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UNDERSTANDING NATIONAL SUBROGATION PROGRAMS

By: Gary L. Wickert

One of the reasons for my relocation to the Midwest was to be closer to the numerous home offices of my clients whom I represented from Houston for the last 15 years. If you do an Internet search with the simple word "subrogation", you will come up with a little more than a handful of subrogation firms, collection firms, and even small law firms claiming to handle subrogation on a nationwide basis. Over the last seven or eight years, the trend toward centralizing subrogation practices in our industry has predominated over the more traditional insurance practice of handling subrogation from a local level. Each such method carries with it both pros and cons.

Carriers handling subrogation from a centralized location lend themselves to unfamiliarity with multiple state laws and foreign venues, the need to associate with numerous counsel with an inconsistency of techniques and results, and the lack of opportunity to get to know the reputation and style of certain plaintiffs' counsel, which can be indispensable in negotiating settlements especially in the smaller of subrogation interests. On the other hand, handling subrogation within our industry from local and even

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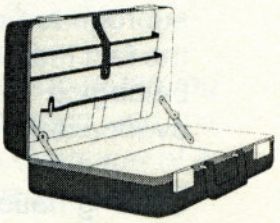

ERISA Preemption Doctrine Weakened

Blackburn v. Sundstrand Corporation, 115 F. 3d 493 (7th Cir. - 1997).

Although, this case is not entirely new, it is becoming an increasingly important case in the area of health insurance subrogation. Those of you with health insurance subrogation responsibilities national in scope, need to be

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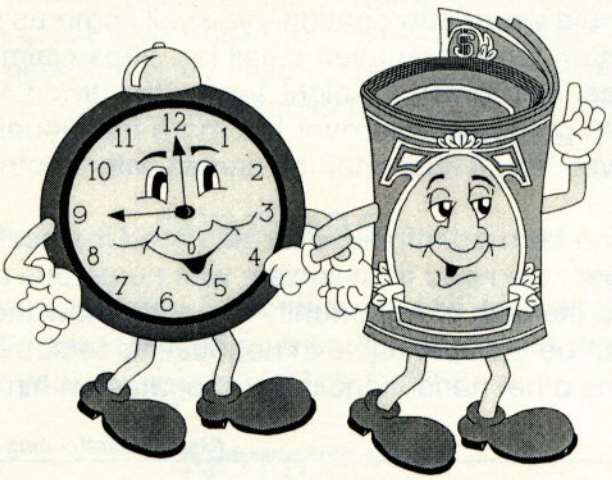
regional offices, often results in a dilution of qualified subrogation personnel, the imposition of claims' adjusters having to wear two hats (one for claims handling and one for subrogation), and a similar inconsistency of results due to varied practices, etc. A subset problem in this area is if, when, and how, to provide incentives for subrogation recoveries in an industry which still lags behind its own potential in recognizing, acting promptly on, and recovering subrogation dollars.

Unlike underwriting or claims handling, the area of subrogation is uniquely deceptive because a carrier's subrogation recoveries, and indeed, a carrier's subrogation report card, is only as good as that carrier's ability to recognize third party liability in the first place. Countless millions of dollars are lost annually and the industry does not even know it. While the "hear no evil, see no evil" defense may provide some relief to cognitive dissonance claims' handlers might otherwise experience if they knew they were failing to realize subrogation dollars, it does little to change the fact that there is a lot of money out there belonging to each of you which is overlooked on a daily basis.



Utilizing national subrogation counsel, such as Mohr & Anderson, can help to eliminate some of the negatives experienced by insurance carriers who have a centralized recovery unit, as well as those who still practice subrogation from a local level. As national subrogation counsel, we serve as a clearinghouse for subrogation matters, large and small, across the country. With local counsel in 47 states across the country, as well as in Mexico and Canada, I have brought 16 years of exclusive handling of subrogation matters to bear on the critical task of selecting and training local counsel, as well as endowing them with the appropriate aggressive, yet pragmatic, subrogation philosophy which must accompany a successful subrogation program.

