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WHY USE NATIONAL SUBROGATION COUNSEL?

By Gary L. Wickert

Over the last twenty-five years we have seen a myriad of methodologies and techniques in subrogating across the country. Large insurance companies and small self-insureds alike have changed, modified and evolved their subrogation programs over the years. Subrogation efforts on all levels have had more faces than the balance of the industry as a whole, including changes and modifications from local subrogation efforts to national recovery centers, from intrastate to interstate underwriting to a global insurance economy, and from being the "red-haired stepchild" of the industry to instituting incentives for successful subrogation performance.

As subrogation managers struggle to deal with recovery efforts in a republic with more than 51 independent bodies of subrogation law, it is frightening to think about how difficult it is to be competent in the many nuances of

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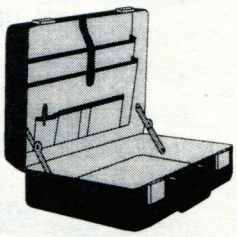
BRIEFCASE NOTES- NEW CASE LAW



Court of Appeals Allows Gerrymandered Settlement

Texas Workers' Compensation Insurance Fund v. Jose Serrano, et al., No. 13-95-482-CV, Court of Appeals (Tex. Civ. App. - Corpus Christi 1999).

Jose Serrano, a Mexican citizen, was severely injured when he was pinned between a truck and trailer, paralyzing him from the waist down. The Fund paid $247,602.20 for medical bills and $3,200.14 for lost wages to the worker's compensation carrier. The plaintiffs settled the third party case for $750,000 and the trial judge approved the settlement as follows:

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subrogation and recovery efforts in even one jurisdiction, let alone dozens. In the last ten years, Gary Wickert has served as national subrogation counsel for numerous insurance companies. National subrogation counsel provide innumerable benefits and services to anyone facing recovery challenges in a predominantly multi-state 21st century setting.

Subrogation Clearing House

National counsel serve as a clearing house and check valve for subrogation matters on a national basis. With local counsel in 47 states, Mexico and Canada, Mohr & Anderson, S.C. can evaluate for you the many factors which must be taken into account in assessing which subrogation action, if any, is called for. When action is warranted, national subrogation counsel, upon approval from the client, initiates the action in the appropriate venue.

Evaluating and Monitoring Local Counsel

In the post-tort reform era, when plaintiffs' attorneys, insureds, and claimants are scraping to put together settlements which will compensate them adequately, subrogated interests are often put on the chopping block as "expendable". On an almost daily basis, case and statutory law across our country is developed with an eye toward streamlining recoveries and shedding these pesky subrogation interests before they can be an impediments to resolving the "real claims".

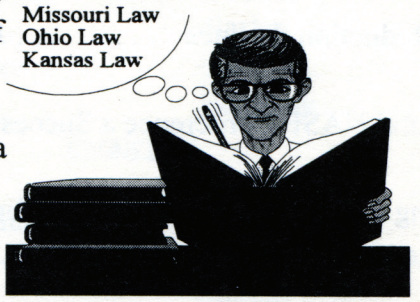
Instant Access to Individual State Subrogation Law

As laws facilitating or debilitating subrogation efforts continue to change, national subrogation counsel keeps its thumb on the pulse of these changes through local counsel who are hand-selected as having subrogation experience and have the demographic make-up within their firm which allows them to act as effective subrogation counsel.

Experience has shown that many large defense firms do not or will not function as subrogation counsel unless the payout of larger defense files accompanies the subrogation work. National subrogation counsel hand picks local counsel with the qualities and demographics necessary to effectively subrogate and maximize your recovery in a particular venue. Local counsel in remote, rural areas are especially difficult to obtain, and national subrogation counsel utilizes its network of subrogation counsel in accomplishing this.

Centralized Reporting

It is difficult enough to stay on top of, monitor, evaluate, and aggressively motivate one or two sets of subrogation counsel, let alone a hundred. National subrogation counsel garrisons local counsel, in appropriate



(Why Use National Subrogation Counsel? - Continued from Page 1)

venues, evaluates and monitors their activity and cost effectiveness, and relieves them of responsibilities if they should ever fail to show the sort of unique dedication and techniques which will be necessary to subrogate effectively in the 21st century. National subrogation counsel takes on the burden of obtaining current status on subrogation matters and forwarding that relevant and necessary information onto the client.

