



INTRODUCTION TO WORKERS' COMPENSATION SUBROGATION

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WORKERS' COMPENSATION GENERALLY

- **History**

- Originated in Germany in 19th Century.
- Wisconsin first state to enact WC legislation in 1911.
- Most states followed in 1913 or thereafter.

- **Purpose**

- To provide employees injured or killed in the course and scope of employment fixed and certain monetary benefits.
- To protect employers from lawsuits by employees.
- Societal Bargain.



WORKERS COMPENSATION SUBROGATION



- **Allows carrier to recoup monies paid to or on behalf of an injured employee when a third party is responsible for injuries.**
 - Entirely Dependent on State Law
 - Created by Statute.
 - Purpose
 - To Prevent Double Recovery.
 - Place Ultimate Burden On Tortfeasor Rather Than Employer Or Carrier.

WORKERS' COMPENSATION SUBROGATION

- **Provides Strongest Subrogation Rights Of Any Line Of Insurance – Depending On State**
- **Gives Carrier Tremendous Leverage Even When Employer Negligent**
- **Deceptively Simple – Leads To Lax Subrogation Techniques And Programs**
- **“Found Money” Myth**



BUILDING BLOCKS OF W/C SUBROGATION

1. Early Recognition of Subrogation
2. Prompt Action on Subrogation
3. Aggressive and Cost-Effective Pursuit of Subrogation



W/C SUBROGATION ANALYSIS

- ANSWER THE FOLLOWING QUESTIONS FOR EVERY CLAIM:
 1. WHAT ARE YOUR SUBROGATION RIGHTS?
 2. WHICH THIRD PARTIES CAN BE SUED?
 3. HOW IS A RECOVERY ALLOCATED?
 4. ARE ATTY'S FEES / COSTS OWED?
 5. DO WE GET A FUTURE CREDIT?
- * MUST KNOW ANSWERS TO MAXIMIZE RECOVERY.
- * ANSWERS DEPEND ON WHICH STATE YOU ARE IN.

SUBROGATION RIGHTS



- **Who has authority to bring third-party action?**
 - Injured Employee Only?
 - Joint Right of Employee and Employer/Carrier?
- **Can carrier intervene?**
 - Mandatory Joinder?
- **When can a third party action be brought?**
 - Separate Time Frames For Filing Suit?
 - Automatic Assignment?
 - Notice Requirements?
- **Are carrier's rights lost if not protected in suit?**

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SUBROGATION RIGHTS

- **Example: Employee Injured In Work Related Accident In Wisconsin.**
 - Automobile Accident
 - Tortfeasor From Wisconsin
 - Injured Employee Wisconsin Resident
 - Wisconsin Benefits Paid
 - Wisconsin Employer



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WISCONSIN – §102.29

- **Carrier Or Worker May File Third-party Suit**
 - Equal Voice In Prosecution Of Suit
 - Notice Must Be Given To Other Party
- **Subrogated Party Must Be Made A Party**
 - Mandatory Joinder
- **Either Employee or Carrier Must Bring Suit Within the Three Year Statute of Limitation**
- **Carrier May Intervene Into Third-Party Action**
- **Worker Can Intervene After Statute of Limitation**
- **Probably Most Favorable Statute In U.S.**

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ILLINOIS – 820 ILCS 305/5(B)



- **Partial Simultaneous Right To File Suit**
 - Employee Can File Suit Anytime Within The Two Year Statute Of Limitation
 - Carrier Can Sue Three Months Before SOL Runs
- **Carrier May Intervene Into Third-party Action**
- **Carrier Has Lien On Third-party Recovery By Employee**

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THIRD-PARTY LIABILITY

- **Recognizing Liability Of Third-Party Tortfeasor.**
 - Early recognition is key to maximizing subro recoveries.
 - General Negligence
 - Medical Malpractice
 - Premises Liability
 - Products Liability
- **Who Can Be Sued?**
 - Co-Employee?
 - UM/UIM Carrier?
 - Negligent Doctor?
 - Exclusive Remedy Rule.
 - Can Employer be sued for contribution?



GENERAL NEGLIGENCE

- **Automobile Accident**

- Most Common Third-party Lawsuit In America.
- Obtain Police Report!
 - Failure to Maintain Proper Control of Vehicle
 - Failure to Maintain Proper Lookout
 - Failure to Yield
 - Improper Turn
 - Deviation from Lane



General Negligence Examples

- **Employee Slows For Traffic, Adverse Rear-ends Vehicle.**
 - Subro Potential? - Failure To Maintain Proper Lookout?
- **Adverse Stops For Traffic, Employee Rear-ends.**
 - Subro Potential? Tail/Break Lights Working?
 - Something (*i.e.*, Mud) Covering Tail Lights?
 - Sudden Stop?
- **Adverse Pulls Out From Stop Sign, Strikes Employee's Vehicle Who Had Right Of Way.**
 - Subro Potential? Failure To Yield?
- **Employee Pulls Out From Stop Sign, Strikes Adverse Vehicle Who Had Right Of Way.**
 - Subro Potential? Excessive Speed?
 - Lights On?
 - Turn Signals On?

