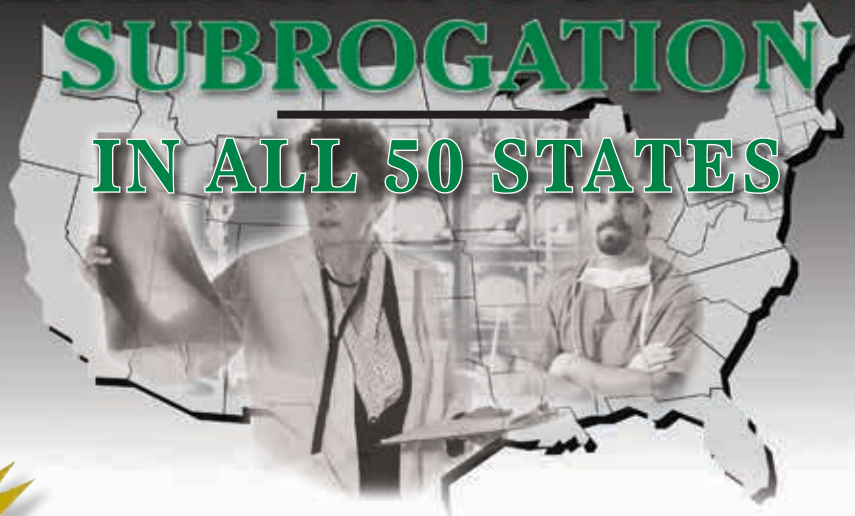


# ERISA AND HEALTH INSURANCE SUBROGATION IN ALL 50 STATES



**All New Fifth Edition**



**“This book is the bible on health insurance subrogation. No claims handler should be without it.”**  
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**BY GARY L. WICKERT**

## ***ERISA and Health Insurance Subrogation – In All 50 States, 5<sup>th</sup> Edition***

**US \$225.** 1500 pages. 1 Hardcover Volume. Table of Authorities. Index.  
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### **About the Author:**

**Gary Wickert** is an insurance trial lawyer and is regarded as one of the world's leading experts on insurance subrogation. He is also the author of several subrogation books and legal treatises and is a national and international speaker and lecturer on subrogation and motivational 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., Mr. Wickert returned to his native Wisconsin in 1998 and co-founded the subrogation law firm of Matthiesen, Wickert & Lehrer, S.C. He oversees a National Recovery Program which includes a network of nearly 285 contracted subrogation law firms in all 50 states, Mexico, Canada and the United Kingdom and boasts more than \$500 million in recoveries and credits for more than 250 insurance companies. Licensed in both Texas and Wisconsin, Mr. Wickert is double board-certified in both personal injury law and civil trial law by the Texas Board of Legal Specialization. He is also dual board-certified as a Civil Trial Advocate and Civil Pretrial Advocate by the National Board of Trial Advocacy, 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 30 years, Mr. Wickert 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. He has represented subrogated insurance carriers in every state, and has been admitted pro hac vice in 17 states. Gary Wickert 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.

### **What's new in the Fifth Edition?**

The *Fifth Edition* of *ERISA And Health Insurance Subrogation In All 50 States* contains a great deal of new information, 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. Although health insurance subrogation has become unduly complex and confusing over the past several years, the *Fifth Edition* goes to great lengths to make the complex understandable, easily digestible and useful. The book is suitable for both the inexperienced health insurance subrogation claims handler and the seasoned veteran.

The Fifth Edition of *ERISA and Health Insurance Subrogation In All 50 States* has been completely revised, edited, and reorganized. This was partly to reflect the new direction recent case decisions have taken health insurance subrogation as well as the crystallization of formerly uncertain and nebulous areas of the law which have now received some clarity. An entirely new chapter entitled "*What Constitutes Other Appropriate Equitable Relief?*" has been added and replaces the old Chapter 9, which merely dealt with *Knudson* and *Sereboff*. The new edition introduces new state court decisions addressing the issue of causation and whether and when a subrogated Plan seeking reimbursement must prove that the medical benefits it seeks to recover were causally related to the original negligence of the tortfeasor. An entirely new section was added concerning the subrogation and reimbursement rights of Medicare Advantage Plans, a statutorily-authorized Plan which provides the same benefits an individual is entitled to recovery under Medicare. This includes recent case law which detrimentally affects the rights of such Plans to subrogate. Also added to the new edition is additional law and explanation regarding Medicaid subrogation, including the differentiation between "cost avoidance" and "pay and chase" when it comes to procedures for paying Medicaid claims. Significant improvements have been made to suggested Plan language which maximizes a Plan's subrogation and reimbursement rights. The suggested language stems from recent decisions and developments in ERISA and health insurance subrogation from around the country since the last edition.

