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Why the Ohio Bureau of Workers' Compensation Must Refund Fifty Million Dollars in Subrogation Payments: A Detailed Look into the State of Subrogation in Ohio after *Holeton v. Crouse Cartage Company*

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WHY THE OHIO BUREAU OF WORKERS' COMPENSATION
MUST REFUND FIFTY MILLION DOLLARS IN SUBROGATION
PAYMENTS: A DETAILED LOOK INTO THE STATE OF
SUBROGATION IN OHIO AFTER HOLETON V. CROUSE
CARTAGE COMPANY

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I. INTRODUCTION

The law is for the protection of the weak more than the strong.¹
Bad laws are the worst sort of tyranny.²

A recent decision by the Supreme Court of Ohio focuses a great deal of attention on Ohio's workers' compensation subrogation statute.³ On June 27, 2001, the Supreme Court of Ohio issued a split decision in *Holeton v. Crouse Cartage Company*,⁴ which declared Ohio Revised Code section 4123.931 unconstitutional in its present form. Under Ohio Revised Code section 4123.931, statutory subrogees⁵ were granted extremely broad rights to recover amounts of compensation and benefits paid to a claimant when that claimant was injured as a result of third-party negligence.⁶ The statutory subrogee was given the automatic right to recover from any settlement or judgment that the injured employee received from the third-party tortfeasor to satisfy the amount of compensation and benefits paid out in a particular claim.⁷

The majority in *Holeton* criticized the specific provision in § 4123.931(A) that allowed a statutory subrogee to recover an amount equal to the estimated future

¹Sir William Erle, English Jurist; Chief Justice, (1850).

²Edmund Burke, (1780).

³OHIO REV. CODE ANN. § 4123.931 (Anderson 2001).

⁴*Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111 (Ohio 2001).

⁵See OHIO REV. CODE ANN. § 4123.93(B) (Anderson 2001) (“‘statutory subrogee’ means the administrator of the Bureau of Workers Compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code.”)

⁶PHILIP J. FULTON, OHIO WORKERS' COMPENSATION LAW § 14.25 (2d ed. 1998).

⁷Denlinger, Rosenthal & Greenberg, LPA, *Workers' Compensation Subrogation Statute Ruled Unconstitutional*, Volume 12, Issue 4, OHIO EMPLOYMENT LAW LETTER (August 2001) at 4 [hereinafter Denlinger] (stating that the statutory subrogees “were entitled to receive an amount equal to past payments of compensation and medical benefits as well as estimated future compensation and medical costs.”) *Id.*

workers' compensation costs.⁸ Thus, the court held that this provision in section 4123.931 amounted to an unconstitutional taking of the employee's property and a violation of due process.⁹ Additionally, the majority criticized section 4123.931's differing treatment of settlements and judgments after trial.¹⁰ The court decided that this differing treatment amounted to an unconstitutional taking, a violation of due process, and a denial of equal protection rights by distinguishing between injured workers who actually try their tort claims and those who settle their tort claims out of court.¹¹ As a result of the *Holeton* decision, subrogation rights in Ohio are surrounded by confusion, uncertainty, and disagreement.

This Note begins by examining the complex history behind workers' compensation subrogation rights in the state of Ohio. This historical timeline flows from the period when statutory subrogation was non-existent in Ohio, to the first version of a subrogation statute in 1993, and finally to the broadened and revised statute in 1995. A detailed examination of the Supreme Court of Ohio's decision in *Holeton v. Crouse Cartage Company* follows the historical overview and focuses on the unconstitutionality of Ohio Revised Code section 4123.931. Additionally, the popular competing views gleaned from both the dissent in *Holeton* and the Bureau of Workers' Compensation's Motion for Reconsideration are discussed to demonstrate the wide scope of disagreement this decision has created in Ohio. In portraying both sides of the various subrogation arguments, this note asserts that the decision reached in *Holeton* was correct.

Having set the stage, the discussion turns to the various controversies the *Holeton* decision has generated in Ohio and those it will generate in the future. This discussion focuses on whether the temporary revival of the 1993 subrogation statute¹² is an appropriate course of action. Additionally, the possible refund of all subrogation payments received by the Bureau as a result of the improper and unconstitutional application of the 1995 statute is also discussed. Finally, this Note provides insight as to what the General Assembly should consider while drafting a new subrogation statute. This Note asserts that the 1993 statute should not be considered revived, and that the Bureau of Workers' Compensation should be enjoined from asserting any subrogation rights under the 1995 statute. Therefore, the refund of all subrogation payments unconstitutionally received by the Bureau of Workers' Compensation through section 4123.931 is warranted.

This Note concludes that once the Bureau of Workers' Compensation has repaid that which it has improperly and unconstitutionally taken from injured employees in the state of Ohio, the General Assembly should pass a new statute that achieves the statutory purpose of subrogation, is fair to the injured employee, and reflects on the employee's constitutional rights.

⁸*Id.*

⁹*Id.* See also *Holeton*, 748 N.E.2d at 1125 (holding that Ohio Revised Code § 4123.931 violated Article I, sections 16 and 19 of the Ohio Constitution).

¹⁰Denlinger, *supra* note 7, at 4.

¹¹*Id.* See also *Holeton*, 748 N.E.2d at 1127 (holding that Ohio Revised Code § 4123.931 violated the Equal Protection Clause of Article I, section 2 of the Ohio Constitution).

¹²OHIO REV. CODE ANN. § 4123.93 (repealed 1995) (reenacted as a definitional statute in House Bill 278).

II. THE HISTORY OF WORKERS' COMPENSATION SUBROGATION IN OHIO

The state of Ohio has never had the benefit of a strong workers' compensation subrogation statute that conferred legitimate subrogation rights. Before 1993, there were no workers' compensation subrogation rights under Ohio statutory law.¹³ In 1993, the General Assembly made its first attempt at a subrogation statute, which resulted in extremely limited enforcement success.¹⁴ In response, the General Assembly adopted a revised 1995 subrogation statute.¹⁵ This statute has been operating unconstitutionally since its inception.¹⁶ Presently, the state of Ohio is refusing to refund the millions of dollars wrongfully taken from the injured workers of Ohio under the 1995 unconstitutional statute.

A. *The Early History of Subrogation in Ohio*

A basic right of subrogation involves "the substitution of one person in place of another with reference to a lawful claim, demand or right."¹⁷ A right of subrogation in the workers' compensation context was created to prevent an employee from receiving a double recovery: recovery from the Bureau of Workers' Compensation and from the third-party tortfeasor.¹⁸ Initially, however, there was no statutory provision regarding subrogation in Ohio law that allowed the Bureau of Workers' Compensation [hereinafter the Bureau] or a self-insured employer to recover the compensation and benefits paid to an employee when that employee was injured by a third-party.¹⁹ This is apparent in *Truscon Steel Co. v. Trumbell Cliffs Furnace Co.*,²⁰ which held that an employer could not recover any sum to reimburse any amount paid in workers' compensation benefits, regardless of whether their employee's injury resulted from the negligence of a third party.²¹

Due to the absence of an Ohio statute that would effectively subrogate the employer to the employee's claim against the third party regarding workers' compensation benefits received by the employee, early court decisions formulated exceptions to the harsh rule enumerated in *Truscon*.²² For example, in 1949, in

¹³See *infra* text accompanying note 19.

¹⁴See *infra* text accompanying notes 34, 35.

¹⁵See *infra* text accompanying notes 40, 41.

¹⁶See *infra* text accompanying note 60.

¹⁷FULTON, *supra* note 6.

¹⁸Denlinger, *supra* note 7, at 4 ("The most common subrogation claims involve motor vehicle accidents, but they may also involve product liability claims, animal bites, medical malpractice, or any other situation in which an employee receives workers' compensation benefits because of injuries caused by a third party.").

¹⁹W. Craig Bashein & Paul W. Flowers, *Assessing the Impact of Holeton*, at 3 (Aug. 9, 2001) (unpublished) (citing *Truscon Steel Co. v. Trumbell Cliffs Furnace Co.*, 166 N.E. 368 (Ohio 1929)).

²⁰166 N.E. 368 (Ohio 1929).

²¹*Id.* at 398-99.

²²See Bashein, *supra* note 19, at 4 (citing *Ledex, Inc. v. Heatbath Corp.*, 461 N.E.2d 1299 (Ohio 1984)).

Midvale Coal Company v. Cardox Corporation,²³ the court held that when the third party tortfeasor's negligence breached an agreement with the employer, the employer was permitted to recover compensation and benefits paid from the actual wrongdoer through a cause of action that was separate and distinct from the employee's tort claim.²⁴ The injured employee was *still* permitted a double recovery from both the Bureau and the third-party tortfeasor, regardless of the employer's separate recovery.²⁵

This exception to the rule lasted until 1963, when the *Midvale* decision was overruled by *Fischer Construction Company v. Stroud*,²⁶ which reaffirmed *Truscon* and held that no subrogation rights existed, and there were no tolerated exceptions.²⁷ Subrogation rights, or the lack thereof, existed in this manner until 1984, when the court in *Ledex, Inc. v. Heatbath Corp.*,²⁸ reinstated the *Midvale* decision.²⁹ The *Midvale* standard regarding subrogation rights in Ohio remained until 1993, when the General Assembly made its first attempt at creating a statutory right of subrogation.

B. The 1993 Ohio Workers' Compensation Subrogation Statute

Effective October 20, 1993, the Bureau and self-insured employers obtained limited subrogation rights, when the Ohio General Assembly adopted House Bill 107.³⁰ House Bill 107 enacted Ohio Revised Code section 4123.93,³¹ which provided "a right of subrogation in favor of the Bureau of Workers' Compensation and self-insuring employers for amounts of compensation and benefits paid in connection with workers' compensation claims which result from third-party negligence."³² Money collected under this new subrogation statute directly benefited self-insured employers, whereas money collected by the Bureau benefited the state fund, thereby, lowering the premium rates for the employer.³³

The statute, however, only created a right of subrogation for some types of recoveries obtained by injured employees.³⁴ Due to the statute's poor drafting and

²³89 N.E.2d 673 (Ohio 1949).

