

**OPINION
67-333**

April 20, 1967 (OPINION)

Honorable Walter Christensen

State Treasurer

RE: Unsatisfied Judgment Fund - Subrogation - Workmens

Compensation

This is in reply to your letter of April 14, 1967, regarding the Unsatisfied Judgment Fund. You state the following facts and question:

"In an opinion filed by the Supreme Court on March 30, 1967, the Supreme Court held that an insurance carrier which had paid claims for bodily injury under an uninsured motorist clause, and taken an assignment from its insured, could not recover the amount of its subrogated interest from the Unsatisfied Judgment Fund. The question is now raised whether or not the Workmen's Compensation Bureau, which likewise has a subrogation claim against a third party who is uninsured, may recover any amount on its subrogation claim from the Unsatisfied Judgment Fund.

"In your opinion, is the Workmen's Compensation Bureau precluded from recovery under the principles set forth in the above mentioned Supreme Court opinion?"

The opinion referred to was issued in Tschider, et al., v. Clarence Burtt. In that case the court stated:

"The purpose of the Unsatisfied Judgment Fund is to protect, within limits, persons who are injured by unknown or financially irresponsible motorists. The purpose of an insured carrying uninsured motorist coverage is the same. Neither the fund nor the insurer providing uninsured motorists' coverage is primarily liable. Neither is obligated to pay unless the wrongdoer is uninsured or financially irresponsible.

"Fundamentally, the right of subrogation exists only against the principal debtor, and does not exist against a person who is merely secondarily liable. 83 C.J.S., Subrogation, sec. 7.

"The insureds' right to recover from the fund no longer exists in this case because they assigned their rights to the insurer. The insurer paid the full amount of their respective claims for damages sustained because of bodily injuries suffered as a result of an automobile accident in which the uninsured financially irresponsible wrongdoer was the driver, and recovered judgment against the wrongdoer for the full amount it paid out. The insured have received full compensation for the injuries suffered. There is nothing in the terms of the Unsatisfied Judgment Act that indicates an intention to relieve an insurer of its responsibility for its own contractual

obligation or to reimburse an insurer for payments made under its insurance contract. The purpose of the fund was not to set up a free reinsurance plan for insurers of those who have suffered bodily injury by financially irresponsible motorists.
* * *"

The court also held the claim against the fund was not valid because the insurer was not proven to be a North Dakota resident which is a requirement for payment out of the fund.

Workmen's Compensation is insurance coverage. See, e.g., 65-01-05.

Section 65-01-09 of the North Dakota Century Code, as amended, provides in part:

"When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, the injured employee, or his dependents may claim compensation under this title and proceed at law to recover damages against such other person. The fund shall be subrogated to the rights of the injured employee or his dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount paid or to be paid in compensation and benefits for the injured employee and the action against such other person may be brought by the injured employee, or his dependents in the event of his death, in his or in his dependents' own right and name and as trustee for the workmen's compensation bureau for the subrogation interest of the bureau. If the injured employee or his dependents do not institute suit within sixty days after date of injury the bureau may bring the action in its own name and as trustee for the injured employee or his dependents and retain its subrogation interest. * * *"

While the use of the phrase "creating in some person other than the fund a legal liability to pay damages" might appear to indicate that the Workmen's Compensation Bureau is subrogated against any person who has a legal liability, whether primary or secondary, to pay damages in respect of an injury or death, we believe this issue must be determined in accordance with the laws governing the Unsatisfied Judgment Fund and not the laws governing the bureau.

In this respect we can see no reason for distinguishing between a private insurer under an uninsured motorist clause and the Workmen's Compensation Bureau. The decision of the Supreme Court herein referred to makes it entirely clear that the right of subrogation exists only against the principal debtor and does not exist against a person who is merely secondarily liable. The court furthermore holds that the Unsatisfied Judgment Fund is not a reinsurance plan. As stated above, we believe this matter must be determined by the laws governing the Unsatisfied Judgment Fund. We find nothing in the Unsatisfied Judgment Fund Act which would give the Workmen's Compensation Bureau a preferred status in this matter. Furthermore there is nothing specific in the Workmen's Compensation Act which would indicate an intention that they have a preferred status insofar as the Unsatisfied Judgment Fund is concerned.

It would require such specific provision permitting the bureau to recover from the fund in order to alter our conclusion since, in the case herein referred to, the court determined the fund was not primarily liable and subrogation is available only against the principal debtor and not against the person who is secondarily liable. While in this instance we are dealing with two state agencies, nevertheless the principle is the same. The Unsatisfied Judgment Fund is not primarily liable and, since the bureau assumes their right only through subrogation, they would not be liable to the bureau.

In summary, it is our opinion that the Workmen's Compensation Bureau is precluded from recovery under the principles set forth in the decision in *Tschider, et al., v. Burtts*. It is our further opinion that the Workmen's Compensation Bureau cannot recover any amount on its subrogation claim from the Unsatisfied Judgment Fund.

Our conclusion herein does not prevent an employee who has not recovered from the Workmen's Compensation Bureau from pursuing his legal remedies against the Unsatisfied Judgment Fund.

HELGI JOHANNESON

Attorney General