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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER APRIL 2012

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 Jamie Breen at **jbreen@mwl-law.com**. We appreciate your friendship and your business.*

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INSURANCE SUBROGATION

SUBROGATION ACTIVISM WORKS

Tea Party Helps Eliminate Maine Anti-Subrogation Law

By Gary L. Wickert

It was about as blatant as you can get. In response to intense lobbying by the Maine Trial Lawyers Association, the Maine Legislature in 2009 amended § 2910-A so as to require auto insurance policy language to provide that there could be no subrogation for medical payments benefits where the third-party recovery did not exceed $20,000. The amended statute read in pertinent part as follows:

> ***§ 2910-A. Subrogation; medical payments coverage.***
>
> *1. Policy requirements. A casualty insurance policy subject to this chapter may not provide for subrogation or priority over the insured of payment for any hospital, nursing, medical or surgical services or of any expenses paid or reimbursed under the medical payments coverage in the policy in the event the insured is entitled to receive payment or reimbursement from any other person as a result of legal action or claim, except as provided in this section.*
>
> *The coverage may contain a provision that allows the payments if:*

A. <u>The provision provides for subrogation or priority over the insured when an insured's awarded or settled damages exceed $20,000;</u>

B. The provision requires the written approval of the insured;

C. The provision provides that the insurer's subrogation right is subject to subtraction to account for the pro rata share of the insured's attorney's fees incurred in obtaining the recovery from another source; and

D. The provision is approved by the superintendent.

As a result of this legislation, § 2910-A arbitrarily limited Med Pay subrogation to situations where the insured's third-party recovery exceeded $20,000. In a February 5, 2012 Bureau of Insurance "Medical Payments Subrogation" Bulletin (State of Maine, Bureau of Insurance, *Bulletin 371*, February 5, 2010.), Superintendent of Insurance, Mila Kofman, clarified that the new anti-subrogation measure applied only to policies issued or renewed after September 12, 2009, and urged carriers wishing to exercise subrogation or priority rights to file updated policy language for the Superintendent's approval under § 2412.

However, in a complete reversal of itself, on March 1, 2012, the Maine Legislature repealed § 2910-A(1)(A) (underlined above), effectively removing the $20,000 anti-subrogation clause. Republican Governor Paul LePage signed the bill into law on March 16, 2012. Carriers wishing to exercise subrogation rights unencumbered by this provision and their current filings will likely be required to immediately make new filings reflecting this positive change to policy language requirements. The new repeal of subsection (1)(A) is a general effective date session law not an emergency effective date session law. This means that the amendment will not be effective until 90 days after the session is adjourned. The Legislature is currently scheduled to adjourn on April 18, 2012. However, according to Senior Staff Attorney Tom Record with the Maine Bureau of Insurance, carriers should be able to begin making their new filings immediately, even before the law becomes effective.

The greater story here – above and beyond the good news of the repeal of the anti-subrogation portion of the Maine statute – is how and why this occurred. How and why did the House of Representatives, the Senate, and the Office of the Governor all get on the same page and reverse an unfavorable statute enacted not even three scant years ago? The answer is lots of hard work and the conservative political winds which blew through our country in 2010. According to Tom Record, we have the Tea Party to thank.

Ambrose Bierce once defined politics as "A strife of interests masquerading as a contest of principles." This is certainly the case in Maine. In a lengthy discussion with Tom Record, he revealed the energy behind the pro-subrogation development in Maine. History reveals the usurpation of the Maine House, Maine Senate, Governorship and Federal offices by mostly Democrats for the last 30-40 years. "For the first time in recent memory, the House of Representatives, Senate, and the Governor's mansion, are all controlled by Republicans," Record says. "The Tea Party has a prominent presence here in Maine, and they are primarily responsible for the incredible transformation." Record says that the change has been helpful to the insurance industry, both from a subrogation and a tort reform standpoint.

"The 2009 anti-subrogation amendment was driven heavily by the Maine Trial Lawyers' Association which was feeling its oats after some pretty significant Democrat victories in 2008 and 2009," Record said. "But the Tea Party and the conservative victories of 2010 changed the landscape here significantly. The Maine Association of Insurers (sic) and the AIA lobbied hard and played a significant role in getting subrogation back on track here."

Another tactic used in Maine, which subrogation professionals and insurers around the country should take note of, was an incredibly effective complaint filed with the Bureau by just one consumer. The

confidential complainant was unhappy that he received Med Pay benefits from his insurer as a result of an accident which was not his fault, and subsequently got rated, resulting in premium increases. Record says that most Maine insurers will not rate an insured involved in a not-at-fault accident. However, the Legislature listened intently to the written complaint read into the record.

