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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **FEBRUARY 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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THE ILLINOIS COMMON FUND DOCTRINE:

Illinois Court of Appeals Sides With Trial Lawyers

Stevens v. Country Mutual Ins. Co., 2008 WL 5473299 (Ill. App. 2008)

On the last day of 2008, the Illinois Court of Appeals for the 4th District climbed into bed with the plaintiffs' trial lawyers by allowing them to recover attorneys' fees from subrogated Med Pay benefits which are reimbursed to an auto carrier – even when the insurance company could have recovered it on its own. The Common Fund Doctrine, of course, is the equitable rule which allows an attorney "who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees." The facts on which the court based its decision are as follows.

In August, 2005, Matthew Stevens, who was insured by Country Mutual, suffered injuries in an automobile accident with Heather Phares, who was insured by State Farm. Stevens hired Attorney Bruce Beeman to represent him, and Beeman sought to enforce Stevens' claim against Phares by informing State Farm of his fee contract with Stevens and requesting that State Farm disclose its policy limits.

Country Mutual Insurance Company paid $20,420.60 in Med Pay benefits to Stevens to partially defray his medical expenses, which totaled about $151,587. Its policy contained typical subrogation language, even though Illinois law allows a Med Pay carrier a right of reimbursement only – not direct subrogation. In

October, 2006, Country Mutual sent State Farm a “Notice of Recovery Interest”, notifying them of the Med Pay payments it had made and copying Attorney Beeman with the letter.

Illinois State Capitol located in Springfield

In June, 2007, Beeman sent a letter to a Country Mutual claims rep, confirming that Country Mutual did not intend to pursue an action against Phares and authorizing him to accept State Farm's $50,000 policy limits settlement offer. The letter also indicated that Stevens intended to file a claim for $50,000 under the terms of his $100,000 UIM coverage policy with Country Mutual. In the letter, Beeman requested that Country Mutual waive its subrogation lien for medical benefits paid. In August, 2007 Country Mutual wrote a letter to Beeman in which it refused to waive its lien and said it was enclosing a $29,579.40 check as substituted payment for the UIM claim. This figure was based on Country Mutual’s UIM policy limits of $100,000 less $50,000 paid by State Farm, less $20,420.60 in medical paid. Curiously, Country Mutual forgot to enclose the check.

In October, 2007, State Farm sent its $50,000 check to Stevens, listing Stevens, Beeman, and Country Mutual as payees. Consistent with its August, 2007 letter, Country Mutual did not endorse the State Farm settlement check. Later that month, Stevens filed a complaint to adjudicate Country Mutual's subrogation lien, arguing that Country Mutual was obligated to pay one-third of its subrogation lien for attorneys’ fees. Each side filed Motions for Summary Judgment. Stevens argued that under the Common Fund Doctrine, Country Mutual was entitled to recover only two-thirds, or $13,613.72, of its $20,420.60 subrogation lien. Thus, Stevens contended that Country Mutual owed an additional $6,806.88. Country Mutual argued that under the terms of its UIM policy, Stevens was not entitled to more than $29,579.40, because its $100,000 UIM limits were properly reduced by the $50,000 third party recovery from State Farm and the $20,420.60 in Med Pay benefits Country Mutual had already paid under its policy.

In March, 2008, the trial court granted Stevens' motion and ordered Country Mutual to (1) endorse the $50,000 check from State Farm; (2) remit $29,579.40 to Stevens, which represented the balance of Stevens' UIM-motorist coverage; and (3) remit $6,806.88 to Stevens, which represented one-third of Country Mutual's subrogation lien for medical payments under the Common Fund Doctrine. The court also ordered Country Mutual to pay Stevens an additional $4,084 pursuant to § 155 of the Code (215 I.L.C.S. 5/155) because they “unreasonably delayed” settling Stevens' claim. Country Mutual appealed.

