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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **APRIL 2009**

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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INSURANCE SUBROGATION

GARY L. WICKERT

SUBROGATION AND THE SUDDEN EMERGENCY DOCTRINE

By Gary L. Wickert

It's happened at least once to every subrogation professional. A significant claim file involving an automobile accident in which liability appears to be a lock, suddenly goes into a tailspin when the other side denies the claim because the tortfeasor suffered a heart attack or blacked out as a result of some other sudden medical emergency. You inquire into the law and learn that almost every state will decline to impose liability where an auto accident is the result of a sudden and unforeseeable physical incapacity. You struggle to find ways to attack and defeat the sudden emergency defense so you can recover your or your client's significant subrogation interest, but evidence and documentation all seem to be peculiarly in the possession and control of the very defendant you want to sue. What should you do?

The sudden emergency doctrine can best be described as follows:

> *A person who is confronted with a sudden and unexpected perilous situation not of his or her own making and who acts as would a reasonably prudent person under the circumstances will not be held liable even if later reflection shows that the wisest course was not chosen.* (http://dictionary.reference.com/browse/sudden+emergency+doctrine.)

The doctrine varies slightly from state to state, but most states require that in order to avoid liability under the sudden emergency doctrine, the defendant must show:

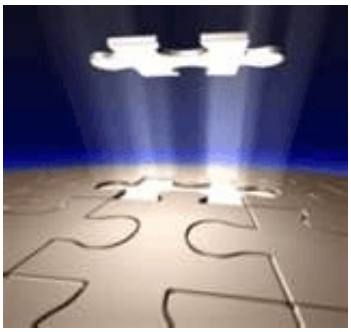
(1) He or she suddenly became physically incapacitated;
(2) The incapacity was not reasonably foreseeable;
(3) The incapacity rendered the defendant unable to control his or her vehicle; and
(4) The accident was the result of a loss of control resulting from the incapacity.

Rogers v. Wilhelm-Olsen, 645 S.E.2d 671 (Ky. App. 1988); *Mobley v. Est. of Johnson,* 432 S.E.2d 425 (N.C. App. 1993).

In most states, the burden of proving each of these elements rests with the defendant who is raising the defense, assuming the plaintiff has otherwise proven his or her case. Some states, such as Virginia, have held that the sudden emergency doctrine is not even an affirmative defense which needs to be pled and proven by the defendant, and there is no burden on the defendant to prove its factors by a preponderance of the evidence. *Vahdat v. Holland*, 649 S.E.2d 691 (Va. 2007). At the same time, those courts do require that the defendant bring forward sufficient evidence to permit a jury to conclude that the defendant's actions were taken as a qualifying "sudden emergency".

Scope of Doctrine

To fall within the scope of this defense, the defendant does not need to die or lose consciousness. The incapacity must only be severe enough to render the defendant incapable of controlling his or her vehicle. The incapacity could be something as benign as a leg cramp or sneeze. *Zabunoff v. Walker,* 13 Cal. Rptr. 463 (Cal. App. 1964) (sneeze); *Reeg v. Hodgson,* 202 N.E.2d 310 (Ohio App. 1964) (leg cramp). So how simple is it for a defendant to simply claim he sneezed or had a leg cramp? It's almost impossible to prove he didn't. In addition, medical testimony is not usually necessary for a defendant to succeed with this defense, because the issue isn't why but whether there was incapacity, and the defendant might be the only one who really knows or can prove that.



Where a sudden emergency confronts a driver, he or she is not expected to exercise the usual degree of care or even the best judgment. Instead, the driver experiencing a sudden emergency must only use an "honest exercise of judgment". *McKee by McKee v. Evans,* 551 A.2d 260 (Pa. Super. 1988). It is important to note that only those who are driving carefully and prudently are entitled to the sudden emergency defense. The defense also doesn't apply to mental illness, such as a case where a person, believing herself to be the object of a conspiracy, turned her car and drove the wrong way on the freeway, driving head-on into oncoming traffic in an attempt to commit suicide. *Ramey v. Knorr*, 124 P.3d 314 (Wash. App. 2005). The defendant in *Ramey* did not meet the test of sudden mental incapacity because the evidence clearly established she had notice and forewarning of her mental condition, had experienced a mental breakdown, and believed the person she worked for was conspiring to kill her by poisoning her. Even though Knorr had no history of being dangerous or violent, or any problems with her driving, that is not required in order to get around the sudden emergency doctrine. Earlier symptoms of a mental disability may constitute adequate notice and forewarning that driving is probably not a good idea and is negligence in and of itself.

