

PRESENTED AT**The Car Crash Seminar**

August 15-16, 2024

Austin, Texas

Subrogation and Liens**Guy D. Choate, Speaker****Judy Kostura, Author**

Speaker Contact Information:

Guy D. Choate

Webb, Stokes & Sparks, LLP

314 W. Harris Ave.

San Angelo, Texas 76903

gdchoate@webbstokessparkes.com

325-635-6866

Author Contact Information:

Judy Kostura

Sorrels Law

2901 Bee Cave Road, Suite L

Austin, TX 78746

Judy@SorrelsLaw.com

512.328.9099

Guy Choate

<https://www.webbstokessparks.com/our-firm/guy-choate/>

“We live in an imperfect world, but we should still avoid harming others and compensate the injured when mistakes are made.”

Guy Choate would enjoy a world where his specialized legal skills were not needed. In a world without personal injuries there would be no need for personal injury attorneys.

Guy works for that day, but he knows that unless corporations, insurance companies, and truckers are held accountable for their actions, our communities will never be safe. So he, along with the other partners at Webb, Stokes & Sparks, insists on bringing wrongdoers to justice to make the roads and homes safer for Texas families.

While an injury-free future is unlikely, it is clear accidents and injuries are reduced when those responsible must pay for the harm they inflict. Guy brings uncompromising character, determination and skill to each case. It is an issue of basic fairness for Guy.

Respected statewide for his work with the State Bar on issues such as personal injury law and ethics, Guy is a regular speaker at State Bar continuing education programs. Guy was president of the Texas Trial Lawyers Association during the 2005 Legislative Session.

Litigation Percentage:

- 100% of Practice Devoted to Litigation

Certification/Specialties:

- Personal Injury Trial Law, Texas Board of Legal Specialization, 1985
- Re-certified (1990, 1995, 2000, 2005, 2010, 2015)

Bar Admissions:

- Texas, 1979
- Supreme Court of the State of Texas 1979
- United States Supreme Court, Admitted 2014
- U.S. District Court Northern District of Texas
- U.S. District Court Western District of Texas
- U.S. District Court Eastern District of Texas
- U.S. Court of Appeals 5th Circuit

Honors and Awards:

- “AV” Rating, Martindale-Hubbell
- Super Lawyer, Texas Monthly Magazine (2003-2004, 2006-2011, 2013-2015)
- John Howie Spirit of Mentorship Award (2007)
- State Bar of Texas, *Presidential Citation* (2008)

Honors and Awards:

- “AV” Rating, Martindale-Hubbell
- Super Lawyer, Texas Monthly Magazine (2003-2004, 2006-2011, 2013-2015)
- John Howie Spirit of Mentorship Award (2007)
- State Bar of Texas, *Presidential Citation* (2008)

Professional Associations and Memberships:

- Texas Trial Lawyers Association
 - Sustaining Member
 - Past President, Legislative Session, 2005
- American Association for Justice
 - Sustaining Member
- Tom Green County Young Lawyers Association
 - President, 1981-1982
- Tom Green County Bar Association
 - Sustaining Member
 - President, 1994-1995
- American Board of Trial Advocates
 - Texas ABOTA President, 2016
- Texas Bar Foundation
 - Life Fellow
- State Bar of Texas
 - Sustaining Member
 - District 15, Director, 2007-2010
 - Director 2006-2009

Judy Kostura

Partner



Main: 713-496-1100

Direct: 512-328-9099 x 1

Fax: 512-328-4132

Email: judy@sorrellslaw.com

Profile | www.sorrellslaw.com

5300 Memorial Dr. Suite 270 Houston, TX 77007

THE COMMISSIONER'S HOUSE AT HERITAGE SQUARE
2901 Bee Cave Road, Suite L, Austin, Texas 78746



Licenses: Texas Supreme Court: 1980; Western District, Federal Court: 1988

Legal Practice: Sorrels Law www.sorrellslaw.com Personal Injury Practice

AV Rating by Martindale-Hubbell (highest ranking for competence and ethics)

Experience: Trucking and Commercial Vehicle Collisions, Automobile Collisions, Premises Liability, Wrongful Death, Burn Injuries, DWI Injuries, Attack by Vicious Animals, Subrogation and Liens, Insurance Bad Faith, Medical Provider Representation on Deposition and Subpoena Disputes

Author: Personal Injury Form Book for West Publishing Co.