Some so-called national insurance firms promise to take your largest files and the files with the best third-party liability, but leave you "holding the bag" with your small and medium size subrogation matters. Unfortunately, the latter make up the bulk of subrogation in this country. Locating and using local counsel across the country often leads to utilization of defense firms who appear only to handle subrogation matters "as a favor", and with the implicit understanding that they will be receiving larger and more lucrative defense work from you. There is also the problem of coordinating numerous local counsel across the country, from a centralized subrogation unit, or even from a home office. Convincing counsel in a foreign state to handle a small amount of subrogation for you and to give it their full attention, can be a difficult task, unless your files are combined with the files of nearly 100 other carriers in that state, making the handling of such matters more attractive to the attorney.

National subrogation counsel means that you have hired someone who will be your eyes, ears, voice, and contact with regard to any matter referred, regardless of where it is across the country. Local counsel across the country should be willing to regularly provide status updates on a particular matter regardless of whether that matter is being handled on a contingency or

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on a time and expense basis. Flexibility with fee arrangements is also critical, as there are some cases which are in the carrier's best interest to have represented on a time and expense basis, as opposed to a contingency. Also, working with local counsel that you have known for an extended period of time and trust can be critical for matters involving short fuses on the Statute of Limitations or even smaller matters which are not promising to an attorney fee wise, but certainly represent a significant subrogation interest for the carrier.

I urge you to consider using Mohr & Anderson as your national subrogation counsel. As should be expected from any full-service insurance firm, subrogation matters forwarded to us will be reviewed and evaluated initially, free of charge. Acting as a gatekeeper for subrogation matters to be handled across the country, an initial evaluation is made as to the cost effectiveness of pursuing a particular matter, taking into such considerations as:

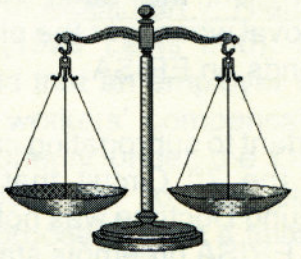
- ❑ Liability Facts
- ❑ Whether Expert Testimony is Needed
- ❑ The Difficulty of the Case Given Lack of Evidence (Such as a Product)
- ❑ The Amount of Subrogation Interest Involved
- ❑ The Likelihood of Recovery (Third-Party Insurance Availability)
- ❑ The Reputation of the Third-Party Tortfeasor for Settling or Litigating Even the Smallest of Matters

Defense counsel across the country traditionally carry with them a defense prejudice or myopia, which can shade their judgment on subrogation potential, especially involving smaller amounts in controversy. Because subrogation is a plaintiff's practice, the creativity and aggressiveness of a plaintiff's attorney must be utilized in not only evaluating and recognizing subrogation potential, but also acting aggressively to recover those subrogation dollars.

When deciding on subrogation counsel, it is always best to allow subrogation counsel to handle a few "test" files, so you can get a feel for how effective they are in turning over subrogation matters. Allowing subrogation matters to drag on for years can be as bad or worse for a subrogating carrier than settling quickly for too little. In choosing national subrogation counsel, you should always utilize someone who has a great deal of experience and background in the handling of subrogation, and, if possible, utilize a firm which specializes in subrogation. You should be able to rely on such counsel for quick, prompt, and over-the-phone responses regarding the likelihood of recovery on certain matters and suggestions as to how you can "turn over" some of the smaller subrogation matters which you plan to handle in house. One of the best methods for determining how dedicated a particular law firm is to handling subrogation, is to ask them for a list of articles or publications to their credit which deals exclusively with subrogation issues.

One thing is for certain, the quality of the subrogation philosophy utilized by your national subrogation counsel will be directly reflected by the results they achieve.

If you would like more information regarding our national subrogation program and the ease in which you can take advantage of it, please contact me at gwickert@mohr-anderson.com. I will be happy to answer any questions you might have.



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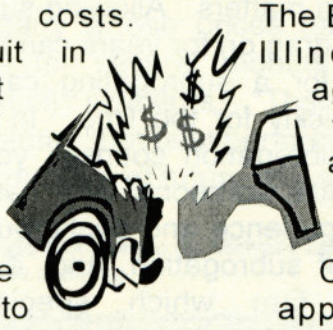
aware of the impact that Blackburn has in the 7th Circuit.

