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 SEPTEMBER 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.

IN THIS ISSUE . . . .

Kansas Legislature Considers Allowing Health Insurance Subrogation 1
Workers' Compensation Subrogation's Secret Weapon:
Extraterritorial Subrogation *Lane v. Stevens Transport*, 2007 WL 2319855 (E.D. Ark. 2007) 2
Extraterritorial Workers' Comp Subrogation: MWL Attorneys Gary Wickert and Ryan Woody Appeal to the 10th Circuit:
Anderson v. Commerce Constr. Serv., Inc., 2007 WL 109962 (D. Kan. Apr. 10, 2007) 4
Testing 1-2-3: Subrogating Against Your Insured's Test and Rental Drivers 5

INSURANCE SUBROGATION

KANSAS LEGISLATURE CONSIDERS ALLOWING HEALTH INSURANCE SUBROGATION

By Gary L. Wickert

In a bill sponsored by Kansas State Senator Phillip Journey, the Kansas legislature is considering a proposed bill which would allow health care insurers to include subrogation clauses in health insurance plans and contracts. Currently, Kansas Administrative Regulation § 40-1-20 prohibits inclusion of such subrogation/reimbursement language into plans and policies. However, Senate Bill 44 would change all that.

Unfortunately, the bill is on life support but still has a pulse. Senator Phillip Journey, the sponsor of the bill, is a good Senator and is a friend of the insurance industry for all the right reasons. I spoke with Senator Journey about the bill recently, and he bemoaned the fact that he cannot get it out of Committee. The reason: a confused Chamber of Commerce lobby who thinks somehow this bill would mean more "frivolous lawsuits" against their businesses. Senator Phillip Journey asked MWL to write an article and send it to him for the *Wichita Eagle* urging support for the bill - which we are doing. It is completely ironic that in a world where Democrat lawmakers are usually the ones who oppose subrogation and reimbursement legislation - courtesy of the strong trial lawyers' lobby - we now have conservative constituents opposing the bill out of ignorance and confusion. Once again, our mission boils down to educating lawmakers and the judiciary about the benefits of subrogation. Senator Journey can be contacted at his law office as follows:

Law Offices of Phillip B. Journey
906 N. Main Street, Ste. 3
Wichita, KS 67203
(316) 269-0602
journey@senate.state.ks.us

We would urge the clients and friends of MWL to contact lawmakers in the Kansas legislature about the issue. If insurance companies want to make good use of their lobbyists - now is the time. This bill, or one substantially like it, is introduced every year. This one is set to be heard by the Special Committee on Judiciary on September 18, 2007 from 10:00 a.m. to 5:00 p.m. - most likely in the morning, depending on the number of conferees. The Special Committee is made up as follows:

Sen. John Vratil (Chair) - vratil@senate.state.ks.us
Sen. Greta Goodwin (R.M. Member) - goodwin@senate.state.ks.us
Sen. Phillip Journey - journey@senate.state.ks.us
Sen. Julia Lynn - lynn@senate.state.ks.us
Sen. Derek Schmidt - schmidt@senate.state.ks.us
Rep. Michael O'Neal (Vice-Chair) - oneal@house.state.ks.us
Rep. Sydney Carlin - carlin@house.state.ks.us
Rep. Marti Crow - crow@house.state.ks.us
Rep. Lance Kinzer - kinzer@house.state.ks.us
Rep. Bill Light - light@house.state.ks.us
Rep. Jan Pauls - pauls@house.state.ks.us
Rep. Marc Rhoades - rhoades@house.state.ks.us
Rep. Vern Swanson - swanson@house.state.ks.us

Contact these committee members and let them know that there is not only state - but national support for the bill - which would take Kansas out of the vast minority of states which have such antiquated and business-unfriendly anti-subrogation statutes. It might be advisable for anybody who can be available on September 18 to contact Athena Andaya at (785) 296-4420 or AthenaA@kird.state.ks.us to get on the speaking schedule. These bills move forward based on the perceived amount of interest and concern from the public. Kansas members are especially urged to speak. MWL attorneys are scheduled to appear and testify before the Kansas legislature this month in support of the bill.

