

1 SENATE BILL NO. 288

2 INTRODUCED BY B. TUTVEDT

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4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A WORKERS' COMPENSATION INSURER HAS
5 FULL SUBROGATION RIGHTS AGAINST AN AT-FAULT THIRD PARTY FOR MEDICAL CLAIMS
6 REGARDLESS OF WHETHER DAMAGE AWARDS EXCEED A COMBINATION OF WORKERS'
7 COMPENSATION BENEFITS AND THIRD-PARTY SETTLEMENTS; AMENDING SECTION 39-71-414, MCA;
8 AND PROVIDING AN EFFECTIVE DATE."

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10 WHEREAS, subrogation is a device of equity "designed to compel the ultimate payment of a debt by the
11 one who in justice, equity and good conscience should pay it", as noted in *Skauge v. Mountain States Telephone
12 and Telegraph Co. and Montana-Dakota Utilities Co.*, 172 Mont. 521, 524, 565 P.2d 628, 630 (1977); and

13 WHEREAS, in *Zacher v. American Insurance Co.*, 243 Mont. 226, 794 P.2d 335 (1990) and *Francetich
14 v. State Compensation Mutual Insurance Fund*, 252 Mont. 215, 827 P.2d 1279 (1992), the Montana Supreme
15 Court held that a workers' compensation insurer or self-insurer has no subrogation interest in proceeds from a
16 third-party action allowed pursuant to 39-71-412 and 39-71-413, MCA, until the claimant has been "made whole"
17 for the claimant's entire loss; and

18 WHEREAS, the "made whole" analysis includes wage loss, loss of earning capacity, loss of fringe
19 benefits, pensions, pain and suffering, and related damages as well as past and future medical costs, meaning
20 that workers' compensation insurers, including self-insurers, are effectively precluded from exercising a
21 subrogation interest in the proceeds of the third-party action; and

22 WHEREAS, in *Zacher* and in *State Compensation Insurance Fund v. McMillan*, 2001 MT 168, 306 Mont.
23 155, 31 P.3d 347, the Montana Supreme Court held that the "made whole doctrine" is not dependent upon a right
24 of recovery of full legal redress under Article II, Section 16, of the Montana Constitution; and

25 WHEREAS, in *Ridley v. Guaranty National Insurance Co.*, 286 Mont. 325, 951 P.2d 987 (1997), the
26 Montana Supreme Court held that under the Unfair Trade Practices Act, an insurer has a duty to pay medical
27 expenses (prior to final settlement) for an injured third party when liability is reasonably clear; and

28 WHEREAS, it is the intent of the Legislature to clearly articulate that for all medical benefits paid by the
29 insurer, the "made whole doctrine" is not to be applied or considered in determining whether an insurer or
30 self-insurer has a subrogation right in a third-party action as allowed for by 39-71-412 and 39-71-413, MCA.

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2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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4 **Section 1.** Section 39-71-414, MCA, is amended to read:

5 **"39-71-414. Subrogation.** (1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and
6 except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and
7 benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien
8 on the claim, judgment, or recovery.

9 (2) (a) If the injured employee intends to institute the third-party action, the employee shall give the
10 insurer reasonable notice of the intention to institute the action.

11 (b) The injured employee may request that the insurer pay a proportionate share of the reasonable cost
12 of the action, including attorney fees.

13 (c) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer
14 waives 50% of its subrogation rights granted by this section.

15 (d) If the injured employee or the employee's personal representative institutes the action, the employee
16 is entitled to at least one-third of the amount recovered by judgment or settlement less a proportionate share of
17 reasonable costs, including attorney fees, if the amount of recovery is insufficient to provide the employee with
18 that amount after payment of subrogation.

19 (3) If an injured employee refuses or fails to institute the third-party action within 1 year from the date
20 of injury, the insurer may institute the action in the name of the employee and for the employee's benefit or that
21 of the employee's personal representative. If the insurer institutes the action, it shall pay to the employee any
22 amount received by judgment or settlement that is in excess of the amounts paid or to be paid under the Workers'
23 Compensation Act after the insurer's reasonable costs, including attorney fees for prosecuting the action, have
24 been deducted from the recovery.

25 (4) An insurer may enter into compromise agreements in settlement of subrogation rights.

26 (5) Regardless of whether the amount of compensation and other benefits payable under the Workers'
27 Compensation Act have been fully determined, the insurer and the claimant's heirs or personal representative
28 may stipulate the proportion of the third-party settlement to be allocated under subrogation. Upon review and
29 approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation. A
30 dispute between the insurer and claimant concerning subrogation is a dispute subject to the mediation

1 requirements of 39-71-2401.

2 (6) (a) ~~The~~ For all medical benefits paid, regardless of whether the claimant is able to demonstrate
3 damages in excess of the workers' compensation benefits and third-party recovery combined, the insurer is
4 entitled to full subrogation rights under this section; For all nonmedical compensation and benefits, the insurer
5 is entitled to full subrogation rights under this section unless the claimant is able to demonstrate damages in
6 excess of the workers' compensation benefits and the third-party recovery combined. If the insurer is entitled to
7 subrogation under this section, the insurer may subrogate against the entire settlement or award of a third-party
8 claim brought by the claimant or the claimant's personal representative without regard to the nature of the
9 damages.

10 (b) If a survival action does not exist and the parties reach a settlement of a wrongful death claim without
11 apportionment of damages by a court or jury, the insurer may subrogate against the entire settlement amount,
12 without regard to the parties' apportionment of the damages, unless the insurer is a party to the settlement
13 agreement.

14 (7) Regardless of whether the amount of compensation and other benefits payable have been fully
15 determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be allocated
16 under subrogation. Upon review and approval by the department, the agreement constitutes a compromise
17 settlement of the issue of subrogation. A dispute between the insurer and claimant concerning subrogation is a
18 dispute subject to the mediation requirements of 39-71-2401."

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20 NEW SECTION. Section 2. Effective date. [This act] is effective July 1, 2015.

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