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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER DECEMBER 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.

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INSURANCE SUBROGATION

DEFENDING SUBROGATION

On November 20, 2007, the *Wall Street Journal* wrote a rather slanted piece slamming subrogation and the "grab for legal winnings" resulting from subrogation. The article focused on one particular case involving a brain-damaged woman named Deborah Shank, whose $700,000 settlement was assailed by her subrogated health insurer. It painted a very dark picture of subrogation. The National Association of Subrogation Professionals ("NASP") Amicus Committee responded with a letter to the *Journal*, essentially defending and justifying subrogation. A copy of the article and community responses to the subject (including one from Gary Wickert) can and should be viewed by clicking the below button:

Accident Victims Face Grab For Legal Winnings - *Wall Street Journal*

It is educational for subrogation professionals to read the various comments posted in the blog in order to get a realistic view of how subrogation is understood and received by the lay person - the very person who will be calling his or her legislator when an anti-subrogation bill (like the one we testified about in Kansas) is up for vote in Congress or any particular state. Several important public policy justifications for the often confusing and misunderstood concept of subrogation resonate more than others with a populace ignorant of both the truth and the many benefits of subrogation. Some of these public policy justifications have been left out of NASP's response to the *Wall Street Journal* article, and bear stressing here.

One of the lynchpins underlying subrogation - and the one cited most by legal scholars and courts across the country in support of the concept - is the fact that it serves to prevent a *double recovery* by the insured, who would otherwise recover once from his or her insurance policy (first party), and again from the tortfeasor's settlement or judgment (third party). Allowing a double recovery to the insured is against public policy, as it allows a windfall to the insured, and results in two separate insurance policies paying for the same elements of damages. The public policy against allowing a double recovery has been echoed by American courts since the country was founded. In 1876, the U.S. Supreme Court had this to say:

> *"Compensation by the wrongdoer after payment by the insurers is not double compensation, for the plain reason that insurance is an indemnity; and it is clear that the wrongdoers are first liable, and that the insurers, if they pay first, are entitled to be subrogated to the rights of the insured against the insurers."* The Atlas, 93 U.S. 302 (1876).

The concept of a "double recovery" is one that is easily understood by and does resonate with a public which is illiterate when it comes to legal concepts such as subrogation. It smacks of "fairness" and should be the poster child of any subrogation campaign aimed at winning the hearts of Americans on the subject. The notion that subrogation prevents the person ultimately responsible for causing injury or loss from evading responsibility for his or her actions - as pointed out in the NASP rebuttal – is a valid policy justification for subrogation. However, the danger in relying on this justification alone is that the collateral source doctrine – a rule existing in most states which prevents the admission of trial evidence showing that the victim's damages were partially compensated by collateral sources such as insurance – is that the collateral source rule eliminates the risk of a tortfeasor evading responsibility. However, collateral source rules simultaneously emphasize the need to prevent a double recovery, which subrogation effectively accomplishes.

Let's also not sell the storied history of subrogation short. Subrogation is actually one of the oldest legal concepts in jurisprudence, having had its roots in Roman law. Under the reign of Emperor Hadrian (A.D. 177 - A.D. 138), Roman law began to shape the building blocks of subrogation. Suretyship began as an accessory contract and the concept known as *beneficium cedendarum actionum* (subrogation to the right of action of the creditor against the principal debtor or pro rata against the co-sureties) was later perfected by Justinian himself. Our U.S. Supreme Court has supported and validated the concept and underlying justifications for subrogation since 1799. Even that is considered modern history considering subrogation is also one of the oldest concepts known to Anglo-American common law, and seems to have been formally established, also with regard to suretyship, in 1215 in the *Magna Carta.* It has a very long and proud heritage, but you wouldn't know that by the amount of public support it gets from our industry. NASP is a good start, but the industry itself must wake up to what is at stake.

