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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **MARCH 2009**

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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WORKERS' COMPENSATION SUBROGATION

GARY L. WICKERT

CONTRIBUTION AGAINST EMPLOYERS IN ILLINOIS WORKERS' COMPENSATION SUBROGATION

By Gary L. Wickert

Most subrogation professionals are aware that in workers' compensation third-party litigation, an employer is generally immune from suit by an injured employee. We know it as the "exclusive remedy rule". Exceptions exist in some states depending on whether there is an intentional act or gross negligence committed by the employer, the employer is operating in a dual capacity, or where there exists contractual indemnity sufficient to shift liability for the accident or injury from the tortfeasor to the employer. The exclusive remedy rule usually means that when a tortfeasor is sued by the injured worker, the tortfeasor cannot bring a third-party action for contribution against the employer.

Illinois is one of two states which buck the system by allowing a tortfeasor to sue an employer for contribution based on the employer's negligence that allegedly contributed to causing the accident and resulting injuries. While Illinois protects the employer from third-party actions filed directly by the worker, a third-party tortfeasor may be able to seek contribution from a negligent employer. 740 I.L.C.S. § 100, *et seq.* (1999). The Joint Tortfeasor Contribution Act gives a third-party tortfeasor a right to seek contribution from a negligent employer for the employer's pro rata share of fault. 740 I.L.C.S. § 100/3.5(a) (1996) (declared unconstitutional in *Best v. Taylor Machine Works,* 689 N.E.2d 1057 (Ill. 1997)). This naturally raises lots of questions; including whether and when an employer might be compelled to pay fresh money on top of its workers' compensation liability.

Allowing contribution against employers is bad law and a violation of the pact made with employers generations ago when workers' compensation legislation first came into existence. In exchange for holding employers responsible for unlimited amounts of medical expenses and lost wage payments, even when they were not responsible for causing the injury of one of their employees, they were given immunity from suit. Sadly, that immunity has been eroded over the years.

An employer's contribution liability to a tortfeasor is limited to the past lien and present value of any future workers' compensation benefits owed. This is known as the "*Kotecki* cap", named after the case which declared it. *Kotecki v. Cyclops Welding Corp*., 585 N.E.2d 1023 (Ill. 1991). Unfortunately, this cap on contribution liability can be waived in an agreement with a potential tortfeasor, meaning that an employer's liability under a contribution action could be unlimited if the cap is waived. *Liccardi v. Stolt Terminals, Inc*., 687 N.E.2d 698 (Ill. 1997); *Bray v. Archer-Daniels-Midland Co*., 676 N.E.2d 1295 (Ill. 1997). In order to have a valid contractual waiver of the *Kotecki* cap, a contract must have a valid provision by which such a waiver is made. *Estate of Willis v. Kifferbaum Constr. Corp*., 830 N.E.2d 636 (Ill. App. 2005).

Construction contracts now routinely contain "*Kotecki*" waivers and innocent employers, who have no choice but to sign the contracts or forego the work, are being exposed to unlimited liability. However, a *Kotecki* waiver by the employer usually applies with regard to the party it is contracting with. A recent Court of Appeals decision makes it clear that a *Kotecki* waiver occurs where it is expressly contracted for between the employer/subcontractor and the party further up the contractual chain seeking to assert that waiver. *Id*.

Illinois law is not clear on the exact procedure to be followed when a subrogated employer is sued for contribution by a defendant in a third-party action. Lawyers regularly disagree as to how it works. It appears that, based on available case law and parallels drawn to Minnesota and Idaho law, on which Illinois based its right of contribution, that (1) defendant pays the entire verdict; (2) employer then contributes to the defendant an amount commensurate with its liability under the Workers' Compensation Act; and (3) the employee reimburses the employer its subrogation interest pursuant to § 5(b). This can be three separate transactions, or the carrier can simply reduce its lien and/or credit, based on the percentage of its fault. In dual employer situations, both employers are liable jointly and severally for the maximum amount under *Kotecki*. *Costiloe v. Allis-Chalmers Corp.,* 615 N.E.2d 7984 (Ill. App. 1993).

