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A FULL SERVICE INSURANCE LAW FIRM

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

This electronic subrogation update 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 update, 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.

****** SUBROGATION UPDATE ******

INSURANCE SUBROGATION

COLORADO ANTI-SUBROGATION LAW UPDATE

Section 10-1-135 to Become Law In August

The Colorado anti-subrogation bill referenced in our latest newsletter has passed and is now worthy of noting by all subrogation professionals handling subrogation in Colorado. The Colorado legislature adjourned on May 12, 2010, but the bill was recently signed into law by Governor Ritter, and under its terms becomes effective August 11, 2010. As such, a thorough treatment of the new made whole landscape in Colorado is in order.

The Made Whole Doctrine was first introduced and accepted in Colorado in the limited context of uninsured motorist coverage in 1989. *Kral v. Am. Hardware Mut. Ins. Co.,* 784 P.2d 759 (Colo. 1989). In the same case, the Colorado Supreme Court answered the question of whether a conventional subrogation provision in a policy can displace the Made Whole Rule. Within that limited context, the Court determined that any subrogation clause was unenforceable to the extent that it would impair the ability of the insured to be made whole. *Id*. For many years, Colorado courts made no direct pronouncements regarding the doctrine's application generally or to health insurance subrogation, and the legislature was reasonably quiet. That all changed with the passage of C.R.S. § 10-1-135 in 2010.

C.R.S. § 10-1-135 will become effective on August 11, 2010 and a global legislative pronouncement of the Made Whole Doctrine. Due to the global nature of its application, it is worth setting forth at length here. C.R.S. § 10-1-135 provides as follows:

> ***C.R.S. § 10-1-135. Reimbursement for benefits--limitations--notice--definitions--legislative declaration.*** *(1) The general assembly hereby finds and declares that:*

(a) When a payer of benefits seeks repayment of the benefits provided to an injured party, the repayment reduces the amount available to the injured party to compensate him or her for injuries and damages other than the cost of medical care and medical services;

(b) Reimbursement or repayment of benefits should not be permitted when the injured party would not be fully compensated for his or her injuries and damages;

(c) It is in the best interests of the citizens of this state to ensure that each insured injured party recovers full compensation for bodily injury caused by the act or omission of a third party, and that such compensation is not diminished by repayment, reimbursement, or subrogation rights of the payer of benefits;

(d) This law regulating insurance and health benefit plans is intended to ensure that an injured party who recovers damages for bodily injuries caused by a third party and receives benefits pursuant to an insurance policy, contract, or benefit plan is fully compensated for his or her injuries and damages before the payer of benefits may seek repayment of benefits provided to the injured party;

(e) In the absence of this section, payers of benefits may seek repayment of benefits out of a recovery obtained by the injured party without paying attorney fees incurred by the injured party in obtaining the recovery, thereby benefitting from attorney services for which they did not pay; and

(f) This section is intended to require a payer of benefits to pay a proportionate share of the attorney fees when the payer of benefits is a beneficiary of the attorney services paid for by the injured party.

(2) As used in this section, unless the context otherwise requires:

(a) "Benefits" means payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments, or any other benefits of any kind, including discounts and write-offs, provided to or on behalf of an injured party under a policy of insurance, contract, or benefit plan with an individual or group, whether or not provided through an employer.

(b) "Injured party" means a person who sustained bodily injury as the result of the act or omission of a third party, has pursued a personal injury or similar claim against the third party or has made a claim under his or her uninsured or underinsured motorist coverage, and has received benefits as a policyholder, participant, or beneficiary from the payer of benefits. "Injured party" includes the personal representative of the estate of an injured party or the legal representative of a person under a disability as provided in article 81 of title 13, C.R.S.

(c)(I) "Payer of benefits" means any insurer, health maintenance organization, health benefit plan, preferred provider organization, employee benefit plan, other insurance policy or plan, or any other payer of benefits. "Payer of benefits" includes a fiduciary of an insurer, plan, or other payer of benefits.

(II) "Payer of benefits" does not include a program of medical assistance under the "Colorado Medical Assistance Act", articles 4 to 6 of title 25.5, C.R.S., of the children's basic health plan, as defined in article 8 of title 25.5, C.R.S.

(d) "Recovery" means recovery of a monetary award from a third party through either settlement or judgment to compensate an injured party for bodily injury sustained as a result

of an act or omission of the third party. "Recovery" includes benefits paid or settlement of claims under uninsured or underinsured motorist coverage pursuant to section 10-4-609.

(3)(a)(I) Reimbursement or subrogation pursuant to a provision in an insurance policy, contract, or benefit plan is permitted only if the injured party has first been fully compensated for all damages arising out of the claim. Any provision in a policy, contract, or benefit plan allowing or requiring reimbursement or subrogation in circumstances in which the injured party has not been fully compensated is void as against public policy.

