The Fight to Reclaim Premium Increases From Tortfeasors

By Gary L. Wickert

Workers' compensation insurance premiums seem to know only one direction—up. On average, premiums rise approximately five percent annually; more if an insured experiences significant losses. For many corporate risk managers and claims professionals, the concepts of underwriting and experience ratings remain a clouded mystery, yet they directly affect the amount of annual premiums a company must pay. These premiums remain one of the most significant business expenses for any American employer. In situations where an employee's on-the-job injury or death results from the negligence or fault of a third-party tortfeasor, many employers are fighting back by bringing claims against those at fault for the resulting increases in their experience modifiers and workers' compensation premiums. Unfortunately, the ability of an employer or insured to bring such a claim is unclear in most states, while those that have established case law show it's the unfavorable kind. Let's look at why courts are turning back employers that try to toe the line and keep expenses in check.

Experience ratings reward employers (insureds) that have a favorable loss history and penalize those that have a poor loss history. This is accomplished by the application of a credit (reduction) or a debit (increase) to premiums predetermined by the National Council on Compensation Insurance (NCCI). NCCI is an insurance service entity that organizes and compiles information on insurance risk and losses and, depending on the state, keeps statistics on various insureds, thereby enabling it to calculate experience modifiers for different companies and employers. The NCCI calculates the experience rating modifications (ERMs) for all but six states: California, Delaware, Massachusetts, New Jersey, New York, and Pennsylvania. The loss history is compiled on unit statistical cards that are available to insurers and insureds alike.

Exceptional Efforts to Recover

It makes sense that, if premiums rise as a direct result of the negligence and tortious act of a third party (person or entity other than employee and employer), the tortfeasor should be responsible for the damages it causes, including the resulting increase in premiums for the innocent small-business owner. Unfortunately, this is not how most courts look at this issue. Most states hold that an employer's increased premiums that result from injuries to employees caused by a third party are damages that are either unforeseeable or not contemplated or allowed under a state's Workers' Compensation Act. Minnesota, however, is an exception.

Minnesota is the only state that allows an employer to pursue the negligent tortfeasor for increased premiums, either because of retroactive assessments or because of a change affecting future rates. M.S.A. § 176.061(5)(b) specifically provides that an employer can enforce liability against a tortfeasor for increased premiums by joining a third-party suit or bringing a separate suit. This claim belongs solely to the employer and not the carrier. The claim is brought along with the subrogation claim. (*Hauser v. Mealey*) Any damages recovered by the employer for increased premiums are "for the benefit of the employer," and are not subject to the allocation formula set forth in § 176.061.

Prior Minnesota case law held that an employer could not recover in tort for increased premiums resulting from an employee's injury or death caused by a tortfeasor's negligence. (*N. States Contracting Co. v. Oakes*) In a nutshell, the courts felt that such damages were too remote and an indirect result of the tortfeasor's negligence. The Minnesota Legislature changed that when it amended § 176.061. Even when such a claim is allowed, there is no guarantee of success. An employer asserting such a claim would be required to prove its claim, usually through the use of underwriting expert testimony addressing the likelihood of future premiums and complicated enterprise risk management calculations. Sadly, other states have not followed Minnesota's lead.

Ruling the Exception

For instance, the California Court of Appeals prohibits an action by an employer against a third party for increased premiums or lost profits, stating that a negligent third party has no general duty to compensate an employer for expenses and lost profits incurred as a result of negligent injury to an

The Rest of the Rule Followers

Many states follow the majority instead of Minnesota's exception. Go online to http://wc.theclm.org to read about additional states' takes on reclaiming premiums from wrongdoers, including the following:

- Massachusetts
- New Jersey
- New Mexico
- North Carolina
- Ohio
- Oregon
- Pennsylvania
- South Dakota
- Texas
- Wisconsin

employee. (*Fischl v. Paller & Goldstein*) The employer also has no cause of action under California Labor Code § 3852 to recover damages for which the employer has been held liable, including salaries, wages, pensions, or other emoluments.

