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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **FEBRUARY 2010**

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

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

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AUTO SUBROGATION

THE FUTURE OF GENERAL MOTORS AND CHRYSLER PRODUCT LIABILITY

By Gary L. Wickert

I could only roughly estimate the amount of subrogation dollars we have redirected from the Big Three automakers over the past 27 years – money which, had it not been used for repayment of workers' compensation, health, and property subrogation interests, would simply have been distributed by plaintiffs' lawyers. Even if I could accurately recount the recovery total, many of the cases involve confidentiality agreements prohibiting disclosure of anything other than the fact that there was a settlement. Naturally, subrogation professionals are concerned and inquisitive about pending and future subrogation claims involving General Motors ("GM") and Chrysler. With 100 million GM and Chrysler vehicles on the road, they represent a large source of subrogation recoveries. A little information about the GM and Chrysler bankruptcies, as well as an understanding of the effect each will have on your subrogation rights and future product liability suits against the two automakers, is in order.

Chrysler Bankruptcy

Chrysler, LLC filed for Chapter 11 bankruptcy protection on April 30, 2009, and announced a plan for a partnership with Italian automaker, Fiat. On June 1, Chrysler, LLC stated they were selling some assets and operations to the newly formed

company Chrysler Group, LLC ("New Chrysler"). Fiat will hold a 20% stake in the new company, with an option to increase to 35%, and eventually to 51% if it meets financial and developmental goals for the company. Chrysler's bankruptcy was completed on June 10, 2009, when the sale of most of Chrysler's assets to "New Chrysler", formally known as Chrysler Group, LLC, was completed. The federal government financed the deal with $6.6 billion in financing, paid to the company left behind in bankruptcy, "Old Chrysler", formally called Old Carco, LLC. Chrysler entered and exited bankruptcy after only 42 days, making it one of the fastest major industrial bankruptcies in memory. When it emerged from bankruptcy, Fiat owned 20% of the new company, United Auto Workers' VEBA Trust owned 67.69% and U.S. and Canadian governments owned 9.15% and 3.16%.

Future Chrysler Product Liability Claims

As a result of the Chrysler bankruptcy, New Chrysler originally only accepted liability for defects in vehicles manufactured by the New Chrysler. Anyone with claims associated with vehicles produced by the old Chrysler would not have been able to bring the claims against new company, regardless of when the injury occured. In late August, however, Chrysler has had a change of heart and agreed to accept responsibility for product defects to consumers who bought Jeeps, Chryslers or Dodge vehicles, prior to its bankruptcy filing, and were injured by product defects. In a letter sent to Members of Congress, Chrysler Group, LLC announced that the company will accept product liability claims on vehicles manufactured by Chrysler, LLC (now Old Carco, LLC) before June 10, 2009, and involved in accidents on or after that date.

General Motors Bankruptcy

GM filed for Chapter 11 Bankruptcy protection in the Manhattan, New York Federal Bankruptcy Court on June 1, 2009, the deadline to supply an acceptable viability plan to the U.S. Treasury. The petition was the largest bankruptcy filing of a U.S. industrial company in history. The filing reported $82.29 billion in assets and $172.81 billion in debt. As part of this restructuring plan, GM sold most of its assets to a new company, the Vehicle Acquisition Holdings, LLC ("New GM"), leaving behind unprofitable assets and other liabilities, including product liability. New GM purchased the continuing operational assets of the old GM.

The company received debtor-in-possession financing to complete the process. After the Chapter 11 filing, effective Monday, June 8, 2009, GM was removed from the Dow Jones and replaced by Cisco Systems. Beginning June 2, GM traded OTC under the symbol GMGMQ. On July 10, 2009, under § 363, a new entity with the backing of the United States Treasury was formed to acquire profitable assets, with the new company planning to issue an initial public offering ("IPO") of stock in 2010. The remaining pre-petition creditors' claims are paid from the former corporation's assets.

In a mere 40 days, GM emerged from bankruptcy with fewer brands, fewer workers and a whole lot of taxpayer cash – $50 billion. (GM is keeping its Chevrolet, Cadillac, Buick and GMC brands and selling or shuttering Hummer, Saturn, Saab and Pontiac.) As of July 10, the majority owners of General Motors are the taxpayers, with a 61% stake; and the United Auto Workers' Health Care Trust, which owns 17%; the Canadian government, which owns 11.7%, with the remainder going to bondholders of the old company.

Future General Motors Product Liability Claims

After the Chrysler bankruptcy left consumers without recourse to the company for potential product defects, GM initially sought a similar outcome. Under pressure from the government, state attorneys general and consumer groups, GM finally agreed to expand its liability for injuries suffered by car-accident victims as a

result of car defects. GM's original bankruptcy plan would have freed the automaker from lemon laws and all past product liability. This would have prevented customers who purchased vehicles from the old GM from bringing claims against New GM. The legal precedent concerning future claimants was murky enough that it might have delayed the speedy bankruptcy proceedings sought by the Obama administration. As a result, the Obama administration encouraged GM to take on future product liability claims. In late June, New GM agreed to accept liability for any injuries caused by all GM vehicles from July 10 onwards (new claims), whether the vehicle was manufactured by the old GM or New GM. They will not stand behind old claims, those pending at the time of bankruptcy or accruing prior to the emergence from bankruptcy.