²⁴*Id.* at 451.

²⁵*Id.*

²⁶175 Oho St. 31 (Ohio 1963).

²⁷*Id.* at 34.

²⁸461 N.E.2d 1299 (Ohio 1984).

²⁹See Bashein, *supra* note 19, at 5 (citing *Ledex, Inc.*). According to Bashein and Flowers, "[a]s a result [of the *Ledex* decision], the only recovery available to an employer whose employee was injured by a third party was a claim for the increased workers' compensation premiums suffered as a result." Bashein, *supra* note 19, at 4.

³⁰See Bashein, *supra* note 19, at 4.

³¹OHIO REV. CODE ANN. § 4123.93 (repealed 1995) (reenacted as a definitional statute in House Bill 278).

³²FULTON, *supra* note 6.

³³Denlinger, *supra* note 7, at 4.

³⁴Bashein, *supra* note 19, at 6.

limited enforcement success, the statute was ineffective in the collection of subrogation funds.³⁵ For example, Ohio courts decided that the 1993 subrogation statute did not apply to out of court settlements,³⁶ to recoveries received from the injured employee's own motorist insurance policy,³⁷ to wrongful death actions,³⁸ and to the employee's reasonable attorney fees and court costs that exceeded the workers' compensation benefits paid.³⁹

Due to the 1993 statute's poor drafting and extremely limited success, the Bureau's law department assisted the Ohio General Assembly in drafting a new subrogation statute that would give the Bureau and self-insured employers stronger and broader subrogation rights.⁴⁰

C. *The 1995 Ohio Workers' Compensation Subrogation Statute*

Effective September 29, 1995, as part of House Bill 278, the Ohio Legislature repealed and reenacted Ohio Revised Code section 4123.93 as a definitional statute, and renumbered the revised subrogation statute as section 4123.931.⁴¹ The newly revised statute created a right of subrogation to benefit a statutory subrogee, defined as "the administrator of the Bureau of Workers' Compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services through approved health care program."⁴² The statutory subrogees were given the automatic right to recover any settlement or judgment that the injured claimant was able to receive from the negligent third party, in virtually any type of situation imaginable, regardless of whether litigation was filed in court.⁴³ Additionally, they were entitled to receive an amount equal to "past payments of compensation and medical benefits and estimated future values of compensation and medical benefits."⁴⁴

The other major controversial provision of the 1995 statute was that the entire amount of any settlement or compromise received by an injured employee was subject to the subrogation rights of a statutory subrogee, regardless of how the

³⁵*Id.*

³⁶*Id.* (citing *Gregory v. Ohio Bureau of Workers' Compensation*, 686 N.E.2d 347 (Ohio 1996)).

³⁷*Id.* (citing *Schultz v. Yellow Freight Syst.*, No. 96APE03-382, 1996 WL 729867 (Ohio Ct. App. 10th Dist. Dec. 17, 1996)).

³⁸*Id.* (citing *Sallach v. United Airlines, Inc.*, 698 N.E.2d 1065 (Ohio 1997)).

³⁹*Bashein*, *supra* note 19, at 7 (citing *State v. Swanger*, No. 9-99-14, 1999 WL 692464 (Ohio Ct. App. 3rd Dist. Aug. 3, 1999)).

⁴⁰FULTON, *supra* note 6.

⁴¹Rhonda Gail Davis, *The Aftermath of Holeyton v. Crouse Cartage Company: The Status of Workers Compensation Subrogation*, at 2. (Aug. 9, 2001) (unpublished).

⁴²FULTON, *supra* note 6 (citing OHIO REV. CODE ANN. § 4123.93 (B)).

⁴³Denlinger, *supra* note 7, at 4; *see also* OHIO REV. CODE ANN. § 4123.931(A) (Anderson 2001).

⁴⁴OHIO REV. CODE ANN. § 4123.931(A) (Anderson 2001).

settlement was characterized.⁴⁵ In addition, any designation of funds to avoid this specific section was void, unless special jury interrogatories were used to designate the different types of damages.⁴⁶

Subrogation under the new section 4123.931 worked fairly well for the Bureau and employers alike from 1995 through 2001. In many instances, however, the broad scope of the statute did not work to the benefit of the injured worker.⁴⁷ This broad and lopsided effect of section 4123.931 prompted numerous attacks on the statute's constitutionality under Ohio law⁴⁸ that paved the way for an injured employee, his attorneys, and the Ohio Academy of Trial Lawyers to challenge Ohio's workers' compensation subrogation statute as unconstitutional in *Holeton v. Crouse Cartage Company*.

III. THE SUPREME COURT OF OHIO'S DECISION IN *HOLETON V. CROUSE CARTAGE COMPANY*

The Supreme Court of Ohio's decision in *Holeton v. Crouse Cartage Company* was a critical first step in correcting the unjust impact that the 1995 subrogation statute had on the injured workers of Ohio. *Holeton* has effectively paved the way for strong arguments in favor of refunding the millions of dollars that were impermissibly taken under the unconstitutional statute. Therefore, injured workers who have been forced to pay exorbitant amounts of money to the state under the 1995 subrogation statute may now have some legitimate relief in sight.

Contained in this section is a brief discussion of the pertinent facts behind *Holeton v. Crouse Cartage Company*, and a detailed explanation of the Supreme Court of Ohio's decision in the matter. In ruling Ohio's workers' compensation subrogation statute unconstitutional, the court began by noting that the concept of subrogation was valid.⁴⁹ However, the court found that parts of sections 4123.931(A) and 4123.931(D) of the statute directly interfered with a claimant's constitutional rights.⁵⁰ The majority's decision as to the unconstitutionality of the subrogation statute is discussed below.

A. *The Facts in Holeton v. Crouse Cartage Company*

On June 18, 1998, plaintiff Rick Holeton was injured in the course and scope of his employment with Harper Structures.⁵¹ At the time of his accident, Mr. Holeton worked as part of a construction crew in the process of building an overpass across the Ohio Turnpike.⁵² A truck, owned and operated by defendants James Parr and

⁴⁵FULTON, *supra* note 6.

⁴⁶*Id.* (citing OHIO REV. CODE ANN. § 4123.93 (D)). This provision of section 4123.931 thereby differentiated between a claimant who takes his or her claim to court, and a claimant who decides to settle out of court.

⁴⁷*Bashein, supra* note 19, at 5-7.

⁴⁸*Id.*

⁴⁹*See infra* text accompanying notes 62, 63.

⁵⁰*See infra* text accompanying notes 67, 73.

⁵¹*Holeton*, 748 N.E.2d at 1113.

⁵²*Id.*

Crouse Cartage Company, struck the telescoping man-lift bucket in which Mr. Holeton was standing.⁵³ The force of the impact propelled Mr. Holeton out of the bucket, thrusting him into the underside of the overpass and then dropping him onto the highway below, leaving him seriously injured.⁵⁴

Since Mr. Holeton's injuries occurred in the course and scope of his employment with Harper Structures, he received and may indefinitely continue to receive, workers' compensation benefits from the Bureau.⁵⁵ At the time of this decision, Mr. Holeton received over \$190,000 in wage and medical benefits from the Bureau.⁵⁶

Mr. Holeton sued Crouse Cartage Company for his personal injuries, and the Bureau asserted a subrogation claim against any settlement or judgment Mr. Holeton might receive by or on behalf of the defendants, pursuant to Ohio's workers' compensation subrogation statute, Ohio Revised Code section 4123.931.⁵⁷ Plaintiffs Rick Holeton, his spouse Shari Holeton, and his two minor children disputed the validity of the Bureau's subrogation claim and argued that the subrogation statute violated relevant sections of Ohio's Constitution.⁵⁸ The majority opinion by Justice Alice Robie Resnick resolved the court's eight-part inquiry into the statute's constitutional and legal validity.⁵⁹ The court held that "the law violates a constitutional provision against the government's taking of private property without just compensation and runs counter to constitutional guarantees of remedy for an injury by due course of the law and equal protection."⁶⁰

B. Attacking the Concept of Subrogation

Although the Supreme Court of Ohio ultimately decided that Ohio's subrogation statute was unconstitutional, the court began its discussion by rejecting two specific arguments made by the Plaintiff, discussed below.⁶¹ By addressing these arguments first, the court effectively laid the foundation for their future support of a *constitutionally sound* subrogation statute. Additionally, by first rejecting these broad and overarching assertions, the court enabled itself to move into a more specified look at the subrogation statute.

First, the Supreme Court of Ohio rejected Mr. Holeton's assertion that a subrogation statute is inherently unconstitutional on its face, by noting that virtually every state has some type of subrogation statute enabling a state fund or an employer

⁵³*Id.* at 1114.

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Holeton*, 748 N.E.2d at 1114.

⁵⁷*Id.*

⁵⁸*Id.* The Bureau, in response, denied that the subrogation statute was unconstitutional and sought to enforce its subrogation rights under section 4123.931.

⁵⁹Communications Office of Ohio Supreme Court, *Supreme Court Strikes Workers' Compensation Subrogation Statute* (June 27, 2001).

