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Problems in Third-Party Action Procedure Under the Wisconsin Worker's Compensation Act - An Update

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PROBLEMS IN THIRD-PARTY ACTION PROCEDURE UNDER THE WISCONSIN WORKER'S COMPENSATION ACT— AN UPDATE

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I. INTRODUCTION

Problems in Third Party Action Procedure Under the Wisconsin Worker's Compensation Act was published in 1976.[1] Since then, the article has been cited by Wisconsin appellate courts a number of times.[2] Over the years, additional questions have developed.

This article updates the 1976 article.[3] Areas addressed include the tort focus of section 102.29(1) of the Wisconsin Statutes,[4] joinder issues, and the nature and effect of notice as a condition precedent to third-party recovery. Additionally, the questions of who controls the third-party claim, what portion of any settlement is subject to section 102.29(1) distribution, and whether there are any limits on that distribution are analyzed. This article identifies and either resolves or offers reasonable solutions for some of the ongoing problem areas associated with third-party procedure under the Wisconsin Worker's Compensation Act.

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1. Donald H. Piper, *Problems in Third Party Action Procedure Under the Wisconsin Worker's Compensation Act*, 60 MARQ. L. REV. 91 (1976).

2. Rixmann v. Somerset Pub. Sch., 83 Wis. 2d 571, 577, 266 N.W.2d 326, 329 (1978); Lupovici v. Hunzinger Construction Co., 79 Wis. 2d 491, 496 n.5, 255 N.W.2d 590, 592 n.5 (1977); Laffin v. Chem. Supply Co., 77 Wis. 2d 353, 359 n.5, 253 N.W.2d 51, 53 n.5 (1977); Elliott v. Employers Mut. Cas. Co., 176 Wis. 2d 410, 415-16, 500 N.W.2d 397, 400 (Ct. App. 1993); Employers Mut. Liab. Ins. Co. v. Liberty Mut. Ins., 131 Wis. 2d 540, 543 n.1, 388 N.W.2d 658, 659 n.1 (Ct. App. 1986); Guyette v. West Bend Mut. Ins. Co., 102 Wis. 2d 496, 503, 307 N.W.2d 311, 314 (Ct. App. 1981).

3. The authors are grateful to Margaret E. Ebner, associate attorney at Fellows, Piper & Schmidt, Milwaukee, Wisconsin, for her research assistance in preparing this article.

4. WIS. STAT. § 102.29(1) (1991-92).

II. THE TORT FOCUS OF SECTION 102.29(1)

Section 102.29(1) of the Wisconsin Statutes permits employees, employers, and compensation insurers to pursue lawsuits against third parties.[5] However, by the plain language of that section, that permission is limited to an action in tort. That section states in pertinent part:

> The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employe shall not affect the right of the employe, the employe's personal representative, or other person entitled to bring action, to make claim or maintain an action *in tort* against any other party for such injury or death, hereinafter referred to as a *3rd party*. . . .[6]

Recent court decisions have affirmed the understanding that the authority granted by section 102.29(1) is limited to actions "in tort." In particular, in *Berna-Mork v. Jones*,[7] the Wisconsin Supreme Court held that a worker's compensation insurer was not entitled to subrogation against an uninsured motorist insurer because the insured's right to recovery was based on contract, not tort. In so holding, the court noted:

> The language of sec. 102.29(1), Stats., is clear and unambiguous. The statute provides that, "[t]he employer or compensation insurer . . . shall have the same right to make a claim or maintain an action *in tort* against any other party. . . ." (Emphasis added.) The statutory language clearly and unambiguously sets forth that the subrogation rights of the employer or compensation insurer are limited to claims in tort. Claims based on contract are not permitted.[8]

Additionally, in a recent court of appeals decision, *Smith v. Long*,[9] the court stated:

> Section 102.29, Stats., reflects the legislature's intent to give a worker's compensation carrier a right to reimbursement in specific, limited types of third-party actions, namely actions in tort for the injury or death of the employee. The Smiths' legal malpractice action does not fall into this category.[10]

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5. WIS. STAT. § 102.29 (1991-92) is entitled: "Third Party Liability."
6. *Id.* § 102.29(1) (emphasis added).
7. 174 Wis. 2d 645, 498 N.W.2d 221 (1993).
8. *Id.* at 651, 498 N.W.2d at 223 (alteration in original).
9. 178 Wis. 2d 797, 505 N.W.2d 429 (Ct. App. 1993).
10. *Id.* at 806, 505 N.W.2d at 433.

