MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **AUGUST 2011**

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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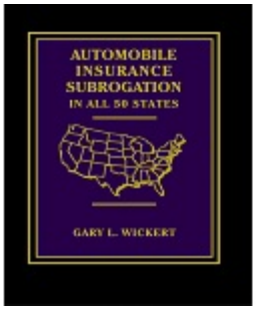


AUTOMOBILE INSURANCE SUBROGATION: IN ALL 50 STATES

Comprehensive Auto Subrogation Book To Be Published Soon!

It has been ten months in the making and the product of thousands of hours of research on the laws, procedures, and administrative regulations of 51 different jurisdictions - including all 50 states. The subrogation book to end all subrogation books is finally finished, and in the hands of MWL's publisher, Juris Publishing, in New York. It is expected to be released within the next few months, but advance orders are being taken now.

Automobile Insurance Subrogation: In All 50 States is the most thorough, comprehensive, and ambitious anthology of subrogation-related legal information and insurance resources ever put to paper. It is the last and most anticipated of the subrogation trilogy, and a book which will serve as the "Bible" for any insurance company writing personal lines or commercial automobile insurance.

The new book took more time to research and write than all of the other MWL subrogation books combined. It covers the nuts and bolts of automobile subrogation in all 50 states, thoroughly covering every topic imaginable, including PIP, Med Pay, UM/UIM, property claims, deductible reimbursement, no-fault subrogation, suspension of driver's licenses, and more. It surveys the laws of every state and provides descriptions of every type of automobile coverage imaginable, as well as the statutory, case law, and regulatory authority governing every aspect of automobile subrogation. The book universally covers issues which are indelibly interwoven into the business of automobile insurance, including a complete treatment of the laws of all 50 states and the District of Columbia relating to:

Basic and Statutory Subrogation Rights • Mandatory vs. Optional Insurance Coverage • No-Fault Laws • Personal Insurance Protection (PIP) • Mini-Torts and Loss Transfer Laws • Tort Limitations, Med Pay Coverage and Subrogation • Uninsured/Underinsured Motorist (UM/UIM) Coverage and Subrogation • Collision/Property Subrogation • Release of Tortfeasor by Insured • Made Whole Doctrine • Common Fund Doctrine • Economic Loss Doctrine • Accord and Satisfaction: Accepting Partial Payments from Tortfeasor • Deductible Recovery and Reimbursement • Collateral Source Rule • Contributory Negligence/Comparative Fault • Seat Belt Laws and Defenses • Rental Cars, Loaner Vehicles, and Test Drivers • Bailment/Parking Lot Liability • Negligent Entrustment • Facing Multiple Claims In Excess of Liability Policy Limits • Conflict of Laws/Interstate Subrogation • Recovery of Attorney's Fees and Costs • Statutes of Limitations • Arbitration of Auto Subrogation Claims • Suspending Driver's Licenses In All 50 States

It is a complete treatment -- A to Z -- of virtually every issue which the insurance claims or subrogation professional will face in the area of automobile insurance. It is like no legal treatise ever written and promises to be the most used reference in any insurance company. The myriad of subrogation topics addressed and receiving thorough treatment in this treatise were carefully selected by the author and affiliated local subrogation counsel in all 50 states over the past 28 years as the most frequently-asked-about areas of automobile insurance subrogation. Members of the National Association of Subrogation Professionals (NASP) may recall a recent flurry of list-serve e-mails regarding questions about suspending driver's licenses with and without judgments in various states. *Automobile Insurance Subrogation: In All 50 States* contains an entire chapter which details the laws, regulations, and even forms necessary when attempting to suspend a driver's license administratively and upon receipt of an unsatisfied civil judgment - providing once and for all a definitive resource in this confusing and often contradictory area of subrogation law. The book is 18 months in the making, and had to be edited several times during its writing to keep up with small changes in the law in several states. If the question has been asked about or inquired into on claims association or subrogation list-serves over the last three decades, it will find treatment and discussion in this book.

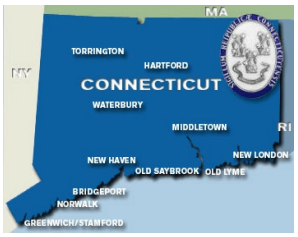
Even the confusing no-fault, PIP and Med Pay laws governing no-fault claims and subrogation in a number of states which have mandatory or add-on no-fault laws receive thorough treatment and lengthy discussion in easy-to-understand language perfect for both lawyers and claims/subrogation professionals. It is the one-stop resource for auto subrogation, and it is truly unique. This book represents the only such compilation of automobile insurance subrogation laws in the industry. No longer do subrogation professionals have to search around on the internet or rely on outdated, incomplete, and inaccurate subrogation charts which are passed on from claims handler to claims handler like devalued subrogation currency. This book has it all - accuracy, thoroughness, understandability, and reliability. There is no other book, resource, or authority like it - anywhere. The price of the book will be recouped with even one small recovery which would not have been possible but for the information it contains. Multiply that by the many thousands of automobile subrogation or collection claims you handle annually and you'll realize that it is a subrogation tool no recovery professional can be without.

