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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **AUGUST 2010**

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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WORKERS' COMPENSATION SUBROGATION

MISSOURI COURT MAKES CO-EMPLOYEES FAIR GAME

Robinson v. Hooker, 2010 WL 2998605 (Mo. App. 2010)

In most states, an injured employee may not bring a third-party action against a co-employee. The co-employee is usually immune from suit under the exclusive remedy rule, to the same extent as the employer. Some exceptions exist for intentional acts, etc., but for the most part, co-employees may not be the targets of third-party actions or subrogation efforts. That has officially changed in Missouri.

On August 3, 2010, the Missouri Court of Appeals decided the case of *Robinson v. Hooker,* in which Robinson and Hooker were performing street cleaning tasks as City of Kansas City, Missouri employees. Hooker lost her grip on a high pressure hose that swung wildly and struck Robinson, causing blindness in his right eye. Two months later, Robinson filed suit against Hooker alleging that Hooker was negligent in failing to use ordinary care while operating the high pressure hose. The petition included a loss of consortium claim for Robinson's wife, Nadine. Hooker filed a Motion to Dismiss, asserting immunity because the Workers' Comp. Act provided Robinson's exclusive remedy for his injury claim against a co-employee.

The situation involving co-employees is somewhat unique in Missouri, and understanding its history is illustrative. Prior to the passage of workers' compensation laws, an employer was not liable for injuries to an employee caused by the negligent acts of a "fellow servant." *Bender v. Kroger Grocery & Banking Co.*, 276 S.W. 405 (Mo. 1925). Missouri courts gradually increased the employer's

tort liability for these injuries based on the theory that an employer has a non-delegable duty to provide a safe place to work. If a co-employee was negligent in performing the non-delegable duty of an employer, the employer could be held responsible for the resulting injuries to other employees. *Mitchell v. Polar Wave Ice & Fuel Co*., 227 S.W. 266 (Mo. App. 1921). In 1926, the Workmen's Compensation Act made the employer responsible for providing benefits to injured employees in exchange for the employer receiving immunity against tort claims for the injuries. *Gunnett v. Girardier Bldg. & Realty Co*., 70 S.W.3d 632 (Mo. App. 2002). Following the common law approach, courts later extended the statutory immunity to co-employees for negligence in performing a non-delegable duty of the employer. *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo. App. 1982).

In *Badami*, this judicial extension of immunity was deemed necessary to "fix" the Act's omission of agency principles in determining liability for workplace injuries. Under *Badami* and its progeny, a co-employee could not be sued unless there was a showing of "something more" than a breach of the employer's duty to provide a safe workplace. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. 2002). The "something more" test required proof that a co-employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. *Id*. Prior to 2005, § 287.800 mandated that courts liberally interpret the Act to extend benefits to the largest possible class and resolved any doubts as to the right of compensation in favor of the employee. *Schuster v. State Div. of Emp't Sec*., 972 S.W.2d 377 (Mo. App. 1998). In 2005, the Act was amended to eliminate the requirement of liberal construction, requiring the courts to use principles of strict construction in applying all provisions of the Workers' Compensation Statute. Mo. Rev. Stat. § 287.800 (2005). Based on this new requirement of strict construction, the Missouri Court of Appeals confirmed in 2010 that employee immunity arose from a liberal construction of the Act in *Badami* and based on the new rules of strict construction, needed to be reevaluated. *Robinson v. Hooker*, 2010 WL 2998605 (Mo. App. 2010). *Robinson* confirmed that a co-employee is not granted immunity under the exclusive remedy rule merely because he is a co-employee. To be immune, he would have to fall within the Act's definition of "employer" which is in relevant part as follows:

> *(1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;*
>
> *(3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter....* Mo. Rev. Stat. § 287.030.1.

The Court confirmed that a co-employee doesn't generally fall within this statutory definition of an "employer" as a "person ... using the service of another for pay" and "having five or more employees." Strict application of the Statute compelled them to conclude that co-employees are not entitled to invoke the employer immunity under § 287.120, and an employee retains a right to bring a third-party action against co-employees who do not fall squarely within this definition of "employer." Unless a co-employee can be shown to fit within the definition of "employer", the co-employee can be sued as a third party. *Robinson*, supra.

