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AUGUST 6, 2009

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

****** HEALTH SUBROGATION ALERT ******

HEALTH INSURANCE SUBROGATION

THE ATTACK ON SUBROGATION CONTINUES:

Amendment to Obama Care Bill Contains Anti-Subrogation Trojan Horse

Just when it appeared there couldn't possibly be any additional reasons to oppose H.R. 3200, the deceptively-titled "*America's Affordable Health Choices Act of 2009*", we find another one – the death of health insurance subrogation. Up to now, the only reference to subrogation in the proposed health care bill was § 136, entitled "*Standardized Rules for Coordination of Benefits and Subrogation*", which read:

> *The Commissioner shall establish standards for the coordination and subrogation of benefits and reimbursement of payments in cases involving individuals and multiple plan coverage.*

This clause in and of itself is both ambiguous with regard to the bill's effect on health insurance subrogation, and unclear as to the blanket authority some bureaucrat would have over the socially valuable right of subrogation. But things have just gotten even worse.

In an "*Amendment to an Amendment In the Nature of a Substitute*" to the Obama Care bill, lying deep within its bowels, hides a Trojan horse which would all but obliterate the cost-mollifying subrogation rights of health plans. Sponsored by two Democrats – Rep. John Barrow of Georgia and Rep. Bruce Braley of Iowa, the Amendment reads as follows in pertinent part:

> *With respect to any qualified health benefits plan requiring an enrollee to reimburse the QHBP offering entity (health plan) for any amount recovered from any source relating to a personal injury or similar type of claim, subrogation or reimbursement is permitted only if the enrollee has been fully compensated for all damages arising out of such claim. Any plan provision to the contrary is not enforceable. Insofar as subrogation or reimbursement of benefits is permitted, the subrogation or reimbursement amount shall not exceed the amount*

allocated to the categories of damages for those benefits in the settlement or judgment, less a pro rata share of any fees and expenses incurred in securing the settlement or judgment.

This Amendment could aptly be named the "*Trial Lawyer Job Security Amendment*", because it simultaneously accomplishes two things devastating to health subrogation:

(1) requires a plan beneficiary to be "made whole" before a plan is entitled to any rights of subrogation; and

(2) allows for subrogation/reimbursement of benefits only if the third-party recovery allocation reflects recovery of the identical health benefits which the plan paid for.

We know from made whole states that trial lawyers never admit their clients are made whole – even if they are. The burden of proving that a party is made whole falls on the shoulders of the insurance industry, an almost impossible burden, especially considering the fact that you have to prove the plaintiff is made whole even though 40% of his recovery has gone to his attorney.

The allocation requirement opens the door for gerrymandering of settlements and is an open invitation to circumvent subrogation rights a plan and its member have contracted for. If the Amendment and H.R. 3200 become law, trial lawyers will be able to "settle around" health plans by allocating their recovery to every element of damage except the medical expenses represented by the plan's subrogation interest.

The overall health care reform bill hurriedly introduced on July 14, passed the House Committee on Energy and Commerce late on July 28, breaking a two-week deadlock between Democrats and Republicans that threatened to derail one of President Barack Obama's top domestic issues. The bill passed by a vote of 31 to 28. No Republicans voted in favor of the bill and five Democrats voted against it. The Democrats who voted against the bill were Reps. Rick Boucher (Virginia), Bart Stupak (Michigan), Jim Matheson (Utah), John Barrow (Georgia), and Charles Melancon (Louisiana).

On July 15, the anti-subrogation Amendment was taken up by the Education and Labor Committee, chaired by Rep. George Miller (D-CA), where it began its markup process of President Obama's health care bill, introduced by House Democratic leaders the day before. The three panels with jurisdiction over health policy in the House began working together as one committee to develop a single bill. The process of marking up bills and resolutions in committees of the House generally resembles the process of amending measures on the House floor. Amendments such as this anti-subrogation Amendment are considered and voted on. At the beginning of a markup, committee members often make opening statements, usually not exceeding five minutes apiece. The bill then is read for amendment, one section at a time, with committee members offering their amendments to each section after it is read but before the next section is read. By unanimous consent only, the committee may agree to dispense with the reading of each section, or to consider a bill for amendment by titles or chapters instead of by sections. Also by unanimous consent, the committee may consider the entire bill as having been read and open to amendment at any point. Each amendment must be read in full unless the committee waives that reading by unanimous consent.

The future of this anti-subrogation Amendment is as of this moment, undecided. Unfortunately, however, it is still alive and we have every reason to be worried. Accordingly to telephone conversations Gary Wickert had today with Hill Thomas, Rep. John Barrow's legislative director, and Jeff Geartz, Rep. Bruce Braley's communication director, the markup session ended rather abruptly last Friday with a mutual decision by both majority and minority to package all of the amendments that were still outstanding - including this one, known as the "*Barrow Subrogation Amendment*" - into a stand-alone bill that would be worked on in September when the House returns from its August recess. Majority leadership in the House wanted the bill to get

reported out of the committee as a “sign of progress”, according to Thomas. The *Barrow Subrogation Amendment* would then have to be added into H.R. 3200 on the floor of the House in September. But it is still alive. Geartz said it would be difficult to “handicap” the amendment’s chances of survival, but unless and until it is dead and a stake has been driven through its heart, we should all be afraid - very afraid.

If the amendment survives, there are many unanswerable questions about its effect. Will it apply to private self-funded plans or only plans under the “public option”? Will preemption under ERISA survive or will this amendment and the new Act trump ERISA, which doesn't speak of subrogation at all. We don't have answers to these questions because the underlying proposed Health Care Bill hasn't been thought through very carefully and it has been rammed through the legislative process at light speed with little time for attention to such details. We do know that the House bill currently requires that within five years, every employer-sponsored plan will become a “Qualified Health Benefit Plan” (QHBP), potentially subjecting all employer-sponsored health plans to this anti-subrogation Amendment. We can all rest assured that trial lawyers will have new and fresh arguments with which to attack subrogation, should the amendment survive. And the fact the Amendment was proffered at all is just one more piece of evidence that we are an industry that must take the time and invest the money necessary to protect this valuable and beneficial right of subrogation.

The passage of H.R. 3200, which committee chairman Henry Waxman called “historic,” now sets the stage for a floor vote in the fall. Waxman’s panel is the third and final House committee to pass legislation to overhaul the health care system. Congress begins its August recess on August 7 and will reconvene for its fall session beginning September 7. In gearing up for a floor vote in September, congressional leaders will need to combine H.R. 3200 with the other two bills approved by committees on Ways and Means and Education and Labor.

Please visit the article on our website at www.mwl-law.com entitled *“The Societal Benefits of Subrogation*” (click on the link to view). Cut and paste portions of this article and send it to your state’s Congressmen. Tell them you are opposed to the anti-subrogation amendment to H.R. 3200 and that we have a *crisis of cost* in health care in our country and subrogation remains one of the last sensible measures available to contain costs and hold down premiums for the public. It makes no sense to complain about the high cost of health care and then turn around and pass an amendment which would further remove our ability to control costs and premiums. Even if you are opposed to the entire bill – as we are – stressing the devastating nature of the Amendment may provide political cover for Democratic representatives currently on the fence and being pressured by the White House to support the overall bill.

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