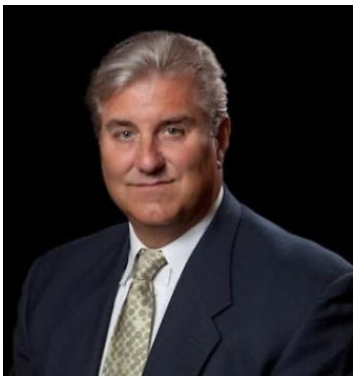
MATTHIESEN, WICKERT & LEHRER, S.C.
ATTORNEYS AT LAW

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.*

In This Issue:

WORKERS' COMPENSATION SUBROGATION



GOING LARGE: The Role Of Deductibles In Workers' Compensation Subrogation

By Gary L. Wickert

Large deductible workers' compensation programs were first introduced to the American insurance industry in the late 1980s with limited deductible options for medical and death benefits. Over time they have grown to become a key player in the ongoing struggle to hold down skyrocketing workers' compensation costs. A deductible is a limited amount of money an employer agrees to contribute toward a work-related workers' compensation claim, usually per claim, per occurrence, per accident, or annual aggregate basis - or some combination thereof. Large deductible insurance programs provide many advantages, particularly for large, financially-secure employers. They simulate self-insurance, utilizing per occurrence deductibles that typically range between $100,000 and $1,000,000. At the same time, they provide financial backing of the insurer in the event of a catastrophic loss. Finally, they allow for significantly reduced premiums.

Most deductible policies practice first-dollar insurer liability to employees, requiring the insurer to pay the entire claim and only then seek reimbursement from the employer for all amounts not exceeding the deductible limit. There is a reason that the employer is willing to shoulder the risk that accompanies a large deductible workers' compensation policy: a large deductible policy is significantly less expensive for the employer than a policy without such a deductible. It results in significantly lower premiums than first-dollar (or guaranteed cost) insurance and creates a large incentive for insureds to develop safety and loss control measures. As shown by a Texas Department of Insurance report, employers saved nearly $342,000,000 in workers' compensation premiums in the third quarter of the year 2000 by choosing policies with deductibles. *Texas Department of Insurance Quarterly Legislative Report on Market*

Conditions 47 (April 2001). While there are differing types of loss-sensitive workers' compensation policies which are implemented in an effort to hold down costs – including sliding scale dividend plans, large deductible plans, and retrospective rating policies – this article focuses on the strange anomalies and concepts created when you mix large deductible policies and workers' compensation subrogation.

Large deductible programs were slow to find favor in America. In 1990, only six states approved of such deductibles. Currently, 45 states utilize large deductible programs for workers' compensation. *"Large Deductible Plans,"* IRMI Workers' Comp Rating and Risk Financing, 2nd Reprint July 2009, Appendix "C," pp. XI.P.13-17. The use of these programs is on the rise. There were exactly 1,874 companies that negotiated large deductible plans in the 4th quarter of 2010, which is an approximate 50% increase since 2000.

In many of these programs, such as the program in Texas, many insureds (employers) are provided with several options as to how to repay deductibles to insurance carriers. Many employers are allowed to set up loss funds from which the insurer makes claim payments, generally on a monthly basis, and the employers then replenish the loss fund on a monthly basis up to the deductible amount. Another option for payment of the deductible is on a paid loss basis, such that payments are not made to the carrier until a loss is incurred. In any event, the insurance carrier generally pays benefits to the injured worker when a workers' compensation claim is submitted and then the employer is billed by the insurance carrier for the amount of benefits paid. Deductible programs often require the employer to put up collateral to cover the expected losses in the deductible layer.

For smaller businesses without the financial ability to take advantage of a large deductible program, many states have implemented a WC Small Deductible Program. The benefits of which the deductible will apply vary by state and in most cases will be one of the three following types:

- *Indemnity Benefits Deductible:* The deductible will apply only to indemnity benefits;
- *Medical Benefits Deductible:* The deductible will apply only to medical benefits;
- *Claims Deductible* (also referred to as a Benefits Deductible): The deductible will apply to both medical and indemnity benefits combined.

