MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670
(800) 637-9176 (262) 673-7850 Fax (262) 673-3766
http://www.mwl-law.com

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER JUNE 2007

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 SUBROGATION ALERT >>>

SUBROGATION ETHICS

Washington Court of Appeals Applies Consumer Protection Act to Subrogation Collection

***Stephens v. Omni Ins./Panag v. Farmers Ins. Co.,* 2007 WL 1180497 (Wash. App. 2007).**

On April 23, 2007, the Washington Court of Appeals rendered an opinion which announced that a collection agency which sent out deceptive demand letters on behalf of a subrogated insurer could be held liable for violation of the Washington State Consumer Protection Act. The decision opens a long-festering wound within the insurance industry with regard to whether subrogation collection efforts can be regulated by the federal Fair Debt Collection Practices Act and/or the Consumer Protection Acts of individual states. While the court had to engage in somewhat reaching logic in order to find as they did, it is important for subrogation professionals to understand what the decision means, and what it does not mean.

The *Stephens* decision actually involved two separate cases. In one, Michael Stephens rear-ended an Omni Insurance Company insured, causing $544.09 in property damage. Omni sent several letters to Stephens asking him to get in touch with them, but he didn't. Six months later, Omni made $6,412 in additional bodily injury payments to its insured, and thereafter hired Credit Collection Services, Inc. (CCS) to collect its subrogation interest from Stephens. CCS sent formal collection notices to Stephens indicating that the "amount due" was $6,412. When Stephens called CCS, he was told that the debt was "in collection" and that they "had the power to get money from [him] in a variety of different ways from whatever financial resources [he] had." When Stephens indicated that he didn't feel he owed the money, CCS threatened litigation and license suspension. Stephens told CCS that he had insurance with Geico, and Geico contacted CCS to let them know Stephens was insured. Stephens hired an attorney and sued CCS and Omni for violation of the Washington Consumer Protection Act.

In the *Panag* case, Panag, who was uninsured, was injured in an accident with Farmers Insurance Company insured, Deven Hamilton. Farmers paid Panag $6,102.53 in property damage, and after investigating subrogation potential concluded that Panag was 40% at fault. Farmers also hired CCS to collect its subrogation interest, and CCS promptly sent out a "formal collection notice" specifying an "amount due" of $6,442.53. Three weeks later, CCS sent another notice of "Subrogation Claim" referencing an "amount due", and later sent out a third notice with the words "Western Union" printed at the top as though it was a telegram. Panag contacted the lawyer she had already hired to represent her in her personal injury action in connection with the same matter, and filed a class action suit against Farmers and CCS, alleging violations of the Consumer Protection Act. The two suits were consolidated.

The Washington Consumer Protection Act declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." R.C.W. § 19.86.020. In order to prevail under the Act, a plaintiff must prove five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. The court found that all five elements were present, and that the plaintiffs could proceed against CCS for their deceptive actions, but that Omni was not liable.

(1) Unfair or Deceptive Act

The court held that the term "deceptive" means that the actor misrepresents something of material importance. It was deceptive for CCS to represent the unliquidated subrogation tort claim as an "amount due", without even calculating or explaining how that amount was arrived at, and without any reference to the underlying accident. The latter infraction alone may have weighed the heaviest on the mind of the court. Simple references to a "subrogation claim" by CCS would not mean anything to the average debtor, and may have indicated to the debtor that the debt was already fixed and due – when it wasn't. It led the debtor to believe that prompt payment was the only solution, and didn't reference his ability to hire a lawyer and defend the underlying negligence claim. Once Geico became involved, CCS sent more appropriate letters indicating that "liability appears to rest with your insured", and therefore began to frame the "debt" in a more realistic and honest manner. But it was too late. In the *Panag* case, the court noted that the deceptive nature of the act was representing an unliquidated claim as an "amount due".

