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BATTLING THE "COMMON FUND" MONSTER

Regardless of which area of insurance you practice in - workers' compensation, property and casualty, health insurance, health, auto, etc. - your subrogation efforts have no doubt been hampered and have come face to face with the common fund doctrine. You aggressively investigate subrogation, place potential third parties on notice, and negotiate with third party carriers regarding recovery of your subrogation lien, only to find a plaintiff's lawyer holding out his hand and demanding one-third or more of your subrogation lien as an attorney's fee. The authority he cites for his right to take a large portion of your subrogation dollar is known as the "common fund doctrine". Understanding this doctrine can greatly assist you in combating its harsh effects.

The common fund doctrine is an exception to the "American Rule", which obligates each party in a lawsuit to pay its own attorneys' fees. This doctrine is relevant in situations where one party's success in litigation benefits others in a recognizable group. A classic example is a situation where a plaintiff's lawyer files a personal injury suit from which your med pay recovery is made. Without the benefit of a lawyer in that case, the plaintiff's lawyer indicates that he has done all the work which created the "common fund", for which he should receive compensation from you.

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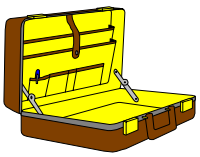
BRIEFCASE NOTES- NEW CASE LAW



Weaver v. Kimberly-Clark Corporation, 2003 WL 2185720 (Ala. 2003).

COMMON SENSE PREVAILS AS EXCLUSIVITY RULE IS LIMITED BY ALABAMA SUPREME COURT

A disturbing and illogical trend within workers' compensation subrogation has been dealt a blow - at least in the State of Alabama. Some third party tortfeasors have been attempting to claim protection of the exclusivity rule when they are sued by a former worker for a negligent act committed while the worker was employed by the third party tortfeasors, but for an injury that occurred at a later date, when the worker was in the employ of another entity. In Weaver, the Alabama Court of Appeals upheld the summary judgment granted to

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This principle is based in equity, requiring each member of the group that is benefitted from the "common fund" to bear a portion of the cost of obtaining that fund.

The common fund doctrine has been recognized as a valid principle by the courts of most states. Most states do not have a statute which requires payment of attorneys' fees by someone who has not employed the attorney, but yet benefits from the attorneys' services. On the other hand, most states interpret their state's common law such that a party who has borne the expense of litigation is entitled to compensation. The idea is that the common fund doctrine prevents unjust enrichment at the expense of the litigating party - this supposedly means unjust enrichment of the insurance company. The common fund doctrine applies even though you have not retained the lawyer making the claim under that doctrine.

Yet, simply because the common fund doctrine may apply, doesn't mean that a plaintiff's lawyer is automatically entitled to one-third of your subrogation interest. The courts of most states indicate that they must examine the facts of the particular case in order to determine appropriate compensation for a lawyer responsible for creating the "common fund". Some courts, such as Nebraska and Wisconsin, require notification by the attorney to parties who may benefit from successful litigation (such as an insurer) before pursuing a claim on their behalf. The notice must be timely, and give the other party an opportunity to choose its own counsel to represent its interest. Whether an attorney is entitled to compensation under the common fund doctrine and exactly what constitutes a reasonable fee requires a subjective analysis. Most states have their own set of factors to be considered, but states such as Nebraska include factors such as the nature of the services performed, the results obtained, and the customary charge for similar work. These general considerations are weighed by Nebraska and other state courts when determining a reasonable fee under the common fund doctrine.

But the common fund doctrine may be defended against. Awarding fees under the common fund doctrine is not automatic. The burden of proving entitlement to compensation usually rests with the attorney who is claiming the fee. The attorney must prove that his services were a "substantial benefit" to the insurer. In many states, carriers defeat a claim for attorneys' fees by the plaintiff's attorney when the plaintiffs' attorney fails to prove that the benefit to the carrier was "substantial". Nebraska is an example of a state which holds that merely showing that the time was spent litigating on the part of the party's behalf is insufficient proof of this. In addition, states such as Wisconsin hold that the common fund doctrine is inapplicable when it is disavowed by contract. Examples include ERISA health benefit plans, and other polices which may include specific proscriptions against application of the common fund doctrine. Where the claim for compensation under the common fund doctrine cannot be defeated entirely, the insurer may be able to reduce the fee claimed by the plaintiffs' attorney. This is usually accomplished by claiming that the fee is unreasonable. The basis of this defense is that the insurer did not contract with the insured's attorney, and therefore is not bound by the insured's fee arrangement. Paying a plaintiff's attorney one-third for simply writing a few demand letters is unconscionable.

