

# THE FORUM

## Subrogation

### MODERATOR



**Richard Lenkov**,  
capital member,  
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Mr. Lenkov's practice areas include insurance litigation and workers compensation, among others. With nearly 20 years of experience, he serves as co-chair of the Claims and Litigation Management Alliance's Workers Compensation Committee.

### How do you identify potential subrogation in a workers compensation claim?

**KRIS McCONNELL:** Most subrogation can be identified in an initial or subsequent investigation. Look for the obvious by asking who is at fault: third party, faulty equipment maintained by a third party, a physician who made a mistake?

**CASEY WOODRUFF:** When significant injuries occur, investigate to determine if a potential culpable defendant exists other than the employer. At construction sites with multiple contractors or where mechanism of injury involves alleged defective or malfunctioning equipment, we frequently investigate third-party actions. This may also include any outside company that was on the employer's premises to service the machine.

**JONATHON SAYRE:** The most critical aspect is the identity of a true third-party defendant. The investigation process should seek to identify any party that does not qualify as an employer or special employer under the Labor Code. If there is a third party, your attorney should prepare an analysis of that party's involvement to the incident and whether there is any articulable cause of action.

### Once you decide that there is subrogation potential, how do you decide whether to actually pursue recovery?

**McCONNELL:** First, meet with your client to see if there is a hold-harmless agreement or something that would preclude you from pursuit. Second, decide whether the pursuit will bring recovery dollars that cover the time and effort needed.

**WOODRUFF:** We consider the likely size of the workers compensation lien, cost in pursuing litigation against the third party (which is traditionally much higher than the expenses associated with a workers compensation case), existence of insurance and our likelihood in showing fault on behalf of the tortfeasor.

**SAYRE:** Counsel and carrier should discuss strength of the case against the third party, including the ability to prosecute the case, size of the lien and the cost to recover. Other considerations include whether the injured employee's counsel will file their own civil action against the third party. If so, counsel and carrier can discuss whether it makes more sense to file a Notice of Lien or intervene into the employee's civil action.

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Jonathon Sayre, Manning & Kass, Ellrod, Ramirez, Trester LLP

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**SUZY BRADEN:** It is a business, then a financial, decision. We do not subrogate if the injury resulted from an incident with a patient or family member of the patient. We do not pursue it if the amount is under \$1,000.

## Tell us something unique in your state about subrogation.

**McCONNELL:** We handle multiple jurisdictions, but specifically in Florida we use the Manfredo formula (see *Manfredo v. Employer's Casualty Insurance Co.*): third-party settlement amount, less attorney fees and costs, divided by the full case value. That gives you the percent value of the lien.

**WOODRUFF:** In Illinois, the *Kotecki* case establishes that a workers compensation carrier is entitled to reimbursement of 75% of what they have paid in workers compensation benefits.

**SAYRE:** If a Notice of Lien is filed, the lien will be reduced by the Common Fund Doctrine. This principle is based out of fairness, as it was the employee's counsel that obtained the recovery and, therefore, it is fair to reduce the lien by counsel's attorney's fees and a pro-rated amount of costs.

**BRADEN:** We operate in many states, but Florida is one of the few that specifically address subrogation in workers compensation. The carrier has the right to file a Notice of Payment pursuant to statute, but they are not allowed to intervene in third-party claims.

## Explain the challenges of handling both the workers compensation claim and the third-party case.

**WOODRUFF:** Compensability of the accident may be accepted in a workers compensation case, but the practitioner must still obtain and preserve evidence that will be probative of fault in a third-party trial. A workers compensation claimant is frequently entitled to only two-thirds of their lost wages and payment of their medical bills reduced by the fee schedule. In a third-party case, the goal is to make the plaintiff "whole" by paying the full amount of their lost wages and medical expenses. Treating medical records and bills are usually most quickly and economically obtained by subpoena issued in the workers compensation case.

## Any practical advice for our readers?

**McCONNELL:** There are times you

can use the lien as leverage to get issues resolved or to accomplish a specific outcome. One example is an overall settlement of the claim for zero dollars by effecting a waiver of the lien in its entirety. Also, this is one time that you want to work with the claimant's attorney who is pursuing the subrogation. Working together can better bring about a lucrative outcome.

**WOODRUFF:** It's better to resolve the workers compensation case before resolving the personal injury case; otherwise, you reduce your opportunity to negotiate.

**SAYRE:** Focus on being pragmatic when negotiating resolution. Counsel and carrier should have a clear understanding as to the expected recovery on the lien, how to obtain that recovery and to be flexible based on the underlying litigation.

**BRADEN:** Don't spend more money chasing subrogation dollars than what you will actually collect. Time really is money! Like any other negotiation, shoot for the stars, but recognize that some money beats no money, especially in states where you have little to no subrogation laws to support your recovery.

## MEET THE PANEL



**Kris McConnell** is state director at CCMCI, managing the Florida office. She has worked in insurance claims with a primary focus

on workers compensation for over 31 years. Kris was a Board of Directors member for the Central Florida chapter of Risk and Insurance Management Society from 2009 to 2016 and has been a member of Workers' Compensation Institute's Conference Planning Committee for over 20 years.



**Casey Woodruff** is the founding attorney and lead personal injury attorney at Woodruff Johnson & Evans Law

Offices in Chicago. He has been recognized by Leading Lawyers and has presented to organizations such as the Illinois Education Association, Illinois Institute of Continuing Legal Education, and the United Food and Commercial Workers International Union.



**Jonathon Sayre** is a partner at Manning & Kass, Ellrod, Ramirez, Trester LLP's Orange County office, where

he is the practice area leader for the firm's subrogation team. He has worked at both pharmaceutical and medical device companies, working on internal legal matters and coordinating efforts with the companies' regulatory departments.



**Suzy Braden** is workers compensation claims manager for Encompass Health Corp. in Birmingham. Encompass Health is one

of the nation's largest providers of post-acute health care services. She has served on the Alabama Workers' Compensation Organization board for 10 years.