

Subrogating Occupational Accident Policies In All 50 States

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 ATTORNEYS AT LAW

Matthiesen, Wickert & Lehrer

- MWL is a National Subrogation Law Firm
- We Handle the Most Occ/Acc Subro of Any Firm!
- We Wrote The Book On Subrogation, Literally.
- Education, Education, Education








Super Lawyers


The Case For Subrogation

- Subrogation Reduces Premiums
 - Since 2001 health insurance costs have increased 78%, compared with a 17% increase in the cost of living.
 - Revenue gained by the insurer, whether through subrogation is applied toward responding to the actual risk that is required to be paid by the insurer under the terms of the contract or policy.
 - Generally between 3% and 5% of all paid claims have subrogation potential. Occ/acc claims can be even higher!

Solvency and Cost Containment

- Catastrophic claims can raise risk modifiers and severely escalate premiums.
- Subrogation can mitigate those increases.





The Occ/Acc Policy


- Niche product.
- Provides medical, disability, accidental death & dismemberment benefits for accidents occurring while the driver is under dispatch.
- Provides coverage to Independent Contractors who are not covered by Workers' Compensation Insurance.
- NOT subject to state workers' compensation laws, so forget everything you know about w/c.
- Covered by E.R.I.S.A.?

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Policy Details

- Insurance Trust, Motor Carrier, or Trucking Association is purchaser and policy holder.
 - Examples: National Truckers Ass'n; Owner-Operator Independent Driver's Ass'n; American Trucking Ass'n.
- Group Policy Holder negotiates the terms.
- Contract situs is where the contract was delivered.
- Drivers must be 18-75 Years of Age
- Drivers must work 1,500 hours per year (30h/week).
- Drivers must be an Independent Contractor and Not an Employee




3 L's of Successful Subrogation

1. LIABILITY - Understanding Tort Liability
2. LAW - Advanced Legal Concepts
3. LABOR - Taking the time and using the tools at your disposal to fully uncover, develop, and preserve third party liability.

Subrogation Is An Investment

Answer These Questions on Each Claim

1. What are your subrogation rights?
2. Which third parties can be sued?
3. Identify obstacles to subrogation.
4. How is a recovery allocated?
5. Are Attorney Fees/Cost owed?
6. Do we get a future credit or offset?




Part I

Understanding the Liability


of Subrogation and Other

Recovery Opportunities




Recognizing Subrogation

- If it's not recognized, it won't be acted on.
- Is the most significant hurdle to a successful subrogation program.
- Requires the most training and experience.
- Requires plaintiff's hat.
- Set aside defense myopia.



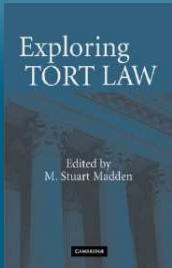
Occ/Acc Subrogation Is Hard Work

- Don't wait for your member to hire counsel.
- Starts from initial claim intake.
- What are the injuries?
- Is there a third party?
- Is there evidence that we need to obtain & preserve?




Liability - Recognizing Subrogation Potential In Different Contexts


- Negligence?
- Auto Accidents
- Medical Malpractice
- Premises Liability
- Product Liability
- Governmental Liability



Auto Accidents


- Most Common Case You Will Have
 - Speed/lookout/lane changes.
 - Also rear-enders but not the way you think.
- Who Are Third Parties?
- UM/UIM Requires specific plan language.
 - "Any Responsible Third Party" y/n? No.
 - "Any Party Who May Be Liable" y/n? Yes.
 - "Caused or Is Liable For?" y/n? Yes





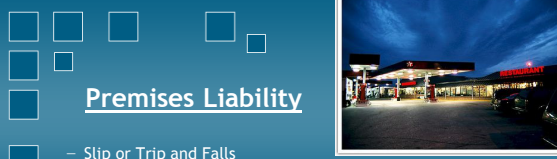
State-By-State Auto Considerations

- 1. Statutes of Limitations
- 2. Minimum Insurance Limits
- 3. Contributory or Comparative Fault
 - Pure Comparative v. Pure Contributory
- 4. PIP/No Fault States
 - Michigan example
 - No subrogation allowed without a coordination of benefits clause.



