

March 25, 2010

The Honorable Dennis Daugaard
President of the Senate
500 East Capitol Avenue
Pierre, SD 57501-5070

Dear Mr. President and Members of the Senate:

I return herewith Senate Bill 169 and VETO the same. Senate Bill 169 is An Act to limit the subrogation of certain insurers unless and until the insured is made whole.

I agree with the sponsors of SB 169 that 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. I veto SB 169, because, I believe, it swings the pendulum too far in the opposite direction. I think, a compromise which moves injured parties to the front of the line, while not placing the subrogation interests of insurers entirely at the end of the line, is the appropriate policy balance which should be struck.

I read SB 169 to allow insurers to recover their subrogation interest only after an insured party is "made whole" in the sense that all items of potentially recoverable damages have been recovered. While I do not accept the argument that the act's failure to define the term "made whole" will automatically generate litigation, I do think that requiring all available damages to be recorded prior to the subrogation interest will spawn disagreements that prioritizing a limited class of damages might not. For example, if the damages that must be satisfied before a subrogation interest may be addressed were limited to actual past and future expenses and other more objective measures, I think that disputes regarding whether a litigant was "made whole" may be less frequent. By including all damages, including pain and suffering, loss of consortium, loss of enjoyment of life, and other subjective measures, I think that a greater likelihood of disputes exists. Additionally, by simply moving from one end of the spectrum to the other, I fear that the main change may be which party instigates disputes.

I believe, a change in this area is appropriate, but must contain more compromise than SB 169 does. I would support an effort by the State Bar to work on a proposal over the interim to present next Session. I think such a proposal should consider limiting the types of damages that must be fully satisfied as "made whole" prior to a subrogation interest being recovered, some rebuttable presumption that settlements within insurance policy limits leave an injured party "made whole," or some type of proportionate recovery system. While I am skeptical of arguments that SB 169 will result in a drastic increase in insurance premiums, I do have a concern that the total reversal of policy in SB 169 will just trade one imbalance for another. Injured parties should not remain strictly at the back of the line, but I do not think the order of the line should simply be reversed.

Therefore, for the reasons set forth above, I respectfully request that you concur with my action and sustain my veto.

Respectfully submitted,
M. Michael Rounds
Governor