CLE presentations to: American Assn of Justice, Texas Trial Lawyers Assn, UT School of Law, State Bar of Texas, University of Houston Law School, South Texas College of Law, Texas Advanced Paralegal Seminar, Capital Area Trial Lawyers Assn, Austin Bar Assn, South Plains Trial Lawyer Assn., Texas Academy of Family Law Specialists; Houston Trial Lawyers Assn.

CLE topics: Subrogation and Liens; Effective Demand Letters to Maximize Damages; Medical Records Privilege and Ethics of Redacting Medical Records; Sufficiency of the Evidence on Appeal; Client Communications; *In re North Cypress* Webinar; Tex. Civ. Prac. Rem. Code 18.001 Affidavits

Course Director: State Bar of Texas Advanced Personal Injury Seminar, 2024

Course Director: State Bar of Texas Advanced Civil Trial, 2023

Course Director: State Bar of Texas Advanced Evidence & Discovery, 2016

Course Director: State Bar of Texas Advanced Personal Injury Seminar, 2013

Course Director: State Bar of Texas Damages Seminar, February 2011

Professional Affiliations: Life Fellow, Texas Bar Foundation

Texas Trial Lawyers Assn: Board of Directors; Executive & Nominating Committees (2005-2006) (2017-2018),

Vice President of CLE (2018); Committees (various): CLE, Communications, Budget

Capital Area Trial Lawyers Association (President 1999-2000, Executive Committee through 2015)

Travis County Bar Association, Board of Directors (1995-1998)

State Bar of Texas Continuing Legal Education Committee (2022-2025)

Lawyer Referral Service Board of Trustees through 2018 (Chair 1995-1998)

Pro Bono College of Law, over 100 hours of Pro Bono Public Service (various)

Professional Honors: Texas Trial Lawyers Assn Lifetime Achievement Award 2023

State Bar of Texas Gene Cavin Award for Continuing Education 2022

Texas Watch Champion of Justice 2019

Texas Monthly Super Lawyer 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024

Texas Monthly Top 50 Texas Women & Texas Monthly Top 50 Central/W. Texas 2016

Texas Monthly Top Women Attorneys in Texas 2021

Texas Trial Lawyers Assn Resolution of Appreciation for Legis. Contributions 2013

Scott Ozmun Trial Lawyer of the Year Capital Area Trial Lawyers Assn 2011

John Howie Spirit of Mentorship Award Texas Trial Lawyers Association 2006

Million Dollar Advocates Forum; National Trial Lawyers Top 100

TABLE OF CONTENTS

I.	OVERVIEW OF SUBROGATION, HISTORY, FEDERAL AND STATE BALANCING ACT, AND COMMON LAW EQUITABLE PRINCIPLES.	1
A.	History of state and federal regulation of insurance.....	1
B.	Definitions.....	2
C.	Types of subrogation interests: conventional, legal, equitable, and “other insurance” or “pro-rata” clauses:	4
D.	Is there subrogation in the absence of a contract or statute? No, unless yes . . .	6
E.	Equitable Principles.	7
	1. Made Whole Doctrine: the plaintiff’s right to first recovery.....	7
F.	The critique of the Fortis opinion:.....	10
G.	HB 1869 Legislative Solution to Fortis:	12
H.	Non-Legislative Solutions to Fortis:	15
	1. Read the written policy to see if it provides for subrogation and reimbursement without any additional reference to claims priority.	15
	2. Do not apply Fortis to subrogation principles that were not at issue in Fortis.	16
I.	Options when the injured claimant is not being made whole by the third party recovery and the contract disclaims the made whole doctrine:	19
	1. Sue the third party tortfeasor.	20
	2. Limit the damages sought in the third party suit.....	20
	3. Invite the plan to a contested hearing on the allocation of the damages obtained in the Recovery.	20
	4. Walk away from the case.....	22
J.	Ideas for ERISA plans:.....	23
	1. Get the Summary Plan Description:	24
	2. Tell the client to spend the money? [JK: this is not without risk!]	24
	3. Focus on conditions precedent:.....	29
	4. Allocate the money to injured family members or claimants who do not owe a subrogation interest:	30
	5. Focus on whether or not an “identifiable fund” exists out of which to repay the plan.....	30
	6. Determine whether or not a lien is required before an “identifiable fund” exists out of which to repay the plan.	33
	7. Common Fund Doctrine: the plaintiff’s right to reimbursement of a pro-rata share of the cost of obtaining the recovery.	34
	8. Laches.....	38
	9. Can the carrier subrogate against itself or its own insured?	38
	10. Construe all ambiguities against the plan.	41
	11. Subrogation as a sword and shield.....	44
	12. Does bankruptcy by the debtor discharge a subrogation interest or lien?	45
	13. Subrogation in cases involving a minor child.....	46
II.	SUBROGATION INTERESTS GRANTED BY FEDERAL LAW (VA, MEDICARE, FEHBA).....	50
A.	Veterans Administration.	50
	1. The right of subrogation.	50
	2. Cases evaluating Made Whole and Pro-Rata division; also Common Fund and reduction or waiver.....	53
	3. For cases in litigation.....	54
B.	TRICARE	54
C.	Medicare.....	59
	1. The right of reimbursement.	60
	1.1 What is Medicare?	60
	1.2 Who receives Medicare benefits?	60
	1.3 Other Subrogation interests arise out of Medicaid and Medical Care Recovery Act:	60
	1.4 Medicare’s subrogation interest arises out of the Secondary Payer Act:.....	60
	1.5 PIP and Medical Payments Coverages are Primary and	