WORKERS' COMPENSATION SUBROGATION

WORKERS' COMPENSATION SUBROGATION'S SECRET WEAPON

Extraterritorial Subrogation: *Lane v. Stevens Transport,* 2007 WL 2319855 (E.D. Ark. 2007)

By Gary L. Wickert

In addition to early recognition of and action on subrogation potential in work-related accidents, the single most effective strategy for increasing workers' compensation subrogation recoveries is to know more than the other person. Claims handlers and subrogation professionals who take the time to familiarize themselves with the laws of 50 different jurisdictions – no small feat – are light years ahead of the game when it comes to squeezing recoveries out of fact scenarios in which most other insurers would not recognize or allow to fall to the strong-arm tactics of aggressive trial lawyers. In

today's global (and certainly interstate) marketplace, more and more workers' compensation injuries are occurring in states other than the state in which the worker was hired, resides, or receives benefits in. This means subrogating carriers often have the choice of laws from at least two states to apply to their recovery efforts. The laws of one state might spell zero recovery, while the laws of the other state might lead to a full recovery. Clearly, knowing that you have a choice is only the beginning.

In the recent Arkansas Federal Court decision of *Lane v. Stevens Transport,* understanding that the possibility of applying the subrogation laws of a second state was critical to the subrogation rights of self-insured Celadon Trucking. Bruce Lane was an employee of Celadon Trucking, an Indiana corporation. While operating a tractor trailer in Arkansas, he was involved in an accident with another rig operated by Stevens Transport. Lane applied for and received $183,028.79 in benefits under Indiana law. He also hired a lawyer in Arkansas who filed suit in Arkansas Federal Court against Stevens Transport. Lane settled his personal injury suit for $750,000, and asked the federal court to declare that Celadon Trucking was not entitled to recoup any part of its lien because Lane was not "made whole" by the settlement. Under Arkansas law, if a worker is not made whole by his/her third party settlement, the carrier's compensation lien is eliminated - sad, but true. However, because benefits were paid under Indiana's workers' compensation statutes, there was the possibility that Indiana's laws could be applied to the subrogation rights of Celadon. Known as comity or conflicts of laws, this area of law allows a court sitting in one state to apply the workers' compensation subrogation laws of another state under whose statutes benefits were paid to the worker. Indiana did not apply the made whole doctrine to workers' compensation subrogation, but it did apply a lien reduction statute which, although it had the potential to reduce the lien based on the percentage reduction of the worker's claim, would not eliminate it altogether as the made whole doctrine would.

The federal court determined that Celadon's recovery rights in Lane's settlement were determined by the law of the state in which the employee obtained compensation benefits – the majority view throughout the country. Because Lane received benefits under Indiana law, Indiana's lien reduction statute would apply. Celadon's $183,028.79 workers' compensation lien was reduced to $78,446.13 (42.86%) because this was the reduction of the full value of Lane's personal injury claim he had to take due to liability and insurance coverage reasons. However, the lien was not eliminated altogether as it would have been under Arkansas law. In fact, had benefits been paid under the laws of most other states, Celadon would have seen a full recovery.

The lesson here is that subrogation professionals need to be constantly vigilant for situations where workers' compensation benefits are paid under the laws of a state other than the state where the third party action is pending. If the subrogation law of the forum state is favorable, say nothing and hopefully nobody else will either. If the law of the state paying benefits is more favorable, bring up extraterritorial subrogation and argue application of that state's laws. Our firm has been instrumental in effecting recoveries in lots of cases where even the plaintiff's attorney had given up because a third party action against a general contractor was prohibited in the forum state, but through extraterritorial subrogation, the laws of another state which allows such suits were applied – allowing a recovery for both the worker and the carrier.

Chapter 8 of our book, *Workers' Compensation Subrogation In All 50 States* (see our website at www.mwl-law.com) is dedicated to the laws of all 50 states with regard to extraterritorial subrogation. The trick here is that the conflict of laws rules to be applied come from the laws of the forum state. There are many different conflict of laws rules, and simply saying that the subrogation law of the state under which benefits were paid applies would not be a true statement - it depends.

However, there will almost always be an argument which can and should be made in situations where the law of the forum state is bad for the subrogated carrier. Please contact Gary Wickert at gwickert@mwl-law.com if you have questions about extraterritorial subrogation.

WORKERS' COMPENSATION SUBROGATION

EXTRATERRITORIAL WORKERS' COMPENSATION SUBROGATION

MWL Attorneys Gary Wickert and Ryan Woody Appeal to the Tenth Circuit: *Anderson v. Commerce Constr. Serv., Inc.*, 2007 WL 109962 (D. Kan. Apr. 10, 2007) (NO. 06-CV-2073 CM)

By Ryan L. Woody

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, Inc. Commerce Construction had hired Anderson's employer, Midwest Environmental to perform demolition of the Circle High School auditorium walls in Towanda. It was alleged that Commerce Construction failed to inform Anderson or his employer that the auditorium walls were not properly enforced. After the accident, Midwest's worker's compensation carrier paid compensation benefits to Anderson under Nebraska law. MWL was retained by the workers' compensate carrier to pursue this matter against the general contractor. MWL filed a third party action in Kansas against Commerce Construction seeking to hold the general contractor liable for the accident.

