MATTHIESEN | WICKERT | LEHRER, S.C.

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **DECEMBER 2010**

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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MWL NEWS

RYAN L. WOODY BECOMES A PARTNER AT MATTHIESEN, WICKERT & LEHRER, S.C.

Matthiesen, Wickert & Lehrer, S.C.("MWL") is very pleased to announce that as of January 1, 2011, Senior Associate Ryan Woody will become a partner of the firm. Ryan has been with MWL since 2004, concentrating his practice on large loss subrogation, ERISA reimbursement litigation, insurance defense and complex coverage issues and appeals. Ryan has represented ERISA Plans seeking reimbursement in numerous federal courts around the country and serves as general counsel to health plans advising on all aspects of Plan language to litigation. Ryan is a member of the American Bar Association, Wisconsin Bar Association, National Association of Subrogation Professionals, Property Loss Research Bureau (PLRB) and Liability Insurance Research Bureau (LIRB). He has contributed to numerous articles and national treatises on insurance coverage, ERISA and workers' compensation subrogation. Ryan also presents subrogation seminars and webinars to insurance professionals around the country. Ryan is frequently called on to testify before legislatures and legislative committees on matters relating to health insurance subrogation. Ryan's long list of published decisions and publication contributions can be found on his attorney profile page on our website at www.mwl-law.com. He was named a Rising Star by *SuperLawyers Magazine*, an award given only to the top 2.5% of young lawyers in the State of Wisconsin.

Prior to joining MWL, Ryan was an Assistant Attorney General with the Wisconsin Department of Justice in Madison, Wisconsin. In 2001, Ryan received his B.S. from Bradley University in Peoria, Illinois and in 2004

he earned his J.D. from Marquette University Law School in Milwaukee, Wisconsin. While at Marquette University Law School, he was involved with moot court, the school newspaper, practical internships, and the Environmental Law Society. Ryan also has a special interest in environmental and natural resources law. He is a member of the Natural Resources Division of the American Bar Association and serves as legal counsel to the Ruffed Grouse Society, a national wildlife conservation association, where he deals with all aspects of Forest Service decision-making and its consequences on the forest's stakeholders, including industry, Native Americans, residents, and environmental interest groups. He has also represented recreation, timber and county associations in natural resources and access litigation.

MWL is very proud and privileged to have Ryan Woody become an owner in what we believe to be one of the premier insurance litigation law firms in the nation. Ryan can be reached rwoody@mwl-law.com.

AUTO SUBROGATION

PENNSYLVANIA SUPREME COURT AFFIRMS RIGHTS OF INSURERS TO PRO RATE DEDUCTIBLES

***Jones v. Nationwide Property & Casualty Ins. Co.*, 2010 WL 4643224 (Pa. 2010)**

By Michael R. Sinnen

The Pennsylvania Supreme Court recently ruled on an insurer's obligations vis-a-vis deductible reimbursement in the state. The case of *Jones v. Nationwide Property & Casualty Ins. Co.,* 2010 WL 4643224 (Pa. 2010) was a class action lawsuit in which the plaintiffs alleged that carriers are obligated to reimburse their insureds for the entire amount of their deductibles before those carriers are allowed to collect on their claims against third parties. The case presented a challenge to Chapter 31, § 146.8 of the Pennsylvania Administrative Code, which provides insurers with the right to pro rate deductibles based on expenses incurred in the pursuit of third parties. The plaintiffs in *Jones* asserted that the Pennsylvania Insurance Commissioner did not have express or implied authority from the Pennsylvania legislature to grant insurers with the right to pro rate deductibles under the Administrative Code. The plaintiffs cited Pennsylvania's common law "Made Whole" Doctrine and contended that insurers cannot collect against third parties until their insureds have been fully reimbursed, or "made whole", via the complete reimbursement of deductibles paid on insurance claims. Claims asserted by the plaintiffs included breach of contract, bad faith, conversion and the unjust enrichment.

In affirming the rulings of the trial court and Superior Court, the Pennsylvania Supreme Court held that Pennsylvania's Insurance Commissioner had the right to enact Chapter 31, § 146.8 of the Administrative Code, and, as such, the "made whole" issue was irrelevant. Further, since Nationwide followed the Code in pro rating its insureds' deductibles, it had not breached its insurance contracts; acted in bad faith; wrongfully converted recovery dollars; or been unjustly enriched. In making its ruling, the Pennsylvania Supreme Court cited a 2009 Federal Court case, *Harnick v. State Farm Mutual Ins. Co.,* 2009 WL 579378 (E.D. Pa. 2009), in which the U.S. District Court for the Eastern District of Pennsylvania addressed the same issue as the court in *Jones* and reached the same conclusion.

