CRANFILL SUMNER & HARTZOG LLP

Workers' Compensation Subrogation: A Practitioner's Viewpoint of N.C.G.S. § 97–10.2

- Date: October 5, 2016
- Time: 4:00 pm to 5:00 pm
- Copy of N.C.G.S. § 97-10.2 with the presentation in your materials
- Apologies in advance

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Overview of the Presentation

- Defining "Subrogation."
- Overview of N.C.G.S. § 97-10.2.
- How N.C.G.S. § 97-10.2 interfaces with workers' compensation claims and bodily injury claims.
- Practice pointers and avoiding pitfalls in subrogation claims. ("SUBRO TIPS")
- Role of "employer negligence."
- How to value a workers' compensation lien.
- UM/UIM implications.
- Recent case law re: N.C.G.S. § 97-10.2.

Defining "Subrogation"

"The right of one who has paid an obligation which another should have paid to be indemnified by the other." Source?

- Black's Law Dictionary

"The substitution of one person for another; especially, the legal doctrine of substituting one creditor for another." Source?

- The American Heritage Dictionary of the English Language

What is this really about…

For the defense: Recovering the workers' compensation benefits you pay out because the accident occurred under circumstances where someone else is at fault.

That someone else = the "third party"

For the plaintiff: Obtaining additional compensation for injuries sustained, and limiting the requirement to reimburse your employer the workers' compensation benefits paid to and on your behalf.

Other subrogation scenarios…

- Not just workers' compensation subrogation.
- Can occur in any scenario where one entity pays a claim that should have been paid by another "third party" or their carrier.
- For example: Defective or defectively installed hot water heater floods a home. Homeowner files a claim with their carrier for property damage. If the claim is paid, the insured/carrier can file against the manufacturer/installer of the hot water heater to seek reimbursement for the loss.
- There is common law subrogation.
- However, workers' compensation claim subrogation is exclusively controlled by N.C.G.S. § 97-10.2.

Look to N.C.G.S. § 97-10.2

- The North Carolina Workers' Compensation Act ("the Act") does not directly define "subrogation."
  - ► Unlike more common terms like "employee", etc.
- It handles the concept of "subrogation" in a statutory manner.
- In other words, you always start with the express language of the Act to determine your "rights".
- Reinforced by mandatory language at N.C.G.S. § 97-10.2(a) - "shall be as set forth in this section."
- Consider some other legal concepts to put this into context.

Contractual Subrogation

- Oftentimes insurance contracts will confer certain rights of recovery. For example policy holder assigns their rights to permit the carrier to pursue a liable third-party for reimbursement.
- Sometimes an issue where the insured does not want to cooperate in pursuing the claim. Examples:
  - a temporary staffing agency doesn't want to implicate one of their best clients;
  - a group of businesses that work together in the construction trades are dependent upon one another for their livelihood

Contractual Subrogation *(cont.)*

- But, recognize that if the employer/insured does not cooperate that can frustrate the litigation. (Loss of key witnesses and testimony)
- Can, at times, create a conflict between the carrier and the employer.
- For carriers: Should be a factor to consider for underwriting purposes.
- Similar problems arise if the injured employee or their attorney do not want to pursue the third party.
- Happening more with recent tort reform, especially “billed versus paid”

Indemnification Agreements

- Contracts of "indemnity" can also give rise to a right or claim of reimbursement (or attempt to limit liability).
- "Indemnify" defined as: "To reimburse (another) for a loss suffered because of a third party's or one's own act or default."
- Common theme – "third party"
- Frequently seen in construction contracts and some contracts for goods or services, BUT
- Some contracts like these have been held void as violating public policy. See N.C.G.S. § 22B-1.
- Reason: To discourage entities to try and contract out of their own negligence.
- Discussed at N.C.G.S. § 97-10.2(e) as well.

