Can workers' compensation carriers subrogate against uninsured motorists' benefits?

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Every state has a system of workers' compensation to provide benefits for workers injured on the job. These benefits are paid regardless of fault and usually according to a statutory scheme set forth in the state statute. Where the work-related injury is the result of negligence of a third-party tortfeasor, most states grant the employee a right to pursue the third-party tortfeasor for damages resulting from the injury, and give the workers' compensation carrier some sort of subrogated interest, lien, or statutory scheme of reimbursement with the idea of preventing a double recovery to the employee and reducing the burden of insurance to the employing public of the state.

Frequently, the employee will not only make a recovery from the third-party, but will also make a claim against and recover damages from an automotive carrier's uninsured motorist coverage. The possibility against subrogating against these UM\UIM benefits should always be explored. Even in states where the law does not patently allow subrogating against these benefits, anyone with subrogation responsibilities should be alert for those cases which involve facts which may be favorable in changing the law. Many times, bad subrogation law is created because subrogees sit on their thumbs instead of aggressively pursuing every opportunity for recovery.

Subrogating against UM\UIM benefits was the focus of a subrogation claim which I supervised as a partner in my former Houston law firm in 1997. Employers Casualty Company was the workers' compensation carrier for Carl Dyess, Jr., who was injured on August 14, 1990 while driving a truck in the course and scope of his employment. Dyess was injured when he was struck by an uninsured motorist and subsequently collected more than $100,000 in workers' compensation benefits.

Dyess sued the uninsured motorist and also sought uninsured motorist benefits from Northbrook Property and Casualty Company, his employer's uninsured motorist carrier. We intervened on behalf of the workers' compensation carrier, seeking to subrogate against the UM benefits. At that time, the case of Bogart v. Twin City Fire Insurance Company, 473 F2d 619 (5th Cir. 1973), interpreting Texas law, had clearly stated that a workers' compensation carrier's subrogation rights do not extend to uninsured motorist coverage. But the facts were in our favor.

The jury had found that the uninsured motorist was solely responsible for the accident, but amazingly, found damages of only $400. The trial court also denied Employers' subrogation claim based on the Bogart case. We appealed the case to the Amarillo Court of Appeals, noting to the court the following:

1. Article 8307 §6(a) of the Texas Workers' Compensation Act provides for a third party action against "a person who has a legal liability to pay damages for the injury". We argued that an uninsured motorist carrier is a person who becomes liable to pay damages is "a person who becomes liable to pay damages";
2. The *Bogart* case involved an uninsured motorist policy which the employee himself purchased, while in our case, Dyess's employer was the person who purchased the policy, and should be the one who benefits from it;
3. Northbrook was not able to enforce an offset for workers' compensation benefits its insured received, and Dyess therefore received a double recovery by recovering both workers' compensation benefits and UM benefits; and
4. Dyess had damages of only $400, according to the jury.

The court of appeals held that Employers could subrogate against UM benefits, because its subrogation rights under the statute applied to any party who was liable for the employee's injury, regardless of whether that liability arose in tort or contract. The court also found the clause in Northbrook's uninsured motorist policy with regard to an offset against workers' compensation benefits to be ineffective and against public policy. The case changed Texas law and workers' compensation carriers can now subrogate against UM\UIM benefits in Texas.

More than being a lesson to subrogees to be aggressive when pursuing recoveries, the briefs in the Dyess case also contained a survey of state law from around the country with regard to workers' compensation carriers subrogating against UM\UIM benefits. Far from being black letter law, whether or not a workers' compensation carrier can subrogate against UM benefits in many states hinges directly on the facts of the individual case.

In some cases, the state's workers' compensation statute explicitly gives the carrier the right to recover UM\UIM benefits. In New Hampshire, for example, for years the case of *Merchant's Mutual Insurance Group v. Orthopedic Professional Association*, 124 NH 648, 480 A.2d 840 (NH 1984) denied a workers' compensation carrier a lien against UM benefits. But in 1994, the court in *Rooney v. Fireman's Fund Insurance Company*, 138 NH 637, 645 A.2d

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52 (NH 1994) held that workers' compensation carriers could subrogate against UM\UIM benefits, because §281-A:13,I of the New Hampshire Statutes had been amended to read:

> An injured employee . . . may obtain damages . . . against another person if the circumstances of the injury create . . . a contractual obligation to pay benefits under the uninsured motorist provision of any motor vehicle insurance policy: the employer or the employer's insurance carrier shall have a lien on the amount of damages or benefits recovered by the employee."

