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# WHERE ARE WE WITH PRO RATA SUBROGATION LAW AND THE MADE WHOLE DOCTRINE IN OHIO?

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On June 30, 2015, Governor Kasich signed into law H.B. 64, Ohio's biannual budget bill. Included within the bill was a repeal of existing R.C. 2323.44, which created the Ohio subrogation rights commission, whose purpose was to "[i]nvestigate the problems posed by, and the issues surrounding, the *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson* (2004), 103 Ohio St.3d 188 decision regarding subrogation[.]" (R.C. 2323.44(B)(1)) The subrogation rights commission was created by statute in 2005, just one year after *Lawson* was decided by the Supreme Court of Ohio. That's right, it did not take long to realize the imbalance in subrogation law created by the *Lawson* decision. No longer was an insurer's enforcement of subrogation rights conditioned upon the insured's receiving full compensation for his or her underlying damages claim. According to *Lawson*, as long as the insurance policy or Plan language unambiguously gives the insurer rights to first recovery, then the contractual language controls and the insurer has priority claims over all other interests, including the injured insured.

Not long ago an opposing counsel pointed out to me that since the *Lawson* decision Ohio still follows the Made Whole Doctrine. This is technically true, but the law's deference to the contractual language of the insurance policy makes "made whole" effectively obsolete. We can expect that every insurance policy written since *Lawson* includes that magic language granting the insurer first rights of recovery for subrogation. Even the opposing counsel had to acknowledge this reality.

Unfortunately, the subrogation rights commission created by R.C. 2323.44 in 2005 ultimately concluded there was not enough information to determine the effects of *Lawson*, so the commission took a "wait and see" approach to addressing the growing subrogation problem. Since there was no change to subrogation, the subrogation monster grew larger.

As practitioners, we have seen firsthand the mess that subrogation has created in Ohio cases. Rather than a method of balanced reimbursement, subrogation has become a one sided money grab that often hijacks a person's claim for damages. The existence of subrogation in a case, which is far more the norm than the exception, results in plaintiff lawyers working as collection agents for the insurance companies, doing all the work, advancing all the expenses, bearing all the risk, but seeing little to no contribution from the insurance company. Under the current law, as long as the insurance policy permits, the insurer sits back and waits for payment. A nice gig if you can get it. Of course, too often this means insurers do not compromise the amount of their liens in an amount commensurate with the challenges and difficulties of a person's case. Thanks to the increased presence of subrogation in cases, achieving settlement is more complicated and cases tend to take longer to resolve. Sometimes, the hardest work in a case comes just before or after a settlement is agreed upon because subrogation interests must be worked out.

H.B. 64 gave us a new R.C. 2323.44, which creates a *pro rata* approach for subrogation in Ohio. The law becomes effective September 29, 2015. Pursuant to R.C. 2323.44 (B)(1), if a person recovers less than full value in a tort action, the insurer's subrogation claim "shall be diminished in the same proportion as the injured party's interest is diminished." What a novel concept. The insurer's recovery is proportionate to the injured person's recovery. While this law is long overdue it should not be taken for granted. The efforts and support of elected officials from both parties was necessary to create the new *pro rata* law. Leadership and volunteer members from OAJ dedicated many hours over the years to achieve improved subrogation law.

So what does the new *pro rata* law mean? Instead of being at the mercy of insurance companies deciding what they will accept, the focus of resolving subrogation claims becomes determining whether the plaintiff experienced a full recovery and, if a full recovery was not achieved, demonstrating the ratio of the full value that was recovered. Under a *pro* rata approach this ratio should determine the amount owed to the subrogated party to satisfy their claim.

With the new law Plaintiff attorneys should be prepared to support, as detailed as possible, (1) the full value of a client's case and (2) why full value could not be recovered. Be prepared to litigate the issue of full value, if necessary.

Ohio's new law should not be foreign to insurers. Most states already follow some form of the Made Whole Doctrine, with existing subrogation laws that are as consumer friendly or friendlier to injured plaintiffs as Ohio's new law. As is often the case with new legislation, there may be disputes over interpretation of select words or sentences of R.C. 2323.44, involving how broad or limited their scope and application. But, the concept of *pro rata* is not new and there should not be much need to educate those you are dealing with about applying a proportionate approach to resolving subrogation claims.

It is expected that the Ohio Insurance Institute (a property casualty insurance trade group) will attempt to stop the enforcement of R.C. 2323.44.

The bottom line is that, as practitioners, we have been advocating for our clients in seeking a fair result for any resolution of a subrogation claim, applying reasonableness to consider the relevant factors that lead to the settlement or trial verdict amount. Now, with R.C. 2323.44, we have legal authority to rely upon as a basis for our approach. Make no mistake, this is a big deal.