In Blackburn, Ronald and Barbara Blackburn were injured in an automobile accident. Their employer, Sundstrand Corporation, had an ERISA welfare benefit plan which covered them and paid $25,831 of their medical costs. The Blackburns filed suit in Illinois State Court against the driver of the other vehicle and settled for $105,000. They then filed in State Court, a Petition to apportion the $105,000, asking that a portion of their attorney's fees and expenses be charged against the subrogation rights of Sunstrand under the ERISA Plan. Sundstrand removed the case to Federal Court because of the ERISA policy. The trial court disallowed the apportionment awarding the full amount to the employer, claiming that the Illinois Common Fund Doctrine was preempted by ERISA. The 7th Court of Appeals held that not only did the Court not have federal jurisdiction, but the Common Fund Doctrine was not preempted by ERISA, at least not under the language of the Plan involved.

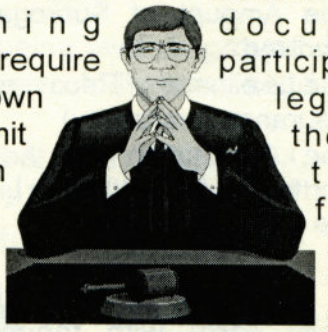


The 7th Circuit Court of Appeals held that the Federal Trial Court did not have jurisdiction mainly because an ERISA Plan was involved. They held that a federal defense to a claim arising under State law does not create federal jurisdiction and therefore, does not authorize removal to Federal Court. A doctrine known as "complete preemption", on the other hand, would permit removal whenever the plaintiff's *own claim* depends on ERISA.

More important to subrogating carriers is the holding of the 7th Circuit that the Illinois Common Fund Doctrine was not preempted by ERISA. ERISA preempts state laws only "insofar as they . . . relate to any employee benefit plan". The Court felt that the Common Fund Doctrine predated ERISA and did not "relate to" the Plan. Their logic was that a state law is not "related" to an ERISA Plan just because it affects the net amounts the Plan pays for health care. As an example, it explains that ERISA does not preempt a state tax on medical services, even though a majority of all health care is purchased these days by ERISA Plans.

The Court held that the Plan's subrogation recovery must be reduced by attorney's fees and expenses, but by their portion of attorney's fees and expenses incurred by the Blackburns. The Court was careful to differentiate between the application of the Common Fund Doctrine (which merely reduces the subrogation recovery), and the application of a State Anti-Subrogation Law, which was clearly preempted under FMC Corp. v. Holliday, 498 U.S. 52, (1990). The Court held that the law at issue in Holliday was directed at group healthcare plans and made for a much closer "relation" than that of the Common Fund Doctrine to ERISA Plans.

The Court noted that a plan has a better argument to avoid the application of the Common Fund Doctrine if its governing documents expressly require participants to pay their own legal fees and to remit the gross rather than the net proceeds from litigation. Because Sunstrand's Plan did not contain such language, the Court held that the Illinois Common Fund Doctrine was applicable and ERISA did not preempt it.



Although in the vast minority, the decision in Blackburn is significant because it is a tool which is now regularly used by plaintiffs'

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attorneys to coerce a reduction in your health insurance subrogation recovery. The majority of jurisdictions give great deference to ERISA Plans, but are increasingly limiting ERISA subrogation rights only to those rights set forth in the language of the Plan itself. Although the Plan language in Blackburn was not spelled out in the opinion, the door has been left open for interpretation of ERISA Plan language, which would grant much broader rights than those afforded the Plan in Blackburn.

When forwarding subrogation matters to subrogation counsel, always include all of the relevant plan language including subrogation language, reimbursement language, gross recovery language and the like. As we can see from this unfortunate decision, the language of a plan does make a big difference.

If you have any questions regarding ERISA subrogation or application of ERISA subrogation law within the Continental United States, contact Gary L. Wickert at gwickert@mohr-anderson.com.

NEW MEXICO FIRE SUBROGATION

As many of you know, we have been spearheading a subrogation\ investigation effort into the catastrophic fires which recently ravaged areas of New Mexico. Working closely with a well-known plaintiff's firm out of Houston, Texas and another out of Albuquerque, New Mexico, we are currently gathering claim information for inclusion of our clients' subrogation interests in the Federal Tort Claims Act claims being pursued against the U.S. Park Service. If you have any property damage claims arising out of these fires, commercial or personal, please contact Gary Wickert regarding including your subrogated claims (even if no payments have been made) in the FTCA claim against the government. The fact that the government has indicated a willingness to "compensate" some of the homeowners affected may have a negative impact on your subrogation rights under New Mexico law. Gary Wickert can be reached at 800-637-9176.

