# MATTHIESEN, WICKERT & LEHRER, S.C.

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**MONTHLY ELECTRONIC SUBROGATION NEWSLETTER** **MAY 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.*

# CALIFORNIA WORKERS' COMPENSATION SUBROGATION SPECIAL EDITION

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WORKERS' COMPENSATION SUBROGATION

## UNDERSTANDING FUTURE CREDITS IN CALIFORNIA WORKERS' COMPENSATION SUBROGATION

**GARY L. WICKERT**

By Gary L. Wickert

Claiming a future credit as a result of the claimant's recovery in a third-party action has become big business. It is frequently as important, or even more important, to recover a large credit and close out a large, pending workers' compensation claim, than to effect a recovery of past benefits which have been paid. While we see far too many carriers unnecessarily waiving large liens in order to receive a credit which was due to them anyway, it is important to understand the nuances of claiming a credit in today's larger workers' compensation cases. Nowhere does this issue become thornier than in the Golden State – California.

California Labor Code § 3858 provides for and defines a future credit for carriers upon resolution of a third-party action. Cal. Labor Code § 3858 (1980). When a third-party recovery is effected, and after expenses and attorneys' fees are paid, the carrier is reimbursed under § 3856. It is also relieved from its obligation to pay future compensation benefits based on the amount recovered by the claimant. *Id*. Section 3858 reads as follows:

> ***§ 3858. Relief of employer from liability for compensation; notice to employer before satisfaction of judgment.*** *After payment of litigation expenses and attorneys' fees fixed by the court pursuant to Section 3856 and payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division up to the entire amount of the balance of the judgment, if satisfied, without any deduction. No satisfaction of such judgment in whole or in part, shall be valid without giving the employer notice and a reasonable opportunity to perfect and satisfy his lien. Id.*


California Labor Code § 3861 further clarifies the carrier's right to a credit. Cal. Labor Code § 3861 (1989). However, no satisfaction of the judgment is valid without giving the employer notice and a reasonable opportunity to perfect and satisfy its lien and credit. *Id*. The employer is entitled to a credit against its future obligations to pay further workers' compensation benefits in the amount of the worker's net recovery against the third-party tortfeasor. *State Comp. Ins. Fund v. W.C.A.B.*, 53 Cal.App.4th 579 (6th Dist. 1997). If a workers' compensation carrier settles its claim for reimbursement of past benefits by compromising its lien or otherwise, this does not affect its right to obtain a credit for future benefits. *Bailey v. Reliance Ins. Co.*, 79 Cal.App.4th 449 (2nd Dist. 2000). This is because the employer or carrier, in its independent action against the third-party tortfeasor, cannot recover for workers' compensation benefits not yet determined by the Workers' Compensation Appeals Board ("W.C.A.B."). *Id*. Section 3861 reads as follows:

> ***§ 3861. Credits against employer's liability for compensation; amount of recovery by employee.***
>
> *The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer.* Cal. Labor Code § 3861 (1989).


The right to recover a compensation lien is separate and distinct from the right to take a credit against future benefits owed to a worker. The lien allows the employer to be *reimbursed* for money already paid, while the credit is taken against sums which *may become due* in the future. *State Comp. Ins. Fund v. W.C.A.B.*, 130 Cal.App.3d. 933 (Cal. App. 1982). The employer loses the credit right only through express waiver of that credit or settlement, not the mere satisfaction of a lien claim and the waiver of a lien, or failure to assert a lien in a third-party action, does not constitute a settlement or waiver of the credit. *Curtis v. State of Cal. ex. rel. Dept. of Transp.*, 128 Cal.App.3d 668 (Cal. App. 1982). The reason the credit is distinct from the lien is that the carrier cannot recover for benefits not yet paid. *Herr v. W.C.A.B.*, 98 Cal.App.3d 321 (Cal. App. 1979).

In some instances, an employer's right to a credit is hampered by other statutes. For example, a statute precluding the employer from claiming a credit for the amount the employee receives in settlement of or recovery in a medical malpractice lawsuit for injuries forming the basis of a workers' compensation claim controls over § 3861 and § 3858, which allow a workers' compensation carrier such a credit. Cal. Civ. Proc. Code § 3333.1 (1997); *Graham v. W.C.A.B.*, 210 Cal.App.3d 449 (4th Dist. 1989), *review denied*.

