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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER NOVEMBER 2008

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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INSURANCE SUBROGATION

RACE TO THE COURTHOUSE: A PRIMER ON CALIFORNIA SUBROGATION

Gary L. Wickert

By Gary L. Wickert

There is an appalling paucity of subrogation resources available to the modern day claims or subrogation professional. While the concept of subrogation is usually simply addressed, the large number of issues which subrogated carriers may be faced with in any given state necessitate a thorough understanding of the many different ways in which states approach and handle subrogation. California rivals Texas and New York in the number and size of subrogation files handled annually. California's more liberal undercurrent also tends to overly complicate even the simplest of subrogation issues. Therefore, an overview of California subrogation principles is always a resource which can serve the multi-state subrogation professional well. California is also one of the states that have specific rules with regard to what happens when the insured and the subrogated insurer each have specific causes of action, and act on those causes of action at different times. This article focuses on the basics of general subrogation law in California, especially with regard to the proverbial race to the courthouse. Much of the information contained herein has been gleaned from the unpublished 2nd District California Court of Appeals decision in *Malibu Broadbeach, L.P. v. State Farm Gen. Ins. Co.,* 2008 WL 588998 (Cal. App. 2008).

Traditionally, a California insurer that pays its insured's claim is entitled to take over the rights and remedies of the insured and to recover any sums paid to the insured from the third party who caused the insured's covered loss, a doctrine known as subrogation. Subrogation can arise by contract, statute or equitable principles. *Hodge v. Kirkpatrick Dev., Inc.,* 130 Cal.App.4th 540, 548 (Cal. App. 2005); *Sapiano v. Williamsburg Nat. Ins. Co.,* 28 Cal.App.4th 533, 537-538 (Cal. App. 1994); *Travelers Indem. Co. v. Ingebretsen,* 38 Cal.App.3d 858, 864 (Cal. App. 1974). A carrier's subrogation right can arise from both the policy's standard subrogation clause (conventional subrogation) and its payment of its insured's covered loss (legal or equitable subrogation). In California, the subrogation provisions of most insurance contracts are general and add nothing to the rights of subrogation that arise as a matter of law. *Progressive West Ins. Co. v. Superior Court,* 135 Cal.App.4th 263, 272 (Cal. App. 2005).

Subrogation in California advances an important policy rationale underlying the tort system by forcing a wrongdoer who helped to cause a loss to bear the burden of reimbursing the insurer for payments made to its insured as a result of the wrongdoer's acts and omissions. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.,* 143 Cal.App.4th 1098, 1119 (Cal. App. 2006). In addition, subrogation prevents the insured from obtaining a double recovery and being unjustly enriched in the process. There are eight essential elements of an insurer's cause of action for subrogation in California:

(1) The insured suffered a loss for which the defendant is liable, as either the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer;
(2) The claimed loss was one for which the insurer was *not* primarily liable;
(3) The insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable;
(4) The insurer has paid the claim of its insured to protect its own interest and not as a volunteer;
(5) The insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer;
(6) The insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends;
(7) Justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and
(8) The insurer's damages are in a liquidated sum, generally the amount paid to the insured. *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1292 (Cal. App. 1998); *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.,* 143 Cal.App.4th 1098 (Cal. App. 2006).

In subrogation, the insurer succeeds to its insured's rights against the third party in the amount the insurer paid. *Hodge,* supra; *Low v. Golden Eagle Ins. Co.,*101 Cal.App.4th 1354, 1361 (Cal. App. 2002). If an insurer's payment on the claim compensates the insured for its entire loss, the insurer becomes the real party in interest as to any claim against the responsible party and may sue the tortfeasor directly. Croskey, *et al.*, Cal. Practice Guide: *Insurance Litigation* (The Rutter Group 2007) ¶ 9:111.21, p. 9-46 (Rutter Guide). However, partial payment to the insured, results in partial subrogation in which the insurer is subrogated only in the amount of the insurance proceeds paid. *Ferraro v. Southern Cal. Gas Co.*, 102 Cal.App.3d 33, 43 (Cal. App. 1980). When the insurer partially compensates the insured for the loss, thereby becoming partially subrogated, the subrogation doctrine results in two or more parties having a right of action for recovery of damages based upon the same underlying cause of action. The insured can sue the responsible party for any loss not fully compensated by insurance, and the insurer can sue the responsible party for the insurer's loss in the amount paid on the insurance policy. *Hodge,* supra at p. 551; *Allstate Ins. Co. v. Mel Rapton, Inc.,* 77 Cal.App.4th 901, 908 (Cal. App. 2000).

