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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **JANUARY 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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WORKERS' COMPENSATION SUBROGATION

ARKANSAS SUPREME COURT CONFUSES SUBROGATION WITH STATUTORY REIMBURSEMENT RIGHT

Ryder v. State Farm Mut. Auto. Ins. Co., 268 S.W.3d 298 (Ark. 2007)

With increasing frequency, the dire need to educate the American judiciary on the fundamentals of subrogation and the distinct differences between subrogation and statutory rights of reimbursement, has become more and more apparent. The Arkansas Supreme Court's recently-published decision in *Ryder v. State Farm* is a bright-line example.

On March 7, 2005, Crystal Ryder and Ronald Froud were involved in an automobile accident in Washington County, Arkansas. Ryder sued Froud for negligence, claiming property damage and personal injuries. The two settled the claim for $15,000. State Farm Mutual Automobile Insurance Company, Ryder's automobile insurance carrier, claimed an interest in the settlement proceeds due to its payment of $5,000 in medical benefits on Ryder's behalf. Ryder filed a motion claiming that the proposed settlement amount between Ryder and Froud did not make Ryder whole and asking the court to dismiss State Farm's intervention. State Farm asked the court to determine its "subrogation rights" and asserted that it was entitled to reimbursement for the $5,000 it paid in medical payments coverage on behalf of Ryder, less the cost of collection.

State Farm claimed that § 23-89-207, the statute at issue in this case, provides it with a statutory right of reimbursement, not a right of subrogation, and therefore, the made whole doctrine should not be applicable. Section 23-89-202 reads as follows:

> *(a) Whenever a recipient of benefits under § 23-89-202(1) and (2) recovers in tort for injury, either by settlement or judgment, the insurer paying the benefits has a right of reimbursement and credit out of the tort recovery or settlement, less the cost of collection, as defined.*

Noting that the statute gave State Farm an automatic right to be reimbursed, rather than a simple right of subrogation, State Farm argued that it should be able to take advantage of its right of reimbursement regardless whether its insured had been made whole.

Arkansas Capitol Building located in Little Rock

State Farm's argument is well-founded. States have begun to recognize the distinct difference between subrogation and reimbursement rights. In Wisconsin, § 102.29 grants a workers' compensation carrier a statutory right of reimbursement, essentially stating that any third party settlement or recovery must be allocated according to a specific formula which allows the compensation carrier to be reimbursed without regard to whether the worker has been made whole. The Wisconsin Court of Appeals has appropriately noted in *Campion v. Montgomery Elevator Co.,* 493 S.W.2d 244 (Wis. App. 1992), that the carrier's rights of reimbursement under § 102.29 is not a subrogation right. It stated that rights of reimbursement are simple requirements set forth by the legislature (as the Arkansas legislature set forth in § 23-89-202). It stated that when a carrier is granted a direct cause of action (for reimbursement or subrogation), this is not the same as merely "stepping into the shoes" of an insured. Rather, it is much stronger and should be protected more, especially against "equitable" defenses to mere subrogation such as the made whole doctrine. The Wisconsin Court of Appeals noted that nowhere in § 102.29 does the word "subrogation" even appear. It noted that a waiver of subrogation is not effective to waive a workers' compensation carrier's rights under § 102.29 because it is not a right of subrogation. Simple enough.

Apparently it wasn't that simple for the Arkansas Supreme Court, who clearly decided the outcome they wanted – defeating subrogation – and found a way to deliver. Tired, anecdotal and erroneous notions of the often misunderstood "equitable" concept of subrogation are hard to battle. The first mistake many courts make is that they call it an "equitable" doctrine even when it is required in writing (*e.g.,* policy terms). This error has all but destroyed subrogation in states like Georgia. And, then like the cow following the butt-end of the cow ahead of it, court after court read the mistake-riddled precedents and restate old and erroneous law, which is precisely what happened in this case. Arkansas law is clear that § 23-89-202 does not provide a separate cause of action in favor of the Med Pay carrier against a third party tortfeasor and could not split its insured's cause of action – a hallmark attribute of subrogation. So, the reimbursement right that has none of the attributes of subrogation is deemed to be subrogation despite the word not even appearing in the statute. Sounds like somebody had an anti-subrogation agenda to fulfill.

