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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **OCTOBER 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

THE BATTLE FOR ATTORNEY'S FEES

Reducing Plaintiff's Attorney's Fees Deducted From Your Lien

By Gary L. Wickert

The goal of recovering 100% of your workers' compensation lien is often beset by one significant hurdle – the plaintiff's attorney usually has the right to take a big chunk of your lien and call it an attorney's fee. States vary as to how much and when an attorney representing an injured worker can recover an attorney's fee out your lien in a third-party action against a negligent tortfeasor. Knowing how and when you can do something about it, can add up to a significant amount of additional money recovered each year. To do so, however, takes an aggressive mind set and a willingness to go the mat over your money.

Imagine the not-so-uncommon scenario where the plaintiff's attorney writes a two paragraph demand letter and settles a third-party case for policy limits. He attempts to argue you're not entitled to recover your full lien, and throws some inapplicable case law and legal obfuscation your way, all in an attempt to intimidate you into reducing or waiving your lien. You don't, but when the attorney reimburses your lien he keeps a big chunk of it for himself and calls it an attorney's fee. State laws vary on the subject, but most states allow the plaintiff's attorney to claim a fee if his hard work has resulted in a significant recovery and you or your subrogation attorney have done very little to contribute to the litigation effort. We don't have to be this helpless.

A quick look at the law of several states shows that quite often, the carrier has the right to argue that the plaintiff's attorney is not entitled to a large attorney's fee out of your lien recovery. How and when you can challenge his attorney's fee varies from state to state:

ALASKA

In order to ensure that the employer's compensation carrier is not unjustly enriched at the employee's expense, the Supreme Court requires a prorationing between the carrier and employee of litigation costs and attorneys' fees incurred by the employee in recovering from the third-party tortfeasor. *Cooper v. Argonaut Ins. Co.*, 556 P.2d 525 (Alaska 1976). Attorney's fees are charged to the carrier where they benefit from the employee's litigation effort. The intent is to prevent the carrier from enjoying a free ride and being unjustly enriched without having to pay an attorney for recovering its lien. However, the court can also award fees to the carrier where it contributed significantly to the litigation effort.

ARIZONA

Your lien is not subject to reduction by the plaintiff's attorney's fee. A.R.S. § 23-1023(C).

ARKANSAS

The judge is required to look at the facts of each case to determine whether the plaintiff's attorney has earned the right to take a fee out of the carrier's lien. *Continental Cas. Co. v. Sharp,* 849 S.W.2d 481 (Ark. 1991). In *Burt v. Hartford Acc. & Indem. Co.,* 483 S.W.2d 218, 222 (Ark. 1972), the employee, who received workmen's compensation benefits from a compensation insurer, which also insured the third-party tortfeasor, maintained that the compensation carrier, which intervened in the employee's suit against the tortfeasor, had no subrogation or reimbursement rights in the matter at all. The subrogated carrier's attorney argued that where the employee's position jeopardizes the insurer's right to subrogation and necessitates the hiring and presence of subrogation counsel, the employee's attorney should not be allowed to take a fee. The record showed that the employee's attorney prepared and handled most of the trial of the employee's claim against the tortfeasor and that the carrier's attorney participated very little. The Arkansas Supreme Court held that the trial court's refusal to deduct a reasonable attorney's fee from the insurer's subrogation recovery was not an error.

CALIFORNIA

The purpose of awarding plaintiff's attorney fees out of the carrier's lien is an implementation of the equitable practice of taxing attorney's fees to *passive* beneficiaries of a common fund created through the efforts of a successful litigation. *Kindt v. Otis Elevator,* 32 Cal.App.4th 452 (Cal. App. 1955). However, if a compensation carrier is not passive, the attorney's fees which should go to the plaintiff's attorney out of the lien should be apportioned between the carrier and the plaintiff's attorney. *Hartwig v. Zacky Farms,* 2 Cal.App.4th 1550 (Cal. App. 1992). Awarding attorney's fees to the plaintiff or his attorney where the carrier had to be active in the case is improper. *Hartwig*, supra. Where the carrier had to engage its own attorney, it is improper to award fees to the plaintiff's attorney. *Id*.