When an insurer reimburses its insured for only a portion of the losses sustained, the insured retains the right to sue the wrongdoer for any uncompensated loss. *Kardly v. State Farm Mut. Auto. Ins. Co.*, 207 Cal.App.3d 479, 487-488 (Cal. App. 1989). The partially subrogated insurer, in turn, is entitled to seek recovery of the sums it paid in several different ways. First, if the insured independently initiates a lawsuit

against the tortfeasor, an insurer may seek to intervene in the insured's lawsuit. *Hodge,* supra (analyzing insurer's options and concluding insurer may intervene as a matter of right in insured's pending action against tortfeasor); *Deutschmann v. Sears, Roebuck & Co.*,132 Cal.App.3d 912 (Cal. App. 1982) (reversing trial court's denial of insurer's petition to intervene in insured's action against tortfeasor). Alternatively, the insurer may elect to wait to recover the funds from its insured once the insured has resolved its claim with the tortfeasor. *Plut v. Fireman's Fund Ins. Co.,* 85 Cal.App.4th 98, 104 (Cal. App. 2000) (subrogated insurer's options include recoupment of payment "from the proceeds of the insured's action against a tortfeasor").

As a third option, the insurer itself may initiate an action against the tortfeasor. Without question, the better practice is usually for the insurer to join its insured as a co-plaintiff in the action, or as a defendant or involuntary plaintiff, if necessary, assuming, of course, the insured has not already filed his or her own claim against the tortfeasor. See Rutter Guide, supra*,* ¶ 9.111.27, p. 9-49; see also ¶¶ 9:90 to 9:91, p. 9-38. However, if the insured has previously sued the third party, the insurer's separate action may be challenged on the ground the insured and insurer have impermissibly split a single cause of action. The California rule against splitting a cause of action, which prohibits a plaintiff from turning a single cause of action into the basis for more than one lawsuit, was applied in *Mel Rapton* to bar an insurer's subrogation claim after the insured had won a small claims judgment against the tortfeasor. As the court cautioned, "to avoid a violation of the rule against splitting a cause of action, the insured and insurer should join in a single suit against the tortfeasor." *Ferraro,* supra*; Bank of the Orient v. Superior Ct. (1977)*, 67 Cal.App.3d 588, 595 (Cal. App. 1977). The subrogated carrier's intervening into the insured's lawsuit remains the safest course of action, where possible.

The risk associated with splitting a cause of action extends both ways. The defense was invoked recently by the Ninth Circuit to affirm the trial court's dismissal of an insured's lawsuit against a tortfeasor when the insured knew the insurer had already sued the tortfeasor but failed to intervene before the insurer settled with the tortfeasor and dismissed its case with prejudice. *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1053-1055 (9th Cir. 2007). The *Intri-Plex* court relied on the decisions in *Mel Rapton* and *Ferraro* to conclude the burden fell on the insured to protect its own rights against the tortfeasor once the insurer had met its coverage obligation.

Although a partially subrogated insurer would be prudent to include its insured in an action against the third party tortfeasor, nearly 20 years ago the California Court of Appeals confirmed the insurer's right to proceed independently:

> *Both the subrogee (insurer) and the subrogor (insured) have a right of action against the tortfeasor. A subrogated insurer is not limited to an action in intervention; he may bring a separate independent action to recover directly from the third party tortfeasor.* Basin Construction Corp. v. Department of Water & Power, 199 Cal.App.3d 819, 825 (Cal. App. 1988); Pacific Gas & Electric Co. v. Superior Ct., 144 Cal.App.4th 19, 23 (Cal. App. 2006).

In some circumstances, the partially subrogated insurer's right to recover the sums it paid to its insured is limited by the made whole rule, a common law exception to an insurer's subrogation right that precludes an insurer from recovering *any* third party funds unless and until the insured has been made whole for the entire loss, not just the covered portion of the loss. *Progressive West Ins. Co. v. Superior Ct.,* 135 Cal.App .4th 263, 274 (Cal. App. 2005) (holding that it's a general equitable principle of insurance law that, *absent an agreement to the contrary,* an insurance company may not enforce a right to subrogation until the insured has been fully compensated for their injuries, that is, has been made whole); see *Sapiano,* supra *(*contractual provision that purports to waive insured's protection under this rule must "clearly and specifically give the insurer a priority out of proceeds from the tortfeasor regardless whether the insured was first made whole"). However, the made whole rule is inapplicable when the insurer funds or actively participates in the prosecution of the claim against the third party. *Ingebretsen*, supra.

