# MOHR & ANDERSON, S.C.

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A Quarterly Publication Fall 1998


## Gary Wickert Offers National Subrogation Program From the Midwest

By Gary L. Wickert

This past spring, as many of you know, I partnered with one of my local counsel in Wisconsin, Mohr & Anderson, S.C., in order to provide economical and effective subrogation representation across the country. M&A is a premier insurance litigation firm located in Hartford, Wisconsin, a few miles northwest of Milwaukee, with another office in Madison, Wisconsin. Many of my subrogation clients expressed a need for a more geographical subrogation presence throughout the United States, and the home offices of many of my clients are located in the Midwest. Although I continue to represent all of my regular clients across the country and litigate matters in all parts of North and Central America under my national subrogation program, this new alliance with M&A brings a fresh arsenal of weapons at my disposal for successfully effecting full subrogation recoveries across the United States.


*(See Gary Wickert Offers National Subrogation - Page 2)*


INSIDE:



## BRIEF CASENOTES-

### NEW CASE LAW

**One Injury - Three Different ERISA Subrogation Results:**

Ninaus v. State Farm Mutual Auto Mobile Insurance Company, 97.0191(Ct. App. Wis. July 14, 1998).

A Wal-Mart employee was involved in a single auto accident resulting in injuries and only limited third party insurance. Her employer's self-funded Health & Welfare ERISA Plan paid the following benefits:

1994 - $56,568
1995 - $16,402
1996 - $28,180


*(See Brief Casenotes - Page 4)*

*(Gary Wickert Offers National Subrogation - Cont.)*

Jim Mohr, a Harvard Law School graduate, is a past president and director of the Civil Trial Counsel of Wisconsin and has received numerous citations and is a member of the Defense Research Institute. Arnie Anderson was a professor of law at Marquette University and is the author of the ultimate treatise on insurance law in Wisconsin, *Wisconsin Insurance Law*. My partners, Jim, Arnie, and Brad Matthiesen have all served as insurance claims handlers and\or insurance in-house counsel, and coupled with my subrogation expertise, join forces to offer a new and innovative subrogation program for insurance clients nationwide. Serving as a clearinghouse for subrogation matters nationally, M&A and our network of subrogation counsel throughout the United States now have the unique ability to review and handle subrogation matters on a national basis. This includes reviewing subrogation files, free of charge, in order to determine third party liability, the likelihood of subrogation recoveries, and the cost-effective aspects of handling a particular claim. In addition, however, we now offer an extremely cost conscious form of subrogation and insurance litigation wherein we provide the additional benefits of lower hourly rates or contingency fees, coupled with an agreement not to charge clients for routine telephone charges, long-distance costs, facsimile charges, copying costs, postage, and the like.

I continue to look forward to serving your subrogation and insurance litigation needs from this legal vantage point in the Midwest, but I also invite you to entrust us with subrogation and other insurance litigation anywhere in the United States. Please direct all file assignments or inquires to myself or Jim Mohr.

Gary L. Wickert

# Subrogation Balancing Act in "Made Whole" Cases

As I am sure we can all agree, one bad Appellate Court decision leads to countless headaches and problems for insurance claims handlers and adjusters attempting to effectively deal with the "made whole" principle in a particular situation. We have recently been bombarded by plaintiff's attorneys and third party claims handlers proudly announcing that the questionable Texas decision of Esparza vs. Scott & White Health Plan, 909 S.W. 2d 548 (Tex. App. - Austin 1995, *writ denied*) is the ultimate death knell for subrogation rights whenever it is alleged that the plaintiff\claimant has not been "made whole," under Texas law and in other states. The Esparza decision is being cited by plaintiff's lawyers around the country for the premise that the "made whole" doctrine applies not just to situations involving equitable subrogation, but to contractual subrogation as well, where the insurance policies contain binding and well thought out subrogation language protecting the carrier's right to recoup its payments. Recently, a South Carolina lawyer representing a boy who was struck by a car while vacationing in the Cayman Islands called to inform us that the health plan which paid for a significant amount of the boy's medicals would not be able to recoup those benefits from a multimillion dollar settlement, despite language which clearly provided for an assignment by the insured to the plan of any subrogation rights. Such specious arguments on the part of lawyers representing injured plaintiffs can be quite convincing, and should be looked at very carefully before you give up on your subrogation rights.

