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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **JUNE 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.

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WORKERS' COMPENSATION SUBROGATION

WEST VIRGINIA AMENDS WORKERS' COMPENSATION SUBROGATION STATUTE

State Limits Subrogation Opportunities In Construction Settings And Enters World of Statutory Employer Legislation

West Virginia has for years resisted limiting subrogation in workers' compensation settings by declaring general contractors, owners, and even subcontractors to be "statutory employers" protected by the exclusivity rule and immune from third-party lawsuits filed by employees. That all changed on May 7, 2009, when the West Virginia legislature passed a series of changes and amendments to West Virginia law that redefined the responsibility of prime contractors to injured employees of their subcontractors and clarified subrogation rights with respect to employees injured by third parties in construction settings. West Virginia's legislation leaves Iowa and Louisiana as the only two remaining states which have not passed specific legislation dealing with the liability of a general contractor or owner for the workers' compensation benefits of injured employees of subcontractors and the possible immunity as a "statutory employer" such legislation might grant to these long-time third-party liability targets.

American workers' compensation carriers are preoccupied with preventing occupational injuries and deaths - and for good reason and with palpable results. The National Institute for Occupational Safety and Health (NIOSH), the Center for Disease Controls' occupational arm which monitors occupational injuries and deaths in the American workplace, reports that over the last twenty years, occupational injuries and deaths are on the decline. However, accidents do happen. For more than ninety years, American insurers have depended, relied, and calculated premiums on the expectation that if a third party other than the worker's employer is responsible for the employee's injuries, the compensation carrier will be able to subrogate the loss and shift the ultimate responsibility for paying the loss onto the party responsible for causing the loss in the first place.

Employers rely on subrogation in occupational settings in order to keep the experience modification factors and retrospective ratings, and consequently their premiums, low. Employers with retrospective rating plans or retention plans literally depend on subrogation to help reflect their true loss history. Unfortunately, our industry has not done enough to sing the praises and designed social benefits of subrogation. Courts and legislatures across our country have begun whittling away at compensation carriers' subrogation rights. Sometimes this is done in the name of "reducing needless litigation" and sometimes it results literally from an ignorance of the philosophical and legal concept underlying subrogation. Perhaps the greatest irony, however, is the fact that states appear to be limiting third-party subrogation most severely in construction settings - the area of workers' compensation in which the average level of injury compensation payments is nearly double the level for all other industries combined. West Virginia has now joined the bandwagon of states limiting subrogation opportunities in construction settings.

West Virginia § 23-2-1(d) was passed on May 7, 2009, amending the term "employer" to include any primary contractor who regularly subcontracts with other employers for the performance of any work arising from or as a result of the primary contractor's own contract, provided that the subcontractor does not provide goods rather than services. In short, if a subcontractor employer fails to make workers' compensation benefit payments to its employee, the primary contractor is now responsible for making those payments. The new statute applies only to contracts which last longer than 60 days and were entered into or extended on or after January 1, 1994. In addition, a subcontractor can become a "primary contractor" if it subcontracts any or all of its responsibilities to another sub-subcontractor. The new statute reads as follows:

§ 23-2-1(d). Prime Contractors and Subcontractors Liability.

(a) For the exclusive purposes of this section, the term "employer" as defined in section 1 of this article includes any primary contractor who regularly subcontracts with other employers for the performance of any work arising from or as a result of the primary contractor's own contract: Provided, that a subcontractor does not include one providing goods rather than services. For purposes of this subsection, extraction of natural resources is a provision of services. In the event that a subcontracting employer defaults on its obligations to make payments to the commission, then the primary contractor is liable for the payments. However, nothing contained in this section shall extend or except to a primary contractor or subcontractors the provisions of sections 6, 6(a) or 8 of this article. This section is applicable only with regard to subcontractors with whom the primary contractor has a contract for any work or services for a period longer than 60 days:

West Virginia State Capital located in Charleston

Provided, however, that this section is also applicable to contracts for consecutive periods of work that total more than 60 days. It is not applicable to the primary contractor with regard to sub-subcontractors. However, a subcontractor for the purposes of a contract with the primary contractor can itself become a primary contractor with regard to other employers with whom it subcontracts. It is the intent of the Legislature that no contractor, whether a primary contractor, subcontractor or sub-subcontractor, escape or avoid liability for any workers' compensation premium, assessment or tax. The executive director shall propose for promulgation a rule to effect this purpose on or before December 31, 2003.

