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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **NOVEMBER 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

TEXAS DECISION PROVES TO BE MIXED SUBROGATION BAG INVOLVING DEDUCTIBLES AND WAIVERS OF SUBROGATION

Reliance Ins. Co. v. Hibdon, 2010 WL 4132198 (Tex. Civ. App. – Houston [11th Dist.] 2010)

By Gary L. Wickert

What Texas courts giveth, Texas courts taketh away. A new Court of Appeals workers' compensation subrogation decision provides a bit of subrogation Yin and Yang because while it presents a potentially good result with regard to waivers of subrogation, it is devastating to the area of deductible policy or SIR subrogation.

Waivers of subrogation – the under-compensating, costly, and ubiquitous enemy of workers' compensation subrogation received an injection of steroids from the decision in *Reliance Ins. Co. v. Hibdon*. The court held that a waiver of subrogation endorsement in a workers' compensation policy by which the carrier agreed to waive subrogation as to any "person or organization" the employer was required in writing to obtain a waiver of subrogation for, did not waive subrogation as to an individual employee of a company with whom the employer had entered into a contract, because that contract merely required it to waive subrogation in favor of a specific company. It did not specify whether there needs to be a waiver as to the employees of that specific company. This opens the doors wide open on a large number of

cases in which you might not have pursued subrogation because of the existence of a blanket waiver in your policy. A thorough review of all workers' compensation subrogation files should be undertaken to determine if you or your company gave up on or simply didn't pursue subrogation rights because of such a waiver. There is a chance you could still recover.

In *Reliance Ins. Co. v. Hibdon,* RME Petroleum Company ("RME") contracted with Grey Wolf Drilling Company, L.P. ("Grey Wolf") to drill a well ("RME/Grey Wolf Contract"). Hibdon was employed by RME. The RME/Grey Wolf Contract required Grey Wolf to maintain certain insurance policies with RME named as an additional insured. The contract also obligated Grey Wolf to secure a waiver of subrogation in favor of RME but did not specify whether RME's employees were to be included in the waiver. Grey Wolf purchased a workers' compensation policy with a $250,000 deductible from Reliance ("Reliance Policy"). In the Reliance Policy, Reliance agreed that it would not enforce its right to subrogation against "[a]ny person or organization" in whose favor Grey Wolf was required by written contract to obtain a waiver of subrogation. Cunningham Lindsey was retained to administer employee injury claims under the Reliance Policy.

In March 2000, Grey Wolf's employee, Lee Valentine, was injured in the course and scope of his employment. Cunningham Lindsey paid $243,397.00 in workers' compensation benefits to Valentine. Reliance then went into receivership and Texas Property and Casualty Insurance Guaranty Association ("TPCIGA)" assumed payment of workers' compensation benefits to Valentine. From December 2002 through January 2005, TPCIGA paid Valentine $96,602.70. The parties agree that Grey Wolf will reimburse $243,397.00 to Cunningham Lindsey and $96,602.70 to TPCIGA. Valentine filed a third-party action against RME and Hibdon. Pursuant to the RME/Grey Wolf Contract, Grey Wolf's insurance carrier, Lexington Insurance Company ("Lexington") was required to defend RME and Hibdon. On December 7, 2004, Hibdon, by and through Lexington's claims personnel, settled with Valentine for $350,000.00. On January 21, 2005, Lexington sent a check for $350,000.00 to Valentine. In December 2006, appellants sued Hibdon, contending Hibdon was obligated by statute to pay them before paying Valentine.

The court began by reviewing the principles under which waivers of subrogation are interpreted. When interpreting a contract, the court must ascertain and give effect to the contracting parties' intent. *Perry Homes v. Cull*, 258 S.W.3d 580, 606 (Tex. 2008). The court must focus on the language used in the contract because it is the best indication of the parties' intent. Id. It must examine the entire contract in an effort to harmonize and effectuate the waiver of subrogation so that neither is rendered meaningless. *Seagull Energy E & P, Inc. v. Eland Energy, Inc*., 207 S.W.3d 342 (Tex. 2006). The court will not give controlling effect to any single provision; instead, it must read all of the provisions in light of the entire agreement. Id.; *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). It may not rewrite the contract or add to its language under the guise of interpretation. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003). Rather, we must enforce the contract as written. *Royal Indem. Co. v. Marshall*, 388 S.W.2d 1761 (Tex. 1965). Language should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated. *Reilly v. Rangers Mgmt., Inc*., 727 S.W.2d 527 (Tex. 1987). In interpreting a waiver of subrogation with a policy, a court may determine that it is ambiguous even if neither party makes the claim. *In re Sterling Chems., Inc*., 261 S.W.3d 805 (Tex. App. - Houston [14th Dist.] 2008, *orig. proceeding*) (citing *Sage St. Assocs. v. Northdale Constr. Co*., 863 S.W.2d 438 (Tex. 1993)).

