



Suing Municipalities for Subrogation

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In Section 2744.05(B)(1) of the Ohio Revised Code, the legislature formalized the collateral source rule for claims against municipalities. Under this provision, any person with a claim for death, injury or property damage arising out of an act or omission in a government function, must disclose the availability of recovery from any source of insurance with the benefits from that policy deducted from the claim against the municipality.

The insurance benefits are deducted from the claim regardless of the claimant's obligation to repay benefits received. Fortunately for insured persons in Ohio, the deduction prevents the claim from being deemed fully compensated so the insurer may not claim rights of subrogation against the insured's remaining recovery. The practical result is that insurers are "on the hook", at least up to their policy limits, for claims against Ohio municipalities

Insurance companies, denied an avenue for asserting subrogation rights against liable third parties, challenged the Ohio law as a violation of equal protection under the United States Constitution. In 1986, the Federal District Court for the Southern District of Ohio, in *Greyhound Food Mgmt., Inc. v. Dayton* (S.D. Ohio 1986), 653 F. Supp. 1207, took up the cause and found that found that Section 2744.05(B)(1) denies insurers equal protection under the United States Constitution.

While that would appear to be the current state of affairs, the Supreme Court of Ohio has not taken kindly to the District Court's holding and specifically refused to accept its conclusion. Thus, in 1989 and 1990, the Ohio Supreme Court issued two decisions in which it stated that it was "mindful of the decision reached in *Greyhound* There, the court held that R.C. 2744.05(B) violates the Equal Protection Clause. Although the court therein stated that it was using the rational-basis test, it instead appeared to subject the classification to a higher level of scrutiny than required and failed to recognize the dual purpose of the statute." See *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27. Thus, in the state courts of Ohio, insurers are prevented from asserting subrogation rights in cases where municipalities are liable, while the opposite is true in federal courts.

Finally, as recently as February 2007, the Ohio Supreme Court upheld Section 2744.05(B)(1) without even addressing the Constitutionality issue. In *Western Rogers v. City of Dayton*, the Court determined that the "General Assembly has obviously found public policy in favor of immunity for the municipal employee, and has decided that of the three other potential bearers of the loss, the tort victim is the least able to sustain the loss, the municipality is the next least able to sustain the loss, and the insurance carrier is in the best position to sustain the loss. While we might not agree with this schedule of preference, we do not find it to be irrational." The Court

also noted that insurers were in the best position to quantify this risk and price their products accordingly.

The conclusion to be reached from this conflict between the Courts? If you are an insurer seeking subrogation against a municipality in Ohio, find a way to assert your claim in the federal courts.