Cost Containment

National subrogation counsel also serves to police spending of subrogation counsel, review and inspect local counsel invoices for fees and\or costs and expenses, and serves as a liaison with the client in seeing to it that only the necessary expenses are incurred, and subsequently paid. National subrogation counsel also takes it upon themselves to consistently and repeatedly evaluate each claim for cost effectiveness, and alert the client should any potential problems be looming on the horizon. After all, you cannot spin yourself into a successful subrogation program, because the only successful subrogation result is one which is obtained cost-effectively.

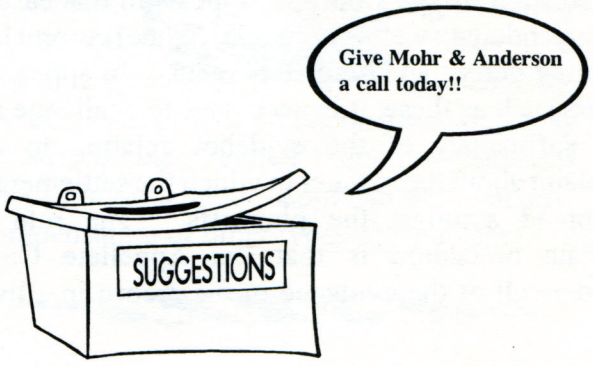
Providing instant answers to subrogation issues, subrogation counsel subrogates and litigates in all fifty states. This garrisons an immeasurable amount of subrogation information and access to subrogation answers in one convenient location. National subrogation counsel is available to provide the client with answers to difficult subrogation questions on a national basis. Where the answers are not immediately known, research or conferring with local counsel can provide the answer almost instantaneously.

Simplicity of Communication

Telephone tag, numerous unreturned phone calls and unresponded to letters are the hallmarks of attempting to communicate with subrogation counsel. Use of national subrogation counsel enables you to contact one counsel to get answers and status on subrogation matters pending anywhere within North America. There are as many reporting and status update techniques and methodologies as there are subrogation counsel.

Use of national subrogation counsel enables you to efficiently obtain only that information which you feel is germane to reporting in your subrogation file from the date the file is opened until recovery is had. Use of national subrogation counsel is the hallmark of subrogation in the 21st century and in the face of a global economy.

Interstate subrogation becomes increasingly more complicated every year. Unless your counsel exclusively practices in the area of subrogation, it is often quite difficult to keep up with not only the many nuances of subrogation law, but be current on the techniques to avoid efforts to distinguish or diminish your subrogation interest. If you have any questions regarding how national subrogation counsel can benefit you, please call Gary Wickert.



(Briefcase Notes - Continued from Page 1)

Jose Serrano	$250,000
Mrs. Serrano	$200,000
Minor Children (3)	$100,000 Each

Ironically, the trial court originally denied the Fund the right to recover on its subrogation claim, claiming that it had failed to offer sufficient evidence to establish a subrogation interest and medical expenses for the insured. The Corpus Christi Court of Appeals affirmed the trial court's decision on January 9, 1997 in an unpublished opinion, and the Texas Supreme Court reversed that decision and allowed the Fund to recover in its opinion in Texas Worker's Compensation Insurance Fund v. Serrano, 962 S.W. 2d. 536 (Tex. 1998).

Now the Corpus Christi Court of Appeals is again hearing an appeal by the Fund based on the argument that the trial court allowed a gerrymandered settlement in that Jose Serrano's family received twice as much of the settlement as did Mr. Serrano himself. Despite being presented with well-reasoned opinions such as Insurance Company of North America v. Wright, 886 S.W. 2d. 337 (Tex. App. - Houston [1st Dist.] 1994 writ denied), the Court of Appeals looked at the losses suffered by the family of Mr. Serrano, and held that the evidence was legally and factually sufficient to support the trial court's division of the settlement.

Previous case law made clear that any decision which appears to circumvent the insurer's worker's compensation carrier's subrogation rights would be held to be improper and will be struck down.

