BUSINESS & LABOR
EXHIBIT NO. 1
DATE 2-17-15
BILL NO. SB 288

# LEGAL REVIEW NOTE

**LC#:** LC0248, To Legal Review Copy, as of January 9, 2015

**Short Title:** Medical recovery of work comp payment from at fault parties

**Attorney Reviewer:** Todd Everts/Jameson Walker

**Date:** January 31, 2015

## CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

***This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).***

***As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.***

**Legal Reviewer Comments:**

LC0248 changes the workers' compensation subrogation statute, section 39-71-414 MCA, to allow an insurer to subrogate medical benefits paid by the insurer. Further, the draft provides that subrogation may occur regardless of whether the insured/claimant is able to demonstrate damages in excess of the workers' compensation benefits and third-party recovery for medical benefits paid.

While some confusion exists as to whether subrogation is a constitutional or equitable principle, one case, *Francetich v. State Compensation Mut. Ins. Fund*, may raise potential constitutional

conformity issues regarding LC0248's changes to 39-71-414. *Francetich v. State Compensation Mut. Ins. Fund*, 252 Mont. 215, 827 P.2d 1279 (1992). *Francetich* expressly declared a prior version of 39-71-414 unconstitutional because it allowed subrogation before the claimant had been made whole, similar to the language proposed in LC0248.

In deciding the case, the Montana Supreme Court analyzed the workers' compensation subrogation statute, 39-71-414(6)(a), in relation to Article II, section 16, of the Montana Constitution. *Id.* at 219, 827 P.2d 1279 at 1282. The Court held that the statute was unconstitutional:

> We hold that 39-71-414(6)(a), MCA, is unconstitutional in light of the clear and direct language of Article II, 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 39-71-414, MCA. *Id.* at 224, 827 P.2d at 1285.

The *Francetich* decision was reaffirmed several years later in *Trankel v. Department of Military Affairs*, 282 Mont. 348, 938 P.2d 614 (1997).

However, in *Van Orden v. United Services Auto Assn.*, the Court allowed an insurer to allow limited subrogation regarding auto insurance before the insured had been made whole. *Van Orden v. United Services Auto Assn.*, 2014 MT 45, 374 Mont. 62, 318 P.3d 1042. The Court held that where "damages are discrete, readily-ascertainable, and completely covered under a separate policy or portion of the policy for which a separate premium has been paid, subrogation may proceed as to that element of loss only." *Id.* at ¶ 25. Thus, the Court carved out an exception to the made whole doctrine to allow subrogation of an automobile portion of a policy before the claimant had been made whole on the medical payment portion of the policy.

The LC0248 amendments attempt to establish limited subrogation, which may be in line with *Van Orden*. By limiting subrogation to medical payments, it may constitute a "discrete" element separate from the whole claim. However, the potential distinction is that damages to a vehicle are known and ascertainable, while medical payments are part of a greater injury to a worker.

Consequently, the holding in *Francetich*, until overruled, may raise potential constitutional conformity issues with respect to LC0248 that allows the insurer to subrogate before the insured/claimant has been made whole on the entire claim.

**Requester Comments:** Senator Tutvedt's response is attached.

LC#: LC0248

Short Title: An Act providing that a workers' compensation insurer has full subrogation right against an at-fault third party for medical claims regardless of whether damage awards exceed a combination of workers' compensation and third-party settlements; and amending § 39-71-414, MCA.

Date: February 5, 2015

LC0248 amends the workers' compensation subrogation statute, MCA § 39-71-414, to provide that "For all medical benefits paid, regardless of whether the claimant is able to demonstrate damages in excess of the workers' compensation benefits and third-party recovery combined, the insurer is entitled to full subrogation rights under this section." As stated in the preamble of the bill, "it is the intent of the Legislature to clearly articulate that for all medical benefits paid by the insurer, the 'made whole doctrine' is not to be applied or considered in determining whether an insurer or self-insurer has a subrogation right in a third-party action as allowed by 39-71-412 and 39-71-413, MCA."

Subrogation is a device of equity which is designed to compel the ultimate payment of a debt by the one who in justice, equity and good conscience should pay it. Generally speaking, an insurer who has indemnified the insured is subrogated to any rights the insured may have against the third party who is responsible for the loss. The theory behind this principle is that absent repayment of the insurer, the insured would be unjustly enriched by virtue of recovery from both the insurer and the wrongdoer or, in absence of such double recovery by the insured, the third party would go free despite his legal obligation in connection with the loss. See *Skauge v. Unigard Insurance Group*, 172 Mont. 521, 565 P.2d 628, 630 (1977) and applied to workers compensation claims in *Hall v. State Fund*, 219 Mont. 180, 708 P.2d 234 (1985).

Despite the foregoing, several workers compensation cases from the early 1990's held that a workers' compensation insurer has no subrogation interest in proceeds until the claimant has been "made whole" for his/her "entire loss." *Zacher v. American Ins. Co.*, 243 Mont. 226, 794 P.2d 335 (1990) and *Francetich v. State Compensation Mutual Ins. Fund*, 252 Mont. 215, 827 P.2d 1279 (1992).

> In determining whether a claimant has been made whole, the amounts received and to be received under the workers' compensation claim shall be added to the amounts otherwise received or to be received from third party claims, and also added to the costs of recovery, including attorney fees; and when that total equals claimant's entire loss, then the insurer shall be entitled to subrogation from all amounts received by the claimant in excess of his entire loss, pursuant to Sec. 39-71-414, MCA (1983).

*Zacher*, 243 Mont. at 231, 794 P.2d at 338 (emphasis added).

Initially, the concept that a claimant must be "made whole" before a workers' compensation insurer's entitlement to subrogation originated in the Montana Constitution.

> Article II, Section 16, of the Montana Constitution, as amended in 1972, provides: Court of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay [Emphasis added.]

"The second sentence is mandatory, prohibitive, and self executing and it prohibits depriving an employee of his full legal redress, recoverable under general tort law, against third-parties." *Francetich*, 252 Mont. at 224.

However, in *State Compensation Insurance Fund v. McMillan*, 306 Mont. 155, 31 P.3d 347 (2001) and relying on *Zacher*, the Supreme Court clarified that the "made whole" limitation on an insurer's right of subrogation is one of equity, not of constitutional principle.

> This theory is not dependent upon a right of recovery of full legal redress under the Montana Constitution. It is based upon an equitable balancing of the rights of the insurer as compared to the claimant.

*Zacher*, 243 Mont. at 230, 794 P.2d at 338 (emphasis added).

It is well-recognized that Legislature may alter common law causes of action and remedies. *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1989). Consistent therewith, in *Swanson v. Hartford Insurance Company*, 309 Mont. 269, 46 P.3d 584 (2002), the court considered whether revised language to MCA § 33-23-203 in 1997 which allowed for "reasonable subrogation" eliminated the "made whole" limitation, the well-established equitable common law doctrine. In deciding that the Legislature's use of the term "reasonable subrogation" did not eliminate the "made whole" limitation, the court agreed with Swanson's arguments that the Legislature could have easily amended the statute to exclude some portion of the "made whole" doctrine if it chose to do so.

Based on the foregoing, it is reasonable to conclude that workers' compensation subrogation is an equitable common law doctrine that is not dependent upon a right of full legal redress under the Montana Constitution. Thus, the Legislature should have the right to define by statute when and in what circumstances a workers' compensation insurer has a subrogation right in a third-party recovery.