OHIO SUBROGATION LAW

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I. OHIO WORKERS' COMPENSATION LIENS

A. Current Statute – Ohio Revised Code § 4123.93, *et seq*.

1. The prior version of R.C. §4123.931 was held unconstitutional "as written" by the Supreme Court of Ohio in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115. The Court held that the statute violated the rights to Due Process and private property because it treated recovery resulting from settlement differently than recovery resulting from jury verdict.

2. Current version of R.C. §4123.931 became effective for claims arising on or after April 9, 2003. The Supreme Court of Ohio has determined that the current statute is constitutional "as written," although it recognized other constitutional issues may arise "as applied" to facts of a case. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546.

3. The statute contains two primary components: R.C. §4123.93 ("Definitions") and R.C. §4123.931 ("Subrogation Rights"). Significant definitions include:
   a. "Claimant": A person who is "eligible to receive compensation, medical benefits, or death benefits;"

   b. "Statutory Subrogee": Can be the Administrator of the Bureau of Workers' Compensation (for state fund claims), a self-insuring employer, or an employer who contracts for direct payment of medical services;

   c. "Third Party": An individual, a private insurer, or a public or private entity or program – most commonly a tortfeasor and his or her liability insurer;

   d. "Subrogation Interest": Includes past, present, and estimated future medical costs and compensation, rehab costs, or death benefits;

e. "Net Amount Recovered": Total amount of any award, settlement, or verdict, less attorney's fees and costs -- does NOT include punitive damages.

f. "Uncompensated Damages": Total demonstrated or proven damages minus the subrogation interest.

4. The Statutory Subrogee holds a statutory right to recover against an individual, private insurer, or private or public entity liable to a workers' compensation recipient pursuant to the formula contained in R.C. §4123.931.

5. The amount that the Statutory Subrogee can recover (the workers' compensation lien) is determined by dividing the Subrogation Interest (total past, present, and estimated future workers' compensation benefits paid) by the sum of the Subrogation Interest and the Uncompensated Damages (total damages less the Subrogation Interest) multiplied by the Net Amount Recovered (total amount of the verdict or settlement minus attorney fees and expenses).

6. The statute gives the Statutory Subrogee and the Claimant the ability to use a more "fair and reasonable" basis to determine the lien or agree to another amount. Parties may also request a conference with a mediator (appointed by the Administrator) or agree to some other form of ADR.

7. The Statutory Subrogee may, but is <u>not</u> required, to move to intervene in a pending action to enforce its subrogated claim pursuant to Ohio Rule of Civil Procedure 24.

   a. To avoid the possibility of multiple obligations, a defendant should set forth the affirmative defense that plaintiff has failed to join a necessary party if the Statutory Subrogee is not already a party to the action.

8. R.C. §4123.931(G) demands that the Statutory Subrogee be given <u>notice and a reasonable opportunity to assert</u> its subrogation rights. If such notice is not given, the Claimant and Third Party will be jointly and severely liable for any payments made without affording the Statutory Subrogee notice.

9. No resolution or recovery can become "final" unless the Claimant provides the Statutory Subrogee notice and an opportunity to be heard. Claimant and the Third Party (including liability insurers) may also be liable for entire Subrogation Interest, without application of any setoffs.

B. Notable Cases

1. *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 2001-Ohio-1091 – Supreme Court of Ohio finds that pre-2003 version of R.C. §4123.931 violated Art. 1, §§2, 16, and 19 of the Ohio Constitution "as written."

    a. *Holeton* not retroactive – *Clark v. Ohio Bur. of Workers' Comp.*, 119 Ohio Misc.2d 17, 2002-Ohio-3522.

2. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546 – Supreme Court of Ohio reviewed challenges to "new" statute and concluded that constitutional challenges to R.C. §4123.93, cited by the Court in *Holeton*, supra, were no longer valid and that R.C. §4123.931 is constitutional "as written." The Court also acknowledged that R.C. §4123.931 could still be deemed unconstitutional "as applied" to a given set of facts.

    a. See also *Smith v. Jones*, 175 Ohio App.3d 705, 2007-Ohio-6708; *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271.