"As Maine goes, so goes the country," is a phrase that at one time was in wide currency in U.S. politics. It described Maine's reputation as a bellwether state for presidential elections. One can only hope that the veracity of that phrase bodes well for future pro-subrogation initiatives around the country. The moral of the story is that only through hard work and eternal subrogation vigilence will we be able to protect the valuable right of subrogation from the onslaught of trial lawyers interested in destroying it.

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

INSURANCE SUBROGATION

GATHERING PEBBLES: *Subrogation's Burden of Proof*

American Int'l Ins. Co. v. A. Steinman Plumbing & Heating Corp., 2012 WL 952782 (N.Y. App. 2012)

The recent New York Supreme Court decision of *American Int'l Ins. Co. v. A. Steinman Plumbing & Heating Corp.* and an ancient parable wouldn't seem to have a lot in common. But they do. In that case, American International Insurance Company ("American") insured a tenant of the 950 Fifth Avenue building known simply as "950 Fifth." The limestone pre-war co-op has only seven units and has a reputation for its billionaire bachelor tenants including Boston Properties CEO Mort Zuckerman, Tyco's Dennis Kozlowski, and Jonathan Tisch of Loews Hotels. However, in 2011, it was the scene of a major leak which caused damage to the apartment of one of American's insureds.

The leak occurred when the float device regulating the flow of water into the water tank on the top of the 950 Fifth Avenue building failed, causing the tank to overflow. At the same time, the overflow alarm designed to warn those responsible for maintaining the building also failed. American paid its insured's claim for water damage and filed suit against 950 Fifth Avenue Corporation and A. Steinman Plumbing & Heating Corporation, the building owner and its plumber, respectively.

The defendants filed a Motion for Summary Judgment alleging that they did not have actual or constructive notice of a defective condition in the water tank and that both the float device and alarm system spontaneously and simultaneously failed. They produced evidence that the water tank was inspected and cleaned annually and that there had been no prior problems with either the float or the alarm prior to this incident. In short, they presented the typical defense subrogating carriers and their subrogation counsel face in the vast majority of subrogation cases.

The plaintiff argued that the defendant was understaffed on the day of the loss, that the overflow alarm actually worked, and that nobody was around to hear it. However, they were unable to come up with any evidence to support these contentions. Their argument that the doorman should have heard the alarm was purely speculative. As a result, the Court dismissed the plaintiff's lawsuit. The Court also denied the plaintiff's request for spoliation of evidence sanctions against the defendant, who had quickly thrown away the subject alarm system and float. The Court correctly pointed out that the defendant repaired the problem on an emergency basis and nobody requested that they retain any evidence.

This case serves as a stark reminder to subrogation professionals that the burden of proving that someone or something has caused property damage or personal injury is squarely on the subrogated insurance carrier. From the moment a claim is made, the claims handler should continually think in terms

of preserving evidence and proving fault. Waiting weeks or even days before taking steps to obtain and/or preserve evidence is almost always fatal to future subrogation efforts.

Whether a claim is large or small – the burden is the same. The subrogated carrier has the burden of proving:

1. that the defendant was negligent (or that a product was defective);
2. that this negligence proximately caused the damages which the carrier paid for; and
3. the amount and nature of those damages.

If it fails with regard to any one of these elements, there will be no subrogation recovery. Liability carriers are quick to latch on to weaknesses in subrogation files and often deny claims simply because the demand letter doesn't address these three elements satisfactorily. Like a chain, a subrogation claim is only as strong as its weakest link and that weakest link is almost always created early in the claim, when memories are fresh and evidence is available. The first few days after a loss are critical - the first and often only chance anyone may have to identify, retain, document, investigate and record valuable information on which a future subrogation lawsuit will depend. Things which may seem to have little or no meaning or importance may turn out to be the lynchpin of an entire subrogation action. An ancient parable is relevant here and goes something like this:

A group of traveling nomads were preparing to make camp for the evening, when suddenly they were surrounded by a great light. They knew instantly they were in the presence of a celestial being. A loud voice spoke from the heavens, "Gather as many pebbles as you can. Put them in your saddle bags. Travel a day's journey. Tomorrow night you will be both glad and sad." Then, as quickly as they had appeared, the voice and the light disappeared. The nomads looked at one another in disbelief. They had expected the revelation of a great universal truth - the key to great wealth or happiness. But instead they were given a menial task that made no sense. Dejected, each one did pick up a few pebbles and put them in their saddle bags. The following morning they broke camp and traveled a day's journey. That evening, while making camp once again, they reached into their saddle bags and discovered that the few pebbles they had gathered the night before had turned into beautiful and brilliant diamonds! Indeed, they were both glad and sad, just as the voice had promised. They were glad they now had beautiful and valuable diamonds. But they were very sad they had not gathered and filled their saddlebags with pebbles when they had the opportunity.

