the South Carolina Code against which the claimant has not made any asbestos trust claims but against which the defendant in good faith believes the claimant may make a successful asbestos trust claim;

(2) the information that the defendant believes supports the additional asbestos trust claims described in subsection (B)(1) of this section;

(3) A description of the information sufficient to meet the asbestos trust claim requirements of the asbestos trusts described in subsection (B)(1) of this section.

(F) Notwithstanding any other provision in this section, if the claimant produces additional asbestos exposure information that supports the filing of an additional asbestos trust claim, the defendant may file a motion to stay the proceedings of this section within seven days of receiving the additional asbestos exposure information.

(G)(1) Within fourteen days after the filing of the defendant’s motion for an order to stay the proceedings under this section, the claimant may do any of the following:

(a) File the asbestos trust claims with or submit them to the asbestos trusts identified in the defendant’s motion for an order to stay the proceedings. The submission to the court and to all of the parties in the asbestos tort action of proof demonstrating that the asbestos trust claims identified in the defendant’s motion to stay the proceedings have been filed with or submitted to the appropriate asbestos trusts is dispositive of the defendant’s motion for an order to stay the proceedings. Alternatively, the defendant may withdraw the motion brought under subsection (B) of this section.

(b) File with the court a response to the defendant’s motion for an order to stay the proceedings requesting a determination by the court that the information supporting the asbestos trust claims against the asbestos trusts identified in the defendant’s motion for an order to stay the proceedings should be modified prior to the filing of an asbestos trust claim with, or the submission of an asbestos trust claim to, an asbestos trust or that there is insufficient information to file or submit the asbestos trust claim identified in the defendant’s motion for an order to stay the proceedings.

(c) File with the court a response to the defendant’s motion for an order to stay the proceedings requesting a determination by the court that the claimant’s or attorney’s fees and expenses to prepare the asbestos claim form and file or submit the asbestos trust claim identified in the defendant’s motion for an order to stay the proceedings exceed the claimant’s reasonably anticipated recovery from the asbestos trust claim.

(2) A submission by the claimant under this section does not constitute a waiver of the attorney client privilege or work product privilege.

(H)(1) If the defendant has met its burden under this section and if the claimant files a response pursuant to this section, the court shall determine by a preponderance of the evidence if a successful asbestos trust claim could be submitted in good faith to each asbestos trust identified in the defendant’s motion for an order to stay the proceedings brought under this section. The claimant has the burden of proof, by a preponderance of the evidence, to demonstrate that the information set forth by the defendant pursuant to this section should be modified prior to the filing of an asbestos trust claim with, or the submission of an asbestos trust claim to, each asbestos trust identified in the defendant’s motion or that the asbestos trust claim should not be filed with or submitted to the asbestos trust because a successful asbestos trust claim cannot be made in good faith.

(2) If the defendant files a motion to stay the proceedings and if the claimant files a response pursuant to this section, the court shall determine if the claimant’s or attorney’s fees and expenses to prepare the asbestos claim form and file or submit the asbestos trust claim identified in the defendant’s motion for an order to stay the proceedings exceed the claimant’s reasonably anticipated recovery from the asbestos trust claim. If the court determines that the claimant’s or attorney’s fees and expenses exceed the claimant’s reasonably anticipated recovery from the asbestos trust claim, the court shall require the claimant to file with the court a verified statement of the claimant’s exposure history to the asbestos products covered by that asbestos trust.

(I) If the court determines that there is a good faith basis for filing an asbestos trust claim with, or submitting an asbestos trust claim to, an asbestos trust identified in the defendant’s motion for an order to stay the proceedings brought under this section, the court shall stay the proceedings until the claimant files the asbestos trust claims with or submits them to the asbestos trusts identified in the defendant’s motion for an order to stay the proceedings and has otherwise met the obligations set forth in this section.

(J) A noncancer asbestos trust claim and a cancer asbestos trust claim are based on distinct injuries caused by a person’s exposure to asbestos. A noncancer asbestos trust claim that is subject to disclosure under the Code or is identified in this section means the noncancer asbestos claim that is the subject of the asbestos tort action in which the defendant seeks discovery pursuant to the Code. If a claimant previously filed a noncancer asbestos trust claim with, or submitted a noncancer asbestos trust claim to, an asbestos trust and subsequently filed an asbestos tort action based on a cancer asbestos claim, a cancer asbestos trust claim that is subject to disclosure or is identified in this section means both the earlier filed noncancer asbestos trust claim and the cancer asbestos claim that is the subject of the subsequent asbestos tort action.