The new edition has been completely reworked both in substance and organization. Recent case law has necessitated consolidation of several portions of the book and elimination or editing of others. A new section entitled "*Liability of Plaintiff's Counsel*" has been added, which provides a clearer exposition on the laws applicable and remedies available when plaintiff's attorneys and Plan beneficiaries settle their third-party cases and

### **PRaise FOR: "ERISA and Health Insurance Subrogation - In All 50 States"**

"A difficult and confusing subject made simple. If you have health insurance subrogation responsibilities, you need this book." -**Loren Smith, Kelly, Smith & Murrah, P.C.**

"When I entered the unsettled world of occupational accident plan subrogation, this book helped me find the answers."

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"As a lawyer, I can tell you that this book is essential to maximizing our clients' subrogation recoveries. Don't settle another subrogation claim without it."

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"Every lawyer and claims adjuster responsible for subrogation should get a copy of this book before handling another health insurance file."

-**Daniel J. Offenbach, Leahy, Eisenberg & Fraenkel, Ltd.**

fail to reimburse the Plan. Also new to the book are recently-passed anti-subrogation measures such as Louisiana's Senate Bill 169, § 1881, which states that no health insurer shall seek reimbursement from automobile Med Pay coverage without first obtaining the written consent of the insured.

The new edition also goes into much greater detail on the procedures for and law underlying the practice of removal of cases from state court to federal court, and the possibility of remand back to state court. This includes the Federal Courts Jurisdiction and Venue Clarification Act of 2011, effective Jan. 6, 2012, which amended federal removal, venue, and citizenship determination statutes in very significant ways. The new edition also delves into, for the first time, the role which the federal Anti-Injunction Act plays when beneficiaries sue in state court to enforce the terms of an ERISA Plan, while the Plan files suit in federal court seeking an injunction against the state court action. New case law and discussion on preemption of FEHBA subrogation and reimbursement claims have been added to Chapter 10 in the wake of new decisions regarding same.

#### **About the Book:**

*ERISA and Health Insurance Subrogation In All 50 States* is the most complete and thorough treatise covering the complex subject of ERISA and health insurance subrogation ever published. Unlike most areas of insurance litigation/subrogation, health insurance subrogation requires the subrogation professional to be familiar not only with applicable state law and the many vagaries and nuances of health insurance subrogation within each state, but also the treatment of health insurance subrogation through ERISA, as applied by Federal District Courts, Federal Appellate Courts, and the United States Supreme Court. Familiarity with the general trends within each of the 12 Federal Circuits is also cited. This book introduces the health insurance claims handler, in-house counsel and subrogation professional to the complex and challenging world of health insurance subrogation in today's insurance subrogation marketplace. It covers the following issues in all 50 states and every federal circuit:

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

#### ***Types of Subrogation***

- Conventional (Contractual) Subrogation
- Legal (Equitable) Subrogation
- Statutory Subrogation
- Difference Between Subrogation and Assignment
- Role of Equity
- Hospital Liens
- Medicare
- Other Statutory Subrogation Rights

#### ***Non-ERISA Health Insurance Subrogation***

- Common Fund Doctrine
- Contributory Negligence
- Indemnification Agreements
- Indemnity Versus Investment Contracts
- Made Whole Doctrine

- Mandatory Joinder of Parties
- Medical Subrogation Generally
- Releases and Settlement Checks
- Statutes of Limitations
- Subrogating Against Municipalities
- Under/Uninsured Motorist Carrier Recoveries

