GO AHEAD AND *NAIG!*

THE EMPLOYER'S OPTIONS WHEN FACED WITH A POTENTIAL SETTLEMENT BY THE EMPLOYEE

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For the past several years, attorneys representing employees in work-related liability actions have used the threat of a *Naig* settlement to force employers into compromising their workers' compensation subrogation claims. This threat often occurs just prior to trial, when the employer has already expended considerable amounts of time and money pursuing subrogation from the third-party tortfeasor. Employers and their attorneys should not feel constrained by such tactics. Rather, the subrogation claim has tremendous value as an independent vehicle to recover money, particularly after a *Naig* settlement by the employee. In many cases, with proper investigation and an aggressive approach, the employer's attorney can use a *Naig* settlement to greatly increase the employer's third-party recovery. The subrogation interest can also be utilized to partially or totally eliminate the employee's workers' compensation claim, or effectuate a separate settlement with the third-party tortfeasor, even where a significant contribution claim may be brought against the employer.

THE SUBROGATION CLAIM

The recovery of workers' compensation benefits by employers is authorized by the third-party liability section of the Minnesota Workers' Compensation Act. *See* Minn. Stat. § 176.061 (1994). This section provides an employer with subrogation and indemnity rights against an at fault third-party for workers' compensation benefits paid or payable to or on behalf of the employee. Minn. Stat. § 176.061, subd. 3, 5(a), 7, 10 (1994); *see United Steelworkers v. Quadna Mountain*, 418 N.W.2d 723, 725 (Minn. 1988); *Todalen v. U.S. Chemical Co.*, 424 N.W.2d 73, 81 (Minn. Ct. App. 1988), *pet. for rev. denied Tyroll v. Private Label Chemicals, Inc.* (Minn. Jun. 29, 1988), *overruled on other grounds* 505 N.W.2d 54 (Minn. 1993); *see also Thibault v. Bostrum*, 134 N.W.2d 308, 311 (Minn. 1965) (legislative intent of Workers' Compensation Act has always been to give employer who meets obligations under act recourse through subrogation). The employer's subrogation claim is a function of common law damages for past and future wage loss, loss of earning capacity, medical expenses, retraining expenses, and similar items of damage. *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54, 60, 61 n. 8 (Minn. 1993); *see Dockendorf v. Lakie*, 86 N.W.2d 728, 731 (Minn. 1957).

Although the statute refers to the "employer's" subrogation and indemnity claim, the workers' compensation carrier also holds the claim. *M.W. Ettinger Transfer v. Schaper Mfg.*, 482 N.W.2d 796, 798 (Minn. Ct. App. 1992), *aff'd as modified* 494 N.W.2d 29 (Minn. 1992), *reh'g denied* (Minn. Mar. 4, 1993); *accord Folstad v. Eder*, 467 N.W.2d 608, 611 (Minn. 1991) (terms "workers' compensation carrier" and "employer" are merely shorthand references for the dual persona of employer-insurer which holds the subrogation and indemnity claim); *Liberty Mut. Ins. Co. v. Nutting Truck & Caster Co.*, 203 N.W.2d 542, 544 (Minn. 1973). The right to maintain the subrogation action is premised on the compensation carrier's obligation to pay workers' compensation benefits to the employee under the Part One portion of a typical workers' compensation policy. *See, e.g., United Steelworkers*, 418 N.W.2d at 725-26 (subrogation founded on a either a "payment or obligation to pay"); *Wandersee v. Brellethin Chevrolet Co.*, 102 N.W.2d 514, 517 (Minn. 1960); *City of Red Wing v. Eichinger*, 203 N.W. 622, 623 (Minn. 1925). Thus, once the employee initiates workers' compensation proceedings, the "automatic effect" is that the employer is subrogated to the rights of the employee against the third-party tortfeasor. *United Steelworkers*, 418 N.W.2d at 725; *accord Liberty Mutual*, 203 N.W.2d at 544; *see Stephenson v. Martin*, 259 N.W.2d 467, 469 (Minn. 1977) (compensation carrier's initial denial of workers' compensation liability no basis for rejecting right of subrogation); *Metropolitan Milk Co. v. Minneapolis St. Ry. Co.*, 183 N.W. 830, 831 (Minn. 1921) (employer can pursue third-party recovery before it pays amount due employee under compensation award); *see also McDonough v. Muska Elec. Co.*, 486 N.W.2d 768, 771 (Minn. 1992) (subrogation rights exist prior to commencement of employee's compensation claim); *Allstate v. Eagle-Picher Industries, Inc.*, 410 N.W.2d 324, 327 (Minn. 1987) (employer's right of indemnity accrues on date of employee's injury).

