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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER MAY 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.

AUTOMOBILE SUBROGATION

SUBROGATING WHEN YOUR INSURED DOES THE REAR-ENDING

By Michael R. Sinnen

There is an entire area of subrogation potential traditionally overlooked or ignored. When your insured rear-ends a tractor trailer which has come to a stop on a highway, is fully in his lane with all brake lights and other safety devices working, there appears to be no third party liability. Look again! Pursuing recoveries against tractor trailers for injuries or deaths as a result of rear-ending a large truck is referred to as “underride litigation”. In 1998, the U.S. Department of Transportation revealed that more than 5,000 people lost their lives in vehicle collisions involving a tractor trailer or other large trucks. This averages approximately one in every eight road fatalities and almost all of those people who were killed were in passenger cars. In addition, large trucks were three times more likely than other vehicles to be rear-ended in fatal two-car crashes.

The U.S. Department of Transportation has set forth guidelines and standards regarding appropriate rear-impact safety guards for tractor trailers and other trucks. The purpose of this legislation is to prevent deaths and injuries caused from other vehicles rear-ending these larger trucks. Current regulations require that all tractor trailers manufactured after January, 1998 have rear guards no higher than 22 inches above the road’s surface. Earlier regulations allowed guards to be as high as 30 inches off the pavement, and this regulation is still in effect for trucks which do not fall under the tractor trailer category, such as straight beds and dump trucks and all tractor trailers manufactured before 1998.

Even with the newer regulations, there are still concerns about safety hazards and dangers involved in rear-ending larger vehicles. Safety professionals recommend guards on the rear of large trucks be no higher than 18 inches above the pavement, and the strength of these “guards” need to be at least twice what it currently requires in order to protect a person from serious injury in rear-ending a tractor trailer.

Many underride collisions are the result of poor trailer lighting at night. A driver can often approach a tractor trailer from the rear and not realize it until it is too late. To address these problems, the U.S. Department of Transportation adopted FMVSS108 in 1993, which required that truck manufacturers partially outline tractor trailers' rear and side panels with alternating red and white sheeting and reflectors.

In subrogating rear-end cases such as these, defendants often claim that federal preemption applies. This means that because federal law has set the standards, it takes precedence over any conflict and any other state tort laws. But preemption applies only if the scope of the federal statute indicates congressional intent to occupy a field exclusively, compliance with both federal and state requirements is impossible, or state law impedes congress' purposes and objectives in enacting an irrelevant statute. But many federal and state courts have held that preemption does not prevent litigants from seeking recovery in underride cases, regardless of whether or not the cause of action is based on failure to properly illuminate the trailer or because of claims of defective rear guards. Courts have held that congress has not expressed or demonstrated an intent to occupy this field exclusively, and therefore preemption may not prevent causes of action based on the theories of underride litigation.

As a member of the Association of Trial Lawyers of America (now the American Association for Justice), we have access to tractor trailer underride documents and other litigation information from underride litigation around the country. Please remember not to close a file and give up on subrogation potential, especially in cases involving medical benefits paid to an insured who was injured as a result of underride, merely because the insured is the one who did the rear-ending and the truck driver appears to have done nothing wrong in the operation of his vehicle. Creative and aggressive subrogation should be pursued at all times to insure maximum recovery of subrogation dollars for a particular insurance company.

WORKERS' COMPENSATION SUBROGATION

SUBROGATING LIABILITY CLAIMS

By Gary L. Wickert

When the subject of subrogation arises, we all too often think of property, workers' compensation, auto and/or health claims. However, our industry leaves a lot of recoveries on the table because many opportunities for liability subrogation go unnoticed and untapped. Subrogation is the stepping into the shoes of another - usually an insured who has suffered a loss as a result of a third person's negligence. In many states, when a liability carrier pays a claim, the file is closed. Little thought is given to the carrier's right to proceed against other tortfeasors whose negligence contributed to the loss or the right to recover all or a significant portion of their claim payments from the third party. Known as "liability subrogation" or "indemnity and/or contribution claims", such potential recovery opportunities all too often are not pursued. The file is closed and the subrogation opportunity dies on the vine. Potential recoveries are never realized.

Generally, a subrogating carrier may pursue any rights its insured has against the third party tortfeasors. However, indemnity and contribution actions arise whenever a tortfeasor (the liability carrier's insured) is damaged by paying for a loss which should be borne solely or primarily by another person or entity. The "damage" is the liability payment it makes because of a third party's

liability claim against the insured. The carrier, therefore, is seeking to make good on its insured's right of contribution (the duty of a joint tortfeasor to pay its fair share of damages caused by its negligence), or indemnity (the duty of a joint tortfeasor to completely make good to another tortfeasor for all damages paid due to some contractual, statutory, or common law duty). It is important to note that all jurisdictions are different, and some states only allow a torfeasor to settle that portion of a damage claim which it caused by its negligence.