The decision by the Court of Appeals in this case is not tremendously well-reasoned in light of current law regarding gerrymandering settlements. In appealing matters such as these, it is necessary to challenge the legal sufficiency of the evidence relating to the complaint about the manner in which the settlement is distributed amongst the plaintiffs. The rule of appellate procedure is that the Appellate Court considers all of the evidence in the record in a light most favorable to the party in whose favor the verdict has been rendered, and they indulge every reasonable inference in that party's favor.

This rule of appellate procedure, when taken in conjunction with the Corpus Christi Court of Appeals decision in this case, gives plaintiffs' attorneys ample ammunition to gerrymander settlements in such a way as to reduce or virtually eliminate subrogation liens by apportioning the majority of settlements for lives for loss of contortions claims and to children who will also be named as plaintiffs in personal injury cases. This methodology directly circumvents the intent and purpose of the Texas Worker's Compensation Subrogation Statute, and makes it more difficult for subrogating carriers to recover most or all of their monies, therefore, we believe that this case will have dire ramifications for future subrogation efforts in Texas, and that these ramifications may spread to other states in the near future. We do note, however, that this case has been appealed to the Texas Supreme Court, and as soon as they determine whether to hear this case, we will notify you of the result.

SUBROGATION UNDER ATTACK IN PENNSYLVANIA

By Gary L. Wickert

A bill which would ban subrogation has been proposed in the Pennsylvania legislature. Senate Bill 1065, introduced by Senators Brightbill, Punt and Waugh, on September 7, 1999, proposes to abolish both the collateral source rule, (the rule by which collateral sources of recovery are not divulged

(*See - Subrogation Under Attack in Pennsylvania - Page 5)*

(Subrogation Under Attack in Pennsylvania - Continued from Page 4)

to a jury), and the right of subrogation itself. Known as the "Single Recovery Act", this bill states that in any tort action, "a claimant shall not recover damages or compensation for any collateral source payments paid, reimbursed or expected to be paid or reimbursed by a collateral source to or on behalf of the claimant." It also states that a collateral source shall have no right of subrogation or reimbursement and shall be barred from asserting, enforcing or collecting upon a lien, right or claim of any kind against the claimant's recovery from the tortfeasor with respect to collateral source payments.

The purpose of this proposed legislation is anything but clear. The intent of subrogation in all fifty states has been to prevent double recovery by the claimant and to reduce the burden of insurance on the public. Subrogation serves to shift the fault and responsibility for payment of a loss to a culpable party, as opposed to an innocent insurance carrier. While the proposed legislation would take care of the problem of a double recovery, because it does not allow the claimant to recover the collateral source payments, it would not accomplish the purpose of reducing the burden of insurance on the public. There has been much debate about the effect of subrogation on premiums and risk modifiers, but underwriting premises and basic insurance philosophy has long held it subrogation positively affects premiums - or at least it should.

In many states, class actions have been filed against insurance carriers who did not turn over deductibles to insureds after recovering those deductibles from a tortfeasor, citing the consumer's interest in recovering their deductibles. That whole mind set seems lost with the proposed legislation, and it remains to be seen exactly what the agenda is of the proponents of this bill. After all, it should be the tortfeasors whose rates are affected, not the innocent parties or insureds who have contributed little, if at all, to a serious loss or injury.

Although the statement that subrogation is purely an equitable doctrine is somewhat misplaced, it is certainly a doctrine that has its roots squarely in equity - or fairness. The bill seems to be the first rumination of creation of an entirely "no fault" state. Logic would dictate that if you can ban subrogation, you can certainly ban plaintiffs' suits. What has happened to the carrier's rights to contract under both the federal and state constitutions? Can an insurer not take an assignment of a cause of action from an insured as part and parcel of its insurance contract? These three legislators seem to think not.

Subrogation has always been a hot topic among insurance representatives who played both sides of the liability fence. For every subrogation suit, there is usually a corresponding liability file open somewhere. However, that does not seem to be reason enough to ban the entire concept and function of subrogation.

I am interested in any information any of you may have regarding the actual effect subrogation has on premiums in all lines of insurance. Studies are being done and Appellate Courts somewhere will want to know whether banning subrogation also means harming the insured in one way or another, even if it means merely increased premiums.

I welcome your thoughts and comments and urge you to e-mail me at gwickert@mohr-anderson.com.