If, after a loss, an insured and insurer executes a detailed subrogation agreement which negates the made whole doctrine, and there is some cooperation and assistance, the insurer should be able to subrogate

without regard to whether or not the insured is made whole. *Ingebretsen*, supra. California makes specific note of the fact that carriers which "sit back without assisting" while the insured prosecutes the third party action will not be able to recover unless the Plan beneficiary is fully made whole. *Samura v. Kaiser Foundation Health Plan, Inc.,* 17 Cal.App.4th 1284 (Cal. 1993). This means that, where applicable, the made whole doctrine prohibits a carrier from subrogation or reimbursement unless there is a surplus resulting from the insured's receipt of both insurance benefits *and* tort damages. *Hodge v. Kirkpatrick Dev., Inc.,* 130 Cal.App.4th 540 (Cal. 2005). A carrier that has knowledge of an insured's tort action and decides not to participate in it may not seek reimbursement from a successful recovery unless the insured's tort recovery exceeds his actual loss. *Plut v. Fireman's Fund Ins. Co.*, 135 Cal.App.4th 263 (Cal. 2005). In California, if the made whole doctrine applies, it means that an insured must reimburse its *nonparticipating* insurer for the surplus, if any, remaining after the insured satisfies "his loss in full and his reasonable expenses incurred in the recovery". Id. at 105. Therefore, when an insurer elects not to participate in the insured's third party action against a tortfeasor, the insurer is entitled to subrogation only after the insured has been made whole. For years, this meant the carrier could not recover until the insured recouped his loss and some or all of his litigation expenses incurred in the lawsuit – including his attorney's fees. Id*; Chong v. State Farm,* 428 F. Supp.2d 1136 (S.D. Cal. 2006). However, as of 2007, the California Court of Appeals decision in *Allstate Ins. Co. v. Superior Ct.,* 2007 WL 1704017 (Cal. App. 2007), attorney's fees and costs are not to be deducted from the insured's third party recovery before comparing the damages sustained by the insured and amount of the third party recovery to determine if the insured was "made whole". *Allstate Ins. Co.,* supra.

Over the last 25 years, the evolution of subrogation law across the country has punished carriers for their relative passivity in pursuing the liability of third parties, and have reflected efforts to provide incentives for carriers to invest in protecting their subrogation rights. In areas where they have refused to take the bait – as in workers' compensation contexts where many carriers still "ride the coat tails" of the workers' attorneys – their rights have been systematically narrowed, and are in danger of being taken away entirely. California remains a state where carriers should heed the warning of the courts, and intervene into cases filed by the insured, or otherwise file suit on their own, if they are interested in protecting their recovery rights.

WORKERS' COMPENSATION SUBROGATION

TENNESSEE FEDERAL COURT APPLIES TENNESSEE LAW IN WORKERS' COMPENSATION THIRD PARTY ACTION INVOLVING TEXAS ACCIDENT

Scott v. AMEC Kamtech, Inc., 2008 WL 4415496 (E.D. Tenn. 2008)

The world of extraterritorial workers' compensation subrogation involving multiple states is a complex and confusing area of the law. Each of the 50 states has their own body of "conflicts of laws" which governs such situations, some clearer than others. A Tennessee Federal Court has just decided a significant issue of extraterritorial subrogation law which neither the Tennessee Courts of Appeal nor the Tennessee Supreme Court have addressed. At least in Tennessee, the issue of extraterritorial workers' compensation subrogation just got a little bit clearer.

In *Scott v. AMEC Kamtech, Inc.,* Scott, a Tennessee employee of Valley Mechanical, Inc. ("Valley"), a Tennessee corporation, was injured while working on a project in Texas on which AMEC Kamtech, Inc. ("AMEC") was the general contractor. Scott filed for and received workers' compensation benefits under the Tennessee Workers' Compensation Act, and filed suit against AMEC in Tennessee Federal Court. AMEC filed a motion for summary judgment, because Tennessee Statute § 50-6-108 provides that a general contractor is responsible for providing compensation benefits in the event the subcontractor employer of an

injured worker fails to so provide. This statute also provides that if the employer does provide benefits to the worker, the general contractor is still considered a "statutory employer" and is immune from being sued as a third party because of the exclusive remedy rule which prohibits third party lawsuits against an employer.

