

# Third-Party Negligence, Subrogation, and Workers' Compensation

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# Why Subrogate?

- The purpose of subrogation is to place responsibility for the injury where it belongs. The employer is entitled, by law, to attempt to recover losses that are the fault of another entity/individual. The claims administrator holds a fiduciary duty to pursue recovery.
- A fiduciary duty is the obligation to operate in the best interest of the employer or the carrier.

# Why Subrogate?

➤ Employer: Subrogation recoveries are reported to the WCIRB as a credit for an insured client's experience modification factor. This could potentially assist with reducing the amount the employer will pay in premium.

**Experience Modifications:** *Factor determined by calculating the loss history, by frequency and severity, and payroll which is used by states and underwriters to establish the insurance premium for an employer. A subrogation recovery could reduce the severity factor for an employer and generate a lower experience mod which could result in a lower premium for the employer. As 3-years of claim history is utilized, a recovery can have a positive impact on an employer for 3-years.*

# Why Subrogate?

- Carriers: Recoveries improve a carriers profit margin as they reduce a carrier's paid loss.
- Self Insured Entity: As the claims are paid by funds directly provided by the self-insured entity, they receive a dollar for dollar impact when a recovery is made. Recoveries will also reduce the amount of the bond they are required to post with the State.

# Definition of Subrogation

➤ Subrogation is the right to pursue reimbursement from any third party whose negligent act or omission caused us to pay a claim or increased the value of the payments made on a claim.

**Example:** Employee is shot in the eye with a nail gun. Potential subrogation exists against the person utilizing the nail gun, owner of the nail gun, manufacture of the nail gun or the company that sold the nail gun.

# Legal Concepts

- The key to a successful subrogation investigation is understanding what needs to be proven.
- Subrogation arises from either an overt act or omission on the part of another party.
- Subrogation potential arises from tortious conduct or omission, auto liability, premises liability, and products liability.

# Negligence

## Elements of Negligence

1. Duty Owed
2. Duty Breached
3. Proximate Cause
4. Loss or Damage

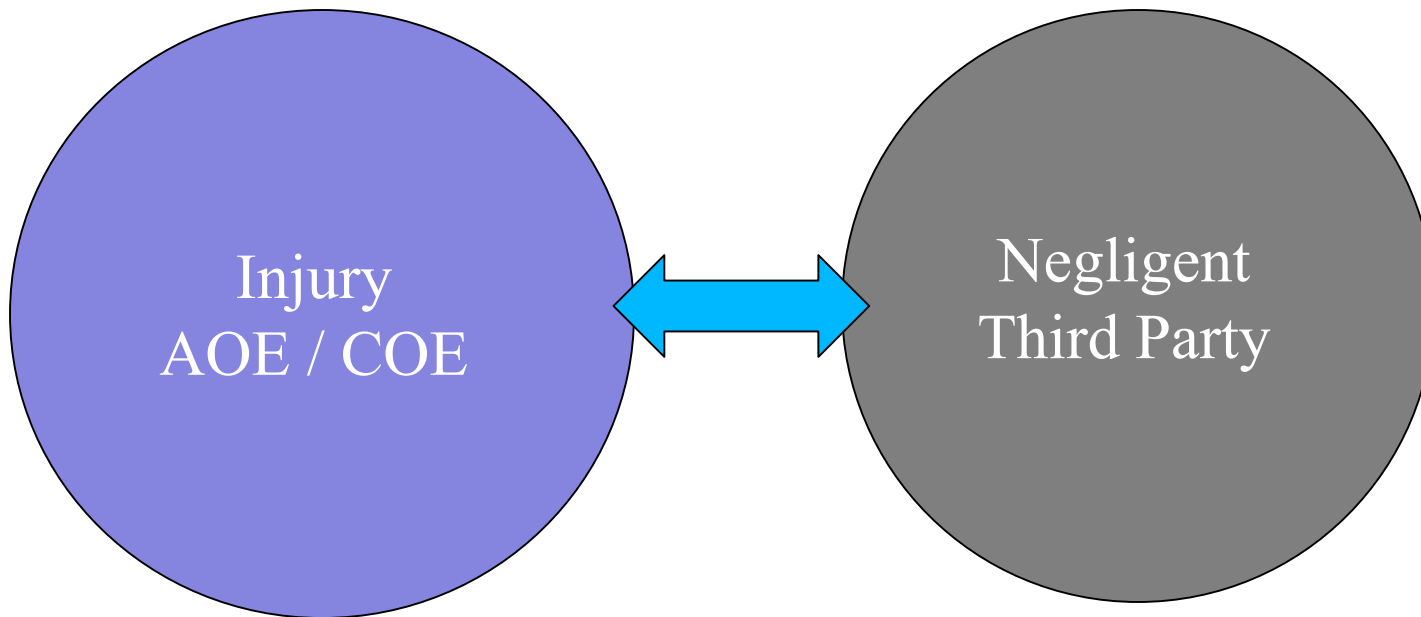
Each of the 4 elements above must be proven to have a successful subrogation claim. You can have a duty owed and breached with damages, however, if you fail to show that the duty breached was the proximate cause of the damages you do not have a valid negligence claim.