III. WISCONSIN STATUTES SECTION 803.03: DOES IT APPLY?

Section 803.03 of the Wisconsin Statutes addresses "Joinder of persons needed for just and complete adjudication."[11] Does this section require joinder of a worker's compensation insurer or of an employer in an employee's third-party personal injury action? The following subsections address this question.

A. Section 803.03(1) Focus

Section 803.03(1) states as follows:

> PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process shall be joined as a party in the action if:
> (a) In the person's absence complete relief cannot be accorded among those already parties; or
> (b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:
> 1. As a practical matter impair or impede the person's ability to protect that interest; or
> 2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.[12]

Section 102.29(1) also deals with joinder. This section states, in pertinent part:

> If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and *irrespective of whether or not all parties join in prosecuting such claim*, the proceeds of such claim shall be divided as follows . . . .[13]

Accordingly, a worker's compensation insurer or an employer is able to share in the recovery of a third-party personal injury suit without being joined as a party. As such, the joinder requirements of section 803.03(1) do not, at first blush, appear to come into play.

Nonetheless, an argument could be made that failure to join may, in certain situations, impair or impede the ability of the worker's compensation insurer or the employer to protect its recovery interest. For example, in a settlement involving both an employee-claimant and the employee's spouse, who asserts a loss of society and companionship

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11. WIS. STAT. § 803.03 (1991-92).
12. *Id.* § 803.03(1).
13. *Id.* § 102.29(1) (emphasis added).

claim, possible distribution problems may arise by reason of the fact that the spouse's claim is not subject to section 102.29 distribution.[14] In this example, the employee, assuming a marital relationship that seeks to foster combined family assets, will attempt to maximize the spouse's share of any total recovery in an effort to minimize the amount the insurer or employer would receive from the total settlement. If earlier joined as a party, a worker's compensation insurer or an employer would be better able to, as a practical matter, protect its ability to argue what part of an overall settlement should be fairly assigned to the employee's claim (which is subject to distribution) as opposed to the spouse's claim (which is not).

By reason of the foregoing, joinder under section 803.03(1) may be appropriate and required whenever the third-party action involves both employee and nonemployee claimants or plaintiffs. Since no Wisconsin appellate court has specifically ruled on this issue, however, the question of whether section 803.03(1) requires joinder in these cases remains open for debate. Judicial or legislative guidance is needed.

B. Section 803.03(2) Focus

> Section 803.03(2)(a) of the Wisconsin Statutes states as follows:
> CLAIMS ARISING BY SUBROGATION, DERIVATION AND ASSIGNMENT. (a) *Joinder of related claims.* A party asserting a claim for affirmative relief *shall join* as parties to the action *all persons who* at the commencement of the action *have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim.* For purposes of this section, a person's right to recover for loss of consortium shall be deemed a derivative right. Any public assistance recipient or any estate of such a recipient asserting a claim against a 3rd party for which the public assistance provider has a right of subrogation or assignment under s.49.65(2) or (3) shall join the provider as a party to the claim. Any party asserting a claim based upon subrogation to part of the claim of another, derivation from the rights or claim of another, or assignment of part of the rights or claim of another shall join as

14. See DeMeulenaere v. Transport Ins. Co., 116 Wis. 2d 322, 342 N.W.2d 56 (Ct. App. 1983), wherein the court stated:

> Because a spouse's claim for loss of consortium is a separate cause of action which does not belong to the other spouse, we hold that a claim for loss of consortium is not included in the term, "claim," as used in sec. 102.29(1), Stats.; and, therefore, is not subject to the sec. 102.29(1) distribution formula.

Id. at 328, 342 N.W.2d at 59; *see also* discussion *infra* part VI.

> a party to the action the person to whose rights the party is subrogated, from whose claim the party derives his or her rights or claim, or by whose assignment the party acquired his or her rights or claim.[15]

Is the section 102.29 recovery right of a worker's compensation insurer or an employer one that is created by subrogation, derivation, or assignment such that it would fall within the scope of section 803.03(2)(a), and thereby require the joinder of the compensation insurer or employer in any third-party tort action brought by the employee? Recent court decisions appear to have addressed this question with finality.

