

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 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.

Assessing fault or contributory negligence is likewise unconstitutional.

McMillan:

“The Zacher formula does not contemplate a deduction from a claimant's entire loss for his or her comparative negligence. This is in accordance with the Workers' Compensation Act, which does not consider a claimant's fault in determining benefit eligibility. **Reducing the calculation of McMillan's entire loss, and thus his eligibility for benefits, for his comparative negligence would introduce consideration of the claimant's fault into the workers' compensation system-a clear violation of the history, purpose and language of the Act.**

This is not a cure all for insurers, the reality is that most cases involve low third party insurance limits, like *Francetich* (\$25,000 limit). The one case with a large amount of money available for damages was *McMillan*, where the US government was the defendant.