COLORADO

Section 8-41-203(1)(e) provides that: "*If the [carrier] elects to intervene within 90 days…any recovery by [the carrier] shall not be reduced by any attorney's fees and costs incurred by the employee."*

DELAWARE

Attorney's fees are to be apportioned between the plaintiff's attorney and carrier as their interests may appear in the case. *19 Del. C. § 2363(f).*

GEORGIA

Attorney's fees are to be apportioned between the plaintiff's attorney and carrier's attorney in proportion to and in consideration of the case facts and the services each attorney provided. *Hammond v. Lee,* 536 S.E.2d 231 (Ga. App. 2000).

HAWAII

Attorney's fees are apportioned between plaintiff and carrier based on the circumstances of the litigation and the roles that attorney played in the litigation. *Disher v. Kaniho,* 631 P.2d 1209 (Haw. App. 1981).

IDAHO

If the plaintiff's attorney takes a position in the third-party case which is adverse to the carrier's right of statutory reimbursement, the Industrial Commission has jurisdiction to determine a reasonable fee for the efforts taken by the carrier's attorneys to protect the employer/carrier. *Cameron v. Minidoka County Hwy. Dist.,* 874 P.2d 1108 (Idaho 1994).

INDIANA

Plaintiff's attorney may recover fees even when he attempts to thwart the statutory lien through a multitude of legal maneuvers and acts with unclean hands. *Dearing v. Perry*, 499 N.E.2d 268, 273 (Ind. Ct. App. 1986).

KANSAS

When the plaintiff's attorney attempts to gerrymander a settlement so as to avoid repayment of the workers' compensation lien, or otherwise tries to defeat the lien, no attorney's fees will be awarded to him. *Richard v. Liberty Mutual,* 160 P.3d 480 (Kan. App. 2007).

MARYLAND

A carrier may be entitled to a credit for the attorney's fees it had to pay its own attorney in order to protect its lien from attack. *Collins v. United Pacific Ins. Co.,* 553 A.2d 707 (Md. 1989).

MASSACHUSETTS

Where the plaintiff conspires and takes efforts whereby the defendant becomes responsible for paying the lien, no attorneys' fees are recoverable. *Carney v. Ramirez,* 490 N.E.2d 804 (Mass. App. 1986).

MISSISSIPPI

An intervening compensation carrier is entitled to recover attorney's fees it incurs in protecting its subrogation interest. *Kidwell v. Gulf, Mobile & Ohio Railroad,* 168 So.2d 735 (Miss. 1964).

RHODE ISLAND

If the plaintiff's attorney follows a course of conduct adverse to the carrier or otherwise acts contrary to the carrier's interests, he waives the right to recover attorney's fees out of the lien reimbursed to the compensation carrier. *Commercial Union Co. v. Graham,* 893 A.2d 235 (R.I. 2006).

TEXAS

In awarding attorney's fees, the important issue is not who did the most to create the third-party recovery, but who did what to protect (or harm) the workers' compensation lien. *Brandon v.*

Am. Sterilizer, 880 S.W.2d 488 (Tex. Civ. App. 1994). The court must apportion fees between the carrier and the plaintiff's attorney if the carrier was active in the third-party action.

VIRGINIA

When the carrier has to pay its own attorney to defend its statutory reimbursement rights because the employee's attorney and plaintiff have taken an adversarial position to the carrier, the court must allow a deduction from the attorney's fees what the carrier would otherwise owe and amount the carrier expended to perfect and protect its right of subrogation. *Sheris v. Travelers Ins. Co.,* 491 F.2d 603 (4th Cir. 1974).

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The laws from the states above should convince any aggressive subrogation professional that there are many occasions when striking first and being active in a third-party action can have its financial benefits – not to mention assisting in maximizing the third-party recovery.

Subrogation counsel should keep detailed records of all activity and efforts he or she undertakes in anticipation of arguing for no reduction of their subrogation recovery for plaintiff's attorney's fees. Active participation – more than simply intervening and calling occasionally for status updates – is required or subrogation counsel is not doing his client justice. Plaintiff's counsel should, but don't always, welcome a helping hand in developing a theory of liability, producing and serving discovery on the defendant, or even sharing in costs subject to a right of reimbursement of the costs off the top of any recovery. In short, subrogation counsel should be on the lookout for cases handled in the above states and work hard to take advantage of the favorable law regarding attorney's fees available to them.