Compare Equitable Subrogation

- An insurer asserting a conventional subrogation claim rightfully paid a claim for its insured, in the first instance, under its policy, but contends that another party is primarily liable for the loss.
- This is why N.C.G.S.
- By contrast, an insurer asserting an equitable subrogation claim did not owe the claim, in the first instance; it was owed by another entity.
- For example: Health insurance carrier mistakenly pays medical bills for someone that was not their insured, and then seeks reimbursement from the proper carrier.
- Compare N.C.G.S. § 97-19 scenarios I'll discuss below. This is another "type" of subrogation provided for in our Act.

SUBRO TIP #1

- Evaluate whether there is subrogation potential as early as possible when you have a workers' compensation claim or injury.
- Why? - The earlier you recognize opportunities for recovery, the better chance you will have of either "getting money back" if the employer/carrier, or maximizing your client's recovery and damages if representing an injured employee.
- Simultaneously, you would need to consider that what is done to prosecute or defend the workers' compensation claim could impact your ability to subrogate in any claim against the third-party.

SUBRO TIP #1 *(cont.)*

- For defendants: Surveillance, IMEs, physician selection, etc.
- For plaintiffs: Frustrating return to work efforts, etc.
- All such information may be discoverable in third party claim.
- Much greater discovery tools in civil court, than under the Act.
- Bottom line: How you manage the workers' compensation claim, from either perspective, will impact how viable the subrogation claim may be in the future.
- An opportunity for both injured employees and employers/carriers (and their counsel) to work together.
- Mutually aligned to maximize damages paid by the third party.

Change your way of thinking…

- Need to do more than look at the workers' compensation claim and liability in a vacuum.
- Do the facts of the injury/loss create liability in a third party?
- Did the employer contribute to the injury or death?
- More on "employer negligence" later.
- Did the employee contribute to his/her injury or death?
- Contributory negligence not applicable in workers' compensation claims.
- Employer's premises? Why?

Identify the "players" in the game.

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

Lien in denied claim?

- Common question I get from time to time; seems counterintuitive.
- An employer can claim a lien in a denied case.
- Permitted by language at N.C.G.S. § 97-10.2(f)(1) – "if an award final in nature…."
- *Radzsiz v. Harley Davidson of Metrolina*, 346 N.C. 84, 484 S.E.2d 566 (1997)
- But may impact how the lien should be valued.

Defined “third party” What next?

- We’ve defined the “third party”.
- 97-10.2(a): states that 97-10.2 applies when “the injury or death [giving rise to the workers’ compensation claim] was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party."
- The question becomes – What are these “circumstances” (i.e. the particular facts of the workers’ compensation claim) which may give rise to subrogation?

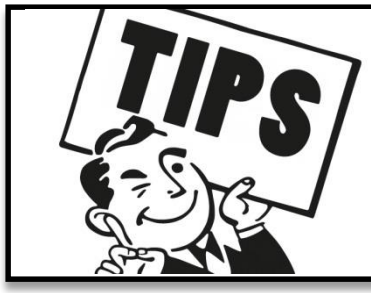
Hypothetical

The facts are as follows:

- A employee works as a driver for Safe Transport.
- The employee/driver is out on his route, stopped at a stoplight.
- “Bad driver” rear ends the Safe Transport vehicle, injuring employee/driver.
- He files a workers’ compensation claim against Safe Transport.

Setting up the "players."

- Typical workers' compensation caption:
  - *Safe Transport's Employee v. Safe Transport*
- The "third party" is not a party to the workers' compensation proceeding, but the Safe Transport Employee has more rights than just a workers' compensation claim against Safe Transport.
- He has a personal injury claim against the "Bad Driver" as well.
  - *Safe Transport's Employee v. Bad Driver*
  - The workers' compensation employer can be an interested non-party in that separate third party litigation under certain circumstances.



SUBRO TIP #2
Investigate Broadly!

- If there is potential liability on the part of the "third party," you will need to consider that possibility when evaluating workers' compensation claim.
- Not as intuitive for those who handle only workers' compensation claims.
- Why? Workers' compensation is akin to strict liability.
- Will need additional information if the case evolves into a third party claim.

