

Report of the Special Committee to Study Subrogation

1 *To the Council of Delegates:*

2 The Special Committee to Study Subrogation respectfully requests your favorable
3 consideration of the following proposal to enact R.C. 3965: Subrogation and
4 Reimbursement. The proposal is attached as Exhibit A.

5 Respectfully submitted,

6 **Richard C. Alkire**, *Independence*
7 Chair

8

9 **EXHIBIT A**

10 **R.C. 3965. Subrogation and Reimbursement**

11 **1. Subrogation and Reimbursement in Insurance Contracts.**

12 No insurance contract providing hospital, medical, surgical and similar or related benefits
13 delivered or issued for delivery or providing for payment of benefits to or on behalf of
14 persons residing in or employed in this State shall contain any provision providing for
15 subrogation and/or reimbursement of any insured's right to recovery for personal injuries
16 from a third person.

17 As adopted from the Commonwealth of Virginia.

18 Alternatively,

19 No right or claim of subrogation or reimbursement is enforceable unless and until the
20 insured is fully compensated for damages legally caused by the conduct of all third
21 parties giving rise to the claim of subrogation or reimbursement.

22 As adopted from South Dakota.

23 **2. Apportionment of Recovery Costs and Expenses**

24 (A) This section applies to an insurer claiming subrogation or reimbursement rights to
25 the proceeds of a settlement or judgment resulting from a legal claim asserted by
26 an insured against a third party legally responsible for personal injury or other
27 entity or person legally responsible for such personal injury.

28 (B) An insurer claiming subrogation and/or reimbursement rights under this section
29 shall reduce its claim pro rata to subrogation and/or reimbursement by the costs,

30 expenses and attorney fees incurred by the insured in asserting the personal injury
31 claim.

32 (C) In the event of a recovery pursuant to subsections (A) and (B), the insurer’s right
33 of subrogation and/or reimbursement shall be reduced by the percentage of
34 negligence attributable to the insured.

35 (D) An insurer claiming subrogation and/or reimbursement rights under this section
36 shall only be entitled to recover that portion of the settlement or judgment
37 specifically attributable to the amounts paid by said insurer.

38 As adopted from Indiana, Iowa and Kansas.

39 **3. Mechanism for Resolution of Subrogation and/or Reimbursement Claims**

40 Where an insurer claiming subrogation or reimbursement rights to the proceeds of a
41 settlement or judgment resulting from a legal claim asserted by an insured against a third
42 party legally responsible for personal injury or other entity or person legally responsible
43 for such personal injury, a reimbursement dispute shall be submitted to a panel appointed
44 by the Ohio State Bar Association (“OSBA”) in lieu of court proceedings if the insured
45 and the insurer agree to submit the dispute to the OSBA panel; the process used shall be
46 as established by the OSBA.

47 As adopted from Hawaii.

48 **4. Applicability**

49 (A) Sections 3965.01 to 3965.03 inclusive of the Revised Code apply to all of the
50 following policies issued in the State of Ohio, and/or for persons residing or
51 working in the State of Ohio: all forms of sickness and accident insurance
52 contracts, all forms of health benefit contracts, all forms of casualty insurance
53 contracts, all forms of homeowners insurance contracts, and all forms of motor
54 vehicle insurance, as these terms are defined within Title 39 of the Revised Code.
55 The terms of this Chapter shall not be circumvented through coordination of
56 benefit provisions, inter-company agreements, intra-company agreements or other
57 mechanisms between or among companies to which the provisions of this Chapter
58 apply.

59 (B) Sections 3965.01 to 3965.03 inclusive shall not apply to the following:

60 (1) Medicare benefits or other benefits issued by the federal
61 government;

62 (2) Medicaid benefits which are governed by R.C. 5101.58;

63 (3) Workers' Compensation benefits which are governed by R.C.
64 4123.93; and,

65 (4) Hospital Charity Assurance Program governed by R.C. Chapter
66 5112

67 **Rationale for Proposal:**

68 In January of 2009, Ohio State Bar Association President Gary Leppla established a
69 Special Committee on Subrogation to be led by Richard Alkire. The mission of the
70 committee was to research and to develop, if appropriate, a method and means for
71 addressing subrogation quagmires confronting Ohio attorneys. Membership in this
72 committee was comprised of insurance attorneys, plaintiff attorneys, and defense
73 attorneys. The committee supports this proposal by a 9-2 vote.