In several states, insurance companies are under no obligation to offer the WC Small Deductible Program, while in others, they are. The rules are not clear as to what exactly constitutes an "offer." Currently, there are three types of "mandatory" offer categories as follows:

(1) Mandatory where the insurer has to offer the customer a WC Small Deductible Program (DE, FL, GA, HI, IL, MA, MT, NY, OK, and TX);
(2) Mandatory, only if the insurer determines that the customer is financially stable to be responsible for the deductible amount (AL, AR, CO, KY, ME, MN, NE, NM, OR, and SC); and
(3) Mandatory, only if the customer requests for a WC Small Deductible Program (NH and PA).

"Optional Offer States" include the following: AZ, CA, CT, IN, IA, KS, MD, MO, NV, NC, RI, SD, TN, UT, and VA. The size of the deductible that constitutes a "Small Deductible" varies by state, but most states consider anything starting at $500 and ranging to $5,000 to be "small." Medium Deductible Programs (deductible values of $10,000 to $75,000) are not mandatory, but are available at the discretion of the insurance carrier. Many Large Deductible Programs necessarily include third-party claims administration services in the premiums they charge. In some states, a separate charge for such services is made on the basis of a percentage of total losses or a fixed charge per claim basis. Loss-based "add-ons" can be substantial.

Large Deductible Plans must usually be filed with the applicable Workers' Compensation Board, such as is required in California. Cal. Ins. Code §§ 11658 and 11750.3; C.C.R. § 2218. Last year, the California Department of Insurance announced the commencement of an administrative enforcement action against two insurers for using a type of workers' compensation insurance agreement known in California as a "Large Deductible Agreement" (LDA) without obtaining review of the agreement by the Department, as required by the California Insurance Code.

As these Large Deductible Programs become more prevalent, we receive an increasingly large number of inquiries and questions regarding the applicability of our *Deductible Reimbursement Laws In All 50 States* chart (found **HERE** or on our website) to the reimbursement of deductibles to employers when a

successful workers' compensation third-party tort recovery is effected from a tortfeasor. However, the two have nothing to do with one another. The chart on our website applies only to the reimbursement of automobile insurance deductibles. When an employee makes a successful third-party recovery from a tortfeasor, most states provide for some sort of reimbursement scheme, allowing the carrier to be reimbursed all or some portion of the benefits it has paid to the employee, sometimes subject to an obligation to bear a pro-rata share of attorney's fee/costs, a statutory or court-created reimbursement formula, possible contribution for employer's negligence, allocations of damages, and even a tortured misapplication of the equitable Made Whole Doctrine in some states. On the other hand, the rights of the *employer* to institute its own third-party action and/or recover its large deductible, reimbursement priority as between the carrier and employer, and the ability of the employer to recover from the tortfeasor increased premiums it must pay going forward as a result of an increased experience modifier, are not as clear and are the equivalent of the final frontier in workers' compensation subrogation. The fight between an employee and a subrogated carrier over a large third-party recovery turns into a three-way cage match once the employer enters the ring.

The few answers we do have in this area vary wildly from state to state. Some states provide that the employer is subrogated to the rights of the injured employee, while others provide that the insurer is subrogated to the rights of the injured employee. The standard workers' compensation policy provides that the insurer is subrogated to the rights of the insured. So who gets what?