Foreseeability

Foreseeability and timing are the two most litigated components involving the sudden mental incapacity which must accompany a successful sudden emergency defense. Foreseeability requires that the defendant be on notice of a risk of sudden incapacity. A previous history of seizures, taking certain medications, or

other medical conditions place the defendant on notice that while convenient, getting in a car and driving could possibly endanger other people and property. The focal point is what the defendant knew when he or she got behind the wheel that day, and whether the decision to drive was reasonable. Simply bringing up these points will take the wind out of the sails of almost any sudden emergency defense, as the defense is thrown down rather cavalierly by defense adjusters almost routinely, without much forethought as to whether it actually applies. This shifts the attention from the moment of driving, when the defendant might sympathetically not be blamed for what happened, to the moment of starting the car, when he or she is to blame. Epileptic individuals may claim that their seizures were under control, to which the reply would be, "obviously they were not."

If a person is suffering from chronic cardiac medical problems, you could argue that it is foreseeable that a heart attack could be imminent. Some cases, however, have held that as a matter of law, such an attack is not foreseeable if there is no reason to believe that it is imminent. *Hout v. Johnson,* 446 P.2d 99 (Or. 1968). However, if you can convince a jury that something is foreseeable, the defense will not be applicable. *Keener v. Trippe,* 222 So.2d 685 (Miss. 1969) (fainting spell found to be foreseeable even though defendant had only a two-month history of headaches and no history of fainting). Family medical history, near-misses, etc., are all relevant and admissible to show foreseeability and negligence.

Timing

It is necessary that the incapacity underlying the defense actually precede the accident. Much like cases involving cattle which wander into a roadway and cause injury, timing must often be shown by circumstantial evidence. It is important to relay to the defense adjuster that circumstantial evidence is allowed and can be convincing in many cases. Juries love to play Sherlock Holmes and deduce things themselves. Leading a jury to water and letting them drink on their own is a powerful litigation tactic.

Whether the defendant suffered a heart attack or other condition before an accident or as a result of the accident is often a critical question in sudden emergency cases. Defendants can fall asleep, get into a serious or fatal crash, and then suffer a heart attack while injured and waiting for medical help. The importance of timing should be obvious. Medical testimony, the position of the deceased defendant's body after the accident, evidence of the defendant's behavior just before the incident, etc., are all important pieces of evidence in building a case to defeat the sudden emergency doctrine.

Accident reconstruction can show that the path the vehicle followed just before the accident would not be the path of a vehicle driven by somebody who was unconscious. If the defendant survives, testimony of first responders or paramedics that he or she was alert and unimpaired can be powerful evidence refuting the allegation of a heart attack or other medical condition. Remember, the basis of the sudden emergency doctrine is that the standard of care required of a party depends on the particular circumstances, and the circumstances would include whether an emergency exists. It will take work to discover those circumstances and put them before a jury. If the subrogation case is large enough, it might be worth the investment of time and some attorney's fees to file suit and conduct some discovery, putting pressure on the other side and putting them to the task of shoring up the allegations of sudden emergency they have been making.

Other Tortfeasors to Pursue

In addition to trying to defeat the sudden emergency doctrine, care should be taken to determine if other persons or entities might have some responsibility for causing the accident. If the defendant was on medication at the time of the accident – something that should always be inquired into – questions regarding the prescription and any warnings that came with or didn't come with the medication should be asked.

Some jurisdictions allow liability to attach to a health care professional for negligence which results in injury to a third party, while others do not. Those which do not say that the physician doesn't owe a duty to the

ultimate victim or his subrogated insurance company. Others allow such liability in appropriate cases and refuse to declare that physicians absolutely have no such duty. In addition, some courts don't want to hold doctors to the impossible task of prescribing medication for a patient while taking the interests of non-patients into account. The more foreseeable an incident is, the more likely the court will allow liability to extend to a physician or other health care provider.

Drug manufacturers have also been looked at as possible target defendants in such cases. This is especially viable where the packaging contains no warnings or inadequate warnings to put the consumer on notice that his or her driving might be impaired while taking the medication. Such warnings are routinely given by drug manufacturers these days, but it doesn't hurt to look into it.

Roll Up Sleeves

When a liability adjuster announces he is going to throw down the sudden emergency card when confronted with a subrogation demand, rather than giving up, the subrogation professional should take this as a cue that he or she is going to have to work for the subrogation dollars. The defense is often thrown down with little or no basis for doing so. If it wasn't an effective tactic, liability adjusters wouldn't do it. When confronted with the defense, the timing, foreseeability and individual circumstances of the loss should be looked at carefully in preparation for building a subrogation case.

