MATTHIESEN, WICKERT & LEHRER, S.C.

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER FEBRUARY 2012

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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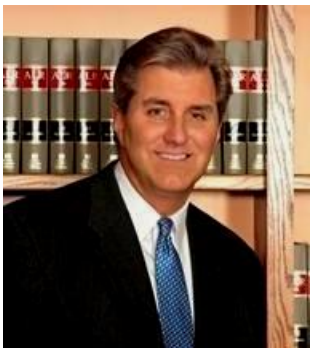

CONNECTICUT CLARIFIES LANDLORD/TENANT SUBROGATION

Amica Mut. Ins. Co. v. Andresky, 2012 WL 527678 (Conn. Super. Ct. 2012)

By Gary L. Wickert

A new Connecticut Superior Court decision has clarified the rights of a landlord's property insurer to subrogate against a tenant causing a fire or otherwise damaging the rental property. In general, tenants in Connecticut are co-insureds under a landlord's fire insurance policy and may not be sued for their negligence as they are an insured under the policy. *St. Paul Fire & Marine Ins. Co. v. Durr*, 2001 WL 984782 (Conn. Super. Ct. 2001) (*not reported in A.2d*). This holding was first adopted in *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975) ("*Sutton* Rule"). In *DiLullo v. Joseph*, 792 A.2d 819 (Conn. 2002), the Connecticut Supreme Court established a "default rule of law" when there is no agreement between the landlord and tenant as to who bears the risk of loss. That "default" was where no such agreement existed in public policy against economic waste, and the lack of expectation on the part of the tenant led to the conclusion, then no right of subrogation existed. The *DiLullo* Court specifically noted that "tenants and landlords are always free to allocate their risks and coverages by specific agreements, in their leases and otherwise." *Id*.

In *Middlesex Mutual Assurance Co. v. Vaszil*, 279 Conn. 28 (2006), the Connecticut Supreme Court held that the lease in question did "not remotely inform the defendant that they would be liable to their landlord's insurer" for fire damages to the landlord's building, nor did it inform the defendant of the need to obtain fire insurance "to cover the value of the entire multi-unit apartment building." One of the reasons *DiLullo* established a "default" rule was to avoid the economic waste of forcing *each* individual tenant in a multi-unit apartment to insure the whole building. However, in *Amica Mut. Ins. Co. v. Andresky*, 2012 WL 527678 (Conn. Super. Ct. 2012), the lease provided:

> *(1) that tenant (defendants) would obtain public liability and fire insurance for the benefit of the landlord and the tenant in the amount of $500,000 for liability and $500,000 for fire, and (2) the tenant would pay all costs if repair is required because of misuse or neglect by tenant, his family or anyone else on the premises.*

The Superior Court in *Andresky* said that this language was "far more clear" and did inform the defendant/tenant that they would be liable to their landlord's insurer.

The Connecticut Legislature has enacted a standard form of fire insurance that all fire insurance policies issued in this state must conform to. C.G.S.A. § 38a-308. In regard to the insurer's subrogation rights, the standard form includes a subrogation provision stating: *"This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefore is made by this Company."* The subrogation clause set forth in C.G.S.A. § 38a-307 fails to provide an insurer with a direct, and inviolate, right of subrogation. It merely provides that an insurer "may require" an insured to assign any rights they have to the insurer. Thus, under this clear language, the right of recovery belongs to the insured, and the insurer can only obtain that right when the insured grants it. *Wasko v. Manella*, 849 A.2d 777 (Conn. 2004). Therefore, the policy must contain specific subrogation language in order for the landlord's carrier to be able to subrogate against one of its tenants.

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

PROPERTY SUBROGATION

NEBRASKA'S CATTLE WARS

Proposed Legislation Would Neuter Supreme Court Decision

Proving that it was the cattle owner's negligence that resulted in cattle roaming a highway and causing serious property damage, death, or personal injury resulting from a collision with a motor vehicle is one of the most challenging – if not impossible – tasks for subrogation professionals. The reason is simple. If and when you do discover who owns the cattle, there is only one person who knows how and why the cattle escaped confinement and wound up in front of your insured's vehicle - the cattle owner himself, who is not about to fall on the sword. In an effort to level the playing field, many states have allowed inferences of negligence under the legal theory known as *Res Ipsa Loquitur*.