Using these rules of contract interpretation, the court declared that a workers' compensation carrier may be able to sue the employee of a company responsible for causing the injuries where the waiver of subrogation waives rights against the company but does not specifically name the employee. *Reliance Ins. Co. v. Hibdon*, 2010 WL 4132198 (Tex. Civ. App. 2010). In *Reliance Ins. Co. v. Hibdon,* the actual waiver of subrogation endorsement obtained in Grey Wolf's workers' compensation policy indicated that Reliance would not enforce its right to subrogation against "*any person or organization*" in whose favor Grey Wolf was

required by written contract to obtain a waiver of subrogation. The court in *Hibdon* held that while Reliance could not pursue the third party referenced in the waiver, it could proceed against the RME employee who caused the injury because the waiver of subrogation did not – nor was it required to – name the employee of the defendant corporation in the waiver. *Am. Risk Funding Ins. Co. ex rel. Cont'l Cas. Co. v. Lambert*, 59 S.W.3d 254 (Tex. Civ. App. 2001). The carrier was free to subrogate against the third-party employee despite the waiver of subrogation which was effective only as to RME, not its employees.

The court made sure to mention that this case was distinguishable from cases in which the workers' compensation carrier tried to recover directly against its own insured's employee via reimbursement, citing *Lambert* for the proposition that the above waiver of subrogation would be effective to prevent a suit against an employee for reimbursement. However, it opens the door to pursuing the individual employee tortfeasor where the waiver of subrogation requirement did not require a waiver against the employees of the tortfeasor company. Id. While the aspect of this case dealing with waivers of subrogation is promising, another aspect of the court's decision in *Hibdon* involving subrogation of deductible policies, is not as favorable.

In *Hibdon,* the workers' compensation policy Grey Wolf purchased from Reliance had a $250,000.00 deductible in accordance with Texas law. Grey Wolf had already reimbursed Reliance, and the defendants argued that because the carrier had been reimbursed, it had no right of subrogation. Amazingly, the court agreed.

It should be pointed out that Texas law provides a workers' compensation carrier with a direct right of subrogation, but does not grant a similar right to a self-insured employer or an employer with a large self-insured retention or high deductible. Unfortunately, Texas case law has pointed out that no direct subrogation rights are granted to employers under the Texas Labor Code – such rights are given only to their workers' compensation carriers. *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526 (Tex. 2002). In *Argonaut Ins. Co. v. Baker,* the court noted that § 5.55C mandates that:

> *A deductible policy must provide that the [carrier] will make all payments for benefits that are payable from the deductible amount and that reimbursement by the policyholder shall be made periodically, rather than at the time claim costs are incurred.* Tex. Ins. Code Art. §5.55C.

Argonaut was a case wherein the workers' compensation carrier recovered the deductible directly from the tortfeasor, rather than from the employer. *Argonaut,* 87 S.W.3d at 532. However, in a case in which the workers' compensation policy had a $250,000.00 deductible and the carrier had already been reimbursed by the employer when it filed its subrogation claim, the Texas Court of Appeals created a subrogation conundrum by stating that if a carrier has already been reimbursed, it is not entitled to subrogation. *Reliance Ins. Co. v. Hibdon*, 2010 WL 4132198 (Tex Civ. App. – Houston [14th Dist.] 2010) (Motion for Rehearing filed as of the date of this printing). If the employer has no right of subrogation and a carrier who is reimbursed by the employer under the deductible policy has no subrogation, then Texas has effectively eliminated subrogation in all policies involving deductibles and has rewarded employers who do not repay the deductibles they owe their carriers.