It should also be noted that the W.C.A.B. has exclusive jurisdiction to determine compensation even where a third-party action is brought before the jurisdiction of the Board has been invoked. *Sanstad v. Industrial Acc. Comm'n*, 171 Cal.App.2d 32 (3rd Dist. 1959). Even if a workers' compensation carrier intervenes into an existing third-party action and consents to the judgment therein, such judgment is not conclusive on the carrier's right of subrogation and/or credit because the commission has jurisdiction over such matters. *Id*.

The employee has a duty to notify the employer of any judgment and its imminent satisfaction. Cal. Labor Code § 3858 (1989). However, no duty of notification falls on the third party even though the third party had knowledge of the employer's lien claim. *Popovich v. U.S.*, 661 F.Supp. 944 (C.D. Cal. 1987).

**CALIFORNIA STATE CAPITOL BUILDING IN SACRAMENTO**

In order for a workers' compensation carrier to properly claim a credit under California law, a petition should be filed with the Workers' Compensation Appeals Board ("W.C.A.B."), seeking an order delineating the employer's right to a credit against its future workers' compensation liability. The California W.C.A.B. has exclusive jurisdiction over all disputes arising under the California workers' compensation law. See, Herlick, Stanford D., *California Workers' Compensation Handbook*, § 13.4.8 (1999). Where jurisdiction attaches in W.C.A.B. because of an industrial injury, the W.C.A.B. has exclusive jurisdiction over all issues arising under the compensation law. However, where a third-party action is settled after the suit has commenced, the court where the suit was brought must approve of the settlement and set attorney's fees. *Id*. at § 12.5. It is not necessary for a carrier to file a Petition for Credit in a case where there is no genuine issue as to employer negligence. *S.C.I.F. v. W.C.A.B. (Brown)*, 130 Cal.App.3d 933 (Cal. App. 1982). Courts have held that it would be "financially foolhardy" for a carrier to continue paying benefits pending the filing of and ruling on a Petition for Credit. *Id*. The carrier can simply assert the credit automatically. If there is any credible issue of employer negligence, however, it is advisable to file a Petition for Credit. However, the carrier does not need to continue payment of benefits pending a ruling on that petition as long as there is no genuine issue as to whether the payments can be suspended.

The carrier, of course, must be careful if there is any suggestion of a limit on the right to a credit as a result of employer negligence, as the assertion of credit without a reasonable legal basis can result in the imposition of serious penalties. If there is any credible issue as to employer negligence, the carrier should file a Petition for Credit. It is always better to resolve the issue of employer negligence in a civil case given the dramatically pro-worker bent of the W.C.A.B. and the total unfamiliarity of its judges with the issue of negligence. Otherwise, a carrier should simply assert the credit and wait for the worker to file his own petition complaining of same. If the issue of employer negligence has been judicially determined, that issue is binding as *res judicata* on the Board. If not, the Board will have to determine the issue of employer negligence on its own – a scary prospect.

If an employee makes a settlement against a third-party tortfeasor without the participation of the carrier, a credit for any sums received by the employee is to be applied against any future compensation benefits. The amount of the credit is limited to the net amount realized in the third-party action after deduction of reasonable attorneys' fees and costs. Cal. Labor Code § 3860 (1989). In order to obtain the credit, the W.C.A.B., on petition by the workers' compensation carrier, may issue an order delineating the employer's right to a credit against future workers' compensation liability.

When a third-party case settles, the subrogated compensation carrier is faced with three possible scenarios:

> (1) Recover a sum for its past lien and enter into a compromise and release of the underlying workers' compensation claim. This constitutes a settlement of the compensation claim completely, and does not allow the worker to reopen the compensation claim for any reason. Usually, the carrier takes a slightly smaller lien recovery in exchange for the certainty of the closure on the compensation claim.
>
> (2) Take a sum certain as a lien recovery, slightly more than if it had opted for the compromise and release in (1) above, and receive a stipulated amount for future credit. Once the credit is exhausted, the carrier again has to begin making benefit payments. With this option, the plaintiff waives the argument of employer negligence (reducing the credit), and the credit is not delayed.