The decision of whether to pursue the subrogation claim involves an evaluation from a fault perspective. In

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situations where the investigation reveals the third-party tortfeasor is more at fault than the employee, the subrogation claim is usually asserted, provided the claim is large enough. This is because the employee's fault alone will be compared with the third-party tortfeasor's at trial. *Todalen,* 424 N.W.2d at 82 (employer's fault not aggregated with employee's in subrogation action); *accord Froysland v. Leef Bros., Inc.,* 197 N.W.2d 656, 659 (Minn. 1972); *see Cambern v. Sioux Tools, Inc.,* 323 N.W.2d 795, 798 (Minn. 1985) (employer's fault not aggregated with third-party tortfeasor's); *Hafner v. Iverson,* 343 N.W.2d 634, 638 (Minn. 1984). *But see Kempa v. E.W. Coons,* 370 N.W.2d 414, 419 (Minn. 1985) (aggregating fault of employer and employee), *appeal after remand* 391 N.W.2d 14 (Minn. Ct. App. 1986).

Once the decision has been made to pursue subrogation, the employer has many options available to recover the compensation payments from the third-party tortfeasor. It can take an aggressive approach by intervening in the employee's action, or by commencing a separate lawsuit in its own name or in the name of the employee. Minn. Stat. § 176.061, subd. 5(a), 7 (1994); *see Norman v. Refsland,* 383 N.W.2d 673, 678 (Minn. 1986) (employer may intervene as of right to protect subrogation interest); Minn. R. Civ. P. 24.01 (1995). The employer will then become a party to the action and will have a right to any third-party recovery. *See Schweich v. Ziegler, Inc.,* 463 N.W.2d 722, 735 (Minn. 1990) (employer becomes a party to the lawsuit through intervention); *Wandersee,* 102 N.W.2d at 518-21; *Dockendorf,* 86 N.W.2d at 731 (permitting employer's post trial intervention to establish right to share in third-party recovery). In certain specialized situations, the employer may elect to "associate" with the employee's counsel for discovery and/or trial purposes through a Notice of Association. A Notice of Association does not confer party status on the employer. *Bess v. Lagerquist, Inc.,* (Minn. Ct. App. Aug. 30, 1994) (unpublished) 1994 WL468097; *see Froysland,* 197 N.W.2d at 659 (employer may agree to be bound by employee's tort action and need not be a party to recover subrogation); Minn. Stat. § 176.061 5(a), 7 (1994).

When pursuing a potential subrogation recovery, the most important principle is action. Waiting for the employee's attorney to protect the subrogation interest is counterproductive. Once the subrogation claim is asserted in the employee's case, the employee's recovery will be reduced pursuant to a statutory allocation formula. *See* Minn. Stat. § 176.061, subd. 6 (1994); *Hodder v. Goodyear Tire and Rubber Co.,* 426 N.W.2d 826, 839 (Minn. 1988), *cert. denied,* 492 U.S. 926 (1989); *Kordosky v. Conway Fire & Safety, Inc,* 304 N.W.2d 616, 619-21 (Minn. 1981). The employee's attorney might therefore elect to abandon the employer and the subdivision 6 formula in order to maximize the employee's recovery. *Folstad,* 467 N.W.2d at 613 (employee's counsel's first obligation is to employee); *see Tyroll,* 505 N.W.2d at 58, 61; *Haase v. Haase,* 369 N.W.2d 311, 315 (Minn. Ct. App. 1985), see also *Kaiser v. Northern States Power,* 353 N.W.2d 899, 903 (Minn. 1984) (employee's interests adverse to employer's under statutory scheme). Consequently, the competing interests of the employer and employee will usually necessitate that separate counsel be retained to represent the subrogation interest. *See Quarberg v. Laundry Store Sales, Inc.,* 130 N.W.2d 340, 342 n.1 (Minn. 1964) (warning against same attorney representing both employer and employee). This enables the employer to become aggressively involved in formalized discovery and settlement discussions. It also positions the employer to strive for the highest possible jury verdict and thereby maximize the subrogation recovery.

