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MINNESOTA THIRD-PARTY LIABILITY AND SUBROGATION PRACTICE

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I. DEFINITION OF WORKERS' COMPENSATION SUBROGATION

The Minnesota Workers' Compensation system is a "no fault" system, meaning that an employee whose injury arises out of and in the course of employment may be entitled to workers' compensation benefits, regardless of who is at fault for the injury. Minn. Stat. §176.021, subd. 1. With certain limited exceptions, workers' compensation benefits are the "exclusive remedy" of an injured employee, therefore, the employee may not maintain a civil action against his/her employer for additional damages. Minn. Stat. §176.031.

The "exclusive remedy" rule, does not, however, prevent an injured employee from seeking additional damages from an at-fault third-party. Nor does the Act prevent an employer/insurer from recovering reimbursement from an at-fault third-party for workers' compensation benefits where that third party's actions caused the employees injury. In fact, the Workers' Compensation Act provides for a right of subrogation for the employer/insurer in circumstances in which an employee is injured through the fault of a third-party.

Subrogation is defined in *Black's Law Dictionary*, Revised 6th Edition as:

> The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.

Blacks Law Dictionary, p. 1427, Revised 6th Edition.

The right to recover workers' compensation subrogation in Minnesota is governed by *Minn. Stat.* §176.061. It provides a mechanism for reimbursement of workers' compensation benefits where someone other than the employer or employee is at fault for the employee's injuries.

II. INSURANCE COVERAGE FOR THIRD-PARTY SITUATIONS

A. Standard Policies

1. Standard Workers' Compensation insurance policies contain provisions for two types of coverage:

a. Coverage A: Provides coverage for payment of scheduled workers' compensation benefits under the Minnesota Workers' Compensation Act ("WCA").

b. Coverage B: Provides that the insurer will pay for damages which the insured is obligated to pay because of bodily injury by accident or disease arising out of and in the course of employment. Coverage B liability typically arises where the employer is a third party defendant being sued for contribution/reimbursement by the alleged third-party tortfeasor or defendant in an employee's civil damage case for personal injuries. *See* the discussion of *Lambertson* liability which follows in Section V. C. Coverage B can also potentially be triggered by an employee's direct action against his/her employer in certain situations wherein the employer did not obtain workers' compensation coverage on the employee. This is typically seen in situations involving closely held corporations wherein the officer or officer's family members elect not to be covered by the Coverage A portion of the workers' compensation policy for workers' compensation benefit purposes. However, the action can potentially be brought by any employee who is not covered by his employer for workers' compensation benefit purposes under Coverage A of its workers' compensation policy. Note also that an injured employee may maintain a direct action against his/her employer for damages incurred as a result of a work injury under circumstances in which the employer procures no policy of workers' compensation coverage.

2. It is important to be aware of both types of coverage under the workers' compensation insurance policy. They are separate types of coverage, involving distinct scenarios triggering them, and they typically have different policy limits.

3. Duty to Defend

Most workers' compensation insurance policies provide that the insurer will defend the insured in any proceeding seeking either workers' compensation benefits, under Coverage A, or other damages, under Coverage B.

4. CGL Exclusions

Most employers have a Comprehensive General Liability policy covering the employer's products or business operations, however, these policies normally contain exclusions for the civil claims of the employer's injured employees. Standard CGL policies also generally contain exclusions for contribution/reimbursement/indemnity claims of third-party tortfeasors or defendants in an employee's civil action for personal injuries. The typical exclusion provides that the CGL policy will not cover or defend the employer against the contribution/reimbursement/indemnity claims of

another party where the contribution claim arises out of an injury incident that occurs during the employment duties of the employee.

III. COMMON THIRD-PARTY SITUATIONS

How do you recognize a potential third-party situation? Look for scenarios where a worker is injured because of the fault or negligence of someone who is not a co-employee or agent of the employer. The following are illustrations of some third-party scenarios, with examples of the types of situations that give rise to a third-party claim.

A. Motor Vehicle Accidents

These situations generally involve an employee who is injured in the course of his/her employment through the negligence of another motor vehicle driver. For example, a delivery driver employee who is rear-ended while making a delivery. However, also watch for situations, such as that which occurred in *Hafner v. Iverson,* 343 N.W.2d 634 (Minn. 1984), where a truck driver drove into a bucket which was suspended over a traffic lane, and the repairmen who were standing in the bucket were injured.

Another scenario involving a motor vehicle accident which gave rise to third-party liability, occurred where the injured employee was returning home after medical treatment needed to relieve the work-related injury. The workers' compensation insurer had a subrogation claim for the additional benefits and medical treatment needed as a result of the automobile accident. *See Thibault v. Bostrom,* 270 Minn. 511, 134 N.W.2d 308 (1965).

B. Products Liability

A third-party may be subject to a products liability action by an injured employee if the employee was injured while using some type of product or machine at work. For example, an employee is injured when his hand is caught in a machine which was manufactured by a party other than his employer. Products liability actions may also arise in situations e.g., such as where an employee is injured when the ladder she is standing on collapses; or where an employee is injured by a toxic substance, such as asbestos.

C. Premises Liability

These cases typically arise were an employee is injured while off the employer's premises. For example, a pizza delivery employee slips on icy stairs of house where he/she is delivering the Big Foot Combo.

D. Dramshop Liability

Dramshop liability generally arises where an employee is injured or killed by a drunk driver, who had received alcohol from a bar or store.

EXAMPLE: In *Paine v. Waterworks Supply Co.*, 31 W.C.D. 18, 269 N.W.2d 725 (Minn. 1978), the employee was killed in a work-related automobile accident by a drunk driver. His widow commenced two proceedings: one for dependency benefits under the Minnesota Workers' Compensation Act ("WCA"), and a dram shop action against the owners of a bar under the Dram Shop Act. The widow settled her dram shop action, and the employer petitioned the workers' compensation division to credit a portion of the dram shop settlement against the employer's workers' compensation liability. The court held that the employer was entitled to the credit. The court found that the dependency benefits the widow sought under the WCA were the same as the damages for loss of means of support which the widow claimed in the dram shop action.

E. Professional Liability

Generally, if an employee sustains additional injuries as a result of medical treatment, or the employee's work-related injuries are exacerbated as a result of medical treatment, the employee may have a professional liability action against the treatment provider.

EXAMPLE: An injured employee seeks treatment with a chiropractor, who negligently breaks two of the employee's ribs, causing the employee's lung to be punctured, resulting in surgery. As a result of the chiropractor's negligence, the employer pays additional benefits and additional medical bills. The employee brings a malpractice action against the chiropractor, and the employer intervenes, asserting its subrogation interest. If the employee recovers from the chiropractor, the employer is entitled to reimbursement, pursuant to the statutory formula, for benefits and medical bills paid. *See also Williams v. Holm*, 25 W.C.D. 307, 181 N.W.2d 107 (Minn. 1970).

F. Occupational Disease and Mold/Sick Building Syndrome

Occupational disease claims can give rise to potential subrogation claims. Likely the most familiar of these is asbestos exposure. Employers and insurers have historically had subrogation interests relative to workers' compensation benefits paid as a result of an employee's development of asbestosis and/or mesothelioma, due to work-related exposure. The possible third parties against whom subrogation may be sought range among a universe of product manufacturers and other parties.

Similar subrogation interests exist relative to other conditions traditionally considered occupational diseases or *Gillette* injuries for Minnesota workers'

compensation benefit purposes. An emerging area for subrogation claims relates to mold exposure and sick building syndrome cases. *See Occupational Disease and Workers' Compensation Benefits, A Primer*, Arthur, Chapman, Kettering, Smetak, & Pikala, P.A., June 2003. There are a multitude of potential third parties against whom employers and workers' compensation insurers may seek recovery through subrogation, including, but not limited to, owners of building premises, contractors for new construction or remodeling, subcontractors, water abatement personnel, etc.

G. Common Enterprise Situations

Questions regarding whether there is a common enterprise arise where the employee of one employer is injured by the negligence of the employee of another employer working on the same premises. Common enterprise situations are governed by Minn. Stat. §176.061, subds. 1-4. There are numerous cases discussing whether two or more employers are engaged in a common enterprise, and a thorough discussion of these cases is beyond the scope of these materials. The key lesson to be taken from these cases is that they are very fact specific, and it is often difficult to determine what distinguishes one situation from another.

1. Factors for Common Enterprise

a. Employers must be engaged on the same project (not merely on the same premises);

b. The employees must be working together, not merely in proximity of each other; and

c. The employees must be subject to the same or similar hazards. *McCourtie v. U.S. Steel Corp.*, 93 N.W.2d 552 (Minn. 1959).

Example: An employee of the plumbing subcontractor at the Mall of America is working on the ground floor, and is injured when an employee of the steel subcontractor, working 60 feet overhead in the Mall of America drops his screwdriver, which then lands on the plumbing employee's head. This is <u>not</u> a common enterprise situation, because the employees were not working together. *See also McCourtie v. U.S. Steel Corp.*, 93 N.W.2d 552 (Minn. 1959).

However, a common enterprise was found where the employee of a steel subcontractor hired to construct the MTC garage, was injured by an employee of the general contractor who was operating a crane involved in the construction of the garage. The court determined that the two employees were working together in furtherance of the same project. *See Ritter v. M.A. Mortenson*, 352 N.W.2d 110 (Minn.Ct.App. 1984).

2. Employee's Damages Limited

Basically, the statute requires the employee to choose between collecting workers' compensation benefits, or bringing a District Court action against the third party. If the employee chooses to forego workers' compensation benefits, and pursue a civil court action, his/her recovery is limited to the same amount recoverable under the WCA. Consequently, if the employer and third party were engaged in a common enterprise, bringing a third-party action is of no benefit to the employee.

3. Employer's Subrogation Interest in Common Enterprise Cases

The fact that the employer and third-party were engaged in a common enterprise does not affect the employer/workers' compensation insurer's right to pursue a subrogation claim against the third-party tortfeasor. *See* Minn. Stat. §176.061, subd. 3 (2000). The employer's subrogation rights are no greater than those which its employee had at common law against the non-employer *at the time of the injury*. *Minnesota Brewing Company v. Egan & Sons Co.*, 574 N.W.2d 54 (Minn. 1998). The fact that the third-party tortfeasor and employer are common enterprisers does not make the non-employer or common enterpriser automatically responsible for half of the workers' compensation benefits received by the employee from his/her employer. Rather, the Supreme Court of Minnesota held in *Minnesota Brewing*, that the right of subrogation under Minn. Stat. §176.061, subd. 3, is based in tort law, and that before an employer can recover its subrogation interest in a common enterprise situation, it must prove the non-employer's degree of causal negligence for the workers' compensation benefits "paid" or "payable". *See Minnesota Brewing Co.*, 574 N.W.2d at 60-61, 62.

STRATEGY TIP: One option in bringing a subrogation claim against the common enterpriser is to bring a petition for contribution on the basis of the loaned servant doctrine. Under the loaned servant doctrine, a person may be the employee of the employer who loans the worker to another to perform a special service, and also, be an employee of the employer for whom the special services are being performed. If the following conditions are met, the special employer may be liable for workers' compensation benefits: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. *Newland v. Overland Express, Inc.*, 295 N.W.2d 615 (Minn. 1980); *Hix v. Minnesota Workers' Compensation Assigned Risk Plan*, 520 N.W.2d 497 (Minn.Ct.App. 1994).

H. Uninsured/Underinsured Motorist Claims

An employee may have an uninsured and/or underinsured motorist claim where he/she is injured in a motor vehicle accident, and the at-fault party has no auto insurance or, alternatively, has insufficient coverage. Under Minnesota law, an employer/workers' compensation insurer cannot bring a subrogation action against the employee's uninsured/underinsured motorist recovery. This result is based on the principle of "first party coverage," that is, that the benefits under the uninsured motorist policy is something that goes directly to the insured by reason of a contract with the insurer.

Example: An employee is killed in an automobile accident by an uninsured motorist. The widow settles with the decedent's uninsured motorist carrier, and also collects death and dependency benefits from the workers' compensation insurer. The workers' compensation insurer petitions to discontinue the benefits seeking a credit against the money received from the uninsured motorists policy. The court concluded that this was not a case where the widow would receive a double recovery, but rather, was receiving money from two separate sources. The court noted that normally subrogation rights can only be asserted against third-party tortfeasors, and the uninsured motorist carrier was not a third-party tortfeasor. *See Janzen v. Land O'Lakes, Inc.*, 278 N.W.2d 67 (Minn. 1979).

I. Co-Employees

Injured employees cannot bring an action against a co-employee working for the same employer, unless the injury resulted from the gross negligence of the co-employee, or was intentionally inflicted by the co-employee. Minn. Stat. §176.061, subd. 5c). Gross negligence is defined as very great negligence, or the absence of even slight care. However, in order to prove gross negligence, a plaintiff need not prove, willful, wanton, or reckless conduct. *See Ackerman v. American Family Mutual Ins. Co.*, 435 N.W.2d 835 (Minn.Ct.App. 1989).

EXAMPLE: Plaintiff/employee is injured in an automobile accident. The vehicle was owned by the employer and driven by a co-employee. Both the employee and the co-employee were working at the time of the accident. The injured employee collected workers' compensation benefits and then brought an action seeking coverage under the employer's general automobile liability insurance policy. The policy contained a "cross-employee" exclusion, stating that it did not provide coverage for any person engaged in the business of the employer with respect to bodily injury to any fellow employee of such person injured in the course of employment. The court held that the injured employee could not recover under the general automobile liability policy. *See Peterson v. Kludt*, 317 N.W.2d 43 (Minn. 1982).

IV. WHAT TO DO WITH A WORKERS' COMPENSATION CLAIM THAT HAS POTENTIAL THIRD-PARTY LIABILITY

Subrogation cases are fundamentally liability actions. As such, recognizing a good subrogation case and formulating an appropriate case handling strategy requires an investigation of the potential fault levels of each of the parties involved in the injury incident (employee, alleged third-party tortfeasor/defendant, and employer). Each party's level of fault can potentially impact upon the level of subrogation recovery which is ultimately obtainable. However, subrogation actions cannot be viewed in a vacuum, as merely "civil liability actions". Subrogation actions arise out of workers' compensation actions. As a result, recognizing a good subrogation case and formulating an appropriate recovery plan requires more than an investigation of the civil aspects of the case and associated fault levels of the parties involved in the accident event. It also involves investigating and analyzing the status of the pending or potential workers' compensation case and the potential future workers' compensation exposure.

A. Preliminary Investigation

Because subrogation cases are liability actions, investigation must be approached differently than a "pure" workers' compensation case. Investigation of a "pure" workers' compensation case typically involves inquiries as to whether an alleged work injury occurred, whether it is a substantial contributing factor in causing the employee's symptoms and whether the medical treatment rendered or proposed is reasonable and necessary and within the confines of the Minnesota Treatment Parameters. Investigation of a subrogation case necessarily involves those elements, but also requires consideration of significant additional elements; namely, the fault of the various parties involved in the injury incident and the extent of the associated damages of the injured employee.

The level of fault of the various parties involved in causing the injury incident and the extent of the damages of the employee will significantly impact the nature and extent of any subrogation recovery. As is detailed further in these materials, the fault attributable to the third-party tortfeasor, the employee, or the employer will most assuredly impact on the extent of subrogation recovery in any case. Similarly, the employee's damages attributable to the work injury incident, as opposed to a pre-existing or subsequent event will impact on the level of subrogation recovery obtainable in any case.

Finally, any subrogation recovery attempt should also involve a preliminary assessment of fault on the part of the employee, the alleged third-party tortfeasor, and employer. It should also involve a preliminary assessment of the amount of workers' compensation benefits paid *and* future exposure for "payable" benefits, the cost of the investigation, the potential cost of litigation, and the likelihood of prevailing at trial. In that regard, all preliminary investigations should include specific inquiries of the employee and the employer and collection of information and documents from the employer and outside sources.

The employer/workers' compensation insurer frequently has the first opportunity to investigate an accident and, as such, is often in a unique position to investigate before attorneys are hired and accident scenes altered. The path of investigation pursued depends upon the unique facts of each particular case. In some cases, interviewing the employee and employer may be sufficient. In others, it may be necessary to retain a qualified expert to visit the accident scene and evaluate the instrumentalities involved.

As discussed elsewhere in these materials, the concept of fault is an important aspect of every subrogation case and must be kept in mind as a case is investigated. Employee and employer fault can impact subrogation recovery. Under Minnesota law, if an employee is 51 percent at fault for his injury, there will be *no* subrogation recovery to the employer, regardless of how much money is paid in workers' compensation benefits. Therefore, questions asked of the employee through investigation should include employee fault, as identified in the investigation checklist below. Additionally, an employer's fault can affect an employer/insurer's subrogation recovery. In some cases employer fault can diminish or completely eliminate an employer/insurer's potential subrogation recovery. Prior to the 2000 legislative amendments to *Minn. Stat. § 176.061*, an employer/insurer's contribution liability to a third-party tortfeasor for its fault in causing injury to an employee could exceed its potential subrogation recovery. As indicated below, the 2000 legislative amendments to *Minn. Stat. § 176.061* capped an employer/insurer's contribution liability at its net subrogation recovery. This is more fully discussed in Section V, C, 6 of these materials.

1. Investigation Checklist for All Subrogation Cases

The following list is by no means exhaustive, however, preliminary investigation in all subrogation cases should incorporate the following:

a. Identification of correct names and addresses of all potential third-party defendants.
b. Obtain instruction manuals for machinery, products, and equipment. Where applicable, obtain maintenance logs.
c. Obtain training manuals, if applicable.
d. Obtain names of personnel with the employer, who may have witnessed the accident and/or who had a supervisory role over the employee and/or the equipment involved in the accident.
e. Contact potential witnesses. Assess the information they convey. If you feel the individual will provide a favorable statement, you may consider taking a recorded statement from them. If you are not convinced that the individual will provide you with a favorable statement, do not proceed with a recorded statement. Rather, summarize the information you obtain through your initial contact. Likewise, with respect to potential employer witnesses, be cautious

about allowing employee's attorney's to contact them. Contact legal counsel first.

f. Obtain insurance coverage information relative to potential defendants.

g. Obtain information regarding the employer's liability insurance;

h. Obtain governmental reports, OSHA reports, police reports, medical records, etc., where applicable. *See* the "Analysis" section, below, for further information in this regard.

i. Obtain photographs of accident scenes, motor vehicles, machines, products, or equipment involved in the employee's injuries.

j. Consider whether an expert will be needed to investigate the particular accident scene.

k. Obtain medical, rehabilitation, and rehabilitation records.

l. Prepare a working itemization of workers' compensation payments you have paid and/or are continuing to pay. Itemize the benefits by categories of expenses (e.g., PPD, TTD, TPD, medical expenses, vocational rehabilitation expenses, etc.).

m. Evaluate possible third-party negligence in causing the employee's injuries. What does the information you have obtained suggest?

n. Evaluate possible employer negligence in accident. What does the information you have obtained suggest? Where there is employer fault, there will likely be a contribution action by the third-party tortfeasor against the employer. An employer may be held liable in contribution. This is known as *Lambertson* liability, and is more fully described in Section V, C, 6 of these materials, "*Lambertson* liability."

o. Evaluate possible employee fault in causing accident. What does the information you have obtained suggest? Remember, if the employee is 51 percent or more at fault, there will be no subrogation recovery, regardless of the amount of workers' compensation benefits paid or payable. Additionally, if the employee's fault is less than 51 percent, it will impact your subrogation recovery, as a verdict is reduced by the employee's fault, before your subrogation recovery is determined. *See* Section V, C, 6 of these materials, "*Lambertson* liability."

2. Case Specific Questions for the Employee Through Investigation

Preliminary investigation may involve interviewing the employee regarding the circumstances of the accident. It should be kept in mind that all written or recorded statements will eventually be discovered by all parties. Therefore, make an initial contact with the employee first, to obtain some general information and to formulate some general impressions regarding the employee and his/her account of the accident. If you feel the employee will give a favorable statement, consider taking a recorded statement. If you sense that the statement will not be favorable,

document your initial impressions in your file, but do not proceed with a recorded statement.

The following are sample questions that may be asked when taking a statement from an injured employee where there is potential third-party liability. The lists are, by no means, exhaustive, but represent some areas of inquiry that may be pursued. Some of these questions may be duplicative of the types of questions you would typically ask about the workers' compensation injury itself. Additionally, it is always important to gather information regarding the extent of the employee's problems, and the extent of outstanding damages.

a. Motor Vehicle Accidents

(1) On what day of the week did the accident occur?

(2) At what time of the day did the accident occur?

(3) Where did the accident occur? If the employee cannot recall a specific intersection/street, attempt to at least obtain information regarding the city or county the accident occurred in, so that any police reports can be more easily obtained.

(4) From where were you coming?

(5) What was your destination?

(6) What were the weather conditions?

(7) What were the light conditions?

(8) What were the road conditions?

(9) Describe the accident scene - e.g., the road surface, level, number of lanes and traffic controls.

(10) What direction was your car going?

(11) What direction was the other car going?

(12) Describe what happened.

(13) What was the position of the cars prior to impact?

(14) What was the position of the cars at impact?

(15) When did you first see the other car? How fast were you going? How fast would you estimate the other car was going?

(16) Were there any visual signals or audible signals prior to impact - e.g., horns?

(17) Were there any attempts to avoid the accident? Did you notice any skid marks on the road, after the accident?

(18) Describe what happened following the accident.

(19) Did you lose consciousness? What were your symptoms immediately following the accident? What injuries did you and the other driver(s) involved sustain?

(20) Did you have any conversations - e.g., with the driver of the other vehicle, with passengers in any of the vehicles, etc. If so, what was said?

(21) Were there any witnesses? Did you speak with them? Did you get their names?

(22) Did the police come to the accident scene? Did they prepare an accident report? If so, do you have a copy of it? Did the police issue a citation to you or the other party? If so, what was the citation given for? Do you have a copy of the citation?

(23) Were any parties taken from the accident scene via ambulance?

(24) Were there any marks or damage to your car? Did you get estimates - where? Was your car repaired?

(25) Did you have any photos taken at the accident scene, or of any of the vehicles following the accident? Are you aware of whether any of the other parties photographed the accident scene?