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

INSURANCE SUBROGATION

THE FACTS BEHIND THE MCDONALDS' HOT COFFEE CASE

Those clients and friends of Matthiesen, Wickert & Lehrer who have attended our seminars and webinars may have heard the story Gary Wickert tells about the infamous McDonalds' hot coffee case and the role it should play in motivating subrogation professionals to become aggressive and creative when pursuing subrogation potential in large and small cases. As a result of some tortuous media treatment, the case has over the years been adopted as the poster child of frivolous lawsuits. However, a closer look at the facts behind the case reveals something altogether different.

Before we get into the facts of the McDonalds' case, let's rewind to the year 1995. Gary Wickert had, for twelve years already, been implementing his national subrogation recovery program as managing partner of Hughes, Watters & Askanase, a large law firm in Houston, Texas. He was investigating a single-vehicle rollover accident which resulted in the death of an employee who was in the course and scope of his employment when the accident occurred. Gary was consulted by the widow of the deceased employee as to whether she should employ the services of an attorney to look into the accident and, if so, who that attorney should be. Gary introduced her to a friend and fellow lawyer in Texas named Reed Morgan. During the interview with Gary and Reed, the grieving widow began to cry and insisted that she needed to find an attorney who would be as aggressive with the investigation and handling of her husband's case as had been the lawyer for the woman in the McDonalds' hot coffee case, which was just then gaining notoriety. Gary turned to the woman and gently told her that Reed Morgan was that lawyer. She engaged him on the spot and together, Gary and Reed made a successful recovery for their respective clients.

FACTS OF THE CASE

On February 27, 1992, Stella Liebeck, a 79-year-old woman from Albuquerque, New Mexico, ordered a 49¢ cup of coffee from the drive-through window of a local McDonald's restaurant. Liebeck was in the passenger's seat of her Ford Probe, and her grandson Chris parked the car so that Liebeck could add cream and sugar to her coffee. McDonald's required franchises to serve coffee at 180–190°F (82–88°C). At that temperature, the coffee would cause a third-degree burn to human flesh in two to seven seconds. Stella's grandson pulled the car forward and stopped the vehicle so Stella could add cream and sugar to her coffee. Stella placed the coffee cup between her knees and pulled the far side of the lid toward her to remove it. In the process, she spilled the entire cup of coffee on her lap. Liebeck was wearing cotton sweatpants; they absorbed the coffee and held it against her skin, scalding her thighs, buttocks, and groin. Stella suffered full thickness burns over 6% of her body, including her inner thighs, perineum, buttocks and genital and groin areas. She remained in the hospital for eight days while she underwent skin grafting and burn debridement treatment. During this period, Liebeck lost 20 pounds (nearly 20% of her body weight), reducing her down to 83 pounds. Two years of medical treatment and extensive medical bills followed.

SETTLEMENT DEMAND

Liebeck sought to settle with McDonalds for a mere $20,000, which would have done little more than cover her medical costs, which were $11,000, but McDonalds offered only $800. When McDonalds refused to raise its offer, Liebeck retained Texas attorney Reed Morgan. Morgan, also licensed in New Mexico, filed suit in a New Mexico District Court accusing McDonalds of selling coffee that was far too hot for human consumption. Just before trial, a mediator suggested that McDonalds settle for $225,000, but McDonalds refused these final pre-trial attempts to settle.

DISCOVERY

During the case's discovery phase, documents produced by McDonalds revealed that between 1982 and 1992, there had been approximately 700 other burn cases involving McDonalds and the severely high temperature of their coffee. Many of the 700 cases involved victims who suffered third-degree burns and required skin grafts just like Stella. McDonalds also revealed during discovery that based on a consultant's advice, it held its coffee at between 180 and 190 degrees in order to produce more coffee vapors and maintain optimum taste. The consultant admitted that he hadn't evaluated the safety ramifications of serving a liquid at near-boiling temperatures, and revealed that most other restaurants and food establishments serve their coffee at substantially lower temperatures – generally between 135 and 140 degrees.

McDonalds' quality assurance manager testified in his deposition that the company actively enforces a strict requirement that the coffee of its franchises be maintained at 185 degrees, plus or minus five degrees. He acknowledged that a burn hazard existed with liquids served any higher than 140 degrees. He also admitted that when the coffee is poured and served to patrons, it is not fit for human consumption because it will permanently burn the mouth and esophagus. He further indicated that despite knowing this, McDonalds had no intention of lowering the temperature of its coffee.