In *Employers Mutual Liability Insurance Co. v. Liberty Mutual Insurance*,[16] the court of appeals held that participation in a third-party action is not a prerequisite to sharing in the proceeds of any recovery.[17] In making that determination, the court supported its view in a footnote that addressed the issue of whether a section 102.29 claim is considered to be akin to a claim based on subrogation, derivation, or assignment within the meaning of section 803.03(2):

> Appellants also argue that Employers Mutual may not state causes of action on behalf of the employees without written assignments or other evidence that it acquired their causes of action. Again, sec. 102.29(1), Stats., imposes no such requirement. The statutory notice "is the only condition precedent to participation in the distribution" of the proceeds of the action.[18]
>
> They also advance the argument that the joinder provisions of sec. 803.03, Stats., provide the sole means by which Employers Mutual can "name the employee[s] . . . as involuntary plaintiffs or defendants." The argument is not clearly stated, but we note that the title to sec. 803.03(2) indicates that it deals with "CLAIMS ARISING BY SUBROGATION, DERIVATION OR ASSIGNMENT" and allows only limited joinder of parties.
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> While the insurer's action under sec. 102.29(1), Stats., is derivative in the literal sense of the term, it is not derivative within the meaning of sec. 803.03(2) in that it is not based on common-law or contractual theories of subrogation. The injured employees are "entitled to share in the recovery . . . regardless of joinder."[19]

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15. WIS. STAT. § 803.03(2)(a) (1991-92) (emphasis added).

16. 131 Wis. 2d 540, 388 N.W.2d 658 (Ct. App. 1986).

17. *Id.* at 543-44, 388 N.W.2d at 659-60.

18. This quote originated in Piper, *supra* note 1, at 98, and was also used in Guyette v. West Bend Mut. Ins. Co., 102 Wis. 2d 496, 503, 307 N.W.2d 311, 315 (Ct. App. 1981).

19. *Employers Mut. Liab. Ins. Co.*, 131 Wis. 2d at 543 n.1, 388 N.W.2d at 659 n.1 (quoting Employers Mut. Liab. Ins. Co. v. Icke, 225 Wis. 304, 309, 274 N.W. 283, 285 (1937)).

Accordingly, a section 102.29 action is not an action created by subrogation, derivation, or assignment, so as to require joinder under section 803.03(2). Later authority reinforces this conclusion.

In *Campion v. Montgomery Elevator Company*,[20] the court of appeals held that rights granted by section 102.29(1) are distinct from subrogation, such that joinder, by reason of claims arising out of subrogation, derivation, or assignment, is not required.[21] In particular, the *Campion* court based its decision on the fact that section 102.29(1) does not mention the word "subrogation."[22] Moreover, the court noted that the Wisconsin Supreme Court has recognized that the Worker's Compensation Act is wholly statutory and is, in this regard, a legislatively created substitute for common law.[23] As such, the recovery rights of the compensation insurer and employer under section 102.29 are given to them by statute, not by operation of any common law doctrines such as subrogation, derivation, or assignment.[24] In addition, the *Campion* court noted that section 803.03(2)(b) provides options for the parties after joinder.[25] These options are different from those provided in section 102.29(1).[26] This distinction further supported the court's decision that Section 803.03(2) does not apply to a worker's compensation recovery action.

IV. THE NOTICE REQUIREMENT OF SECTION 102.29(1)

"Notice" is required in order to invoke the distribution formula of section 102.29(1). In this regard, section 102.29(1) provides in pertinent part:

> The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death. . . . However, each shall give to the other reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel. If a party entitled to notice cannot be found, the department shall become the agent of such party for the giv-

20. 172 Wis. 2d 405, 493 N.W.2d 244 (Ct. App. 1992).

21. *Id.* at 412-13, 493 N.W.2d at 247.

22. *Id.* at 414, 493 N.W.2d at 248.

23. *Id. See also* Leonard v. Dusek, 184 Wis. 2d 267, 274, 516 N.W.2d 453, 455 (Ct. App. 1994).

24. *Campion*, 172 Wis. 2d at 414, 493 N.W.2d at 248. The court in *Campion* went so far as to describe the rights under section 102.29(1) as an "independent cause of action." *Id.*

25. *Id.* at 413, 493 N.W.2d at 248.

26. *Id.*

> ing of a notice as required in this subsection and the notice, when given to the department, shall include an affidavit setting forth the facts, including the steps taken to locate such party. Each shall have an equal voice in the prosecution of said claim, and any disputes arising shall be passed upon by the court before whom the case is pending, and if no action is pending, then by a court of record or by the department. *If notice is given as provided* in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and *irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided as follows* . . . . A settlement of any 3rd party claim shall be void unless said settlement and the distribution of the proceeds thereof is approved by the court before whom the action is pending and if no action is pending, then by a court of record or by the department.[27]

Unfortunately, neither section 102.29(1) nor subsequent interpretive case authority provides much guidance as to what kind of notice is sufficient, when notice must be given, and what the effect is of a failure to give notice.

