

# WHAT EVERY ADJUSTER NEEDS TO KNOW ABOUT WORKERS' COMPENSATION SUBROGATION

Presented by:

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# subrogate

(sŭb' rō-gāt) *VERB*

TO PUT IN PLACE OF  
ANOTHER; TO SUBSTITUTE.



# WHAT IS SUBROGATION?

**Subrogation from an Insurance Perspective.** Recouping medical and income benefits for a claim the insurance company paid, when another party should have been responsible for paying at least a portion of the claim.

**Subrogation from a Legal Perspective.** The substitution of one person in the place of another to make a claim for a lawsuit right.

**Teamwork.** If we are stepping into the shoes of another, we need to know as much information as possible about the claim and claimant in order to succeed.

## SUBROGATION CHECK-LIST

- ❖ Determine if there is a potential viable third party claim.
- ❖ Obtain the police report and witness statements.
- ❖ Investigate the claim relating to third party action.
- ❖ Determine if the Claimant is pursuing the matter.
- ❖ Send notice of lien & demand letter to the Claimant, Claimant's attorney, third-party insurance carrier and third-party insurance carrier's attorney (consider a conversion lawsuit, if necessary).
- ❖ Retain an attorney to represent your interests as they may not be protected by the Claimant.
- ❖ Deadline for the Statute of Limitations – 2 years from accident date.

# HOW TO IDENTIFY SUBROGATION

Was there an auto accident? If yes, who was at fault?

Did the injury occur off the employer's premises?

Was the injured employee using equipment or machinery? If so, was the equipment or machinery owned, maintained, or manufactured by a third party?

Did any other third party individual contribute to the work injury?

If there is a third party involved, it is always worth investigating further.



"A show of hands please...how many of you  
had the foresight to purchase  
flood insurance?"

# HOW TO INVESTIGATE A SUBRO CLAIM

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Take statements from the injured employee, supervisor, and any other witnesses.

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Ask the employer to take pictures of the accident scene and any related vehicles/equipment.

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If an auto accident, obtain the police report as quickly as possible.

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Determine whether there is any surveillance of dash cam footage.

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Put all parties on notice once subrogation is identified.

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*Rule of Thumb for adjusters – go overboard and get too much info rather than too little.*

# WORKERS' COMPENSATION CARRIERS' RIGHTS IN THIRD-PARTY MATTER

Right of **first recovery** in a third party lawsuit to recover damages.

Right to **Intervene**.

Right to **pursue claim** in place of the injured worker.

Right to subrogation even if benefits have **not matured**.