In Nebraska, where there are plenty of cattle wandering the roadways and highway, a recent and sensible Supreme Court recognized the difficulty vehicle owners face in this regard and recently issued a decision allowing the use of *Res Ipsa Loquitur* even in the face of a Nebraska statute which requires proof of negligence in order to hold cattle owners responsible. However, the Nebraska Legislature is having none of it, and has proposed legislation which would again make it impossible for innocent vehicle owners and subrogated carriers to recover in these situations.

In Nebraska, the domestic animal's owner is responsible for negligence that results in damage to a person or property lawfully on a public highway, if the accident was one which the owner could

reasonably have anticipated. *Traill v. Ostermeier,* 300 N.W. 375 (Neb. 1941). The owner of livestock must exercise ordinary care to confine his cattle to prevent them from being unattended upon the public highway. *Dizco, Inc. v. Kenton,* 313 N.W.2d 268 (Neb. 1981). If the owner knows, or, in exercise of ordinary diligence, should know that any of his cattle are unattended upon highway, it is his duty to exercise ordinary care to round them up and confine them. *Id*.

In an effort to prevent lawsuits against cattle owners, Section 25-21,274 was enacted in 2001 and currently provides as follows:

> ***§ 25-21,274. Motor vehicle collision with domestic animal; principles applied.***
>
> *(1) In any civil action brought by the owner, operator, or occupant of a motor vehicle or by his or her personal representative or assignee or by the owner of the livestock for damages resulting from collision of a motor vehicle with any domestic animal or animals on a public highway, the following shall apply:*
>
> *(a) The plaintiff's burden of proving his or her case shall not shift at any time to the defendant;*
>
> *(b) The fact of escaped livestock is not, by itself, sufficient to raise an inference of negligence against the defendant; and*
>
> *(c) The standard of care shall be according to principles of ordinary negligence and shall not be strict or absolute liability.*
>
> *(2) For purposes of this section, highway and motor vehicle have the same meaning as in section 39-101.* Neb. Rev. Stat. § 25-21,274 (2001).

In 2011, the Nebraska Supreme Court decided a case involving this statute wherein a rancher placed six head of cattle into a holding pen near his residence. *McLaughlin Freight Lines, Inc. v. Gentrup*, 798 N.W.2d 386 (Neb. 2011). Shortly after midnight, a truck collided with the cattle on a Nebraska State Highway. Though the truck driver was unharmed, the truck sustained damage and the truck owner filed suit. The holding pen in which the cattle were confined was 50 by 80 feet, constructed of steel, and secured to the ground by steel posts which were cemented into the ground. The owner testified that to secure the pen's gate, he wraps a chain around the gate once and places the chain into a latch. He stated that he then hangs the excess chain on the outside of the pen to prevent the cattle from disturbing it. He further testified that on May 13, 2009, he put six cattle in the pen and secured the gate in his usual manner. None of his cattle had ever "licked" or "rubbed [the chain] off" previously, although he had heard of it happening to other ranchers and believed this was the most probable explanation for the escape of his livestock. Affidavits submitted by two cattle producers stated that the latching system used by the defendant cattle owner was common in the industry. The owner had used the pen since 1993 without any cattle escaping.

Following the accident, the owner inspected the pen and found the fence intact, though the gate was open and all six cattle had escaped. He found two of his cattle dead on the highway, and the other four were found alive in a nearby field. The plaintiff's sole theory of recovery was based upon the Doctrine of *Res Ipsa Loquitur*, as the plaintiff had no direct evidence of the owner's alleged negligence. The Court noted that where the defendant presented uncontroverted evidence which indicated that there was no genuine issue of material fact as to whether the cattle would ordinarily escape through the gate in the absence of negligence, § 25–21,274 precluded the plaintiff's suit, and the plaintiff appealed.