Medical Malpractice

- Standard of Care
 - That degree of care exercised by other doctors in the same or similar location.
 - Not responsible for mistake in judgment.
 - Frequent areas of malpractice
 - Specialist owes higher degree of care
- Vicarious Liability
- Hospital Liability
- Notice - Most States Require
- Tort Reform - Damage Limitations



Premises Liability

- Slip or Trip and Falls
- Invitee (customer) - Duty to Inspect
 - There is liability where the owner knows or should have known of a dangerous condition and its risk of harm to potential customers.
 - Consider weather conditions, lighting and surface defects - NEED PHOTOS!!!
 - Slip and falls on ice - Must be an unnatural accumulation of ice for liability to apply.

Product Liability


- REQUIRES COST-BENEFIT ANALYSIS
- EXPERTS ARE KEY
 - Expert Database
 - Use of right expert
 - Prompt investigation
 - Get the product!
 - Minimize Spoliation Issues



Governmental Liability


Who do the Notice and Immunity Rules apply to?

- Towns
- Cities
- Villages
- School Districts
- Fire departments
- Governmental subdivisions
- State and Federal Agencies



File The Right Notices

- STATE, COUNTY, MUNICIPAL
 - 1st step is not filing a lawsuit.
 - It is not sending a simple letter.
 - Within 120 days serve a "Notice of Injury."
- FEDERAL
 - Administrative Claim - w/in 2 years
 - Standard Form 95
 - File suit within 6 months of denial.



Railroad Accidents

- Involve Subrogation Counsel from the Outset.
- Duty to Warn of Crossing?
 - Preempted by Federal Law
 - Where federal funds were used to install signs.
- Duty to Maintain Crossings
 - Rough Crossings / Signals Malfunctioning
- Obstructions to View
 - Unmowed grass, unpruned trees, etc.
- Duty to Keep Proper Lookout
- Keep In Mind Contributory Negligence
 - Your driver failed to yield, traveling too fast, failed to keep a proper lookout, etc.




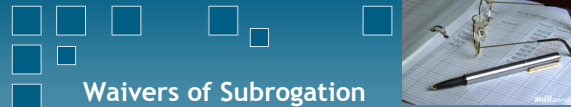
**Part II
Advanced Concepts**



Advanced Concepts


1. Waivers of Subrogation
2. The Made Whole Rule
3. The Common Fund Doctrine
4. Anti-Subrogation Laws
5. Policy Language
6. Choice-of-Law






Waivers of Subrogation

- One of the ways to avoid subrogation is through the implementation and enforcement of waivers of subrogation.
- Just as an insurer has a legal right to pursue subrogation, so too does a party to a commercial transaction have a right to structure the transaction so that the party's legal rights of recovery against the other party are limited.
- Such clauses have the intent and effect of limiting a party the party's insurer from subrogating against another party to the transaction.
- Motor Carriers have these agreements with their larger customers.



The Made-Whole Doctrine

- The Made-Whole Doctrine
- What Is It?
 - The judicial and legislative mandate that the injured claimant be fully compensated for all damages before a subrogated party may collect.
- State Law
 - Georgia. O.C.G.A. §33-34-56.1(e); Colorado. C.R.S. § 10-1-135 (2010)
 - Wisconsin. *Rimes v. Garrity* (1982)
 - Massachusetts. No made-whole requirement.
- Federal Common Law
 - 6th, 9th & 11th - Default rule (applies unless there is Plan to the contrary).
 - 1st, 5th, & 8th - Reject Federal made whole



The Made-Whole Doctrine

- Can It Be Avoided?
 - Depends on the State
- 1. Good Policy language. “First priority notwithstanding whether the covered person was fully compensated.”
 - Contractually disclaim made whole if policy contains clear language. *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007)
- 2. Plaintiff settles within defendant's policy limits. See *Allen v. Binckett*, 2009 WL 1744494 (Ohio App.2009); *Bell v. Fed. Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va. 1988); *Thompson v. Fed. Express Corp.*, 809 F. Supp. 950, 954 (M.D. Ga. 1993); C.R.S. § 10-1-135 (2010) (“rebuttable presumption”)

