# MATTHIESEN, WICKERT & LEHRER, S.C.

**(Formerly Mohr & Anderson, S.C.)**

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## MOHR & ANDERSON RENAMED MATTHIESEN, WICKERT & LEHRER

Gary Wickert, as President of Mohr & Anderson, S.C., and its Vice-President, Bradley Matthiesen and Treasurer, Douglas Lehrer, have renamed the firm, Matthiesen, Wickert & Lehrer, S.C., in order to reflect the ownership of the firm's three shareholders, and the recent "Of Counsel" status of former shareholders, James W. Mohr, Jr., and Arnold P. Anderson, both of whom will remain "Of Counsel" to the firm. The name change was also undertaken to compliment the firm's national subrogation and insurance litigation reputation and the names of the shareholder litigators who have contributed to that reputation. We are excited to announce that although the firm's name has changed, everything else - including the firm's reputation and expertise as one of the premier subrogation firms in the country - has remained the same.

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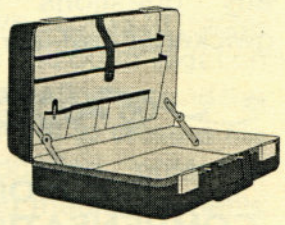
IN THIS Issue



BRIEFCASE NOTES-
NEW CASE LAW



### Ohio Supreme Court Declares WC Subrogation Statute Unconstitutional

Holeton v. Crouse Cartage Co., 748 N.E.2d 1111 (Ohio 2001).

On Wednesday, June 27, 2001, the Ohio Supreme Court, in a 4-3 decision, declared the state's "subrogation statute" unconstitutional and in violation of three sections of the Ohio Constitution. The ramifications of this shocking decision may be quite far-reaching.

*(Briefcase Notes - See Page 3)*

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We will continue to office out of the same locations in Hartford and Madison, Wisconsin, and our staff of subrogation and insurance litigation lawyers and professionals have not changed, except for the addition of additional subrogation legal assistants and lawyers. We will continue to offer the same cost-effective and aggressive subrogation representation to more than 150 of our subrogation and insurance litigation clients, as we have over the last two decades. Our office address and telephone number remains the same, but we have had to change our web site address to http://www.mwl-law.com. E-mail addresses have also changed, and each of our staff members may be located by using their [first initial, followed by their last name] @mwl-law.com. For example, Gary Wickert can be contacted at gwickert@mwl-law.com.

We hope that the name change does not cause our clients any inconvenience, but we felt the change was necessary to reflect the leadership, ownership, and vision of one of the country's premier subrogation and insurance litigation law firms. Please direct any questions to Gary Wickert at gwickert@mwl-law.com.

## BOOK ON WORKER'S COMPENSATION SUBROGATION NOW AVAILABLE!

Our publisher calls it "the most complete and thorough treatise covering workers' compensation subrogation ever published. It is entitled, *Worker's Compensation Subrogation in All 50 States*, and it is now available. This book is the culmination of more than two years of research and dedication, and is clearly the most complete and thorough treatise covering workers' compensation subrogation ever published. This lengthy, annually updated publication is in binder form, and available through Juris Publishing at http://www.jurispub.com/books/workerscomp.htm or at (800) 887-4064 (United States and Canada). A complete description of the book and a detailed index of its contents can be found at the above web site or at http://www.mwl-law.com.

This book is intended to introduce the workers' compensation claims handler, in-house counsel, and subrogation professionals to some of the esoterica more complex subrogation issues encountered in today's workers' compensation insurance subrogation marketplace. It covers and discusses the law in all 50 states on the following issues:

- Allocating third party recoveries;
- Attorneys' fees;
- Borrowed Servant Doctrine;
- Conversion of workers' compensation liens;
- Costs and expenses;
- Dual Capacity Doctrine;
- Equitable subrogation/contribution;
- Exclusivity Rule barring action against employer;
- How to calculate your credit/advance and how it is applied in each state;
- Intentional acts;
- Joint ventures;
- Made Whole Doctrine as applied to workers' compensation subrogation;
- Necessity of Intervention;
- Reduction Statutes;
- Staff leasing services and temporary employment agencies;
- Statutory subrogation rights;
- Subrogating against UM/UIM benefits;
- Subrogating in medical malpractice cases;
- Subrogating in legal malpractice cases;
- Waivers of subrogation;
- Who qualifies as a third party; and
- Other workers' compensation subrogation-related issues.

