

THE NEGLIGENT EMPLOYER:

Obstacle or Advantage in Workers' Compensation Subrogation?

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Subrogation professionals are always searching for sources of overlooked recovery opportunities. In my experience, the most common scenario in which subrogation monies are left on the table is in the area of workers' compensation subrogation. This is especially true when the subrogation professional perceives a significant amount of negligence on the part of the employer or a co-employee. Investigation of a work-related injury may reveal that the employer modified the machine on which the injured employee was working at the time of a catastrophic injury. It may reveal that a co-employee forgot to flip a shut off switch or that the company failed miserably in its efforts to train the injured worker on using the product, machine or instrumentality that was involved in the injury. Does the employer's negligence destroy subrogation potential in such workers' compensation scenarios? Or does it endow the carrier with super subrogation rights, which allow it to make a recovery when an insured is partly or even mostly responsible for causing a work-related loss? The answer might surprise you.

The Magic of Exclusivity

Workers' compensation subrogation is almost totally dependent on state law. The laws of each state vary greatly as to when and how a workers' compensation carrier may recover its lien. However, with very few exceptions, if an employee is injured on the job, his recourse against the employer is limited to the recovery of workers' compensation benefits. Known as the "workers' compensation bar" or the "exclusivity rule," the employee is "barred" from directly suing his employer for negligence under most circumstances. While each state deals with the workers' compensation bar differently, most states do not allow the employer's negligence to even be submitted to the jury along with the negligence of the defendant and the

contributory negligence of the plaintiff. Rather, many states allow only an instruction to the jury advising them that they may find neither the plaintiff nor the defendant negligent if they find that the employer was the "sole proximate cause" of the injury. This can be a tremendously strong tool for subrogating workers' compensation carriers, because it allows for subrogation when the insured is primarily at fault in causing an injury.

In Texas, for example, an employee can sue an employer only for commission of an intentional act.¹ This means that unless the employer's acts are intentional in nature, the employer cannot be brought in as a third-party defendant. What is more, the jury is entitled only to an instruction allowing them to find for the defendant if they determine that the employer is the "sole proximate cause" of the injury.² What does this mean? In practice, it means that a workers' compensation carrier may subrogate against a third party where the employer is 99 percent at fault and the third party tortfeasor is only one percent at fault. It is almost a reverse "pure contributory negligence" scenario. Under such circumstances, the men and women of the jury will certainly hear the lawyers argue about the role the employer played in causing the incident, but when it comes time to fill in the blanks regarding the percentage of negligence of each party, there will be no blank for the employer.

Many states operate similarly to Texas. This gives the workers' compensation carrier a tremendous advantage in workers' compensation scenarios and provides an opportunity to make recoveries under even the most absurd of factual situations. By and large, most states follow the Texas model:

Arizona: Employer may be sued only for willful conduct – not gross negligence.³

Arkansas: Employer is immune from liability unless it acts willfully.⁴

Connecticut: Workers' compensation liability is the exclusive remedy against the employer.⁵

District of Columbia: Employer cannot be held liable in tort for the injuries to the employee.⁶

Indiana: Employers are immune from liability and third party actions.⁷

Kansas: An injured worker may not pursue a common law negligence action against his or her employer.⁸

Maine: An employee is prohibited from suing an employer who qualifies under the Act.⁹

Missouri: Employers who provide workers' compensation coverage to their employees are exempt from any and all liability to the employer or any other person.¹⁰

Montana: The exclusive remedy rule is applied no matter how grossly negligent the employer is.¹¹

Nebraska: The employer is protected with the exclusive remedy rule but co-employees are not.¹²

Nevada: Acceptance of workers' compensation benefits is in place of any other

compensation, award or recovery rights against the employer.¹³

New Hampshire: Employee can pursue employer only if it commits an intentional tort.¹⁴

North Carolina: Employers may be sued only for intentional acts.¹⁵

North Dakota: Even if the employer is 75 percent at fault and the third party is only 25 percent at fault, you cannot reduce the third-party recovery because of the employer's negligence due to the exclusive remedy rule.¹⁶

Oregon: Employer, employer's insurer and the self-insured employer's administrator are all immune from suit.¹⁷

Pennsylvania: A worker may recover the full amount of his/her damages, even if the employer's negligence exceeds that of the third party defendant's negligence.¹⁸