UM is subject to Medicare’s interest:.....	60
1.6 2003 Amendment to the MSP:.....	61
1.7 2007 Amendment to the MSP:.....	61
1.8 One slight exception:	61
1.9 Medicare’s interest is not a “lien”:	61
2. Finding the intermediaries and opening the file.	61
2.1 Open the file:	61
2.2 Other contact information for non-tort recoveries.	61
2.2.1 BCRC Recovery Portal:.....	62
2.3 BCRC interaction with CMS:	62
2.4 FTCA cases:.....	62
2.5 Documents to send to CMS/BCRC:	63
3. The amount of reimbursement for past medical bills.	63
3.1 Pre-existing and unrelated conditions:.....	63
3.2 Formula for Reimbursement:.....	64
3.3 Judgments and their effect:	64
3.4 Wrongful death vs survival damages:.....	65
4. For Future Medical Bills: Does Medicare get a holiday and is a set-aside required?.....	65
4.1 Definitions and Options offered for Public Comment by CMS:	65
4.2 MSA Rules Withdrawn Again.	68
4.3 Medicare’s position:	68
4.4 MSA has its origins in worker’s compensation cases:.....	69
4.5 How to do WCMSAs:.....	69
4.6 Mandatory reporting is required of Defendants and Plaintiffs:	69
4.7 Penalties for failing to report:	69
4.8 Reporting effective dates:	70
4.9 Content of the new reporting rules:	70
4.10 De minimus reporting thresholds:.....	71
4.11 The User Guides answer books:	71
4.12 The amount to be set aside in trust:	71
4.13 Comparative negligence of Plaintiff:.....	72
4.14 Penalty for failing to create MSA:	72
4.15 Seeking advance approval of MSA:	72
4.16 Who establishes and administers the MSA?.....	73
4.17 Is An MSA required in all cases?:	73
5. The procedure for determining reimbursement.	74
5.1 For past medical expenses: Start early:.....	74
5.2 For future medical expenses:	75
5.3 Confidentiality Agreements:.....	76
5.4 Court Allocation of Damages to avoid excessive repayment:	76
6. Asking for a waiver.	78
7. Penalties for failing to reimburse.	78
7.1 Who must reimburse the past medical expense subrogation interest:	78
7.2 Medicare’s enforcement options:.....	79
7.3 Liability of Plaintiff’s counsel, tort defendants and liability insurers:	79
7.4 Interest on damages by Medicare and Defendants:	81
7.5 Statute of Limitations:	81
7.6 Constructive notice:	81
8. Naming Medicare, or not, on the settlement check:	81
9. Medicare Choice HMO’s and Medicare Advantage HMO’s.....	83
9.1 Authority for alternative plans under Medicare Part C:.....	83
9.2 Does the Medicare Part C Plan have a private cause of action to enforce its subrogation interest?	83
9.2.1 No says the U.S. District Judge in Humana v. Reale.....	83
9.2.2 Yes says the 3 rd , 4 th , 5 th , 11 th Circuits; see in In Re Avandia	84
10. May providers bill the patient instead of submitting the	