*(See Subrogation: The New Balancing Act - Page 3)*

As you may recall, the ***made whole doctrine***, which is applied in one form or another in most states, is generally applied as a rule of equity. This means that where an insurer makes benefit payments under an indemnity policy of insurance such as a health insurance policy, automobile policy, or casualty policy, its subrogation rights are granted out of fundamental "fairness" or equity, because such rights are not granted by statute or specific policy language. However, in most states, when the contract of insurance prescribes subrogation rights such as an assignment of rights or generic subrogation language, the courts have considered the parties to have contracted regarding the issue of subrogation by the carrier, and have relieved the parties from the duties of equity. In other words, when the policy language calls for subrogation, the insured generally does not have to be "made whole" before the carrier can exercise its subrogation rights. The decision in Esparza, on its face, appears to indicate that such contractual subrogation language merely confirms, but does not expand, equitable subrogation rights of insurers, and equities must still be balanced in deciding what amount, if any, the subrogee is entitled to receive in a given case. In the case involving the injuries in the Cayman Islands, our client's policy contains strong language granting an assignment of any rights from the insured to the insurer in order to protect the carrier's subrogation rights. The court in Esparza was dealing with a policy which merely had the following language:

> *"....health plan is entitled to deem the first amounts received by a member as recoupment of its costs, expenses, the value of services rendered to which health plan is entitled to subrogate up to the value of health plans claims."*

The Austin Court of Appeals in Texas, therefore, appears to make a distinction between subrogation language which merely granted subrogation rights, and subrogation language which granted an assignment of a cause of action from the insured to the insurer. Citing its own opinion in Lexington Insurance Company vs. Gray, 775 S.W. 679 (Tex. App. - 1989), the court specifically refused to follow the Garrity decision out of Wisconsin which is known throughout the country as the mother of all "made whole" cases.

The distinction which has been made in light of the questionable decision in Esparza, therefore, is that when your policy language contains an assignment of a cause of action, the case is removed from equity and the contract terms govern subrogation rights. However, when mere subrogation language is present, Esparza seems to say that equitable principles still apply, and the made whole doctrine can be used.

When dealing with a made whole argument in a subrogation matter, immediate attention should be given to the nature of the policy, the terms of the subrogation language, if any, contained in the policy, and the facts surrounding the settlement of recovery by the claimant. When dealing with a non-ERISA qualifying health plan, attention should be given not only to the plan language, but also to the Summary Plan Description. The Fifth Circuit Court of Appeals has held that contractual subrogation language exempts a subrogee from dealing with the made whole issue and the relative equities of the parties involved. Nonetheless, the decision by the Austin Court of Appeals in Esparza will present hurdles and headaches for us when attempting to recover our subrogation interests in situations where the insured has not or claims to have not recovered fully for his damages. In truth, it is probably quite rare to have an insured admit that he has been "made whole," as such an admission

*(Subrogation: The New Balancing Act - Cont.)*

appears to be against human nature, at least in the context of insurance and personal injury claims. Nonetheless, when faced with a made whole argument and the Esparza decision, rely on the assignment\subrogation distinction raised by the Texas Court of Appeals. If you have any questions regarding the made whole doctrine or need assistance in subverting its often misplaced tentacles, please do not hesitate to contact Gary Wickert.

## Subrogation Bible Now Available

For fifteen years, Gary Wickert has researched, gathered, and collected subrogation case law for Texas and states around the country. A newly updated, 1999 version of this 200-page anthology of the most important subrogation decisions of this century has been updated and is now available to clients of Mohr & Anderson. It contains more than 700 cases outlined as to subject areas and meticulously indexed to assist insurance claims handlers and subrogation personnel to refute spurious claims made by plaintiff's attorneys and defense counsel alike with the intent and purpose of causing you to reduce or waive your subrogation interests in worker's compensation, property casualty, automobile, inland marine, ERISA, group health and life, and other insurance settings.

Mohr & Anderson will make available, free of charge, a copy of the *Subrogation Case Manual* to its clients. If you would like a copy, please contact Gary Wickert or his secretary, Jamie Breen. We would like to limit clients to one copy per office\company, due to the size of the publication. Please call and we would be happy to forward a copy to you as well as answer any questions you may have in learning how to most effectively use the manual.

