

MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670

(800) 637-9176 (262) 673-7850 Fax (262) 673-3766

<http://www.mwl-law.com>

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

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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

WHO WILL SPEAK FOR SUBROGATION?

By Ryan L. Woody

On September 18, 2007, Matthiesen, Wickert & Lehrer testified before the Kansas legislature in support of proposed Senate Bill No. 44. Currently, Kansas law prohibits the inclusion of subrogation language in health insurance plans and policies. The proposed bill would, for the first time, allow health insurers to include subrogation and reimbursement provisions in their policies. The bill promises to lower premiums for Kansas residents and increase revenues for health insurers. The problem, once again, however, is that the insurance industry is failing to stand up for its own valuable rights of subrogation.

Despite MWL's support, the bill appears to be on its last legs, in large part due to the absence of the insurance industry. At the hearing, MWL and the bill's sponsor, Senator Phillip Journey, were the only ones to offer support for the bill. The Committee members asked several times where the representatives from the major health insurers were. In fact, Blue Cross and Blue Shield of Kansas, who has a sizeable presence in downtown Topeka, was noticeably absent.

In the absence of any health insurers or other industry proponents the Kansas Bar Association joined the Kansas Trial Lawyers Association in opposing the bill. These lawyer groups testified about those hard luck cases involving individuals who may not fully recover their damages if subrogation were to be allowed. In addition, the Kansas Health Consumer Coalition and AARP both came out against the bill, despite the promise of lower health premiums for their members.

In spite of the vociferous opposition, the Committee voiced their support for the promise of lower premiums for Kansas residents and businesses. However, they seemed baffled by the fact that the insurance industry was missing. In addition, Committee members seemed befuddled that the insurance industry, despite its promises of lower premiums, failed to produce any study or survey that demonstrates those savings.

Kansas Senate Bill No. 44 allowing health subrogation should be an example of a bill that galvanizes the subrogation industry to support its passage. Instead, the industry's absence will surely mean the defeat of a bill that would have substantially increased revenues and reduced premiums. All too often, whether advocating in front of state legislatures, judges, courts of appeals, or Supreme Courts, we are left with little evidence but our word that subrogation serves the greater societal good. Far too many people in important positions still believe subrogation is simply one of a long list of needless, spurious and sometimes frivolous lawsuits which clog our civil courts and add to the backlog of important litigation in America. As set forth in the attached MWL testimony, just the opposite is true. Subrogation is true and is right. It is part of the backbone of the insurance industry, which is the fabric onto which our entire American economy is woven.

Subrogation prevents a double recovery and puts the burden and liability for the wrong on the back of the person who created the loss in the first place. It prevents a negligent tortfeasor from benefitting from the insurance paid for by the innocent victim, and helps hold down premiums for all persons, government entities, and businesses. However, simply saying that allowing the insurance industry a right of recovery will help accomplish these things won't carry the day. We must prove it. Our industry needs more public relations efforts in the area of subrogation. Most people, including many lawyers, don't understand the concept of subrogation or have never even heard the word. We need studies conducted across the country exhibiting and proving that recoveries help reduce premiums. We need anecdotal stories about companies whose very existence was threatened by a catastrophic injury, death, or loss - only to be reborn with a complete reversal of their risk modifier and loss history with a successful subrogation recovery. We need evidence that such things do translate into lower premiums. We need more state laws mandating that successful recoveries be translated into the loss history of the insured and reflected in their future premiums. Without these things, we are simply spitting into the wind as MWL did before the Kansas legislature.

A copy of MWL's testimony before the Kansas legislature can be viewed by clicking on the paperclip in the box below this article. Please send a copy of it to individuals within the insurance industry who have responsibility for advocating and protecting our precious rights of subrogation.

[MWL's Testimony Before the Kansas Legislature](#) 

INSURANCE SUBROGATION

HOUSTON CHRONICLE ARTICLE ON SUBROGATION

By Gary L. Wickert

It's not too often that subrogation makes the news, but on September 21, the *Houston Chronicle* issued a major story in their business section on exactly what subrogation is. It may be a bit simplistic for those of us in the recovery industry, but for many people reading the story, it will be the first time they have heard the word. Our industry needs continued and persistent public relations pieces like this wherever and whenever possible. The success and viability of subrogation against the onslaught of ill-conceived notions of equitable and legal defenses depends on educating the public - especially judges and lawmakers. Unless we can convince the public that subrogation is more than simply lining the pockets of the insurance giants after

taking premiums for the risk of assuming the loss, subrogation as we know it may cease to exist in the next generation. If you are in the insurance business, please talk to your lobbyists or public relations personnel and urge them to sponsor studies on the effects of subrogation on reduced premiums and insurance rates. Ask them to go to bat for a right that we have taken for granted for far too long. If we don't go public with what we do, we may wake up one day and ask ourselves what happened.

Below is the *Houston Chronicle* article that I am referring to above. Also of interest, the writer of this article interviewed Loren Smith, a Houston attorney, who is and has been for nearly a decade now, one of our Texas local counsel.

Sept. 21, 2007, 9:22PM

By MARY FLOOD

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INSURERS PAY YOU; WHO PAYS INSURERS?