Lien Reduction Statutes

The Newest Subrogation Obstacle

By Gary L. Wickert

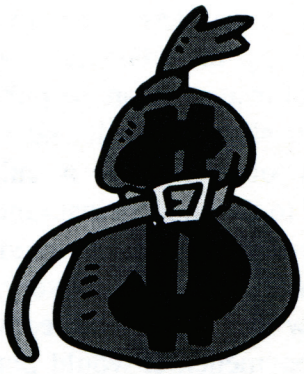
Just about the time subrogating carriers are finally making leeway against anti-subrogation doctrines such as the "made whole doctrine", the "common fund doctrine", and other equitable attacks on carriers' rights of subrogation, a new obstacle has surfaced. A trend is developing across the country whereby states are enacting statutes known as "lien reduction statues".

These statutes, which are a result of efforts to increase insureds' recoveries in light of the tort reform efforts of the last two decades and are driven by decreased tort recoveries and increasing subrogation liens and interests. Judges, mediators, and lawyers for both plaintiffs and defendants have begun utilizing this new anti-subrogation vehicle, under which a lien is diminished or eliminated due to the contributory negligence on the part of the insured or claimant and/or the uncollectability of a judgment or recovery due to one of a number of factors.

One example of such a Lien Reduction Statute is Indiana Code §34-51-2-19, which reads as follows:

> *"If a subrogation claim or other lien or claim that arose out of the payment of medical expenses or other benefits exist in respect to a claim for personal injuries or death and the claimant's recoveries diminished: 1.) By comparative faults; or 2.) By reason of the uncollectability of the full value of the claim for personal injuries or death resulting from limited liability insurance or for many other cause; the lien or claim shall be diminished in the same proportions as the claimant's recovery is diminished. The party holding the lien or claim shall bear a pro rata share of the claimant's attorney's fees and litigation expenses.*

While there is very little case law interpreting the meaning and application of this statute and its effect on subrogation interests, you can be sure that defense counsel, plaintiffs' counsel, and mediators are using it to brow beat subrogating carriers into relinquishing all or part of their subrogation interest. Assuming a worker's compensation lien in the amount of $100,000 or more, and a third party recovery of only $300,000, it is easy to see why there is a concerted effort to eliminate the worker's compensation carriers' lien. The Indiana Lien Reduction Statute, like many of its sisters' statutes around the country, is being interpreted as a license to reduce the carriers $100,000 above lien in the upon the scenario based fault of the comparative the case is claimant. If jury decides tried and the plaintiff is that the 40% at fault, it is argued that the lien should likewise be reduced by 40%. If the case settles and there is no finding by a judge or jury of comparative fault, the matter is submitted to the trial court for a determination of exactly what percentage of fault the plaintiff is to bear for the accident. The problem with this is that after the matter has settled, the plaintiff's main interest would be to show himself as much as fault as possible, in order to reduce or eliminate the subrogation interest.

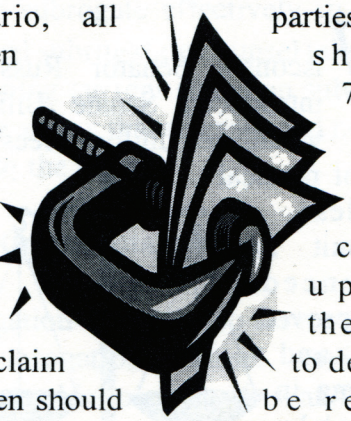


Even more complicated is the allegation that the the subrogation interest should be reduced due to the "uncollectability of the full value of the claim".

(See - Lien Reduction Statutes - Page 7)

(Lien Reduction Statutes - Continued from Page 6)

Assume that, in the above scenario, the $300,000 recovery is a recovery of policy limits from the third party tortfeasor, despite the fact that the claim has a value of $1,000,000. Under this scenario, all parties will argue that your lien should be reduced by 70%, because the plaintiff's claim was reduced by 70%. Again, the trial court would be called upon to determine the actual value of the claim to decide how much the lien should be reduced. Unfortunately, there is not much Indiana case law or case law throughout the country, interpreting these relatively new statutes and their effect on subrogation interests.



