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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER JUNE 2008

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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WORKERS' COMPENSATION SUBROGATION

OHIO SUPREME COURT FINALLY GETS IT RIGHT

Workers' Compensation Statute Declared Constitutional:
Groch v. General Motors Corp., 883 N.E.2d 377 (Ohio 2008)

By Dan Borck

An unpredictable Ohio Supreme Court and a newly rewritten workers' compensation subrogation statute, combined to form a climate in which possible attacks on the statute are almost certain to occur. It didn't take long for Ohio trial lawyers to take another stab at getting the entire workers' compensation subrogation scheme in Ohio overturned. In *Groch v. General Motors Corp.*, 883 N.E.2d 377 (Ohio 2008), the Ohio Supreme Court once again reviewed the trial lawyers' challenge to that state's statute. Surprisingly, the Supreme Court got it right this time. Ohio Rev. Code Ann. § 4123.931, the statute which gives a workers' compensation carrier a right of reimbursement and sets forth the scheme for doing so, was upheld as constitutional.

In *Groch*, Douglas Groch, an employee of General Motors, was injured while working and brought a third-party action against both his employer, General Motors Corporation and other third-party defendants, premised on a defective product. Groch received workers' compensation benefits

from his employer, and General Motors sought reimbursement of those benefits in that case. Groch asserted that §§ 4123.93 and 4123.931 of the Ohio statutes, which grant workers' compensation carriers rights of subrogation and reimbursement were unconstitutional as a violation of the takings clause (Art. I, § 19), due process and remedies clause (Art. I, § 16), and equal protection clause (Art. I, § 2) of the Ohio Constitution.

In June of 2001, the entire Ohio workers' compensation subrogation statute was struck down by the Ohio Supreme Court on state constitutional grounds. In *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111 (Ohio 2001), the Ohio Supreme Court held that the provisions of the old workers' compensation subrogation statute which gave workers' compensation carriers a current collectible interest in estimated future benefits were unconstitutional as violating a workers' guarantee to due process and right to private property. The court upheld the workers' compensation system in general, but declared the workers' compensation subrogation statute to be unconstitutional.

Ohio Supreme Court

In April of 2003, the Ohio legislature enacted Senate Bill 227, which revamped the subrogation provisions in §§ 4123.93 and 4123.931, which had previously been ruled unconstitutional in *Holeton*. The new statute set forth an entirely new settlement procedure in which the claimant would receive "an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered." Ohio Rev. Code Ann. Stat. § 4123.931(B). The statutory subrogee would receive "an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered." The new statute also permits workers to establish an interest-bearing trust account for the full amount of the subrogation interest which represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, for which the claimant makes reimbursement payments to the carrier for the future payments of compensation, medical benefits, rehabilitation costs, or death benefits. Ohio Rev. Code Ann. Stat. §4123.931(E)(1).

In *Groch*, the trial lawyers argued that the current subrogation statute violated the same constitutional provisions as were found to be violated in *Holeton*. The trial lawyers argued that the statute still authorizes an unconstitutional taking because the interest-bearing trust account is not realistic, because most of the principal will be eaten up by fees and expenses, and those who do not set up a trust account will be forced to fully reimburse the carrier for estimated future payments just as under the prior statute which was held unconstitutional in *Holeton*.

The Ohio Supreme Court disagreed, and declared that the trust option affords the worker an opportunity to avoid the consequences of overestimating future benefit values. The court stated that the claimant who invokes the trust option is no longer required to reimburse the carrier up front for future estimated payments that may never be made. The former statute allowed the carrier to retain any overpayment, but the current statute and its trust option ensures the return to the worker all funds remaining after the "final reimbursement" of the carrier.

The Ohio Supreme Court's complicated 43-page opinion does not make for light reading, but it does signal a victory for the insurance industry and subrogation in general. All seven members of the Ohio Supreme Court are Republicans - traditionally viewed as conservative and sympathetic to the insurance industry. However, subrogation and politics makes for strange bed fellows, and even some conservative judges and legislatures wrongfully view subrogation as "just another unnecessary lawsuit." The Ohio workers' compensation subrogation statute was actually a compromised bill and a bipartisan effort of the Ohio legislature. The former Republican governor Robert Taft signed the bill and it was thought the bill would be free from constitutional attacks. However, never underestimate trial lawyers, who may attempt to mount another attack on the statute in the coming years.

