MWL

MATTHIESEN, WICKERT & LEHRER, S.C.
ATTORNEYS AT LAW

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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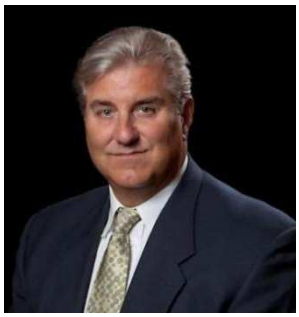
HEALTH INSURANCE SUBROGATION



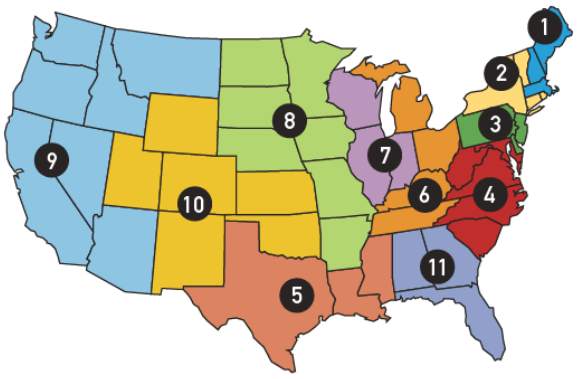
FEDERAL COURT RULING MAY PROVE TO BE CRYSTAL BALL ON 2ND CIRCUIT MADE WHOLE POSITION

Iron Workers Locals 40, 361 & 417 Health Fund v. Dinnigan, 2012 WL 5877426 (S.D.N.Y. 2012)

By Gary L. Wickert

As most of us know, the Made Whole Doctrine (MWD) in almost every state stands for the proposition that if the insured is not "made whole" by a third-party recovery for all elements of the damages he has suffered, subrogation will not be allowed. The MWD has been playing an increasingly significant role in ERISA and health insurance subrogation across the country. The predominant preemption question to be faced in most cases involving the MWD is whether or not specific Plan language is sufficient to overcome the application of this Doctrine. Even though there are an infinite number of Plan language variations, there are usually only two results - the MWD applies and no subrogation is allowed, or it does not, and subrogation is allowed. The issue within health insurance subrogation is whether or not ERISA Plan language which provides for subrogation and/or reimbursement even when the Plan beneficiary is not made whole is sufficient to preempt and avoid application of the MWD in the state in which a case is pending. Right now, the 2nd Circuit has not addressed or taken a position on this issue. However, the Federal Court's ruling from New York's Southern District may predict how the 2nd Circuit will rule on this issue when it finally does take a position.

There are 11 federal regional circuits, each covering several states. The MWD as it applies to ERISA and health insurance subrogation is handled differently from circuit to circuit.



1st Circuit: The MWD does not apply where the Plan confers an unqualified entitled to reimbursement on the Plan. *Harris v. Harvard Pilgrim Healthcare, Inc.*, 208 F.3d 274 (1st Cir. 2000).

2nd Circuit: Has never addressed the MWD as it applies to an ERISA Plan's right to reimbursement.

3rd Circuit: For a long time refused to apply the MWD to ERISA subrogation as the default rule. However, in 2011, the infamous *McCutchen* case for the first time declared that because § 1132(a)(1)(B) limits a Plan fiduciary's available relief to "other appropriate relief," a Plan is limited in its recovery from a beneficiary by the equitable defenses "typically available in equity," including the MWD. *US Airways, Inc. v. McCutchen*, 2011 WL 5557411 (3rd Cir. 2011) (on appeal to and argued before the U.S. Supreme Court on November 27, 2012).

4th Circuit: The MWD will not apply unless the Plan specifically states that it will apply. *In re Paris*, 211 F.3d 1265 (4th Cir. 2000).

5th Circuit: As long as the Plan language provides for "full reimbursement, 100% reimbursement, or reimbursement to the extent of benefits paid," or similar language, the MWD will not apply. *Sunbeam-Oster, Inc. v. Whitehurst*, 102 F.3d 1368 (5th Cir. 1996).

6th Circuit: Applies the MWD as the default rule and requires the language of an ERISA Plan to conclusively overcome it or otherwise clearly establish its priority right over any partial recovery. *Copeland Oaks v. Haupt*, 209 F.3d 811 (6th Cir. 2000).

7th Circuit: Does not allow application of the MWD where the Plan specifically disclaims the rule. *Cutting v. Jerome Foods, Inc*., 993 F.2d 1293 (7th Cir. 1993).

8th Circuit: Copied the **5th Circuit**. As long as the Plan language provides for "full reimbursement, 100% reimbursement, or reimbursement to the extent of benefits paid," or similar language, the MWD will not apply. *Waller v. Hormel Foods, Inc.*, 120 F.3d 138 (8th Cir. 1997).