Utah: The worker may sue a statutory employer who has not been required to pay workers' compensation benefits.¹⁹

Vermont: Both the employer and the owner of a lessee of the premises where the employer's business is carried on are immune from third party's fate.²⁰

West Virginia: Employer loses immunity where its conduct constitutes an intentional tort or willful, wanton and reckless act.²¹

Wisconsin: A negligent third party is held liable to an injured worker, and cannot seek contribution from an employer, even where the employer is substantially more at fault than the third party.²²

Bare Employer

The exclusivity rule of most of the states' workers' compensation laws provide protection to the employer only if the employer provides workers' compensation coverage to the employee. Where the employer does not carry workers' compensation coverage, it is considered "bare." In states such as Kentucky, if the employer fails to obtain the appropriate and required workers' compensation coverage, it is not protected from liability under any portion of the workers' compensation laws.²³ Most other states follow suit.

This brings up an interesting set of circumstances which, given the rise of employee leasing and temporary employing services, is becoming more and more prevalent. If a third party tortfeasor claims to be the special employer of a borrowed servant at the time of the injury, then, depending on that state's laws regarding borrowed servants and employee leasing situations, the special employer's workers' compensation carrier should be responsible for reimbursing the subrogated carrier of the actual employer and picking up the tab for all future benefits paid. The moment a third-party defendant claims to be a special employer in a borrowed servant situation, serve on it discovery requesting the name, address, policy number and dates of coverage for any applicable workers' compensation coverage it may have. When it produces the name of a carrier, depose that carrier and obtain a copy of the appropriate policy.

More often than not, you will find that the carrier will deny

having workers' compensation coverage in effect for that time period. If that is the case, the third-party defendant has now judicially admitted itself into being a "bare employer." We all know what this means – that employer will be responsible for any tort damages to the plaintiff, usually not encumbered by common law defenses, and the carrier should be able to subrogate to any of those recovered damages.

Where the third-party defendant who claims to be a special employer is covered by workers' compensation coverage and the newly discovered workers' compensation carrier is not agreeing to reimburse the benefits paid and take over future payment of benefits, an action in equitable subrogation or equitable contribution should be considered. This works in some states (Kansas), while not in others (Missouri). This disparity of laws can literally mean that whether or not a workers' compensation carrier can receive reimbursement of its benefits under such a situation, for example, may depend on which side of State Line Road in Kansas City a business is located on. If it is on the west side, it is in Kansas and can equitably recover, while if it is on the east side, it is in Missouri and cannot.

Subrogation and third party actions are also allowed even where an employer has contractually indemnified a third-party tortfeasor and after the damages are paid by the tortfeasor. The tortfeasor will have the right to go back and seek a shifting of the burden from the tortfeasor to the employer. Business and underwriting considerations come into play in such circumstances. Even though a workers' compensation carrier is generally allowed to subrogate under such circumstances, it may not sit well with the insured.

For those states that allow an action directly against an employer for an intentional act, some have gone to great length to delineate what constitutes a "deliberate intention" on the part of the employer. In West Virginia, for example, an employer loses immunity from common law actions where the employer's conduct constitutes "an intentional tort or willful, wanton and reckless misconduct."²⁴ West Virginia courts have held that the plaintiff can prove "deliberate intention" by showing that there was a specific intent²⁵ or by showing all five of a statutory delineated list of factors.²⁶ Each state may have its own requirements as to what constitutes an intentional act such as to obviate the application of the exclusive remedy rule.

Odd Ball States

Some states insist on being different. In a few states, the employer may be sued under amazingly relaxed circumstances. In these states, it does behoove the subrogation professional to note and fully consider the negligence of the employer before determining or not whether to subrogate.

In **California**, an employee may maintain an action against the employer in situations where the employee's injury was aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment.²⁷ In addition, the State of California also goes a step further and statutorily allows an employee to sue an employer who has knowingly removed or failed to provide a guard on a power press.²⁸ If an employer designs, manufactures and installs its own power presses for the employee's use, it may

be subject to potential liability as a third-party tortfeasor as well.²⁹ In California, a workers' compensation carrier's reimbursement from a third-party tortfeasor is also to be reduced by the percentage of the employer's negligence.³⁰ Therefore, an employer is only reimbursed for the amount by which its compensation liability exceeds its proportional share of the injured employee's recovery.³¹ Where the total amount of damages that could be attributed to the negligence of the employer is greater than the sum of the workers' compensation payments made, the carrier may not recover anything on its workers' compensation lien.³² The burden is on the employee to show that the employer had engaged in tortious misconduct so as to bar recovery of its lien – which means that in settlements, the employee may need to ask the court to make a determination or allocation of negligence, resulting in a sort of mini trial. Obviously, this is not necessary where the jury has actually come to a verdict and allocated percentages of fault.

