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QUARTERLY ELECTRONIC INSURANCE DEFENSE NEWSLETTER FALL 2011

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

This quarterly electronic insurance defense newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of insurance defense and insurance coverage issues have, for many lawyers and insurance professionals, made keeping current with changing laws an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this quarterly insurance defense newsletter, to assist in the dissemination of new developments in insurance law and the continuing education of insurance 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.

IN THIS ISSUE....

WORKERS' COMPENSATION DEFENSE LITIGATION

THE SECRET TO EFFECTIVE DEFENSE OF WISCONSIN WORKERS' COMPENSATION CLAIMS

By Peter M. Silver

Many of our clients may be interested to learn that Wisconsin was the first state to enact a constitutional workers' compensation law back in 1911. Thereafter, many other states actually fashioned workers' compensation programs after our own. Matthiesen, Wickert & Lehrer, S.C. (MWL) has one of the best-established and experienced worker's compensation practices in Wisconsin, with five attorneys who devote their practices to this very specialized type of defense practice. We are experienced in all aspects of workers compensation defense, including penalty claims and claims running directly against the employers such as wrongful refusal to rehire and wrongful termination. While MWL is committed to providing the best workers' compensation defense representation available to employers and insurers in Wisconsin, it is how we go about doing that which sets us apart from the rest.

To be successful, workers' compensation defense must be both aggressive and cost-effective – two objectives usually considered to be mutually-exclusive. Workers' compensation defense attorneys must be able to build a strong wall of defense around employers, protecting Wisconsin employers from frivolous and fraudulent workers' compensation claims, keeping the insurance client well-informed and well-equipped to make informed decisions on the handling of the file. They must be adept at

working with in-state and out-of-state employers on all workers' compensation defense issues, particularly in the areas of:

- Uninsured Employers
- Workers' Compensation Fraud
- Serious And Willful Misconduct Allegations
- Counsel To Minimize Risk And Avoid Problems
- Workers' Compensation Appeals

Yet, the best workers' compensation defense is a strong workers' compensation defense. Little things matter and these little things set apart a good workers' compensation defense firm from a great one. MWL focuses on the following objectives in any workers' compensation defense matter referred to us:

(1) Assign a claim to defense counsel once there is a dispute concerning liability for indemnity and/or medical bills or whether injury arose out of the employment …. preferably before a Hearing Application is filed.

(2) Defense counsel and claims representative work together to determine the appropriate IME to use for settlement as well as credibility before an Administrative Law Judge at the hearing.

(3) If a worker is Medicare eligible, obtain a Medicare Set-Aside quote as soon as possible to determine if future medicals can be closed.

(4) Calculate the social security offset to reduce liability for Temporary Total Disability or Permanent Partial Disability.

(5) Work with the insured to get the worker back to work to avoid excessive lost time benefits.

(6) If the worker has sustained a permanent injury, obtain a vocational expert to minimize the exposure for retraining benefits or loss of earning capacity.

(7) Obtain a job video or accurate job description of the worker's tasks to either get employee back to work or minimize vocational loss.

(8) Determine if there is third-party liability to recover the worker's compensation benefits paid ... work together with the plaintiff's counsel at mediation to maximize recovery and close out the worker's compensation claim.

(9) Initiate settlement negotiations with the worker or their legal counsel to expedite resolution of claim.

(10) Draft an iron-clad Compromise Agreement to ensure approval of the settlement by the Workers' Compensation Board.

Some of these objectives may seem fairly simple taken alone. However, aggressive and cost-effective workers' compensation defense is the sum of its parts, and workers' compensation subrogation insurers should come to expect the above as a minimum from its defense counsel. And, of course, it doesn't hurt if your defense attorneys know a little something about subrogation to boot.

If you have any questions regarding this article or workers' compensation defense in general, please contact Peter Silver at **psilver@mwl-law.com**.

SELECTING AND USING EXPERTS IN WISCONSIN

New Developments In Forensic Expert Testimony

By Douglas W. Lehrer

The new Omnibus Tort Reform Act (SB 1) was signed into law by Gov. Scott Walker and became effective February 1, 2011. These changes are spread throughout the Wisconsin Statutes but are embodied in 2011 Wisconsin Act 2 (the "Act"). With Act 2, the legislature has essentially rewritten Wisconsin product liability law. The changes to product liability law and the use of experts can be broken down into four areas:

Consumer Expectations Test Replaced With Reasonable Alternative Standard. This is essentially a new test for whether a product has a "defect." Previously, a broad "consumer expectations test" was used to determine the liability of the product manufacturer. The test inquired as to whether an ordinary, reasonable consumer would find the product's design, manufacture and/or instructions/warnings defective. Under the new test, a plaintiff alleging that he was injured by a design defect can only recover if he produces proof of a *reasonable alternative design* that would have reduced the foreseeable dangers. Wis. Stat. § 895.047(1)(a). This is a move toward the test employed by the *Restatement (Third) of Torts*, which is being used by more and more states. Under the old law, a person injured by a product could hold the manufacturer strictly liable by showing that:

(a) the product was unreasonably dangerous to the person;
(b) the seller was in the business of selling the product;
(c) the product was in a defective condition when it left seller;
(d) the product reached the consumer in same condition it was sold; and
(e) the defect was a cause of the injuries or property damage.