(b) A primary contractor may avoid initial liability under subsection (a) of this section if it obtains from the executive director, prior to the initial performance of any work by the subcontractor's employees, a certificate that the subcontractor is in good standing with the Workers' Compensation Fund.

(1) Failure to obtain the certificate of good standing prior to the initial performance of any work by the subcontractor results in the primary contractor being equally liable with the subcontractor for all delinquent and defaulted premium taxes, premium deposits, interest and other penalties arising during the life of the contract or due to work performed in furtherance of the contract: Provided, that the commission is entitled to collect only once for the amount of premiums, premium deposits and interest due to the default, but the commission may impose other penalties on the primary contractor or on the subcontractor, or both.

(2) In order to continue avoiding liability under this section, the primary contractor shall request that the commission inform the primary contractor of any subsequent default by the subcontractor. In the event the subcontractor does default, the commission shall notify the primary contractor of the default by placing a notice in the certified United States mail, postage prepaid, and addressed to the primary contractor at the address furnished to the commission by the primary contractor. The mailing is good and sufficient notice to the primary contractor of the subcontractor's default. However, the primary contractor is not liable under this section until the first day of the calendar quarter following the calendar quarter in which notice is given and liability is only for that following calendar quarter and thereafter and only if the subcontract has not been terminated: Provided, the commission is entitled to collect only once for the premium amounts, premium deposits and interest due to the default, but the commission may impose other penalties on the primary contractor, subcontractor, or both.

(c) In any situation where a subcontractor defaults with regard to its payment obligations under this chapter or fails to provide a certificate of good standing as provided in this section, the default or failure is good and sufficient cause for a primary contractor to hold the subcontractor responsible and to seek reimbursement or indemnification for any amounts paid on behalf of the subcontractor to avoid or cure a workers' compensation default, plus related costs, including reasonable attorneys' fees, and to terminate its subcontract with the subcontractor notwithstanding any contract provision to the contrary.

(d) The provisions of this section are applicable only to those contracts entered into or extended on or after January 1, 1994.

(e) The commission may take any action authorized by section 5(a) of this article in furtherance of its efforts to collect amounts due from the primary contractor under this section.

(f) Effective upon termination of the commission, subsections (a) through (e), inclusive, of this section shall be applicable only to unpaid premiums due the commission or the Old Fund as provided in article 2(c) of this chapter.

(g) The Legislature finds that every prime contractor should be responsible to ensure that any subcontractor with which it directly contracts is either self-insured or maintains workers' compensation coverage throughout the periods during which the services of a subcontractor are used and, further, if the subcontractor is neither self-insured nor covered, then the prime contractor rather than the Uninsured Employer Fund should be responsible for the payment of statutory benefits. It is also the intent of the Legislature that this section not be used as the basis for expanding the liability of a prime contractor beyond the limited purpose of providing coverage in the limited circumstances and in the manner expressly addressed by this section: Provided, That receipt by the prime contractor of a certificate of coverage from a subcontractor shall be deemed to relieve the prime contractor of responsibility regarding the subcontractor's workers' compensation coverage.

(h) On after the effective date of the reenactment of this section in 2009, if an employee of a subcontractor suffers an injury or disease and, on the date of injury or last exposure, his or her employer did not have workers' compensation coverage or was not an approved self-insured employer, and the prime contractor did not obtain certification of coverage from the subcontractor, then that employee may file a claim against the prime contractor for which the subcontractor performed services on the date of injury or last exposure, and such claim shall be administered in the same manner as claims filed by injured employees of the prime contractor: Provided, that a subcontractor that subcontracts with another subcontractor shall, with respect to such subcontract, is the prime contractor for the purposes of this section: Provided, however, that the provisions of this subsection do not relieve a subcontractor from any requirements of this chapter, including the duty to maintain coverage on its employees. The subcontractor shall provide proof of continuing coverage to the prime contractor by providing a certificate showing current as well as renewal or replacement coverage during the term of the contract between the prime contractor and the subcontractor. The subcontractor shall provide notice to the prime contractor within two business days of cancellation of expiration of coverage.

(i) Notwithstanding that an injured employee of a subcontractor is eligible for workers' compensation benefits pursuant to this section from the prime contractor's carrier or the self-insured prime contractor, whichever is applicable, a subcontractor who has failed to maintain workers' compensation coverage on its employees:

(1) May not claim the exemption from liability provided by sections 6 and 6(a) of this article;
(2) May be held liable to an injured employee pursuant to the provisions of section 8 of this article; and
(3) Is the designated employer for the purposes of any "deliberate intention" action brought by the injured worker pursuant to the provisions of section 2, article 4 of this chapter.

