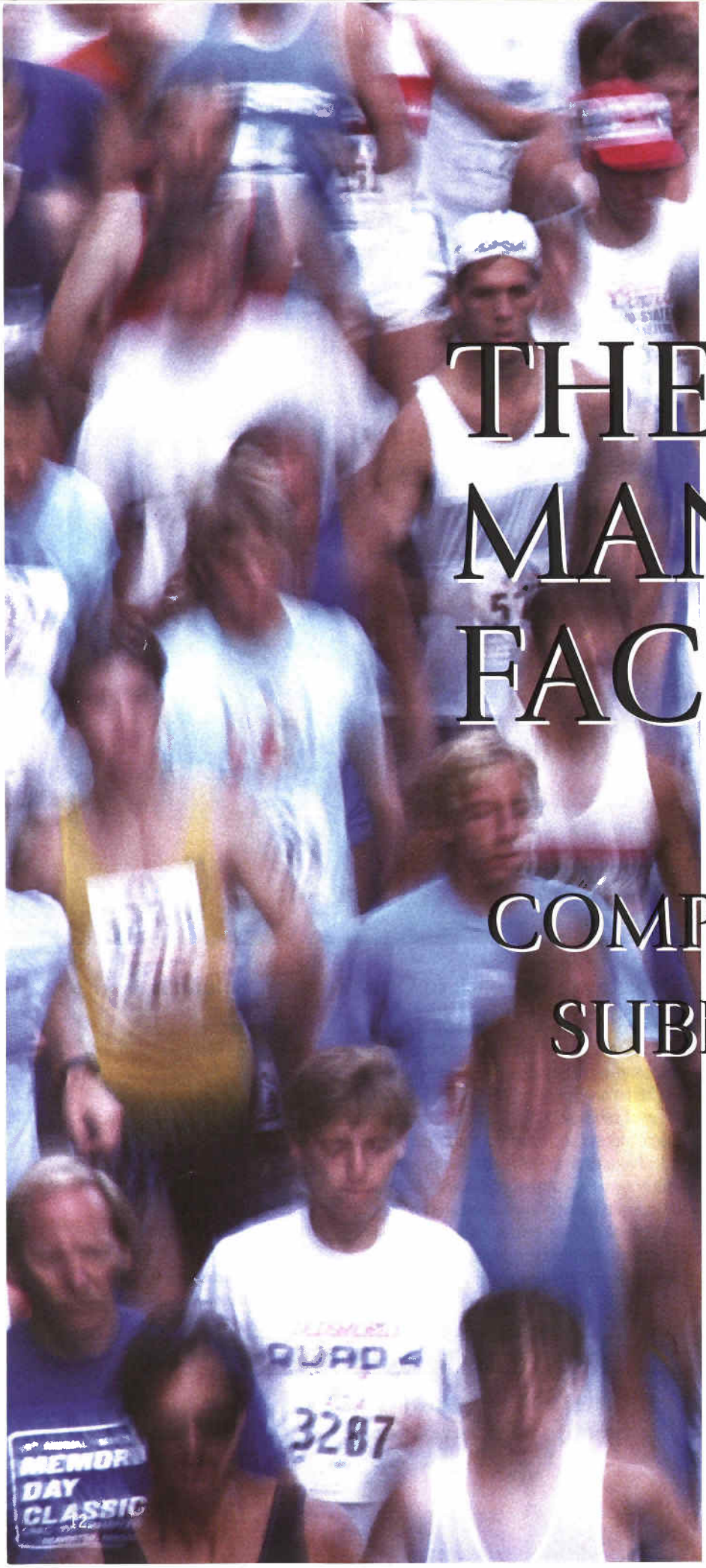

THE MANY FACES OF WORKERS' COMPENSATION SUBROGATION

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More than any other area of personal injury subrogation, workers' compensation subrogation is often fraught with traps and pitfalls for the unwary subrogation professional. This is primarily because most subrogation professionals assume that workers' compensation subrogation is fairly similar from one state to the next. Every state, except one [1], allows for workers'

1 ON JUNE 27, 2001, THE OHIO SUPREME COURT STRUCK DOWN, ON STATE CONSTITUTIONAL GROUNDS, THE ENTIRE OHIO WORKERS' COMPENSATION SUBROGATION STATUTE. HOLETON V. CROUSE CARTAGE CO., 748 N.E.2D 1111 (OHIO 2001).

compensation subrogation. That is where the similarities end. In truth, there are very few areas in which the laws of each individual state vary more and are applied as differently than in the area of workers' compensation subrogation. While the basic parameters of workers' compensation claims from state to state remain somewhat constant, the laws regarding subrogation and the application of those laws vary greatly from state to state.