bills to Medicare? Maybe. For a up to a year.	85
10.1 Providers who bill for claim related injuries:	85
10.2 Seeking conditional payment from Medicare:.....	86
10.3 Strategy to encourage providers to bill Medicare:.....	87
10.4 The amount the provider may bill the beneficiary:.....	88
11. Admitting evidence of the subrogation interest into evidence in the third party claim:	90
12. Recommended Reading.	91
13. Protecting Recoveries in a Special Needs Trust	91
D. Medical Care Recovery Act, 42 U.S.C.A. § 2651-53 (2002).....	91
E. Federal Employees Health Benefits Act.	92
F. Federal Employees Workers Compensation Act.....	97
III. TEXAS STATUTORY SUBROGATION INTERESTS (NOT INCLUDING WORKER’S COMPENSATION).	97
A. Medicaid	97
1. Medicaid’s assignment not a right of reimbursement.....	98
2. Balance billing strictly regulated.	99
3. Finding Medicaid to repay subrogation.	101
4. Preserving Medicaid eligibility.....	102
5. Reduction for client.	102
6. Attorney’s fees and expenses.	106
7. Medicaid cases involving a minor child.	107
8. MERP (Medicaid Estate Recovery Program).....	107
B. Texas Rehabilitation Commission.	107
C. Indigent Health Care Treatment Act.	108
D. Health Care to Prisoners.....	108
E. Crime Victim’s Compensation Fund.	108
F. Child Health Plan For Certain Low-Income Children (CHIPS)	108
G. State Employees Health Benefits Act and ERS and exhaustion of remedies.....	109
IV. TEXAS STATUTORY SUBROGATION INTEREST: WORKER’S COMPENSATION.	110
A. The right of reimbursement.....	110
1. The scope of recovery: from the third party claim.	110
2. Attorney fees for collecting the subrogation interest.....	115
3. Attorney fee for collecting the attorney fee.....	119
4. Attorney liability for failing to pay the w/c subrogation interest.....	119
5. There is no made whole doctrine in worker’s compensation: Allocating the third party recovery and the subrogation interest.....	120
6. Three practice tips.....	121
7. Statute of limitations.....	122
8. Disclosure and consent.	123
9. Ethical Considerations.	123
10. Uninsured/Underinsured Motorist Coverage.....	124
11. Substitute policies.....	126
12. When the third party settles the comp lien cheap.	128
13. Waiver of the worker’s comp lien in contracts.....	128
14. State of Texas and local gov’t self-funded worker’s compensation plans.....	130
15. Worker’s comp plans cannot subrogate to the Guaranty Association but Association can subrogate to Plaintiff recovery.	130
16. Admitting evidence of the worker’s compensation lien into evidence in the third party claim:	131
17. Jurisdiction over the dispute: court or commission?.....	132
V. TEXAS STATUTORY LIENS (HOSPITAL LIENS AND CHILD SUPPORT LIENS).....	132
A. The Hospital Lien Statute; lien content, UM/UIM, wrongful death, SOL, govt hosp.	132
1. Reasonable and Regular Rate:	134