Country Mutual contends that the Common Fund Doctrine does not apply because it did not receive any benefit from the common fund – it received none of the $50,000 third-party policy limits. To sustain a claim under the Common Fund Doctrine, the attorney must show that (1) the fund was created as the result of legal services performed by the attorney; (2) the subrogee or claimant did not participate in the creation of the fund; and (3) the subrogee or claimant benefitted or will benefit from the fund that was created. The Court of Appeals disagreed. They felt that Country Mutual did benefit from the creation of the common fund. Specifically, but for Beeman's actions, Country Mutual would have expended substantial administrative and legal resources to recover the $20,420.60 it paid to Stevens, and it was allowed to reduce its liability under its UIM policy due to the third party recovery from State Farm.

The crux of the case – and the lesson to be remembered by carriers wanting to avoid the rapacious effects of the Common Fund Doctrine – was that at no time did Country Mutual expressly state to Beeman that it (1) did not want him to take action to recover its subrogation lien, and (2) would not pay him if he did. In *Tenney v. American Family Mutual Ins. Co.*, 124, 470 N.E.2d 6 (Ill. App. 1984), the Court of Appeals held that a plaintiff’s attorney may not recover Common Fund Doctrine attorneys’ fees when his services are unwanted. To the contrary, the record shows that Country Mutual (1) approved Beeman's acceptance of State Farm's settlement; (2) would not waive its subrogation lien; and (3) did not intend to pursue a claim against Phares. The Court of Appeals, in affirming the trial court’s decision, also noted that the fact that

Country Mutual's policy with Stevens allowed it to recover medical payments made through its UIM coverage does not negate its obligation to pay Beeman for his services in creating the common fund.

Justice Appleton dissented from the opinion, correctly pointing out that if an attorney creates a fund in which someone other than the attorney and his/her client has an interest, the Common Fund Doctrine allows the attorney to seek payment of fees by the non-client for the proportional share of the fees due, to prevent the non-client from being unjustly enriched by the attorney's efforts. However, Justice Appleton observed that without claiming any right of subrogation, Country Mutual allowed the plaintiff to settle his claim against the tortfeasor. Country Mutual voluntarily paid its Med Pay benefits to Stevens, and only after the settlement between Stevens and the third party did Country Mutual issue a check to Stevens for the bargained-for $100,000 UIM monies, appropriately deducting first the settlement amount with the tortfeasor ($50,000) and then amounts it had paid for plaintiff's medical expenses ($20,420.60), as provided in the insurance contract.

Where, under these circumstances, is the “fund” created by plaintiff's counsel's efforts? It appears to us as it appeared to Justice Appleton, that there is none. The fees that counsel sought constitute one-third of the medical payments made under the “med pay” provisions of plaintiff's policy with Country Mutual. Once again, an appellate court has given subrogation the back hand by implying the imposition of an equitable doctrine to facts under which the Made Whole Doctrine should never have applied. The obvious point which even this decision doesn’t mention is that an attorney who has to write a simple letter (or even less) to obtain policy limits from a third party carrier, as was done in this case, should receive nothing from the subrogated carrier. The carrier could have written that letter itself and saved considerable fees. In appropriate cases with larger subrogation interests and minimum limits on the other side, subrogation professionals should routinely notify plaintiffs’ counsel that they don’t want the attorney to protect their interests or represent them, and they will not pay a fee to the attorney even if they do.

INSURANCE SUBROGATION


John V. Burns

A PRIMER TO THE APPLICATION OF WISCONSIN’S RECREATIONAL IMMUNITY STATUTE

By John V. Burns

Matthiesen, Wickert & Lehrer, S.C. was recently involved in a Texas lawsuit in which we were called upon to oppose a Motion for Summary Judgment filed by the Defendants in the case. The motion was based on Wisconsin’s Recreational Immunity Statute. The plaintiff and one of the two defendants were Texas residents so suit was filed in Texas. However, the injury-causing accident occurred in Wisconsin. The Texas court ruled, therefore, that Wisconsin’s Recreational Immunity Statute applied to the case. Matthiesen, Wickert & Lehrer, S.C. assisted the plaintiff and successfully opposed the motion, allowing the plaintiff to ultimately settle his case prior to trial. Based on our experience with issues related to the statute, this article has been prepared as an introduction and a primer to the application of Wisconsin’s Recreational Immunity Statute to a given fact situation.