INSURANCE SUBROGATION

NEW YORK COURT OF APPEALS ISSUES FAVORABLE MADE WHOLE OPINION

Paula Fasso Independent Health Ass'n, Inc. v. Doerr, 2009 WL 435322 (N.Y. 2009)

New York has recognized and employed the equitable made whole doctrine for many years. An insurer has no right of subrogation against its insured when the insured's actual loss exceeds the amount it has recovered from both the insurer and third party. Nothing surprising there. What is surprising is that, until recently, there were no New York cases applying the made whole doctrine to health insurance subrogation, but that is no longer the case. The New York Court of Appeals – New York's highest appellate court – issued an opinion on February 24, 2009, applying the made whole doctrine to health insurance subrogation, but giving subrogation professionals a nice surprise in the process.

In *Paula Fasso Independent Health Ass'n v. Doerr,* the New York Court of Appeals decision indicated that the made whole doctrine would be applicable to bar health insurance subrogation rights. While this clearly has the biggest effect on non-self-insured ERISA plans who do not have the benefit of ERISA preemption at their disposal, fully insured and non-ERISA plans shouldn't lose heart. In *Doerr,* the Fassos filed a medical negligence case against Dr. Doerr and received $780,000 in benefits from their health plan, Independent Health Association ("IHA"), who was allowed to intervene into the case. The plaintiff settled her case for $900,000 and contended that the "made whole" rule precluded IHA from pursuing equitable subrogation. The court acknowledged that the made whole doctrine applied. The good news, however, is that the court went on to state that the plaintiffs misconstrued the made whole principle.

The court in *Doerr* held that if the recovery received by the injured party, whether determined by settlement or verdict, is greater than the wrongdoer's assets and available insurance coverage, there is nothing left for the insurer to execute its subrogation rights against and the made whole rule prevents the insurer from sharing in the insured's judgment or recovery. But that was not the situation here. In this case, the court announced that the made whole doctrine did not present an obstacle to IHA's right to seek recoupment from the tortfeasor because the settlement between the Fassos and Dr. Doerr left a potential source of recovery - $1.1 million in remaining insurance coverage. Consequently, the made whole rule did not mandate dismissal of IHA's equitable subrogation claim merely because the Fassos decided to accept a settlement figure that did not completely compensate them for the full extent of their damages.

New York joins a growing list of states with case authority indicating that voluntary settlement of a lawsuit by an insured for an amount less than, and not as a result of, minimum limits of insurance, should not prevent a subrogated insurer from seeking full reimbursement of its subrogation interests.

WORKERS' COMPENSATION SUBROGATION

CHRIS M. MILLER

WORKERS' COMPENSATION SUBROGATION CONFUSION IN PENNSYLVANIA

By Chris M. Miller

In the last several weeks, many of our clients have indicated some confusion about the current state of workers' compensation subrogation in Pennsylvania. It seems that workers' compensation carriers are on occasion being told by third parties and their carriers that we have no right to independently file a third-party action, because Pennsylvania case law says so and the subrogation statute at 77 P.S. § 671 does not provide for it. We wanted to take this opportunity to set the record straight and assure our clients that they do indeed have such a right.

There are federal court decisions applying and interpreting Pennsylvania law which indicate that a carrier is entitled to bring an action directly against the third party causing the injuries for those benefits payable under the Act. *Ledford v. Central Medical Pavilion, Inc.*, 90 F.R.D. 445 (W.D. Pa. 1981); *London Lancashire Indem. Co. of Am. v. Reid*, 156 F.Supp. 897 (E.D. Pa. 1957). The statute grants the carrier a right to be subrogated to the rights of the employee, and, therefore, the carrier is entitled to sue to enforce its subrogation rights in Pennsylvania. *Ledford*, supra. In *Ledford,* the court stated as follows:

> *An insurer may sue to enforce its subrogation rights in Pennsylvania. The Pennsylvania Workmen's Compensation Act specifically allows such a suit.* Id.

