

MATTHIESEN, WICKERT & LEHRER, S.C.

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

OCTOBER 2006

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.

NEW! LIVESTOCK/VEHICLE COLLISION SUBROGATION BOOK

After many requests, and as a result of receiving hundreds of subrogation questions involving vehicle/livestock collisions in all fifty states, we have written a book on the subject and it is now ready for distribution. It is entitled "WHERE'S THE BEEF? Subrogating Livestock/Vehicle Collisions In All 50 States". Even more than other areas of subrogation, the laws regarding liability of livestock owners are esoteric, complex, and are in a constant state of flux and change. Even a thorough understanding of state law on the subject leaves one lacking for the full legal picture, as many states allow individual counties to pass local stock laws relevant only to accidents occurring within that particular county. This new book contains the most thorough treatment of this area of subrogation law ever assembled. The book helps the claims professional with even the smallest of claims by quickly providing relevant case and statutory law to cite to liability adjusters who might otherwise simply deny the claim. It also helps the practicing subrogation attorney by giving him/her the resource tools necessary to litigate this area of the law in which the law varies not only from state to state and county to county, but quite literally, from one side of the street to the other.



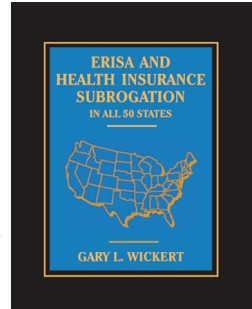
An additional useful resource contained within this new book can be found in Sections 1.04 and 1.05 of Chapter One, entitled, "Purposes of Subrogation" and "Anti-Subrogation Arguments". These sections contain a strong policy argument in favor of subrogation - something sorely missing within this area of the insurance industry. These arguments can be used in both appellate briefs as well as correspondence with third party claims professionals with whom you are negotiating for resolution of a claims loss. They also contain a rundown on the most prevalent anti-subrogation arguments we run across in our business, and counter-arguments to those positions. It is time to start defending the public policy and societal/economic benefits of subrogation, and these two sections serve as a jumping-off point for doing so. The Table of Contents for the 506 page book can be viewed by clicking the below button.

Where's the Beef?
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Ordering the book is easier than ever and the cost is only \$49.95. The book can be ordered by sending an e-mail to Jamie Breen at jbreen@mwl-law.com. Jamie will send you a copy of the book along with an invoice. This new subrogation tool will give you an advantage when negotiating livestock/vehicle collision cases involving property damage or personal injury.

**NEW! 2007 UPDATED SECOND EDITION ERISA AND HEALTH
INSURANCE SUBROGATION IN ALL 50 STATES**

After two years in the making, the Second Edition of "*ERISA And Health Insurance Subrogation In All 50 States*" is finally finished and ready for 2007! It is available through Juris Publishing at <http://www.jurispub.com>. This edition is the most complete and thorough treatise covering the complex subject of ERISA and health insurance subrogation ever published.



The Second Edition of *ERISA And Health Insurance Subrogation In All 50 States* marks a new era in health insurance subrogation in our country. The book encompasses, dissects, and explains all of the new state and federal case and statutory law which has been decided since the First Edition was published. A lot has changed and much of the book had to be rewritten and reorganized in light of the landmark 2006 U.S. Supreme Court decision in *Sereboff v. Mid-Atlantic Medical Services*, which served as damage control and clarification of the confusion caused by the conflicting Circuit Courts of Appeals' treatment of the 2002 U.S. Supreme Court decision in *Great-West Life & Annuity Ins. Co. v. Knudson*. Other significant case law, including the 11th Circuit's *Popowski* and *Carillo* decisions, are also analyzed, explained, and applied. Suggested plan language improvements are even included to deal with the tsunami of changes which have affected health insurance law since the First Edition. Pending litigation and possible Congressional action, which may affect health insurance subrogation in the coming years, is discussed and explained in the Second Edition - which is the most comprehensive and thorough treatment of this area of the law ever compiled.

Although health insurance subrogation has become unduly complex and confusing over the last five years, the Second Edition goes to great lengths to make the complex issues understandable, easily digestible and useful for practicing lawyers, inexperienced health insurance subrogation claims handlers and other subrogation professionals. For the first time since 2002, health insurance subrogation professionals can spend less time reacting to the drive-by confusion and damage inflicted by the *Knudson* decision - a case which should never have been appealed in the first place - and spend more time focusing on maximizing health plan recoveries in both state and federal court. The Second Edition contains a rewrite of Chapter 10, with an expanded easy-to-understand explanation of the complicated interplay between state and federal court jurisdiction as it applies to a plan's rights of subrogation and reimbursement. In short, the Second Edition is the best resource on ERISA and health insurance subrogation to be found anywhere. No claims handler, plan administrator, subrogation professional, or lawyer should be without it. The table of contents can be viewed by clicking on the button below.

