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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

MARCH 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](mailto:rthomson@mwl-law.com). We appreciate your friendship and your business.*

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#### PROPERTY SUBROGATION

## SLIPS AND FALLS ON ICE AND SNOW

By Gary L. Wickert



Injury and workers' compensation cases involving slips and falls on snow and ice during winter in America's northern states continue to be a perplexing subrogation puzzle for insurance claims and subrogation professionals. During the winter months our office sees a flood of cases involving slips and falls on ice, snow and slush during winter conditions. It is important to understand when and how liability attaches in such cases – and when it does not.

Life is such that accidents happen, and they do occasionally happen because the injured victim is careless and not paying attention. The key to success in these types of cases is knowing the difference between such instances and those in which the negligence of a third party is responsible for injury. Juries know that in the winter months, plaintiffs need to tread more slowly and with more caution. Contributory negligence on plaintiffs in slips and falls cases is traditionally very high and such cases are not usually very good cases without extenuating circumstances. The reason? We all have a responsibility to watch where we are walking and this is especially true in winter, when we are all on notice of the naturally-occurring dangers and slippery conditions over which we all must traverse. While the laws of each state are somewhat different, they almost all have certain basic principles in common. We will use Wisconsin as an illustration.



Wisconsin, like many states, creates a legal distinction between privately owned property and public property. Private property owners owe a duty of reasonable care to invitees - persons invited, implicitly or explicitly, upon the real property of another. Public property owners, and maintenance companies, owe a much higher duty to people on their property, than do private property owners. Wisconsin, like other states, also creates a distinction between the classes of individuals who are injured. Private property owners owe a different duty to trespassers as opposed to non-trespassers. A trespasser is someone who goes on somebody's private property without permission and without their knowledge.

*Private Property.* Wisconsin private property owners owe different duties to trespassers as opposed to non-trespassers. In Wisconsin a trespasser is defined as someone who goes onto someone's private property without consent or an invitation. If an individual is considered to be a trespasser, then the Wisconsin private property owner cannot willfully, wantonly, or recklessly inflict injury upon the trespasser. If the owner knew or should have known of the trespasser's presence on the property, then the owner cannot do anything likely to cause injury to the trespasser.

**NOTICE**  
**PRIVATE**  
**PROPERTY**  
**KEEP OUT**

With regard to non-trespassers, a private property owner must only use ordinary care under the circumstances to construct, manage and maintain the premises to avoid exposing non-trespassers to an unreasonable risk of harm. Such private property owners have a duty to discover and make safe conditions on their property that would likely expose a non-trespasser to an unreasonable risk of harm. If an unreasonable risk of harm existed and the owner knew of it or should have known of it, then the owner has a duty to either fix the problem or warn of the condition.

*Public Property.* Slips and falls on public – as opposed to private – property, present many different concerns. By “public property” we are referring to government property and property owned by businesses onto which the public is both invited and expected to traverse. The majority of Wisconsin injuries on public property involve a series of statutes known as Wisconsin's Safe Place Law, which applies to public buildings and places of employment. This law requires certain public property owners and employers to keep their

premises as safe as the nature of their business reasonably permits. This requirement includes the construction, maintenance and repair of the premises. As with private property, trespassers are not covered by the Wisconsin Safe Place Law. Business and employers are not required to keep their property absolutely safe, but they are required to keep the property as free from danger to the life, health, safety, or welfare of visitors or employees as the nature of the property will reasonably permit. This requires the owner or employer to use reasonable care in inspecting the property for potential hazards and making safe any hazards which it can.



Wisconsin Safe Place violations by building owners can be separated into two types: *structural defects* and *defects associated with the structure*. A *structural defect* is an unsafe condition on property that has been “built-in” in the sense that structural defects include improper building materials, improperly designed buildings or even an improperly laid out building. Steps that do not have appropriate traction or the lack of a handrail on a stairway where one is required would be examples of structural defects. A *defect associated with the structure* means an unsafe condition due to disrepair or lack of adequate maintenance.

