RECOVERY AND CLAIMS SUMMARIES

The Recovery and Claims Summaries that appear in every issue give members an opportunity to promote their companies and share their successes by briefly describing general large recovery successes, recovery obtained by overcoming obstacles and "Weird Subro," or subro arising under unusual, bizarre or humorous circumstances. Please keep all submissions under 350 words.

Please send submissions to:

Gloria Isackson
NASP
4248 Park Glen Road
Minneapolis, MN 55416
Fax: (952) 929-1318
gloria@subrogation.org

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THE GREAT MEXICAN SUBROGATION SHOOTOUT

by Gary L. Wickert, Matthiesen, Wickert & Lehrer, S.C., Hartford, Wisconsin

Subrogation lawyers and claims professionals love to recall the exotic or sexy subrogation claims they've handled - the ones with a twist or a flair of drama. A fatal ship collision in the Gulf of Mexico in which one passenger takes a photograph of another passenger being attacked by a bull shark - while both are in the water, worker's compensation claims involving a high profile professional athlete and another involving a prominent rock star, and a large loss resulting from the filming of a major motion picture, are representative of some of the more memorable cases which lawyers from Matthiesen, Wickert & Lehrer, S.C. have handled. But a large property damage subrogation claim litigated recently in Federal Court in Mexico really does take the cake. The only thing missing was Pancho Villa himself.

Matthiesen, Wickert & Lehrer, S.C. was retained by a London underwriter and Seguros Comercial America (SCA) in Mexico, in connection with a catastrophic explosion which occurred in February of 1996, when a large tractor trailer carrying a large quantity of petrol and owned and operated by Auto Liquidos, collided with two locomotives owned by Ferrocarriles Nacionales de Mexico (Mexican National Railroad), in a crowded area of downtown Tampico, Mexico. The resulting explosion destroyed a considerable portion of the town, as well as both railroad locomotives, insured by our client, resulting in a considerable claim payment for which they sought subrogation against Auto Liquidos.

Utilizing its Mexico City local counsel, we filed suit in Mexico City against Auto Liquidos, who had already been charged criminally and found guilty for this incident. In Mexico, a guilty finding in a criminal case automatically makes you liable in the civil matter. And while liability was not a problem in this case, just about everything else was. For starters, even though the trucking company was a large ongoing concern with

over one hundred employees, they had no insurance. For several months we labored under an inability to obtain documents and records from the criminal court. This problem mysteriously disappeared with a USD$5000 check issued to the court for "records processing." The litigation was marred by several interlocutory appeals of minute issues to the appellate courts, two challenges to the integrity of the sitting judge, and four years of legal wrangling over the identity of the companies involved, their owners and the veracity of the court documents. Finally, liability was proven and a judgment obtained. Then came the appeals.

Mexican civil law employs a quasi-appellate procedure known as amparo proceedings - similar to habeas corpus relief in American criminal courts. The defendants and their lawyers made good use of this time-intensive process, outlasting several judges. We were fortunate that, although Mexico does have a system of relief for debtors similar to bankruptcy in the United States, it must be filed before an incident from which they are claiming relief. The defendants even appealed a simple order requesting us to file a schedule to convert the judgment from pesos to U.S. dollars. An appeal meant that the subrogation client could not begin collection efforts until the appeal was resolved - while the state-owned railroad could recover its uninsured losses without such an encumbrance, presenting new and different logistical obstacles. Finally, however, the court ordered the defendant to pay millions of pesos in damages. The biggest challenge, however - collecting on the judgment - lay ahead.

The court issued an order allowing us to seize the trucking company's assets, including trucks, equipment and accounting records. We showed up at the gates of the large company with a piece of paper in our hands, only to be met by nearly one hundred angry employees, wielding clubs and guns. Needless to say, we left. Another attempt was made in the company of several private security guards, but even that was not enough. For this seizure I was unable to attend personally, so my partner, Doug Lehrer, went in my stead. His wife was not happy with me. The defendant's lawyer instigated the crowd to resist our entry onto the property. Doug, the lone American in the crowd, was politely asked to stand way in the back. It was back to the drawing board. Finally, at considerable cost to the carrier, we were later accompanied by dozens of armed security guards and federal police and were able to gain entry to the company's property. Accounts receivables, records, equipment and a few trucks were seized. But the rising threat of violence required us to leave quickly and go back to court to order additional manpower.

One week later, we again returned with 40 Mexican policemen in riot gear. Some of the debtor's employees were also armed, and some of them chained themselves to the two-ton gate at the front of the property, which nearly killed one of them when it was later swung open in what could only be described as a tug of war. The two sides squared off at the gate in what would have to be one of the tensest moments of my career. The incident would later make Mexican news. We slowly inched our way onto the property, and were ultimately successful in seizing eight more trucks, valued at over MX$5 million, without a single shot being fired. When the owners and their lawyers saw that we were, little by little, walking out with the company's assets, they suddenly announced to the court that the workers

were now "on strike." Mexican labor law prohibits the seizure of a company's assets while its employees are on strike - at least until the court can ascertain that the workers' welfare is being protected. It was one of the slickest stall tactics I had ever had used against me. Resolution of the labor issues could have taken several more months of litigation, or longer. As you can imagine, the client's frustration level was high.

