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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **JANUARY 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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MISSISSIPPI MADE WHOLE DOCTRINE WEAKENED

Armstrong v. Mississippi Farm Bureau Cas. Co., 2011 WL 71453 (Miss. App. 2011).

By Gary L. Wickert

For years, Mississippi has had a major obstacle standing in the way of almost all subrogation efforts – the equitable Made Whole Doctrine. This Doctrine requires that a plaintiff be made whole, and to recover all his damages before an insurance carrier is allowed to enforce its contractual right to subrogation. *Federated Mutual Ins. Co. v. McNeal,* 943 So.2d 658 (Miss. 2006). Unfortunately, Mississippi doesn't differentiate between equitable subrogation and contractual subrogation with regard to the application of equitable subrogation defenses, such as the Made Whole Doctrine. Therefore, an insurer will not be able to subrogate until it has overcome the obstacle of proving its insured has been made whole. *Hare v. State,* 733 So.2d 277 (Miss. 1999). Last week, this subrogation obstacle was brought down a few notches. The Mississippi Court of Appeals announced for the first time that a judgment makes an insured whole as a matter of law - that puts a whole new spin on subrogation in Mississippi.

The problem with the Made Whole Doctrine in principle is that an insured will never announce, "Hey, I'm made whole. Come and take some of my money!" Therefore, the burden of proving an insured is made whole usually falls on the insurance company seeking to enforce a right of subrogation. The insured, through

his attorney, will inevitably argue that regardless of what amount he settles for and the amount awarded by the jury, his damages actually exceed that amount and he is not made whole. He may claim the settlement or judgment amount was a result of questionable liability and that his actual damages are much greater *than* that. The result - subrogation denied.

In *Armstrong,* Armstrong and Hill were in Armstrong's pickup truck. Hill was driving, and Armstrong was in the passenger seat. While stopped at a traffic light, they were struck from behind by a delivery truck owned by Flowers Baking Company and driven by a Flowers' employee. In the months following the accident, Armstrong and Hill were treated for injuries resulting from the accident. Armstrong, as the owner of the pickup truck, had an automobile insurance policy with Farm Bureau Casualty Insurance Company. Pursuant to the policy, Farm Bureau covered Armstrong's and Hill's medical expenses-$2,982.81 for Armstrong and $3,075.32 for Hill. Armstrong's automobile policy contained a subrogation clause, and the plaintiffs' attorney told Farm Bureau that if they were successful, they would repay its subrogation interest, less pro rata attorney's fees.

In 2008, the plaintiffs' cases were tried by a jury and they received a verdict of $4,411 for Armstrong and $3,735.30 for Hill. As is par for the course, the plaintiffs claimed they were not made whole and shouldn't be required to repay Farm Bureau its Med Pay subrogation interest. Farm Bureau filed this suit to determine whether Armstrong and Hill were made whole. Armstrong and Hill argued that they couldn't be required to pay the subrogation lien to Farm Bureau because the judgment they received against Flowers was inadequate to make them whole. In other words, they asserted that their true damages were greater than the amount of the judgment, and under Mississippi law, until they are fully compensated for their injuries so they couldn't be required to reimburse Farm Bureau. The trial court agreed with Armstrong and Hill, but the Court of Appeals did not.

In a well thought-out decision, the Court of Appeals announced that Armstrong's and Hill's damages were actually litigated and decided. At their trial, the jury was instructed to award actual or compensatory damages "in an amount which will reasonably compensate for the loss sustained." The instructions stated that such damages "are awarded for the purpose of making the plaintiffs whole again." After hearing all of the evidence and being given those instructions, the jury returned verdicts of $4,411 for Armstrong and $3,735.30 for Hill. The jury determined these were the amounts necessary to make them whole. The Court of Appeals said that when an insured's damages have been determined by a jury in an underlying tort case, the jury's assessment of damages determines the amount of damages recoverable by the insured, and the insured is both made whole as a matter of law and collaterally estopped from arguing that he hasn't been made whole.

In an opinion of first impression, the Court of Appeals announced that both Armstrong and Hill were prevented from claiming they were not made whole and Farm Bureau was allowed its subrogation interest. Not only is this case a landmark decision for taking a chink out of the made whole armor in Mississippi, but it also stands for the very cogent principle that good subrogation law can be made even in small cases involving small subrogation interests. Sometimes principles are worth fighting for – for the good of the insurance industry overall.

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

New Arbitration Service Opens Doors

There is a new kid on the arbitration block – one determined to take insurance arbitration to a new level. The Dispute Resolution Organization (DRO) has just introduced ***onlineARBITRATION.net***. The new arbitration venue boasts a true paperless system and promises to address some shortcomings the insurance arbitration industry has struggled with over the past few years.

