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CALIFORNIA WORKERS' COMPENSATION SUBROGATION: The Nuts and Bolts – Part 1

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WORKERS' COMPENSATION INSURANCE GENERALLY



- **System of Civil Laws**
- **Worker who is injured in the course and scope of employment.**
 - Receive Benefits By Applicable Statute
- **Each State Varies**
- **Average Costs**
 - Motor Vehicle Injuries - \$78,000+
 - Slip and Fall Injuries - \$46,000+




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IMPORTANCE OF WORKERS' COMPENSATION





- California is one of the most complex.
- California's workers' comp program is the single largest privatized social benefit system in the world, second only to Social Security in the delivery of medical and indemnity benefits.
- In 2018, over 650,000 workers' comp cases were filed in California.


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STATUTORY SUBROGATION RIGHTS

- California Insurance Code § 11662**
 - Whenever any employer is insured against liability for compensation with any insurer, such insurer is subrogated to the rights of the employer to recover losses arising out of any of the following acts by the insurer:
 - Assuming the liability of the employer for compensation in the manner provided by the law relating thereto.
 - Payment of any compensation for which the employer is liable.
- California Labor Code § 3850, et seq.**



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STATUTORY SUBROGATION RIGHTS

- California Labor Code § 3850, et seq.**
 - Establishes what type of actions are allowed, who can obtain notice, etc.
 - § 3850 Definitions
 - § 3852 – Action against Third Person; Rights of Employee and Employer
 - § 3853 – Copy of Complaint, Proof of Service; Consolidation
 - § 3854 – Action by Employer Alone
 - § 3855 – Action by Employee Alone
 - § 3856 – Actions against Third Party



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SUBROGATION STATUTE CALIFORNIA LABOR CODE § 3852

- § 3852, Action against Third Person; Rights of Employee and Employer**
 - Basis for employer's/carrier's right to recover payments for worker's comp benefits.
 - Provides recovery to an employer who pays or becomes obligated to pay.
- Fremont Comp. Ins. Co. v. Sierra Pine, Ltd., 17 Cal. Rptr.3d 80 (Cal. App. 2004).**



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POLLING QUESTION #1

California Labor Code is the basis for the employer's/carrier's right to recovery payments for workers' compensation benefits made in a third-party action.

True or False



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WHO MAY BRING A THIRD-PARTY ACTION?

- Third-Party Action = Civil Suit
- SOL – 2 Years Personal Injury or Wrongful Death
- Within the applicable SOL
 - Employee can file a third party-action.
 - Carrier can file a third-party action.





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STATUTORY TRUSTEE

- Statutory Trustee
 - Amount of compensation benefits paid to the injured employee.
 - Employee's General Damages
- Can be treated as separate matters for litigation.
- What you must prove:
 - Tortfeasor's Negligence
 - Liability for the Employee's Damages
 - Total Amount of the Employee's Damages





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WAYS TO PROTECT SUBROGATION RIGHTS

- **Four Ways To Protect:**
 1. Notice of Lien
 2. Intervention
 3. Direct Action
 4. Assignment of Lien



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NOTICE OF LIEN

- Employee files and prosecutes the third-party action.
- California Labor Code § 3856(b) and § 3862
- Gives Notice of the Lien to All Parties
- Court Must Address
 - Usually After Entry of Judgment
- When To Use:
 - Smaller Files or Cases
 - Liability Facts Are Weak



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INTERVENTION

- Intervene Into The Employee's Action
- Involves filing a Motion to Intervene
- Difference Between Federal And State Intervention



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STATE COURT INTERVENTION

- **State:** Unconditional right any time prior to trial on the facts and California Labor Code § 3853.
- **IMPORTANT:** If the action is dismissed while your intervention is pending, you are out of luck.





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FEDERAL COURT INTERVENTION

- **Federal: As a Matter of Right or Permissive**
 - Four-Part Test for Intervention as a Matter of Right
 - Timely Motion
 - ‘Significantly Protectable’ Interest
 - Applicant must be situated so that disposition of action may as a practical matter impair or impede the interest.
 - Interest must be inadequately represented by parties.
 - Permissive Intervention
 - Common question of law or fact with main action.
 - Timely Motion
 - Independent basis for jurisdiction over applicant’s claim.





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INTERVENTION CONTINUED

- **Settling Around Workers’ Compensation Claim**
 - CA employee can settle around known as omitting from its settlement with the third party any damages which are duplicative.
- **Segregated Settlement vs. Non-Segregated Settlement**
- **If carrier has intervened, interests are still protected.**
 - You will proceed with your case.
 - Must always be prepared.
 - Tends to occur at the eve of trial.





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INTERVENTION CONTINUED



- Allowed even after statute of limitations has run.
- Have the same procedural rights and remedies as the employee and third party.
- Pandemic
 - Motions are being heard months and months from the date.
 - Secure a motion date and then ask all parties to stipulate.
 - Secure a motion date file an *ex parte* to shorten time.