*(Book on W.C. Subrogation Now Available - Continued from Page 2)*

In addition to being a wonderful primer on workers' compensation subrogation, suitable for both the new subrogation professional and the seasoned veteran. This book also contains a detailed synopsis of the workers' compensation subrogation laws in each of the 50 states. It is a must for anyone with multi-state subrogation responsibilities. Complete with diagrams, references and thousands of footnotes, this is the most ambitious workers' compensation subrogation project ever undertaken. The book will be updated and supplemented annually through Juris Publishing, Inc. We hope that this treatise, which is written in language for the non-lawyer but is detailed enough for lawyers to use in writing legal briefs, will become a research and reference staple of every subrogation professional with multi-state jurisdiction and responsibilities. Please give us a call if you have any questions about the book.

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## OHIO SUPREME COURT DECLARES WC SUBROGATION STATUTE UNCONSTITUTIONAL

In June of 1998, Rick Holeton, a construction worker working on the Ohio Turnpike, was injured when a manlift bucket he was in was struck by a truck driven by a Crouse Cartage employee. The collision jolted Holeton out of the bucket and he slammed into the underside of the overpass he was working on and then fell to the highway below. Holeton collected workers' compensation benefits for his injuries, and then sued Crouse and various other people in United States District Court to recover personal injury damages. The Bureau of Worker's Compensation, relying on Ohio Statute § 4123.931, the subrogation statute, claimed it was entitled to recover benefits it paid Holeton from whatever third party damages he collected in Federal Court. Holeton challenged the subrogation statute and the District Court certified questions of law for the Ohio Supreme Court. The Ohio Supreme Court held that the statute was unconstitutional.

The Supreme Court found fault with a statutory provision in § 4123.931 that permits the Bureau or an employer to collect "estimated future values of compensation or medical benefits" from a damages award. The court felt that this statute created a condition under which a prohibited taking by the government would occur. The State of Ohio had a quasi-credit scheme under which a subrogating workers' compensation carrier/bureau could collect not only its past lien but also estimated future benefits which it owes to an injured worker, out of any third party recovery. In a situation where an injured employee dies before his or her life expectancy, the monies recovered by the worker's compensation carrier would amount to an unlawful windfall, and would not prevent a "double recovery", as was the intent of the statute.

Ohio was the last state in the Union to enact a subrogation provision in its workers' compensation scheme. According to local counsel, one problem with the statute is that it was written by the manufacturing community, so some felt it was one-sided. Another problem that the Supreme Court had with the statute is that if there was a settlement in the third party case, the entire amount of the recovery was subject to a lien, with the subrogating carrier having no accountability or responsibility for any contributory negligence on the part of the employer or the employee. The net result was that plaintiffs were often forced to trial when they otherwise would have settled the case, were it not for a large worker's compensation lien.

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Continued from Page 3)*

The Ohio Supreme Court also held that the settlement language of the statute led to a violation of the constitution's equal protection clause by presuming a double recovery whenever a claimant retains workers' compensation and tort damages. The court said that claimants who try their claims are permitted to rebut this presumption while claimants who settle their tort claims are not. The court was split on its decision and a dissenting opinion was quite vocal on the principle that courts are not the creators of public policy and should not decide cases based on disagreement with the legislature. The dissenting opinion felt that the majority appeared to derive their determination from their disagreement with the substance of the legislation, and their reasons for declaring the statute unconstitutional were basically public policy arguments, not principles of constitutional law. Another dissenting opinion indicated that the majority went too far in calling the statute unconstitutional on its face.

What is the ramification of this decision? We are not sure. Some carriers are fearful that they will have to refund millions of Ohio subrogation dollars which have been collected over the past ten years. Fortunately, this is an unlikely scenario. There are also rumors among insurance companies that they will be forced to stop subrogating medical payments subrogation claims on auto cases, and that other areas of subrogation will be affected as well. This is not the case. The gravest upshot of this decision is that it clearly signals an attack on workers' compensation subrogation rights, not only in Ohio, but across the country. The majority decision states that injured parties should no longer be "collection agencies" for subrogating workers' compensation carriers. The truth is, if an injured party does not want to be a collection agency for a worker's compensation carrier, his choices are quite simple. Either he can simply collect the statutory benefits, which are afforded to him regardless of contributory fault or negligence, or he can opt not to pursue a third party action, but allow that to be pursued by the worker's compensation carrier. The Ohio Supreme Court is the same court which not too long ago held that a motorist could recover uninsured motorist benefits from its employees' auto policy, even though they were not on the job and were not in their employer's car. This is also the same court which in a 4-3 vote held not too long ago that an employee could recover workers' compensation benefits based on emotional distress he suffered because of someone else's injury.

