

## DOES *ROBINSON V. BATES* EXIST IN MALPRACTICE CASES AFTER HOUSE BILL 7?

Earlier this year, the Ohio General Assembly passed House Bill 7, otherwise known as the “Medical Malpractice Improvement Act.” A portion of House Bill 7 is set forth in newly enacted statute R.C. 2317.45. R.C. 2317.45, while not the focus of House Bill 7 as a whole, relates to the inadmissibility of certain policies, determinations, and regulations to establish standard of care or breach of standard of care. R.C. 2317.45 states:

(A) As used in this section:

- (1) “Health care providers” means any person or entity against whom a medical claim may be asserted in a civil action.
- (2) “Insurer” means any public or private entity doing or authorized to do any insurance business in this state. “Insurer” includes self-insuring employer and the United States centers for Medicare and Medicaid services.
- (3) “Medical Claim” has the same meaning as in section 2305.113 of the Revised Code.
- (4) “Reimbursement determination” means an insurer’s determination of whether the insurer will reimburse a health care provider for health care services and the amount of that reimbursement.
- (5) “Reimbursement policies” means an insurer’s policies and procedures governing its decisions regarding the reimbursement of a health care provider for health care services and the method of reimbursement.

(B) Any insurer’s reimbursement policies or reimbursement determination or regulations issued by the United States centers for Medicare and Medicaid services of the Ohio department of Medicaid regarding the health care services provided to the patient in any civil action based on a medical claim are not admissible as evidence for or against any party in the action and may not be used to establish a standard of care or breach of that standard of care in the action.

While the insurance industry’s goal with section (B) was to keep “never events” from becoming admissible evidence, based on the plain language of the statute, there may be a huge unintended effect on how *Robinson v. Bates* is applied in malpractice cases.

The decision in *Robinson v. Bates*, 112 Ohio St. 3d 17, 857 N.E.2d 1195 (2006), modified Ohio’s Collateral Source Rule to allow into evidence both the amount of an original medical bill

and the amount paid by insurance. However, with the passage of House Bill 7 and the enactment of R.C. 2317.45, this may no longer be the case. The statute is clear that both reimbursement determinations and policies “in any civil action based on a medical claim are not admissible as evidence for or against any party...” R.C. 2317.45(B) The plain language of R.C. 2317.45 makes inadmissible evidence of the amount paid by an insurer as this amount is a “reimbursement determination” as defined in the statute.

One Court has already addressed the effect R.C. 2317.45 has on *Robinson v. Bates*. In *Grossman v. Kettering Medical Center, et al*, Case No. 2017CV 01983, Montgomery C.P. (May 14, 2019), the plaintiff filed a Motion in Limine to exclude evidence of the amount paid by health insurance. Plaintiff’s argument was based on the plain language of newly enacted R.C. 2317.45. The court agreed stating, “The plain language of the subject statute precludes the admissibility of a ‘reimbursement determination,’ which is an insurer’s determination of whether the insurer will reimburse a health care provider for health care services and the amount of that reimbursement, and the admissibility of ‘reimbursement policies,’ which are an insurer’s policies and procedures governing its decision regarding the reimbursement of a health care provider for health care services and the method of reimbursement, as evidence for or against any party in a civil action based on a medical claim.” The court sustained the Motion in Limine and precluded all parties from “eliciting testimony or submitting evidence regarding any insurer’s reimbursement determination or reimbursement policies related to this matter.”

This change to *Robinson v. Bates*, whether intended or otherwise, falls in line with the basic purpose of the statute, which is to make inadmissible certain policies, determinations, and regulations to establish standard of care or breach of standard of care. In other words, the

insurance and healthcare lobbyist may have not thought this one through. Now, the plain language of the statute prevents reimbursement determinations and policies from affecting and potentially deciding the outcome of cases – this includes, according to a court in Montgomery County, the “*Robinson*” numbers from being submitted as evidence.