

## **PROPOSED OHIO ANTI-SUBROGATION LEGISLATION MARCHES ON: NARY A PEEP FROM THE INSURANCE INDUSTRY**

The anti-subrogation bill being proposed by an Ohio State Bar Association Committee which would have (1) eliminated all subrogation and reimbursement language found in any insurance policy providing hospital or medical benefits and/or (2) established a state-wide made whole doctrine and common fund doctrine, has been voted down by the special State Bar committee considering it. This is good news and is the direct result of an outpouring of concern and even attendance at the committee hearing by insurance representatives, subrogation professionals and subrogation counsel. Unfortunately, however, the battle is not over.

There are three other committees reviewing the same proposal, and the proposal will still be considered by the Council of Delegates for the Ohio State Bar Association ("OSBA"), who supposedly will take into consideration the votes and comments of the various committees which considered it. In other words, the delegates can still recommend the anti-subrogation proposal even if all the committees vote it down. If they do, they then shop for a legislator who will sponsor the suggested legislation and our fight in Ohio will start anew in the Ohio Legislature.

While the outcry from the insurance and subrogation community was loud - probably as a result of the global anti-subrogation effect the proposal will have - we can never let down our guard when it comes to advocating for and educating about the many societal and economic benefits of the not-so-well-understood legal concept of subrogation.

On Friday, October 23, 2009, the OSBA Screening Committee reviewed the legislative proposal drafted and endorsed by the majority of the Special Subrogation Committee. The Screening Committee then voted on whether the proposal should be recommended for consideration by the full Council of Delegates. Unfortunately, the Screening Committee passed through the proposal with only a couple of nay votes. This means the proposed legislation will be considered and endorsed by the full Council of Delegates on November 6, 2009. If it passes that hurdle, as it is expected to, the OSBA will then actively engage in lobbying for the codification of subrogation, the made whole rule, the common fund doctrine, and a list of other plaintiff-friendly changes. Subrogation in Ohio as we know it will be dead.

Once again, the industry defense of subrogation was sparse. NASP was present and spoke out against the legislation, but the main rebuttal in defense of subrogation as a cost-saving vehicle for the industry was an assistant general counsel from Nationwide who advocated with all of the zeal and passion of Don Knotts. The spokesman for the insurance industry basically fell on the sword, admitting that subrogation was a problem, and instead of advocating against the proposed legislation, suggested a kinder, gentler approach, such as approaching every case with a made whole issue (which will essentially be every case) on a pro rata distribution basis. The insurance spokesman on behalf of subrogation admitted there was a problem with subrogation that needed fixing. Go figure. There was little more than a peep from the rest of the industry.

Folks, we are going to have to decide whether or not subrogation is something we value, whether or not it is something worthy of our time....worthy of protection. If subrogation truly is a source of revenue for the insurance industry, it will need to stand up and protect subrogation. If not, our subrogation rights will fall like dominoes, from state to state, until everyone reading this newsletter will be searching the want ads for something new to do with their lives. Matthiesen, Wickert & Lehrer has been litigating subrogation cases for 25 years, and our lawyers have yet to run across a plaintiff's attorney who openly admits that his client has been "made whole". Like lambs to the slaughter, our industry is giving up one of its chief cost-containment weapons unilaterally, without any concessions from the other side. Things are not good in Subrogationville.