# Investigation

- A workers compensation case is investigated to determine if injury occurred in the course and scope of employment. The system is a no fault benefit system. Negligence is not an issue in the investigation process.
- A subrogation case investigation is completed to determine negligence and liability. The Civil Arena is based on damages.
- For the purposes of Subrogation we need to prove that the benefits paid in the workers compensation system were actually owed. Defense can assert that disability or medical care benefits paid were not warranted and diminish the value of our recovery.



# Identifying Subrogation Potential:



# Investigation

Look for injuries related to the actions or inactions of others.

Examples as follows:

- Auto Accident
  
- Premises - slip and falls
  
- Products - Did a piece of equipment cause or contribute to the injury
  
- Is there a potential design defect?

# Investigation Documentation

- Preservation of evidence is essential. Again if we cannot prove it we cannot prevail on it. With our nail gun example we would want to obtain it and save it. We also need to document possession of the gun so we can prove no alterations occurred to it from the time of the accident through our taking possession.
- Spoliation letter(s)
- Investigator to photograph scene, measurements, instrumentation, and take recorded statements from witnesses (for MVA's good to hire a PI with former law enforcement experience)
- Record of chain of custody for secured / preserved evidence

# Methods To Pursue Recovery

- Lien
- Complaint in Intervention
- Complaint

# Statute of Limitations

- **Private Sector**: Suit needs to be filed and served within 2-years from the date of the accident
- **Public Agencies**: 6-months from the date of injury for State, County and City Governments.
- **Federal**: 2-years from date of injury for Federal Government

To protect the statute a formal Complaint needs to be filed. Simply sending a letter is not sufficient.

# Resolution Options

- Settlement with Future Credit
- Sell our lien to the defendant
- 3<sup>rd</sup> Party Compromise and Release
- Verdict

# Steps to Take in Managing the Case

- Identify the Exposure;
- Investigate the Cause and Effect of the injury;
- Secure and preserve any relevant evidence;
- Identify the responsible party;
- Place the responsible party, applicant, employer, and carrier on notice of the subrogation interest;
- Continue with investigation and gather evidence to support claim;
- Provide all parties with 90-day updates on amount of our lien and request 100% reimbursement;
- Identify appropriate resolution strategy;
- Complete cost benefit analysis;
- If necessary, preserve the Statute of Limitations.

# Steps to Take in Managing the Case

- Attempt to avoid resolving the subrogation case prior to the value of the workers compensation case being fully established. This is not always possible. If a coverage limit issue exists early resolution may be warranted;
- Employ outside investigator when exposure and recovery potential warrant – Use Attorney Work Product Privilege to preserve and protect your investigative efforts;
- Conference your case with manager and counsel on a regular basis;
- Establish recovery strategy early in the case and modify as facts are developed;
- When warranted retain services of subrogation counsel;
- When resolved complete appropriate settlement paper work and file on the WCAB. Remember if credit rights are being claimed petition for credit must be filed and an order approving pursued.



# Litigation Management

- When needed, retain qualified subrogation counsel.
- Include all evidence, payment history, medical reports, and documentation with referral.
- Evaluate litigation strategy at all stages. Require defense to consistently provide a cost benefit analysis and resolution recommendations.
- Keep counsel informed of benefit status and developments.
- Collaborate with counsel for best results.

# Pitfalls to Avoid

- Never assume that someone else is protecting your interest. Your interest in a subrogation matter needs to be monitored at all times.
  - Do not assume that the parties in the underlying WC matter are concurrently addressing civil issues / interests.
- Never assume that statutes have been protected. Get copies of appropriate correspondence.
- Do not lose sight of your objective which is a + net cash recovery for client and a closed claim. Monitor costs at all stages.
- Do not waive or reduce recovery rights without agreement from all parties. Often, you are not dealing with your money.
- Always require subrogation counsel to provide an assessment on impact of litigation activities on the net recovery.

**Questions?:**