Perhaps, most importantly, societal justification for subrogation, however, is the fact that subrogation helps keep premiums lower for all Americans and reduces the burden of insurance on the public. This is something all Americans, Republican or Democrat, tort reformers or trial lawyers, can benefit from and agree on. The only problem is, we haven't done a good job of marshaling evidence in support of this fact, and have done an even worse job of communicating this benefit to the public. Courts have opined on the subject in a variety of ways, but at least with regard to workers' compensation, it has been put like this:

> *"This situation [before subrogation] was, in reason, imperfect; it served to bring to the employee more than his damages, which was, perhaps, not sound economy, and to make the insurance more burdensome to the insurer and hence more expensive to the employer*

and ultimately to the public than would have been the case had the amount recovered from the actual tortfeasor been applied first to the repayment of the amount of the compensation, and then the balance to the employee, to make him whole." Consolidated Underwriters v. Kirby Lumber Co., 267 S.W. 703 (Tex. Comm. App. 1924).

In New York, where they have modified their collateral source rule to allow evidence of collateral sources, but then require a reduction of any jury award in the same amount except where there is a subrogation right, efforts to repeal the subrogation exception have produced court testimonials to the virtues of subrogation such as the following:

*"The terms of the statute clearly limit its reach to those plaintiffs who have or will be compensated by a collateral source. The intention behind section 4545 is to prevent double recovery for the same injury, and thereby to reduce insurance premiums (5 Weinstein-Korn-Miller, NY Civ. Prac. § 4545.01, p. 5-612). If recovery in subrogation actions were limited by section 4545, as defendants contend, the loss would be borne by the insurers. By not limiting recovery the insurer obtains reimbursement for monies it pays to its insured by passing the loss onto the tortfeasor and his insurer. In either case the insured, limited by section 4545(c), is compensated only once for his loss. The cost to the insurance industry as a whole is the same, except that the tortfeasor's insurer will ultimately pay for the loss, placing the burden where it *461 properly belongs. The goal of reducing insurance premiums is advanced by permitting full recovery in the subrogation action because the insurer is reimbursed by the tortfeasor rather than having to increase its own premiums to obtain reimbursement. Construing section 4545 as limiting recovery in subrogation actions, therefore, does nothing to further the purpose of the legislation."* Kelly v. Seager, 545 N.Y.S.2d 261 (N.Y. Sup. 1989).

The insurance industry is second to none when it comes to lobbying and public relations on many subjects. Unfortunately, subrogation is not one of them. Public relations is perhaps the number one responsibility of any organization involving subrogation, and calls out for industry efforts to appear before legislative bodies, consider opportunities for public education, respond to partisan and slanted pieces like the one in the *Wall Street Journal*, write and submit articles on subrogation to national publications, and generally serve as a sentinel of and an advocate for the subrogation rights of our industry.

On September 18, 2007, Matthiesen, Wickert & Lehrer, S.C. appeared and testified before the Kansas Legislature in support of a proposed Senate Bill which would have repealed the current law prohibiting the inclusion of subrogation language in health insurance plans and policies. Our testimony included responding to questions from the legislators about the value and societal benefits of subrogation, as the turnout from trial lawyer advocacy groups, the Kansas Health Consumer Coalition and the AARP, were large – all speaking against the bill. Each of the opponents of the bill spouted trite aphorisms about stealing money from badly injured women and children and the tsunami of additional litigation we can expect from subrogation in Kansas. Sadly, we were the only ones who showed up to squelch such specious nonsense and in support of a bill that would have reinvigorated subrogation rights in an entire American state. Even Blue Cross & Blue Shield of Kansas, who has a sizeable presence in downtown Topeka, where the hearing was held, was conspicuously absent. A copy of MWL's testimony before the Committee can be seen at http://www.mwl-law.com/CM/Newsletters/Newsletter-October-2007.pdf.

Writing letters to the *Wall Street Journal* in support of subrogation is good. But that alone will not win the day for subrogation – which is under attack on all fronts and in every state in the country. Aggressive education and advocacy are needed to combat the rather poignant and easily

understandable propaganda from trial lawyers and consumer advocacy groups, who simply point out that subrogation often takes money out of the pocket of injured individuals and aggrieved insureds. We must stress the big picture and NASP should be applauded for the aggressive rebuttal, and urge its members to educate themselves and regurgitate the important public relations and lobbying sound bites underscoring subrogation which are not only critical to foster positive legislative and judicial treatment of subrogation, but are good for America and the American economy.