(II) This paragraph (a) does not limit the right of an insurer to seek reimbursement or subrogation to recover amounts paid for property damage or the right of an insurer providing uninsured or underinsured motorist coverage pursuant to section 10-4-609 to an injured party to pursue claims against an at-fault third party, and any amounts recovered by such insurer shall not be reduced pursuant to paragraph (c) of this subsection (3).

(b) If the injured party is fully compensated and reimbursement or subrogation of benefits is authorized, the reimbursement or subrogation amount cannot exceed the amount actually paid by the payer of benefits to cover benefits under the policy, contract, or benefit plan or, for health care services provided on a capitated basis, the amount equal to eighty percent of the usual and customary charge for the same services by health care providers that provide health care services on a noncapitated basis in the geographic region in which the services are rendered.

(c) The amount recoverable, if any, by the payer of benefits for reimbursement or subrogation shall be reduced by an amount equal to the payer of benefits' proportionate share of the attorney fees and expenses incurred by or on behalf of the injured party in making the recovery, based on the ratio of the amount of attorney fees and expenses incurred to the amount of the recovery.

(d)(I) If the injured party makes a recovery of an amount that is less than the total amount of coverage available under any third party liability insurance policy or uninsured or underinsured motorist coverage pursuant to section 10-4-609, there is a rebuttable presumption that the injured party has been fully compensated. If the injured party makes a recovery of an amount equal to the total amount of coverage available under all third party liability insurance policies and uninsured or underinsured motorist coverages, there is a rebuttable presumption that the injured party has not been fully compensated.

(II) If the injured party obtains a judgment, the amount of the judgment is presumed to be the amount necessary to fully compensate the injured party.

(4)(a)(I) Any disputes between the payer of benefits and the injured party regarding entitlement to reimbursement or subrogation shall be resolved in accordance with this paragraph (a), regardless of whether administrative remedies contained in the policy, contract, or benefit plan documents have been exhausted by the injured party.

(II) If the injured party obtains a recovery that is less than the sum of all damages incurred by the injured party and intends to enforce the requirements of subsection (3) of this section, the injured party shall notify the payer of benefits within sixty (60) days of receipt of each recovery. The notice shall include the total amount and source of the recovery; the coverage limits applicable to any available insurance policy, contract, or benefit plan; and the amount of any costs charged to the injured party. If recovery was obtained through a settlement agreement that contains a confidentiality provision that

affects the information required by this subparagraph (II), the confidentiality provision is unenforceable as to the disclosure of the required information.

(III) If the payer of benefits disputes the injured party's recovery is less than the sum of all damages incurred by the injured party, the dispute shall be resolved by arbitration. The payer of benefits may request arbitration of the dispute to determine the extent to which the payer of benefits may be entitled to share in the recovery pursuant to subsection (3) of this section. The payer of benefits may request arbitration no later than sixty (60) days after receipt of any notice under subparagraph (II) of this paragraph (a).

(IV) If the payer of benefits requests arbitration of the dispute, the injured party and the payer of benefits shall jointly choose an arbitrator to resolve the dispute. If the injured party and the payer of benefits cannot agree on an arbitrator, the dispute shall be resolved by a panel of three arbitrators selected as follows:

(A) The injured party shall select one arbitrator;

(B) The payer of benefits shall select one arbitrator; and

(C) The arbitrators chosen by the parties pursuant to sub-subparagraphs (A) and (B) of this subparagraph (IV) shall select the third arbitrator.

(b) If the arbitrator determines that the amount of the recovery does not fully compensate the injured party for his or her damages, the payer of benefits shall have no right to repayment, reimbursement or subrogation.

(5) A payer of benefits shall not deny or refuse to provide any plan benefits otherwise available to an injured party because of the existence of a potential personal injury or similar claim or the resolution of a personal injury or similar claim.

(6)(a)(I) Except as provided in subparagraph (II) of this paragraph (a), a payer of benefits shall not bring a direct action for subrogation or reimbursement of benefits against a third party allegedly at-fault for the injury to the injured party or an insurer providing uninsured motorist coverage.

(II) If an injured party has not pursued a claim against a third party allegedly at fault for the injured party's injuries by the date that is sixty (60) days prior to the date on which the statute of limitations applicable to the claim expires, a payer of benefits may bring a direct action for subrogation or reimbursement of benefits against an at-fault party. Nothing in this subparagraph (II) precludes an injured party from pursuing a claim against the at-fault third party after the payer of benefits brings a direct action pursuant to this subparagraph (II), and the payer of benefits' right to reimbursement or subrogation is limited by subsection (3) of this section.

(b) A third party shall not include a payer of benefits that is claiming repayment or reimbursement pursuant to subsection (3) of this section as a copayee on any check or draft in payment of a settlement with or judgment for or on behalf of the injured party.

(7)(a) A payer of benefits shall not delay, withhold, or otherwise reduce benefits:

(I) Because the obligation to pay benefits results from an act or omission for which the third party may be liable; or

(II) As a means of enforcing or attempting to enforce a claim for reimbursement or subrogation.

(b) Nothing in this subsection (7) prohibits the coordination of benefits between or among payers of benefits.