Old Versus New Claims

The difference between the GM's liability for old as opposed to new claims has left many scratching their heads, wondering why the bankruptcy court was allowing car manufacturers to pick and choose which legal claims it will accept. Under the new plan, "New GM" will not assume liability for already pending claims against the automaker and those people will still be forced to seek compensation from old GM. This means that a person who is injured by an old GM vehicle because of faulty manufacturing will be permitted to sue New GM, if the accident occurs after New GM emerges from bankruptcy protection.

Under the current plan, however, plaintiffs with pending lawsuits, those who won lawsuits against GM before it filed for bankruptcy, and those who get in accidents while the company is under bankruptcy protection will still be unable to bring claims against or collect from New GM. This raises concerns that numerous customers would be left with limited legal rights, because they would be seeking compensation from the old GM, a company with largely unprofitable assets. These plaintiffs will be relegated to the back of the line in dividing up the old company's assets. It is likely these consumers, including subrogated carriers with interests in those claims, will be able to collect little, if anything, as compensation for their damages.

An Unfair Result

The handling of future GM and Chrysler product liability seems even more absurd when you consider that the bankruptcy court had other options to ensure a fairer outcome for Americans injured by the car manufacturer's products. For example, the bankruptcy court could have set aside money from New GM's assets specifically for legitimate product liability claims by consumers. A similar type of victim's compensation fund was created by courts that handled bankruptcy matters for asbestos manufacturers. Although the fund may not have provided full compensation, it would have been better than what claimants filing against the old GM are likely to recover.

Congressman André Carson

To prevent car manufacturers from skirting their financial and moral obligation to pay for injuries caused by their products, Congressman André Carson introduced the Jeremy Warriner Consumer Protection Act of 2009 in the House of Representatives at the end of June. If passed, the Act would require certain vehicle manufacturers to carry liability insurance to cover consumer claims. Accordingly, victims with legal claims that otherwise would have been invalidated by the companies' bankruptcies may be able to seek compensation. On June 29, this bill was referred to the House Committee on Financial Services. We shall see what comes of it.

AUTO SUBROGATION

VEHICLE DEFECTS CREATE SUBROGATION OPPORTUNITIES

By Michael R. Sinnen

Insurance carriers have recently seen a spike in claims caused by defects in certain automobiles. Chief among the affected vehicles are those manufactured by Toyota and Honda. As many carriers have discovered, the problems in Toyota automobiles have primarily regarded the accelerator pedal being trapped by the floor mat, an increase in the friction factor inside the accelerator pedal assembly, or a slight bending within that assembly. Toyota has recalled vehicles to address each of those issues, but for many carriers, the problems created by the defects have already been realized.

In the majority of Toyota cases - those in which the accelerator pedal becomes trapped by the floor mat - the accelerator pedal sticks at a consistent revolutions-per-minute (rpm) range. Therefore, this problem cannot be defined as a "sudden acceleration" or a "runaway throttle" condition, as many carriers previously thought. Fortunately, experts can document the rpm range following an occurrence, which helps prove the case to Toyota, or, alternatively, to a jury. Experts are able to document the rpm range by interfacing a laptop with the vehicle's powertrain control module (PCM), and then recording the throttle position and rpm. Importantly, subrogation professionals should remember to have their experts match the particular Toyota recall with the facts of each case before issuing written reports.

Meanwhile, Honda has recently recalled hundreds of thousands of vehicles due to faulty air bags. As part of its recall, Honda intends to replace the driver's side air bag inflator, as some air bags are deploying with excessive pressure. When an air bag deploys with too much pressure, the inflator can rupture and injure or kill the driver. As is the case with the Toyota vehicles, it is important to have an expert examine the subject Honda vehicle and determine whether an air bag issue arose because of a defective inflator.

If you would like further information on a particular vehicle defect, or are curious as to whether your file has subrogation potential, contact Matthiesen, Wickert & Lehrer, S.C.

AUTO SUBROGATION

TOYOTA CLASS ACTIONS FILED

It didn't take long. The first class action suits against Toyota relating to various manufacturing defects have already been filed….44 of them to be exact. Tim Howard, a law professor at Northeastern University in Boston is coordinating litigation against Toyota and recently announced that these class action suits have been filed under state and federal law across the country.

The class action suits relate not only to the cost of repairing the vehicles (estimated $3.6 billion) but also for deaths, injuries and property damage caused by the defective parts. Some of the suits also claim damages for the reduced trade-in values of Toyota vehicles.

Two law firms in Kansas and Louisiana are also spearheading a class action suit filed by dealers and auctioneers claiming compensation as a result of vehicle sales as a result of the freeze imposed earlier this month on the sale of eight recalled Toyota models. The federal government is also investigating the alacrity with which Toyota announced the recalls and NHTSA has just released production data, consumer complaints and other documents which will not only shed light on how and when Toyota learned of problems affecting an estimated six million vehicles it has recalled, but will also prove to be valuable evidence in subrogation efforts from here on out.

