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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

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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

BARE EMPLOYER CAN BE SUED IN MISSOURI

DOT Transportation, Inc. v. Nathan Gilmore, et al., ---S.W.3d--- (Mo. App., April 12, 2011)

By Gary L. Wickert



A subrogation case handled by Matthiesen, Wickert & Lehrer, S.C. ("MWL") has led to a landmark case of first impression decision by the Missouri Court of Appeals. The April 12, 2011 decision answers a previously unanswered question in Missouri and opens up subrogation opportunities where multiple employers and/or statutory employers are involved.



In *DOT Transportation, Inc. v. Nathan Gilmore, et al.*, Nathan Gilmore was driving a tractor-trailer through Missouri for his employer, Buddy Freeman Trucking. In the sleeper of the cab was Gilmore's co-employee, Lonnie Lewis. Gilmore lost control of the truck and it overturned in Missouri, killing Lewis. Buddy Freeman Trucking was operating the truck pursuant to a contract with DOT Transportation. Freeman carried no workers' compensation insurance, so DOT Transportation, as statutory

employer, was obligated to provide benefits through its workers' compensation carrier Sentry Insurance Company. Sentry hired MWL to subrogate against Nathan Gilmore and Buddy Freeman Trucking. MWL, through Missouri local counsel, filed suit, alleging that the defendants were fair game for a third party action because they were "bare" – i.e., were not covered by workers' compensation insurance. Gilmore and Freeman promptly filed a Motion for Summary Judgment, claiming that Lewis' family had made an election of remedies by obtaining workers' compensation benefits from DOT Transportation. The circuit court granted their motion, and MWL appealed.



On appeal, the Missouri Court of Appeals decided what it declared was a case of first impression in Missouri. It noted that § 287.280.1 allows an employee to bring suit against a bare employer which has not provided workers' compensation insurance as required by Missouri law. Under § 287.280.1, when an employer refuses or fails to insure his liability for workers' compensation insurance, the employee may:

- (1) bring an action against the employer to recover damages for the injury or death;
- (2) recover benefits under the workers' compensation law; or
- (3) file a request for payment to be made for medical expenses out of the Second Injury Fund.



In this case, Lewis' family opted for number 1 – filing an action against Freeman to recover damages. Freeman claimed on appeal that because the Lewises chose to file a claim for workers' compensation and obtained an award against Freeman as the employer and DOT Transportation as the statutory employer, they were precluded from filing the wrongful death action against Freeman. However, the Court of Appeals noted that the award for workers' compensation benefits was entered against DOT Transportation, not Freeman. The Lewises never recovered an award against Freeman, because it wasn't insured for

workers' compensation. The Court held that the mere fact that DOT Transportation became the statutory employer should not excuse Freeman from its obligation to secure insurance. Freeman asserted in its briefs that a civil suit and a claim for workers' compensation based on the same wrongful death are inconsistent remedies and the election to pursue one (claim for compensation) is a bar to the other (wrongful death claim). The Court of Appeals disagreed.

The Court held that because Freeman did not comply with the workers' compensation law, it subjected himself to being sued in a civil suit as allowed by § 287.280.1. The Court went even further and announced that they were not suggesting that the Lewises would be entitled to keep both the workers' compensation benefits from DOT Transportation and any damages recovered from Freeman, because such a double recovery is "an evil to be avoided." Rather, the Court emphasized that Sentry, DOT Transportation's workers' compensation carrier, would be subrogated to any recovery from Freeman, thereby avoiding the double recovery.

Every once in a while the courts "get it." This is such an example. In an effort to allow compensation to the deceased's family and prevent a double recovery, the Court allowed Sentry to recover from the actual employer who neglected to secure and maintain workers' compensation coverage.

The case will likely be appealed to the Missouri Supreme Court, but good subrogation law has been created in Missouri. On a side note, Missouri is also the state which just last year announced in *Robinson v. Hooker*, 2010 WL 2998605 (Mo. App. 2010) that a co-employee could be sued as a third-party tortfeasor. The Missouri legislature is in the process of trying to "fix" that at the moment, but there is clearly a lot happening on the subrogation front in the Show Me State.



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

COMMON FUND DOCTRINE HELD INAPPLICABLE TO HOSPITAL LIENS

Wendling v. Southern Illinois Hospital Services, 2011 WL 1085186 (Ill. 2011)

By Michael R. Sinnen



In a significant victory for Illinois hospitals and health care providers, the Illinois Supreme Court recently reversed an appellate court decision and ruled that liens held by those medical institutions are not subject to the equitable doctrine known as the “Common Fund Doctrine.” As a consequence, health care lien holders can seek dollar for dollar repayment on their liens, up to the aggregate amount of 40% of any judgment or settlement obtained by the patient/plaintiff. 770 I.L.C.S. 23/10(a).



