



S.B. 227

124th General Assembly
(As Introduced)

Sens. **Nein, Wachtmann, Jacobson, Goodman, White, Austria, Spada, Armbruster, Ryan**

BILL SUMMARY

- Modifies the workers' compensation subrogation statute regarding the portion of a claimant's recovery from a third party tortfeasor that is subject to subrogation and the means utilized to determine how to divide the recovered amount between the claimant and statutory subrogee.
- Specifies requirements for claimants and statutory subrogees regarding reimbursement payments made to statutory subrogees.
- Requires claimants to notify the Attorney General of all third parties against whom the claimant has or may have a right of recovery when the statutory subrogee is a state fund employer, and specifies limitations applicable when this notice is not provided.
- Specifies new provisions applicable to a claimant when a statutory subrogee institutes legal proceedings against a third party.
- Specifies that when a claim involves wrongful death or minor beneficiaries, amounts allocated pursuant to a subrogation settlement or decision are subject to probate court approval.

CONTENT AND OPERATION

Background

Workers' compensation subrogation

The Workers' Compensation Law (R.C. Chapters 4121., 4123., 4127., and 4131.) contains a provision that creates a right of subrogation in favor of a statutory subrogee against a third party. A statutory subrogee is the entity

responsible to pay workers' compensation claims. The law specifically defines "statutory subrogee" as the Administrator of Workers' Compensation, self-insuring employers, and specified employers who make direct payment of medical services. Essentially the statute has allowed a statutory subrogee to recoup money from a third party against whom a claimant has a cause of action so that the statutory subrogee is reimbursed for money it pays out on a workers' compensation claim.

Stated simply, if Mr. Smith, in the course of his employment, is injured when Mr. Jones collides with his vehicle, Mr. Smith may receive workers' compensation benefits and also may sue Mr. Jones. If Mr. Smith sues Mr. Jones, then Mr. Smith's employer, or the Administrator, as appropriate, may seek reimbursement from the amount Mr. Smith recovers in the third party suit.

Supreme Court ruling

The Ohio Supreme Court, in *Holeton v. Crouse Cartage Co.* (2001) 92 Ohio St.3d 115, however, found that the workers' compensation subrogation statute, in its present form, violates provisions of the Ohio Constitution that guarantee equal protection, guarantee a person's right to a remedy by due course of law, and prohibit the taking of private property without just compensation (Sections 2, 16, and 19 of Article 1 of the Ohio Constitution). The Court said that "R.C. 4123.931(D) establishes a procedural framework under which an unconstitutional taking of the claimant's property or a denial of remedy by due course of law can occur. This framework distinguishes between third party claims that are tried and third party claims that are settled." The Court further stated that "R.C. section 4123.931(D) operates unconstitutionally...because it allows for reimbursement from proceeds that do not constitute a double recovery." (*Holeton*, p. 14, 15.) Furthermore, the Court said that

R.C. 4123.931(D) essentially creates a presumption that a double recovery occurs whenever a claimant is permitted to retain workers' compensation and tort recovery. Claimants who try their tort claims are permitted to rebut this presumption, while claimants who settle their tort claims are not. Such disparate treatment of claimants who settle their tort claims is irrational and arbitrary because...there are situations where claimants' tort recovery is necessarily limited to amounts that if retained along with workers' compensation cannot possibly result in a double recovery. (*Holeton*, p. 23.)

The existing subrogation statute

The statute currently states that a statutory subrogee's "subrogation interest" (see "**Definitions**," below) includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant. It also states that the entire amount of any settlement or compromise of an action or claim against a third party is subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement or compromise is characterized. Any settlement or compromise that excludes the amount of compensation or medical benefits currently does not preclude a statutory subrogee from enforcing its rights under the subrogation statute. Moreover, the statute specifies that the entire amount of any award or judgment is presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that are subject to a statutory subrogee's subrogation rights unless the claimant obtains a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages. (Sec. 4123.931(A) and (D).)

The current statute specifies that subrogation does not apply to the portion of any judgment, award, settlement, or compromise of a claim to the extent of a claimant's attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment, award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant's own resources for which reimbursement is not sought. Under the existing statute, no additional attorney's fees, costs, or other expenses in securing any recovery can be assessed against any subrogated claims of a statutory subrogee. (Sec. 4123.931 (E).)

The bill

Right of recovery

The bill revises the existing subrogation provisions by eliminating all of the foregoing provisions and establishing the new provisions described below. The bill states more specifically than the existing statute that payment of compensation or benefits creates a right of recovery, as opposed to existing law's "right of subrogation," of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The "net amount recovered" (see "**Definitions**," below) is subject to a statutory subrogee's right of recovery. (Sec. 4123.931(A).)

Provisions applicable when attempting to settle

The bill specifies that if a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the net amount recovered must be divided and paid to the claimant and the statutory subrogee on a basis that is proportional to the claimant's "uncompensated damages" and the statutory subrogee's "subrogation interest" (see **Definitions**," below) unless it is divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee.

Bureau conferences and other forms of alternative dispute resolution. If while attempting to settle, the claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the bill allows the claimant and statutory subrogee to file a request with the Administrator for a conference to be conducted by a designee appointed by the Administrator, or the claimant and statutory subrogee may agree to utilize any other binding or non-binding alternative dispute resolution process.