Most states allow a carrier to equitably proceed against a joint tortfeasor to recover the portion of the damages for which the joint tortfeasor is responsible. For example, an owner or general contractor who is forced to make a liability payment to an injured person or even for property damages due to a fire, may be able to pursue the subcontractor whose negligence actually caused the loss. Also, allowed in most states is the ability of a seller of a defective product to proceed against the manufacturer for any payments it made and the ability of an employer to proceed against an employee, if it so desires, for any payments it made which were the result of actions of the employee. These indemnity actions are either allowed by statute or common law.

Some states, such as South Carolina, require a settling party to pursue equitable indemnity, but only if the settlement is bona fide, the decision to settle is a reasonable means of protecting the innocent party's interests, the amount of the settlement is reasonable in light of the third party's estimated damages, and the risk and extent of the defendant's exposure should the case be tried. *Griffin v. Van Norman*, 397 S.E.2d 378 (S.C. App. 1990). In *Griffin*, a home seller, who had no knowledge that an exterminator's wood infestation report to purchasers was false, was allowed to recover from the exterminator the amount it paid to the purchasers in order to settle a fraudulent representation claim brought against the sellers by the purchasers. Far too often, we see claims such as these closed within our clients' systems, with no effort at recovery made. The statute of limitations for such subrogation claims in most jurisdictions does not begin to run on the date of the loss. Rather, it frequently (but not always) begins to run on the date the underlying claim is settled or paid. A misunderstanding about this may be one reason so many recovery opportunities are overlooked. Another reason may be the fact that the claims handlers involved were trained mainly in liability adjusting and not subrogation.

When two or more persons' actions contribute to cause a loss, payment by one of the tortfeasors usually means that party has a right to seek contribution against the other "at fault" party. Known as contribution, this method of subrogation has been bolstered by the passage of the Uniform Contribution Among Joint Tortfeasors Act. By 1988, seventeen states had adopted it. The following states have adopted it by statute.

Arizona:	A.R.S. §§ 12-2501 to 12-2509
Colorado:	West's C.R.S.A. §§ 13-50.5-101 to 13-50.5-106
Florida:	West's F.S.A. § 768.31
Massachusetts:	M.G.L.A. c. 231B, §§ 1 to 4
Nevada:	N.R.S. §§ 17.225 to 17.305
North Carolina:	N.C.G.S. §§ 1B-1 to 1B-6
North Dakota:	N.D.C.C. §§ 32-38-01 to 32-38-04
Ohio:	Ohio R.C. §§ 2307.31 to 2307.34
Oklahoma:	12 Okla. Stat. Ann. § 832
South Carolina:	S.C. Code 1976, §§ 15-38-10 to 15-38-70
Tennessee:	T.C.A. §§ 29-11-101 to 2911-106

The Uniform Contribution Among Tortfeasors Act reads as follows:

(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This Act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Act shall not apply to breaches of trust or of other fiduciary obligation.

It is imperative that insurance companies take a look at the recovery dollars which are simply not being realized in the areas of contribution, indemnity and liability subrogation. One thing is certain, these recovery opportunities will never be realized if they are not recognized. Please call on us if you have liability subrogation matters which need review or if you have questions in this area.

WORKERS' COMPENSATION SUBROGATION

SUBROGATING FOR MORE THAN YOUR LIEN

By Douglas W. Lehrer

Imagine subrogating for damages an insurance carrier didn't pay for. What's more, imagine subrogating for *and actually recovering* more than the amount of the claim you paid. Amazingly, both scenarios are possible for subrogating workers' compensation carriers in Wisconsin.

The Wisconsin Supreme Court in *Threshermens Mutual Ins. Co. v. Page*, 217 Wis.2d. 451 (1998) has held that a workers' compensation insurer may seek recovery of an injured employee's claims

even if the employee declines to participate in a third party action. In *Threshermens*, the court held that the Wisconsin Worker's Compensation Act allows an insurer who filed an action against a third party defendant to assert the same claims against the third party as those that would be available to the injured employee, including claims of pain and suffering and future medical expenses. This article will summarize the effects of this holding on an insurer's subrogation rights as well as discuss the increased chances that a workers' compensation carrier may recover damages in excess of benefits paid.