SUBROGATION RIGHTS GENERALLY

The starting place for all third party subrogation actions is the workers' compensation subrogation statute of the individual state. Subrogation professionals must initially understand what sort of subrogation rights they have. Many states grant the carrier a right to independently, and apart from the worker, file a third party action and pursue it.[2]

2 EXAMPLES OF SUCH STATES ARE TEXAS, ARKANSAS, ILLINOIS, LOUISIANA, OREGON, AND PENNSYLVANIA.

In other states, the injured worker is the true party in interest, and the workers' compensation carrier is granted only a lien on the proceeds of any third party recovery.[3]

3 EXAMPLES OF SUCH STATES ARE VIRGINIA AND FLORIDA.

Some states grant the employee the exclusive right to bring an action within a certain period of time, where after either party has a joint right to bring such an action.[4]

4 NORTH CAROLINA IS SUCH A STATE. SEE N.C.G.S.A. ' 97-10.2.

Many states give the workers' compensation carrier the right to intervene into a third party action filed by the worker, while some do not.[5]

5 FIDELITY & CASUALTY CO. OF NEW YORK V. BEDINGFIELD, 60 SO.2D 489 (FLA. 1952); COMMERCIAL STANDARD INSURANCE CO. V. MILLER, 274 SO.2D 588 (FLA. 1ST D.C.A. 1973).

Florida, for example, gives the workers' compensation carrier the right to file a "Notice of Payment" pursuant to §440.39 of the Florida Statutes, but they are not allowed to intervene into any third party action pending against third party tortfeasors. Some states give the workers' compensation carrier additional time to sue a third party tortfeasor after the ordinary statute of limitations has run.[6]

6 ALABAMA: WORKERS' COMPENSATION CARRIER HAS ADDITIONAL SIX MONTHS AFTER THE STATUTE OF LIMITATIONS RUNS IN WHICH TO FILE THIRD PARTY SUIT. ALA. STAT. ' 25-5-11(D) (1993); ALASKA: CARRIER CAN FILE SUIT AFTER ONE YEAR. AK. STAT. ' 23.30.015(D) (2000); ARIZONA: THIRD PARTY CLAIM IS DEEMED ASSIGNED TO CARRIER AFTER ONE YEAR, BUT MAY BE REASSIGNED TO THE CARRIER. A.R.S. ' 23.1023(B); GEORGIA: CARRIER MAY PURSUE IN ITS OWN NAME AND WORKER=S NAME AFTER ONE YEAR. O.C.G.A. ' 34-9-11.1; MASSACHUSETTS: WORKER HAS RIGHT TO PURSUE THIRD PARTY ACTION FOR SEVEN MONTHS - THEN CARRIER MAY PURSUE. N.G.L.A. 152 ' 15 (2000); SOUTH CAROLINA: CARRIER HAS RIGHT TO PURSUE ACTION AFTER ONE YEAR, BUT MUST GIVE TWENTY DAYS NOTICE FIRST. ' 42-1-560(C).

In some states, the law requires that a subrogating carrier or an injured worker filing a third party action must join the other in the action as the necessary party to filing suit.[7]

7 WISCONSIN: ANY PARTY WITH A SUBROGATED INTEREST MUST BE MADE A PARTY TO THE LITIGATION. WIS. STAT. ' 803.03 (2001); COLORADO: WORKER MUST JOIN CARRIER AS A PARTY PLAINTIFF IN ANY ACTION FILED AGAINST TORTFEASOR. COUNTY WORKERS COMPENSATION POOL V. DAVIS, 817 P.2D 521 (COLO. 1991).

Still other states give the carrier the right to intervene into a third party action, but specifically prevent the worker from forcing the carrier to become a party to the litigation.[8]

8 TENNESSEE: MCCOY V. WEAN UNITED, INC., 67 F.R.D. 491 (E.D. TENN. 1973).

This becomes significant in states that allow successful third party tortfeasors to charge and tax costs of court against both the worker and the more solvent carrier. In yet other states, it is still literally a condition precedent to the worker's right to claim workers' compensation benefits from his employer, that he assigns his cause of action for third party damages against the third party to the workers' compensation carrier.[9]

9 UTAH: INDUSTRIAL COMMISSION V. WASATCH GRADING CO., 14 P.2D 988 (UTAH 1932).

It is clear, therefore, that a workers' compensation carrier's subrogation rights vary greatly from state to state. Understanding the parameters of your subrogation rights is a crucial first step in making an informed decision as to how to adequately and fully protect your subrogation interest.