⁶⁰*Id.*

⁶¹*Holeton*, 748 N.E.2d at 1117.

to recover paid benefits and compensation.⁶² To support this position, Justice Resnick stated that “[a]ny decision that would hold the mere concept of subrogation or reimbursement *per se* invalid in the workers’ compensation context would constitute a legal anomaly.”⁶³

Second, the court noted that Ohio’s subrogation statute does not operate to reduce an injured employee’s workers’ compensation benefits in any way.⁶⁴ Justice Resnick stated that even though the statute may diminish or extinguish a claimant’s tort recovery irrespective of whether a double recovery had occurred, the statute does nothing to the claimant’s workers’ compensation recovery; “the claimant is always left with the full measure of compensation and benefits to which he or she is entitled under the Workers’ Compensation Act.”⁶⁵ Although these assertions were rejected, the Supreme Court of Ohio ultimately decided that Ohio’s subrogation statute was unconstitutional, as it specifically violated Article I, sections 2, 16, and 19 of the Ohio Constitution.⁶⁶

C. Estimated Future Values of Compensation and Medical Benefits

The Supreme Court of Ohio found that Ohio’s workers’ compensation subrogation statute impermissibly gave the statutory subrogee a claim to recover estimated future values of compensation and medical benefits under section 4123.931(A), and was, therefore, unconstitutional.⁶⁷ Justice Resnick stated:

By giving the subrogee a current collectible interest in estimated future expenditures, R.C. 4123.931(A) creates conditions under which a prohibited taking may occur. This would happen in those situations where the amount of reimbursement for “estimated future values of compensation and medical benefits” proves to be substantially greater than the subrogee’s eventual compensation outlay.⁶⁸

For example, a claimant may die before collecting the entire expected and estimated amount of compensation, and therefore, the subrogee would receive money never actually paid to the claimant.⁶⁹

Additionally, in discussing wrongful death situations, the court illustrated another prime example of when the amount of reimbursement for estimated future values proves to be greater than the subrogee’s eventual compensation outlay:

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Holeton*, 748 N.E.2d at 1129.

⁶⁷*Id.* at 1119.

⁶⁸*Id.* In other words, O.R.C. 4123.931(A) requires the claimant to reimburse the Bureau for future benefits that the claimant may never receive.

⁶⁹Calfee, Halter & Griswold LLP, *Subrogation Unconstitutional*, LEGAL NEWS (July 2001) available at <http://www.calfee.com/news>.

[I]n a wrongful death situation where the decedent leaves a surviving spouse—say, a woman in her thirties or forties . . . the BWC or self-insured employer will calculate estimated future benefits based upon the . . . woman's life expectancy. However, if the woman remarries, she will cease to be entitled to workers' compensation benefits upon remarriage . . . in those circumstances, if the subrogee has recovered estimated future benefits based upon the woman's life expectancy, and she remarries shortly thereafter, the statute endows the subrogee with an enormous windfall at the expense of the injured party.⁷⁰

The majority stated that in these types of events, which occur all too often, the subrogation statute does not operate to prevent the claimant from receiving a double recovery, but instead provides the statutory subrogee with monies that the claimant never actually received, thus frequently resulting in a windfall.⁷¹ The court considered this potential windfall for the statutory subrogee at the expense of the claimant tantamount to an unlawful taking of the claimant's property, which violates Article I, sections 16 and 19 of the Ohio Constitution.⁷²

D. Distinguishing Between Settlements and Judgments

Additionally, the court found that Ohio's workers' compensation subrogation statute impermissibly establishes a procedural framework that distinguishes between third-party claims that are tried in court and third-party claims that are settled under section 4123.931(D).⁷³ Simply speaking, workers' compensation benefits cover only certain types of injuries to the specific claimant.⁷⁴ It does not cover any additional damages that may surround the claimant's accident (i.e., pain and suffering).⁷⁵ Under section 4123.931(D), if a claimant decided to try his or her case against a third-party tortfeasor, he or she would be able to obtain jury interrogatories in which he or she would be able to request the jury to categorize the various types of damages, and separating those damages that represent workers' compensation or medical benefits and those that do not, thereby, protecting certain damages from being subject to subrogation.⁷⁶ If, on the other hand, a claimant decided to settle his claim outside of court, the entire amount of settlement or compromise is subject to the reimbursement right of the statutory subrogee, and the claimant is precluded under section 4123.931(D) from showing that certain portions of the settlement or compromise do not represent or duplicate benefits and compensation paid out by the Bureau or a self-insured employer.⁷⁷ Therefore, Ohio's subrogation statute

⁷⁰*Holeton*, 748 N.E.2d at 1119-20.

⁷¹*Id.* at 1119.

⁷²Calfee, Halter & Griswold LLP, *supra* note 69.

⁷³*Holeton*, 748 N.E.2d at 1121.

⁷⁴*See generally Holeton*, 748 N.E.2d at 1121-23.

⁷⁵*Id.*

⁷⁶*Id.* at 1121. *See also* Denlinger, *supra* note 7, at 4.

⁷⁷*Holeton*, 748 N.E.2d at 1121. *See also* Denlinger, *supra* note 7, at 4.

impermissibly and unconstitutionally discriminated between claimants who settled third party tort actions and those who tried their cases to a jury.⁷⁸

Additionally, Justice Resnick noted that often times the actual combined amount of the workers' compensation benefits and settlement recovery is insufficient to cover all of a claimant's loss, and "[i]t can hardly be said that a double recovery results when a tort victim is allowed to retain two recoveries that, when combined, still do not make him or her whole."⁷⁹ The court decided that the settlement problem in section 4123.931(D) amounted to an unconstitutional taking, a violation of due process, and a violation of the Equal Protection Clause in Article I, § 2, as it distinguished between injured workers who go to trial and those who settle.⁸⁰ The Equal Protection violation is based on the settlement language of the statute, which essentially presumes a double recovery occurs whenever a claimant retains workers' compensation and tort damages, and "claimants who try their claims are permitted to rebut this presumption while claimants who settle their tort claims are not."⁸¹

E One Final Statement by the Supreme Court of Ohio

Mr. Holeton asserted five other grounds under which Ohio's subrogation statute should be held unconstitutional, all of which were summarily struck down by the Supreme Court of Ohio.⁸² Importantly, the court stated, "[i]n so holding, we do not accept the proposition that a workers' compensation subrogation statute is *per se* unconstitutional, and nothing in the opinion shall be construed to prevent the General Assembly from ever enacting such a statute. We only hold that R.C. 4123.931, in its present form, is unconstitutional."⁸³

After the Supreme Court of Ohio's split decision in *Holeton*, three judges offered a blistering dissent.⁸⁴ Additionally, the Bureau promptly filed a Motion for Reconsideration in an attempt to preserve the workers' compensation subrogation statute in Ohio.⁸⁵ By examining and considering those various arguments and competing views, this Note asserts that the majority in *Holeton* correctly ruled that Ohio's subrogation statute stands in violation of the Ohio Constitution.

IV. COMPETING VIEWS ON SUBROGATION RIGHTS IN OHIO: THE *HOLETON*
DISSSENT AND THE BUREAU'S MOTION FOR RECONSIDERATION

Due to the great importance of subrogation rights in the workers' compensation context, the *Holeton* decision stirred up a great deal of controversy in Ohio. The

⁷⁸*Holeton*, 748 N.E.2d at 1121-22.

⁷⁹*Id.* at 1122.

⁸⁰Denlinger, *supra* note 7, at 4.

⁸¹Communications Office of Ohio Supreme Court, *Supreme Court Strikes Workers' Compensation Subrogation Statute* (June 27, 2001).

⁸²*Holeton*, 748 N.E.2d at 1129.

⁸³*Id.* at 1129.

⁸⁴*See id.* (Moyer, J., dissenting)

⁸⁵*See* Motion for Reconsideration of Respondent, Ohio Bureau of Workers' Compensation, *Holteon v. Crouse Cartage Co.*, 748 N.E.2d 1111 (Ohio 2001) (No. 00-428).

dissenting justices and the Bureau argued intensely against the majority's decision, perhaps predicting the onslaught of arguments that would arise regarding the refund of subrogation monies following the majority's decision. After an examination of each specific argument from both sources, however, it becomes clear that the majority's decision in *Holeton* was correct, and the Supreme Court of Ohio was justified in denying the Bureau's Motion. This conclusion effectively allows the injured workers of Ohio to continue on their path towards reimbursement.

A. *The Dissent's Arguments*

The dissent's first argument is based on "[t]he principle that courts are not the creators of public policy and should not decide cases based on a disagreement with [the] legislature"⁸⁶ The dissenting justices in *Holeton* accused the majority of overstepping its role and substituting themselves for the General Assembly of Ohio, thereby, basing their decision on their own legislative policy preferences.⁸⁷ In the dissent, Justice Moyer stated, "[t]he majority's determination . . . appears to derive from its disagreement with the substance of legislation. The reasons stated for declaring the statute unconstitutional are generally policy arguments, not principles of constitutional law."⁸⁸

Second, the dissent saw no constitutional problem with letting the Bureau or a self-insured employer collect estimated future costs as part of its subrogation claim against an injured employee's recovery.⁸⁹ The dissent noted that no estimate is ever going to be absolutely perfect, and even though future costs may sometimes be overestimated, they are often underestimated.⁹⁰ For example, the court stated that although there were circumstances in which an employee may die before receiving benefits equal to the amount of subrogation, there were also circumstances in which an employee may live beyond their life expectancy.⁹¹ Justice Moyer added that in determining future values, the court "hears evidence from both the claimant and the subrogee, and may reject the subrogee's projections if it finds them not well supported . . . [c]ourts routinely estimate the value of future payments in these cases, aided by expert testimony, mortality tables, and formulas for reducing future payments to present value."⁹²

Third, the dissenting justices argued that no fundamental constitutional right of an employee was violated because of the treatment of settlements differently than judgments awarded after a trial.⁹³ Justice Moyer supported this proposal by stating "[i]f an employee is dissatisfied with settlement policies, the employee may proceed with a jury trial . . . R.C. 4123.931 does not force employees to litigate . . . like all

⁸⁶*Holeton*, 748 N.E.2d at 1129.

⁸⁷Denlinger, *supra* note 7, at 4.

⁸⁸*Holeton*, 748 N.E.2d. at 1129.