Wisconsin’s Recreational Immunity Statute (“the statute”) is embodied in Wis. Stats. § 895.52. The statute is lengthy and it can potentially be applicable to a wide range of factual situations. The statute can be utilized by a property owner and a property owner’s officer, employee or agent (collectively “property owner”) as a complete defense to liability. If the statute is applicable to a given fact situation, it provides a property owner with absolute immunity from liability for conduct that would constitute negligence in any other situation. Thus, knowledge of the statute and its potential applicability to a case or a claim can be a powerful weapon for a defendant and the liability insurer of a defendant.

The purpose of the statute and the policy behind the statute is to encourage property owners to open their lands for recreational activities by removing a property user's potential cause of action against the property owner's alleged negligence. In order to achieve the goal of encouraging property owners to open their lands to public recreation by limiting the liability of property owners, courts must liberally construe the statute in favor of property owners. *Linville v. City of Janesville*, 184 Wis.2d 705, 715, 516 N.W.2d 427 (1994). Despite the purpose and the policy behind the statute, however, a defendant seeking the protective immunity of the statute still has the burden of proving that the statute is applicable to his/her case because the immunity the statute can confer is an exception to, and in derogation of, Wisconsin's common law negligence standards. *Rintelman v. Boys & Girls Clubs of Greater Milwaukee, Inc.*, 288 Wis.2d 394, 412-13, 707 N.W.2d 897 (Ct. App. 2005).

The statute can only confer its immunity from liability upon "property owners". Thus, it is important to initially determine who or what qualifies as a property owner under the statute. Pursuant to Subsections (1)(d) and (e) of the statute, a property owner can be a person (a private property owner), as well as a governmental body or a non-profit organization, that owns, leases, or occupies property. "Occupiers" of property can qualify as "owners" of property for the liability immunizing purposes of the statute even if the occupier is not the actual legal owner of the property on which an injury occurs. To qualify as an immunized owner of the property, an occupier of property must have the actual use, possession and control of the property when the injury causing incident occurs. *Bethke v. Lauderdale of LaCrosse, Inc.*, 235 Wis.2d 103, 112, 612 N.W.2d 332 (Ct. App. 2000).

There are two critical and determinative issues that frequently arise in cases involving the application of the statute. They are: (1) What constitutes a recreational activity under the statute [note: if an injured person was not engaged in a recreational activity pursuant to the statute when he/she was injured, the statute does not apply to the case and it cannot be utilized to grant immunity to a property owner]; and (2) What constitutes negligent conduct related to the condition or the maintenance of the land/property on which an injury causing accident occurs [note: if the alleged negligent conduct of the land owner is not related to the condition or the maintenance of the land owner's land/property, the statute does not apply to the case and it cannot be utilized to grant immunity to a property owner].

The previously cited *Linville* decision is the cornerstone for establishing Wisconsin's modern tests for determining what constitutes a recreational activity under the statute and for determining what constitutes negligent conduct related to the condition or maintenance of the land/property on which an injury causing accident occurs. The *Linville* decision established bare bones tests for making these determinations based on the facts presented in the *Linville* case. Other subsequent decisions have expanded upon these tests and refined them to fit the fact situations presented in each case. Thus, the tests established by *Linville* remain valid as a starting point for determining whether the statute applies to a case, but the determination is fact intensive and ultimately depends on the specific facts presented in each given case or claim.

Pursuant to the *Linville* decision, the critical and often dispositive first step in determining whether the statute applies to a case is to determine whether the injured property user's activity was "recreational" under the statute. The issue of what constitutes a recreational activity under the statute has been frequently litigated in Wisconsin and the resolution of this issue largely depends on the facts of the given case. The issue is often dispositive because if a court determines that the injured property user was not engaged in a recreational activity under the statute when the injured property user was hurt, then the statute simply does not apply to the case and it cannot be utilized to grant immunity to a property owner. The focus of this analysis is on the activity of the injured property user. The activities of other people using the property when the injury occurs, including the activities of the owner of the property, have very little relevance in this analysis. See *Sievert v. American Family Mutual Ins. Co.*, 190 Wis.2d 623, 631-32, 528 N.W.2d 413 (1995).