The Employer's Increased Premium Claim

Section 176.061 also gives the employer an independent claim against the third-party tortfeasor for increased workers' compensation premiums, either because of retroactive assessments or because of a change affecting future rates. *See* Minn. Stat. § 176.061, subd. 5(b) (1994). This claim belongs solely to the employer and not the compensation carrier. *Id.* Because the employer's increased premium claim arises out of the same occurrence as the right of subrogation — i.e., the employee's injury — it is often brought concomitant with the subrogation claim. If this claim is not included in the subrogation action, it is possible a court may deem it to have been merged into the litigation and barred from being brought in any subsequent lawsuit. *See Hauser v. Mealey,* 263 N.W.2d 803, 806 (Minn. 1988); *Kaiser,* 353 N.W.2d at 902.

The nature of the employee's injury and the amount of compensation benefits paid generally determines whether the employer has an increased premium claim. The attorney representing the subrogation interest will usually notify the employer of its potential claim for increased premiums. There is probably no conflict of interest for the same attorney to represent the employer for both claims if the attorney enters into a separate fee arrangement with the employer to prosecute the increased premium claim. The employer and its compensation carrier should be able

to resolve any additional conflicts that may arise. The technical aspects of the increased premium claim and the absence of appellate authority on this part of the statute may necessitate the use of an outside expert to analyze the claim and ultimately testify on the increased premium and how it is calculated. Any damages recovered for increased premiums are "for the benefit of the employer" and thus are not subject to the allocation formula under subdivision 6 of section 176.061. Minn. Stat. § 176.061, subd. 5(b) (1994).

THE EMPLOYEE'S CLAIM AND *NAIG* SETTLEMENTS

Section 176.061 also gives an injured employee a statutory right to pursue a claim for damages against a third-party tortfeasor. Minn. Stat. § 176.061, subd. 5(a) (1994); *see Kaiser*, 353 N.W.2d at 903. When the employee commences suit against the third-party tortfeasor after receiving workers' compensation benefits, "he is suing not only on his own behalf but also on behalf of the subrogated employer and its workmen's compensation carrier." *Liberty Mutual*, 203 N.W.2d at 544; *accord Keenan v. Hydra Mac, Inc.*, 434 N.W.2d 463, 466 (Minn. 1989); *Kaiser*, 353 N.W.2d at 903. Due to the involvement of the subrogation interest, the employee's claim consists of two categories of common law damages: those "recoverable" and "nonrecoverable" under the Workers' Compensation Act. *See Tyroll*, 505 N.W.2d at 59; *Folstad*, 467 N.W.2d at 611; *Kempa*, 370 N.W.2d at 414; *Kaiser*, 353 N.W.2d at 903. Nonrecoverable damages include such items as pain and suffering, general disability, emotional distress, embarrassment, disfigurement, loss of consortium and mental anguish. *See Tyroll*, 505 N.W.2d at 59; *Kaiser*, 353 N.W.2d at 903. Recoverable damages are simply those damages to which a subrogation interest attaches; i.e., damages paid and payable by workers' compensation. *See Tyroll*, 505 N.W.2d at 59; *Folstad*, 467 N.W.2d at 612.

The employee is entitled to independently settle the nonrecoverable damages with the third-party tortfeasor. The vehicle commonly used to effectuate this separate agreement is a *Naig* settlement, from the Supreme Court's decision in *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977). In *Naig*, an employee sustained work-related personal injuries and commenced a tort action against the third-party tortfeasor. Prior to trial, the employee, with notice to the employer, settled his claim with the third-party, specifically excluding any amounts to which a subrogation interest attached. *Id.* at 892-93. The Supreme Court approved the settlement, holding the employee could settle with the third-party for an amount representing the employee's damages "not recoverable" under the Workers' Compensation Act. *Id.* at 894; *see Folstad*, 467 N.W.2d at 612 (Naig settlement separates employee's tort action into claims for recoverable and nonrecoverable damages).

GO AHEAD AND *NAIG*

In many cases, the best course of action for the employer is to encourage the employee to reach a *Naig* settlement and eliminate the employee's nonrecoverable damages. Settlements of this type do not affect the employer's "statutory subrogation action against the third-party tortfeasor." *Naig*, 258 N.W.2d at 894 (*quoting Nutting*, 203 N.W.2d at 545); *accord Sargent v. Johnson*, 323 N.W.2d 767, 770 (Minn. 1982); *Ruddy v. Ford Motor Co.*, 399 N.W.2d 634, 637 (Minn. Ct. App. 1987) (*Naig* "settlements do not preclude an employer from exercising its subrogation rights.").

