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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **JUNE 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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MADE WHOLE DOCTRINE IRRELEVANT IN PENNSYLVANIA DEDUCTIBLE REIMBURSEMENT ISSUES

Jones v. Nationwide Property and Casualty Ins. Co., 2010 WL 2030301 (Pa. Super. 2010)

By Gary L. Wickert

In the world of subrogation, the issue of how much of an insured's deductible must be reimbursed to the insured after a carrier makes a successful subrogation recovery remains a perplexing and confusing issue for subrogation professionals. It rivals ERISA preemption in health insurance subrogation and the no-fault laws of certain states as one of the most confusing and least understood areas of subrogation. Even experienced subrogation professionals and lawyers get it wrong when it comes to understanding and employing the laws surrounding the obligation of a subrogated carrier to reimburse an insured a deductible. On May 24, 2010, the Pennsylvania Superior Court – one of two intermediate appellate courts in that state – rejected another baseless class action suit aimed at the insurance industry's practice of prorating deductible reimbursements in Pennsylvania.

On December 10, 2005, Brenda Jones was involved in an auto accident with another driver. Jones held collision insurance, issued by Nationwide, with a $500 deductible. Nationwide paid the Appellant the amount of her loss, minus the $500 deductible. Nationwide then pursued a subrogation action against the other driver. Nationwide received an amount greater than $500, but less than the amount Nationwide had already paid to Jones.

Pursuant to Insurance Department Regulations, 31 Pa. Code § 146.8(c) (*see* Deductible Reimbursement Laws Chart on MWL's website at [www.mwl-law.com]), Nationwide did not reimburse the Appellant the full amount of her deductible, but rather, only a *pro rata* share, which was $450.

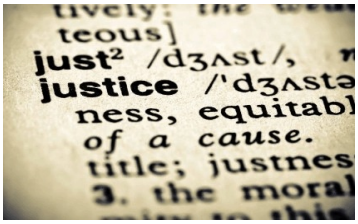
Amazingly, Jones filed a class action complaint, alleging that Nationwide's policy and practice of reimbursing only a *pro rata* share of the deductible constituted breach of contract, bad faith, conversion, and unjust enrichment and she sought an injunction to stop the practice.

Nationwide filed preliminary objections in the nature of a demurrer and argued that the complaint failed to state a claim because Nationwide's reimbursement scheme was consistent with the language of the Appellant's policy, and with Pennsylvania law; most specifically, § 146.8(c), which read as follows:

> *"Insurers shall, upon request of claimant, include first-party claimant's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with first-party claimant, unless deductible amount has been otherwise recovered. A deduction for expenses cannot be made from the deductible recovery unless outside attorney is retained to collect recovery. The deduction may then be for only pro rata share of allocated loss adjustment expense."*

In response, Appellant argued that § 146.8(c) is void because the Insurance Department had no authority to promulgate it. On October 17, 2008, the trial court granted Nationwide's preliminary objections without issuing an opinion. The appeal followed.

The Pennsylvania Superior Court made short work of the trial court's order, concluding that § 146.8(c) "fits squarely within the scope of authority delegated [to the Insurance Department] by the General Assembly." The Court concluded that "the behavior complained of by the plaintiffs, which is specifically permitted by Pennsylvania's insurance regulations, cannot violate the common law 'Made Whole' Doctrine even assuming that the doctrine would in fact support a claim like that of these plaintiffs." The Court reasoned that "[b]ecause the behavior does not violate the 'Made Whole' Doctrine, the plaintiffs have failed to state a basis on which the Court could find a breach of the parties' contract."



The Court rejected the plaintiff's remaining claims, declaring that Nationwide's behavior was not an act of bad faith because the defendant acted in reasonable reliance on a valid state insurance regulation. Under the terms of § 146.8(c), the plaintiffs were not legally entitled to a full recovery of their insurance deductible. The Court said Jones was entitled by law only to a prorated amount of the deductible. In short, the defendant's behavior as alleged was permissible under Pennsylvania law.

