MATTHIESEN | WICKERT | LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670
(800) 637-9176 (262) 673-7850 Fax (262) 673-3766
http://www.mwl-law.com

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **JULY 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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NEW FIRM ADDITION!

ANOTHER WORKERS' COMPENSATION DEFENSE ATTORNEY JOINS MATTHIESEN, WICKERT & LEHRER, S.C.

Only weeks after announcing that renowned workers' compensation defense attorney Peter Silver had joined the firm, Matthiesen, Wickert & Lehrer, S.C. ("MWL") is proud to welcome the addition of another attorney with significant workers' compensation defense experience, Melissa M. Stone, as an associate. Melissa received her Bachelors of Science Degree in Criminal Justice from Carroll College, Magna cum Laude in May 2003. She received her J.D. from Marquette University Law School in May 2007. Melissa has been practicing in the areas of workers' compensation insurance defense, personal injury insurance defense and coverage general practice, subrogation and civil litigation. While attending Carroll College, Melissa had an internship with the office of the Public Defender in Waukesha County, Wisconsin, where she prepared sentencing reports for convicted offenders. She spent the last five years working with the Anderson Group law firm in Lake Mills, Wisconsin, and comes highly recommended to MWL.

Melissa has already begun handling subrogation and workers' compensation defense work for our clients and, like Peter, has a keen insight into the important relationship between the defense of claims and the aggressive pursuit of third-party subrogation potential. "As Abraham Lincoln said, 'The leading rule for the lawyer is diligence - leave nothing for tomorrow which can be done today'," she says - an adage reflected by her work ethic. She firmly believes that the only limits on the successful defense of contested claims or

recovery of subrogation interests are the ones we place on ourselves, and she has become quite adept at helping clients work through some of those limits. Melissa can be reached at mstone@mwl-law.com.

We welcome Melissa and the insurance clients she has brought with her. If you have the opportunity to work with Melissa, please welcome her and take a moment to get to know her. We know you'll be as pleased and excited as we are that she chose MWL as her professional home.

HEALTH INSURANCE SUBROGATION

NEW YORK INTERVENTIONS MAY AVOID ANTI-SUBROGATION LAWS

New York Court of Claims Suggests Way Around Bad Law
Rink v. State, 2010 WL 1686054 (N.Y. Ct. Claims 2010)

On March 22, 2010, the New York Court of Claims (exclusive forum for civil litigation seeking damages against the State of New York or certain other state-related entities) issued a shocking decision which appears to partially neuter the anti-subrogation effects of some rather inconvenient New York law. In short, it says that the subrogation or reimbursement rights of health insurance carriers seeking recovery of medical expenses it paid might not be dead after all. Some background of health insurance subrogation law in New York is in order.

New York recognizes equitable subrogation. *Fed. Ins. Co. v. Arthur Andersen & Co.*, 552 N.E.2d 870 (N.Y. 1990); *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101 (2nd Cir. 1992). In addition, New York recognizes a contractual right of subrogation. *J & B Schoenfeld Fur Merchants, Inc. v. Albany Ins. Co.*, 492 N.Y.S.2d 38 (1985). Until recently, New York allowed health insurers to enforce both subrogation and reimbursement provisions. *Faust v. Luke*, 364 N.Y.S.2d 344 (1975); *Niemann v. Luca*, 645 N.Y.S.2d 401 (N.Y. 1996). The right of a health insurer to seek recovery from a third party, created through the principle of subrogation, is not necessarily a "lien," which is a charge or encumbrance on property, the creation of which requires an agreement or statute. *Teichman v. Community Hosp. of Western Suffolk*, 640 N.Y.S.2d 472 (N.Y. 1996).