A recent Supreme Court decision provides the employer with an opportunity to make a complete recovery on its subrogation claim after a *Naig* settlement by the employee. In *Tyroll, supra*, the Supreme Court set forth a procedure for litigating the employer's subrogation claim after a *Naig* settlement has been reached. The court held that after a *Naig* settlement, the employer must prove the nature and extent of the employee's personal injury damages at trial. *Tyroll*, 505 N.W.2d at 59 (citing *M.W. Ettinger*, 494 N.W.2d at 34); *see Easterlin v. State of Minnesota*, 330 N.W.2d 704, 708 (Minn. 1983). However, the trial court must first hold a pretrial hearing to determine the amount of workers' compensation benefits paid and payable, and must presume the compensation payments by the employer were "reasonable and proper expenditures under the Workers' Compensation Act." *Tyroll*, 505 N.W.2d at 61. Although the court left open exactly how this pretrial hearing is to be conducted, the burden falls upon the third-party tortfeasor to present evidence which rebuts the presumption of reasonableness. *Id.*; *see Wilken v. International Harvester Co.*, 363 N.W.2d 763, 767-68 (Minn. 1985) (suggesting trial court can determine compensation amounts through affidavits, depositions and exhibits submitted). As a practical matter, the parties can usually avoid the pretrial *Tyroll* hearing by stipulating to the amount and reasonableness of the compensation payments. *See Tyroll*, 505 N.W.2d at 61.

After the amount of the compensation benefits "paid and payable" is determined by the court, a common law

personal injury case is tried to the jury, which determines the common law damages by category. *Id.* If the jury verdict exceeds the amount of compensation paid and payable as determined by the trial court, the employer recovers the entire amount of the benefits. If the common law damages are less than the amount determined by the court, the employer receives the lesser amount. *Id.*

Tyroll thus gives the employer an excellent opportunity to obtain a recovery on its entire subrogation interest, particularly in a case of favorable liability. Indeed, the holding specifically allows the employer to collect, as part of its subrogation recovery, the present value of future compensation payments as determined by the trial court. *Id.* (post-*Naig* subrogation claim includes compensation payments to date and the present value of future benefit payments); *see Wilken,* 363 N.W.2d at 767-68; *cf. Hagen v. Venum,* 366 N.W.2d 280, 286 (Minn. 1985) (total proceeds of structured settlement discounted to present value for formula allocation). In other words, the employer is entitled to collect the present value of the workers' compensation payments it *might* be required to pay to the employee in the future. If the future payments never come due, the employer still retains the money awarded for future payments. Thus, in certain cases, the employee's *Naig* settlement can actually result in a windfall to the employer.

Tyroll is not completely favorable to employers, however. The decision holds that after a *Naig* settlement the employer has the burden of proving the employee's common law damages before a jury as a prerequisite to recovering on its subrogation claim. *Tyroll,* 505 N.W.2d at 61. Because of this burden of proof, employers have found it more expensive to pursue subrogation after a *Naig* settlement, particularly in the area of medical experts. *Tyroll* has also required employers to obtain greater cooperation from employees to testify at trial concerning their common law damages. The holding might even apply in wrongful death cases, forcing employers to subpoena the employee's heirs and next of kin to testify about the employee's damages when they may be reluctant to become involved in the subrogation action.

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Another important benefit employers receive from a *Naig* settlement is the elimination the employee's right to any share of the subrogation recovery. In a pre-*Naig* settlement scenario, the statutory formula set forth in section 176.061 provides a mechanism for dividing the proceeds of a third-party recovery between the employer and the employee. *See* Minn. Stat. § 176.061, subd. 6 (1994). Specifically, the formula provides the "costs of collection" must first be deducted from the party's total recovery. *Id.* Employees' attorneys generally seek to have the court equate "costs of collection" with their own fees and expenses, thereby obtaining a share from the employer for their collection of the employee's recovery. *But see Dockendorf,* 86 N.W.2d at 737 (The determination of what constitutes reasonable collection costs rests with the trial court and not with the employee's attorney.) Once the costs of collection are deducted, the formula allows the employee to then deduct one-third of the employer's net subrogation recovery. Minn. Stat. 176.061, subd. 6(b) (1994); *Sargent,* 323 N.W.2d at 769.