This right of contribution is only allowed against an employer. Similar contribution from co-employees is not allowed, but co-employee negligence will be imputed against the employer. *Ramsey v. Morrison,* 676 N.E.2d 1304 (Ill. 1997). An employer became legally responsible for an employee's injury to the extent it was caused by its own negligence or the negligence of a co-worker, while acting within the course and scope of his employment, and provided a third party brings a contribution claim against the employer. *Equistar Chemicals, L.P. v. B.M.W. Constructors, Inc.,* 817 N.E.2d 534 (Ill. App. 2004).

The 7th Circuit Court of Appeals decision in *Baltzell (*see case highlight below*),* has clarified that the *Kotecki* cap is comprised of both a carrier's past lien and present value of future benefits it owes. *Baltzell v. R & R Trucking Co.,* 2009 WL 249981 (7th Cir. 2009). While Illinois law is not entirely clear on the subject, some believe that this creates the possibility of an employer owing "fresh money" in contribution liability. This flies in the face of the Joint Tortfeasor Contribution Act § 3.5, which reads in part:

> ***100/3.5. Contribution against the plaintiff's employer.***
>
> *(a) If a tortfeasor brings an action for contribution against the plaintiff's employer, the employer's liability for contribution shall not exceed the amount of the employer's liability to the plaintiff under the Workers' Compensation Act … or the Workers' Occupational Diseases Act. … The tortfeasor seeking contribution from the plaintiff's employer is not entitled to recover money from the employer. The tortfeasor shall receive a credit against his or her liability to the plaintiff in an amount equal to the amount of contribution, if any, for which the employer is found to be liable to that*

tortfeasor, even if the amount exceeds the employer's liability under the Workers' Compensation Act or the Workers' Occupational Diseases Act.

740 I.L.C.S. § 100/3.5(a) (1996) (The Joint Tortfeasor Contribution Act gives a third-party tortfeasor a right to seek contribution from the negligent employer for the employer's pro rata share of fault); see 740 I.L.C.S. § 100/3.5(a) (1996) (declared unconstitutional in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

If this statute is applied literally, the tortfeasor receives only a credit from the employer for its contribution, rather than an actual cash payment. Unfortunately, this statute was declared unconstitutional in a very questionable decision by the Illinois Supreme Court, which gave very little deference to the employer's rights against whom the deck is already stacked. *Best v. Taylor Machine Works,* 689 N.E.2d 1057 (Ill. 1997).

In practical terms, the employer still gets a credit, assuming its contribution liability does not exceed its past lien and present value of the future benefits it owes. If the employer pays the third party directly, it would still have its right of reimbursement for its past lien and future credit. Because the contribution payment by the employer would simply go to a tortfeasor ,who would then pay it to the plaintiff, who, in turn, would reimburse it right back to the carrier, stating the effect of an employer's contribution liability as a credit, as the statute above does, would be accurate. Due to the statute being declared unconstitutional, Illinois employers now face the risk of significant contribution liability, requiring them to pay the tortfeasor up to the amount of the past lien and the present value of future benefits owed, while only recovering its past lien less 25% for attorney's fees from the plaintiff. This assumes a *Kotecki* cap is in place. If it isn't, the employer's contribution liability could be unlimited.

The *Baltzell* decision intimates that where the *Kotecki* cap is not waived, an employer's contribution liability is limited by its past lien and the present cash value of its total workers' compensation obligation (its *Kotecki* cap). Whether the carrier is obligated to pay fresh money or simply receive a reduced future credit is unclear.

One way in which the employer might be obligated to pay fresh money has to do with the reduction of its lien reimbursement by 25% for attorney's fees. The subrogated carrier may be obligated to pay up to 25% of its lien to the attorney or worker as an attorney's fee under the Illinois statute, and yet the employer's liability in contribution (usually paid by the compensation carrier's Employer's Liability coverage) is limited only by the extent of its workers' compensation liability (which arguably doesn't include the reduction for attorney's fees). Therefore, there is a possibility that the carrier's contribution liability could be greater than its liability under the Workers' Compensation Act, and it could be required to pay "fresh money" to the defendant in contribution - roughly equivalent to the attorney's fees owed.

In *LaFever v. Kemlite Co.,* 706 N.E.2d 441 (Ill. 1998), the Illinois Supreme Court said that the carrier could waive its lien at any time, even after a verdict finding significant contribution liability against it, and it would have no more contribution liability. In *LaFever*, the employer's full compensation benefits had been paid and there were no future benefits owing. The *Baltzell* decision has now clarified that even in a case in which the compensation claim is still open and future benefits are owed, the carrier can waive its lien, even after a verdict in the third-party case is handed down, and avoid any contribution liability whatsoever.

