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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **JUNE 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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AUTO INSURANCE SUROGATION

MANDATORY SUBROGATION ARBITRATION BILL SENT TO ILLINOIS GOVERNOR

New Law Would Mandate Arbitration Of Auto Property Subrogation

Illinois Senate Bill 152, sponsored by State Senator William Haine (D), provides that auto insurers must arbitrate and settle all subrogation claims for auto physical damage between them in accordance with the terms of and rules adopted pursuant to the Nationwide Inter-Company Arbitration Agreement (NICA), unless the carriers agree to use another forum. The Bill passed both Houses of the Illinois Legislature and on June 24 was sent to Governor Pat Quinn for signing into law. As of this newsletter's date, it has not yet been signed.

The new Bill would create a new § 143.24d, which would read as follows:

Sec. 143.24d. Arbitration of physical damage subrogation claims between insurers in certain cases.

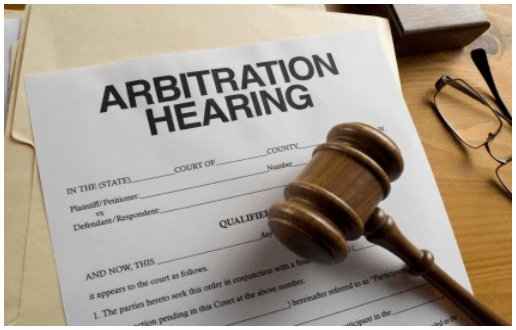
(a) With respect to physical damage subrogation claims arising from auto damages incurred on or after January 1, 2012, insurers shall arbitrate and settle such claims where the amount in controversy, exclusive of the costs of

the arbitration, is less than $2,500. Such arbitration shall be in accordance with the terms of and rules adopted pursuant to the Nationwide Inter-Company Arbitration Agreement, or any successor thereto, as adopted and from time to time amended by its members, unless the parties on a case-by-case basis mutually agree to use another forum; the alternate forum may include a court of competent jurisdiction, in which case the claim shall be arbitrated or tried in that alternate forum. Mandatory arbitration of disputed claims shall be limited solely to the issues of liability and damages.

(b) Nothing in this Section shall be interpreted to require an insurer to become a member of any organization or to sign the Nationwide Inter-Company Arbitration Agreement.

Section 99, Effective date. This Act takes effect January 1, 2012.

The new law provides that mandatory arbitration will be limited solely to the issues of liability and damages, not coverage. It also sets forth that every insurer licensed to issue a policy of auto insurance shall utilize arbitration, but does not require them to sign or become a member of the NICA or any successor thereto.



The Bill was sent to Governor Pat Quinn on June 24 and, by law, he has 30 days to sign or veto the Bill. If he takes no action, the Bill becomes law automatically. Matthiesen, Wickert & Lehrer, S.C. spoke with the governor's office on June 30 and believes that the law will be signed shortly. Once signed the law dramatically changes the landscape of auto insurance subrogation in Illinois. Previously, Illinois common law allowed simple subrogation suits between a subrogated carrier and an at-fault tortfeasor, regardless of the amount of damages. If § 143.24d becomes law, it would mandate arbitration for all physical damage subrogation claims under $2,500.

Practically speaking, § 143.24d will require all auto insurance companies to utilize a non-government agreement known as NICA for smaller property damage subrogation matters. There are currently more than 4,000 insurance company signatories to this agreement. The agreement is the medium through which insurance carriers work with and resolve disputed issues related to claims among themselves through arbitration, without having to go to courts. The NICA program is administered by Arbitration Forums, Inc.

Not all auto insurance companies are signatories to the agreement. The process of settling the claims under the agreement and between participating companies rely on each company submitting every fact they have to the arbitrators, and then wait for the final decision. So, if your company is not happy for paying your claim because they think it is the other person's fault, then the adjuster of your company will file the proper paperwork including all supportive documents (statements, photos, estimates, bills, etc.) to arbitration and the opposing company. Very strict guidelines and timetables are used in the process of filing the paperwork.