Early cases dealing with the notice requirements were not very specific as to what was considered adequate notice. Nonetheless, arguably those cases provide some guidance. In this regard, *Wolff v. Sisters of St. Francis of the Holy Cross*[28] suggests that the notice must be in writing.

In *Wolff*, Liberty Mutual was both the worker's compensation insurer and auto liability insurer of the employer. At issue was section 102.29(4),[29] and whether the notice required under that section was given. Although the court considered a section other than section 102.29(1), its comments are arguably applicable. Just as the court rejected an alleged telephone call as substantial compliance with the notice requirement of section 102.29(4), so too, arguably, would it reject a similar verbal notice under section 102.29(1).[30]

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27. WIS. STAT. § 102.29(1) (1991-92) (emphasis added).

28. 41 Wis. 2d 594, 164 N.W.2d 501 (1969).

29. WIS. STAT. § 102.29(4) (1991-92) states as follows:

> If the employer and the 3rd party are insured by the same insurer, or by the insurers who are under common control, the employer's insurer shall promptly notify the parties in interest and the department. If the employer has assumed the liability of the 3rd party, it shall give similar notice, in default of which any settlement with an injured employe or beneficiary is void. This subsection does not prevent the employer or compensation insurer from sharing in the proceeds of any 3rd party claim or action, as set forth in sub.(1).

30. *See Wolff*, 41 Wis. 2d at 599, 164 N.W.2d at 504.

Holmgren v. Strebig[31] also offers some guidance with regard to what notice is sufficient under section 102.29(1). In this case, the court adopted, via dicta, the idea that "substantial compliance" with section 102.29(1) would satisfy that section's "reasonable notice" requirement.[32]

The court of appeals, in *Guyette v. West Bend Mutual Insurance Company*[33] amplified, to some extent, what type of written notice is appropriate. In *Guyette*, the court noted that because West Bend Mutual Insurance Company served "formal notice of its claim for reimbursement under sec. 102.29, Stats.," participation in the suit was not necessary.[34] Unfortunately, the *Guyette* court did not recite the wording of the involved "formal notice."

More recently in *Elliott v. Employers Mutual Casualty Company*,[35] the court of appeals considered the question of notice, holding that reciprocal notice was not required under section 102.29(1).[36] In addition, the court stated that if the employee names the worker's compensation insurer in the third-party action against the tort-feasor, the worker's compensation insurer is not required to do anything prior to receiving statutory distribution. For example, that named insurer need not notify the injured party of whether it plans to participate in the action.[37] In response to the injured party's motion to exclude that insurer from recovery because of its nonparticipation in the suit, the court further ruled that the worker's compensation insurer did not need to answer the complaint. This decision was based on the legal conclusion that participation is not a required prerequisite to recovery.[38] Moreover, the *Elliott* court held that the burden lies with the party initiating the claim or action to provide the statutory notice.[39] In so ruling, the court further stated that the worker's compensation insurer holds an unconditional right to the statutory distribution, as long as the notice prerequisite is fulfilled.[40]

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31. 54 Wis. 2d 590, 196 N.W.2d 655 (1972).

32. *Id.* at 599, 196 N.W.2d at 660.

33. 102 Wis. 2d 496, 307 N.W.2d 311 (Ct. App. 1981).

34. *Id.* at 504, 307 N.W.2d at 315; *see also* Gerth v. American Star Ins. Co., 166 Wis. 2d 1000, 1012, 480 N.W.2d 836, 842 (Ct. App. 1992) (citing *Guyette* with approval).

35. 176 Wis. 2d 410, 500 N.W.2d 397 (Ct. App. 1993).

36. *Id.* at 416, 500 N.W.2d at 400.

37. *Id.* at 415, 500 N.W.2d at 400.

38. *Id.* at 415, 500 N.W.2d at 399-400.

39. *Id.* at 416, 500 N.W.2d at 400.