3. *Ohio Bur. of Workers' Comp. v. Williams*, 180 Ohio App.3d 239, 2008-Ohio-6685 – Motorists settled a claim with Williams without providing notice to the BWC. Tenth Appellate District held that Williams and Motorists were jointly and severally liable for the full amount of the BWC lien, including past, present, and future estimated payments. It rejected Motorists' argument that the Claimant had not made it aware of the subrogation lien.

4. *Ohio Bur. of Workers' Comp. v. Kidd* (Oct. 1, 2008), Franklin C.P. No. 07-CVH-08-10619, unreported – Action brought by BWC against Claimant regarding settlement of automobile claim. Kidd settled with liability insurance carrier Progressive while the workers' compensation claim was denied. The Franklin County Common Pleas court held that Claimant was liable for the BWC's subrogation interest.

    a. This case is often cited by BWC as the basis for arguing that the status of an underlying workers' compensation claim at the time of settlement is not material to the BWC's lien.

5. *Ohio Bur. of Workers' comp. v. Dernier* (April 12, 2010), Lucas C.P. No. CI01-3595, unreported – Claimant settled with liability carrier for tortfeasor without disclosing to the carrier that the injury was work related, and at the time the claim was denied by BWC. Lucas County Court of Common Pleas (J. Bates) agreed that the injured worker was not a "Claimant" as defined by R.C. §4123.93(A) because she was not eligible to receive benefits.

6. *Am. Interstate Ins. Co. v. G&H Srv. Ctr., Inc.*, 112 Ohio St.3d 521, 2007-Ohio-608 – Workers' compensation claim filed in another state, personal injury action filed in Ohio. Supreme Court of Ohio held that subrogation interests arising from workers' compensation payments are governed by the law of the state where the claim was made, not where the personal injury action was pending.

7. *Bush v. Senter*, 141 Ohio Misc.2d 1, 2006-Ohio-7155 – Common pleas court found R.C. §4123.931(F), governing time limits for establishing trust accounts, was unconstitutional, but held that the provision was able to be "severed" from the remainder of the statute.

8. *Ross v. Nappier*, 185 Ohio App.3d 58, 2009-Ohio-695 – The Court applied R.C. §4123.931 to *Robinson v. Bates* situations, concluding that evidence regarding the existence of a BWC subrogation lien, as well as amounts previously paid, should have been admitted into evidence in the personal injury action.

9. *Dambolena v. Ohio Bur. of Workers' Comp*., 2007-Ohio-4435 – An employee injured by third party who repaid BWC was barred from seeking "equitable" relief from BWC.

10. *Corn v. Whitmore*, 183 Ohio App. 2d 204, 2009-Ohio-2757. Unlike in the insurance context where subrogation is derivative, R.C. §4123.93 creates a separate cause of action which is governed by the six (6) year statute of limitations of R.C. §2305.07.

II. OTHER LIENS AND INSURERS

A. Med Pay Liens

1. *Contract Provisions*

   a. Med pay subrogation clauses are not against public policy.

2. *Separate Action*

   a. An insurer, subrogated to the medical payments claim assigned by the insured, may prosecute this claim in a separate action against the tortfeasor unless the tortfeasor requires joinder of the insurer-subrogee to an action by the insured against the tortfeasor. *Nationwide Ins. Co. v. Steigerwalt* (1970), 21 Ohio St. 2d 87.

3. *Insurer's Entitlement*

a. The insurer is entitled to recover the full subrogated amount and, typically, no deductions for the insured's expenses in maintaining the suit are allowed. *State Auto. Mutual Ins. Co. v. Manges* (Aug. 19, 1993), 7th Dist., No. 715, 1993 Ohio App. LEXIS 4015.

b. If an insured is required to reimburse the insurer for amounts paid under a policy, the recovery may be reduced, by reasons of equity, for the efforts made by the insured's attorney to recover that which is owed to the insurer. *Thatcher v. Sowards*, 2000-Ohio-1970, 2000-Ohio-1979.

B. Med Pay Liens and UM/UIM Set-offs

1. In *Berrios v. State Farm Insurance Co.*, 98 Ohio St.3d 109, 2002-Ohio-7115, the Supreme Court of Ohio held that an insurer has no right of subrogation against its insured to reduce the amount of UIM coverage paid to the insured, even though it results in a "double recovery".

a. The court based its decision on *Grange Mut. Cas. Co. v. Lindsley* (1986), 22 Ohio St.3d 153 and the need to protect the amount of coverage required to be provided by R.C. § 3937.18.

b. To do otherwise would be to "allow insurers to use subrogation clauses to avoid their obligations" under R.C. § 3937.10.