ILLINOIS

Illinois certainly has its share of non-standard carriers. Insurers that work in the non-standard markets are less likely to agree with this new law because their clients are less likely to cooperate at the time of crash or provide information that clients of standard carriers provide. For that reason, non-standard companies will most likely benefit less from the new law. Some argue that with the passage of this new law, non-standard insureds will have to pay more for insurance, while their quality of service will go up. While that is very good news to some, retractors believe that increasing insurance premiums will leave more people driving uninsured.

Assuming the Bill passes – which it probably will – insurers doing business in Illinois should become geared for handling a larger number of arbitration claims in Illinois. The success of arbitration claims is directly

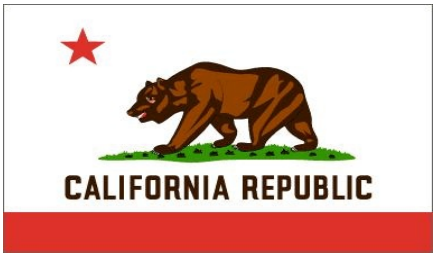
proportional to the amount of preparation and skill used in submitting them. Matthiesen, Wickert & Lehrer, S.C. serves as national subrogation counsel for several national auto carriers and handles a large number of arbitration claims annually. If you have a need for quality arbitration representation on a contingency fee basis, please contact Jeannine Black at jblack@mwl-law.com.

ERISA SUBROGATION

CALIFORNIA FEDERAL COURT HOLDS THAT THE MADE WHOLE DOCTRINE IS NOT AN EQUITABLE DEFENSE

By Ryan L. Woody

The Northern District of California recently came out with a surprisingly subrogation-friendly decision regarding application of the Made Whole and Common Fund Doctrines. In *Aetna Life Ins. Co. v. Kohler*, 4:11-CV-004390CW (N.D. Cal., May 23, 2011) an ERISA-sponsored Plan sought reimbursement from a husband and wife who settled their personal injury lawsuit. The Plan paid out $147,986.76 to cover Mr. Kohler's medical expenses but, it appears that the attorney purposely allocated the majority of the settlement proceeds to Mrs. Kohler in an attempt to defeat the Plan's lien. As such, Mr. Kohler was to receive $7,250 and Mrs. Kohler $137,750 for a total of $145,000. The Kohlers' attorney refused to reimburse the Plan asserting the Made Whole Doctrine as a defense. The Plan was forced to file suit in federal court under ERISA § 502(a)(3). Meanwhile, the parties to the state court lawsuit interpleaded the settlement funds into the state court's registry pending resolution of the ERISA claim.



In the federal action, the Kohlers argued that the Plan's action was not "equitable" because, if allowed, Mr. Kohler would not have been made whole. In a line that many ERISA practitioners are used to hearing, the Kohlers' attorney argued that "he who seeks equity must do equity." They argued that the Plan's language forcing waiver of their equitable defenses, including the Made Whole Doctrine, constituted an inequity. However, the district court was not persuaded by such argument. First, the court explained to the Kohlers the basic tenet of the Made Whole Doctrine. It wrote:

> *The Made Whole Doctrine is not an equitable defense. It is a federal common law rule that provides that "absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole." Barnes v. Indep. Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan, 64 F.3d 1389, 1394 (9th Cir. 1995). The Made Whole Doctrine is a federal common-law rule of contract interpretation. It is a "gap-filler" that applies only if the contract's subrogation clause is silent with respect to the insured's right to be made whole before the insurer may obtain reimbursement for benefits paid. Thus, the parties may abrogate the Made Whole Rule by providing that the insurer has "the right of first reimbursement out of any recovery the insured [is] able to obtain, even if [the insured is] not made whole." Id. at 1395.*

After the court reviewed the Plan's first priority lien provision, it concluded that there was no authority that would preclude the Plan from seeking equitable remedies "simply because Aetna's recovery may exhaust settlement proceeds."