Additionally, in Illinois and other states, an insurer may attempt to prevent a claim for compensation by notifying the insured's attorney of its intention to pursue its own subrogation interest. However, written notice alone is often inadequate in avoiding a claim under the common fund doctrine, as it must be coupled with "meaningful participation" by the carrier's own lawyer in pursuing its own claim. "Meaningful participation" has been held to include:

(1) Informing the tortfeasors' insurance company that the insurer intends to pursue its own subrogation claim and that medical payments should not be included in a settlement with the insured;
(2) Sending written notification to the insured's attorney indicating an unwillingness to pay the attorneys' fees throughout the period of litigation; and

(3) Communicating with the insured's attorney about every element of the litigation, so that the insurer can be proactive in pursuing its own claim independently.

By negotiating directly with the tortfeasors' insurance carrier, you are sending a clear message to the insured's attorney that you intend to pursue your own claim without outside assistance. South Dakota courts have held that such active participation in the settlement process may allow the carrier to avoid paying the plaintiffs' attorney a portion of your recovery as fees.

Aggressive subrogation efforts, tactful and considered utilization of subrogation counsel, and aggressive subrogation action from the claims handler's desk, are all effective tools to be used in combating the wasting of subrogation recoveries as a result of the common fund doctrine. For information specific to various jurisdictions, please contact Gary Wickert.

COMMON SENSE PREVAILS AS EXCLUSIVITY RULE IS LIMITED BY ALABAMA SUPREME COURT

(Continued from page 1)

Kimberly-Clark after a paper mill employee, Robert Weaver, who was injured during a fall when a handrail gave way, brought an action for damages against Kimberly-Clark which had sold the mill to a successor corporation twelve days before the accident and injury occurred.

While Weaver was an employee of Kimberly-Clark, Kimberly-Clark welded a handrail on its premises. Shortly thereafter, Kimberly-Clark sold its pulp and paper mill facility to U.S. Alliance, and Weaver was thereafter employed by U.S. Alliance at the same plant. Weaver was later injured when the handrail, which was welded by Kimberly-Clark, gave way and caused Weaver to fall. Weaver received workers' compensation benefits from the workers' compensation carrier at U.S. Alliance, and sued Kimberly-Clark for the negligent weld. Kimberly-Clark filed a motion for summary judgment citing the exclusive remedy provision of the Alabama Workers' Compensation Statute. Weaver argued that Kimberly-Clark could not evoke the exclusivity provision, because Weaver was not employed by Kimberly-Clark at the time of the accident. Kimberly-Clark, on the other hand, argued that the exclusivity provision should apply because Kimberly-Clark and Weaver were in an employee\employer relationship at the time of the alleged negligence that led to the injury. The Court of Appeals sided with Kimberly-Clark, allowing them to take advantage of the Alabama Workers' Compensation Exclusivity Rule.

Liberty Mutual, the workers' compensation carrier for U.S. Alliance, retained the services of Matthiesen, Wickert & Lehrer, who filed an Amicus Curiae Brief in the underlying appeal from the Court of Appeals to the Alabama Supreme Court.

On August 8, 2003, the Alabama Supreme Court reversed the Court of Appeals decision, and held that Kimberly-Clark could not immunize itself from the third party action by claiming the exclusive remedy rule under Alabama law.

In this case of first impression, the Supreme Court noted that the Alabama Exclusive Remedy Rule § 25-5-53, provided as follows:

> *No employer shall be held civilly liable for personal injury to or death of the employer's employee for purposes of this chapter, whose injury or death is due to an accident or an occupational disease while engaged in the service or business of the employer; the cause of which accident or occupational disease originates in employment . . . (Emphasis Added).*

Prior to this, the Oregon Supreme Court had adopted a contrary minority view that a former employer who had complied with the statutory duty of maintaining workers' compensation insurance, was entitled to protection under the exclusive remedy rule, provided that the alleged negligence occurred during the former employment. Fields v. Jantec, Inc., 857 P.2d 95 (Or. 1993).