In **Idaho**, an employer may be held liable in a third-party action if the injury to the employee was concurrently caused by a breach of any duty or obligation owed by the employer to another person, but the employer's liability is limited to the amount of compensation for which the employer is liable or has paid under the workers' compensation statute.³³ Unlike most states, if an Idaho employer has been found to be jointly negligent with a third party, the employer is not allowed the statutory subrogation rights of the workers' compensation statute. In fact, a tortfeasor may defend a third party action solely on the basis that the employer was negligent, regardless of whether or not the employer is a party to the action.³⁴ Where an Idaho employee is found to be jointly negligent, the amount of the workers' compensation benefits paid to the injured employee will offset the amount of the award against the third-party tortfeasor.³⁵

In **Kansas**, prior to 1982, §44-504 of the Kansas statutes did not provide for reduction of an employer's/carrier's

subrogation lien even if the employer was found to be partially at fault for the employee's injuries. The Kansas Supreme Court, however, felt that this was inequitable but refused to remedy the inequity because it felt that it was a matter for the legislature. On July 1, 1982, the Kansas legislature heeded the Supreme Court's concerns and amended §44-504 to add subsection (d):

(d) If the negligence of the worker's employer or for those for whom the employer is responsible other than the injured worker is found to have contributed to the party's injury, the employer's subrogation interest or credit against future payments of compensation and medical aid, as provided by this section, shall be diminished by the percentage of the recovery attributed to the negligence of the employer for whom the employer is responsible, other than the injured worker.

In 1991, the Kansas Supreme Court was called on to interpret the meaning of "shall be diminished by the percentage of

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the damage awarded or attributed to the negligence of the employer.”³⁶ In Brabander, the employer’s negligence was held to be 53 percent. Later courts applied the Brabander formula for determining an employer’s diminished lien as follows:

“Diminished lien equals lien minus [damages x percentage of employer’s fault].”

This was because the original language of the statute provided for diminishing the lien by the percentage of the “damage award attributed to the negligence of the employer . . .” This statute was later amended to provide for diminishment by the percentage of “the recovery” attributed to the negligence of the employer. Therefore, the new Kansas formula for determining the diminished lien where the employer is at fault is as follows:

“Diminished lien equals lien minus [recovery x percentage of employer’s fault].”³⁷

In the State of **Minnesota**, there is another peculiar law in effect, which does violate the rule of employer immunity. Where the employer’s negligence contributed to the employee’s injuries, the defendant in a third-party action may bring a claim for contribution against the employer as a third-party defendant.³⁸ Known as “*Lambertson* contribution,” a third-party tortfeasor against whom a judgment has been obtained will pay the entire verdict to the plaintiff, and then the employer will be required to contribute to the third-party tortfeasor the amount proportionate to its percentage of negligence – not to exceed the amount of workers’ compensation benefits payable to the employee.³⁹