It can be ordered through the publisher's website at <http://www.jurispub.com> or through our website at <http://www.mwl-law.com>. We believe this revised Second Edition is more user-friendly and has more information applicable to claims handlers and subrogation professionals, as well as lawyers. We are confident it is an indispensable tool for any insurance professional with subrogation responsibilities.

WORKERS' COMPENSATION SUBROGATION

**SLEEPING WITH THE ENEMY:
Federal Statute Creates Opportunity For Subrogation
Stipulation In Workers' Compensation Files**

By Gary L. Wickert

Greek mythology and subrogation have much in common. In mythology, as a punishment from the gods for his trickery, Sisyphus was compelled to roll a huge rock up a steep hill, but when he reached the top of the hill the rock always rolled down the other side, and he had to begin again. In subrogation, recovery professionals must negotiate daily with and combat the trickery and deception of trial lawyers looking to greatly reduce or eliminate their workers' compensation subrogation interests. Purported stipulations and subrogation reimbursement agreements seemingly roll down the other side of the subrogation hill when real dollars are put on the table, setting the subrogator to his task all over again. Effective negotiation strategies and successful ploys, therefore, are worth their weight in gold. One such strategy is a little-known tactic which involves use of a federal statute.

Trial lawyers spend a great deal of time and money keeping their third party personal injury suits pending in favorable venues in state courts around the country. When the plaintiff is a citizen of a different state than every defendant in such a suit, federal diversity jurisdiction can be invoked by the defendants under 28 U.S.C. § 1332, and a state court lawsuit can be removed to federal court where its value plummets. Most lawyers eschew federal court – even to the point of adding defendants with little or no potential culpability in order to destroy diversity – because federal court judges do not allow much latitude in discovery, federal rules are stricter, and the cases are often pushed to trial much more quickly than a meticulous trial lawyer would like.

Subrogating workers' compensation carriers should always be looking for ways to strike a reimbursement agreement with a plaintiff's attorney, in which the compensation lien is repaid with a reduced or eliminated deduction for attorney's fees, costs, or made whole considerations, where applicable. A nice tactic to consider in workers' compensation subrogation cases involves a federal statute located at 28 U.S.C. § 1445(c). That federal statute provides that:

"A civil action in any state court arising under the workman's compensation laws of such state may not be removed to any district court of the United States."

Therefore, if this section applies, a third party lawsuit cannot be removed to federal court by the defendants, even if there is complete diversity OR a federal question. When there is a plaintiff's attorney involved in a subrogation file you are handling, and it looks like diversity or the existence of a federal question leaves no option but filing in, or removal to, federal court, consider negotiating with the plaintiff's attorney to keep the suit in state court by means of this federal statute. The subrogation laws of most states allow a worker's compensation carrier to file a third party action if the worker does not, and in some case, even if he does. If the two of you agree, and the compensation carrier initially files the third party suit, and the plaintiff later intervenes, the above federal statute may prevent removal of the case. This is music to the ears of plaintiffs' attorneys looking desperately to avoid removal to federal court from favorable venues. The new case of *Pemiscot-Dunklin Electric Coop v. Jacobson*, 2006 WL 2432026 (E.D. Mo. August 18, 2006) clearly indicates that a third party suit filed by a compensation carrier under Section 187.150 of the Missouri workers' compensation subrogation statutes, is a suit "arising under the workman's compensation laws" of Missouri. The same is true in most states. Therefore, in exchange for guaranteeing the carrier a complete recovery, perhaps with a reduced claim for attorney's fees or no claim at all, the value of the plaintiff's case can double or triple.

The viability of this maneuver depends entirely on whether the ability of a workers' compensation carrier to file a third party action stems from a state's common law or whether it is expressly provided for in the state's workers' compensation statutes. In the case of the former, the third party suit would not be considered to have arisen under the workers' compensation laws of the state, and removal to federal court would be allowed. In the case of the latter, 28 U.S.C. § 1445(c) would prevent removal and give the subrogating carrier the ability to help out the plaintiff's attorney by preventing the dreaded removal to federal court. The 8th Circuit, construing Missouri law, has confirmed that this statute prevents removal regardless of whether federal jurisdiction arises due to diversity of citizenship of the parties, or the existence of a federal question. *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995). Any third party action filed by a carrier pursuant to this strategy should clearly delineate that it is being filed pursuant to the specific statute in that state which grants carriers the right to file.