The claimant and statutory subrogee are required under the bill to pay equal shares of the fees and expenses of utilizing an alternative dispute resolution process, unless they agree to pay those fees and expenses in another manner. The bill prohibits the Administrator from assessing any fees to a claimant or statutory subrogee for a conference conducted by the Administrator's designee. (Sec. 4123.931(B).)

If a claimant and statutory subrogee request that a conference be conducted by the Administrator's designee, the designee must schedule a conference on or before 60 days after the date that the claimant and statutory subrogee file a request for the conference. The bill specifies that a determination made by the Administrator's designee is not subject to the Administrative Procedure Act. (Sec. 4123.931(C).)

Provisions applicable when a claimant's action proceeds to trial

Under the bill, when a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:

(1) The net amount recovered must be divided and paid to the claimant and the statutory subrogee on a basis that is proportional to the claimant's uncompensated damages and the statutory subrogee's subrogation interest.

(2) The court in a nonjury action must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories that specify the total amount of the compensatory damages and the

portion of those compensatory damages that represents economic loss and noneconomic loss. (Sec. 4123.931(D).)

Means utilized to reimburse statutory subrogee

Trust account. After a claimant and statutory subrogee know the net amount recovered, and after the means for dividing it has been determined either through settlement or by trial, the bill specifies that a claimant may establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, from which the claimant must make reimbursement payments to the statutory subrogee for the future payments of compensation, medical benefits, rehabilitation costs, or death benefits. If the workers' compensation claim associated with the subrogation interest is settled, or if the claimant dies, or if any other circumstance occurs that would preclude any future payments of compensation, medical benefits, rehabilitation costs, and death benefits by the statutory subrogee, any amount remaining in the trust account after final reimbursement is paid to the statutory subrogee for all payments made by the statutory subrogee before the ending of future payments must be paid to the claimant or the claimant's estate.

A claimant may use interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account, but the bill requires all remaining interest to be credited to the trust account.

Reimbursement payments. If a claimant establishes a trust account, the bill requires the statutory subrogee to provide payment notices to the claimant on or before June 30 and December 31 every year listing the total amount that the statutory subrogee has paid for compensation, medical benefits, rehabilitation costs, or death benefits during the half of the year preceding the notice. The bill requires the claimant to make reimbursement payments to the statutory subrogee from the trust account on or before July 31 every year for a notice provided by June 30, and on or before January 31 every year for a notice provided by December 31. The claimant's reimbursement payment must be in an amount that equals the total amount listed on the notice the claimant receives from the statutory subrogee. (Sec. 4123.931(E).)

If a claimant does not establish a trust account, the bill requires the claimant to pay to the statutory subrogee, on or before 30 days after receipt of funds from the third party, the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits. (Sec. 4123.931(F).)

Notification requirements

Under current law, a claimant must notify a statutory subrogee of the identity of all third parties against whom the claimant has or may have a right of recovery. Under the bill, a claimant also must notify the Attorney General when the statutory subrogee is a state fund employer. The bill makes two additional modifications that correspond to this added notification requirement. Currently, no settlement, compromise, judgment, award, or other recovery in any action or claim is final unless the claimant provides the statutory subrogee with the required prior notice and a reasonable opportunity to assert its subrogation rights. The bill adds that this limitation applies also when the Attorney General is not so notified as required. Currently, the third party and claimant are jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest if the claimant fails to give the statutory subrogee the required notice. The bill applies this penalty also when the Attorney General is not so notified as required. (Sec. 4123.931(G).)

Modifications effecting claimants when a statutory subrogee institutes legal proceedings

Current law specifies that a statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a statutory subrogee institutes legal proceedings by itself against a third party, the bill requires the statutory subrogee to provide notice of that fact to the claimant. Additionally, the bill specifies that if the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first if the matter proceeds to trial. (Sec. 4123.931(H).)

Probate court approval of allocation amounts for certain types of claims

The bill specifies that if a claimant's claim against a third party is for wrongful death or the claim involves any minor beneficiaries, amounts allocated under the bill's provisions are subject to the approval of probate court. (Sec. 4123.391(J).)

Definitions

The bill adds the following definitions for purposes of the subrogation statute:

"Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death

benefits, and any other costs or expenses paid by the statutory subrogee under the Workers' Compensation Law.

"Net amount recovered" means the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery.

"Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest. (Sec. 4123.93(D), (E), and (F).)

The bill modifies the definition of "claimant" in a manner that appears to make no substantive change in the law. Under the current definition, "claimant" means a person who is eligible to receive compensation or medical benefits under the Workers' Compensation Law, including any dependent or person whose eligibility is the result of an injury to or occupational disease of another person. The bill adds that a claimant is a person eligible to receive compensation, medical benefits, *or death benefits*, but eliminates the reference to dependents or persons whose eligibility is the result of an injury to or occupational disease of another person. The only benefits for which dependents may be eligible are death benefits; thus this change appears to be nonsubstantive. (Sec. 4123.93(A).)

The bill eliminates the existing definition for "subrogated amounts." Instead, the bill specifies that the statutory subrogation right of recovery applies to, but is not limited to, the amounts that are described in the existing definition of "subrogated amounts," with two exceptions. The right of recovery under the bill eliminates existing law's reference to amounts recoverable from any third party, notwithstanding any limitations by the third party concerning its responsibility to make payments in cases involving workers' compensation under the Workers' Compensation Law. Also, the bill adds that the right of recovery includes amounts recoverable from an intentional tort action. The existing definition of subrogated amounts does not reference amounts from intentional tort actions. (Secs. 4123.93(C) and 4123.931(I).)

HISTORY

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