⁸⁹Denlinger, *supra* note 7, at 4.

⁹⁰*Holeton*, 738 N.E.2d at 1130 (Moyer, J., dissenting); Denlinger, *supra* note 7, at 4.

⁹¹*Holeton*, 738 N.E.2d at 1130 (Moyer, J., dissenting).

⁹²*Id.* at 1130.

⁹³Denlinger, *supra* note 7, at 4.

claimants, injured employees are free to decide whether to proceed to trial or to settle.”⁹⁴

Finally, Justice Cook’s dissent stated that the majority’s decision stood “for the bizarre and unsupportable proposition that a court may declare a statute unconstitutional on its face simply because it may be applied unconstitutionally in some cases.”⁹⁵ Justice Cook believed that the majority’s decision to declare the statute facially unconstitutional fell short of the difficult standard required for this type of challenge; even though a statute may operate unconstitutionally in some circumstances, that is not sufficient to render it completely void.⁹⁶

As stated in the preceding arguments, the dissenting Justices in *Holeton* would have upheld the subrogation statute’s constitutionality by attacking the majority’s decision and the methodology employed to arrive at that decision. Additionally, the Bureau promptly filed a Motion for Reconsideration after the decision in *Holeton*.⁹⁷ Discussed below are various arguments made by the Bureau that are similar to those arguments made by the dissent in *Holeton*, but also unique in certain situations.

B. The Bureau’s Motion for Reconsideration’s Arguments

First, the Bureau argued that section 4123.931 was rationally based because the statute furthered a legitimate legislative objective.⁹⁸ The Bureau felt that the majority in *Holeton* simply declared Ohio’s subrogation statute unconstitutional based upon two potential and hypothetical situations that may arise in a case where subrogation rights are asserted.⁹⁹ Furthermore, the Bureau argued that the majority overlooked the fact that there are circumstances under which the subrogation statute benefited the claimant, and fulfilled the legislature’s intent of preventing a double recovery.¹⁰⁰

Second, the Bureau argued that section 4123.931(D) did not violate equal protection guarantees of claimants who settled their tort claims, but simply precluded the parties from colluding to prevent subrogation.¹⁰¹ In the case of those claimants

⁹⁴*Holeton*, 748 N.E.2d at 1131. Additionally, the dissent stated that “[e]ach process has its own advantages and disadvantages, and the employee must decide whether to submit his or her claim to a trial that would determine the portion of the award that should be shielded from subrogation, or to settle with the tortfeasor, taking into consideration that the settlement amount will be subject to subrogation.” *Id.* at 1131-32.

⁹⁵*Id.* at 1133 (Cook, J., dissenting).

⁹⁶*Id.* Additionally, Justice Cook felt that the majority needed to consider many more additional situations before declaring the statute facially unconstitutional or invalid *in toto*; simply finding the statute invalid in a few circumstances is not enough. *Id.* Justice Cook also noted that the majority’s analysis fell short of this exhaustive standard. *Id.*

⁹⁷*See supra* note 85.

⁹⁸*See* Motion for Reconsideration of Respondent, Ohio Bureau of Workers’ Compensation at 2, *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111 (Ohio 2001) (No. 00-428).

⁹⁹*See id.* at 4.

¹⁰⁰*See id.*

¹⁰¹*See id.* at 7 (“The provision that any settlement is presumed to represent amounts subject to subrogation will not necessarily work to the detriment of the plaintiff, as the court assumes . . . without such a provision, the subrogee’s interests are not protected.”).

who go to trial, the statute allowed the jury to determine the amounts and types of damages.¹⁰² In the case of settlement, the statute simply made it a practical necessity to involve the subrogee in negotiations, thereby, allowing the subrogee to look after his or her interests.¹⁰³

One last notable argument from the Bureau involved the idea of severability. The Bureau argued that even if portions of section 4123.931 were deemed unconstitutional, the subrogation statute itself was not.¹⁰⁴ Therefore, the Bureau asserted that the few portions of the statute deemed unconstitutional should be severed and the remaining portions should remain intact since that was the intent of the legislature.¹⁰⁵

The arguments presented by the dissenting justices and the Bureau demonstrate the mixed emotions and conflicting ideas the *Holeton* decision created. Deep examination of these preceding arguments, however, leads to the conclusion that the majority's decision in *Holeton* was correct. Thus, the Supreme Court of Ohio correctly denied the Bureau's Motion for Reconsideration, thereby making *Holeton* the law.

C. Examination of the Dissent's Arguments

The dissenting justices began with the argument that the majority substituted themselves for the General Assembly, making policy arguments instead of constitutional law arguments.¹⁰⁶ This argument is generally flawed, as the majority took great pains to compare throughout the entire decision many facets of the subrogation statute to the applicable areas of constitutional law.¹⁰⁷ By examining hypothetical situations that commonly arise in workers' compensation situations, the majority found clear violations of specific provisions of the Ohio Constitution.¹⁰⁸ Additionally, in the last paragraph of the decision, the majority urged the General Assembly to enact a subrogation statute that would be constitutionally sound.¹⁰⁹ The majority did not substitute itself for the General Assembly, but simply informed the General Assembly that the present statute is unconstitutional and needs to be revised.¹¹⁰ The majority made no recommendations, nor any policy arguments. They simply stated how the present statute violated common law notions embedded in the Ohio Constitution, actually leaving the rest up to the actual General Assembly.

The dissenting justices went on to argue that no future estimate is perfect, and although estimates may sometimes be overestimated, they are often

¹⁰²See Respondent's Motion for Reconsideration at 9, *Holeton* (No. 00-428).

¹⁰³*Id.* Such a provision is not unconstitutional, but serves the legitimate governmental interest of promoting a full and equitable resolution of a subrogation claim. *Id.*

¹⁰⁴See Respondent's Motion for Reconsideration at 10, *Holeton* (No. 00-428).

¹⁰⁵See *id.*

¹⁰⁶*Holeton*, 748 N.E.2d at 1129-30.

¹⁰⁷See generally, *Holeton*, 748 N.E.2d at 1119-24.

¹⁰⁸*Id.*

¹⁰⁹See *id.* at 1129.

¹¹⁰*Id.*

underestimated.¹¹¹ The dissent failed, however, to see the magnitude of its reasoning because a constitutional violation will always occur when future values of compensation and benefits are overestimated, thus resulting in a windfall for the subrogee.¹¹² Simply stating that underestimations occur does not relieve the notion that overestimations *often* result in constitutional violations. Therefore, the resulting windfall to the statutory subrogee in these circumstances needs to be eliminated. Since no estimate formulated by a court is going to be perfect, a new statute that implements new methods is needed to prevent a statutory subrogee from collecting in situations where an obvious unconstitutional taking has occurred.

The dissenting justices also stated that a claimant is not forced to settle because he or she always has the chance to litigate and therefore take full advantage of jury interrogatories to categorize damages.¹¹³ An effective counter-argument to this proposition, however, is that it is not true that every claimant has the money, means, or time to litigate their respective claims. It is naïve to believe that all claimants have the unfettered opportunity to try their claims. By discriminating between those claimants who do and those who do not try their claims, a clear violation of equal protection rights takes place. Additionally, the majority points out that trying a case to have damages designated does not obviate the potential problems in these types of situations.¹¹⁴ The fact that a claimant has the legal ability to try their case does not mean they will have the means to do so. Moreover, it does not mean a double recovery will not still occur in the process.

The final argument made by Justice Cook is perhaps the most persuasive of the dissent's arguments. Justice Cook believed that although a statute may operate unconstitutionally in some circumstances, it is insufficient to render the statute completely void on its face.¹¹⁵ Although the majority considered only a few instances where the statute operated unconstitutionally, they explained that situations and circumstances like those mentioned in the opinion happen frequently in the workers' compensation context, and it is the subrogation statute that creates those situations by virtue of its classifications and presumptions.¹¹⁶ The majority considered the repeated and familiar circumstances that often arise between the common law and the subrogation statute to determine that the statute was not related to its presumed goal of preventing double recoveries.¹¹⁷ It is impossible for a court to consider every possible circumstance that may arise with respect to the subrogation statute. Therefore, in considering a few of the most often occurring situations, the majority demonstrated that the subrogation statute worked

¹¹¹*Id.* at 1130 (Moyer, J., dissenting).

¹¹²*Holeton*, 748 N.E.2d at 1119.

¹¹³*Id.* at 1131 (Moyer, J., dissenting).

¹¹⁴*Id.* at 1124 (“Despite any allocation of damages, the claimant’s tort recovery is still fixed by the insurance policy limits, the combined amount of those limits and workers’ compensation is still insufficient to cover the claimant’s actual total loss, and there is still no double recovery to justify a right of subrogation to any of the insurance proceeds.”).

¹¹⁵*Holeton*, 748 N.E.2d at 1133 (Cook, J., dissenting).

¹¹⁶*Id.* at 1125.

¹¹⁷*Id.*

unconstitutionally.¹¹⁸ Although the statute is appropriate in some situations, important sections of the statute work directly against the Ohio Constitution.¹¹⁹ Therefore, the majority correctly held that Ohio's workers' compensation subrogation statute violates the Ohio Constitution.

The arguments in response to the majority's decision in *Holeton* continued when the Bureau set forth a few more arguments in their Motion for Reconsideration. Unfortunately, these arguments found little merit with the Supreme Court of Ohio. Consequently, the court denied the motion. Through an examination of the Bureau's three main arguments, the flaws become quite apparent.

D. Examination of the Bureau's Motion for Reconsideration

The Bureau agreed with the dissent and believed that the majority overlooked the fact that there are circumstances under which the subrogation statute works to the benefit of the claimant and fulfills the legislature's intent of preventing a double recovery; thus, the Bureau argues the statute has a rational basis.¹²⁰ The statute's operation, however, does not aid the government's interest in preventing double recoveries, because, in attempting to achieve that goal, constitutional violations occur quite regularly in numerous claims.¹²¹ As mentioned previously, just because the statute works in some circumstances does not mean that it should deduct monies from claimants and produce a windfall for subrogees in other circumstances.¹²² The subrogation statute is both arbitrary and irrational in a wide variety of circumstances.