(26) Did you have auto insurance for the car you were driving - name of company? (In the alternative, if the car was a company car, ask about the auto insurance provided by the company.) Name of insurance company for other vehicle?

(27) Were any claims made against any insurance policy? Were the claims paid?

(28) What was the condition of your vehicle at the time of the accident? Had it been repaired recently? Were your brakes in good condition - had they been prepared recently?

(29) What is your driving record like - history of violations?

(30) Had you been drinking (alcoholic beverages) prior to the accident? Were you taking any drugs or medication (over-the-counter, or prescription)?

(31) Was there any indication that the other driver was under the influence or alcohol or drugs - e.g., could you smell alcohol on his/her breath, etc.

b. Products Liability

While products liability claims can include many different scenarios, the following list is intended as an example of the types of questions you may consider asking if the employee was injured by some type of machinery.

(1) On what day of the week did the accident occur?

(2) At what time of day did the accident occur?

(3) Where were you working at the time of the accident?

(4) What was your job at the time of the accident?

(5) What machine were you working on - e.g., what machine/product was involved in the accident?

(6) Who was the manufacturer of the machine/product?

(7) Where was the machine/product located at the time of the accident?

(8) Describe the features of the machine and how it functions.

(9) Were there any guards on the machine (e.g., to prevent people from sticking their hands in the machine)? Do you know who put the guards on the machine?

(10) Were there any warning signs on or near the machine? Do you know who put the signs on or near the machine?

(11) Were any modifications made to the machine prior to the accident?

(12) Are you aware of whether the machine had any routine or other type of maintenance shortly before the accident?

(13) Describe how the accident occurred.

(14) What injuries did you sustain? Obtain information regarding the nature and extent of the injuries and whether the employee lost consciousness after the accident.

(15) Were there any witnesses to the accident? Obtain names/addresses, etc.

(16) Who was your supervisor at the time of the accident?

(17) Are you aware of how maintenance of the machine/product was handled? Did your employer perform routine maintenance on the machine or was that contracted out to another company?

(18) Is the machine still located in the same place? Is it still being used?

(19) Have any modifications been made to the machine since your accident?

(20) Are you aware of any other injuries involving this machine? Names of the injured employees?

c. Premises Liability

The most common scenarios for premises liability are a slip and fall events in a parking lot, a slip and fall on stairs, or slip and fall on a wet floor while working in a building not owned by the employer.

(1) On what day of the week did the accident occur?

(2) What time of day?

(3) From where were you coming?

(4) What was your destination?

(5) What was your purpose in going to that destination?

(6) What were the weather conditions?
(7) What were the light conditions?

(8) Were there any warning signs posted indicating potential hazards?

(9) Describe what happened - e.g., what step were you on when you slipped; were you going up or down the stairs?

(10) What injuries did you sustain? Obtain information regarding the nature and extent of the injuries and whether the employee lost consciousness after the accident.

(11) What was the condition of the premises at the time of your accident - e.g., was the floor wet or dry; was there proper lighting; was it snowy or icy?

(12) Who owned the premises where the accident occurred?

(13) Were there any witnesses? Did you speak to them? Did you get their names?

(14) Were any claims made against any insurance policy? Were the claims paid?

d. Professional Liability

(1) Who was the healthcare provider?

(3) Who referred you to this provider?

(4) What was your condition before you saw the health care providers - e.g., describe your problems/symptoms.

(5) What type of background information did you provide to the healthcare provider - e.g., was an accident history taken?

(6) Who, besides the healthcare provider, spoke with you, or provided any type of treatment?

(7) Describe what happened during your treatment - e.g., what conversations you had and with whom, the specific nature of the treatment provided, whether the treatment was explained, etc.

(8) Did anything unusual happen during your treatment?

(9) Describe any problems or symptoms you had after the treatment.

(10) When did you first notice that you had additional symptoms, or that your problems were worse?

(11) What injuries did you sustain? What new symptoms did you experience? Obtain information regarding the nature and extent of the injuries.

(12) To whom did you report the increased symptoms/problems to?

(13) Was additional treatment provided? Was it helpful?

e. Mold Exposure/Sick Building Syndrome Cases

Mold exposure and sick building syndrome cases can potentially create workers' compensation subrogation interests and furnish the self-insured employer or workers' compensation insurer with an ability to pursue reimbursement for workers' compensation benefits paid, through subrogation.

If the presence of mold or other fungi results from a construction defect, the failure of a landlord to adequately maintain the premises, or other third-party negligence, the self-insured employer or workers' compensation carrier may initiate a subrogation claim (third-party civil liability action) against the at-fault third-party for reimbursement of workers' compensation benefits paid to, and on behalf of, the employee as a result of the work-related condition caused by the occupational exposure.

In all workers' compensation cases involving alleged mold exposure or sick building syndrome, a preliminary investigation should be made regarding the nature and extent of the alleged association between the purported exposure and resulting symptoms or condition. The preliminary investigation will necessarily involve collection of information from the employer and employee. As outlined below, mold exposure and sick building syndrome cases are uniquely vulnerable to problems with

causation which can adversely affect any potential subrogation recovery. As a result, it is critical to focus on potential causal issues early in case investigation.

Preliminary investigation of a workers' compensation mold or sick building syndrome case may involve interviewing the employee regarding the circumstances of the injury. The self-insured employer's or workers' compensation carrier's initial contact with the employee should involve specific questions regarding the alleged exposure and alleged resulting symptoms. The following is a list of sample questions that may be asked of the employee. The list is, by no means, exhaustive, but represents some areas of inquiry that may be pursued.

(1) When did the symptoms begin? What are your symptoms?

(2) Do the symptoms exist all the time, or do they come and go?

(3) Are the symptoms associated with certain times of day, days of the week, or seasons of the year?

(4) If so, are you usually in a particular place at those times?

(5) Does the problem cease either immediately or gradually when you leave there? Does it recur when you return?

(6) Where do you work?

(7) Have you recently changed employers or assignments?

(8) Has your employer recently changed locations?

(9) If not, has your work place been redecorated or refinished; or, have you recently started working with new or different materials or equipment? (If so, do you know who did the redecorating, when it was done, or what, in particular, was done?).

(10) What is the smoking policy at your workplace?

(11) Do you smoke?

(12) Are you exposed to tobacco/second hand smoke at work? Home? Recreation?

(13) Describe your work place and specific work area(s).

(14) What type of construction materials are associated with the work building? (Is the exterior composed of stucco siding, vinyl siding, or wood siding?)

(15) What are the components of your work area? (Do you work in an area with a carpeted floor?)

(16) Where do you live?

(17) Have you recently changed your place of residence? (If so, what changes were made, by whom, and when?)

(18) What year was your place of residence built?

(19) What type of construction materials are associated with your residence? (Is the exterior composed of stucco siding, vinyl siding, or wood siding?)

(20) Have you had any water leakage problems at your residence?

(21) Is the relative humidity in your home or workplace consistently above 50%?

(22) Are humidifiers or other water spray systems in use? How often are they cleaned?

(23) Have you made any recent changes in or additions to your residence?

(24) Have you or anyone in your family recently started a new activity or hobby?

(25) Have you recently acquired a new pet?

(26) Do you experience symptoms at home or other places outside of the work place?

(27) Do you notice that your symptoms worsen or improve at particular times of the year?

(28) Do you have any allergies? Hay fever?

(29) Do you take any regular medications at any times during the year?

The above-listed questions go beyond inquiring into possible work-place sources of an employee's symptoms and address other possible sources of the symptoms. That line of inquiry is crucial to an early determination of potential causation problems which may adversely affect subrogation recovery.

3. Specific areas of investigation for employers

Some of the avenues of inquiry for injured employees listed above may also be pursued with the employer, who may be in a better position to provide information. For example, in products liability actions, the employer should be questioned about modifications to the product, maintenance of the product, training of the employees for use of the product, prior instances of injury with the product and the current whereabouts of the product, post-injury.

In addition to potentially interviewing the employee, preliminary investigation should involve collecting written documents and other information from the employer. It may also involve interviewing individuals with the employer. Again, it should be kept in mind that all written or recorded statements will eventually be discovered by all parties and, as a result, unfavorable statements should not be taken. Non-favorable information should be summarized and retained in a separate "work product" file.

Bear in mind that under both Minnesota law and OSHA regulations, an employer has a non-delegable duty to provide a safe workplace. *See Baumgartner v. Holsin*, 236 Minn. 325, 52 N.W.2d 763 (Minn. 1952); 29 *U.S.C.* §654; *Minn. Stat.* §182.653. This non-delegable duty includes a duty to provide a reasonably safe place to work, to furnish reasonably safe tools and equipment, to warn and instruct employees regarding dangers, and to supervise and direct employees. *Berg v. Johnson*, 252 Minn. 397, 90 N.W.2d 918 (Minn. 1958). The duty, while non-delegable, requires only the exercise of reasonable care. *Netzer v. Northern Pac. Ry*, 238 Minn. 416, 57 N.W.2d 247 (Minn. 1953), *cert. denied*, 346 U.S. 831 (1953).

The *simple tool doctrine* is an exception to an employer's duty to provide reasonably safe tools. An employer has no duty to inspect simple or common tools to discover or remedy defects arising from ordinary use. *Mervin v. Magney Const. Co.*, 416 N.W.2d 121 (Minn. 1987); *Dally v. Ward*, 223 Minn. 265, 267 26 N.W.2d 217, 218 (Minn. 1947). Some tools that have been held to qualify as "simple tools" are a hammer (*Dally v.*

Ward, 223 Minn. at 267, 26 N.W.2d 218); a bolt and nut holding two ends of chain (*Olson v. Great N. Ry*, 141 Minn. 73, 169 N.W. 482 (Minn. 1918); a small step stool (*Person v. Okes*, 224 Minn.541, 29 N.W.2d 360 (Minn. 1947); and a ladder (*Halverson v. University of Minnesota*, No. C3-92-1858 (Minn. Ct. App. April 20, 1993) (Unpublished decision). The simple tool doctrine does not apply when the employer has actual knowledge of a defect, the employee has no knowledge of the defect, and the defect is latent. *Heise v. J.R. Clark Co.*, 245 Minn. 179, 71 N.W.2d 818 (Minn. 1955). The simple tool doctrine does not apply to vicarious liability for a co-employee's negligence in using a defective tool. *Mervin v. Magney Constr. Co.*, 416 N.W.2d at 125.

Additionally, employer liability can be triggered through violation of OSHA (Occupational Safety and Health Act) standards or other statutory provisions (e.g., Uniform Building Codes - adopted in Minnesota, *Minn. Stat.* §16B.59, *et seq.*, as amended in Minn. Rules §§1305.0110-.7100; the Uniform Fire Code - adopted in Minnesota, *Minn. Stat*. §199F.011, as modified in *Minn. Rules* §§7510.1100-.300; the Uniform Mechanical Code - adopted in Minnesota, as modified in *Minn. Rules* §1346.0050, *et. seq.*). Possible statutory violations are many and varied. With all codes, it is important to determine whether the code applies and the version of the code applicable to the particular case you are dealing with.

An employer's violation of an OSHA or other regulation/statute can be determined to be "negligence per se", or "presumed negligence". The breach of an OSHA or other regulation gives rise to "negligence per se" or "presumed negligence" if the persons harmed by the violation are within the intended protection of the statute or regulation and the harm suffered is the type the legislation was intended to prevent. *Zorgdrager v. State Wide Sales, Inc.*, 489 N.W.2d 281 (Minn. 1992); *Shufelt v. Kraus-Anderson Construction Company*, 1997 WL 147222 (Minn. Ct. App. 1997). An employer's violation or disregard of an OSHA or other statutory violation can have a significant impact upon whether the employer is deemed to bear a portion of the liability in causing an employee's injury and, thus, *Lambertson* contribution liability to a third-party tortfeasor. That, obviously, can adversely impact on an employer's potential subrogation recovery, as any *Lambertson* liability will offset or reduce any net subrogation recovery obtained.

Employer liability can also be triggered by the gross negligence of a co-employee, in causing another employee's injury.

Finally, industry standards and industry custom and practice are admissible to prove negligence of an employer. Industry standards are generally recorded in printed material and contain agreed upon standards as established by particular groups, such as the American National

Standards Institute (ANSI), Underwriters Laboratories (UL), the American Sanitation Foundation (NSF), the American Society of Mechanical Engineers (ASME), the National Fire Protection Association (NFPA), and the National Society for Testing and Materials (ASTM). These groups are composed of individual members of industry, government, consumer groups, etc. Industry custom and practice is not generally a formal written standard but, rather, represents the norms the particular industry has adopted regarding safe practices. Internal safety manuals, members of an industry, and experts are sources of information regarding custom and practice. All of the above represent possible sources to aid in investigation of possible employer liability.

The following are examples of some specific lines of investigation that can be pursued with employers:

a. Is there evidence of a failure to maintain a safe premises?

b. Is there evidence of a failure to adequately maintain tools or machinery?

c. Is there evidence that would suggest that proper work procedures were not followed?

d. Is there evidence that would suggest that there may have been a failure to adequately train or instruct employees?

e. Is there evidence that would suggest that there may have been a failure to adequately supervise or direct employees?

f. Is there evidence that would suggest that the employer may have altered a machine (e.g., removing guards or other equipment from a machine, failure to install protective guards or other equipment, after the machine is delivered from the manufacturer)?

g. Is there evidence that would suggest that the machine/product in question was not properly or routinely maintained prior to the accident?

h. Obtain instruction manuals, purchase orders, maintenance files, and instruction files for equipment;

i. Obtain training manuals, if applicable;

j. Obtain names individuals with the employer, who were in charge of maintenance of the machine/product and/or training or certification of employees to operate the machine;

k. Consider obtaining a statement from employer witnesses. Again, summarize unfavorable information, but do not take non-favorable statements;

l. Obtain information regarding the employer's liability insurance;

m. Obtain governmental reports, OSHA reports, police reports, medical records, photographs, etc., from employer, to the extent the employer has these things.

4. Specific areas of investigation in mold/sick building syndrome cases

a. Questions for the Employer

Preliminary case investigation in mold/sick building syndrome cases should involve focused and specific questioning of the employer. The following is a list of sample questions that may be asked of the employer. The list is, by no means exhaustive, but represents some areas of inquiry that may be pursued.

(1) What type of construction materials are associated with the work building? (Is the exterior composed of stucco siding, vinyl siding, or wood siding?).

(2) What year was the building constructed?

(3) If the building was recently constructed, obtain information regarding the identity of the contractor and subcontractors.

(4) Has the building been remodeled? (If so, obtain information regarding what precisely was remodeled, who performed the remodeling, and when the remodeling was completed).

(5) Has the building had a history of water leakage? (If so, what measures were employed to remedy the problem? What contractors or subcontractors were utilized to make the repairs?).

(6) What entity is responsible for maintaining the building?

(7) Has the employer undertaken any "self-repairs" of water or mold problems?

(8) Are humidifiers or other water-spray systems used in the building? How often are they cleaned? Who is responsible for cleaning the units?

(9) What type of heating/cooling unit is utilized in the building? How old is it? Is it serviced regularly? What entity is responsible for maintaining the unit?

(10) What type of air circulation system is utilized in the building?

(11) Is the work place carpeted? (If so, what type of carpeting is in the building? Is the carpeting on a pad or directly on the floor/concrete?).

(12) Is there evidence of mold growth? (visible or odors?).

(13) Are organic materials handled in the workplace?

(14) Are there problems with cockroaches or rodents?

(15) Is the work place ventilated with outdoor air?

(16) When did the employee begin working for the employer?

(17) When did the employee report the symptoms in relation to the hire date?

(18) Where, precisely, does the employee work within the building? (Obtain detailed physical description of each place or station the employee works within the building).

(19) What hours does the employee work per week?

(20) What are the employee's particular job duties?

(21) Have other employees noted complaints similar to those the particular employee is making in this case?

b. Information and documents to be obtained through the investigation process.

The subrogation investigation process in a mold exposure or sick building syndrome case should also involve collecting information and documentary materials from the employer. What follows are examples of some of the information that may be sought.

(1) Obtain a complete and detailed job description from the employer, including job duties, physical descriptions of all locations in which the duties are performed, and the hours the employee works per week.

(2) Obtain a list of all materials used by the employee on the job.

(3) Obtain a list of all other materials or furnishings utilized in the vicinity of the alleged exposure.

(4) To the extent possible, obtain information regarding the amount of hours per week the employee works in each location of the alleged exposure (if more than one area of alleged exposure is involved).

It should be noted that the causative link between mold exposure and health effects beyond allergies is a controversial issue which is continually evolving as science advances. At this point, there are more questions than answers. For a number of reasons, establishing a causative link between workplace exposure and resulting condition can be difficult in a mold exposure/sick building syndrome case. First, there are a lack of standards governing mold and exposure to mold. At this time, no state or federal standards exist for what constitutes "acceptable" levels of mold in a building or residence. Second, human response to mold exposure may vary considerably. Third, while case studies indicate the possibility or even the plausibility of health effects from mold, such studies, by their nature, cannot address whether an effect is common or widespread among building occupants. Results from studies that have not been reproduced may be spurious or have yet to be confirmed by well-designed follow-up studies. In large epidemiologic studies general symptoms have been associated with moisture damaged and, presumably, moldy buildings. However, many of the reported symptoms are subjective and difficult to quantify. Results to these studies are often confounded by the fact that the association is general, and mold is not the only possible cause of the symptoms.

The causal issues raised by alleged mold exposure in the workplace are beyond the scope of this article, however, our Firm has prepared an extensive discussion of the topic. *See Occupational Disease and Workers' Compensation Benefits, A Primer,* Arthur, Chapman, Kettering, Smetak & Pikala, P.A., July 2003. For purposes of this article, it should be noted that there are a number of causative problems which may make it difficult to establish a causal link between workplace exposure and serious long term health effects resulting from alleged mold or sick building syndrome. Those causative problems may adversely impact on potential subrogation recovery. Recall that an employer/insurer's subrogation claim is derivative of the employee's claims. To the extent that causation cannot be established, the employer's/workers' compensation insurer's subrogation interest will not be recoverable.

B. Analysis of information obtained through investigation process

After conducting preliminary investigation, a preliminary analysis of the case should be made. The following should be considered in analyzing a subrogation case:

1. Cost of pursuing recovery: Products liability, professional liability, and construction accident cases are generally more expensive cases to prepare for trial than are simple negligence cases. This is a general rule only. The expense of any case depends upon its own individual facts. A convoluted automobile accident case can be as expensive to prepare for trial as a professional liability case. Each case must be individually evaluated. Are expert's needed? How many parties will need to be deposed? How many parties are involved? Is there an agreement as to how the injury incident occurred? etc.

2. The fact that a *Lambertson* contribution claim is or may be asserted against the employer <u>does not</u> necessarily warrant waiver of a subrogation claim. <u>Do not</u> assume that simply because there may be employer fault in a particular case that it warrants a "waive and walk" action. The *Lambertson* claim should be evaluated in terms of its merits and the cost to defend the claim. The employer's liability may be small and/or the defense relatively inexpensive. From a practical standpoint, the maximum cap on *Lambertson* liability is the net subrogation recovery or the employer's percentage of fault in relation to the damages awarded at trial, whichever is less. Depending upon the percentage of the employer's fault and the size of the damage award, it is possible for the employer to obtain a net subrogation recovery that exceeds its *Lambertson* contribution liability. In those specific cases, an employer/insurer would be foolish to "waive and walk".

3. With the ultimate decisions of liability in civil lawsuits being made by a jury, results are necessarily influenced by the presentation of the individual parties and witnesses. Because an employer/insurer's subrogation claim is derivative of the employee's claims against the third-party tortfeasor, and because the employer's subrogation recovery will be impacted by the relative fault levels of the employer, alleged third-party tortfeasor, and the employee, the type of presentation each party may make in front of a jury is an important consideration that can influence the outcome of a case at trial. The employer/workers' compensation insurer should in every case, consider whether the witness will likely present as a good witness or a bad witness on his/her behalf. The employer/insurer should also consider whether there are credibility problems that the witness will face if the matter is tried. The employer/insurer should consider whether the potential witness will be cooperative.

4. Results in a civil lawsuit will also depend greatly on the fault of the third-party tortfeasor, the employee, and the employer. Where there is a bad case for negligence against the third-party tortfeasor, the potential for subrogation recovery will be diminished or eliminated. Consider what your preliminary investigation revealed about the respective fault of the parties involved. How did the employee or individuals with the employer present to you in your initial contact or recorded statement?

5. Results in a civil lawsuit also depend on the employee's damages. Even if the case for negligence against a third-party tortfeasor is strong, the potential for subrogation recovery will be diminished where the employee's damages are limited. Consider what your investigation revealed about the employee's damages (injuries, loss of time from work, disfigurement, emotional distress, pain and suffering, etc.). What were your initial impressions?

6. Consider your best and worst case scenarios if the matter were tried to a jury.

   After preliminary investigation and analysis of the case, a determination will need to be made regarding whether or not to pursue recovery of the subrogation interest. If it is determined that subrogation recovery will be pursued, all parties should be notified of the employer/insurer's subrogation rights and the fact that those rights are being pursued. This should involve providing notice to the employee's attorney, the third-party tortfeasor, and the third-party tortfeasor's insurance carrier. *See* the "Litigation" portion of these materials for further information on this point. Not every case is ultimately a "good" subrogation case, but each case must be evaluated under its own facts, particularities and idiosyncrasies. There is no way to generalize "good" or "bad" subrogation

cases. In each case, the potential for recovery must be balanced with the costs incurred in obtaining the recovery and the uncertainties inherent in the jury system. Being able to recognize a "good" or "bad" subrogation case and being able to determine whether to pursue subrogation recovery requires an understanding of the competing interests of all parties involved and the interplay between those interests.

V. THE INTERESTS OF THE RESPECTIVE PARTIES AND THEIR IMPACT ON THE POTENTIAL SUBROGATION RECOVERY

Recognizing the situations in which a subrogation claim may arise is fairly simple. The more difficult aspect of workers' compensation subrogation is evaluating the potential for recovering workers' compensation benefits that have been paid. Several things must be considered in making this evaluation: (1) the plaintiff/employee's potential for prevailing in a third-party action, (2) the value of the plaintiff/employee's damages; (3) the comparative fault of the plaintiff/employee; (4) the comparative fault of the employer which could lead to a contribution claim; and (5) the parties' anticipated presentations before a jury.