In so holding, the federal court specifically referenced the language of § 671 which reads:

> *Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of (the employee) against such third party to the extent of the compensation payable ... by the employer.*

However, one state Superior Court (trial court) decision has cast doubt on the ability of the carrier to sue a third party on its own, and it is this decision which is being cited by the bad guys for the proposition that we have no such right. In *Reliance Ins. Co. v. Richmond Machine Co.,* a workers' compensation carrier tried to sue a product manufacturer after the underlying statute of limitations had run. *Reliance Ins. Co. v. Richmond Machine Co.*, 455 A.2d 686 (Pa. Super. 1983). This Pennsylvania trial court held that the carrier could not sustain its suit because in order for a compensation carrier to succeed in a third-party subrogation suit, it

must show the third party is liable, which was hard to do in that case seeing as the statute of limitations had run. The compensation carrier was trying to sneak by a breach of contract cause of action in its own name, for which there was a four (4) year statutes of limitation and would be timely filed. However, the court, in *dicta*, added the following comment:

> *Our appellate courts have not hitherto construed section 319 as providing the employer or its insurer with a cause of action against a third party in its own right. We see no reason to do so at this stage, where the legislature has not chosen to do so, where the liability of the alleged third party tortfeasor has not been determined, and where the statute of limitations for personal injury actions has barred an action in trespass against the alleged tortfeasor.* Id.

Dictum (plural "*dicta*") is any statement that forms a part of a court's judgment, in particular a court whose decisions have value as precedent. Conceptually, *dicta* are divided into two (2) types: *Ratio decidendi* are those which form a part of the reason for the decision and are binding as precedent and *obiter dicta,* which are not binding, but are merely editorializing, or explanatory. The word *dicta* standing alone and, as used in this article, is often used as a synonym for *obiter dicta*, although this usage is not technically correct.

While some have cited the above language from the *Reliance Insurance Company* decision for the proposition that the carrier may not bring a third-party action on its own, the point the trial court was trying to make was that the carrier could not sue the third party where the third party was not liable (as where the statute of limitations had expired) and when the carrier does proceed on its own, it must do so in the name of the injured employee as it does not have a cause of action in its own name – only a right to be reimbursed from a suit brought in the name of the injured employee. The confusing language of the *Reliance Insurance Company* decision has led some to cite it for the proposition that the carrier cannot file a third-party suit under § 671, even if that suit is filed as subrogee and it names the injured worker as the plaintiff subrogor.

All the *Reliance Insurance Company* decision does is awkwardly state that the cause of action is owned by the worker, not the employer or compensation carrier, who are clearly subrogated to that right. Clarification from the Pennsylvania Supreme Court or an amendment clarifying this issue from the Pennsylvania legislature would be welcomed by subrogation practitioners.

As stated on the Workers' Compensation Chart on our website summarizing the workers' compensation laws of all 50 states and in the Pennsylvania chapter of our book, *Workers' Compensation Subrogation In All 50 States,* a carrier does have the right to threaten filing suit on its own and to follow through with that threat if needed. Please contact us if you have any questions regarding workers' compensation subrogation anywhere throughout North America. As a full-service subrogation firm, that is what we are here for.

WORKERS' COMPENSATION SUBROGATION

INDIANA COURT CLARIFIES WORKERS' COMPENSATION FUTURE CREDIT

Smith v. Champion Trucking Co., Inc., 901 N.E.2d 620 (Ind. App. 2009)

The Indiana Court of Appeals has clarified a nagging area of ambiguity in the Indiana workers' compensation subrogation statute. That statute specifically provides that the liability of the workers' compensation carrier to pay further compensation benefits shall terminate upon third-party recovery, regardless of whether all of

the dependents are entitled to share in the proceeds. I.C. § 22-3-2-13 (2000). In fact, it states the following when a judgment or settlement occurs in a third-party case:

> *…the liability of the employer or the employer's compensation insurance carrier to pay further compensation or other expenses shall thereupon terminate, whether or not one (1) or all of the dependents are entitled to share in the proceeds of the settlement or recovery and whether or not one (1) or all of the dependents could have maintained the action or claim for wrongful death.* Id.

For years, this was interpreted to mean that where an injured worker settled a claim with the third party, the liability of the employer to pay further compensation benefits was terminated. *McCammon v. Youngstown Sheet & Tube Co.*, 426 N.E.2d 1360 (Ind. App. 1981). This was justified because § 22-3-2-13 gave the employee an option of either collecting a judgment and repaying the employer for compensation previously drawn, or assigning all rights under the judgment to the employer and thereafter receiving from the employer compensation to which he is entitled. I.C. § 22-3-2-13 (2000).

On February 25, 2009, however, the Indiana Court of Appeals held for the first time that a third-party settlement does *not* bar additional workers' compensation benefits after a third-party recovery where the recovery is obtained before a worker's compensation award has been resolved, and is in an amount less than the anticipated worker's compensation benefit. *Smith v. Champion Trucking Co., Inc.,* 901 N.E.2d 620 (Ind. App. 2009). The *Smith* court held for the first time the bar against receiving future benefits when a third-party case was settled does not apply where the settlement is obtained before a worker's compensation award has been resolved, and is in an amount less than the anticipated worker's compensation benefits.