The Bureau's Motion also claimed that section 4123.931(D) did not violate equal protection guarantees of claimants who settled their tort claims, but simply precluded the parties from colluding to prevent subrogation.¹²³ The majority's arguments regarding settlements and judgments under the statute, however, make it clear that section 4123.931 created a level of discrimination between claimants.¹²⁴ When the Bureau stated that section 4123.931(D) simply worked to keep parties from colluding to prevent subrogation, they only examined the tip of the iceberg. As previously examined, section 4123.931(D) worked unconstitutionally in many ways and cannot be viewed with such simplicity.

Lastly, the Bureau asserted that the court deemed two specific phrases, but not the entire statute, in section 4123.931 unconstitutional. Therefore, the entire statute should not have been declared unconstitutional, and only the unconstitutional portions should have been severed.¹²⁵ This argument initially fails because the Bureau did not previously raise the issue of severability, and they should not be

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰See Respondent's Motion for Reconsideration at 4, *Holeton* (No. 00-428).

¹²¹*Holeton*, 748 N.E.2d at 1125.

¹²²*Id.*

¹²³See Respondent's Motion for Reconsideration at 7, *Holeton* (No. 00-428).

¹²⁴See *supra* text accompanying note 114.

¹²⁵See Respondent's Motion for Reconsideration at 10, *Holeton* (No. 00-428).

permitted to raise this issue at so late a juncture.¹²⁶ Moreover, *Holeton* argued that the subrogation statute “represents a highly integrated, comprehensive treatment of subrogation rights . . . [i]t is simply not possible to sever [a provision] . . . and still remain true to the legislative intent.”¹²⁷ This argument, therefore, lacks merit and can be dismissed.

Although the holding of *Holeton* is correct, issues still surround the state of subrogation in Ohio. Because the 1995 statute has been effectively ruled unconstitutional, the Bureau and self-insured employers no longer enjoy subrogation rights under Ohio’s statutory scheme. However, one of the many post-*Holeton* arguments revolves around whether the 1993 subrogation statute is now revived with the fall of the 1995 statute. This argument is fully examined in the following section.

V. IN THE AFTERMATH OF *HOLETON*: IS THE FORMER SUBROGATION STATUTE REVIVED?

Directly following the Supreme Court of Ohio’s decision in *Holeton*, questions began forming as to what subrogation rights, if any, the Bureau now possessed. One of the strongest arguments focused on the revival of the 1993 subrogation statute, which would effectively give the Bureau all subrogation powers it retained under the old statute.¹²⁸ Although the general view is that the 1993 subrogation statute is not revived, the Bureau has not taken a position on it. This section asserts that for various constitutional, statutory, and legislative intent-driven reasons, the 1993 statute should not be revived. Moreover, if the statute was ever revived, it should fail for the same constitutional reasons that led to the demise of the 1995 statute. Therefore, since the Bureau cannot assert *any* subrogation powers under this line of argument, the injured workers of Ohio have an increasingly better chance at having the millions of dollars unconstitutionally taken by the state finally returned to them.

A. *The Argument for Revival of the 1993 Subrogation Statute*

The Supreme Court of Ohio’s decision to rule the 1995 subrogation statute unconstitutional has major implications as to whether the 1993 statute should be in effect. The Supreme Court of Ohio has explained the consequences and impact of ruling a statute unconstitutional, stating that “[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”¹²⁹ Since section 4123.931 is to be treated as a legal nullity, “the ruling of *Holeton* is to be applied retroactively and the statute must be viewed as never having any force or

¹²⁶Memorandum in Opposition to Respondents Motion for Reconsideration, at 4-5, *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111 (Ohio 2001) (No. 00-428).

¹²⁷*Id.* “[S]ince the statute defines BWC’s subrogation interest in an omnibus fashion that includes both past and future wages and medical benefits, the provision dealing with subrogation of future benefits is entirely essential to (and inseparable from) the balance of the statute.” *Id.*

¹²⁸Telephone Interview with Suzanne Stocker, Esq. (Dec.-Jan. 2001-02) (hereinafter Stocker).

¹²⁹Rhonda Gail Davis, *The Aftermath of Holeton v. Crouse Cartage Company: The Status of Workers Compensation Subrogation*, at 9 (Aug. 9, 2001) (unpublished) (citing *Middleton v. Ferguson*, 25 Ohio St. 3d 71, 80 (1986)).

effect.”¹³⁰ Therefore, the 1995 subrogation statute should be viewed as if it never existed, leaving the possibility that the 1993 subrogation statute is revived.

The strongest argument for revival of the 1993 statute is based upon the notion that when the 1995 statute was ruled unconstitutional and invalid, the provisions that repealed the 1993 statute were also made invalid, therefore, reviving the 1993 statute.¹³¹ In a recent decision by the Supreme Court of Ohio in *State v. Sullivan*,¹³² the court held that

[W]hen a court strikes down a statute as unconstitutional, and the offending statute replaced an existing law that had been repealed in the same bill that enacted the offending statute, the repeal is also invalid unless it clearly appears that the General Assembly meant the repeal to have effect even if the offending statute had never been passed.¹³³

The argument here is that the enactment of the offending statute via House Bill 278, section 4123.931, replaced an existing law, the former section 4123.93, which was repealed in that same bill. Therefore, under the court’s logic in *Sullivan*, the repeal of the former section 4123.93 also became invalid when the court ruled section 4123.931 unconstitutional. This rationale leaves the former 1993 subrogation statute in full effect.

Although they are not taking a firm position on the matter, the Bureau and self-insured employers can use this case law to argue that the *Holeton* decision revived the 1993 statute, and that version of the statute is now in full force.¹³⁴ There are, however, many arguments that support the proposition that the 1993 statute cannot be revived. These arguments, along with the unconstitutionality of the 1993 statute, make it apparent that the 1993 subrogation statute should not be revived.

B. The Constitutional Argument Against Revival

The basis for a major argument against the possible revival of the 1993 subrogation statute lies in the Ohio Constitution. Article II, § 15(D) of the Ohio Constitution states that “[n]o law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.”¹³⁵ This provision of the Constitution arose as early as 1917, in *State, ex rel. Godfrey v. O’Brien*.¹³⁶ In that decision, the Supreme Court of Ohio noted that this provision of the Ohio Constitution is mandatory, stating that “it is clear that this provision of the Constitution, requiring each new act to contain the entire act revived, or the section or sections amended, is mandatory;

¹³⁰Bashein, *supra* note 19, at 8 (citing *Peerless Electric Co. vs. Bowers*, 129 N.E.2d 467, 468 (1955)).

¹³¹Bashein, *supra* note 19, at 10.

¹³²739 N.E.2d 788, 794 (Ohio 2001).

¹³³*Id.* at 794; *see also* *Peerless Elec. Co. v. Bowers*, 129 N.E.2d 467 (Ohio 1955); *Pogue v. Groom*, 109 N.E. 477 (Ohio 1914).

¹³⁴Bashein, *supra* note 19, at 10.

¹³⁵*Id.* (citing OHIO CONST. art. II, § 15(D)).

¹³⁶115 N.E. 25 (Ohio 1917).

otherwise repealed sections must be given the same force and effect as if they were not in fact repealed."¹³⁷ The court further mentioned that if reference may be made to statutes expressly repealed by the legislature, reference could be made to a statute that was repealed half a century ago.¹³⁸ Not only is this extremely impractical, but it is expressly prevented by this provision of the Ohio Constitution.¹³⁹

More recently, in *State, ex rel. Judy v. Wandstrat*,¹⁴⁰ the Court of Appeals for the First District of Ohio held that when a statute that effectively repealed earlier enactments was found to be unconstitutional, that determination would not operate to revive earlier enactments, due to the provision of Article II, § 15(D) of the Ohio Constitution.¹⁴¹ Therefore, in order to revive the 1993 subrogation statute, the General Assembly must pass a new act that contains the relevant portions of the former 1993 subrogation statute.¹⁴² The case law in tune with *State v. Sullivan*, which supports revival of the 1993 statute, fails to address this important and mandatory Constitutional provision that effectively bars revival.¹⁴³

In addition to this Constitutional provision that prevents revival, an argument may be made as to what the intent of the legislature was when they enacted House Bill 278 and, specifically, section 4123.931. The Bureau and self-insured employers may argue that the General Assembly definitely intended to have a subrogation statute in place, but through an examination of the language contained in House Bill 278, the legislature's true intent becomes apparent.

C. The General Assembly's Intent

By examining section 10 of House Bill 278, it becomes apparent that the General Assembly did not intend the 1993 statute to be revived as a consequence of the 1995 statute being held unconstitutional.¹⁴⁴ In section 10 of House Bill 278 the General Assembly stated that "[t]he sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void and ineffective shall not effect any other section or parts of sections."¹⁴⁵ This supports the rationale that just because the court ruled section 4123.931 unconstitutional and void does not mean that the repeal

¹³⁷*Id.* at 28. Accordingly, the court states that "[t]he repeal of a statute is the end of that statute. To all extents and purposes it is the same as if it never existed." *Id.*; see also Bashein, *supra* note 19, at 10.

¹³⁸*State, ex rel. Godfrey*, 115 N.E. at 28.

¹³⁹*Id.*

¹⁴⁰577 N.E.2d 364 (Ohio Ct. App. 1st Dist 1989).

¹⁴¹*Id.* at 366. "The passage of Am.Sub.H.B. No. 390 effectively repealed these earlier enactments, and a determination by this court that Am.Sub.H.B. was unconstitutional would not operate to revive them." *Id.*; see also Bashein, *supra* note 19, at 10-11.