Fortunately, cooler heads finally prevailed. A settlement was soon reached involving the payment of 80% of the MX$5 million judgment amount, together with reimbursement of the significant costs incurred in hiring the private security personnel and Mexican federales. There remained several thorny issues between the insured, the primary carrier, and our client, the 95% reinsurer, but they were soon resolved.

It took nearly eight years for our client to receive their subrogation recovery. But in the end, patience, truth, and justice prevailed. Two things are certain, however. I was a lot younger when this file was first entrusted to us, and this is one subrogation file I will never forget.

Piense la subrogación!

A BUDDHA, A BEAR AND A BAD DECISION

by Kevin F. Gillis, Esq., The Law Office of Kevin F. Gillis, Esq., Canton, MA

In our office we called it the "Case of the Burnt Buddha." But after the Supreme Judicial Court of Massachusetts, in a related case, recently held that a settling tortfeasor's percentage of fault should not be considered by a jury when evaluating the relative degrees of fault of the remaining tortfeasor and the subrogor, our case was cooked.

Both cases arose out of a fire that destroyed a nineteenth century barn owned by The Shantigar Foundation, Inc., an organization formed by playwright Jean-Claude Van Itallie to promote spiritual and artistic practices through workshops, retreats and theatrical presentations.

Shantigar had contracted with Bear Mountain Builders, a sole proprietorship run by Joseph C. Kayan, to renovate the barn for about $1 million. Kayan subcontracted some of the work to Jeffrey P. Stone, who was doing business under the name Cove Building Company. Eventually, Shantigar contracted directly with Cove, although Bear Mountain was listed on the building permit as the construction supervisor and remained involved to some extent.

Near the end of the renovation, Stone allegedly left unattended overnight a pile of oily rags that had been used to buff the barn's wood floors. According to Shantigar's expert, the cause of the fire was the spontaneous combustion of the linseed oil-soaked rags and other materials.

Shantigar's insurer filed a subrogation suit against both Bear Mountain and Cove for negligence and breach of contract. Shortly thereafter, Cove settled with the plaintiff for $300,000, the limit of its insurance coverage. The claims against Bear Mountain (who had more than enough insurance coverage to take care of the balance and pay our client's claim too) proceeded to trial in May, 2002. The jury found that Bear Mountain did not breach its contract and was not negligent in its performance of its work. However, the jury did find that Bear Mountain was negligent "in the supervision of others on the project" and that its negligence proximately caused the fire and damage to the barn.

But here's the rub. Mr. Van Itallie had decided not to install a sprinkler system because one was not legally mandated, although his architect had described the old wooden barn to him as a "tinderbox" and had recommended that such a system be installed. So, the jury also found Shantigar negligent. The jury found Bear Mountain forty percent at fault and Shantigar to be sixty percent to blame. Since a plaintiff in Massachusetts cannot recover if its negligence is greater than fifty percent, the judge entered judgment for Bear Mountain.

Meanwhile, my office had filed a smaller subrogation suit against both defendants. Our client had issued a Fine Arts policy that paid out some $90,000 for damage to some of Shantigar's artwork, antiques and collectibles, including a healthy-sized statue of the aforementioned Buddha. We had agreed to stay this action pending the appeal of the bigger case.

The main issue on appeal was whether Cove's degree of fault should have been considered by the jury. If it had been, it is likely that the jury would have found the two defendants to have the majority of fault, resulted in a finding of less than (or equal to) fifty percent fault for Shantigar, meaning Bear Mountain would have lost and judgment would have entered for Shantigar, less the amount of fault found against Shantigar by the jury. Needless to say, we were rooting for Shantigar's insurer's appeal, because Cove's insurance coverage was exhausted, its owner, Stone, was judgment-proof, and the judgment in favor of Bear Mountain would have been res judicata[1] in our case.

Unfortunately, the Massachusetts SJC held that "the removal of absent (settling) tortfeasors from the jury's consideration comports with the Legislature's intent and is consistent with the Massachusetts statutory schemes of joint and several liability, and contribution."

The morale of the story, or at least one of them, is to be careful with whom you settle if there are multiple tortfeasors on the hook, settlement with one of them is less than what you are seeking and your insured may have some comparative fault.

ENDNOTES:

[1] Res judicata (rayz judy-cot-ah) n. Latin for "the thing has been judged," meaning the issue before the court has already been decided by another court. Therefore, the court will dismiss the case before it as being useless.

THE BOVINE THAT BOLTED

by Anthony C. Iannizzotto, Thomas George Associates, Ltd., Northport, New York

It was a pleasant sunny day in Colorado. Like a scene from an old John Wayne movie, it was the equivalent to "small town USA."

A local farmer decided to bring his pride steer to auction, in search of a few extra dollars to put food on the table for his family.

The town hall, buzzing with bidders, was in frenzy. Our four legged friend, perhaps growing bored with it's surroundings, decided to journey onto the interstate for a stroll; perhaps hearing that Hollywood could be a place where such a creature could make a name for itself.