(3) The plaintiff/worker contests everything, including the lien and the right to a credit. In this case, the trial court must determine the amount of employer negligence so as to determine the appropriate amount of the carrier's credit. If the case settles, then the trial court is out of the picture and the employer's negligence is determined by the W.C.A.B. Where no court has adjudicated the employer's percentage of negligence, this task falls to the Board. However, this is rarely a good option for the carrier because the Division is extremely pro-worker. The carrier must first meet its threshold of employer negligence (20% employer negligence x $1 million = $200,000). This means the lien is first reduced by the $200,000, and if it is eaten up, then the credit is reduced by the remainder. The carrier has to meet its "threshold" before it receives any lien recovery or a credit.


When employer negligence is involved, many plaintiffs' attorneys are under the mistaken impression that the credit is eliminated, and they may represent the law to you as such, but this is not the case. The credit is merely delayed until the carrier has met its "employers' credit threshold". This means that the carrier must continue to pay benefits commensurate with its liability before it can receive credit against further demands for benefits in that case. *Southern Cal. Edison Co. v. W.C.A.B.*, 58 Cal.App.4th 766, 68 Cal.Rptr.2d 265 (Cal. App. 1997). The following hypothetical exemplifies how this works:

*An injured worker receives $75,000 in compensation benefits and then receives a $340,000 settlement from the third-party. The worker nets $194,000 out of the settlement after attorneys' fees and costs. Employer negligence is an issue, and the workers' compensation judge determines that the employer was 25% at fault. The court (where there is a jury trial) or W.C.A.B. (where there is a third-party settlement) determines that the value of the worker's tort damages is $500,000.*

In the above scenario, taken directly from *Southern Cal. Edison Co. v. W.C.A.B.*, 58 Cal.App.4th 766, 68 Cal.Rptr.2d 265 (Cal. App. 1997), the "employer's credit threshold" is $125,000 ($500,000 x 25%) and the employer is entitled to a future credit of $69,000 ($194,000 - $125,000). However, the credit cannot immediately take effect, because the "employer's credit threshold" ($125,000) must first be met. Put another way, the employer/carrier must contribute an additional $125,000 before it can start claiming a credit. However, the carrier can count its past lien payments ($75,000) toward meeting this threshold. Therefore, the carrier must pay an additional $50,000 ($125,000 - $75,000) before it can claim a credit.

It should be remembered that the past lien will only count toward meeting the employer's credit threshold if it has not been reimbursed and any portion of the lien which is reimbursed will not count toward meeting the threshold. However, subrogation practitioners in California rarely, if ever, see the plaintiffs' attorneys making a claim for credit for the amounts a carrier is reimbursed. Either they don't think about it, or they don't know about it, but that's okay, because it is very bad law. It has the effect of double-charging the carrier to the extent of its third-party recovery and permitting a double recovery by the injured worker, to the extent of the carrier's third-party recovery - something subrogation is supposed to remedy. Any opportunity to revisit this issue before the California Supreme Court, or Sacramento's Third District Court of Appeals (which is more pro-employer than the Second District where *Tate* was decided) to possibly reverse this law, should be acted upon. It should be noted that, in the case of a settlement (as opposed to a jury verdict in the trial court), where there is no agreement with plaintiff's counsel regarding the credit (which should be the goal), the W.C.A.B. judge will determine the injured worker's total tort damages and percentage of employer negligence, rather than the trial court judge. This is bad, and should be avoided if possible, because this judge is going to be extremely pro-claimant in his or her leanings.

**The courtroom used by Sacramento's Third District Court of Appeals, and for six days a year, the California Supreme Court, is one of the most beautiful courtrooms in the country.**

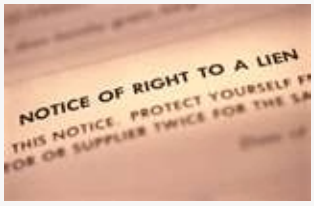
California remains a state in which subrogated workers' compensation carriers must obtain subrogation counsel to intervene into an existing third-party action, or file one on its own behalf. Not only are the mechanics of workers' compensation subrogation in California complicated and laden with potential traps and pitfalls, but the trial lawyers know they have the ability to settle around idle and inattentive carriers - and they often do.