TOO CLEVER BY HALF?
10TH CIRCUIT ISSUES IMPORTANT CHOICE-OF-LAW DECISION IN CASE ARGUED BY MWL ATTORNEY, RYAN L. WOODY

Ryan L. Woody

***Anderson, Shon v. Commerce Construction Services, Inc.*, 2008 WL 2599823, 07-3128 (10th Cir., July 2, 2008)**

On March 3, 2004, Shon Anderson, suffered catastrophic and permanent injuries while working on a construction job site in Towanda, Kansas, that was being operated by Commerce Construction Services ("Commerce Construction"). Commerce Construction is a Kansas corporation located in Wichita, Kansas. Commerce Construction had bid on and been awarded a contract to demolish and remodel Circle High School in Towanda, Kansas. At the time of the accident, Mr. Anderson, who was not a Kansas resident, was directly employed by Midwest Environmental ("Midwest"), which is a Nebraska corporation with its principal place of business located in Lincoln, Nebraska. Midwest had been retained by Commerce Construction as a subcontractor to perform demolition of the Circle High School auditorium walls. At the time of suit, the workers' compensation carrier for Midwest had paid in excess of $325,000 in workers' compensation benefits to or on behalf of Mr. Anderson pursuant to Nebraska law.

MWL filed suit on behalf of Shon Anderson and the workers' compensation carrier against Commerce Construction in the United States District Court for the District of Kansas. MWL alleged that Commerce Construction's negligence resulted in the misidentification of a non-reinforced CMU wall that ultimately fell on Mr. Anderson causing his permanent injuries. Commerce Construction denied liability and alleged as an affirmative defense that under Kansas law, Mr. Anderson was a statutory employee of the defendant and that his action was barred by the exclusive remedy doctrine of Kansas.

Commerce Construction filed its motion for summary judgment with the district court, and argued that Kansas' exclusive remedy rule applied to the case under the *lex loci delecti* choice-of-law analysis. MWL argued that the suit was not barred and that under Kansas' choice-of-law rules, Nebraska's exclusive remedy rule would apply to the underlying case. The district court granted Commerce Construction's motion for Summary Judgment in a Memorandum and Order that applied the Kansas exclusive remedy rule and found that Commerce Construction was immune from suit as a statutory employer under the Kansas Worker's Compensation Act. MWL appealed the decision to the 10th Circuit Court of Appeals in Denver.

On July 2, 2008, the 10th Circuit issued its opinion, affirming the district court's decision. The decision will be published and can currently be cited as *Anderson v. Commerce Const. Services, Inc.*, 2008 WL 2599823, 07-3128 (10th Cir., July 2, 2008). Although we knew we had an uphill battle to win the case, the court of appeals issued a very well-reasoned opinion involving the complex subject of extra-territorial workers' compensation subrogation.

The crux of the decision came down to whether the 10th Circuit would apply Kansas' long-standing *lex loci delecti* or "place of the wrong" choice-of-law rule or the law of the state where workers' compensation benefits were paid. MWL argued that under the *Restatement* §185 and the *Larson* Rule, a Kansas court should not focus on the location of the accident, but instead on the Act of the state under which benefits were paid. In support of §185, MWL cited to *Miller v. Dorr*, 262 F. Supp.2d 1233 (D. Kan. 2003), a recent Kansas district court opinion applying §185 to the allocation of settlement proceeds. However, the 10th Circuit held that because the issue was whether the plaintiff could sue Commerce Construction, who was

a statutory employer under Kansas law, rather than who was entitled to a recovery which had already been effected by the injured employee, *Restatement* §184, rather than §185, applies to conflicting exclusive remedy rules, while §185 applies to conflicting subrogation (right of reimbursement) rules. The court also read into the *Larson* Rule the ability of a court to apply the exclusive remedy rule of any state which would be "liable" for benefits – which it interpreted not to mean the state under whose laws benefits were "paid", but any state under whose laws benefits "could be paid."