Section 23-89-202 grants the Med Pay carrier a statutory lien (spelled out clearly in the statute) and a right of reimbursement. I would ask the Arkansas Supreme Court what they think the Arkansas legislature should have written into the statute to be clearer about the Med Pay carrier's rights of recovery. The court tried to pound the square hole into the round peg by claiming that Arkansas courts had defined subrogation as:

> *Subrogation is the substitution of one party for another. The party asserting subrogation is making a demand under the right of another. Subrogation is a normal incident of indemnity insurance. That is to say that because insurers pay the obligations to their insureds, a right in equity to subrogation in the insurer arises. This assures against unjust enrichment by way of double recovery.*

And their point is? There has been no substitution of one party for another under § 23-89-202. Likewise, there has been no demand by the Med Pay carrier under the right of the insured – in fact, the demand is made ON the insured! While subrogation may be a "normal incident" of indemnity insurance, it was not subrogation which gave State Farm its rights of reimbursement. It was the Arkansas legislature. It is the province of the legislature to do what it wishes within constitutional boundaries. It decided to give the Med Pay carrier an automatic and statutory right of reimbursement rather than a right of subrogation. Many other states give only a right of subrogation. Arkansas' legislature went further, until the Arkansas Supreme Court wrongfully said they did not.

WORKERS' COMPENSATION SUBROGATION

GEORGIA WORKERS' COMPENSATION SUBROGATION PRIMER

Georgia remains the most difficult state to successfully and cost-effectively subrogate for workers' compensation benefits. From the division of economic versus non-economic damages to the ubiquitous and statutory made whole doctrine, life for subrogation professionals in the Peach State can be difficult. Matthiesen, Wickert & Lehrer has compiled a small booklet which dissects Georgia workers' compensation subrogation law and helps separate fact from fiction. The short, 15-page booklet reviews Georgia law as it applies to all aspects of Georgia workers' compensation subrogation, and contains recommended practices and strategies for maximizing your recoveries. If you have an interest in obtaining a copy of the complimentary booklet, please contact Jamie Breen at jbreen@mwl-law.com. It can be emailed to you in a PDF format.

PROPERTY SUBROGATION

John V. Burns

SUBROGATING LIVESTOCK/VEHICLE COLLISIONS IN IDAHO

By John V. Burns

Collisions between vehicles and livestock remain a plentiful source of insurance claims and subrogation potential. Knowing how and when you can subrogate for such collisions is the key to taking the first step toward making a successful recovery. It takes only a little common sense to know that you're going to run across more such claims in states like Idaho or Texas than in Maryland or Connecticut. In fact, Idaho remains a state in which we see a preponderance of such claims.

Idaho allows a cause of action for negligence against the owner of livestock on the roadway, in a backdoor fashion through § 25-2119. What makes subrogation of these cases difficult is that the burden of proving the owner was negligent falls on the party driving down the road (or their subrogated insurer) who has no idea which fences were in disrepair, which gates were left open, or exactly what the owner did which allowed the cattle to escape and wander onto the road. So, to know precisely what to prove, we have to know what the duty of the owner is.

Idaho law reveals there are two geographical areas other than cities and villages recognized in this state in relation to livestock owner's liability for damage done by their stock to another's land. First, herd districts created pursuant to § 25-2401, *et seq*., where within the district the English common law rule of prohibiting livestock from running at large, is reinstated. Since 1963 herd districts could not contain "open range," which was defined as "all uninclosed land outside cities and villages which by custom, license or otherwise, livestock, excepting swine, are grazed or permitted to roam." 1963 Idaho Sess. Laws, ch. 264, p. 674.

Livestock areas in Idaho fall into two categories outside cities and villages: open range areas and herd districts. *Adamson v. Blanchard,* 990 P.2d 1213 (Idaho 1999); see also *Moreland v. Adams*, 152 P.3d 558, 561 (Idaho 2007). "Open range" is defined by § 25-2402 of the Idaho Statutes as all areas of the state not within cities, villages, or already created herd districts. Animals may roam freely in open range areas without their owner's risking liability. However, in herd districts animals may not roam freely and owners incur a duty to keep livestock fenced. *Whitt v. Jarnagin,* 91 Idaho 181, 187, 418 P.2d 278, 283 (1966) (I.C. § 25-2118 impliedly makes it the duty of the owner to keep the animal off the highway unless the highway is in open range.) Section 25-2401, *et seq*. provides the mechanism for creation of herd districts as an alternative to landowners who wish to protect their land from damage caused by roaming stock on open range. A landowner may recover damages caused by animals straying upon his property in a herd district. Although animals may not be herded upon the highway in a herd district, "trailing or driving of livestock from one location to another on public roads" cannot be prohibited. I.C. § 25-2402(2)(c). The Idaho Supreme Court has previously held that there is a distinction between "herding" and "trailing or driving" and that the two terms are not synonymous. *Etcheverry Sheep Co. v. J.R. Simplot Co.,* 740 P.2d 57, 58 (1987) (citing *Phipps v. Grover,* 75 P. 64 (1904)).