We have made changes in our book, *Workers' Compensation Subrogation In All 50 States* (www.jurispub.com), as well as our workers' compensation subrogation summary chart to reflect the clarification in Indiana law.

PROPERTY SUBROGATION

FLOODING DISASTERS ALSO REPRESENT SUBROGATION OPPORTUNITIES

Recently, *USA Today* reported on heavy rain causing flooding in parts of northwest Ohio, where rivers in some areas surged to more than 8 feet above flood levels. Communities in Illinois, Indiana and Missouri also have experienced recent flooding. To make matters worse, communities in New York and Vermont are bracing for flood watches. Our industry knows that such news always translate into significant insurance claims. What we don't always realize, however, is that natural disaster claims can possess significant subrogation potential.

The nemesis of most insurance carriers is the natural disaster. When God sends a hurricane, tornado, flood or a naturally occurring fire, the resulting claims can be enough to put many carriers out of business. With no third parties or subrogation potential, these claim payments are simply money down the drain. Such appeared to be the case with the Great Flood of 1993 in the Midwest and along the upper Mississippi River. This naturally-occurring flood cost an estimated $21 billion, covered parts of nine states and lasted three months. As the flood waters rose, 1,369 brand new Subaru automobiles, ready for distribution and valued at more

than $17 million, were being stored by the Chicago & Northwestern Railroad (now Union Pacific) for Subaru of America, Inc. at an old American Motors outdoor storage facility in Kenosha, Wisconsin, which the railroad had leased for this purpose. Lloyds of London and its lead underwriter, Commercial Union Insurance Company, ultimately paid more than $11 million on this claim. The claim also resulted in Lloyds canceling Subaru's policy. Subrogation was looked into by the Lloyds Claims Office and quickly dismissed. It was, after all, the storm of the century. Who could one possibly blame for that?

As subrogation counsel for the Lloyds Claims Center, Gary Wickert, had routinely performed quarterly subrogation reviews at his office on Lime Street. During a routine file review, Wickert came across the Subaru claim file in the closed file area. The words "No Subrogation" were stamped across the top of the file. Noticing that there had been a similar flood in this area earlier, Wickert convinced the lead underwriter to invest $50,000 to do a hydrological study and produce a HEC - 2 computer simulation of the flood, which, together with an historical survey of the area, revealed that many of the vehicles might have been stored on the 100-year flood plain. That was enough to file suit on behalf of Subaru and Lloyds sued Chicago & Northwestern, Wackenhut Security and several other purported owners of the property.

Discovery was excruciating with many of the depositions taking three days or more. Ultimately, an old lease agreement between Chicago & Northwestern and Subaru was produced, which required CNW to maintain certain minimum standards, including drainage that would prevent more than two inches of water to accumulate. Wickert put an ad in a local paper seeking anecdotal stories about previous floods in this area and received favorable responses. Still, the defendants strenuously claimed that the flood as an Act of God.

Faced with the hydrological evidence and the existence of a flood plain, however, they ultimately had to admit that parking $17 million worth of automobiles on a flood plain was not prudent. After several Motions for Summary Judgment, two trial settings and a three-day mediation, the defendants ultimately paid more than $7 million. It was $7 million Lloyds never thought they would see. After the recovery, Wickert set a meeting between Subaru and Lloyds, which resulted in Lloyds reissuing their coverage to Subaru. A happy ending that proves the adage that when you have catastrophic natural disasters - you have subrogation potential!

If you are hit with a significant natural disaster claim, consider engaging Matthiesen, Wickert & Lehrer, S.C. to conduct subrogation investigation and evaluation on the loss. The smallest of investments could mean complete erasure of a significant loss for your insured, and a good year for your subrogation department.

UPCOMING EVENTS.....

May 11-15, 2009 - MWL will be exhibiting at the Claims Education Conference being held in Coeur D'Alene, Idaho. Jamie Breen will be at our exhibit booth so stop by our booth if you plan on attending this conference. For information on this conference, please go to http://www.claimseducationconference.com.

November 1-4, 2009 - MWL will be exhibiting at the NASP 2009 Conference being held at the Broadmoor Hotel in Colorado Springs, Colorado. Gary Wickert, Ryan Woody and Jamie Breen will be at our exhibit booth so stop by our booth if you plan on attending this conference. For information on this conference, please go to www.subrogation.org.