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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 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.

<<< SPECIAL HEALTH INSURANCE SUBROGATION ALERT >>>

HEALTH INSURANCE SUBROGATION

Fortis Benefits v. Vanessa Cantu and Ford Motor Company, 05-0791, In The Supreme Court of Texas

THE TEXAS SUPREME COURT HANDS SIGNIFICANT VICTORY TO SUBROGATION OVER THE MADE-WHOLE DOCTRINE

In what will surely be a significant victory for subrogation in Texas, on Friday, June 29, 2007, the Texas Supreme Court held that policy language will trump the application of the made whole doctrine. The case, *Fortis Benefits v. Cantu*, 05-0791, was handled by Attorney Loren R. Smith and also briefed by Attorney Gary L. Wickert for the National Association of Subrogation Professionals ("NASP"), who appeared as an amicus curiae.

The case reflects an all too common scenario faced by everyone in the health subrogation field. Fortis, as health insurer, for Ms. Cantu had paid $247,534.14 in medical benefits after she was injured in a car wreck. Cantu then filed suit against the adverse driver, his employer, and vehicle seller and manufacturer. She later recovered $1.445 million in a settlement with those defendants. Fortis then sought reimbursement for its lien out of those proceeds in accordance with the subrogation and reimbursement language in its policy. Cantu argued, however, that she was not made whole by the settlement and that Fortis was entitled to nothing. The made whole doctrine, of course, is an equitable rule that holds that unless and until an insured is fully compensated, the subrogated insurer is not entitled to be reimbursed. The trial court and a divided appellate court agreed and awarded Fortis nothing. The case was then appealed to the Texas Supreme Court to decide whether the made whole doctrine could override the Fortis policy language.

In Texas, the made whole doctrine has existed for nearly thirty years since the court's decision in *Ortiz v. Great Southern Fire & Casualty Ins. Co.*, 587 S.W.2d 342 (Tex.1980). However, as argued by Fortis and NASP, *Ortiz* involved application of equitable subrogation and did not address contractual subrogation, which arises by way of the language in the insurance policy. Fortis asked the court to enforce the specific terms of its policy that called for subrogation under these circumstances. The insurer argued that subrogation recoveries effectively allow it to calculate risk and even reduce premiums.

The Texas Supreme Court looked to its prior decisions involving subrogation and the U.S. Supreme Court's decision in *Sereboff* in order to distinguish equitable and contractual subrogation. The court also looked at the important Texas policy of enforcing written agreements. It wrote, "[w]here a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy." The court went on to hold that "contract-based subrogation rights should be governed by the parties' express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement." The court went on to award Fortis its entire subrogation amount of $247,534.14, not reduced by any equitable considerations.

This decision will have far reaching effects on all facets of subrogation in Texas. Subrogation professionals should immediately begin citing this decision to plaintiffs' counsels and prepare for significantly greater recoveries in Texas. Insurers should be aware that Texas courts will apply their insurance provisions as written and therefore should look to bolster or revise their subrogation provisions accordingly. If you have any questions about this decision and its effect on your subrogation rights, please contact Gary L. Wickert at gwickert@mwl-law.com.