ASSAULT ON SUBROGATION IN OHIO CONTINUES

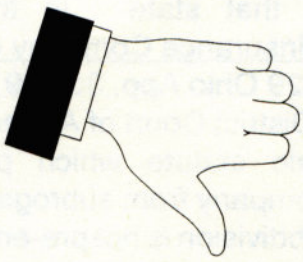
Three more bad subrogation decisions from the State of Ohio have confirmed that the assault on your subrogation rights continue in that state. In the case of Community Insurance Company v. Hambden Township, 129 Ohio App. 3d 609, (1999), the state's 11th District Court of Appeals has held that an Ohio statute which prohibits an insurance company from subrogating against a political subdivision is not pre-empted by the Employee Retirement Income Security Act (ERISA). That Court held for some reason that ERISA preemption of state law did not apply in a claim in which an insurance carrier was attempting to recover medical expenses which it has paid to an insured as a result of an injury the insured had received while voting at the polls.

In the case of Moellman v. Niehaus, Ohio 1st App. Dist. (1999 Lexis 300), the Court of Appeals held that an employer who was self insured for workers' compensation was not entitled to priority under the Ohio Worker's Compensation Act to the distribution of settlement proceeds from a third party. The

(Assault on Subrogation in Ohio Continues - Continued from Page 5)

settlement proceeds from a third party. The Court held that because the limits of the third parties' insurance was not sufficient to fully compensate the worker for his damages, the made whole doctrine would apply even in a worker's compensation context. Application of the made whole doctrine in most states has been held not to be applicable to workers' compensation subrogation, because this equitable doctrine did not apply to statutory subrogation such as workers' compensation subrogation. The case is a disappointment to the principle of keeping equitable remedies separate from statutory subrogation such as workers' compensation, hospital liens, etc.

Finally, in the case of Nationwide Mutual Insurance Company v. James, Ohio 6th App. Dist. (Lexis 3001), an uninsured motorist carrier refused to make benefit payments claiming that it was prejudiced by the insured's failure to present the claim within one year. The Court found that the carrier could not deny uninsured motorist benefits, because an insurer must aid in the preservation of the subrogation rights and a subrogation clause does not operate to place the entire burden on the insured. In essence, the court was stating that it is okay if an insured prejudices your subrogation rights, you still need to pay the claim.



The assault on basic subrogation rights continues across the country, stemming in part from arguments that subrogation itself has not served part of its purpose, that of helping to reduce insurance premiums for the public. However, subrogation continues to insure that liability for a loss is placed on the culpable third party, and is not absorbed by an innocent insurer.

If you learn of any unusual or questionable decisions involving subrogation, please e-mail them to Gary Wickert at GaryWickert@msn.com.

HOW TO OBTAIN CREDIT FOR A THIRD PARTY SETTLEMENT IN A TEXAS WORKERS' COMP CLAIM

Since the massive revision of the 1989 Texas Workers' Compensation Act, workers' compensation carriers who have taken advantage of a credit as a result of a third-party settlement received by a worker have had to do so by filing notice with the TWCC. For years, this notice has been required under Board Rule 124.4. On August 29, 1999, that Board Rule was repealed and subsumed within Amended Board Rule 124.2. Section 124.2 is entitled *Carrier Reporting Notification Requirements*. In Subsection (e)(3), it is required that the carrier notify the Commission and the claimant in any change in the next benefit payments which were caused as a result of a change in the employee's post-injury earnings, including advances, contribution, and subrogation, within ten days of the change. This notice has traditionally been filed under TWCC Form 21. There has been some confusion as to how this notice should be filed in light of new electronic filing procedures at the TWCC.

According to the TWCC Claim's Information representative, B.J. Webb, it is not possible for a worker's compensation carrier to claim a statutory credit with an electronic filing. According to her, this is because an A-49 electronic submission contains no code for obtaining a statutory credit. The Code S-7 has been used for notifying TWCC electronically of any suspension of benefits once benefits are "exhausted". However, when you obtain a statutory credit, benefits

(How to Obtain Credit for a Third Party in a Texas Workers' Compensation Claim - Continued from Page 6)

are not "exhausted", but they are, rather "suspended", until the advance is exhausted. According to Ms. Webb, the only means of filing notice of and documenting your statutory credit as a result of a third-party settlement is to file a TWCC Form 21, and fill in Block 43, in claim specific and plain language, the reason for the suspension of benefits. Obviously, the reason would be that the claimant has recovered funds in a third-party settlement and you are claiming your statutory credit pursuant to §417.002(b). In other words, if you want your credit, you have to get it the "old-fashioned way".