Subrogation professionals often assume that if a state employs or recognizes the "Made Whole Doctrine", then the insured must be totally reimbursed for its out-of-pocket deductible and any uninsured losses, before a carrier can subrogate. Unfortunately, this over-simplistic view and application of the Made Whole Doctrine is not only erroneous, but also results in reduced subrogation recoveries for carriers across the country. Surprisingly, the obligation of an insurer to reimburse some or all of its insured's deductible has very little to do with the Made Whole Doctrine in most states. It is now clear that it has nothing to do with deductible reimbursement in Pennsylvania.

MADE WHOLE DOCTRINE TAKES ANOTHER BLOW IN TEXAS

Texas Health Insurance Risk Pool v. Sigmundik, 2010 WL 2136625 (Tex. 2010)

The Texas Supreme Court struck a big victory for subrogation last month. In a powerful, pro-subrogation opinion, the Court declared that a trial court abuses its discretion when it invokes the equitable "Made Whole" Doctrine to circumvent a party's contractual right to subrogation. The Court went even further and said that a trial court may not cut a party out of a settlement where the settlement purports to resolve that party's claim, and the party participated in the proceedings and requested an allocation.

Thomas Sigmundik was injured in an oilfield explosion and spent 52 days in the hospital before succumbing to his extensive injuries. His insurer, Texas Health Insurance Risk Pool, paid $336,874.71 in medical expenses resulting from the accident. The Texas Health Risk Pool is a quasi-governmental entity that exists to provide affordable insurance to Texans who have pre-existing conditions or other high-risk conditions that might prevent them from obtaining insurance otherwise.

Subrogation comes in three varieties: equitable, contractual, and statutory. Shortly before the Court of Appeals issued its decision in this case, the Texas Supreme Court issued another pro-subrogation opinion in *Fortis Benefits v. Cantu,* 234 S.W.3d 642 (Tex. 2007), a case in which Matthiesen, Wickert & Lehrer, S.C. drafted and filed the amicus brief on behalf of the National Association of Subrogation Professionals. That decision held that the "Made Whole" Doctrine does not apply where, as here, "the parties' agreed contract provides a clear and specific right of subrogation." As they indicated in *Fortis Benefits,* equitable doctrines conform to contractual and statutory mandates, not vice versa. They further clarified that "contract-based subrogation rights should be governed by the parties' express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement."

The Court held that under *Fortis Benefits,* the "Made Whole" Doctrine was inapplicable in this case. The Texas Health Risk Pool has a contract-based lien on any recovery by Sigmundik's estate, and the amount of repayment sought, $336,874.71, was not contested. However, the contractual "lien against any recovery" means nothing if there is no recovery by the insured - that is, if the estate receives no part of the settlement. Thus, if the settling parties were the three Sigmundik family members and Thomas Sigmundik's estate, any amount allocated to Thomas Sigmundik would not go to his wife and children but to the Texas Health Risk Pool as subrogee. Here, the trial court avoided the Texas Health Risk Pool's subrogation right by directing all the settlement funds to the family and none to the estate. The Court held this is not allowed.

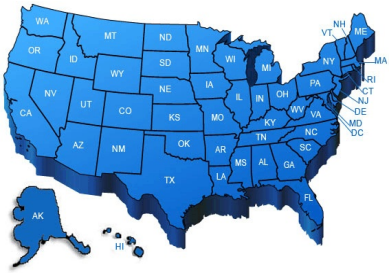
The trial court could not cut the estate completely out of the settlement just because the estate's main beneficiary is an insurance company or, more to the point, because the trial court believed the surviving family needed the money more than the insurer. This is especially true where beneficiaries and representatives are trying to remove others with an interest in the estate, notwithstanding fiduciary and other obligations owed by those asserting control of the estate. This new decision should be a powerful tool not only with regard to health insurance subrogation, but in all aspects of subrogation in the State of Texas. If you should have any questions regarding health insurance subrogation in any state, please contact Gary Wickert at gwickert@mwl-law.com.