# INTERVENING IN CALIFORNIA WORKERS' COMPENSATION THIRD-PARTY ACTIONS

Workers' compensation carriers across the country continue to wrestle with the seemingly simple decision as to whether they should protect their subrogation interests by intervening into California third-party actions or simply file a Notice of Lien, and hope some of the third-party funds will find its way to them. This article will analyze the applicable law relating to this issue, and provide the subrogation professional with some guidance in making the right decision in the right case.

Understanding the nuances of the somewhat complicated and confusing subrogation law in California is instrumental in formulating the right decision when it comes to protecting your workers' compensation subrogation interests. The California Act makes clear that either the employee or employer may bring a third-party action. Such an action must be brought within the two-year statute of limitations for personal injury and wrongful death actions in California, and this statute is not tolled by the fact that special damages may be accruing or workers' compensation payments may be in the process of being made during this time period. The employer is entitled to file an independent action against the third party, intervene into an employee's lawsuit filed against a third party, or file a Notice of Lien in the pending third-party action. If the civil action against the third-party tortfeasor is brought by the employee alone, the employer can apply for first lien against the judgment for damages in the amount of the employer's expenditure for compensation together with amounts to which he or she may be entitled for special damages under California Labor Code § 3852. This has become known as filing a "Notice of Lien".




The simple act of filing a Notice of Lien is attractive and deceptively simple for any subrogation professional. It seems relatively easy to do, and the downside is not readily apparent. Filing a Notice of Lien doesn't work any magic other than putting the salient parties on notice of a carrier's workers' compensation subrogation interest. It doesn't give a subrogated party any greater rights than already exist under California law, but serves only to memorialize notice to the parties. It will help ensure that the parties do not settle without giving notice to the carrier. It can be filed with the court for no fee. However, this is absolutely the weakest form of enforcing a workers' compensation carrier's subrogation interest. It should be used in smaller cases, cases in which there are limited third-party insurance limits, or cases with obviously weak liability. A worker can "settle around" a workers' compensation carrier by expressly excluding from his/her settlement with the third party the carrier's reimbursement claim. Merely filing a Notice of Lien will not protect the carrier should the parties settle around the carrier and will not give the carrier any protection from the plaintiff's attorney's claim for attorney's fees which will be paid out of the carrier's lien. The foregoing is true even where the worker is killed. The risk of proceeding with only a Notice of Lien must be weighed against the potential cost of intervening and putting into play more strenuous protection and participation options.

In essence, the workers' compensation carrier may do one of three things to protect its workers' compensation liens: (1) bring an action directly against the tortfeasor on its own; (2) join as party plaintiff by intervening in third-party action brought by the employee; or (3) allow the employee to prosecute the action and then apply for first lien against the resulting judgment or settlement.

The level of activity a carrier chooses will have a direct effect on a carrier's recovery amount, or whether the carrier will be able to recover at all. The less active a carrier is in a case, the more likely a plaintiff and defendant will settle around the carrier, knowing that there is no way that the carrier, with its limited activity and involvement in the case, will be able to gear up and try the case. Larger files (lien and/or credit combined) and files with better liability are usually candidates for interventions as opposed to mere Notices of Liens. The level of activity a carrier chooses to engage in after filing an intervention will depend on those same criteria. Section 3862 provides for "perfecting a lien" upon a judgment in a third-party action. It reads as follows:

> ***§ 3862. Enforcement of employer's lien against judgment.*** *Any employer entitled to and who has been allowed and has perfected a lien upon the judgment or award in favor of an employee against any third party for damages occasioned to the same employer by payment of compensation, expenses of medical treatment, and any other charges under this act, may enforce payment of the lien against the third party, or, in case the damages recovered by the employee have been paid to the employee, against the employee to the extent of the lien, in the manner provided for enforcement of money judgments generally*.