While the Missouri legislature undoubtedly will consider closing this loophole, the Court's ruling in *Robinson* opens a Pandora's Box of subrogation opportunities in Missouri workers' compensation subrogation. We have notified our Missouri local counsel to evaluate pending and future subrogation claims for new potential and recovery opportunities given the broad reach of this decision. In most cases, while a co-employee will not have sufficient assets to satisfy a large judgment, subrogation professionals must consider the possibility of coverage being afforded to the co-employee under his or her homeowner's policy. Liability coverage under homeowner's policies helps protect the homeowner and the family from financial disaster if someone files a suit against the homeowner for negligence – even if committed away from the home. It is worth looking

into to determine whether the co-employee's homeowner's liability coverage would step up to provide indemnity or if there are business-related damages or loss exclusions which would prevent this. We doubt any court would hold the employer and its liability carrier responsible to indemnify for the negligent acts of a co-employee, even in light of the Missouri strict construction rules. Section 287.120 clearly provides that an employer is *"released from all other liability therefore whatsoever, whether to the employee or any other person."*

Regardless how the tangled coverage issues shake out in the aftermath of this new decision, subrogation professionals interested in squeezing every possible recovery dollar out of every loss would be remiss in not considering all the new opportunities in Missouri.

If you should have any questions regarding this article, please do not hesitate to contact Gary Wickert at gwickert@mwl-law.com.

AUTO SUBROGATION

SUBROGATION AND THE SEAT BELT DEFENSE

By Gary L. Wickert

Every state except **New Hampshire** requires adults to wear seat belts while traveling in a motor vehicle. Lap belts have been mandated on new vehicles since 1968. Rear outboard lap belts have been required since 1989, and shoulder harnesses since 2008. Subrogation professionals, like trial lawyers, must come face to face with an increasingly used defense within the civil justice system. In cases involving automobile accidents, even if the plaintiff/insured is totally free from negligence, not wearing a seat belt could result in a reduction of the damages the plaintiff will be allowed to recover. And with increasing frequency, it is being used by liability adjusters as an argument for significantly reducing offers of settlement. Trial lawyers are also using the argument offensively and with some success. In some states, through the interplay of the Made Whole Doctrine or other state statutes, this defense could have an affect on a carrier's rights of subrogation or reimbursement.

Seat Belt Defense Generally

The seat belt defense has been integrated into the comparative fault system of many states to distribute equitably the costs of first and second collision injuries on the basis of their respective causes. "First collision" injuries, of course, are the injuries resulting directly from an insured being rear-ended by a tortfeasor. "Second collision" injuries are those injuries which result inside the plaintiff's vehicle which would not have occurred had the insured been properly wearing his or her seat belt. With a growing number of state mandatory seat belt use laws, we will see a proliferation of the seat belt defense in the coming years.

Thirty states currently have no seat belt defense in place: **Alabama**, **Arkansas**, **Connecticut**, **Delaware**, **Idaho**, **Illinois**, **Indiana**, **Kansas**, **Kentucy**, **Louisiana**, **Maine**, **Maryland**, **Massachusetts**, **Minnesota**, **Montana**, **Nebraska**, **New Hampshire**, **New Mexico**, **North Carolina**, **Oklahoma**, **Pennsylvania**, **Rhode Island**, **South Carolina**, **Tennessee**, **Texas**, **Utah**, **Vermont**, **Virginia**, **Washington** and **Wyoming.** Twenty six of these states actually have laws prohibiting evidence of non-use of a seat belt - all except **Idaho**, **Indiana** and **Tennessee**. In most of these states, comparative fault or contributory negligence laws are in place which allow the jury to compare the plaintiff's negligence as compared to the defendant. However, for example, in Maryland, state law requires that occupants of

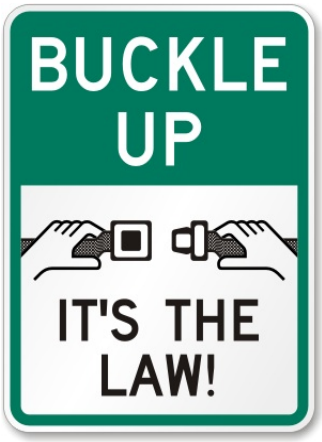
motor vehicles wear seat belts. Transportation Art., Md. Code Ann. § 22-412.3. Nonetheless, Maryland does not consider failure to use a seat belt as contributory negligence. The accident, they feel, was caused by the negligence of the driver's operation of the motor vehicle – NOT the plaintiff's failure to wear a seat belt.

