

OHIO WORKERS' COMPENSATION 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. The 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”)

R.C. §4123.931 (“Subrogation Rights”)

Definitions:

a. *Claimant:*

A person who is “eligible to receive compensation, medical benefits, or death benefits;” See *Ohio Bur. of Workers’ Comp. v. Dernier*, 2011-Ohio-150.

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.

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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. Statutory Subrogee:

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. Recovery amount:

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. "Fair and Reasonable":

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. Motion to Intervene:

The Statutory Subrogee may, but is not 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. Notice:

R.C. §4123.931(G) demands that the Statutory Subrogee be given notice and a reasonable opportunity to assert 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. Final Resolution:

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. Dernier*, 2011-Ohio-150:

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. The Sixth District Court of Appeals 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 at the time of settlement. Jurisdiction is pending in the Supreme Court of Ohio.

5. *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.

6. *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.

7. *Ross v. Nappier*, 185 Ohio App.3d 548, 2009-Ohio-6995:

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.

8. *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.

II. WORKERS' COMPENSATION SUBROGATION CAUSES OF ACTION

- A. The current subrogation statutes create an independent cause of action with a six year statute of limitations.

1. *Corn v. Whitmore*, 183 Ohio App. 3d 204, 2009-Ohio-2737:

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. See also, *Ohio BWC v. McKinley*, 2010-Ohio-1006, currently on appeal with the Ohio Supreme Court.