WORKERS' COMPENSATION SUBROGATION

ILLINOIS COURT OF APPEALS REBUKES JUDGE FOR REDUCING LIEN

Michele Smith v. Louis Joliet Shoppingtown, L.P. and Panera, L.L.C., No. 1-06-2988 (2nd Div. Ill. Ct. App., Oct. 30, 2007)

Subrogation professionals accustomed to being admonished by judges to reduce their liens or give up on subrogation interests sometimes enjoy when the situation is reversed. Such is the case of *Michele Smith v. Louis Joliet Shoppingtown, L.P. and Panera, L.L.C.*, an appeal from the Circuit Court of Cook County to the Second Division of the Illinois Court of Appeals decided on October 30, 2007. In this case, Michele Smith was injured in the course and scope of her employment with United Parcel Service, when she slipped and fell on the defendant's premises. Her employer's workers' compensation carrier, Liberty Mutual, paid a total of $143,000 in benefits to or on behalf of Michele Smith. At a settlement conference, the defendants offered to settle for $110,000, and the plaintiffs sought the advice of the court with regard to the workers' compensation lien, which exceeded the amount of the offer. The court recommended that Liberty Mutual settle for $25,000 in satisfaction of their lien. Liberty Mutual countered, requesting $50,000 out of the $110,000 in satisfaction of its lien. The court gave Liberty Mutual two options: (1) accept $25,000 with recovery of costs, or (2) accept $30,000 without recovery of costs. The attorney representing Liberty Mutual communicated the recommendation to the claims handler, who did not immediately respond. Meanwhile, the plaintiff and defendant negotiated a settlement in the amount of $110,000, and the court adjudicated Liberty Mutual's workers' compensation lien to $30,000, without counsel for Liberty Mutual present and dismissed the case with prejudice.

Liberty Mutual filed a motion to vacate the court's order, maintaining that § 5(b) of the Illinois Workers' Compensation Act requires that Liberty Mutual provide the court with written consent of any settlement, which did not happen because Liberty Mutual was not present when the settlement was reached. The trial court found that Liberty Mutual was either estopped from objecting to the court's order or it waived the objection to the court's order because it had left the courthouse on the day of the settlement conference. The trial judge stated, "there is such a thing called estoppel, there is such a thing called waiver, there are all kinds of things that we have in the law of business that maybe this particular claims adjuster might want to learn about." Liberty Mutual appealed.

On appeal, it was the judge that learned about the law of business. He learned that when a statute says something, even a trial judge cannot deviate from the statute. Liberty Mutual contended on appeal that it was entitled to full reimbursement of its workers' compensation lien and that the court erred in adjudicating the lien to a lesser amount without its consent and that it was entitled to the plaintiff's entire recovery of $110,000, less 25 percent for attorneys' fees.

The Illinois Workers' Compensation Act § 5(b) provides that Liberty Mutual has a statutory lien on any recovery the employer receives from the defendants. The Act further provides that no release or settlement, and no satisfaction of judgment shall be valid without the written consent of the employer and the employee. It provides that such consent is not required of the employer where the employer has been fully indemnified or protected by the court's order - which Liberty Mutual was not in this case. The Court of Appeals quoted the Illinois Supreme Court in *Blagg v. Ill. F.W.D. Truck & Equip. Co.*, 143 Ill.2d 188 (Ill. 1991), stating that "it is of the utmost importance that the trial court protect an employer's lien." Here, Liberty Mutual did not consent to either of the trial court's recommendations and its lien was not protected by the court's order because it would have provided for Liberty Mutual to receive only a fraction of the plaintiff's settlement. The Court of Appeals held that Liberty Mutual was not estopped from recovering its lien and did not waive its right to recover its lien, because a waiver arises from an affirmative act, and amounts to an intentional relinquishment of the main right - which Liberty Mutual did not do in this case. Therefore, the Court of Appeals reversed the trial court's judgment and remanded the case to the circuit court with directions to the judge to order payment to Liberty Mutual in accordance with § 5(b) of the Act. In short, Liberty Mutual will recover the entire settlement, less 25 percent for attorneys' fees.