(j) If a claim of an injured employee of a subcontractor is accepted or conditionally accepted into the Uninsured Employer Fund, both the prime contractor and subcontractor are jointly and severally liable for any payments made by the Fund, and the Insurance Commissioner may seek recovery of the payments, plus administrative costs and attorneys' fees, from the prime contractor, the subcontractor, or both: Provided, that a prime contractor who is held liable pursuant to this subsection for the payment of benefits to an injured employee of a subcontractor may recover the amount of such payments from the subcontractor, plus reasonable attorneys' fee and costs: Provided, however, that if a prime contractor has performed due diligence in all matters requiring an verifying a subcontractor's maintenance of insurance coverage, than the prime contractor is not liable for any claim made hereunder against the subcontractor.

This is a clear departure from previous West Virginia law which did not provide that a prime contractor could be considered a statutory employer. While there is no case law to guide us at this time, it certainly appears that prime contractors, as well as any subcontractors who fit the new definition of "employer" under § 23-2-1(d), are "employers" protected by the exclusive remedy rule under § 23-3-6. It is unclear whether such "statutory employers" will have the benefit of such immunity by virtue of being contingently liable for compensation benefits or only if and when they are actually called on to make benefit payments in lieu of the true employer.

Subrogating professionals should be familiar with the various states' laws as they relate to subrogating in construction settings. Knowing when you can and when you can't subrogate can mean the difference between recovering millions of dollars and recovering nothing at all. If you should have any questions regarding this article or subrogating in construction settings, please contact Gary Wickert at gwickert@mwl-law.com.

AUTO SUBROGATION

Michael R. Sinnen

CONNECTICUT ENACTS NEW LAW ON DEDUCTIBLE REIMBURSEMENT

By Michael R. Sinnen

Beginning on January 1, 2010, automobile insurers in Connecticut will need to seek reimbursement for their insured's deductible when pursuing responsible third parties. According to Connecticut Public Act No. 09-72, § 2, which was recently signed into law by Governor M. Jodi Rell, "...if an

insurer chooses to exercise its right of subrogation pursuant to the terms of an automobile liability insurance policy, such insurer shall include in such subrogation demand the amount of any collision deductible paid by such insured, unless such insured requests such insurer not to include such amount."

Connecticut Public Act No. 09-72, § 2, also addresses recovery disbursement between an automobile insurer and its insured and states, "The insurer shall share subrogation recoveries with the insured on a proportionate basis." Previously, Connecticut laws had not addressed the distribution of subrogation recoveries, which placed Connecticut among the states that are, by default, "pro rata distribution states." With the enactment of Public Act No. 09-72, § 2, Connecticut has now clarified this issue.

For questions regarding deductible reimbursement laws in all 50 states, please contact Mike Sinnen at msinnen@mwl-law.com or view the chart entitled "Deductible Reimbursement Laws In All 50 States" located on our website homepage under Insurance Resources. For your convenience, you can also click on the following link to access our deductible chart:

http://www.mwl-law.com/CM/Resources/50-State-Deductible-Chart-(20090625).pdf

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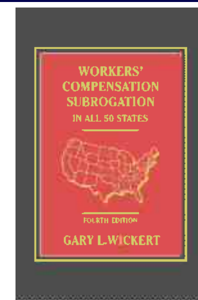
NEW FOURTH EDITION NOW AVAILABLE



WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES (4TH EDITION) NOW AVAILABLE!!

We are happy to announce that our new 4th Edition *Workers' Compensation Subrogation In All 50 States* book is now available for purchase. Workers' compensation subrogation continues to change and adapt, as trial lawyers prod its weak points and capitalize on confusing areas of the law. The last 18 months saw many changes in workers' compensation statutes and case law in many states. Arizona completely rewrote and renumbered their subrogation statute, and several other states made minor amendments to theirs as well. The Fourth Edition of *Workers' Compensation Subrogation In All 50 States* includes for the first time the complete texts for the states with the most confusing exclusive remedy statutes and those with new case law interpreting that area. It also includes clarification on confusing statutes from several states dealing with the recovery of attorneys' fees and costs by workers' attorneys, and the inclusion of specific statutory notice requirements set forth in California law. Combined with more than 100 new case decisions, this Fourth Edition is the most complete and up-to-date edition yet.