TRIAL

The trial took place from August 8–17, 1994, before Judge Robert H. Scott in Bernalillo County, New Mexico. During the trial of the case, the evidence revealed that at the temperature McDonalds served it coffee, the coffee would cause a third-degree burn in two to seven seconds, requiring skin grafting. The plaintiff's thermodynamics burn expert told the jury that as the scalding hot coffee was reduced in temperature to 155 degrees, the liquid had sufficient time to cool before causing full thickness burns to human skin and tissue. Lowering the temperature to 160 degrees would increase the time for the coffee to produce such a burn to 20 seconds. Plaintiff argued that these extra seconds could provide adequate time to remove the coffee from exposed skin, thereby preventing many serious burn injuries. McDonalds claimed that the reason for serving

such hot coffee in its drive-through windows was that those who purchased the coffee typically were commuters who wanted to drive a distance with the coffee; the high initial temperature would keep the coffee hot during the trip. However, this contradicted the company's own research that showed customers actually intend to consume the coffee while driving to their destination.

In a display of arrogant testimony, McDonalds' quality control manager, Christopher Appleton, angered the jury when he testified that this number of injuries (700 and counting) was insufficient to cause the company to evaluate its practices. He argued that McDonalds had more pressing dangers to be concerned about.

VERDICT

A 12-person jury reached its verdict on August 18, 1994. Applying the principles of comparative negligence, the jury found that McDonalds was 80% responsible for the incident and Liebeck was 20% at fault. Though there was a warning on the coffee cup, the jury decided that the warning was neither large enough nor sufficient. They awarded Liebeck $200,000 in compensatory damages, which was then reduced by 20% to $160,000. In addition, they awarded her $2.7 million in punitive damages. The jurors apparently arrived at this figure from Morgan's suggestion to penalize McDonalds for one or two days' worth of coffee revenues, which were about $1.35 million per day. The judge immediately reduced the punitive damages award to $480,000, three times the compensatory amount, for a total verdict of $640,000. The decision was appealed by both McDonalds and Liebeck in December 1994, but the parties settled out of court for an undisclosed amount less than $600,000. Liebeck died on August 4, 2004, at the age of 91.

Frivolous lawsuits continue to be a drain on the insurance industry and the American economy as a whole, and reasonable tort reform has been a welcome addition to our system of civil justice on many fronts. However, it is important to remember that as subrogation professionals within the insurance industry, we must remove our liability-limiting insurance liability hats and don the hat of a plaintiff's trial lawyer when evaluating and pursuing subrogation potential among all lines of insurance. Rather than being the poster child for frivolous and baseless lawsuits, the McDonalds' hot coffee case should serve as a clarion call to all subrogation professionals that aggressive investigation and pursuit of legitimate third-party liability subrogation cases in civil court is not only wise from a business standpoint, it's our job.

AUTOMOBILE SUBROGATION

SUBROGATING TIRE DEFECT CASES

If there was an example of a subrogation case which presents significant investigation obstacles, difficulty in subrogation recognition, cost challenges, and an uncertainty in recovery potential, it would be the vehicle accident involving a possible tire defect. According to the National Highway Traffic Safety Administration (NHTSA), over 400 people are killed annually or seriously injured in vehicle accidents involving tire failures. A significant portion of those cases involves potential third-party subrogation that is never realized or recognized because of the inherent difficulties attendant to such cases. This article will serve as an overview of tire defect cases and a tutorial on how and what to do if you suspect that a tire defect may have played a role in causing a loss.

Most accidents involving tire defects are attributable to manufacturing defects, design defects, or the tire manufacturer's failure to warn users about dangers that the tire industry has been aware of for years. The first step in moving forward on one of these cases is to identify the manufacturer of the tire. Don't assume that a Sears tire is made by Sears. Some companies, such as Cooper, make more than 100 private-brand

tires for major retailers and tire wholesalers. The only way to correctly identify the manufacturer of a tire is the Department of Transportation (DOT) number, stamped on the axle side of the outer wall of the tire. The first two digits following the letters "DOT" are the manufacturer's identification code. The last three or four digits indicate the date the tire was made. A manual available in most tire stores will reveal the identity of the manufacturer from the code letters.

Next you must determine how and why the tire failed. Common modes of tire failure include tread separation, sidewall failures, bead failures, ozone cracking, and explosive separation of multi-piece rims.