On the other hand, 15 states do have some mechanism in place which could result in reduction of plaintiff's damages for not having a seat belt on at the time of an accident: **Alaska**, **Arizona**, **California**, **Colorado**, **Florida**, **Georgia**, **Iowa**, **Michigan**, **Missouri**, **New Jersey**, **New York**, **Ohio**, **Oregon**, **West Virginia** and **Wisconsin.** These states rationalize that while the accident itself may have been caused by the driver's negligence, the actual injury for which damages are sought is often exacerbated by the "second collision" which occurs within the plaintiff's vehicle as a result of his/her not wearing a seat belt.

These 15 states have adopted the seat belt defense, some by common law with no statutory approval, some by case decision, and some specifically by statute. These states have provisions for allowing the introduction of evidence that the plaintiff was not wearing a seat belt in order to affect the allocation of fault by the jury or have a more structured statutory scheme which assesses fault or limits the percentage of fault which can be attributed to the failure to wear a seat belt. Clearly, a driver not wearing a seat belt and injured when his car is rear-ended by an inattentive driver can't conceivably be 100% at fault for his injuries, but that could be the result in some states.

Two states, **Hawaii** and **North Dakota**, do not have a specific statute addressing the seat belt defense but have considered it and indicated they might move toward one. The North Dakota Supreme Court, for example, has indicated that it would probably be inclined to accept the seat belt defense. *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983).

Three states, **Indiana**, **Mississippi** and **Nevada**, do not have fully developed seat belt defense laws, because no statute or case specifically prohibits application of the seat belt defense based on a comparative negligence or failure to mitigate damages theory. *State v. Ingram*, 427 N.E.2d 444 (Ind. 1981); *Rhinebarger v. Mummert*, 362 N.E.2d 184 (Ind. Ct. App. 1977); Miss. Code § 63-2-3 (1997); *Roberts v. Grafe Auto Co., Inc.*, 701 So.2d 1093 (Miss. 1997).



There are a number of ways the seat belt defense comes into play – depending on the state. Usually, it arises under a "comparative negligence" or a "failure to mitigate damages" theory. **Florida** is an example of the former. Fla. Stat. Ann. § 316.614(9) (West 1997); N.Y. Vehicle and Traffic Law § 1229-c(8) (McKinney 1997). **New York** is an example of the latter. *Spier v. Barker,* 323 N.E.2d 164 (N.Y. 1974). In New York, as in most states which allow it, the seat belt defense can be submitted to the jury only if the defendant can demonstrate, by competent evidence, a causal connection between the plaintiff's non-use of an available seat belt and the injuries and damages sustained. In **Oregon**, if there is evidence from which the jury might conclude that the plaintiff's injuries were exclusively or primarily the result of his/her failure to wear a safety belt, the jury can find that such failure to do so is not reasonable under the circumstances. Little guidance beyond this is given. *Dahl v. BMW*, 748 P2d 77 (Or. 1987).

The seat belt defense is controversial and is not always fair. To ameliorate its potential harshness, some jurisdictions affirmatively limit the percentage of fault which can be attributed to an otherwise-blameless driver who wasn't wearing a seat belt. In **Missouri**, only 1% can be attributed to the person who failed to use a seat belt. Mo. Rev. Stat. § 307.178(4). In **Iowa**, **Michigan** and **Oregon**, the maximum percentage is 5%. Iowa Code Ann. § 321.445(4) (West 1997); Mich. Comp. Laws Ann. § 257.710(e)(6) (West 1997); Or. Rev. Stat. § 18.590 (1996). But perhaps the state with the most litigated and most clearly defined seat belt laws is **Wisconsin**, where the percentage is a statutory 15%.

Section 347.48(2m)(g) of the Wisconsin Statutes provides as follows:

> *(g) Evidence of compliance or failure to comply with par. (b), (c) or (d) is admissible in any civil action for personal injuries or property damage resulting from the use or operation of a motor vehicle. Notwithstanding s. 895.045 , with respect to injuries or damages determined to have been caused by a failure to comply with par. (b), (c) or (d), such a failure shall not reduce the recovery for those injuries or damages by more than 15%. This paragraph does not affect the determination of causal negligence in the action. The fact that jurisdictions have dealt with the seat belt defense in such varying ways is testament to the defense's controversial nature. This paper will outline some of the ways to combat the questionable and damage-reducing seat belt defense. Part I of the paper will discuss how to legally combat the defense in jurisdictions where the law may still not be completely settled on the issue. Part II will discuss how to factually combat the seat belt defense in jurisdictions where it does exist.*