At the time this article was printed, a Motion for Rehearing had been filed in the *Hibdon* case, but no appeal. If an appeal is necessary, we will urge the appropriate organizations to file Amicus briefs in support of protecting subrogation rights where deductible plans or SIRs are involved. If you should have any questions regarding this article or wiavers of subrogation, please contact Gary Wickert at gwickert@mwl-law.com.

USE IT OR LOSE IT!

Lack of Aggressive Pursuit of Subrogation Contributes To Its Demise In Pennsylvania

Tannenbaum v. Nationwide Ins. Co., 2010 WL 1692433 (Pa. 2010)

Short-sightedness within the insurance industry is slowly but surely costing it big dollars. Subrogation – for decades considered the red-haired stepchild of the insurance industry and given short shrift when it comes to staffing, funding, and respect along many lines of insurance and many different carriers – is like human muscle. If it isn't used, and used aggressively, it atrophies, withers, and eventually goes away. The Pennsylvania Supreme Court just gave us another clear example of why carriers who don't aggressively preserve and protect subrogation rights are destined to lose them.

In *Tannenbaum v. Nationwide Ins. Co.,* 2010 WL 1692433 (Pa. 2010), the Pennsylvania Supreme Court was faced, for the first time ever, with the issue of whether § 1722 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") statutes (allowing reduction of verdicts by the amount of collateral sources the plaintiff has received) entitles an UIM carrier to deduct from amounts it is obligated to pay the value of benefits the injured insured received from separately purchased disability policies. In its final decision, the Supreme Court ironically used our industry's historically passive pursuit of subrogation and our all-too-frequent willingness to radically compromise subrogation liens and interests as a weapon against the concept of subrogation itself.

In 2000, Appellee Alan Tannenbaum, M.D. had a flourishing medical career. He was a board-certified pediatrician with 13 years of experience who was then employed as part of a group practice by Albert Einstein Medical Center. As part of his employment arrangement, Dr. Tannenbaum was covered by a group disability policy, which was paid for by the practice. Dr. Tannenbaum also purchased two other individual disability policies which he directly paid for out of his own funds. On December 1, 2000, Tannenbaum's vehicle was struck by a truck that failed to stop at a red light. He suffered severe bodily injuries, including fractures to his neck and spinal vertebrae, deep lacerations to his chest, abdomen and kidneys, as well as muscle and nerve damage, and was no longer able to perform his duties as a physician. He applied for Social Security disability benefits, as well as income loss benefits under his other personal disability policies. Tannenbaum settled a suit he brought against the tortfeasor and then sought to recover UIM income loss benefits from his own Nationwide auto policy, representing "economic damages for lost past and future earnings, lost earning capacity and pain and suffering." The matter was submitted to arbitration.

Nationwide successfully precluded Tannenbaum from introducing at the arbitration proceeding the amount of benefits he received from his group disability plan and personal disability plans as evidence of his lost wages, thereby effectively deducting or setting off the total value of those benefits from any recovery to be awarded under his UIM policy. Tannenbaum argued that he was improperly precluded by the arbitrators from introducing into evidence the amount of benefits paid under his group and personal disability plans as part of his wage loss calculation and that Nationwide was improperly permitted to deduct the amount he was paid under the disability policies from the amount of his income loss and thereby reduce his UIM recovery.

The trial court agreed with Dr. Tannenbaum's assertions, vacated the arbitration award, and ruled that he was entitled to recover benefits under both his disability policies and his UIM coverage since he separately paid for each of the policies out of his own funds. The Supreme Court then faced for the first time the

question of whether § 1722 of the MVFRL entitles an insurer in a UIM proceeding to deduct from amounts it is obligated to pay under its UIM policy the value of benefits the injured insured received from separately purchased disability policies.

The Supreme Court reversed the trial court, holding that an insured's recovery under UM/UIM policies may be offset by group/program/arrangement benefits, including disability benefits purchased, in whole or in part, by the insured, at least so long as those benefits are not subject to subrogation. It noted that § 1722 reflects the legislature's intent to shift a substantial share of the liability for injuries caused by uninsured and underinsured motorists from automobile insurance carriers to collateral source providers, with the aim to reduce motor vehicle insurance premiums.

The Financial Responsibility Law § 1720 provides as follows:

> ***Subrogation.*** *In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits in lieu thereof paid or payable under 1719 (relating to coordination of benefits).* 75 P.S. § 1720 (1990).