Tread Separation. During the making of a tire, layers of the tire are bonded together by a process known as vulcanization. Rubber does not adhere to the steel which makes up steel belts in tires, so the steel wires must be coated. The ends of the steel belts don't easily adhere to the shoulder of the tire, which is the highest stress part of the tire. Therefore, special procedures have to be implemented by tire manufacturers. Some manufacturers are better at these procedures than others. Those that aren't have a tendency to produce tires which suffer tread separation at a rate far above normal.

Sidewall Failures. When a split develops in the sidewall of a tire, it is more often than not the result of the tire having been run without enough air in it or as a result of striking a sharp object. In most cases, the failure of the sidewall is the result of a tire failure, not the cause of it. If the tire is a retread, there may be weaknesses in the sidewall of a tire which are simply the result of age which was not detected or was ignored in the retreading process.

Bead Failures. The bead is the part of the tire that comes into contact with the rim or wheel. It is made of strong steel and acts as an anchor holding the tire to the rim. The wire in the bead is known as the "bead bundle" and is made of a series of wires overlapped and spliced. Bead failure normally occurs at the point where the bead bundle is spliced. A common failure occurs during inflation of the tire when the bead bundle is put under pressures as low as 38 psi. Tire manufacturers have discovered that they can use a continuous bead, rather than a spliced version; spliced beads are still common because it is a cheaper way to make a tire. Bead failures occur most frequently during inflation and mounting of tires, when the bead gets "hung up" on the rim. An exploding tire can cause serious injury and death, not to mention property damage. Prior to the introduction of the 16.5 inch rim, one size tire wouldn't fit on a different size rim. We see more accidents now because a 16-inch tire can be fit onto a 16.5 inch rim without much problem – except for the almost certain bead hang up and explosion.

Multi-Piece Wheels. Multi-piece wheels or rims are nicknamed "widow makers" because of their tendency to kill service station and tire shop employees. OSHA has tried to ban multi-piece rims, but the tire industry has prevented this from happening. Programs exist that serve to warn installers about the dangers of installing multi-piece rims, but this merely serves to shift the responsibility from the tire manufacturer to the installer and its employees. Safety cages are supposed to be used when installing these type rims, but many injuries still occur when the tire is removed from the installation cage.

Tire manufacturers defend tire defect cases with the same defenses. They will claim that the tire impacted something on the roadway and that was the cause of the failure or the impact could have happened thousands of miles before the actual tread separation and accident, but they will not be able to tell you what the tire hit or the circumstances of the impact. Defense experts will tell you that if you hit a pothole with sufficient force to jar the frame of the vehicle, you should immediately get out of your car and check the tire, and watch the tire carefully for 1,000 miles or so.

Tire manufacturers will allege that there were improper repairs involving a tire on which there were repairs. They'll say that the recommended procedure for repairing a puncture is a plug and a patch and anything less than that is an "improper" repair. If a tire was ever punctured (such as by a nail), the defendants will claim that this allowed air to sneak into the body of the tire itself, resulting in tread separation.

Tire manufacturers' experts will also almost always claim that the tire was operated in an under-inflated condition – at some point during its life – and that this was the cause of the failure. These are difficult defenses to counter and this is why tire cases usually end up being a battle of experts.

Experts. Unlike many other areas of liability and subrogation, there are only a handful of qualified tire experts in the country who are worth using in cases of any appreciable size. Resist with all of your ability the tendency to use the local mechanical engineer you call on in all of your smaller cases. He possesses neither the expertise nor the sophisticated equipment often needed to evaluate tire cases and prove a tire defect. In the cases we have handled, we've found only two experts which possess the necessary equipment to evaluate and test large Off-The-Road (OTR) tires used on large construction and earthmoving equipment. Anything less than the most qualified expert, you are almost assuring yourself defeat.

We have spent the last 27 years gathering and organizing experts of all disciplines from all price ranges and all geographical areas, in order to be able to quickly and confidently arrive at the right expert for the right case at the right price. If even one of those variables of choosing the right expert is wrong, recovery potential is drastically reduced or the cost of obtaining that recovery is drastically and unnecessarily increased.