Under Tennessee law, the worker could not sue AMEC. However, because the accident occurred in Texas, the plaintiff argued that Texas workers' compensation law – which does not protect a general contractor from suit – should apply. Until this case, Tennessee courts had not directly addressed this issue, so the Federal Court took a stab at predicting what the Tennessee Supreme Court would do if and when it is confronted with this issue. The Federal Court's decision will be persuasive precedent on the issue until the Supreme Court makes a ruling of its own some day.

The Federal Court granted AMEC's motion for summary judgment, holding that Tennessee workers' compensation law applied to the case, rather than Texas law. In doing so, it applied *Restatement (Second) of Conflict of Laws* § 184. That section reads as follows:

> ***§ 184. Abolition of Right of Action for a Tort or Wrongful Death.***
>
> *Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of the state under which the defendant is required to provide insurance against the particular risk and under which: (a) the plaintiff has obtained an award for the injury; or (b) the plaintiff could have obtained an award for the injury, if this is the state: (1) where the injury occurred; or (2) where employment is principally located; or (3) where the employer supervised the employee's activities from a place of business in the state; or (4) whose local law governs the contract of employment under the rules of §§ 187-188 and 196.*

Some states prohibit an employee of a subcontractor from suing a contractor – which they deem to be a "statutory employer" – and others do not. Section 184 provides a rule of law which guides courts who have to apply and justify conflicts of laws in workers' compensation subrogation scenarios involving the exclusive remedy rule and other rules of immunity similar to the exclusive remedy rule. As in this case, § 184 is usually applied with regard to a third party action against a general contractor or subcontractor. While § 185 appears to apply when there is a dispute over reimbursement of a workers' compensation carrier out of a successful third party recovery which has been effected by an injured employee, § 184 appears to apply even before such a recovery, in determining whether the employee can sue, or is prohibited from suing due to the exclusive remedy rule or some other immunity.

The federal judge in *Scott* decided that the Tennessee Supreme Court, when it ultimately is confronted with this issue, would apply *Restatement* § 184 in resolving the conflict of laws issue. Therefore, he held in this case that Scott could not sue AMEC because Tennessee workers' compensation benefits were paid, and the Tennessee workers' compensation law with regard to the exclusive remedy would be applied to this case. Scott was not able to sue AMEC as a result, and the judge granted summary judgment in AMEC's favor.

This case is significant for two reasons. First, Tennessee has now gone on record as adhering to the well-thought out rule set forth in § 184. This makes clear that the law of the state under whose system benefits are being paid will govern whether the plaintiff can pursue a third party action. Secondly, with this ruling, savvy workers' compensation carriers will know ahead of time that the decision as to which state's benefits to apply to a worker's compensation claim – assuming they have a choice – can make a black and white difference over the ability to recover those monies in a subsequent subrogation action, as well as a clear difference for the injured worker's ability to pursue a tortfeasor. Where the worker has a choice of states from which to claim benefits, a knowledgeable claims handler will want to steer the worker in the direction of accepting benefits under the laws of a state which will allow a third party action – as opposed to disallowing it. The worker and his attorney will be eternally grateful. These decisions are often made by the worker and even his workers' compensation attorney with an eye toward which state offers the best benefits. But no amount of benefits will make up for the worker being prohibited from filing a third party action.

This is one example of a situation where the claimant, claimant's attorney, and carrier, all have one goal in mind – making a successful third party recovery. Any carrier should be happy to pay out $150,000 in benefits paid out under the laws of a state which will allow a third party recovery, rather than $135,000 in benefits paid out under the laws of a state that won't. Seeing that far into the future would make even Nostradamus proud.

WORKERS' COMPENSATION SUBROGATION

FLORIDA COURT PROHIBITS SUBROGATION RECOVERY FROM LEGAL MALPRACTICE LAWSUIT

Columbia v. Brewer, 2008 WL 4643815 (Fla. App. 2008)

Florida has finally cleared up an issue regarding workers' compensation subrogation which has remained undecided for decades. The issue of whether a workers' compensation lien attaches to the proceeds of a legal malpractice recovery pursuant to § 440.39 of the Florida Workers' Compensation Act is an issue that had not been addressed directly by the Florida courts, until now. They have now decided that such a right of subrogation does not exist.

In a 2001 Court of Appeals decision, the court had held that a workers' compensation carrier's lien would not attach to the proceeds of a legal malpractice recovery in that case, but only because an intervention was not timely filed. *Zurich, U.S. v. Weeden*, 805 So.2d 945 (Fla. App. 2001). The court noted that this issue was one of first impression in Florida, and held that the carrier was not entitled to a recovery because it did not timely file an intervention. However, the court did not address the issue of whether or not a carrier had a right to subrogate in a legal malpractice action. Id.