The *Linville* Court concluded that the injured property user's activity in its case was recreational under the statute. That conclusion did not end the Court's inquiry into the applicability of the statute, however. The *Linville* Court established a second requirement that must be met before the statute can grant immunity from liability to a property owner. The alleged negligent conduct of the property owner must be directly connected to the property owner's land/property or to the condition or the maintenance of the land itself. Immunity cannot be extended under the statute to negligent actions that are unrelated to the actual condition or maintenance of the property owner's land. See also *Kosky v. International Association of Lions Clubs*, 210 Wis.2d 463, 565 N.W.2d 260 (Ct. App. 1997). This requirement was not well explained or well defined by the *Linville* Court. Whether or not this requirement can be established by a defendant property owner, again, depends largely on the facts of a given case or claim.

Litigation related to Wisconsin's Recreational Immunity Statute has been extensive. The determination as to whether the statute applies to a case is always very fact intensive. Thus, Wisconsin courts have not applied the statute in an entirely consistent manner. This article, therefore, has only touched on several core issues related to the application of the statute. If you should have any questions about the applicability of the statute to a specific set of facts, please contact John Burns at jburns@mwl-law.com.

INSURANCE SUBROGATION

PARENTAL RESPONSIBILITY LAWS IN ALL 50 STATES CHART NOW AVAILABLE

By Michael R. Sinnen

Michael R. Sinnen

An area of subrogation potential sometimes overlooked by insurers is the pursuit of parents for the wrongful actions of their children. Too often, subrogation dollars that can be collected from a parent or a parent's homeowner's policy are left by the wrongful actions of their children. Too often, subrogation dollars that can be collected from a parent or a parent's homeowner's policy are left by the wayside, due to a lack of information about a given state's parental responsibility laws. A clear understanding of the laws for all 50 states can assist subrogation professionals, as they deal with losses stemming from a minor's tortious conduct.

Almost all states have statutes that define the circumstances in which parents become automatically liable for their child's intentional or negligent misconduct. For example, West Virginia Code § 55-7A-2 provides that liability is imposed on a parent if their child willfully or maliciously injuries another person, destroys property, sets fire to a forest or wooded area belonging to another, or willfully takes property of another. However, in Wyoming, a parent is liable only in situations in which their child willfully damages or destroys property. Wyo. Stat. § 14-2-203. Further, in states that allow parties to pursue parents for their child's misconduct, there exists a cap on the amount that can be pursued against the parent. Many states have set their caps between $1,000-$5,000, but several allow for the collection of $10,000 or more against the parent.

For a complete breakdown of the parental responsibility laws in all 50 states, please click on the below button which will take you to the chart located on our website homepage left-hand sidebar, under Insurance Resources.

CLICK HERE FOR CHART

The attorneys at Matthiesen, Wickert & Lehrer, S.C., possess a keen understanding of the parental responsibility laws in all 50 states, and are ready to assist you in obtaining your subrogation dollars. If you believe you may be able to realize subrogation dollars through a parent, contact our firm to provide the assistance you need. If you have any questions regarding this chart, please contact Michael Sinnen at msinnen@mwl-law.com.

INSURANCE SUBROGATION

ARBITRATION BILL TO BE INTRODUCED


Gary L. Wickert

By Gary L. Wickert

Congressman Henry Johnson (D - Georgia) is set to introduce the Arbitration Fairness Act of 2009 this week. The Arbitration Fairness Act (AFA) would prohibit the enforcement of binding mandatory arbitration clauses in consumer, employment, and franchisee contracts. One of our indelible rights is the right to a jury trial. Guaranteed by the Constitution, this right has been gradually ceded by citizens every day as they purchase a new cell phone, buy a home, place a loved one in a nursing home, or accept a new job. Once used as a tool for businesses to solve their disputes, arbitration agreements have found their way into the employment, consumer, franchise, and medical contracts of average consumers and citizens.