(2) Trade or Commerce

The second element requires that the deceptive act be in the conduct of any trade or commerce. The defendants argued that the plaintiffs were not involved in a consumer transaction, and therefore were not involved in trade or commerce. While the federal Fair Debt Collection Practices Act applies only when an effort is made to collect a debt (obligation arising from a bilateral agreement), the Washington Consumer Protection Act was not as limited. It applies to any trade or commerce affecting the people of Washington. R.C.W. § 19.86.010(2). The court made a stretch here, and held that the sale of CCS's collection services to Omni and Farmers was sufficient to fulfill the "trade or commerce" requirement of the Act. They said that the plaintiff need not be the party doing the "consuming" in order to sue.

(3) Public Interest Impact

The court decided that the sending of deceptive subrogation demands disguised as formal collection notices was a practice with a real and substantial potential for repetition. Without clearly

indicating the public interest impact, the court held that there was nothing in the records to indicate that these two incidents were isolated or unique, and therefore they met this requirement as well.

(4) Injury and (5) Causation

A plaintiff suing under the Washington Consumer Protection Act must have been "injured in his or her business or property" by the deceptive act. CCS contended that Panag and Stephens were not injured, because neither actually paid the "amount due". However, the court didn't buy that argument, and determined that no proof of *economic* damages was necessary. The Act is clear that mental distress, embarrassment and inconvenience alone do not establish injury, but the court again made a stretch by holding that the time and expense of investigating their fear of damaged credit was injury enough.

The court held that Omni was not liable for CCS's acts, because it had no relationship with CCS and no involvement in the subrogation demands. Because Omni had no right of control over the means and methods used by CCS, the court held it was not liable for the acts, and dismissed it.

Lessons Learned

While the court made some rather significant stretches in order to fit a square subrogation peg into the round consumer protection hole, subrogation professionals should take a mental note of the mistakes made by CCS which landed them in hot water, and avoid repeating any of these mistakes:

(1) Do not misrepresent an unliquidated tort subrogation claim as an unliquidated debt.
(2) Do not indicate that any subrogation interest which has not been adjudicated is "due and owing".
(3) Utilizing collection firms necessarily implies some aggressive tactics because all they can do is send out demands just like the carrier who hired them. Avoid aggressive or gimmicky techniques to get debtors to pay subrogation demands.
(4) Do not represent the nature of your communication by disguising it as an urgent telegram, when it is not.
(5) Do not make a demand for more than what you think is actually owed and never demand more than you have actually paid.
(6) Posture your subrogation demands in terms of being a negotiation to resolve potential liability in lieu of litigation.
(7) Be careful to treat insureds' deductibles appropriately, and reimburse all or a portion of the deductible as is required by law. (See www.mwl-law.com for a chart on the laws and administrative regulations of all 50 states in this regard.)
(8) Do not represent that you have any legal rights or remedies available to you that you do not have.
(9) Do not misrepresent any aspect of your subrogation interest, and be sure to explain everything in lay terms. It's not worth it to trick the tortfeasor into paying.

Fair Debt Collection Practice Act ("FDCPA")

Keep in mind that this case applies only to the Washington Consumer Protection Act. All states have one variation or another of consumer protection legislation, and each state is different with regard to the elements which must be proven in order to prevail. Consult subrogation counsel if you have questions about making demands, and have form demand letters reviewed by counsel

before using them. Train all subrogation personnel not to be overbearing or overreaching in either their correspondence or phone calls with the debtor.

While state consumer protection laws form the basis of a case, subrogation professionals should also be cognizant of the existence and possible application of the Federal Fair Debt Collection Practices Act. 15 U.S.C. § 1692. The FDCPA was passed to meet the problem of "abusive, deceptive and unfair debt collection practices". Under this federal statute, the existence of a "debt" is key to its application. While it's beyond the scope of this article, it's important for subrogation professional to be aware of its existence and possible application to certain actions they may take.