In addition, the Financial Responsibility Law § 1722 provides as follows:

> ***Preclusion of pleading, proving and recovering required benefits.*** *In any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719*. 75 P.S. § 1722 (1990).

The dramatic alteration of the litigation landscape reflected in § 1722 was designed to eliminate double recoveries in automobile accident litigation, supposedly remediating spiraling insurance costs plaguing the driving public. This statute essentially eliminates the collateral source rule in automobile and insurance litigation. Sections 1720 and 1722 were designed to work in tandem. Under § 1720, as originally enacted, any insurer providing benefits to its injured insured was prohibited from asserting a subrogation claim against any tort recovery the injured insured would subsequently receive. Correspondingly, under § 1722, the injured insured was barred from recovering those same first-party benefits in any subsequent action against a tortfeasor. The net effect of the interrelationship of these two provisions was to shift the cost of the injured party's recovery from the tortfeasor's liability policy to the first-party benefit policy carried by the injured party, up to his or her first-party benefit limits, and thereby, in theory, reduce the cost of mandatory liability insurance.

The legislature's logic in enacting this legislation is flawed, or at best incomplete. They believed that subrogation is only premised upon preventing a duplicate recovery, and they ignored all the other societal benefits of and premises underlying subrogation, including the importance of putting the ultimate burden for the loss on the tortfeasor who created it in the first place. They claimed that § 1722 eliminates double recoveries and § 1720 maintains the balance and equilibrium by neatly eliminating subrogation in this area. The statute shifts a substantial share of the liability for injuries caused by uninsured and underinsured motorists from automobile insurance carriers for negligent tortfeasors to collateral source providers paid for by the innocent victims of an accident, many of which previously held subrogation interests. The Pennsylvania Supreme Court pulled back the curtain somewhat, showing that a lack of aggressive subrogation eventually led to the end of subrogation:

"*Subrogation interests, where they do exist, are frequently compromised to achieve prompt and certain resolutions, and thus, the elimination of subrogation does not necessarily represent a quid pro quo for the offset of benefits*."

This is a bad decision by the Pennsylvania Supreme Court, but it might be deserved by an insurance industry frequently seeking to take short cuts when it comes to subrogation. To borrow a phrase from our president's favorite preacher, the subrogation industry's chickens are coming home to roost. Consistently referring subrogation work to the lowest bidder – including some subrogation vendors whose only resources are a phone bank and an aluminum siding salesman approach to subrogation, has reflected poorly on and undermined our industry's efforts to legitimately claim that subrogation serves society by keeping premiums low, ensuring economic justice, and adhering to the concept of personal responsibility. We flaccidly accept the routine and often unjustified compromise of valid subrogation interests by 50% to 75% or more in the interest of expediency and holding down costs. The resulting damage to subrogation as a whole can be seen in the Supreme Court's one sentence evaluation of its effectiveness.

If you should have any questions regarding this article or subrogation in general, please contact Gary Wickert at gwickert@mwl-law.com.

PROPERTY SUBROGATION

INSURER'S LIABILITY FOR NEGLIGENT INSPECTIONS

Many insurance companies along several lines of insurance routinely provide insurance inspections of their insureds' premises and operations (also known as field inspections or loss control surveys) for loss control, risk management, and underwriting purposes. In their unstoppable search for deep pockets and third parties, trial lawyers have for years been requiring insurers and defense counsel to respond to a vagary of legal theories of liability that challenge a common assumption in our industry – that an insurance company cannot be liable for injuries resulting from such inspections, if performed negligently. That assumption is not always correct.

Many people do not fully understand the importance of the insurance inspection and how it relates to the underwriting process. These inspections are often used to verify the insured exists at the address on the policy and that there are no liability or other hazards that exist on the property that could cause the homeowner (personal lines, residential inspections), business owner (commercial lines, commercial inspections) and/or the insurance company unnecessary exposure. These inspections are used as an underwriting tool to minimize the potential of an insurance claim and to verify that the information collected at the time of application for the policy is correct. With increasing frequency, however, trial lawyers are attempting to make inspections conducted by workers' compensation carriers, general liability carriers and property insurers a basis for tort liability.