Carriers faced with employer contribution claims and possible Coverage B involvement are forewarned to seriously consider obtaining separate counsel for defense of the contribution action against their insured and their subrogation and reimbursement efforts. Counsel assigned to represent the employer are duty bound to get the employer (not the carrier) off the hook at all costs, including waiver of a significant subrogation lien. You are not likely, nor should you, receive from the employer's counsel an unbiased assessment urging you to press your lien even if it means a risk to the employer. Having separate counsel obviates this problem and conflict.

7TH CIRCUIT CLEARS UP EMPLOYER CONTRIBUTION ISSUES

Baltzell v. R & R Trucking Co., 2009 WL 249981 (7th Cir. 2009)

On February 4, 2009, the 7th Circuit Court of Appeals cleared up a long-standing question which has haunted subrogation practitioners, plaintiffs' attorneys, and defense counsel for years. The Court held that while an employer's *Kotecki* cap does include the past lien payments and present value of any future benefits owed, in a rare pro-subrogation moment, the Court indicated that an employer/workers' compensation carrier can waive its lien at any time, even after a verdict comes in, and avoid any contribution liability, no matter how large it might be. Finally, the Court clarified that if an employer/carrier waives its lien to avoid contribution liability, the tortfeasor receives a credit on the verdict against it in the amount of the carrier's past lien only.

Millard "Skeeter" Baltzell was injured when he was crushed by a tractor-trailer while working for Ensign-Bickford Company. Skeeter sought workers' compensation from Ensign, and his wife, Ruth Ann, brought strict liability claims against three companies: R & R Trucking Company, the owner of the tractor-trailer; Freightliner Corporation, the tractor manufacturer; and Lufkin Industries, Inc., the trailer manufacturer. These defendants then sought contribution against Ensign, the employer. On April 21, 2005, a jury returned a verdict in favor of Skeeter for $11,980,120, and in favor of Ruth Ann for $2,000,000, which resulted in a total judgment of $13,980,120. The jury apportioned fault as follows:

0%	Skeeter Baltzell
20%	Freightliner
10%	Lufkin
40%	R & R
30%	Ensign (Employer)

Illinois law limited Ensign's contribution liability to the present cash value of its total workers' compensation obligation (for a clearer understanding of the *Kotecki* cap and the import of this case, see the related article in this newsletter). However, the Illinois Workers' Compensation Commission ("IWCC") hadn't yet determined what Ensign's total workers' compensation liability would be, so the district court required Ensign to submit an estimate of this amount. Ensign submitted documentation that its *Kotecki* cap was $4,085,571.21, and that it had already paid $873,953.31 in workers' compensation to the Baltzells.

Ensign then moved to waive its lien on the Baltzells' recovery and to dismiss the defendants' third-party contribution claims. On October 4, 2005, the district court denied this motion, reasoning that "[a]llowing Ensign-Bickford to waive its lien now would more than partially frustrate the purpose of the Contribution Act, and it would do nothing to promote the purposes of the workers' compensation statute." The court then reduced the total judgment of $13,980,120 by the amount that Ensign would pay (the *Kotecki* cap amount of $4,085,571.21), which left the remaining $9,894,548 in damages to be split among the three defendants based on their respective share of the liability. For example, R & R was liable for 40% of the total damages, and the three defendants were liable for 70% of the total damages, so R & R's share was 40%/70% = 57.142857% of the cumulative liability for the three defendants, thereby making R & R liable for $9,894,548 x .57142857 = $5,654,027. Similarly, the court found Freightliner liable for $2,827,013, and Lufkin liable for $1,413,506. The court entered judgment in favor of the Baltzells in these amounts.

The Baltzells and the defendants then entered into a settlement agreement in which the defendants agreed to pay their respective pro rata judgment shares but reserved their right to litigate contribution and set-off issues against the employer. Accordingly, Ensign was liable to Skeeter and Ruth Ann for $13,980,120 X .30

= $4,194,036. Ensign moved to dismiss the contribution claims against it in exchange for waiving its statutory lien. The district court denied Ensign's motion and entered judgment against all parties. Ensign appealed.