#### ***Complete Summary of Health Insurance Subrogation in All 50 States***

- Anti-Subrogation Statutes
- Collateral Source Rule
- Common Fund Doctrine
- Complete Statutes of Limitations
- Contractual Subrogation Rights
- Equitable Subrogation Rights
- Historical Treatment of Health Insurance Subrogation
- Interface with No-Fault Insurance Laws
- Limitation on Recovery
- Notice Requirements
- Rights of Reimbursement
- Rights of Subrogation
- Statutory Subrogation Rights
- Treatment on Made Whole Doctrine
- Wrongful Settlement

#### ***ERISA-Covered, Self-Funded Employee Medical Benefit Plan Subrogation***

- Allocation of Recovery Among Beneficiaries
- Church Plans
- Exclusions from ERISA
- Federal Common Law
- Gerrymandered Settlements
- Government Plans
- History and Scope of ERISA
- HMO Plans
- Multi-Employer Plans
- Occupational Accident Plans
- Recovery Priorities
- Reimbursement Agreements
- Reimbursement Rights
- Rights of Subrogation Under ERISA
- Role of Plan Fiduciaries and Third Party Administrators
- Sample ERISA Plan Language
- Self-Funded Plans Versus Insured Plans
- Stop-Loss Coverage
- Subrogation Receipts
- Summary Plan Descriptions
- Trade Association Plans
- Trust, Contract and Labor Law Parallels
- Types of Subrogation Provisions

#### ***Preemption***

- Complete Preemption
- Conflict Preemption
- Erosion of Preemption
- Preemption, Savings and Deemer Clauses
- State Law Relation to Employee Benefit Plans

#### ***Made Whole Doctrine Under ERISA***

- As Effected by Plan Administrator's Interpretation

- As Effected by Settlements
- As Effected by Reimbursement Provisions
- Made Whole Doctrine as Default Rule
- Plan Cooperation Clause
- Presumptions Against Made Whole Doctrine
- Self-Funded Plans
- Specific Plan Language Involving Made Whole Doctrine
- Summary of Made Whole Doctrine by Federal Circuit

**Common Fund Doctrine**

- Absence of Plan language
- As Effected by Plan Language
- As Effected by Plan Administrator’s Interpretation
- Common Fund Doctrine Under Federal Common Law
- Full Reimbursement Language
- Who May Raise Common Fund Claims

**Rights of Recovery: Subrogation and Reimbursement**

- Anti-Subrogation Statutes
- Collateral Source Rules
- Common Fund Doctrine Statutes
- Lien Reduction Statutes
- Federal Common Law
- Federal Employee’s Health Benefit Act
- Laws Regarding Minors
- Medical Malpractice Recoveries
- No-Fault Insurance Laws
- Other State Statutes
- Regulation of Insurance Tests
- State Collateral Source Rules

**Conversion of ERISA Subrogation Interests**

- Breach of Fiduciary Duty
- Breach of Plan Terms
- Effective Release

- Implied Partnership
- Jurisdiction
- Plaintiffs’ Attorney’s Ethical Considerations
- Recovery of Same
- Tortuous Interference
- Unjust Enrichment

**What Constitutes “Other Appropriate Relief?”**

- Authority Under ERISA Plan
- Case Decisions
- Persons Who Can Pursue Subrogation
- Statutory Authority for ERISA Enforcement
- Venue
- *Knudson* Confusion Made Clear
- Treatment of *Knudson* in Each Federal Circuit
- Detailed Explanation of *Sereboff* Decision
- Practical Ramifications of *Sereboff*
- *U.S. Airways v. McCutchen*


**Intervention and Jurisdiction**

- Abstention
- Broad View
- Intervention
- Jurisdiction
- Narrow View
- Removal
- State Court Jurisdiction After *Knudson*
- Statutes of Limitation

**Improving Plan Language**

- Examples of Good Plan Language
- Examples of Poor Plan Language
- Improving Plan Language to Maximize Subrogation Recoveries
- Plan Language Changes Recommended in Light of *Sereboff* and *Knudson*

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