These loss control inspections are performed by either company-trained loss control inspectors or graduate engineers, and function much like a home inspection you might request before purchasing a home. The insurer wants to know if there are any problems, dangers, risks, or potential claims waiting to happen as a result of shoddy safety programs and careless operations on the part of the insured. The inspections vary greatly in scope and thoroughness. Some are quick and cursory confirmations of the existence of certain safety equipment such as sprinklers, fire extinguishers, etc. Others are more involved and detailed, involving the technical aspects of large, complex manufacturing facilities. In addition

to looking for potential problems and hazards, the inspections also serve to gauge an insured's attitude, cooperativeness, knowledge and commitment to loss prevention and control. A safe insured is often a better risk than an insured which is not safe.

Upon a completion of the inspection, the inspector typically prepares a detailed report of their findings, including recommendations for how the insured might improve its safety, and occasionally making renewal of a policy contingent upon complying with a list of the inspector's recommendations. The inspector's activities are geared toward the business end of insurance underwriting, not necessarily to provide advice to insureds on their plant safety. Improved safety at the insured's location is usually a by-product of their actual purpose – improving profitability of the insurer's business. In short, they are self-serving and are not performed for the benefit of the insured or third parties, although such third-party benefits are an undeniable collateral benefit of the inspections. Most policies contain some sort of boilerplate admonishment regarding the extent and purpose of these inspections:

> *The Company shall be permitted but not obligated to inspect the Insured's property and operations at any reasonable time. Neither the right to make inspections nor the making thereof, nor any advice or report resulting therefrom shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such work places, operations, machinery or equipment are safe.*

Even if the policy doesn't contain these disclaimers, the inspection report usually does. However, this does not deter trial lawyers from arguing that the insurance company has, by inspecting the premises, undertaken and assumed a duty to the insured and third parties on the premises of the insured or using the insured's equipment.

Any cause of action for negligent inspection must be based on § 324A of the Restatement (2d) of Torts:

> **§324A Liability to Third Person for Negligent Performance of Undertaking**
>
> *One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if: (a) his failure to exercise reasonable care increases the risk of harm, or (b) he has undertaken to perform a duty owed by the other to the third person; or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.*

This Restatement is sometimes referred to the "Good Samaritan Rule." Most insurance inspections do not fall within this Restatement because the insurer does not "undertake" or assume responsibility to perform the inspection principally for the benefit of another. It is done as part of the insurer's underwriting process. *Smith v. Allendale Ins. Co.*, 303 N.W.2d 702 (Mich. 1981). Some courts, however, ignore the undertaking requirement and hold that reliance on an insurance company's inspection by either employee or employer is sufficient to sustain a tort claim by employee against company for negligent inspection. *Huggins v. Aetna Cas. & Sur. Co.,* 245 Ga. 248, 264 S.E.2d 191 (1980). Other courts have determined that, depending on the facts, such inspections are necessary undertakings for the benefit of the insured and any benefit derived by the insurer does not remove the inspection from the scope of § 324A. *Nelson v. Union Wire Rope Corp.,* 199 N.E.2d 769 (Ill. 1964) (applying Florida's workers' compensation law).

What sort of evidence would constitute evidence of an undertaking sufficient to place liability on the inspecting insurer? A New York case decided by Chief Justice Cardozo has indicated that if conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a

benefit, but positively or actively in working an injury, there exists a relation out of which a duty to go forward arises. *Glanzer v. Shepard,* 135 N.E.2d 275 (N.Y. 1922). Admittedly, facts sufficient to create such a duty are rare, but they do exist. It is not enough that an insurance company has acted. In order to incur liability for negligent inspections, it must have undertaken to render services to another or that the insurer intended to render benefits for the benefit of another.

If, in the course of marketing or promoting itself and its inspection services, or in conjunction with the actual undertaking of the inspection itself, the insurer advertises or represents that it will provide complete fire inspection services to alert the insured to fire hazards on the premises, its failure to detect and/or notify the insured of such hazards which thereafter result in a fire, could form the basis for liability on the part of the insurer. *Smith v. Allendale Mut. Ins. Co.,* supra. This line of reasoning has been followed, with detrimental results for the inspecting insurance company, in a number of cases. *Deines v. Vermeer Mfg. Co.,* 752 F.Supp. 989 (D. Kan. 2990). In *Deines,* the insurer's advertisements and coverage proposal to the insured implied benefits to the insured from the inspection and did not state that the services would relieve the insured of the burden of monitoring its own facilities.