However, other cases have held that the employer is not entitled to immunity under such circumstances. In Hunter v. Southworth Products Corp., 775 N.E.2d 238 (Ill. App. 2002), Exxon Mobil Corporation purchased and installed a hydraulic lift table in one of its plants. Exxon Mobil subsequently hired Jeffrey Hunter to work as an electrician in the plant. Nine months later Exxon Mobil sold the plant to Tenneco Packaging, Inc. After the sale of the plant, Hunter continued working at the plant for Tenneco, and while working on the lift table, he was killed when it collapsed on him. Hunter's widow sued Exxon Mobil, who plead the exclusivity rule under Illinois law. The Illinois Court of Appeals held that the Illinois legislature could have expressly limited the exposure of former employers, but did not do so. Therefore, it denied the exclusive remedy protection to Exxon Mobil.

The Alabama Supreme Court noted that its workers' compensation laws were adopted from those of Minnesota. The case of Konken v. Oakland Farmers' Elevator Co., 425 N.W.2d 302 (Minn. App. 1998), had held that a former employer is a "person other than the employer, against whom a third party action can be maintained." Because the Alabama definition of "employer" was similar to the Minnesota definition, cast in the present tense, the Alabama Supreme Court ruled in Liberty Mutual's favor and against Kimberly-Clark, joining the majority of cases which hold that an employer must be the employer of the worker at the time of the injury, rather than at the time of the negligent act.

The Supreme Court also cited Larson's Workers' Compensation Law, § 100.01(3), Page 100-106 (2002), which states that:

> *The controlling fact in establishing exclusiveness of the remedy is the relationship of the parties at the time of the occurrence of the injury.*

Alabama, therefore, logically joins the majority of states, which also includes Washington and the case of Duvon v. Rockwell Int'l, 807 P.2d 876 (Wash. 1991), in holding that the employer/ employee relationship must exist at the time of the injury. This decision is good news for subrogating carriers across the country who wanted to see this disturbing trend reversed.

SUBROGATING AGAINST GOD?

The nemesis of most insurance carriers is the natural disaster. When God sends a hurricane, tornado, flood or a naturally occurring fire, the resulting claims can be enough to put many carriers out of business. With no third parties or subrogation potential, these claim payments are simply money down the drain. Such appeared to be the case with the Great Flood of 1993 in the Midwest and along the upper Mississippi River. This naturally occurring flood cost an estimated $21 billion, covered parts of nine states and lasted three months. As the flood waters rose, 1,369 brand new Subaru automobiles, ready for distribution and valued at over $17 million, were being stored by the Chicago & Northwestern Railroad (now Union Pacific) for Subaru of America, Inc. at an old American Motors outdoor storage facility in Kenosha, Wisc., which the railroad had leased for this purpose. Lloyds of London and its lead underwriter, Commercial Union Insurance Company, ultimately paid over $11 million on this claim. The claim also resulted in Lloyds canceling Subaru's policy. Subrogation was looked into by the Lloyds Claims Office and quickly dismissed. It was, after all, the storm of the century. Who could one possibly blame for that?

As subrogation counsel for the Lloyds Claims Center, Gary Wickert, with Matthiesen, Wickert & Lehrer, S.C., had routinely performed quarterly subrogation reviews at his office on Lime Street. During a routine file review, Wickert came across the Subaru claim file in the closed file area. The words "No Subrogation" were stamped across the top of the file. Noticing that there had been a similar flood in this area earlier, Wickert convinced the lead underwriter to invest $50,000 to do a hydrological study and produce a HEC-2 computer simulation of the flood, which, together with a historical survey of the area, revealed that many of the vehicles might have been stored on

the 100-year floodplain. That was enough to file suit on. Subaru and Lloyds sued Chicago Northwestern, Wackenhut Security and several other purported owners of the property.

Discovery was excruciating with many of the depositions taking three days or more. Ultimately, an old lease agreement between Chicago & Northwestern and Subaru was produced, which required CNW to maintain certain minimum standards, including drainage that would prevent more than two inches of water to accumulate. Wickert put an ad in a local paper seeking anecdotal stories about previous floods in this area and received favorable responses. Still, the defendants strenuously claimed that the flood was an Act of God.

Faced with the hydrological evidence and the existence of a flood plain, however, they ultimately had to admit that parking $17 million worth of automobiles on a flood plain was not prudent. After several Motions for Summary Judgement, two trial settings and a three-day mediation, the defendants ultimately paid over $7 million. It was $7 million Lloyds never thought they would see. After the recovery, Wickert set a meeting between Subaru and Lloyds, which resulted in Lloyds reissuing their coverage to Subaru. A happy ending that proves the adage that when you have catastrophic losses - you have subrogation potential!

