MATTHIESEN | WICKERT | LEHRER, S.C.

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QUARTERLY ELECTRONIC INSURANCE DEFENSE NEWSLETTER **WINTER 2010**

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

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

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MWL NEWS

RYAN L. WOODY BECOMES A PARTNER AT MATTHIESEN, WICKERT & LEHRER, S.C.

Matthiesen, Wickert & Lehrer, S.C.("MWL") is very pleased to announce that as of January 1, 2011, Senior Associate Ryan Woody will become a partner of the firm. Ryan has been with MWL since 2004, concentrating his practice on large loss subrogation, ERISA reimbursement litigation, insurance defense and complex coverage issues and appeals. Ryan has represented ERISA Plans seeking reimbursement in numerous federal courts around the country and serves as general counsel to health plans advising on all aspects of Plan language to litigation. Ryan is a member of the American Bar Association, Wisconsin Bar Association, National Association of Subrogation Professionals, Property Loss Research Bureau (PLRB) and Liability Insurance Research Bureau (LIRB). He has contributed to numerous articles and national treatises on insurance coverage, ERISA and workers' compensation subrogation. Ryan also presents subrogation seminars and webinars to insurance professionals around the country. Ryan is frequently called on to testify before legislatures and legislative committees on matters relating to health insurance subrogation. Ryan's long list of published decisions and publication contributions can be found on his attorney profile page on our website at www.mwl-law.com. He was named a Rising Star by *SuperLawyers Magazine*, an award given only to the top 2.5% of young lawyers in the State of Wisconsin.

Prior to joining MWL, Ryan was an Assistant Attorney General with the Wisconsin Department of Justice in Madison, Wisconsin. In 2001, Ryan received his B.S. from Bradley University in Peoria, Illinois and in 2004 he earned his J.D. from Marquette University Law School in Milwaukee, Wisconsin. While at Marquette University Law School, he was involved with moot court, the school newspaper, practical internships, and the Environmental Law Society. Ryan also has a special interest in environmental and natural resources law. He is a member of the Natural Resources Division of the American Bar Association and serves as legal counsel to the Ruffed Grouse Society, a national wildlife conservation association, where he deals with all aspects of Forest Service decision-making and its consequences on the forest's stakeholders, including industry, Native Americans, residents, and environmental interest groups. He has also represented recreation, timber and county associations in natural resources and access litigation.

MWL is very proud and privileged to have Ryan Woody become an owner in what we believe to be one of the premier insurance litigation law firms in the nation. Ryan can be reached rwoody@mwl-law.com.

AUTOMOBILE LITIGATION

STATUTORY INTEREST FOR THIRD-PARTY CLAIMANTS IN WISCONSIN

By Douglas W. Lehrer

More and more personal injury attorneys in Wisconsin are demanding interest payments be made on top of settlements and judgments citing Wis. Stat. § 628.46. This article discusses when a third-party claimant is entitled to recover interest payments as well as limitations established by Wisconsin Courts.

Wis. Stat. § 628.46 provides, in part, as follows:

> *Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and the amount of the loss... Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer... All overdue payments shall bear simple interest at the rate of 12% per year.*

The Wisconsin Supreme Court has recently had the opportunity to address the issue of when a third-party claimant is entitled to recover interest payments pursuant to Wis. Stat. § 628.46 in *Kontowicz v. American Standard Ins. Co. of Wisconsin*, 714 N.W.2d 105, 290 Wis.2d 302 (2006). In *Kontowicz*, the Court held that Wis. Stat. § 628.46 only allows interest to a third-party claimant when three conditions are triggered. First, there can be no question of liability on the part of the insured. Second, the amount of damages must be in a sum certain. Third, the claimant must provide written notice of both liability and the sum certain amount owed. *Id*. at page 327.

The Court in *Kontowicz* also held that if an insurer has "reasonable proof" that it may not be responsible to pay the claimant in the demanded amount, the Statute does not apply. The Court defined "reasonable proof" as "the amount of information which is sufficient to allow a reasonable insurer to conclude that it may not be responsible for payment of a claim". *Id*. Reasonable proof of non-responsibility will also be found when coverage issues are "fairly debatable". *Allstate Ins. Co. V. Konicki*,519 N.W.2d 723, 186 Wis.2d 140 (Ct. App. 1994). In other words, if coverage is "fairly debatable", no interest should be assessed.