The 10th Circuit acknowledged that Nebraska had an interest in applying its workers' compensation scheme, but also emphasized the importance of Kansas' own interests in this particular case. It wrote:

> *Like Nebraska's scheme, the Kansas workers' compensation system also reflects a carefully crafted statutory compromise between employees and employers. Under this system, statutory employers such as Commerce are required to provide mandatory coverage to subcontractor employees such as Anderson. In exchange for extending mandatory coverage and paying into the state system, employers are protected from common law claims for workplace injuries. If a court applied Nebraska's exclusive remedy law and permitted Anderson's suit, the court would be disrupting this legislative compromise between Kansas employers and employees.* Id. at p. 12.

Although it applies the immunity provisions of the defendant's home state, the decision recognizes the dichotomy between a foreign worker's right to sue and a forum defendant's right not to be sued. This decision will certainly help subrogation practitioners in other extra-territorial workers' compensation cases. The 10th Circuit avoided the trap of applying a §145 significant contact analysis, which is meant to apply to issues of general tort law. Instead, the court correctly sought out *Restatement* §§ 184 and 185 specifically dealing with workers' compensation, and, probably correctly, applied §184 to the facts of this case. The only critique is the court's analysis of the interplay between §184, §185 and the *Larson* Rule. There is clearly a conflict between these choice-of-law rules that results in the application of two workers' compensation schemes to the same case. While §184 will apply the immunity provisions of the defendant's state, §185 will apply the subrogation provisions of the plaintiff's state resulting in a piecemeal application not contemplated by the legislatures of either state. However, such is the case with most extra-territorial workers' compensation matter.

Should you have any questions or comments about this decision or wish to obtain a copy of the decision itself, please feel free to contact Attorney Ryan Woody at 262-673-7850 or at **rwoody@mwl-law.com**.

ERISA SUBROGATION

ATTORNEY'S ALLOCATION OF TORT SETTLEMENT VIOLATES TERMS OF PLAN: JUDGE RECONSIDERS DECISION, RULES IN FAVOR OF ERISA PLAN

***Diamond Crystal Brands, Inc. v. Wallace*, 531 F.Supp.2d 1366 (N.D. Ga. 2008)**

By Ryan L. Woody

MWL attorney, Ryan Woody, arguing on behalf of the Diamond Crystal Brands, Inc.'s self-funded ERISA Plan, recently won a significant victory for ERISA practitioners in Georgia. The case arose due to negligent medical care which resulted in the death of Deborah Hayes. Prior to her death, her employer, Diamond Crystal provided $261,863.58 in medical benefits related to the medical malpractice. Following her death, the Estate of Deborah Hayes and her daughter Tamara Hayes retained Attorney Mike Regas to pursue a wrongful claim against the hospital. The plaintiffs pursued their claim in Georgia state court and ultimately settled both claims for $900,000, of which Attorney Regas

allocated $837,000 to Tamara Hayes and $63,000 to the Estate of Deborah Hayes. After the settlement, Diamond Crystal sought reimbursement in the amount of $261,863.58 which it had paid in medical bills. The plaintiffs refused to reimburse the Plan, arguing that the Plan could not seek reimbursement from the $837,000 allocated to Tamara Hayes. The Plan filed suit in federal district court seeking an injunction over the disputed funds.

After initially granting an ex-parte Temporary Restraining Order in favor of the Plan, the court held a preliminary injunction hearing. At the hearing, counsel for the Estate confirmed that he allocated the maximum amount allowed under Georgia law to Deborah's daughter Tamara and the remainder was awarded to the Estate. This is significant, because under Georgia's wrongful death statute, the claim for medical bills belongs to the Estate. As such, the attorney felt that the Plan could only subrogate or pursue reimbursement for monies allocated to the Estate. To the contrary, MWL argued (1) the initial allocation by the attorney violated the terms of the Plan by allowing monies to be allocated away from the Estate and toward Tamara Hayes, and (2) despite the allocation, the Plan could still seek reimbursement from Tamara Hayes because the portion of Georgia's wrongful death statute that conflicted with the Plan's reimbursement provision, was preempted by ERISA. Following the preliminary injunction hearing, the court requested additional briefing on the ERISA preemption question. Another preliminary issue that should be mentioned was the fact that the settlement proceeds had been returned to the hospital's insurer after the Plan filed suit and after the court issued a temporary restraining order. As such, the defendants argued that the court lacked jurisdiction because the funds were not in their possession.