This section, along with § 3852, seems to be the statutory source of authority in California for filing a Notice of Lien in those cases which may not justify an intervention or the filing of an independent third-party action by the carrier. However, as indicated above, the filing of such Notice of Lien doesn't appear to have any more force or effect than simply giving all parties notice of the carrier's statutory subrogation interest under California law, and can leave the subrogated carrier vulnerable to a variety of lien avoidance techniques which California trial lawyers regularly avail themselves of.

Filing an intervention and active participation have benefits beyond merely thwarting the plaintiff's attorney's effort to settle around you or take a significant portion of your lien as an attorney's fee. In California, a carrier's lien can be substantially reduced by the percentage of employer negligence which is found to exist. Therefore, an employer is only reimbursed for the amount by which its compensation liability exceeds its proportional share of the worker's recovery. Even in a case involving a lot of employer negligence in which any recovery is unlikely, active participation in the case may well result in a significant increase in the amount of future credit the carrier is entitled to, over what would have otherwise been available in the absence of such efforts. We all know that in many cases, the future credit and reserve takedown can be more valuable to the carrier than the lien recovery.

Twenty-five years of workers' compensation subrogation experience has taught us that most of our clients see a net recovery of between 25% and 35% of their lien when utilizing a simple Notice of Lien. In cases involving smaller liens (less than $25,000), this may be the preferred method of protection. This is because after deducting attorneys' fees incurred by subrogation counsel, attorneys' fees possibly awarded to plaintiffs' counsel, and a pro rata share of costs, the $25,000 lien may be reduced to as little as $10,000. Utilizing a Notice of Lien in such cases, especially such smaller cases where liability is speculative, a recovery of $8,000 may be expected, and the two methods of protecting your lien yield similar results, without the risk of incurring fees and costs and receiving a defense verdict on the third-party case to boot.


On the other hand, in cases of clear liability and/or in cases where the lien is between $25,000 and $100,000, the decision as to whether to intervene or to simply file a Notice of Lien should be evaluated in a risk/benefit manner, calculating likely recoveries in comparison with likely expenses. Approximately 75% of the time, these calculations lead to the conclusion that intervening will be the smarter option – increasing your net recovery and showing your insureds that you are serious and aggressive about protecting their subrogation interests and keeping their risk modifier low.

In cases involving liens of more than $100,000, the intervention route is almost universally the smartest choice. Only in cases involving the slimmest of third-party liability should liens of this size be protected only with a Notice of Lien. In this category of larger lien files, it is important to engage experienced subrogation counsel. The reason? Counsel must advise you as to three levels of activity which can be undertaken. Whether your subrogation counsel employs low, medium, or high levels of participation in the third-party case, will determine whether the carrier has an ability to defeat any claim for attorney's fees made by the workers' compensation attorney. If an employer or carrier actively participates in procurement of a common fund, apportionment is inappropriate and can be avoided. However, merely showing up for depositions or filing one or two documents, lacking in any real substance, does not qualify as active participation and may not be sufficient to defeat the worker's right to receive a contribution to the costs of the procurement of the third-party settlement. In general, an employee is entitled to attorneys' fees as long as there was no active participation by the carrier in the third-party litigation.

In the larger cases (more than $100,000), the level of activity should be determined by both the strength of the third-party liability and the sufficiency of third-party liability insurance available. The stronger the liability and the more insurance available, the higher the level of activity should be. This is because higher activity will increase the carrier's net recovery disproportionate to the cost necessary to increase it. Although the figures vary, every dollar spent on subrogation efforts in such cases can realize $10 or more in increased recoveries.

Quality subrogation counsel should help subrogation professionals decipher the many options which California workers' compensation law presents. Whether to file a Notice of Lien or intervene into a third-party action, whether to be active or passive in the third-party action, etc., all must be determined by looking at all of the variables which present themselves in the great State of California.