An intervention is generally allowed for a health insurer seeking to enforce subrogation or reimbursement rights. Id.; but see, *Berry v. St. Peters Hosp. of City of New York*, 678 N.Y.S.2d 674 (1998) (wherein it was held not to be an abuse of discretion to disallow intervention where subrogating health insurer's presence would prejudice the plaintiff where plaintiff's damages appeared to significantly exceed the third-party's liability coverage); *Rink v. State,* 2010 WL 1686054 (N.Y. Ct. Claims 2010) However, some courts have held that a health insurer does not have a right to intervene into a third-party action. *Humbach v. Goldstein*, 653 N.Y.S.2d 950 (1997); see also, *Nossoughi v. Federated Dept. First, Inc.*, 669 N.Y.S.2d 479 (1998) (for different result). The ultimate result depended on the particular court in which a health insurer is attempting to intervene. The First, Second, and Third Judicial Departments have denied an insurer's right to intervene in pending litigation between its insured and the alleged wrongdoer. *Halloran v. Don's 47 West 44th Street Restaurant Corp.*, 680 N.Y.S.2d 227 (N.Y. App. Div. [1st Dept.] 1998); *Marshall v. 426-428 West 46th Street Owners, Inc.*, 821 N.Y.S.2d 884 (N.Y. App. Div. [1st Dept.] 2006); *Humbach v. Goldstein*, 653 N.Y.S.2d 950 (N.Y. App Div. [2nd Dept.] 1997); *Berry v. St. Peter's Hosp. of City of Albany*, supra.

These Judicial Departments found that to allow an insurer into the pending tort litigation would create an adversarial relationship between the insurer and its insured and detrimentally complicate the litigation. The Fourth Department has contrarily held that the insurer has the right to intervene in the pending tort litigation and has rejected arguments that the insurer's right to subrogation is foreclosed by the application of C.P.L.R. § 4545 against the insured. *Poblocki v. Todoro*, 865 N.Y.S.2d 448 (N.Y. App. Div. [4th Dept.] 2008); *Oakes v. Patel*, 803 N.Y.S.2d 455 (N.Y. App. Div. [4th Dept.] 2005); *Kaczmarski v. Suddaby*, 779 N.Y.S.2d 394 (N.Y. App. Div. [4th Dept.] 2004); *Omiatek v. Marine Midland Bank, N.A.*, 781 N.Y.S.2d 389 (N.Y. App. Div. [4th Dept.] 2004). The New York Court of Appeals has not addressed the issue directly, but has said that given the competing policy concerns, the issue should be addressed by the Legislature. *Fasso v. Doerr*, 903 N.E.2d 1167 (N.Y. App. 2009). The Court in *Fasso* encouraged the Legislature to reexamine the concept of permissible intervention as a means for an insurer to pursue its equitable subrogation rights.

The intervention issue has become a quagmire. Successful intervention used to be primarily dependent upon which judicial department the action was venued, and now the issue is further complicated by an amendment to § 5-335 of New York's General Obligation Laws passed in response to *Fasso*. N.Y. Gen. Oblig. Law § 5-335 (2009). Section 5-335 now provides that any personal injury, medical malpractice, or wrongful death case's recovery does not include health care compensation which a "benefit provider" has paid, thereby eliminating health plan subrogation. N.Y. Gen. Oblig. Law § 5-335 (McKinney 2009). Section 5-335 provides as follows:

> ***§ 5-335. Limitation of non-statutory reimbursement and subrogation claims in personal injury and wrongful death actions.*** *(a) When a plaintiff settles with one or more defendants in an action for personal injuries, medical, dental, or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement does not include any compensation for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there is a statutory right of reimbursement. By entering into any such settlement, a plaintiff shall not be deemed to have taken an action in derogation of any nonstatutory right of any benefit provider that paid or is obligated to pay those losses or expenses; nor shall a plaintiff's entry into such settlement constitute a violation of any contract between the plaintiff and such benefit provider.*
>
> *Except where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider.*
>
> *(b) This section shall not apply to a subrogation claim for recovery of additional first-party benefits provided pursuant to article fifty-one of the insurance law. The term additional first-party benefits, as used in this subdivision, shall have the same meaning given it in section 65-1.3 of title 11 of the codes, rules and regulations of the state of New York as of the effective date of this statute.* Id.