In *Wendling v. Southern Illinois Hospital Services*, 2011 WL 1085186 (Ill. 2011), the plaintiffs, who were injured in automobile accidents, pursued the drivers who were responsible for those accidents, and the hospitals that treated the plaintiffs asserted liens against the proceeds of the lawsuits, pursuant to Illinois’ Health Care Services Lien Act (770 I.L.C.S. 23/1, *et seq.* (West 2008)). The circuit court and appellate court held that the hospitals’ liens were subject to a reduction based on a proportionate share of the plaintiffs’ attorney fees. Since the plaintiffs’ attorneys were responsible for the recovery, the lower courts reasoned that the equitable Common Fund Doctrine should be applied against the hospitals’ liens.

In reversing the decisions of the lower courts, the Illinois Supreme Court held that the creditor/debtor relationship between a hospital and a patient distinguished a hospital’s lien from liens held by, for example, a subrogated insurance carrier. Under the former arrangement, the hospital has no rights against third parties and the plaintiff is obligated to repay the amounts owed, regardless of the outcome of the plaintiff’s tort claim. A hospital does not benefit from, and is not unjustly enriched by, the efforts of a plaintiff’s attorney. Meanwhile, in the latter situation, the subrogated carrier has the option to pursue responsible third parties and participate in the prosecution of third-party actions, and the subrogated carrier’s rights are contingent on the plaintiff’s rights against the third parties. Based on those distinctions, the Court found that the equitable Common Fund Doctrine, which applies to a subrogated insurance carrier’s lien in a third-party action, does not apply to a hospital’s lien following a third-party recovery. In fact, as the Court noted, the inapplicability of the Common Fund Doctrine to a hospital’s lien had already been decided in the case of *Maynard v. Parker*, 75 Ill.2d 73, 25 Ill. Dec. 642, 387 N.E.2d 298 (1979).

The circuit and appellate courts’ rulings in *Wendling* demonstrate that plaintiffs’ attorneys are always on the lookout for ways to reduce liens, despite legal precedent. Matthiesen, Wickert & Lehrer’s knowledgeable and aggressive counsel anticipates arguments that will be advanced by plaintiffs’ attorneys and is at the ready to stand up for the lien rights of hospitals and health care providers in all 50 states. If you need help in collecting or enforcing hospital liens anywhere in the U.S., please contact Gary Wickert at gwickert@mwl-law.com or Michael Sinnen at msinnen@mwl-law.com.





UNDERSTANDING FUTURE CREDITS IN LOUISIANA *DeQuincy v. Henry*, 2011 WL 880277 (La. 2011)

On March 15, 2011, the Louisiana Supreme Court decided the case of *DeQuincy v. Henry*, clearing up once and for all long-standing confusion over how and when a future credit operates in Louisiana. In 2003, the Louisiana Court of Appeals in *Breaux v. Dauterive Hospital Corporation*, 838 So.2d 109 (La. App. 2003) had declared that when an injured employee settles a third-party tort case or tries the case and receives a favorable verdict, the workers' compensation carrier is entitled to a future credit for the net recovery made by the employee, but only as to future indemnity benefit payments. The Court in *Breaux* said that no future credit is allowed toward future medical benefits. That has all changed with the new Supreme Court decision.



In *DeQuincy v. Henry*, Officer Randy Henry was investigating an auto accident for the City of DeQuincy in November 2000 when he was electrocuted by a downed power line. The City, through the Louisiana Municipal Risk Management Agency (RMI), paid workers' compensation benefits to Henry, who filed suit against the CLECO Utility Group for his injuries. The City spent no time or money investigating or preserving subrogation, and later even declined to attend a mediation between Henry and CLECO. Instead, the City opted to waive one-third of its lien as attorney's fees. The case settled for \$4.35 million and all parties – including CLECO – signed a written settlement agreement. After

the settlement was funded, the City filed a motion to terminate future benefits as part of its statutory credit, claiming that Henry settled without the City's prior written approval. The workers' compensation judge ruled that the City was entitled to a credit – but for future indemnity benefits only – not future medical benefits. The Court of Appeals affirmed the judge.

On appeal, the Louisiana Supreme Court announced that a 2003 decision from the Louisiana Court of Appeals – which had essentially said the future credit was for indemnity only – was no longer valid. *Breaux*, *supra*. The Court in *Breaux* had determined that the workers' compensation carrier is not entitled to a credit for future medical benefits, even when the amount recovered from the tortfeasor exceeded that sufficient to reimburse the carrier for its past lien. That Court said that if the legislature had intended to include future medical benefits as part of compensation obligations for which a credit is due, it would have done so when it amended the statute. It also pointed out that § 23:1102 deals exclusively with situations where there is a settlement or compromise of the third party case, while § 23:1103 is concerned with the division of damages where a judgment in a tort suit is obtained.