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**WORKERS' COMPENSATION SUBROGATION**


## QUESTIONABLE DECISION INDICATES THAT CALIFORNIA FUTURE CREDITS MAY BE REDUCED BY AMOUNT OF PAST LIEN RECOVERY

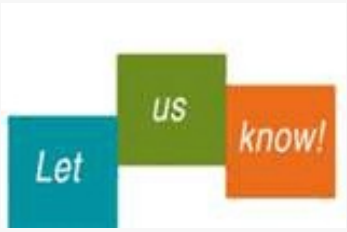
***Southern Cal. Edison Co. v. Workers' Comp. Appeals Board,***
**58 Cal.App.4th 766, 68 Cal.Rptr.2d 265 (Cal. App. 1997).**

As you can see from the other articles in this newsletter, California workers' compensation subrogation requires an in-depth knowledge of the law and the ability to play poker. In California, an employer is entitled, under § 3861, to a credit against the carrier's obligation to pay further workers' compensation benefits to an injured worker in the amount of a third-party settlement or judgment. That credit, however, is reduced by the extent to which fault attributable to a negligent employer caused the worker's civil damages. Therefore, in situations in which an employer is partially negligent, it must pay benefits commensurate with its liability before it can receive credit against further demands for benefits in that case.

However, a poorly decided 1997 California Court of Appeals decision appears to completely miss the boat with an aberrational opinion strangely suggesting that the carrier's future credit must be reduced by the amount of any past lien reimbursement the carrier/employer has received. There is no existing premise in California law for this rather bizarre decision, and subrogation professionals must be aware that it is out there as it may occasionally have to be contended with.

In *Southern Cal. Edison Co. v. Workers' Comp. Appeals Board*, an injured employee obtained a settlement from a third-party defendant and also received compensation benefits from his employer. At the time the employee received his tort settlement, the employer negotiated a settlement with the third-party defendant ($40,000) concerning the workers' compensation paid out at that point ($75,478). The workers' compensation judge determined the employer to be 25% negligent and further determined the credit to be applied against the employer's future compensation benefits from the third-party settlement ($109,000), after the employer met the threshold determined by its portion of the liability ($85,000). The judge also found that the employer could not offset the $85,000 threshold with the previously paid $75,478 because it had settled its lien with the third party for $40,000. The Workers' Compensation Appeals Board ("W.C.A.B.") denied the employer's petition for reconsideration.

The Court of Appeal annulled the decision of the W.C.A.B. and remanded the matter, holding that although the previous payments could be included in the $85,000 threshold, the $40,000 settlement the employer had negotiated with the third party could not be included. The employer could not include the $40,000 as "previous payments made," since it had been reimbursed for those payments by the third party. This is completely contrary to California workers' compensation subrogation law, but the case may be cited for this proposition unless and until the California Supreme Court has an opportunity to set the record straight.




Watch out for trial lawyers citing this terrible case to you. In essence, it says that an employer's credit rights have to be reduced by the amount it recovered in the third-party case. We are eager to find an opportunity to take this issue to the state Supreme Court, so if you have any California cases in which this is the issue, please contact us regarding possible handling of the case. As a practical matter, we have only seen one attorney take this rather bizarre position, and few seem to know about it.

## UPCOMING EVENTS.....


**June 3, 2009** - Ryan Woody will be at the 2009 Association of Railroad Medical Service Executives (ARMSE) Conference being held in Las Vegas, Nevada. Ryan Woody will be presenting *Subrogation 101.*

**August 11-12, 2009** - Chris Miller will be at the 5th Annual National Workers' Compensation Subrogation Strategies Insurance ExecuSummit, being held in Uncasville, Connecticut. Chris Miller will be presenting, *The Complete Guide To Taking A Future Credit In All 50 States*. For more information on this conference, please go to www.ExecuSummit.com.

**November 1-4, 2009** - Gary Wickert and Ryan Woody will be at the 2009 NASP Annual Conference being held in Colorado Springs, Colorado. On November 2, Gary Wickert will be presenting *The Complete Guide To Taking A Future Credit In All 50 States* and, on November 3, Ryan Woody will be presenting *ERISA and The Wrongful Death Lawsuit.* MWL will also be exhibiting at this conference so if you plan on attending, please stop by our booth and see Gary Wickert, Ryan Woody and Jamie Breen. For more information on this conference, please go to www.subrogation.org.