40. *Id.* at 415-16, 500 N.W.2d at 400. In so stating, the court cited the 1976 article that is the subject of this update. The court stated that its view is shared by a commentator in the area: "In the [commentator's] opinion, the lack of timely notice relates entirely to the question of selection of counsel and control of the litigation—not the right to receive distribution under

The cases discussed above offer no clear guidelines on what is considered sufficient notice. Nonetheless, written notice signed by an authorized representative that sets forth the current amount to be reimbursed should be sufficient. That written notice can be stated in a letter or a pleading. These authors suggest the following notice language be used whenever a matter is in suit:

> ABC Insurance Company (or employer) appears by its undersigned counsel and hereby gives notice to the court and all counsel that it has become obligated to pay and has paid medical and/or disability benefits to or on behalf of (employee's name), in accordance with the provisions of Chapter 102 of the Wisconsin Statutes, and may continue to do so in the future. In particular, the following amounts have been paid to date: medical expenses—$_____ and disability benefits—$_____. By virtue of such payments and the provisions of section 102.29(1) of the Wisconsin Statutes, ABC Insurance Company (or employer) hereby gives notice of its right to be reimbursed, pursuant to that statute, out of any payment of proceeds to the (employee's name) as a result of the summons and complaint in the above-captioned matter, whether such payments arise from judgment, settlement, or otherwise. ABC Insurance Company (or employer) further requests that the court adjudicate and protect its rights under section 102.29(1) of the Wisconsin Statutes, to the extent necessary and applicable.

This language would be sufficient to advise the court and all litigants of the worker's compensation insurer's right or the employer's right to share in any recovery proceeds, pursuant to the provisions of section 102.29(1). As noted, there is no specifically prescribed requirement as to the content or the form such notice must embody. Rather, what is important is that some form of written notice—whether by pleading or letter—be served upon all parties and the court so that the statutory rights of the worker's compensation insurer or employer are enforced and protected.[41]

With respect to the question of when notice must be given, the court of appeals in *Employers Mutual Insurance Company v. Liberty Mutual*

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section 102.29(1)." *Id.* at 416, 500 N.W.2d at 400 (quoting Piper, *supra* note 1, at 104 (footnote omitted)).

41. See WIS. STAT. § 102.29(1) (1991-92), which states: A settlement of any 3rd party claim shall be void unless said settlement and the distribution of the proceeds thereof is approved by the court before whom the action is pending and if no action is pending, then by a court of record or by the department.

Insurance Company[42] provides some guidance. The court indicated that once the claim had been initiated by one party, notice "prior to trial" is all that is required to allow for the statutory distribution under section 102.29(1).[43] Moreover, the court held that such notice did not have to be provided prior to the running of any statute of limitations.[44]

Finally, while section 102.29(1) requires notice, there is little guidance as to the effect of a failure to give such notice.[45] By the express terms of section 102.29(1), when the requisite notice is timely given, the *entire* cause of action against the third party is considered and resolved. The unstated inference of that statement is that if such notice is not given, the entire cause of action will not be resolved. This suggests that the party who was not given notice has a continuing claim and can seek to void the settlement pursuant to the last sentence of section 102.29(1).[46]

Because the third party is interested in resolving the *entire* cause of action in one proceeding, that third party should always make sure that adequate notice has been given. Also, because the joint prosecution procedure and distribution formula specified in section 102.29(1) will usually be most advantageous to the worker's compensation insurer or employer, those parties should be sure to give the requisite notice as soon as they are able.

As noted above, the notice requirement of section 102.29(1) raises many questions. Judicial or legislative clarification would be helpful.

V. WHO CONTROLS THE THIRD-PARTY CLAIM?

A party seeking reimbursement under section 102.29(1) is entitled by statute to "an equal voice in the prosecution of said claim."[47] Who, in

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42. 131 Wis. 2d 540, 388 N.W.2d 658 (Ct. App. 1986).

43. *Id.* at 544, 388 N.W.2d at 660.

44. *Id.* at 543, 388 N.W.2d at 659.

45. The *Elliott* court, in dicta, provided the following statement: "Where such notice is not given, the distribution cannot occur until such deficiency is corrected." Elliott v. Mut. Cas. Co., 176 Wis. 2d 410, 416, 500 N.W.2d 397, 400 (Ct. App. 1993). Unfortunately, the *Elliott* court did not elaborate further.

46. The word "void" in the statute has been interpreted to mean voidable. Lumberman's Mut. Cas. Co. v. Royal Indem. Co., 10 Wis. 2d 380, 103 N.W.2d 69 (1960).

47. See WIS. STAT. § 102.29(1) (1991-92), which states:

> The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death. . . . Each shall have an equal voice in the prosecution of said claim . . . .

light of this declaration, controls the third-party claim? In particular, who controls the terms and amount of any settlement?

