MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER MAY 2006

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

To coincide with the May edition of our new monthly electronic subrogation newsletter and bulletin, Matthiesen, Wickert & Lehrer, S.C. is proud to announce the launching of our new website at www.mwl-law.com. The new website contains all of the features of our old website, plus some additional subrogation resources and references which will be of use to subrogation professionals among all lines of insurance. Features of the new website include:

- *lengthy lists of insurance subrogation resource website links;*
- *complete statute of limitations chart for all 50 states;*
- *complete chart detailing the laws for all 50 states regarding reimbursement of insured's deductible;*
- *contributory/negligence comparative fault chart detailing comparative fault systems for all 50 states;*
- *subrogation file referral forms;*
- *archived newsletters;*
- *complete list and text of all subrogation articles published by our firm; and*
- *subrogation question form allowing submission of questions regarding subrogation in any jurisdiction throughout North America.*

Click on the button below to visit our new website and let us know what you think.

http://www.mwl-law.com

WELCOME TO THE FIRM . . . .

Matthiesen, Wickert & Lehrer, S.C. is proud to announce that Kevin M. Differt has joined the firm as an associate. Kevin joins us with seven years of litigation experience having previously worked with the plaintiffs' personal injury firm of Wagner, Falconer & Judd, Ltd. in Brookfield, Wisconsin. We welcome this new addition to our firm, which continues to provide quality insurance litigation representation for clients in Wisconsin and throughout North America.

HEALTH INSURANCE

SUPREME COURT WATCH

The U.S. Supreme Court held oral arguments on March 28, 2006 in the much anticipated case of *Joel Sereboff, et ux. v. Mid Atlantic Medical Services, Inc.* (No.05-260). The case should resolve what has become a post-*Knudson* nightmare for ERISA subrogation within the 6th and 9th Circuits (this includes the states of Arizona, California, Idaho, Kentucky, Michigan, Montana, Nevada, Ohio, Oregon, Tennessee and Washington). The questions presented were whether a Plan fiduciary can bring a civil action against a Plan participant to obtain "appropriate equitable relief" under §502(a)(3) of ERISA, where a term of the Plan

requires the participant to reimburse medical expenses advanced by the Plan in the event of a third party tort recovery and the funds remain identifiable.

The facts are rather straightforward. The ERISA Plan paid $75,000 to the Sereboffs for medical expenses for accident related injuries. The Sereboffs recovered $750,000 and placed those funds into an investment account. The Plan sued the Sereboffs for reimbursement pursuant to 502(a)(3) for appropriate equitable relief. The Sereboffs argued that the Plan was seeking forbidden "legal" rather than "equitable" relief. The 4th Circuit, joined with the 5th, 7th, 8th and 10th Circuits, and held that the action was "equitable" and awarded the Plan its subrogation interest less a prorated share of attorney fees and costs.

The Sereboffs were represented by Whittier Law School Professor, Peter K. Stris, who argued that the requested relief is one for monetary damages and therefore prohibited "legal" relief. On the other side, the ERISA Plan was bolstered by support from the Bush administration and the Solicitor General' s office, who argued that equity traditionally enforced equitable liens created by contract.

The transcript of the Court's oral argument has not yet been released. However, internet blogs have reported on some of the questions of the Justices. According to these reports, Justice Souter reportedly asked whether a judge could issue an injunction in order to decide the issue. The Sereboffs admitted that a judge could, but that the transfer of funds was legal in nature. Justice Scalia said that the case was governed by *Barnes v. Alexander*, 232 U.S. 117 (1914), which held that a contract to convey a specific object makes the contractor a trustee as soon as he receives the object. Meanwhile, Justice Roberts, distinguished Barnes because this case is dependent upon contractual terms, while Barnes dealt with an attorney's creation of a common fund. We will keep you posted as to all developments in this extremely important decision affecting our rights of reimbursement in the difficult 6th and 9th Circuits.

HEALTH INSURANCE

MATTHIESEN, WICKERT & LEHRER, S.C. OBTAINS INJUNCTIVE RELIEF

Matthiesen, Wickert & Lehrer's success in health subrogation continued this month. Attorney Ryan L. Woody is currently representing the Trustees of the Texas Carpenters & Millwrights Health & Welfare Fund in its action against a California Plan member who refused to reimburse the ERISA Plan out of his $3,000,000 tort settlement. The Trustees are seeking equitable relief pursuant to ERISA § 502(a)(3). Most recently, District Judge Miles-LaGrange agreed with the Trustees and issued a Temporary Restraining Order preventing the Plan member from further disbursing the settlement proceeds. The case is *Trustees of the Texas Carpenters and Millwrights Health and Welfare Fund v. Sayyed*, No. 06-CV-246-M (W.D. Okla.).