In Texas, Article § 5.55C of the Texas Insurance Code was adopted by the Texas Legislature in 1989, which required workers' compensation insurance carriers to offer a deductible plan that allows employers to self-insure for a certain deductible amount. Tex. Ins. Code Art. § 5.55C(a) (2000). This statute also provides that neither the employer nor the carrier is allowed to shift the responsibility for payment of this deductible to the worker in any way. Therefore, because this statute places the burden of reimbursing the deductible amount on the employer, the issue of whether or not a workers' compensation carrier is entitled to recover the deductible amount on behalf of the employer was the subject of a Texas Supreme Court opinion in 2002. *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526 (Tex. 2002). In *Argonaut*, the Court held that the workers' compensation carrier is entitled to be reimbursed from the proceeds of the employee's settlement for benefits paid to and on behalf of the employee, including benefits paid in connection with the employer's optional deductible plan.

It should be pointed out that Texas law provides a workers' compensation carrier with a direct right of subrogation, but does not grant a similar right to a self-insured employer or an employer with a large self-insured retention or high deductible. Unfortunately, Texas case law has pointed out that no direct subrogation rights are granted to employers under the Texas Labor Code – such rights are given only to their workers' compensation carriers. In *Argonaut,* the Court noted that § 5.55C mandates that:

> *"A deductible policy must provide that the [carrier] will make all payments for benefits that are payable from the deductible amount and that reimbursement by the policyholder shall be made periodically, rather than at the time claim costs are incurred*."

In *Argonaut,* the workers' compensation carrier recovered the deductible directly from the tortfeasor, rather than from the employer. However, in a more recent case in which the workers' compensation policy had a $250,000 deductible and the carrier had already been reimbursed by the employer when it filed its subrogation claim, the Texas Court of Appeals created a subrogation conundrum by stating that if a carrier has already been reimbursed, it is not entitled to subrogation. *Reliance Ins. Co. v. Hibdon*, 333 S.W.3d 364 (Tex Civ. App. – Houston [14th Dist.] 2010) (*rev. denied,* Oct. 21, 2011). In *Hibdon,* the workers' compensation policy Grey Wolf purchased from Reliance had a $250,000 deductible in accordance with Texas law. Grey Wolf had already reimbursed Reliance and the defendants argued that because the carrier had been reimbursed, it had no right of subrogation. Amazingly, the Court agreed. If the employer has no right of subrogation and a carrier who is reimbursed by the employer under the deductible policy has no subrogation, then Texas has effectively eliminated subrogation in all policies involving deductibles and has rewarded employers who do not repay the deductibles they owe their carriers.

With regard to deductible policies, the Texas Department of Insurance has promulgated rules which indicate that when the carrier recovers from the third-party subrogation recovery, the amount recovered should first be applied to the amount paid on the claim by the carrier, and only then will any money left over be applied to the amount of the deductible paid by the insured, with reimbursement being made to the insured, if necessary. Rule XIX, *Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance* (2nd Reprint). However, workers' compensation is a little different and has many different variables to consider. Take the following hypothetical:

> *An employee is seriously injured while on the job and receives a workers' compensation benefit in the amount of $1,000,000. The employer has a $250,000 deductible which it pays to the carrier. The injured employee sues a third party and recovers $3,000,000. However, the employee still is treating and workers' compensation benefits are continuing. Out of the $3,000,000 recovery, the employee's attorney recovers attorney's fees and the balance is used to reimburse the employer's deductible payment and the amounts the insurer has paid out in benefits, with the excess paid to the employee and allotted as a future credit.*

So far, this seems logical, but after the credit is exhausted, the insurance company claims that the employer, which has already been reimbursed its entire deductible, must pay future statutory benefits going forward until the deductible once again is eroded. The employer will claim that the deductible obligations are fulfilled. After all, the policy states that there is one deductible per accident and the employer fulfilled that obligation. Why would the employer be required to foot the deductible a second time after a successful recovery?