> (1) The first issue the 7th Circuit addressed was whether the employer could waive its past lien – even after a verdict – and have the huge contribution claim against it dismissed. The court held that prior Illinois case law (*LaFever* case) which held this could be done where the compensation claim was closed out, was valid even when there was large compensation claim exposure.

The defendants claimed that *LaFever* was distinguishable because the compensation claim had been concluded in that case with no future benefits owing, whereas in this case about $3 million in future benefits were owed. Illinois courts, however, have never suggested that they should distinguish between paid and future benefits when deciding whether an employer can waive its workers' compensation lien. Illinois law is clear that an employer's lien encompasses both past and future workers' compensation benefits. They can waive both – the right to recover their past lien and their future credit – even after a verdict. In short, Ensign was not liable for contribution, was not allowed reimbursement of its lien and will owe continued future benefits under the Workers' Compensation Act.

> (2) The court then tackled the issue of whether the third-party defendants were entitled to a set-off because of Ensign's lien waiver, and in what amount. It held that the defendants were entitled to a set-off in the amount of the past lien only. The 7th Circuit remanded the case to the district court to allow the parties to submit an update on the past workers' compensation payments that have been made and on the status of the proceedings before the IWCC.

The Court held that once an employer waives its lien, an employee who has received compensation benefits will not have to repay the employer for those benefits, even if the employee recovers damages from third parties for the same injury. Illinois courts award a set-off that reduces the third-party's liability by whatever amount of compensation benefits the employee has already received. The rationale behind this rule is simple - a plaintiff who has already received compensation from an employer should not get a double recovery from a third party for the same injury. The 7th Circuit noted that it was too speculative to award a set-off for future compensation benefits when nobody knows how the IWCC will resolve the matter and the parties have not stipulated to a set-off amount. This is because the IWCC has not determined future compensation liability and the worker could die the next day, resulting in an inequitable windfall for the responsible tortfeasor and an injustice for the employer.

Of interest is the fact that in *dicta* (portion of the opinion which doesn't deal directly with its ruling), the 7th Circuit did mention that, regarding future benefits, the most efficient solution might be for all the parties to agree that any future workers' compensation payments that the Baltzells receive from Ensign will be held in trust and distributed to the defendants according to their pro rata liability. There will undoubtedly be future cases appealed testing the limits and boundaries of this new decision.

ERISA SUBROGATION

ERISA PRACTITIONERS IN KENTUCKY CAN BREATHE A SIGH OF RELIEF

***Humana Health Plans, Inc. v. Patti Powell*, 07CV385 (W.D. Ky. Feb. 25, 2008)**

By Ryan L. Woody

RYAN L. WOODY

In the case of *Humana Health Plans, Inc. v. Patti Powell*, 07CV385 (W.D. Ky. Feb. 25, 2008), the Western District of Kentucky, Judge Heyburn, has issued an important decision regarding ERISA preemption of Kentucky Stat. § 441.188. This Kentucky Statute at issue in the case limits a subrogated party's rights where

that party fails to intervene in the state court action. Previously, the Court had decided that this section was not preempted by ERISA, but in this decision the Court reconsidered and reversed itself.

The case arose after Patti Powell received a settlement of $550,000 for her personal injury claim. Humana paid about $25,000 under an employee benefit plan as a result of the injuries and sought reimbursement. Powell argued that because Humana did not intervene in the state case, it was barred from seeking reimbursement pursuant to K.R.S. § 411.188. Initially, the Court agreed, but took up the preemption issue on reconsideration.

Ordinarily, courts are reluctant to reconsider a prior ruling, and these motions are rarely granted. In this case, the Court explained:

> *"Certainly, the Court's analysis in this new Memorandum changes the previous result. However, the new reasons justify the change under the applicable law. Ultimately, it is the Court's responsibility to get the answer right."*

And in this case, the Court got it right. As we know, ERISA has a broad preemptive sweep that preempts any state law "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). In this case, the Court relied heavily upon the 3rd Circuit's preemption analysis in *Levine v. United Healthcare*, 402 F.3d 156 (3rd Cir. 2005). In that case the 3rd Circuit held that a New Jersey collateral source statute was one of general application not directed at the insurance industry and therefore was preempted by ERISA. The same logic applied to this Kentucky Statute. The Court wrote:

> *K.R.S. § 411.188 is not found in the chapter of the Kentucky statutes that regulate insurance and it applies to any party with subrogation rights, not merely insurers. Indeed, the New Jersey collateral sources statute seems more directed toward insurance companies than K.R.S. § 411.188. Issues of collateral source are more likely to involve insurance companies than subrogation claims.*

Accordingly, the Court found that Kentucky's Statute could not survive an ERISA preemption analysis. The decision is a big win for ERISA practitioners who were very concerned with the Court's prior decision, which would have stripped Plans of their right to file an ERISA reimbursement claim where they did not previously intervene in state court. However, I am sure that this case will be appealed and the 6th Circuit will have a shot at this Kentucky Statute. Should you have any questions about this or any other ERISA issue, please feel free to contact Ryan Woody at rwoody@mwl-law.com or Gary Wickert at gwickert@mwl-law.com.

WORKERS' COMPENSATION SUBROGATION

THE DUAL CAPACITY DOCTRINE:

ANOTHER EXCEPTION TO THE WORKERS' COMPENSATION EXCLUSIVITY REMEDY RULE

KEVIN M. DIFFERT

By Kevin M. Differt

The Exclusive Remedy Doctrine provides that when an employee is injured in the course and scope of employment, the employer's only liability will be for scheduled workers' compensation benefits. The Doctrine was put in place as part of the pact society made with employers when it announced employers would be on the hook for unlimited medical and lost wage benefits when employees are hurt on the job. The Doctrine has also been gradually eroded over the years by the creation of numerous exceptions or causes of action that expose an employer to liability beyond its workers' compensation obligations. While these erosions are

unfortunate from a CGL or Employer's Liability perspective, such erosions do provide additional avenues of subrogation for the diligent workers' compensation carrier.

One such exception to the rule is known as the Dual Capacity or Dual Persona Doctrine. It provides that an employer may be liable to an employee if a "second persona" is created, completely independent from and unrelated to its status of employer. *Rauch v. Officine Curioni S.P.A.*, 508 N.W.2d 12 (Wis. App. 1993). One noted workers' compensation treatise describes it as follows:

> *"Under this doctrine, an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer."* 2A, Larson, Law of Workmen's Compensation, § 72.80 (1976) at 14-112.

Examples of forms of conduct which may create liability on the part of the employer in states which apply the Dual Capacity Doctrine, include the following:

(1) Failure to maintain safe premises;
(2) Self insurer's failure to make safety inspections;
(3) Medical malpractice;
(4) Distribution of unsafe products;
(5) Negligent maintenance of vessel;
(6) Negligent maintenance of roads; and
(7) Miscellaneous conduct which involves wearing a "second" hat.

An excellent example of the Dual Capacity Doctrine in action is the California case of *Duprey v. Shane*, 39 Cal.2d. 781, 249 P.2d 8 (1952). In that case, a chiropractor's assistant was treated by the chiropractor, who negligently aggravated an injury. The employer was found to be acting outside of his role as an employer, having put on the hat of a treating doctor and was thus vulnerable to being sued by the employee, despite being the employer.

Another good illustration of the Doctrine in play is the Massachusetts case of *Longever v. Revere Copper and Brass, Inc.,* 381 Mass. 221, 408 N.E.2d 857 (1980). In that case, the employee was severely injured by an allegedly defective machine manufactured by one of the employer's other divisions. The plaintiff alleged that the employer was acting in a different capacity than that of "employer" when it manufactured the machine, and sued the employer as a third party. The Massachusetts Supreme Court recognized the existence of the Dual Capacity Doctrine, but ultimately held in that case that the manufacture of the machinery was not a separate function above and beyond the employer's duty to provide a safe working place, and therefore, the third-party action was barred by the Exclusive Remedy Doctrine. *Henning v. General Motors Assembly Division*, 419 N.W.2d 551, 143 Wis.2d 1 (Wis. 1980).