A subrogation case begins with actual initiation of a lawsuit or one or more parties threatening to initiate a lawsuit. The employee may be threatening to sue the third-party tortfeasor; the third-party tortfeasor may be threatening to sue the employer in contribution or, alternatively, the employer/insurer may be threatening to sue the third-party tortfeasor for reimbursement of its subrogation interest.

The employer and workers' compensation insurer may pursue recovery by intervening in a suit initiated by the employee or, alternatively, by commencing a separate lawsuit in its own name or that of the employee. In either case, the employer/insurer will be a party to the action and have a right to recover damages through a jury trial. This subject is more fully addressed in the "Litigation" Section of these materials, below.

The two chief considerations in every workers' compensation subrogation case are that (1) the fault levels of each of the parties involved in an accident can impact on the employer's/workers' compensation insurer's subrogation recovery, and (2) the extent of an employee's damages can impact on the employer's/workers' compensation insurer's subrogation recovery. Each party in a workers' compensation subrogation recovery action will necessarily have a different and, often, competing legal interest or strategy. The employee will have an interest in establishing past and future medical and indemnity items of damage. The alleged third-party tortfeasor will have an interest in reducing its potential exposure by attempting to establish that the injured employee, his/her employer, or both, bear all or a portion of the liability for the employee's damages. The alleged third-party tortfeasor will also have an interest in establishing that the damages claimed by the employee are either partially or wholly inappropriate.

The employer/workers' compensation insurer administers a more precarious balancing act. On the one hand, the employer/workers' compensation insurer has an interest in any

pending workers' compensation action to limit its potential to-date or future workers' compensation benefit exposure by attempting to establish that the employee's injuries were merely temporary, that they are not substantial contributing factors in the employee's claimed condition, disability, or need for medical treatment, and that the claimed medical treatment is not reasonable or necessary. On the other hand, the employer/workers' compensation insurer will necessarily have to take a position diametrically opposed to that in its civil action for subrogation recovery. In particular, the employer/workers' compensation insurer will argue that the employee's work injury is a substantial contributing factor in the employee's condition, disability, and need for medical treatment and that the claimed medical treatment is both reasonable and necessary. The employer/workers' compensation insurer will also seek to establish that the potential future workers' compensation exposure is sizeable. The employee will seek to establish this same position, while also seeking to minimize his/her own fault in causing the work injury. In pursuing any subrogation recovery, the employer/workers' compensation insurer should be aware of these competing interests and the interplay between them to better maximize its potential subrogation recovery.

A. Employee's claims against the third-party tortfeasor

Because the employer/insurer's subrogation rights are derivative of the employee's and the employer/insurer's ultimate subrogation recovery is dependent upon the employee's ability to recover against the third-party tortfeasor, an understanding of the nature of the employee's claims against the third-party tortfeasor is critical.

1. Admissibility of evidence of workers' compensation benefits in a civil trial

The employee's damages in a civil trial are determined without regard to workers' compensation benefits. Payment of workers' compensation benefits is generally inadmissible in the employee's civil action to prove the extent of the employee's harm.

2. The effect of comparative fault

The plaintiff/employee's recovery will be determined by the Comparative Fault Statute, Minn. Stat. §604.01, et seq. It has two chief effects on the employee's case and, consequently, the employer's.

a. The employee can only recover if his/her fault is not greater than the tortfeasor's.

The fact that the employee is determined to be partially at fault for the injury is not a bar to recovery, so long as the employee's fault is not greater than that of the third-party tortfeasor. This ultimately affects the employer/insurer's subrogation claim, as well. Because

the employer/insurer's subrogation rights are derivative of the employee's, it will make no recovery if the employee's fault is determined to be greater than the third-party tortfeasor's. If an employee's liability is determined by a jury to be 51% or greater in causing a work injury, the employee will make no recovery against the third-party tortfeasor and the employer/workers' compensation insurer will have no ability to obtain any subrogation recovery. As a result, the third-party tortfeasor will strategically attempt to spread enough "fault" for the employee's injuries between the employee and the employer, so as to reduce the third-party tortfeasor's fault to a level below the employee's, thus reducing or barring any recovery to the employee or employer.

b. The employee's recovery is reduced by his/her percentage of fault.

If the employee's fault is not greater than the third-party tortfeasor's, the employee will be able to recover damages from the third-party tortfeasor, however, any damages recovered will be reduced in proportion to the fault attributable to the employee. This, in turn, affects the employer, as the amount available to satisfy the employer's subrogation claim will also be reduced. Based on the 2000 legislative amendments to Minn. Stat. § 176.061, and as explained more fully below in the discussion of *Lambertson* liability, this actually benefits the employer in situations in which it has *Lambertson* liability (liability to the third-party tortfeasor for employer's fault in causing employee's injuries), as the overall verdict or damage award is reduced by the employee's level of fault, which in turn reduces the alleged third-party tortfeasor's debt obligation and, consequently, the employer/workers' compensation carrier's *Lambertson* liability. *See* Section V, C, 6, below, *Lambertson* liability.

Note: In assessing fault, the fault of the employee is only compared with that of the tortfeasor, not the employer or co-employee's. Employee fault cannot be aggregated with the fault of the employer. *See Hafner v. Iverson*, 343 N.W.2d 634 (Minn. 1984). Nor can the fault of the third-party tortfeasor be aggregated with the fault of the employer. *See Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795 (Minn. 1982).

B. Employer's subrogation claim against the third-party tortfeasor

1. Dependent on Plaintiff's Capacity to Recover

The employer/workers' compensation insurer's subrogation rights are not derivative of the employee's in the sense that an employer/workers' compensation insurer's ability to recover in subrogation depends on an ability to intervene in an employee's civil lawsuit against a third-party tortfeasor. Indeed, and employer/insurer can institute a lawsuit to recover its subrogation interest whether or not the employee pursues any claim against the third-party tortfeasor. However, the employer/insurer's subrogation rights are derivative of the employee's in the sense that any subrogation recovery is dependent on the legal capacity of the plaintiff/employee to recover. As indicated above, that means the employer and insurer will only recover if the employee's fault is not greater than the third-party tortfeasor's. It also means that any subrogation recovery the employer/insurer makes will be reduced by the employee's percentage of fault. That fault assessment will be made whether or not the employee participates in the legal action for subrogation recovery.

2. What Benefits Can or Cannot be Recovered?

a. Prior to the 2000 Amendments to Minn. Stat. §176.061, wage loss benefits, medical benefits, and loss of earning capacity were clearly subject to subrogation. *See Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54 (Minn. 1993), discussed below. On the other hand, it was less clear how other benefits, such as permanency, were to be treated. *Tyroll* allowed subrogation only to the extent that common law benefits overlapped workers' compensation benefits. Since there is no common law equivalent to permanent partial disability benefits, it was unclear whether they were recoverable. However, the 2000 amendments make clear that the employer/insurer has a right to recover all benefits it pays to/on behalf of the employee, regardless of whether they were recoverable at common law or not. This has now been affirmed by the Minnesota Court of Appeals in *Zurich American Insurance Company v. Bjelland*, Case No. A04-709 (Minn. Ct. App. 2004), discussed below in Section VII., A., 4.

b. Employer cannot claim reimbursement for interest or penalties in subrogation action. Minn. Stat. §176.081, subd. 6.

3. Which employers can recover benefits in subrogation?

Any employer that has a valid policy of workers' compensation insurance on its employees or is self-insured for workers' compensation liability relative to its employees has a right of subrogation for any workers' compensation benefits it pays to/on behalf of covered employees injured as a result of the negligence of a third-party tortfeasor.

Notably, the Minnesota Court of Appeals has held that the right of subrogation extends to employers who voluntarily pay lost wages to non-covered employees, where coverage of those employees is not required by statute. *See Olson v. Blesener, d/b/a/ Blesener's Quality Exteriors*, 633 N.W.2d 544 (Minn. Ct. App. 2001). It should be noted, however, that this right of subrogation is a "common law" right and is not governed by Minn. Stat. §176.061. As such, it is unclear whether Minnesota Courts will extend to this common law subrogation situation, legal concepts which are associated with statutory subrogation under Minn. Stat. §176.061. For example, it remains to be seen whether Minnesota courts will hold that an employer in a common law subrogation situation such as *Olson* could enter into a *Reverse*-Naig settlement or unilaterally "waive" its subrogation interest and effectuate a dissolution of the third-party tortfeasor's contribution claims against it.

In *Olson, Olson v. Blesener, d/b/a Blesener's Quality Exteriors*, 633 N.W.2d 544 (Minn.Ct.App. 2001), the Minnesota Court of Appeals (Judge Anderson) specifically held that an employer who elects not to carry workers' compensation insurance, when not required to do so by statute, is entitled to subrogation from a third-party tortfeasor when it voluntarily pays lost wages to its employee in an effort to protect its own interests. The employee was a 50 percent shareholder and employee of the employer and sustained a work-related injury, through the negligence of a third-party. The employer elected not to insure the employee under workers' compensation. The employer paid the employee's wages until he returned to work. The employer subsequently successfully sued the third-party tortfeasor to recover the wages it voluntarily paid the employee during his period of disability. The third-party tortfeasor appealed, contending that the district court judge erred because Minnesota does not recognize a common-law subrogation action between an employer and third-party tortfeasor for an injury to the employee except for payments the employer is *required* to make under the workers' compensation act. The payments made by the employer in this case were not workers' compensation benefits, but rather, voluntarily paid lost wages. The Court held that the right of subrogation extends to parties who pay a debt in self-protection when that obligation is in dispute (the employer was a third-party defendant in the tort action), because they may suffer loss if the obligation is not discharged. The Court also noted that public policy was advanced

by encouraging voluntary payments by employers to injured employee/owners, rather than requiring the employee/owner to forego all payments until resolution of a tort action.

Clearly the court of appeals in *Olson* has demonstrated its willingness to apply at least some statutory concepts of Minnesota workers' compensation subrogation to common law employer-only subrogation situations. Again, the extent to which Minnesota courts will extend these concepts in future cases is unclear.

4. Limited admissibility of workers' compensation benefits paid

As noted above, in a civil trial against the third-party tortfeasor, the fact that workers' compensation benefits have been paid is inadmissible to establish employee harm.

5. Third-party tortfeasor's fault is "pure" fault.

The comparative fault statute contains a provision providing that when two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Up until 2003, the statute provided an exception for limited cases in which a person's fault was 15 percent or less. In those situations, the person's liability for the entire award was no greater than four times the percentage of fault. Thus, where an individual was only 5 percent at fault, under this rule, he/she could be held liable only to the extent of 20 percent of the entire award. This became known as the "15X4 Rule". **The important thing to note for workers' compensation subrogation cases is that Minnesota case-law determined that the third-party tortfeasor could not make use of the rule. Thus, the third-party tortfeasor's exposure, after deducting the employee's fault, was not limited by the "15X4 Rule" of Minn. Stat. §604.01, Subd. 1.**

In 2003, joint and several liability changed. For claims arising out of events occurring on or after August 1, 2003, joint and several liability only applies to a party whose fault is greater than 50 percent. If the fault is 50 percent or less, the party is liable only for that percentage of the award. If the event occurred before August 1, 2003, the 15X4 limitation applies. Again, there is no impact of the pre or post-2003 law on this point, as it pertains to an employer's/workers' compensation carrier's recovery of its subrogation interest.

Explanation:

a) Joint and Several Liability

- Generally

  It has long been the law in Minnesota that joint tortfeasors (e.g., two or more defendants whose fault exceeds the fault attributed to the plaintiff) are "jointly and severally" liable for the entire damage award. That means that the plaintiff can collect the entire damage award from either defendant. For example, assume that the plaintiff is injured when her water heater explodes. She sues the manufacturer and the drunken, bankrupt plumber who installed the water heater. The jury awards $1,000,000 in damages. It determines that the plumber is 70% at fault and that the manufacturer is 30% at fault. Since the drunken, bankrupt plumber and the manufacturer are jointly and severally liable for the award, the plaintiff can collect the entire $1,000,000 from the manufacturer even though the manufacturer was only 30% at fault.

- Protection for Defendants Who Are Only Slightly at Fault

  Prior to 1988, Minnesota had a "pure" joint and several liability statute. In other words, a defendant who was only 1% at fault could be held liable for 100% of the damage award. Recognizing the unfairness of that rule, the Legislature modified the statute so that a defendant whose fault is 15% or less is only liable for 4 X their percentage of fault. This is known as the 15 X 4 rule.

  For example, assume the jury found that the drunken, bankrupt plumber was 99% at fault and the water heater manufacturer 1% at fault. Under the old rule, the plaintiff could recover the entire $1,000,000 from the manufacturer. With the enactment of the 15 X 4 rule, however, the manufacturer's total liability is 4% (1% X 4) which equals $40,000.00.

- Decker v. Brunkow, 557 N.W.2d 360 (Minn. Ct. App. 1996) *rev. denied* (Minn. 1997).

  In *Decker*, an employee was injured when she tripped and fell. She sued the property owner (third-party tortfeasor) who then brought a claim for contribution and indemnity

against the plaintiff's employer. The case went to trial and the jury determined that the property owner was 5% at fault and the employer was 95% at fault. Citing the 15% X 4 rule, the third-party tortfeasor argued that its liability was limited to 20% (e.g., 5% x 4) of the total award. The court of appeals disagreed. It held that in a *Lambertson* claim, the fault shared between the tortfeasor and the employer may be "joint fault," but it is not "joint and several liability" that would trigger the operation of the comparative fault statute and its "16% Rule". The court noted that when an employer is immune from direct liability from the employee due to the exclusive remedy provision in Minn. Stat. §176.031, the statutory limitation of third-party tortfeasor liability to just four times its percentage of fault does not apply. As a result, the third-party tortfeasor was held liable to pay the entire award, less contribution from the employer up to an amount equal to the workers' compensation benefits paid and payable by the employer.

Had the Court of Appeals accepted the property owner's argument, the third-party tortfeasor's liability would have been limited to four-times its 5% fault (20%). The employee's recovery against the third-party tortfeasor would have been dramatically lower as would have the subrogation recovery and the employer's liability. For example, if the damages were $100,000.00, the Plaintiff would only recover $20,000.00 from the property owner (5% x 4 x 100,000.00). Likewise, since the only claim against the employer is the property owner's claim for contribution and indemnity, the employer's maximum liability would be 95% of $20,000.00. As it now stands, however, the property owner is liable for the full $100,000.00 award. He will receive contribution and indemnity from the employer up to $95,000.00 ($100,000.00 x 95%). Prior to the 2000 legislative amendments to Minn. Stat. § 176.061, that figure was still subject to the *Lambertson* paid and payable cap. In the post-2000 amendment world, the figure became capped at the "net recovery" of the employer. *See* Section V, C, 6 of these materials, below.

The appropriateness of this result is underscored by the Minnesota Court of Appeals' decision in *Zurich American Insurance Company v. Bjelland,* Case No. A04-709 (Minn. Ct. App. 2004), wherein the Supreme Court held that an

employer/insurer's subrogation recovery cannot be limited by common law or statutory limits outside of the workers' compensation statute.

As indicated above, it should be noted that in 2003, joint and several liability changed. For claims arising out of events occurring on or after August 1, 2003, joint and several liability only applies to a party whose fault is greater than 50 percent. If the fault is 50 percent or less, the party is liable only for that percentage of the award.

If the event occurred before August 1, 2003, a party whose negligence is 15 percent or less is only liable for a percentage of the whole award no greater than four times his or her percentage of fault (i.e., a defendant who is 15 percent negligent is only jointly and severally liable for 60 percent of the total award). Minn. Stat. §604.02, subd. 1.

Prior to August 1, 2003, when a state or a municipality was jointly liable and its negligence was less than 35 percent, its joint liability was limited to a percentage of the whole award no greater than twice the amount of its fault. *Id.*

6. No Reduction for Employer's Fault

While the employee's third-party recovery is reduced by the amount of his/her own negligence, the employer/insurer is not required to reduce its subrogation interest proportionately. However, the amount out of which the subrogation recovery is taken will be reduced by the employee's fault. Therefore, the overall subrogation interest will be affected.

7. Recovery May be Limited by Third-Party's Insurance Policy

In an unpublished Minnesota Court of Appeals case, the court determined that a subrogation interest may be limited by the policy limits of the third-party's insurance. *See John Colin Advertising, Inc. v. State Farm Mutual*, Case No. CO-94-347 (Minn.Ct.App. 1994). This issue arose in a case where the employee was injured by a negligent driver. The employee brought a third-party action against the driver, and the employer intervened to recover workers' compensation benefits paid. The negligent driver's insurance had a liability limit of $50,000.00, and the employee entered into a *Naig* settlement with the driver from $47,500.00. State Farm then tendered $2,500.00 to the employer, in settlement of the subrogation claim. The employer claimed that it was entitled to benefits based on the $100,000.00 aggregate limits of the State Farm policy. The court rejected the employer's argument. In making its decision, the court

relied on the "plain language" of the policy, and determined that the policy required State Farm to pay damages for "bodily injury to others," and that bodily injury was defined as "bodily injury to a person. The court concluded that the employer could not have suffered a "bodily injury" since it was not "person" within the meaning of the policy.

Note: In situations in which the insurer for the third-party tortfeasor expends all or most of its insurance policy dollars in a *Naig* settlement with the employee, the employer may still proceed with an action against the third-party tortfeasor directly, for recovery of the balance of any unsatisfied subrogation interest. As a practical matter, that often invites a bad faith claim by the alleged third-party tortfeasor against his/her insurer for failing to retain sufficient policy monies after resolving the employee's civil damage claims to service the subrogation claims of the employer/workers' compensation insurer.

C. Third-party tortfeasor's contribution claims against the employer - the employer's *Lambertson* liability

1. Basis for *Lambertson* Contribution Claims - Historical Background

When the Minnesota workers' compensation act was originally enacted in 1913, an employee injured by a third-party tortfeasor in the course of his/her employment was required to make an election of remedies. He/she could receive workers' compensation benefits from the employer or, alternatively, sue the third-party tortfeasor in a negligence, the recovery of which could not exceed the amount fixed by the workers' compensation act. Act of April 24, 1913, Ch. 467, § 33, 1913 Minn. Laws 691-92; *Schleicher v. Lunda Const. Co.* 406 N.W.2d 311, 313-314 (Minn. 1987).

The election of remedies provision of the workers' compensation statute was amended in 1923. Act of April 16, 1923, Ch. 279, §1, 1923 Minn. Laws 374-75. Under the amended statute, the employee was only required to elect a remedy if the employer and third-party tortfeasor were involved in a "common enterprise". Act of April 16, 1923, Ch. 279, §1, 1923 Minn. Laws 374-75. *Schleicher v. Lunda Const. Co.*, 406 N.W.2d 311, 313-314 (Minn. 1987). The employee's rights increased, as he/she then had an ability to recover workers' compensation benefits from the employer and the ability to recover civil damages from an at-fault third-party tortfeasor. The employer's liability remained limited to the exclusive remedy provisions of the Act. Minn. Stat. §176.031.

Due to the exclusive remedy provisions of the workers' compensation act, Minnesota courts held that employers could not be found liable for direct negligence claims of employees, and held that employers could not be

held liable for contribution claims of alleged third-party tortfeasors. As a result, third-party tortfeasors bore responsibility for the entirety of a jury verdict, despite the fault of the employer. On the other hand, at-fault employers were still permitted to recover in subrogation against the third-party tortfeasors, amounts they paid to injured employees in workers' compensation, with no reduction relative to the employer's level of fault.

This all changed in 1977, with the Minnesota Supreme Court's decision in *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977).

2. The *Lambertson* Decision

In the *Lambertson* case, the employee caught his hand in a punch press machine, and partially amputated it, primarily due to his employer's failure to obtain safety devices offered by the manufacturer and a co-worker's negligent operation of the machine. At trial, the manufacturer was determined to be only 25% liable, the employer 60% liable and Lambertson, 15% liable. At that time, Minnesota law dictated that the employer would be fully reimbursed for the workers' compensation benefits it had paid by the manufacturer, who was only 25% responsible for the injury. The Supreme Court of Minnesota held that an at-fault employer could be held liable for contribution to the third-party tortfeasor for the employer's fault, up to a maximum amount equivalent to its workers' compensation benefits paid and the present value of future workers' compensation benefits payable. With that decision, the third-party tortfeasor's right of contribution against at-fault employers was born.

3. Theories of contribution under *Lambertson*

Lambertson contribution claims may arise under several different scenarios of employer fault: The fault of the employer, the fault of a co-employee (vicarious liability), or the fault of a third-party for whose conduct the employer was responsible.

a. Employer's Fault

This theory of liability is based on a claim that the employer, through its own negligence, was a causal force in bringing about an employee's personal injuries while in the course and scope of his/her employment. These contribution claims often focus on some act or omission of the employer, such as a failure to properly train the employee in the use of the equipment that ultimately caused the injury; a failure to provide the proper equipment; a failure to post proper warnings; a failure to provide adequate information or supervision; a failure to provide a safe workplace; and alteration of a product.

b. Common Enterprise

An employer may have contribution liability as a result of the fault of someone for whose conduct the employer is responsible.

Example: In *Peterson v. Little-Giant Glencoe Port. Elev.*, 366 N.W.2d 111 (Minn. 1985), the employee was killed while demonstrating farm equipment manufactured by Little-Giant and owned by Easterlin. The employee's employer sold farm equipment to Easterlin. At the time of the accident, the employee was helping Easterlin's employee's prepare the equipment for demonstration. The defendants cross-claimed for contribution and indemnity against the employee's employer. The jury found the manufacturer 65% negligent, and the owner 35% negligent. However, it was also determined that the employee was involved in a common enterprise with the owner's employees. Consequently, Easterlin had no direct liability to the employee. However, since Easterlin and the employer were considered co-employers, Little-Giant could recover contribution from Easterlin and the employer, in an amount not exceeding the employer's subrogation rights.

c. Vicarious Liability/Co-Employee Fault

Under the rule of respondeat superior, an employer is liable for the negligence/gross negligence of its employees.