Section 5-335 states that when a plaintiff settles with one or more defendants, it will be conclusively presumed that the settlement does *not* include any compensation for the cost of health care expenses or other economic costs to the extent that those losses or expenses have been or are obligated to be reimbursed by a benefit provider, such as an insurer, unless there is a statutory right of reimbursement.

New York continued its anti-subrogation agenda on November 10, 2009, when New York passed Senate Bill S66002, which will also have a limiting effect on health insurance subrogation. 2009 N.Y. Sess. Law New York Senate Bill No. S66002 (Nov. 10, 2009). The purpose of the bill was to prevent what the New York State Trial Lawyers Association called "unwarranted reimbursement and subrogation claims." The new bill rewrites § 4545 as follows:

> **§ 4545. Admissibility of collateral source of payment.**
>
> *(a) Actions for personal injury, injury to property or wrongful death. In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source, except for life insurance and those payments as to which there is a statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery.*
>
> *(b) Voluntary charitable contributions excluded as a collateral source of payment. Voluntary charitable contributions received by an injured party shall not be considered to be a collateral source of payment that is admissible in evidence to reduce the amount of any award, judgment or settlement.* C.P.L.R. § 4545 (2009).

The newly amended collateral source statute provides that a jury verdict will be reduced by any collateral sources except where there is a "statutory right of reimbursement." Senate Bill S66002 also amends C.P.L.R. § 4213(b) (trials to the judge) and C.P.L.R. § 4111(e) and C.P.L.R. § 4111(f) (governing jury verdicts) so as to require itemized verdicts spelling out the elements of damages recovered) and adds § 5-335.

No sooner had the Legislature passed § 5-335 then the New York Court of Claims stepped into the picture. *Rink v. State*, supra. The Court of Claims in *Rink* said that § 5-335 addresses only the situation where the insured and tortfeasor have settled a third-party action. Where the case is settled, the insurer's right to seek subrogation is extinguished. However, the Court said that § 5-335 does not address the situation where litigation is still pending. Despite a general consensus that allowing an insurer to intervene complicates the case and creates an adversarial relationship between the insurer and insured, the Court rejected those arguments where the grounds for intervention have otherwise been met. The argument that allowing the insurer into the pending litigation effectively negates C.P.L.R. § 4545 was also denounced. Although § 5-335 limits the intervening insurer's right to reimbursement from a verdict or judgment, it did not extinguish its rights entirely. Accordingly, the Court of Claims held that the insurer's subrogation claim shares common

questions of fact and law with the underlying tort action, and the insurer's involvement can be contained to proof of payment of medical expenses which will not prejudice the claimant, intervention should be allowed. Therefore, it appears that intervening into a pending third-party litigation may be a way around the anti-subrogation effects of § 5-335. The Court of Claims allowed the subrogated carrier to intervene to the extent of introducing evidence of the amount of medical and health expenses it paid.

We should bear in mind that New York's anti-subrogation legislation affects health insurance subrogation rights involving Plans which are not self-funded. Subrogation involving a statutory right of reimbursement and subrogation involving ERISA-covered self-funded health Plans should be able to avoid the harsh effects of this law thanks to § 4545's "statutory reimbursement" exception and ERISA's preemption provisions. Remember that New York state law will usually only apply to subrogating Plans which are not covered under ERISA, including governmental Plans, trade association Plans, school Plans and FEHBA Plans. Harmful state laws usually will not apply to ERISA-covered Plans, both insured and self-funded, depending on the circumstances.

INSURANCE SUBROGATION

SUBROGATING DOG BITES:

NEW DOG BITE LAW IN ALL 50 STATES CHART AVAILABLE

By Melissa M. Stone

Work-related injuries involving dog bites are quite common for postal workers, delivery men, meter readers, and other occupations which require frequent visits to people's homes. Recognizing third-party liability in dog bite cases is not always tremendously difficult – a dog bit the employee; the owner must pay. What is difficult, however, is understanding and becoming familiar with the patchwork of state statutes, case decisions, common law, and administrative regulations which work together to create a body of state law which governs the liability of the dog's owner under different circumstances and fact settings.