In 2008, the Court of Appeals decided a case in which Eddie Brewer, Jr. was injured by a paving machine within the course and scope of his employment with Anderson Columbia. Brewer engaged a lawyer to represent him in a negligence and product liability case against the paving machine manufacturer, but the lawyer's negligent handling of the file resulted in Brewer recovering nothing. Brewer filed a legal malpractice action against his lawyer, and the workers' compensation carrier, FCCI Insurance Company, tried to assert its statutory right of recovery under Florida Workers' Compensation Act § 440.39. The Florida Court of Appeals held that the phrase "injured or killed in the course of his or her employment by the negligence or wrongful act of a third-party tortfeasor" contained in § 440.39 was not sufficiently broad to include defendants in a legal malpractice action within the definition of "third-party tortfeasors". *Columbia v. Brewer*, 2008 WL 4643815 (Fla. App. 2008). The court determined that FCCI was not subrogated to or entitled to reimbursement from recoveries by Brewer in his legal malpractice actions.

The decision is an unfortunate one because it leaves subrogated carriers with no recourse when, through no fault of its own, a negligent lawyer causes it to lose potentially hundreds of thousands or even millions of dollars of benefit payments which it would otherwise have a right to recover. The ruling is questionable because it presumes that the legislature specifically chose this language so as to exclude any right of subrogation in legal malpractice cases. It also leaves open the likelihood that when a lawyer makes a mistake and is sued for legal malpractice, the claimant has automatically won the lottery and is going to receive a double recovery - benefits from the workers' compensation carrier and a full recovery from the lawyer's malpractice carrier for the same elements of damages. It remains to be seen if Florida's collateral source rule, which reduces any damage award a plaintiff receives by the amount of collateral source benefits the plaintiff has received (such as workers' compensation benefits) will apply when the right of workers' compensation subrogation is abrogated as it now is in legal malpractice actions.

INDIANA'S LIEN REDUCTION STATUTE SHOULD APPLY ONLY TO INDIANA THIRD PARTY RECOVERIES

Lane v. Celadon Trucking, Inc., 543 F.3d 1005 (8th Cir. 2007)

The Indiana Lien Reduction Statute, a thorn in the side of workers' compensation subrogation practitioners since 1992, has had its wings clipped. A recent 8th Circuit Court of Appeals decision interpreting Arkansas law has decided a case in which an Indiana worker received Indiana benefits after being injured in Arkansas. In *Lane v. Celadon Trucking, Inc.,* the district court applied Indiana law (which did not apply the made whole doctrine), rather than Arkansas law (which did apply the made whole doctrine), to the subrogation interest of the self-insured employer. However, the court also reduced the lien because of the Indiana Lien Reduction Statute. The 8th Circuit Court of Appeals affirmed that Indiana law applied, but said the lien reduction statute did not apply. The court did not apply the Indiana Lien Reduction Statute to the Arkansas settlement, because the statute is part of Indiana's Comparative Fault Act, not its workers' compensation laws. Therefore, in extraterritorial subrogation cases where the injury occurs in one state and the employer is from another state and benefits are paid under the latter state's laws, while the subrogation rights of the carrier under the latter state's laws might apply, if that state is Indiana, the Lien Reduction Statute should not apply.

Indiana has a Lien Reduction Statute in § 34-51-2-19 (1999) which for years reduced carriers' subrogation interests among all lines of insurance except for workers' compensation. This section reads as follows:

> ***Liens or Claims to Diminish in Same Proportion as Claimant's Recovery is Diminished.***
>
> *§ 19. If a subrogation claim or other lien or claim that arose out of the payment of medical expenses or other benefits exist in respect to a claim for personal injuries or death and the claimant's recovery is diminished: (1) by comparative fault; or (2) by reasons of the uncollectability of the full value of the claim for personal injuries or death resulting from limited insurance or from other cause; the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. The party holding the lien or claim shall bear a pro rata share of the claimant's attorney's fees and litigation expenses.* Id.

In most states, generic lien reduction statutes or laws relating to subrogation (such as the made whole doctrine or the common fund doctrine), do not usually apply to workers' compensation statutes because they involve statutory subrogation, not contractual or conventional subrogation.