# HOW TO IDENTIFY SUBROGATION



# IDENTIFYING SUBROGATION

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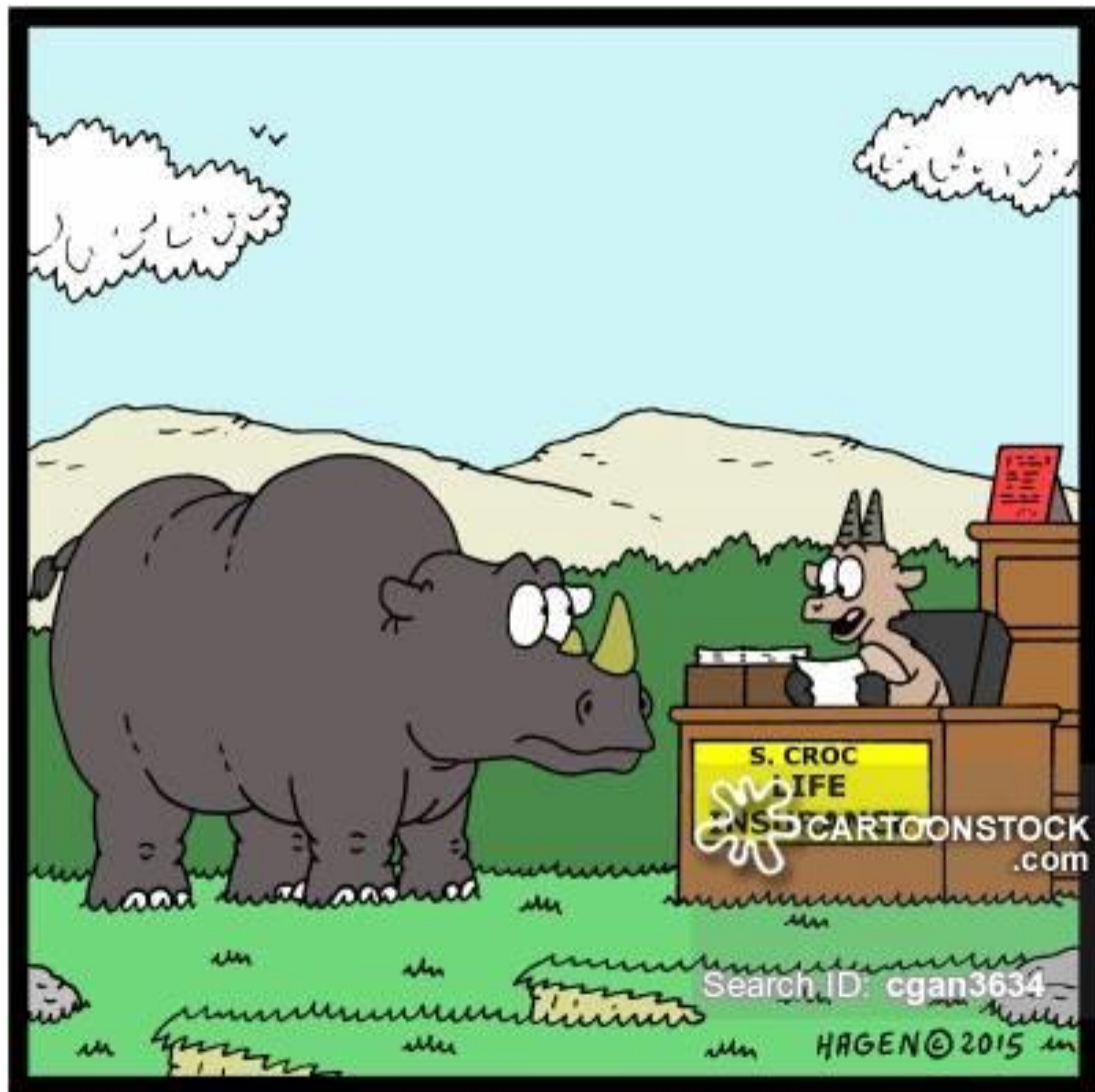
It is not always easy to identify what workers' compensation injuries might have a subrogation interest.

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Subrogation always requires a third party.

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Consider some of the third parties that may not be immediately apparent.



Well, you're on the endangered species list,  
so you had to expect high premiums...

# WHAT KIND OF CLAIMS MAY HAVE SUBROGATION?

## CAR ACCIDENTS

You can subrogate if the other driver is more than 50% at fault. This is the most common third party lawsuit (failure to maintain proper control of vehicle, failure to yield the right of way, failure to yield, deviation from lane). Texas has modified comparative negligence which bars plaintiff's recover if more than 51% liable for an accident.

Contributory negligence bars all recovery. In 1995, Texas adopted modified joint and several liability, making a defendant responsible for all damages if more than 50% liable, but the defendant can seek contribution from co-defendants.

# WHAT KIND OF CLAIMS MAY HAVE SUBROGATION CONTINUED?

Injuries Caused by Other Entities – Consider the mechanism of injury. It may have been caused by a third party.

- For example, a construction worker is injured at a construction site because he tripped over an item left by an employee of a different subcontractor. Or, a machine that does not have a “kill switch” injures a worker.

## Injuries Occurring Off-Premises

- Employee traveling for business falls on a wet floor at the airport. There may be a premises liability claim against the airport. Duty owed to invitee v. licensee v. trespasser.

# GENERAL NEGLIGENCE EXAMPLES

**Employee slows for traffic, adverse rear-ends vehicle.**

- Subro potential? - Failure to maintain proper lookout?