SUBRO TIP #2 *(cont.)*

- Principles apply equally to both the employee and employer/carrier and their respective counsel.
- Evaluate the facts not only to assess whether there is a viable workers' compensation claim, but also to evaluate liability of the third party.
- May need statements from more than just the injured employee. Other witnesses? Bear in mind, oftentimes these persons will not be accessible through the employer. May be complete strangers to the interested parties.

SUBRO TIP #2 *(cont.)*

- Consider how to obtain or preserve substantive evidence including pictures, any defective product, machinery involved in the incident, etc.
- Obtain as much information about the identity of the third party(ies), any carrier(s), and insurance coverage(s) available.
- The earlier this information is obtained, the better.

SUBRO TIP #2 *(cont.)*

- Obtain any accident reports, but try to also locate any other relevant documentation to support liability of the third-party
- If the employer is potentially involved in the incident try to make sure they do not admit fault. ("employer negligence")
- Same for employee. ("contributory negligence")
- Consider that the third party or their carrier may contact your insured or client, as they may be conducting a parallel investigation.

What else to think about?

- For attorneys representing injured workers, consider the scope of your representation.
- For employers/carriers - If you need/have workers' compensation counsel, consider whether they can also assist you with the subrogation aspects of the case.
- For both sides: If settling a workers' compensation claim, there may be certain provisions you will want to have (or not have) in your "clincher".

What else to think about? *(cont.)*

- Most clinchers are notarized, i.e. “under oath”
- Keep in mind that things that happen in the workers’ compensation claim, before a third party claim is filed, can impact your subrogation potential.
- Workers’ compensation claims usually move towards closure more quickly than the litigation with the third party.

Clear facts giving rise to "subrogation" under 97-10.2

- Common fact scenarios where the right of subrogation may exist:
  - "Rear-end collision" or "automobile accident" – The workers' compensation claimant is driving in the course and scope of his employment and is rear-ended or otherwise injured by a negligent driver.
  - A majority of cases implicating subrogation involve automobile collisions.
- "Premises liability" – The employee is injured on premises other than the employer in the course and scope of his/her employment. Or, on the premises of the employer due to the negligence of someone other than the employer.

Less clear facts giving rise to subrogation

- "Medical negligence" – Negligent medical care during a workers' compensation claim resulting in additional disability on the part of the employee and benefits paid under the Act.
  - ► Original "accident/incident" giving rise to the claim?
- "Products liability" – The employee, although injured in the course and scope of his employment (and even on the premises of the employer), is injured as a result of a defective piece of machinery or other device.

Less clear facts giving rise to subrogation *(cont.)*

- Compensable work-related injury and subsequent "off-the-job" injury.
  - A closer question with conflicting issues.
  - The further away you get from the actual event giving rise to the workers' compensation claim, the less likely you will have subrogation potential.

SUBRO TIP #3 – Experts "To retain or not to retain"

- Think about whether you will want to retain an expert.
- Expert always needed in some cases, i.e. product liability, medical negligence.
- Almost always advisable in construction cases.
- Less critical in ordinary negligence cases, because of the legal standards.

SUBRO TIP #3 - Experts
"To retain or not to retain" *(cont.)*

- But medical testimony on causation and relationship of injury to the negligent act necessary in all cases.
- Compare: Workers' compensation is like strict liability.
- *Parson's* presumption and recent case law.
- An opportunity to share experts.

SUBRO TIP #4
"Spoliation of Evidence"

- When you investigate, determine whether any evidence should (must) be preserved.
- Send a "litigation hold" letter.
- Why? If the third party subsequently destroys/loses/fails to preserve key evidence, can argue for a presumption to work in your favor.
- A good reason to hire an expert early.

SUBRO TIP #4
"Spoliation of Evidence" *(cont.)*

- Will also bring clarity to options in the workers' compensation claim.
- If key evidence is destroyed or missing, less critical to "protect" the third party claim.

Application of N.C.G.S. § 97-19

- Consider the statutory language: "Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who … would have been liable for the payment thereof."
  - ► Another form of statutory subrogation.
  - ► For example . . .

What should you do?
What I do … Quick Checklist.