MEDICAL MALPRACTICE



- **Departure From That Degree Of Care Exercised By Other Doctors In The Same Or Similar Location.**
 - Not Responsible For Mistake In Judgment
 - Not Responsible For Reasonably Foreseen complications.
 - Example: Staph Infection
 - Specialist Owes Higher Degree Of Care.

MEDICAL MALPRACTICE EXAMPLE

- Employee injured left shoulder, back, hip and head after slip and fall during course and scope of employment.
- Employee undergoes fusion surgery of several vertebrae, and thereafter, has trouble swallowing.
 - Scope
 - Feeding Tube
- Two weeks later, suffers severe shortness of breath, and diagnosed with pneumonia and respiratory failure.
- Upon further examination, discovered surgical screw head protruded through the back wall of employee's esophagus resulting in infection.
 - Was this a reasonably foreseeable complication or medical mal.?

Premises Liability



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- **Trespassers (w/o permission) Limited Duty**
 - Undiscovered – reckless conduct only
 - Discovered – reasonable care
 - Attractive nuisance
- **Licensees (social guest) Moderate Duty**
 - Owner knows of dangerous, hidden condition of property
 - Owner fails to make known condition safe
 - Invitee didn't know of condition and risk
- **Invitee (customer) – Heightened Duty to Inspect**
 - Owner knows of dangerous condition and its risk of harm to Plaintiff

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PREMISES LIABILITY EXAMPLE

- **Employee making delivery to private residence in course and scope of employment.**
- **Slips on stairs outside of home.**

– Issues:

- Stairs Not Up To Code
- Uneven
- Tread
- No Railing
- Lighting Issues



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PRODUCTS LIABILITY

- **Most Overlooked Area Of Subrogation**
 - Difficult To Identify
- **Requires Cost-benefit Analysis**
 - Experts
 - Investigation Costs
- **If Cost-Effective:**
 - Prompt Investigation
 - Hire Expert
 - Get the product!
 - Get statements!
 - Spoliation: Destruction or Withholding of Evidence Resulting In Prejudice To The Opposing Party



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PRODUCTS LIABILITY (CONT.)

- **Manufacturing Defect:** When the product bends, breaks, fails, leaks, ignites, explodes or does something different than as designed.
- **Design Defect:** Product does conform to its plans and specifications, but design itself renders product unreasonably dangerous.
- **Marketing Defect:** Seller fails to warn of product dangers or provide instructions for safe use of the product.

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INVESTIGATION: THE WHY

- First and perhaps only chance at some evidence.
- Catch witnesses when memories are fresh.
- Identify and retain evidence.
- Explain the process of subrogation to insured, et al.
- May be only chance to recognize the issues involved.
- The time and energy spent on a thorough investigation is inversely proportionate to the cost of subrogating.
- Identify roadblocks (indemnity, waiver, etc.) early.
- Is essentially a walk-through of your third party lawsuit.
- On-the-job training for subrogation and claims personnel.
- Lock witnesses into positions and testimony.
- To give notice to parties/government entities.

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INVESTIGATION: THE WHAT

- A look into facts and details surrounding injury or death.
- A valuable commodity that can be used for advantage.
- Information on product or instrumentality causing loss.
- A defense to combat claims for attorney's fees/costs.
- Means to uncover subro killers such as indemnity/waiver.
- Protection against disappearing witnesses and evidence.
- A chance to get info from employee before he's represented.
- A tool to bring extraterritorial issues into play.
- An opportunity to represent Plaintiff's interests.
- Opportunity to uncover third parties and sources of recovery.
- The HOW...
 - WC-401 *Subrogation Investigation In Workers' Compensation Claims* (2 hrs.) – January 25, 2011 MWL Live Webinar – Visit MWL Website Homepage at www.mwl-law.com to Register for this Webinar.

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THIRD-PARTY LIABILITY

- **Exclusive Remedy Rule**
 - Typically, sole remedy (against employer) of employee who elects to receive workers' comp benefits, even if employer was negligent.
 - But, consider construction settings.
 - Are general contractors or sub-contractors an employer and thus privy to the exclusive remedy rule?
- **Who Can Be Sued?**
 - Can an employee sue a co-employee?
 - Is the UM / UIM Carrier subject to subrogation?
 - Negligent Doctor?
 - Negligent Lawyer?

