MATTHIESEN | WICKERT | LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670
(800) 637-9176 (262) 673-7850 Fax (262) 673-3766
http://www.mwl-law.com

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **FEBRUARY 2011**

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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MWL FIRM NEWS!

EXPERIENCED TRIAL LAWYER JOINS MATTHIESEN, WICKERT & LEHRER, S.C.

Matthiesen, Wickert & Lehrer, S.C. is proud to announce that Eric J. Goelz has joined the firm. Eric is an insurance litigation trial lawyer with 22 years of experience in complex insurance litigation, including large loss property, automobile, and workers' compensation subrogation, as well as complex construction and insurance defense litigation. Eric comes to us from the downtown Milwaukee law firm of O'Neill, Schimmel, Quirk & Carroll, S.C., and brings with him as a client, Integrity Mutual Insurance Company, who we welcome as a client to our firm. Eric will make an excellent addition to the firm and we look forward to introducing him to our many clients and friends, and vice-versa. Eric can be contacted at egoelz@mwl-law.com.

INSURANCE SUBROGATION

ILLINOIS SENATOR INTRODUCES SUBROGATION ARBITRATION BILL

By Melissa M. Stone

Democrat Illinois Senator William R. Haine has introduced a new bill in the 97th General Assembly in Illinois, purporting to deny subrogated automobile insurance carriers the right to sue to recover subrogated damages, limiting them instead to inter-company arbitration.

Senate Bill 0152 amends the Illinois Insurance Code and adds a brand new Section at 215 ILCS 5/1143.24d entitled "Physical Damage Between Insurers." It provides that insurers must arbitrate and settle all disputed claims made for automobile physical damage between them in accordance with the terms of and rules adopted pursuant to the Nationwide Inter-Company Arbitration Agreement unless the parties agree to use another forum. It also provides that mandatory arbitration shall be limited solely to the issues of liability and damages. Furthermore, it provides that every insurer licensed to issue a policy of automobile insurance must be a signatory of the Nationwide Inter-Company Arbitration Agreement or successor thereto.

As with everything political, this new bill is an incremental step in the war against subrogation. One day eliminating subrogation altogether will be much easier if it is simply some statutory right to arbitration being eliminated rather than a common law to enforce contractual subrogation in the courts of Illinois.

The right of subrogation is unlike most political issues which generally falls favorably on one side of the political aisle or the other. Unlike health care reform, abortion, taxes, balanced budgets, deficit-spending, or any of dozens of political issues permeating society today, the effort to destroy subrogation doesn't fall along party lines. Democrats attack subrogation because the trial lawyer lobby wants to eliminate it so that they do not have to give up any part of their tort recoveries. Republicans attack subrogation because they don't understand the societal and cost-savings value it brings with it and they view subrogation as simply more unnecessary and sometimes "frivolous" lawsuits clogging up our court system.

It's hard to win a political battle when you have no friends. Subrogation remains friendless in many political quarters lately. The only way to combat that is through education – teaching those on the right that subrogation helps keep insurance premiums low for the employing public of America, and teaching those on the left that without subrogation, an infinitesimally small number of people will see a slightly higher tort recovery (and their attorney's a correspondingly higher fee), but the rest of America, who do not resort to using the civil justice system, will end up seeing higher premiums they cannot afford to pay. We can and should strive to win over both sides, and there is no time like the present. You can contact Senator Haine at senhaine@cbnstl.com.

INSURANCE SUBROGATION

MISSOURI LEGISLATURE QUICKLY REACTS TO ROBINSON DECISION

By Eric J. Goelz

In our August, 2010 newsletter, we reported to you about the significant Missouri Court of Appeals' decision in *Robinson v. Hooker,* 323 S.W.3d 418 (Mo. App. 2010). While the law in most states is that an injured employee may not bring a third-party action against a co-employee, the Court of Appeals in *Robinson* announced that a co-employee is not granted immunity under the exclusive remedy rule merely because he is a co-employee. To be immune, he must fall within the Act's definition of "employer" which is in relevant part as follows:

> *(1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;*

(3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter.... Mo. Rev. Stat. § 287.030.1.

The Court confirmed that a co-employee doesn't generally fall within this statutory definition of an "employer" as a "person ... using the service of another for pay" and "having five or more employees." Strict application of the Statute compelled them to conclude that co-employees are not entitled to invoke the employer immunity under § 287.120, and an employee retains a right to bring a third-party action against co-employees who do not fall squarely within this definition of "employer." Unless a co-employee can be shown to fit within the definition of "employer", the co-employee can be sued as a third party.

Well, it didn't take the Missouri Legislature long to react to this decision. The Missouri 96th General Assembly quickly sprang into action and Representative Jerry Nolte (R) sponsored House Bill No. 91, which amends the Missouri exclusive remedy statute and adds the following language:

3. Co-employees shall be released from liability for negligence in performing the non-delegable duty of an employer to provide a safe workplace when the negligence contributes to a co-employee's personal injury or death by accident arising out of and in the course of the injured or deceased employee's employment, unless the co-employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

The proposed language would nullify the Court of Appeals' decision and foreclose any possible third-party actions against co-employees, unless the co-employee was engaged in a negligent act that purposefully and dangerously caused or increased the risk of injury. House Bill 91 was referred to the Rules Committee on January 31, 2011, and there it presently sits.

Without opining as to the wisdom of the *Robinson* decision or the proposed legislation closing the subrogation opportunity presented by that decision, the very language of the proposed additional statutory language shows the folly which often emanates from lay legislatures (*i.e.*, non-lawyers). You see, by definition, a "negligent act" cannot be "purposeful." For now, co-employees remain fair subrogation game in Missouri.

