

## **SUBROGATION LIENS IN AUTO CASES**

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### **A. What is Subrogation?**

Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand or right. The person who is substituted succeeds to the rights and obligations of the other. For example, insurance companies may have the right to step into the shoes of a party whom they have compensated and sue any other party the compensated party could have sued. Generally, subrogation rights can be created by express agreement (contract) or are implied by operation of law.

### **B. What is a Lien?**

A lien is a claim on property to secure the payment of some debt, obligation or duty.

### **C. Subrogation Under the Pennsylvania MVFRL**

Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) provides that the right of subrogation for entities such as private health insurance carriers is totally eliminated with respect to the claimant's tort recovery. The "flip side" of this provision is found in Section 1722 of the Act, which prevents a claimant in a third party liability suit, or in a UM or UIM proceeding, from recovering the amount of benefits "paid or payable" under private health insurance plans or "any program, group contract or other arrangement for payment of benefits as defined in Section 1719."

Where benefits similar to those found in an auto insurance policy were once recoverable but then later subject to subrogation, now under Section 1722 they simply cannot be recovered, thereby eliminating the need for subrogation. In Section 1722 the legislature has precluded recovery, where in the past subrogation resulted in a reduction of the recovery by requiring a payback by the injured party. The changes brought about in Section 1720 and Section 1722 have zero net effect on the injured party. Browne v. Nationwide Mut. Ins. Co., 449 Pa. Super. 661, 666 (Pa. Super. Ct. 1996)

### **D. Subrogation of Worker's Compensation Benefits**

Act 44 of 1993 repealed Section 1720 and Section 1722 of the MVFRL regarding worker's compensation. Worker's compensation carriers may now seek subrogation for all benefits paid as a result of job related motor vehicle accidents which occurred after the effective date of the Act, August 31, 1993.

The rationale for this right of subrogation is threefold: to prevent double recovery for the same injury by the claimant, to insure that the employer is not compelled to make compensation

payments made necessary by the negligence of a third party, and to prevent a third party from escaping liability for his negligence.... "[Subrogation] is just, because the party who caused the injury bears the full burden; the employee is made 'whole,' but does not recover more than what he requires to be made whole; and the employer, innocent of negligence, in the end pays nothing." Thus where a third party's negligent conduct causes injury to an employee actually engaged in the business of his employer, there is a clear, justifiable right to subrogation under Section 319 of the Workers' Compensation Act. Brubacher Excavating Inc. v. Workers' Compensation Appeal Board (Bridges), 774 A.2d 1274 (Pa. Cmwlth. 2001),

### 1. Recovery From Employer's UM/UIM Policy

In Warner v. Continental Insurance Co., 688 A.2d 177(Pa. Super. 1996), the plaintiff was operating a motor vehicle owned by his employer and was acting within the scope of his employment when he was involved in an accident with a negligent third party. The plaintiff received worker's compensation benefits from his employer's policy, and also received the liability limits of the tortfeasor. The plaintiff then sought recovery of UIM benefits under the employer's policy covering the vehicle. The Superior Court in Warner found that the plaintiff could recover UM/UIM benefits under the employer's policy. However, this would create a fund from which the worker's compensation carrier could assert a subrogation lien. See also, Travelers Indemnity v. DiBartolo, 131 F.3d 343 (3d Cir. 1997).

In the previous arrangement, prior to Act 44 of 1993, a workers' compensation carrier had no right to subrogate against an employee's claim and the employee could not recover from the uninsured motorist carrier any amounts payable under workers' compensation. In the new arrangement, the employee's recovery from the uninsured motorist carrier is not to be reduced by the amount of any workers' compensation benefits payable, but the workers' compensation carrier is given the right of subrogation for any benefits paid to the employee under workers' compensation.

### 2. Subrogation for UM Benefits Paid Under Personal Auto Policy

In contrast to the Warner case, the Superior Court in Standish v. American Manufacturers Mutual Insurance Co., 698 A.2d 599 (Pa. Super. 1997), held that a worker's compensation carrier is not entitled to subrogation to an amount received by the claimant from an uninsured motorist settlement under a personal auto policy which the claimant purchased and paid the premiums. According to the Superior Court, this payment was not considered a "third party recovery."