2.	Emergency hospital care, freestanding ER, and emergency medical care:.....	137
3.	Admission within 72 hours and HB 2929: Is an ER evaluation a hospitalization? Yes.	139
4.	Constructive notice and the timing of notice.	139
5.	The lien (arguably) applies to a child's recovery.....	140
6.	Subrogation principles do not apply.	140
7.	If recovery is inadequate, determine if HB 2929 applies.....	140
8.	Unanswered question if a check is made payable to a hospital but not paid to the hospital.	141
9.	Lienholders do not get interest or attorneys' fees on top of the lien amount (unless via dec action).	142
10.	Balance Billing: Hospitals and emergency care physicians are prohibited by Ch. 146 Civ. Prac. and Rem. Code from asserting a lien when health insurance or Medicare should pay; Chapter 55 of the Property Code reiterates that prohibition; No Surprises Act.	142
11.	Crime Victims Compensation Fund:	149
12.	Remedies for improperly filed lien:.....	150
13.	Does bankruptcy by the debtor discharge the lien?	150
14.	Turning a lien into lemonade: The Stowers Doctrine.	151
15.	Hospital liens in other states.	151
B.	The Child Support Lien Statute.....	152
1.	Notice of the child support lien: actual or constructive?	153
2.	The property of the current spouse is not subject to the child support lien.	154
3.	Medical liens and attorneys' fees and expenses take priority over the child support lien.	154
4.	Letters of protection do not take priority over the child support lien.	154
5.	The child support lien takes priority over an ERISA interest.	155
6.	Lottery Winnings may be subject to child support liens.....	155
VI.	MUNICIPAL OR COUNTY EMPLOYEE SUBROGATION INTERESTS GRANTED BY TEXAS LAW.....	155
A.	Employees of Local Political Subdivisions.....	155
B.	Municipal Officers & Employees.	156
VII.	ERISA EMPLOYEE WELFARE BENEFIT PLANS.....	157
A.	The effect of ERISA (overview of subrogation cases).....	158
B.	Establishing the plan's status as an 'employee welfare benefit plan'.	163
1.	There must be a plan.	163
2.	There must be proper intent and handling.	164
3.	The employer must be engaged in an industry or activity affecting interstate commerce.....	164
C.	Plans that are not ERISA plans:	165
D.	Laws that are/are not preempted by ERISA:.....	166
E.	The child support lien takes priority over an ERISA interest.	167
F.	Retaliation is barred under ERISA.....	168
G.	The beneficiaries' remedy for an ERISA plan's misrepresentation of its subrogation rights.....	168
VIII.	ERISA AND TEXAS COMMON LAW EQUITABLE CONCEPTS, INCLUDING MADE WHOLE AND COMMON FUND, IN AN INSURANCE FUNDED PLAN.....	168
A.	ERISA does not (automatically) kill off Texas' made whole doctrine or common fund doctrine because ERISA's savings clause preserves state regulation.....	168
1.	Made whole doctrine and ERISA.	170
2.	Common fund doctrine and ERISA.....	172
IX.	THE DOCUMENTS BEGIN THE DISCUSSION; GET THE SUMMARY PLAN DESCRIPTION AND THE EMPLOYEE WELFARE BENEFIT PLAN.....	174
A.	ERISA and the Summary Plan Description.	174
1.	Statutory Requirement for the plan and providing copies on request.....	174
2.	The Summary Plan Description requirements;	177
3.	What constitutes a Summary Plan Description.....	180

4.	Read the Employee Welfare Benefit Plan's subrogation provisions.	181
X.	ERISA AND SELF-FUNDED EMPLOYEE WELFARE BENEFIT PLANS.	182
A.	The statutory authority.	182
B.	Stop Loss Coverage:	183
1.	Stop loss coverage and the issue of state regulation:	184
2.	Stop loss coverage and the issue of appropriate equitable relief:	184
C.	The first [of several] seminal self-funded cases: FMC v. Holliday.	185
D.	The 5 th Circuit and Supreme Court: what part of "all" do you not understand? Allowing the plan to sue its own insured for reimbursement.....	185
E.	Bad news from the 4 th Circuit: Failing to sign subrogation reimbursement forms terminates coverage.....	189
F.	The Effect of Knudson and Sereboff: The Plan may seek equitable relief, including imposing a constructive trust on identifiable funds.	189
G.	Making the Self-Funded ERISA Plan Secondary.	191
H.	Overview of Cases Determining Appropriate Equitable Relief and the Plan's Remedies:	192
1.	Liability of the plan member:	192
2.	Liability of the plan member's attorney:	200
3.	Liability (or not) of third parties including other insurance companies:	207
I.	The plan must plead and prove its ERISA status.	209
J.	Four practice tips.....	209
XI.	ERISA'S PREEMPTION (OR NOT) OF FEDERAL OR STATE LAW CAUSES OF ACTION.	211
A.	State law causes of action and ERISA preemption:	211
B.	Federal law causes of action and preemption:.....	212
C.	The Common Fund doctrine and ERISA preemption.	213
D.	Preemption of state court jurisdiction, or not:	214
E.	Long Term Disability Policies	216
F.	Additional research sources.	217
XII.	USING THE DECLARATORY JUDGMENT ACT TO CONSTRUE AN AMBIGUOUS OR SILENT PLAN DOCUMENT OR TO DETERMINE ENTITLEMENT TO RECOVERY.	218
A.	Federal Actions Authorized by ERISA:	218
B.	Action in State Court.....	219
XIII.	NON-ERISA PLANS SUCH AS HMO'S, CHURCH-SPONSORED OR GOVERNMENT PLANS, AND INDIVIDUALLY PURCHASED HEALTH INSURANCE CONTRACTS.	220
A.	Non-ERISA Plans	220
B.	HMO's.....	220
C.	Private Health Insurance.	221
D.	Government or Church Employer Sponsored Plans.....	221
XIV.	AUTOMOBILE POLICIES, INCLUDING PIP, MEDICAL PAYMENTS, UM/UIM, AND PROPERTY DAMAGE.	222
A.	Preserving the plaintiff's PIP.	222
B.	Medical Payments Coverage on Auto Insurance.	223
1.	The Common Fund Doctrine:	223
2.	Made Whole Doctrine.	223
C.	Uninsured/Underinsured Motorist Coverage.	225
1.	Statutory Authority.	225
a.	Preserving the UM/UIM Carrier's subrogation rights	225
b.	Stowers and the UIM carrier	225
c.	Preserving the client's full use of their UM/UIM coverage free of subrogation.....	225
D.	Vehicle Property Damage.	227
XV.	COORDINATION OF BENEFITS AS A MEANS OF AVOIDING	