¹⁴²Bashein, *supra* note 19, at 11.

¹⁴³*Id.* at 10.

¹⁴⁴*See id.* at 12.

¹⁴⁵*Id.* (citing section 10 of House Bill 278).

provisions of the House Bill 278¹⁴⁶ may also be considered void. The express intent of the legislature is that the repeal provisions should be left alone, even if certain parts of the Bill are held unconstitutional.¹⁴⁷

Moreover, as stated previously in *Sullivan*, a repeal will be considered invalid unless it is clear that the General Assembly meant the repeal to persist even if the offending statute had never been passed.¹⁴⁸ The General Assembly's directions in section 10 of House Bill 278 clearly show that the Assembly intended the repeal provisions to remain unharmed, and thereby prevent the 1993 subrogation statute from ever being revived.¹⁴⁹

It is apparent that the 1993 statute cannot be revived while staying true to Ohio Constitutional Law and the General Assembly's express intent. Additionally, because the 1993 subrogation statute was so worthless and ineffective, the General Assembly had to enact a broader, more productive statute in 1995. Therefore, it may be argued that the General Assembly could never have intended the 1993 statute to be revived, as it is inherently weaker than its successor.¹⁵⁰ With that in mind, it can be concluded that the 1993 subrogation statute should be considered unconstitutional for the same reasons as the 1995 statute.

D. The Unconstitutionality of the 1993 Subrogation Statute

If the 1993 statute were revived, a challenge to its relevant sections under the Ohio Constitution would be the most effective method at proving the statute's invalidity.¹⁵¹ As discussed in previous sections, the 1993 subrogation statute was intended to preclude double recoveries, but in actuality it accomplished even less than the 1995 statute.¹⁵² For example, the Bureau or a self insured employer had no subrogation rights in any of the following instances: out of court settlements, recoveries from the employee's own motorist insurance policy, wrongful death actions, or when the employee's reasonable attorney fees and court costs exceeded the workers' compensation benefits paid.¹⁵³ Therefore, like the 1995 subrogation statute, the 1993 statute "indiscriminately required subrogation claims to be paid in only limited instances and without regard to the actual amount of any 'double recovery' received by the injured worker."¹⁵⁴ This type of action amounts to

¹⁴⁶Section 2 contains the provision that effectively repealed the former subrogation statute, § 4123.93.

¹⁴⁷*See* Bashein, *supra* note 19, at 11.

¹⁴⁸*Sullivan*, 739 N.E.2d at 794.

¹⁴⁹*See* H.R. 278, 310 124th Gen. Assem. Reg. Sess. (Ohio 2001).

¹⁵⁰Bashein, *supra* note 19, at 14. "[T]he readily apparent loopholes, incongruities, and uncertainties created by H.B. 107 prompted the passage of H.B. 278. In many respects, the earlier legislation is even more unfair and inequitable than the General Assembly's latest effort to create subrogation rights in Ohio." *Id.*

¹⁵¹Bashein, *supra* note 19, at 15.

¹⁵²*Id.*

¹⁵³*Id.* at 15-16.

¹⁵⁴*Id.* at 16.

prohibited taking, which is against the constitutional ideals of private property due process.¹⁵⁵

In ruling the 1995 statute unconstitutional, the Supreme Court of Ohio found serious equal protection problems in the 1995 statute's differing treatment of claimants who decide to settle their claims and those who try their claims in court.¹⁵⁶ Similarly, by discriminating between claimants in the different instances mentioned above, the 1993 subrogation statute violated a claimant's equal protection rights in an intensified offensive manner.¹⁵⁷ This statute cannot satisfy the high equal protection standards that the *Holeton* decision promoted.¹⁵⁸ When the 1993 statute is held to the analysis of *Holeton*, it becomes apparent that this statute is inherently flawed and it should not be revived.¹⁵⁹

The *Holeton* decision effectively gutted Ohio's subrogation statute of any type of subrogation power, leaving only worthless definitions.¹⁶⁰ Additionally, as a result of the preceding arguments, it is readily apparent that the 1993 statute should remain repealed indefinitely.¹⁶¹ Therefore, Ohio is currently in a position similar to what it was in before subrogation rights existed in Ohio.¹⁶² However, the difference lies in the fact that the Bureau and self-insured employers have been unjustifiably collecting subrogation funds from claimants for several years under a subrogation statute that has been held to be unconstitutional and is therefore non-existent.¹⁶³ Under this premise, it seems proper that the Bureau should be forced to refund all funds improperly taken under an unconstitutional subrogation statute.

VI. THE FINAL STEPS: REFUND OF SUBROGATION PAYMENTS AND A NEW SUBROGATION STATUTE

The Bureau and self-insured employers enjoyed the luxury of collecting over fifty million dollars from the injured workers of Ohio since 1995.¹⁶⁴ These monies were taken regardless of whether a double recovery actually occurred and in apparent conflict with the Ohio Constitution. Now they're being unjustly retained. The Bureau should be required to repay these monies that were unconstitutionally taken. Only then can the state of Ohio move into the future and create a new subrogation statute that is both fair to the injured worker and keeps the subrogation rights of the Bureau in mind.

¹⁵⁵*Id.*

¹⁵⁶Bashein, *supra* note 19, at 16. *See also, Holeton*, 748 N.E.2d at 1130.

¹⁵⁷*See* Bashein, *supra* note 19, at 17.

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰Rhonda Gail Davis, *The Aftermath of Holeton v. Crouse Cartage Company: The Status of Workers Compensation Subrogation*, at 4 (Aug. 9, 2001) (unpublished).

¹⁶¹*See supra* Sections V.B, V.C, V.D.

¹⁶²Bashein, *supra* note 19, at 13.

¹⁶³*Id.* at 17.

¹⁶⁴*See infra* text accompanying note 166.

This section begins with an introduction as to the Bureau's position on refunding subrogation payments, and the main argument that is being asserted in a pending class action lawsuit dealing with the matter, *Santos v. Bureau of Workers Compensation*.¹⁶⁵ This section asserts that the court of common pleas is the correct court to grant this type of equitable relief, and specific cases will be examined that provide the remedy sought in this class action.¹⁶⁶ Moreover, this section asserts that a total refund of subrogated funds is appropriate under an equitable principle of restitution.¹⁶⁷ This section concludes with a discussion as to the creation of a new subrogation statute in Ohio.¹⁶⁸

A. *The Bureau's Position on Refund of Subrogation Payments*

Although the Bureau has collected approximately fifty million dollars from injured Ohio citizens based upon an unconstitutional subrogation statute, the Bureau has made no move to refund any of the money.¹⁶⁹ Moreover, even in light of the *Holeton* decision, the Bureau has not stated that it will cease and desist all subrogation activities throughout the state of Ohio in all circumstances.¹⁷⁰ Additionally, the Bureau did not indicate it would refund the monies it had unlawfully taken from injured workers through application of an unconstitutional subrogation statute.¹⁷¹

B. *The Class Action Lawsuit*

This firm position maintained by the Bureau is currently being attacked in a class action lawsuit, *Santos v. Bureau of Workers Compensation*, pending in the Eighth District Court of Appeals.¹⁷² The attorneys for the class¹⁷³ are arguing that the state of Ohio should be *enjoined* from asserting any subrogation rights under the now unconstitutional statute.¹⁷⁴ Additionally, the Bureau should be responsible for

¹⁶⁵See *infra* text accompanying note 169-72.

¹⁶⁶See *infra* Section VI.B.

¹⁶⁷See *infra* Section VI.C.

¹⁶⁸See *infra* Section VI.D.

¹⁶⁹Brief of Plaintiff-Appellees, Angel L. Santos, et al., at 1,9, *Santos v. Bureau of Workers' Comp.* (Ohio Ct. App. filed July 13, 2001) (No. 80353).

¹⁷⁰*Id.* at 2.

¹⁷¹*Id.*

¹⁷²No. 80535 (Ohio Ct. App. filed July 13, 2001). This class action lawsuit is being brought by Craig Bashein and Paul Flowers (among others), whose unpublished seminar materials provided a great deal of information used to construct this Note.

¹⁷³The protected classes are "[a]ll workers who have established, or are in the process of establishing, intentional tort claims against their employers where subrogation rights have been or are being asserted under R.C. 4123.931 with respect to any civil recovery secured from the tortfeasor" and "[a]ll workers who are or have been subject to subrogation claims, other than those based on intentional tort claims, asserted by authority of R.C. 4123.931." Brief of Plaintiff-Appellees, Angel L. Santos, et al., at 3, *Santos* (No. 80353).

¹⁷⁴Bashein, *supra* note 19, at 19.

refunding all payments received as a result of the improper application of the section 4123.931.¹⁷⁵

Therefore, a decision was made in the *Santos* class action lawsuit to file in the court of common pleas. To understand why suit was filed in the court of common pleas, it is extremely important to clarify that the class action complaint contains **no request for monetary damages** against the Bureau.¹⁷⁶ The complaint asserts “the government is obtaining these monies unlawfully pursuant to an unconstitutional statute, and seeks an *equitable order* requiring the government to disgorge the money it obtained . . . such a case is not a claim for legal damages, but for equitable relief.”¹⁷⁷ The Plaintiffs in this class action correctly argue that the court of common pleas has the authority to issue equitable, injunctive, and declaratory relief against state agencies.¹⁷⁸ This conclusion becomes valid by examining Ohio Revised Code section 2743.039(A)(2)¹⁷⁹ and judicial decisions which offer guidance, and more importantly, precedence.