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DIRECT ACTION



- California Labor Code § 3852
- Must be within the statute of limitations
- If both employee and carrier file two different suits – must consolidate; California Labor Code § 3853.
- Must provide notice.
 - Certified Mail or Personal service





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ASSIGNMENT OF LIEN

- Assign lien to third-party tortfeasor for immediate payment.
 - Agreement to cooperate with tortfeasor.
- Tortfeasor is entitled to deduct the full amount of the lien.
- Plaintiff's counsel can still make a claim for attorney's fees against the lien.
- Must be careful as to future credit.






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POLLING QUESTION #2

There are six ways to protect subrogation rights.

True or False


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WHAT BENEFITS ARE RECOVERABLE?

- **Definition of Compensation**
 - California Labor Code § 3207
 - California Labor Code § 5001 Benefits
- **Compensation Includes:**
 - Medical and Hospital Expenses §§ 4600-4608
 - Applicant's Medical/Legal Expenses §§ 4620-4628
 - Vocational Rehabilitation Expenses §§ 4635-4647
 - Disability Indemnity Payments §§ 4650-4663
 - Death Benefits §§ 4700-4709
 - Interest § 5800




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WHAT BENEFITS ARE RECOVERABLE?

- **Is it a benefit conferred on the employee**
- **Other Benefits That Are Arguably Recoverable**
 - Mitigation of One's Damages
 - Bill Review Charges
 - Case Management Charges
 - Utilization reviews
 - Independent Medical Reviews
 - Defense Qualified Medical Exam




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WHAT BENEFITS ARE RECOVERABLE?



- **Nurse Case Management Fees**
 - California Labor Code § 4600
 - *Patterson v. W.C.A.B. (The Oaks Farm, et al.)*, Case No. ADJ3905924 (W.C.A.B. 2014).
 - Nurse case manager fees is an expense for medical treatment.



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WHAT BENEFITS ARE RECOVERABLE?

- **Entitlement to Full Reimbursement**
 - The defendant cannot litigate reasonableness of payments.
- **Exceptions to Full Reimbursement**
 - Employer's Negligence
 - Tortfeasor can indirectly reduce by establishing employee's damages are less than benefits paid.



"Ready to walk the Reimbursement Maze?"



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ADMISSIBILITY OF BENEFITS

- **California Labor Code § 3854**
 - Evidence of compensation benefits payments are admissible.
 - Proximately resulting from injury and will carry presumption.
 - Does not impose absolute liability on defendant.
- **Breese v. Price, 29 Cal.3d 923 (1981)**
 - Does not allow tortfeasors the right to challenge reasonableness of the amount of benefits paid by the carrier or the handling of the workers' compensation case.



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EXCLUSIVE REMEDY RULE



- California Labor Code § 3602
- Employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability.
- Exceptions to the Rule:
 - Caused by a willful physical assault.
 - Employer's fraudulent concealment.
 - Caused by a defective product manufactured by the employer.



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CO-EMPLOYEES





- California Labor Code § 3601
- Generally barred by Exclusive Remedy Rule
- Exceptions:
 - Willful and unprovoked physical act of aggression.
 - Intoxication
 - Not acting within the course and scope of employment.



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INTENTIONAL ACT/CO-EMPLOYEE



- California Labor Code § 3602(b)(1)
 - If injury or death is a result of an intentional and/or willful physical assault by the employer.
 - Intentional torts not part of employer-employee bargain.
- Employer ratifies the assault of the employee by co-employee, can be added as a named defendant.
 - Ratification can be expressed or implied.



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SERIOUS AND WILLFUL MISCONDUCT

- To prevail must prove:
 - Violation of safety order.
 - Violation was a proximate cause of injury.
 - Employer had knowledge.
- When an employer is found to have caused employee injury by its “serious and willful misconduct”.
 - If proved, employee awarded additional one half of all temporary and permanent disability, medical, and vocational rehabilitation benefits.
- Penalty is uninsurable.



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BARE EMPLOYER

- Another exception to Exclusive Remedy Rule.
- When an employer fails to secure the payment of workers’ compensation.





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CONTRACTUAL INDEMNITY



- California Labor Code § 3864
- Employer can be sued as a third-party defendant when it has contractually indemnified the tortfeasor.
- Typically seen in the construction field.
- Three basic types of Indemnity clauses:
 - Type I Indemnity Agreement
 - Type II Indemnity Agreement
 - Type III Indemnity Agreement



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CONTRACTUAL INDEMNITY

- **Type I Indemnity Agreement**
 - Expressly provides indemnitor is to indemnify indemnitee.
 - Active Negligence
- **Type II Indemnity Agreement**
 - Passive Negligence
- **Type III Indemnity Agreement**
 - If the injury or damage was caused by the indemnitor, but not if caused by a third party other than the indemnitor.
 - Active or Passive Negligence



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CONTRACTUAL INDEMNITY
AGAINST THIRD PARTY

- The insurer is subrogated to – i.e., both benefited and bound by – any contract that it's insured had with a third party.
- Insurer has both statutory rights and contractual rights.
- *Employers Mutual Liability Ins. Co. v. Tuto-Saliba Corp., (1998) 17 Cal.4th 632.*
 - Employers retain the contractual rights and obligations they have in relation to third parties from whom they may seek to recover worker's comp benefits paid to their injured employees.