ARBITRATION

SETTING ASIDE BINDING ARBITRATION DECISIONS

Arbitration has become the miracle cure for subrogating certain types of losses and almost all smaller claims, where both insurers involved are members of arbitration. But simply because arbitration is involved does not mean that carriers can take lightly the preparation of evidence and submissions to Arbitration Forums. Matthiesen, Wickert & Lehrer, S.C. regularly prepares and files arbitration packages, briefs and submissions for clients wishing to arbitrate certain subrogation matters, yet still intent on seeing to it that they have the best chance of prevailing. However, even having experienced subrogation counsel present your arbitration case doesn't ensure that you won't be saddled with illogical, ambiguous, and indefinite arbitration results which are binding. Although arbitration results are binding, one recent New York appellate court in *In re Arbitration between Utica Mutual Ins. Co., and Selective Ins. Co. of America*,

N.Y.S.2d, 2006 WL 721434, N.Y.A.D. 3 Dept. (March 23, 2006) has held that where an arbitration award is arbitrary and capricious, even a binding arbitration award can be set aside.

Utica and Selective were automobile insurance companies who insured, respectively, two policyholders involved in a motor vehicle accident that occurred in New York in July of 2001. After paying $50,000 in no-fault benefits, Utica filed an application for mandatory arbitration with Arbitration Forums, Inc., a company that administers no-fault arbitrations in New York (see Insurance Law § 5105). In January 2004, an arbitrator rendered a decision finding that *"Selective submitted proof [of] negligence against [petitioner] (Utica), 70%, comparative negligence applied."* The determination further stated that *"Comp[aritive] Neg [ligence] applies, find [Utica] -30%[;] [Selective] -70%" and awarded $35,000 to Utica.* After receiving the arbitrator's findings, Selective commenced a CPLR Article 75 proceeding seeking an order vacating the arbitrator's determination. Utica cross-moved for confirmation of the award. The Supreme Court (New York's trial court), finding the arbitrator's award to be "exceedingly indefinite," vacated the award and remanded the matter to the arbitrator to clarify her findings. Utica did not seek a stay of the court's order, but instead filed an appeal in the Appellate Division. Meanwhile, the arbitrator issued an amended decision indicating that the "liability percentage was reversed," finding Utica's insured to have been 70% at fault and Selective's insured to have been 30% at fault, and reducing Utica's award to $15,000. Upon respondent's petition for vacatur, the trial court concluded that the arbitrator's amended decision further confounded the issue. The court vacated the amended award and remanded the matter to the arbitrator for further guidance. In a second amended decision, the arbitrator again awarded Utica $15,000. The petitioner then moved to dismiss this appeal as moot, asserting that the arbitrator had issued a definitive decision establishing liability.

In its opinion vacating the award, the appellate court said that where arbitration is compulsory, "the standard for judicial review of the award is more exacting than in voluntary arbitration" (*Matter of Furstenberg [Aetna Casualty. & Surety Co. - Allstate Ins. Co.],* 49 N.Y.2d 757, 758 [1980]) and "[t]o be upheld, an award . . . must have evidentiary support and cannot be arbitrary and capricious" *(Matter of Motor Vehicle Accident Indemnity Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 214, 223 [1996]). Particularly relevant here, an award may be vacated where the arbitrator "so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511[b][1][iii]; see *Matter of Meisels v. Uhr,* 79 N.Y.2d 526, 536 [1992]). As the Supreme Court explained, the original award is internally inconsistent because it states that respondent was 70% negligent, yet apportions only 30% of fault against respondent. Further confusion was created by the arbitrator's incorrect statement that respondent's insured was cited for a traffic violation at the scene, whereas it was in fact petitioner's insured who was cited. Finally, we note that in seeking to vacate the first amended award, which suffered from many of the same infirmities as the original award, the respondent itself characterized the award as "ambiguous and indefinite and as written, fail[ing] to present a coherent, rational determination." Under these circumstances, we agree with the Supreme Court that vacatur of the original award was required.

The court said that in order to be upheld, an award . . . must have evidentiary support and cannot be arbitrary and capricious" (*Matter of Motor Vehicle Accident Indemnity Corp. v. Aetna Casualty & Surety Co.,* 89 N.Y.2d 214, 223 [1996].). Particularly relevant here, an award may be vacated where the arbitrator "so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511[b][1][iii]; see *Matter of Meisels v. Uhr,* 79 N.Y.2d 526, 536 [1992]).

This decision is very significant in that it allows a foothold for anyone victimized by an illogical, arbitrary or capricious finding by the arbitrators. At the moment, the holding is limited to New York, but expect similar decisions in other states and under different fact patterns to follow.