In *Simanek v. Miehle-Goss-Dexter*,[48] the court of appeals said:

> The statute thus mandates the division of proceeds without regard to participation in the suit. An insurer that exercises its statutory right to waive prosecution of the claim cannot be penalized for doing so by being forced to accept any settlement arranged between the employee and the third party. The insurer has an interest in the outcome of the settlement and must be allowed to participate, at least to the extent of ensuring that the settlement agreement complies with the statute.[49]

Unfortunately, *Simanek* does not specify whether this rule (allowing the worker's compensation insurer or employer to participate in the outcome of the settlement) extends to a right to reject both the form and *amount* of the settlement, or simply the form.

In *Elliott v. Employers Mutual Casualty Co.*,[50] the court of appeals appears to have provided at least a partial answer to this question. The court said that if the worker's compensation insurer does not actively participate in the settlement negotiations with the tort-feasor, it waives its right to complain about the "terms or amount of the settlement."[51] Moreover, the *Elliott* court said:

> The statutory notice procedures assure that an interested party who is not making the claim or instituting the action nonetheless is given an opportunity to actively join in the claim or the action and thereby have a voice (most notably through counsel) in all strategic decisions, *including settlement.* However, where the interested party receiving notice chooses not to directly participate in the claim or the action, such declination does not operate to defeat such party's right to the statutory share of the distribution.[52]

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48. 113 Wis. 2d 1, 334 N.W.2d 910 (Ct. App. 1983).

49. *Id.* at 5, 334 N.W.2d at 912.

50. 176 Wis. 2d 410, 500 N.W.2d 397 (Ct. App. 1993).

51. See *Elliott*, where the court of appeals noted that the worker's compensation carrier, having received notice of the pending third-party action:

> could have actively participated in the ensuing settlement negotiations with the tortfeasor. It did not. Therefore [the worker's compensation insurer] could not (and did not) complain about the terms or amount of the settlement. However, [the worker's compensation insurer's] silence did not defeat its right to share in the settlement pursuant to the statutory distribution formula.

Id. at 416, 500 N.W.2d at 400.

52. *Id.* at 415, 500 N.W.2d at 400 (emphasis added).

In short, lack of participation in the settlement negotiations, while negating the ability to complain about the amount of the settlement, does not defeat the right of the worker's compensation insurer or the employer to share in whatever settlement proceeds result from such negotiations. As *Elliott* and *Simanek* emphasize, that right remains absolute.

Two questions arise at this point: what is meant by "equal voice" and what degree of "participation" is required to complain about the amount of the settlement? Unfortunately, there is no law offering a meaningful discussion with regard to the equal voice aspect. Moreover, the law addressing the necessary level of participation is unclear, especially when considered in the context of the scenario discussed below.

For example, assume a worker's compensation insurer or employer appears by counsel, files a responsive pleading, and actively participates in all pretrial discovery and motions. Notwithstanding this participation, the employee and tort-feasor negotiate and agree upon a settlement figure without consulting the worker's compensation insurer or employer. The holding in *Elliott* suggests that such participation on the part of the insurer or employer may give rise to a right to challenge the terms or amount of the settlement[53] negotiated exclusively by the employee and tort-feasor. Unfortunately, a clear answer or guideline specifying what level of participation is necessary to do so has yet to be provided.

In this regard, it should be emphasized that in *Elliott*, the amount of the settlement was not in issue. Therefore, the discussion in that case as to the ability to challenge the amount of the settlement was dicta. However, there may be cases in which a question will arise as to whether the worker's compensation insurer or employer can challenge the settlement *amount* as inappropriate. One could argue, based upon the *Elliott* dicta and the "equal voice" language of section 102.29(1), that such a challenge should be resolved by a court of record.[54] Further judicial or legislative guidance is needed in this area.

VI. WHAT PORTION OF THE OVERALL SETTLEMENT IS SUBJECT TO SECTION 102.29(1) DISTRIBUTION?

The language of section 102.29(1) sets out what appears to be a simple formula for dividing the recovery proceeds among the employee, em-

53. *Id.*

54. WIS. STAT. § 102.29(1) (1991-92) provides, in part: "[A]ny disputes arising shall be passed upon by the court before whom the case is pending, and if no action is pending, then by a court of record or by the department."

ployee's counsel, and the worker's compensation insurer or employer.[55] Although many distributions are problem-free, some are problematic. Various factors may enter into the settlement picture, raising questions as to what portion of the total recovery must comply with the statutory "formula." Fortunately, the courts have provided guidance in cases involving several such complicating factors.