The Supreme Court stated that the Doctrine of *Res Ipsa Loquitur* is an exception to the general rule that negligence cannot be presumed, and is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected. The Court stated that there are three elements that must be met for *Res Ipsa Loquitur* to apply:

> (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence;

(2) The instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and
(3) There must be an absence of explanation by the alleged wrongdoer.

The Supreme Court noted that under the facts of this case, a reasonable jury could determine that cattle do not escape enclosures such as this in the absence of negligence. Although the record also reflects that the owner stated that he secured and latched the chain to the gate and placed the excess chain outside of the fence so that the cattle could not lick or rub it, ultimately, the question is one properly decided by a jury. The defendant argued that § 25–21,274 precludes the very application of *Res Ipsa Loquitur*, because the statute states that "the fact of escaped livestock is not, by itself, sufficient to raise an inference of negligence against the defendant." The Court declared that § 25-21,274 merely recites that the fact of escaped livestock is, standing alone, insufficient to raise an inference of negligence against a cattle owner, but *Res Ipsa Loquitur* may still allow a jury to infer negligence under the facts of a case. *Gentrup,* supra.

In Nebraska, it is clear that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the Doctrine of *Res Ipsa Loquitur* is not applicable. *Long v. Hacker,* 520 N.W.2d 195 (Neb. 1994). The Doctrine of *Res Ipsa Loquitur* proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the Doctrine of *Res Ipsa Loquitur* cannot be applied. In order that the Doctrine of *Res Ipsa Loquitur* may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and there is an absence of explanation by the alleged wrongdoer.

In another effort to protect cattle owners from injury and damage done by their animals, Republican State Senator Ken Schilz has proposed legislation directly in response to the *Gentrup* case. Legislative Bill 1021 was introduced on January 17, 2012 and would amend subsection (b) of § 25-21,274 to read:

> *(b) The fact of escaped livestock without evidence of specific acts of negligence by the defendant is not, by itself, sufficient to raise an inference of negligence against the defendant.*

To date, the Bill has been referred to the Judiciary Committee and is set for hearing. However, its passage would once again make subrogating cattle-in-the-road cases all but impossible in Nebraska. For more information on our book entitled "*Where's The Beef?"* – a complete 50 state guide on the history, statutes, and law surrounding open range laws, stock law, statutes, and case decisions regarding the liability of cattle owners for damages caused by collisions with vehicles on the highway – please click **HERE**. If you should have any questions regarding this article or subrogation in general, please contact Gary Wickert at **gwickert@mwl-law.com**.

WORKERS' COMPENSATION SUBROGATION

SIGNIFICANT DECISION LIMITS MASSACHUSETTS WORKERS' COMPENSATION SUBROGATION

Curry v. Great American Ins. Co., 954 N.E.2d 580 (Mass. App. 2011)

Until recently, a Massachusetts employee was obligated to reimburse his or her workers' compensation carrier, out of any judgment or settlement received, any and all benefits previously paid by the carrier. *Pina v. Liberty Mut. Ins. Co*., 445 N.E.2d 1057 (Mass. 1983). In addition, until recently, whether or not a workers' compensation carrier could subrogate against the proceeds from a medical malpractice recovery was not entirely clear. This is because in 1986, the Massachusetts' Legislature enacted Chapter 231 § 60G of the Massachusetts General Laws which purports to reduce the award of damages

in any medical malpractice action by the amount of any collateral source benefits received by the injured worker. M.G.L.A. 231 § 60G. The Collateral Source Rule generally prevents a defendant from showing that the plaintiff had received compensation from an insurance policy, workers' compensation benefits, social security benefits or any other source in order to reduce the plaintiff's total recovery by the amount of such collateral source benefits. *Goldstein v. Gontarz*, 309 N.E.2d 196 (Mass. 1974). Plaintiffs' attorneys would regularly cite Chapter 231 § 60G as an authority for eliminating subrogation in medical malpractice actions, despite the fact that the very language of M.G.L.A. 231 § 60G itself excluded "benefits received pursuant to Chapter 152 of the General Laws" (Massachusetts workers' compensation laws).