The Common Fund Doctrine

- Common Fund Doctrine
 - Equitable doctrine which allows the attorney who has recovered a fund charge each passive beneficiary for his efforts in creating the fund.
- Does the Plaintiff's attorney who has done most of the work in creating the recovery have a right to attorney's fees?
- In Illinois the common fund claim is owned by the attorney and the doctrine cannot be disclaimed in an insurance policy or even an ERISA plan.

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The Common Fund Doctrine


Can We Avoid its Application?

- Occ/Acc policies cannot, in most cases, contractually disclaim the doctrine.
- Subrogated party could actively participate, thus destroying the claim. See *Allstate Ins. Co. v. Edminster*, 2007 WL 196433 (Tex.App.2007); *Oakley v. Wis. Fireman's Fund Ins.*, 470 N.W.2d 882 (Wis.1991).

State Anti-Subrogation Laws


- Lien Reduction Statutes
 - *Indiana Statute §34-51-2-19*. This section purports to reduce all subrogation interests in the same proportion the claimant's recovery is diminished by comparative fault and limits of liability.
- Anti-Subrogation Laws
 - *Pennsylvania, 75 P.S. § 1720*. This statute prohibits subrogation in cases involving motor vehicle accidents.
 - *Virginia Statute 38,2-3405*. This statute prohibits all subrogation involving hospital, medical, surgical and related benefits. See also Kansas.
 - Complete Anti-subrogation States: Arizona (non-assignment), Connecticut (not to disability), Missouri, Georgia (made-whole), Montana (made-whole), New Jersey (collateral source), North Carolina (statutory).

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Subrogation of Death Benefits?

- **No subrogation for accidental death benefits.**
See *LeMars Mut. Ins. Co. v. Prehn*, 238 N.W.2d 274(S.D. 1975); *Matter of Schmidt's Estate*, 398 N.E.2d 589 (Ill.App.1979); *Thornton v. Ins. Co. of North America*, 287 So.2d 262 (Miss.1973); *Bara v. Motorists Mut. Ins. Co.*, 603 N.E.2d 322 (Ohio App. 1991).
- **Subrogation allowed.** See *Southern Pacific Transp. Co. v. Chabert*, 973 F.2d 441 (5th Cir. 1992); *Ohio Cas. Ins. Co. v. Atherton*, 656 S.W.2d 724 (Ky. 1983).



The Importance of Policy Language


1. **Made whole Doctrine** – The Policy should contain language subrogating it to “any and all first monies paid (or payable) to or on behalf of the covered individual regardless of whether or not the beneficiary has been made whole.” Absent first priority language, the made-whole doctrine can apply.
2. **Common Fund Doctrine** – A reduction of at least 1/3, plus pro rata costs will apply. The Policy can declare that it is not responsible for the covered person’s costs or attorney fees in procuring a settlements. However, in most cases only intervention and active participation can destroy the common fund doctrine.
3. **Payments Made by Other Than Third Party** – The Policy subrogation provision should make clear that insurer is subrogated to payments that are or may be made not only by the tortfeasor’s insurer, but also to payments that are or may be made by the covered persons own automobile or liability insurer, including the covered persons own no-fault and/or uninsured motorist coverage.



The Limits of Policy Language


4. **Allocation, Allocation, Allocation.**
Subrogation to Amounts Paid Other Than to Covered Person– A policy’s subrogation language should refer to the “covered individual” or “covered person.” The policy should not define such “participants” broadly so that it allows subrogation rights from a covered employee’s dependants, representatives, estates, beneficiaries, etc. (death cases).
Subrogation Not Limited to Amounts Recovered for “Medical Expenses” – Some policies unnecessarily limit their subrogation rights to amounts paid to the covered person by a third party for “medical expenses.”
5. **Require Cooperation.** While we hope that we can willingly gain the cooperation of our covered drivers and their attorneys, the best thing we can do is require full cooperation pursuing subrogation and prohibiting member from doing any that would prejudice our subrogation rights.
6. **Provide for a Credit or Offset for Any Recovery.** This provision is often the most powerful part of any subrogation language. It allows the Plan to deny or offset future benefits if the member fails to reimburse the Plan upon a third party recovery.