Where there has been a *Naig* settlement, however, the employer is able to pursue the entire amount of its compensation benefits paid and payable without being constrained by the subdivision 6 formula. *Tyroll,* 505 N.W.2d at 58, 61; *see Ruddy,* 399 N.W.2d at 637; *Haase,* 369 N.W.2d at 315 (*Naig* settlement supersedes scheme for allocation of the third-party recovery established in subdivision 6); *Naig,* 258 N.W.2d at 894. Accordingly, the employee's attorney, having obtained a *Naig* settlement for the employee, cannot force the employer to pay a share of the employee's attorneys fees from its subrogation recovery. *Folstad,* 467 N.W.2d at 612; *see Haase,* 369 N.W.2d at 315. In addition, "the employee waives her right to the 'one-third' outright share she would otherwise receive under the formula." *Naig,* 258 N.W.2d at 894; *see Folstad,* 467 N.W.2d at 612.

A *Naig* settlement also eliminates any potential contribution claim by the third-party tortfeasor against the employer. *Tyroll,* 505 N.W.2d at 61 ("[T]he employer, even if at fault, is not liable to contribute to the sum the tortfeasor paid the employee to settle the 'nonrecoverable' damages under the *Naig* release.") (citing *Kempa,* 370 N.W.2d at 419). In certain circumstances, this fact alone may be a compelling reason to encourage the employee to enter into a *Naig* settlement with the third-party tortfeasor. Further, after a *Naig* settlement, the employer controls the prosecution of the tort action, including the attorneys fees and expenses its pays to obtain the subrogation recovery. In many cases, the benefit the employer will realize after a *Naig* settlement can literally be measured in thousands of dollars.

Of course, there will be cases when a *Naig* settlement is contraindicated. For instance, in many slip and fall cases, the personality of the employee is vital to a favorable liability finding. In cases involving substantial investigation expenses and expert fees, it may be advantageous to have the employee's attorney in the action to either split or advance the costs of pursuing the litigation. An association agreement may be useful in these circumstances; if the employee *Naigs*, the employer can decide whether to enter the case as a party or pursue its subrogation claim at a later date. When an employer associates, however, it is agreeing to rely on the employee's attorney to conduct pretrial investigation, select experts and present the subrogation case at trial. The employer should therefore include a provision in the association agreement which allows its own attorney to participate at trial to the extent necessary to ensure the subrogation claim is adequately presented to the jury. *Cf. Norman*, 383 N.W.2d at 678 n. 3.

THE REVERSE-*NAIG* OPTION

Regardless of what course of action the employee decides upon, the employer should aggressively pursue settlement of its subrogation claim with the third-party tortfeasor at an early stage in the litigation. In many instances, the most effective means the employer has to recover its subrogation interest is a reverse-*Naig* settlement. This type of settlement agreement has become more prevalent after the Supreme Court's decision in *Folstad, supra.*

In a reverse-*Naig* settlement, the employer settles its separate subrogation claim for compensation benefits paid and payable with the third-party tortfeasor. *See Folstad*, 467 N.W.2d at 612; *Kohn v. La Manufacture Franchise*, 476 N.W.2d 184, 189 (Minn. Ct. App. 1991) (reverse-*Naig* settlement eliminates assertion of subrogation claim because it is no longer part of the suit), *Keenan*, 434 N.W.2d at 467. Like most settlements, a reverse-*Naig* halts the expenditure of money to pursue the third-party recovery and eliminates the uncertainty of obtaining a favorable verdict from a jury. In particular, a reverse-*Naig* agreement is useful in cases where the third-party has limited liability limits; cases of weak liability; where there is a high potential third-party contribution claim against the employer; and where the money offered is fair and reasonable.

If the employer settles on a reverse-*Naig* basis prior to the jury being impaneled, the statutory formula under subdivision 6 of section 176.061 will not apply to the settlement. *Folstad*, 467 N.W.2d at 613 ("We conclude the best situation is to hold that the subdivision 6 formula does not apply if the compensation carrier settles any time prior to the commencement of trial."); *Kubiszewski v. St. John*, 518 N.W.2d 4, 7 (Minn. 1994); *see Kohn*, 476 N.W.2d at 189. When the employer obtains a pretrial reverse-*Naig* with the third-party, the employee's attorney is saved the burden of prosecuting the subrogation claim and is not entitled to a fee on the employer's settlement. *Folstad*, 467 N.W.2d at 612. The employer thus avoids being forced to pay twice for its own recovery. *Anderson v. Twin City Lines*, 182 N.W.2d 193, 195 (Minn. 1970) (employer not required to pay proportionate share of its recovery to employee where benefit to employer was obtained through the efforts of its own counsel); *see Folstad*, 467 N.W.2d at 612. *But cf. Keenan*, 434 N.W.2d at 467 (employer benefitted from employee's tort action by utilizing subrogation interest asserted by employee to settle contribution claim).