In **California**, juries are allowed to hear evidence of seat belt non-use to prove comparative fault. California Vehicle Code §27315(i), provides that *"In a civil action, a violation of [the seat belt use law] does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as fact without regard to the violation.*" Although a violation of the California seat belt statute does not "constitute negligence as a matter of law or negligence per se," the statute does not "totally ban use of the seatbelt statute as a factor in determining negligence." *Housley v. Godinez*, 4 Cal. App. 4th 737, 746 (1992). In California, for purposes of determining comparative fault, not only may the jury learn of a plaintiff's failure to use his or her seat belt, the jury may also decide what weight, if any, to give the seat belt use statute in determining the plaintiff's standard of reasonable care.

As mentioned in the introduction, the state of the seat belt defense is not completely settled in many jurisdictions including **Hawaii, Indiana, Mississippi, Nevada** and **North Dakota**. Some states seemingly cannot make up their mind on the issue. In **Kentucky**, § 189.125(5) overruled *Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987) so that now Kentucky does not employ the seat belt defense. In **Ohio**, § 4513.263(f) overruled *Vogel v. Wells*, 566 N.E.2d 154 (Ohio 1991) so that now Ohio does not allow for application of the seat belt defense. Furthermore, the following states have adopted the seat belt defense, but only by common law with no statutory approval: **Alaska, Arizona, Georgia** and **New Jersey**. If you are practicing in a jurisdiction where seat belt defense law is not completely settled, or where it is settled only by common law, the following arguments may help you avoid a damaging seat belt subrogation reduction:

(1) Argue that the defense is not technically causative of the accident in question and can't be considered comparative negligence because your insured's failure to wear his or her seat belt did not help to actually cause the accident itself in any way. The traditional application of comparative negligence is that it applies only when the plaintiff's misconduct is the "but for" cause of the accident, not the "but for" cause of the damages. Failing to wear a seat belt may have made the plaintiff's injuries worse, but it certainly did not help to cause the accident itself. Stress that the failure to wear a seat belt cannot logically be considered comparative negligence.

(2) Argue that the seat belt defense does not logically fit into the doctrine of mitigation of damages. The traditional mitigation of damages rule states that a plaintiff has a duty to mitigate his or her damages *after* an accident has already occurred. Obviously, it would do a plaintiff no good to secure his or her seat belt after a car accident. Thus, failure to wear a seat belt cannot accurately be described as a plaintiff's failure to mitigate damages either.

(3) Argue that the seat belt defense runs counter to the traditional tort doctrine that defendants take their plaintiffs as they find them, also known as the "egg-shell" plaintiff's doctrine. The plaintiff would not be assessed a percentage of fault if he or she had

exceptionally brittle bones which allowed fractures to occur from a minor impact – why should it be any difference with the "seat-beltless" condition of the insured in which the defendant found the insured?

(4) Argue that plaintiffs should not have to anticipate other peoples' negligence.

(5) Argue that a jury will have trouble speculating about what kind of damages to award a plaintiff if the seat belt defense is allowed and speculation should not play a role in causation. In other words, if the seat belt defense is asserted, juries will essentially have to guess what damages a plaintiff would have sustained with seat belt use as compared to what they actually sustained. Even with the help of experts, this kind of calculation could become nothing more than mere guesswork.

Subrogation and the Seat Belt Defense

The seat belt defense can be used to thwart legitimate subrogation interests in a number of ways. Obviously, a defense attorney or third-party liability adjuster can claim they are entitled to a significant reduction in your subrogation damages due to the failure to use a seat belt. However, plaintiff's attorneys who have settled their cases in made whole jurisdictions can also claim that they were not made whole because they had to reduce their damages due to the application or potential application of the seat belt defense, even in otherwise clear-cut cases of defendant liability. The same arguments above should be used to counter the reasonableness of the plaintiff's "reduced settlement." Diligent subrogation investigation also enters the picture here.