In *Kontowicz*, the trial court consolidated two different cases involving two different accidents. In the first accident, the plaintiff's spinal cord was severed and was rendered a quadriplegic as a result of the accident. Based upon the skid marks left by the defendant's vehicle, the police concluded that the defendant was traveling between 88 and 90 miles per hour in a 35 miles per hour zone. The American Standard policy issued to the defendant contained policy limits of $500,000.00. Within one week after the accident, American Standard was aware of plaintiff's quadriplegic injuries. In fact, the head of American Standard's legal department met with the claims adjustor assigned to the claim one month after the accident and decided that "once the paraplegic injuries are confirmed, the $500,000.00 policy limits should be paid". Payment was not made, however, until ten months after the accident.

In concluding that interest should be assessed, the Court held as follows:

> *There was no question about the liability of American Standard's insured. American Standard knew about the accident involving (defendant) and (plaintiff) by September 2000, and that (defendant) was at fault and that (plaintiff) was apparently paralyzed (Defendant) conceded liability in his answers to the Interrogatories on December 28, 2000. American Standard had investigated the accident, and determined that once (plaintiff's) severe injuries were confirmed, in light of the admitted liability on the part of (defendant), then it was liable under its policy. We, therefore, hold consistent with the determination of the Circuit Court, ... that interest would accrue..."* Id.

In contrast, the second accident took place when defendant was traveling 40 miles per hour and failed to stop at a red light striking plaintiff from behind. At the time of the accident, defendant was covered under a Metropolitan insurance policy. Plaintiff suffered similar injuries in an automobile accident that occurred five years prior to the accident at issue. In concluding that interest payments should not be assessed, the Court held as follows:

> *In (plaintiff's) case, we hold that Metropolitan had knowledge of clear liability for the accident by January 29, 2001. However, in this case, because Metropolitan had information that there were pre-existing injuries of a similar nature as well as similar injuries subsequent to the ... accident, and it was fairly debatable as to whether the wage loss and medical specials were all attributable to the ... accident, we determined that Metropolitan had reasonable proof to establish that it was not responsible for at least a portion of the plaintiff's claim. The amount that it was responsible for could not be determined with any certainty. Therefore, interest under Wis. Stat. § 628.46 is not appropriate...* Id.

As referenced above, interest payments are only allowable under very limited circumstances. As such, all claims adjustors should make certain that interest payments are only made when there is no question of liability on the part of your insured, the amount of damages are in a sum certain and the claimant has provided written notice of both liability and a sum certain.

If you should have any questions regarding this article or insurance defense or coverage issues in general, please do not hesitate to contact Doug Lehrer at dlehrer@mwl-law.com.

SPORTS LITIGATION

LIABILITY IN SPORTS (1st in a Series)

GOLF

When accidents occur on a golf course, with the typical result being that someone is injured, such claimants can attempt recovery against (1) the owner and architect

based upon the nature and condition of the golf course and/or (2) the individual whose conduct allegedly was responsible for the injury. This article will summarize some of the factors courts will look at in determining whether liability will be assessed in the case of golf course injuries.

Condition/Nature of Course - Owner/Architect Liability

Occasionally a plaintiff will allege that the condition or design of a golf course was defective and pursue a claim against the course owner or architect/designer. This type of claim is rarely made but may be more likely to succeed than individual liability because of the fact that a defect in the course design is less likely to be an assumed aspect of the sport. However, most courts have held a golf course owner/architect is only responsible for making sure that the premises are fit for their specific purpose - playing golf.

In the case of *Nussbaum v. Lacopo,* 27 N.Y.2d 311, 265 N.E.2d 762, 317 N.Y.S.2d 347 (1970), the plaintiff pursued a claim against a golf course owner and the individual who hit the golf ball, which went over a row of trees and hit the plaintiff in his backyard. In finding no negligence, the court stated that because the incident was unforeseeable, the owner/defendant was not liable.