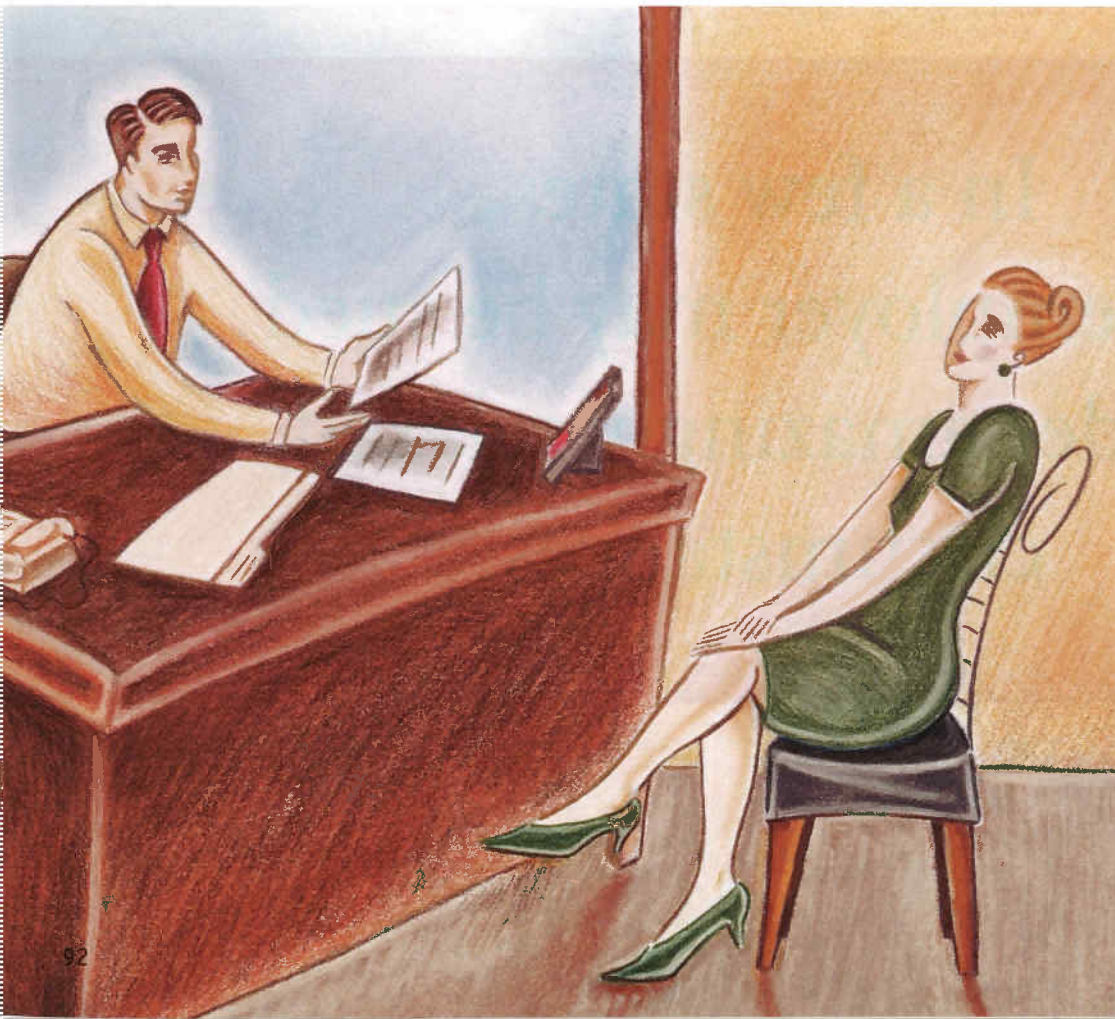
Catch All-States

The ability to subrogate even where the employer is partially or mostly at fault remains the rule, rather than the exception among all 50 states. However, it is clear that the trend is toward ameliorating what otherwise seems like an inequitable result when a carrier is allowed to subrogate even though its insured is primarily at fault for the injuries. The problem here is that such “logical” equitable considerations still fail to take into account the fact that the employer is still liable for the scheduled medical and indemnity benefits regardless of fault. Therefore when you take into consideration the “socialist” bent of the workers’ compensation scheme, it really isn’t all that unfair. Perhaps it is no coincidence that the first state to enact a workers’ compensation law that was allowed to stand in court⁴⁰ was a state with a pronounced socialist movement at the time.

Some states, such as **Nebraska**, provide that if an agreement cannot be reached between the parties as to allocation of a third-party recovery, the court must determine whether a settlement offer is fair and reasonable and can order a “fair and equitable distribution” of the proceeds of judgment or settlement.⁴¹ In practical application, this sort of “equitable law” means that a judge can take into consideration any factor – including the negligence of the employer – in apportioning third-party recovery proceeds.

Conclusion

Workers’ compensation carriers should aggressively subrogate even where the employer may be partially or primarily at fault for causing an injury. Although this may seem unfair, ask an employer how fair it is to be automatically liable for medical and indemnity payments when it may have had nothing to do with causing the employee’s injury. However, certain state laws create formidable obstacles to subrogation where the employer is at fault. Knowing and recognizing these obstacles and avoiding investing considerable time and resources in cases where the employer is negligent will result in more cost-effective subrogation on a national basis.