In any third-party case where the claimant does not recover as much as he or she might feel they are entitled to, it is always the possibility of the credit being exhausted and the carrier having to kick in again with payment of indemnity and medical benefits. Plaintiffs' attorneys have also resorted to claiming that a carrier is not entitled to its credit unless it is documented correctly with the TWCC according to TWCC Board Rules. Accordingly, carriers should be painstakingly careful to appropriately and properly document their statutory credit whenever a worker receives a third-party recovery. If you discover that a worker has received a third-party recovery sometime ago, and you were not notified, you may have paid benefits which you were not obligated to pay. In that case, please give us a call and we can discuss your rights in terms of recovering mistaken payments of benefits under Texas law or the law of many other states.

Should you have any questions about obtaining your statutory credit or recovery of benefits paid after or in light of a third-party settlement, please call Gary Wickert. For other case specific problems, contact B.J. Webb at the Texas Workers' Compensation Commission at (512) 448-7900.

WACKY WARNING LABELS

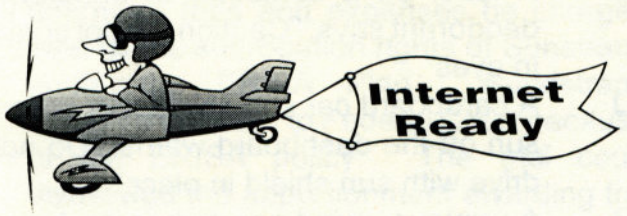
While aggressiveness and creativity are the cornerstones of an effective subrogation program, we all too frequently see the evidence of businesses trying to protect themselves against marketing defect claims by warning against some of the most absurd situations. A few examples include the following:

- A label on a hair dryer reads: "Never use hair dryer while sleeping".
- A label on a container of underarm deodorant says: "Caution, do not spray in eyes".
- A cardboard car sun shield that keeps sun off the dashboard warns: "Do not drive with sun shield in place".
- A unique wind-proof beach towel advises users: "This towel has been tested to withstand significantly strong winds. Please be advised that during a hurricane or other severe winter conditions, this product should not be used to secure yourself or anything of value".
- An iron came with the warning: "Never iron clothes while they are being worn".
- A warning label found on a 13-inch wheel barrel tire reads: "Not for highway use".
- The label on a bathroom heater reads: "This product is not to be used in bathrooms".
- A label on a plastic toy helmet used as a container for popcorn at an Ice Capades event states: "Caution, this is not a safety protective device".
- A prescription of sleeping pills says: "Warning: May cause drowsiness".
- "Aim-N-Flame" fireplace lighter cautions: "Do not use near fire, flame, or sparks".

(Wacky Warning Labels - Continued from Page 7)

- A label on a hand-held massager advises users not to use: "While sleeping or unconscious".
- A cartridge for a laser printer warns: "Do not eat toner".
- A can of self-defense pepper spray warns users: "May irritate eyes".
- A brochure promoting the stock of a company whose prices have gone down for several months advises potential investors: "There is no guarantee that past performance will be indicative of future results".

Grateful acknowledgment given to the Michigan Lawsuits Abuse Watch at http://www.mlaw.org.



Mohr & Anderson, S.C. is proud to announce that we have just established our firm web site. It is located at http://mohr-anderson.lawoffice.com. Our new web site is full of useful information for insurance clients, including:

- Biographical and professional information on attorneys.
- Copies of articles written on topics including subrogation and other insurance issues.
- Cites to cases of some import handled by lawyers in our firm.
- Information regarding our National Recovery Program.
- Detailed descriptions of areas of practice and fees.
- A list of representative clients.
- Quick and easy means of contacting each of us for answers to questions involving subrogation, coverage, insurance defense, and other insurance-related issues.

Be sure to bookmark this web site as one of your favorites for those occasions when you have tough to answer questions or need the benefit of our years of insurance-related experience.

In our last issue, we gave you the wrong e-mail address for Patrick Anderson. His correct e-mail address is panderson@mohr-anderson.com. We are sorry for any confusion this may have caused.

