

# Law Offices of Skala & Moore

A Professional Association

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## **SUBROGATION - I WANT MY MONEY BACK**

- I. Introduction
- II. Pitfalls for the unwary
  - a. Notice to Third Party and Insurance Company
  - b. Statutes of Limitations
    - i. Regular 1 Year
    - ii. Government Claims 6 months
      - 1. Notice of Claim
      - 2. Lawsuit Timelines
    - iii. Filing by either party satisfies the statute
  - c. Local Court Rules
  - d. Fast track (can we slow down please or give me my money now)
  - e. Costs due if you lose case
  - f. Defense attorney fees by contract
  - g. Disclosure of expert witnesses
  - h. Trial Preparation
    - i. Arrange witnesses
    - ii. Jury Instructions
    - iii. Motions in Limine

### III. How do I participate

- a. Lien Claim
  - i. Common fund rule (30% to 40% fee plus pro rata costs)
  - ii. Notice of lien
- b. Your own action
- c. Intervention/Consolidation
  - i. Cutting your losses (try to get a waiver of costs)
  - ii. Active participation
    - 1. Lien recovery before plaintiff's attorney fees
    - 2. Be reasonable (cost sharing)
    - 3. Deposition transcripts (should you order?)
- d. Direct action against plaintiff
- e. Assertion of WCAB credit rights

### IV. Interaction with subrogation counsel

- a. Keep each other in the loop as to case status and discovery
- b. Work toward having cases settle as close together as possible

### V. Settlement Considerations

- a. Apportionment between multiple injuries (medical evidence)
- b. Comparative Fault (see discussion above)
- c. Arbitration
  - i. Non-binding (waste of time?)

- ii. Binding high/low (a better alternative)
- d. Mediation (the best alternative)
- e. Trial at WCAB/Civil Court (no other options)
- f. Sell your lien (a way to bail out)
- g. Third Party C&R
  - i. Remember liens in compensation case (EDD, medical etc.)
  - ii. Settle vocational rehabilitation
- h. Stipulation to credit
  - i. All benefits
  - ii. Limited benefits

### **Hypothetical**

Bob is a painter for ABC painting. His employer has subcontracted with the San Juan School District to paint the school. He is working on scaffolding owned, maintained and controlled by San Juan School District. The scaffolding was not tied off and it fell over while he was painting. He fell from the scaffold and hurt his back. The accident was 2 months ago and you received the workers' compensation file in your office today. What do you initially need to do to protect your subrogation rights while you investigate the claim?

## **Considerations For Deciding How Actively You Will Participate**

1. Solvent defendant (Investigation)
2. Too solvent of a defendant? (Product cases)
3. Policy Limits/Liability Investigation
4. Jury value of case (extortion value discussion)
5. Comparative fault (Bob, Employer and San Juan School District)
6. Employer contribution threshold before recovery
7. Future & present workers' compensation exposure (recovery/credit rights)
8. Costs and expenses to stay involved in the Third Party Case
9. The golden rule: **If active participation is likely to create a positive economic benefit for your client, then you need to be actively involved. If not, then file a lien and wait for settlement opportunities and/or pursue your credit rights at the WCAB.**

## **Considerations For Settlement**

1. Time to bail?
2. Costs vs. recovery potential
3. Sending a message
4. Interplay between recovery and credit rights (always start with 3<sup>rd</sup> party C&R)
5. Mediation is a great vehicle
  - a. Parties are there to “settle”
  - b. Try to get defendant to pay for mediation
  - c. Be involved and talk with mediator
  - d. Make sure applicant attorney is aware and participating

### **Discuss Various Scenarios**

1. Over-treatment and excessive compensation payments
2. Excessive plaintiff comparative or employer negligence
3. Large jury value and small employer negligence
4. Small jury value