The third-party tortfeasor will also have strong incentives to settle separately with the employer. By entering into a pretrial reverse-*Naig* settlement, the third-party eliminates the employer's attorney from the action and simplifies pretrial discovery. This type of agreement also makes more money available for settlement because the statutory formula is eliminated from the case. Moreover, the third-party can obtain an assignment of the subrogation claim as part of a pretrial reverse-*Naig* and use the assignment as a collateral source offset to that portion of the employee's recovery which includes subrogated damages. *Krutsch v. Walter H. Collin GmbH*, 495 N.W.2d 208, 215 (Minn. Ct. App. 1993), *see Folstad*, 467 N.W.2d at 613 (offset applies if employee retains subrogated damages where employer has asserted no claim to such damages); *Buck v. Schneider*, 413 N.W.2d 569, 572 (Minn. Ct. App. 1987). *But cf. Kohn*, 476 N.W.2d at 189-90 (no offset where subrogation claim assigned to employee because subrogation interest was still being asserted). By aggressively pursuing settlement with the third-party tortfeasor early on in the action, the employer can make effective use of a reverse-*Naig* agreement to maximize its subrogation recovery.

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There will be occasions when the employer will not want to enter into a reverse-*Naig* settlement. When a reverse-*Naig* agreement is reached, the employer waives all rights to the employee's recovery, including the right to

claim a portion of the employee's recovery as a credit against future compensation payable. *See Folstad,* 467 N.W.2d at 612. Thus, where the employer is faced with a large future compensation exposure, a reverse-*Naig* settlement is usually not warranted, particularly in a case where the third-party is financially responsible and liability is favorable.

Yet even in this situation, the employer may still be able to use a reverse *Naig* settlement *in combination* with a close out of the employee's future workers' compensation claim. Employees are often interested in a small close out of their future workers' compensation claim in return for more money in the liability case. In order to accomplish this result, however, the third-party must be willing to settle the employee's liability claim, and the employer must also be willing to compromise its subrogation interest. If this can be arranged, the employer will be in a position to settle with the third-party on a reverse-*Naig* basis while the employee settles on a *Naig* basis. The settlement documents should reflect the simultaneous close out of the employee's future compensation. A separate stipulation specifically concerning the close out is usually submitted to the Workers' Compensation Division (or trial court) for an Award on Stipulation. The stipulation should include a recital of the separate consideration for the close out of the employee's future interest; e.g., the employer compromised its subrogation claim in a certain amount in exchange for the stipulation.

THE *LAMBERTSON* CHALLENGE

In certain cases involving work-related injuries (industrial injury situations, for example) the third-party tortfeasor may decide to sue the employer for contribution, claiming the employee's injury was caused in whole or part by the fault of the employer. This claim is often called a *Lambertson* claim, from the germinal case in this area, *Lambertson v. Cincinnati Corp.,* 257 N.W.2d 679 (Minn. 1977). Under *Lambertson,* damages are assessed against an at fault employer "in an amount proportional to its percentage of negligence, but not to exceed its total workers' compensation liability to [the employee]." *Id.* at 689; *accord Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp. of America,* 366 N.W.2d 111, 116-17 (Minn. 1985) (employer's *Lambertson* liability not only includes compensation benefits paid but also those payable into the future); *see Hudson v. Snyder Body, Inc,* 326 N.W.2d 149, 157 (Minn. 1982) (employer obligated to pay *Lambertson* contribution even where employee's fault is greater than employer's); *Wilken,* 363 N.W.2d at 767.

The employer's *Lambertson* liability is separate and distinct from the right of subrogation. While the employer-compensation carrier's subrogation rights stem from the duty to pay compensation benefits under the Part One portion of the workers' compensation policy, the employer's duty to pay contribution — the *Lambertson* liability — normally falls under the Part Two employer's liability portion of the policy. The typical limit for the Part Two employer's liability coverage is $100,000. In a case involving severe injuries and high employer liability, a substantial jury verdict and high *Lambertson* claim above the Part Two limit is possible.

