

WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES



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**BY
GARY L.
WICKERT**

Workers' Compensation Subrogation – In All 50 States - 4th Edition

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Author: Gary Wickert is a Senior Partner with the law firm of Matthiesen, Wickert & Lehrer, S.C., and is regarded as one of the world's leading experts on insurance subrogation in all lines of insurance. He is the author of several subrogation books and legal treatises and is a national and international speaker and lecturer on subrogation and motivational topics. He is also a published commercial fiction author ("Dark Redemption" at Amazon.com) and a politician in Wisconsin, elected to and serving his fourth term as Supervisor in the Township of Cedarburg. After 15 years as the youngest managing partner in the history of the 30-lawyer Houston law firm of Hughes, Watters & Askanase, L.L.P., Mr. Wickert returned to his native Wisconsin in 1998 and co-founded the subrogation firm of Matthiesen, Wickert & Lehrer, S.C. He oversees a National Recovery Program which includes a network of nearly 285 contracted subrogation law firms in all 50 states, Mexico, Canada and the United Kingdom and boasts recoveries of more than \$500 million in recoveries and credits for more than 250 insurance companies since 1983.

Licensed in both Texas and Wisconsin, Mr. Wickert

is double board-certified in both personal injury law and civil trial law by the Texas Board of Legal Specialization. He is also certified as a Civil Trial Advocate by the National Board of Trial Advocacy, for whom he has both written and graded the product liability questions contained on the NBTA national certification exam taken by trial lawyers around the country. For 25 years, Mr. Wickert has served as an expert witness and insurance consultant on subrogation and insurance related issues and has been consulted by insurance carriers, lawyers, and legislative bodies from several states. He is a licensed arbitrator and has attended more than 1,000 mediations in more than 30 different states. He has represented subrogated insurance carriers in every state, and has been admitted pro hac vice in 17 states. Gary Wickert has worked with the Texas Legislative Oversight Committee in rewriting their workers' compensation subrogation statutes, is a former member of the Board of Directors of the National Association of Subrogation Professionals, and has been cited as an authority on workers' compensation subrogation by several appellate courts, including the Texas Court

PRAISE FOR

"Workers' Compensation Subrogation"

"This book fills a long-standing need for a complete treatise covering this confusing subject across the country. Gary Wickert is clearly the country's leading authority on nationwide workers' compensation subrogation."

- **Loren Smith**, Kelly, Smith & Murrah, P.C., Houston, Texas.

"Regardless of which state you handle claims in, if you have workers' compensation subrogation responsibilities - you need this book!"

- **Jennifer Williams**, Claims Service Consultant, The Hartford, Orlando, Florida.

"The book is the bible on workers' compensation subrogation - regardless of which state the claim is in."

- **Paul Webb**, Claims Specialist, Latitude Subrogation Services, LLC., Bloomfield Hills, Michigan.

"When our own state's workers' compensation statute came under attack, Gary Wickert was the first person we turned to for information and experience as to how other state's statutes handled the same issues. This book is invaluable for subrogation lawyers and insurance subrogation professionals."

- **Dave Matejczyk**, Roberts, Matejczyk & Ita Co., L.P.A., Subrogation Lawyer and former Board Member of the National Association of Subrogation Professionals, Cleveland, Ohio.

"*Workers' Compensation Subrogation - In All 50 States* provides an invaluable tool for the subrogation professional in one handy source. The compilation of this material was a Herculean effort on Attorney Gary Wickert's part, and the insurance industry is indebted to him for leading the charge in protecting and enforcing carrier's rights in this one time underutilized area of claims handling. I highly recommend Attorney Gary Wickert's book and counsel to all workers' compensation adjusters and claims managers interested in maximizing subrogation recoveries in each state they write business."

- **Bill Gray**, GUARD Insurance Group, Home Office Claims Analyst/Specialist, Wilkes-Barre, Pennsylvania.

of Appeals. He is one of only a few lawyers to have ever represented a subrogated carrier before the United States Supreme Court, and was named as one of Law & Politics magazine's Super Lawyers for 2005, 2006, 2007, and 2008.

About the Book: Workers' compensation subrogation continues to change and adapt, as trial lawyers prod its weak points and capitalize on confusing areas of the law. The last 18 months saw numerous changes in workers' compensation statutes and case law in many states. Arizona completely rewrote and renumbered their subrogation statute, and several other states made minor amendments to theirs as well. The Fourth Edition of *Workers' Compensation Subrogation - In All 50 States* includes for the first time the complete texts for the states with the most confusing exclusive remedy statutes and those with new case law interpreting that area. It also includes clarification on confusing statutes from several states dealing with the recovery of attorney's fees and costs by workers' attorneys, and the inclusion of specific statutory notice requirements set forth in California law. Combined with more than 100 new case decisions, this Fourth Edition is the most complete and up-to-date edition yet.