PAYMENT BY HEALTH INSURERS 228

XVI. ASSIGNMENTS TO CREDITORS, LETTERS OF PROTECTION AND AGREEMENTS TO REPAY SUBROGATION INTERESTS 230

 A. Assignments to Creditors. 230

 B. Letters of Protection. 233

 C. Failure to Mitigate Damages Defense. 235

 D. Agreements to Repay Subrogation Interests. 236

 1. Ethical Issues When the Client Reneges or the Recovery is Inadequate. 237

 2. Ethical Issues When the Plan is Self-Funded. 237

 3. Does a Reimbursement Agreement confer more benefits to the Plan than a Subrogation Agreement?..... 239

 4. Do Not Sign a Reimbursement Agreement which is broader than the Plan or Summary Plan Description provisions. 239

XVII. STATUTORY VIOLATIONS BY HEALTHCARE PROVIDERS AND STATUTORY VIOLATIONS BY SUBROGATION COLLECTION AGENCIES. 239

 A. Chapter 146, Civil Practice & Remedies Code and Balance Billing. 240

 B. Violations by Insurer of Federal Fair Debt Collection Practices Act..... 241

 C. Violations of the Texas Deceptive Trade Practices-Consumer Protection Act..... 242

 1. State Law Damages Available to Injured Consumers. 243

 2. Extra-Contractual Damages May Not be Allowed in Plans Subject to ERISA..... 244

 D. Violations by Hospitals of the Federal Patient Protection and Affordable Care Act..... 244

XVIII. ADVICE TO ATTORNEYS. 244

 A. Communicating with Client. 244

 1. At the first interview..... 244

 2. At the time of settlement..... 244

 3. If a lawsuit against the subrogee is necessary..... 245

 B. Communicating with Third Party Liability Carrier..... 246

 1. At the time the file is opened. 246

 2. At the time of settlement..... 246

 C. Communicating with Subrogated Insurer or Self-Funded Health Plan..... 248

 1. At the time the file is opened. 248

 2. During the course of the claim..... 248

 3. At the time of settlement..... 248

 D. Converting the Money ... bad idea? Or naughty but immune?..... 250

 1. Penalties for conversion..... 251

 2. Protect yourself if the client does not want to repay..... 252

 3. Statute of limitations..... 252

 E. Health insurers (or plans) which refuse to pay bills rather than pay and subrogate..... 253

XIX. CHOICE OF LAW ISSUES..... 253

XX. INDEMNIFICATION AND RELEASE DOCUMENTS. 255

XXI. APPENDIX..... 258

For Fun:

They're out to get you
 To capture you and make you, spellbound
 Howling and prowling
 You're shivering, quivering, spellbound
 You cannot run and you cannot hide

Yeah, you've gotta face it, baby
 Things go bump in the night

Wherever you run and wherever you hide
Yeah, you've gotta face it, baby
Things go bump, bump, bump in the night
Things That Go Bump in the Night, by the Allstars