If you should have any questions regarding this article or subrogation in general, please do not hesitate to contact Michael Sinnen at msinnen@mwl-law.com.

SUBROGATING FOR MORE THAN YOU'VE PAID

In Wisconsin Workers' Compensation Subrogation, It's Possible

By Gary L. Wickert

The name of the game in workers' compensation subrogation – while complicated by an array of 50 different state statutes and subrogation schemes – is really quite simple: recover as much of your past lien and future credit as possible. Imagine subrogating for benefits an insurance carrier hasn't yet paid for. What's more, imagine subrogating for *and actually recovering* more than the amount of the claim you paid. Amazingly, both scenarios are now possible for subrogating workers' compensation carriers in Wisconsin, whenever the carrier pursues its subrogation interest alone. Wisconsin allows a subrogated carrier to fight for and recover all damages an employee would have been able to recover on his or her own, where they do not pursue the third-party case.

The Wisconsin Supreme Court, in *Threshermens Mutual Ins. Co. v. Page*, 217 Wis.2d 451 (1998) announced for the first time that a worker's compensation insurer may seek recovery of an injured employee's claim even if the employee declines to participate in a third-party action. In *Threshermens*, the Court held that the Wisconsin Workers' Compensation Act allows an insurer who filed an action against a third-party defendant to assert the same claims against the third-party as those that would be available to the injured employee, including claims of pain and suffering and future medical expenses. If you want to lose a friend for life, just read this article and try to whittle away at a trial lawyer's fee out of a successful third-party recovery.

Threshermens arises out of an accident whereby an employee was injured when she fell in a parking lot owned by her employer while in the course of her employment. Threshermens Mutual Insurance Company was the employer's workers' compensation carrier and, pursuant to the Workers' Compensation Act, made certain payments to the employee to compensate her for the injuries she sustained in the fall. Subsequently, Threshermens filed a subrogation action, pursuant to Wis. Stat. § 102.29(1) against the parties responsible for maintaining the parking lot alleging that their negligence caused the employee's injuries resulting in workers' compensation benefits being paid. Pursuant to Wisconsin Statute, Threshermens notified the employee of the pending lawsuit and allowed her the opportunity to join in the prosecution of the claim. The employee, however, declined to actively participate in the lawsuit and was subsequently joined as an involuntary plaintiff in Threshermen's action.

During the course of litigation, a dispute arose regarding which damages Threshermens would be entitled to recover at the time of trial. Specifically, Threshermens intended to present evidence and request recovery of damages representing the employee's pain and suffering claim as well as future medical expenses claim. The defendants, on the other hand, attempted to limit the action to only those payments Threshermens had previously made to the employee. The defendants argued that Threshermens was not entitled to assert a claim for pain and suffering: (1) because it was not obligated to pay pain and suffering as workers' compensation benefits to the employee; and (2) because the employee did not file her own independent action. In addition, the defendants argued that Threshermens could not assert a claim for future medical expenses because such a claim would be "too speculative".

On appeal, the Court addressed the issue as to whether a workers' compensation carrier is entitled to recover damages representing an injured worker's claim of pain and suffering, as well as a claim for future medical expenses, under the Worker's Compensation Act. In determining whether an insurer may properly recover for such claims, the Court first looked to the clear and unambiguous language of Wis. Stat. § 102.29(1), which provides in pertinent part as follows:

> *The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right [as the employee] to make claim or maintain an action in tort against any other party for such injury or death. However, [the employer or compensation insurer, or the employee make a claim] shall give to the other reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel . . . If notice is given as provided in this subsection, the liability of the tortfeasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim.*

After reviewing the above language, the Court noted that Wis. Stat. § 102.29(1) allows either the injured employee or insurer to commence an action against a third-party tortfeasor and grants each the "same rights" to make a claim or maintain an action. The Court further noted that the statute specifically provides that as long as proper notice is given, "the liability of the tortfeasor shall be determined as to all parties having a right to make a claim, and irrespective of whether or not all parties join in prosecuting such claim". Since it was undisputed that pain and suffering damages fell within the category of claims to which § 102.29(1) applies, Threshermens was entitled to present the employee's claim for pain and suffering to the jury even though Threshermens was never required to pay pain and suffering benefits.