The Federal Arbitration Act (FAA) was enacted as an alternative to resolve disputes between businesses on equal footing. Today, these agreements have entered the consumer level. In order to receive service, businesses have imposed mandatory pre-dispute arbitration agreements on consumers. Citing it as a cheaper, informal, expedited process, these contracts of adhesion leave consumers, employees, and small businesses at a disadvantage. Insurance is on both sides of this issue, but the disappearance of legal remedies in courts of law has hurt subrogation professionals and recoveries across the country.

Although states have tried to address this problem through their consumer protection laws, the courts have interpreted the FAA to trump state laws leaving consumers very little recourse. This legislation would return the FAA to its original intention and omit consumer, medical, franchise, and employment agreements from these pre-dispute agreements. Americans are entitled to a trial by jury; pre-dispute mandatory arbitration agreements give only one side the upper hand.

The Arbitration Fairness Act (AFA) would continue to allow voluntary arbitration while preserving the right to trial by jury. The bill would prohibit a corporation from forcing a consumer into a rigged mandatory arbitration system where the corporation hand-picked the arbitrator and all of the rules of the process before a dispute even occurred. The AFA encourages voluntary arbitration; it only prohibits corporations from forcing mandatory clauses on consumers without them having a chance to negotiate the terms and often without them knowing about it.

The AFA does not affect traditional inter-company arbitration as one might see in inter-company subrogation claims. However, its passage would provide subrogating insurance companies stepping into the shoes of a damaged consumer the opportunity to pursue a third party in subrogation which might otherwise have been lost due to the FAA. In truth, arbitration can be an economic and efficient means of pursuing recoveries. However, more frequently, arbitrators carry with them an uninformed bias against one insurance company pursuing

another in subrogation. Arbitrators are not bound by any laws. They do not have to follow the law and they don't have to make public or even provide to the consumer (or his/her subrogee) any explanation for ruling the way that they did. Most arbitration clauses require that proceedings be kept confidential, even if the case raises important public policy issues. As a result, only the corporation can track past decisions and know which arbitrators have ruled for them. In addition, arbitrators do not set or follow judicial precedent, something our judicial system requires to ensure consistency and fairness in legal proceedings.

While the insurance industry undoubtably comes down on both sides of this issue, as subrogation professionals, you need to be kept informed of how pending or proposed legislation might affect you and your rights or subrogation.

UPCOMING EVENTS.....

April 2-3, 2009 - Gary Wickert will be at the NASP 2009 Subro Litigation Skills and Management Conference being held in St. Pete, Florida. Gary Wickert, along with Regis Moeller, Daran Kiefer, Adam Russo, and Aaron Browder, will be presenting *Lobbyist! We Don't Need No Stinkin' Lobbyist!...Do We?* For more information on this conference, please go to www.subrogation.org.

April 21, 2009 - Gary Wickert will be a keynote speaker at the 6th Annual National Property Subrogation Strategies ExecuSummit being held in Uncasville, Connecticut. He will be presenting *The Societal Benefits of Subrogation*. For more information on this conference, please go to www.execusummit.com.

April 22-24, 2009 - Gary Wickert and Ryan Woody will be presenting at the National Other Party Liability Group (NOPLG) Conference being held in Minneapolis, Minnesota. Gary will be presenting *The Complete Guide to Taking a Future Credit In All 50 States* on April 23rd and Ryan will be presenting *Health Subrogation Best Practices in the Wake of the Shank Case* on April 24th. MWL will be exhibiting at this conference so stop by our exhibit booth if you plan on attending this conference. For information on this conference, please go to https://www.SignUp4.net/Public/ap.aspx?EID=2008838E.

May 11-15, 2009 - MWL will be exhibiting at the Claims Education Conference being held in Coeur D'Alene, Idaho. 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.

November 1-4, 2009 - MWL will be exhibiting at the NASP 2009 Conference being held at the Broadmoor Hotel in Colorado Springs, Colorado. Gary Wickert, Ryan Woody and 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 www.subrogation.org.