Practitioners are attempting to argue that the "uncollectability of the full value of the claim" language also means that in addition to reduction of the claim for a comparative fault, the lien should be reduced further based on the fact that the plaintiff had to "settle for less" than he would have liked to, due to concerns not only for lack of insurance, but the contributory negligence of the plaintiff himself. While this is obviously an attempt to double the reduction a subrogated carrier should sustain, the language of the statute itself does not make it clear that this is not allowed. For the last several years, the statute has specifically accepted worker's compensation liens from its effect.

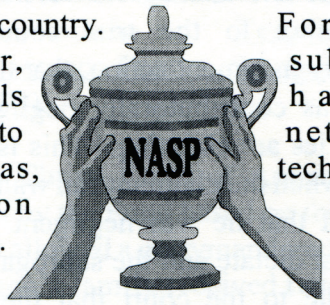
However, the Indiana statute was recently amended, and the original worker's compensation exception to the statute was either intentionally or inadvertently omitted from the statute, giving practitioners the opportunity to claim that it applies to workers' compensation liens.

When confronted with lien reduction statutes such as that the one in Indiana, subrogation professionals must gather, conduct, and take a look at all of the relevant discovery in the underlying case relevant to contributory negligence and the total value of the claim, as these factors will bear directly on how much, if anything, is recovered by them out of their subrogated interest. In essence, the subrogation action becomes a "quasi defense" action, and the subrogated carrier is left to prove, either to the trial court or in a declaratory judgment action, that the claimant was not as contributorally negligent as the other parties are claiming. This is especially difficult when the claimant can walk into court and admit that he was negligent. Common sense must dictate and the subrogation carrier must argue to the court that the plaintiff's representation about his contributory fault at mediation or trial must be looked at, and not his position when attempting to reduce the subrogation lien.

If you have any questions about a particular state you are subrogating in whether they have a lien reduction statute, or if you are faced with the application for such a statute or similar legislation, please feel free to call Gary Wickert to determine applicability and whether it is being applied in the correct fashion. Depending on the state, it may be shown that the lien reduction statute is unconstitutional and inapplicable to workers' compensation or other types of coverage.

INAUGURAL NASP CONFERENCE A HUGE SUCCESS

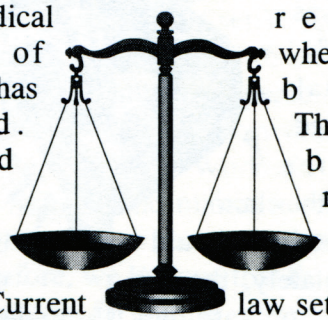
November 7 through November 10, 1999, the National Association of Subrogation Professionals held their Inaugural Conference in Las Vegas, Nevada. Every spot was filled as hundreds of subrogation professionals turned out to coalesce in the first event of its type in this country. For the first time ever, subrogation professionals have an opportunity to network and share ideas, techniques and information among themselves. The conference was full of interesting and useful subrogation seminars including recognizing product liability subrogation, subrogating in large property losses, and the like. Most of all, the conference gave each attendee the realization that they were not alone in subrogating in a legal atmosphere that is increasing with hostility toward subrogation.



Membership in the NASP is useful and indispensable for anyone who has subrogation responsibilities. Next year's conference will be November 5th through November 8th, in Orlando, Florida. For information on next year's NASP Conference, or becoming a member of the NASP, call Gloria Isackson at (612) 928-4661.

PENDING LEGISLATION WHICH SET UNIFORM FEES FOR MEDICAL RECORDS

Wisconsin Senator Russ Decker has introduced Senate Bill 195, which would set uniform fees for obtaining copies of medical records regardless of whether or not a lawsuit has been commenced. The bill has been approved by the senate and now awaits scheduling in the Assembly Insurance Committee. Current law sets uniform fees for copies of medical records once an action has been commenced. However, insurance clients and subrogating carriers are often interested in obtaining medical records prior to initiating a lawsuit.



We feel this bill is necessary for insurance clients because unless a legal action is commenced, the medical records' facility making the copy can charge whatever they deem "reasonable". The bill is also supported by the Litigation Law Section of the Wisconsin State Bar.