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ALLOCATION OF THIRD-PARTY RECOVERY

- **What part of the settlement does the carrier receive?**
 - How and when does carrier recover lien?
- **Does carrier recover past AND future payments?**
 - Can carrier claim a credit?
- **Is there a special formula used?**
- **Does employer's negligence reduce recovery?**
- **Will "made whole doctrine" be applied?**
- **Subrogated to all elements of damages?**

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ARIZONA – §23-1023(C)

- **Carrier has lien on any recovery “actually collectible”.**
 - Even extends to loss of consortium recovery.
- **Carrier’s lien reduced by proportionate share of employer’s negligence.**
 - Only if there is jury verdict/not settlement.
 - Carrier may challenge % of employer’s negligence.
- **Carrier must approve settlement.**
- **Carrier does not act in bad faith by refusing to approve settlement.**

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IOWA - §85.22



- **No contribution from employer.**
- **Carrier reimbursed out of gross recovery.**
 - Lien extends to all elements of damages, even if employee deliberately refuses to submit medical expenses paid by carrier to jury.
- **Subrogated party must be made a party.**
- **Lien rights extend to benefits payable in the future, not just reimbursement for past benefits paid.**

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ATTORNEY'S FEES/COSTS

- Can plaintiff's attorney recover fees and costs?
- Can plaintiff's attorney reduce your future credit based on his fees?
- Can carrier recover its administrative costs?
- What if carrier has active subro counsel?
- Example of State Statutes:



STATE STATUTES



Arizona: No attorney's fees owed.

Arkansas: Carrier pays reasonable costs of collection, and must intervene, or risk losing entire lien.

California: Court may apportion if carrier is actively represented.

Tennessee: If "active participation", then fees are apportioned.

Wisconsin: Formula followed. No additional fees owed. In some situations where carrier has actively prosecuted the case court may apportion fees back to carrier.

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STATUTORY CREDIT

- Often, the third party suit settles prior to the workers' compensation claim settling.
- Carrier may be permitted to obtain credit/advance (a.k.a cushion, holiday, offset) in addition to recovering for the past benefits paid.
- This credit/advance is applied toward future benefit payments.
 - Example, like a deductible, the credit/advance must be exceeded before the carrier is obligated to make future benefit payments.



FUTURE CREDIT/OFFSET

Texas: Credit for entire recovery by worker.

Florida: *Manfredo* formula allows for a percentage reduction of future benefits based on worker's net recovery.

Georgia: No future credit.

Wisconsin: Fees off top; 1/3 to worker (no credit); Balance to carrier; If any left, it constitutes credit.

Alabama: Future credit formula too complex to go into this presentation.

Bottom Line – Get your right to a credit in writing and make sure to document your credit with the Workers' Compensation Commission.

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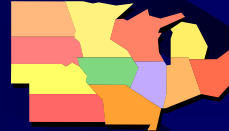
EXTRATERRITORIAL SUBROGATION

- **Definition:** Any effort to subrogate outside the boundaries of the state where benefits are being paid ("enabling state").
 - Is primarily concerned with which state's subro laws apply.
 - Becomes a significant issue if benefits are paid in a different state from where the accident occurred or the suit is filed.

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COMP CLAIMS INVOLVING MULTIPLE STATES

- **If Two Or More Workers' Compensation Subrogation Statutes Are Involved:**
 - 1. **Determine All The Variables/Factors.**
 - Where Was Claimant Hired?
 - Where Will Claimant File Claim?
 - Where Was Claimant Injured?
 - Where Is Employer Principally Located?
 - Where Is Third-party Lawsuit Filed?
 - Where Is Tortfeasor Located?
 - 2. **Determine The Subrogation Law Of Both States.**
 - 3. **Determine If There Is A Conflict.**
 - Conflict = Difference In Laws Results In Two Different Outcomes.
 - 4. **If There Is A Conflict, Apply The Conflict Rule Of The Forum State (Where Suit Filed).**



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WHICH STATE'S SUBRO LAWS APPLY?

- 1. **LEX LOCI DELECTI** (The Place of the Wrong)
 - Applies Law Of Forum State (Accident Occurred)
 - Is The Minority Rule – Only 12 States
- 2. **LARSON RULE** (Restatement §185)
 - Applies Law Of Enabling State (Benefits Paid)
- 3. **MOST SIGNIFICANT CONTACTS**
 - Applies Law Of State With Most Significant Relationship To The Incident
 - Is Majority Rule – Replacing *Lex Loci*
- 4. **LEX FORI** (Law of Forum – If different from No. 1)

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PRACTICAL TIPS

- **Know the laws of the state in which you are subrogating.**
- **Remember to determine if more than one state's law applies.**
- **Always assert your statutory credit.**
 - Remember to negotiate that any additional payments made from the date of settlement add to your total lien and get it in writing.

Introduction to Workers' Compensation Subrogation

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