THIRD PARTIES

Once a subrogation professional determines which and what type of subrogation rights a subrogating workers' compensation carrier has, he must understand exactly who qualifies as a "third party" for purposes of a "third party suit." Many states allow a subrogating carrier to sue an employer if there was an intentional act or if the employer was acting in a "dual capacity," while others do not. States such as California do not allow a malpracticing healthcare provider to qualify as a third party for purposes of a third party suit.[10]

10 ALTHOUGH PREVIOUSLY ABLE TO SUBROGATE AGAINST A RECOVERY IN A MEDICAL MALPRACTICE ACTION, CALIFORNIA RECENTLY ENACTED ' 3333.1 OF THE CALIFORNIA CIVIL CODE, WHICH PROHIBITS SUBROGATION IN MEDICAL MALPRACTICE CLAIMS AND TRUMPS THE WORKERS' COMPENSATION STATUTE GIVING THE CARRIER RIGHT OF SUBROGATION. ANN. CAL. CIV. CODE ' 333.1 (1997); MILLER V. SCIARONI, 172 CAL. APP.3D 306 (APP. 1 DIST. 1985).

While a few states prohibit malpracticing physicians from being considered "third parties" under their state's workers' compensation subrogation statute, a large number of states do allow such third party actions.[11]

11 ALABAMA, ALASKA, CONNECTICUT, ILLINOIS, INDIANA, KANSAS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, TEXAS, AND WISCONSIN, ARE EXAMPLES OF STATES WHICH DO ALLOW A WORKER'S COMPENSATION CARRIER TO SUBROGATE AGAINST THE PROCEEDS OF A RECOVERY FROM A THIRD PARTY MALPRACTICE SUIT.

The majority of states that allow medical malpractice third party actions limit the workers' compensation carrier's recovery to those benefits, which were paid as a direct result of the malpractice. Similarly, some states allow a worker's compensation carrier to subrogate against the benefits of an uninsured or underinsured motorists' policy paid to the injured worker.[12]

12 ARKANSAS, INDIANA, LOUISIANA, NEVADA, NEW MEXICO, AND TEXAS, ARE EXAMPLES OF STATES WHICH ALLOW SUBROGATION AGAINST UM/UIM BENEFITS. NORTH CAROLINA ALLOWS SUBROGATION FOR POLICIES ISSUED AFTER OCTOBER 1, 1999.

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On the other hand, a number of states do not define an uninsured motorist' policy as a "third party" either under the terms of their statute or through interpretation by state case law.[13]

13 ARIZONA, CALIFORNIA, GEORGIA, ILLINOIS, IOWA, KANSAS, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, NEBRASKA, OREGON, PENNSYLVANIA, TENNESSEE, AND WASHINGTON DO NOT ALLOW SUBROGATION AGAINST UNINSURED MOTORISTS' BENEFITS.

Still other states, allow or disallow subrogation against UM/UIM benefits, depending on other factors, including whether the policy was procured by the injured worker or the employer.[14]

14 ALABAMA, KENTUCKY, NEW JERSEY, AND VIRGINIA ARE EXAMPLES OF STATES WHICH ALLOW SUBROGATING AGAINST UM BENEFITS, DEPENDING ON THE CIRCUMSTANCES.

Therefore, knowing your subrogation rights in a particular state is only a small fraction of the battle. Once you know your subrogation rights in which entities can qualify as third parties, the most confusing aspect of workers' compensation subrogation - allocating the proceeds of the third party recovery - enter into the picture.

ALLOCATION OF THIRD PARTY RECOVERY

The general rule is that a worker's compensation carrier is to be reimbursed out of any third party recovery, for the amount of benefits it has paid in the past. Unfortunately, so many exceptions to this general rule have developed that it is inappropriate to even refer to it as a general rule. In Alabama, the carrier is entitled to be reimbursed out of any judgment recovered by the employee or its representatives in a suit against the third party for all payments made by the employer which were included within the meaning of the word "compensation."[15]

15 DAVISON V. PET, INC., 644 SO.2D 896 (ALA. 1994), REHEARING DENIED.

Therefore, there can be situations when payments other than indemnity, medical and death benefit payments can be recovered. There is no need for the worker to be "made whole" in order for the carrier to recover, and it makes no difference what type of damages are claimed in the worker's Complaint. In addition to recovering past benefits, the carrier can also recover that portion of the settlement, which is attributable to future medical expenses the carrier is legally obligated to pay.[16]

