

**Issue:**

"Subrogation" is a legal term where one party - such as an insurance company - steps in and sues on behalf of another. It's a concept that dates back to English case law in 1748, in an instance that involved Lloyds of London and the Spanish Armada.

The general rule is that, after paying your claim, your insurer is "subrogated" to the rights of your policy and can "step into your shoes" to sue the negligent party on your behalf.

Subrogation recoveries, premiums, and investments are the three major revenue sources for the insurance industry.

Forty-three states have a "make whole" rule; South Dakota is one of seven states without such a rule. Because of this, insurance companies in South Dakota have the option of recouping all their expenses in a claim before the insured person receives compensation. This becomes an issue in instances where damages exceed the amount of insurance.

**Example:** Suppose another driver runs a red light and crashes into you. Adding up property damage, medical bills, lost wages, and other expenses, your total bill for the accident comes to \$300,000.

Your insurance company promptly writes you a check for \$100,000, because that's how much insurance coverage you have paid for. Your insurance company then sues the other driver on your behalf. In this example, we'll pretend the other driver has \$200,000 worth of insurance, so that insurance company will write a check to \$200,000 to your insurance company.

Under the *make whole* rule, your insurance company would turn the entire \$200,000 over to you, giving you a total of \$300,000 to cover your costs and "make you whole."

Under *current South Dakota law*, your insurance company would keep back \$100,000 to cover its expenses, and then turn the remaining \$100,000 over to you.

**Background:**

For each of the past two legislative sessions, bills have been introduced to limit the subrogation of certain insurers until the insured person is fully compensated, or "made whole."

SB169 in the 2010 Session passed narrowly, and was subsequently vetoed by Governor Rounds. In his veto message, the Governor wrote that he agreed "the current system in South Dakota which allows insurers to recover their subrogation interest ahead of any recovery by an injured party is inequitable and should be changed." However, he expressed concern about defining what should be included in the concept of "make whole." He wrote that a definition based on objective measures, such as actual past and future expenses, would be preferable to a provision that allowed subjective measures such as pain and suffering, loss of consortium, or loss of enjoyment of life.

In the 2011 session, HB 1184 was an act to limit the subrogation of certain insurers unless and until the insurer is fully compensated. The bill read: "No insurer under this chapter is entitled to participate in any recovery from any tortfeasor on account of bodily injury or death or damage to property unless and until its insured has first been fully compensated as provided in § 21-3-1. The provisions of this Act do not apply to any workers' compensation insurer."

Supporters said that the bill was designed to prohibit insurance companies from "cutting in line" ahead of the those they insure. Insurance companies testified that it will lead to

increased insurance costs, cause more litigation, and drive up premiums. Insurance lobbyists expressed concern about determining when an insured is "fully compensated."

HB1184 passed the House 40-26 but died on the Senate Floor 11-24.

**Farm Bureau Insurance:** Farm Bureau insurance policies contain the following section on Subrogation/Indemnification:

*If any "insured" has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The "insured" must not impair those rights.*

*At our request, the "insured" will:*

*A. Bring "suit"; or*

*B. To the extent of our payments transfer the right to bring "suit" to us; and*

*C. Help us enforce those rights.*

### **SD Farm Bureau Policy:**

SDFB policy does not address this issue.

### **Questions:**

1. Do insurance customers have a right to expect to be "made whole" above and beyond the amount of insurance coverage in their policy?
2. If South Dakota could benefit from a "made whole" law, should it be restricted to certain items, such as property damage, medical, bills, and lost wages? What items should be included?
3. Would South Dakota benefit from a type of subrogation law where the insurance company and the injured person share the subrogation proceeds, such as a 50-50 split or some other ratio?