Second, the court addressed the defendant's common fund claim. Specifically, counsel for the Kohlers argued that it would be inequitable for the Plan to recover prior to the attorney's claim for fees. But, again, the court rebuffed this argument, writing:

Defendants also argue that Aetna is not "doing equity" because, under the "Common Fund Doctrine," their counsel's right to fees should take priority over Aetna's claim. Under this Doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Staton v. Boeing Co., 327 F.3d 938, 967 (9th Cir. 2003) (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)). According to the Supreme Court, the "Doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." Van Gemert, 444 U.S. at 478. However, the Plan's terms provide that, if a party accepted benefits, that party agreed that the Plan "is not required to participate in or pay court costs or attorneys fees to any attorney hired by the Covered Person to pursue the Covered Person's damage claim." Compl., Ex. A, at 41. Thus, the Common Fund Doctrine does not require dismissal of Aetna's claim, in whole or in part.

Finally, Defendants contend that Aetna is not "doing equity" because they and their attorneys may receive nothing from the settlement with Ms. Warren and her insurer if Aetna were to prevail. However, Defendants offer no authority that this result precludes Aetna from pursuing equitable relief.

Third, the Kohlers sought to preclude the Plan from recovering any of the funds that were unilaterally apportioned to Mrs. Kohler, because "she is not a 'Covered Person' as defined by the Plan." This was a key issue since the vast majority of the settlement had been allocated to Mrs. Kohler. Notwithstanding the unilateral allocation, the court found that the Plan's language sufficiently provided that a "lien may be enforced against any party who possesses the funds or proceeds representing the amount of benefits paid by the Plan including, but not limited to, the Covered Person, … and/or any other source possessing funds representing the amount of the benefits paid by the Plan."

Finally, for those ERISA gurus out there, the court also rejected a request to abstain the action under the *Colorado River* Doctrine, because the parties were litigating the case in state court and the funds were on deposit with that court. The court explained this unique doctrine:

In situations involving the contemporaneous exercise of jurisdiction by different courts over sufficiently parallel actions, a federal court has discretion to stay or dismiss an action based on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation. Colorado River, 424 U.S. at 817. The two actions need not exactly parallel each other to implicate the Colorado River Doctrine; it is enough that the two cases are substantially similar. Nakash v. Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989). The mere presence of additional parties or issues in one of the cases will not necessarily preclude a finding that they are parallel. Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc., 962 F.2d 698, 700-701 (7th Cir. 1992); see also Interstate Material Corp. v. City of Chicago, 847 F.2d 1285, 1288 (7th Cir. 1988) (noting that the requirement is for parallel suits, not identical ones).

However, the federal court decided that *Colorado River* abstention would only apply in "exceptional circumstances" and that federal district courts "have a 'virtually unflagging obligation' to exercise their jurisdiction." Not surprisingly then, the court concluded that exceptional circumstances did not exist.

In the end, the court denied the defendant's motion to dismiss the Plan's claim. Further, the language in the order suggests that a future motion for summary judgment filed by the Plan will be granted for the entire amount of the settlement. To me, this case represents a breath of fresh air from a usually difficult jurisdiction. It is also an important holding because it establishes that the Made Whole Doctrine is not a separate equitable defense that would bar a Plan's ability to bring an equitable

claim under § 502(a)(3), notwithstanding Plan language to the opposite. For those ERISA practitioners out there, I suggest pulling a copy of this decision and using it to negotiate with plaintiff's counsel in your California cases.

If you should have any questions regarding this article or ERISA subrogation in general, please contact Ryan Woody at rwoody@mwl-law.com.

ERISA SUBROGATION

MWL FILES NASP AMICUS BRIEF IN SIGNIFICANT ERISA CASE

Matthiesen, Wickert & Lehrer, S.C. (MWL) has authored and filed an amicus curiae brief on behalf of the National Association of Subrogation Professionals (NASP) in the 9th Circuit case of *CGI Technologies and Solutions, Inc. Welfare Benefit Plan v. Rhonda Rose and Nelson Langer Engle, PLLC.* Ryan Woody and Tim Mentkowski authored the brief, which turned out to be a powerful defense of subrogation generally, and health insurance subrogation specifically.