Threshermens arises from an incident whereby an employee was injured when she fell in a parking lot owned by her employer while in the course of her employment. Threshermens was the employer's compensation carrier and, pursuant to the Worker's Compensation Act, made certain payments to the employee to compensate her for injuries she sustained in the fall. Subsequently, Threshermens filed a subrogation action, pursuant to Wis. Stat. § 102.29(1), against the parties responsible for maintaining the parking lot alleging that their negligence caused the employee's injuries which resulted in compensation benefits being paid. Pursuant to statute, Threshermens notified the employee of the pending lawsuit and allowed her the opportunity to join in prosecution of the claim. The employee, however, declined to actively participate in the lawsuit and was subsequently joined as an involuntary plaintiff in Threshermens' action.

During the course of litigation, a dispute arose regarding which damages Threshermens would be entitled to recover at trial. Specifically, Threshermens intended to present evidence and request recovery in damages representing the employee's pain and suffering claim as well as a claim for future medical expenses. The defendants, on the other hand, intended to limit the action to only those payments Threshermens had previously made to the employee. The defendants argued that Threshermens was not entitled to assert a claim for pain and suffering: (1) because it was not obligated to pay pain and suffering as workers' compensation benefits to the employee; and (2) because the employee did not file her own independent action. In addition, the defendants argued that Threshermens could not assert a claim for future medical expenses because such a claim would be "too speculative".

On appeal, the court addressed the issue as to whether a workers' compensation carrier is entitled to recover damages representing an injured worker's claim of pain and suffering as well as a claim for future medical expenses under the Workers' Compensation Act. In determining whether an insurer may properly recover for such claims, the court first looked to the clear and unambiguous language of Wis. Stat. § 102.29(1), which provides in pertinent part as follows:

> *"The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right [as the employee] to make claim or maintain an action in tort against any other party for such injury or death. However, [the employer or compensation insurer, or the employee making a claim] shall give to the other reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel .... If notice is given as provided in this subsection, the liability of the tortfeasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim."*

After reviewing the above language, the court noted that Wis. Stat. § 102.29(1) allows either the injured employee or the insurer to commence an action against a third party tortfeasor and further grants each the "same rights" to make a claim or maintain an action. The court further noted that the statute specifically provides that as long as proper notice is given, "the liability of the tortfeasor

shall be determined as to all parties having a right to make a claim, and irrespective of whether or not all parties join in prosecuting such claim". Since it was undisputed that pain and suffering damages fell within the category of claims to which Wis. Stat. § 102.29(1) applies, Threshermens was entitled to present the employee's claim for pain and suffering to the jury even though Threshermens was never required to pay benefits for pain and suffering.

In regards to Threshermens' claim for future medical expenses, the court noted that the third party liability statute specifically allows a workers' compensation carrier to recover "all payments made by it, or which it may be obligated to make in the future." Although the court acknowledged that there may be some inexactitude in awarding damages for future medical expenses, if competent medical evidence is presented to demonstrate that the employee will incur future medical expenses, Threshermens must be allowed to recover these damages. As such, the court held that denying Threshermens the opportunity to present the claim for future medical expenses violated the clear language of the statute.

Conclusion

The holdings of the court in the *Threshermens* case greatly enhanced an insurer's subrogation rights to recover against a third party tortfeasor. If an injured employee declines to actively participate in a third party action filed under Wis. Stat. § 102.29(1), an insurer is entitled to recover as damages monies above and beyond those actually made to the injured employee. Specifically, the Wisconsin Supreme Court has held that damages such as an employee's pain and suffering and future medical expenses may be included in those an insurer is entitled to recover against a third party defendant, even if the insurer did not pay those damages to the employee. Based upon this ruling, the chances that a workers' compensation insurer will recover not only the total dollar amount paid in benefits to an injured employee, but an amount greater than that actually paid are greatly increased. These are reasons to act promptly and aggressively when subrogating a worker's compensation claim. For specific questions about subrogating workers' compensation claims, please contact Gary Wickert or Doug Lehrer.

WELCOME TO THE FIRM ....

Matthiesen, Wickert & Lehrer, S.C. is proud to announce that Michael R. Sinnen has joined the firm as an associate. Michael is a 2003 graduate of the University of Wisconsin - Green Bay, where he earned a degree in Political Science and graduated *summa cum laude*, with a distinction in his major. Michael then attended the Drake University School of Law, serving as a member of the Drake Law Review and graduating with high honors. Michael also finished in the top ten at the Drake C. Edwin Moore Moot Court Competition, earned recognition on the dean's list every semester of law school and was a recipient of an academic scholarship. We welcome this new addition to our firm, which continues to provide quality insurance litigation representation for clients in Wisconsin and throughout North America.