1. When an injury occurs, consider whether or not there is a possible subrogation issue. This will usually be the case when the workers' compensation claim is "accepted." But, a lien exists in a denied claim too.
2. Identify the "third party" or "third parties"- yes, there can be more than one.
3. Calendar/diary the employee's AND the employer's Statute of Limitations. (2 year wrongful death, 3 year negligence, various others….)
4. Get crash report from the DMV, and obtain other investigation materials. (Form TR-67A on the DMV website)

What should you do?
What I do … Quick Checklist *(cont.)*

5. For defendants: Check and see if the employee's attorney is going to pursue the third party claim. If not, why not? If he/she is, make sure that he/she does so within the statute of limitations. Employer can pursue if employee fails to cooperate or pursue in their name.

6. For defendants: Periodically provide employee's attorney updates about what benefits have been paid under the Workers' Compensation Act, and put the "third party (ies)" on notice of the lien as well.

What should you do?
What I do … Quick Checklist *(cont.)*

5. For defendants: If the employee's attorney pursues the third party directly, offer assistance to him/her. Why?

6. Get a copy of all the pleadings in the separate third party action. Most important are the *Complaint* and the *Answer*. Important to consider whether or not "employer negligence" is going to be an issue. (We'll discuss this below)

7. For defendants: File a Notice of Appearance in the third party claim, especially if "employer negligence" is an issue. But can solely because of the lien.

SUBRO TIP #5
Notice? – No, but yes

- Does a lien holder have to give you formal notice of their lien?
- Answer: No. No notice requirements set forth at N.C.G.S. § 97-10.2. Why? Lien vests by statute.
- Best practices: As the workers' compensation claim unfolds, employer/carrier should provide the third party and employee's attorney notice of their lien.
- Keeps the lien on everyone's "front burner."
- An excuse for everyone to take a look at where things stand periodically and avoid bumping up against the applicable "statute of limitations."

SUBRO TIP #6

- All parties must understand your "statute of limitations" (SOL) (and "statute of repose" in product liability claims).
- Many potential limitations periods can apply:
  - 1 year for many intentional torts;
  - 2 years for wrongful death;
  - 3 years for personal injury for ordinary negligence, such as non-fatal auto accidents, premises liability, medical negligence, product liability-based on negligence theory;

SUBRO TIP #6 *(cont.)*

- 4 years for breach of warranty claims;
- 12 year statute of repose for product liability cases, but may be some exceptions.
- State Tort Claims: 2 year for wrongful death, 3 years for ordinary negligence.

Watch out: A common pitfall

- Regardless of who you represent, you must ensure that an action is pursued against the "third party" to protect the SOL.
- Look to N.C.G.S. § 97-10.2(b) and (c) for deadlines.
- Driven by the SOL which would apply to the cause of action against the "third party"
  - (i.e. negligence = 3 years).

Watch out: A common pitfall *(cont.)*

- First 12 months of the applicable SOL – only the employee can pursue the "third party" by way of settlement or by filing suit. (but employer can and should still investigate)
- After the initial 12 months, and if the workers' compensation is an accepted claim, either the employee or the employer can pursue the "third party."
- BUT – 97-10.2(c) also states: "60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee…."

For example:

- A wrongful death action in North Carolina has a two year SOL. That means that if the plaintiff's estate does not wish to pursue the third party, the employer would only be able to do so:

  #1 - After the first year lapses; and

  #2 - Until 1 year and 10 months next following the death of the employee.

  •Only 10 months.

Multi-jurisdictional claims and issues

- There are some very unique legal principles that govern out-of-state accidents, where there is a non-resident third party and non-resident employee, even if the workers' compensation claim is properly venued in North Carolina.
- If you have an out-of-state accident and a North Carolina workers' compensation claim, research will be needed when calendaring the SOL.
- "Borrowing statute" – where NC borrows the SOL from the accident location.

Who will pursue the third party?