This position that the court of common pleas has the authority to issue equitable, injunctive, and declaratory relief against state agencies is strengthened in recent Ohio Court of Appeals decision.¹⁸⁰ In *Judy*, the court of appeals held that claims for injunctive relief and simple reimbursement of improperly assessed fees against the Bureau of Motor Vehicles are not money damages.¹⁸¹ Additionally, the court ruled that the claims were within the exception provided for in Ohio Revised Code section 2743.03(A)(2), and that the court of common pleas had the authority to hear the case.¹⁸² This type of injunctive and equitable relief in the form of simple reimbursement was the appropriate remedy in this decision.¹⁸³ Moreover, it is apparent that Ohio courts have often ruled for plaintiffs in equitable, injunctive, and declaratory relief claims against state agencies, usually resulting in a refund of monies impermissibly taken by that agency.¹⁸⁴ The following two cases not only

¹⁷⁵*Id.*

¹⁷⁶Brief of Plaintiff-Appellees (No. 80353).

¹⁷⁷*Id.* (emphasis added). Accordingly, the court in *Ohio Hosp. Assn.* noted that “[t]he reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity [because the State has previously consented to be sued on such matters]” *Id.* (citing *Ohio Hosp. Assn. v. Ohio Dept. of Human Services*, 579 N.E.2d 695, 699 (Ohio 1991)).

¹⁷⁸Brief of Plaintiff-Appellees, at 8, *Santos* (No. 80353)

¹⁷⁹This provision of the Revised Code allows another Court of original jurisdiction (other than the Court of Claims) to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief. OHIO REV. CODE ANN. § 2743.039(A)(2) (Anderson 2001).

¹⁸⁰*Judy v. State of Ohio*, No. L-01-1200, 2001 Ohio Ct. App. LEXIS 5978 at *2 (Ohio Ct. App. 6th Dist. Dec. 31, 2001), *cert. granted*, *Judy v. Ohio Bureau of Motor Vehicles*, 769 N.E.2d 395 (Ohio 2002).

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*See generally* Brief of Plaintiff-Appellees, at 15, *Santos* (No. 80353).

¹⁸⁴*See id.*

supplement the ideas laid out above, but also show that in this specific circumstance, refund of subrogation payments is a plausible and correct measure to take.

In *Ohio Hospital Ass'n v. Ohio Dep't of Human Services*,¹⁸⁵ several hospitals sought an injunction and monetary relief from the Ohio Department of Human Services stemming from Human Services' adoption of an administrative rule reducing Medicaid reimbursements, which the court ruled violated Title XIX of the Social Security Act.¹⁸⁶ The Supreme Court of Ohio explained that the claim for reimbursement of monies was one for equitable relief rather than money damages, explaining that damages are given to a plaintiff to substitute for a loss, whereas equitable relief is given to give a plaintiff that which he is entitled to.¹⁸⁷ Therefore, the court held that Human Services was not immune from money damages, and awarded relief in this circumstance.¹⁸⁸

Likewise, in *Henley Health Care v. Ohio Bureau of Workers' Comp.*,¹⁸⁹ a health care provider brought action against the Bureau for monetary relief stemming from the Bureau's withholding of payments due to the provider for supplies given to workers' compensation claimants.¹⁹⁰ The Bureau withheld the payments because the provider allegedly broke certain rules.¹⁹¹ Those rules were later found to be invalid because they were properly promulgated under Chapter 119 of the Revised Code.¹⁹² The court noted that the claims were truly equitable in nature, and the common pleas court would have jurisdiction.¹⁹³ Therefore, the provider was permitted to seek reimbursement because they were entitled to the funds that were being withheld.¹⁹⁴

Like the plaintiffs in the preceding cases, injured workers in Ohio have had funds taken from them under a statute that has been decisively ruled unconstitutional by the highest court in the state. The ruling in *Holeton* has made it perfectly clear that the Bureau has taken that which it had absolutely no right to take.¹⁹⁵ Therefore, in light of statutory law and specific cases discussed above, the injured workers of Ohio are entitled to the over fifty million dollars that is owed to them. The class action lawsuit should succeed for the reasons stated above, *but more importantly*, the injured workers of Ohio are entitled to refund of their money under an equitable theory of restitution.¹⁹⁶

¹⁸⁵579 N.E.2d 695, 695 (Ohio 1991).

¹⁸⁶*Id.* at 695.

¹⁸⁷*Id.* at 700.

¹⁸⁸*Id.* at 701.

¹⁸⁹No. 94APE08-1216, 1995 WL 92101 at *1 (Ohio Ct. App. 10th Dist. Feb. 23, 1995).

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²*Id.*

¹⁹³*Id.* at *2.

¹⁹⁴*Henley, Health Care*, 1995 WL 92101 at *4.

¹⁹⁵*See generally Holeton*, 748 N.E.2d at 1111.

¹⁹⁶Bashein, *supra* note 19, at 20.

C. An Equitable Theory of Restitution

Injunctive and equitable relief in the form of reimbursement is an appropriate remedy under the equitable theory of restitution.¹⁹⁷ Therefore, under this common law principle, the injured workers of Ohio have a solid argument for refund of their money. In current law, a principle of restitution is closely associated with the idea that one ought to pay for a benefit that is unjustly retained.¹⁹⁸ As noted by the Ohio Eighth District Court of Appeals in, “[r]estitution is an equitable remedy used to make an injured party whole. At the core of the law of restitution is the principle that a person who has been unjustly enriched at the expense of another is required to make restitution to the other”¹⁹⁹ Therefore, it follows that if a government agency withholds funds that it was never entitled to, the agency is unjustly enriched and the common law demands restitution. It is quite apparent here that the Bureau has been unjustly enriched at the expense of the injured workers of Ohio.²⁰⁰

In the circumstance at hand, the Bureau refuses to refund all subrogation funds it has collected under the authority of an unconstitutional statute. A principle of restitution requires that these injured workers be made whole, and this entails a full refund of the millions of dollars impermissibly and unfairly taken from them by the Bureau.²⁰¹ It is perfectly clear that restitution is an appropriate and necessary action in this case, and until the refund of all subrogated monies occurs, the state of Ohio is still allowing an unconstitutional statute to hold some remnants of power.

D. Formulating a New Subrogation Statute

Ohio has never had the benefit of a strong subrogation statute that prevents double recoveries and protects the rights of the injured worker and the statutory subrogee. The subrogation statutes failed because there was not a fair balance of power between the parties, and the methodology that the statutes employed was flawed in many instances. In creating a new statute, Ohio needs to examine alternative methods to achieving the goal of subrogation. This can be done by examining the offensive portions of the 1995 statute, and looking to other state subrogation statutes for guidance.

The *Holeton* decision and its various implications effectively left Ohio as the only state without a valid subrogation statute.²⁰² The Ohio General Assembly, however, has begun work on a new subrogation statute that should surface sometime in the upcoming year.²⁰³ In an interesting and surprising move, the General Assembly has enlisted the help of both the Bureau and various plaintiff attorneys in

¹⁹⁷*Id.*

¹⁹⁸KASTELY, ET AL. CONTRACTING LAW, 93 (2nd ed. 2000).

¹⁹⁹Bashein, *supra* note 19, at 20 (citing Colangelo v. Cahelmara, No. 57581, 1990 W.L. 180653 at *4 (Ohio Ct. App. 8th Dist. Nov. 21, 1990)).

²⁰⁰Bashein, *supra* note 19, at 20.

²⁰¹*See id.*

²⁰²Stephen S. Mazzei, How will the Legislature Respond? Subrogation Around the Country, at 1 (August 9, 2001) (unpublished).

²⁰³*See* Stocker, *supra* note 128.

order to formulate a workable statute that is fair to both sides, and presents few complications and little conflict between parties. In mounting the difficult task of making Ohio's new subrogation statute work effectively, it is important that the General Assembly begin by looking to other state subrogation statutes for statutory guidance. In actuality, they need look no further than Pennsylvania for a subrogation model that works well and poses no threat to the injured worker's constitutional rights. The Pennsylvania subrogation statute is examined below, in light of the unconstitutional provisions that doomed the 1995 statute.

The "estimated future values of compensation" provision in Ohio's subrogation allowed the Bureau to collect additional monies from the injured workers' settlement or judgment based on a estimate of what the Bureau would probably have to pay the injured worker in the future benefits.²⁰⁴ This provision caused great controversy, and was eventually deemed unconstitutional due to the many circumstances where the Bureau would take more than it was actually entitled to.²⁰⁵ Although Ohio's method of providing the Bureau with future compensation was deemed unconstitutional, the majority of state subrogation statutes *do* allow an employer to sustain a valid subrogation claim for the actuarial future of additional compensation and benefits.²⁰⁶ Only a minority of states limit subrogation claims to the actual amounts paid, without taking estimated future values of compensation into consideration.²⁰⁷ Therefore, the General Assembly cannot simply ignore the statutory subrogee's right to future values of compensation while creating the new statute. Future values of compensation need to be included in Ohio's subrogation statute in a way that is fully constitutional (i.e., not amounting to a taking in any given situation). This can be accomplished by creating an appropriate methodology, which all relative parties can agree on, to which future interests may be decided.²⁰⁸ One such method that could easily work to solve the problem of estimated future values in Ohio is embedded in Pennsylvania's statutory subrogation scheme.²⁰⁹

Section 319 of the Pennsylvania Workers' Compensation Act²¹⁰ states that "[a]ny recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee . . . and shall be treated as an advance payment by the employer on account of any future installments of compensation."²¹¹ The Supreme Court of Pennsylvania elaborated on this provision of the subrogation statute in *P&R Welding & Fabricating v. Workmen's Comp. Appeal Bd.*²¹²

²⁰⁴See *supra* text accompanying notes 67-72.

²⁰⁵See *supra* text accompanying notes 77-81.

²⁰⁶*Id.*

²⁰⁷*Id.*

²⁰⁸*Id.* at 3.

²⁰⁹See 77 PA. CONS. STAT. § 671 (2001).

²¹⁰*Id.*

²¹¹*Id.* (emphasis added).