As the Court explained in American Red Cross v. Workers' Compensation Appeal Board (Romano), 745 A.2d 78, 81 (Pa. Cmwlth. 2000), affirmed per curiam, 564 Pa. 192, 766 A.2d 328 (2001), there is a fundamental difference between "proceeds obtained by a claimant through his *own* insurance policy, be it uninsured or underinsured provisions of that policy, the premiums for which are paid exclusively by the claimant" and proceeds obtained from a third party." (emphasis in original). Consequently, where a claimant receives monies from a policy purchased and paid for by the claimant for his own benefit, the employer does not possess a subrogation right. However, a very different issue is presented when a claimant receives proceeds from a policy, the

premiums for which are paid exclusively by employer. Schwaab v. Workers' Comp. Appeal Bd. (Schmidt Baking Co.), 832 A.2d 1164, 1170 (Pa. Commw. Ct. 2003)

### 3. Recovery From Co-Employee's Policy

In Gardner v. Erie Insurance Co., 691 A.2d 459 (Pa. Super. 1997), affirmed, 722 A.2d 1041 (Pa. 1999), the plaintiff was injured in a car owned by a co-employee. The cause of the accident was the negligence of a phantom vehicle. The plaintiff and the co-employee were acting within the scope of their employment at the time of the accident. The plaintiff recovered UM benefits from his own policy and also received worker's compensation benefits. Plaintiff then sought to recover UM benefits from the co-employee's personal auto policy. Erie denied the claim on the theory that the plaintiff had received worker's compensation benefits and therefore could not seek recovery from his co-employee. However, the court noted that the claimant's case had nothing to do with the alleged negligent acts of his co-employee. Therefore, the co-employee immunity provision in the Pennsylvania Worker's Compensation Act did not bar the UM claim under the co-employee's personal auto policy.

### 4. Subrogation Lien Against Consortium Claims

Occasionally, a plaintiff's attorney may seek to shield a portion of his recovery for a work-related injury by shifting some of the settlement proceeds into the spouse's consortium claim. In Darr Construction Co. v. W.C.A.B., 715 A.2d 1075 (Pa. 1998), the Pennsylvania Supreme Court noted that a consortium claim is separate and distinct from the spouse's bodily injury claim. The Court further noted that the Worker's Compensation Act provides a right of subrogation against "the employee, his personal representative, his estate or his dependents." Spouses are not included in this statutory provision. Therefore, the Court held that the employer/worker's compensation carrier had no subrogation interest in the claim of the injured worker's spouse.

### 5. Does the Auto Carrier Have an Obligation to Protect a Potential Lien Asserted by a Worker's Compensation Carrier?

The short answer here is that there is no obligation on the part of the auto carrier to include the name of the worker's compensation carrier or the employer on the settlement draft. However, it is a good practice to include in your general releases an agreement on the part of the plaintiff to defend and indemnify the defendant and/or the insurer for any claims that might be asserted by the employer or worker's compensation carrier.

Generally, a plaintiff's attorney does not have an affirmative obligation to notify the worker's compensation carrier of the settlement of a third party claim. Likewise, the plaintiff's attorney has no affirmative obligation to protect the subrogation lien of the worker's compensation carrier. However, although the worker's compensation carrier does not have a direct right against the plaintiff's attorney who does not notify it of the proposed settlement, the worker's compensation carrier clearly does have a right of action against the injured employee for repayment of the lien, even if the settlement has been concluded by the time the comp carrier learns of the third party claim.

6. Do Self-Insured ERISA Plans, HMOs or Worker's Compensation Carriers Have a Direct Cause of Action for Reimbursement of Medical Payments Even if no Claim is Pursued by the Injured Party?

The main difficulty with these claims is that they are typically asserted well before the expiration of the statute of limitations by the worker's compensation carrier, the HMO or the self-funded ERISA health plan. Although at the time that the claim is made, the potential claimant may have indicated that he does not intend to pursue a claim (e.g., he would be a limited tort plaintiff), but the possibility always exists that the claimant will subsequently change his mind and will file suit prior to the expiration of the statute of limitations. If a payment has been made to the worker's compensation carrier, the ERISA plan or an HMO prior to the filing of suit by the injured claimant, such payment could deplete the available bodily injury liability coverage for the insured. This is especially true where the insured has limited coverage, (e.g., a 15/30 policy).

No suits, to my knowledge, have been filed by an HMO or an ERISA self-funded health plan seeking reimbursement of health benefits paid to a claimant. However, claims have been pursued by worker's compensation carriers in inter-company arbitration. With regard to inter-company arbitration, the results may vary, depending upon the decision maker at the time. It is recommended that a one year deferment be sought whenever there is a possibility that the claimant can still file a suit in his own name prior to the expiration of the statute of limitations.