The scope of the inspection might bear on whether a duty is owed to the insured or a third person. Likewise, the type of insurance at issue is also relevant. Courts draw sharp distinctions between third-party liability, workers' compensation, and first-party property insurance, with a tendency for workers' compensation carriers and boiler and machinery insurers to be liable more so than first-party carriers. *Leroy v. Hartford Steam Boiler Inspection and Ins. Co.,* 695 F.Supp. 1120 (D. Kan. 1988). This makes sense because workers' compensation insurance inspections would be more focused on personnel safety while first-party inspections are attuned more to preventing property loss.

If the insurer inspects specific dangerous machinery, such as in boiler and machine inspections, the tendency is to place liability on the carrier's negligent acts. This is especially true if the insurer has the authority in a specific jurisdiction to shut down the insured's operations. *Seay v. Travelers Indemnity,* 730 S.W.2d 774 (Tex. Civ. App. 1987); *Van Winkle v American Steam Boiler,* 52 N.J.L. 240, 23 Vroom 240, 19 A. 472 (1890).

In workers' compensation settings, an additional obstacle of the creative trial lawyer is the exclusivity rule, which holds that the employer is immune from suit by an injured employee. In most states, the workers' compensation insurer is granted the same immunity as its insured, allowing it to take advantage of the exclusive remedy rule as a defense.

Restatement § 324A also provides some indication that where the reliance of the insured, or of the third person, has induced the insured to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk. In *Thompson v. Bohlken,* 312 N.W.2d 501 (Iowa 1981), the court stated:

> *Travelers [defendant insurer] also argues that it cannot be held under a duty of inspection under its insurance contract with [employer]. However, its liability for inspections does not arise from, nor is it circumscribed by, the contract of insurance; it arises ... from its undertaking the responsibility of making such inspections in such a manner as to increase the risk of harm or create reliance to another's detriment.*

In order to create liability on the part of the inspection carrier, the negligent inspection must result either in an increase in the risk of harm, in an undertaking to perform a duty owed by another to a third person, or in reliance by the insured or the employee of the insured upon the undertaking. *Derosia v. Liberty Mut. Ins. Co.,* 583 A.2d 881, 886 (Vt. 1990).

In most cases, there will be no liability for an action brought against an insurer for negligent inspection. This is because there is generally no duty under § 324A because the insurers do not normally agree to be, or by their actions voluntarily assume to be, responsible for the safety of the structure being inspected. *Gooch v. Bethel A.M.E. Church,* 792 P.2d 993, 998 (Kan. 1990). Generally speaking, insurers owe no duty of care to provide a reasonably safe workplace for the employees of their insured. *Commercial Union Ins. Co. v. DeShazo,* 845 So.2d 766 (Ala. 2002). However, where there is specific and dangerous property which is being inspected, the insurer has the authority to shut down the insured if it fails the inspection, the advertising of the inspection services raises the expectations of the insured as to the inspection as well as their reliance on the inspection, or there is some sort of other undertaking on which the insured relies, the occasional case may see liability attach for the negligent inspection conducted by the insurer. But those cases will be few and far between.

If you should have any questions regarding this article or subrogation in general, please contact Gary Wickert at gwickert@mwl-law.com.

UPCOMING EVENTS.....

November 30, 2010 - Gary Wickert will be presenting a live webinar entitled *"Subrogating Against God: Creative Ways of Circumventing The Act of God Defense"* from 10:00 - 11:00 a.m. (CST). The webinar is approved for 1.0 hours of Texas CE credit and is free to clients and friends of MWL. A registration link is on our website homepage but you can register now by clicking on the "Register Now" button to the right.

December 16, 2010 - Gary Wickert and Russell Whittle will be presenting a live webinar entitled "Medicare Set-Asides and The Subrogation Professional" from 10:30 - 11:30 a.m. (CST). This webinar is approved for 1.0 hours of Texas CE credit and is free to clients and friends of MWL. 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.

May 10-13, 2011 - MWL will be exhibiting at 6th Annual Claims Education Conference in Fort Lauderdale, Florida. 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.claimseducationconference.com.

PLEASE NOTE.....

We are providing webinars and, as we do, we're putting recorded versions of the webinars on our Seminars/Webinars page on our website at www.mwl-law.com, which can be viewed at no cost. The most recent webinars to be added are *State of Washington: PIP and Med Pay Subrogation* and *Construction Defect Subrogation*.