The Holeton decision clearly should signal to workers' compensation carriers across the country that they should actively pursue their workers' compensation liens and engage subrogation counsel as quickly as possible. Sitting on strong subrogation rights has always resulted in bad law being handed down from the various states' high court. Aggressive and early investigation and prompt action in protection of workers' compensation subrogation liens is required now, more than ever, in order to avoid results similar to this in states around the country. It should also be a clear signal that subrogating carriers should be mindful of and even proactive in local issues regarding elections to their state's Supreme Court. It is clear that the four justice majority on the Ohio Supreme Court has no interest in protecting workers' compensation carriers or the insurance industry in general. It appears that their only interest is in walking lockstep with the Ohio trial lawyers, whose amicus curia brief was followed almost verbatim in their decision.

*Please contact Gary Wickert if you have any workers' compensation claims in which there may be questions as to how to go about protecting your subrogation interest. The actions required of you may vary from state to*

*(Briefcase Notes -*
*Continued from Page 4)*

*state, but aggressive and proactive subrogation action is almost always necessary.*

## WORKERS' COMPENSATION SUBROGATION ISN'T WHAT IT USED TO BE

By: Gary Wickert

It has long been true that the subrogation rights of workers' compensation insurance carriers vary greatly from state to state. Generally speaking, statutory workers' compensation benefits are the employee's exclusive remedy against the employer for a work-related injury in the course and scope of his employment. In exchange for an employee giving up his right to sue an employer for negligence resulting in an injury, the plaintiff is given a schedule of predictable and guaranteed medical, indemnity, and/or death benefits not contingent upon or affected by negligence of the employee himself. The purpose of these statutes are to protect the carrier, reduce the burden of insurance on the employers, and see to it that the ultimate burden for the loss is borne by the party whose negligence caused the loss or injury in the first place.

At the same time, in order to hold down the burden of insurance on the employing public, virtually all states have historically provided a statutory subrogation scheme by which the employer and/or insurance carrier is able to recover any benefits it has paid, should the employee make a recovery from a third party tortfeasor who was responsible for causing the original injury. Unfortunately, these subrogation rights are as confusing and varied as any state law that can be found. Such subrogation rights are usually granted within the state statute. Over the past several years, these subrogation rights have become increasingly confusing and unpredictable. It once was a rather simple scenario - worker recovers settlement or judgment from tortfeasor and carrier was entitled to reimbursement, occasionally minus a proportionate share of attorneys' fees. Workers' compensation subrogation statutes across this country have now evolved to the point where there are enumerable defenses, loop holes, obstacles, and unresolved legal issues which stand in the way of a carrier's clean getaway with its subrogated interest. The unfortunate fallout of all of this is that increased expertise on state subrogation law and subrogation techniques are required in order to maximize workers' compensation subrogation recoveries.

The made whole doctrine - the equitable principle that a subrogating carrier was not entitled to subrogation unless its insured was "made whole" out of the third party recovery - was almost universally inapplicable to workers' compensation scenario until recently. Now, not only is the made whole doctrine being applied, or arguably applied, in certain situations by the application of state case law, but it is common in some states, even made part of the worker's compensation statute itself. In Nebraska, statute provides that if the carrier and the employee do not agree on a distribution of the proceeds of any settlement, the court may order a "fair and equitable distribution" of the proceeds. Neb. Rev. St. § 48.118 (1999).