If you are interested in seeing Senate Bill 195 or similar bills passed in Wisconsin or elsewhere, please contact your state representative. In Wisconsin, your state representative can be contacted at Wisconsin State Assembly, P.O. Box 8952 (Reps. A-L) or 8953 (Reps. M-Z), Madison, WI 53708. If you have any questions, you may also feel free to contact Cory Mason, Government Relations Coordinator at the State Bar of Wisconsin at (800) 444-9404 X6128.

WITNESSES' STATEMENTS IN WISCONSIN

By Bradley W. Matthiesen

Whether you are subrogating or defending on a liability policy, the importance of taking statements soon after a loss cannot be overemphasized.

In a recent trial, the plaintiff, a young woman, was injured in a farm accident and argued that it was our insured, the farmer, who was negligent and responsible for her injuries. However, we had the written statement of her best friend who indicated that the day following the plaintiff's injury, she spoke to the plaintiff at which time the plaintiff admitted "that the accident was all her fault" and that she "did not know what she was doing." Based upon the indicated statement, we believed that our chances for a defense verdict were greatly enhanced. Nonetheless, on the day of trial, the plaintiff's attorney brought a Motion in Limine, seeking to bar the best friend's testimony pursuant to §904.12 of the Wisconsin Statutes.

Sec. 904.12 (1) of the Wisconsin Statutes states:

> *"In actions for damages caused by personal injury, no statement made or writing signed by the injured person within seventy-two hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as a present sense impression, excited utterance or a statement of then existing mental, emotional or physical condition . . ."*

On its face, Rule 904.12 appears to bar all post-accident "statements" made by an injured party within seventy-two hours of the day of the accident, unless the statement would qualify as an exception to the hearsay rule in the form of being a present sense impression, an excited utterance, or one evidencing a then existing state of mind. However, it should be noted that such statements are barred only if the statement itself was obtained from an injured person for potential use in *defending* a future claim brought by the injured person. In addition, when the injured person's physical or mental condition was such that he or she could not intelligently answer questions and protect his or her own rights, the statement may also be excluded.

However, the statement will not be excluded, even though taken within seventy-two hours of the accident, if the person who either took the statement or heard the injured person make verbal statements, was a disinterested person and/or the plaintiff had volunteered the statements to his or her acquaintance. If the person who heard or took the statement is simply relaying testimony or receiving a statement without an eye toward future litigation, then the statement will likely not be found to be improperly procured. Examples of such would be a medical professional questioning an injured party for the purpose of medical treatment or diagnosis, etc.

Also, if the person were shown to be under the influence of medication, was clearly affected by the extent of pain and suffering from the accident to the extent that they "could not think straight," then the statement may be objectionable. Even so, it would seem prudent to treat the "incapacity" as affecting the weight to the afforded statement, not its admissibility.

(See - Witnesses' Statements in Wisconsin - Page 10)

(Witnesses' Statements in Wisconsin - Continued from Page 9)

Even if a statement is obtained within seventy-two hours and also with an eye toward future litigation, if the statement was a present sense impression, an excited utterance or a statement of the declarants then existing mental state, then pursuant to the exception to the hearsay rule, the statement would still be admissible. However, if the statements were made long enough after the accident, and not within the seventy-two hours following the accident, it may be more difficult to argue for the statements admissibility. Absent proof that the injured party was deranged or severely traumatized by the accident, damaging, spontaneous statements that a person may make shortly thereafter are likely to come into evidence.

GARY WICKERT PUBLISHES FIRST NOVEL

Those of you who have been clients for a while may know that Gary is a freelance writer. His first novel, entitled *Dark Redemption*, is being published by Tudor Publishing, Inc. out of Greensboro, North Carolina and is now available in catalogs and on Amazon.com in paperback. Gary has his first book signing at the Little Professor Book Shop in West Bend, Wisconsin on January 15, 2000 from 1:00 until 3:00.

FOR YOUR INFORMATION

Mohr & Anderson, S.C. Is Now On The Internet!!

Look for us at:
mohr-anderson.com

Mohr & Anderson, S.C. is happy to announce that we are now Y2K ready and accessible through the Internet. When sending E-Mail to us, it will be necessary to use the person's first initial and last name followed by our address. An example would be gwickert@mohr-anderson.com. Below is a list of attorneys and staff with their E-Mail address. We look forward to hearing from you.

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