EXAMPLE: In *Hafner v. Iverson*, 343 N.W.2d 634 (Minn. 1984), two employees were injured when the bucket in which they were standing to repair a traffic light was struck by a truck attempting to pass under it. When the employees sued the truck driver and his employer, the defendants commenced a third-party action against the plaintiffs' employer for contribution. One of the employees testified that they knew that the traffic light and the bucket were "too low." Consequently, the court determined that both employees could have been negligent. The employer was, therefore, responsible for the negligence of each employee under the theory of respondeat superior (that a servant's acts are his/her master's acts). Consequently, the percentage of negligence apportioned to each employee would be the percentage of the employer's contribution to any recovery of the other employee.

Note that an employee generally has no direct action against a co-employee for injuries sustained in the workplace. Under Minn. Stat. §176.061, Subd. 1 and Subd. 4, an injured worker can only

sue a co-worker for a work injury if that co-worker had a duty that was independent of his employer's duty to keep a safe work place and that co-worker was either grossly negligent or intentionally inflicted the injury. Minn. Stat. §176.061, Subd. 5c).

Note that an employer generally has no vicarious liability for the intentional torts or intentional criminal acts of its employees.

4. How *Lambertson* contribution is provided for in insurance policies

Following the *Lambertson* decision, employers and workers' compensation insurers potentially have two duties in third-party liability cases: the duty to pay worker's compensation benefits on the one hand, and the duty to pay contribution, on the other. The standard workers' compensation policy provides for two (2) types of coverage:

a. Coverage A: Provides coverage to the employer for workers' compensation benefits it is obligated to pay to/on behalf of the employee, under the workers' compensation act.

b. Coverage B: Provides coverage to the employer for its liability to pay damages due to bodily injury the employee sustains in the course of employment. Coverage B liability is often triggered in two main situations. The first situation arises when an employer is sued in contribution (*Lambertson* liability) by a defendant/third-party tortfeasor that the employee sues for his/her personal injuries incurred through the course/scope of his/her employment with the employer. The Coverage B policy provides a defense to the employer, relative to the contribution claim of the defendant/alleged third-party tortfeasor. The second situation in which Coverage B claims arise is when an employee is not covered for workers' compensation benefit purposes under Coverage A of the workers' compensation policy and sues the employer directly for damages as a result of the employer's alleged negligence in causing the employee's injuries.

The obligation to pay contribution or indemnity on behalf of an at-fault employer is commonly referred to as the "Coverage B" exposure/obligation. Coverage B limits are often $100,000.00. Umbrella liability coverage may exist, which provides additional coverage to the employer.

5. Employers' *Lambertson* liability prior to 2000

The *Lambertson* decision was intended simply to prevent an employer from benefitting from its own fault. A problem for employers was created the year following the *Lambertson* decision, with the legislative amendment to the distribution formula of Minn. Stat. § 176.061, Subd. 6, requiring the subrogation claim of the employer to be reduced by a percentage reflecting the cost of recovery. Progeny cases interpreted the statute as such. *See Wilken v. International Harvestor Co.*, 363 N.W.2d 763 (Minn. 1985); *Kordosky v. Conway Fire & Safety*, Inc. 304 N.W.2d 616 (Minn. 1981); *Albert v. Paper Calmonson & Co.*, 524 N.W.2d 460 (Minn. 1994)). In those decisions, the Supreme Court of Minnesota interpreted *Lambertson* as requiring the employer's subrogation interest to be discounted by the cost of collection percentage of the total recovery. The end result of the *Lambertson* decision and its progeny is that employers were left with "new money" exposure in contribution to the third-party tortfeasor, beyond amounts employers had paid in workers' compensation benefits. That resulted in situations in which the employer's potential *Lambertson* contribution exposure could far exceed its potential subrogation recovery.

Thus, the *Lambertson* contribution exposure of the employer was set by the dollar amount of the workers' compensation benefits paid to-date, plus the workers' compensation benefits "payable" in the future. In *Wilken v. International Harvester Co.*, 363 N.W.2d 763 (Minn. 1985), the Supreme Court of Minnesota determined that the "payable" portion of the employer's contribution liability would be assessed based on a trial court's (not a compensation judge's) determination of the present value of workers' compensation benefits payable in the future. If the employer had paid $25,000.00 in workers' compensation benefits through trial, but had exposure to pay an additional $300,000.00 in workers' compensation benefits in the future, the employer's *Lambertson* contribution to the third-party tortfeasor would be $325,000.00.

This entire valuation system was changed with the statutory amendments to Minn. Stat. §176.061 in 2000, as discussed more fully, below.

a. Limitation on Employer's Contribution - Prior to the 2000 amendments to Minn. Stat. §176.061

The amount of the employer's contribution was in accordance with the employer's percentage of negligence, but could not exceed the sum of the workers' compensation benefits paid and payable, reduced to present value. *Wilken v. International Harvester Co.*, 363 N.W.2d 763 (Minn. 1985).

b. Effect of Comparative Fault

The tortfeasor could recover on a contribution claim, even if the employer's level of fault was less than the employee's or the third-party tortfeasor's. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149 (Minn. 1982). This remains the law, even after the 2000 Amendments.

c. Waive and walk settlements

In an effort to avoid problems caused by the "new money" exposure, employers/insurers often entered into "waive and walk" settlements. In such a settlement, the employer/insurer entered into an agreement with the third-party tortfeasor in which the employer/insurer agreed to waive any subrogation claim it may have had against the tortfeasor, in exchange for the torfeasor's agreement to release any claims for contribution against the employer. Thus, the employer who had *Lambertson* liability exposure that far exceeded its potential subrogation recovery could avoid the "new money" exposure by simply waiving its subrogation claim. "Waive and walk" settlements are more fully discussed, below, as are the effects of the 2000 legislative amendments to Minn. Stat. §176.061, on such settlements.

In other situations, particularly where the at-fault employers could not reach an agreement to "waive and walk" with the third-party tortfeasor, employers/workers' compensation insurers attempted to unilaterally remove the *Lambertson* liability exposure by filing a motion to dismiss the *Lambertson* liability claim through the workers' compensation insurer's voluntary waiver of its subrogation interest. While such motions met with some success, there was no appellate court decision or statutory provision confirming the right to waive and walk prior to the 2000 statutory amendments.

6. Employer's *Lambertson* liability after the 2000 amendments to Minn. Stat. §176.061

In 2000, the legislature amended Minn. Stat. §176.061, Subd. 11. It now reads:

Right of contribution. To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any non-employer third-party who is liable has a right of contribution against the employer in an amount proportional to the

employer's percentage of fault, *but not to exceed the net amount the employer recovered pursuant to Subd. 6, paragraphs c) and (d).* The employer may avoid contribution exposure by affirmatively waiving, before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third-party. Procedurally, if the employer waives or settles the right to recover workers' compensation benefits paid and payable, the employee or the employee's dependents have the option to present all common law or wrongful death damages, *whether they are recoverable under the Workers' Compensation Act or not.* Following the verdict, the Trial Court will deduct any awarded damages that are duplicative of workers' compensation benefits paid or payable. Minn. Stat. §176.061, Subd. 11.

Based on this statutory amendment, the employer/workers' compensation insurer can now unilaterally waive its subrogation interest. That waiver operates to immediately extinguish the third-party *Lambertson* contribution claim.

a. Employer contribution is now capped at an amount equal to its "net" subrogation recovery under Minn. Stat. §176.061, Subd. 6.

Under the new statutory language, the "net subrogation recovery" under Minn. Stat. §176.061, Subd. 6 is used to determine the employer's *Lambertson* contribution exposure. As a result, the *Lambertson* contribution is reduced by the percentage of attorney's fees/cost of recovery reimbursed to the employee. It is unclear whether the drafters of the amendments intended the employer's future credit (in situations in which there is a future credit) to also be reduced by the cost of recovery. Practitioners have reached different conclusions. One line of interpretation following the 2000 amendments was that the net effect of the future credit should also be reduced by the cost of collection. Another line of interpretation is that it should not. As indicated below, the better line of interpretation is that the future credit should be reduced by the cost of recovery, as direct operation of the statutory distribution formula in Minn. Stat. §176.061, even prior to the 2000 amendments, resulted in that precise reduction.

b. *Lambertson* Liability Examples

What follows are two examples of how an employer's *Lambertson* exposure is impacted by the 2000 amendments and under varying interpretations of how the cost-of-collection discount is to be

calculated. The merits of those interpretations are addressed below:

Hypothetical 1

Assumptions:

Verdict of $200,000.00
Work Comp paid to-date: $60,000.00
Work Comp payable in future: $30,000.00
Plaintiff fault: 5%
Third-party tortfeasor fault: 35%
Employer fault: 60%

	$200,000.00	(Verdict)
less	$10,000.00	(Employee's fault)
	$190,000.00	(Net recovery to Employee)
less	$66,500.00	(cost of collection, 35%)
	$123,500.00	
less	$41,166.66	(Employee's statutory 1/3 share)
	$82,333.34	(Balance available for subrogation)
less	$39,000.00	(Employer's subrogation recovery = WC pd -[(cost of collection ÷ net recovery) x WC benefits pd]
	$43,333.34	(Balance to Employee)
	$28,166.67	Future Credit to Employer. Any balance remaining paid to the Employee ($43,333.34) shall be a credit to the employer for any future workers' compensation benefits payable, but the credit will be reduced by the cost of collection, leaving a net value of $28,166.67.

Hypothetical 2

Assumptions:

Verdict: $80,000.00
Work Comp paid & payable: $50,000.00

Plaintiff fault: 10%
Third-party tortfeasor fault: 30%
Employer fault: 60%

	$80,000.00	(Verdict)
less	$8,000.00	(Employee's fault)
	$72,000.00	(Net recovery to Employee
less	$25,200.00	(Cost of collection - 30%)
	$46,800.00	
less	$15,600.00	(Employee's 1/3 share)
	$31,200.00	
		(Employer's recovery) Employer receives all $31,200.00, with no opportunity for a future credit, because the amount available for subrogation after the employee receives his/her 1/3 share is less than what the employer is entitled under operation of the distribution formula.

(1) Hypothetical 1 - Pre-2000 Amendment - *Lambertson* contribution and impact on employer/insurer's incentive to "waive and walk"

The third-party tortfeasor will be required to pay all of the $190,000.00 verdict to the employee, but would have a right to contribution from the Employer, to the extent of $90,000.00 ($60,000.00, relative to workers' compensation benefits "paid" and $30,000.00, equaling the present value

of future workers' compensation benefits "payable" as determined by the district court judge). The employer will in-turn, receive $39,000.00 in subrogation recovery, distributed by the employee, with a right to a future credit in the amount of $28,166.67.

Under this scenario, the employer will want to enter a "waive and walk" settlement with the third-party tortfeasor because the employer's contribution liability exceeds its potential recovery (contribution liability: $90,000.00; subrogation recovery: $67,166.67 (cash recovery of $39,000.00, and $28,166.67 in a possible future credit.)).

(2) Hypothetical 1 - Post-2000 Amendment - *Lambertson* contribution

The third-party tortfeasor will be required to pay all of the $190,000.00 verdict to the employee, but his/her right of contribution from the employer is limited to either:

- $67,166.67 from the employer (the employer's "net" recovery of $39,000.00 plus its $28,166.67 future credit net "recovery", both numbers of which have been reduced by the cost of collection) or;

- $82,333.34 from the employer (the employer's "net" recovery of $39,000.00, plus the "gross" value of the future credit not reduced to net value by the cost of collection $43,333.34).

Out of the $190,000.00 verdict proceeds, the employer will receive from the employee, $39,000.00, representing its subrogation recovery, and will have a possibility of a future credit in the amount of $28,166.67.

As indicated above, there is some disagreement among practitioners as to whether the future credit for the purposes of these calculations should be reduced by the cost of recovery. Some hold that it should not be reduced, thus arriving at the contribution figure of $82,333.34, above. Those holding that it should be so reduced will arrive at the contribution figure of $67,166.67, above.

While it is true that the statute does not expressly address the issue, the statutory language and principles of equity suggest that the future credit, for contribution purposes,

should be reduced by the cost of collection. The statute as amended, expressly provides that an employer's contribution liability is capped at the "net" amount the employer "recovered pursuant to Subd. 6, paragraphs c and d." As Hypothetical 1, above, demonstrates, the employer's "net" recovery in cash and in future credit becomes a "net" recovery under the statute precisely because *both* the cash subrogation recovery and the future credit recovery are reduced by the cost of collection, under normal practice. If the intent of the drafters was to limit the employer's contribution exposure to its total "net" recovery under Minn. Stat. 176.061, as appears to be the case, then it would appear to confound that intent if employers are required to contribute to third-party tortfeasors, the "net" value of their cash subrogation recovery (reduced by the cost of collection) and, additionally, the "gross" value of their future credit recovery. If that were the case, employers would be required to contribute to third-party tortfeasors, an amount of money that they will never recover in subrogation, even if they are fully able to recover the entirety of their net future credit [$15,166.67, in Hypothetical 1, representing the difference between the gross future credit ($43,333.34) and the net value of the future credit the employer actually receives ($28,166.67)]. That approach does not appear to be what the drafters intended by creating a *Lambertson* liability cap at the employer's "net" recovery. Indeed, that approach would return employers to a "new money" exposure situation.

(3) Hypothetical 1 - Post 2000 Amendment - Impact on employer/insurer's incentive to "waive and walk"

If the "net/net" approach is used, as outlined in "(a)", above, the employer/insurer may have less incentive to "waive and walk" than before the 2000 amendments, as there is no longer the potential for huge *Lambertson* "new money" exposure. Indeed, the employer's contribution liability will, even in a "worst case scenario" be exactly the same as the amount it obtains in subrogation recovery (cash recovery and future credit recovery). Nevertheless, there are situations in which an incentive will exist to "waive and walk":

- To avoid what may be potentially large legal costs associated with pursuing subrogation in cases in which that pursuit will be particularly complex,

drawn out, or problematic from an evidentiary or witness standpoint;

- In situations in which the employer is not reasonably confident that it will recover the full value of the future credit in future workers' compensation benefits:

- Where the employee appears to have stabilized medically and from a wage loss standpoint;

- Where the future exposure for workers' compensation benefits is low because the employee has reached or will soon reach certain benefit caps (e.g., 104 weeks of temporary total disability benefits, 225 weeks of temporary partial disability benefits, etc.);

- Where the employee's worker's compensation claims have been settled on a full, final, and complete basis before or during the pendency of the third-party action;

- Where the employee has died and any death/dependency benefit claims can either be reasonably predicted to be lower than the future credit or where the death/dependency benefit claims have been settled.

  In any of the above cases, all or a portion of the future credit is worthless because the employer/insurer will never be able to collect it and, as a result, the employer/insurer will pay at least some contribution to the third-party tortfeasor that will not be reimbursed through the future credit.

- In situations in which it is not possible to accurately predict the potential jury verdict or fault apportionment.

- Alternatively, if the "net/gross" approach is used, as demonstrated above in Hypothetical 1, with subrogation recovery of $82,333.34, the employer/insurer will have the same incentives to "waive and walk," as outlined above, but will also have the additional incentive of avoiding the

$15,166.67 "new money" exposure it will be required to pay to the third-party tortfeasor [representing the difference between the gross future credit ($43,333.34) and the net value of the future credit the employer actually receives ($28,166.67)], which it will not be able to recoup through collection of the future credit (as the future credit, even if fully realized, will only be $28,166.67).

(4) Hypothetical 2 - Pre-2000 Amendment - *Lambertson* contribution and impact on employer/insurer's incentive to "waive and walk"

The third-party tortfeasor will be required to pay all of the $80,000.00 verdict to the employee, but will have a right to contribution from the employer/insurer, up to $48,000.00 (its 60% share of fault). The employer will, in-turn, receive $31,200.00 in subrogation recovery. There will be no opportunity for a future credit, because the amount available for subrogation after the employee receives his/her 1/3 share is less than what the employer is entitled under the operation of the distribution formula.

Under this scenario, the employer/insurer will want to enter a "waive and walk" settlement with the third-party tortfeasor because the employer/insurer's contribution liability exceeds its potential recovery (contribution liability: $48,000.00; subrogation recovery: $31,200.00).

(5) Hypothetical 2 - Post-2000 Amendment - *Lambertson* contribution and impact on employer/insurer's incentive to "waive and walk"

The third-party tortfeasor will be required to pay all of the $80,000.00 verdict to the employee, but his/her right of contribution from the employer is limited to $31,200.00, (the employer's "net" subrogation recovery).

Out of the $80,000.00 verdict proceeds, the employer will receive from the employee, $31,200.00, representing its subrogation recovery.

In this particular case, the employer's subrogation interest and contribution liability are identical. As such, the only real incentive to "waive and walk" is to avoid the legal

costs and fees associated with trying the subrogation case. It is important to bear in mind that this is a retrospective evaluation. In making the assessment in this hypothetical, we have the benefit of knowing the precise amounts of fault attributable to the various parties, the exact amount of the jury verdict, and the exact value of the workers' compensation benefits "paid" and "payable". In the real world, more speculation is involved. There are often a host of factors, legal and non-legal, that affect a jury's verdict and assessment of fault. The difficulty in making those pre-trial assessments may also impact an employer/insurer's decision to "waive and walk".

c. Codification of right to "waive and walk"

As indicated above, Minn. Stat. §176.061, Subd. 11, as amended, provides that "the employer may avoid contribution exposure by affirmatively waiving before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third-party." Minn. Stat. §176.061, Subd. 11. The statute also provides that "procedurally, if the employer waives or settles the right to recover workers' compensation benefits paid or payable, the employee or the employee's dependents have the option to present all common law or wrongful death damages whether they are recoverable under the Workers' Compensation Act or not. Following the verdict, the trial court will deduct any awarded damages that are duplicative of workers' compensation damages paid or payable." *Id*.

The statute codifies an employer's ability to unilaterally waive its subrogation interest and, therefore, avoid potential *Lambertson* liability. The statute does not articulate how the waiver should procedurally be effectuated, however, a motion continues to be a sound and recommended approach.

7. Unanswered questions following the 2000 legislative amendments

a. Do the 2000 amendments have retroactive effect?

The statutory amendments to Minn. Stat. §176.061 became effective on August 1, 2000. There is nothing in the amendments themselves which indicates whether they will govern injuries prior to that date. This is of great importance for the new cap on *Lambertson* liability. There are sound arguments that the statutory changes are simply codifications of common law that should apply

retroactively. This retroactivity issue will no longer be a legal issue within another year when the statute of limitations will expire on any potential negligence action with a date of injury preceding August 1, 2000.

b. How is the "net recovery" calculated for purposes of calculating the cap on *Lambertson* liability?

As indicated above, there is a difference of opinion among practitioners as to what the "net subrogation recovery" language means. See, Section V, C, 6, above.

c. How does a post-2001 "waive and walk" impact the employee's remaining third-party claim?

As indicated above, the effect of a post-August 2000 "waive and walk" action is to completely remove the employer's subrogation claim from the third-party action. Employee/plaintiffs will argue that they should continue to be permitted to prove damages for medical expenses and wage loss benefits in the civil setting and any common law damages awarded which equate to workers' compensation benefits. The third-party tortfeasor will argue that any damages which have already been paid in workers' compensation should not be presented. That would arguably eliminate the employee's right to include wage loss and/or medical expenses as common law damages. The third-party tortfeasor should receive an offset for any damages awarded that are duplicative of workers' compensation benefits paid or payable.

d. If the employer's subrogation claim is completely removed from the third-party action, how are comparative fault issues to be addressed?

While the statutory amendments do not address this issue, it would appear that the employer's fault share will need to be addressed in any jury verdict form in the remaining third-party action concerning the employee and third-party tortfeasor, so that the comparative fault of the remaining parties can be determined. Some have suggested that this should yield a *Pierringer* result, destroying joint and several liability. It is unclear how this will uniformly be handled.

8. Conflicts of interest

Does a conflict of interest arise when you are asserting a subrogation interest and, at the same time, having a *Lambertson* claim asserted against

you? Should you retain different attorneys to represent each interest? Not every *Lambertson* liability case inherently involves a conflict of interest, requiring dual representation. If the workers' compensation carrier is the only party likely to be affected by a *Lambertson* contribution determination (e.g., where the total compensation paid and payable is less than the employer's liability limits or where the employer is completely self-insured for Coverage A and B), there may be no conflicts of interest.

On the other hand, conflicts can arise when the employer and workers' compensation carrier are potentially affected differently by the outcome of the *Lambertson* liability portion of the case. One example of this is when the employer is subject to increased premiums as a result of the resolution of the third-party action.

Another conflict situation arises when the anticipated contribution payments exceed the employer's liability limits. The employer or its excess carrier has a monetary interest in the result, as does the Coverage B carrier.

An example of this is demonstrated by the case of *Albert v. Paper Calmenson & Co.*, 524 N.W.2d 460 (Minn. 1994). In *Albert*, MAK Oil was hired to clean two underground storage tanks for Paper Calmenson (PaCal). The employee worked for MAK Oil, and was part of the crew assigned to clean the tanks. Prior to the arrival of the MAK Oil crew, PaCal heated the No. 6 fuel oil in one of the underground tanks to make it easier to pump out. When the MAK Oil crew arrived, the supervisor asked PaCal to turn off the heat. The supervisor testified that when No. 6 fuel oil is cold it is not very flammable. However, PaCal did not tell the MAK Oil crew that it had been heating the oil to approximately 240 degrees, which created dangerous, flammable vapors in the tank. The MAK Oil crew had difficulty removing the bolts on the manhole cover on the tank, so the supervisor went to get some additional tools. While the supervisor was gone, the PaCal plant maintenance supervisor provided the employee, and a co-worker with a blowtorch to remove the bolts. The MAK Oil supervisor had not advised the employees of the dangers of using a blowtorch around the tank. The employee suffered second- and third-degree burns over 85 percent of his body.