One of the key changes DRO is promoting is based on the premise that a cornerstone of the arbitration process should be that those best qualified to render decisions on arbitration matters should do exactly that. DRO is promising to use only licensed, subrogation-experienced attorneys to render decisions in the hope that this will take some of the frustration of ill-founded decisions out of the arbitration experience.

Some of the details of the ***onlineARBITRATION.net*** process include:

- The process currently accepts auto and property subrogation disputes; workers' compensation subrogation will be added by mid-2011.
- The minimum amount sought by the plaintiff party must be $10,000 or more. A defendant may counterclaim for any amount.
- Any insurance carrier or self-insured entity may participate in the process by mutual consent of the involved parties A *Participant Agreement* is available for those seeking a more long-term commitment to the process.
- A case submission fee of $250 applies to any party (plaintiff or counter-claiming defendant) seeking to recover money. If an involved party is solely defending its position against making payment to an adverse party, they pay nothing.
- Evidence may be submitted electronically; with a couple of mouse-clicks, users eliminate the need to photocopy and mail supporting documentation, saving time and money.
- No "arbitration by ambush"; evidence can be viewed throughout the process by any of the involved parties, thereby allowing the defendant to fairly determine if the amount sought is justifiable by reviewing the proofs.
- Electronic notification keeps you informed throughout the process as to the status of your case. Every time something important happens to your case, you're notified, with an embedded link taking you right to the case.
- No more toggling back-and-forth to enter multiple damages items; all damages entries are made on one screen, intuitively.
- A full-function word processor is incorporated into the application to support the use of *italics*, **bolding**, underlining, or a ***combination***, to emphasize a point to the reader (attorney arbitrator) of your argument.
- Faster turnaround times. The *Guidelines* governing this process, coupled with the commitment of the attorneys rendering decisions means you can expect a decision in 60 days, often far less.

DRO also set out to make the appeals process – a sore spot with most arbitration venues - more legally proper. Their appeals process involves more than just giving the matter to another arbitrator and payment of a filing fee. The DRO appellate process begins with an arbitration *de novo*, allowing parties to modify their argument, and, if necessary, culminates with a three-attorney panel appeal, complete with allowable appellate briefs. Because an original plaintiff must be seeking $10,000 for a case to qualify for the DRO process, DRO felt it necessary to allow any case to be eligible for its appellate process.

You don't have to be a member participant to utilize this new process – parties to a dispute can mutually agree to use the new system. Companies which plan on utilizing the new system, can make the process even more efficient by signing on as a participant bound by the DRO Standards and Guidelines. The subrogation profession welcomes innovative and creative new forums and ideas, and DRO's new arbitration process certainly qualifies. For more information, contact David Jones at (727) 773-1515.

INSURANCE SUBROGATION

NEW JERSEY BILL HARMFUL TO PIP SUBROGATION

On December 13, 2010, the New Jersey Assembly voted 75 to 0 to approve legislation granting plaintiffs a priority over PIP carriers seeking reimbursement for PIP benefits against a tortfeasor's insurance policy. Last October, the Senate passed its version of this bill 37 to 0. The bill was proposed to reverse the New Jersey Supreme Court's decision in *Fernandez v. Nationwide Mutual Fire Ins. Co.,* 974 A.2d 1031 (N.J. 2009). The *Fernandez* court was faced with the issue of whether a PIP carrier's right to reimbursement of PIP benefits it has paid has priority over the insured's right to be made whole where the third-party tortfeasor's liability coverage does not fully cover the insured's personal injury damages.

In *Fernandez,* a tractor trailer struck Mr. Fernandez and caused significant injuries. Fernandez received $250,000 in PIP benefits under his automobile policy issued by Nationwide. Fernandez sued the trucking company which was insured by Proformance Insurance Company. Nationwide filed a subrogation claim through arbitration against Proformance, seeking reimbursement of its PIP payments. Fernandez then settled with Proformance for $1,000,000. Proformance paid Fernandez $750,000 and paid $250,000 into the court's registry, pending the outcome of the PIP arbitration filed by Nationwide.

Fernandez objected to Proformance depositing the $250,000 into court and filed an action seeking the release of those funds in fulfillment of his settlement agreement. The trial court found that Fernandez had priority to the entire $1,000,000 and Nationwide was only allowed to recover that amount still available under the Proformance policy (if any) after Fernandez' recovery. The New Jersey Court of Appeals reversed the trial court and found that Nationwide was entitled to reimbursement even if Fernandez did not receive his total settlement. The Supreme Court announced that an injured plaintiff does not have priority to a tortfeasor's third-party insurance proceeds when a carrier seeks to be reimbursed for PIP benefits pursuant to § 39:6A-9.1. It was a subrogation victory which the New Jersey Legislature simply could not stomach.