(8) When a payer of benefits obtains reimbursement of benefits pain in accordance with this section, the payer of benefits shall apply the amount of the reimbursement as a credit against any lifetime maximum benefit contained in the policy, plan, or contract under which the benefits were paid.

(9) Any language in an insurance policy, contract, or benefit plan that is contrary to this section is void and unenforceable. Although such language is unenforceable, nothing in this section requires an insurer to modify and refile with the commissioner, prior to the standard filing date, an insurance policy, contract, or benefit plan that contains language that is contrary to this section.

(10) Nothing in this section modifies:

(a) The requirement of section 13-21-111.6, C.R.S., regarding the reduction of damages based on amounts paid for the damages from a collateral source. The fact or amount of any collateral source payment or benefits shall not be admitted as evidence in any action against an alleged third party tortfeasor or in an action to recover benefits under section 10-4-609.

(b) Lien rights of hospitals pursuant to section 38-27-101, C.R.S., or of the department of health care policy and financing pursuant to section 25.5-4-301(5), C.R.S.; or

(c) Subrogation and lien rights granted to workers' compensation carriers or self-insured employers pursuant to section 8-41-203, C.R.S. C.R.S. § 10-1-135 (2010).

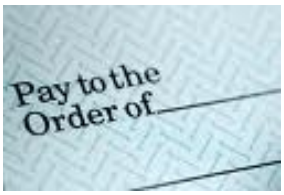
The new statute limits the ability of a "payer of benefits" to subrogate or seek reimbursement of benefits in a third-party lawsuit or claim if the insured is not made whole. This applies to any insurer, HMO, health Plan or other provider of health care benefits. C.R.S. § 10-1-135(c)(II) (2010).

C.R.S. § 10-1-135 not only applies the Made Whole Doctrine to all health insurance subrogation and automobile medical subrogation, but also legislates the Common Fund Doctrine by making subrogated carriers who successfully seek reimbursement responsible for a proportionate share of the insured's attorney's fees. C.R.S. § 10-1-135(f) (2010). It applies to any third-party recovery by an insured, whether through settlement or judgment. C.R.S. § 10-1-135((3)(d)(I) (2010). Any provision in an insurance policy which provides contrary to this statute is void as against public policy. C.R.S. § 10-1-135(3)(a)(I) (2010). When reimbursement or subrogation is allowed under this section, the amount recovered by the subrogated carrier cannot exceed (1) the amount actually paid by the carrier, or (2) for benefits paid by a capitated Plan, the amount equal to 80% of the usual and customary charge for the same services provided on a non-capitated basis in the geographic region in which the services are provided. C.R.S. § 10-1-135(3)(b) (2010). A "capitated" Plan pays a specified amount periodically to a health provider for a group of specified health services, regardless of quantity rendered or the actual reasonable and necessary cost of the medical services provided.

C.R.S. § 10-1-135 does provide that if an insured settles within the available third-party liability policy limits or uninsured/underinsured coverage limits pursuant to § 10-4-609, there is a *rebuttable presumption* that the insured has been made whole. C.R.S. § 10-1-135(3)(d)(1) (2010). Also, if an insured litigates the case and receives a judgment, there is a presumption that the amount of the judgment fully compensates the insured. C.R.S. § 10-1-135(3)(d)(II) (2010).

If there are any disputes with regard to whether the insured has been made whole, they must be resolved according to the terms of § 10-1-135. If the insured feels he is not made whole, he must notify the subrogated carrier within 60 days of receipt of the recovery. C.R.S. § 10-1-135(4)(a)(II) (2010). Notice must include: (1) the total amount of recovery; (2) the coverage limits applicable to any available policy or Plan; and (3) the amount of costs charged to the insured. *Id*.

If the subrogated carrier wants to dispute that the insured has not been made whole, the dispute must be resolved by arbitration. C.R.S. § 10-1-135(4)(a)(III) (2010). The subrogated carrier or Plan must request arbitration no later than sixty (60) days after receipt of notice from the insured. *Id*. In that event, the insured and carrier must jointly choose an arbitrator to resolve the dispute. If they cannot agree, the dispute is resolved by a panel of three (3) arbitrators – one selected by the insured, one by the carrier, and one by the first two arbitrators.



Another troubling provision in § 10-1-135 is that a subrogated carrier is now prohibited from pursuing any subrogation directly against a third party, unless, within sixty (60) days of the running of the applicable statute of limitations, the insured has not pursued a claim against the third party. C.R.S. § 10-1-135(6)(II) (2010). A third party is also precluded from including the subrogated carrier on any settlement draft. C.R.S. § 10-1-135(6)(II)(b) (2010).

C.R.S. § 10-1-135 will not affect current coordination of benefits procedures, application of Colorado's collateral source set forth in § 13-21-111.6, or subrogation rights of a workers' compensation carrier under § 8-41-203. C.R.S. § 10-1-135(10 (2010).

If you should have any questions regarding this article, please do not hesitate to contact Gary Wickert at gwickert@mwl-law.com.