Despite the many obstacles thrown in the path of subrogating workers' compensation carriers, it should be remembered that many statutes are written so as to strongly support the carrier's right of subrogation. Often, there is no reason for a carrier to settle for a diminutive portion of a plaintiff's settlement, or even agree to apportion the settlement one-third to the worker, one-third to the worker's attorney and one-third to the carrier. Workers' compensation carriers have a great amount of leverage and should insist on receiving the lion's share of any settlement which is less than the amount of the carrier's lien, and certainly no less than half of that amount.

WORKERS' COMPENSATION SUBROGATION

WORKERS' COMPENSATION VS. NO-FAULT

Subrogating Delaware Workers' Compensation Against PIP and Med Pay Benefits

Workers' compensation claims handlers are sometimes faced with the prospect of subrogating against an employee's automobile policy's uninsured/underinsured coverage. The carrier's right to be reimbursed from such benefits is clear, regardless of which state you are in. You are allowed reimbursement under the policy of the worker, the employer, both, or neither - depending on the state under whose laws the benefits were paid. The ability to subrogate such payments can be found on our chart entitled *Workers' Compensation Subrogation In All 50 States* found on the home page of our website at www.mwl-law.com. However, the compensation carrier's right to reimbursement from PIP or Med Pay benefits is a horse of a different color, and is highly dependent on interplay between the workers' compensation subrogation statute and the state's automobile.

Under the "primacy rule" created by statutes in many states, the workers' compensation insurer is primarily liable for the benefits due under the Workers' Compensation Act. And, to the extent payment is due under that Act, the liability of the carrier providing PIP benefits is reduced. This is how it works in most states. Most workers' compensation reimbursement statutes grant the carrier a right to recoup their benefits from a "third person" other than the employer or employee, who is responsible for causing the accident. PIP and Med Pay coverage is generally not considered to be a "third person". Still, the laws of some states, such as Delaware, provide that no-fault type benefits such as PIP and Med Pay are to be deducted from a verdict or are not allowed into evidence.

The Delaware Workers' Compensation Statute (19 Del. C. § 2363) says that "(a) Where the injury for which compensation is payable...was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages..." Section 2363 was amended in 1993 to clarify the subrogation rights of insurers where both workers' compensation and no-fault benefits (PIP and Med Pay) are payable to an injured person. The statute's amended subsection (e) now reads:

> *"Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the Workmen's Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, except that for items of expense which are precluded from being introduced into evidence at trial by 21 Del. C. § 2118, reimbursement shall be had only from the third-party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved."*

Delaware also has statutory law dealing with the provision of PIP and Med Pay benefits - law which seemingly creates conflict between it and the subrogation rights of a workers' compensation carrier. With regard to no-fault benefits, Section 2118 provides as follows:

> *"(h) Any person eligible for benefits described in paragraph (2) or (3) of subsection (a) of this section, other than an insurer in an action brought pursuant to subsection (g) of this section, is precluded from pleading or introducing into evidence in an action for damages against a tortfeasor those damages for which compensation is available under paragraph (2) or (3) of subsection (a) of this section without regard to any elective reductions in such coverage and whether or not such benefits are actually recoverable."*