Workers' Compensation Subrogation is the most complete and thorough treatise covering workers' compensation subrogation ever published. There are very few areas in which the laws of each state vary more and are applied as differently, then in the area of workers' compensation subrogation. This book is intended to introduce the workers' compensation claims handler, in-house counsel, and subrogation professionals to some of the more esoteric and complex subrogation issues encountered in today's workers' compensation insurance subrogation marketplace. It covers the following issues in all 50 states:

- Allocating third party recoveries
- Attorney's fees
- Borrowed Servant Doctrine
- Conversion of workers' compensation liens
- Costs and expenses
- Dual Capacity Doctrine
- Equitable subrogation/contribution
- Exclusivity Rule barring action against employer
- How to calculate your credit/advance and how it is applied in each state
- Intentional acts
- Joint Ventures
- Made Whole Doctrine as applied to workers' compensation subrogation
- Necessity of Intervention
- Reduction Statutes
- Staff leasing services and temporary employment agencies
- Statutory subrogation rights
- Subrogating against UM/UIM benefits

- Subrogating in medical malpractice cases
- Subrogating in legal malpractice cases
- Waivers of subrogation
- Who qualifies as a third party
- Other workers' compensation subrogation-related issues

In addition to being an excellent primer on workers' compensation subrogation, suitable for both the new subrogation professional and the seasoned veteran, the book also contains a detailed synopsis of the workers' compensation subrogation laws in each of the 50 states. It is a must for anyone with multi-state subrogation responsibilities. Complete with diagrams, references and thousands of footnotes, this is the most ambitious workers' compensation subrogation project ever undertaken.

The following issues and topics are covered in detail for each of the 50 states:

Statutory Subrogation Rights

- Identifies the statutory authority for workers' compensation subrogation in that state.
- Discusses the purpose/legislative intent of the statute.
- Is an election necessary by the worker?
- Who can bring a third party action (plaintiff, carrier, employer, or all of the above)?
- When and must a third party action be brought?
- What are the rights of a carrier to intervene in an existing third party action filed by a worker?
- Will a worker's compensation carrier's subrogation interest be barred if not brought timely?

Third Parties

- Who can be sued as third parties in a third party action?
- Can a co-employee be sued and under what circumstances?
- Can an uninsured/underinsured carrier be a "third party" under the laws of that state?
- Is there a dual capacity or borrowed servant doctrine which somehow affects the ability of a worker's compensation carrier to effectively subrogate?
- What is the state's workers' compensation bar?
- Are there any specific restrictions regarding subrogation against a subcontractor or an employee of a subcontractor in a construction situation?
- Under what circumstances can the employer be sued?
- Can a carrier subrogate to the benefits of a recovery in a legal or medical malpractice action?

Allocation of Third Party Recovery

- How and when does the carrier recover its subrogated interest? *(continued>)*

- Does the carrier recover past benefits only or also the present value of future benefits which it owes under the Workers' Compensation Act of that state?
- Is there a formula used to determine how a third party recovery is allocated?
- What happens to the total recovery and how is it applied?
- Can a carrier recover benefits paid by a third party or recovered in a third party action which relate to loss of consortium, or non-economic damages such as pain and suffering, mental anguish, or punitive damages?
- Does the employer's negligence reduce the recovery by the worker or carrier?

Attorneys' Fees/Costs

- Can the plaintiff's attorney recover attorneys' fees and/or costs out of the carrier's subrogated recovery and under what circumstances?
- How are attorneys' fees and costs handled if the carrier is also represented by subrogation counsel, intervenes into the third party action and actively represents its interest?
- What if the carrier isn't represented?
- Can a plaintiff's attorney recover attorneys' fees based on the value of past benefits only or will he be able to recover attorneys' fees based on the future benefits/credit recovered by the carrier?
- Must a carrier bear its proportionate share of expenses as many states require, and what does that really mean?

Credit/Advance

- Can a carrier take a vacation from paying workers' compensation benefits once a worker makes a third party recovery?

- How is the credit calculated under state law?
- Does the carrier have to do anything special to obtain the credit, such as filing with the Workers' Compensation Commission?
- Does the carrier get a credit toward future compensation benefits it owes or does it actually get to collect the present value of the future benefits it owes and still be obligated to pay the scheduled benefits in the future?

Statutes of Limitation

- What are the applicable statutes of limitation or statutes of repose that may be applicable to third party subrogation actions?

Related Subrogation Issues

- Are there any other issues or statutes which affect a worker's compensation carrier's right of subrogation, such as the made whole doctrine, common fund doctrine, or anti-subrogation statutes?
- Are there any lien reduction statutes, such as those existing in Indiana, which affect a worker's compensation carrier's right of recovery?
- Does the state have any no-fault laws which complicate workers' compensation subrogation involving an automobile accident, such as exist in Michigan and Colorado?
- What are the carrier's options if the worker and his attorney simply refuse to repay a worker's compensation carrier's lien after settling a third party action?
- If the worker fails to repay the carrier, is there a cause of action for conversion of a carrier's subrogation interest or may the carrier still proceed against the third party tortfeasor to recover its subrogation interest?

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