Kansas law precludes suits by injured workers against general contractors while Nebraska law does not. At trial, Commerce Construction argued that the Kansas' exclusive remedy rule applied to the case under the *lex loci delecti* choice-of-law analysis or "place of the wrong". On the other hand, MWL argued that under Kansas choice-of-law rules, Nebraska's Workers' Compensation Act and its exclusive remedy provisions applies to the underlying case. However, the district court 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 on behalf of the workers' compensation carrier.

On appeal, MWL contends that the district court's error stemmed from improper application of the Kansas choice-of-law rules. Specifically, the court erred by applying the rule of *lex loci delecti* found in *Ling v. Jan's Liquors*, 703 P.2d 731, 735 (Kan. 1985). Instead, because this case involves application of the Nebraska Worker's Compensation Act, *lex loci delecti* is inappropriate, and the court should have applied a separate choice-of-law analysis that applies the exclusive remedy rule of the state where benefits were paid. See A. Larson, Workers' Compensation Law (2005); Restatement (Second) of Conflicts §185; *Miller v. Dorr*, 262 F. Supp.2d 1233 (D. Kan. 2003). The general rule in extraterritorial workers' compensation subrogation, and the one utilized by many states, is known as the *Larson* Rule. This rule is as follows:

> *As to third-party actions, if compensation has been paid in a foreign state and suit is brought against a third-party in the state of injury, the substantive rights of the employee, subrogated insurance carrier and the employer are ordinarily held governed by the laws of the foreign state.*
>
> *A. Larson, Workers' Compensation Law, § 144 (2005).*

The case also presents interesting Constitutional concerns. A separate choice-of-law rule for extraterritorial workers' compensation subrogation has its roots in the doctrine of comity and the Full Faith and Credit Clause in the United States Constitution. Article 4, § 1 of the United States Constitution provides:

> *Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceeding of every other State and the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be provided and Effect thereof.*

Congress then mirrored this constitutional requirement with the passage of the Full Faith and Credit Act. See 28 U.S.C. § 1738.

> *Full Faith and Credit is a national policy, not a state policy. Its purpose is not merely to demand respect from one state for another, but rather, to give us the benefits of a unified nation by altering the status of otherwise independent, sovereign states. MWL argues in its appeal that the lex loci delecti rule applied by the District Court fails to abide by the constitutional limitations laid down by the Full Faith and Credit clause.*

Interestingly, it was MWL's idea to apply extraterritorial subrogation law from Nebraska to the facts of the case. The plaintiff's attorney had given up and was closing his file. On our suggestion, he allowed us to appeal the case based on the extraterritorial argument - and our chances of success should be fairly good. The case is currently being briefed by the parties with oral arguments likely to be set for this winter in Denver, Colorado. MWL will keep you updated on the progress of this important workers' compensation appeal. Should you have any questions about this appeal or any other extraterritorial workers' compensation issues, please feel free to e-mail Gary Wickert at gwickert@mwl-law.com or Ryan Woody at rwoody@mwl-law.com.

AUTO SUBROGATION

TESTING 1-2-3: SUBROGATING AGAINST YOUR INSURED'S TEST AND RENTAL DRIVERS

By Michael R. Sinnen

Has your insured dealership or automotive garage found itself wondering if it can subrogate against a test driver who falls asleep at the wheel, drives his car into a tree, and causes extensive vehicle damage? While feelings of fairness suggest that one should be able to collect from this culpable car operator, insurers of car dealerships are confronting a host of complex issues as they try to determine whether they can subrogate in this developing area of the law. Issues ranging from unfavorable state statutes to the impact of subrogation on business relationships with car dealerships are affecting insurers in their deliberations. Insurers interested in leveling the scales of justice against the negligent driver are seeking a framework to assist them in their thought process. To that end, these insurers will find the following fruitful.

