



## The Best and Worst States for Subrogating Workers' Compensation Claims

By Gary L. Wickert

It makes very little legal sense and, for all intents and purposes, is fundamentally antithetical to a free market, capitalist society. Its underpinnings can be traced to Germany's Second Reich and its first chancellor, Otto Von Bismarck. It has ties to Marxism and socialism, and its evolution has been fueled by populism and social revolution. It was America's first tort reform initiative and was the "Obamacare" of the early 20th century—and every bit as controversial. Its very concept runs contrary to the principles underlying the American system of civil justice, yet it has over time become as much a part of the American social fabric as mom, baseball, and apple pie. No, it is not the federal income tax system or Social Security—it's the American system of workers' compensation.

Workers' compensation in America turns 105 years old this year, and it seems society has forgotten the deal that it made with employers and their insurers. Workers' compensation subrogation is under attack by judges, lawyers, lawmakers, and "civil justice" warriors, putting subrogation on the run. Once again, the fallout of this war on subrogation lands on the shoulders of small businesses in the form of higher insurance premiums. It is time that the underwriting industry recognize and reward those states that preserve and protect the right of workers' compensation carriers and self-insureds, and call out and punish those states that cuddle up to trial lawyers and treat with contempt the greatest tool small businesses have for keeping workers' compensation insurance premiums low—subrogation.

My 33 years of subrogating workers' compensation claims in all 50 states and appearing before countless supreme courts, appellate courts, and legislative committees as a defender of this right in the face of fierce opposition provides keen and unique insights into which states are friendly toward subrogation and which are not. A number of variables—some of which transcend a state's workers' compensation laws and decisions—have been taken into account to create a list of the five states most favorable and the five states least favorable to workers' compensation subrogation. These variables include:

- Made-whole case law and legislation.
- Availability and implementation of future credits.
- Lien reduction statutes.
- No-fault automobile insurance laws.



- Limits and/or prohibition on the right to file third-party actions or intervene in them.
- Notice requirements.
- Attorney's fees considerations/common fund doctrine application.
- Rights of employer contribution/effect of employer negligence on subrogation.
- Types of third parties against which a carrier can subrogate (e.g., UM/UIIM, medical malpractice, legal malpractice).
- Ability of courts to "equitably" apportion a lien if the employee is unhappy.
- Types and terms of statutory formulas in place.

Taking into consideration the above criteria and considerations, the following are the winners and losers when it comes to workers' compensation subrogation.

### Best of the Best

**Wisconsin.** Wisconsin provides a predictable statutory formula that has no exceptions and cannot be deviated from or avoided. It provides an opportunity for the workers' compensation carrier to recover 100 percent of its workers' compensation lien in most instances, without reduction for the plaintiff's attorney's fees, employer negligence, the made-whole doctrine, or other considerations. A carrier's right of reimbursement under Wis. Stat. § 102.29 actually is not even subrogation rights—they are distinct from subrogation and represent a statutory right of reimbursement. Wis. Stat. § 803.03 requires a subrogated carrier

to be made an involuntary defendant in third-party cases filed by the employee, which may necessitate the involvement of subrogation counsel, even in the case of smaller liens. The carrier can file a third-party action at any time.

**Alabama.** Alabama provides a first-money right of reimbursement for the subrogated workers' compensation carrier, after the deduction of attorney's fees by the plaintiff. While the carrier is reimbursed first, its recovery is reduced by the *Fitch* formula, which obligates the carrier to reimburse a proportionate share of the plaintiff's attorney's fees and litigation expenses.

Similarly, the *Miller* formula requires the carrier to contribute the same percentage of the future benefit payments it is relieved of paying under its future credit as a contribution toward fees and expenses if, as, and when, the future benefits are owed. Employers are immune from contribution, even if their actions are intentional. However, a co-employee can be sued for intentional acts or willful removal of a machine's safety guard. Recovery from an employer's UM/UIIM policy is allowed, and the carrier is actually given six extra months after the two-year statute of limitations lapses in which to file a direct third-party subrogation action.

**Delaware.** Similar to Alabama, a third-party recovery is reduced by attorney's fees and litigation costs, and the balance is paid to the carrier, less a pro-rata contribution toward the fees and expenses, with the balance paid to the employee and constituting a future credit for the carrier. A future credit is recoverable by the carrier, and subrogation against a UM/UIIM policy is allowed if they insure the employer.

