



Finding Your “Pot Of Gold”  
At The End Of The

# SUBROGATION RAINBOW

*Alternative Settlement Negotiation Models  
Can Resolve The “Unresolvable” Case*

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Taking a creative approach to settlement negotiation can enable the self-insured employer or workers’ compensation carrier to close off future exposure in costly workers’ compensation cases where settlement seems impossible. ▶

Workers' compensation subrogation recovery should be approached with consideration of the future life of a workers' compensation claim. Particularly in States which recognize future credits and in States in which the subrogation interest is comprised not only of benefits paid, but also those which are payable in the future. The type of subrogation recovery approach should be tailored to the future life of workers' compensation benefits after subrogation recovery is obtained. For example, 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 often favored. Obviously, a host of circumstances may eventuate which may make a global settlement impossible, leaving the self-insured 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 and complete settlement, or if the employer has potential employer liability in States which recognize that concept, a case resolution model which resolves both the workers' compensation case and the subrogation claim is often not possible. In those circumstances, subrogation recovery often must be pursued separately from any attempt to control the future workers' compensation benefit exposure.

In many States, there is either a variety of established "traditional" settlement negotiation models for subrogation recovery or a legal landscape that may enable various settlement models to be attempted. The traditional settlement negotiation models range from holistic, such as the "global" settlement model outlined above, to partial resolution models. Many of these have strange "catch-phrases" such as Reverse-Naig settlement (Minnesota), Waive and Walk settlement (Minnesota), and Assignment of a Subrogation Interest (Minnesota). The traditional models work well enough for certain specific types of cases, but they are inadequate for resolving others. Unfortunately, many cases that are not particularly

amenable to settlement through one of the traditional settlement models are consequently deemed unresolvable and are then relegated to the uncertainties of trial, or subrogation is simply not pursued. As a result, the pot of gold at the end of the subrogation rainbow remains unclaimed.

Alternative types of settlements beyond the parameters of the "traditional" settlement models can be used to successfully and economically bring about a favorable resolution of the workers' compensation and subrogation aspects of a case. Countless alternative settlement negotiation models may be utilized to resolve the "hard to resolve" case. What follows is a discussion of three such models that this author has designed and utilized to resolve those cases.

#### **The Conditional Assignment/Conditional Full, Final and Complete Workers' Compensation Settlement**

A number of States allow a self-insured employer or workers' compensation carrier to assign its subrogation interest to the injured employee as a complete funding mechanism for a full, final and complete workers' compensation settlement. That is often a preferred way of resolving the subrogation and workers' compensation aspects of a case, because through the assignment to the employee, the self-insured employer/workers' compensation carrier maximizes the effects of a full subrogation recovery while not assuming any of the risk of possible failure of its claim against the third-party tortfeasor. At the same time, the self-insured employer/workers' compensation carrier completely extinguishes future workers' compensation benefit exposure through a workers' compensation settlement that requires no new money for its funding. Workers' compensation subrogation recovery is most often problematic in cases where there are significant weaknesses in the employee's civil case for liability, damages, or both, against the third-party tortfeasor. In those cases, employees' attorneys are often uninterested in accepting an assignment of the workers' compensation subrogation interest to fully fund a workers' compensation settlement. Employees' attorneys may be willing to

"take a chance" on their civil case against the third-party tortfeasor, notwithstanding significant weaknesses in their case for liability or damages. However, they are often reluctant to resolve the workers' compensation case for no new money and place their clients in a possible position of making no cash recovery on their civil or their workers' compensation claims after the jury renders its verdict on the civil case. In those cases, self-insured employers/workers' compensation carriers are often relegated to either actively pursue subrogation recovery, enter into an agreement with the employee's counsel for a return on the jury's damage award, if a favorable verdict is rendered, or simply elect not to pursue subrogation recovery. Each of those options can potentially result in an insubstantial subrogation recovery and none of the options provide any control over future workers' compensation benefit exposure.

