



Arkansas Association of Defense Counsel

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Settlement before Subrogation?

Clearing up the Confusion Regarding Med Pay/PIP Subrogation Rights

Before a certain 2013 Arkansas Supreme Court decision was handed down, there had been long-standing debate regarding whether or not medical payment (Med Pay) and personal injury protection (PIP) carriers were entitled to subrogation rights without first obtaining a settlement or judgment. You can see where this confusion might present issues—in some cases, the insured chooses not file suit against the third-party tortfeasor, even though the insured receives no-fault medical payments from his/her insurer. Under one side of this debate, in these circumstances, the insurer would not be able to seek subrogation benefits from the third-party tortfeasor, essentially resulting in no remedy for the insurance company.

The confusion surrounding this issue centered on two separate statutory provisions: the right to reimbursement and the right to subrogation. A.C.A. §23-89-207 governs an insurer's right of reimbursement, which in relevant part states, "Whenever a recipient of benefits...recovers in tort for injury, *either by settlement or judgment*, the insurer paying the benefits has a right of reimbursement and credit out of the tort recovery or settlement." This seems simple enough. There is obviously a requirement of either a settlement or judgment before an insurer can seek reimbursement. However,

A.C.A. §23-79-146—subrogation recovery—gives Med Pay and PIP carriers the right to receive subrogation benefits from liable third parties. In the subrogation recovery statute, there is no such requirement of a settlement or judgment.

The point of contention surrounding this debate did not arise from ambiguity in the statutes, but rather, differing interpretations surrounding the doctrines of reimbursement and subrogation. In *Daves v. Hartford Accident and Indemnity Co.*, the Arkansas Supreme Court stated that "the right of reimbursement is in the nature of subrogation." 788 S.W.2d 733, 736 (Ark. 1990). This blending of the two doctrines was even further cemented in *Ryder v. State Farm Mutual Auto Ins. Co.*, where the Arkansas Supreme Court held that "the right to reimbursement under §23-89-207 is a right to subrogation vested in the insurer that is established by statute." 268 S.W.3d 298, 302 (Ark. 2007). The holding in *Ryder* paved the way for the argument that the right to subrogation arises under §23-89-207—the reimbursement statute, and not §23-79-146—the subrogation recovery statute, and, subsequently, the notion that the remedy of subrogation is not available in the absence of a settlement or judgment.

Fortunately for the Med Pay and PIP carriers, in 2013, the Supreme Court of Arkansas cleared up the confusion with its holding in *Progressive Halcyon Ins. v. Saldivar*, No. 12-458, 2013 WL 655234

(Ark. 2013).¹ In the case at bar, Progressive sought subrogation rights under §23-79-146 in order to recover on the no-fault medical payments it had made to its insured after the insured was injured in a motorcycle accident. *Id.* The trial court granted summary judgment in favor of the defendant and dismissed Progressive’s case with prejudice based on the notion that subrogation was not available in the absence of a settlement or judgment in accordance with §23-89-207. *Id.* On appeal, the Arkansas Supreme Court reversed the trial court decision, expressly holding that, “While subrogation and reimbursement are similar in their effect, they are different doctrines.” *Id.* (quoting *Provident Life & Accident Ins. Co. v. Williams*, 858 F.Supp. 907 (W.D. Ark. 1994)). The Court noted that with subrogation, the insurer stands in the shoes of the insured, but with reimbursement, the insurer has a direct right of repayment. *Id.* Subsequently, given the distinction between the two recovery doctrines, the Court noted that the reimbursement statute does not provide an exclusive means of recovery, and that the failure to satisfy the criteria under §23-89-207 does not preclude a Med Pay or PIP carrier from seeking subrogation under §23-79-146. *Id.* The Court noted that the subrogation recovery statute has no settlement or judgment requirement, and therefore, Progressive had properly sought

subrogation benefits in accordance with §23-79-146. *Id.*

The thanks of the AADC go out to an unidentified law clerk at the Barber Law Firm for writing this article.

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¹ “Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding. Opinions of the Supreme Court and Court of Appeals issued before July 1, 2009, and not designated for publication shall not be cited, quoted,

or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as *res judicata*, collateral estoppel, or law of the case).” Sup. Ct. Rules, Rule 5-2(c).