Choice-of-Law




- Can be the single most important legal element in occupational accident subrogation cases.
 - Accident occurred in Kansas, driver is from Colorado and tortfeasor is a Missouri resident driving for an Iowa company.
 - Kansas v. Iowa – The difference between no recovery and full recovery.
- By filing in Iowa (& filing before the insured) we may be able to avoid Kansas' anti-subrogation statute.

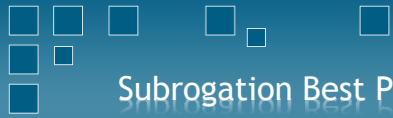
Choice-of-Law (cont.)



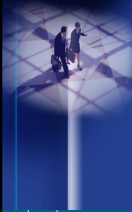
- Contract between Policy Holder and Insurer must contain a Choice-of-Law Provision.
- Some states give full force to choice-of-law provisions, see *Allianz Ins. Co. of Canada v. Sanfileben*, 454 F.3d 853 (8th Cir. 2006) (applying Minnesota law), while others do not *Scarpone v. Empire Blue Cross Blue Shield*, 1996 WL 231026 (N.D.Cal.1996) (refusing to apply NY choice-of-law provision in a group policy).
- Lex loci delicti – Law where the tort occurred.
- Lex loci contractus – Law where contract was made.
- Most Significant Contacts

Part III
Setting a New Course to Maximizing Subrogation






Subrogation Best Practices




- Goals are to maximize subrogation recoveries and shorten file lifecycles.
- Benefits of In-House Subrogation Units
- Benefits of Outsourcing - National Subrogation Counsel - [Matthiesen, Wickert & Lehrer](#)

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SUBROGATION CHECKLIST:



1. Look for subrogation potential. Focus on details that establish third party liability.
2. Talk to witnesses, gather details and ask important questions in more than one way. Ask what the witness think happened.
3. Talk to police, fire department and other first responders to gather information, determine what they did.
4. Obtain photos, send investigator to do a site investigation, retain expert if required by the type of case.
5. Determine whether Anti-Subrogation laws may apply to limit or destroy subrogation potential and whether another state's laws may apply.
6. Place all parties on notice and Follow Up.
7. Retain attorneys and experts for investigation, if necessary.

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Litigation Options



- Special Arbitration
 - Pros and Cons
- Subrogation Lawsuit
 - Pros and Cons
- Intervention
 - Pros and Cons
- Reimbursement Lawsuit
 - Pros and Cons

Hiring Subrogation Counsel


Depends on size of claim, nature of subrogation interest, facts and the law in the jurisdiction at issue.

- Is plaintiff's attorney adequately pursuing third party suit? Can we pursue in a better venue? Can we avoid a common fund reduction?

Get to Subro Counsel if:

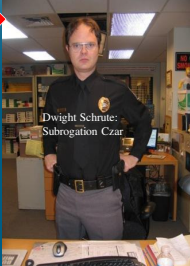
- You have been named as a defendant.
- The Plaintiff's attorney is refusing to acknowledge the lien. (made-whole, anti-subrogation law, etc.)

- When?
 - As soon as possible, after you have determined that the Plaintiff's counsel is not cooperating.
 - Before the settlement proceeds have been distributed!
- What Fee?
 - Hourly or Contingency?



Tips For Maximizing Subrogation

- Make Subrogation a Priority - Set Goals
- Appoint a Subrogation Czar
- Utilize Subro Checklists
- Establish Standard Procedures
- Continue Subrogation Education
- Utilize Outside Expertise.
 - Start with the 50 State Chart!



Closing

- Remember to determine Liability.
- Know the applicable subrogation Law.
- Maximizing subrogation requires Labor.

Go Out and Subrogate!
