

6 YEAR OHIO WORKERS' COMPENSATION SUBROGATION STATUTE OF LIMITATIONS ANNOUNCED

***Corn v. Whitmere*, 2009 WL 1636601 (Ohio App. 2009)**



The topsy-turvy world of workers' compensation subrogation in the on-again, off-again State of Ohio is a double-edged sword. Workers' compensation subrogation in Ohio has gone through major transformations since it was ruled unconstitutional several years ago, but subrogation is currently a statutory right of carriers and self-insured employers. On June 27, 2001, the entire Ohio workers' compensation subrogation statute was struck down by the Ohio Supreme Court on state constitutional grounds in the case of *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111 (Ohio 2001). The moment the statute became unconstitutional, the earlier version (1993) of the statute became effective. To nobody's surprise, the earlier version of the statute was quickly declared unconstitutional too.

On April 9, 2003, a new statute was enacted by the Ohio legislature which returns the right of subrogation to Ohio workers' compensation carriers and self-insured employers. This new law addresses several of the previous criticisms leveled by the Ohio Supreme Court. However, because it was a complete rewrite of Ohio workers' compensation subrogation law, it left many questions unanswered. Answers come slowly and only with the glacial creep of appellate case law.

One very interesting and positive answer came this summer, courtesy of the Ohio Court of Appeals. On July 9, 2009, the Court of Appeals held for the first time that a workers' compensation carrier's statutory right of workers' compensation subrogation and/or reimbursement is governed by Ohio's six-year statute of limitation dealing with rights created under statute (§ 2305.07), as opposed to its normal two-year personal injury statute of limitations (§ 2305.10).

The facts in *Corn v. Whitmere* are as follows. On August 24, 2004, Joseph Corn, AT&T's employee, was injured in an accident with Henry Whitmere and on August 23, 2006, Corn and his wife filed a Complaint for personal injuries against Whitmere and Erie Insurance Company, which insured the Corns' vehicle. On May 3, 2007, the trial court granted Erie Insurance Company's Motion for Summary Judgment, finding that Corn had no underinsured motorist claim. On August 8, 2007, the Corns filed an Amended Complaint, joining Corn's employer, AT&T, as a defendant. AT&T, as a self-insured employer, provided workers' compensation benefits to Corn. On September 10, 2007, AT&T filed an Answer, Counterclaim, and Cross-Claim.

In May of 2008, Whitmere filed a Motion for Summary Judgment, arguing that the Corns failed to obtain service on Whitmere within the one-year commencement period required by Ohio law, and that AT&T never obtained service on Whitmere. It sought the entire case to be dismissed because it was beyond the two-year statute of limitations for personal injury actions. Whitmere opposed AT&T's motion for partial summary judgment, but in July, the trial court dismissed the entire case because the two-year statute had expired.

The trial court determined that AT&T's Cross-Claim was barred by the statute of limitations found in § 2305.10. According to the court, AT&T's Counterclaim against Corn was for statutory entitlement by right of subrogation (§ 4123.93 and § 4123.931) to recover from Corn the damages Corn may receive from Whitmere, to the extent of the benefits that AT&T, Corns' employer, paid to Corn or for the benefit of Corn as a self-insurer under the Workers' Compensation Act. Such benefits were paid as a result of injuries allegedly caused Corn by Whitmere's negligence. The court concluded that AT&T's Counterclaim could not stand alone but was dismissed without prejudice.

On appeal, it was disputed whether the two-year statute of limitations for actions for bodily injury as a result of tort negligence applied to the filing of the action by AT&T, or whether a six-year statute of limitations applied. The Court of Appeals declared that a carrier's subrogation rights under the workers' compensation subrogation statute are governed by the six-year statute of limitations in § 2305.07, which applies to claims based on liability created by statute. Section 2305.07 provides as follows:

“Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by a statute other than a forfeiture or penalty, shall be brought within six years after the cause of action thereof accrued.”

The self-insured employer’s Cross-Claim, seeking reimbursement from the third-party tortfeasor for workers’ compensation benefits paid to, or on behalf of, its employee, was based upon liability specifically created by statute (§ 4123.931). Thus, the Cross-Claim was subject to the six-year period of limitations, rather than two-year limitations period applicable to personal injury actions.

This is a significant declaration because it departs from the usual practice of applying a state’s personal injury statute of limitation to a workers’ compensation carrier pursuing a third-party action directly against a tortfeasor. In addition to extending an Ohio workers’ compensation carrier’s statute of limitations for filing such an action to six years, the decision has another practical and important impact on Ohio Workers’ Compensation carriers. Loss payments for injuries sustained after the April 9, 2003 enactment of the new subrogation statute which may have been considered unrecoverable due to a two-year statute of limitation can be re-evaluated for subrogation recovery potential based on a six-year statute of limitation. Thus, Ohio workers’ compensation carriers can now pursue recoveries for good cases that may have been considered “lost” due to the running of Ohio’s two-year statute of limitations for actions for bodily injuries.

For questions regarding this article or Ohio workers’ compensation statute, please contact gwickert@mwllaw.com.