2. *Berrios* was abrogated by SB 97, which eliminated mandatory UM/UIM coverage and permits insurers to include limitations and exclusionary clauses in UM/UIM policy provisions.

a. In *State Farm Mut. Auto. Ins. Co. v. Grace.*, 123 Ohio St. 3d 471, 2009-Ohio-5934, the Supreme Court of Ohio held that "R.C. 3937.18(I), as amended by S.B. 97, permits an insurer to limit coverage so as to preclude payment pursuant to UM/UIM coverage for medical expenses that have previously been paid or are payable under the medical payment coverage in the same policy."

C. Hospital and Doctor's Liens

1. *Creatures of Contract:*

a. A number of states have statutes regarding hospital's and doctor's liens, and the recovery thereof, but Ohio has no such statute. Rather,

such liens and the right of subrogation of amounts recovered from third parties, is a creature of contract. Courts will enforce the contractual lien to the extent that the contract is valid.

2. The majority of litigation in this area has arisen in situations where an attorney of an injured plaintiff has signed an agreement promising to reimburse a hospital or doctor for services provided out of any monies received through judgment or settlement in the case.

   a. In *Manor Care v. Ruppert* (1997), 123 Ohio App.3d 481, the attorney sent a letter to the health services provider stating:

      > "Please be advised that our office is hereby guaranteeing that before any funds are disbursed to Bonnie Thomas or her husband, we will pay any balance due and owing Manor [Care] out of any settlement proceeds or jury demand." *Manor Care*, supra.

   b. This obligation was akin to a "contingent-suretyship." A suretyship is the "contractual relation whereby one person, the surety, agrees to answer for the debt, default or miscarriage of another, the principal * * *." Id. Thus, to that extent, the plaintiff's attorney was a surety for the hospital bill up to the amount received.

D. Medicaid Liens

The Ohio Revised Code gives a "right of recovery" to the Ohio Department of Job and Family Services (ODJFS) against tortfeasors for collection of medical expense payments made on behalf of Medicaid recipients. R.C. 5101.58(A). Because the statute provides a "right of recovery" and not a right of "subrogation," a tortfeasor may be liable to reimburse Medicaid even if the Medicaid recipient cannot recover from the liable third party.

1. In *Ohio Dep't of Human Serv . v. Kozar* (1995), 99 Ohio App. 3d 713, the court dismissed the state's subrogation claim against the tortfeasor because the injured party had no cause of action against the tortfeasor. The court reasoned that the prior statute provided subrogation rights against the tortfeasor and not an independent cause of action against the tortfeasor.

   After *Kozar*, the legislature amended the statute to provide the state an independent "right of recovery" from the tortfeasor. Therefore, the state may bring its own cause of action directly against the tortfeasor for recovery of benefits paid by the state. Additionally, the statute requires the Medicaid

recipient to notify ODJFS of the identity of any liable third parties. R.C. 5101.58(C).

However, like the BWC subrogation statute, the Medicaid statute does not require a third party to notify ODJFS, and any settlement between the tortfeasor and the Medicaid recipient will not prevent ODJFS from asserting its lien against a liable party. R.C. 5101.58(A).

E. Medicare Liens

1. *Current Medicare Secondary Payer Act*

The Medicare Secondary Payer Act provides that Medicare is the "secondary payer" for eligible Medicare beneficiaries' medical expenses when a "primary payer" is available. Primary payers include health insurance, worker's compensation insurance, any liability or no-fault insurance and any tortfeasor. See 42 USCS § 1395y(b)(2). The statute provides that if Medicare pays compensation when it is the "secondary payer," Medicare has a right of subrogation against any "primary payer." Even though the Medicare statute uses the word "subrogation," Medicare's right to recovery from "primary payers" does not depend on the recipient's rights of recovery. *United States v. York* (C.A.6 1968), 398 F.2d 582, 584 (finding that "Congress intended to give the United States an independent right" to recover Medicare benefits from a liable third party). The Medicare Secondary Payer Act goes beyond other statutorily imposed liens because Medicare has a right of recovery against many homeowners and automobile policies, including their "med pay" coverages. See *United Services Auto. Assoc. v. Perry* (C.A.5 1996), 102 F.3d 144, 148 ("[medical payments coverage] is a form of no-fault insurance"). Additionally, because a review of a patient's medical records will generally put a third party on notice of the patient's eligibility for Medicare, Medicare is not required to notify the third party of its lien. See *United States v. Bartholomew* (W.D. Okla. 1967), 266 F. Supp. 213, 215 (stating a party can easily determine through a review of the medical records that a party is eligible for Medicare benefits).