Complicating an already complicated issue is the fact that there is very little case or statutory law from state to state dealing with the interplay between employer deductible plans and subrogation**.** Indiana offers optional endorsements to workers' compensation policies which may include deductible or co-insurance provisions for an insured. I.C. § 22-3-5-5.5(i) provides:

> *(i) This subsection applies to an employee of an employer that has paid a deductible or co-insurance under this section and to the employee's dependents. If an employee or a dependent recovers damages against a third party under I.C. § 22-3-2-13, the insurer shall provide reimbursement to the insured equal to a pro-rata share of the net recovery by the insurer.*

Therefore, regardless of policy provisions, Indiana provides for reimbursement of a deductible as many states do with automobile insurance deductibles – on a pro-rata basis. However, far too many states do not even address subrogation and/or reimbursement rights in the presence of large deductible workers' compensation third-party cases, making the utilization of subrogation counsel a necessity in any such situation. Often, the only guidance available is buried deep within State Administrative Regulations or Administrative Decisions not available to the public. However, the confusion is only just beginning.

In most states, laws and regulations governing the respective subrogation and/or reimbursement rights of a workers' compensation carrier and its insured are virtually non-existent. Insurer claims for reimbursement from their insured and disputes over who gets reimbursed what, when there is a successful subrogation recovery, often hinge upon the parties' rights under the policy. Because carriers file their individual deductible program with each state, no two Large Deductible Programs are alike, and these agreements become extremely important in determining recovery rights. Each deducible program requires careful review to fully understand the respective reimbursement/subrogation rights of the insured and the insurer. However, because workers' compensation is highly-regulated, state laws and regulations often augment the rights and duties contained in the large deductible agreement.

Our federal government must naturally enter the picture and complicate matters further. In the wonderful world of Medicare, workers' compensation carriers and employers with self-insured retentions or large deductibles must be concerned about more than whether they can recover all or part of their subrogation interests. Another concern is possible future exposure to the Centers for Medicare & Medicaid Services ("CMS") when they lump-sum a workers' compensation claim or settle a third-party liability case in which the claimant/plaintiff has received or likely will receive Medicare benefits. Federal statutes provide that an entity that engages in a business, trade or profession shall be deemed to have a self-insured plan if it

carries its own risk (whether by failure to obtain insurance, or otherwise) in whole or in part. 42 U.S.C. § 1395y(b)(2)(A). Self-insurance or deemed self-insurance can be demonstrated by a settlement, judgment, award, or other payment to satisfy an alleged claim (including any deductible or co-pay on a liability insurance, no-fault insurance, or workers' compensation law or plan) for a business, trade or profession.

Special considerations, including possible Medicare Set-Aside (MSA) responsibilities, must be made where workers' compensation involving a deductible or co-insurance is paid to the insurer or workers' compensation entity for distribution (rather than directly to the claimant). Pursuant to the federal definition of "liability self-insurance," such deductibles and co-payments constitute liability self-insurance, and require reporting by the self-insured entities. However, in order to avoid two entities reporting where the deductibles and/or co-payments are physically being paid by the insurance company or workers' compensation rather than the self-insured entity, CMS has determined that the liability insurance company, no-fault insurance company, or workers' compensation, as appropriate, must include the self-insurance deductible or co-pay in the amount it reports. For more about workers' compensation subrogation and Medicare Set-Aside responsibilities, see an article from our January 2010 Newsletter entitled *Subrogation And The Great Medicare Set-Aside Debate: Extent Of Liability For Failure To Prepare And File MSA In Dispute* by clicking **HERE**.

The complex and confusing labyrinth which subrogation professionals must navigate is a direct result of the confusing interplay between the unusual nature of workers' compensation and the American common law system of civil justice. Effectively subrogating, these days, means more than maximizing the bottom line for a subrogated carrier or employer, it can also mean avoiding liability and expensive litigation. Only one thing is certain. If you are dealing with a workers' compensation issue involving a Large Deductible Program, you are dealing with significant dollars and potentially significant liability. You should be represented by subrogation counsel. For more questions about subrogation of workers' compensation benefits where large Self-Insured Retentions or deductibles are involved, contact Gary Wickert at **gwickert@mwl-law.com.**