However, the Supreme Court pointed out that the case on which *Breaux* relied (*Brooks v. Chicola*, 504 So.2d 7 (La. 1987)), was decided in 1987, prior to the legislature amending both §§ 23:1102 and 23:1103. It noted that these amendments substantively changed the statutes with regard to future credits, rendering inapplicable the case on which *Breaux* relied. Therefore, the law in Louisiana now appears to be that when a worker receives a third-party recovery (settlement or judgment), the workers' compensation carrier is to receive a dollar for dollar credit for the full amount recovered, toward both future indemnity *and* medical benefits.



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



HAWAII ANTI-SUBROGATION BILL GAINS NO TRACTION IN STATE SENATE

We are pleased to report that an anti-subrogation bill proposed in Hawaii, Senate Bill 270, never reached a hearing in the Hawaii Senate, and it is no longer being considered by that legislative body. The bill, if passed, would have allowed defendants to introduce evidence of collateral source benefits that were paid to plaintiffs, including payments made by a workers' compensation carrier, a health or disability plan, or a casualty carrier. The bill would have then prohibited subrogation or reimbursement for those collateral benefits. As the bill gained no traction in Hawaii's State Senate, it is no longer an immediate concern for subrogation professionals. However, efforts to undermine subrogation rights will continue to be made throughout the country, and we must all continue to be vigilant in identifying those bills and keeping public officials informed of the vast societal benefits of subrogation.

POUND-WISE AND PENNY-FOOLISH



Successful Subrogation Requires a New Look at an Old Idiom

The 17th Century English idiom, "penny-wise and pound-foolish" was coined by Edward Topsell in his 1607 book, *Historie of Foure-Footed Beastes*. We know it to mean that one who is stingy or over-careful about saving small amounts of money could end up costing himself large amounts of money as a result. Over the last 30 years, the lawyers at Matthiesen, Wickert & Lehrer have handled insurance subrogation for clients through good times and bad – including four U.S. recessions. Recessions historically translate into reduced subrogation recoveries. Understanding how subrogation recoveries can be increased during difficult economic times follows an understanding of why such recoveries are traditionally lower.



The face of subrogation has changed over the last three decades, but during the recessions of 1981, 1990, 2001 and the Great Recession we are currently experiencing which began in 2008, subrogating carriers all experienced one thing in common - reduced subrogation recoveries. It wasn't because claims fell dramatically. While auto claims fall somewhat because fewer people are driving due to increased unemployment and the higher cost of gas, the opposite phenomenon can be seen with workers' compensation claims. An analysis of Minnesota data published in 2002 indicates that workers' compensation costs tend to rise during recessions for two reasons – claim rates increase and disability duration lengthens. The reason subrogation recoveries historically drop during periods of economic downturns has much to do with the 17th Century English idiom. Carriers tend to be penny-wise and pound-foolish.

Carriers facing a recession often draw a harder line when it comes to paying claims. They naturally tighten their belts, cut costs and make themselves leaner so as to successfully weather the downturn. But here is where carriers tend to lose the mind set about subrogation being a good investment, rather than an avoidable and unnecessary cost. Especially in hard times, subrogation may represent the best investment opportunity a carrier has. Investing in subrogation investigation and funding subrogation litigation, unlike other areas of insurance, has an upside – a potential payday. During hard times, carriers tend to recoil from the idea of investing in subrogation potential, leading to the diminution and even destruction of both small



and large subrogation claims. Some subrogation operations are even brought in-house, and carriers become satisfied with low-overhead minimal investigation while sending out repeated demand letters to potentially-culpable tortfeasors – a recipe for subrogation disaster. Millions of subrogation dollars can be lost – often without the carrier being aware of it - while proverbial pennies in subrogation costs are saved and dutifully tucked away. The idiom becomes reality.

We encourage the aggressive pursuit of subrogation potential in good times and bad. Tort laws don't change during a recession. The only variable at work is the carrier's appetite and capacity for investing in future recovery potential. In fact, during economic dark times subrogation may be the only area outside of premiums where the carrier sees actual income. The rate of interest for many CD's today is less than 1%. You won't find a better investment than subrogation. During recessionary times, pound-wise and penny-foolish might not be a bad motto to adhere to.

**DON'T BE PENNY FOOLISH, BE
POUND WISE**

UPCOMING EVENTS.....

May 10-13, 2011 - MWL will be exhibiting at 6th Annual Claims Education Conference in Fort Lauderdale, Florida. Jamie Breen will be at Booth 20, so stop by if you plan on attending this conference and introduce yourself. For information on this conference, please go to www.claimseducationconference.com.

June 9, 2011 - Chris Miller will be presenting a live webinar entitled "*Landlord/Tenant Subrogation In All 50 States*" from 10:30 a.m. - 11:30 a.m. (CST). This webinar is approved for 1.0 Texas CE credits 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.



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