All of that changed recently with the Yin and Yang contained in one Massachusetts Court of Appeals decision. In *Curry v. Great American Ins. Co*., the Court held both that:

> (1) The subrogated workers' compensation carrier is subrogated only to medical expenses and lost wages – the nature of benefits paid by the workers' compensation carrier, and
> (2) The subrogated carrier is subrogated to medical malpractice claims, the elements of damages recovered by a plaintiff to whom the workers' compensation is subrogated.

In *Curry*, Massachusetts determined for the first time that the recovery under a lien of a worker's compensation carrier in a wrongful death case was limited to the portion of damages allocated to loss of net expected income of the next of kin of the deceased. The worker's compensation carrier was not entitled to the portions of the damages allocated to conscious pain and suffering or loss of consortium because only damages for loss of net expected income represented benefits "that are duplicated by the worker's compensation benefits." It is virtually a certainty that this limitation will apply to injury cases as well, because the Court justified its decision by saying, "…conscious pain and suffering was not a compensable injury under the workers' compensation statute." A carrier is also limited to reimbursement of those portions of the net proceeds of a third-party settlement which are allocated to the recipients of workers' compensation benefits for wrongful death, even though the statutory benefits also include children of the decedent who are not recipients of workers' compensation benefits.

This decision heightens the importance of involving qualified and experienced subrogation counsel in your efforts to protect and recover your workers' compensation subrogation interests whenever Massachusetts benefits are involved. Gerrymandering efforts will be encouraged and facilitated by this questionable decision, which fabricates subrogation requirements not addressed or required in the Workers' Compensation Statute found at Chapter 152, § 15 of the Massachusetts Statutes.

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

PROPERTY SUBROGATION

MWL AUTOMOBILE SUBROGATION WEBINAR SERIES CONTINUES

The first in a series of webinars entitled "*Automobile Subrogation In All 50 States*" was presented by Gary Wickert on February 8, 2012. It was a tremendous success with over 600 attendees. The 2-hour webinar generated 77 subrogation-related questions, setting an all time record and requiring three days to respond to all of them. Following the webinar, a vast majority of attendees responded to a survey question asking them to name the top five (5) states they wanted to see individually covered in future webinars of this series. The results for the top ten were as follows:

1. Texas (422)
2. Florida (374)
3. California (361)

4. New York (359)
5. Illinois (336)
6. Colorado (319)
7. New Jersey (307)
8. Arizona (292)
9. Michigan (281)
10. Louisiana (273)

Other states, which are listed in the order of votes received most to least, were Minnesota, Washington, Pennsylvania, Georgia, Missouri, Arkansas, Iowa, Nevada, Wisconsin, Kentucky, Massachusetts, New Mexico, Alabama, Oklahoma, Kansas, Mississippi, North Carolina, Connecticut, Oregon, South Dakota, Tennessee, North Dakota, Virginia, South Carolina, Idaho, Utah, Montana, Rhode Island, Ohio, Maryland, Hawaii, Indiana, District of Columbia, Delaware, New Hampshire, Wyoming and Nebraska. These states will also be covered in this webinar series following the webinars for our top ten chosen states.

In light of this survey result, our next 1-hour webinar will be on *Texas Automobile Subrogation* on April 3, 2012 from 10:00 a.m. – 11:00 a.m. (CST). We invite all of our friends and clients to attend this informative webinar which will be presented by Gary Wickert, who has been licensed in Texas since 1983. We look forward to seeing you in attendance at the next webinar in this series. Following Texas' webinar, we will proceed to cover the remaining top ten chosen states listed above every other month until we make our way through the list.

UPCOMING EVENTS

April 3, 2012 – Gary Wickert will be presenting a live webinar on *"Texas 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 now.