SUBROGATION AND LIENS

I. OVERVIEW OF SUBROGATION, HISTORY, FEDERAL AND STATE BALANCING ACT, AND COMMON LAW EQUITABLE PRINCIPLES.

A. History of state and federal regulation of insurance

Subrogation is an element of insurance law. In 1944, the United States Supreme Court determined that “insurance” is a form of interstate commerce subject to federal regulation; see *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944). Shortly thereafter, Congress passed the McCarran-Ferguson Act, 15 U.S.C.S. § 1011 and following. The McCarran-Ferguson Act granted authority to the states to regulate the “business of insurance.” Various federal laws continued to govern the “peripherals of the industry (labor, tax, securities).” State laws which regulated the core nature of the insurance business therefore overrode most federal laws to the contrary. This paper is designed to analyze the myriad of state and federal statutes and cases on the topic of subrogation, from the standpoint of the plaintiff’s personal injury practitioner.

In an attempt to harmonize the proliferation of insurance policies and laws and to protect workers, Congress passed the Employee Retirement and Income Security Act, commonly known as ERISA, in 1974. ERISA did not vitiate the McCarran-Ferguson’s grant of state regulation; it did spawn a spate of lawsuits trying to determine which state laws qualify as state regulation (not-preempted by ERISA) and which laws deal with peripheral issues (pre-empted by ERISA). ERISA also recognized that some health plans are self-funded, not funded by insurance premiums, and those plans are exempt from state regulation.

The shifting of risk through the payment of premiums is the most fundamental principle of insurance. Subrogation is a bastardization of that risk-shifting principle. Therefore, subrogation should come within the “core business” of insurance and be subject to state regulation for all premium funded insurance policies. A Florida court traced the history and analysis:

[T]he court in *Pilot* looked to case law interpreting the phrase “business of insurance” under the McCarran-Ferguson Act. *Id.* This law, taken as a whole, provided three criteria for determining whether a practice would fall under the “business of insurance.” *Id.* Namely:

“[F]irst, whether the practice has the effect of transferring or spreading a policyholder’s risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.” *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982) (emphasis in original). *Id.* at 48-49.

However, in *Kentucky Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003), the Supreme Court receded from the McCarran-Ferguson factors, stating:

Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a “law ... which regulates insurance” under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. See *Pilot Life, supra*, at 50, 107 S.Ct. 1549, *UNUM, supra*, at 368, 119 S.Ct. 1380; *Rush Prudential, supra*, at 366, 122 S.Ct. 2151. Second ... the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky’s law satisfies each of these requirements.

The majority of cases addressing state subrogation and collateral source statutes have determined that they are laws regulating insurance. In *FMC Corp. v. Holliday*, 498 U.S. 52, 60-61 (1990), the Supreme Court considered whether a Pennsylvania anti-subrogation statute was a law “regulating insurance” and held:

There is no dispute that the Pennsylvania law falls within ERISA’s insurance saving clause.... Section 1720 directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S., at 740-741, 105 S.Ct., at 2389-2390. It does not merely have an impact on the insurance industry; it is aimed at it. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50, 107 S.Ct. 1549, 1554, 95 L.Ed.2d 39 (1987). This returns the matter of subrogation to state law. *Coleman v. BCBS of Alabama, Inc.*, No. 1D10-1366, (D. Ct of Appeal Florida, 1st Dist. - Dec. 8, 2010)

This paper reviews U.S. and Texas subrogation interests and liens in favor of Veterans Administration, Medicare, Medicaid, workers' compensation, Hospital Liens, or child support liens. It covers conventional/contractual subrogation interests, including ERISA Employee Welfare Benefit Plans and Non-ERISA Plans, Self-funded Pools, Private Health Insurance, Government Employer or Church Sponsored Plans, Medical Payments Coverage, Uninsured/Underinsured Motorist Coverage, Vehicle Property Damage, and HMO's. It also covers equitable subrogation imposed by law. It analyzes the effect of the Texas Supreme Court's decision in *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007), NO. 05-0791, on the made whole doctrine, and the legislative reform of *Fortis* by the passage of Ch. 140A Civ. Prac. and Rem. Code, effective on 01/01/2014. See Section I.E.1.B, Ch. 140A of this paper for a discussion of the *Liberty Mutual Ins. Co. v. Transit Mix Concrete & Materials Co.*, No. 06-12-00117-CV, (___ S.W.3d ___ June 28, 2013, pet. den.) case and the statute's effective date for 3rd party and 1st party claims.