HEALTH INSURANCE SUBROGATION

NEW YORK COURTS HOLD THAT THE MEDICARE ACT PREEMPTS NEW YORK LAW

By Ryan L. Woody

In *Potts v. Rawlings Co., LLC*, 11 CIV. 9071 JPO, 2012 WL 4364451 (S.D.N.Y. Sept. 25, 2012) and *Meek-Horton v. Trover Solutions, Inc.,* 11 CV 6054 RPP, 2013 WL 25888 (S.D.N.Y. Jan. 2, 2013), Medicare Advantage recipients brought putative class actions in state court against health care insurers and a number of subrogation vendors ("subrogation defendants") alleging that liens placed on personal injury or wrongful death settlements violated New York law. The subrogation defendants removed the cases to federal court and filed motions to dismiss based on federal preemption.

For those unfamiliar with the product, Medicare Advantage (MA) is a health insurance program that provides an eligible person with the United States' Medicare benefits. Medicare Advantage differs from the original Medicare model, which offered a standard Plan provided directly by the state. In contrast, MA is offered by a private provider. The term originated with the passage of the Balanced Budget Act of 1997, which offered Medicare beneficiaries this option, instead of receiving these benefits through the original Medicare Plan (Parts A and B). These programs were known as Medicare+Choice or Part C Plans. Pursuant to the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, the compensation and business practices changed for insurers that offer these Plans, and "Medicare+Choice" Plans became known as Medicare Advantage Plans.

When it comes to reimbursement, as many of you are aware, Medicare has a statutory super lien that allows it to recover its payments based on federal law. Specifically, the Medicare Secondary Payer Act

(MSPA) provides that the United States *"may bring an action against any or all entities that are or were required or responsible ... to make payment with respect to the same item or service (or any portion thereof) under a primary plan."* 42 U.S.C. § 1395y(b)(2) (B)(iii). Furthermore, the MSPA also provides the United States with a right of subrogation. *Id.* § 1395y(b)(2)(B)(iv) *("The United States shall be subrogated [to the extent of payment made under this subchapter for such an item or service] to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan."*).

However, with the introduction of MA Plans, trial lawyers had begun to question the subrogation and reimbursement rights of these Plans which are administered by private insurers. *See e.g., Care Choices HMO v. Engstrom,* 330 F.3d 786 (6th Cir. 2003); *Konig v. Yeshiva Imrei Chaim Viznitz of Boro Park, Inc.,* No. 12 Civ. 467, 2012 WL 1078633 (E.D.N.Y. Mar. 30, 2012); *Parra v. PacifiCare of Arizona, Inc.,* No. CV 10–008–TUC–DCB, 2011 WL 1119736 (D. Ariz., Mar. 28, 2011); *Nott v. Aetna U.S. Healthcare, Inc.,* 303 F.Supp.2d 565 (E.D. Pa. 2004). The MA Plans have always argued that, like Medicare, they possess the same super lien pursuant to the Medicare statute. The validity of this assertion was at the heart of these cases.

Specifically, the plaintiffs argued that New York's new Anti-Subrogation Statute, General Obligations Law § 5-335, prohibited the subrogation defendants' practices of collecting subrogation and reimbursement from New York personal injury settlements. Obviously, the issue holds implications throughout the United States. The applicable New York Anti-Subrogation Statute provides that:

> *When a plaintiff settles with one or more defendants in an action for personal injuries, medical, dental, or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement does not include any compensation for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there is a statutory right of reimbursement. By entering into any such settlement, a plaintiff shall not be deemed to have taken an action in derogation of any nonstatutory right of any benefit provider that paid or is obligated to pay those losses or expenses; nor shall a plaintiff's entry into such settlement constitute a violation of any contract between the plaintiff and such benefit provider.*
>
> *Except where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider.*

The New York law, on its face, does not apply where a party possesses a statutory right to subrogation. According to the Court, the dispositive issue in the case is whether Congress, in enacting the MA Program, intended to provide MA Organizations with a statutory right of reimbursement for medical benefits paid to an enrollee who subsequently recovers a settlement from a third-party tortfeasor. If so, the plaintiffs would have no case.