New Jersey PIP subrogation is already dismal enough without the new anti-subrogation bill. An insurance carrier has no right of subrogation for any PIP payments made pursuant to § 39:6A-4 or 10. New Jersey provides a PIP carrier with only a limited right of PIP reimbursement, and only against a vehicle not defined as an "automobile" or otherwise not required to maintain PIP coverage under New Jersey law. The newly-enacted New Jersey bill amends § 39:6A-9.1 regarding reimbursement of PIP benefits and provides:

> *Any recovery by an insurer, health maintenance organization or governmental agency...shall be subject to any claim against the insured tortfeasor's insurer by the injured party and shall be paid only after satisfaction of that claim, up to the limits of the insured tortfeasor's motor vehicle or other liability policy.*

The bill now goes to Governor Christie for his consideration. The National Association of Subrogation Professionals is actively communicating with Governor Christie's office to convince him not to sign the bill, because the knee-jerk abrogation of subrogation rights will have untold costs associated with it for New Jersey insurers, employers, and government entities. All subrogation professionals are urged to contact Governor Christie's office and urge him not to sign the bill. He can be contacted through the governor's website at http://www.state.nj.us/governor/contact/.

INSURANCE SUBROGATION

SEEKING REIMBURSEMENT FROM CO-INSURERS AFTER PAYING A CLAIM

By Michael M. Sinnen

Do you face a situation in which another insurance company provides coverage for your insured's loss, but will not reimburse you for their fair share after you have paid the claim in full? Cases between co-insurers have also become hotly litigated in courts throughout the United States. A basic understanding of the causes of action you have against potential co-insurers will assist you in your initial evaluation of these cases, and Matthiesen, Wickert & Lehrer, S.C. (MWL) is ready to pursue those carriers that stubbornly refuse to pay, despite their coverage provisions.

Two causes of action that an insurer has against another insurer in these coverage cases include equitable subrogation and equitable contribution. Many insurance companies, and even courts, become confused on the difference between these two claims. One of the differences between these causes of action pertains to the situations in which they apply. Indeed, while equitable subrogation applies when an excess insurer is pursuing a case against a primary insurer, or when a primary insurer is pursuing a case against another primary insurer that covers a different risk, equitable contribution applies when carriers cover the same loss, and provide the same type of coverage *(i.e.,* primary carrier vs. primary carrier, or excess carrier vs. excess carrier). Additionally, the remedies provided by these causes of action differ: in equitable subrogation actions, a carrier is pursuing full reimbursement for its loss, while equitable contribution actions consist of shifting a portion of a loss to another carrier.

Therefore, carriers seeking reimbursement against other carriers must look to the language of their own policy, as well as the adverse carrier's policy, to determine whether the same risk is insured. If the same risk is insured, and the same type of coverage is provided, then the paying carrier will have an equitable contribution cause of action against the co-insurer. The amount that the paying insurer is entitled to pursue will be based on the language of the two policies, and the paying insurer should consult the "other insurance" provisions of the policies, as well as other applicable provisions, to determine the amount they may be entitled to pursue. Meanwhile, if a carrier pays a loss and then realizes that they do not actually cover the risk, or that they are only an excess carrier and a primary carrier exists, that carrier may have a claim for equitable subrogation, and may be able to be reimbursed for the entire amount paid on a claim.

MWL has dealt extensively with claims for both equitable subrogation and equitable contribution and is ready to assist you with either type of case. Whether it be analyzing insurance policies to determine the type of action you may have, or representing your interests in a declaratory judgment action against another insurer, MWL is prepared to help you collect monies that other insurers rightfully owe your company.

If you have any questions regarding this article or subrogation in general, please contact Michael Sinnen at msinnen@mwl-law.com.

2010 RECOVERIES MADE BY MATTHIESEN, WICKERT & LEHRER, S.C.

Each year Matthiesen, Wickert & Lehrer, S.C. (MWL) meticulously tracks its recoveries during the course of the year. 2010 was a very good year, resulting in recoveries and credits of more than $39 million for our clients, spread over the 662 files we handled and closed during the year. We look forward to the opportunity of including your recoveries in our totals for 2011. Please let us know if we can be of assistance to you in maximizing your subrogation recoveries in the coming year. If you'd like to be part of the MWL National Subrogation Network, it is as simple as forwarding potential subrogation files to us utilizing the convenient File Referral Forms found at www.mwl-law.com. We hope all of our clients and friends enjoy a blessed 2011.

UPCOMING EVENTS.....

February 16, 2011 - Ryan Woody will be presenting a live webinar for the National Association of Subrogation Professionals (NASP) entitled *"A Review of Longaberger v. Kolt and Other Potential ERISA Game-Changing Cases*" at 1:00 p.m. (EST). For more information on this webinar, please visit www.subrogation.org.

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.

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.