In Arkansas, the subrogating carrier is given a "first money" right - not of the "gross recovery," but of the "net recovery". Ark. St. § 11-9-410 (1999). The Georgia Workers' Compensation Act has affirmatively made the made whole doctrine applicable to workers' compensation subrogation by stating that the employee must be "fully and completely compensated" before subrogation rights can be affected. Ga. St. § 34-9-11.1 (1999). Other statutes, such as the Indiana statute, give the carrier a lien on any recovery, but subject to its paying a pro rata share of reasonable and necessary costs and attorneys' fees. In. St. § 22-3-2-13 (2000). In Wisconsin, the king of "made whole" states,

*(Workers' Compensation Isn't What it Used to Be - Continued from Page 5)*

the worker's compensation statute allows the carrier to subrogate for and actually recover more than the amount of their worker's compensation lien, without any concern whatsoever for whether the employee is made whole. Wis. Stat. §102.29(1) (1995-96); Threshermens Mutual Insurance Company v. Page, 217 Wl.2d 451 (1998). Some states, such as Texas, Arkansas, and Wisconsin, allow the carrier to actually initiate a third party action, recover its worker's compensation lien, and pay any excess to the injured employee. Other states have waiting requirements and statutory calendars defining when and if a carrier can subrogate if the employee does not.

Other states, such as Florida, discourage and arguably prohibit a carrier from intervening into a third party action, on the theory that its subrogation interest must be protected by the plaintiff. However, in practice, we often find that the plaintiff and his attorney are the worst enemies of the worker's compensation carrier when it comes time to distributing and allocating a limited recovery between them. Whether a carrier can subrogate against uninsured motorist benefits varies from state to state and depends on such factors as whether or not the policy is issued to the employer or the employee. Also varying greatly from state to state is whether or not the employer/carrier can receive a credit against future workers' compensation benefit obligations, for any amounts that the employee receives in his settlement. Equally uncertain is the procedure by which the carrier must secure and protect its future credit. All of these uncertainties make workers' compensation subrogation, especially on a multi-state basis, extremely difficult and virtually unpredictable. Some states allow a carrier's attorney to recover attorneys' fees and costs on top of the worker's compensation lien, reducing the burden and expense for a subrogating carrier. Others do not.

Years ago, a worker's compensation subrogation claims handler had only to deal with a particular state statute and a small number of cases interpreting it. Today, other state statutes have been found to be applicable and interrelated to a carrier's subrogation rights. For example, Indiana has long had a lien reduction statue which reduces a carrier's subrogation interest along all lines of insurance except for workers' compensation. In. St. § 34-51-2-19 (1999). However, in 1992, the Indiana Supreme Court amended this statute, and either intentionally or unintentionally omitted an exception for workers' compensation liens. The Supreme Court held that because this statute no longer contained the exception, the lien reduction statute would now apply to workers' compensation subrogation also. This statute requires worker's compensation carriers to now do the following:

- Determine the full value of the case based on the plaintiff's assertion in its Petition;
- Determine the settlement amount;
- Calculate a percentage that the settlement amount bears for the plaintiff's prayer for damages in its Petition; and
- Reduce the worker's compensation lien by that percentage.

Obviously, these calculations are fraught with opportunities for misuse by the plaintiff, who could simply pray for millions in damages, and thereby reduce the worker's compensation lien.

Still in other states, such as Missouri, efforts were made to prevent employers from circumventing the requirements of the Worker's Compensation Act by hiring independent contractors to perform the work which the employer would otherwise perform. In the statute full of good intent, the Missouri legislature enacted Mo. Rev. Stat. § 287.050, which defines a statutory employee as anyone who does work under contract on the premises

*(Workers' Compensation Isn't What it Used to Be - Continued from Page 6)*

of the employer, including subcontractors and their employees. While this may, in fact, prevent abuses by which employers attempted to dodge obtaining workers' compensation coverage, it also threw another obstacle in the way of subrogating worker's compensation carriers. Mo. Rev. Stat. § 287.050 makes it clear that statutory employment exists when three elements coexist:

1. The work is performed pursuant to a contract;
2. The injury occurs on or about the premises of the alleged statutory employer; and
3. The work is in the usual course of the business of the alleged statutory employer.

Therefore, this statute provides the opportunity for defendants of all shapes and sizes to claim that they are "statutory employees" of the employer, and thereby avoid liability on the third party action all together. The contract doesn't even have to be in writing, and can be oral. It is often the case that the subcontractor will disavow any relationship between their employees and the employer before the Worker's Compensation Commission, and then do an about-face and claim that they are statutory employees under Mo. Rev. Stat. § 287.050 when it's time to defend the third party action. Obviously, this is not fair, but it is one of many obstacles which have been thrown up in the way of subrogating worker's compensation carriers over the past decade.