16 EX PARTE MILLER & MILLER CONSTRUCTION CO., INC., 736 SO.2D 1104 (ALA. 1999).

However, what Alabama giveth, Alabama taketh away. In Alabama, if the third party recovery is uncollectible by the worker, in part, then the carrier recovers in proportion to the ratio of the amount of the judgment collected bears to the total amount of judgment.[17]

17 ALA. STAT. ' 25-5-11(A) (1992).

In California, §3856 of the California Labor Code details how a third party recovery is to be allocated between the worker and the carrier. The allocation scheme depends on whether the carrier sues alone, the employee sues alone or the employee and the carrier sue together in a single consolidated action. Then, California requires that the workers' compensation carrier's subrogation recovery be reduced by a percentage representing the percentage of the employer's negligence.[18]

18 ROOMEY V. U.S., 434 F. SUPP. 766 (N.D CAL. 1977), AFF=D, 634 F.2D 1238.

Therefore, a California carrier is only reimbursed for the amount by which its compensation liability exceeds its proportional share of the injured employee's recovery. Put another way, a worker's compensation carrier for a negligent California employer is entitled to reimbursement from a third party tortfeasor only to the extent that the workers' compensation benefits paid exceeds the proportional share of total damages suffered by the employee attributable to the employer's negligence.[19]

19 EMPLOYERS MUTUAL LIABILITY INSURANCE CO. V. TUTOR-SALIBA CORP., 951 P.2D 420 (CAL. 1998).

In California, therefore, the injured worker has the burden of showing the percentage of the employer's negligence and should submit negligence to the jury in such a matter.

In Georgia, the made whole doctrine has actually been codified into the workers' compensation statute.[20]

20 O.C.G.A. ' 34-9-11.1.

The difficulty and confusion surrounding the made whole doctrine's introduction into the workers' compensation arena has been compounded by recent case law.[21]

21 ANTHEM CASUALTY INSURANCE CO. V. MURRAY, 542 S.E.2D 171 (GA. APP. 2000) (CARRIER BROUGHT SEPARATE ACTIONS AGAINST THE EMPLOYEE AND THE THIRD PARTY TORTFEASOR SEEKING TO ASSERT ITS SUBROGATION LIEN AGAINST A $1.5 MILLION JURY VERDICT WHICH THE PLAINTIFF RECEIVED.).

The court in Murray noted the difficulty of determining when the worker had been fully and completely compensated where a general verdict form is used. The court noted that it was the responsibility of the carrier to protect its interest by intervening and requesting a special verdict. That alone is the reason to obtain subrogation counsel in every Georgia workers' compensation case.

In Indiana, the workers' compensation statute is fairly straightforward with regard to how proceeds are to be allocated.[22]

22 I.C. ' 22-3-1-1, ET SEQ.

If an injured employee sues and recovers a judgment or settlement, then any amount recovered by the employee or his dependents shall be paid to the employer/carrier in satisfaction of its workers' compensation subrogation interest, subject to a pro rata share of costs and expenses.[23]

23 I.C. ' 22-3-2-13 (2000).

If a worker gets a final judgment for a sum less than the lien and the future liability of the workers' compensation carrier, the worker then has to choose between collecting a judgment and repaying the carrier for the past lien or assigning all rights to the carrier and continuing to receive workers' compensation benefits.[24]

24 I.C. ' 22-3-2-13 (2000).

However, Indiana has a lien reduction statute, which complicates matters.[25]

25 I.C. ' 34-51-2-19 (1999).

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This lien reduction statute, for years, has reduced an insurance carrier's subrogation interest among all lines of insurance except workers' compensation. However, the case of Department of Public Aid, State of Indiana v. Couch,[26]

26 605 N.E.2D 165 (IND. 1992).

changed all that. For years, the old "§12" contained an exception for workers' compensation liens. However, when §12 was amended and the new statute, §34-51-2-19, was enacted, the new statute did not contain this exception. The Supreme Court in Couch held that §12 applied to all recoveries, whether before or after trial. Therefore, the lien reduction statute now applies to workers' compensation as well as other lines of insurance. Plaintiffs and defendants now use the Couch decision to urge the court to do the following:

1. Determine the full value of the case based on the Movant's assertion in its Petition;

2. Determine the settlement amount;

3. Calculate a percentage that the settlement amount bears to the plaintiff's prayer for damages in its Petition; and

4. Reduce the workers' compensation lien by that percentage.

As you can see, by coupling this new lien reduction scenario with alleged claims that the plaintiff had to settle for less than it would have liked to because of the negligence of the employer, limited insurance or even liability problems, a worker's compensation lien can be seriously jeopardized, and the carrier may receive only pennies on its subrogation dollar.