2. *Amendments to Medicare Secondary Payer Act*

On January 1, 2011, revisions to the Act will go into effect. The amendments require a primary insurer to 1) determine whether a Claimant qualifies for Medicare benefits currently or in the future; and 2) notify Medicare when a primary insurer resolves a claim with a current or future Medicare beneficiary. The amendment provides stiff penalties for primary insurers who fail to notify Medicare of a resolved claim with a current or future Medicare beneficiary.

a. Determine Eligibility Status of Claimants

The eligibility status of a current Medicare beneficiary can be determined by reviewing the Claimants' medical records and bills. However, a primary insurer must also determine whether a Claimant is reasonably expected to qualify for Medicare eligibility when the settlement involves payment of future medical services and/or lost wages. According to the Centers for Medicare and Medicaid Services (CMS), an injured individual that is not currently receiving Medicare benefits "should ... consider Medicare's interests when the injured individual has a 'reasonable expectation' of Medicare enrollment within 30 months of the settlement date, and the anticipated total settlement amount for the future medical expenses and disability/lost wages over the life or duration of the settlement agreement is expected to be greater than $250,000." Thus, the primary insurer should contemplate protecting itself from not only a current but a future Medicare "super lien."

b. Notify Medicare of a Settlement

Once a primary insurer settles a claim with a Medicare beneficiary (or a person reasonably expected to receive Medicare benefits), the primary insurer must notify CMS of the resolution of the claim. The time limit for the notification is not set forth in the amendments. Therefore, a primary insurer should, to avoid the penalties, advise CMS of the potential resolution of the claim prior to entering into negotiations and/or before trial commences.

c. Penalties for Non-Compliance

The amendments provide that a primary insurer that fails to notify CMS of the resolution of a claim involving a Medicare beneficiary pay a fine of $1,000.00 per day for the notification failure. This penalty is in addition to the double damages already provided under the current Medicare Secondary Payer Act. If a primary payer fails to reimburse Medicare when it knew or should have known of Medicare's lien, the United States has a private right of action against the primary insurer to recover two times the amount of Medicare benefits the beneficiary received for medical services.

F. Ohio Victims of Crime

If a person receives compensation under the Ohio Victims of Crime Compensation (R.C. 2743.51 to 2743.72), the Reparations Fund has an independent cause of action for "reimbursement, repayment and subrogation" against 1) the offender; 2) an insurer of the offender or the victim; or 3) the victim if the victim receives additional benefits from other sources. R.C. 2743.72. See also *Montgomery v. John Doe 26*, (2000), 141 Ohio App. 3d 242. While the reparations fund has a notice provision allowing it to assert its recovery rights through correspondence from the Attorney General, the statute does not require notice to be sent to a third party. R.C. 2743.72(L). Finally, the statute provides that any settlement between a victim and an insurer does not release the Reparations Fund's interest. R.C. 2743.72(I).

G. U.S. Veterans and Military Personnel

Under the Federal Medical Care Recovery Act (FMCRA), the United States has a statutory right of recovery for compensation paid by the government to active military personnel and veterans against tortfeasors and any applicable insurance available to the injured party. 42 USCS § 2651. Further, the United States also has a right of subrogation against an insurer that provides medical payments or no-fault personal injury protection (PIP) to the injured military employee or veteran. 42 USCS § 2651(c); cf. *United States v. Trammel* (C.A.6 1990), 899 F.2d 1483, 1486 (holding that Kentucky's statutory no-fault insurance abolished a finding of a tortious actor in an automobile accident precluding recovery under the former FMCRA because it only confers a right of subrogation against tortfeasors).