

Oregon State Legislature
Senate Committee on Judiciary

March 4, 2019

Submitted through electronic submission system to: sjud.exhibits@oregonlegislature.gov

RE: SB 421, Motor Vehicle Accident Reimbursement or Subrogation - NAMIC's Written Testimony in Opposition

Dear Senator Prozanski, Chair; Senator Thatcher, Vice-Chair; and honorable committee members:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to the Senate Committee on Judiciary for the public hearing on SB 421.

The National Association of Mutual Insurance Companies (NAMIC) is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC members represent 40 percent of the total property/casualty insurance market, serve more than 170 million policyholders, and write nearly \$225 billion in annual premiums. NAMIC has 153 members who write property/casualty in the State of Oregon, which represents 44% of the insurance market.

NAMIC shares the bill sponsor's desire to clarify the scope and legal requirements for an insurer to pursue contractual subrogation on Personal Injury Protection (PIP) first-party insurance coverage. Unfortunately, the proposed amendments to the current law create legal ambiguity not clarity. When the language of a bill is unclear, and the specific legislative intent and public policy objective is unascertainable from the language of the proposed legislation, there is potential for disagreement over the interpretation of the bill and costly legal conflict over application of the amended requirements. Consequently, NAMIC requests clarification as to the legislative intent of the bill, the specific public policy objectives sought by the proposed amendments and revisions to the language of several key provisions in the bill so that insurers have a clear understanding of what they must do or refrain from doing to be in compliance with the bill.

Specifically, NAMIC respectfully submits the following comments, questions and suggested revisions:

- 1) Section 2, (4) seems to remove the insurer's right to be reimbursed out of the liability settlement or judgement for the injured person's share of expenses, costs and attorney fees incurred by the insurer in connection with the recovery. NAMIC is concerned that this language could adversely impact the insurer's subrogation claim.

Current language of law:

(4) If requested in writing by the insurer, the injured person shall take through any representative not in conflict in interest with the injured person designated by the insurer, such action as may be necessary or appropriate to recover such benefits furnished as damages from such responsible person, such action to be taken in the name of the injured person, but only to the extent of the benefits furnished by the insurer. In the event of a recovery, the insurer shall also be reimbursed out of such recovery for the injured person's share of expenses, costs and attorney fees incurred by the insurer in connection with the recovery. [Emphasis added to denote what key language is missing from amendment].

Proposed language of amended law:

(4) If requested in writing by the insurer, the injured person shall take, in the injured person's name and through any representative the insurer designates who is not in conflict in interest with the injured person, such action as is necessary or appropriate to recover the amounts to which the insurer is entitled under this section, including amounts for the injured person's share of expenses, costs and attorney fees that the insurer incurred in connection with the recovery.

What is the public policy rationale for removing the insurer's right to be reimbursed out of the settlement recovery? Claims settlement proceeds may be the only financial resources of the injured person available for the insurer to secure reimbursement of the injured person's share of expenses, costs and attorney fees associated with the insurer's subrogation action. This limitation on reimbursement or subrogation will likely result in higher premiums.

- 2) Section 4 of the proposed legislation, changes key terminology that will have serious legal implications for insurers. The current language of the statute refers to "damages suffered by that person". This language is replaced with "full compensation for the injured person's injuries". NAMIC is concerned that this revision creates legal ambiguity and could be interpreted to include far more than legally recognized damages awarded in a settlement or judgment. NAMIC's concern is supported by the fact that the bill expressly states the following:

(2) For purposes of this section, the following rebuttable presumptions apply:

(a) The amount of any judgment that an injured person obtains is the amount necessary to fully compensate for the injured person's injuries.

The logical implication of this rebuttable presumption is that the injured person may assert, without the benefit of a rebuttable presumption, compensation not captured in or in excess of a legal judgment. Consequently, the proposed legislation greatly expands the scope of damages one may assert to be "fully compensated" for their injuries. The practical ramification of this statutory change is that an insurer could ultimately be left with little to no subrogation recovery, which they rely upon and factor into their insurance rating and product pricing for the benefit of insurance consumers.

- 3) Section 4, (3) is concerning in that it could be interpreted to interfere with and supersede terms and conditions of the insuring agreement.

The proposed language states:

(3) An insurer may not deny or refuse to provide benefits that are otherwise available to an injured person because of the potential the injured person has to make a claim or bring an action against another person or enter into a settlement with another person. [Emphasis added]

NAMIC appreciates the public policy objective of making sure that an injured worker does not lose their contractual right to benefits merely because they possess the potential to directly assert a claim against the at-fault party. However, the current language could be read to prevent an insurer from enforcing key terms and conditions of the insurance policy that may be in place to protect the contractual rights of the insurer. For example, this language could be interpreted to say that an insurer may not deny or refuse to provide a benefit to the injured worker, even if the injured worker breaches a material term or condition of the insuring agreement.

We suggest rewriting the language as follows:

3) An insurer may not deny or refuse to provide benefits that the injured person is contractually entitled to solely because of the potential the injured person has to make a claim or bring an action against another person or enter into a settlement with another person. [Emphasis added]

- 4) NAMIC is concerned with the provision in Section 4, (4) that prevents an insurer from being named as a payee on any settlement where they have a right of subrogation or reimbursement. First of all, these are contractual rights, where the insurer “stands in the shoes” of the policyholder/injured person to the extent of the contractual benefits provided by the insurer to the policyholder/injured worker. Therefore, from a legal standpoint, the insurer should have the right to be a co-payee on any settlement check to the extent of the benefits provided to the policyholder/injured worker. This is consistent with standard contract law and promotes the fundamental principles of fairness and equity. Second, if the insurer is not named on the settlement check, there is a good chance that the insurer may never actually receive its legally entitled subrogation recovery. Having the insurer listed as a co-payee on the settlement check is really in the best interest of both the insurer AND the injured worker, so that the injured worker does not accidentally spend funds he/she is not legally entitled to and for which he/she could be legally required to pay to the insurer pursuant to the terms of the insuring agreement.
- 5) NAMIC is concerned with the provision in Section 4, (5) for the same legal and public policy reasons articulated in subsection 3 of this written testimony.
- 6) NAMIC is concerned with Section 4, (7), because determination as to the validity of a contract and/or the enforceability of contractual terms and conditions are within the exclusive purview of the judicial branch of government. The proposed legislation enumerates substantive requirements and prohibitions in regard to subrogation, whether a particular term or condition in an insuring agreement is in fact in conflict with the legislative declarations is for the judicial system to decide. NAMIC requests that this entire subsection, which is really a legal pronouncement should be removed from the bill. The courts already possess the right to make such a legal determination and issue a legal ruling on the validity and enforceability of contractual terms and conditions.

For the aforementioned reasons, NAMIC respectfully requests that the members of the Senate Committee of Judiciary **VOTE NO on SB 421, because the proposed subrogation changes are rife with legal and practical application problems, and the bill would create an insurance rate cost-driver that would adversely impact affordability of insurance for consumers.**

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC’s written testimony.

Respectfully,



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