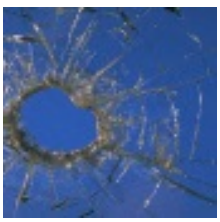
Conduct of Patrons - Individual Liability

A more common basis for a claim is usually against another golfer for disregarding the rules of the game, specifically, his/her failure to yell “fore”.

In the Wisconsin case of *Rasmussen v. Richards,* 7 Wis.2d 22, 95 N.W.2d 791 (1959), the court dealt with the question of negligence when the defendant’s shot curved to the right and hit the plaintiff. The plaintiff argued that violating a golf course rule in failing to yell “fore” constituted negligence. However, the court determined that negligence was inapplicable as the plaintiff was “neither within the area appertaining to the hole being played nor in the approximate intended line of flight of the ball.” *Id.* at 28.

Similarly, in *Strand v. Conner*, 207 Cal.App.2d 473, 24 Cal.Rptr. 584 (1962), the defendant’s golf ball struck the plaintiff playing in an adjoining fairway. Although the defendant failed to yell “fore”, the court determined that the defendant was not liable due to the plaintiff’s assumption of the risk, *i.e.*, errant shots are an inherent part of the game.

Finally, this issue has most recently been dealt within the case of *Anand v. Kapoor*, 61 AD 3d 787 - NY: Appellate Div., 2nd Dept. 2009. In this case, two doctors were playing golf on Long Island. One of the golfers hit such a poor shot from the rough that it hit his partner, standing somewhere off to the side, in the head. The issue before the court was whether the ball striker was negligent and should have yelled, “fore”, as a warning before the shot. In this case, the judge dismissed the plaintiff’s lawsuit finding that he took on the primary risk by golfing. A mid-level court agreed concluding that the plaintiff was “not in the foreseeable danger zone” and his friend had no duty to yell the customary warning. The plaintiff was blinded in one eye.



So then the question remains, what exactly does “foreseeable danger zone” mean? Generally, this will depend on the facts of each particular case. In the case of *Richardson v. Muscato*, 576 N.Y.S.2d 721, 176 A.D.2d 1227 (1991), it meant that a golfer on the tee who was hit on the head by a ball from another golfer on a different hole was in the zone when the defendant admitted he saw the plaintiff ahead about 40 feet before taking his shot. In the case of *Rinaldo v. McGovern*, 78 N.Y.2d 729, 587 N.E.2d 264 (1991), it meant

that a person driving his car on a road adjacent to the golf course was not in the zone when a ball came crashing into his windshield.

Taking into account the cases mentioned above, a golfer should still yell "fore" when he hits an errant shot and if he does not, he may be found liable in court if his shot injures another golfer. However, liability for hitting an errant shot will likely not be found when the plaintiff: (1) is not in the line of sight; (2) has gone ahead of the area where the golfer's ball lies who is furthest from the hole; or (3) otherwise acts without regard for his own safety.

If you should have any questions regarding this article or insurance defense or coverage in general, please contact Brad Matthiesen at bmatthiesen@mwl-law.com.

AUTOMOBILE LITIGATION

WISCONSIN'S RECENT CHANGE REGARDING PROCEDURES TO ESTABLISH MEDICAL EXPENSES AT TRIAL IS FOUND TO BE RETROACTIVE

On November 23, 2010, the Wisconsin Court of Appeals confirmed that the procedure for a plaintiff to prove up medical expenses, which changed on July 1, 2009, will be applied retroactive. This article will outline the history of this statutory change as well as the significance of this holding.

In Wisconsin, an injured party may only recover the value of medical expenses he or she incurs and not the actual charge, if they differ. *Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 302 Wis.2d 110 (2007). Prior to July 1, 2009, this amount could only be proven by expert testimony. *Dean Medical Center, S.C. v. Frye*, 439 N.W.2d 633, 149 Wis.2d 727 (Ct. App. 1989).

However, on July 1, 2009, Wis. Stat. § 908.03(6m) was revised to state as follows:

> *(bm) Presumption. Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.*

Under Rule 908.03(6m)(bm), a party desiring to prove the reasonableness of medical expenses no longer needs to have a qualified expert testify at trial as long as "patient health care records" are admitted into evidence. Once they are, the amounts charged are presumed to be the reasonable amount for the services rendered.

