

# SUBROGATION & LIENS

## Personal Injury Cases

### JUDY KOSTURA

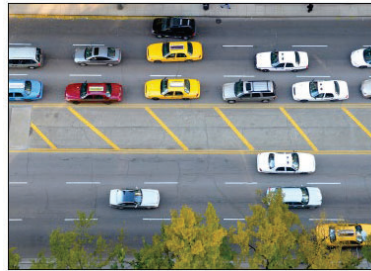
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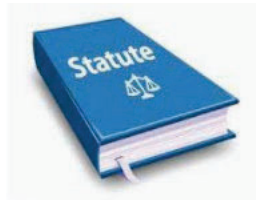
2021

## THE CAR CRASH SEMINAR



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Three ways in which a subrogation interest or lien can be granted:



“The Supreme Court of Texas ... described *Matagorda County* ... as a case ‘declining to recognize an implied-in-fact, an implied-in-law, or an equitable reimbursement right outside of the insurance policy’s provisions.’ *Excess Underwriters at Lloyd’s, London v. Frank’s Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 45 (Tex. 2008).” *Charla Aldous v. Darwin National Assurance Company*, No. 16-10537-CV0 (5<sup>th</sup> Cir. 03/16/17).

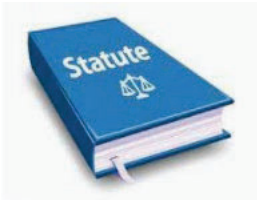
The 5<sup>th</sup> Circuit declared “**we will not rewrite the contract** to grant Darwin rights beyond those it included in the contract.” (fn 11). *Id.*



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Look at the **contract** documents (for ERISA, both the plan and summary plan description). Apply contract law principles: construe ambiguities against maker, etc. "Accuracy is not a lot to ask." *Hansen v Continental Ins.* (5<sup>th</sup> Cir. 1991)



Look at the **statute**. ERISA does not contain a subrogation provision but 29 U.S.C. §1024(b)(4) requires subrogation or reimbursement to be in the SPD to be enforceable and limits plans to equitable relief. Workers' comp, hospital liens, Medicare, Medicaid, MCRA (VA) and other statutes have their own rules, leading to specific court decisions applicable only to that statute.



The Courts may apply **equity** (estoppel, laches, fraud, etc.) to reform an ERISA plan: *Sullivan-Mestecky v Verizon and The Prudential*, E. Dist. NY, 06/01/2020, *Cigna Corp. v. Amara*, 563. U.S. 421 (2011). ERISA plans (but not beneficiaries) are limited to equitable relief, cannot seek relief at law, i.e., cannot sue for breach of contract; *Montanile* (2016).



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**"Subrogation"** is the "substitution of one person in the place of another with reference to a lawful claim, demand or right." *Black's*.



Plans step into plaintiff's shoes and sue the tortfeasor directly to recover the plan's payments. "[I]n essence, subrogation is an **assignment**." COUCH ON INS § 222:54

Plan <= Tortfeasor

**"Reimbursement"** seeks money from its own insured [injured plaintiff] after the insured recovers from the tortfeasor or other responsible payer.



Plan <= Plaintiff <= Tortfeasor



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An insurance company, having paid a loss to its named insured, **may not proceed against its own insured in a subrogation action.** *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc., and Westchester Fire Insurance Company*, 515 S.W.2d 32, 36 (Tex. App. – Dallas 1974.)

So.... What are we doing here?



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## Words Matter, 1: **Subrogation** vs **Reimbursement**

“No meaningful difference between [subro vs reimb]” *Wausau v Wedel* Tex 2018 [Labor Code uses both]

But BAM! Blue, Aldous and Malouf & \$114M jm for Hill, => more suits. *Aldous v Darwin Nat'l Assurance Co* 5<sup>th</sup> Cir, 03/16/17: Darwin, get off your Nat'l Ass and sue the 3rd party, not Aldous, because your **k subro interest vs 3<sup>rd</sup> party is not a right of reimb against your own insured.**



*Freitas v. Geisinger Health Plan*, (M.D. Pa. May 27, 2021): PI Plaintiffs claims: Deft insurer wrongly demanded **reimbursement** of insurance benefits bc **subrogation provision in contract did not include a right of reimbursement**; suit for wrongful denial of benefits; for breach of fiduciary duty; for misrepresentation of the insurance terms; for breach of the duty to disclose material information; and for wrongful interpretation of the ins policy. **Held:** Plans 12(b)(6) motion denied.



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