SUBROGATING ON THE WATERFRONT
Longshore and Harbor Worker's Compensation Subrogation

Part One

The 1954 classic and award winning film *On the Waterfront*, starring Marlon Brando takes a realistic look at the problems of trade unionism, corruption, and racketeering on New York suppressive waterfront docks. Although the movie didn't address it, the injuries sustained by some of the characters in the movie would probably have been covered and subrogable by longshore and harbor workers' compensation. While we shouldn't hold our breath waiting for a Hollywood blockbuster about subrogation, we should take the time to look at an area of recoveries which is often lost in the shuffle.

Generally

Understanding Longshore and harbor workers' compensation subrogation will go a long way in enabling claims handlers, subrogation personnel, and supervisors alike to maximize their recoveries regardless of the venue. Longshore and harbor workers' compensation subrogation is a second cousin to traditional state workers' compensation subrogation. Like its distant relative, subrogation rights under the Longshore and Harbor Workers' Compensation Act ("LHWCA") are derived solely from statute. Longshore and Harbor Worker's Compensation Act, 44 Stat. 1424 as amended, 33 U.S.C. § 901 et seq. (1984). The LHWCA was passed in 1927 to compensate injured maritime workers, without regard to fault. Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976). Its "manifest purpose" is to assure prompt aid to the employee when the need is the greatest. Louviere, 509 F.2d at 283. The Act grants the compensation carrier a right of subrogation when it assumes the duty of payment for compensation to an injured employee (usually a longshoreman) of the insured employer (usually a stevedore). 33 U.S.C. § 933(h) (2003). This is because the Act preserves an injured worker's right to recover damages from third parties (usually a vessel owner) other than his employer, when he has made a claim for LHWCA benefits. 33 U.S.C. § 933(a) (2003).

Statutory Subrogation Rights

Following acceptance of an award of compensation, the employee has six months to commence an action against a third party. 33 U.S.C. § 933(b) (2003). If the employee fails to initiate a claim, this right shifts to the carrier for a period of 90 days. After 90 days, if no claim has been filed by the carrier, the right reverts back to the injured employee. Therefore, it can be seen why prompt subrogation recognition is critical in LHWCA subrogation scenarios. If the employee is dilatory in filing suit, the carrier must be

prepared to do so. During the 90-day assignment period, the employer's control of the worker's cause of action is exclusive. The worker is forbidden from commencing a suit on the claim during this time period. Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981). Note that if a formal compensation award is not entered, this assignment provision of the Act does not apply, even if the employer/carrier has voluntarily made compensation payments, and the right to assert the third party cause of action remains with the worker. Pallas Shipping Agency, Ltd. v. Duris, 461 U.S. 529 (1983). A carrier, even though it is not contesting liability under the Act, may request cause entry of a compensation award, solely for the purpose of triggering the 6-month period on the statutory assignment. 20 C.F.R. § 702.315 (1984).

If the injured employee commences a third party action, the carrier may intervene into the third party suit to protect its subrogation rights. Travelers Ins. Co. v. Hayden, 418 A.2d 1078 (D.C. App. 1980); Allen v. Texaco, Inc., 510 F.2d 977 (5th Cir. 1975). If the carrier fails to intervene into an existing third party action, its right to reimbursement may still be protected if the carrier notifies the third party tortfeasor that payment of benefits has been made to the plaintiff. Hayden, at 1081. However, notice must occur prior to a settlement and will operate as a lien on any recovery by the employee.

Third Parties

Quite similar to state workers' compensation scenarios, the LHWCA provides that the injured worker or longshoreman may proceed with a third party action against some person other than the employer or a person or persons in the employer's employ, who may be "liable in damages". U.S.C. § 933(a) (2003). Under the LHWCA, unlike state court workers' compensation subrogation, a stevedore may have its own cause of action for indemnity against the vessel owner where the vessel owner has breached a duty of care owed to the stevedore. Teters v. North River Ins. Co., 764 F.2d 306 (5th Cir. 1985) (this cause of action is known as a "Burnside Action"). The employee might not have this cause of action and would not be pursuing it. It is always important in LHWCA cases for the workers' compensation carrier to look at possible liability of the vessel as well as other third parties. The longshoreman's lawyer won't do it for you. In cases where the vessel owner may be responsible, the employer is free to assert its independent cause of action against the third party ship owner, based on the third party's duty owed to the employer, not the worker.