**E. "Attorney's Liens"**

From time to time, letters may be received from a claimant's former attorney in which that attorney asserts that the carrier is required to "protect or honor" his claim for an attorney's fee from the proceeds of the settlement. Despite the assertions of plaintiff's counsel, there is no case law to support the proposition that an insurer may be liable to a former attorney of a claimant who was discharged by the claimant before the settlement was finalized. In many instances, these disputes can be handled by putting the name of the claimant, the current attorney and the former attorney on the check and they can then resolve their differences without further involvement of the insurer. However, where the claimant objects to such an arrangement, the check should be made payable to the claimant only (and his new attorney, if there is one). In this type of situation, the recommended practice would be for the claimant to execute an indemnity agreement which would cover all liens, including any lien which might be asserted by the former attorney.

In the case of In re: Callahan Settlement Proceeds, 6 Pa. D.& C. 4<sup>th</sup> 637 (Lycoming County) the former attorney tried to obtain an order from the court affirming his entitlement to a "charging lien" against 1/3 of the gross settlement proceeds. However, the court refused the petition to impose a charging lien. The court noted that before a charging lien can be imposed on a settlement, there has to be some indication that the former attorney is or will be precluded from pressing his claim directly against his former client for his quantum meruit share of the proceeds. For example, a charging lien will be imposed where the settlement fund might be depleted by creditors with prior claims, where the client is insolvent, or where the client is

attempting to defraud the attorney. Absent such extraordinary circumstances, the courts will take the position that the claim by a former attorney for a share of the settlement proceeds is something that should be resolved between the claimant and the former attorney in a separate proceeding, without any involvement of third parties.

## **F. ERISA Liens**

Subrogation may be permitted in certain circumstances for payments made pursuant to a self-funded ERISA plan. In FMC Corp. v. Holliday, 498 U.S. 52 (1990), the United States Supreme Court held that Section 1720 of the MVFRL was preempted by the provisions of ERISA (Employee Retirement Income Security Act) which is a federal law governing employee benefit programs. The Supreme Court held that only self-funded programs preempt the MVFRL. self-insured ERISA plans were not to be considered/deemed insurance companies for purposes of ERISA, and state laws, such as Pennsylvania's, which purported to regulate such plans were, to that extent, overridden. In other words, employee benefit programs that are wholly funded through insurance are not preempted by ERISA, and therefore they have no right of subrogation.

Thereafter, Section 1722 of Pennsylvania's motor vehicle code was found to be preempted by ERISA in Travitz v. Northeast Dept. ILGWU Health and Welfare Fund, 13 F.3d 704 (3d Cir. Pa. 1994), where a self-funded plan was involved. There the circuit court reasoned that Section 1722 had a "connection" to ERISA, which is the equivalent of being "related to" an employee benefit plan under the preemption clause of the statute. As such, Section 1722 had the effect of subjecting plan administrators to conflicting state regulations, the specific evil ERISA was intended to address. Accordingly, Section 1722 was found to be inapplicable to self-insured ERISA plans.

In order to determine whether the plan which is asserting the lien is in fact a fully or partially self-funded benefit plan, it is recommended that a copy of the plan be obtained, as well as the plan's Form 5500 for the year in which the payments are made. The plan documents will help to determine whether in fact there is a contractual right of subrogation, and the Form 5500 will identify whether there are any insurance policies which actually bear the risk of loss.

If the employee benefit plan is insured, the state may regulate it. This includes the right to bar the plan from seeking subrogation for benefits paid. However, if the plan is self-funded, the state may not regulate it since it is deemed not to be an insurance company, insurer or engaged in the business of insurance. In short, insured plans are open to regulation by the state, and the state rules prohibiting subrogation may be applied to such plans. On the other hand, self-funded or uninsured employee benefit plans are entitled to subrogation.

## **G. Subrogation Claims From HMO's**

HMO's have argued that they are entitled to subrogation because HMO's are not "insurance companies, insurers or engaged in the business of insurance" for purposes of the ERISA savings clause. In addition, the Pennsylvania Health Maintenance Act, 40 P.S. §1551, *et seq.* also makes a distinction between HMO's and insurance companies.

Whether HMO is or is not entitled to subrogation from recoveries made in third party auto cases had been an open question of law in Pennsylvania for some time. However, a 2005 decision by Judge Bartle from the United States District Court for the Eastern District of Pennsylvania opened the door to a final determination that HMO's are in fact entitled to subrogation.

In Wirth v. Aetna U.S. Healthcare, 2004 WL 739878 (E.D. Pa.), the insured, Wirth, was injured in a motor vehicle accident caused by a third party tortfeasor. His treatment for those injuries was covered under an HMO healthcare agreement. These benefits were part of an ERISA-qualified employee benefit plan and in excess of those already paid by Wirth's household auto insurance policy. Wirth eventually obtained a settlement from the third-party tortfeasor. The insurer sought subrogation from that settlement, which the insured contended was prohibited by Pennsylvania's MVFRL anti-subrogation provision.