The "fence out" rule prevails in Idaho. *Maguire,* supra. This rule says that landowners have a duty to erect fences to keep wandering cattle from entering their property and causing damage to their crops. There are important legislative exceptions to the "fence out" rule and landowners may revert to a "fence in" rule – which requires landowners to keep their own animals fenced in - by following statutory procedures to create a herd district. *Id*.; I.C. § 25-2401. Idaho law grants open range immunity to cattle owners against liability to motorists involved in collisions with their cattle when three specific statutory requirements are met: the land is (1) "uninclosed"; (2) falls "outside of cities, villages and herd districts"; and (3) is land "upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam". *Maguire,* supra; *Moreland*, supra.

The legislature enacted § 25-2118, concerning animals on open range, and § 25-2119, concerning animals lawfully on the highway. These two statutes are thus *in pari materia* (Latin legal term for items or events that are of the same type, and which can be interpreted in similar ways) because they relate to the liability relationship between livestock owners and motorists on the highway. Section 25-2118 thus relieves owners of livestock roaming on open range of the duty to keep such stock off the highway and grants absolute immunity from liability for any damages stemming from "a collision between the vehicle and the animal." *Adamson,* supra. Some have argued that the legislature used different language in § 25-2118 and § 25-2119 because it intended an absolute grant of immunity in the former and a limited grant of immunity (abolition of *res ipsa loquitur)* in the latter. However, this disregards the notion that the legislature was addressing two very different situations. Section 25-2118 relates to owner liability in open range and grants total immunity from liability for any damages. By contrast, § 25-2119 addresses only an owner's right to drive animals on public roads, or otherwise lawfully position animals upon the highway, and grants immunity only from liability for negligence associated with this activity. The legislature, therefore, used absolute language in § 25-2118 because it intended to completely immunize owners in open range areas from liability under any cause of action. The legislature then used more limited language in § 25-2119 because it intended to immunize owners from a negligence cause of action only in the limited situation where animals are lawfully present on the highway. *Id.*

Idaho Capitol Building located in Boise

Section 25-2119, therefore, relieves from negligence any person owning, or controlling the possession of, a domestic animal *lawfully* on a highway. Moreover, § 29-2118 impliedly makes it the duty of a person owning, or controlling the possession of, a domestic animal, to keep such animal off the highway, unless the highway is on open range; and does not absolve such person from liability for damages to a vehicle or injury to a person caused by a collision between the vehicle and any such animal, unless the highway is on open range.

Idaho also recognizes a cause of action against the cattle owner for negligence in letting a fence fall into disrepair and out of conformity with the statutes dealing with legal fences and their minimum conditions. *Soren v. Schoessler,* 394 P.2d 160 (Idaho 1964), *overruled by Moreland v. Adams,* 152 P.3d 558 (Idaho 2007).

Summarizing Idaho law as it relates to animal owners which cause accidents on roads in either an open range or a herd district, the Idaho Supreme Court has identified six guiding principles:

> *(1) the owners of domestic animals are not liable or negligent when the animals cause a highway collision in "open range" or when the animals are "lawfully on any highway,"* I.C. §§ 25-2118 and 2119*;*
> *(2) if the "open range" or "lawful" conditions are not present, then the doctrine of res ipsa loquitur supplies an inference that the animal owner was negligent;*
> *(3) the inference can be supplemented by other evidence of the owner's negligence;*
> *(4) the inference can be rebutted by a satisfactory explanation or showing by the animal owner of proper care, enclosures, and any other evidence tending to negate the inference of the owner's negligence;*
> *(5) when properly placed at issue by the parties, the issues of lawful presence, inference of negligence, and rebuttal of the inference, are questions for the trier of facts; and*
> *(6), in any event, the vehicle owner may be liable for contributory negligence under various theories.* Grifith v. Schmidt*,* 715 P.2d 905, 909 (Idaho 1985)*.*

Although the term "lawfully" is not defined in the statute, the Idaho Supreme Court has determined that "its definition is not at issue in cases of nighttime vehicle collisions with unattended domestic animals running at large wherein we can presume the animals' presence on the highway does not fall within any reasonable definition of lawfully." *Id.;* see also *Adamson,* supra.