9th Circuit: For years applied the MWD as the default rule. Unless the Plan language specifically allowed the Plan a right of first reimbursement out of any recovery, a Plan beneficiary was able to obtain even if the Plan beneficiary was not made whole. *Barnes v. Independent Auto. Dealers Ass'n of Cal. H & We Benefit Plan*, 64 F.3d 1389 (9th Cir. 1995). However, that position is in question with the decision in *CGI Technologies and Solutions, Inc. v. Rose*, which holds that the statutory term "appropriate equitable relief" places an "unmistakable limitation" on the availability of equitable relief, and a court must assess the degree to which the traditional equitable defenses raised by a beneficiary defending against subrogation claims, including the MWD, are applicable in delimiting those categories of relief that were typically available in equity and that therefore hem in what is "appropriate equitable relief" within the meaning of § 502(a)(3). *CGI Technologies & Solutions, Inc., v. Rose,* 683 F.3d 1113 (9th Cir. 2012) (Amicus Brief on behalf of NASP was written and filed by Matthiesen, Wickert & Lehrer, S.C.).

10th Circuit: Plan language can override the MWD when it "gives priority over any funds paid by a third party." *Alves v. Silverado Foods, Inc.*, 6 Fed. Appx. 697 (10th Cir. 2001).

11th Circuit: The MWD applies to limit a Plan's subrogation rights where an insured has not received compensation for his total loss *and* the Plan does not explicitly preclude operation of the MWD. *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997).

As you can see, the only Circuit which remains undecided on the applicability of the MWD is the **2nd Circuit**. On November 21, 2012, however, U.S. District Court Judge Paul Crotty signed an opinion which may give us some indication as to how the 2nd Circuit is leaning on this issue. In *Iron Workers Locals 40, 361 & 417 Health Fund v. Dinnigan,* an ERISA Plan sued one of its members, Robert Dinnigan, seeking equitable relief and a constructive trust for reimbursement of $1.7 million it paid on behalf of Dinnigan's 7-year-old daughter following a car accident, rendering her a quadriplegic. Dinnigan filed suit against several defendants and ultimately recovered

over $14 million. The Plan – the terms of which expressly repudiated the MWD - sought recovery of its subrogation interest from Dinnigan, who argued, among other things, that the Plan is limited to "appropriate equitable relief" and that because his daughter was not made whole, the MWD should prevent any subrogation or reimbursement by the Plan. The Plan language included the following clause:

> *The [Health] Fund's rights will not be defeated or reduced by the application of any "Made Whole Doctrine" ... or any other doctrine purporting to defeat the [Health] Fund's right by allocating the proceeds exclusively, or in part, to non-medical expense damages.*

The judge held that because of the unambiguous language above, it was not necessary for the beneficiary to be made whole before the Plan could seek reimbursement. The decision noted that *"the 2nd Circuit has not adopted the Made Whole Doctrine as an automatic gap-filler."* It did require the Plan to contribute 25% of the $1.7 million it was going to recover to the plaintiffs as their pro rata share of the attorney's fees incurred by plaintiff in making the $14 million recovery.

There is no indication whether this decision has or will be appealed to the 2nd Circuit Court of Appeals. However, if we can consider this District Court opinion as a potential window into the soul of the 2nd Circuit, it portends good things if, and when, the 2nd Circuit finally becomes affiliated in the ongoing MWD debate involving ERISA and health insurance subrogation. If you have any questions regarding ERISA or health insurance subrogation, or need subrogation representation anywhere within North America, contact Gary Wickert at **gwickert@mwl-law.com**.

PRODUCT LIABILITY SUBROGATION

PRODUCT LIABILITY TEST CHANGED IN WISCONSIN

Tort Reform Bill Will Affect Subrogation Litigation Too

By Aaron D. Plamann

A significant portion of subrogation cases involve defective products causing injury or damage to people and property. Therefore, any significant changes in product liability laws become ground zero for continuing subrogation education. This is the case in Wisconsin where, on February 1, 2011, the Wisconsin Omnibus Tort Reform Act went into effect, severely affecting and changing product liability law in Wisconsin. The Act, approved by a 57 to 36 vote in the Assembly (note: there are currently 59 Republicans, 39 Democrats, and 1 Independent in the Wisconsin Assembly) made some rather dramatic changes to product liability in Wisconsin. Those changes will, in turn, have a significant impact on product liability subrogation cases.

Changes In Wisconsin Product Liability Law

With regards to product liability cases, the principal change in the Act was the adoption of a new test for defectiveness when claiming a design defect in a product. In the past, in order to establish strict liability, the standard was whether a product was dangerous beyond which would be contemplated by the ordinary consumer ("consumer expectations" test). This test focused on the reasonable expectations of the ordinary consumer and was arguably a lower hurdle for a plaintiff to overcome in proving that the design was defective.