A fairly recent 5th Circuit opinion held that the FDCPA applies to an insurer's contract-based subrogation claim. *Hamilton v. United Healthcare of Louisiana, Inc.,* 310 F.3d 385 (5th Cir. 2002). The 5th Circuit held that the underlying "debt" arose not out of the automobile accident which formed the basis of the claim payment and resulting subrogation interest, but rather, from the transaction that occurred when the plan beneficiary involved purchased the insurance. Various state Fair Debt Collection Practices Act legislation may also apply. A Colorado Attorney General opinion dated July 14, 2004 determined that insurance subrogation claims do constitute "debt" under the Colorado Fair Debt Collection Practices Act at C.R.S. § 12-14-101 *et seq*. Accordingly, collection agencies acting on behalf of insurance companies and attempting to collect subrogation claims from consumers must comply with all of the Colorado Act's provisions.

An Illinois federal court has determined that a subrogating insurer does not qualify as a "debt collector" under the FDCPA. *Vasquez v. Allstate,* 937 F.Supp. 773 (N.D. Ill. 1996). The 11th Circuit has held that a subrogation claim is not a "debt" under the FDCPA. *Hawthorne v. Mac Adjustment,* 140 F.3d 1367 (11th Cir. 1998). While it seems that most subrogation claims that sound in tort are not "debts" under the FDCPA, those which sound in contract can be.

Insurance companies and self-insured subrogees have a responsibility to engage reputable and trustworthy collection companies. The social and economic benefits of subrogation are already mired and lost as a result of the lobbying efforts of trial lawyers and the passivity of the insurance industry when it comes to being advocates for this significant aspect of our industry. Utilize subrogation counsel whenever possible and avoid subrogation of claims which you feel reasonably certain will not be successful. Bad facts make bad law – and nobody knows this better than subrogation professionals.

WORKERS' COMPENSATION SUBROGATION

ARIZONA REVAMPS ITS WORKERS' COMPENSATION SUBROGATION STATUTE

Section 23-1023 is Arizona's workers' compensation subrogation statute. On April 24, 2007, this statute was completely rewritten and now reads as follows:

> ***§ 23-1023. Liability of third person to injured employee; election of remedies.***
>
> *(A) If an employee who is entitled to compensation under this chapter is injured or killed by the negligence or wrong of another person not in the same employ, the injured employee, or in event of death the injured employee's dependents, may pursue the injured person's remedy against the other person.*

(B) If the employee who is entitled to compensation under this chapter or the employee's dependents do not pursue a remedy pursuant to this section against the other person by instituting an action within one year after the cause of action accrues, or if after instituting the action, the employee or the employee's dependents fail to fully prosecute the claim and the action is dismissed, all of the following apply:

> *(1) The insurance carrier or self-insured employer may institute an action against the other person.*
> *(2) Any dismissal that is entered for lack of prosecution of an action instituted by the employee or the employee's dependents shall not prejudice the right of the insurance carrier or self-insured employer to recover the amount of benefits paid.*
> *(3) If the statute of limitations of the claim is one year after the cause of action accrues, the insurance carrier or self-insured employer may file the action prior to one year after the cause of action accrues.*
> *(4) The claim may be prosecuted or compromised by the insurance carrier or the person liable for the self-insured employer or may be reassigned in its entirety to the employee or the employee's dependents. After the reassignment, the employee who is entitled to compensation, or the employee's dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.*

(C) The employee or the employee's dependents shall provide the insurance carrier or the self-insured employer written notice of the intention to bring an action against a third party and shall provide to the insurance carrier or self-insured employer timely and periodic notice of all pleadings and rulings concerning the status of the pending action. In any action instituted by the employee or the employee's dependents, the insurance carrier or the self-insured employer shall have the right to intervene at any time to protect the insurance carrier's or the self-insured employer's interests.

(D) If the employee proceeds against the other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from the other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorney fees, actually expended in securing the recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by this chapter for the case. Compromise of any claim by the employee or the employee's dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the insurance carrier or self-insured employer liable to pay the claim.

(E) For purposes of this section, the commission shall have the same rights as an insurance carrier or self-insured employer. A.R.S. § 23-1023 (2007).