²¹²701 A.2d 560 (Pa. 1997).

In *P&R Welding*, the court explained that a gross method should be used when determining an employer's subrogation rights and liabilities in a third-party settlement.²¹³ Under this method, "any balance of recovery [the amount available for future credits] is determined by deducting the employer's accrued lien [monies which the employer has paid out in benefits to the injured worker] from the total recovery."²¹⁴ Then, "[t]he balance of recovery is . . . divided by the weekly compensation rate being paid to the workers' compensation claimant in order to arrive at what is known as a 'grace period.'"²¹⁵ The grace period is simply the actual number of weeks *in the future* for which the employer *does not have to pay claimant's workers' compensation benefits*.²¹⁶ Basically, whatever the claimant recovers in excess of what is owed to the employer goes directly to the future workers' compensation benefits that the claimant is entitled to receive, by way of a "credit system." This somewhat confusing method can be simply illustrated by the facts in *P&G Welding*. The claimant recovered \$165,000 from the third-party tortfeasor.²¹⁷ The money owed to the subrogee, or the "accrued lien," totaled \$117,167.25.²¹⁸ The difference, or "balance of recovery" is, therefore, \$47,832.74.²¹⁹ This balance is divided by the weekly compensation rate, and the grace period comes out to 142 weeks.²²⁰ The Bureau does not have to pay the claimant for 142 weeks, due to the \$42,832.74 obtained in settlement with the third-party.²²¹

This subrogation method prevents a double recovery by the claimant, makes the statutory subrogee whole, and achieves the notion of "future compensation" without ever having to calculate an estimate. Therefore, if this "credit" method was implemented in Ohio, there would be no chance of a prohibited taking occurring, and the statute might actually fly under the "constitutional radar." In the Pennsylvania statute's simplicity, the purpose of subrogation is accomplished, and each party benefits equally. Likewise, this statute provides insight as to the problem *Holeton* found in discriminating between settlements and judgments.

²¹³*Id.* at 565; *see also* Darr Construction Co. v. Workmen's Compensation Appeal Board, 715 A.2d 1075 (Pa. 1998).

²¹⁴*P&R Welding*, 701 A.2d at 563.

²¹⁵*Id.*

²¹⁶*Id.* It is also important to note how attorney fees and costs are repaid to the claimant under Pennsylvania's subrogation statute. Upon the claimant's repayment of the accrued lien to the employer, the employer must immediately reimburse the claimant's share of attorney fees and costs in recovering that amount. Additionally, the remaining proportion of legal fees that can be attributed to the "balance of recovery" are paid back to the claimant on a pro-rata basis for each individual week that the employer does not have to make workers' compensation payments, i.e., during the employer's "grace period." This method can easily be instituted in Ohio if Pennsylvania's subrogation method would be statutorily adopted. *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹*P&R Welding*, 701 A.2d at 563.

²²⁰*Id.*

²²¹*Id.*

Ohio's subrogation statute also treated claimants who settled their claims differently from those who tried their claims.²²² Interestingly, every other state's subrogation statutes treat agreed upon settlements exactly the same as court judgments.²²³ Therefore, it is important that the language of Ohio's new statute allow for relevant damages to be characterized in both settlements and judgments.²²⁴ Under Pennsylvania's subrogation statute, there is no provision that may be construed as creating a difference between settlements and judgments.²²⁵ Pennsylvania recognizes that a statutory subrogee cannot touch damages which stem from pain and suffering or loss of consortium, and compensation for these damages may be negotiated through settlement procedures in lieu of trial.²²⁶ In either circumstance, damages are always classified to see which represent monies paid pursuant to a workers' compensation program and those that do not.

In this context, the biggest fear that the Bureau has is that they will be excluded from settlement proceedings, and therefore be unable to understand how damages were classified. To remedy this situation, it is important that Ohio's new statute require both the employee's and the subrogee's signature on a settlement agreement, consider settlements made without the subrogee's knowledge void, and permit the employee and subrogee to agree to terms other than those expressly provided in the statute.²²⁷ With these provisions intact, settlements and judgments may be treated the same, damages will always be classified, and the injured worker's constitutional due process rights will not be violated.

Solving the major problems inherent in the 1995 subrogation statute will be the first steps for the General Assembly, in addition to making sure that each aspect of a new subrogation statute is constitutionally sound. With subrogation statutes like Pennsylvania's in mind, a new and stronger method for achieving the purpose of subrogation can be implemented. As advocates from all respective parties work on a new statute, it is hopeful that Ohio's new subrogation statute remains a statutory staple for years to come. With a new statute, the tumultuous history of workers' compensation subrogation in Ohio may give rise to a new era.

VII. CONCLUSION

The state of subrogation rights in Ohio has been on thin ice from the very beginning. The early absence of an Ohio statute that would effectively subrogate the employer to the employee's claim against a third party created confusion and

²²²See *supra* text accompanying note 73-81.

²²³See Mazzei, *supra* note 203, at 3.

²²⁴*Id.* at 4.

²²⁵See 77 PA. CONS. STAT. § 671 (2001).

²²⁶See *Darr Constr. Co. v. Workmen's Comp. Appeal Bd.*, 715 A.2d 1075, 1079-80 (Pa. 1998). However, the Court also noted that "[w]e recognize that a potential for abuse exists in the structuring of loss of consortium settlements between a claimant and a third party tortfeasor due to the lack of participation by the employer in the proceeding. Fear of abuse, however, is an impermissible basis upon which to require the forfeiture of a spouse's valid recovery. In the event a settlement is unreasonably apportioned, an employer may always seek recourse in the court of common pleas." *Id.* at 1081.

²²⁷Mazzei, *supra* note 203, at 3.

disruption between the courts.²²⁸ Moreover, the 1993 subrogation statute was simply a worthless disaster, as it indiscriminately required subrogation claims to be paid in only limited instances and without regard to the actual amount of any double recovery received by the injured worker.²²⁹

The Supreme Court of Ohio's decision in *Holeton* effectively perpetuated the many hardships that have plagued the history of workers' compensation subrogation in the state of Ohio. However, in disrupting the state of subrogation, the court correctly determined that the 1995 statute violated the constitutional rights of injured workers in Ohio. Additionally, this decision opened the doors for the refund of all subrogation monies collected by the Bureau since 1995. It is important to note that all subrogation payments by the injured workers of Ohio were non-voluntary. The claimants had no choice but to comply with Ohio's subrogation statute, even if it was clear that they were not receiving a double recovery. This injustice needs to be remedied by the Ohio courts.

Very simply, the injured workers of Ohio deserve to have that which was unconstitutionally taken from them returned, and both the basic principles of restitution and case law demand such a remedy.²³⁰ If the Ohio courts fail to refund these monies, the Bureau will be unjustly enriched, and that is inherently unfair.

Before the state of Ohio moves on and develops a more productive and constitutionally sound statute, it is important that the court correct the mistakes the past subrogation statutes have created. The troubles caused by the subrogation statutes cannot be quelled until the injured workers of Ohio are repaid. Once that is done, the General Assembly can justifiably continue creating a new statute, and the state of Ohio can finally put the troublesome workers' compensation subrogation statutes of the past behind them.

VIII. EPILOGUE

As promised by the Ohio General Assembly, a new subrogation statute has surfaced since this Note was completed. Signed into power on January 8, 2003, Senate Bill 227 effectively repealed the existing Ohio Revised Code Sections 4123.93 and 4123.931 and implemented a new and improved subrogation statute, 4123.931.²³¹ The new subrogation statute has eliminated the unconstitutional provisions of the former subrogation statute and created a new formula aimed at achieving a fair and equitable result for both the claimant and statutory subrogee.²³²

Under a careful analysis of the new 4123.931, it appears that the Ohio General Assembly has rectified the major problems inherent in the 1995 statute. Additionally, the new formula seems to be a more specific, stronger and balanced method for achieving the purposes of subrogation. Time will tell if Ohio's new subrogation statute passes constitutional muster and puts an end to the troublesome history of workers' compensation subrogation in Ohio.

²²⁸*See supra* text accompanying notes 19-29.

²²⁹*See supra* text accompanying notes 30-40.

²³⁰*See supra* text accompanying notes 186-96.

²³¹*See generally* Ohio Senate Bill No. 227 (2001 Ohio SB 227).

²³²*Id.*

Additionally, on June 6, 2002, the Eighth District Court of Appeals came down with its decision in *Santos v. Bureau of Workers' Compensation*.²³³ The Court ultimately held that "there is a presumption that a claim against the state should be filed [exclusively] in the Court of Claims," and thereafter found that the complaint (which sought the return of money subrogated under an unconstitutional statute) is a civil action at law which should be lodged in the Court of Claims."²³⁴ On November 20, 2002, the Supreme Court of Ohio accepted the appeal for review.²³⁵ Again, time will tell if the injured workers of Ohio are finally returned the fifty million dollars owed to them by the Ohio Bureau of Workers' Compensation.

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²³³*Santos v. Bureau of Workers' Compensation*, No. 80353, 2002 Ohio Ct. App. LEXIS 2784 (Ohio Ct. App. 8th Dist. June 6, 2002).

²³⁴*Id.* at *10.

²³⁵*Santos v. Ohio Bureau of Workers' Compensation*, 97 Ohio St. 3d 1459 (2002).

²³⁶I would like to give special thanks to W. Craig Bashein and Suzanne Stocker for their knowledge, skill and expertise in the area of workers' compensation law. The advice and guidance that both Mr. Bashein and Ms. Stocker gave me while I was formulating my issues and constructing my Note was and continues to be greatly appreciated. It was both a pleasure and a privilege to speak with the both of them on numerous occasions throughout this entire process. Additionally, I would like to thank my advisor and Legal Writing Professor, Carolyn Broering-Jacobs, whose knowledge, patience and unwavering commitment to every aspect of this process helped me immensely.