In regards to Threshermen's claim for future medical expenses, the Court noted that the third-party liability statute specifically allows a carrier to recover "all payments made by it, or which it may be obligated to make in the future." Although the Court acknowledged that there may be some inexactitude in awarding damages for future medical expenses, if competent medical evidence is presented to demonstrate that the employee will incur future medical expenses, Threshermens must be allowed to recover these damages. As such, the Court held that denying Threshermens the opportunity to present the claim for future medical expenses violated the clear language of the statute.

Conclusion

The holding of the Court in *Threshermens* greatly enhances an insurer's right to recover against a third-party tortfeasor. In the right scenario, the carrier recovers all of its past lien in addition to all of its attorney's fees. Any excess is distributed according to the formula set forth in Wis. Stat. § 102.29, most of which will constitute a future credit.

If an injured employee declines to actively participate in a third-party action filed under Wis. Stat. § 102.29(1), an insurer is entitled to recover as damages monies above and beyond those actually paid to the injured employee. Specifically, the Wisconsin Supreme Court has held that damages such as an employee's pain and suffering and future medical expenses may be included in those an insurer is entitled to recover against a third-party defendant, even if the insurer didn't pay those damages to the employee. Based upon this ruling, the chances that a worker's compensation insurer will recover not only the total dollar amount paid in benefits to an injured employee, but an amount greater than that actually paid are greatly increased. These are exciting, new reasons to act promptly and aggressively when subrogating, and place Wisconsin high on the list of states which take seriously protecting and enforce subrogation rights.

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

RECOVERY OF ATTORNEYS' FEES IN OREGON SUBROGATION CASES

Automobile subrogation claims can be difficult to pursue cost-effectively in some situations because the amounts being claimed are usually smaller. Oregon has a state statute which makes the subrogation of smaller claims somewhat easier, because it threatens to reward the subrogated carrier with the recovery of attorneys' fees if the defendant fights a case of good liability merely because it knows the subrogated carrier cannot afford to litigate. This modified application of the English Rule (loser pays fees of winning party) is different from every other state, which all follow the American Rule (each party pays its own attorneys' fees).

Oregon Stat. § 20.080 is a statute creating an attorneys' fee claim in any tort action for $7,500 or less. It was intended to create an incentive for attorneys to take claims with relatively small value, thereby preventing tortfeasors from avoiding responsibility by simply denying those claims on the assumption that they would never be litigated. Oregon Statute 20.080 reads as follows:

§ 20.080. Attorney fees where $7,500 or less pleaded.

(1) In any action for damages for an injury or wrong to the person or property, or both, of another where the amount pleaded is $7,500 or less, and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, at trial and on appeal, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant, and on the defendant's insurer, if known to the plaintiff, not less than 30 days before the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 30 days after the transfer of the action under ORS 46.461. However, no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 30 days after the transfer of the action under ORS 46.461, an amount not less than the damages awarded to the plaintiff.

(2) If the defendant pleads a counterclaim, not to exceed $7,500, and the defendant prevails in the action, there shall be taxed and allowed to the defendant, at trial and on appeal, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the counterclaim.

(3) A written demand for the payment of damages under this section must include the following information, if the information is in the plaintiff's possession or reasonably available to the plaintiff at the time the demand is made:

(a) In an action for an injury or wrong to a person, a copy of medical records and bills for medical treatment adequate to reasonably inform the person receiving the written demand of the nature and scope of the injury claimed; or
(b) In an action for damage to property, documentation of the repair of the property, a written estimate for the repair of the property or a written estimate of the difference in the value of the property before the damage and the value of the property after the damage.

(4) If after making a demand under this section, and before commencing an action, a plaintiff acquires any additional information described in subsection (3) of this section that was not provided with the demand, the plaintiff must provide that information to the defendant, and to the defendant's insurer, if known to the plaintiff, as soon as possible after the information becomes available to the plaintiff.

(5) A plaintiff may not recover attorney fees under this section if the plaintiff does not comply with the requirements of subsections (3) and (4) of this section.

(6) The provisions of this section do not apply to any action based on contract. O.R.S. § 20.080 (This is the text of the section which is effective until January 1, 2012. There is a new section that will be effective after that date.)