In general, the LHWCA lien may be asserted against any defendant from whom the plaintiff seeks recovery for the injury giving rise to the compensation lien. This lien can be complicated by waivers of subrogation. Typically, and particularly in the Outer Continental Shelf development, the foreign LHWCA employer sends its employees to a job site, and must sign a master service agreement with its customer, the contractor. Frequently, this contract provides for a waiver of subrogation of compensation liens, requires additional named insured status and requires indemnification. Indemnification and additional named insured status issues are beyond the scope of this article. Note that when the contractor/defendant asserts that a waiver of subrogation is set forth in the master service agreement, a LHWCA employer/carrier may be prohibited from recovering its lien. Allen v. Texaco, Inc., 510 F.2d 977 (5th Cir. 1975). Even in such situations, the entire lien may be recovered from any remaining third party defendants who have not obtained a contractual waiver of subrogation from the employer. LeBlanc v. Petco, Inc., 647 F.2d 617 (5th Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981). In addition, the insured must obtain the approval of the carrier in order to obtain the waiver of subrogation. If the employer fails to obtain this consent, the carrier has an independent cause of action to recover the complete LHWCA lien from any third party defendant, including the contractor which obtained the contractual waiver of subrogation from the employer. Stewart v. Cranvela Rental Co., Inc., 510 F.2d 982 (5th Cir. 1975). The third party defendant/contractor may have a breach of contract action against the employer, but their subrogation rights will be intact. Even if there is a valid waiver, with consent given by the

carrier, the carrier is still entitled to a credit or offset for the net recovery by the worker from the third party suit, which is applied toward any future LHWCA benefits which are to be paid to the worker. Petro-weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980). A waiver of subrogation does not negate the worker's obligation to obtain the prior written approval of the carrier for any third party settlement as set forth later in this article.

Vessel owners are typical third party defendants. However, vessel owners may also be owners of the stevedoring companies which employ longshoremen. If this is the case, a third party defendant has a dual capacity: (1) employer of the longshoreman; and (2) a vessel owner. Because of this dual capacity, a carrier may intervene into a third party suit to recover its lien against its own insured under these circumstances. Taylor v. Bunge Corp., 845 F.2d 1323 (5th Cir. 1988).

Unfortunately, a LHWCA carrier is not subrogated to an injured employee's legal malpractice claim filed by him against his attorney in a situation where an attorney has mishandled the third party case. Moores v. Greenberg, 834 F.2d 1105 (1st Cir. 1987). This is because the lien extends only to third parties who have "caused the underlying injury". This is one of the few instances in which LHWCA subrogation is less favorable than state workers' compensation subrogation. Many states allow a carrier to be subrogated to a legal malpractice action under such circumstances. On the other hand, medical malpractice does cause distinct personal injuries and will extend the period of time compensation and medical benefits are owed. A carrier is subrogated to the rights of an injured worker against a malpracticing doctor for damages asserted in a medical malpractice third party suit. Mills v. Marine Repair Service, 21 BRBS 115 (1998), *on reconsideration overruled in part by* 22 BRBS 335 (1989).

Due to the length of this article, we are bringing it to you in three parts. Please look for Part Two in our Summer 2004 newsletter. If you have any questions regarding longshore and harbor worker's compensation subrogation, e-mail Gary Wickert at gwickert@mwl-law.com.

SUBMIT YOUR SUBROGATION QUESTIONS OVER THE INTERNET

Many of our clients are taking advantage of the new feature of our web site located at www.mwl-law.com. Our web site now contains a link entitled "Submit Subrogation Questions". Simply click on the link, and a form will appear on which you can submit subrogation questions from all lines of insurance to subrogation professionals. Questions are usually responded to within a day after receiving the question. When submitting questions, please be sure to include all relevant information regarding the question, such as the line of insurance involved, the date of loss (if relevant), and the state or states involved. If additional information is needed, a clarification e-mail will be sent to you. We continue to look for innovative and efficient ways of serving our clients' subrogation needs. Please feel free to utilize this free service the next time you have a subrogation issue or question that arises.