Similarly in Connecticut, an employer does not have a cause of action against a tortfeasor for the increased costs of premiums resulting from benefits paid by the compensation carrier to its employee for injuries sustained due to negligence of a third-party tortfeasor. (*RK Constructors Inc. v. Fusco Corp.*)

Florida courts, too, have determined that the Workers' Compensation Act prohibits an employer from pursuing a claim against a tortfeasor for the increased costs of premiums resulting from benefits paid by the compensation carrier to its employee for injuries sustained due to negligence of a third-party tortfeasor. Florida courts explain that the Workers' Compensation Act precludes an employer from recovering damages specific to it, such as lost profits or increased premiums, in a third-party action arising out of an accident that results in losing an employee's services for a period of time. (*Southland Const. Inc. v. Greater Orlando Aviation*)

Georgia does not allow a cause of action by an employer against a tortfeasor for the increased costs of premiums resulting from injuries caused by a third-party tortfeasor. (*Unique Paint Co. v. Wm. F. Newman Co.*) Georgia believes that any such increase in the employer's premiums is too remote a consequence to be recovered in a breach of contract claim against the manufacturer of defective scaffolding, the failure of which allegedly caused the plaintiff's employee's death. (*Sanford-Brown Co. v. Patent Scaffolding Co.*) There is neither an indemnity right nor a legal duty owed by the tortfeasor to the employer to refrain from injuring the plaintiff's employee. Any such premium increase also is too remote for recovery in tort. (*North Georgia EMC v. Thomason, etc.*)

The Supreme Court of Iowa also has concluded that an employer's claim in negligence for increased premiums resulting from injuries to its employees caused by a third-party tortfeasor was nonactionable. (*Anderson Plasterers v. Meinecke*) The employer has no cause of action based on the tort of interference with contractual relations where the interference is in the form of injuries to an employee caused by a third person, thus resulting in a loss of services to the employer. Such a cause of action for tortious interference with contractual relations will lie only where the interference is intentional as opposed to negligent.

In Michigan, an employer's claims for increased premiums and any lost profits arising from it are not recoverable from a third-party tortfeasor. (*Pro-Staffers Inc. v. Premier Mfg. Support Servs.*) Michigan believes that such damages are not recoverable under the statutory scheme established by the legislature. A review of the subrogation provision of the Workers' Disability Compensation Act clearly shows that the legislature has not provided such a statutory remedy for an employer. The Workers' Compensation Act contains the exclusive remedies that an employer may seek in an action against a third-party tortfeasor in which the employer seeks to recover the costs associated with the payment of workers' compensation benefits. Because the Workers' Compensation Act provides a detailed procedure that, if utilized by the employer or carrier, will result in full reimbursement of the benefits paid to the injured employee, no additional remedies can be inferred. Had the legislature intended for employers to recover damages in the form of increased premiums and lost profits, it would have provided for it within Mich. Comp. Laws § 418.827. Less appropriate common-law remedies cannot supplement those remedies placed into the statute by the legislature.

Around the Circuits

The U.S. Court of Appeals for the 3rd Circuit believes that there is an unmistakable trend to view the workers' compensation system as the exclusive source of recovery not only for employees against their employer, but also for the employer against third parties. In each instance, the Workers' Compensation Act exacts trade-offs—benefits and detriments—that are balanced if not precisely, then at least in some rough approximation. (*Erie Castings Co. v. Grinding Supply Inc.*) It concludes that Pennsylvania's Workers' Compensation Act provides an exclusive remedy for the employer to recover expenditures incurred as the result of an employee's injury.

The U.S. Court of Appeals for the 5th Circuit has stated that an employer cannot recover in admiralty for increased premiums resulting from injuries to employees because "economic damages are not recoverable in negligence untethered to an injury to a property interest."(*Am. River Transp. Co. v. KAVO KALIAKRA SS*)

Perhaps it's a lack of subrogation education, perhaps it's something more. Whatever the reason, not allowing an employer's claim for increased premiums punishes the innocent employer and exonerates the wrongdoer. Workers' compensation premiums remain one of the most significant obstacles to the creation and continued existence of many small businesses. The insurance industry and businesses across the country should push their claims for increased premiums using the cogent example of Minnesota. Using the right underwriting expert and proving your case will be critical. These claims are worth pursuing, so pursue them well. ■

Gary L. Wickert is a partner with CLM Member Firm Matthiesen, Wickert & Lehrer S.C. He can be reached at (800) 637-9176, gwickert@mwl-law.com, mwl-law.com.