B. Definitions.

"Subrogation" has been defined as the "substitution of one person in the place of another with reference to a lawful claim, demand or right." Black's Law Dictionary. "Subrogation is the substitution of one person in the place of another, whether as creditor or as the possessor of some lawful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim. . . . By subrogation, a court of equity, for the purpose of doing exact justice between parties in a given transaction, places one of them, to whom a legal right does not belong, in the position of a party to whom the right does belong." 53 Tex.Jur.2d Subrogation § 1, at 429 (1964).

Although some courts use "subrogation" and "reimbursement" interchangeably, they are distinct concepts. The "subrogee" is the entity – usually an insurer -- which paid benefits to the subrogor (injured plaintiff) and has a right to stand in the shoes of the plaintiff, with respect to the plaintiff's liability claims, and sue the tortfeasor. The "subrogor" is the one who contracted away his or her rights of recovery to the subrogee. A right of reimbursement requires the person with the original claim (injured plaintiff) to turn over collected claim proceeds to the insurer claiming the right of reimbursement from its own insured. See *Charla Aldous v. Darwin Nat'l Assurance Co.*, 851 F.3d 473, 485, No. 16-10537-CV0 (5th Cir. 03/16/17) (revised to rescind part III.B.4 on 05/11/2018) which denied an insurer the right to collect from its own insured because it failed to exercise its contractual subrogation interest against the third party and had no right of reimbursement against its insured. See also

Freitas v. Geisinger Health Plan, (M.D. Pa. May 27, 2021) 2021 WL 2156740, in which plaintiffs survived a 12(b)(6) motion. The court held those plaintiffs' suit stated claims that their insurer inappropriately demanded reimbursement of insurance benefits when a subrogation provision did not include a right of reimbursement; 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 insurance policy. [The court later granted summary judgment to the plan when another plan document, more complete and containing a right of reimbursement, surfaced during additional discovery.] See also *Patterson v. United HealthCare*, No. 22-3167, (6th Cir, August 1, 2023), allowing a plan beneficiary to sue United and Optum: Eric Patterson was injured; the summary plan description contained a subrogation provision and right of reimbursement. He asked for a copy of the plan and was told no separate plan document existed. He repaid the plan \$25,000 from his third party recovery. When Eric's wife was injured a few months later, she requested a copy of the plan and was given a copy; the plan did not contain a right of reimbursement. Although the 6th circuit did not allow Eric Patterson to sue on behalf of a class, it did agree he stated plausible claims for equitable relief against Optum and United, reversing the trial court's grant of summary judgment for the plan and recovery agent.

A subrogation interest is not the same as a lien and a subrogee is not automatically a secured lienholder. Subrogation and assignments were equated by the 5th Circuit in *Associated International Ins. Co. v. Scottsdale Ins. Co.*, 16-20465 (5th Cir. 07/07/17): "[S]ubrogation works much like an assignment: both transfer rights from the assignor to the assignee. See *Hamilton v. United Healthcare of La., Inc.*, 310 F.3d 385, 397 (5th Cir.) (Garza, J., concurring) ("[I]n essence, subrogation is an assignment."): COUCH ON INSURANCE § 222:54 (noting that the distinction between assignment and subrogation may be "academic and not a substantive matter"). Although subrogees stand in the shoes of the subrogors, they cannot seek the same statutory or punitive damages as the subrogors; *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 133 (Tex. App. – Houston [14th Dist.] 1997), *aff'd sub nom. Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692 (Tex. 2000). From *Union Fire*:

On the issue of statutory or punitive damages and equitable subrogation, a majority of the justices agreed that as a general rule, subrogation gives indemnity and no more. *American Centennial*, [843 S.W.2d at 485](#) (citing *Phipps v. Fuqua*, [32 S.W.2d 660, 663](#) (Tex.Civ.App. —

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Subrogation and Liens: Medicare, Medicaid, and Hospitals

Also available as part of the eCourse

[2024 The Car Crash eConference](#)

First appeared as part of the conference materials for the
2024 The Car Crash Seminar session

"Subrogation and Liens: Medicare, Medicaid, and Hospitals"