The standard for "unreasonably dangerous" was that the product was dangerous beyond that which would be contemplated by the consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics. *Restatement (Second) of Torts § 402A*. Under the new law, there is a distinction between the three forms of defects – manufacturing, design, and marketing. To prove that a product had a design defect, the plaintiff must prove that there was a *reasonable alternative design* which would have reduced the foreseeable dangers. If inadequate warnings are claimed, the plaintiff must now show that the foreseeable dangers would have been reduced by reasonable warnings or instructions. Wis. Stat. § 895.047(1)(a). Therefore, the plaintiff has the burden of showing that the omission of a safer design or necessary warning made the product unreasonably dangerous. After proving the product to be defective, the plaintiff can get strict liability by showing four remaining elements above - (b) through (e).

The new "Reasonable Alternative Standard" will heighten the battle of experts in most files. The expert will need to be qualified in the design of products (see *Daubert* discussion below) in order for the plaintiff to meet the burden of showing a reasonable alternative design and proving that the failure to use that design rendered the product defective. There is a shift of emphasis from the dangerous condition of the product to the conduct of the manufacturer.

Additional Defenses Available To Manufacturers. The new Act also provides a list of statutory defenses for manufacturers which are essentially exceptions to liability:

(a) Intoxication or drug use. Proving use of drugs or alcohol by the plaintiff creates a rebuttable presumption that this was the cause of the injury. Wis. Stat. § 895.047(3)(a).

(b) A product is presumptively not defective if it meets and satisfies all applicable federal or state standards at the time of sale. Wis. Stat. § 895.047(3)(b).

(c) A court may dismiss any claim for damages caused by a product's inherent characteristic if ordinary consumers would recognize it as such. Wis. Stat. § 895.047(3)(d).

(d) The liability of the defendant is reduced by the percentage of harm attributable to the plaintiff's misuse, alteration, or modification of the product. Wis. Stat. § 895.047(3)(c).

In addition, sellers or distributors of products are not strictly liable for the product defect unless they have contractually assumed manufacturing, design, or warning duties from the manufacturer. Wis. Stat. § 895.047(2)(a)(1). They are not liable if they received the product in a sealed container and did not have a reasonable opportunity to test or inspect the product. Wis. Stat. § 895.047(3)(e).

The Act also changes the laws of evidence with regard to subsequent remedial measures. Plaintiffs can no longer introduce such measures, unless it is used to show that a reasonable alternative design existed at the time the product was made. Wis. Stat. § 895.047(4). Lastly, the Act institutes a new statute of repose which bars all claims involving products manufactured more than 15 years before the injury. Wis. Stat. § 895.047(5).

Apportionment Of Fault/Contributory Negligence. The Act changes the effect of contributory negligence on a claimant's recovery. A plaintiff who is 51% or more at fault cannot recover from a manufacturer or seller. Wis. Stat. § 895.047(3)(d). The jury must apportion fault between the plaintiff, the product and any other person. If the defendant is 51% or more at fault, it is jointly and severally liable. Wis. Stat. § 895.045(1).

Restricts Rarely Used "Risk Contribution" Theory. The Act also reinforces the requirement of specific product identification for all types of claims arising from products. This is a rare exception when manufacturers of lead-based paint or asbestos are involved.

EFFECT ON EXPERTS

Wisconsin has now joined the federal courts and the majority of states in adopting the *Daubert* "reliability" rule for the admission of expert testimony. No longer will courts in Wisconsin rely on the *Walstad* "relevancy" rule, but rather judges in Wisconsin will now take a more active gatekeeper's role in determining whether expert witnesses will be allowed to testify at the time of trial. To fully understand the implications of this change, it is necessary to take a brief look at how Wisconsin courts previously handled expert testimony. In *Watson v. State*, 64 Wis.2d 264 (1974), the Wisconsin Supreme Court established the "reliability" standard wherein a wide open rule of cross examination of experts at trial was utilized to test credibility. In 1984, the Court clarified the Wisconsin rule by stating that if a witness had scientific, technical or other specialized knowledge which would assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, would be able to testify regarding that knowledge in the form of an opinion or otherwise. *State v. Walstad*, 119 Wis.2d 483 (1984).