TEXAS ISSUES ETHICS RULING ON ATTORNEYS' FEES

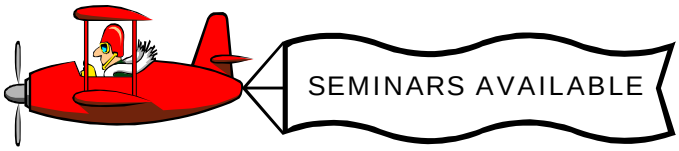
In a rapidly growing number of our Texas workers' compensation files we have been seeing plaintiffs' attorneys getting around the squeeze we have been putting on them by collecting a 40 percent attorney's fee "off the top" of a third party recovery, and then simply reimbursing the carrier's lien. This effectively nets the plaintiff's attorney a larger fee than if he had reimbursed the carrier first and then taken a fee off the remaining amount, which is the proper way to do the accounting in such a situation. Gary Wickert asked the Professional Ethics Committee for the State Bar of Texas to issue a formal opinion to cover this subject, as there was no case law to guide us. The Professional Ethics Committee recently issued Opinion 549, declaring that under the Texas Disciplinary Rules of Professional

Conduct, a lawyer representing a worker's compensation claimant in their third party action pursuant to a contingent fee arrangement may not collect a fee from the client/claimant based on the gross recovery, part of which is required to be paid to the worker's compensation carrier.

This is good news for subrogating carriers whose credit has been eaten away by such plaintiffs' lawyer's tactics. Because the carrier's credit is arguably based on the "net recovery" the worker receives, if a plaintiff's lawyer takes an attorney's fee based on the gross recovery, the net result is that the credit received by the carrier is reduced even further. It is suspected that some lawyers might even reimburse their client the difference between what the client received and what the client should have received if the calculations were done ethically, and the entire accounting process used simply short changed the carrier. However, there is now an ethics opinion which clearly indicates that this cannot be accomplished. Refer to State Bar of Texas Ethics Opinion 549 if you run across situations such as this and you should obtain favorable results. If you would like to receive a copy of the Ethics Opinion 549, please contact Jamie Breen, my assistant, at jbreen@mwl-law.com.

Chart on Contributory Negligence/ Comparative Fault Rules for all 50 States Now Available on our Web Site

Matthiesen, Wickert & Lehrer, S.C. has compiled a list of various laws in every state dealing with whether the state is a contributory negligence state (bars recovery with only 1% of fault by the plaintiff) or a comparative negligence state (recover by plaintiff is reduced or prohibited based on the percentage of fault attributed to the plaintiff and whether the state is a pure comparative or modified comparative state. This list is useful in evaluating subrogation potential where there may be contributory negligence on the part of your insured. The list is available on our web site at http://www.mwl-law.com. If you have any questions, please contact Gary Wickert.



Matthiesen, Wickert & Lehrer, 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 at gwickert@mwl-law.com or fax your request to (262) 673-3766.

FUTURE NEWSLETTERS TO BE SENT IN ELECTRONIC FORM

Notify us if you want to remain on our newsletter mailing list! Future issues of the Matthiesen, Wickert & Lehrer newsletter will be sent electronically, via e-mail. Our mailing list has grown exponentially over the past few years - as have our costs of printing, distribution and postage. Following the example of many other organizations and companies, we will be forwarding all future newsletters via e-mail, beginning with our Summer 2004 issue. If you wish to remain on our newsletter mailing list, please contact Jamie Breen at (800) 637-9176 or via e-mail at jbreen@mwl-law.com, and provide Jamie with your e-mail address. The next issue will then be sent to you automatically.

CONSIDER JOINING THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS (NASP)

Joining professional organizations and attending continuing education programing, while necessary in our industry, is the equivalent of fingernails scraping across a chalkboard. Many insurance organizations provide programs of doubtful relevance and applicability, and focus more on the particular venue where the conference or convention is being held. It is, essentially, a vacation peppered with obligatory

attendance at narcoleptic programing sessions. NASP is different.

The National Association of Subrogation Professionals (NASP) is a non-profit trade association of insurance companys' subrogation specialists, attorneys practicing in the field of subrogation, and venders serving the subrogation needs of the insurance industry. Its stated purpose is "to create a national forum for education, training, networking and sharing of information and, ultimately, the most effective pursuit of subrogation on an industry-wide basis." This organization is different. Its programs and conferences have specific relevance and applicability in the professional careers of those responsible for subrogation and recoveries. It provides members with valuable resources and networking opportunities peculiar to the subrogation industry. Members can ask questions or run specific fact situations past thousands of NASP members with a click of an e-mail, and its annual subrogation conference provides the very best in programming and discussion opportunities to enhance recovery programs and subrogation results for insurance companies, third party adjusting firms and self-insured entities across the nation. Regional subrogation efforts augment the star-studded annual conference by bringing subrogation programing and expertise to the insurance company's front door, and by providing programs two or three times every year in all six regions throughout the country. Even its web site places hundreds of subrogation articles and resources at the fingertips of the subrogation professional. It is, without a doubt, the sine qua non of the subrogation profession. If subro professionals within your company have not been given access to the many benefits of NASP, then your subrogation program is lacking. It is as simple as that.