An alternative settlement negotiation model, involving a conditional settlement of the workers' compensation benefits, coupled with an assignment of the subrogation interest as the sole funding mechanism for the settlement overcomes these limitations. In that model, 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 the employee's civil and assigned subrogation interest against the alleged third-party tortfeasor. The parties stipulate as to a certain verdict amount and recovery that will be sufficient to consummate the workers' compensation benefit settlement. The parties contract that any verdict lower than that "magic number" will: (1) at the employee's option, result in a void workers' compensation settlement, (2) will return the parties to their pre-stipulation status (e.g., the workers' compensation claim proceeds), and (3) will require the employee to return to the employer its rightful subrogation recovery under the State's statutory distribution scheme, as it applies to any third-party recovery the employee makes.

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 he or she is able to obtain a recovery before the workers' compensation settlement is deemed final. This settlement model enables the self-insured employer/workers' compensation carrier to potentially resolve the workers' compensation and subrogation aspects of the case early on in case development, without having to undertake the time, expense and uncertain recovery associated with a civil trial. It also potentially enables the self-insured employer/workers' compensation carrier 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 an amount equal to or higher than the agreed-upon "magic number" in the civil action, the employee can either consummate the workers' compensation settlement anyway and keep the full measure of any civil award/settlement or, alternatively, the parties will each be returned to their original position. While the employee would be free to pursue a workers' compensation claim against the employer, the employer would nonetheless receive a guaranteed cash subrogation recovery on any civil damages the employee obtains through trial, settlement or otherwise. The employer would also be free to defend against any future workers' compensation claims advanced.

This settlement model works if medical treatment has essentially stopped or if the parties can negotiate an arrangement with medical providers, with whom the employee anticipates treating in the interim, as to how ongoing treatment and bills will be handled. This settlement is also only advisable if the self-insured employer/workers' compensation carrier 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 where the employee is receiving ongoing workers' compensation wage loss benefits and has no other

source of income during the pendency of the civil action, or where there is an allegation of employer fault in a pending civil action against the third-party tortfeasor.

#### **Conditional Assignment/Conditional Full, Final and Complete Workers' Compensation Settlement Coupled with Refundable Cash Payment to the 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, funding the full, final and complete workers' compensation 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 advanced 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 this agreement, the credit can be used to offset future workers' compensation benefits deemed payable. Depending upon the laws of the State involved, it is advisable to draft language into the settlement agreement which provides that the parties stipulate that the future credit can be taken on a dollar-for-dollar basis and recovered before any future workers' compensation benefits are payable.

This settlement model is useful in situations where 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 ultimately able to obtain a favorable case resolution with no net lump sum paid to the employee to fund the workers' compensation settlement.

#### **Unconditional Assignment of Subrogation Interest Coupled with Refundable Cash Payment to the Employee**

This settlement model is the same as that addressed in the foregoing section, 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 self-insured 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 advanced 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, he or she will be obligated to pay the entirety of the \$2,500.00 advancement 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 his or her civil recovery, they would be required to repay the employer 80% of the 2,500.00 advanced, or \$2,000.00.

This settlement model is useful in situations in which the parties are able to agree to enter into a workers' compensation settlement that will be deemed "final" regardless of whether the employee succeeds or fails in his or her claims against the third-party tortfea-

sor. The unique use of the advanced lump sum under this model reduces risk for the employee in entering into this agreement and, at the same time, ensures that the employer/insurer does not pay "too much" to fund the settlement. The employee is guaranteed a lump sum recovery even if he or she fails in their claim against the third-party tortfeasor, as he or she can keep the entirety of the lump sum advancement in that circumstance. However, if the employee makes a large recovery against the third-party tortfeasor, he or she will be required to proportionately reimburse the employer/insurer some or all of the lump sum advancement.

These are just three of many settlement negotiation models that can be used to break the barriers of the traditional resolution models and enable self-insured employers/workers' compensation carriers to negotiate a case resolution which maximizes the effects of subrogation recovery and minimizes the future workers' compensation benefit exposure, ensuring that the "pot of gold" at the end of the subrogation rainbow is claimed.

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