In the case of *Correa v. Farmers Ins. Exchange*, 2010 WL 4723462 (Wis. 2010), the Wisconsin Appellate Court, for the first time, had the opportunity to address the issue of whether this new rule applies retroactively. In *Correa*, the defendant insurance company argued that because the motor vehicle accident at issue occurred in January 2004, Wis. Stat. § 908.03(6m)(bm) should not apply. The Wisconsin Court of Appeals, however, disagreed. In so holding, the Court held as follows:

> *As long as changes in evidence rules do not alter the elements of a claim or a defense, trials are governed by the rules of evidence as they are at the time of trial. Frame v. Plumb, 138 Wis. 179, 189190, 118 N.W. 997, 1001 (1908). Correa's entitlement to recover his past medical expenses was the same before and after the amendments to RULE 908.03(6m). Stated another way, the*

amendments did not change Farmers Insurance's and Close's potential for liability as a result of the accident; the amendments merely fine-tuned how admissible evidence could be established. RULE 908.03(6m)(bm) applies.

The amendment to Wis. Stat. § 908.03(6m) will clearly change how defense counsel in Wisconsin must deal with the issue of medical expenses. Prior to the change in the statute, it was the plaintiff who had the burden to call expert testimony at trial to establish the value of medical expenses incurred. With this change, as long as "patient health care records" are admitted as evidence at trial, no expert testimony is needed. Defense counsel must now consider whether to retain experts of their own to counter any argument that medical expenses charged are unreasonable in amount. This change in law will not only apply to motor vehicle accidents that occurred after the change, but also to all motor vehicle accidents regardless of date. Defense counsel, and insurance carriers must, therefore, be cautious to consider this change in determining whether expert testimony will be needed.

If you should have any questions regarding this article or insurance defense or coverage issues in general, please do not hesitate to contact Doug Lehrer at dlehrer@mwl-law.com.

WORKERS' COMPENSATION INSURANCE

STATUTE OF LIMITATIONS FOR TREATMENT EXPENSE RELATING TO TRAUMATIC INJURIES

Society Ins. Co. V. Labor and Industry Review Commission, (Wis. Supreme Court, 2010 WI 68, July 8, 2010).

By Peter M. Silver

A worker suffered a traumatic work injury in 1982 which resulted in his need for a prosthetic leg. The last primary compensation payments were made in 1990 and the 12-year statute of limitations that applied to his claim ran in 2002. According to Wis. Stats. §§ 102.66 and 102.17(4), the State of Wisconsin Work Injury Supplemental Benefit Fund (WISBF) was responsible for the cost of his medical treatment from 2002 onward. On April 1, 2006, the legislature changed Wis. Stat. § 102.17(4) to do away with the statute of limitations for treatment expense relating to traumatic injuries that resulted in the loss of a limb as well as other types of scheduled injuries. The legislation was intended to apply retroactively. As a result of this new legislation, liability for treatment expense shifted from the WISBF to the insurance carrier that initially had coverage for the date of injury.

The WISBF demanded that Society Insurance begin making payments for medical expense for this 1982 injury under the new statute. Society Insurance then brought this action to determine whether it had the responsibility to make such payments. The issue before the court was whether the amended section of Wis. Stat. 102.17(4) applied retroactively to claims such as this one where the statute of limitations ran before the amendment to the statute was made.

The worker sustained a traumatic injury on June 25, 1982 while working at James Meyer, Inc. that resulted in his right leg being amputated below the knee. Society Insurance, Meyer's workers' compensation carrier, paid various benefits. The last primary compensation paid to the worker occurred on June 12, 1990. In 2004, the worker filed a claim for medical expenses. Society denied liability on the basis that it was time barred under § 102.17(4) and directed the worker to submit his claim to the WISBF. A worker's compensation hearing was held and the administrative law judge agreed with Society Insurance. In July 2006, the WISBF began forwarding the worker's medical expenses to Society Insurance based upon the amendments to §§ 102.17(4) and 102.66(1). Society

Insurance filed an Application for Hearing, and an administrative law judge concluded that the amendments to §§ 102.17(4) and 102.66(1) retroactively applied to make Society liable for the ongoing medical expenses. Society appealed to the Commission, which affirmed the administrative law judge's decision and expressly declined to comment on the constitutionality of retroactively applying the amendments.