The plaintiffs argued that MA Plans are a creation of Medicare Part C and that the statute does not contain a statutory right subrogation. Instead, they argued that the statute merely authorizes the private insurer to include in its insurance contract a right of subrogation against an insured's recovery from a third party for money previously paid for the insured's medical care, which of course, can be defeated by the New York statute. Therefore, the plaintiffs argue that MA Plans have no statutory right of reimbursement under either federal or state law.

However, both Courts wasted little time finding that the MA Plans are covered by the Medicare statute and that the plaintiffs' claims arise under that statute. In finding for the subrogation defendants, the Court reviewed the regulations promulgated by the Secretary pursuant to the authority set forth in the statute, 42 U.S.C. § 1395w–26(b)(1), which expressly confirmed that MA Plans supersede state law:

[T]he rules established under this section supersede any State laws, regulations, contract requirements, or other standards that would otherwise apply to MA plans. A State cannot take away an MA organization's right under Federal law and the MSP regulations to bill, or to authorize providers and suppliers to bill, for services for which Medicare is not the primary payer. 42 C.F.R. § 422.108(f); *see also, Id.* § 422.402 *("The standards established under this part supersede any State law or regulation [other than State licensing laws or State laws relating to plan solvency] with respect to the MA plans that are offered by MA organizations.")*.

As such, both New York Courts determined that the Medicare Statute preempted New York's Anti-Subrogation Statute and dismissed the action. Unfortunately, though, this will not be the end of the battle over MA Plans' rights as there is a split of authority over whether the Medicare statute creates a private cause of action that is enforceable by the MA Plans. Compare *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.,* 685 F.3d 353 (3rd Cir. 2012) with *Care Choices HMO v. Engstrom,* 330 F.3d 786 (6th Cir. 2003); *Konig v. Yeshiva Imrei Chaim Viznitz of Boro Park Inc.,* No. 12 Civ. 467, 2012 WL 1078633 (E.D. N.Y. Mar. 30, 2012); *Parra v. PacifiCare of Ariz., Inc.,* No. CV 10–008–TUC–DCB, 2011 WL 1119736 (D. Ariz., Mar. 28, 2011).

As always, Matthiesen, Wickert & Lehrer, S.C. will continue to keep you abreast of the latest developments. In the meantime, should you have any questions or concerns related to MA Plans and their subrogation or reimbursement rights, please contact Ryan Woody at **rwoody@mwl-law.com**.

PROPERTY SUBROGATION

INDIANA CAN'T MAKE UP IT'S MIND ON LANDLORD/TENANT SUBROGATION

LBM Realty, LLC v. Mannia, 2012 WL 6608104 (Ind. App. 2012)

There are three approaches used by trial courts in the country to resolve the question of whether a landlord's insurer can file a subrogation action against a negligent tenant. These approaches include: (1) the no-subrogation or implied co-insured approach (also known as the "*Sutton* Rule"), in which, absent an express agreement to the contrary, a landlord's insurer is precluded from filing a subrogation claim against a negligent tenant because the tenant is presumed to be a co-insured under the landlord's insurance policy; (2) the pro-subrogation approach, in which a landlord's insurer is allowed to bring a subrogation claim against a negligent tenant absent an express term to the contrary; and (3) the case-by-case approach, in which courts determine the availability of subrogation based on the reasonable expectations of the parties under the facts of each case.