The jury awarded 2.6 million in damages, and apportioned liability 25% to the employee, 25% to MAK Oil, and 50% to PaCal. After deduction of 25%, the employee's net recovery was $1,962,108.40. The judge ordered MAK Oil to pay $654,036.07 to PaCal for its contribution interest. MAK Oil also had a large subrogation interest. MAK Oil carried a $100,000 liability policy ("Coverage B"). *Albert and MAK Oil Company v. Paper Calmenson & Company*, 515 N.W.2d 59 (Minn.Ct.App. 1994)

On appeal, the Minnesota Court of Appeals held that an employer can offset its contributed obligation against the workers' compensation subrogated claim of its insurance carrier.

First, the court applied the Subdivision 6 formula, and determined that the workers' compensation carrier was entitled to reimbursement of $362,121.00 for workers' compensation benefits paid to date, and a credit against the payment of future workers' compensation benefits of $334.216.00. The court added these two amounts together, and determined that MAK Oil's total subrogation interest was $696,337.00.

Next, the court subtracted MAK Oil's *Lambertson* contribution obligation of $654,036.00 from the total subrogation interest, and determined that the insurance carrier was entitled to a future credit of only $42,301.00, and no reimbursement.

MAK Oil appealed, and the Supreme Court summarily reversed, ruling that the Court of Appeals should have followed the procedure set forth in *Johnson v. Raske Building Systems, infra*. Consequently, the court ruled that an employer cannot offset its contributed obligation against the workers' compensation subrogated claim of its insurance carrier. This result gives the workers' compensation insurer full reimbursement for its subrogation interest, and requires the employer to pay any judgment above its Coverage B policy limits.

This case demonstrates the potentially differing interests of the employer, the workers' compensation insurer, and underscores the necessity of separate legal representation in cases involving contribution exposure in excess of the Coverage B limits. The employer and insurer in the above case, will undoubtedly have different interests in how the *Lambertson* contribution issue is resolved.

Note that if the workers' compensation insurer has an opportunity to settle the employer's Coverage B exposure by payment of the policy limits and fails to do so, the workers' compensation insurer can be subject to a bad faith claim where the employer is later required to make payment in excess of its policy limit, as in *Albert*, above.

In practice, a number of different factors may combine to create differing interests between the employer and the workers' compensation insurer in *Lambertson* cases. As a result, each case involving *Lambertson* exposure should be evaluated carefully to determine whether divergent interests exist and, consequently, whether separate legal representation is necessary, relative to those interests.

D. Indemnity Claims Against the Employer

In certain situations, a third-party from whom the employee recovers may be entitled to complete recovery from the employer. An indemnity claim would typically arise where the tortfeasor committed no independent active negligence, or where there was a contract between the parties with an otherwise enforceable indemnity provision running in favor of the tortfeasor. Following are some of the situations where the third-party might be entitled to indemnification.

1. The third-party's liability is derivative of the employer's liability - e.g., the third-party paid damages only because it was compelled to by some legal obligation, but the employer is, in fact, responsible for the damages.

Example: An auto dealer owned two vans and hired another company to customize the vans. Two employees of the customizer went to the dealership and picked up the vans. While they are driving the vans back to the customizing shop, one of the employees negligently ran into the van driven by the other employee, who sustained injuries. The injured employee collected workers' compensation, and sued the dealer under a Minnesota Statute which makes the owner of an auto responsible for the actions of a permissive user. The dealer settled with the employee and then sought indemnification from the employer. The employer had a subrogation claim for workers' compensation benefits paid. The car dealer was granted indemnification in the amount of the workers' compensation settlement.

2. Where the third-party incurred liability in the interest of, or in reliance on the employer.

3. Where the third-party incurred liability because of a breach of duty owed by the employer.

4. Where there is an express contract for indemnification - e.g., where the employer breaches a contractual duty to observe safety rules, and there is an express contract to indemnify.

VI. LITIGATION

A. Against whom may a subrogation action be brought?

Subrogation actions are "fault-based" actions. A subrogation action may be brought against anyone from whom an employee can recover under a tort theory for that person or entity's fault in causing the employee's personal injuries. If the employee has a purely *contractual* right to recover benefits, the employer is not subrogated to that right (e.g., if an employee has a right against an insurance

carrier in the form of no-fault benefits, uninsured motorist coverage, or underinsured motorist coverage, there is no subrogation right. *See Freitag v. American Casualty Company of Reading*, Case No. C9-01-1727 (Unpublished) (Minn. Ct. App. 2002); *Cooper v. Younkin*, 339 N.W.2d 552, 553 (Minn. 1983) (Uninsured-motorist proceeds not converted from payments to damages because injured employee was a beneficiary rather than a contracting party and stating that "regardless of who pays the premium, uninsured motorist coverage is simply a contract for the payment of a sum measured by the amount of damages which the insured is legally entitled to recover from an uninsured third-party tortfeasor); *W. Nat'l Mut. Ins. Co. V. Casper*, 549 N.W.2d 914, 915-916 (Minn. 1996) (affirming ruling that arbitration award was not subject to reduction by amount of workers' compensation proceeds paid to employee where employee claimed underinsured motorist benefits under his employer's underinsured motorist policy).

B. Employer/Insurer has a right to bring a subrogation claim even if the employee cannot meet the tort threshold under the No-Fault Act.

Minn. Stat. §176.061, subd. 10, adopted in 1983, provides employer/workers' compensation insurers with a right of indemnification for all workers' compensation benefits paid and payable, "notwithstanding the provisions of chapter 65B or any other law to the contrary." Chapter 65B is the Minnesota No-Fault Act. Therefore, the employer and workers' compensation insurer may bring and action against the tortfeasor, even though the employee cannot meet the tort threshold.

This law was further supported through the Minnesota Court of Appeals' decision in *Zurich American Insurance Company v. Bjelland*, 690 N.W.2d 352 (Minn. Ct. App. 2004). The *Zurich* case is discussed in detail below, in Section VII., A., 4. One of the significant determinations of the *Zurich* Court was its determination that the 2000 statutory amendments to the Minnesota Workers' Compensation Act permit an employer/workers' compensation insurer full recovery of workers' compensation benefits paid and payable regardless of any *common law* or *statutory limits*. That decision further supported already established law that an employer's/workers' compensation insurer's subrogation recovery is not limited or otherwise encumbered by an employee's inability to meet the tort thresholds in his/her injury instance. In February 2006, the Supreme Court of Minnesota reversed the Court of Appeals' decision in *Zurich*. A full discussion of the Supreme Court's decision is outlined below in Section VII, A., 4. In essence, the Supreme Court held that a workers' compensation carrier's subrogation recovery is, in fact, limited to the same damage limitations that a civil damage statute or common law places on an employee's civil damage recoveries. While the Court's decision and rationale would appear to also support the position that an employer/workers' compensation carrier could make no recovery under circumstances in which an injured employee is not able to meet Minnesota's tort thresholds, the Court's decision addresses and acknowledges that the workers' compensation statute continues to allow subrogation recovery even where the

employee is unable to satisfy Minnesota's tort thresholds. From that standpoint, the Court's reasoning appears to be internally inconsistent. Future case law will need to address this issue.

C. How does an employer/workers' compensation insurer assert its subrogation rights?

There are various ways in which to pursue recovery of the employer/workers' compensation insurer's subrogation interest, including intervening in an employee's action against a third-party tortfeasor and commencing a direct action against the third-party tortfeasor in the employee's or employer's name. Which method is selected depends upon the particular circumstances of each case. However, before any method is selected, the employer/workers' compensation insurer should notify all parties if its subrogation rights under Minn. Stat. § 176.061, and that those rights are being asserted. The employee's attorney, the third-party tortfeasor, and the third-party tortfeasor's insurance carrier should be notified in writing.

1. Intervene in an Action Brought by the Injured Employee Against a Third-Party Tortfeasor

If this option is chosen, the employer/workers' compensation insurer will typically have to depend on the plaintiff's attorney to prove the case. The counsel for the subrogation interest will have to work together with the plaintiff's counsel to coordinate their strategy. The role of counsel for the subrogation interest will be limited so as not to duplicate the work of the employee's counsel. Additionally, if this option is chosen, the employer/workers' compensation insurer must be prepared for the possibility that the employee will enter into a *Naig* settlement (discussed below) with the third-party, and must be prepared to go forward with the case on its own.

Note: Just because an employer/workers' compensation insurer elects to intervene in a third-party lawsuit does not mean that it has to agree to a third-party settlement, based on the employee's determination of how proceeds are to be allocated. On the other hand, an employer/insurer cannot unreasonably interfere in an employee's settlement. However, as discussed below, in the discussion of *Naig* and Global Settlements, the employee must provide notice of settlement negotiations and provide the employer an opportunity to protect its interest. *See Easterlin v. State*, 330 N.W.2d 704 (Minn. 1983); *Jackson v. Zurich American Insurance Co.*, 546 N.W.2d 621 (Minn. 1996).

Ideally, an employer/workers' compensation insurer should intervene in a pending civil case before an employee reaches a

Naig or other settlement with the third-party tortfeasor. However, the Minnesota Court of Appeals has held that in order to protect its subrogation interest in an underlying tort action that has not been settled on a *Naig* basis, and pursuant to a proper and timely motion, a workers' compensation insurer must be permitted to intervene under Minn. Stat. §176.061, subd. 8a (2004) before the district court approves or disapproves of a settlement motion. *See State Farm Mutual Insurance Company v. Mead, et. al.*, File No. C7-03-0818 (Minn. Ct. App. Feb. 1, 2005).

a. Notice of Association vs. Intervention

An employer/workers' compensation insurer can attempt to "ride along" with an employee in his/her pursuit of civil damages against an alleged third-party tortfeasor without formally intervening in the action. However, because it is not a formal party to the pending litigation, the employer/workers' compensation carrier will have no right or standing to attempt to control procedural aspects of the pending case. This can obviously create circumstances which disadvantage the employer/workers' compensation insurer as litigation develops.

Example: The Minnesota Court of Appeals has determined that a "Notice of Association" is not the same as a formal intervention into a case. In *Bess v. Lagerquist, Inc.*, Case No. C3-94-312 (Minn.Ct.App. 1994) (unpublished), following a work injury and payment of benefits, the employee brought a third party action. The employer signed a Notice of Association with the employee's attorney, but the employee's attorney allowed the employer only to prove medical or wage loss expenses at the trial. The employer participated in some of the settlement negotiations, but ultimately the employee settled out with the defendants on a *Naig* basis. The employer appeared for trial along with attorneys from the defendant, but the employee's attorney did not appear. The employer's attorney sought a continuance of the trial on the basis that it had never been made a party to the case, and needed more time to prepare for trial. The Court of Appeals ruled that the employer had never been made an actual party to the litigation, and ordered that the case be tried.

2. Bring an Action in District Court in its Own Name Against a Third-Party Tortfeasor to Enforce its Subrogation Right

An Employer/workers' compensation insurer can bring a direct action in its own name against an alleged third-party tortfeasor to recover its subrogation interest at any time. However, there are two main situations

in which employer's/workers' compensation insurer's typically bring actions in District Court in their own name against the third-party tortfeasor. One situation arises after the employee has entered a *Naig* settlement of his/her non-recoverable damages with the third-party tortfeasor. The employer is free to pursue its own cause of action for recoverable items of damage, against the tortfeasor.

Another situation in which the employer/workers' compensation carrier will pursue its own direct action against the third-party tortfeasor, is in cases involving common enterprise. As is discussed above, if the employee has collected workers' compensation benefits, and it appears that the employer and the third-party tortfeasor were involved in a common enterprise, the employee has no incentive, and in fact, cannot pursue a claim against the third-party tortfeasor. However, the fact that the employee cannot bring such a claim does not preclude the employer/workers' compensation insurer from bringing the claim to recover benefits paid from the at-fault tortfeasor.

3. Bring an Action in District Court in the Injured Employee's Name

The employer/insurer may elect to pursue a claim in the employee's name. It may do so for strategic purposes only (e.g., the appearance to the jury may be more sympathetic if the case is brought in the employee's name, than the employer's). It may also do so because the employee and employer/insurer are cooperating in pursuit of the third-party recovery.

4. Bring an Action for Recovery of Medical Benefits

Even if the employee's injuries are the result of the negligence or fault of a third-party, the employer is still liable for the employee's medical treatment. However, the employer may bring an action against the third-party for recovery of medical benefits. This action can either by brought separately, or joined with the action in which the employer's subrogation interest is represented. *See Minn. Stat.* §176.061, subd. 7. However, the award of past and future medical expenses is subject to the subdivision 6 formula (discussed below). *See Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988).

5. Factors involved in assessing whether to intervene or pursue direct recovery of a subrogation interest

Apart from the above-noted situations in which the circumstances of the employment relationship (common enterprise) or the employee's settlement actions (*Naig* settlement) force the employer/insurer into pursuing its own direct action for recovery of its subrogation interest, an employer/insurer may freely choose to intervene in an existing third-party

action or, alternatively, pursue its own action against the third-party tortfeasor. That choice may be influenced by a number of factors:

a. Ability of Plaintiff's Counsel

If the employer/workers' compensation insurer intends to simply "ride along" with the efforts of the employee's/plaintiff's counsel in pursuing the alleged third-party tortfeasor, the employer/insurer should be convinced of the capabilities of the employee/plaintiff's counsel in being able to obtain an appropriate recovery. If the employer/workers' compensation insurer chooses not to actively participate in a pending claim/litigation against the alleged third-party tortfeasor and the employee/plaintiff's counsel does not adequately appreciate the issues or take the appropriate approach to recovery, the employer's/workers' compensation insurer's subrogation recovery can be compromised. If the employer's/workers' compensation carrier is not convinced of the plaintiff's counsel's abilities, a direct subrogation claim should be actively pursued.

b. The Complexity of the Case

The more complex the plaintiff's case, the more advantageous it becomes for the employer/insurer to become formally involved in the case, due to competing interests of the parties.

c. *Lambertson* Liability

Where there is a third-party contribution (*Lambertson*) claim against the employer, the employer/workers' compensation insurer should obtain separate counsel relative to its interests.

6. Employer May Maintain an Action for Damages Due to Change in Workers' Compensation Insurance Premiums

If an employer's workers' compensation premiums are adversely affected as the result of the injury or death of an employee for which a third-party is at fault, the employer may bring an action against the third-party for recovery of the increased premiums. This action can either be brought separately, or joined with the action in which the employer's subrogation interest is represented. Damages for recovery of premiums are not subject to the Subdivision 6 formula. Minn. Stat. §176.061, subd. 5(b).

D. When can a subrogation action be brought?

In order for an employer or workers' compensation insurer to legally assert and recover reimbursement through subrogation, there must generally be a specific employee who has specific symptoms/claims, as the result of a compensable work injury, to which the employer/insurer has either paid workers' compensation benefits or to which the employer/workers' compensation insurer *may have a legal obligation to pay* after a hearing on the merits.

In *Conwed Corporation v. Union Carbide Chemicals and Plastics Company, Inc.*, 634 N.W.2d 401 (Minn. 2001), the employer sought subrogation from an asbestos manufacturer for workers' compensation benefits paid to employees who were exposed while working for the employer. Additionally, the employer sought to recover amounts it *may* be liable to pay in the future for employees who have settled claims with the employer but may seek additional benefits as their conditions worsen, who are sick but have not sought workers' compensation benefits, and who have not manifested symptoms but may become sick. Additionally, the employer sought a determination of whether it could prove its claims on behalf of all employees as a single claim or as several categories of claims. The Supreme Court (Justice Blatz) held that the employer may bring subrogation claims only on behalf of identified employees who have a compensable injury and to whom the employer has a *present duty* to pay workers' compensation benefits. The Supreme Court held that the employer could recover *payable* benefits for those employees the employer could provide sufficient evidence of the benefits it would have to pay in the future. The Supreme Court held that the employer could not recover benefits for those employees who have not yet manifested symptoms of asbestos-related disease. The Court held that the employer could not predate the workers' compensation claims of former employees who have developed asbestos-related illnesses, but who have not yet sought workers' compensation benefits. The Supreme Court held that the employer must make "employee-specific" claims, but referred the matter back to the Federal District Court to divide the employees into reasonably related groups. *See Conwed Corporation v. Union Carbide Chemicals and Plastics Company, Inc.*, 634 N.W.2d 401 (Minn. 2001)**.**

However, note that an employer/workers' compensation insurer can have a valid potential subrogation interest where it has denied primary liability for a claimed work-related injury and there is a hearing pending to determine its liability. *See Womack v. Fikes of Minnesota*, 61 W.C.D. 574 (W.C.C.A. 2001). In *Womack*, the Employer and Insurer had denied primary liability for the employee's alleged injuries arising out of a motor vehicle accident. A hearing was held relative to the employee's claims. However, prior to the hearing, the employee initiated a third-party lawsuit against the third-party tortfeasor, which went to trial and resulted in a verdict. The employee failed to notify the employer/workers' compensation insurer of the proceeding. At the workers' compensation hearing, the compensation judge found the employer/insurer liable for workers' compensation

benefits and ordered the insurer to reimburse the no-fault carrier for wage loss benefits paid to the employee. The judge also determined that the employer was entitled to a credit against workers' compensation benefits payable to the employee as a result of amounts received by the employee pursuant to the verdict on his third-party action. The judge reduced the credit through application of a *Henning* type allocation.

On appeal to the Workers' Compensation Court of Appeals, the parties arguments were confined to issues pertaining to the nature and extent of the future credit. None of the parties appealed the workers' compensation judge's determination that the employer/workers' compensation carrier was entitled to some measure of subrogation recovery after a hearing on the merits determined that primary liability existed for the employee's alleged injuries. As a result, *Womack* provides a sound basis for the position that an employer/workers' compensation insurer has a potential subrogation interest and, therefore a right to notice of an employee's settlement negotiations with a third-party tortfeasor, even when the employer/workers' compensation insurer is maintaining a primary liability denial and the issue of primary liability is pending a judicial determination at the Minnesota Office of Administrative Hearings. Based on the reasoning of the court in *Womack*, an employer/workers' compensation carrier can arguably assert its potential subrogation interest, at least informally, while a judicial determination on the issue of primary liability is pending.

E. When must a subrogation action be brought? - limitations of actions

The Statute of limitations applicable to an action by an employer to recover workers' compensation benefits is the same as applicable to the employee. There may be cases in which application of that rule would lead to seemingly unjust results (e.g., where an employer/insurer voluntarily pays benefits for three years following an injury in a situation in which a two year statute of limitation applies. It could be argued that to deny an employer/insurer a cause of action at that time would be unconstitutional.). The best rule of thumb is to abide by the statute of limitations applicable to your specific case. In most cases of common law negligence, a six-year statute is applicable. However, there are several types of actions in which a shorter period is applicable: medical malpractice actions (four years for injuries occurring on or after August 1, 1999; two years for injuries occurring before August 1, 1999), actions with injuries arising out of improvements to real property (two years), and intentional torts (two years). Shorter periods may also be applicable in other cases including claims against a municipality and Dram Shop Claims. Such actions require a party to give notice to the prospective defendant within certain short time periods (as little as 120 days after the occurrence).

Practice tip: If there is any doubt regarding the applicable statute of limitations period, contact our office.

In cases in which an employee commences an action and the employer/insurer does not intervene or commence its own action until after the statute of limitations expires, courts have held that the statute does not run during the period of the pendency of the employee's action. In *Liberty Mutual Insurance Company v. Nutting Truck and Caster Company,* 203 N.W.2d 542 (Minn. 1973), the Supreme Court of Minnesota held that the claim of a workers' compensation insurer who was subrogated to the rights of an injured employee against a third-party tortfeasor was not barred by the statute of limitations where the employee had commenced his civil damage claim against the third-party tortfeasor within the applicable statute of limitations period, even though the insurer failed to commence an action against the third-party tortfeasor within the statute of limitations period. While there was a strong dissent to this opinion, it has not been overruled to-date. In fact, the Minnesota Court of Appeals affirmed the viability of the *Liberty Mutual* decision in *American Mutual Insurance Company v. Honeywell, Inc.*, 422 N.W.2d 274 (Minn. Ct. App. 1988) *rev. denied.*

Notwithstanding this case-law, it is nonetheless, wise for the employer/insurer to commence its own action within the statutory time, in order to avoid complications.

F. When "should" a subrogation action be brought?

Subrogation actions require time to mature before they should be pursued. An employer/workers' compensation insurer has only one opportunity to obtain subrogation recovery against an at-fault tortfeasor. Because the employer's/workers' compensation insurer's subrogation recovery is based upon workers' compensation benefits "paid" and "payable", the ideal and most appropriate time to bring a subrogation action is when the employer/workers' compensation insurer can accurately determine the future workers' compensation exposure for workers' compensation benefits "payable" and incorporate that into a subrogation action. That necessarily means that in some cases, the employer/workers' compensation carrier will be best served by not pursuing subrogation recovery until the workers' compensation case develops and matures. If the employer/workers' compensation insurer pursues and obtains subrogation recovery too early in the development of a workers' compensation case (e.g. after $10,000.00 is paid in workers' compensation benefits) and a large future workers' compensation exposure later eventuates (e.g., $150,000.00), there will be no ability to obtain subrogation recovery relative to those future expenses. As a result, the most ideal course is to avoid actively pursuing subrogation recovery until the employer/workers' compensation insurer has an accurate picture of the future workers' compensation exposure in any given workers' compensation case.

Notwithstanding the above, there are certain procedural considerations (e.g., statute of limitations, the employee's initiation of a civil case against the alleged third-party tortfeasor, the alleged third-party tortfeasor's initiation of a *Lambertson* liability claim against the employer/workers' compensation insurer via a third-party complaint, etc.) which may require an employer/workers' compensation insurer to actively pursue subrogation recovery before it has been able to realistically assess future workers' compensation benefit exposure.

Additionally, it should be noted that even where a workers' compensation subrogation claim is not formally asserted early in a matter's development , the employer/workers' compensation insurer must still prepare the subrogation claim for eventual advancement by undertaking an early investigation and analysis of the injury incident and the circumstances surrounding it.