**Adverse stops for traffic, employee rear-ends.**

- Subro Potential? Tail/break lights working?
- Something (i.e., mud) covering tail lights?
- Sudden stop?

**Adverse pulls out from stop sign, strikes employee's vehicle who had right of way.**

- Subro Potential? Failure to yield?

**Employee pulls out from stop sign, strikes adverse vehicle who had right of way.**

- Subro Potential? Excessive speed?
- Lights on?
- Turn signals on? (proper turn).



**“No, sir, I’m afraid you can’t collect on  
your fire insurance just because you got fired...”**

# THE CLAIMANT'S ELECTION

Does the claimant have to elect between workers' compensation benefits and a third party claim?

No. An employee or legal beneficiary may seek damages from a third party who is or becomes liable to pay damages for an injury or death that is compensable under this subtitle and may also pursue a claim for workers' compensation benefits under this subtitle.



# SCENARIO #1



- ❖ Rhett Butler is a bus driver for Gettysburg Bus Company in Tara County, Texas when he is driving down a rural road and hits a horse owned by Scarlett O'Hara. Gettysburg Bus Company's workers' compensation company accepts the claim and pays benefits to Rhett Butler.
- ❖ Can they pursue subrogation against Scarlett O'Hara?



"Oh, sure, the whole nine lives thing is great until the life insurance premiums come due."

# HOW TO PURSUE SUBROGATIO N



# WHAT SHOULD YOU DO IF THERE IS A POSSIBLE SUBROGATION CLAIM?

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Immediately secure the scene, and keep employees from tampering with the site. Secure any equipment involved in the accident, and restrict access to it.

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Immediately take photos of the accident site and the machinery, vehicle or premises involved in the accident before they are altered. If the accident happened somewhere other than the workplace, have your personnel take photos of the site.

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Get the name, address, employer and other contact information of the person who contributed to the accident.

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Get medical attention for anyone who needs it. Then, get statements from eyewitnesses and the injured employee as soon as possible. If necessary, get eyewitnesses' names so you can interview them later.



"We're denying this claim of a paper cut  
from a game of 'Rock, Paper, Scissors'  
played in the employee lounge."

# AUTOMOBILE ACCIDENTS

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Police Report, Statements & Photos. Talk to Officer.

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Names and Statements of Witnesses, Field Adjusters and/or Insured.

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Skid Marks, Debris, Signs, Signals. Including Accident Reconstruction Reports, Fire Reports, Weather Reports, and Traffic Light Reports.

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Obtain photographs of any damage to the vehicles involved or diagrams of the scene.

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Weather, trip logs, vehicle inspections.

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Possible use of expert.

## SCENARIO #2



Dr. Peter Venkman is called to the Ghost Hotel to investigate paranormal activity. While there he slips and falls on a loose floor tile while being slimed by a ghost. His workers' compensation carrier pays for medical treatment and lost wages.

Can Ghostbusters' workers' compensation carrier file a lawsuit for subrogation against the Ghost Hotel?

## LIMITATIONS ON RIGHT TO SUBROGATION

### Practical Considerations

- Responsible party does not have insurance, has low limits of insurance, or is in bankruptcy. Texas has minimums of \$30,000/\$60,000/\$25,000 – 30/60/25.
- Waiver of Subrogation (hold-harmless agreements) – arises from specific waiver of subrogation provisions in contract; common in construction contracts and leases.
- Indemnification - an indemnification agreement requires indemnity in the event of an accident.
- Attorney Fees – up to 1/3 of subrogated recovery, plus share of expenses paid to Claimant's attorney.





## SCENARIO #3



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Bella Swan is driving a delivery truck for Cullen Industries when she is rear-ended by Jacob Black. Bella sustained injuries to her neck and back and Cullen Industries workers' compensation carrier paid benefits to Bella and her medical providers.

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What steps should the workers' compensation carrier take to try and recover money it has paid out on the claim?

## **Mother Goose Insurance Co.**



**"The old woman who lives in a shoe is  
covered for fire, theft and liability  
...but not athlete's foot."**

# RECOVERY



# HOW TO SECURE SETTLEMENT FROM THE THIRD PARTY

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Reach agreement for installment payments before lawsuit or request to suspend driver's license.