In effectuating a § 20.080 claim for attorneys' fees, the plaintiff must send a written demand with supporting documentation at least 30 days prior to the filing of a suit seeking $7,500 or less. If the defendant makes an offer before suit that is rejected, and the plaintiff ultimately recovers less than that offer, no attorneys' fees are assessed. However, if no offer is made before suit, then the plaintiff is eligible for attorneys' fees if he/she is awarded any recovery at all at arbitration or trial.

Over the years the threshold dollar amount under this statute has risen. It recently went from $5,500 to $7,500 and that number is set to rise to $10,000 in 2012. The requirement that supporting documentation be provided with the demand is new, and defendants will undoubtedly seek to avoid § 20.080 fees by arguing that supporting documentation with the demand was insufficient. Thus, a plaintiff is well-advised to adhere closely to the statutory directives as to which supporting information to provide, and to err on the side of inclusion. Conversely, this could create privacy and disclosure issues.

As you can imagine, § 20.080 is an effective tool in subrogation cases, making an appearance in virtually every action with an amount in controversy under the statutory amount. In cases where the amount in controversy is slightly over the § 20.080 threshold, it might be advisable to reduce the amount to $7,500 ($10,000 in 2010) in order to take advantage of the threat of attorneys' fees.

AUTO SUBROGATION

MADE WHOLE CLASS ACTION FAILS

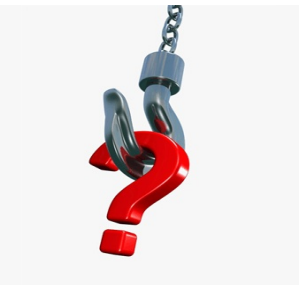
***Chandler v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 938113 (9th Cir. 2010)**

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

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

reimbursement from the third-party tortfeasor's insurer, which questioned the charge and paid State Farm only $70. State Farm apparently accepted the $70 payment. The plaintiff then also pursued reimbursement of his out-of-pocket rental costs from the third-party tortfeasor's insurer, which refused to pay. Rather than institute a lawsuit against the driver who rear-ended him, the plaintiff demanded that State Farm pay him his out-of-pocket costs from the $70 it had received from the driver's insurance company because, according to the plaintiff, he is entitled to reimbursement from State Farm under the "made whole" rule, which he argued barred State Farm from recovering any of its expenses until the plaintiff's rental car expenses were paid in full.

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



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

The decision is a beacon of hope in a subrogation world in which the very concept of made whole has been twisted to the point where in some jurisdictions it trumps even the ability of parties to contract around the made whole requirement. We expect to see more twisted efforts to fit the square made whole peg into the round hole of subrogation, but the more common sense decisions we have to combat such efforts the better off we'll be as an industry. If you should have any questions regarding the Made Whole Doctrine or subrogation in general, please contact Gary Wickert at gwickert@mwl-law.com.

UPCOMING EVENTS.....

December 16, 2010 - Gary Wickert and Russell Whittle will be presenting a live webinar entitled "Medicare Set-Asides and The Subrogation Professional" from 10:30 - 11:30 a.m. (CST). This webinar is approved for 1.0 hours of Texas CE credit 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.

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

PLEASE NOTE.....

We are providing webinars and, as we do, we're putting recorded versions of the webinars on our Seminars/Webinars page on our website at www.mwl-law.com, which can be viewed at no cost. The most recent webinars to be added are *Construction Defect Subrogation* and *Subrogating Against God: Creative Ways of Circumventing the Act of God Defense.*

MERRY CHRISTMAS AND HAPPY NEW YEAR!

Matthiesen, Wickert & Lehrer, S.C. would like to thank all of our clients for a wonderful year and we wish you all a Merry Christmas, Happy Hanukkah, and a blessed Holiday Season. Regardless of what Christmas means to you, we hope your Christmas is full of holiday cheer shared with family and friends. For us at Matthiesen, Wickert & Lehrer, S.C., Christmas is just the beginning – a simple, yet wonderful reminder of Christ's humble beginning as a human child in this world. It's only a beginning because His birth merely set the stage for the power, glory, and salvation that would be revealed in His life, death, and resurrection come Easter morning.

An important part of the holiday season is remembering those who make the holidays meaningful to us. Matthiesen, Wickert & Lehrer, S.C. would like to wish you and your family all the happiness and prosperity this Season can bring, and may it follow you throughout the coming year.