(K) Asbestos trust claims and the information that is the subject of disclosure under the Code are presumed to be authentic, relevant to, and discoverable in an asbestos tort action. Notwithstanding any agreement or confidentiality provision, trust claims materials are presumed to not be privileged. The parties in the asbestos tort action may introduce at trial any trust claims material to prove alternative causation for the exposed person’s claimed injury, death, or loss to person, to prove a basis to allocate responsibility for the claimant’s claimed injury, death, or loss to person, and to prove issues relevant to an adjudication of the asbestos claim, unless the exclusion of the trust claims material is otherwise required by the rules of evidence.

(L) In addition to the disclosure requirements set forth in these sections, the parties to the asbestos tort action may seek additional disclosure and discovery of information relevant to the action by any mechanism provided by any applicable section of the South Carolina Code, the Rules of Civil Procedure, any local rule, or any case management order. In addition to the disclosure described in this section, any defendant in the asbestos tort action also may seek discovery of the claimant’s asbestos trust claims directly from the asbestos trusts involved.

(M) In an asbestos tort action, upon the filing by a defendant or judgment debtor of an appropriate motion seeking sanctions or other relief, the court may impose any sanction provided by a law of this State, including, but not limited to, vacating a judgment rendered in an asbestos tort action for a claimant’s failure to comply with the disclosure requirements of this section and other sections of the South Carolina Code.

(N) If subsequent to obtaining a judgment in an asbestos tort action in this State a claimant files any additional asbestos trust claim with, or submits any additional asbestos trust claim to, an asbestos trust that was in existence at the time the claimant obtained that judgment, the trial court, upon the filing by a defendant or judgment debtor of an appropriate motion seeking sanctions or other relief, has jurisdiction to reopen its judgment in the asbestos tort action and do either of the following:

(1) adjust the judgment by the amount of any subsequent asbestos trust payments obtained by the claimant; or

(2) order any other relief to the parties that the court considers just and proper.

(O) A defendant or judgment debtor shall file any motion under this section within a reasonable time and not more than one year after the judgment was entered or taken.”

SECTION 5. Section 56‑5‑6540 of the 1976 Code is amended to read:

“56‑5‑6540. A person who is adjudicated to be in violation of the provisions of this article must be fined not more than twenty five dollars, no part of which may be suspended. No court costs, assessments, or surcharges may be assessed against a person who violates a provision of this section. A person must not be fined more than fifty dollars for any one incident of one or more violations of the provisions of this article. A custodial arrest for a violation of this article must not be made, except upon a warrant issued for failure to appear in court when summoned or for failure to pay an imposed fine. A violation of this article does not constitute a criminal offense. Notwithstanding Section 56‑1‑640, a violation of this article must not be:

(1) included in the offender’s motor vehicle records maintained by the Department of Motor Vehicles or in the criminal records maintained by SLED; or

(2) reported to the offender’s motor vehicle insurer.

(B) A law enforcement officer must not issue a citation to a driver or a passenger for a violation of this article when the stop is made in conjunction with a driver’s license check, safety check, or registration check conducted at a checkpoint established to stop all drivers on a certain road for a period of time, except when the driver is cited for violating another motor vehicle law. The driver and any passenger shall be required to buckle up before departing the checkpoint and should the driver or the passenger refuse, then the person refusing may be charged with a primary violation.

~~(C)~~ ~~A violation of this article is not negligence per se or contributory negligence, and is not admissible as evidence in a civil action.~~

~~(D)~~(C) A vehicle, driver, or occupant in a vehicle must not be searched, nor may consent to search be requested by a law enforcement officer, solely because of a violation of this article.

~~(E)~~(D) A law enforcement officer must not stop a driver for a violation of this article except when the officer has probable cause that a violation has occurred based on his clear and unobstructed view of a driver or an occupant of the motor vehicle who is not wearing a safety belt or is not secured in a child restraint system as required by Article 47 of this chapter.

~~(F)~~(E) A person charged with a violation of this article may admit or deny the violation, enter a plea of nolo contendere, or be tried before either a judge or a jury. If the trier of fact is convinced beyond a reasonable doubt that the person was not wearing a safety belt at the time of the incident, the penalty is a civil fine pursuant to ~~Section 56‑5‑6540~~ this section. If the trier of fact determines that the State has failed to prove beyond a reasonable doubt that the person was not wearing a safety belt, no penalty shall be assessed.

~~(G)~~(F) A person found to be in violation of this article may bring an appeal to the court of common pleas pursuant to Section 18‑3‑10 or Section 14‑25‑95.”

SECTION 6. This act takes effect upon approval by the Governor.

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