Footnotes

- 1 31 Castleberry v. Goolsby Building Corporation, 617 S.W.2d 665 (Tex. 1981); Texas also allows the estate of a deceased employee to sue an employer if its conduct amounted to “gross negligence”.
- 2 Magro v. Ragsdale Bros., Inc., 721 S.W.2d 833 (Tex. 1986).
- 3 Bidiaz v. Magma Copper Co., 950 P.2d 1165 (Ariz. App. Div. 2, 1997), review denied.
- 4 Atskett v. Fischer Laundry & Cleaner Co., 230 S.W.2d 28 (Ark. 1950).
- 5 Therrien v. Safeguard Mfg. Co., 408 A.2d 273 (Conn. 1979), no error found, 429 A.2d 808.
- 6 Howard University v. Good Food Services, Inc., 608 A.2d 116 (D.C. 1992).
- 7 Williams v. Marlin, 656 N.E.2d 1145 (Ind. App. 1995).
- 8 K.S.A. § 44-501(b).
- 9 Me. Rev. Stat. Ann. Tit. 39-A, § 102 (West 2001).
- 10 Rev. Stat. Mo. § 516.120(4) (1994).
- 11 Schmidt v. State of Montana, 951 P.2d 23 (Mont. 1997).
- 12 Rehn v. Bingaman, 36 N.W.2d 856 (Neb. 1949), appeal dismissed, 38 U.S. 806 (1949).
- 13 N.R.S. § 616 A.020(4).
- 14 N.H. Rev. Stat. Ann. § 281-A: 8(I)(b) (2001).
- 15 Woodson v. Roland, 407 S.E.2d 222 (N.C. 1991).
- 16 Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334 (N.D. 1983).
- 17 O.R.S. § 656.018 (1999).
- 18 Jones v. Carborundum Co., 515 F.Supp. 559 (W.D. Penn. 1981)
- 19 Bosch v. Busch Development, Inc., 777 P.2d 431 (Utah 1989).
- 20 Vt. Stat. Ann. Tit. 21, § 601(3) (1987).
- 21 Mandolidis v. Elkins Industries, Inc., 246 S.W.2d 907 (W. Va. 1978).
- 22 Houlihan v. ABC Ins. Co., 542 N.W.2d 178 (Wis. App. 1995), review denied, 546 N.W.2d 470.
- 23 Matthews v. G&B Trucking, Inc., 987 S.W.2d 328 (Ky. App. 1998).
- 24 Roberts v. Consolidation Coal Company, 2000 WL 989870 (W. Va. 2000).
- 25 West Virginia Code § 23-4-2(c)(2)(i) (1998).
- 26 West Virginia Code § 23-4-2(c)(2)(ii) (1998).
- 27 Ann. Cal. Labor Code § 3602(b)(2) (1989).
- 28 Ann. Cal. Labor Code § 4558 (1989).
- 29 Flowmaster v. Superior Court, 16 Cal. App. 4th 1019 (1993).
- 30 Rooney v. U.S., 434 F.Supp. 766 (N.D. Cal. 1977), aff’d, 634 F.2d 1238.
- 31 Employers Mutual Liability Insurance Co. v. Tutor-Saliba Corporation, 17 Cal. 4th 632 (1998).
- 32 Arbaugh v. Proctor & Gamble Manufacturing Co., 80 Cal. App. 3rd 500 (2nd Dist. 1978).
- 33 Runcorn v. Shearer Lumber Products, Inc., 690 P.2d 320 (Idaho 1984).
- 34 Runcorn v. Shearer Lumber Products, Inc., supra.
- 35 12 Schneider v. Farmers Merchants, Inc., 678 P.2d 33 (Idaho 1983).
- 36 Brabander v. Western Co-op Electric, 811 P.2d 1216 (Kan. 1991).
- 37 Enfield v. A.B. Chance Company, 73 F.Supp. 2d 1285 (D. Kan. 1999).
- 38 Lambertson v. Cincinnati Corporation, 257 N.W.2d 679 (Minn. 1977); M.S.A. § 176.061(11).
- 39 Albert v. Paper Calmanson & Company, 524 N.W.3d 460 (Minn. 1994), rehearing denied.
- 40 In 1911, Wisconsin became the first state to enact a worker’s compensation scheme which withstood judicial scrutiny.
- 41 Neb. Rev. Stat. § 48-118.