The Act changed this standard to a more exact test of whether there is a reasonable alternative design that should have been utilized by the manufacturer. Now, in Wisconsin, in an action for damages caused by a manufactured product based on strict liability, a product is defective in its design if the foreseeable risk of harm could have been reduced or avoided by the adoption of a reasonable alternative design, the omission of which renders the product not reasonably safe.

This is an expansive move to a standard that may be more difficult and costly for a plaintiff to prove. An engineering expert will not only need to identify the cause

of the injury (not always obvious in complex machines), but also identify whether an alternative design could have reduced or avoided the injury. This means that an expert will have to be carefully chosen to ensure that he or she has the correct experience to render an opinion that there was a reasonable alternative design that the manufacturer could have chosen.

The Act also changed the apportionment of fault in product liability cases filed after February 1, 2011. Now, if more than one manufacturer, distributor, or seller of a product is found liable, the court must apportion liability among those defendants and that liability will be several and not joint. Further, in addition to the other elements that are needed to prove a product liability claim, a claimant must prove that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm.

Now, if a claimant cannot prove that a specific product caused an injury (if there are multiple manufacturers of a product and a specific manufacturer cannot be identified), then the claimant must prove all of the following: (1) no other lawful process exists for the claimant to seek any redress from any other person for the injury or harm; (2) the plaintiff has suffered an injury or damage that can be caused only by a product chemically identical to the specific product that caused the plaintiff's harm; and (3) the manufacturer, distributor, seller, or promoter of a product manufactured the product as a complete integrated product in the form used by the plaintiff.

Other Notable Changes To Wisconsin Law

The bill has some other rather broad-reaching effects above and beyond its effect on product liability actions. The changes will apply to actions filed on or after its effective date. Some of these changes include the following:

Punitive Damages: (a) Places a cap where punitive damages received by a plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater. Wis. Stat. § 895.043(6). However, this cap does not apply to a plaintiff seeking punitive damages from a defendant whose actions included the operation of a vehicle while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle. (Note: Gary Wickert was consulted by the Wisconsin Legislature and assisted in the drafting of this portion of the statute); and (b) Raises the threshold for winning punitive damages in lawsuits so that plaintiffs would have to prove that defendants acted "with intent to cause injury to a particular person" or with a knowledge that their action would lead to that result.

Expert Testimony: (a) In addition to the current requirements for expert testimony in Wisconsin, and in an effort to rid the state of junk forensic science, an expert may now only testify if: (1) the testimony is based upon a sufficient review of the facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert has applied the principles and methods reliably to the facts.

Wisconsin Is Following Other States

Subrogation plaintiffs should keep in mind that Wisconsin's change in the standard for proving a design defect follows most other states in moving away from the *Restatement (Second) of Torts* to the *Restatement (Third) of Torts*. One should expect that most other states that are still following the *Restatement (Second)* and its consumer expectations test will follow suit in the near future. So, even if you are not subrogating a lot in Wisconsin, states that you are subrogating in probably will adopt changes in their product liability law similar to the changes recently adopted in Wisconsin, if they haven't already.

Further, the change in expert testimony requirement brings a heightened standard for engineering expert witnesses. Many adjusters request an expert report immediately after sending a part or machine for an engineering analysis. They usually receive a general report from an engineering expert, firm, or laboratory, which come to opinions without explaining the analysis behind those opinions. These reports look good, but will be of limited use at trial. Not only will the expert's opinions have to hold up in court, but how the expert reached that opinion must also hold up.

Matthiesen, Wickert & Lehrer, S.C. (MWL) believes in a scientific, aggressive, yet cost-effective approach to the evaluation and pursuit of product liability subrogation cases. Our maxim has always been that you cannot spend yourself into a successful subrogation program. As an engineer, I am one of the lawyers at MWL who reviews and pursues product liability subrogation. Please contact me at **aplamann@mwl-law.com** if you have any questions or would like us to review a new case for product liability potential.

GENERAL SUBROGATION

WAIVER OF THE STATUTE OF LIMITATIONS

By Timothy L. Pagel

Insurance companies often engage in settlement negotiations with claimants and/or tortfeasors, right up to the statute of limitations. When an adjuster is negotiating settlement of a claim with a third-party claimant or is attempting to negotiate recovery of a subrogation interest from a tortfeasor or their carrier, the subject of waiving the statute of limitations is often raised. When the liability adjuster is negotiating with a third-party claimant, especially as time draws close to the end of the statute of limitations period, he or she wants to be careful not to inadvertently waive the statute of limitations defense. Likewise, when the subrogation recovery negotiations move along successfully, but extend beyond the applicable statute of limitations period and no suit is filed to preserve the subrogation cause of action, it is good to know whether and when the argument that the statute of limitations has been waived by the actions or words of the third-party carrier is available.