If you happen to be practicing in one of the 15 jurisdictions which allow seat belt evidence to reduce a plaintiff's damages, it is important to know whether your client was actually wearing a seat belt or not. Obviously, you need to ask that question during your investigation, especially if this fact is not noted in the police report. It is also important to know what kind of seat belt, if any, they were wearing. The following are some issues for your consideration:

(1) If it is argued that government tests verify the efficacy and injury-reducing benefits of wearing a seat belt, you can argue with some authority that those tests are generally flawed and cannot universally be applied to everybody. First note that many of those tests are performed using anatomical dummies which represent only 50% of the population. Thus, the results of the tests are generally only valid as to 5'7", 165-pound males. Also note that the government tests are performed with the seat belts snugly secured around the dummies' waists so as to get the maximum benefit out of the belts. Since the average person does not use a seat belt in this way, the tests cannot be representative of how seat belt use would have affected the average person, including your client, who wears his or her seat belt less formally.

(2) Look at your insured physically. A short client, for example, may sit closer than "normal" to the steering wheel. Thus, a short plaintiff, *even if they wore a seat belt*, may have sustained damages that an "average" person would not have sustained. Also, consider that your plaintiff may be physically heavier than others. A heavy plaintiff, even if they wore a seat belt, may have pushed the seat belt system past its maximum limits thereby making it less effective, or even ineffective.

If it is alleged, by a police officer or the defense that your insured was not wearing a seat belt when they in fact were, it is certainly possible that the seat belt was simply ineffective. If your client claims to have worn a seat belt, but you are faced with a seat belt defense nonetheless, the first thing you should do is thoroughly inspect the vehicle itself to look for physical signs of seat belt use. You may want to have an expert help you

perform this task. Some things to look for include: stretch marks on the seat belt, scuffing on the belt buckle, and physical deformation of the "D-Ring" which holds the seat belt system in place at its height.

In addition to checking the vehicle for physical signs of seat belt use, and possibly seat belt failure, you may want to find out if the seat belt system in question had what is known as the “Window Shade Device.” If it did, then you should explain to the defense counsel, and the jury if necessary, that the “Window Shade Device” can make seat belts less effective to the point that even if a seat belt was worn, the aftermath of an accident makes it look like there was no seat belt use. The “Window Shade Device” is a comfort feature, and arguably a defect, that is included in some seat belt systems which allows the wearer of the seat belt to introduce slack into the belt. This introduction of slack can be accomplished intentionally or accidentally by pulling on the belt. For example, if a driver reaches forward to turn on the air conditioning, the “Window Shade Device” may introduce slack into the belt which never gets re-tightened. If a car passenger is then in an accident with a loosely fitted seat belt, it may appear as if no seat belt was worn at all. Not only is it obvious, but it has also been well documented that slack in a seat belt system seriously compromises the effectiveness of the seat belt as a whole. Thus, if your client’s seat belt system had the “Window Shade Device” feature, it is certainly possible that your client was wearing a seat belt, and that it just didn’t work.

If your insured was only wearing a “lap belt,” which are often the only kinds of belts available in the back seats of cars, some studies show that your client could have actually been more injured because of seat belt use. Indeed, internal damage from the lap belt may be worse than if your client was wearing no seat belt.

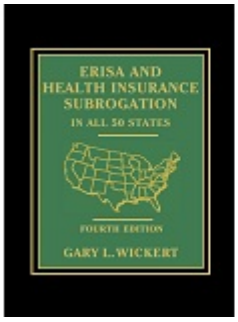
Conclusion

The seat belt defense has emerged as one of the most controversial issues in recent tort law history. Although a clear majority of jurisdictions have rejected the defense, a substantial number of large and influential states, including **New York**, **California** and **Florida**, have adopted at least some version of it. As the controversial doctrine establishes itself more firmly, there are sure to be new issues relating to its application to subrogation claims. The very fact that you are familiar with the seat belt defense, its applicability in a particular jurisdiction, and some rather cutting-edge arguments with which to diffuse it, will go a long way in bolstering your negotiating strength and your overall subrogation recovery.

For laws or particulars relating to a specific state’s seat belt laws or the existence of a seat belt defense, please feel free to contact us through our Subrogation Question feature contained on the home page of our website at www.mwl-law.com.

HEALTH INSURANCE SUBROGATION

ERISA AND HEALTH INSURANCE SUBROGATION IN ALL 50 STATES 4TH EDITION JUST RELEASED!!