On January 22, 2008, the court issued its decision on the Plan's motion for a preliminary injunction. First, it found that it was not deprived of jurisdiction despite the fact that the funds had been returned to the insurer. It wrote:

> *Prior to the preliminary injunction hearing, Tanner Medical issued a settlement check to Defendants, which was received by Defendant Houck, Ilardi & Regal [sic] as trustee of the settlement funds while the temporary restraining order was in place. The fact that Defendant Houck, Ilardi & Regas returned that settlement check to Tanner Medical in order to have it issue two separate settlement checks does not render the fund unidentifiable or outside the possession and control of Defendants for purposes of §1132(a)(3). The injunction would also be effective against Tanner Medical as "persons who are in active concert or participation" with Defendants.* Diamond Crystal Brands, Inc. v. Wallace, 531 F.Supp.2d 1366, 1371-72 (N.D. Ga. 2008).

Second, the court held that the Plan was entitled to a preliminary injunction over the $63,000 that was allocated to the Estate, but not over the portion allocated to Tamara Hayes. It reasoned:

> *The wrongful death claim in this case belongs to Tamara Hayes, not the Estate of Deborah Hayes. See McInnis, 21 F.3d at 590; Thomas, 210 F.Supp.2d at 1300-01. And like the wrongful death claim in Liberty, Plan 501 never had a right to reimbursement under the Plan to any of the settlement proceeds recovered on behalf of Tamara Hayes's wrongful death claim. Liberty, 984 F.2d at 1388-89. Accordingly, Georgia's wrongful death statute does not sufficiently "relate to" the Plan within the meaning of ERISA, and the Georgia statute is not preempted by ERISA.* Id. at 1373.

The court explained that it believed the Plan could have intervened into the state court tort suit or filed for an injunction prohibiting the Estate from allocating settlement proceeds in the first place and felt as if its hands were tied to revisit the allocation issue. However, MWL disagreed with the court's rationale that it could not revisit the allocation issue. In fact, just shortly after the court decision, the 11th Circuit did just that in *Admin Comm. for the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Horton*, 513 F.3d 1223, 1225 (11th Cir. 2008) (re-allocating proceeds of a minor settlement). Accordingly, Diamond Crystal moved for reconsideration of the court's decision.

In a rare move, the court granted Diamond Crystal's motion for reconsideration. *Diamond Crystal Brands, Inc. v. Wallace*, 531 F.Supp.2d 1366, 2008 WL 2608158 (N.D. Ga., May 15, 2008). Acknowledging its ability to revisit the issue of allocation based on the *Horton* decision, the court held:

> *The language of the Plan requires that the Estate reimburse the Plan out of any settlement or tort judgement [sic] to the full extent of the benefits paid by the Plan. The Estate agrees to hold the funds received by it or its legal representative in trust for the Plan and to grant a first lien on such proceeds. The Plan language also prohibits the Estate from doing "anything which may have the effect of prejudicing any of the foregoing rights, including but not limited ... arranging for others to receive proceeds of the judgment, award, settlement, covenant, release or other payment; or releasing any claim in whole or part without reasonable compensation therefore." Here, the Estate's attorney structured the settlement with the third party tortfeasor in a manner that prejudiced the rights of the Plan by arranging for Tamara Hayes to recover the vast majority of the settlement funds - $836,536.00 of the total $900,000.00 settlement. The Estate's actions in structuring the settlement to minimize its reimbursement to the Plan for the medical expenses of Deborah Hayes violates the terms of Plan 501.* Id. at p.3.

This decision is a significant victory, because it means that federal courts have the power to revisit improper settlement allocations after the fact. In particular, eager attorneys will not be allowed to permit the proceeds of a wrongful death claim to be allocated to the beneficiaries at the expense of the Estate. The case continues and may be appealed by the defendants. Many thanks go out to Ann Cook, who's testimony at the preliminary injunction hearing was invaluable.

Should you have any questions about this case or wish to obtain a copy of the decisions, please feel free to contact Attorney Ryan Woody at 262-673-7850 or at **rwoody@mwl-law.com**.

DID YOU KNOW?

Subrogation is 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 with the relation of suretyship, know as the *fidei-jussor*. Sureties were given the right of action of the creditor against the principal debtor, or *pro rata* against the co-sureties. Subrogation is also one of the oldest remedies known to the Anglo-American common law, and seems to have been formally established in common law in the *Magna Carta.*