The moment a claims handler is notified of a claim involving a collision with cattle on a roadway or highway, the clock begins ticking. Immediately engage somebody to contact the owner and "innocently" ask how the cattle got loose. Admissions such as "we had a hole in the fence that I haven't gotten around to fixing" or "Wilma left the gate open again" are invaluable in proving negligence. Take a hundred photographs of the accident scene and all fencing or gates nearby where cattle could have escaped. Photograph any areas of fencing which evidence new repairs. Look at gate latches and pull on them to determine if cattle could have learned how to open them by nudging or bumping them. Interview the insureds to determine in which direction the cattle appeared to be walking or coming from. All of these things are critical in establishing negligence.

The law is different in every state. For a more thorough review of livestock/vehicle collisions in all 50 states, including a guide as to how to create negligence liability in all 50 states, see our book entitled, "*Where's The Beef: Subrogating Livestock / Vehicle Collisions In All 50 States"* at http://www.mwl-law.com/CM/Custom/Wheres-The-Beef.asp or contact Jamie Breen at (800) 637-9176 or jbreen@mwl-law.com. The cost is $49.99 and is complimentary for subrogation clients.

Gary L. Wickert

THE SOCIETAL BENEFITS OF WORKERS' COMPENSATION SUBROGATION

By Gary L. Wickert

Subrogation is one of the oldest legal concepts in jurisprudence with roots that trace back to Roman law under the reign of Emperor Hadrian (A.D. 177–A.D. 138). First established in English common law with the Magna Carta in 1215 A.D., subrogation is now part of the fabric of both our insurance industry and the American economy. Subrogation today works hand-in-hand with the concept of insurance and indemnity to ensure both economic justice and individual responsibility, and is favored under the laws of every state. Workers' compensation subrogation remains one of our last lines of defense to keep premiums in check and ensure the affordability of insurance for employers, large and small, across the country.

Workers' compensation subrogation is much different than other forms of subrogation, and should be treated as such. Workers' compensation legislation first came into being in 1911 when Wisconsin became the first state to adopt workers' compensation legislation. By 1948, every state had some form of "workmen's compensation." Such legislation had its roots in socialism and is a social contract in which employers are mandated by law to pay unlimited medical expenses and lost wages when employees are injured while working – even if the employer is absolutely without fault. In exchange for this social safety net, workers' compensation becomes a worker's exclusive remedy as against their employer, and the employer is given immunity from liability. As part of the contract, the employer (or its insurance carrier) are also entitled to be reimbursed for any benefits paid whenever a third party tortfeasor (somebody other than the employer or employee) is responsible for the injury or death. Unfortunately, courts and legislatures have begun eroding away the employers' end of the bargain, rendering them liable both when they are at fault, and when they are not. At the same time, their rights of reimbursement have also been assailed.

The term "subrogation" might be a misnomer when it comes to workers' compensation, because the carrier's right is more appropriately one of "statutory reimbursement." The Wisconsin Court of Appeals has correctly observed that "the rights granted by the statute are distinct from subrogation." *Campion v. Montgomery Elevator Co.,* 493 N.W.2d 244 (Wis. App. 1992). Rather, they are a defined set of rules for honoring our social contract with employers by safeguarding reimbursement, placing the responsibility for the loss on the backs of the wrongdoers, and holding down employers' insurance premiums. Unlike traditional subrogation, the carrier here is not subrogated to the rights of its insured – but rather, is statutorily given the right to press the claim of or receive reimbursement from the injured worker, a stranger to the insurance contract.

Judges and legal scholars agree that subrogation recoveries are an important component in calculating premiums. An insurance company sets its rates based on historical net costs. One legal scholar at the University of Chicago explained how subrogation impacts insurance premiums. See Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337 (1997), *citing* Harry L. Sutton, Jr. and Allen J. Sorbo, *Actuarial Issues in the Fee-For-Service/Prepaid Medical Group*, 46 Center for Research in Ambulatory Healthcare Admin., 2d ed., 1993. ("An adjustment to estimated total HMO expenses…should be included to project the impact of coordination of benefits, workers' compensation, and subrogation"), and author's *Phone Interview*

and Letter from Dean K. Lam, Senior Actuary for Allstate Insurance Company to Jeffrey A. Greenblatt, Jan. 30, 1997 ("*Lamb letter*") (on file with U. Chi L. Rev.). "An insurance company sets its rates based on historical net costs. Thus, if the insurer had one hundred policyholders in the experience period, and experienced a total of $20,000 in claim costs, it will set its actuarial premiums at $200 per policy holder. If, on the other hand, the insurance company experienced $20,000 in claim costs and received $5,000 in subrogation, it will set its actuarial premiums at $150 per policy holder." *Id*. at 1355. Similarly, another writer explained how subrogation recoveries figure into an insurer's premium calculations:

> *Revenue gained by the insurer, whether through subrogation collection or otherwise, is applied toward responding to the actual risk that is required to be paid by the insurer under the terms of the contract or policy…As a source of revenue, subrogation operates to reduce the actual past cost total used in the calculation of probable future insurable risk or loss on which future premiums will be based.* F. Joseph Du Bray, *A Response to the Anti-Subrogation Argument: What really emerged from Pandora's Box,* 41 S.D.L. Rev. 264 (1996).

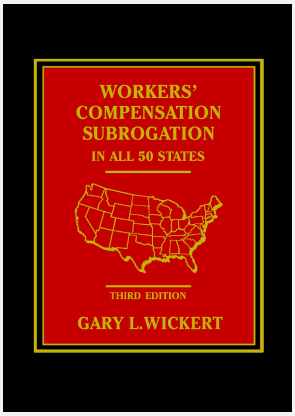
Courts throughout the country agree that subrogation benefits society by lowering insurance costs and preventing double recoveries. See *e.g., Brooks v. A.M.F., Inc.*, 278 N.W.2d 310, 313 (Minn. 1979). Subrogation along all lines of insurance serves the vital function of helping to keep premiums low for billions of insureds worldwide, and should be protected at all costs. This is especially true with workers' compensation insurance where the laws of some states require reimbursements to be considered in calculating premiums.

The complicated calculation of workers' compensation premiums necessarily involves the concept known as the Experience Modification Factor. The Experience Modification Factor (also known as an Experience Modification Rating, EMR, Experience Modifier, or just the Mod) is an adjustment that is made to the Workers' Compensation insurance premium of American employers. This means that the calculation of insurance premiums for an employer takes into consideration a number of factors, including prior years' payroll, loss history, and subrogation recoveries.

In 2005, the Workers' Compensation Subcommittee of the American Academy of Actuaries reported to the U.S. Senate Judiciary Committee on the dangers and economic harm associated with efforts to limit subrogation rights in the workers' compensation arena, acknowledging that insurance premiums for employers are generally determined in the process of underwriting taking into consideration and counting on the fact that subrogation rights will apply. The role subrogation plays in holding down workers' compensation premiums is even much more pronounced than in some lines of insurance because when the employee makes a successful third-party recovery, the workers' compensation carrier not only has a right to recover past benefits it has paid, but in most states, it has the right to take a credit in the amount of the worker's net recovery toward any future benefit payments it might owe. This combination of subrogation and future credit plays a large role in erasing negative loss histories, positively affecting risk modifiers, and helping to hold down insurance premiums for one of the key operating costs for American businesses large and small – workers' compensation insurance.

Allowing insurers a right of subrogation will not increase the amount of lawsuits. In fact, it will have the opposite effect of reducing lawsuits. For example, without subrogation many plaintiffs are free to bring a lawsuit without concern for whether he or she must repay their subrogated carrier. If plaintiffs were forced to repay their health insurers after a third-party recovery, many doubtful or borderline cases would not be brought.

FOURTH EDITION SOON TO BE RELEASED



WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES - (FOURTH EDITION) SOON TO BE RELEASED!!!

We are happy to announce that we have just completed updating our *Workers' Compensation Subrogation In All 50 States* treatise. The Fourth Edition has been sent to our publisher for printing and it should be released by early spring. We will keep you posted as to its release date.

Workers' compensation subrogation continues to change and adapt, as trial lawyers prod its weak points and capitalize on confusing areas of the law. The last 18 months saw many changes in workers' compensation statutes and case law in many states. Arizona completely rewrote and renumbered their subrogation statute, and several other states made minor amendments to theirs as well. The Fourth Edition of *Workers' Compensation Subrogation In All 50 States* includes for the first time the complete texts of many exclusive remedy statutes from the most confusing states and those with new case law interpreting that area. It also includes clarification on confusing statutes from several states dealing with the recovery of attorney's fees and costs by workers' attorneys, and the inclusion of specific statutory notice requirements set forth in California law. Combined with more than 100 new case decisions, this Fourth Edition is the most complete and up-to-date edition yet.

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 to be there. 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 in Coeur D'Alene, Idaho. Gary Wickert and Jamie Breen will be at our exhibit booth so stop by if you plan to be there. For information on this conference, please go to http://www.claimseducationconference.com.

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.