

WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES

SIXTH EDITION

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"This book fills a long-standing need for a complete treatise covering this confusing subject across the country. Gary Wickert is clearly the country's leading authority on nationwide workers' compensation subrogation."

- Loren Smith, Kelly & Smith, P.C., Houston, Texas.

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- Paul Webb, VP of Claims, Latitude Subrogation Services, LLC., Bloomfield Hills, Michigan.

**WORKERS' COMPENSATION
SUBROGATION
IN ALL 50 STATES**

SIXTH EDITION

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SIXTH EDITION HIGHLIGHTS!

- 2,150 pages
- Table of Authorities, Cases and Statutes
- Hundreds of New State and Federal Decisions
- Complete W/C Subrogation Laws In All 50 States

TEXAS STATUTORY SUBROGATION RIGHTS

Workers' compensation subrogation in Texas is controlled by § 407 of the Texas Labor Code. To purchase the following statute, see Appendix.

§ 407.001. Third-Party Liability

§ 407.002. Recovery on Third-Party Action

§ 407.003. Employee's Duty for Representation of Employer (Continued)

§ 407.004. Employee Liability to Third Party

The Texas statute allows an employer to subrogate its right to damages from a "third party" who is a business entity in any damage due to injury or death arising out of and in the course of employment. The statute provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee. The statute also provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee. The statute also provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee. The statute also provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee.

GEORGIA

STATUTORY SUBROGATION RIGHTS

Georgia law (Official Code of Georgia Annotated) provides that an employer may subrogate its right to damages from a "third party" who is a business entity in any damage due to injury or death arising out of and in the course of employment. The statute provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee. The statute also provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee. The statute also provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee. The statute also provides that the employer's right to subrogate is not limited by the amount of compensation benefits paid to the employee.

A third-party action must be brought by the employee within one year after the date of injury. If it is not, the employer may, at its option, to defend and settle the employee's cause of action in writing, either in the past tense or in the future tense. If the employer settles the cause of action in writing, the employer shall have the right to subrogate. If the employer settles the cause of action in writing, the employer shall have the right to subrogate. If the employer settles the cause of action in writing, the employer shall have the right to subrogate. If the employer settles the cause of action in writing, the employer shall have the right to subrogate.

§ 407.001. Third-Party Liability. (a) An employer who is liable for the payment of compensation benefits to an employee who is injured by a third party shall have the right to subrogate its right to damages from the third party. (b) The right to subrogate shall not be limited by the amount of compensation benefits paid to the employee. (c) The right to subrogate shall not be limited by the amount of compensation benefits paid to the employee. (d) The right to subrogate shall not be limited by the amount of compensation benefits paid to the employee.

**BY
GARY L.
WICKERT**

Workers' Compensation Subrogation – In All 50 States, Sixth Edition

US \$250. **US \$200.** ISBN 978-1-57823-444-8 Go directly to the web-page: bitly.com/wcsubrogation6
1 Hardcover Volume. 2,150 pages. Table of Authorities. Table of Cases and Statutes. Published June 2015.

Author: Gary Wickert is an insurance trial lawyer and is regarded as one of the world's leading experts on insurance subrogation. He is the author of several subrogation books and legal treatises and is a national and international speaker and lecturer on subrogation topics. After 15 years as the youngest managing partner in the history of the 30-lawyer Houston law firm of Hughes, Watters & Askanase, L.L.P., Gary returned to his native Wisconsin in 1998 and co-founded the subrogation law firm of Matthiesen, Wickert & Lehrer, S.C. Gary oversees a National Recovery Program which includes a network of contracted subrogation law firms in all 50 states, Mexico, Canada, and the United Kingdom and boasts over \$500 million in recoveries and credits for more than 250 insurance companies. Licensed in both Texas and Wisconsin, Gary is double board-certified in both personal injury law and civil trial law by the Texas Board of Legal Specialization and is a dual board-certified Civil Trial Advocate by the National Board of Trial Advocacy (NBTA), for whom he has both written and graded the product liability questions contained on the NBTA national certification exam taken by trial lawyers around the country. For 32 years, Gary has served as an expert witness and insurance consultant on subrogation and insurance-related issues and has been consulted by insurance carriers, lawyers, and legislative bodies from several states. He is a licensed arbitrator and has attended more than 750 mediations in more than 30 different states. Gary has worked with the Texas Legislative Oversight Committee in rewriting their workers' compensation subrogation statutes, has served on the Board of the National Association of Subrogation Professionals, and has been cited as an authority on workers' compensation subrogation by several appellate courts, including the Texas Court of Appeals. He is one of only a few

lawyers to have ever represented a subrogated carrier before the U.S. Supreme Court. Gary also writes a monthly column for the *Claims Journal Magazine* entitled "The Road To Recovery."