The entire body of dog bite law, which subrogation professionals must become familiar with when faced with dog bite cases, include civil, criminal, and administrative law. For example, in California, the civil code gives a dog bite victim the right to prosecute a "private animal control" case, so the civil and administrative bodies of law actually overlap.

There are some consistencies – although heavily-laden with exceptions. Most states will hold a person civilly liable for a dog bite if they knowingly kept a dog with a vicious history or which has previously bit somebody. If the dog has previously bitten somebody, the law says that its owner has "scienter" or "knowledge" of the dog's propensity, and holds the dog owner liable for not taking reasonable precautions to protect potential victims of the dog's vicious propensity. This is known as the "one bite rule." If the dog has previously bitten somebody, it is reasonable to expect that it might do so again. The dog owner must take precautions to see to it that innocent victims are protected from the dog, including victims who come onto the owner's property for lawful purposes. Failure to protect potential victims amounts to negligence.

Such negligence can be general or negligence per se. The latter is a form of negligence based upon the violation of a statute designed to protect the public's health or safety. Courts have held that such laws include a leash law, prohibition against dogs running at large, and prohibition against dogs trespassing. If a dog bites somebody in a park where dogs are prohibited, the owner might be liable without having to prove negligence because the violation of the statute is considered negligence per se.

When dog bites occur on the premises of the dog's owner, many states apply the doctrine of premises liability - a specific form of negligence governing the civil liability of land owners and landlords. Premises liability is usually concerned with slip and falls, and the duty owed to a stranger to the owner's premises usually depends on the nature of the purpose for the visit.

Not all states require us to prove negligence to hold the dog owner liable for a dog bite. A growing number of states have passed statutes which create liability on the part of the dog owner even when the owner has no advance notice of a dog's dangerous propensity and even though it has never bitten anybody before. These are known as "strict liability" statutes. All that needs to be proven is that the defendant owned the dog and the dog bit the plaintiff.

There are countless fact situations under which somebody can be bitten by a dog. As a result, U.S. dog bite law varies widely in both what is required for liability and in the remedies they provide. Some impose liability of whoever had custody of the dog as well as its owner. Some apply to non-bite injuries as well as bites, some limit their scope to only the victim's medical bills, or provide for additional compensation if the dog previously bit a person.

Other states combine concepts of negligence, common law strict liability, and/or violations of local law, creating hybrid law which can be confusing. These states are known as "mixed dog bite law states" or simply "mixed states."

Defenses to dog bite liability also vary from state to state. They include proof that the victim provoked the dog, was a trespasser, was negligent, consciously assumed the risk of being bitten, or was a canine professional that was deemed to assume the risk. When the victim is a child, another defense is that his parent negligently failed to supervise him, and therefore was a cause of the accident.

Investigation in dog bite cases seems deceptively simple. Most claims handlers simply look into who owned the dog. However, the burden of proof is on the subrogation professional, so time and care should be taken to carefully investigate these claims, looking into such things as whether the dog has previously bitten anybody, whether the dog has exhibited vicious propensities (even though it has never bitten anybody before), whether there are any statutes governing the ownership and supervision of dogs, etc. Familiarity with the law of a particular state is also an important part of the investigation. If the subrogation professional is not familiar with the particular law involved, he or she will not know what to look for or investigate.

In order to help the subrogation professional with the legal aspects of investigating and pursuing subrogation in dog bite injury cases, MWL has just released its latest subrogation insurance resource – a chart depicting a summary of the dog bite laws for all 50 states and the District of Columbia. The chart is now available on our website and can be viewed by clicking **HERE**.

If you have any questions regarding liability of dog bites, please feel free to contact Melissa Stone at mstone@mwl-law.com.