If you have accidents involving loss of control of a vehicle, mysterious single-vehicle accidents, or cases involving blown or exploding tires and/or rims, please consult us with regard to the investigation and handling of these matters, as well as retention of the right expert to use. Efforts must be taken to immediately preserve not only the tires (yes, all of them), but also the entire vehicle. Tire manufacturers can and will claim that there are defects and malfunctions of the vehicle that could have contributed to the accident, such as steering and suspension problems. Tire cases are difficult enough without facing serious spoliation allegations and possible jury instructions. Please contact Gary Wickert at gwickert@mwl-law.com if you have any questions about or would like to discuss a possible tire defect subrogation case.

AUTOMOBILE SUBROGATION

MADE WHOLE CLASS ACTION FAILS

***Chandler v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 938113 (9th Cir. 2010)**

A rather interesting albeit misguided class action lawsuit involving the infamous Made Whole Doctrine filed against State Farm in California went down in flames earlier this year when the 9th Circuit Court of Appeals affirmed the dismissal of the suit by Federal Judge Gary Feess. The decision represents a glimmer of common sense in a legal world in which even the smartest of trial lawyers assume that the Made Whole Doctrine functions to guarantee recovery of deductibles and out-of-pocket expenses such as rental charges *before* an insurer has any rights of subrogation.

The class action dealt with the question of whether an insurer is permitted to recoup a payout from a third-party tortfeasor's insurance company before the insured has sued the third-party tortfeasor, and without first making the insured whole for every out-of-pocket loss he or she sustained. The plaintiff and State Farm's insured Stuart Chandler purchased from defendant State Farm Mutual Auto Insurance Company an automobile insurance policy that reimburses policyholders for 80% of their out-of-pocket rental car costs while their automobiles are being repaired following covered accidents. The plaintiff suffered such an accident in March 2007 when his car was rear-ended by the tortfeasor. The plaintiff rented a car, which cost him approximately $300, and State Farm reimbursed him 80% of those costs pursuant to the policy terms. Then, State Farm, as a partial subrogee of the plaintiff, sought reimbursement from the third-party tortfeasor's insurer, which questioned the charge and paid State Farm only $70. State Farm apparently accepted the $70 payment. The plaintiff then pursued reimbursement of his out-of-pocket rental costs from the third-party tortfeasor's insurer, which refused to pay. Rather than institute a lawsuit against the driver who rear-ended him, the plaintiff demanded that State Farm pay him his out-of-pocket costs from the $70 it had received from the driver's insurance company

because, according to the plaintiff, he was entitled to reimbursement from State Farm under the "Made Whole" Doctrine, which he argued barred State Farm from recovering any of its expenses until the plaintiff's rental car expenses were paid in full.

The plaintiff candidly admitted that his position could defeat a carrier's ability to recoup from tortfeasors and their insurers the full amount of its payments to its policyholder, and that it would, in effect and to that extent, require an insurer to pay more than its contractual obligation to the policyholder. The federal court ruled – and the 9th Circuit affirmed – that the imposition of an obligation on an insurer to pay the insured out of proceeds obtained as reimbursement for its out-of-pocket costs in paying the policyholder's claim would confer greater rights on the policyholder than provided in the policy and eliminate any incentive on the part of the policyholder to seek reimbursement from the tortfeasor.

The 9th Circuit declared that the plaintiff's position undermined the most fundamental public policy at play in this and other cases - the principle that the person ultimately responsible for causing the damage should pay for it. It said that the imposition of an obligation on an insurer to pay the insured for his out-of-pocket losses out of proceeds obtained from the fruits of its subrogation efforts would confer greater rights on the policyholder than provided in the policy and eliminate any incentive on the part of the policyholder to seek reimbursement from the tortfeasor. The policyholder's carrier would end up short changed, and the tortfeasor would be off the hook even though the tortfeasor caused the damage in the first place.

This decision is a beacon of hope in a subrogation world in which the very concept of made whole has been twisted to the point where in some jurisdictions it trumps the ability of parties to contract around the made whole requirement. We expect to see more twisted efforts to fit the square made whole peg into the round hole of subrogation, but the more common sense decisions we have to combat such efforts the better off we'll be as an industry.

UPCOMING EVENTS.....

November 8-9, 2010 - Ryan Woody will be presenting *"A Review of Longaberger v. Kolt And Other Potential ERISA Game-Changers"* on November 9th at 12:30 p.m. at the NASP 2010 Annual Conference in Grapevine, Texas. For information on this conference, please go to www.subrogation.org.

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 752 so stop by if you plan on attending this conference. For information on this conference, please go to www.wcconference.com.

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.

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*.