Wirth paid off the insurer to release its lien and then filed an action in state court to recover the monies he paid to the insurer. The insurer removed the case to federal court on the grounds of federal question jurisdiction since ERISA was implicated because the benefits were part of an ERISA-qualified employee benefit plan. The district court concluded that the claim was preempted by ERISA and, more importantly, that the MVFRL in general and the anti-subrogation provision of Section 1722 specifically did not apply to the insurer, which was an HMO covered by Pennsylvania's Health Maintenance Organization Act (HMO Act), 40 Pa. Cons. Stat. § 1560(a).

The Wirth decision was handed down by the district court on April 5, 2004, and an appeal was taken to the Third Circuit Court of Appeals. On appeal, the Third Circuit Court agreed with the district court that ERISA preempted the claim, therefore, the matter was properly removed to federal court. Because it was a matter of undecided and unpredictable state law the Third Circuit Court of Appeals certified the question, whether the insurer HMO is exempt from the anti-subrogation provision of the MVRFL by virtue of the HMO Act, to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court found that there was nothing in the MVFRL that specifically and in exact terms applied to HMOs and, therefore, the anti-subrogation provision of the MVFRL did not apply to HMOs.

It is significant to note that the HMO in the Wirth case was an employee benefit plan within the scope of ERISA. Therefore, the court could have limited its holding to ERISA qualified HMO's. Nevertheless, the opinion set out by the Honorable Marjorie Rendell applied broadly to all HMO's, not just self-funded or partially self-funded ERISA employee benefit plans.

## **H. Medicare Liens**

Medicare has a right of reimbursement with respect to payments made for items or services for which payment can reasonably be expected to be made under an automobile or liability insurance policy. 42 U.S.C. §1395y(b)(2)(A)(ii). Under the regulations which have been adopted to enforce Medicare, Medicare is subrogated to any individual, provider, supplier, physician, private insurer, state agency, attorney or any other entity entitled to payment by a third

party payer. In addition, if it is necessary for Medicare to take legal action against a “primary plan” which fails to provide for primary payment (or appropriate reimbursement), then Medicare may recover twice the amount of the lien. 42 U.S.C. §1395y(b)(3)(A). Medicare may waive its lien, in whole or in part, if it determines that the waiver is in the best interest of the program, or if the probability of recovery is low, or if the amount involved does not warrant pursuit of the claim. The exact amount of the Medicare lien can be determined by contacting the Medicare Coordinator of Benefits.

## **I. Medicaid Liens**

Pennsylvania law provides that the Department of Public Welfare (DPW) has the right to recover the reasonable value of benefits provided to a beneficiary “because of an injury for which another person is liable, or for which an insurer is liable in accordance with the provisions of any policy of insurance...” 62 P.S. §1409(b)(1). DPW may compromise, settle or release any such claim if DPW determines that collection would result in “undue hardship” upon the person who suffered the injury or in a wrongful death action upon the heirs of the deceased. However, waivers of these liens are apparently quite rare. Where a beneficiary of Medicaid payments brings an action against a third party who may be liable for the injury, notice of institution of legal proceedings, notice of settlement and all other notices shall be given to DPW. Section 1409(b)(12). In the event of judgment or an award in a suit against a third party or insurer, the court first deducts reasonable litigation expenses, including reasonable attorney’s fees, and then allows a first lien on the remaining amount to DPW. Section 1409(b)(7).

Finally, Section 1409(b)(9) provides that any person who, after receiving notice of DPW’s interests, knowingly fails to comply with the obligations established under the law shall be liable to DPW, and the Department may sue to recover from that person.

## **J. Cash Assistance**

Generally, cash assistance recipients have a similar obligation to pay back to DPW amounts received from the date of the accident causing the injury to the time of the settlement or collection of judgment. 62 P.S. §1974. Amounts received from personal injury settlements can be counted in determining a welfare recipient’s eligibility for future benefits.

## **K. Railroad Retirement Board**

As part of the Railway Labor Act, 45 U.S.C. §351, et seq., there is a provision that the Railroad Retirement Board is entitled to be reimbursed with respect to any benefits paid to a claimant for an injury for which he receives a settlement. The Railroad Retirement Board takes the position that it has a right of reimbursement from any person or company who does not protect the RRB’s lien, i.e., that person or company shall remain liable to the RRB until the RRB is reimbursed in full. In other words, the person or company making payment on the personal injury claim has an obligation to ensure that RRB is reimbursed out of any settlement which is made. Presumably, it is this person or company’s obligation to then seek a refund of the settlement money from the claimant.