SUBROGATION COUNSEL NEEDED IN INDIANA

Supreme Court Denies Compensation Lien Where There Is No Attorney

On May 27, 2010, the Indiana Supreme Court gave us another good reminder as to why it is important for subrogated carriers to be represented by subrogation counsel in Indiana. *Travelers Indemnity Co. of America v. Jarrells*, 906 N.E.2d 912 (Ind. App. 2009). In *Jarrells,* Jerry Jarrells was seriously injured at a construction site. LeMaster's worker's compensation insurer, paid workers' compensation benefits of $66,135.67. Jarrells sued a third party, another subcontractor, for the same injuries. He notified Travelers of the lawsuit, and Travelers simply responded with a notification of its statutory lien in the amount of $66,135.67, but did not intervene in the personal injury suit prior to trial. At the jury trial, Jarrells presented evidence of the worker's compensation payments and testified that he was aware that if he recovered in the lawsuit, he might have to reimburse Travelers for those payments.

The jury was instructed that it may consider any amount of the collateral source payments and costs that the worker may have to repay in arriving at damages but that worker could not recover more than once for any item of loss sustained. The jury returned a verdict in favor of Jarrells, valuing his total damages at $925,000, assigning 55% of the fault to one defendant, 30% to the employer, a non-party, and 15% to Jarrells, producing an award of 55% of $925,000, or $508,750. After Jarrells notified Travelers of the judgment, Travelers demanded reimbursement from Jarrells in the amount of $22,495.75, which it calculated by reducing its $66,135.67 expenditure to account for comparative fault and a share of Jarrells' attorney's fee. Jarrells responded that Travelers was not entitled to any of the judgment proceeds because the jury "already reduced the award by the amount of the workers' compensation benefits and the award should not be reduced further after judgment."

Travelers moved to intervene in the trial court and reopen the case. The trial court permitted Travelers to intervene, and Travelers moved for summary judgment, seeking a declaration that it was entitled to a statutory lien on the proceeds of Jarrells' recovery. The trial court denied that motion and granted summary judgment to Jarrells rejecting Travelers' claimed lien. The trial court ruled that Travelers' requested relief would impose a double setoff on the recovery because the jury had already deducted the worker's compensation benefits from the gross award. Travelers appealed, and in three separate opinions the Court of Appeals reversed with instructions to enter judgment for Travelers and determine the value of its lien. The case was then transferred to the Indiana Supreme Court.

The Indiana Supreme Court held that the carrier could not recover its lien. It noted that the common law collateral source rule prohibited presentation of evidence that a plaintiff in a personal injury action had received payments from sources other than the defendant. In 1986, Indiana enacted the Collateral Source Statute, Indiana Code § 34-44-1-1 *et seq.* (2004). The stated purpose of the statute is to enable an accurate assessment of the "prevailing party's pecuniary loss" and to provide "that a prevailing party not recover more than once from all applicable sources for each item of loss sustained." Id. The statute specifically addresses workers' compensation benefits, and provides that presentation of such benefits is permitted in order to establish "proof of the amount of money that the plaintiff is required to repay." I.C. § 34-44-1-2(2). The statute expressly allows proof of payments from some collateral sources, including workers' compensation, and also directs the trier of fact to "consider" the payments allowed to be admitted into evidence. I.C. § 34-44-1-3.

The Supreme Court held that to overcome the Collateral Source Statute, there must be evidence of an obligation to repay. Only then should the jury include the amount of collateral source payments in its award. The defendant, therefore, is benefitted by evidence of the collateral source payments, and the plaintiff or subrogated carrier gets the benefit of proof of obligation to repay. The court noted that had Travelers participated in the trial and objected to the instruction or submitted evidence of the obligation to repay, the problem would have been remedied. However, because there was no objection to the instruction, and Travelers, as a post-trial intervener, takes the trial as it finds it. This is a stark reminder of the importance of engaging subrogation counsel in the State of Indiana.

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 will soon be 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. We have two new webinars that will be added in the very near future, *Advanced Concepts of Workers' Compensation Subrogation* and *State of Washington: PIP and Med Pay Subrogation*.