



Workers' Compensation Subrogation: Overview of N.C.G.S. § 97-10.2 and a survey of recent cases.

- Date: June 17, 2017
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Overview of the Presentation

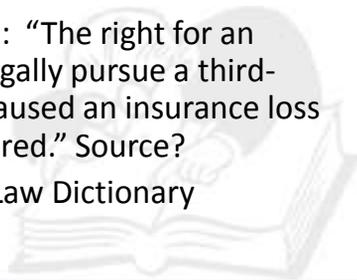
- Defining "Subrogation".
- Overview of N.C.G.S. § 97-10.2 and potential pitfalls.
- *Easter-Rozzelle v. City of Charlotte*, ___ N.C. App. ___, 780 S.E.2d 244 (2015).
- *Key Risk Insurance Company v. Peck*, No. COA16-872 (March 7, 2017)
- *Dion v. Batten*, ___ N.C. App. ___, 790 S.E.2d 844 (2016).
- Practice pointers for each case discussed.
- Proposed solutions to some of the most common problems.
- Settlement issues and final observations (if we have time).



Defining "Subrogation"

Subrogation: "The right for an insurer to legally pursue a third-party that caused an insurance loss to their insured." Source?

- ▶ Black's Law Dictionary



Subrogation in other scenarios...

- Can occur in any scenario where one entity pays a claim that should have been paid by another “third party” or their carrier.
- For example: Defective or defectively installed hot water heater floods a home. Homeowner files a claim with their carrier for property damage. If the claim is paid, the insured/carrier can file against the manufacturer/installer of the hot water heater to seek reimbursement for the loss.
- There is common law subrogation, both in law and equity.
- However, workers’ compensation claim subrogation is exclusively controlled by N.C.G.S. § 97-10.2. Very consistent theme in recent case law decisions.
- See also N.C.G.S. § 97-19. Another form of subrogation in the Act.



Look to N.C.G.S. § 97-10.2

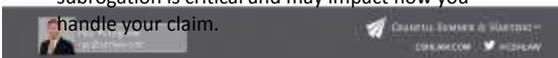
- The North Carolina Workers’ Compensation Act (“the Act”) does not directly define “subrogation.”
 - ▶ Unlike more common terms like “employee”, “employer”, etc.
- It handles the concept of “subrogation” in a statutory manner.
- In other words, you always start with the express language of the statute to determine your “rights”.
- Reinforced by mandatory language at N.C.G.S. § 97-10.2(a) - “shall be as set forth in this section.”



N.C.G.S. § 97-10.2(a)

The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

- Early recognition that a claim may involve subrogation is critical and may impact how you handle your claim.



Identify the “parties” in the game.

- As we know N.C.G.S. 97-10.2 grants certain rights against a group called “third parties:”
- Reason such claims are often referred to as “third party claims”.
- Who are included in this group?
- Look to N.C.G.S. § 97-10.2(a) – injury/death caused by “some person other than the employer to pay damages therefor, such person ... being ... the ‘third party.’”
- Why? Because that third party might be liable for medical expenses, lost wages, permanent injury and other “damages” which are equally payable as workers’ compensation benefits.



The typical scenario – set the stage

- Your client’s employee is making a delivery.
- Rear-ended by a “third party”.
- Employee sustains injuries.
- Files a workers’ compensation claim.
- Your client pays benefits.
- But, the employee (or your client) also have a right of action against the third-party.
- Others in the room may defend the third party.



Less clear facts giving rise to subrogation

- “Premises liability” – Employee on premises other than those “owned, maintained and controlled” by the employer, and sustains injury (or on employer’s premises, but injured due a acts or omissions of a third party invitee).
- “Products liability” – The employee, although injured in the course and scope of his employment (and even on the premises of the employer), is injured as a result of a defective piece of machinery or other device.
- “Medical negligence” – Negligent medical care during a workers’ compensation claim resulting in additional disability on the part of the employee and benefits paid under the Act.



Less clear facts giving rise to subrogation (cont.)

- Compensable work-related injury and subsequent “off-the-job” injury.
 - ▶ A closer question with conflicting issues.
 - ▶ The further away you get from the actual event giving rise to the workers’ compensation claim, the less likely you will have subrogation potential.
 - ▶ Original accident/incident giving rise to the claim?
 - ▶ *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 502 S.E.2d 645 (1998).



No subrogation - ☹️

- Legal malpractice - *Grant Construction Co. v. McRae*, 146 N.C. App. 370, 553 S.E.2d 89 (2001).
- Not in circumstances of co-employee negligence - *Trivette v. Yount*, 366 N.C. 303, 735 S.E.2d 306 (2012).
- “Special employer” – *Poe v. Atlas-Soundelier/American Trading and Production Corp.*, 132 N.C. App 472, 512 S.E.2d 760 (1999)



Lien in denied claim?

- Common question I get; seems counterintuitive.
- An employer can claim a lien in a denied case.
- Permitted by language at N.C.G.S. § 97-10.2(f)(1) – “if an award final in nature... ”
- *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 484 S.E.2d 566 (1997).
- But may impact how the lien should be valued and whether the employer can preemptively pursue the third party before admitting liability under the Act.