74 The Supreme Court of Ohio has long held that claimants are entitled to be made whole
75 before subrogors are entitled to any compensation. *James v. Michigan Mutual Ins. Co.*
76 (1985), 18 Ohio St.3d 386, at Paragraph 1 of the Syllabus (“Generally, where an insured
77 has not interfered with an insurer’s subrogation rights, the insurer may neither be
78 reimbursed for payments made to the insured nor seek setoff from the limits of its
79 coverage until the insured has been fully compensated for his injuries.”); *N. Buckeye Edn.*
80 *Council Group Health Plan Benefits v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886
81 (recognizing the existence of the make-whole doctrine).

82 Although the “make-whole” rule is the law of Ohio, Ohio lacked legislative direction as
83 to how conflicts regarding this rule should be addressed. Consequently, case law has
84 been dictated by the language of various subrogors’ contracts, resulting in patchwork law
85 and inconsistent results for claimants and subrogors.

86 The Subrogation Committee first considered whether federal law, that is, ERISA, would
87 preempt any state law and determined, by legal research and by discussions with the Ohio
88 Department of Insurance, that in the vast majority of cases, ERISA would not be
89 preemptive. The Committee then turned to the statutory and common law of the rest of
90 the United States to review how other states have addressed subrogation. One of the
91 criteria reviewed was whether the individual states had an established Alternative Dispute
92 Resolution mechanism to resolve this matter consistent with Rule 1.15 of the recently
93 adopted Ohio Rules of Professional Conduct.

94 The survey of the states revealed a consistent trend toward the “make-whole” rule and a
95 body of statutory law and resulting common law from which Ohio could draw. In the
96 proposal approved by the Committee, two means are proposed to address Subrogation
97 and Reimbursement in Insurance Contracts. If the first option of section 1 is adopted, the
98 remainder of the proposal is unnecessary. If, however, the second option of section 1 is
99 adopted, then sections 2-4 naturally flow from that proposal. The Committee
100 recommends that this proposal be codified into Title 39 of the Ohio Revised Code as a
101 separate chapter. Specifically, the Committee recommends that this law be enacted as
102 R.C. 3965.

103 The codification of subrogation in Ohio is long overdue. The proposal of the Committee
104 is to establish a uniform process by which claimants and subrogors can resolve matters
105 judiciously and economically. Furthermore, the proposal of the Committee is consistent
106 with the federal common law of the Sixth Circuit. For these reasons, the Subrogation
107 Committee requests that the Ohio State Bar Association Council of Delegates consider
108 and adopt the proposal to codify the “make-whole” rule in Ohio.

109 **Minority Opinion:**

110 The minority opinion of the Subrogation Committee is that the current state of
111 subrogation occasionally creates significant problems, most commonly where the injured
112 person has comparative fault and her health insurer wants full recovery, or where the
113 available liability insurance is inadequate. It is the minority position that the Ohio State
114 Bar Association should recommend a change in Ohio law to mandate that subrogated
115 insurers may recover only a proportional share in those situations where the insured is
116 comparatively at fault or where there are inadequate liability limits. The Committee’s
117 proposal goes far beyond resolving the problem, and the minority is seriously concerned
118 that the proposal will fail ultimately, and that the opportunity to solve this problem will
119 be lost or delayed.

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121 In one form of the proposal, all subrogation in Ohio is banned. Elimination of
122 subrogation would result in an increase of 5% to 12% in insurance premiums, for home,
123 auto, business and health insurance, according to data from insurers. The proposal
124 requires insurers to reduce recoveries in order to reimburse insureds for legal fees and
125 expenses, regardless of whether the insurer benefits from this work or whether the insurer
126 retains its own trial counsel, and give the insurer no rights in the case of malpractice by
127 the insured’s attorney. A large number of Ohio lawyers practice insurance subrogation
128 law, and their practices would immediately be eliminated. The proposal limits the insurer
129 to claim exclusively against amounts “allocated” to the medical expenses, yet does not
130 require that an allocation actually be made. The purpose of the proposal is to correct
131 problems related to health insurance, but it goes beyond this goal and bans intercompany
132 arbitration, even between auto collision insurers.

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