The fourth edition can be purchased through our publisher, Juris Publishing, Inc., at http://www.jurispub.com/385/workers-compensation-subrogation-in-all-50-states. You can also go to http://www.mwl-law.com/PracticeAreas/Workers-Compensation-Subrogation-All-50-States.asp, which is a link to our website where you will find an article on the book, a preview of the Table of Contents, and the book's brochure and ordering information.

MOVEMENT GROWS TO UNDERCUT THE MADE WHOLE DOCTRINE

By Michael R. Sinnen

The made whole doctrine's choke-hold on subrogation rights is weakening in some venues. Courts in several "made whole states" have ruled that carriers may recover part or all of their subrogation liens, despite arguments from plaintiffs' attorneys that their clients were not made whole by third-party settlements.

Specifically, subrogated carriers have gained traction in situations in which plaintiffs have settled their third-party cases for an amount less than the available third-party insurance limits. In these scenarios, subrogated carriers have posited the logical argument that plaintiffs have been made whole, since they are acknowledging, through their settlements, that their damages are reflected in the settlement dollars they receive. If the plaintiffs' cases were worth more than the settlement amount, those plaintiffs would have attempted to collect more of the available third-party insurance.

As reflected in a recent Ohio appellate case decision, courts are finding the arguments of subrogated carriers persuasive. See *Allen v. Binckett*, 2009 WL 1744494, at *3 (Ohio App. 5 Dist. 2009); quoting *Risner v. Erie Ins. Co.*, 633 N.E.2d 588, 590 (Ohio App. 3 Dist. 1993). In *Allen*, one of the plaintiffs sustained personal injuries as a result of a motor vehicle accident with an at-fault driver, and that plaintiff, along with his spouse, filed a lawsuit against the adverse driver. The case ultimately settled at mediation for $10,500 - an amount that was substantially less than the available insurance limits. State Farm sought to recoup its $4,073.85 subrogation interest, and the plaintiffs argued they were not made whole by the settlement. In siding with State Farm, the court stated, "[T]he voluntary settlement by an insured of his claims against a tortfeasor, without proof to the contrary, is persuasive evidence of the value of the insured's 'personal injury claim, and tends to prove that [the insured] was fully compensated' for his injuries."

A host of other courts have utilized the same logic as the *Allen* court. These cases include: *Thompson v. Fed. Express Corp.*, 809 F. Supp. 950, 954 (M.D. Ga. 1993); *Bell v. Fed. Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va. 1988); and *Illinois Farmers Ins. Co. v. Wright*, 391 N.W.2d 519 (Minn. 1986).

The aforesaid decisions provide hope for carriers whose subrogation rights are continuously undermined by the made whole doctrine. When cases arise in states that employ the made whole doctrine, carriers are advised to aggressively pursue their subrogation interests and make the logical arguments that were successful in other jurisdictions. With the continued persistence of carriers, the line of cases that undercut the made whole doctrine should continue to expand.

For questions regarding this article or subrogating in made whole states, please contact Mike Sinnen at msinnen@mwl-law.com.

UPCOMING EVENTS........

August 11-12, 2009 - Chris Miller will be at the 5th Annual National Workers' Compensation Subrogation Strategies Insurance ExecuSummit, being held in Uncasville, Connecticut. Chris Miller will be presenting, *The Complete Guide To Taking A Future Credit In All 50 States*. For more information on this conference, please go to www.ExecuSummit.com.

November 1-4, 2009 - Gary Wickert and Ryan Woody will be at the 2009 NASP Annual Conference being held in Colorado Springs, Colorado. On November 2, Gary Wickert will be presenting *The Complete Guide To Taking A Future Credit In All 50 States* and, on November 3, Ryan Woody will be presenting *ERISA and The Wrongful Death Lawsuit.* MWL will also be exhibiting at this conference so if you plan on attending, please stop by our booth and see Gary Wickert, Ryan Woody and Jamie Breen. For more information on this conference, please go to www.subrogation.org.

May 11-14, 2010 - MWL will be exhibiting at the 5th Annual Claims Education Conference being held in New Orleans, Louisiana. Jamie Breen will be at our exhibit booth so stop by our booth if you plan on attending this conference. For information on this conference, please go to http://www.claimseducationconference.com.

This electronic newsletter is intended for the clients and friends of Matthiesen, Wickert & Lehrer, S.C. It is designed to keep our clients generally informed about developments in the law relating to this firm's areas of practice and should not be construed as legal advice concerning any factual situation. Representation of insurance companies and/or individuals by Matthiesen, Wickert & Lehrer, S.C. is based only on specific facts disclosed within the attorney/client relationship. This electronic newsletter is not to be used in lieu thereof in any way.