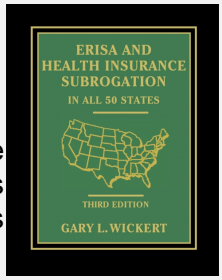
In Indiana, the case of *Dep't of Public Aid, State of Ind. v. Couch,* 605 N.E.2d 165, 168 (Ind. 1992) changed that. For years, the old "§ 12" contained an exception for workers' compensation liens. Section 34-51-2-19 was formerly § 34-4-33-12, and was renumbered to § 34-51-2-19 pursuant to P.L. 1-1998, effective July 1, 1998. When § 12 was amended and the new statute, § 34-51-2-19, was enacted, the new statute did not contain this exception. The amendment to § 34-4-33-12 was effective July 1, 1990 and deleted the exception for workers' compensation. It appears that the amended statute applies to injury claims which occurred prior to this amended date. See *Weidenair v. Ind. Ins. Co.*, 874 F.Supp. 235 (N.D. Ind. 1995). The Supreme Court in *Couch* held that § 12 applied to all recoveries, whether before or after trial, whether by judgment or settlement and that the Lien Reduction Statute now applies to workers' compensation as well as other lines of insurance. *Couch* at 168. Plaintiffs and defendants now use the *Couch* decision to urge the court to:

(1) Determine full value of the case based on 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 he would have liked to because of the negligence of the employer, limited insurance, or even liability problems, your lien can be seriously jeopardized and you may receive only pennies on the subrogation dollar. Assuming your workers' compensation lien is in the amount of $100,000 or more, and the third party recovers only $300,000, it is easy to understand why there is a concerted effort to eliminate the workers' compensation carrier's lien by all parties involved. The Indiana Lien Reduction Statute, like some similar statutes around the country, is being interpreted as a license to reduce the carrier's $100,000 lien in the above scenario based on the comparative fault of the claimant. If the case is tried and the jury decides that the plaintiff is 40 percent at fault, it is argued that the lien should likewise be reduced by 40 percent. If the case settles and there is no finding by a judge or jury of comparative fault, the matter is submitted to the trial court for determination of exactly what percentage of fault the plaintiff is to bear for the accident. The problem with this is that once the matter has been settled, the plaintiff's main interest would be to show himself as much at fault as possible, in order to reduce or eliminate the subrogation interest. "Falling on the sword" becomes common place in these situations.

Where Indiana law is applied to recoveries in other states via extraterritorial subrogation, it's nice to know that the lien reduction statute isn't necessarily applied. The 8th Circuit reminded us that the Lien Reduction Statute is found in Indiana's Comparative Fault Act, not its workers' compensation laws, and when Indiana law is applied to recoveries via their conflict of laws rules, the lien reduction statute doesn't necessarily get applied. When it comes to applying this anti-subrogation statute extraterritorially, plaintiff's lawyers like to use the "American Express Rule" - don't leave home without it. Thankfully, the 8th Circuit uses VISA instead.

ERISA AND HEALTH INSURANCE SUBROGATION IN ALL 50 STATES 3RD EDITION JUST RELEASED!!



The new edition contains a great deal of new material, statutory amendments and case decisions. It reflects the changing nature of health insurance subrogation, and emphasizes the areas which have traditionally been weak spots in the subrogation professional's arsenal. The new edition has been updated to include:

- Voluminous updates on and fortification of the various states' collateral source rules and statutes, including those which serve as anti-subrogation tools.
- Additional information on the various states' common fund doctrines.
- For the 12 states which have some form of auto no-fault laws, an overview of the laws and its interface with health insurance subrogation is included to give the practitioner an advantage in those states where confusing no-fault laws are routinely and wrongly thrown in the path of subrogated plans by trial lawyers.
- Enhanced descriptions of what constitutes a plan, including legal material and background information on the effect of wrap documents and their role in subrogation.
- For ERISA-covered plans, the effect of the common fund doctrine and made whole doctrine has been updated thoroughly for each federal appellate circuit.
- Concepts of complete preemption and conflict preemption, and their role in subrogating health plans.
- The import and treatment of the *Ahlborn* decision in the Medicaid subrogation arena.

Overall, the new edition is a much more potent subrogation tool than its predecessor. *ERISA And Health Insurance Subrogation In All 50 States* remains the industry's bible on health insurance subrogation. You can order your copy through our publisher's website at www.jurispub.com. We stand behind all of our books so if you should have questions regarding any of the book's material or need clarification on any ERISA issue, do not hesitate to contact us. We would happy to assist you!