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**.

July 18-19, 2012 – MWL will be exhibiting at the *32nd Annual National Workers' Compensation and Occupational Medicine Conference* in Hyannis, Cape Cod, Massachusetts. Jamie Breen will be at Exhibit Booth 10 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please click **HERE**.

November 11-14, 2012 – MWL will be exhibiting at *NASP's 2012 Annual Conference, "Cirque du Subro",* in Las Vegas, Nevada. Jamie Breen will be at our Exhibit Booth 103 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.subrogation.org**.

INDUSTRY NEWS

YORK RISK SERVICES ACQUIRES AVIZENT

YORK® York Risk Services Group, a premier national provider of claims management, specialized loss adjusting, insurance pool administration and other insurance services, has acquired Dublin, OH-based Avizent, a national third-party administrator which provides claims management services, managed care services, alternative risk financing options and a variety of loss control services to clients ranging from public entities, self-insured

clients and carriers. York intends the acquisition to result in better claims management solutions across all states and all lines of business.

MARKEL ACQUIRES THOMPSON INSURANCE ENTERPRISES

Markel Corporation has announced the acquisition of Thompson Insurance Enterprises, LLC, a privately-held program administrator based in Kennesaw, Georgia, underwriting multiline insurance programs. Markel Corporation is an international property and casualty insurance holding company headquartered in Richmond, Virginia, which targets niche markets including wind and earthquake exposed commercial properties, liability coverage for highly specialized professionals, horse mortality and other horse related risks, personal watercrafts, high-valued motorcycles, aviation and energy-related activities. Thompson produces business through a network of 4,500 producers and has 108 employees, most of which are located near their home office in Kennesaw, in addition to branch offices in Kansas City and Denver. Markel says Thompson will continue to operate as a separate business unit with Thompson and Bob Heaphey, Thompson's president, leading the operation as part of Markel Specialty. The transaction has been approved by all of Thompson's members and is expected to close in the 2012 first quarter.

NEACE LUKENS ACQUIRES KENTUCKY'S BERRYMAN AGENCY

Louisville-based insurance agency Neace Lukens is expanding its presence in Kentucky by buying the Berryman Insurance Agency. The Hartford, Kentucky-based Berryman Agency was founded in 1937 and its current owners date back to 1967. The agency specializes in auto, home, property, workers' compensation, and life and health products. In addition to its Hartford office, the agency has offices in Owensboro and Hardinsburg. Neace Lukens is a wholly-owned subsidiary of AssuredPartners Inc., a portfolio company of GTCR, a private equity firm. Neace Lukens has 22 offices located in Kentucky, Ohio, Illinois, Michigan, Tennessee, Arizona, Georgia, Arkansas, Florida and South Carolina. The acquisition of the Berryman Agency is the first since AssuredPartners bought Neace Lukens in September 2011.

NEW YORK-BASED USI INSURANCE SERVICES ACQUIRES THE PINNACLE GROUP

USI Insurance Services, an insurance brokerage and financial service firm in Briarcliff Manor, New York, acquired most of the assets of The Pinnacle Group. Based in Virginia Beach, Virginia, Pinnacle is a full-service employee benefits consulting firm specializing in middle-market business and is expected to contribute roughly $3.3 million in annual revenues to USI. Terms of the transaction were not disclosed. USI Insurance said the Pinnacle acquisition strengthens the firm's existing mid-Atlantic organization and its expanding employee benefit practice in Virginia. Pinnacle CEO and founder Anthony Jernigan and the rest of Pinnacle's staff will join the USI team. USI Insurance has been making a number of acquisitions in recent months. Last December, it acquired Rhode Island.-based employee benefit consulting and brokerage firm Bluff Head Enterprises. In November, it acquired Reston, Virginia-based employee benefits brokerage firm Barros International. In September, it bought all assets of First Place Insurance Agency of Youngstown, Ohio. Also in September, it purchased de la Parte & Associates, a Tampa, Florida, employee benefits and insurance consulting firm.