The 4th Edition of *ERISA And Health Insurance Subrogation In All 50 States* contains a great deal of new information, statutory amendments and case decisions. It reflects the changing nature of health insurance subrogation and emphasizes the areas which have traditionally been weak spots in the subrogation professional’s arsenal. Although health insurance subrogation has become unduly complex and confusing over several years, the 4th Edition goes to great lengths to make the complex understandable, easily digestible and useful, the book is suitable for both the inexperienced health insurance subrogation claims handler and the seasoned veteran.

The 4th Edition includes new case law, both state and federal, that has shed new light on causes of action available against plaintiffs' lawyers who settle cases and do not honor a Plan's reimbursement rights. This includes entirely new sections on Equitable Liens by Agreement, Conversion and Tortious Interference. As tort reform continues to change the subrogation landscape, the 4th Edition details new case law applicable to medical malpractice actions and its interplay with subrogation claims and collateral source rules. New law and analysis has been added to the book confirming that ERISA preempts not only state legislation, but also has the power to preempt the judgments and orders of state courts – even those orders touching on domestic relations, which is an area of law traditionally reserved for state courts. New federal district cases with the 6th Circuit have confirmed that now two (2) – instead of just one (1) – requirements must be met in order to overcome the Made Whole Doctrine with your Plan language. The 6th Circuit also has a new decision which clarifies that the Common Fund Doctrine does not apply when a Plan says that it automatically has a first priority line upon the proceeds of any recovery from a third party. New 6th Circuit case law regarding an ERISA Plan's efforts to place a constructive trust on Social Security benefits received by a Plan beneficiary which result in overpayment by the Plan has been added to Chapter 10.

Additional information and guidance has been added to the 4th Edition regarding the difficulty of determining whether a Plan is self-funded as opposed to fully-insured and what is necessary to prove this. Also, tips for deciphering insurance filings and Form 5500 mistakes which can mislead trial lawyers are addressed. New York's collateral source statute was amended in 2009 to severely limit the subrogation rights of non-ERISA, fully-insured Plans which cannot avail themselves of ERISA's preemption provisions. This *Fourth Edition* also contains helpful information regarding The Health Information Technology for Economic and Clinical Health Act (HITECH), enacted on February 17, 2009 and signed into law by President Obama, which could have a profound impact on subrogation's interface with privacy law such as HIPAA.

Overall, the 4th Edition is a much more potent subrogation tool than its predecessor. *ERISA and Health Insurance Subrogation In All 50 States* remains the industry's bible on health insurance subrogation and no claims handler, Plan administrator, subrogation professional, or lawyer should be without it. You can order your copy through our publisher's website at www.jurispub.com or you can get a copy of the book's brochure and ordering information by clicking **HERE**. We stand behind all of our books so if you should have questions regarding any of the book's material or need clarification on any ERISA issue, do not hesitate to contact us. We would happy to assist you!

WORKERS' COMPENSATION SUBROGATION

INDEPENDENT RIGHT OF COMPENSATION SUBROGATION FOUND IN OHIO'S NEW HYBRID STATUTE

Ohio Bur. of Workers' Comp. v. McKinley, 2010 WL 893801 (Ohio App. 2010)

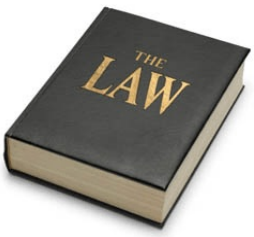
Workers' compensation subrogation in Ohio has been in a state of flux and uncertainty for the last decade. It was ruled unconstitutional by an activist and plaintiff's-oriented Ohio Supreme Court in 2001. The moment the statute became unconstitutional, the earlier version (1993) of the statute became effective. To nobody's surprise, the earlier version of the statute was quickly declared unconstitutional too. A new statute was soon enacted by the Ohio legislature which returned the right of subrogation to Ohio workers' compensation carriers and self-insured employers. However, because the new statute was constructed anew from the ground up in an effort to avoid confrontation with Ohio courts, there were suddenly many questions about how the statute was to be interpreted and implemented.

One such question was whether new § 4123.931 created a derivative right of subrogation for the workers' compensation carrier – dependent on and subject to the worker filing suit against a tortfeasor – or whether

it created an independent right to pursue the tortfeasor on the part of the subrogated carrier. On March 15, 2010, the Ohio Court of Appeals held that the carrier's right was independent and that its right to file suit against a negligent tortfeasor to recover its benefit payments was subject to the six (6) year statute of limitations, rather than the general two (2) year statute of limitations for negligence to which the claimant would be subject. The Court of Appeals also added the interesting comment that Ohio's workers' compensation statute can be classified as a "hybrid" subrogation statute in which the right of the subrogee-carrier to recover is an independent right, but it is subrogated in the sole sense that it can only recover from the claimant and/or third party if the third party is liable to the claimant in tort.