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Suspend driver's license under Texas Transportation Code Section 601.152 ("reasonable probability of judgment"). Submit the SR-106 – safety responsibility form.

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Under Texas Insurance Code 1952.155(b) there can be no subrogation for PIP payments.

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If obtain a judgment (default, summary judgment, directed verdict, or jury verdict/judgment), can also suspend license.

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If obtain judgment, obtain and file Abstract of Judgment (makes judgment public record and gives it legal effect and gives lien on nonexempt real estate) where debtor owns property, secure Writ of Execution (allows constable to take nonexempt property) from county clerk to allow sheriff to seize non-exempt property. Can also seek Writ of Garnishment (garnish money) or Turnover Order (order for person to turn over non-exempt property).

# WHAT IS NON-EXEMPT AND PROTECTED FROM JUDGMENT CREDITORS?

1. A debtor's home is protected from creditor seizure except for mortgage note lenders or taxing authorities, or construction lien claimants who perfected a homestead mechanic's lien contract.
2. Retirement plans and life insurance is exempt from creditor seizure.
3. For a single person, \$30,000, and for a married person, \$60,000 of personal property is exempt from seizure. Cash in bank accounts or under your mattress is not exempt.



"I'm sorry, but when you took out the policy,  
you never specified that it was a  
mobile home."

# HANDLING THE “HOLIDAY” ADVISORY 2004-02

During the period when the injured employee is paying medical benefits under these requirements, health care providers must continue to submit requests for preauthorization and to submit their medical bills to the workers' compensation insurance carrier as required by Commission rules. The workers' compensation carrier is responsible for responding to those requests for preauthorization and for adjusting the medical bills received as required by Commission rules. However, once the medical bills are adjusted, the insurance carrier should submit the medical bills and the required explanation of benefits to the injured employee for prompt payment of the adjusted amount by that employee to the health care provider. The insurance carrier should subtract the adjusted bill amounts and the amounts of any other benefits due from the remaining subrogation interest to determine when the insurance carrier is required to resume payment of benefits.



# BENEFITS “HOLIDAY”



Explanation  
of Benefits still  
sent to Carrier  
and should be  
audited  
appropriately.

Adjusted  
medical bill  
shall be  
forwarded to  
the injured  
worker for  
payment.

Claimant  
required to  
pay benefits  
until  
exhaustion of  
recovery.



"I couldn't get life insurance. Turns out that curiosity is a pre-existing condition."

# ATTORNEY'S FEES

An insurance carrier whose interest is not actively represented by an attorney in a third-party action shall pay a fee to an attorney representing the claimant in the amount agreed on between the attorney and the insurance carrier. In the absence of an agreement, the court shall award to the attorney payable out of the insurance carrier's recovery:

1. a reasonable fee for recovery of the insurance carrier's interest that may not exceed one-third of the insurance carrier's recovery; and
2. a proportionate share of expenses. shall pay a fee to an attorney representing the claimant in the amount agreed on beforehand.

# TEXAS ETHICS OPINION RE. CLAIMANT'S ATTORNEY FEES

Can an attorney representing a workers' compensation claimant charge a contingent fee based on the gross recovery, including the workers' compensation lien?

## AN ATTORNEY CAN'T DO THIS

**TOTAL SETTLEMENT - \$100,000**  
**LESS 1/3 ATTORNEY FEES - \$33,333**  
**LESS REIMBURSEMENT TO COMP CARRIER - \$50,000**  
**MONEY TO CLAIMANT - \$16,662**

## AN ATTORNEY MUST DO THIS

**TOTAL SETTLEMENT - \$100,000**  
**REIMBURSEMENT TO COMP CARRIER - \$50,000**  
**OF \$50,000 LEFT, 1/3 TO ATTORNEY - \$16,667**  
**MONEY TO CLAIMANT - \$33,333**

# TEXAS ETHICS OPINION RE. CLAIMANT'S ATTORNEY FEES

- The attorney may not collect a fee from the claimant based on the gross recovery, part of which is required to be paid to the workers' compensation carrier.
- The Carrier's lien is subject to attorney fees of up to one-third.