For the past six years our *Landlord/Tenant Subrogation In All 50 States* Chart (found on our website or by clicking **HERE**), which details the laws in all 50 states regarding a landlord's insurers' ability to pursue a negligent tenant for property damage to his buildings and property, has read as follows:

> Indiana has avoided an inflexible application of the "*Sutton* Rule" (see Oklahoma) and taken a more flexible case-by-case fire approach, holding that a tenant's liability to the landlord's insurer for negligently causing a fire depends on the intent and reasonable expectations of the parties to the lease as ascertained from the lease as a whole. *United Farm Bureau Mut. Ins. Co. v. Owen*, 660 N.E.2d 616 (Ind. App. 1996).

This was because Indiana, up until the *Owen* decision, had not yet picked one of the above three approaches to subrogation. The question had not been raised in other cases where an insurer brought a subrogation claim against an insured's tenant for property damage. *Cincinnati Ins. Co. v. Davis,* 860 N.E.2d 915 (Ind. App. 2007); *St. Paul Fire & Marine Ins. Co. v. Pearson Constr. Co.,* 547 N.E.2d 853 (Ind. App. 1989). The *Owen* Court, however, analyzed the lease and the intentions of the contracting landlord and tenant, including the following provision:

> *Landlord and Tenant do each hereby release the other from all liability for any accident, damage or injury caused to person or property, provided, this release shall be effective only to the extent*

that the injured or damaged party is insured against such injury or damage and only if this release shall not adversely affect the right of the injured or damaged party to recover under such insurance policy.

The *Owen* Court then held that the landlord's carrier could not subrogate against Owen, and it appeared that Indiana had adopted the case-by-case approach - then came the *Mannia* decision. In *Mannia,* the trial court simply announced that Indiana followed the no-subrogation "*Sutton* Rule" and dismissed a subrogation suit filed by a tenant's insurer against a negligent tenant because the Court felt that the tenant was an implied co-insured. On December 19, 2012, the Court of Appeals reversed that decision, ostensibly backtracking from its decision in *Owen*, and announcing that, while Indiana law does not preclude a subrogation action by a landlord's insurer against a tenant, the Court in *Owen* did not adopt a case-by-case approach. Rather, *Owen* merely affirmed a trial court's entry of summary judgment in favor of a tenant and against an insurer who sought subrogation for a claim it paid to its insured (the tenant's landlord) because the specific language of a lease provision at issue released the tenant from property damage liability to the landlord, thereby precluding the insurer - who steps into the shoes of its insured - from raising a subrogation claim. The *Mannia* decision noted that in *Owen*, the Court of Appeals did not discuss or adopt any of the three subrogation approaches, and the question of whether Indiana would adopt a rule regarding subrogation claims by a landlord's insurer against a negligent tenant was never raised. It said that whether the no-subrogation approach, pro-subrogation approach, or case-by-case approach should be adopted in Indiana was a matter to be left for another day. For now, Indiana appears to be a state which simply says, "Insurers can bring a subrogation claim against a tenant," and that's fine by us.

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

UPCOMING EVENTS

March 22, 2013 – Gary Wickert will be presenting a seminar on *Workers Comp: 100 Years In The Rear View Mirror* for the AMCOMP Program at the Wynn Las Vegas in Las Vegas, Nevada.

April 9, 2013 – Doug Lehrer and Tim Pagel will be presenting a teleconference on *Parental Liability For The Acts Of A Minor* for the National Business Institute (NBI). Information on this teleconference can be found **HERE**.

April 10, 2013 – Aaron Plamann will be presenting a seminar on *Product Liability Property Subrogation: A Litigating Engineer's Perspective* at the National Property Subrogation Strategies ExecuSummit in Uncasville, Connecticut. Information on this conference can be found by clicking **HERE**.

June 10, 2013 - Brad Matthiesen and Matthew Fricker will be presenting a teleconference on *Handling Injury Claims From the Defense Perspective* for the National Business Institute (NBI). More information on this teleconference to follow as it becomes available.

Note: Information on our upcoming webinar will be in our March Newsletter. MWL has been very busy the past few months and, if all goes as planned, MWL will be sharing some very exciting news about our website in our March Newsletter! Stay tuned…….