Other interesting and quite complicated rulings regarding intentional acts, the dual capacity doctrine, joint ventures, injuries caused by fellow employees, indemnity agreements, employee leasing companies, borrowed servant defenses, and waiver of subrogation scenarios are all areas of the law which defendants use to their advantage to avoid liability in workers' compensation third party actions. Subrogation personnel have to be well-versed in the law of each state in order to make prompt decisions about whether or not subrogating will be cost-effective, successful, or simply amount to throwing good money after bad. The benefits of national subrogation counsel in the area of workers' compensation subrogation cannot be underestimated. Please rely on your subrogation counsel to provide you with prompt answers to difficult questions when subrogating for a worker's compensation benefits.

*Please feel free to contact Gary Wickert or Doug Lehrer with any questions you may have regarding workers' compensation subrogation throughout North America.*

## RECOVERING ATTORNEY'S FEES IN PROPERTY SUBROGATION

By Douglas W. Lehrer

Historically, the bane of small property subrogation claims has been the fact that there is virtually no incentive on the part of the third party carrier to settle the claims. Frequently, we see the classic "we are only responsible for paying those claims for which our insured are liable" letters, indicating that they have no intention to pay the claim, even though liability appears to clearly rest with the third party. Frequently, the reason they can get away with this is because they have no fear of our threat to file suit and obtain a judgment against them. If they do lose at trial, or it looks like they may be found liable after they put us to the task of actually suing them, they can simply offer a percentage of the damages and insurance carriers are often glad to just do away with a small subrogation file that will quickly become cost-ineffective to pursue if they have to go through litigation. Therefore, creative subrogation counsel should be looking for ways to leverage and put pressure on third party carriers to settle these smaller property subrogation claims immediately, such as the

*(Recovering Attorney's Fees in Property Subrogation - Continued from Page 7)*

potential of lumping the insured's uninsured losses or "out of pocket" damages into the mix.

Another angle is to threaten recovery of attorney's fees. Many states have statutes which allow for defendants to make an offer of settlement or judgment, and then recover attorney's fees if the ultimate verdict ends up being less than the amount offered. Subrogating carriers would do well to take notice that there are also statutes which allow subrogating carriers to recover attorney's fees in property damage subrogation claims, under certain circumstances.

In Oklahoma, the legislature enacted § 940 of Title 12, Chapter 14, for the purpose of encouraging settlement of smaller property damage claims. 12 Okl. St. Ann. § 940. This statute provides that in any civil action to recover damages for the negligent or willful injury to property, the prevailing party will be allowed to recover reasonable attorney's fees, court costs and interest, to be set by the court and to be taxed and collected as other costs in the action. § 940(A). This statute does allow the defendant to make a written offer to allow judgment to be taken against him. If the plaintiff accepts the offer, it is filed with the court and judgment is taken against the defendant. The defendant has ten days after being served with a summons to make this written offer of judgment. If the written offer is not accepted within five days after the offer was made, the offer is deemed withdrawn and is not admissible at trial. If judgment is rendered for the defendant, or if a judgment for the plaintiff is an award of a lesser amount than the defendant's offer, then the plaintiff shall not be entitled to recover attorney's fees, courts costs and interest. If the judgment is rendered for the plaintiff, and is for the same amount as the defendant's offer, then both parties incur their own attorney's fees, court costs and interest. However, if the judgment rendered is for the plaintiff, and is for a larger amount than the defendant's offer, then the plaintiff shall be entitled to recover attorney's fees, court costs and interest.

Utilization of national subrogation counsel, such as Matthiesen, Wickert & Lehrer, gives you the unique benefit of being able to utilize the nuances of various state laws which can expedite your multi-state subrogation efforts, and gain you additional leverage in those hard-to-settle, smaller property subrogation files. Of course, these techniques can also be used to expedite settlement and recovery of larger property subrogation losses as well. It is recommended that in all Oklahoma subrogation claims, a demand letter be sent which reminds the third party carrier of the devastating effect § 940 can have if the third party doesn't agree to settle a case which reasonably should be settled. In smaller property subrogation files, including files less than $2,500.00, attorney's fees can often far exceed the amount of the subrogation interest itself. No third party liability adjuster wants to find himself in a situation where the bulk of what he has to pay out is for attorney's fees, when he could have settled a small subrogation claim for considerably less early in the case. To be cost-effective in smaller subrogation claims, the subrogee must either think smart or close the file because the subrogated interest is small.