*(Brief Casenotes - Cont.)*

The ERISA plan changed each year and the Court rendered a different ruling on each of the Wal-Mart plans for the years 1994, 1995, and 1996. It was established that the injured worker, Julie Radish, was not made whole as a result of the third party insurance, and her attorney was arguing that the ERISA plan should not be entitled to recover anything because of the equitable "made whole" doctrine.

For the payments made during the year 1994, the Trial Court determined that Radish had not been *made whole* by the settlement. It also held that because the terms of the Summary Plan Description (SPD) for the 1994 plan said that "the plan has a right to recover benefits previously paid by the plan to the extent that medical benefits may be payable in any of the following - judgment, settlement, or any payment made or to be made by a [third party]". The plan language specifically provided for recovery of "any payment - regardless of whether the payments designated as payment for the medical benefits or any other specified damages". The SPD and the plan were in conflict and the terms of the SPD governed. Because the settlement proceeds were not specifically designated for "medical expenses", but rather, were in a lump sum without allocation as to elements of damage, the SPD did not provide Wal-Mart with subrogation rights as to the medical benefits paid during 1994, noting specifically that there was no *priority clause* dictating the parties' rights to proceeds of any settlement. Although the ERISA policy preempted Wisconsin State law, the made whole doctrine, which provides that an insurer cannot assert a subrogation right until the insured is fully compensated for his or her injuries, did not supplant or dictate the terms of the plan. The made whole doctrine was held to apply as to the 1994 payments because the plan failed to designate priority rules or provide its fiduciaries the discretion necessary to construe the plan accordingly.

*(See Brief Casenotes - Page 5)*

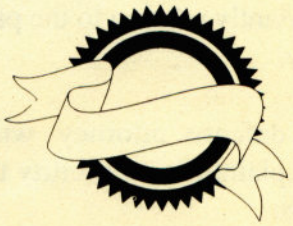
As to the payments made during 1995, Wal-Mart was granted subrogation rights, but was ordered to pay 1/3 of this amount to Radish's attorneys for their work in obtaining the settlement. The Court noted that the American Rule is that a person bears the expense of his or her own case, but where a plan participant settlement benefits the plan and the plan is not engaged in attorney and actively pursued its subrogation claim, and the plan would not have recovered any benefits had it not been for the participant and his or her lawyer, a 1\3 reduction of the plan is fair as an attorney's fee to compensate the participant's lawyer. The Court also noted that under Wisconsin Statute §803.03(2)(b), a party has several choices when joined with subrogation rights to a lawsuit. If the party chooses to have its interests represented by the party who caused the joinder, attorneys' fees are appropriate.

As to the payments made during 1996, the Court held Wal-Mart was entitled to full subrogation without having to pay attorneys' fees. Because the plan language in 1996 prohibited attorneys' fees and granted a right of subrogation without the limiting language contained in the 1994 plan, the Court allowed a full recovery without responsibility for paying attorneys' fees.

This case is an excellent example of how plan language and an ERISA qualifying plan can make or break the outcome of a plan's subrogation efforts. If you have specific subrogation language which you are working within your plans and would like to have it reviewed, please contact Gary Wickert. It is imperative that group health and disability carriers and third party adjusters\ administrators pay attention to the details of the plan and Summary Plan Description language. It is also imperative that any and all subrogation rights or terms are spelled out in the Summary Plan Description, as any conflict will most likely be construed against the plan and the subrogating third party administrator.

## Gary Wickert to Speak at IRM Insurance Conference

Gary Wickert has been invited to join an elite group of speakers at the 18th Annual Construction Insurance Conference held by the International Risk Management Institute, Inc., in New Orleans on November 2-5, 1998. Speaking on "Subrogation and Contractual Risk Transfer", Gary will also join a panel of speakers to address issues relating to contractual risks transfers at the conference which is sponsored by such companies as AIG, CNA, Hartford, Liberty Mutual, Travelers, and Willis Corroon, all clients of Mohr & Anderson, S.C. The conference addresses important risk management challenges and opportunities facing the insurance industry, contractors and project owners in the late 1990's, including unfair contractual risk transfer issues and liability arising out of the year 2000 computer bug known as Y2K. The conference runs from Monday, November 2 through Thursday, November 5. For more information on the conference, call International Risk Management, Inc., at (972) 960-7693.