Matthiesen, Wickert & Lehrer, S.C. is very proud of the work which went into this book and looks forward to the feedback and symbiosis with the claims/recovery industry which has helped make its other subrogation resources the leaders in the industry. It is a symbol of the maturity and growth which has taken place within

the insurance subrogation industry over the past two decades. The book is priced by Juris Publishing at $395 and will be available in hard-copy and electronically online in a searchable format. You can pre-order the book or learn more about this book from Juris Publishing by clicking **HERE**.

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

WORKERS' COMPENSATION SUBROGATION



CHANGES TO CONNECTICUT WORKERS' COMPENSATION SUBROGATION

The Connecticut legislature has amended § 31-293, effective July 1, 2011, with a couple of changes which directly affect workers' compensation subrogation in the Constitution State. Section 31-293 provides that where the worker and carrier join as plaintiffs and recover damages, the carrier's claim takes precedence over the claim of the worker, after deduction of reasonable and necessary expenses, including attorneys' fees. Until recently, it was improper for the court to deduct a portion of the employee's attorneys' fees from the employer's reimbursement for benefits paid to the employee. However, effective July 1, 2011, § 31-293 was amended to provide as follows:

> *If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee, except that such reduction shall not apply if the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer, or the custodian of the Second Injury Fund.*

In this way, Connecticut has gone from a state which prohibited a carrier's lien from being reduced for attorney's fees for the employee's attorney to a state in which the lien is reduced automatically by one-third, ostensibly as an attorney's fee for the plaintiff's attorney, without regard to how much work the carrier's attorney has done or whether plaintiff's counsel has fought to eliminate or destroy the carrier's lien.

For years, the failure of a carrier to bring an action against the tortfeasor amounts to a waiver of their reimbursement rights to the same extent as if they had failed to intervene after notice of action brought by the worker. If the carrier failed to intervene after receiving the 30-day notice required from the worker, it lost its right to intervene. Notwithstanding the above, effective July 1, 2011, § 31-293 was amended to provide that the carrier will now not lose its subrogation rights for failing to intervene within 30 days after notice of an action brought by the employee, provided it "gives written notice of a lien in accordance with § 31-293."

The new changes in Connecticut do not eliminate the need for active subrogation representation in Connecticut, as the carrier must still be alert to and proactive against efforts to gerrymander settlements in such a way as to eliminate their subrogation interests. The carrier must also be active to assert its right to future credits and combat the myriad of ways in which trial lawyers can and will strive to defeat the carrier's right to both reimbursement of past benefits and a future vacation from paying prospective benefits.

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

AUTOMOBILE SUBROGATION

NOT BAD FAITH FOR UM CARRIER TO DELAY BENEFITS PENDING VERIFICATION OF MEDICARE LIEN

Wilson v. State Farm Mutual Automobile Ins. Co., 2011 WL 2378190 (W.D. Ky. 2011)

A Kentucky federal district court has ruled that it does not constitute bad faith for an uninsured motorist automobile carrier to delay payment of UM benefits while it attempts to determine the exact amount of a Medicare lien.

On August 29, 2009, Steven Wilson was a passenger in a Jeep Grand Cherokee insured by State Farm when it was involved in a collision with another vehicle. The driver of the other vehicle was at fault and uninsured. As a result of the accident, the plaintiff had significant medical bills, some of which were paid by Medicare. State Farm agreed that the plaintiff was due uninsured benefits up to the policy limits of $50,000. However, State Farm attempted to determine the value of Medicare's lien and asked for permission to discuss the lien with Medicare. The plaintiff refused the request and instead asked State Farm to deposit the full policy limits in an escrow account from which the Medicare lien would be paid. The plaintiff agreed "to hold State Farm ... harmless from any claim by Medicare." Medicare was not involved in nor bound by this agreement. As an alternative, State Farm suggested including Medicare as a payee on the settlement check. The plaintiff rejected this request. Finally, State Farm decided to await Medicare's determination of the value of its lien and then issue separate checks to Medicare and the plaintiff. While waiting for the information from Medicare, the plaintiff filed a lawsuit against State Farm, claiming it was bad faith to delay payment of the $50,000 more than 30 days merely to protect itself from later liability to Medicare. Two months later, State Farm learned the value of the Medicare lien.