Under the new *Daubert* rule, Wisconsin trial judges must now act as gatekeepers as to all expert testimony as to both relevancy and reliability. For example, absent a stipulation, Wisconsin trial judges must conduct a hearing outside the presence of the jury to determine whether expert testimony will or will not be allowed to be heard by the jury. In that hearing, the trial judge will be guided by several factors including the following:

(1) whether the expert's technique or theory has been tested;

(2) whether the technique or theory has been subjected to peer review and publication;

(3) whether the known or potential rate of error;

(4) whether the existence and maintenance of standards and controls;

(5) whether the technique or theory has been generally accepted in the scientific community;

(6) whether the experts are proposing to testify about matters flowing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed it for purposes of testifying;

(7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

(8) whether the expert has adequately accounted for obvious alternative explanations;

(9) whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and

(10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

After reviewing these factors, an expert will then only be allowed to testify if all the following are true:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

With this change, it will be important for Wisconsin defense counsel to scrutinize the background, opinions and theories of all plaintiffs' expert witnesses to consider whether a *Daubert* hearing can be used to prevent plaintiffs' expert witnesses from testifying at trial. Likewise, defense counsel will want to make certain that the opinions of any expert retained will be sufficiently relevant and reliable to withstand any *Daubert* hearing.

If you have any questions regarding this article or insurance defense litigation in general, please contact Doug Lehrer at **dlehrer@mwl-law.com**.

INSURANCE DEFENSE LITIGATION

NEW CHANGE IN INTEREST RATES ON ALL CIVIL JUDGMENTS IN WISCONSIN

On November 16, 2011, Special Session Senate Bill 14 was approved which amends the interest rates calculated on all civil judgments in Wisconsin. As will be outlined below, this law, which became effective December 2, 2011, will change how interest rates will be calculated when money judgments are entered.

Prior to December 2, 2011, interest rates on all money judgments were calculated at a rate of 12% per year. Thus, if a civil judgment was entered for $100,000 on January 1, 2010 and satisfied on January 1, 2011, interest payments would need to be made in the amount of $12,000 to fully satisfy the judgment. For judgments that remained unsatisfied for many years, interest payments often became substantial.

For a money judgment entered on or after December 2, 2011, the interest rate will be *"equal to 1% plus the prime rate in effect on January 1st of the year in which the*

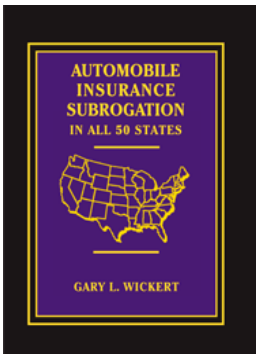
judgment is entered if the judgment is entered on or before June 30th of that year or in effect on July 1st of the year in which the judgment is entered if the judgment is entered after June 30th of that year..." As was the case before, interest rates will be calculated *"from the time of verdict, decision or report until judgment is entered..."* Prime rate will be determined as reported by the Federal Reserve Board in Federal Reserve Statistical Release H. 15. The change in interest rate calculation will apply to Wis. Stats. § 807.01 (Settlement Offers), § 814.04 (Interest on Verdict When Judgment is for Recovery of Money) and § 815.05 (Execution Upon Judgment for Recovery of Money).

Since January 1, 2008, the prime interest rate has held consistent at a rate of 3.25%. Thus, if a civil judgment is entered for $100,000 on December 8, 2011 and satisfied on December 8, 2012, interest payments will be calculated at a rate of 4.25% or $4,250. This is $7,750 less then it was under the previous statutes. Of course, prime rate can and often does change.

If you should have any questions regarding this article or insurance defense litigation in general, please contact Douglas W. Lehrer at **dlehrer@mwl-law.com**.

UPCOMING EVENTS

October 26-28, 2011 - MWL exhibited at the *Self-Funding Employer Healthcare and Workers' Compensation Conference* in Chicago, Illinois. Jamie Breen enjoyed meeting everyone who attended this event. We would like to congratulate the two winners who each won an autographed copy of our treatise entitled *ERISA and Health Insurance Subrogation In All 50 States* at the prize drawing we had at our exhibit booth. The winners were selected from the business cards placed in the basket at our booth. Those winners were Brad Cohen, with Insurance Care Direct, and Allen Keehler, with Avert Risk Management Group, LLC.



December 2011 - MWL's *Automobile Insurance Subrogation: In All 50 States* will soon be released. 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. There is no other book, resource, or authority like it - anywhere. 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. The myriad of subrogation topics addressed in this treatise were carefully selected by the author as the most frequently-asked-about areas of automobile insurance subrogation. MWL 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. You can pre-order the book or learn more about it from our publisher, Juris Publishing, or by clicking **HERE**. The publisher is offering a 20% pre-publishing discount for the book if it is pre-ordered by December 15, 2011.

February 8, 2012 – Gary Wickert will be presenting a live webinar entitled *"Automobile Subrogation In All 50 States*" from 10:00 - 12:00 p.m. (CST). This webinar is approved for 2.0 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.

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**.

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.