# Credibility

By Bradley W. Matthiesen

Credibility is one of the most, if not most vital issue to be determined by a jury at trial. This is especially true when dealing with claims of soft tissue injury where it is very difficult for a plaintiff to verify the fact that he or she is actually suffering the claimed injury other than through that person's own testimony.

If a defense attorney can cause questions to be raised about the plaintiff's testimony and whether or not they are actually suffering as indicated, it will go a long way toward either no award or a greatly reduced award relating to pain and suffering. Juries seem to be attracted to anything of an evidentiary nature that cast doubt on any aspect of a plaintiff's testimony, most importantly relating to the plaintiff's complaints of injury.

A defense attorney will typically attack a plaintiff's credibility through two important means:

1. Past criminal convictions through the use of Wisconsin Statute §906.09; and
2. Prior inconsistent statements through Wisconsin Statute §906.13.

If a plaintiff has a prior criminal conviction, a defense attorney will typically not disclose that fact prior to trial. Once at trial, the defense attorney, after the direct examination of the plaintiff but before the cross-examination, will advise the court that the hearing must be conducted pursuant to §906.09. At that point, certified copies of the indicated criminal conviction will be produced and if the court agrees that they are relevant, will allow the defense attorney to typically ask just two questions:

1. Whether the plaintiff has ever been convicted of a crime; and if so,
2. How many times.

If a defense attorney can raise questions between the plaintiff's in court testimony and that produced at the time of deposition or through the use of statements made in medical records, the defense attorney can point out those inconsistences through the use of Wisconsin Statute §906.13.

Typically, should the credibility of a plaintiff be impeached through the use of either or both prior criminal convictions and\or prior inconsistent statements as indicated, it will go a long way in convincing a jury that the plaintiff's claim is not as believable as they would have the jury believe and will lay the foundation for an argument that either no damages or very little damages should be awarded.

# Discovering Evidence of Alternative Causes of Injury

By Douglas W. Lehrer

Successful defense attorneys and insurance adjusters must be suspicious as to a plaintiff's claimed cause of an injury and be willing to investigate possible alternative causes. Although a plaintiff may claim that a back injury was caused by a minor rear-end collision involving your client, a thorough investigation may ultimately reveal that the back injury was, in fact, caused by a prior slip and fall or a degenerative medical condition. This article will briefly describe some of the sources of documents available to insurance adjusters or defense attorneys to assist in identifying the real causes and contributory factors of an injury.

*(See Discovering Evidence of Alternative Causes - Page 7)*

**Medical Records.** Medical records are often the best source of information available to assist in identifying preexisting and subsequent injuries and conditions. Early on in the defense of any personal injury claim it is important to obtain the names of all of the plaintiff's medical providers prior to and subsequent to the accident in question. To obtain that information, written interrogatories are sent to every personal injury plaintiff requesting the identification of each and every medical practitioner and medial facility where he or she had ever sought medical treatment. Once the plaintiff responds to the interrogatories, medical authorizations can and should be submitted to the plaintiff allowing the defense attorney to collect all of the medical records.

Once the records are collected and reviewed, it is common to discover that certain accidents, unrelated to the incident in question, are undisputably the cause of the complained-of injury. Such accidents include a prior or subsequent automobile collision, slip-and-fall, sports injury, fight, assault, domestic violence, and work injuries. Furthermore, medical records may reveal a plaintiff's current complaints may have existed for a prolonged period of time and may have been caused by a preexisting condition. These conditions include arthritis, nontraumatic inflammation, infection and anabolic disorders. These types of preexisting conditions are often overlooked by treating physicians who are asked to make a determination regarding causation without reviewing the plaintiff's complete medical history. It is important, therefore, to carefully review all of the medical records collected to find notation of prior and subsequent injuries and conditions which may be the actual cause of an injury.

**Employment Records.** Another source of documents available to a defense attorney to assist in discovering alternative causes of an injury include employment records. These records may contain notation of preexisting conditions or injuries similar to the injury being investigated. For example, work accident reports may reveal fights, slip-and-falls and other work-related injuries. Additionally, worker's compensation records, often contained in an employer's file, may reveal other accidents or preexisting conditions.