While a dealership may have more than one insurance carrier, insurers seeking to subrogate will be referred to as the "dealership's carrier." The forthcoming framework also assumes that the carrier is the automobile or garagekeepers' policy for the dealership. The answer may vary if the subrogating entity has a "Wholesale Floor Plan" Property Policy wherein the automobile

manufacturer provides property coverage for the vehicles the manufacture owns located on the dealership floor plan or an "Inventory Coverage Policy" wherein the automobile manufacturer provides coverage for a franchised auto dealership, such as for demonstrators, shop/rental vehicles, etc.

In each particular test or rental driver case, the first question that needs to be answered is whether the test driver is considered an insured of the dealership's carrier. The answer to this question may vary from state to state, as state regulations may mandate coverage by the dealership's carrier. For example, certain states, such as Iowa, have statutes that contain language such as, "…when damage is done by any car by reason of the negligence of a consent driver, the owner of the car shall be liable for such damage." Iowa Code § 321.493. In some situations, the dealership's carrier actually owns the vehicle, and the carrier will obviously be viewed as the primary liability insurer of the driver in these cases. If the dealership's carrier is the owner of the vehicle and it proceeds to sue the driver in states such as Iowa, the carrier runs the risk of literally pursuing its own "insured" as a third party for damages to its vehicle. This is something which violates the anti-subrogation rule in many states prohibiting a subrogation action against one's own insured but this varies from state to state. Meanwhile, if the dealership is the owner of the vehicle and the dealership's insurer proceeds to seek reimbursement from the dealership (or another of the dealership's insurers), the dealership's carrier runs the risk of harming its business relationships with its dealerships. Furthermore, if the driver is deemed an insured of the dealership's carrier, then the dealership's carrier should seek contribution from either the test or rental driver's carrier, or a separate insurer of the dealership. Whenever possible, this avenue should be pursued because the dealership's carrier may have better results if it seeks contribution before making payment.

Where contribution and coordination of the policies (dealership policy vs. test driver's personal auto policy) isn't an option, the next step is to consider suit against the test driver based on the "if you break it, you buy it" philosophy. Some policies issued by a dealership's carrier are for physical damage only. In these instances, and in states that do not have laws that force the dealership's carrier into the position of a liability insurer merely because a policy is in place, the dealership's carrier can try to subrogate against the test driver. The dealership's carrier can subrogate even when its physical damage coverage is primary, since the coverage is only for physical damage. In states that have laws that are "friendly" to the dealership's carrier, the dealership's carrier will not have the accompanying risk of violating the anti-subrogation rule when it sues the driver because the driver will not be interpreted as the dealership's carrier's insured.

When the dealership's carrier is successful in proving to a court or an arbitrator that the driver is not its insured under applicable state laws, it may be able to proceed with claims against the driver, and perhaps the driver's insurer, on the basis of negligence, bailment, and, in some cases, breach of contract. The validity of claims based on negligence and bailment will depend on the facts of each particular case. The dealership's carrier will need to ascertain the extent to which the driver was responsible for causing the loss and make decisions on whether to pursue subrogation based on this analysis. Meanwhile, if there is a contract in place between the dealership (or the dealership's carrier) and the driver, the contract terms will be most relevant in determining whether to sue a driver based on a breach of the contract.

At any rate, successful negligence arguments should invoke coverage by the driver's insurer, while arguments based on bailment and breach of contract may or may not invoke coverage, depending on the driver's policy terms. The dealership's carrier should be aware that well-represented test drivers will implead (i.e., bring an additional party into the case) the dealership's garagekeepers' or liability carrier. This may present problems for the dealership's carrier, who seeks to maintain good

business relationships with its dealerships. The dealership's carrier should therefore evaluate every case carefully before deciding whether to pursue claims against the test driver.

Unfortunately, many arbitrations involving such claims against test drivers are met with frustration because the arbitrator rules that either the dealership's carrier is primary without looking at the negligence issue, or they reject the case because of a coverage question.

Subrogation suits against the test driver based on the "you broke it, you buy it" philosophy are complicated and generally present more subrogation obstacles than opportunities. If a third party is at fault, subrogation becomes more feasible. But when the target is the test driver who could possibly be an insured of your own policy, some thinking is required before proceeding. The "other insured" language of both the dealership's policy and the test driver's auto insurance policy, the specific liability facts of the case, the laws of the specific state you are in, and other such factors must be considered in each case.

As you can see, with a variety of issues coming into play, this area of subrogation can become complicated and consulting a subrogation attorney may produce the best results when determining what avenue to take in order to effectuate a recovery. If you have any questions or need assistance in determining whether to pursue a subrogation claim involving test driver/rental vehicles collisions, please e-mail Michael Sinnen at msinnen@mwl-law.com.