INSURANCE SUBROGATION

HAWAII JOINS THE ANTI-SUBROGATION BANDWAGON

By Gary L. Wickert

Hawaii is only the latest state to propose subrogation-destroying legislation in the name of "tort reform." Senate Bill 270 revises medical tort reform laws to: allow for arbitration of medical services contracts, create a new cap on non-economic damages for medical torts, allow for introduction of evidence, limit contingency fees, and allow for periodic payments for future damages. It redefines non-economic damages for purposes of tort actions and limits the amount recoverable for non-economic damages to $250,000.

However, the part of the Bill that is relevant to subrogation professionals reads as follows:

No source of collateral benefits introduced pursuant to subsection (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

The Bill would limit subrogation and reimbursement by health, casualty and workers' compensation carriers, in any case where the plaintiff has brought a medical tort lawsuit and the defense has introduced evidence of collateral benefits. The bill is unclear as to whether the introduction of medical bills as reduced should be done at trial or outside the trial setting.

However, the truly amazing aspect of the bill is who introduced it. Senate Bill 270 was introduced into the Hawaii Legislature by Republican Senator Sam Slom. Despite the Republican landslide in November 2010, Hawaii's Senate has only one Republican – Sam Slom. Slom is the last GOP stalwart in the Hawaii senate. There were two Republicans but Senator Fred Hemmings didn't seek re-election and a Democrat took his place. Why is this significant? Because it clearly indicates that subrogation is so poorly understood that it is being attacked by members of both sides of the political aisle, in the name of tort reform.

The pertinent parts of the bill, if enacted in its current form, would allow the defense to introduce evidence of "collateral benefits" such as payments made by a worker's compensation carrier, a health and/or disability plan, and a casualty carrier. The injured plaintiff would have the right to counter by introducing evidence of premium payments and the bill would then prohibit subrogation and reimbursement for the "collateral benefits."

Senator Slom needs to be educated on the societal and economic benefits of subrogation. His e-mail address is senslom@Capitol.hawaii.gov. The harmful language in § 2 of the bill states:

> *No source of collateral benefits introduced pursuant to subsection (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.*

All carriers doing business in Hawaii may want to alert their legislative affairs department of this anti-subrogation bill, or contact Senator Slom directly. In the late 1980's and throughout the 1990's, "tort reform" was what it claimed to be – reforming tort laws to reflect and encourage reasonable verdicts and discourage frivolous lawsuits. Over the years, however, lazy Republican legislators facing massive mobilization by the trial lawyers' lobby, and lazy Democrat legislators simply trying to line the pockets of those same trial lawyers, have defaulted into taking the easy road – beating up on the whipping boy of subrogation. Why Republicans would carry the anti-subrogation banner, given all of the good, cost-saving, premium-reducing benefits it has, is beyond me.

Just a short trip down memory lane reveals that tort reform used to preserve subrogation rights, rather than destroy it. Here are a few examples:

HAWAII 1986—SB S1
Provided for payment of valid liens (arising out of claims for payments made from collateral sources for costs and expenses arising from an injury) from special damages recovered. Prevented double recoveries by allowing subrogation liens by insurance companies or other sources; third parties are allowed to file a lien and collect the benefits paid to the plaintiff from the plaintiff's award. The reform does not affect the amount of damages paid by the defendant to the plaintiff.

IDAHO 1990—HB 745
Permitted the admissibility of evidence of collateral source payments. Provided for awards to be offset to the extent that they include double recoveries from sources other than federal benefits, life insurance, or contractual subrogation rights.

1988—HB 551
Mandated that juries be advised of collateral source payments and subrogation of rights of collateral payers.

MAINE 1990
Provided for awards to be offset by collateral source payments, where the collateral sources have not exercised subrogation rights within 10 days after a verdict for the plaintiff.

Minnesota 1986—SB 2078
Permitted the admissibility of evidence of collateral source payments only for the court's review. Provided for awards to be offset by collateral source payments, unless the source of reimbursement has a subrogation right.

1987—HB 567
Permitted the admissibility of evidence of collateral source payments, unless the source of reimbursement has a subrogation right under state or federal law. Required a court to offset damages over $50,000.

As you can see, even at the height of tort reform measures, subrogation was recognized and protected for the value that it brought to the table. Lazy legislators like Sam Slom must be reminded of that value and urged to protect subrogation at all costs. We have enough of a chore protecting subrogation rights against attack by Democrats across the country. We don't need a battle on two fronts.

UPCOMING EVENTS.....

February 22, 2011 - Doug Lehrer will be presenting a live webinar entitled "*Bad Faith Litigation*" from 10:30 - 11:30 a.m. (CST). This webinar is approved for 1.0 hour of Texas CE ethics credit 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.

April 6, 2011 - Chris Miller will be presenting a live webinar entitled *"Investigation and Subrogation of Large Fire Losses*" from 10:00 a.m. - 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 10-13, 2011 - MWL will be exhibiting at 6th Annual Claims Education Conference in Fort Lauderdale, Florida. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference and introduce yourself. For information on this conference, please go to www.claimseducationconference.com.

This electronic newsletter is intended for the clients and friends of Matthiesen, Wickert & Lehrer, S.C. It is designed to keep our clients generally informed about developments in the law relating to this firm's areas of practice and should not be construed as legal advice concerning any factual situation. Representation of insurance companies and/or individuals by Matthiesen, Wickert & Lehrer, S.C. is based only on specific facts disclosed within the attorney/client relationship. This electronic newsletter is not to be used in lieu thereof in any way.