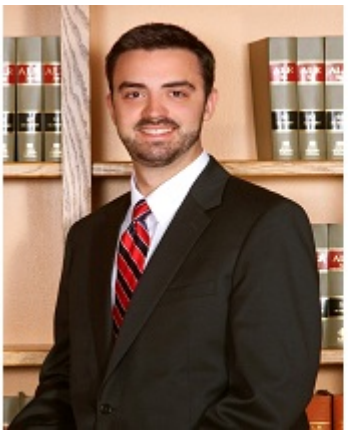
Rhonda Rose was an ERISA Plan participant who received about $30,000 in benefits following an auto accident with a third party. The Plan contained a clear reimbursement/subrogation provision with first priority, anti-made whole, and anti-common fund language. Rose settled her claim with the tortfeasor well in excess of the lien, but refused to fully reimburse the Plan, relying on the usual suspects: made whole, common fund, equitable remedy, etc. The Plan filed suit against Rhonda and her attorneys under ERISA remedy provision 502(a)(3) which allows for "appropriate equitable relief." They sought a constructive trust or equitable lien over the settlement funds, which is explicitly authorized by the Supreme Court in the *Sereboff* case -- a common approach for subrogated ERISA plans.

The battle over whether such reimbursement actions are "equitable" has already been lost by Plan participants, so the plaintiff's attorneys have taken a new tack, arguing that the relief is not "appropriate." Essentially, they say that "appropriate" means application of made whole principles and pro rata lien reductions to reflect the amount of settlement allocated for "medical payments." The amicus brief dispatches their arguments and, more importantly, amounts to a powerful sermon espousing why subrogation and reimbursement are essential cost-containment tools for keeping premiums low and complying with ERISA fiduciaries' obligations to all Plan participants.

This case is important because it represents the efforts of beneficiaries and their attorneys to foreclose access to the federal courts for ERISA reimbursement actions. These cases belong in federal court since ERISA Plans are intended to be governed by federal law but, the beneficiaries don't like it because the courts are strict about enforcing the language of the written Plans, and will not typically apply "subrogation defenses" in these actions where the Plan contracts out of it. The alternative is to send the case to the states where the results will be inconsistent and unpredictable, and where ERISA really ought to preempt anyway. Since they can't cut out the 502(a)(3) remedies, they now want to enforce lien reductions under the guise of "appropriateness." As the brief says, however, the Plans must be enforced according to their terms in order to serve the purposes of ERISA (primacy of the written Plan, bargained-for expectations of the parties) and there is no reasonable basis for imposing made whole or common fund to the liens.

If anybody would like a copy of the amicus brief, please contact Jamie Breen at jbreen@mwl-law.com.

MWL FIRM NEWS



MATTHIESEN, WICKERT & LEHRER, S.C. WELCOMES ATTORNEY TIMOTHY S. MENTKOWSKI TO THE FIRM

Matthiesen, Wickert & Lehrer, S.C. is pleased to announce the addition of Associate Attorney Tim Mentkowski, who joined the firm last month. Tim is a graduate of Washington and Lee University School of Law where he attended on an academic scholarship and was a finalist in the Robert J. Grey, Jr. Negotiations Competition. Tim also studied at the Renmin University of China School of Law in Beijing and the University of Zagreb School of Law in Croatia. He speaks both Mandarin and Serbian. Tim has worked at the Milwaukee County Courthouse under Judge Marshall Murray and as a research assistant for Professor Doug Rendleman at Washington and Lee, where he contributed to the legal textbooks of *Remedies* and *Complex Litigation.* Tim will be working as a subrogation attorney and his talents will also be utilized in assisting in the updating and monitoring of MWL's subrogation books and treatises. We look forward to Tim's contribution in representing the firm's many insurance clients throughout North America.

UPCOMING EVENTS……

September 20, 2011 - Ryan Woody will be presenting a live webinar entitled *"Avoiding The Made Whole And Common Fund Doctrines*" from 10:30 a.m. - 11:30 a.m. (CST). This webinar is approved for 1.0 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.

October 26-28, 2011 - MWL will be exhibiting at the *Self Funding Employer Healthcare and Workers' Compensation Conference* in Chicago, Illinois. Jamie Breen will be at exhibit booth 105 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please go to www.selffundingconference.com.

May 9-12, 2012 - MWL will be exhibiting at 7th Annual Claims Education Conference in Napa Valley, California. Jamie Breen will be at exhibit booth 12 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please go to www.claimseducationconference.com.