HEALTH INSURANCE SUBROGATION

MATTHIESEN, WICKERT & LEHRER, S.C. INTRODUCES NEW 50 STATE OCCUPATIONAL ACCIDENT INSURANCE SUBROGATION CHART!

By Ryan L. Woody

This chart is big news to those of our clients who write occupational accident or "occ-acc" insurance. For those of you who don't know, occ-acc insurance is a niche product that covers a large percentage of over-the-road truckers and independent contractors throughout the United States. These so-called owner-operator truck drivers are not employees, and are, therefore, not covered by state workers' compensation insurance. Instead, they rely upon this important insurance product that mimics coverage similar to workers' compensation benefits. However, given the niche nature of this coverage there simply is very little legal guidance for subrogation professionals. Workers' compensation laws do not apply and ERISA may or may not apply. As such, practitioners struggle with determining what their subrogation rights are and how recoveries are allocated for this niche product.



As of today, Matthiesen, Wickert & Lehrer, S.C.("MWL") sets that confusion aside by introducing its newest 50 State Occupational Accident Insurance Subrogation Chart. Since MWL handles the largest volume of occupational accident subrogation of any law firm in the United States, we thought it was our obligation to provide a concise, workable chart for our clients and occ-acc practitioners. Using our years of experience with occ-acc subrogation, we have put together the most comprehensive chart identifying the critical legal questions faced by each and every occ-acc practitioner. The chart identifies whether and to what extent you can subrogate occ-acc coverage in each state. In addition, the chart provides the most current restatement on the Made Whole and Common Fund Doctrines in each state and how those laws apply to occ- acc coverage. This chart is a must for all occ-acc practitioners, claims adjusters and subrogation attorneys. As always, we offer this chart free-of-charge on our website – www.mwl-law.com. You can also view this new chart by clicking **HERE**.

MWL is the country's foremost authority on occ-acc insurance subrogation. If you have questions about occ-acc subrogation, please contact Ryan Woody at rwoody@mwl-law.com or any of the attorneys at MWL. On June 1, 2010, Ryan Woody presented a live webinar on Subrogating Occupational Accident Plans. The recorded version of that webinar is now available at no cost on the Seminars/Webinars page of our website. You can also click **HERE** to view the recorded version of this webinar.

INSURANCE SUBROGATION

COLORADO AT IT AGAIN

Anti-Subrogation Bill Threatens Subrogation At Multiple Levels

No sooner had the ink dried on their 2008 ravaging of Med Pay subrogation rights, then the Colorado legislature is once again swinging the anti-subrogation axe with the introduction of H.B. 10-1168. Under current Colorado law, the Made Whole Doctrine has really only been applied in uninsured motorist situations and only when legislatively-mandated coverage would be reduced by certain subrogation rights. However,

this new bill threatens to unleash a Godzilla-sized version of the Made Whole Doctrine on health insurance, uninsured motorist, and potentially even property and workers' compensation subrogation.

H.B. 10-1168 proposes to limit the ability of a "payer of benefits" to subrogate or seek reimbursement of benefits in a third-party setting if the insured is not made whole. "Benefits" is defined as "payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments, or any other kinds of benefits, including discounts and write-offs, provided to or on behalf of an injured party under a policy of insurance, contract, or benefit plan with an individual or group, whether or not provided through an employer." This provision calls into question the viability of § 8-41-203, Colorado's Workers' Compensation Subrogation Statute, which allows only subrogation or reimbursement of economic damages, but does not, as of yet, apply the Made Whole Doctrine.

The made whole issue must be determined in the court where the case is pending, and if no suit has been filed, the insured must give notice to the insurer in writing that the recovery obtained does not fully compensate him or her. If the insurer disputes the made whole claim, the insurer must file a post-trial or other appropriate motion, or seek declaratory judgment to determine whether the insured is made whole.

