

Oppose SB 288 – Injured Workers Have Right To Be Made Whole **BEFORE** the Work Comp Insurers Subrogate Payment From Negligent Third Parties. The choice you are facing with changing the subrogation law is quite stark and clear.

Current law - individual case by case determination of equity/fairness: Injured workers who bring a claim against a third party are able to assert that there should be no subrogation until they have been made whole or received full legal redress for all their damages and the costs to obtain those damages. AND, insurers have a statutory right to dispute whether the injured worker has or has not been made whole or received full legal redress, including to argue that the injured worker is receiving double payments.

Proposed Changes – no determination of equity/fairness: The legislature will determine by statute that no matter what the facts in each individual case, there will be subrogation, with no examination of the equity or fairness in that individual case, AND injured workers would have no right to dispute that.

It is not just "made whole," it is also about full legal redress under the Montana Constitution.

Francetich:

"We hold that 5 39-71-414 (6) (a) , MCA, is unconstitutional in light of the clear and direct language of Article If, Section 16, of the Montana Constitution. **We hold that in a case of reasonably clear liability where a claimant is forced to settle for the limits of an insurance policy which, together with claimant's workers' compensation award, do not grant full legal redress under general tort law to the claimant, under workers' compensation laws the insurer is not entitled to subrogation rights under 5 39-71-414, MCA ."**

Francetich has not been overruled.

Made Whole Is Fair and Equitable:

It is based upon an equitable balancing of the rights of the insurer as compared to the claimant. . . . [T]he basic conclusion is that when the amount recovered by a claimant is less than the claimant's total loss, with a result that either the claimant or the insurer must to some extent go unpaid, then it is equitable that the loss be born [sic] by the insurer which had been paid an insurance premium for the assumption of its liability. . . . **The key aspect is that the insurer has been paid for the assumption of the liability for the claim, and that where the claimant has not been made whole, equity concludes that it is the insurer which should stand the loss, rather than the claimant. . . .**

Zacher, 243 Mont. at 230.

SB 288 is not a cure all for insurers, the reality is that most cases involve low third party insurance limits, like *Francetich* (\$25,000 limit). **SB 288** continues the pattern of taking ever more benefits from injured workers – **just say NO to SB 288.**

Examples on back side.

How SB 288 works with **third party liability payments** compared to current law that requires that the injured worker must be made whole.

| #1 Worker injured by negligent driver with \$25,000 liability insurance. \$50,000 damages: \$25,000 medical, \$25,000 general damages.* | | |
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| | Worker Damages – Under SB 288 | Worker Damages – Under Made Whole Doctrine |
| Total Damages | \$50,000.00 | \$50,000.00 |
| Comp Insurer Pays | \$12,500.00 | \$25,000.00 |
| Liability Insurer Pays Comp Insurer | \$12,500.00 | |
| Liability Insurer Pays Injured Worker | \$12,500.00 | \$25,000.00 (\$25k general damages) |
| Worker Loss | \$12,500.00 | \$0.00 |

| #2 Worker injured by negligent driver, with \$100,000 liability insurance. \$150,000 damages: \$50,000 medical, \$100,000 general damages.* | | |
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| | Worker Damages – Under SB 288 | Worker Damages – Under Made Whole Doctrine |
| Total Damages | \$150,000.00 | \$150,000.00 |
| Comp Insurer Pays | \$25,000.00 | \$50,000.00 |
| Liability Insurer Pays Comp Insurer | \$25,000.00 | |
| Liability Insurer Pays Injured Worker | \$75,000.00 | \$100,000.00 (\$100k general damages) |
| Worker Loss | \$25,000.00 | \$0.00 |

*The calculation of the injured worker's loss also includes but is not limited to **general damages** such as: wage loss; loss of earning capacity; permanent disability; loss of fringe benefits such as pensions; disfigurement; loss of course of life; and pain and suffering.

In addition, other factors have to be considered in determining the injured worker's loss, such as: attorneys' fees and costs incurred in pursuing the third party recovery; and, insurance policy limits that determines the amount of the settlement.