A. Structured Settlement Cases

One problem area is that of structured settlement cases in which all or part of the settlement is paid in the form of annuities rather than a simple "lump sum" payment by the tort-feasor. *Simanek* involved such a settlement plan, devised without the consent of the worker's compensation insurer, to distribute payments to the plaintiff over a twenty-year period.[56] Under the plan, the worker's compensation insurer would be required to wait until the eleventh year before receiving any reimbursement.[57] The court rejected this plan on the grounds that it would unfairly penalize the worker's compensation insurer by denying the insurer the "use of its money for over 11 years."[58] Accordingly, unless the worker's compensation insurer or employer agree otherwise, the insurer or employer and employee must receive payments *contemporaneously*.[59] That is, for such a plan to comply with the statutory requirements, it must call for *each* payment to be distributed under the statutory formula.[60]

B. Derivative Claim Cases

Another complicating circumstance is the presence of a spouse's claim for loss of consortium. In *Kottka v. PPG Industries, Inc.*,[61] the

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55. See *id.*, which provides, in part:

> After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employe or the employe's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter. . . . Any balance remaining shall be paid to the employe or the employe's personal representative or other person entitled to bring action.

56. Simanek v. Miehle-Goss-Dexter, 113 Wis. 2d 1, 1, 334 N.W.2d 910, 910 (Ct. App. 1983).

57. *Id.*

58. *Id.* at 7, 334 N.W.2d at 912.

59. *Id.* at 6-7, 334 N.W.2d at 912.

60. *See* Skirowski v. Employers Mut. Cas. Co., 158 Wis. 2d 242, 462 N.W.2d 245 (Ct. App. 1990).

61. 130 Wis. 2d 499, 388 N.W.2d 160 (1986).

Wisconsin Supreme Court addressed this question and held that a spouse's claim for loss of consortium is not subject to allocation under section 102.29(1).[62] The court's guideline for making this determination appears clear and certain: the allocation formula applies "to all claims in tort for an employe's injury or death for which the employer or its insurer has or may have liability."[63] The spouse's claim, although derivative of the injured employee's third-party tort claim, is a separate claim for which the worker's compensation insurer had no prior liability under the provisions of Chapter 102.[64] Therefore, it is not subject to distribution.[65]

C. *Questionable Compensability Cases*

A question arises as to whether the worker's compensation insurer or employer is entitled to reimbursement under section 102.29(1) out of the entirety of a third-party recovery in a case where that insurer or employer paid only a portion of a questionable compensation claim and denied the remainder. The Wisconsin Supreme Court addressed this question in *Nelson v. Rothering*.[66] The court held that even if a worker's compensation insurer denied coverage for a portion of the plaintiff's injuries on the grounds that such injuries were not work related, it can still recover in a subsequent third-party action for such injuries, provided the compensable injuries for which benefits were paid are part of the plaintiff's claim for recovery against the third-party tort-feasor.[67]

To understand this rule, the facts in *Nelson* must be examined. In *Nelson*, the plaintiff suffered a whiplash injury in a work-related automobile accident.[68] She allegedly developed gastrointestinal problems as a result of medication prescribed for her injuries.[69] The worker's compen-

62. *Id.* at 521, 388 N.W.2d at 170.
63. *Id.* at 514-15, 388 N.W.2d at 167.
64. *Id.* at 521-22, 388 N.W.2d at 170.
65. *See also* DeMeulenaere v. Transp. Ins. Co., 116 Wis. 2d 322, 342 N.W.2d 56 (Ct. App. 1983). As to the question of what portions are allocable out of wrongful death payments to a surviving spouse or children, see Stolper v. Owens-Corning Fiberglas Corp., 178 Wis. 2d 747, 505 N.W.2d 157 (Ct. App. 1993) (applying the *Kottka* rules in holding such claims subject to distribution, with the exception of amounts apportioned for loss of consortium), *rev. denied*, 179 Wis. 2d clxxvii, 510 N.W.2d 138 (1993). *But see* Cummings v. Klawitter, 179 Wis. 2d 408, 506 N.W.2d 170 (Ct. App. 1993), *rev. denied*, 513 N.W.2d 405 (1993). There appears to be a conflict of authority between the court of appeals in two different districts. Interestingly, the Wisconsin Supreme Court has denied petitions to review in *both* cases.
66. 174 Wis. 2d 296, 496 N.W.2d 87 (1993).
67. *Id.* at 305, 496 N.W.2d at 91-92.
68. *Id.* at 299, 496 N.W.2d at 89.
69. *Id.*

sation insurer paid benefits for the whiplash injury, but denied payment for the gastrointestinal problems on the grounds they were not work related.[70] In a subsequent third-party action, plaintiff argued the recovery should be apportioned between the two different "injuries," with only the portion for the whiplash injury being subject to section 102.29(1) distribution.[71] The court rejected this argument and held that the statute required application of the statutory formula to the *entire* recovery.[72]