Likewise, if a plaintiff is claiming that they are unable to perform a certain work activity due to a limitation, employment records may be helpful on showing otherwise. For example, performance evaluations which show equal or better ratings after an accident may refute a plaintiff's claim that an injury has hampered his or her work activities. Time and attendance records may also be used in defense of a claim of loss of time at work due to an accident and may show significant disability or sick time before the accident in question. Finally, a thorough review of all employment applications completed by a plaintiff after the date of an accident may reveal that the plaintiff has failed to identify alleged injury complaints or alleged work restrictions. When a plaintiff fails to identify an alleged work restriction on employment applications, it is difficult for a plaintiff to then attempt to convince a jury that they are, in fact, suffering from the unidentified work restriction.

**Driver's Abstract Records.** For a nominal fee, the Department of Motor Vehicles in most states will release drivers' abstracts which show every reported accident the plaintiff has had while operating a motor

*(See Discovery of Alternative Causes - Page 8)*

vehicle in that state. It is important to check not only the state in which the plaintiff currently resides but also other states in which he or she may have lived. When a prior accident is discovered, an investigation should be made as to whether or not the plaintiff indicated whether they were injured in that accident. Additionally, information in a driver's record abstract can be utilized to obtain police accident reports. The accident report may indicate whether the plaintiff sustained an injury and whether the plaintiff was transported to a hospital for emergency room treatment after the accident. If a plaintiff attempts to claim they were not injured in a prior or subsequent accident, these records may raise issues of a plaintiff's credibility when presented at a deposition or at trial.

**Court Records.** County Court Clerk's offices can also be valuable places to find records of other accidents or incidents where the plaintiff has been injured and a lawsuit has been filed. For example, Civil Court records may reveal that the plaintiff filed a personal injury lawsuit prior to the subject incident involving the same or similar injuries. Documents such as medical records, permanency reports, witness lists and pleadings can be obtained from the Court's files to refute a plaintiff's claim that the injury was caused by the subject incident. Furthermore, the identity of the defense attorney involved in the prior lawsuit can be obtained so as to allow an attorney to obtain additional file documents from that attorney such as deposition transcripts and answers to interrogatories.

**Central Index Bureau (CIB) Records.** Evidence regarding other prior and subsequent accidents can also be revealed through access to CIB records. The CIB is a depository of claims data established and maintained by insurance companies. CIB records are good sources of information about other accident claims by plaintiffs, however, it is still important to conduct other searches as not all accidents involving the plaintiff may be included in a CIB report.

## CONCLUSION

When handling insurance defense matters, we have a duty to our clients to leave no stones unturned to expose fraud and perjury. There are many valuable sources available in determining whether a complained-of injury was, in fact, caused by a prior or subsequent injury or condition. Records which identify real causes and contributory factors to a plaintiff's claimed injury are not only effective ammunition at the time of trial but often lead to successful settlements prior to trial.

***"Ignorance of the law excuses no man, not that all men know the law, but because 'tis an excuse' every man will plead, and no man can tell how to refute him."***

**JOHN SELDON**
TABLE TALK

# WISCONSIN SUPREME COURT CREATES NEW TORT OF NEGLIGENT SUPERVISION

By Gary L. Wickert

On June 24, 1998, the Wisconsin Supreme Court decided the case of Miller vs. Wal-Mart Stores, Inc., establishing the existence of the tort of "negligent supervision". This tort allowed an employer to be liable to a third party for negligent supervision of its employees, even though the employee committed no actual tort himself.

On the same day Miller was filed, the Wisconsin Supreme Court also handed down the decision in Doyle vs. Engelke, which burdened insurance companies with an obligation to defend the mere allegation of negligent supervision. This decision creates precedent for a possible domino effect of similar decisions in other states, giving insurance companies pause for thought, but at the same time creating new subrogation opportunities where there previously had been none.

In Miller, Wal-Mart employees confronted Miller in a parking lot and accused him of shoplifting. No merchandise was found on Miller's possession and Miller filed suit against Wal-Mart alleging that the employees unlawfully stopped, detained, searched, and interrogated him, causing damages. The jury found that Wal-Mart was not liable, through the acts of its employees, for false imprisonment, battery, negligent infliction of emotional distress, and loss of consortion claimed by Miller's spouse. The jury did, however, find that Miller did not exercise ordinary care in training, supervising, and hiring its employees and that these acts of negligence were the cause of the damages suffered by Miller.