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

Who will pursue the third party? *(cont.)*

- Obviously, more efficient if the same attorney also handled the workers' compensation claim.
- Employer (usually via their carrier) will want to get a copy of the Complaint, and – more importantly – any Answer to the Complaint to see if "Employer Negligence" was alleged.
- Both employee and employer mutually aligned.

SUBRO TIP #7

Watch for "Employer Negligence"

97-10.2(e) provides: "If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then … the entire amount recovered, after such reduction [of the lien], shall belong to the employee or his personal representative free of any claim by the employer."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Watch for "Employer Negligence" *(cont.)*

- Operates similar to the doctrine of "contributory negligence" – if an employer's negligence contributed to the employee's injury or death, there is an automatic bar to any subrogation recovery.
- A word about "duly served." Rule 5?
- But look at the "Certificate of Service."
- What does "joined and concurred" really mean.
- "Notice pleading" required.
- Boilerplate in most Answers from by the third party.

If alleged, Employer has certain rights…

- Set out at N.C.G.S. § 97-10.2(e): They are
  - "to appear" in the third party claim;
  - "to be represented" in the third party claim;
  - "to cross examine adverse witnesses…"; and
  - "to argue to the jury" as fully as if a party although not named or joined therein.
  - Status: that of "interested non-party"
  - Interesting role…

Additional matters for the employer to consider.

- When you get a copy of the pleadings in the third party claim, look at the third party's *Answer* to see if they have alleged "employer negligence." If they have, then -

  1. Check if they have properly served the employer. (Note: sometimes the employer will fail to notify their insurer)
  2. Although not necessarily required, when I represent employers, I respond the *Answer* w/in 30 days by filing a reply/response. Not required by N.C.G.S. § 97-10.2(e). War story.
  3. Check what insurance coverage might be available from the third party, to assess the cost-effectiveness of subrogation.

Additional matters for the employer to consider *(cont.)*

4. Again, put the employee's attorney on notice of your lien, provide a payment history, and, if appropriate, offer to assist. Mutually aligned as it concerns this issue.
5. Consider whether you want an "expert" on the issue of "employer negligence". Again, aligned with employee's counsel.
6. Employer/carrier/counsel should be aware of and attend the mediation in the third party claim so that you can protect the lien. If the workers' compensation claim remains open, you can consider resolving the workers' compensation claim and lien simultaneously.

Think like the third party…

- N.C.G.S. § 97-10.2(e) can help mitigate their loss, by shifting payments back to the workers' compensation claim. Why?
- If jury finds "employer negligence" then the adverse verdict is offset by the amount of the workers' compensation lien. Impacts how they view coverage.
- Last question submitted to the jury.
- Can also be argued to reduce the settlement value of their claim.
- Boilerplate - "Employer Negligence" will be in almost every Answer where liability is not otherwise admitted, and even in some where it is because "joined and concurred" is the standard.

What if employee doesn't pursue the third party?

- Usually the employee is going to pursue the "third party"… Why? Financial motivation. Workers' compensation is limited remedy, personal injury actions are not similarly limited.
  - "Pain and suffering, full wage loss, etc..
- But, if employee does not want to pursue the action… 97-10.2(d) does give rights to the employer (carrier) to file the action, subject to the time limitations we discussed.
  - The suit, even if pursued by the employer, should be filed in the name of the employee. Cooperation?

What if employee doesn't pursue the third party? *(cont.)*

- Conflict of Interest. Resolution: "Joint Prosecution and Subrogation Agreement" or something similar.
- If the employee still does not cooperate, then the employer may file in their name, and move the Court to substitute the employee as party Plaintiff or Defendant, by Order.
- Another reminder - watch out for the "60 day" rule.
- Party "defendant" = practical problems.

Third Party claim settles. What happens next?

- When the employee's attorney receives proceeds by settlement or judgment, they cannot disburse the proceeds without some reconciliation of the employer's lien.
- Options:
  1. Settle the workers' compensation claim by lien waiver, or deal with the workers' compensation lien as part of any workers' compensation settlement; and
  2. Secure an Order Directing Distribution of Third Party Proceeds from the Industrial Commission; OR
  3. Go to hearing pursuant to 97-10.2(j) and secure an Order from a Superior Court Judge determining the amount of the employer's subrogation interest - a/k/a the "j Hearing."