The federal court ruled in favor of State Farm, holding that State Farm did not act in bad faith. In order to have acted in bad faith, an insurance company must (1) have an obligation to pay the claim at issue; (2) not have a reasonable basis for failing to pay the claim; and (3) know that it lacked a reasonable basis to delay payment. The court said that mere delay of payment alone does not constitute bad faith. While the plaintiff has the primary responsibility to repay Medicare, State Farm would be absolutely liable to Medicare should plaintiff fail to make the repayments. State Farm may also have an obligation to protect Medicare's lien under the Medicare Secondary Payer Act and its corresponding regulations. Therefore, while some Kentucky courts have held that it is reasonable for a UM carrier to include Medicare as a payee on a settlement check (which Steven Wilson refused to agree to), the delay in making the payment while State Farm determined Medicare's interests did not constitute bad faith.

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

PIP/MED PAY SUBROGATION

ARKANSAS PIP/MED PAY SUBROGATION

Supreme Court Decision In Riley v. State Farm Adds Confusion

By Michael R. Sinnen

For generations, Arkansas has had a proud heritage of allowing PIP and Med Pay subrogation. Arkansas allows auto carriers to offer optional "medical expense benefits" (Med Pay) along with a standard automobile

insurance policy. This Med Pay coverage is included in § 23-89-202(1), which provides for payment of 100% of any medical bills up to the coverage amount of $5,000 per person. Traditional Med Pay coverage is less common in Arkansas because § 23-89-202 requires PIP coverage which includes a Med Pay component. Arkansas blends the concept of Med Pay with PIP benefits, so subrogation of Med Pay benefits is allowed to the same extent as is the subrogation of PIP benefits. In Arkansas, an insurer which has paid Med Pay benefits to its insured under § 23-89-202 has an automatic lien upon and a right of reimbursement from, any tort recovery or settlement obtained by its insured. *Daves v. Hartford Acc. & Indem. Co*., 788 S.W.2d 733, 736 (Ark. 1990); *Northwestern National Ins. Co. v. Am. States Ins. Co*., 585 S.W.2d 925 (Ark. 1979); *Carnathan v. Farm Bureau Ins. Co*., 705 S.W.2d 885 (Ark. 1986); *National Inv. Fire and Cas. Ins. Co. v. Edwards*, 633 S.W.2d 41 (Ark. App. 1982). This right of reimbursement is in the nature of subrogation. *Daves,* supra. The underlying principle of subrogation is to avoid a double recovery by the insured. *Id*.

Under Arkansas law, the Made Whole Doctrine is recognized and dictates whether an insurer has a subrogation right in settlement proceeds. In accordance with this Doctrine, an insurer's subrogation right is secondary to the right of the insured. *Green v. Ford Motor Co*., 2011 WL 2666198 (W.D. Ark., 2011). This Doctrine is a descriptive term for assuring against unjust enrichment of the insured. *Farm Bureau Casualty Ins. Co. v. Tallant,* 207 S.W.3d 468 (Ark. 2005). An insured should not recover more than that which fully compensates him and an insurer should not recover any payments that should rightfully go to the insured so that he is fully compensated. *Id*. The general rule in Arkansas is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss. *Franklin v. Healthsource of Ark.,* 942 S.W.2d 837 (Ark. 1997); *Shelter Mutual Ins. Co. v. Bough,* 834 S.W.2d 637 (Ark. 1992); *Riley v. State Farm Mutual Auto. Ins. Co.,* 2011 WL 2410521 (Ark. 2011). Arkansas courts are permitted to determine whether an insured has been made whole based upon the facts presented, and neither the insured nor insurer is entitled to a trial by jury on this issue. *Green*, supra. The relevant question is whether the insured's uncompensated (uninsured) loss is greater than the net recovery from the tortfeasor. *Id*.