If the plaintiff's attorney agrees to protect your subrogation interest – or a pre-agreed high percentage of it – and not claim any attorney's fees or only a drastically reduced percentage for fees, you not only save fees and costs because your subrogation counsel can be relatively inactive and passive in the case, but the reduction in attorneys' fees agreed on helps maximize your subrogation recovery. Everyone is happy. The plaintiff gets a bigger recovery, which translates into a bigger future credit for you. The plaintiff's attorney gets a bigger fee from a bigger pie. The workers' compensation carrier maximizes its subrogation recovery and its future credit, while paying less in attorneys' fees which would not be included in the credit if paid. In short, everybody wins. The stone finally comes to rest at the top of the hill.

Workers' Compensation and Work-Related Traffic Accidents

By Debra J. Roy

In 2004, crashes involving vehicles on public roadways was the leading cause of work-related fatalities, according to the U.S. Bureau of Labor Statistics, accounting for almost a quarter of all fatal work injuries. As subrogation professionals, recovering claim dollars is only one facet of our responsibilities. Educating and informing our insureds, risk management, and recovering deductibles are other ways in which we provide full service insurance services. All too often, our insureds do not notify or educate their employees with regard to behavior both before and after losses. As a reminder, the following are some areas in which our insureds can help reduce claim losses and help subrogation efforts if a loss occurs.

Steps you can take after an accident to help your employer's workers' compensation carrier subrogate your work-related traffic accident claim:

- If you witness an accident, provide a statement to police.
- Make sure the police are notified of the accident and arrive at the scene.
- Obtain contact information for independent witnesses.
- Seek medical attention immediately, if needed.
- As soon as possible, write a narrative of the accident, even if you have already provided a statement to the police. Be as descriptive as possible, even preparing a diagram of the accident scene.
- If injured, keep a diary of your rehabilitation.
- Keep a list of contact information for each of your medical providers.
- Do not speak to any adverse party regarding the accident; speak only to your attorney (if you have retained counsel). If you have not yet retained counsel, speak only to your employer and your employer's attorney.

Steps you can take before a possible accident:

- Do not operate any vehicle or equipment that you think is defective. Notify the safety director or other appropriate person of the danger, in writing, if possible.
- Keep maintenance records up to date on company vehicles.
- Participate in training for the operation of company vehicles/equipment by participating in any type of equipment/drivers' safety courses/classes offered.
- Keep yourself in good physical health. NHTSA statistics show that at least 1,500 deaths occur each year as the result of drivers falling asleep at the wheel.
- Pay attention to your driving behavior. In 2004, speeding was a contributing factor in 30 percent of all fatal crashes and more than 900 people died as a result of vehicles running red lights.
- If you are traveling near a large truck, remember that they have many blind spots, so allow plenty of room when making a maneuver near a large truck. Also, remember that the larger a vehicle is, the longer it will take the vehicle to slow or stop, so do not pull abruptly in front of any large vehicle. In 2004 and 2005, an estimated 190 people died in crashes involving large trucks.

SHORTENED TIME TO ANSWER LAWSUIT IN WISCONSIN

By Douglas W. Lehrer

Under previous Section 802.06 of the Wisconsin Statutes, a defendant served with a lawsuit had 45 days in which to answer the complaint. However, on May 23, 2006, Governor Jim Doyle signed into law 2005 Wisconsin Act 442, which drastically shortens this time period. Effective October 1, 2006, defendants will no longer have 45 days to answer, but must file an answer within 20 days after being served. Amended Section 802.06 now provides that defendants must act quickly to get lawsuits answered within 20 days or risk being in default. The new law does provide an exception for situations in which the defendant is a state or an officer of the state, the defendant is an insurance company sued directly, or the complaint alleges that a tort (civil wrong) occurred.

The new law raises questions and concerns on the part of subrogating carriers in a state in which subrogated parties must be added as an involuntary plaintiff. In practice, however, many subrogees are brought in as defendants, which technically means they must file an answer or risk being in default. This becomes even more critical in a state such as Wisconsin where subrogated entities must become parties, and defaulting on such a claim can mean waiving your subrogation interests. If you are served with a citation and summons in Wisconsin as a subrogated insurance carrier, please be careful and see to it that the complaint gets into the hands of Wisconsin subrogation counsel at your earliest convenience, in order to avoid being found in default. Under the amended statute, an answer must be filed by the responding party within 20 days after service of the complaint, unless the case is against a state or an officer, agent, employee or agency of the state. Please contact Doug Lehrer at dlehrer@mwl-law.com with any questions you may have.

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.