The jury in Miller held the Wal-Mart employees to be not liable for damages, essentially indicating that they had not committed a tort or actionable conduct against Miller. Wal-Mart argued that if it were liable for negligent hiring, there must be an underlying tort committed by its employees. The Court disagreed, finding that there was a "wrongful act", and even though this wrongful act was not a tort according to the jury, it could form the basis for the tort of "negligent supervision".

The jury found that Wal-Mart did not have reasonable cause to find that Miller had shoplifted. The Court in Miller indicated that a claim for "negligent supervision" is different than a claim for "vicarious liability" for the acts of employees. Negligent supervision is based on tort principles, and vicarious liability based on agency principles.

By way of example, if a retail store instructs its security agents to apprehend and search anyone suspected of shoplifting, regardless of the facts, in an effort to crack down on theft, and a store employee gets into a fight with a customer in the parking lot while trying to apprehend him, the store will probably be found liable for the employee's acts because they were within the course and scope of his or her employment. On the other hand, if the store employee pulls out a knife and murders the customer in the parking lot, his acts may be found to be so outrageous as to be outside the scope of his employment for the store. With this new tort of negligent supervision, the store owner may still be found liable for negligent hiring\supervision, for not detecting the criminal assault record of the store employee before hiring him or her, or for failing to instruct the employees on the appropriate procedures in how and when to apprehend suspected shoplifters.

In Doyle vs. Engelke, a claim for negligent supervision was found sufficient to trigger the insurers' duty to defend.

Frequently, we see potential subrogation cases involving violent acts committed against the insured, resulting in benefit payments. Subrogating against the individual who committed the tort may provide a subrogating carrier with a paper judgment, but will do little to bring in a money recovery unless the person who committed the assault can be found to be in the course and scope of employment. Usually, such individuals are not in a financial position to make good on judgments against these individuals alone. With this new tort of negligent supervision, a new area of possible subrogation is created. When investigating claims for subrogation possibilities, always inquire into the employment circumstances of the third party suspected of committing the tort. If it can be established that the employer negligently supervised and\or hired this individual, possible subrogation avenues arise. From a defense standpoint, immediate investigation should be conducted into the details of this person's employment, including all background checks, training, safety meetings, etc., in order to refute possible allegations of negligent supervision which are now sure to follow. We may see more states leaning toward creation of such a tort in the future.

(Arnie Anderson of Mohr & Anderson recently published an article entitled *"The New Tort of Negligent Supervision"* in 71 Wis. Law. 14 (Sept. 1998). For a copy please contact Jamie Breen at the Hartford Office of M & A).

# FOR YOUR INFORMATION

## WELCOME TO THE FIRM ...

Gary L. Wickert joined the firm as a partner in June. After fifteen years of subrogation and insurance litigation practice in Houston, Gary was able to return to his native Wisconsin with his wife Lisa and his three sons, Chris, Lee, and Matt. Gary is in charge of the firm's subrogation practice.

Jamie Breen also joined the firm in June as a legal secretary to Gary Wickert. She recently moved to Wisconsin from Harvard, Illinois with her husband Mike and two daughters, Brittany and Justine. She is a graduate from McHenry County College in Crystal Lake, Illinois, and welcomes the challenge and opportunity to pursue her career at Mohr & Anderson.

Kristy Stippich joined the firm in October as a legal secretary to Bradley Mattiesen. She comes to our firm from the law firm of McLario, Helm & Bertling, S.C. She presently resides in the West Bend area with her husband, Patrick. She is a graduate of Moraine Technical College in Fond du Lac, and is continuing her studies at Concordia University Wisconsin.

## SEMINARS

Mohr & Anderson, S.C. offers a variety of subrogation and insurance related seminars. To schedule a seminar or request a presentation on a particular topic or topics, please contact Gary Wickert or Doug Lehrer, or fax your request to (414) 673-3766.

## NOTICE

Anyone using any of Mohr & Anderson's seminar materials as resources or references should keep in mind that insurance law is dynamic and rapidly changing. This newsletter and other materials promulgated by Mohr & Anderson, S.C. may become outdated or superseded as time goes by. If you have any questions about the current applicability of any topics contained in this or any other newsletter distributed by Mohr & Anderson, S.C., please call Gary Wickert and\or Brad Matthiesen.