Arkansas applies the Made Whole Doctrine rather broadly. It follows something called the "*Franklin Formula,*" which says that the precise measure of an insurer's reimbursement is the amount by which the amount of the sum received by the insured from the third party, together with the insurance proceeds, exceeds the loss sustained and the expense incurred by the insured in realizing his claim. *South Central Ark. Elec. Co-Op v. Buck*, 117 S.W.3d 591 (Ark. 2003); *Franklin,* supra. In short, Arkansas has begun sliding down the unsound legal slope of not differentiating between equitable/legal subrogation and contractual/conventional subrogation. The insured must be wholly compensated before an insurer's right of subrogation arises – only where the recovery by the insured exceeds his total amount of damages incurred. *Bough*, supra. In *Franklin*, the Arkansas Supreme Court expanded the use of the Made Whole Doctrine and held that an insurer is not entitled to subrogation unless the insured has been fully made whole, regardless of whether the insurance contract between the insurer and insured expressly gave the insurer a right of subrogation for benefits paid. *Franklin v. Healthsource of Ark.,* 942 S.W.2d 837 (Ark. 1997). The Made Whole Doctrine applies even in cases of statutory reimbursement rights, such as PIP benefits under § 23-89-207. *Ryder v. State Farm Mutual Auto. Ins. Co.,* 268 S.W.2d 298 (Ark. 2007).

In fact, the Arkansas Supreme Court has held that the Made Whole Doctrine applies not only to equitable and conventional rights as well as statutory rights, but also to statutory rights of subrogation provided under workers' compensation statutes. *General Accident Ins. Co. of Am. v. Jaynes*, 33 S.W.3d 161 (Ark. 2000). It is advisable for auto carriers subrogating for property damage to intervene into their insured's third-party action, because Arkansas does not approve of splitting of causes of action. *Home Ins. Co. v. Dearing*, 452 S.W.2d 852 (Ark. 1970).

Leave it to a few judicial activists on the Arkansas Supreme Court to destroy decades of subrogation tradition in Arkansas. In the 2011 decision of *Riley,* the Court bluntly announced that no subrogation rights arise until there is an affirmative determination by a court (or through an agreement – an event very few subrogation

professionals will ever witness) that the injured party has been made whole. *Riley*, supra. In *Riley*, State Farm had paid its insured $5,000 in medical benefits due to a car accident with a GEICO insured. Prior to making any benefit payments, State Farm sent GEICO a letter notifying them of their right to subrogation. Riley later settled her claim with GEICO for $11,500, which issued one check payable to Riley and her attorney for $6,500, and a second check payable to Riley, her attorney and State Farm for $5,000.

Riley sent a letter to State Farm asserting that she had not been "made whole" by the settlement. State Farm responded that the $11,500 settlement from GEICO was sufficient "to fully compensate Ms. Riley for her injuries" and agreed to reduce its recovery to $3,000 (so as to reimburse for recovery expenses and fees). Riley, nonetheless, filed a declaratory judgment action and complaint against State Farm alleging that the notice letter to GEICO violated the rules and that the subrogation recovery was premature without a court's determination that Riley had been "made whole." The trial court dismissed this count, ruling that State Farm had a valid but unenforceable subrogation lien under Arkansas law. The Supreme Court reversed and held that unless an agreement has been reached between an insured and its carrier, the "subrogation lien cannot arise, or attach, until the insured has received the settlement proceeds or damage award and until there is a judicial determination that the insured has been made whole." The Court was clear in stating that the legal determination of made whole "must occur before the insurance company is entitled to recover in subrogation."

In Arkansas, an insurer cannot modify or contract around the Made Whole Doctrine within the terms of its insurance policy. *Franklin*, supra. So, the pronouncement in *Riley* has caused a great deal of consternation and confusion within the insurance profession. The right of subrogation does not accrue until there has been a legal determination by a court that the insured has been made whole. *Riley*, supra.

One thing is certain: there will be no legal determinations of whether an insured is made whole unless initiated by the subrogated carrier. Taking no action or instructing subrogation counsel not to take action on Med Pay or PIP subrogation in Arkansas is not necessary and will ensure no recoveries. Do not hamstring your subrogation counsel because the activist Supreme Court in Arkansas has issued a confusing and troublesome opinion. Instruct your subrogation counsel to actively seek a judicial determination as to whether the insured has been made whole. Anything short of that will ensure lost subrogation opportunities.

If you should have any questions regarding this article or subrogation in general, please contact Michael Sinnen at msinnen@mwl-law.com.