About the Book: Workers' compensation subrogation continues to change and adapt, as trial lawyers prod its weak points and capitalize on confusing areas of the law. There have been numerous changes in workers' compensation statutes and case law in many states since the last edition. New developments and clarification of workers' compensation subrogation rights in **Alabama** have necessitated a re-writing of the Alabama chapter in order to more clearly illustrate the confusing reimbursement/subrogation rights of a carrier, as well as calculations and procedural steps which must be undertaken in order to calculate and properly document any future credit it may be entitled to. The confusing state of the law in **Delaware** with regard to the interface between workers' compensation and PIP no-fault benefits is discussed. Significant law regarding the **Louisiana** Anti-Indemnity Act, cases interpreting it, and its effect on both indemnity and waiver of subrogation clauses has been added. A new section has been added to the **Michigan** chapter dealing with the confusing concept of no-fault carriers seeking reimbursement from carriers. New case law has been added to the **New Jersey** chapter regarding the controversial "Section 20" settlements and whether and when they provide the carrier with a statutory lien under Section 40. **New York** law regarding payment of a carrier's equitable share of attorney's fees and litigation costs under the *Kelly* or *Burns* formulas has been completely revised and summarized to reflect recent decisions on the issue. **Oklahoma** completely repealed their old statutes

Praise for "*Workers' Compensation Subrogation – In All 50 States*" (continued from pg. 1)

"Regardless of which state you handle claims in, if you have workers' compensation subrogation responsibilities - you need this book!"

- **Jennifer Williams**, Claims Service Consultant, The Hartford, Orlando, Florida.

"When our own state's workers' compensation statute came under attack, Gary Wickert was the first person we turned to for information and experience as to how other state's statutes handled the same issues. This book is invaluable for subrogation lawyers and insurance subrogation professionals."

- **Dave Matejczyk**, Roberts, Matejczyk & Ita Co., L.P.A., Subrogation Lawyer and former Board Member of the National Association of Subrogation Professionals, Cleveland, Ohio.

"*Workers' Compensation Subrogation - In All 50 States* provides an invaluable tool for the subrogation professional in one handy source. The compilation of this material was a Herculean effort on Attorney Gary Wickert's part, and the insurance industry is indebted to him for leading the charge in protecting and enforcing carrier's rights in this one time underutilized area of claims handling. I highly recommend Attorney Gary Wickert's book and counsel to all workers' compensation adjusters and claims managers interested in maximizing subrogation recoveries in each state they write business."

- **Bill Gray**, GUARD Insurance Group, Home Office Claims Analyst/Specialist, Wilkes-Barre, Pennsylvania.

and laws dealing with workers' compensation subrogation and enacted new ones. These statutes dramatically change the workers' compensation landscape in Oklahoma, including changing the name of their workers' compensation laws and adding a new ability to subrogate for death benefits. The law regarding future credits in **Tennessee** has been rewritten as a result of the 2013 Supreme Court decision of *Cooper v. Logistics Insight Corp.* A more thorough treatment of subrogation rights for payments made both "to" and "by" the **Texas** Subsequent Injury Fund is covered. **Virginia**'s confusing statutory employer laws, which often make the difference between a subrogation recovery and no recovery at all, and Virginia's four active tests for determining whether an entity is immune from a third-party action are thoroughly reviewed.

The *Sixth Edition* for the first time includes all-new and easy-to-locate subheadings under the "Third Parties" section of each state's chapter. These guides make using the book easier, delineating the various categories of potential third parties discussed in the subsection. The chapter on Longshore and Harbor Workers' Compensation (LHWCA) was edited to include information on the Special Fund and its rights of reimbursement, as well as additional case law and explanations regarding when and how a "vessel" can be sued as a third party for purposes of subrogation. A new section on the Jones Act and the interplay between the LHWCA and the Jones Act with regard to an employer/carrier's right of subrogation/reimbursement is included. Additional law and cases have been added with regard to credits obtainable by carriers when they pay LHWCA benefits but later face Jones Act actions, and vice-versa. The new edition introduces a detailed treatment of the War Hazards Compensation Act and Defense Base Act, under which carriers are paying significant benefits to employees of U.S. government contractors overseas and in war zones, as well as the subrogation and reimbursement opportunities available under these laws. Entire new sections have been added to deal with anti-indemnity statutes and their effect on subrogation and waivers of subrogation. The state chapters for **Texas, Louisiana, New Mexico, and Wyoming** have been amended to reflect their unique anti-indemnity legislation and case law interpreting it. New state-by-state law and regulations regarding whether and to what extent a carrier can recover case management costs, medical bill audit fees, rehabilitation benefits, nurse case worker fees, and the like, are included, for those states which have addressed or commented on this issue. New law has been added to the chapters for each state with regard to the role Owner-Controlled Insurance Programs ("wrap-up programs") play in workers' compensation subrogation and their effect on recoveries. This new 6th Edition is the most complete and up-to-date edition yet. *Workers' Compensation Subrogation* is the most complete and thorough treatise covering workers' compensation subrogation ever published. There are very few areas in which the laws of each state vary more and are applied as differently, then in the area of workers' compensation subrogation. This book is intended to introduce the workers' compensation claims handler, in-house counsel, and subrogation professionals to some of the more

esoteric and complex subrogation issues encountered in today's workers' compensation insurance subrogation marketplace. It covers the following issues in all 50 states:

- Allocating Third-Party Recoveries
- Attorney's Fees
- Borrowed Servant Doctrine
- Conversion of Workers' Compensation Liens
- Costs and Expenses
- Dual Capacity Doctrine
- Equitable Subrogation/Contribution
- Exclusivity Rule Barring Action Against Employer
- How To Calculate Your Credit/Advance In Each State
- Intentional Acts
- Joint Ventures
- Made Whole Doctrine As Applied To Workers' Compensation Subrogation
- Necessity of Intervention
- Lien Reduction Statutes
- Staff Leasing Services and Temporary Employment Agencies
- Statutory Subrogation Rights
- Subrogating Against UM/UIM Benefits
- Subrogating In Medical Malpractice Cases
- Subrogating In Legal Malpractice Cases
- Waivers of Subrogation
- Who Qualifies As A Third Party
- Other Workers' Compensation Subrogation-Related Issues

In addition to being an excellent primer on workers' compensation subrogation, suitable for new subrogation professionals and seasoned veterans, the book also contains a detailed synopsis of the workers' compensation subrogation laws in each of the 50 states. It is a must for anyone with multi-state subrogation responsibilities. Complete with diagrams, references and thousands of footnotes, this is the most ambitious workers' compensation subrogation project ever undertaken.

The following issues and topics are covered in detail for each of the 50 states:

Statutory Subrogation Rights

- Identifies the statutory authority for workers' compensation subrogation in that state.
- Is an election necessary by the worker?
- Who can bring a third-party action (plaintiff, carrier, employer, or all of the above)?
- When and must a third-party action be brought?
- What are the rights of a carrier to intervene in an existing third-party action filed by a worker?
- Will a carrier's subrogation interest be barred if not brought timely?

Third Parties

- Who can be sued as third parties in a third-party action?
- Can a co-employee be sued and under what circumstances?
- Can an uninsured/underinsured carrier be a "third party" under the laws of the state?
- Is there a dual capacity or borrowed servant doctrine which

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affects the ability of a carrier to effectively subrogate?

- What is the state's workers' compensation bar?
- Are there any specific restrictions regarding subrogation against a subcontractor or a subcontractor's employee in a construction situation?
- Under what circumstances can the employer be sued?
- Can a carrier subrogate to the benefits of a recovery in a legal or medical malpractice action?

Allocation of Third-Party Recovery

- How and when does the carrier recover its subrogated interest?
- Does the carrier recover past benefits only or also the present value of future benefits which it owes under the Workers' Compensation Act of that state?
- Is there a formula to determine how a third-party recovery is allocated?
- What happens to the total recovery and how is it applied?
- Can a carrier recover benefits paid by a third party or recovered in a third-party action which relate to loss of consortium, or non-economic damages such as pain and suffering, mental anguish, or punitive damages?
- Does the employer's negligence reduce the recovery by the worker or carrier?

Attorneys' Fees/Costs

- Can the plaintiff's attorney recover attorneys' fees and/or costs out of the carrier's subrogated recovery and under what circumstances?
- How are attorneys' fees and costs handled if the carrier is also represented by subrogation counsel, intervenes into the third-party action and actively represents its interest?
- What if the carrier isn't represented?
- Can a plaintiff's attorney recover attorneys' fees based on the value of past benefits only or will he be able to recover attorneys' fees based on the future benefits/credit recovered by the carrier?

- Must a carrier bear its proportionate share of expenses as many states require, and what does that really mean?

Credit/Advance

- Can a carrier take a vacation from paying workers' compensation benefits once a worker makes a third-party recovery?
- How is the credit calculated under state law?
- Does the carrier have to do anything special to obtain the credit, such as filing with the Workers' Compensation Commission?
- Does the carrier get a credit toward future compensation benefits it owes or does it actually get to collect the present value of the future benefits it owes and still be obligated to pay the scheduled benefits in the future?

Statutes of Limitation

- What are the applicable statutes of limitation or statutes of repose that may be applicable to third-party subrogation actions?

Related Subrogation Issues

- Are there any other issues or statutes which affect a carrier's right of subrogation, such as the Made Whole Doctrine, Common Fund Doctrine, or anti-subrogation statutes?
- Are there lien reduction statutes, such as those existing in Indiana, which affect a carrier's right of recovery?
- Does the state have no-fault laws which complicate workers' compensation subrogation involving an auto accident, such as exist in Michigan and Colorado?
- What are the carrier's options if the worker and his attorney simply refuse to repay a carrier's lien after settling a third-party action?
- If the worker fails to repay the carrier, is there a cause of action for conversion of a carrier's subrogation interest or can the carrier still proceed against the third-party tortfeasor to recover its subrogation interest?

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