**Maine.** The carrier is entitled to a first-money right of reimbursement, less a pro-rata share of the plaintiff's attorney's fees and costs. No employer contribution is allowed, and the carrier can secure a future credit from any excess recovered by the plaintiff. Interventions are freely allowed. The carrier can file suit at any time with 30 days' notice. Recovery against UM/UIIM policies, medical negligence recovery, and even legal malpractice recovery appear to be possible. Maine also enjoys an extended six-year personal injury statute of limitations.

**Wyoming.** Workers' compensation subrogation law in Wyoming is sparse,

with issues such as recovery rights against UM/UIIM benefits, medical malpractice, and legal malpractice still undecided. However, the law they do have is favorable to subrogating carriers that have a first-money right of reimbursement and are not obligated to contribute to the employee's attorney's fees and litigation costs. The future credit must be recovered in the third-party action rather than as a traditional credit, and the carrier can file the action with only 15 days' notice.

### **Worst of the Worst**

**Georgia.** It is as though the Georgia legislature is intentionally trying to make it more expensive for small businesses and employers in their state to be profitable. Georgia is hands down the worst state for workers' compensation subrogation, which is all but impossible to handle successfully. It is the only state that codifies the equitable made-whole doctrine into its workers' compensation statutes, requiring the employee to be completely made whole before the carrier is entitled to one dollar. To make matters worse, even if the employee is made whole (which, as you can imagine, the employee never admits to), the carrier is not subrogated to noneconomic damages—requiring the carrier to be active at trial to make sure the jury questions require allocation of the elements of damages. If it makes it past the made-whole gauntlet, it owes attorney's fees to the employee's attorney. And there is no future credit.

**Florida.** Florida is right behind Georgia. There is no right to intervene in a third-party action. Instead, the carrier can only file (in fact, must file) a notice of lien, which allows no participation in the litigation. Once there is a recovery, the carrier's reimbursement is determined by the *Manfredo* formula (a ratio of "net" settlement to "total value" of the case). And, yes, the plaintiff always adds several subjective zeros to the number that he believes the total value to be. As if that weren't enough, subrogation also is complicated by no-fault laws.

**Illinois.** Illinois turns workers' compensation subrogation into a source of reimbursement from the party who is supposed to be protected by the exclusive remedy rule. Contribution from the employer by third-party tortfeasors is allowed. Once limited to the amount of the lien, this "Kotecki cap" on employer

contribution is now considered "waived" by even the most common and ordinary contract terms involving indemnity. Attorney's fees are owed to the plaintiff's counsel, but are limited to 25 percent. There is no subrogation allowed against UM/UIIM policies, even if owned and paid for by the employer.

**Kentucky.** Only recently has Kentucky become a bad jurisdiction for workers' compensation subrogation. The carrier must intervene or it risks losing its subrogation rights. No reimbursement is allowed from noneconomic damages, and a modified made-whole doctrine is applied. To make matters worse, the plaintiff can settle around the workers' compensation carrier, necessitating active and qualified subrogation counsel in every case. Nobody knows why, but there is no future credit if the past lien does not exceed the amount of the plaintiff's attorney's fees and costs.

**California.** California has favorable rights of reimbursement and participation by the workers' compensation carrier and even allows the carrier to be reimbursed "off the top" before anybody else recovers a dime, subject to a pro-rata obligation toward litigation fees and costs. However, this is all neutered by the simple fact that California allows the employee to settle around the workers' compensation carrier at any time and for any reason, necessitating that the carrier's attorney be familiar enough with the details of the litigation to allow him to try the third-party case on short notice. This makes California a state in which subrogation counsel is all but required.

Legislators, judges, and rule-makers are only human. They react to those who work hard to protect or insist on their rights. Trial lawyers and their lobbies have been indoctrinating those who hold our industry's subrogation rights in the palm of their hands for decades, while our industry, as a whole, has been reluctant to stand up for and preserve our valuable rights of recovery. If the value we place on something is reflected in how hard we fight to protect it, the insurance industry doesn't value workers' compensation very highly. ■

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