VII. Are There Any Limits to Section 102.29(1) Recovery?

A different set of rules applies to section 102.29(1) cases than to common law subrogation cases. Unlike in the latter situation, section 102.29(1) recovery does not require that the plaintiff be "made whole" before the right of the worker's compensation insurer or the right of the employer to reimbursement arises.[73] The court of appeals has rejected the argument that a worker's compensation insurer should not recover reimbursement out of a tort settlement far below the actual value of a third-party claim.[74] In addition, the court of appeals has rejected the applicability of common law subrogation principles[75] since these principles "do not address the Worker's Compensation Act and the disbursement of funds under sec. 102.29(1), Stats."[76]

Moreover, the Wisconsin Supreme Court has rejected the argument that equitable principles apply to such cases. In *Nelson*, the court emphasized that common law rules of equitable subrogation do not apply to third-party tort actions arising from worker's compensation claims.[77] Rather, recovery in these actions is governed not by "a determination of

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70. *Id.* at 299-300, 496 N.W.2d at 89.

71. *Id.* at 300, 496 N.W.2d at 89.

72. *See also* Smith v. Long, 178 Wis. 2d 797, 505 N.W.2d 429 (Ct. App. 1993) (holding proceeds from a settlement of a legal malpractice claim—for failing to prosecute a third-party action—not allocable, pursuant to the *Kottka* rule, and contrasting the differing rights involved in a claim for medical malpractice arising from treatment of compensable injuries).

73. *Cf.* Rimes v. State Farm Mut. Auto. Ins. Co., 106 Wis. 2d 263, 316 N.W.2d 348 (1982); Garrity v. Rural Mut. Ins. Co., 77 Wis. 2d 537, 253 N.W.2d 512 (1977). *But see* Brewer v. Auto-Owners Ins. Co., 142 Wis. 2d 864, 418 N.W.2d 841 (Ct. App. 1987). Where insurance proceeds are insufficient to satisfy both the reimbursement claim and the surviving spouse's claim for wrongful death, settlement must be pro-rated between allocable and non-allocable amounts, as set forth in a formula devised by the court of appeals. *Id.* at 869, 418 N.W.2d at 843.

74. *Nelson*, 174 Wis. 2d at 306, 496 N.W.2d at 92.

75. *See* Rimes v. State Farm Mut. Auto. Ins. Co., 106 Wis. 2d 263, 316 N.W.2d 348 (1982); Garrity v. Rural Mut. Ins. Co., 77 Wis. 2d 537, 253 N.W.2d 512 (1977).

76. Martinez v. Ashland Oil, Inc., 132 Wis. 2d 11, 14, 390 N.W.2d 72, 73 (Ct. App. 1986) (citing Vogt v. Schroeder, 129 Wis. 2d 3, 13, 383 N.W.2d 876, 880 (1986)).

77. *Nelson*, 174 Wis. 2d at 306, 496 N.W.2d at 92.

the equities involved but rather a mathematical application of the legislative formula for apportioning the settlement proceeds."[78] Since the legislature has mandated a method for apportioning recovery under such claims, "the courts of this state are not free to select a method they might consider to be the most equitable for allocating the proceeds of a particular third-party settlement."[79]

It is interesting to note that the majority in *Nelson* agreed that their result was, perhaps, not entirely equitable. Nonetheless, since the legislature has established a "worker's compensation scheme," setting forth a specific method for dividing such recoveries, it is not up to the courts to fashion a different, albeit more fair, result.[80]

VIII. CONCLUSION

Problems associated with third-party action and procedure continue to be identified. Although some questions have been addressed by the appellate courts, other questions, most importantly who controls the third-party claim, remain open for debate and ultimate resolution via legislative or judicial means.

78. *Id.*

79. *Id.*

80. *See* Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 180, 290 N.W.2d 276, 279-80 (1980) ("It must be remembered that worker's compensation laws constitute an all-pervasive legislative scheme which attempts to effect a compromise between the employer and the employee's competing interests.").