MWL NEWS

MWL INTRODUCES NEW RESOURCE LINK PAGE TO WEBSITE

By Jamie L. Breen

MWL's website is already one of the most informative subrogation websites to be found anywhere for insurance professionals. Now, MWL has gone a stop further by revamping their Internet Resource Link page, which can be located on the top menu bar on their website homepage or by clicking **HERE**. This page offers a plethora of Internet resource links to assist you on a daily basis with finding information on any insurance topic and so much more. The resource links include multiple links for each of the below subjects:

ARBITRATION/ELECTRONIC SETTLEMENT SERVICES
INSURANCE ASSOCIATIONS
INSURANCE MAGAZINES/PUBLICATIONS
INSURANCE RESOURCES

LEGAL RESOURCES
GOVERNMENT RESOURCES
ADMIRALTY AND MARITIME
ERISA AND HEALTH INSURANCE
MOTOR VEHICLE, HIGHWAY SAFETY AND TRANSPORTATION
PROPERTY AND CASUALTY
WORKERS' COMPENSATION
GENERAL RESOURCES/MEASUREMENTS/LANGUAGE
LOCATING COMPANIES, PEOPLE AND INFORMATION
INVESTIGATORS
POLICE RECORDS
WEATHER
MAPS
NEWS
SEARCH ENGINES
MISCELLANEOUS

Our Resource Link page is just one of the many resources you will find on our website. Our website is more than just a website - it not only contains an overview of our firm and the services we provide, a detailed description of how our National Subrogation Recovery Program operates and a complete list of past and current MWL clients, it provides copies of published articles, published books, newsletters, recorded subrogation webinars, and numerous insurance resources to aid the subrogation professional, including a variety of subrogation charts that cover numerous subjects for all 50 states, such as *Workers' Compensation Subrogation In All 50 States*, *Med Pay/PIP Subrogation In All 50 States*, *Contributory Negligence/ Comparative Fault In All 50 States*, *Made Whole Doctrine In All 50 States*, *Economic Loss Doctrine In All 50 States*, just to name a few. You can also submit subrogation questions through our website. By clicking on any of the above underlined items, it will take you directly to that source.

Just as MWL prides itself on being a one-stop shop for all your insurance subrogation needs, likewise, our website is dedicated to our clients. We hope you find our entire website and our new Resource Links page beneficial and that you will visit it and use it often. If there are any questions our website doesn't answer for you, we would urge you to contact us as we stand ready to assist you.

HEALTH INSURANCE SUBROGATION

TEXAS SUPREME COURT CLARIFIES SCOPE OF RECOVERABLE AMOUNT IN PERSONAL INJURY LAWSUITS

During the tort reform flurry of 2003 in Texas, CPRC § 41.0105 was amended to limit a plaintiff's recovery of medical expenses to those that are paid or incurred, rather than the full medical bill charged to the patient. One of the lingering questions was whether the full, non-discounted bills could be presented to a jury. The Texas Supreme Court addressed this issue on July 1, 2011, holding only paid or incurred medical expenses can be presented to a jury.

On July 1, 2011 the Texas Supreme Court in *Haygood v. Escabedo*, 2011 WL 2601363 (Tex. 2011) held that "only evidence of recoverable medical expenses is admissible at trial." Under Texas law, the "recovery of medical or health care expenses is limited to the amount actually paid or incurred by or on behalf of the claimant." This ruling clarified that the amount of medical expenses that can be introduced into evidence is to be calculated based on what a medical provider is reimbursed for, not necessarily the amount the provider billed. In *Haygood*, the plaintiff's health care providers billed the plaintiff $110,000. However, the plaintiff was covered by Medicare Part B, which only pays a "reasonable charge" for services. The plaintiff's health care

providers adjusted their bills with credits of $82,000, leaving a total bill $28,000. Under this new ruling, the plaintiff could only introduce evidence of medical bills totaling $28,000. The Court found that since no one would end up paying the $82,000 credit, that evidence concerning it could not be used at trial.

The concern with the ruling, of course, is that limiting the evidence to amounts that have been or must be paid "provides the jury an unfairly low benchmark with which to gauge the seriousness of the plaintiff's injuries…" For subrogation professionals, this means several things. Conceivably smaller recoveries mean the plaintiff will fight that much harder to destroy your subrogation interest. However, because the amount the subrogated carrier pays for medical expenses is often the only amount the jury will hear, it provides you with an opportunity to work with plaintiff's counsel. In exchange for preparing detailed medical expense reports and summaries which can be presented directly to the jury, you save the plaintiff's attorney a great deal of time which might possibly be exchanged for stipulations on your subrogation interest.

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

UPCOMING EVENTS……

September 20, 2011 - Ryan Woody will be presenting a live webinar entitled *"Avoiding The Made Whole And Common Fund Doctrines*" 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.

October 26-28, 2011 - MWL will be exhibiting at the *Self Funding Employer Healthcare and Workers' Compensation Conference* in Chicago, Illinois. Jamie Breen will be at Exhibit Booth 110 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.selffundingconference.com.

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.