Many of our clients have made the mistake of only sending higher management to some of these programs, but the basic building block of subrogation expertise provides a wealth of opportunity and information for the subrogation professional in the trenches. If you have not yet done so, consider joining NASP and/or making NASP membership compulsory for members of your subrogation team. Even if you don't send them to the national conference, which would be unfortunate, there are too many benefits of this organization to disregard. Our firm would not so strongly recommend joining this organization if the benefits of membership didn't pay dividends many times over. Gary Wickert is a current member of the Board of Directors of NASP and Douglas Lehrer is director of the North-Central Region for NASP's regional effort. We believe strongly that this is a resource and an opportunity too valuable to ignore.

For information on joining NASP, please contact Sarah Mehrer at (888) 828-8186 or via e-mail at sarah@subrogation.org. You won't be disappointed.

NEW ERISA/HEALTH PLAN SUBROGATION BOOK DUE IN AUGUST!

It is finally done! Our newest subrogation book is due to roll off the presses in mid-August, 2004. Entitled, "ERISA and Health Insurance Subrogation - 2004", this book is the ultimate source on ERISA and health insurance plan subrogation. This bound reference book contains sections on subrogation generally, non-ERISA health care subrogation, and ERISA-covered medical benefit plan subrogation. From understanding what an ERISA plan is to knowing what rights of subrogation it carries with it as a legal entity, this book covers and explains issues such as Preemption, Made Whole Doctrine, Common Fund Doctrine, Recovering from UM/UIM Policies, Understanding and Improving Plan and SPD Subrogation Language, and the like. It explains, by using case law and decisions from each federal circuit and many state decisions as well, exactly how and when you can intervene, remove a matter to federal court, recover when the beneficiary's attorney refuses to pay, and exactly which cases to cite to the other side in the process.

The book is more than a tutorial in ERISA subrogation. It is also a handbook and reference tool for the subrogation professional or claims handler in the trenches. It is the essential subrogation tool for hand-to-hand subrogation combat. The book also clearly explains the unfortunate 2002 decision of *Knudson v. Great-West Life & Casualty*, and covers all federal and state decisions which have clarified or explained this case's impact on your subrogation rights, whereve§r your venue. It is the complete guide to ERISA and Health Plan subrogation in all 50 states.

The 2004 edition of this book will be available for $115 beginning in August of 2004. If you are interested in reserving an advance copy of this useful subrogation tool, please call Jamie Breen at (800) 637-9176 or e-mail her at jbreen@mwl-law.com.

2004 UPDATES TO *WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES* COMPLETE

Our 2004 updates to "Workers Compensation Subrogation In All 50 States" are now complete and have been forwarded to Juris Publishing, the book's publisher in New York. It usually takes Juris a few months to get the updates into publication and forwarded to everyone who has purchased the book. If you do not have a copy of this book, and have any responsibility for workers' compensation subrogation, please consider reviewing the book at www.jurispub.com or at our website at www.mwl-law.com. It is the bible on workers' compensation subrogation, and contains an introduction into all facets of workers' compensation subrogation, from the most basic premises to the most complex scenarios you may encounter. It also contains chapters on Extraterritorial Subrogation (subrogating across state lines), as well as lengthy and comprehensive chapters on the specific workers' compensation subrogation laws in each of the 51 jurisdictions. This year's updates have added a completely new and thorough analysis and summary of Longshore and Harbor Worker's Compensation Subrogation. They also add an in depth look at the trend within each state to extend the exclusive remedy rule (immunity from third party suit) in construction settings to other "statutory employers" such as general contractors, subcontractors, and owners within construction projects. If you'd like to order one of these books, you can do so at either of the two web sites above. The updates will be automatically forwarded to you once you order the book. If you have any questions, please call Jamie Breen at (800) 637-9176.

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