The mere fact that a *Lambertson* claim may be asserted against the employer should not deter the prosecution of the subrogation claim. Indeed, pursuing the subrogation claim in a potential *Lambertson* situation can be an effective means of resolving the entire lawsuit. By doing so, the employer-compensation carrier can prosecute its subrogation claim against the third-party to *recover* the amount of compensation benefits "paid and payable." *See Tyroll,* 505 N.W.2d at 61. In federal court, if the employer does not assert the subrogation claim the right to recover subrogation may be forfeited because of the compulsory counterclaim rule. *See* Fed. R. Civ. P. 13(a) (1994). Nevertheless, the employer may still be required to *pay* its *Lambertson* liability in an amount not to exceed the compensation benefits "paid and payable." *See Wilken,* 363 N.W.2d at 767.

By intervening early in the employee's case and pursuing the subrogation claim, the employer can position itself to settle the subrogation interest with the third-party tortfeasor before trial on a reverse-*Naig* basis, assign the subrogation rights to the third-party, and receive a release for any potential *Lambertson* claim. Although the employer gives up its right to recover subrogation, it avoids the risk of any *Lambertson* liability and, perhaps, because of a potential conflict of interest, the expense of two attorneys representing its interests. Alternatively, in the right situation, the employer may be able to "waive and walk": waive its subrogation claim in exchange for a dismissal of the *Lambertson* claim against it by the third-party. *See Keenan,* 434 N.W.2d at 467; *Krutsch,* 495 N.W.2d at 214-15; *see also Lambertson,* 257 N.W.2d at 689 (preserving the employer's interest in not paying more than its

compensation liability); *Bingham v. J.C. Penney Co.*, 268 N.W.2d 892, 899 (Minn. 1978). *But see Kordosky*, 304 N.W.2d at 621 (result produced by statutory formula inconsistent with the equitable goals set forth in *Lambertson*).

The employer can also work with the parties to settle the related claims affecting the litigation. For instance, it can encourage the employee to settle with the third-party tortfeasor on a *Naig* basis and thereby avoid the third-party *Lambertson* claim. *Tyroll*, 505 N.W.2d at 61. In the right situation, the employer may even be able to effectuate the simultaneous settlement of the subrogation and *Lambertson* claims together with a close out of the employee's workers' compensation claim. This arrangement is usually referred to as a "global" settlement.

Even in cases where the *Lambertson* liability may be substantial there might well be a duty to commence the subrogation action. For instance, the compensation carrier's duty to act in good faith to protect the employer from an excess *Lambertson* judgment may require the carrier to assert the subrogation claim as a means of resolving the litigation. Further, if the potential future compensation exposure is large enough, the Workers' Compensation Reinsurance Association (WCRA) may end up making compensation payments under its reinsurance agreement with the compensation carrier. *See* Minn. Stat. 79.34 *et. seq.* (1994). Since the WCRA would have a monetary interest in the third-party recovery in such a situation, it would be statutorily entitled to subrogation and must first be fully reimbursed from the recovery. *Id.* at § 79.36(f), (g). The WCRA would accordingly want to prosecute the subrogation claim and maximize the recovery.

Finally, the employer may have a significant independent claim against the third-party tortfeasor for increased workers' compensation premiums. In certain circumstances, the employer may want to maximize its recovery against the third-party because of its increased premium claim. In other cases, because of its potential *Lambertson* exposure, the employer may want to show an absence of fault on the third-party in order to minimize the *Lambertson* claim. Attorneys handling the competing monetary interests of the employer and, at times, the compensation carrier, should be prepared to recognize such problem areas. These competing interests can create conflicts which may necessitate separate counsel to represent the competing interests.

Conclusion

The employer has many different options available to pursue its workers' compensation subrogation recovery from the third-party tortfeasor. A *Naig* settlement allows the employer to recover the entire amount of its subrogation interest without having to share any part of the proceeds with the employee or the employee's attorney. The employer can also utilize the subrogation claim to encourage the third-party tortfeasor to settle on a reverse-*Naig* basis and thereby maximize its recovery independent of the employee's actions. In certain cases, the employer can incorporate a close out of the employee's workers' compensation claim in combination with a reverse-*Naig* settlement. Finally, even when faced with a potential *Lambertson* claim, the employer can assert the subrogation interest as leverage to settle the litigation. An aggressive attitude and thorough understanding of the complexities of third-party recovery will aid the employer's attorney in maximizing the subrogation recovery. ▲