Subrogation is little-known but increasingly used by firms to get reimbursement.

When you sue over a car crash or defective product, you are usually suing for two — you and your insurance company.

Though lawyers know insurance companies track such lawsuits in order to recoup the money they've paid you, few who sue and probably few who serve on juries realize this.

The term for this attempt at recovery is "subrogation."

"The vast majority of people, when I say I work in subrogation, they say 'What?' " said Loren Smith, a Houston subrogation attorney for 16 years. "I have a little spiel to explain. My wife uses it, too."

Smith tells folks to think about a house that has burned down because of a defective heater and the homeowner's insurance company pays for the loss. Subrogation is when the home insurance company goes after the heater maker and its insurance company to be reimbursed.

"After we tell them this, you might see a gleam register in their eye," said Smith, who has seen insurance companies increase their subrogation activity in the last decade.

Smith said that though the vast majority of insurance claims do not involve subrogation, there is enough work to keep attorneys like him doing this full time.

X-Ray Example

The tip of the subrogation iceberg can emerge, for example, when someone in the family is injured, gets an X-ray and then the insurance company writes to see if an accident caused the injury and if someone else was at fault.

The goal of that letter is to see if there is some place the insurance company can get reimbursed for the cost of the X-ray and care. This is one way an insurance company can find out if someone else is planning a lawsuit or if it might want to sue.

Don Kidd, a lawyer who tries and handles a lot of personal injury cases at Jim Adler's Houston law office, said subrogation is often a surprise to his clients.

"Subrogation is the insurance companies trying to recover any way they can, and they want to stand in line first," said Kidd, referring to insurance contracts that require the insurance company be paid first in out-of-court settlements.

A recent Texas Supreme Court case ruled that is fine, even if the injured party will never get the money needed for future problems.

Kidd said insurance subrogation is one of the things lawyers must consider in deciding whether to pursue a case.

He said if the injured person's insurance contract allows for subrogation, some cases just aren't worth it for the injured person to sue. He said they'll likely leave the courtroom empty-handed, though their medical bills would be paid back to the health insurer.

Kidd worries that since Texas law bans discussing health insurance payments in trial, juries might assume someone hurt had insurance to cover the injuries and money awarded will go to the person on top of that.

Group Only 10 Years Old

The National Association of Subrogation Professionals is only about 10 years old, and it's filled with insurance professionals, attorneys, collection agency workers and expert witnesses. Its magazine is called Subrogator.

Leslie Wiernik, director of education for the nonprofit group, said subrogation comes up a lot in auto accidents, workers compensation cases and other injury cases.

She said the insurance industry is becoming increasingly aware of the benefits of subrogation and the ways to get involved early to preserve evidence and establish a lien.

"The concept has been around for hundreds of years, but ... it was an afterthought until about 15 years ago," Wiernik said. "The market is not what it used to be, and insurance companies are looking for other ways to increase profits."

She's seen companies becoming more proactive about subrogation — which is mostly from other insurers. She said a health care insurance company may seek reimbursement from an auto policy insurer after an auto accident, for example.

Wiernik said the idea behind subrogation is that people would not be allowed to "double dip," or to have insurance pay for a claim and then get the same money paid to them by the wrongdoer. But she said it's also good policy because it can keep insurance premiums down.

Shep Sands, a Dallas subrogation lawyer active in the national group, said he tells people that subrogation is usually "a transfer of assets from one insurance company to another."

Some of his job, he said, is filing lawsuits when the injured party doesn't do it.

Examples, he said, would be suing a contractor whose negligence started a house fire or suing a dog owner whose pit bull attacked a line worker and caused an injury on the job.

Sands said that because laws in Texas have reined in the ability to sue for torts or injuries, he's seen more lawyers who formerly did plaintiffs work moving to subrogation cases.

mary.flood@chron.com

HOW DO WE KEEP YOU CURRENT ON SUBROGATION LAW?

By Gary L. Wickert

One of the benefits of utilizing a full service subrogation firm is that you will be automatically kept abreast of new developments and/or changes in subrogation law in all 50 states. This includes new amendments to statutes and breaking court decisions in both federal and state courts. We felt it relevant to let you know exactly how we do this, so that you are comfortable knowing that you are getting the very latest in breaking subrogation news.

As lawyers, we subscribe to electronic legal services which scour and digitize new case decisions and slip opinions, as well as new or amended statutes fresh out of the state legislatures or Congress. Within hours of cases being released, the new statutes or cases are sent to our desks, where we decipher them to determine if they are truly a change in the law, a brand-new law, a significant decision affecting your subrogation files, or simply nothing at all. This often means that you receive the new or amended laws even before plaintiffs' lawyers, and can use the information to your advantage in dealing with your subrogation files. Knowing a change in the law in any particular jurisdiction might affect the way you handle a particular matter or whether you need to compromise in a given situation, or promptly refer the matter to subrogation counsel.

We communicate these changes in the law to you through our electronic monthly newsletter, or, if the development is more significant, through our subrogation alert. All of it is sent to you at the speed of light to ensure that you are on the cutting edge of recovery and subrogation law in any jurisdiction where you find yourself.

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.