Although the statute looks much different from before, it is substantially similar with regard to its content. However, under the newly amended statute, a worker must provide the carrier with written notice of his intention to bring an action against a third party. In addition, a worker must now provide the carrier with timely and periodic notices of all pleadings and rulings concerning the status of the pending third party action. The statute expressly provides that the carrier has the right to intervene into any third party action filed by the worker. These are significant changes from the previous statute. The injured worker has one year after a third party cause of action accrues to pursue a third party action. A.R.S. § 23-1023(B). If the worker does not pursue a third party action, the claim against the third party is deemed assigned to the workers' compensation carrier. Such a claim may then be prosecuted and/or compromised by the carrier and/or the self-insured employer, or may be reassigned in its entirety to the employee, who shall then have the same rights to pursue the claim as if it had been filed within the first year. A.R.S. § 23-1023(B). Unfortunately, injured workers often dismiss their cases or otherwise neglect to aggressively pursue their cases and allow them to be dismissed. In such situations, the workers' compensation carrier was left without a third party action, and had no ability to file its own. Therefore, the amended statute takes into consideration this scenario, and provides that if, after the worker files suit, the suit is not fully prosecuted and is dismissed, the claim against the third party is also deemed assigned to the workers' compensation carrier in that circumstance. A.R.S. § 23-1023(B).

These changes reflect a progressive and enlightened approach to subrogation in the State of Arizona, one of only a handful of states which does not allow the plaintiff's attorney to reduce a workers' compensation carrier's subrogation interest by the amount of attorney's fees and costs incurred by the injured worker and his attorney.

WORKERS' COMPENSATION SUBROGATION

ALABAMA SUPREME COURT CLARIFIES WORKERS' COMPENSATION SUBROGATION

Alabama has a workers' compensation subrogation statute which, at first blush, appears to be no different from the statues of many states. Alabama Statute § 25-5-11 provides that when an injury or death is caused "under circumstances also creating a legal liability for damages on the part of any party other than the employer", the worker can pursue workers' compensation benefits and simultaneously bring a tort action against the third party. If damages are recovered in such a third party action, the workers' compensation carrier is entitled to be reimbursed for the amount of benefits paid in the past, including medical and vocational benefits paid by the carrier. Recently, the carrier's right to recover benefits has been called into question. Section 25-5-11 reads, in pertinent part, as follows:

> *"...the employer shall be entitled to **reimbursement** for the amount of compensation theretofore paid on account of injury or death."*
> *"The employer shall be entitled to **subrogation** for medical and vocational benefits expended by the employer on behalf of the employee."*

In the statute above, the dispute over the carrier's right of recovery hinged on the difference on the words "reimbursement" and "subrogation". Before 1992, § 25-5-11 allowed reimbursement only for "compensation", which the Alabama Supreme Court had concluded did not include

medical expenses. *Liberty Mutual Ins. Co. v. Manasco*, 123 So.2d 527 (Ala. 1960). Therefore, although an employer could be reimbursed for any workers' compensation benefits or death benefits, it could not be reimbursed for medical benefits expended to care for the injured employee. As a response, the Alabama legislature amended the Act to provide for the reimbursement of compensation and benefits, but gave the employer only a right for "subrogation" for medical and vocational benefits. The use of the two terms "reimbursement" and "subrogation" was picked up on by plaintiff's attorneys looking for ways to avoid repayment of workers' compensation subrogation interests. "Reimbursement" is generally the right to recover out of any third party recovery, monies which have been paid as workers' compensation benefits. However, "subrogation" refers to the legal right to pursue a third party responsible for injuries resulting in the medical and vocational benefits paid by the carrier.