G. Trial

1. How damages are collected and distributed following the jury's verdict

a. Tortfeasor Pays Plaintiff/Employee

When a jury enters a verdict in favor of the plaintiff/employee (e.g., plaintiff's percentage of liability is less than third-party tortfeasor's percentage), the third-party tortfeasor pays the entire amount of the plaintiff's recoverable damages directly to the plaintiff.

b. Employer Pays Tortfeasor

The tortfeasor receives from the employer the employer's contribution to the damages (the percentage of fault attributed to the employer.) Remember, prior to the 2000 amendments to Minn. Stat. §176.061, the employer's contribution was limited by the amount of workers' compensation benefits paid, plus the amount of future payable benefits reduced to present value. As a result of the 2000 amendments, the employer's contribution is now limited to its *net* subrogation recovery under Minn. Stat. §176.061.

c. Employee Pays Subrogation Interest

The employee distributes the money damages to satisfy the subrogation interest. *Johnson v. Raske Building Systems,* 33 W.C.D. 43, 276 N.W.2d 79 (Minn. 1979).

2. The manner in which the employer's and employee's interests are calculated

General Rule of Thumb: The employer typically gets back no more than 2/3 of what it paid in workers' compensation benefits, with the possibility of a future credit. Additionally, there are defense costs. Consequently, a small verdict, or high amount of fault attributable to the employee may further reduce the amount of the employer's subrogation recovery.

a. Distribution Formula

Minn. Stat. §176.061, subd. 6, establishes the formula to be used in distributing the plaintiff's award between the plaintiff and the employer/ insurer with a subrogation interest. A summary of the statutory language establishing the formula and an example of how the formula operates are outlined below

(1) First, start with the overall recovery, and subtract an amount equivalent to the plaintiff's share of the fault.

(2) Next, deduct the reasonable cost of collection, including but not limited to attorneys fees and burial expense in excess of statutory liability.

(3) One-third of the remainder is then paid to the injured employee or the employee's dependents, and it not subject to the subrogation interest.

(4) The Statute provides that the remainder is then used to reimburse the employer in an amount equal to benefits paid under the Workers' Compensation Act, less the product of the costs deducted under the first section, divided by the total proceeds received by the employee, and multiplied by all benefits paid by the employer. In essence, the balance remaining after the employee's statutory 1/3 share is removed, is subject to the employer's right of recovery. The maximum amount of the employer/insurer's recovery is determined by multiplying the cost of collection of the entire damage recovery (typically 33%-35% plus costs) by the workers' compensation benefits paid. The resulting amount is then subtracted from the compensation paid, and the remaining amount is the sum available for reimbursement to the employer/workers' compensation insurer. Note - if this amount is less than or equal to the workers' compensation benefits paid, less the cost of collection, the employer and insurer recover the entire

amount, and there is no future credit. *See Kealy v. St. Paul Housing and Redevelopment Authority*, 303 N.W.2d 468 (Minn. 1981).

(5) Any balance which is left is paid to the employee, and the employer is given a credit in that amount for any benefits the employer might be obligated to pay in the future.

- The Formula has no affect on the third-party tortfeasor's obligation.

  The distribution formula operates *after* the employee's damages have been paid by the tortfeasor. Under the formula, calculation of the amount to be paid or distributed by the employee back to the employer-defendant is based *only* on the amount of workers' compensation benefits *paid* up to the date of the verdict. It *does not* include a present payment relative to the employer's subrogation interest in future "*payable*" workers' compensation benefits. Rather, the formula addresses the future benefits by providing the employer with a "credit" for future workers' compensation benefits payable. *See Cronen v. Wegdahl Co-op Elevator Assn.* 278 N.W.2d 102 (Minn. 1979).

- Nature of the future credit.

  The future credit is not a pure credit in the exact amount of the balance paid over to the Employee. Rather, the credit is also subject to a cost of collection discount, requiring the insurer to pay one-third (or the particular percentage of cost of collection applicable to the particular case) of all future compensation benefits until the credit is used up. *Cronen v. Wegdahl Coop. Elevator Assn.*, 278 N.W.2d 102 (Minn. 1979). Thus, under *Cronen*, for every dollar of benefits paid in the future, the Subdivision 6(d) credit should be reduced by 33% (or the applicable percentage cost of collection derived in the Subdivision 6c calculation). *See Kealy v. St. Paul Housing and Redevelopment Authority*, 303 N.W.2d 468 (Minn. 1981). As a practical matter, the future credit has an actual net value to the employer/workers' compensation

insurer, which is 33% (or the applicable percentage cost of collection utilized in the particular case) less than the gross figure derived through mathematical operation of the formula. For every dollar of future workers' compensation liability incurred, the employer will actually pay the employee 33 cents (or the applicable amount derived from the cost of collection ratio under the formula) and reduce its credit by one dollar.

Following *Cronen* and *Kealy,* there remained some confusion among practitioners as to how the future credit was to be taken. In *Snyder v. Yellow Freight System,* File No. 476-52-1367, Served and Filed March 1, 2004, the WCCA revisited the issue and clarified the manner in which an employer/insurer's future credit is to be taken. In *Snyder,* the employee obtained a third-party recovery. The amount of the employer's cash subrogation recovery and future credit recovery were not in issue, but the parties disagreed as to how the future credit should be applied. Under the statutory distribution scheme provided in Minn. Stat. §176.061, a third-party recovery is first reduced by the reasonable costs of collection and then the employee's contributory negligence if any. Out of the remaining sum, the employee receives 1/3. The employer will either receive the entire balance remaining in satisfaction of its subrogation interest, or part of the sum remaining in cash, with the remainder going to the employee, but that remainder acting as a future credit that the employer may take against future workers' compensation benefits deemed payable. The amount of the credit is not the total amount paid to the employee. Rather, the employer is again required to share in the cost of collection and, as a result, the future credit is, like the cash recovery, reduced by the cost of collection. In *Snyder,* while the employer was entitled to a cash subrogation recovery of $145,007.77, after the employee received his statutory 1/3 under the formula, the employer elected to be paid only $60,000 in a cash lump sum and take the remaining $85,007.77 as a credit against future workers' compensation benefits payable. Compensation Judge Olson held that with regard to that future credit, relative to

workers' compensation benefits already paid, the employer could take a dollar for dollar future credit until the credit is exhausted and, as a result, not pay future workers' compensation benefits until those benefits exceeded the $85,007.77 future credit. The WCCA (Judges Rykken, Wilson and Pederson) affirmed, noting that this result is appropriate because the $85,000 had already been reduced by the cost of collection at the outset of the operation of the statutory distribution formula.

However, in *Snyder*, the third-party recovery was substantial enough that apart from the $145,007.77 the employer was entitled to as a cash subrogation recovery, it was also entitled to an additional future credit of $245,049.20. Judge Olson held that the future credit would be reduced "up front" by the cost of collection (33.5% in this case), leaving $168,942.72 and that the employer could then take a dollar for dollar credit against future workers' compensation benefits payable until the entire credit would be exhausted, ensuring that the employee would be paid no workers' compensation benefits until the $168,942.72 future credit was completely exhausted. The WCCA reversed, holding that the cost of collection cannot be reduced up front in that manner. Rather, the WCCA held that the cost of collection must be paid for incrementally. The result is that an employer has an immediate obligation to pay future workers' compensation benefits that are deemed payable. For every $1.00 of future benefits the employer is obligated to pay, the employer will pay $.335, and will recover a $1.00 credit. Once the employer has recovered its future credit due from the proceeds of the employee's third-party action, the employer must resume payment of the employee's benefits at the full entitlement level.

- **Extent of Future Credit**

The literal language of *Minn. Stat.* §176.061, Subd. 6(d), provides that the future credit extends to "any benefits which the employer...is obligated to pay, but has not paid, and for any benefits that the employer...is obligated to pay in the future." *Minn.*

Stat. §176.061, Subd. 6(d). The only limitation the Statute places on the future credit is that it may not be applied to interest or penalties. Case law interpreting the Statute appears to have acknowledged that the future credit applies to future medical expenses as well as indemnity benefits. *See S.B. Foot Tanning Company, et. al. V. Leo Piotrowski, et. al.*, 554 N.W.2d 413 (Minn. Ct. App. 1996).

However, in at least one situation, the Workers' Compensation Court of Appeals has held that an employer or workers' compensation insurer cannot use the future credit to defeat a no-fault insurer's right to reimbursement as against the workers' compensation insurer. *Womack v. Fikes of Minnesota*, 61 W.C.D. 574 (W.C.C.A. 2001). In *Womack*, the Employer and Insurer had denied primary liability for the employee's alleged injuries arising out of a motor vehicle accident. A hearing was held relative to the employee's claims. However, prior to the hearing, the employee initiated a third-party lawsuit against the third-party tortfeasor, which went to trial and resulted in a verdict. The employee failed to notify the employer/workers' compensation insurer of the proceeding.

At the workers' compensation hearing, the compensation judge found the employer/insurer liable for workers' compensation benefits and ordered the insurer to reimburse the no-fault carrier for wage loss benefits paid to the employee. The judge also determined that the employer was entitled to a credit against workers' compensation benefits payable to the employee as a result of amounts received by the employee pursuant to the verdict on his third-party action. The judge reduced the credit through application of a *Henning* type allocation.

On appeal to the Workers' Compensation Court of Appeals, the employer/workers' compensation insurer argued it was entitled to a full credit against all amounts recovered by the employee under the third-party verdict. The WCCA held that the

employer/workers' compensation insurer was entitled to a future credit in an amount of the total verdict, less attorney's fees/cost of collection. The WCCA also held that the future credit could not be used "dollar-for-dollar" but was subject to an adjustment based on the cost of collection ration, as outlined in *Kealy v. St. Paul Housing & Redevelopment Auth.*, 303 N.W. 2d 468 (Minn. 1981), noted above.

On the other hand, the WCCA literally held that the employer/insurer could not utilize the Subdivision 6(d) credit as against the no-fault carrier. The WCCA observed that "as between them, the workers' compensation insurer has primary liability for medical expenses and must reimburse the no-fault insurer...[t]o permit the workers' compensation insurer the use of a credit against its obligation to reimburse the no-fault insurer would leave the no-fault insurer with less than the reimbursement ordered by the compensation judge and no recourse as against the employee or the third-party tortfeasor." *Womack. V. Fikes of Minnesota*, 61 W.C.D. 574, 589 (W.C.C.A. 2001).

Womack is a very fact specific decision. It is unclear what effect it may have on a different situation, in which an employer/workers' compensation insurer fully participate in a third-party recovery, which is then distributed pursuant to the statutory formula, the employer/insurer receives a credit for future workers' compensation benefits payable, and the no-fault intervention interest arises subsequently.

b. Example: Operation of the distribution formula set forth in Minn. Stat. §176.061:

Assumptions

- Damages awarded: $100,000;
- Cost of collection: 1/3 of damages awarded;
- Workers' compensation benefits: $25,000.

Statutory Formula for Allocation of Damages Awarded

- Determine net damages awarded by deducting cost of collection

  $100,00 - $33,000 = $66,667.

- Determine employee's statutory 1/3 share.

  $66,667 x 1/3 = $22,222.33

- Determine net damages awarded after reduction by employee's 1/3 share.

  $66,667.00 - $22,222.33 = $44,444.67.

- Determine employer's proportionate share of cost of collection.

- $33,333.00 divided by $100,000.00 = .33 x $25,000 = $8,250.00.

- Determine employer's reimbursement by subtracting employer's proportionate share of the cost of collection from the total amount of workers compensation benefits paid.

  $25,000 - $8,250 = $16,750.

- Determine balance of employee's recovery by subtracting employer's reimbursement from net damages awarded.

  $44,444.67 - $16,750.00 = $27,694.67.

- Determine net value of future credit to employer by reducing the balance of employee's recovery by employer's proportionate share of cost of collection.

  $27,694.67 - $9,231.46 (1/3 x $27,694.67) = $18,463.21.

- Determine employer's subrogation interest. In post-*Tyroll* cases this will be done by the judge. However, this should be the sum of the employer's future benefits payable, reduced to present value, and the employer's reimbursement.

$18,463.21 + $16,750 = $35,213.21.

c. Employee's Option to Have Damages Allocated by Judge, Instead of Following the Distribution Formula

In cases where the plaintiff, defendant tortfeasor and/or employer enter into a global settlement prior to trial (*Henning v. Wineman*, 306 N.W.2d 551 (Minn. 1981)), or immediately after trial *(Drake v. Reile's Transfer & Delivery, Inc.* 613 N.W.2d 428 (Minn. Ct. App. 2000)), the plaintiff may choose to have the Subdivision 6 formula applied to the total proceeds of the settlement, or the plaintiff may choose to have the judge hold an allocation hearing to determine the amount of the proceeds attributable to recoverable versus non-recoverable claims. Any settlement or award issued will be distributed in the same proportion as the compensable versus non-compensable damages bear to the total amount of the settlement or award. Consequently, the employee may avoid having the Subdivision 6 formula applied to the total proceeds of the settlement. However, in doing so, the employee forfeits his/her statutory right to 1/3 of the proceeds. The *Henning* decision granted the employee the right to pursue the judicial allocation where the settlement occurred prior to trial. The *Drake* case extended that right post-trial. The decision does not invalidate the jury's allocation of fault at trial, but does recognize the right of parties to settle after a jury verdict and, thereafter, seek reallocation.

Practice Tip: **Do not agree to a global settlement without stipulating exactly how the proceeds will be divided.**

For further discussion of *Henning* allocations, refer to the Global Settlement discussion, below.

d. Employee's failure to properly notify employer/workers' compensation carrier of commencement of trial on third-party action results in future credit to the employer/workers' compensation carrier.

As discussed above, in *Womack. V. Fikes of Minnesota*, the Workers' Compensation Court of Appeals held that the consequences of failing to give notice of the institution of suit or trial of a third-party action should be the same as those attaching to an employee's failure to provide notice of an intention to settle, outlined further, below. In *Womack*, the employee failed to notify the employer/workers' compensation insurer of a third-party action until after the third party case was tried and a verdict rendered.

The WCCA held that the employer/workers' compensation insurer was entitled to a future credit in an amount of the total verdict, less attorney's fees/cost of collection. The WCCA also held that the future credit could not be used "dollar-for-dollar" but was subject to an adjustment based on the cost of collection ration, as outlined in *Kealy v. St. Paul Housing & Redevelopment Auth.*, 303 N.W. 2d 468 (Minn. 1981), noted above. *See Womack. V. Fikes of Minnesota*, 61 W.C.D. 574, 589 (W.C.C.A. 2001).

VII. PARTIAL/PRETRIAL SETTLEMENTS AND THEIR IMPACT ON THE REMAINING CLAIMS

A. *Naig* Settlements

As indicated above, all third-party claims involve a number of different interests. The employer/insurer has a right to recover, through subrogation, benefits it has paid to/on behalf of the employee. The third-party tortfeasor can recover in contribution from the employer/insurer, amounts related to the employer's fault in causing the employee's injury. The employee has a right to recover from the third-party tortfeasor, items of damage that the workers' compensation act does not compensate him/her for, such as emotional distress, pain and suffering, loss of consortium, etc. A "*Naig* Settlement" occurs when an employee settles items of damage that are not compensable under workers' compensation (e.g., pain and suffering, emotional distress, loss of consortium, etc.). *See Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977). The workers' compensation subrogation claim is left intact. However, where the employer/workers' compensation insurer is given notice of the *Naig* settlement, the employer/workers' compensation insurer should request a copy of any *Naig* settlement agreement to ensure that it expressly states that it does not affect the workers' compensation carrier's subrogation rights. After a *Naig* settlement, the employer/workers' compensation insurer then steps into the shoes of the employee to continue the unsettled portion of the employee's tort cause of action -- the damages for which the employee has been paid workers' compensation benefits. Employer's/Insurer's typically commence this action in the employee's name, but the action can be commenced in the name of the employer.

1. Notice Requirements

The employee is required to give the employer prior notice of the intention to settle within sufficient time to afford it a "reasonable opportunity" to participate in settlement negotiations and to appear or intervene in any litigation to protect its interests. Minn. Stat. §176.061, Subd. 8(a); *Easterlin v. State*, 330 N.W.2d 704 (Minn. 1983). Additionally, when an employee commences an action against a third-party, a copy of the complaint must be served on the employer and workers' compensation insurer. Minn. Stat. §176.061, subd. 8(a).

It is clear that an employer/workers' compensation carrier is entitled to notice of *Naig* settlement discussions where there has been an admission of liability for the work-related injury and workers' compensation benefits have been paid by the employer/workers' compensation carrier. However, employees and alleged third-party tortfeasors often take the position that there is no obligation to provide an employer with notice of *Naig* settlement discussions and an opportunity to participate when an employer/workers' compensation carrier has denied primary liability for a work-related injury and paid no workers' compensation benefits to or on behalf of the employee. Their position is that there is no subrogation interest because liability for the work injury has been denied by the workers' compensation carrier and no benefits paid. They reason that because there is no subrogation interest, there is no legal obligation to provide notice of *Naig* or Global settlement discussions.

There are strong arguments against that position where the employee has filed a workers' compensation claim and an administrative proceeding is pending on the issue of primary liability. The Minnesota Workers' Compensation Statute provides that an employer's/workers' compensation insurer's subrogation interest is in workers' compensation benefits "paid" and "payable". An employer/workers' compensation insurer has a strong argument that it is entitled to notice of *Naig* or Global settlement discussions and an opportunity to participate where a judicial determination as to primary liability for an injury (and hence "payable" workers' compensation benefits) is pending. As indicated above, the Minnesota Workers' Compensation Court of Appeals decision in *Womack v. Fikes of Minnesota*, 61 WCD 574 (Minn. WCCA September 12, 2001), supports that position. *See* discussion of *Womack* above, in Section VI., D.

a. What is *proper* notice?

The *Easterlin* decision does not delineate any bright-line time-frame which will be deemed "proper" notice. Instead, it simply provides that notice must be sufficient to afford the employer a "reasonable opportunity" to participate in the employee's and third-party tortfeasor's negotiations and appear or intervene in any litigation to protect its interests. Whether notice is timely is addressed on a case-by-case basis, subject to this standard. The notice requirement is to be judged in light of the status of the parties at the time of the *Naig* settlement (e.g., at the time the notice should have been given), rather than at the time the failure of notice is discovered. *Risdal v. Independent School District No. 146*, File No. 532-42-7759, unpublished (Minn. W.C.C.A. 2000).

b. What happens when there is a failure of proper notice?

It is the employee's burden to provide the employer/insurer with notice of *Naig* settlement negotiations. Failure to properly notify the employer/insurer of *Naig* settlement negotiations is "presumptively prejudicial" to the employer/insurer under *Easterlin*. If the employee is unable to rebut the presumption of prejudice, the employer/insurer is entitled to a credit for future compensation payable against the employee's *Naig* settlement. Note that the employer/insurer still maintains the right to pursue a subrogation claim against the settling tortfeasor for amounts not satisfied by the credit. What remains unclear and unaddressed by the courts is whether there are any circumstances in which an unnotified employer would be entitled to a portion of the cash *Naig* recovery, if the employer was made aware of the settlement before the proceeds were spent. The rationale for a future credit appears less strong in that case than in the typical "notice-failure" case wherein the employee settles on a *Naig* basis and the proceeds are spent before the employer becomes aware of the settlement.

2. Burden of Proof When Going Forward with Trial

At the trial following a *Naig* settlement, the employer/workers' compensation insurer is still required to prove the reasonableness of the compensation paid. Therefore, the employer must prove the nature and extent of the employee's injury. *Ettinger Transfer and Leasing Co. v. Schaper Mfg., Inc*., 494 N.W.2d 29 (Minn. 1992).

3. The *Tyroll* Case and post-*Naig* subrogation recovery prior to the 2000 Amendments to Minn. Stat. §176.061

In the case of *Tyroll v. Private Label Chemicals, Inc*., 505 N.W.2d 54 (Minn. 1993), the Minnesota Supreme Court defined the procedure to be followed subsequent to a *Naig* settlement. In short, an employer seeking to recover its subrogation interest following an employee's *Naig* settlement with the third-party tortfeasor, was required to undergo a two-step process under *Tyroll*. The employer had to first prove up the employee's common law damages, as indicated in *M.W. Ettinger Transfer & Leasing Co.*, 494 N.W.2d 29 (Minn. 1992). Under *Ettinger Transfer*, the Court held that when the employer pursues its subrogation recovery separately, following a *Naig* settlement, its claim is not necessarily equal to the amount of benefits paid to the employee, but rather, the employer is required to prove the nature and extent of the employee's injury and take its recovery out of items of damage in which the common law damages awarded and workers' compensation benefits overlap. *See M.W. Ettinger Transfer,* 494 N.W.2d 29. Under the second step in *Tyroll*, a separate

proceeding is held before the court, and the employer/insurer proves up the amount of workers' compensation benefits paid and payable, with benefits payable being discounted to present value by the court. *See* Minn. Stat. § 176.165. The employer was then allowed subrogation recovery only to the extent that such benefits overlapped. A more in-depth review of the *Tyroll* decision follows.

a. In-depth review of *Tyroll v. Private Label Chemicals, Inc*., 505 N.W.2d 54 (Minn. 1993)

The employee commenced a third-party action, and subsequently entered into a *Naig* settlement with the third-party tortfeasor. The employer/workers' compensation carrier had paid $135,000 in benefits, and pursued the subrogation suit to trial. The trial judge decided the case without the assistance of a jury, and found the third-party tortfeasor to be 100% at fault for the employee's accident. The judge also determined that the benefits paid to and on behalf of the employee were reasonable and necessary, and entered judgment in that amount in favor of the employer/insurer. Following the decision of the Court of Appeals, several issues were appealed to the Minnesota Supreme Court, which attempted to clarify the law in this area.

First, the Court determined that the defendant tortfeasor has a right to a jury trial. However, certain issues relating to the reasonableness and propriety of the workers' compensation claims are to be tried by the judge.

Next, the Court described the nature of the employer's subrogation action, establishing a "line of demarcation" between common law tort damages "recoverable" or "not recoverable" under the Workers' Compensation Act:

(1) Recoverable:

- Past and future wage loss;
- Loss of earning capacity.

(2) Non-recoverable:

- Pain and suffering;
- General disability;
- Embarrassment;
- Disfigurement;
- Mental anguish.