Subrogation investigation is much like the opportunity the nomads had to gather pebbles. You don't know which pebbles might turn out to be valuable so you conduct your investigation promptly as though they are all valuable. It is important to lock witnesses into positions and testimony favorable to your subrogation case, before the other side gets a hold of them. It is sometimes urgent and legally necessary to place government entities on notice of your claim. Early and thorough investigation often uncovers additional third parties and sources of recovery, including the occasional existence of other insurance which may be available to contribute to the loss.

When the cause of a loss seems apparent, don't stop with simply securing the evidence needed to prove your case. Bear in mind that the targets of your investigation will almost always find alternate causes and persons to blame, and will quickly cry spoliation if evidence which they claim may exonerate them is gone or damaged. Think like the defendant. Take efforts to disprove and eliminate the alternate theories your subrogation counsel will ultimately face. If the claim is significant, engage subrogation counsel or an investigator to conduct the investigation and take thorough statements of all witnesses and, if called for, timely engage experts who are qualified and experienced.

The extra work of properly investigating a claim often deters claims handlers from stuffing their saddlebags full of pebbles, but every case is different and it is often the pebble you leave behind that

turns out to hold the key to a full recovery. The pebbles might not turn into brilliant diamonds as in the parable, but they literally can and often do translate into subrogation dollars realized.

INSURANCE SUBROGATION

WHAT IS A "CLAIMANT"?

Twice in the last week we have been asked to clarify what is meant by the term "claimant" in civil litigation and the world of subrogation.

Ironically, this turns out to be one of the most frequently misused terms we see in our industry. On a daily basis, we see clients and even other lawyers referring to the third-party tortfeasor as a "claimant." We also see the tortfeasor's liability carrier referred to routinely as the "claimant's carrier." Unfortunately, although this use of the term is becoming widespread, it is incorrect.

A "claimant" is defined in Merriam-Webster as: "One that asserts a right or title." The Free Online Dictionary correctly defines a "claimant" as "a person who brings a civil action in a court of law; also known as a 'plaintiff'." In short, it is somebody "bringing" a claim, not somebody against whom a claim is or will be brought. The International Investigations, Inc. Glossary of Investigation Terms defines claimant as "Person making an insurance claim or claim against an insurance policy; see also Insured."

The misnomer is widespread. Investigators, claims handlers, police officers, and even some lawyers occasionally refer to the third-party tortfeasor as a claimant, which can cause some confusion when reading reports or other communications explaining an accident or claim. But by and large, the most common misuse of the term is from within the insurance industry. Traditionally and almost predominantly, the term "claimant" has been used in reported state case decisions to refer to a workers' compensation benefit recipient, who technically makes a "claim" for such benefits. Most state workers' compensation statutes make use of the term "claimant" in this fashion. The term also has some traction in the world of freight claims, referring to the owner of freight which has been damaged in transit and for which the owner is making a "claim". In the world of bad faith litigation, a "third-party claimant" refers to the injured individual whose personal injury claim has been mishandled by the tortfeasor's liability carrier or who may have a "claim" for spoliation against some party as a result of lost or damaged evidence.

However, nowhere is the term correctly used to refer to a tortfeasor against whom a lawsuit, subrogation or otherwise, is or may be filed. Most lawyers and judges understand who is being talked about in an investigation report or claim summary produced by an insurance claims handler. However, unless there is specific reference to which the term is being used to describe, there is unfortunately an opportunity for liability adjusters and opposing counsel in subrogation claims to utilize the misuse of the term to their advantage.

Recently, we had a case of clear liability denied by the third-party carrier despite a strong statement from an independent witness. In the statement, it referred to the "claimant" having a red light. The liability adjuster quickly pointed out that our insured was the claimant. Misuse of the term "claimant" is not the end of the world. But in a profession where accuracy translates into dollars recovered, it is important to bear in mind the correct use of the term.

INDUSTRY NEWS

TRISTAR AQUIRES REM

TRISTAR Risk Management, the largest privately held, third-party claims administrator ("TPA") in the U.S., recently announced that it will be acquiring Risk Enterprise Management (REM). Started in 1987, TRISTAR Insurance Group has grown from a small, local and specialized TPA with revenues of under $1

million to the western regional TPA that it is today with 500 employees and over $50 million in revenue. Since 1995, REM's national property and casualty TPA services have provided its customers with the personal service and innovative tools that are vital to a strong claims management program. Both TRISTAR and REM have impressive reputations for customer service within the risk management community. The merger will create a leading national property & casualty TPA with significant scale, an extensive geographic footprint, deep analytical and IT resources and a diversified claims management offering.

"We are approaching the combination of the two companies as a merger to leverage the complementary strengths of both organizations," stated Tom Veale, Founder of TRISTAR Risk Management. He went on to state that the combined company will provide the highest level of customer service and support to clients ranging from single location operators to those with a national footprint. The REM brand will be retired and the organization will be known as TRISTAR Risk Management going forward. The combined company will generate in excess of $100 million in annual revenues and have nearly one thousand employees in 44 offices strategically located in 25 states and all major metropolitan areas for maximum service coverage throughout the U.S.