**“Your insurance provides coverage for catastrophic events — but a bad haircut doesn’t qualify.”**

# SCENARIO #4

- ☐ Captain America was driving his truck for his second job as a pizza delivery man.
- ☐ Captain America was t-boned by a red light runner.
- ☐ S.H.I.E.L.D. Insurance Company paid out workers' compensation benefits to Captain America and is pursuing subrogation.
- ☐ S.H.I.E.L.D. has come to an agreement with the third party carrier but the carrier won't settle until Captain America agrees and signs a release. The carrier can't find Captain America because he is overseas on assignment.
- ☐ How would you respond?



## POST SETTLEMENT CONSIDERATIONS: CONVERSION

Conversion is the wrongful exercise of dominion and control over another's property in denial of, or inconsistent with, his rights.

Statute of limitations for conversion is 2 years.



# Gilvortney Insurance Company



"I don't think there *is* such a thing as malpractice insurance for burglars."

## APPEAL NO. 032973-S, CARRIER CAN NOT SUBRO AGAINST CLAIMANT'S UNINSURED MOTORIST CARRIER

Facts: claimant was involved in a work-related motor vehicle accident and received \$25,000 from his own insurance company pursuant to his UM coverage. Claimant paid the premiums for the UM coverage.

Ruling: retreating from APDs 001511 and 013070, the AP concluded that a carrier can not seek subrogation against the UM carrier because, (1), there's no 3<sup>rd</sup> party, (2), there were no damages, and (3) there's no equity when an injured employee pays for the UM coverage him/herself, but the carrier reaps the benefit.



"That's an interesting story. I'm a lawyer.  
Who owns the wall?"

## “FIRST MONEY” & INTERVENTION

TEXAS MUTUAL INS. CO. V. LEDBETTER, 251 S.W.3D 31 (TEX. 2007).

Facts: Charles Ledbetter was electrocuted in August, 2003 while working, and Texas Mutual Insurance Company (TMIC) paid \$6,000 in funeral expenses and began paying \$1,258/month in death benefits to the widow and minor son. The decedent's family sued third parties, and the case settled for \$4.5 million two weeks before trial. TMIC filed a petition in intervention for subrogation of past and future benefit payments.

Plaintiff's attorney filed a non-suit. The trial court denied TMIC's motion for intervention.

TEXAS MUTUAL INS. CO. V. LEDBETTER, 251 S.W.3D 31  
(TEX. 2007).

Court's Rationale: Citing Texas Labor Code Chapter 417, the Court stated, "There is nothing discretionary about this statute; a carrier's right to reimbursement is mandatory. In the words of the statute: The net amount recovered by a claimant in a third-party action *shall be used* to reimburse the insurance carrier for benefits, including medical benefits, that have been paid for the compensable injury." The carrier had every right to intervene 2 weeks before trial, and has a right to subrogation recovery. **The workers' compensation carrier gets the first money recovered by an injured employee, citing Argonaut Ins. Co. v. Baker, 87 S.W.3d 526, 530 (Tex.2002)**

## SCENARIO #5



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Bruce Banner works for the Green Machine Company and is delivering isotopes for his employer. Dr. Evil runs a red-light and side-swipes Bruce Banner. Bruce Banner wants to sue Dr. Evil but finds out that Dr. Evil does not have insurance, so he decides that he's not going to file a lawsuit.

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Can the workers compensation carrier pursue a liability claim against Dr. Evil when Bruce Banner decides he's not going to pursue a claim?

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Can the workers compensation carrier pursue a liability claim against Dr. Evil when Dr. Evil does not have car insurance?

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What if Dr. Evil is driving his Ma-Evil's car? (Ma-Evil is Dr. Evil's evil mother).

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OKAY, BUT DON'T TRY TO OPERATE  
IT UNTIL I INVENT INSURANCE.



B2/00



**THANK YOU FOR ATTENDING  
HAVE A GREAT DAY**

THE LAW OFFICE OF RICKY D. GREEN, PLLC