(3) Benefits not discussed:

The Court failed to address certain types of benefits paid in many workers' compensation cases, including, retraining benefits, and permanent partial disability benefits. Following the *Tyroll* decision, it was unclear how those items of damage would be provided for and, consequently, how it would affect an employer's post-*Naig* recovery.

The *Tyroll* court outlined the procedure for determining the post-*Naig* workers' compensation subrogation damages:

- The employer's subrogation action is limited to "recovery of common law damages for past and future wage loss, loss of earning capacity, and similar items of damages, if any."

- The recovery is not subject to subdivision 6 formula;

- If the jury's award exceeds the benefits paid and payable, the excess is moot, deemed settled under the *Naig* release. If the jury awards damages less than benefits paid and payable, the employer's recovery is limited to the amount awarded.

- Because the subd. 6 formula does not apply, there is not additional recovery for attorney's fees and no credit remaining outstanding.

It was determined that comparative fault may still diminish or defeat liability for the subrogation claim. Consequently, the employer's recovery will be reduced by the amount of the employee's fault, and the amount of the employer's fault. Similarly, there are no *Lambertson* contribution issues because even if the employer is found to share some portion of the fault for the employee's injuries, the employer is not liable to contribute to the sum the tortfeasor paid the employee to settle the "non-recoverable" damages under the *Naig* release.

The benefits paid by the employer/workers' compensation insurer are presumed to be reasonable and proper expenditures under the WCA. However, in a footnote, the Court did indicate that the defendant/tortfeasor could argue that certain benefits paid and payable were not reasonable

and necessary, but the Court also indicated that this argument might be subject to restrictions on collateral attacks.

In determining the amount of benefits payable in the future the judge is to consider the "evidence available, (using affidavits, depositions and exhibits) and make reasonable assumptions (such as life expectancy of the injured employee), and then reduce the benefits payable to present value." *See Wilken v. International Harvester Co.*, 363 N.W.2d 763 (Minn. 1985).

4. Post-*Naig* subrogation recovery *after* the 2000 Amendments to Minn. Stat. §176.061 -- Subrogation is now allowed for *all* benefits paid and payable.

With the 2000 legislative amendments to Minn. Stat. § 176.061, language was added to Subdivisions 3, 5, and 7, providing that the employer/insurer has a right to recover *all* benefits it has had to pay to/on behalf of the employee, due to the negligence of a third-party, regardless of whether the benefits were *recoverable* at common law or not. The language overrules the Supreme Court's holdings that the employer's subrogation recovery was limited to the amounts the employee could recover at common law. *See Tyroll v. Private Label Chemicals*, 505 N.W.2d 54 (Minn. 1993); *Ettinger Transfer v. Shaper Mfg.*, 494 N.W.2d 29 (Minn. 1992). This has particular importance in the employer's subrogation case following an employee's pre-trial *Naig* settlement (in cases involving injuries after the effective date of the amendment: August 1, 2000). Following the statutory amendments, the matching of benefits to common law damages as set forth in *Tyroll* is arguably no longer required.

In 2004, the Minnesota Court of Appeals confronted these issues head-on, in *Zurich American Insurance Company v. Bjelland*, 690 N.W.2d 352 (Minn. Ct. App. 2004). In *Zurich*, the employee sustained fatal injuries in a work-related motor vehicle accident with the defendant, Bjelland. The employee's employer, through its workers' compensation carrier, paid dependency benefits to the deceased employee's survivors. The employee's surviving spouse and defendant Bjelland entered into a *Naig* settlement, settling all damages against Bjelland except for those damages recoverable under workers' compensation. A *Naig* settlement is one in which the employee settles his/her civil damage claims against the third-party tortfeasor. These are damages not compensable under workers' compensation, such as pain and suffering, emotional distress, loss of consortium, etc. The employer/workers' compensation carrier's subrogation claims remain intact. The employer and Zurich thereafter initiated a subrogation claim against Bjelland. Zurich alleged that, based

upon amendments to the Workers' Compensation Act in 2000, it was entitled to recover all workers' compensation benefits it had paid in the case ($104,319.00) irrespective of limitations under the Wrongful Death Act. In 2000, the Minnesota legislature amended Minn. Stat. §176.061, subd. 3 to provide that: "The employer...may bring legal proceedings against the party and recover the aggregate amount of benefits payable to or on behalf of the employee or the employee's dependents, *regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute* together with costs, disbursements, and reasonable attorney's fees."

Defendant Bjelland argued that Zurich's subrogation recovery was limited to damages allowable under the Wrongful Death Act ($48,336.05). This argument was based on the premise that the employer/workers' compensation carrier's rights are co-extensive with the deceased employee's survivors' rights and are thus subject to the Wrongful Death Act because the employer/workers' compensation carrier obtains its rights only through subrogation. His argument was that because under common-law subrogation the subrogee stands in the shoes of the subrogor and obtains no greater rights than the subrogor, Zurich would be limited in subrogation by the limits of the Wrongful Death Act, just as the deceased employee's survivors would be limited by the limits of that act in a wrongful-death civil action against Bjelland.

The Minnesota Court of Appeals (Judge Shumaker) reversed the trial court's holding that Zurich's subrogation recovery was limited by the limits prescribed by the Wrongful Death Act. It held that the 2000 amendments to Minn. Stat. §176.061, subd. 3 permit an employer/workers' compensation insurer full subrogation recovery of workers' compensation benefits paid and payable regardless of any common law or other statutory limitations. The Court held that the employer/workers' compensation carrier has a right to recover all provable damages. It noted that the alleged third-party tortfeasor in a workers' compensation subrogation case has a right to a jury trial on damages and liability. The employer/workers' compensation carrier is not automatically entitled to full recovery of benefits paid and payable, but is required to prove liability and damages.

Note that the *Zurich* decision arguably overruled the balancing approach for subrogation damage calculation and recovery in a post-*Naig* settlement context, as previously established in *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54 (Minn. 1993). Under *Tyroll* and predecessor cases, including *M.W. Ettinger Transfer & Leasing Co.*, 494 N.W.2d 29 (Minn. 1992), the employer was required to prove the nature and extent of the employee's injury and then take its subrogation recovery out of damages in which the common law damages awarded and workers' compensation benefits paid overlapped. Under *Tyroll*, two separate legal proceedings

were held to try the issue of liability, determine damages, and then determine the employer/workers' compensation carrier's subrogation recovery. Ultimately, that subrogation recovery was limited to a sum representative of the overlap between workers' compensation damages and civil damages. That balancing approach to determining subrogation recovery was likely overruled by the 2000 amendments, and the language of the Minnesota Court of Appeals decision in *Zurich* suggests as much in its discussion of the impact of the 2000 amendments on the *Tyroll* decision.

On February 2, 2006, the Supreme Court of Minnesota reversed the Court of Appeals' decision in *Zurich v. Bjelland*, 690 N.W.2d 352 (Minn. Ct. App. 2004). The Supreme Court held that an employer's damages are limited to those damages recoverable by the employee at common law or by statute. The Supreme Court decision drafted by Justice Helen Meyer goes through gyrations to undo the language in the 2000 statutory amendment confirming that the employer by statute has its own "separate additional cause of action against the third party to recover amounts payable for medical treatment or for other compensation payable under the section resulting from the negligence of the third party *regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute*." Minn. Stat. '176.061, Subd. 7. (See also Subds. 3, 5, and 10). The Supreme Court's opinion engages in a misguided analysis of what the legislature really meant by the words "all benefits" which was in the statute prior to the enactment of the 2000 statutory amendments, and ultimately concluded that those words somehow made the amendment ambiguous.

The Supreme Court's decision will potentially reduce a self-insured or workers' compensation carrier's subrogation recovery in the rare cases in which the level of workers' compensation benefits paid exceed the amount of damages that can legally be recovered under common law or a civil damage statute. However, the decision appears to have no impact on the portions of the amendment that create the right to "Waive and Walk" and limit the employer contribution to the subrogation recovered as opposed to the workers' compensation paid and payable.

5. Allocation of fault and distribution of damages in post-*Naig Tyroll* proceedings.

In *Conwed Corporation v. Union Carbide Corporation*, No. Civ. 5-92-88 DDARLE, (D. Minn. May 3, 2004), Judge Alsop addressed two key issues arising after a group of Conwed employees entered into *Naig* settlements with third-party defendant, Union Carbide. Specifically, the Judge addressed the issues of: (1) whether an employee's general disability damages can be included in an employer's subrogation claim in a post-*Naig* settlement *Tyroll* proceeding; and (2) the manner in which an

employer's subrogation recovery in a *Tyroll* proceeding is reduced relative to the comparative fault of the employer.

Judge Alsop made two key rulings. First, he held that the employer was not precluded from including its employee's general disability damages in its subrogation claim. As indicated above, general disability damages were an item of damage that the Minnesota Supreme Court expressly deemed non-recoverable in *Tyroll*. However, Judge Alsop reasoned that while *Tyroll* set forth a list of damages that would be considered "recoverable" and "non-recoverable" damages, the *Tyroll* Court noted in its opinion that the list was to govern "at least generally." Judge Alsop reasoned that language enables a determination that general disability damages can be included in an employer's subrogation claim. Judge Alsop's determination is likely correct, not because of the analysis he set forth in his opinion, but rather, because of the 2000 amendments to Minn. Stat. §176.061. As indicated above, those amendments added language providing that an employer may bring a subrogation action and recover the aggregate amount of benefits payable to or on behalf of the employee, *regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute.* The amendments would appear to independently enable an employer to include general disability damages in its subrogation claim. This was essentially affirmed by the Minnesota Court of Appeals in *Zurich*, outlined above, and would appear to be supported also by the Minnesota Supreme Court's interpretation of the 2000 statutory amendments in its decision in the *Zurich* case. *See* above.

The second key ruling Judge Alsop made relates to how an employer's comparative fault for causing an employee's injuries is to be dealt with in a *Tyroll* context. Judge Alsop held that "although an employer has no obligation to contribute to 'non-recoverable' amounts the third party tortfeasor paid in a *Naig* settlement, a *Naig* settlement cannot allow [an employer] to escape its contribution obligation for the portion of the jury verdict that is recoverable under workers' compensation." Thus, Judge Alsop held that an employer's subrogation recovery in a *Tyroll* context will involve another two-step procedure. The court must first determine the employer's total subrogation damages, which will be equal to the amount of benefits paid and payable to the employee "or to the percentage of the jury verdict attributable to the [third-party's] fault, whichever is less." The court must then reduce the employer's total subrogation damages proportionally by the percentage of fault attributable to the employer and enter judgment against the third-party tortfeasor in that amount.

This determination may present significant legal issues and may ultimately be appealed. First, in holding that the total subrogation damages could,

under the appropriate circumstances, be "the percentage of the jury verdict attributable to the third-party's fault," and then requiring that figure to be further reduced by the employer's comparative fault, yielding a "net" subrogation recovery, it would appear that the employer's subrogation interest is being reduced twice for its own fault. It would appear that in limiting the total subrogation damages to an amount representing only the third-party tortfeasor's fault level, the court will have already excepted the employer's fault level from the subrogation recovery. It would appear that by then further reducing the subrogation recovery a second time, for the employer's fault, the employer will have its potential subrogation recovery reduced for its own level of fault twice.

The second and third issues which may arise relative to Judge Alsop's holding relate to possible conflicts with the Workers' Compensation Act. The 2000 statutory amendments placed a cap on employers' potential contribution liability. Issues may arise in the future as to whether employers are entitled to a similar cap in a post-*Naig* proceeding of the type that Judge Alsop has outlined. Additionally, the 2000 amendments to the Workers' Compensation Act literally provide for only one way in which an employer's fault level is to be dealt with and the statute articulates that it is through contribution to the third-party, a codification of the principles outlined in *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977). Issues may evolve as to how an employer's comparative fault allocation as outlined by Judge Alsop in *Conwed* is to be reconciled with the statute.

6. Post-Trial *Naig* Settlements

In some cases, the employee and the third-party defendant will enter into a *Naig* settlement, after the jury's award has been entered. Since the settlement is a compromise of the damages awarded by the jury, several questions are raised, including how the employer should proceed with its subrogation claim, and whether the third-party defendant can require the employer to contribute to the settlement if fault is apportioned to the employer at trial. These issues were addressed in *Kempa v. E.W. Coons Co.*, 370 N.W.2d 414 (Minn. 1985).

a. Employer Cannot be Required to Contribute to the Settlement

In *Kempa*, the post-trial *Naig* settlement resolved only those claims not subject to the subrogation interest. Therefore there was no basis for requiring the employer to contribute to the settlement.

b. Subrogation Action Continues in Employee's Name

Similarly, because the *Naig* settlement did not encompass the employee's claims in which the employer had a subrogation interest, the employer was allowed to simply continue the suit in the employee's name.

c. Subrogation Interest Calculated on Basis on Entire Verdict

After the judge determines the extent of the subrogation claim (taking into account future benefits payable), the subdivision 6 formula is applied to the entire jury verdict to determine the amount the employer is entitled to.

d. Employer's Subrogation Interest is Offset Against its Contribution Obligation

The employer's contribution obligation is also calculated by taking into account the entire jury award. This amount is then offset against the subrogation interest to determine the amount, if any, of the third-party's obligation to the employer.

7. Advantages of *Naig* Settlements

a. No contribution to costs of attorney's fees

In any situation in which the statutory distribution scheme outlined in Minn. Stat. §176.061 is used, the "costs of collection" are deducted before the formula is applied. The employee's attorney's fees are the largest portion of the "costs" of collection, often 33 percent or more. The end result is that the employer/insurer end up "subsidizing" the employee's attorney's fees by having its ultimate recovery reduced by the cost of collection before its subrogation interest is calculated pursuant to Minn. Stat. §176.061. After a *Naig* settlement, however, the employee's attorney is owed nothing from the workers' compensation subrogation recovery the employer/insurer ultimately obtains.

b. *Lambertson* contribution claim evaporates

Once there has been a *Naig* settlement, there is no longer any *Lambertson* type contribution claim. *See Tyroll*, 505 N.W.2d at 61 ("There is no *Lambertson* contribution problem because the employer, even if at fault, is not liable to contribute to the sum the tortfeasor paid the employee to settle the 'non-recoverable' damages under the *Naig* release."). *Conwed Corporation v. Union*

Carbide Corporation, File No. 5-92-88 DDARLE, 2004 WL 326695 (D.Minn February 11, 2004); 634 N.W.2d 401 (Minn. 2001). On the other hand an employer/insurer's contribution liability can remain an offset against its subrogation recovery, but it cannot exceed the employer/insurer's total subrogation recovery. This is due to principles of comparative fault. The employer/insurer's subrogation claim will be reduced by the aggregate fault of the employee and employer. *See Tyroll*, 505 N.W.2d at 61.

8. Disadvantages of *Naig Settlements*

In certain specific cases, *Naig* settlements are undesirable. There may be cases in which the employee's presentation to a jury is particularly important in the employer/insurer's recovery. Employees who settle on a *Naig* basis may have diminished incentive to cooperate in the employer's case, as they have already received their recovery. This is particularly the case in circumstances in which the workers' compensation case has already been resolved on a full, final, and complete basis. Additionally, an employee's *Naig* settlement leaves the employer and insurer in a situation in which it is forced to bear the full costs of experts and other trial expenses.

B. No-*Naig* Agreements

One way that the employer/workers' compensation insurer may be able to avoid having to go forth with the subrogation claim on its own is to enter into an agreement with the employee not to enter into a *Naig* settlement. In exchange for this agreement, the employer/insurer may agree to share in a portion of the employee's expenses, such as sharing the cost of expert witnesses. Most often, however, the employer/workers' compensation insurer agrees not to enter into any type of Reverse-*Naig* settlement with the alleged third-party tortfeasor.

C. Reverse-*Naig* Settlements

A "Reverse-*Naig*" settlement occurs when the employer and the third-party tortfeasor settle the employer's subrogation claim separately from the damages claim of the employee. The impact of a reverse-*Naig* settlement depends upon whether the settlement is entered into before or after the trial starts.

1. Pre-trial Reverse-*Naig* Settlements

The key case in this area is *Folstad v. Eder*, 467 N.W.2d 608 (Minn. 1991). An explanation of the facts in *Folstad* will help clarify this discussion:

The employee was involved in a car accident, while working, and was paid workers' compensation benefits. The employee subsequently sued the driver of the other vehicle, and included the workers' compensation subrogation claim in her suit. Prior to the trial, the workers' compensation carrier and the third-party tortfeasor settled the subrogation claim. The third-party tortfeasor took an "assignment" of the workers' compensation carrier's rights. The jury awarded damages, and apportioned fault 70% to the third-party tortfeasor, and 30 percent to the plaintiff/employee. The question then became how the employee's award should be adjusted to account for the subrogation interest?

a. Employer receives full amount of its subrogation settlement with the tortfeasor. The third-party tortfeasor is then able to deduct full amount of settlement from the employee's verdict.

b. Employer avoids reimbursement for proportionate share of attorney's fees and costs. This is the key advantage of entering into a Reverse-*Naig* agreement for an employer - the settlement is not put through the distribution formula.

c. No collateral source problem. Under the collateral source statute, Minn. Stat. §548.36, damages awarded to the plaintiff will be reduced by the amount of any benefits the plaintiff has received from a collateral source, e.g., workers' compensation benefits. To qualify for a deduction, however, the collateral source benefits must be one for which a subrogation right has not been asserted. The intent of the statute is to avoid giving the plaintiff a double recovery. The court held that once the subrogation claim was settled, there was nothing for the collateral source deduction statute to act upon. Therefore, no deduction was performed. However, the court also noted that the plaintiff could not recover medical expenses already paid, therefore, those amounts were deducted from her overall award.

c. Employer and tortfeasor must estimate specific amount of future workers' compensation benefits payable. The judge cannot reduce the employee's recovery by the subrogation claim unless a specific amount is determined. Presumably, this amount will have been determined by the trial judge, prior to the selection of the jury, using the procedure suggested in *Tyroll*.

d. Close-out both subrogation and contribution claims. An employer and insurer must be very careful to insure that the reverse-*Naig* agreement contains a close-out of not only the subrogation claim, but the contribution claim as well. If the contribution claim is not

closed out, the employer could be liable for a substantial contribution claim following the trial.

e. Employee is still free to pursue a post-reverse *Naig* claim against the tortfeasor for wage loss sustained that is uncompensated through temporary total/temporary partial disability payments. *See Sayre v. McGough Construction Co., Inc.* 580 N.W.2d 503 (Minn. Ct. App. 1998), rev. denied (Minn. August 18, 1998). Case No. C6-97-2117, Served and Filed June 23, 1998. In *Sayre*, the tortfeasor argued that the injured employee had already been compensated for lost earning capacity via workers' compensation benefits. Thus, the workers' compensation insurer — not the injured employee — had a claim for lost earning capacity and that claim was settled as part of the reverse-*Naig*. The Court of Appeals disagreed. It noted that workers' compensation benefits do not fully compensate injured workers. Consequently, the injured worker should be entitled to recover for lost earning capacity to the extent he was not fully compensated by workers' compensation benefits.

2. Post-trial Reverse-*Naig* Settlements

If a Reverse-*Naig* settlement is entered into anytime after selection of the jury *Folstad* does not apply. The key disadvantage for employers and insurers is that the distribution formula is applied to the settlement. However, the results are somewhat similar. If an employer/workers' compensation insurer settles its subrogation claim after the trial begins, the collateral source deduction will not be invoked to reduce the plaintiff's award. *See Keenan v. Hydra-Mac, Inc*., 434 N.W.2d 463 (Minn. 1989).

3. Advantages of Reverse-*Naig* Settlements

Reverse-*Naig* settlements are advantageous to employers/insurers in situations in which the case for liability against the third-party tortfeasor is weak and where the alleged third-party tortfeasor's liability limits are limited. Those situations often favor early Reverse-*Naig* settlement discussions. Reverse-*Naig* settlements can also be beneficial in situations in which there is potentially *Lambertson* liability exposure and the Reverse-*Naig* settlement also resolves the third-party contribution (*Lambertson*) claim.

4. Disadvantages of Reverse-*Naig* Settlements

Reverse-*Naig* settlements are not advantageous in situations in which the potential liability for future workers' compensation benefits is high and where the case for liability against the third-party tortfeasor is strong.

Remember, the reverse-*Naig* agreement eliminates the employer's right to a future credit for future workers' compensation benefits payable. In those cases, a global type settlement or reverse-*Naig* in combination with a close-out of the employee's workers' compensation claims is a better route to pursue.

D. Assignment of the Employer's Subrogation Claim

These types of settlements occur between the employee and employer/insurer. In practice, they have historically been called "*Buck v. Schneider*" assignments. These assignments involve the workers' compensation employer/insurer, assigning its subrogation rights to the employee in exchange for an employee's agreement to settle his/her remaining workers' compensation claim on a full, final, and complete basis. The workers' compensation benefits are not subject to a collateral source offset in the third-party action. *See Buck v. Schneider*, 413 N.W.2d 569 (Minn. Ct. App. 1987). In their purest form, the assignments involve a full, final, and complete workers' compensation settlement, with no new money paid to fund the settlement. The assignment fully funds the agreement. In alternative forms, additional "new money" is paid to secure the workers' compensation settlement, in addition to the assignment. However, less money is typically expended than what would normally be appropriate to close out claims of the type asserted by the employee.

Assignments are particularly useful in situations in which the subrogation case is problematic due to problems with the employee's credibility, high employee comparative fault, potentially low fault level of the alleged third-party tortfeasor, and potentially low civil damages attributable to the employee, etc.

E. Employer/Insurer Waiver of Subrogation Claim

An employer/workers' compensation insurer may avoid liability for a contribution claim by waiving its subrogation claim. *See* Section V, C, above, regarding "Waive and Walk" agreements and *Lambertson* liability. As indicated above, waiver of a subrogation interest is only warranted after the employer/workers' compensation carrier has calculated: (1) the potential *Lambertson* liability, (2) the potential jury verdict, and (3) the potential subrogation recovery as compared with the *Lambertson* liability, and has also concluded that the potential subrogation recovery will be equal to and absorbed by the anticipated *Lambertson* liability.