On July 13, 2003, while working for Safway Services, Inc. at Heritage-WTI, Inc.'s facility in East Liverpool, Ohio, McKinley was injured. Since Safway was a state funded employer, McKinley filed a claim for workers' compensation benefits with the Ohio Bureau of Workers' Compensation ("OBWC") and received benefits. McKinley sued both Safway and Heritage-WTI. The claim against Safway was for an employer intentional tort and was later dismissed. The premises liability claim brought against Heritage-WTI was later settled for an undisclosed amount and McKinley later brought a declaratory judgment action in the Common Pleas Court challenging the constitutionality of R.C. § 4123.93 and R.C. § 4123.931 and asking the Court to declare the amount owed to OBWC. Sadly, the Common Pleas Court found that the statutes violated §§ 2, 16, and 19, Article I of the Ohio Constitution and OBWC appealed the decision to the Fourth Appellate District. On appeal, the Court found that the statutes did *not* violate the Ohio Constitution, reversed the decision, and remanded the case to the trial court for further proceedings. McKinley appealed that decision to the Ohio Supreme Court, which affirmed the Court of Appeals. The case was remanded to the trial court and McKinley dismissed the cause of action against OBWC.

OBWC still hadn't been reimbursed for the benefits it paid, so on November 4, 2008, OBWC filed a complaint against McKinley and Heritage-WTI, asserting its subrogation rights against both defendants. McKinley and Heritage both defended by claiming there was not an independent right of subrogation and that the two (2) year negligence statute of limitations had run. OBWC focused on the statutory language "creates a right of recovery" while Heritage-WTI, on the other hand, focused on the language "the statutory subrogee is subrogated to the rights of a claimant against that third party."



The Court of Appeals noted something most courts who try to inject subrogation-killing equitable doctrines into the workers' compensation arena forget – a subrogated workers' compensation carrier is "not a subrogee in the usual sense" and that the statute was not a typical subrogation statute. Section 4123.931(A)'s use of the phrase "right of recovery" shows that it creates an independent right of subrogation. On the other hand, the Court acknowledged that while the statute uses the phrase "right of recovery," it also states that "the statutory subrogee is subrogated to the rights of a claimant against that third party." The latter phrase is more of a typical subrogation phrase. Therefore, the statute contains both a typical subrogation clause and a clause which bestows an independent right of recovery. As such, one might conclude that this creates an ambiguity problem. However, the Court said it did not. Instead, they held that the statute can be classified as a *hybrid subrogation statute*. The right of the carrier (OBWC in this case) to recover is an independent right, but it is subrogated in the sole sense that the subrogee (OBWC) can only recover from the claimant (McKinley) and/or third party (Heritage-WTI), if the third party (Heritage-WTI) is liable to the claimant (McKinley) in tort. It creates an independent right of subrogation.

The road to clarity when facing a brand new statute – yet alone an innovative one – is often long and tortuous. This is the case in Ohio. There are many unanswered questions, including whether medical malpractice and legal malpractice qualify as third-party cases under the new law. The only way to obtain answers to these questions is for our industry to push the envelope, challenge obstructions to our rights of recovery, and continue to value the right of subrogation by treating it as a thing of value – investing in and protecting it.

UPCOMING EVENTS.....

September 16, 2010 - Doug Lehrer and Chris Miller will present a live webinar entitled *"Construction Defects"* from 10:00 - 11:00 a.m. (CST). A registration link is on our website homepage but you can register now by clicking on the "Register Now" button to the right.

November 10-11, 2010 - MWL will be exhibiting at the19th Annual National Workers' Compensation and Disability Conference Expo in Las Vegas, Nevada. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference. For information on this conference, please go to www.wcconference.com.

PLEASE NOTE.....

We are now providing webinars and, as we do so, we are putting the recorded versions of those webinars on our Seminars/Webinars page on our website at www.mwl-law.com, which at this time can be viewed at no cost. The two (2) most recent webinars to be added are *Advanced Concepts of Workers' Compensation Subrogation* and *State of Washington: PIP and Med Pay Subrogation*.