Society Insurance then appealed the Commission's decision to the Circuit Court. That Court concluded that the legislature intended the amendments to apply retroactively, but that doing so was unconstitutional because it violated Society Insurance Company's due process rights and the contract clauses under the Wisconsin Constitution. The Court found that the expenses were substantial and that Society did not have any way to address premiums to pay for currently existing medical bills for claims where the statute of limitations had already run. The WISBF appealed, and the Court of Appeals certified the appeal to the Wisconsin Supreme Court.

The Wisconsin Supreme Court determined that it only needed to determine whether §§ 102.17(4) and 102.66(1) as applied to Society Insurance were unconstitutional beyond a reasonable doubt. The Court looked at the due process challenge following a two (2) part test. As part of the first prong of that test, the Court looked at whether Society had a vested property right that was violated by retroactive application of the statutes. The Court observed that parties who rely on statutes of limitation have a vested property right once that period has run. Because the statute of limitation had run two (2) years prior to the worker's 2004 claim, the Court held that Society had a vested property right in the statute of limitations defense.

For the second prong of the due process analysis, the Court employed the rational basis balancing test which weighs the private interest overturned by the retroactive legislation against the public purpose served by that legislation. First, the Court concluded that Society has a right to fixed exposure to liability and that right was unsettled by the retroactive application of §§ 102.17(4) and 102.66(1). The Court noted that the retroactive application also prevents Society the opportunity to recover the expense of the increased exposure on the claim by increasing the insured's premiums.

The Court next turned to the other side of the balancing test and examined the public purpose behind retroactive application. The WISBF argued that the legislature's purpose was to maintain the Funds solvency. However, the Court observed that retroactively applying these sections is in direct conflict with the purpose of the Worker's Compensation Act which is to compensate injured workers with smaller yet certain recoveries and to free employers and insurers from the risk of large and unpredictable damage awards. Balancing Society's private interest with the public interest in retroactive application, the Court concluded that Society's private interests were more substantial and held that Society met its burden of establishing beyond a reasonable doubt that retroactive application of these sections violated its due process rights. The Court also analyzed the contract clauses of the United States and Wisconsin Constitutions and concluded that the retroactive application of §§ 102.17(4) and 102.66(1) to Society also violated the contract clause.

This case is significant for private insurance carriers that provided coverage to insureds for traumatic injuries where the statute of limitations has run prior to April 1, 2006. The net effect of this case is that where the statute of limitations has run prior to April 1, 2006, the WISBF is liable for the ongoing treatment expenses. In other words, the amendments to §§ 102.17(4) and 102.66(1) are not retroactive in application. However, where the statute of limitations runs after April 1, 2006, the insurance carrier, not WISBF, will be liable for ongoing treatment expenses.

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

UPCOMING EVENTS……

January 25, 2011 - Gary Wickert will be presenting a live webinar entitled *"Subrogation Investigation of Workers' Compensation Claims*" from 10:00 - 12:00 p.m. (CST). This webinar is approved for 2.0 hours of Texas CE 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.

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 hours of Texas CE 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.

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.

PLEASE NOTE…. We are now providing live webinars and, as we do so, we are putting the recorded versions of these webinars on our Seminars/Webinars page on our website at www.mwl-law.com.The recorded versions of these webinars can be viewed at a time most convenient for you and at no cost.

HAPPY HOLIDAYS!
HAPPY NEW YEAR!

Matthiesen, Wickert & Lehrer, S.C. would like to thank all of our clients for a wonderful year and we wish you all a Merry Christmas, Happy Hanukkah, and a blessed Holiday Season. Regardless of what Christmas means to you, we hope your Christmas is full of holiday cheer shared with family and friends. For us at Matthiesen, Wickert & Lehrer, S.C., Christmas is just the beginning – a simple, yet wonderful reminder of Christ's humble beginning as a human child in this world. It's only a beginning because His birth merely set the stage for the power, glory, and salvation that would be revealed in His life, death, and resurrection come Easter morning.

An important part of the holiday season is remembering those who make the holidays meaningful to us. Matthiesen, Wickert & Lehrer, S.C. would like to wish you and your family all the happiness and prosperity this Season can bring, and may it follow you throughout the coming year.