F. Be Careful Not to Unintentionally Waive Subrogation Claims

An insurer may unintentionally waive its subrogation rights, by entering into a stipulation for settlement of the employee's workers' compensation claims, and not preserving the subrogation right.

VIII. GLOBAL SETTLEMENTS

Global settlements are those in which all of the parties' respective claims against one another are resolved. In some situations all of the parties (e.g., employer/insurer, employee, and third-party tortfeasor) actively participate in the settlement process. In other situations, the employee may enter into a settlement with the third-party tortfeasor which settles the employee's tort claims and the employer/insurer's subrogation claims. In some situations, even the workers' compensation claims are settled as part of the Global settlement. In the typical case, the third-party tortfeasor tenders a sum of money globally, in exchange for an agreement by the employee and employer that their respective claims against the tortfeasor are resolved on a full, final, and complete basis.

Frequently, the third-party tortfeasor simply tenders a sum of money, without delineating the portion paid to resolve the employer's subrogation interest versus the employee's non-compensable items of damage. In those cases, the parties may agree on a distribution scheme. The parties may agree to simply utilize the statutory formula. On the other hand, the employee has the unilateral right to petition the district court for a *Henning* allocation hearing, whereby a district court judge will separate the total settlement into recoverable and non-recoverable items of damage, and award sums to the employee and employer/insurer, relative to their respective interests. *See Henning* allocations, below.

A. Notice Requirements

1. Employee must notify employer/insurer of intent to settle tort and subrogation claims

An employee must notify the employer/insurer of any settlement negotiations or intent to settle all claims against the third-party tortfeasor (the employee's tort-law claim and the employer/insurer's subrogation claim). The notice must be given in sufficient time to afford the employer/insurer a "reasonable opportunity" to participate in the negotiations and to appear or intervene in any litigation to protect its interests. Minn. Stat. §176.061, Subd. 8(a); *Jackson v. Zurich American Insurance Co.*, 546 N.W.2d 621 (Minn. 1996).

It is clear that an employer/workers' compensation carrier is entitled to notice Global settlement discussions where there has been an admission of liability for the work-related injury and workers' compensation benefits have been paid by the employer/workers' compensation carrier. However, employees and alleged third-party tortfeasors often take the position that there is no obligation to provide an employer with notice Global settlement discussions and an opportunity to participate when an employer/workers' compensation carrier has denied primary liability for a work-related injury and paid no workers' compensation benefits to or on behalf of the employee. Their position is that there is no subrogation

interest because liability for the work injury has been denied by the workers' compensation carrier and no benefits paid. They reason that because there is no subrogation interest, there is no legal obligation to provide notice of Global settlement discussions.

There are strong arguments against that position where the employee has filed a workers' compensation claim through any one of the various possible initiating workers' compensation pleadings and an administrative proceeding is pending on the issue of primary liability. The Minnesota Workers' Compensation Statute provides that an employer's/workers' compensation insurer's subrogation interest is in workers' compensation benefits "paid" and "payable". An employer/workers' compensation insurer has a strong argument that it is entitled to notice of Global settlement discussions and an opportunity to participate where a judicial determination as to primary liability for an injury (and hence "payable" workers' compensation benefits) is pending. As indicated above, the Minnesota Workers' Compensation Court of Appeals decision in *Womack v. Fikes of Minnesota*, 61 WCD 574 (Minn. WCCA September 12, 2001), supports that position. *See* discussion of *Womack* above, in Section VI., D.

2. What Happens When the Employee Fails to Provide Adequate Notice?

a. Employer/Insurer do not have to "consent" to the settlement

In *Jackson v. Zurich American Insurance Co.*, 546 N.W.2d 621 (Minn. 1996), the Supreme Court of Minnesota held that without an employer's consent, an employee cannot settle the entire third-party action, including the employer/insurer's subrogation interest. However, an employer/insurer cannot unreasonably withhold consent. *See Jackson v. Zurich American Insurance Co.*, 546 N.W.2d 621 (Minn. 1996).

b. Any settlement between the employee and third-party tortfeasor is deemed "void" as against the employer's subrogation interest.

Where the employee fails to properly notify the employer/insurer of a third-party settlement which purports to settle the entire third-party action, the resulting settlement between the employee and third-party tortfeasor is void as against the employer/insurer's right of subrogation and the employer/insurer is entitled to credit a portion of the settlement proceeds against its workers' compensation liability. Additionally, to the extent that the employer's subrogation claim exceeds the credit, the employer

continues to have a right to pursue a direct action in subrogation against the third-party tortfeasor. *See Minich v. Isenberg Equipment, Inc.*, 61 WCD 319 (Minn. WCCA February 21, 2001); *Jackson v. Zurich American Insurance Co.*, 546 N.W.2d 621 (Minn. 1996), *Modjeski v. Federal Bakery of Winona, Inc.*, 307 Minn. 432, 240 N.W.2d 542 (Minn. 1976); *Lang v. William Bros. Boiler & Mfg. Co.*, 250 Minn. 521, 85 N.W.2d 412 (Minn. 1957); *United Steelworkers v. Quandra Mountain*, 418 N.W.2d 723 (Minn. 1988); *Aetna Life & Casualty v. Anderson*, 310 N.W.2d 91 (Minn. 1981).

c. Employee loses his/her entitlement to a *Henning* allocation of any settlement proceeds

In *Womack v. Fikes of Minnesota*, 61 WCD 574 (Minn. WCCA September 12, 2001), the Minnesota Workers' Compensation Court of Appeals (Judges Wheeler, Johnson, and Pederson) confirmed that when an employee fails to provide notice as required by Minn. Stat. §176.061, Subd. 8(a), he/she is not entitled to request a *Henning* allocation of the recovery from a verdict or settlement. The employer/insurer receives a credit. The *Henning* allocation is discussed in detail, below.

d. The measure of the employer/insurer's future credit

The measure of the employer/insurer's credit in situations wherein the employee fails to provide appropriate notice of a global settlement or trial and associated verdict is the total gross value of the verdict or settlement, less attorney's fees/cost of collection. The remaining sum represents the employer/insurer's credit. *See Womack v. Fikes of Minnesota*, 61 WCD 574 (Minn. WCCA September 12, 2001). At least in situations in which the employee fails to provide notice of a trial, the resulting credit may not be used on a dollar-for-dollar basis by the employer, but is subject to an adjustment based on the cost of collection, as outlined in *Kealy v. St. Paul Housing & Redevelopment Auth.*, 303 N.W.2d 468 (Minn. 1981), noted above. *See Womack v. Fikes of Minnesota*, 61 W.C.D. 574, 588 (W.C.C.A. 2001).

B. The *Henning* Allocation

In *Henning v. Wineman*, 306 N.W.2d 551 (Minn. 1981), the Supreme Court of Minnesota held that where the employee settles with the third-party tortfeasor and the settlement includes amounts both recoverable and nonrecoverable under the workers' compensation statutes, the employer/insurer's subrogation recovery can be calculated in on of two ways, at the employee's option:

1. The employee can elect to have the statutory allocation formula of Minn. Stat. §176.061, Subd. 6 applied to the entire recovery, as described in the Litigation portion of these materials, or;

2. The employee can petition the district court to allocate the settlement proceeds between recoverable and nonrecoverable damages, and then have the statutory distribution formula applied only to that portion of the settlement allocable to recoverable damages. However, the employee who selects this option forfeits his/her statutory right to receive one-third of the settlement proceeds.

C. Situations in Which the Employee Will Likely Seek a *Henning* Allocation

The employee is likely to pursue a *Henning* allocation when the employee has sustained serious injuries involving pain and suffering, disfigurement, emotional distress, etc. The employee's distribution share under application of Minn. Stat. §176.061 is blind to such damages and the employee's distributive share is likely to be less under the statute than under a *Henning* proceeding, where pain and suffering, disfigurement, emotional distress, and other similar items of damage are addressed.

The employee may also seek settlement, followed by a *Henning* allocation in situations in which the employee has substantial fault (would offset recovery under application of the statutory distribution formula) and where the employee also has sufficient damages relative to pain and suffering, disfigurement, emotional distress, and other similar damages, which would justify the gamble inherent in petitioning for a *Henning* allocation.

D. The *Henning* Allocation Cannot Allocate All of the Settlement Proceeds to the Employee

Henning allocation proceedings are risky for the employee and the employer, as neither party can be completely certain of how the judge will allocate the settlement proceeds. The employee could receive less than what he/she would have been entitled under operation of the statutory distribution formula. Likewise, the employer/insurer could receive an allocation exceeding or falling below what it could have received through application of the statutory distribution formula. The district court judge has the ability to make any reasonable allocation, with the only exception that the judge cannot allocate 100 percent of the settlement proceeds to the employee.

In *Kliniski v. Southdale Manor*, 518 N.W.2d 7 (Minn. 1994), the Supreme Court of Minnesota reversed a decision of the Court of Appeals, which had upheld a district court judge's allocation of the entire proceeds of a settlement to the injured employee, as damages not-recoverable under the workers' compensation

act. In so doing, the Court essentially overruled an earlier decision of the Minnesota Court of Appeals in *Hewitt v. Apollo Group*, 490 N.W.2d 898 (Minn. Ct. App. 1992), which allocated the entire settlement proceeds to the employee. While the Supreme Court did not formulate a specific formula for determining how much an employee versus an employer/insurer is entitled under a *Henning* allocation, the Court held that any district court allocation which allocates the entire settlement proceeds to the employee will be presumptively arbitrary and subject to reversal. *See Kliniski v. Southdale Manor*, 518 N.W.2d 7 (Minn. 1994)

E. The *Henning* allocation can be made after trial of the third-party action

In *Drake v. Reile's Transfer & Delivery, Inc.*, 613 N.W.2d 428 (Minn. Ct. App. 2000), the Minnesota Court of Appeals (Judge Kalitowski) affirmed a district court's post-trial *Henning*. In *Drake*, the employee brought a third-party action and the employer/workers' compensation insurer intervened for recovery of its subrogation interest. A jury found the employee and third-party tortfeasor 50 percent liable, and apportioned damages to the employee for loss of past and future earnings, past and future medical expenses, and past and future damages for pain, disability, disfigurement, embarrassment and emotional distress. The employee petitioned the district court for further review of the tort action and, while awaiting a response, the employer and the employee reached a settlement of the employee's workers' compensation claim. The settlement was a full, final, and complete settlement with the exception of future medical expenses. The settlement also provided that the workers' compensation insurer retained any subrogation rights it had with respect to the third-party action. The settlement agreement did not address the method of allocation for the proceeds of the third-party action. Following the Supreme Court's denial of its petition for further review of the tort action, the employee petitioned the district court for allocation of the judgment between recoverable and nonrecoverable damages, pursuant to *Henning v. Wineman*, 306 N.W.2d 550 (Minn. 1981), rather than the statutory allocation formula under Minn. Stat. § 176.061, subd. 6 (1998). The insurer opposed the petition arguing hat the employee was estopped equitably and as a matter of law from making a post-trial petition for a *Henning* allocation after the jury verdict was reduced to judgment and satisfied. The district court granted the employee's petition and allocated the judgment consistent with the itemized damage award made by the jury in its special verdict.

On appeal, the insurer argued that once a tort action results in a judgment, *Henning* is not applicable and allocation of the proceeds may only occur according to the statutory formula. The Court of Appeals disagreed. In so holding, the Court held that the decision in *Kempa v. E.W. Coons, Co.*, 370 N.W.2d 414 (Minn. 1985) (which mandated the use of the statutory allocation formula on a judgment from a jury verdict) was not applicable, as *Kempa* involved a situation in which the employee reached a post-trial *Naig* settlement with the third-party tortfeasor that specifically excluded the employer's subrogation claim for workers' compensation benefits. In *Kempa*, the Supreme

Court held that the statutory formula must be used because the employer had participated actively in the trial but not the settlement, and the settlement agreement specifically excluded any resolution of the employer's subrogation rights. In the instant case, the Court of Appeals held that *Kempa* did not limit an employee's right to choose between allocation methods, as permitted by *Henning*, as the issue never arose in *Kempa* because the employee was no longer part of the dispute, having entered into a settlement with the tortfeasor that expressly excluded resolution of the employer's subrogation interest. Therefore, the Court of Appeals held that a post-trial *Henning* allocation is permissible.

F. Advantages and Disadvantages of Global Settlements

Global settlements are advantageous in situations in which the third-party tortfeasor has limited liability limits and there are competing claims on those limited policy limits by the employer/workers' compensation insurer and the employee. A Global settlement is also advantageous in situations in which future workers' compensation liability is limited or can be resolved as part of the Global settlement. A Global settlement removes the possibility of a *Henning* allocation and the associated risk factors for subrogation recovery inherent in *Henning* allocations. Global settlements are not advantageous where these factors are not present.

IX. "NEW-AGE" / "CUTTING EDGE" SETTLEMENTS

The customary manner in which Assignment settlements, Reverse-*Naig* settlements, and Global settlements are typically approached have serious limitations. Yet, the vast majority of practitioners continue to approach these settlement models in the same manner, yielding inefficient case handling and inadequate case resolutions. Subrogation recovery should be approached with consideration of the future life of the workers' compensation claim. The type of subrogation recovery approach should be tailored to the nature of the future life of the workers' compensation action after subrogation recovery is obtained. If the future for workers' compensation benefit claims remains open and the potential exposure for those claims is large, a global settlement which resolves the future potential workers' compensation benefit claims and, at the same time, resolves the subrogation interest is favored. Obviously, a host of circumstances may eventuate which may make a Global settlement impossible, leaving the employer/workers' compensation carrier to pursue a more piecemeal "issue-by-issue" resolution strategy. If the employee's workers' compensation case is already settled, if the employee will not entertain a full, final, or complete settlement, and if the employer has potential *Lambertson* liability, a case resolution model which resolves both the workers' compensation case and the subrogation claim is not possible. Subrogation recovery will need to be pursued separately. The trouble with the typical subrogation resolution models is that they are fashioned to address clear cut, "black and white" situations. While they work well enough in certain specific situations, they will result in a deadlocked case that cannot be settled, where the circumstances are not clear cut or "black and white". There are countless alternative settlement models that can be utilized

to resolve a case that is not clear cut on its facts. What follows are some examples of settlement models we have created to resolve those "hard to resolve" cases.

A. Conditional Assignment/Conditional Full, Final and Complete Workers' Compensation Settlement

In this settlement, the Employer and Employee enter into a full, final, and complete settlement of the workers' compensation claims with an assignment of the subrogation interest to the Employee as the sole funding mechanism for the settlement. The entirety of the pending workers' compensation action is placed on hold while the Employee's attorney pursues recovery of his client's civil and assigned subrogation interests from the alleged third-party tortfeasors. The parties stipulate as to a certain verdict amount and recovery that will be sufficient to consummate the Stipulation for Settlement. The parties contract that any verdict lower than that "magic number" will at the employee's option result in a void Stipulation for Settlement and will (1) will return the parties to their pre-Stipulation status (e.g., the workers' compensation claim proceeds), and (2) will require the Employee to return to the Employer, its rightful subrogation recovery under the Minnesota statutory distribution scheme, as it applies to the third-party recovery the Employee made.

1. Advantages of this settlement model :

The chief value of this settlement model is that it can make an otherwise unresolvable case resolvable. Often times, plaintiff's attorneys do not want to accept an assignment of the subrogation interest to fully fund a full, final, and complete workers' compensation settlement when there is a civil action for the employee's damages pending and the case for liability or employee damages is shaky. Plaintiffs attorneys are understandably fearful of the adverse consequences that could eventuate for their clients if they resolve the workers' compensation case for an assignment and no new money, and then loose at the eventual civil trial, obtaining no civil recovery for their client. Under that scenario, their client effectively has all avenues of recovery closed out and obtains no tangible compensation for it. This settlement model enables the workers' compensation case to be conditionally settled, with all pending claims suspended. It also affords the employee the opportunity to pursue the civil case and determine whether she is able to obtain a recovery before the workers' compensation settlement is deemed final.

Another advantage to this settlement model is that it enables the employer to potentially resolve the workers' compensation and subrogation aspects of the case now, without having to undertake the time, cost, expense, and uncertain recovery associated with a civil trial. It also potentially enables the employer to obtain an overall resolution of the entire case for less money than it would expend through a more piecemeal approach (e.g.,

subrogation recovery and leaving open future workers' compensation claims). If the Employee does not recover in the civil action, the parties are each returned to their original position in the workers' compensation case. Additionally, the employer/workers' compensation insurer obtains the benefit of a subrogation recovery if a civil recovery is made, and the employer/workers' compensation carrier will have no associated transaction costs associated with pursuing the subrogation recovery.

2. Disadvantages with this settlement model:

This settlement model only works if future medical expenses are left open as part of the Stipulation for Settlement, at least through the pendency of the civil case. This settlement is also only advisable if the employer has confidence in the abilities of the Employee's attorney to properly prosecute the civil claim. Additionally, this settlement model may not work in situations in which the Employee is receiving ongoing workers' compensation wage loss benefits and has no other source of income during the pendency of the civil action.

B. Conditional Assignment/Conditional Full, Final, and Complete Workers' Compensation Settlement Coupled with Refundable Cash Payment to Employee

This settlement model is the same as that outlined above, with the sole exception that a lump sum is paid to the employee by the employer/workers' compensation carrier in addition to the assignment of the subrogation interest, to fund the full, final, and complete settlement. The lump sum is, however, treated as an "advancement" to the employee on the third-party recovery. If the employee obtains the agreed-upon third-party damage award through trial or settlement, he/she will fully refund the advancement lump sum to the employer/workers' compensation insurer. If the settlement or damage award through trial is inadequate to enable the full repayment of the entire sum advanced, an agreed-upon portion will be repaid to the employer/workers' compensation insurer and any remaining unpaid portion of the sum advanced will be treated as a future credit by the employer/workers' compensation insurer. Under the terms of the agreement, the credit can be used to offset future workers' compensation benefits deemed payable. We have drafted language into our settlement agreements which provides that the parties stipulate that the future credit can be taken on a dollar-for-dollar basis and recovered before any workers' compensation benefits are payable.

This settlement model is useful in situations in which the employee requires a lump sum to be paid in addition to the assignment of the subrogation interest to fund the workers' compensation settlement. The employer/workers' compensation insurer, who is already assigning a valuable subrogation interest to purchase the full, final, and complete workers' compensation settlement may

understandably not want to provide additional cash to the employee to obtain the settlement. By treating the lump sum as a loan that can be fully recouped by cash payment or future credit, the employer/workers' compensation carrier is able to obtain a favorable case resolution with no net lump sum paid to the employee to fund the workers' compensation settlement.

C. Unconditional Assignment of Subrogation Interest Coupled with Refundable Cash Payment to Employee

This settlement model is the same as that listed above in Section IX, B, but the variation is that the assignment of the subrogation interest and the workers' compensation settlement are not conditional upon the employee receiving any particular civil recovery against a third-party tortfeasor. The workers' compensation settlement will remain a full, final, and complete settlement regardless of whether the employee makes a large civil recovery, a small civil recovery, or no civil recovery. However, the lump sum paid to the employee to fund the workers' compensation settlement beyond the assignment of the subrogation interest is repayable. In the event that an employee's civil recovery reaches a certain figure (agreed-upon in advance by the employee and the employer/workers' compensation carrier) which is sufficient to enable a full repayment of the lump sum advancement, the lump sum will be fully refunded to the employer/workers' compensation insurer by the employee. In the event that the civil recovery is insufficient to fully refund the advancement lump sum to the employer/insurer, the employee is required to refund a portion of the lump sum recovery to the employer. That portion is derived by dividing the total gross recovery the employee did make by the previously agreed-upon sum deemed sufficient to obligate the employee to make a full cash reimbursement to the employer. The resulting percentage is then applied to the sum of money advanced to the employee to determine the actual amount the employee is obligated to repay the employer/insurer.

Example: The employer/insurer agree to settle the workers' compensation case with an assignment of the subrogation interest and a cash advancement to the employee of $2,500.00. The parties then agree that if the employee's civil action results in a gross recovery of $5,000.00 or more, she will be obligated to pay the entirety of the $2,500.00 advanced back to the employer. The parties further agree that in the event that the civil recovery ranges between $0.00 and $5,000.00, the employee will repay the employer a portion of the $2,500.00 advanced which is equivalent to the ratio between the civil recovery the employee makes and the sum of $5,000.00. If no civil recovery is made, there will be no obligation to repay any portion of the $2,500.00 advanced. On the other hand, if the employee recovers $4,000.00 in her civil recovery, she would be required to repay the employer 80% of the 2,500.00 advanced, or $2,000.00.

D. Full, Final, and Complete Workers' Compensation Settlement Coupled with Reverse-*Naig* Settlement

While certainly not as novel as the above-noted settlement models, this settlement model is useful in situations in which an employee has already reached a *Naig* settlement of his civil claims against the alleged third-party tortfeasor and the future life of the workers' compensation benefit exposure remains open and subject to claims. The employer/insurer is in a conundrum in this type of case. If it settles the third-party subrogation claim first, it will be left with a future of exposure on the potential workers' compensation claims the employee may bring. If the employee does bring those claims and if they are deemed compensable, there will be no ability to obtain any subrogation recovery on the benefits that are paid. While one could attempt to predict the total value of future "payable" workers' compensation benefits and incorporate that figure into a settlement demand to the third-party tortfeasor on a Reverse-*Naig* basis, the third-party tortfeasor may be uninterested in compensating the employer/workers' compensation carrier for those speculative damages, especially after the employee has resolved his case against the third-party tortfeasor by way of a *Naig* settlement.

A solution to this problem is to cut off the future workers' compensation exposure by resolving the workers' compensation claims of the employee on a full, final, and complete basis. That benefits the employer/workers' compensation carrier by cutting off all future workers' compensation liability and by also enabling the employer/workers' compensation carrier to assert a clearly articulable subrogation claim that does not depend upon speculation of what the future workers' compensation exposure may be. The amount of the workers' compensation settlement is then added to the total workers' compensation benefit payments already made to and on behalf of the employee and asserted as the subrogation claim against the third-party tortfeasor. That subrogation claim can then be resolved by way of a Reverse-*Naig* settlement.

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