Therefore, the legislature made the matter simple.

In other states, the legislature has specifically proscribed a workers' compensation carrier from recovering or subrogating against UM\UIM benefits. The Florida Uninsured Motorist Statute §627.27(1) prohibits UM\UIM benefits from applying to the direct benefit of a workers' compensation carrier. The Florida Workers' Compensation Act §440.39(3)(a) establishes the subrogation rights of a workers' compensation carrier, permits only consideration of the liability of the third-party tortfeasor, not a UM\UIM carrier. Likewise, the Pennsylvania Workers' Compensation Act, 77 P.S. §671 prohibits a carrier from subrogating against UM\UIM benefits because the UM carrier is not a tortfeasor. In these states and others like them, the legislature has made it clear that carriers may not subrogate against UM\UIM benefits.

But what about where the state statute doesn't resolve the issue? In such states, the courts must fashion a policy taking into consideration the language of the workers' compensation statute, public policy's of the statute, and also the state's uninsured motorist statute. In Louisiana and Vermont, courts have held that the carrier is entitled to reimbursement out of such benefits. In Alabama, the courts have permitted a credit against the employer's liability for workers' compensation benefits to the extent that the employee's receipt of uninsured benefits would result in a double recovery. The New Jersey Workers' Compensation Act §34:15-40 refers to an employee's recovery "from the third person or his insurance carrier", as allowing subrogation against UM\UIM benefits. Other court decisions in New Jersey have held that such subrogation rights exist regardless of whether the uninsured motorist policy was purchased by the employer or the employee. This distinction makes a significant difference in other states. In North Carolina, South Dakota, and Tennessee, courts have similarly held that the carrier was subrogated to the employee's claim for UM\UIM benefits. The supreme courts of at least five states allow a workers' compensation carrier to subrogate against UM\UIM proceeds, including New Jersey, Louisiana, Delaware, Maine, and South Dakota.

Some states allow for subrogation against UM\UIM benefits, but make exceptions to the rule. New Jersey allows it only if the employee's recovery of benefits under both workers' compensation and the automobile policy exceed the full amount of damages, in other words, utilizing the "made whole" doctrine. In other states, cases have held that a carrier's right to subrogate against UM\UIM benefits depends on who procured the UM policy under which the benefits are paid. If the policy was procured by the employer or a third party, case law in Delaware, Louisiana, Maine, and Washington allow subrogation, but not if the policy was purchased by the employee. In Alabama, a 1997 decision prohibiting subrogation against UM benefits seem to conflict with a 1987 case, which allowed it where the employee stood to make a double recovery. In Delaware, a 1986 decision grants the carrier's subrogation rights against UM\UIM benefits where the policy was purchased by the employer, and a 1988 decision indicates that such subrogation rights are not granted where the policy was procured by the employee.

In the overwhelming majority of states where the statute does not expressly decide the issue, the courts have held or recognized that an employer or workers' compensation carrier was not entitled to be reimbursed out of sums payable to an employee under a UM\UIM policy, because the workers' compensation law did not expressly grant such rights. Court decisions in Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, Oklahoma, Pennsylvania, Utah, and Virginia have indicated that because the statute did not give the carrier a lien on UM\UIM benefits, such subrogation rights would not be granted.

In a related issue, but one which exceeds the scope of this article, some states have decisions which address an employer's right to offset uninsured motorist benefits against workers' compensation awards. States such as Oklahoma have indicated that an employer is not entitled to offset UM\UIM benefits against workers' compensation awards and benefits, because public policy does not allow it.

The right of a workers' compensation carrier to subrogate against UM\UIM benefits is truly a moving target. Rights in individual states can change rapidly, and can be dramatically effected by new court decisions, amendments to the workers' compensation statute, and amendments to the UM\UIM statute. Cases in which the employee is seriously injured by an uninsured motorist and the policy is purchased by the employee, make bad facts and should be carefully scrutinized before subrogation is attempted. The adage "bad facts make bad law" is nowhere more relevant

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than in the area of subrogation. In Texas, for example, most of the decisions limiting or constricting subrogation rights involve subrogation actions brought by universities, municipalities, and other government entities, who seem to blindly subrogate on the tax payer's dollar no matter what the facts.

We are living in an era where our subrogation rights are under attack, and in some states legislation has been proposed threatening to abolish subrogation all together. When subrogating for workers' compensation benefits, it is prudent to always determine whether there is a UM\UIM policy issued to either the employee or the employer, and the state's law regarding subrogation rights against such benefits should be carefully looked into.