Plaintiff's attorneys picked up on this language resulting in the 2007 Alabama Supreme Court decision of *Trott v. Brinks, Inc.*, 2007 WL 1300734 (Ala. 2007). Decided on May 4, 2007, the case involved an employee's widow who brought a wrongful death action against a seatbelt manufacturer, alleging the seatbelt's failure caused her husband's injuries in a work-related truck rollover. The workers' compensation carrier, Liberty Mutual, intervened in the federal court in which the suit was pending alleging an entitlement to be reimbursed for all of the benefits it had paid. Liberty Mutual paid $415,098.00 in medical expenses as a result of the injury and death of the deceased employee, Ronald Trott. Liberty Mutual claimed that it was entitled to be reimbursed for both death benefits and medical expenses paid to Mrs. Trott from any amount recovered in the third party action. Mrs. Trott agreed with regard to reimbursement of the death benefits (subject to a pro rata share of attorney's fees), but disputed the right of reimbursement for medical benefits paid on behalf of Mr. Trott before he died. Mrs. Trott and her attorneys maintained that recovery for medical expenses in a wrongful action is inconsistent both with the wording of § 25-5-11, and with the principles of subrogation. In Alabama, the only recoverable damages in a wrongful death case are punitive damages intended to punish the tortfeasor for its actions, not to compensate the plaintiff. Therefore, they argued that medical expenses, such as those Liberty Mutual sought to recover, were compensatory in nature and were not recoverable by a plaintiff in a wrongful death action. Therefore, Mrs. Trott and her attorneys argued that because she, as the representative of Ronald Trott's estate, could not recover damages from the third party for medical expenses, Liberty Mutual couldn't either. Liberty Mutual argued that the workers' compensation subrogation statute gave it the right to be reimbursed out of any third party recovery, those benefits it paid on behalf of the worker. The federal court certified the question for the Alabama Supreme Court, and the court rendered its decision on May 4, 2007.

The Alabama Supreme Court strictly construed the language of the statute. It held that an employer has a right to "reimbursement" of compensation and benefits. However, as far as medical benefits are concerned, the statute clearly states something different. The court held that the employer only has the right to "subrogation" for medical and vocational benefits, and that the use of the two different terms - reimbursement and subrogation - is a distinction which they believe has a meaning. Therefore, because subrogation involves "stepping into the shoes" of the insured, and the insured in this case did not have the right to recover medical expenses, then neither did Liberty Mutual. On the other hand, "reimbursement" is a broader term which implicates a simple repayment or indemnification. The court concluded that an employer is not entitled to be reimbursed for medical benefits from amounts recovered from a third party in a wrongful death action filed by an employer/decedent's personal representative.

Unfortunately, the Alabama Supreme Court assumed that the legislature, made up of primarily lay persons and non-lawyers, knew or fully understood the difference between reimbursement and

subrogation. While these terms are used interchangeably and conflated among the small percentage of the general population who understands the terms, in a strictly legal sense, they are different. Rather than uphold the public policy behind the workers' compensation subrogation statute and allow recovery of medical expenses paid in a wrongful death action, the court tried to find a way to help the widow of the deceased employee, and as a result, has saddled us bad and rather questionable subrogation precedent.

The legislative intent of § 25-5-11 was to ease the burden of expense to the employee in bringing the third party action, to allow reimbursement of the carrier to hold down the cost of workers' compensation insurance to the employee public, and to ensure that someone other than the employer/carrier who is responsible for the injuries, bears the burdens of those injuries. *Southern v. Plumb Tools*, 696 F.2d 1321 (11th Cir. 1983) (Alabama was in the 11th Circuit in 1983). The Supreme Court decision in *Trott v. Brinks, Inc.* exponentially increases the cost of workers' compensation in cases of injuries resulting in deaths. Either, the Alabama legislature must amend its wrongful death statute to allow for recovery of medical expenses when a subrogated workers' compensation carrier brings the action, or, the Alabama Supreme Court must realize that the Alabama legislature did not know the difference between subrogation and reimbursement when § 25-5-11 was amended. In fact, there is no rational basis for allowing reimbursement of one form of benefit payments, and only the lesser subrogation rights for recovery of the other. Anyone writing insurance and subrogation is urged to contact their legislators and lobby for either of these changes in order to remedy this defective and erroneous Supreme Court decision.