In some states, such as Oklahoma, if the third party case is to be settled for less than the amount of the compensation paid or to be paid in the future, the settlement must have the approval of the trial court.[27]

27 85 OKL. ST. ANN. 44(A).

If recovery from a third party action is accomplished other than by settlement, the carrier is reimbursed for its past benefits paid, less a proportionate share of expenses and attorneys' fees. After expenses and attorneys' fees are paid, the balance of the recovery is apportioned between the worker and the carrier based on the ratio that the workers' compensation benefits paid in the past bear to the total recovery in the third party action. It may also be apportioned in any matters the parties agree to. Confusing? Undoubtedly. To further complicate matters, the court is required to make a "just and reasonable" apportionment of settlement proceeds if the parties cannot agree.[28]

28 OKLAHOMA PROPERTY AND CASUALTY GUARANTY ASS'N V. TIPTON, 807 P.2D 299 (OKLA. APP. 1990).

In practical application, the term "just and reasonable" does nothing more or less than bring the "made whole" doctrine back into the picture.

In Texas, the carrier's strong subrogation rights give it the unequivocal right to recover "first money" out of any third party recovery, regardless of who procures it.[29]

29 FORT WORTH LLOYDS V. HAYGOOD, 246 S.W.2D 865 (TEX. 1952).

The carrier is granted a property interest in the corpus of the settlement, and neither the worker nor his attorney are entitled to any proceeds of the third party settlement unless and until the carrier is repaid in full.[30]

30 ROCKWOOD INSURANCE CO. V. WILLIAMSON, 596 F. SUPP. 1524 (N.D. TEX. 1994).

Of course, as in most states, the carrier is obligated to pay a proportionate share of expenses and attorneys' fees in connection with the third party settlement - but the carrier is not obligated to pay expenses if it retains an attorney to represent its interests.

Virginia is an example of a state that requires any settlement by a carrier exercising its rights of subrogation to be approved by the Commission and the injured worker.[31]

31 VA. ST. ' 65.2-309(C).

Because the carrier, by operation of law, becomes the assignee of any right to recover damages which the injured employee has, Virginia law appears to give a worker's compensation carrier a lien on any recovery which the employee effects in a third party action. Virginia's statute contains significant notice requirements and the carrier is entitled to be reimbursed fully out of the third party recovery for any payments it has made or will make, less attorney's fees and expenses.[32]

32 HENRICO COUNTY SCHOOL BOARD V. BOHLE, 421 S.E.2D 8 (1992), REV=D OTHER GROUNDS, 431 S.E.2D 36 (1993).

Therefore, the allocation schemes vary from state to state about as much as they possibly can. Knowing which states you are subrogating in is essential to maximizing your workers' compensation subrogation recoveries. These scenarios do not even take into consideration the possibility that the workers' compensation carrier pays benefits under the laws of one state and vies for apportionment of a third party recovery in a suit filed in another state. This raises the ugly specter of conflict of laws in extraterritorial jurisdiction, which is beyond the scope of this article.

RECOVERY OF YOUR CREDIT/ADVANCE

Often, a recovery of a worker's compensation carrier's credit or advance is more significant than reimbursement of its workers' compensation lien. Significant reserve takedowns can dramatically affect the carrier's bottom line. It is all the more surprising, then, that many carriers and/or their subrogation counsel ignore or fail to effectively pursue a carrier's right to a future credit. If, after reimbursement of a worker's compensation carrier's lien, the injured worker effects the net recovery free and clear of attorneys' fees and costs, most states consider that recovery, or some portion of it, to constitute a credit to the carrier, relieving it of paying future benefits until the credit is exhausted. However, once again, the many faces of workers' compensation subrogation in our

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country require us to become familiar with the various state laws regarding the credit or advance. In many states, such as Alabama, the carrier receives a simple credit toward future benefit payments for any damages recovered by the worker which are in excess of the benefits the carrier has paid.[33]

33 ALA. STAT. ' 25-5-11(A) (1992).

Even Alabama, however, complicates matters by providing that when an injured employee recovers from a third party tortfeasor, the amount of that recovery attributable to the employee's medical or vocational expenses should be exhausted before the employer or its workers' compensation carrier is obligated to resume payment of those expenses.[34]