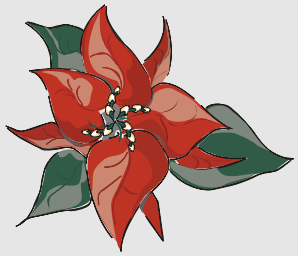
So, the question of whether these no-fault benefits can be recovered from a third party (so they can be reimbursed to the compensation carrier under § 2363), was an unknown until the 1993 amendment. Before the amendment to 2363, where workers' compensation benefits were paid out before PIP and Med Pay benefits, the Delaware courts created an exception to subsection (h). *Duphily v. Delaware Elec. Co-op, Inc*., 662 A.2d 821 (Del. 1995). The court in *Duphily* stated that under § 2363, a workers' compensation insurance carrier is permitted to join in the employee's personal injury action against a third party to assert its lien. Any recovery by an employee in the action "shall first reimburse the employer or its worker[s'] compensation carrier for any amount paid or payable under the Workmen's Compensation Act...." § 2363(e). The purpose of this section is to prevent an employee from receiving compensation for his loss by the third-party tortfeasor when the loss has already been compensated through workers' compensation. *State v. Calhoun*, 634 A.2d 335 (Del. Supr. 1993). Thus, the law prevents a double recovery by the employee and permits the employer or its insurer to recoup its compensation payments. *Moore v. General Foods*, 459 A.2d 126 (Del. Supr. 1983).

In *Duphily*, decided before the amendment to § 2363, the court held that, under § 2118(h), any special damages (PIP benefits) covered by the Delaware no-fault statute cannot be pled or introduced into evidence in an action for damages against a tortfeasor. Delaware Electric maintains that, under this statute, evidence of Duphily's medical expenses which might have been covered by PIP could not be introduced at trial, regardless of whether the PIP benefits were actually ever

paid. It was argued that, in an action against an alleged tortfeasor, the right of the workers' compensation insurance carrier to be reimbursed under § 2363(d) from the employee's recovery is limited by § 2118(h), which excludes any amount payable under the Delaware no-fault statute. The Delaware court did not believe that § 2118(h) was intended to foreclose the compensation carrier's subrogation rights under § 2363(d) for reimbursement of medical expenses simply because a motor vehicle was involved in the employee's accident, especially when there has been no claim asserted for PIP benefits. In that case, the court said that the jury should have been informed of the amount of payments made by the compensation carrier for the worker's medical expenses as well as the fact that any recovery for these expenses should be awarded to the carrier instead of the plaintiff. This approach permits the workers' compensation carrier to recover directly from the tortfeasor and allows the jury to fully understand its role in awarding damages. Accordingly, we hold that, in this case, evidence of Duphily's medical expenses should have been admitted.

After the aforementioned amendment to § 2363, an unreported Superior Court case told us how the newly amended statute would be interpreted in light of § 2118(h). In *Peiffer v. City of Wilmington*, 1996 WL 527208 (Del. Super. 1996), the court noted that the Legislature, in enacting the amendment to § 2363(e), revised the procedure for a workers' compensation carrier to obtain reimbursement when PIP coverage is available. The new statute provides that if a workers' compensation carrier is entitled to reimbursement where PIP is involved, then the workers' compensation carrier may recover only the maximum amounts of the third party's liability insurance coverage once the plaintiff's claim is settled or otherwise resolved. This means that if there is a trial, the special damages will not be introduced in accordance with § 2118(h). The workers' compensation carrier will be allowed to look to the PIP carrier for reimbursement and not to the sums the plaintiff might recover. The plaintiff will receive money, and the PIP carrier ultimately will be responsible for the PIP benefits. In essence, the workers' compensation carrier will be allowed to subrogate against PIP and Med Pay coverage under those circumstances.

The ability of a workers' compensation carrier to recover PIP and Med Pay benefits depends heavily on the state you are subrogating in, and the particular facts of the case involved. If PIP and Med Pay benefits have been paid and received by the worker, the result may be different, and the carrier may, in fact, be allowed to claim such benefits in the actual third party case, seeing as its opportunity to claim them directly from the auto carrier has been lost. While the interplay between workers' compensation and automobile insurance law may be complicated - and in the case of Delaware, seemingly contradictory - the important lesson here is that the subrogation professional be aware of the issue and the potential interplay between the two.



The best part of the holiday season is remembering those who make the holidays meaningful. Matthiesen, Wickert & Lehrer, S.C. would like to wish you and your families all the happiness and prosperity this season can bring. May it follow you throughout the coming year!