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FRAUDULENT CONCEALMENT



- Injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment.



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DUAL CAPACITY DOCTRINE

- Recognizes that employers may have multiple duties towards their employees whether based on common law or statute.
- Applies in two different situations:
 1. Injured or killed by a defective product manufactured by the employer and sold, leased, or otherwise transferred to an independent third person for valuable consider.
 2. The employer serves a separate legal role or assumes an obligation toward the employee that is not usually assumed within the employer-employee relationship.


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ENTITY RELATED TO EMPLOYER/ALTER EGO

- A third-party action may be maintained against an agent of the employer for injuries sustained through the negligence of that agent.
- The exclusive remedy provisions do not affect the right to sue third parties with whom the employer has entered into a consensual legal relationship.
- *Gigax Doctrine*


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UM/UIM COVERAGE

- Uninsured motorists' recovery to be reduced by the present value of an award under the Workers' Compensation Act.
- Not considered recovery from a third-party tortfeasor.
 - Not entitled to credit.
 - Not entitled to reimbursement.



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MEDICAL MALPRACTICE

- California Civil Procedure § 3333.1
- Prohibits Subrogation
- Trumps Workers' Compensation Statute

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LEGAL MALPRACTICE

- Soliz v. Spielman*, 118 Cal. Rptr. 127 (Cal. App. 1974).
 - Denies the employer a right of subrogation and/or reimbursement out of the proceeds of a legal malpractice action.
- Several conflicting W.C.A.B. decisions on this issue.

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INDEPENDENT CONTRACTOR

- General Rule: One who employs an independent contractor is not liable for the misconduct of the independent contractor while acting within the scope of the contract.
- Employees of Independent Contractors are injured.
 - Limited to workers' compensation.
 - Can't sue general contractor.
 - Can't sue owner that hired contractor.

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INDEPENDENT CONTRACTOR: PRIVETTE RULE

- An entity hiring an independent contractor is not liable for injuries to the independent contractor's employees.
- An independent contractor's employees cannot sue the party that hired the independent contractor.
- Applies even if there is a failure to comply with workplace safety requirements.
- California Workplace Safety Laws
 - Employees of independent contractors not hirer's own employees.



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EXCEPTIONS TO PRIVETTE RULE

- Retained Control Theory
 - Retain control over contractor's work AND exercises the control that "affirmatively contributes" to injury.
- Failure to warn about a latent or concealed preexisting hazardous condition on property.
- Peculiar Risk Doctrine



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PECULIAR RISK DOCTRINE

- Special, recognizable danger arising out of the work itself.
- Is the work that is being performed "inherently dangerous".
- Liability Imposed
 - Inherently dangerous work is involved, and no special precautions are taken or provided for in the contract in order to avoid the peculiar risk involved.
 - Even where special precautions are taken, having been advised to take the special precautions, ignores the advice, and an injury which could have been avoided by following the advice occurs.



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CRIMINAL RESTITUTION

- Any restitution paid to an employee will be subject to a reimbursement or subrogation claim by the employer or carrier.



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POWER PRESS EXCEPTION

- California Labor Code § 4558
 - Employer knowingly removes or fails to install a safety guard which the manufacturer requires on a machine or power press.



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GOVERNMENTAL ENTITIES

- A subrogated workers' compensation carrier is entitled to use the tort claim notice filed by plaintiff against the governmental entity to satisfy the carrier's claim filing requirement under the tort claims statutes.
- If the employee does not file, then you must file your own tort claim notice.



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WRONGFUL DEATH/SURVIVAL ACTIONS

- Wrongful Death Action - CCP § 377.60
- Survival Action - CCP § 377.30
- Carrier paying death benefits entitled to file a third-party action.
 - California Labor Code § 3851
 - Any recovery by employee's dependents subject to carrier's right to reimbursement.



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POLLING QUESTION #3

An employer can never be sued due to the Exclusive Remedy Rule.

True or False



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PART 2: ADVANCED CONCEPTS IN CALIFORNIA WORKERS' COMPENSATION SUBROGATION

May 11, 2021
11:00 – 12:00 p.m. (CDT)

- Employer Negligence
- Allocation of Third-Party Recovery
- Attorney's Fees and Costs
- Future Credit
- Waivers of Subrogation





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CALIFORNIA WORKERS' COMPENSATION SUBROGATION: THE NUTS AND BOLTS PART 1

QUESTIONS?

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