Order of Distribution

- Most typical when the parties' resolve the lien, and, in some circumstances where the employer waives their lien as part of a clincher settlement.
- Handled by Motion/Petition to Executive Secretary Henderson, or in conjunction with an Order approving a workers' compensation settlement.
- Unless an agreement by the parties to the contrary, rigidly applies 97-10.2(f) with the Industrial Commission having no discretion to reduce the employer's subrogation interest (except by operation of the statute).

Order of Distribution *(cont.)*

- In rare circumstances, may occur where there is a settlement in the third party action, without consent of the employer, and/or dismissal of the third party action with jurisdiction reverting back to the Industrial Commission.
- Very rare for a non-consensual distribution by the Industrial Commission – Plaintiff will universally want to pursue a "j Hearing."
- A recent example.

By the book – 97-10.2(f)

- A mechanical distribution of any third party proceeds in a statutory manner.
- 97-10.2(f) provides for a distribution as follows:

  a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

  b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment . . . not [to] exceed one-third of the amount obtained or recovered of the third party.

By the book – 97-10.2(f) *(cont.)*

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

- Under this scheme, employer is reimbursed before the employee.
- Caps third party attorney fee at 1/3rd.

SUBRO TIP #8
Understand the "j Hearing"

- If the parties cannot agree on the value of the lien, the employee has the option to pursue a "j Hearing."
- The least attractive option for the employer because a Superior Court Judge has discretion to reduce or eliminate an employer's lien. But, must apply the statutory factors.
- Even more problematic, a "j Hearing" can go forward despite an open and ongoing workers' compensation claim.
- The employer's present and prospective subrogation rights can be determined absent a final lien figure.

“j”enerally speaking

- A “j Hearing” is actually a Motion for Reduction/Elimination of Workers’ Compensation Lien pursuant to 97-10.2(j).
- Short time frames are involved since it is a “Motion.” As little as 7 to 10 days’ notice. If you get served, you should react immediately.
- Despite a such a Motion, there may still be opportunities for resolution short of the “j Hearing” – always consider additional negotiations on the lien.
- Bear in mind, there has been increased unpredictability with respect to liens and how they are being handled at such hearings.

More details on the Motion

- Who: Per 97-10.2(h)(2), either the employee or the employer can file for a judicial determination of the employer's subrogation rights.
  - ► It is rare for the employer to pursue the remedy since it usually works to their disadvantage.
  - ► Now the "third-party" can also file for a determination of the lien.

More details on the Motion *(cont.)*

- Where: Per 97-10.2(j), the Motion may be heard before (1) "the resident superior court judge of the county in which the cause of action arose," (2) "before the resident superior court judge where the injured employee resides" (3) "or to a presiding judge of either district,"
  - ► Note: If the action is pending in Federal Court, the determination is made by a Judge in that particular District.
  - ► Forum shopping other issues related to venue…

More details on the Motion *(cont.)*

- What happens: The Judge hears the parties, hears any witnesses, considers other evidence tendered, and applies the factors contained of 97-10.2(j).
- What about a UM/UIM carrier?

97-10.2(j)

In relevant part, the statute reads:

"After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, ***IN HIS DISCRETION***, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien."

97-10.2(j) *(cont.)*

- For the parties, what is the most dangerous aspect of this statute?
- That part which reads: “in his discretion.”
- What does it mean?

THE JUDGE CAN DO WHATEVER THEY WISH.

Factors the Judge “shall” consider…

- accrued or prospective workers' compensation benefits
- the amount of cost of the third-party litigation to be shared between the employee and employer
- anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future
- the net recovery to plaintiff
- the likelihood of the plaintiff prevailing at trial or on appeal
- need for finality in the litigation
- any other factors the court deems just and reasonable

If you get served, what next?

- If you are going to defend a "j" Hearing, the employer/carrier can add these tasks your "to do" list.