South Carolina recognizes the Dual Persona Doctrine in cases where the employer/hospital and its physicians negligently treat an employee for a work-related accident and, in so doing, exasperate the injury. *Tatum v. Med. Univ. of S.C.*, 517 S.E.2d 706 (S.C. App. 1999), *rev'd by*, 552 S.E.2d 18 (S.C. 2001) (Under the Dual Persona Doctrine, the employer may become a third person, vulnerable to suit by employee if, and only if, it possesses a second persona so completely independent from and unrelated to its status as employer that by the established standards the law recognizes that person as a separate legal person.). The "Dual Capacity Doctrine" may be applicable to South Carolina under certain circumstances. However, it is not applicable where the employer was the successor corporation of the manufacturer of a machine which caused the worker's injury, and where the injury was not incidental to employment but was directly related to it while the worker was working at her regular job near a machine furnished to her by her employer for use in its manufacturing process. *Strickland v. Textron, Inc.*, 433 F. Supp. 326 (D.C. S.C. 1977).

Some states reject the Dual Capacity Doctrine outright. In *Borman v. Interlake, Inc.*, 623 S.W.2d 912 (Ky. App. 1981), the Kentucky Court of Appeals looked at a suit filed by the decedent employee's family against the employer, Interlake, who was engaged in the manufacture of steel products. The employee was killed

while writing on the outside wrap of a coil of steel. The outer band on the coil was manufactured by Interlake at another plant. The band came loose allowing the steel to uncoil, killing the employee, whose family filed a third-party suit against Interlake in their role as manufacturer of the band. The Court of Appeals held that as a matter of public policy in Kentucky, the Dual Capacity Doctrine is not recognized under the Commonwealth's Workers' Compensation Act.

South Dakota also does not recognize the Dual Capacity Doctrine. *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874 (S.D. 1983). Montana holds that before an employee can maintain a separate cause of action against an employer under the Dual Persona Doctrine, it must first appear that the employer-employee relationship is unrelated or only incidentally involved in the injury or incident. *Herron v. Pack & Co.*, 705 P.2d 587 (Mont. 1985). The court in *Herron* relies on the following cases in referring to the Dual Persona Doctrine: *Mercer v. Uniroyal, Inc.*, 361 N.E.2d 492 (Ohio 1997); *Profilet v. Falconite*, 371 N.E.2d 1069 (Ill. 1977); *Rosales v. Verson Allsteel Press Co.*, 354 N.E.2d 553 (Ill. 1976); *Neal v. Roura Iron Works*, 238 N.W.2d 837 (Mich. 1975). Some states specifically outlaw the application of the Dual Capacity Doctrine in their statutes. Louisiana's workers' compensation law specifically states as follows:

> *(b) This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.* La. R.S. § 23:1032 (A)(1)(b).

In *Payne v. Galen Hosp. Corp. d/b/a Clear Lake Med. Center*, 28 S.W.3d 15 (Tex. 2000), the Texas Supreme Court held that an employee cannot sue an employer covered by workers' compensation insurance for providing a prescription drug to which the employee had an adverse reaction. In finding that the plaintiff's claim against the hospital was barred by the Texas Workers' Compensation Act's Exclusive Remedy Doctrine, the Court noted that the Act has previously been held to cover on-the-job injuries, as well as any effects of the treatment for the on-the-job injury and that drugs prescribed for on-the-job injuries are considered part of an employee's treatment under the Texas Workers' Compensation Act. The Court further stated that the hospital only filled the plaintiff's prescription because it was her employer and it was a result of an on-the-job injury. As a result, the Dual Capacity Doctrine did not apply to the instant case.

So what does this all mean to a subrogated carrier? Workers' compensation carriers need to be cognizant of this potential avenue of subrogation recovery. Certainly, carriers may be reluctant to turn the pointy edge of their subrogation sword at their own insured, especially if the Employer's Liability policy or its CGL policy provides coverage. The insured may also be a very good account for the carrier, thereby making impossible such action against them. However, in some instances, the insured may have coverage with another insurer or the dollars involved may usurp any concerns about whether the insured will renew with the carrier the following year. In addition, odds are that if the Dual Capacity Doctrine allows it, the employee will be moving forward with a suit against his or her employer at the advice of counsel. In such cases, it makes good financial sense for the subrogated carrier to be involved - even if just passively - or to mitigate the loss which its CGL or Coverage B policy must pay out by insisting on its statutory right of reimbursement.

States and jurisdictions have varying interpretations of the Dual Capacity Doctrine. The law can be confusing, but the opportunity should never be passed up unless the subrogated carrier has investigated and made an informed business decision to do so. Please feel free to contact Kevin Differt at kdiffert@mwl-law.com with any questions or concerns regarding this exception to the exclusivity doctrine in your state or jurisdiction.

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