RYAN SPECIALTY GROUP TO ACQUIRE WKFC UNDERWRITING MANAGERS IN NEW YORK

Chicago-based Ryan Specialty Group said its subsidiary RSG Underwriting Managers is acquiring WKFC Underwriting Managers in New York. Terms of the transaction have not been disclosed. Ryan Specialty Group is a global-holding company which includes a group of highly-specialized underwriting companies, a Lloyd's insurer and other specialty services designed for agents, brokers and insurers. Its chairman and CEO is Patrick G. Ryan, the founder and retired chairman and CEO of Aon Corporation. WKFC is a managing general agency in the excess and surplus lines arena. Its business is comprised of property risks, general liability and specialty lines such as windstorm and earthquake deductible buybacks, equipment breakdown, inland marine, professional liability, weather, and special events programs.

MARSH ACQUIRES COSMOS SERVICES; HUB ACQUIRES SIGNATURE INSURANCE

Two major insurance brokers, Marsh and Hub, announced they have made acquisitions. Marsh, a wholly-owned subsidiary of Marsh & McLennan Companies, says it has acquired Cosmos Services (America) Inc., the U.S. insurance-brokerage subsidiary of global trading firm ITOCHU Corp. With offices in New York, Los Angeles, and Chicago, Cosmos specializes in providing commercial property and casualty, personal lines, and employee-benefits-brokerage services to U.S. subsidiaries of Japanese companies. Cosmos' employees will become part of Marsh's Asia Client Services team under the leadership of John McDonnell, president and chief executive officer of ACS in the United States. Marsh says the deal further strengthens its capabilities and resources in serving Japanese clients in the U.S. and also forges a strategic relationship between Marsh and ITOCHU.

Chicago-based Hub International Ltd. says it has acquired the assets of Signature Insurance Group, Inc., a Woodinville, Washington-based insurance-benefits-brokerage firm. Signature is a longstanding brokerage serving the insurance and risk-management needs of businesses and individuals throughout Washington, Oregon, Idaho and Alaska. Signature offers a range of personal- and commercial-lines products and services, with a specialty in serving condominium associations and apartment complexes. Signature will become part of the Hub International Northwest (Hub Northwest) operation.

MAIN STREET AMERICA GROUP PARTNERS WITH AUSTIN MUTUAL

The Main Street America Group and Austin Mutual Insurance Co., a Minnesota-domiciled regional property and casualty carrier, reached an agreement to establish Austin Mutual as an affiliate of Main

Street America. Main Street America, a major regional property and casualty mutual insurance holding company based in Jacksonville, Fla., says the affiliation agreement, approved by the boards of both companies, is subject to regulatory approval from the State of Minnesota Insurance Commissioner's Office as well as policyholders of Austin Mutual. The closing is projected to occur by mid-year 2012. Terms of the transaction were not disclosed. Austin Mutual, founded in 1896, will maintain its brand name and continue to sell its products via its network of independent agents in nine Midwest and Western states. Under terms of the affiliation, Austin Mutual chairman, president and chief executive officer Jeffrey Kusch will continue to oversee the company's daily operations out of its Maple Grove, Minn., headquarters and report to Tom Van Berkel, chairman, president and chief executive officer of Main Street America. There will also be a management and services agreement in place between the two companies and Main Street America will provide Austin Mutual with quota-share reinsurance. Over the past four years, Main Street America has established a Midwest presence through an acquisition of Michigan-domiciled Great Lakes Casualty Insurance Co. in 2008, and two other affiliations: Indiana-domiciled Grain Dealers Mutual Insurance Company in 2009 and Minnesota-domiciled Spring Valley Mutual Insurance Company in 2011.

UPCOMING EVENTS

May 9-12, 2012 - MWL will be exhibiting at the *7th Annual Claims Education Conference* in Napa Valley, California. Jamie Breen will be at Exhibit Booth 12 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please go to **www.claimseducationconference.com**.

June 13, 2012 – Alejandro Bautista will be presenting a live webinar on *"Florida Automobile Subrogation*" from 10:00 - 11:00 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 click on the "Register Now" button to the right to register.

July 18-19, 2012 – MWL will be exhibiting at the *32nd Annual National Workers' Compensation and Occupational Medicine Conference* in Hyannis, Cape Cod, Massachusetts. Jamie Breen will be at Exhibit Booth 10 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please click **HERE**.

November 11-14, 2012 – MWL will be exhibiting at *NASP's 2012 Annual Conference, "Cirque du Subro",* in Las Vegas, Nevada. Jamie Breen will be at Exhibit Booth 103 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please go to **www.subrogation.org**.