  1. Carefully review the Motion per N.C.G.S. § 97-10.2(j). Also, look for the "Notice of Hearing" - very short deadlines and refer to counsel if you want to appear. Make sure the employer and carrier were properly served.
  2. Consider whether you want to respond to the Motion.

If you get served, what next? *(cont.)*

3. Get an updated payment history to counsel to claim the fullest lien possible. Consider evidence of "prospective" benefits.
4. Determine which Judge will hear the Motion.
5. Consider what witnesses you might need at the hearing and take steps to prepare them. Have your client present at the hearing.
6. Think about whether you to prepare a *Memorandum of Law.*
7. Hope for the best…

SUBRO TIP #9
UM/UIM

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

UM/UIM *(cont.)*

N.C.G.S. § 20-279 reads:

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

What does that mean?

- Three initial cases:
  - *Austin v. Midgett I and II*
  - *Walker v. Penn National*
- Proposition: The UM/UIM carrier can claim a credit or offset a verdict/award for any amount paid by workers' compensation and *not reimbursed the employer or carrier for their lien*.
- Problem: Which came first, the chicken or the egg? Still no answer or guidance from our appellate courts, but *Dion v. Batten* (August 2, 2016).

Hypothetical

- $30,000.00 primary policy limits, tendered
- $200,000.00 workers' compensation lien
- $1,000,000.00 UIM policy
- $500,000.00 arbitration award
- Question: How much does the Plaintiff get?
- Answer: We don't know until we know the value of the workers' compensation lien.

Run the numbers….

- Judge at a “j” Hearing reduces the workers’ compensation lien ($200,000.00) down to $50,000.00.
- Plaintiff gets $30K from primary; the UIM carrier’s available coverage is $970,000.00 because they get a credit for the primary coverage tendered.
- Therefore, $970K is available, but the award only came back at $500K.

What does the UIM carrier actually pay?

- Recall, per N.C.G.S. § 20-279 the UIM carrier can offset their liability by the workers' compensation payments *not reimbursed to the carrier.* In this case, the Plaintiff did not have to pay back the full $200K lien, only $50K. As such, the UIM carrier can take a credit for the $150K not reimbursed, which means the UIM carrier would only pay $350,000.00.
- Practical problems….

Current Hot Topics

- Observations regarding recent cases interpreting 97-10.2:
  - *Easter-Rozzelle v. City of Charlotte*
  - *Dion v. Batten*

Basic lien negotiations

- Approx. 66 2/3rds the lien is best case;
- 1/3rd of third-party recovery (practically speaking) is best case, but not necessarily;
- $0.00 is worst case. But *Sherman v. Home Depot.*
- If less than 10%-15% of lien, or third party recovery (depending on amount), take chances at “j” Hearing.

Basic lien negotiations *(cont.)*

- If 20% or greater, probably makes sense to guarantee the amount back. Bird in the hand….
- Use “lien waiver” to reduce workers’ compensation exposure, or achieve global resolution.
- But must have a pretty good idea of the “value” of the third-party claim to really evaluate the lien.
- Employer negligence could adjust the value of the lien downward.

SUBRO TIP #10
When in doubt . . . call

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§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

(a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the employee or his personal representative shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(d) The person in whom the right to bring such proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto. If the employee or his personal representative shall refuse to cooperate with the employer by being the party plaintiff, then the action shall be brought in the name of the employer and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an

express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee. In the event that the court becomes aware that there is an express contract of indemnity between the employer and the third party the court may in the interest of justice exclude the employer from the trial of the claim against the third party and may meet the issue of the actionable negligence of the employer to the jury in a separate hearing.

(f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

(g) The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:

(1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or

(2) If either party follows the provisions of subsection (j) of this section.

(i) Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.

(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in

which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324; 1963, c. 450, s. 1; 1971, c. 171, s. 1; 1979, c. 865, s. 1; 1983, c. 645, ss. 1, 2; 1991, c. 408, s. 1; c. 703, s. 2; 1999-194, s. 1; 2004-199, s. 13(b).)