34 EX PARTE B.E. & K. CONSTRUCTION CO., 728 SO.2D 621 (ALA. 1998), ON REMAND, 728 SO.2D 624.

In Arizona, the credit acts like a deductible. It must be exceeded before the carrier is obligated to make further benefit payments.[35]

35 A.R.S. ' 23-1023(C).

The carrier's future credit applies to all amounts recovered, including post-judgment interest.[36]

36 YOUNG V. INDUSTRIAL COMMISSION OF ARIZONA, 707 P.2D 986 (AZ. APP. 1985).

Subrogating carriers in Arizona must pinch themselves, because Arizona is one of the few states which specifically does not allow a lien to be subject to a collection fee.[37]

37 A.R.S. ' 23-1023(C).

Therefore, the worker's attorney's fees are deducted first from the gross recovery before reimbursement of the carrier's lien. The remainder is the amount against which the insurance carrier has a lien, is reimbursed and out of which any future credit it receives must originate.[38]

38 LIBERTY MUTUAL INSURANCE V. WESTERN CASUALTY & SURETY CO., 527 P.2D 1091 (AZ. 1974).

In some states, such as Massachusetts, once the carrier has paid its pro rata share of attorneys' fees and costs and is subjected to future claims for benefits, the employee's future claims for benefits are paid on a fractional basis. In other words, the carrier pays the benefits in the same ratio that the employee's attorney's fees and costs bear to the amount of the total recovery from the third party action. Once the total amount of the future claims equal the statutory excess, the carrier is then obligated to begin making full compensation benefits once again. In other words, if the attorney's fees and costs are one-third of the recovery, the carrier pays one-third of the employee's claims subsequent to the third party recovery as the claims for benefits arise, until the total amount of claims equals the statutory excess recovered in the third party action.

In Nebraska, a carrier should give notice to the worker's attorney and also to the third party tortfeasor of its intent to take a credit. If it were a practical matter, the amount of any credit would then be negotiated with the employee as a part of the lump sum settlement of the workers' compensation claim. After receiving its credit, the workers' compensation benefit payments are suspended until the amount of compensation owed to the employee exceeds the amount of the employee's net recovery from the third party tortfeasor.[39]

39 NEKUDA V. WASPI TRUCKING, INC., 388 N.W.2D 438 (NEB. 1986).

In Texas, there is an ongoing dispute as to whether or not the credit equals the net recovery or gross recovery by the injured worker. In addition, in order to obtain its statutory credit, the workers' compensation carrier must file with the Texas Workers' Compensation Commission a TWCC Form 21, filling in Block 23 in plain specific and plain language, the reason for the suspension of benefits.[40]

40 SEE MOHR & ANDERSON, S.C. SPRING, 2000 SUBROGATION NEWSLETTER FOUND AT HTTP://MOHR-ANDERSON.LAWOFFICE.COM/NEWSLTTR-5637/

In Louisiana, when a worker settles a third party action, the carrier is entitled to a credit or advance against future benefit payments.[41]

41 LA. R.S. ' 23:1103.

It is possible that the carrier may have to intervene into the suit in order to obtain its credit. This is an invaluable reason for a worker's compensation carrier to intervene in all Louisiana third party actions. A compensation carrier has no right to any credit against any amount recovered by the plaintiff against the third party for future medical expenses, unless there is an award for future medical expenses, and then only to the extent of the award for that item.[42]

42 ROBERTSON V. EMPLOYERS CASUALTY CO., 546 SO.2D 263 (LA. APP. 1989).

SUMMARY

As confusing and as variegated as the workers' compensation subrogation laws are in our country, they become even more confusing and obfuscated when overlaid with other related subrogation issues such as lien reduction statutes, no-fault laws, tort reform and varying statutes of limitations, for both the worker and the carrier. While the subrogation rights of a worker's compensation carrier are many and varied, so are the possible ways of losing them, through inaction or ignorance. Every subrogation program owes it to educate its staff on not only the laws of the various states within its jurisdiction, but also the subrogation laws in any state in which any of its insured's do business or travel. Although not an easy task, familiarizing subrogation personnel with the many faces of workers' compensation subrogation has become a necessary evil in our era of interstate commerce and centralized recovery units. Unless subrogation professionals know more than the attorneys for the workers and third party tortfeasors, the carrier will surely be leaving money on table.