Notice? Also Counterintuitive?



- Does a lien holder have to give formal notice of their lien?
- Answer: No.
 - No notice requirements set forth at N.C.G.S. § 97-10.2.
 - Why? Lien vests by statute.
- Best practices . . .

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Two Way Street

- *Easter Rozzelle v. City of Charlotte*, ___ N.C. App. ___, 780 S.E.2d 244 (2015).
- Facts.
- Holding.
- Wait for the Supreme Court.
- Lessons/practice pointers.



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Watch Out for a Common Problem.

- If representing an employer, you must ensure that an action is pursued against the “third party” to protect the Statute of Limitations (SOL).
- Look to N.C.G.S. § 97-10.2(b) and (c) for deadlines and procedure for doing so.
- Driven by any SOL which would apply, (i.e. common law negligence = 3 years).

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Who and When?

- First 12 months of the applicable SOL – only the employee can pursue the “third-party” by way of settlement or by filing suit (but “employer” can and should investigate).
- After the initial 12 months, and if the workers’ compensation is an accepted claim, either the employee or the employer can pursue the “third party”.



BUT, and It’s a Big One

- **BUT** – 97-10.2(c) also states: “60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee . . .”.



For Example.

- A wrongful death action in North Carolina has a two year SOL. That means that if the plaintiff’s estate does not wish to pursue the third party, the employer would only be able to do so:
 - ▶ After the first year; and
 - ▶ Until 1 year and 10 months next following the death of the employee.
 - ▶ Only 10 months.



Multi-jurisdictional claims and issues

- There are some very unique legal principles that govern out-of-state accidents, where there is a non-resident third party and out-of-state accidents, even if the workers' compensation claim is properly venued in North Carolina.
- If you have an out-of-state accident and a North Carolina workers' compensation claim/third party claim, research will be needed when calendaring the proper SOL.
- "Borrowing statute" – where NC borrows the SOL from the accident location. N.C.G.S. § 1-21; *Glynn v. Stoneville Furniture Co., Inc.*, 85 N.C. App. 166, 354 S.E.2d 552 (1987).



Who will Pursue the Third Party?

- Most often, especially if "clear liability," the employee's attorney should and will pursue the third-party.
- Why? To protect their client.
- Also preferred by N.C.G.S. § 97-10.2.
- Why? Employee is the real "party in interest" as they sustained the injury and are the key witness.



But What If Not?

- If employee does not pursue the action . . . 97-10.2(d) gives the right to the employer (not the carrier) to file the action if the employee "refuses to cooperate... ."
- The suit, even if pursued by the employer, shall be filed in the name of the employee.
 - Cooperation?
- If still "refuses to cooperate" then the action "shall be brought in the name of the employer".



Key Risk v. Peck (Mar. 7, 2017)

- Facts.
- Holding: Action cannot be brought in the name of the “insurer” or “administrator”.
- Must be brought in the name of the “employer” only.
- Good example of statutory construction.
- Lessons/practice pointers.



Ethical Considerations



- Conflict of Interest.
 - Resolution: “Joint Allocation Agreement”.
- If the employee still does not cooperate, the employer may file in their name, and move the Court to make the employee a party Plaintiff or Defendant.
- Party “Defendant” = practical problems.



UM/UIM

- Can claim a lien against UM/UIM recoveries.
- N.C.G.S. § 20-279.21(e) is the applicable statute.
- Complex legal issues especially if it is the employer’s UIM coverages which are implicated, in addition to their workers’ compensation insurance coverages.



UM/UIM (cont.)

N.C.G.S. § 20-279 reads:

UM/UIM coverage "shall insure that portion of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j). In no event shall this subsection be construed to require that coverage exceed the applicable uninsured or underinsured coverage limits of the motor vehicle policy or allow a recovery for damages already paid by workers' compensation."



What does that mean?

- Three initial cases:
 - ▶ *Austin v. Midgett I and II*
 - ▶ *Walker v. Penn National*
 - ▶ Proposition: The UM/UIM carrier can claim a credit or offset a verdict/award for any amount paid by workers' compensation and not reimbursed the employer or carrier for their lien.



Dion v. Batten, ___ N.C. App. ___, 790 S.E.2d 844 (2016).

- Facts.
- Holding.
- Lessons/practice pointers.



Settlements (if we have time)

N.C.G.S. § 97-10.2(h) "Neither the employee ... nor the employer shall make any settlement ... without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable ... unless both employer and employee ... join therein... "



An example ...

- I.C. NO. 203651, *Lynch v. Interstate Brands*, Opinion and Award (June 18, 2009).
- Settlement of the workers' compensation lien directly with the third-party carrier.
- Violated N.C.G.S. § 97-10.2(h).



Significant legal consequences.

- Defendants shall transfer \$21,632.96 of the \$25,366.93 in trust to plaintiff. The remaining \$3,733.97 is Defendants' share of the disbursement.
- Loss of \$21,632.96.



When in doubt ... call

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