## HOW TO SUBROGATE WHEN YOUR INSURED DOES THE REAR-ENDING

By Russell J. A. Jones, J.D.

There is an entire area of subrogation potential which is traditionally overlooked or ignored. When your insured rear-ends a tractor trailer which has come to a stop on a highway, is fully in his lane, and all of its brake lights and other safety devices are working, there appears to be no third party liability. Look again! Pursuing recoveries against tractor trailers for injuries or deaths as a result of rear-ending a large truck

*(How to Subrogate When Your Insured Does the Rear-Ending - Continued from Page 8)*

is referred to as "underride litigation". In 1998, the U.S. Department of Transportation revealed that more than 5,000 people lost their lives in vehicle collisions involving a tractor trailer or other large trucks. This averages out to about one in every eight road fatalities and almost all of those people who were killed were in passenger cars. In addition, large trucks were three times more likely than any other vehicle to be rear-ended in fatal two-car crashes.

The U.S. Department of Transportation has set forth guidelines and standards regarding appropriate rear-impact safety guards for tractor trailers and other trucks. The purpose of this legislation is to prevent deaths and injuries caused from other vehicles rear-ending these larger trucks. Current regulations require that all tractor trailers manufactured after January, 1998 have rear guards that are no higher than 22 inches above the road's surface. Earlier regulations allowed guards to be as high has 30 inches off the pavement, and this regulation is still in effect for trucks which do not fall under the tractor trailer category, such as straight beds and dump trucks and for all tractor trailers manufactured before 1998.

Even with the newer regulations, there are still concerns about safety hazards and dangers involved in rear-ending larger vehicles. Safety professionals recommend guards on the rear of large trucks be no higher than 18 inches above the pavement, and the strength of these "guards" needs to be at least twice what it currently is in order to protect a person from serious injury in rear-ending a tractor trailer. Many underride collisions are the result of poor trailer lighting at night. A driver can often approach a tractor trailer from the rear and not realize what it is until it is too late. To address these problems, the U.S. Department of Transportation adopted FMVSS108 in 1993, which required that truck manufacturers partially outline tractor trailers' rear and side panels with alternating red and white sheeting and reflectors.

In subrogating rear-end cases such as these, defendants often claim that federal preemption applies. This means that because federal law has set the standards, it takes precedence over any conflict and any other state tort laws. But preemption applies only if the scope of the federal statute indicates congressional intent to occupy a field exclusively, compliance with both federal and state requirements is impossible, or state law impedes congress' purposes and objectives in enacting an irrelevant statute. But many federal and state courts have held that preemption does not prevent litigants from seeking recovery in underride cases, regardless of whether or not the cause of action is based on failure to properly illuminate the trailer or because of claims of defective rear guards. Courts have held that congress has not expressed or demonstrated an intent to occupy this field exclusively, and therefore preemption may not prevent causes of action based on the theories of underride litigation.

As a member of the Association of Trial Lawyers of America, we have access to tractor trailer underride documents and other litigation information from underride litigation around the country. Please remember not to close a file and give up on subrogation potential, especially in cases involving medical benefits paid to an insured who was injured as a result of underride, merely because the insured is the one who doing the rear-ending and the truck driver appears to have done nothing in the operation of his vehicle. Creative and aggressive subrogation should be pursued at all times to insure maximum recovery of subrogation dollars for a particular insurance company.

Grateful acknowledgment given to Martin J. Healy, Jr. and John P. Scanlon who provided research in their August, 2000 article in *Trial* Magazine entitled "Silent Killer on the Highway".

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"For the past ten years, CNA has utilized Gary Wickert's subrogation expertise on everything from workers' compensation to property to eight figure catastrophic losses. If you are serious about recovering money, you need to talk to Mohr & Anderson." **-Monica Walker, CNA\RSKCo, Downers Grove, Illinois**

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"For years, Gary Wickert has provided quality subrogation representation to Underwriters and the London Market. If there is subrogation potential, this firm will get your money. If there isn't, they will tell you." **-Kevin Whelan, Lead Underwriter, Cornhill Insurance, London, England**


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