INSURANCE SUBROGATION

HELPING US HELP YOU: THE IMPORTANCE OF TIMELY SUBROGATION REFERRALS

As every good subrogation professional is aware, third-party recoveries can only be maximized by paying close attention to detail – from the moment a claim arrives until the time of settlement or jury verdict. At the very onset of a case investigation, potentially culpable third parties are developing and employing defense strategies they will rely on after a lawsuit is filed. These tactics are frequently utilized when evidence is inspected and destructively tested. When such actions occur, the subrogation professional must recognize the maneuvers and posturing of third-party defendants so that evidence is not affected in a manner that establishes the framework for a spoliation argument. It is unlikely for a third-party case to be won when evidence is initially examined; however, if a viable theory of recovery is not timely established; if parties are not properly noticed; if a deficient protocol is distributed; or if the parties do not effectively communicate, otherwise stellar subrogation potential can be lost or mitigated. These realities demonstrate the importance of having experienced subrogation attorneys handling your workers' compensation subrogation files as soon as the claim arrives. While you continually reset your diary 60 days at a time, hoping somebody will send you a check, virtually every other party involved is plotting as to how to destroy or minimize your rights of recovery. And there are plenty of opportunities to do so in most states.

An understanding of a state's spoliation laws are critical to the handling of a third-party investigation and evidence examination. In Wisconsin, for example, parties have to be provided with a reasonable notice of a loss; a basis for a claim; the existence of evidence relevant to the claim; and opportunities to inspect the evidence. Furthermore, spoliation claims could arise if parties are not provided with an opportunity to make protocol recommendations for destructive testing of evidence, or are not invited to actively participate in that testing. Lack of notices and undue tampering with evidence can lead to significant problems for the subrogated party; those problems range from pre-trial discovery sanctions to negative inference instructions to a jury to outright dismissal of a case.

To be sure, many third-party cases are effectively in litigation before suit is even filed. Given this reality, it is critical to refer cases to experienced subrogation attorneys as soon as a claim arrives. For example, MWL recently handled a complex boiler case in which dozens of potentially adverse parties had to be identified in a boiler manual and noticed within a week after an accident, since the initial destructive testing had to be performed quickly. After the initial round of testing, numerous rounds of additional destructive analyses ensued. As MWL's attorneys and experts developed theories of liability, some parties were eliminated as target defendants, while others were elevated. While the insured stressed the need to move the testing along as quickly as possible, it was imperative for the new target defendants to have ample opportunity to modify

complex protocols, so that certain pieces of the boiler were not tested, removed or replaced before others, and all critical pieces of evidence were tested in place, and still preserved for future examinations. Although many adverse parties strategically objected to certain testing, MWL's attorneys and experts were able to differentiate between the legitimate and illegitimate objections, move the process along to meet the demands of the insured, and preserve the third-party case.

As is apparent in the aforesaid example, the prompt assignment of experienced subrogation counsel to your file can make the difference between a large subrogation recovery and no recovery at all. At MWL, we are prepared to assist your company in handling your subrogation files from initial investigations through the pivotal evidence examinations, and on through trial.

UPCOMING EVENTS.....

February 10-12, 2010 - MWL exhibited at the NAMIC 2010 Claims Conference held in St. Petersburg, Florida. Jamie Breen enjoyed meeting all of the attendees at the conference. While it was colder than normal there, it was a beautiful location and a great conference. Congratulations to Gary Gourley of Advantage Workers' Compensation Insurance and Brooke Shultz of Mutual Boiler Re who both won a free *Workers' Compensation Subrogation In All 50 States* book, autographed by the author, Gary L. Wickert.

February 23, 2010 - Gary Wickert will present MWL's first live webinar, entitled *"WC-101, Basics of Workers' Compensation Subrogation"* at 10:00 a.m. (CST). A registration link can be found on our website homepage or you can click on the "Register Now" button to the right.

April 27-30, 2010 - Gary Wickert will be presenting at the 2010 NOPLG Conference in Savannah, Georgia. He will be presenting "Recent Developments In Workers' Compensation Subrogation". For more information on this conference, please go to https://www.signup4.net/public/ap.aspx?EID=2008838E&OID=147.

May 11-14, 2010 - MWL will be exhibiting at the 5th Annual Claims Education Conference being held in New Orleans, Louisiana. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference. For information on this conference, please go to http://www.claimseducationconference.com.

June 22-24, 2010 - MWL will be exhibiting at the 14th Annual America's Claim Event in Las Vegas, Nevada. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference. For information on this conference, please go to http://www.summitliveevents.com/sites/ace09/pages/default.aspx.

November 10-11, 2011 - MWL will be exhibiting at the19th Annual National Workers' Compensation and Disability Conference Expo in Las Vegas, Nevada. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference. For information on this conference, please go to www.WWConference.com.