MOHR & ANDERSON, S.C. ADDRESS CLARIFICATION

In order to please our post office and to ensure that your mail reaches us in an efficient and timely manner, please send all regular mail to:

MOHR & ANDERSON, S.C.
P.O. Box 270670
Hartford, WI 53027-0670

If your mail is being sent via ground delivery (Federal Express, etc.), please send mail to:

MOHR & ANDERSON, S.C.
1111 E. Sumner Street
Hartford, WI 53027-1609

Always indicate the person whom you intend to receive the mail or package in the address above or below our firm name.

THANK YOU!!

WANT TO DEAL WITH JUST ONE LAWYER FOR ALL OF YOUR NATIONAL SUBROGATION?

Our National Recovery Program gives you these advantages:

- ❑ Local counsel in 47 states, Mexico and Canada
- ❑ 20+ years of exclusive subrogation experience
- ❑ No cost subrogation evaluation on every file
- ❑ Low hourly or contingency fee arrangements
- ❑ More than 200 satisfied insurance and self-insured clients
- ❑ More than $1,000,000 million in subrogation recoveries and credits
- ❑ Aggressive and cost-effective subrogation techniques
- ❑ You deal with just one lawyer for reporting and file status
- ❑ Our lawyers average 20+ years of trial experience

Multi-state, centralized subrogation becomes more complicated every year. Use of national subrogation counsel is the hallmark of centralized subrogation in the 21st Century. Are you tired of the least experienced lawyers in the firm handling your subrogation files?

Property Losses – Worker's Compensation – Inland and Ocean Marine – Auto
Fire and Casualty – Personal Lines – Fidelity and Surety – Refusal to Honor Subrogation

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DON'T TAKE OUR WORD FOR IT . . . ASK OUR CLIENTS!

"When dealing with subrogation, your attorneys must think and act like plaintiffs' attorneys and be creative and aggressive in their pursuit of third party liability. This is one of the many reasons we use Mohr & Anderson." - **Lawrence E. Bunchek, Corporate Recovery Specialist, Amerisure Companies, Farmington Hills, Michigan**

"On one catastrophic Wisconsin inland marine loss in which London underwriters didn't feel strongly about recovery prospects, I saw first hand how Gary Wickert helped turn a naturally occurring flood loss into a $7 million recovery." **-Fred Blazye, Lloyds of London, Claims Center, London, England**

"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**

"If you have any responsibilities whatsoever for subrogating group health and disability claims, whether ERISA or not, you need this firm." **-Kip Howard, Mega Health and Life Insurance Company, Dallas, Texas**

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

Call or Visit our Web Site for Additional Information

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FOR YOUR INFORMATION

WELCOME TO THE FIRM ...

Danielle M. Laska joined the firm in August of last year as a file clerk and assumed the position as legal secretary to Douglas W. Lehrer in September. Danielle came to us from Wisconsin Lift Truck where she was a Sales Administrator. She graduated from Milwaukee Business Training Institute after obtaining her Paralegal Certificate. She lives in Slinger, Wisconsin with her husband Al and three daughters, Lacey Marie, Morgan Emily and Taylor Ann. She looks forward to the fast-paced environment and the challenges that Mohr & Anderson has to offer her.

Bonnie J. Hodgson joined our firm in February of this year as our receptionist and legal secretary to Patrick J. Anderson. Bonnie came to us from The Beard Law Firm in Carbondale, Illinois where she was a paralegal handling personal injury cases. Originally from Horicon, Wisconsin, Bonnie is happy to be able to return to this area and looks forward to pursuing her career at Mohr & Anderson, S.C.

SEMINARS

Mohr & Anderson, S.C. offers a variety of subrogation and insurance related seminars. To schedule a seminar or request a presentation on a particular topic or topics, please contact Gary Wickert or Doug Lehrer, or fax your request to (262) 673-3766.

NOTICE

Anyone using any of Mohr & Anderson's seminar materials as resources or references should keep in mind that insurance law is dynamic and rapidly changing. This newsletter and other materials promulgated by Mohr & Anderson, S.C. may become outdated or superseded as time goes by. If you have any questions about the current applicability of any topics contained in this or any other newsletter distributed by Mohr & Anderson, S.C., please call Gary Wickert and\or Brad Matthiesen.