Statutes of limitations are generally governed by state law, which makes anything other than a generic discussion of this subject, beyond the scope of a newsletter article such as this. In Illinois, for example, most attorneys and claims handlers are familiar with the two-year statute of limitations for personal injury cases. 735 I.L.C.S. § 5/13-202. However, there are many other statutes of limitations in Illinois. There are different deadlines for construction cases, warranty cases and property damage claims, among others. There are also statutes of repose which begin to run not from the date the cause of action accrued, but from when some event (e.g., substantial completion of construction of a house) occurs. Claims for minors in most states do not run until a number of years after they reach majority. Statutes of limitations can be tolled for members of the armed forces or during periods in which the defendant is out-of-state. Tex. Civ. Prac. & Rem. Code § 16.063 provides that "*The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of absence*." So, it is an understatement to say that any claims handler should be familiar with exactly which statute of limitations is involved for the type of claim being handled.

In order to avoid someone claiming your actions have tolled the statute of limitations, it is important to recognize the difference between estoppel and waiver. For example, in Illinois, a claim of "estoppel" is made when:

- The other person misrepresented or concealed material facts;
- The other person knew at the time he or she made the representations that they were untrue;
- The party claiming estoppel did not know that the representations were untrue when they were made and when that party decided to act, or not act, upon the representations;
- The other person intended or reasonably expected that the party claiming estoppel would determine whether to act, or not, based upon the representation;
- The party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and
- The party claiming estoppel would be prejudiced by his or her reliance on the representations. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006).

These elements must be proven by the party claiming estoppel. The conduct of the adjuster in dealing with the claimant is what matters here. If it becomes apparent that the claimant believes the statute of limitations is two years, when it is one, and the adjuster does or says nothing, estoppel may prevent a successful defense based on the statute of limitations. In Wisconsin, estoppel can be invoked to preclude a defense based on a statute of limitations when a claims adjuster has been guilty of fraudulent or inequitable conduct. The conduct need not constitute actual fraud, but may be equivalent to a representation upon which the plaintiff may have relied to his or her disadvantage by not commencing his or her action within the statutory period. That conduct must have occurred before the expiration of the limitation period with no unreasonable delay by the aggrieved party after the inducement. *State ex rel. Susedik v. Knutson*, 52 Wis.2d 593 (1971).

In *Elliott v. General Casualty Co.*, 2011 Wis. App. 155, 807 N.W.2d 33, 337 Wis.2d 737, negotiations by an insured with his insurance company resulted in a check for less than the insured wanted being sent after the statutory one-year period for action on a fire insurance policy. The Court said that assurances by the claims adjuster that the claim would be paid when the repairs were complete, combined with simultaneously telling the insured not to begin repairs until the estimate was approved, was sufficiently "unfair and misleading" as to outweigh the public interest in the statute of limitations being enforced.

Every state is different and the need to be familiar with a state's laws regarding the statute of limitations is important. It is also challenging when a claims adjuster's geographical responsibilities cover many states. The general rule is that any plaintiff, who delays filing a claim simply because he or she thinks the matter will settle, without obtaining an agreement tolling the statute of limitations runs the risk of being barred from recovery. However, if the defendant or defendant's carrier intentionally lures the plaintiff into a false sense of security, estoppel may apply to a statute of limitations defense. Repeated promises to settle, dragging out the settlement process or delay in providing information to the claimant, all figure into the possible estoppel argument. The plaintiff must reasonably also rely on the representation by the defendant.

When you are negotiating with an unrepresented individual, it is always wise to simply advise them of the existence of the statute of limitations. There is usually no need to become their lawyer and specify the date on which the statute runs, only that there is one. There is just as big a risk of notifying them of an exact date which later turns out to be wrong. If you are dealing with an attorney, there is usually no need to warn or inform them of the statute of limitations. If you are close to settlement and need a short agreement tolling the statute of limitations, contact Tim Pagel at **tpagel@mwl-law.com**.

MWL FIRM NEWS

MWL DOES ITS PART TO SUPPORT THE TROOPS THIS HOLIDAY SEASON

Each year, MWL supports our troops by providing space within our facility for our local "*Support The Troops*" coalition to assemble, package, and ship thousands of care packages to our military troops. This year was no different. The coalition had 20 pallets of donated Girl Scout Cookies delivered to our facility that were taken inside and placed into care packages being assembled for our military troops this holiday season. Our local "*Support The Troops*" coalition is headed up by LeAnn Boudwine, who has a two sons in the military, and who donates a good portion of her time all year round to gathering materials for the care packages they send to our troops. We want to thank all the brave men and women of our armed forces for their service, dedication, and the sacrifices they and their families have made on behalf of us, our country, and for freedom. God bless them all!

UPCOMING EVENTS

January 16, 2013 – Gary Wickert will be presenting a live webinar on *"California 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.

REGISTER NOW

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!