Furthermore, the bill makes it impossible for an insurer to bring a direct action against a tortfeasor and the tortfeasor is prohibited from putting the insurer's name as a co-payee on any settlement draft. Insurers are further prohibited from delaying, withholding, or reducing benefits as a tool to coerce subrogation or reimbursement. Even if an insurer obtains reimbursement of benefits it has paid, the insurer must apply the amount of its reimbursement as a credit against any applicable lifetime cap on benefits contained in the policy or plan.

The bill throws personal responsibility to the wind by letting tortfeasors responsible for causing accidents and injuries off the hook and destroying uninsured motorist subrogation – which is traditionally driven by the subrogated UM carriers. This bill is sponsored by 27 Democrats in the House and 9 Democrats in the Senate, which should give you some indication on how to vote this November. Arguably, you could say it is a "bi-partisan" bill because one lone Republican is joining in sponsoring it – Greg Brophy, a self-described "farmer" who can be reached at greg@gregbrophy.net. It is a bill that is completely driven and supported by the Colorado trial lawyers.

It is too early to know the chances of whether this bill will become law, because it was only first introduced in the House on January 22, 2010, whereupon it was assigned to the Judiciary Committee. The text of the proposed bill and the names of its nefarious sponsors can be found at http://www.statebillinfo.com/bills/bills/10/1168_01.pdf.

HEALTH INSURANCE SUBROGATION

MEDICARE SET-ASIDES

Understanding And Dealing With The Newest Obstacle To Third-Party Recoveries

As is the case with most government initiatives, the newest developments involving Medicare and its Secondary Payer Statute are once again chocked full of the unintended consequences of good intentions. Understanding the new developments and regulations is difficult. Knowing when they apply and how to

comply with them may be next to impossible. If you have responsibilities adjusting or handling or overseeing subrogation and/or liability claims, there is no avoiding coming face to face with this confusing procedure.

Medicare is the federal health insurance program that covers most people age 65 and older, as well as some younger people who are disabled or who have End-Stage Renal Disease (permanent kidney failure). Clearly, there are accidents and injuries for which both Medicare and workers' compensation insurance will provide overlapping benefits and coverage. In recent years, the U.S. government has been taking more of an interest with regard to workers' compensation settlements. Specifically, Medicare has taken an interest in and is starting to review workers' compensation settlements more closely because it believes that there has been an illegal shift of medical benefits from workers' compensation insurers to Medicare. As Medicare's role in workers' compensation and liability settlements evolves, subrogation professionals have had to become increasingly educated on this confusing and often conflicting area of the law. Settlement of workers' compensation claims without proper Medicare approval can lead to serious liability on the part of compensation carriers and even lawyers. Medicare's interest and authority is now even spreading to settlement of third-party liability lawsuits. A lack of clear guidance has left many subrogation professionals – not to mention lawyers – perplexed and at risk.

The Medicare Secondary Payer Act is found at 42 U.S.C. §1395y. It provides that the United States may bring an action against any or all entities required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to an item or service (or any portion thereof) for which Medicare could potentially have to pay in the future. The Act provides that the Centers for Medicare & Medicaid Services (CMS) of the Department of Health and Human Services (HHS) can collect double damages against any such entity which fails to comply with the appropriate Medicare Set-Aside requirements and for which Medicare ultimately finds itself responsible. For more information, please click **HERE**.

UPCOMING EVENTS.....

July 21, 2010 - Gary Wickert will present a live webinar entitled *"Advanced Concepts of Workers' Compensation Subrogation"* from 10:00 - 12:00 p.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, 2011 - 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 live webinars and, as we do so, we are putting the recorded versions of these webinars on our Seminars/Webinars page on our website at www.mwl-law.com.The recorded versions of these webinars can be viewed at a time most convenient for you and at no cost.