The main distinction between structural defects and defects associated with the structure is that injured persons are not required to prove that the owner of the property was aware, or should have been aware, of the structural defect. Wisconsin injury victims can also pursue claims against public property owners in Wisconsin under a general negligence theory. As with all negligence claims, the plaintiff is required to show the following:

- Duty - The owner had a general duty to keep their premises safe.
- Breach - The owner breached their duty to keep their premises safe.
-

- Proximate Cause - The plaintiff was injured due to the owner's breach of their duty.
- Damages - The plaintiff was injured due to the owner's breach of their duty.

The two most difficult aspects of any premises liability case are (1) establishing the breach of a duty – evidence that the owner of the premises knew of a defect and failed to take any action to correct it, and (2) overcoming the open and obvious defense – the natural tendency of many jurors to conclude that the instrumentality on which the plaintiff slipped and fell would and should have been open and obvious to an alert person, increasing the likelihood of placing 50% or more contributory negligence on the injured plaintiff, which in many states will eliminate any recovery.



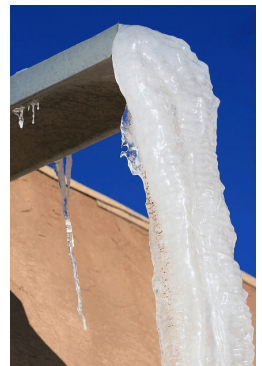
The difficulty of prevailing in slips and falls cases involving snow and ice becomes evident when you consider the above-referenced two difficult areas. When nature dumps snow and ice on property, the law alters the responsibility of the land owner because such natural accumulations of snow and ice affect us all and we are all on notice of them. Some municipalities require property owners to clear the sidewalks in front of their homes and buildings (New York), and owners of stores and offices are required to clear the entrances and exits to their buildings. Slips and falls in public places such as this are more likely to result in a recovery than a similar fall in front of somebody's home. Parking lot owners, if they intend for their parking lot to be used, need to clear the snow and ice from their parking lots.



Reasonableness in the law dictates that a land owner does not need to clear walkways in the middle of a snowstorm, but should do so in a reasonable time after a storm. Private homeowners have more leeway. To determine liability for slips and falls on snow and ice, states like Illinois follow what is known as the Natural Accumulation Rule. In order for there to be liability for a fall on snow or ice, the snow or ice must be an unnatural accumulation of snow or ice. If it is a natural accumulation of snow or ice, there is generally no liability. The dividing line between a natural and unnatural accumulation of snow and ice is not always very clear. Generally, the snow and ice is considered a natural accumulation if it is the result of natural weather conditions. If the snow

and/or ice was not shoveled or salted, there is less likely to be liability for the property owner. Going a step further, the law still considers ice which has been formed by snow being tamped down by pedestrian or vehicular traffic to be a natural accumulation of snow and ice. It also considers puddles of water inside of buildings resulting from pedestrians tracking in snow that melted to be a natural accumulation of snow. Whether accumulation of snow or ice on a public sidewalk is artificial or natural is a question of law. Exceptions to these rules exist where there is a provision in a lease for property where the management company or landlord agrees to remove snow and ice.

Prompt and thorough investigation of slips and falls cases are necessary for claims and subrogation professionals. They must look for and memorialize features or defects in the property which causes snow or ice to accumulate in a particular location or in a particular manner. A common example of this would be a down spout which dumps water onto a sidewalk where it freezes and becomes ice. Also, look for evidence of actions on the part of the property owner which cause snow or ice to accumulate in a particular location. This might include an owner piling snow in a dangerous location. Cases involving falls on snow or ice require a thorough analysis of the facts before it can be determined whether there is liability for falls on snow or ice, and this investigation must come immediately after notice of such an injury – preferably the same day notice is received.



Slips and falls involving a fall on snow or ice are usually not worth pursuing unless there are significant injuries such as herniated discs or fractures or other injuries which require surgery. This is because of the research and investigation which is required in order to make such cases fly. Liability carriers almost always take the position that there is no liability for a fall on snow or ice and that suit will almost always have to be filed and a hard-fought fight is almost a certainty. Therefore, a subrogated carrier must be willing to invest

the time and money necessary to prove the elements needed for liability to attach. Don't rely on subrogation counsel to investigate every small slips and falls case for you. Make a decision on a case by case basis – using the facts of the individual cases to discriminate between good cases and bad cases. Take lengthy statements of the victims, the property owners, and any witnesses. Take photographs and measurements of the conditions which existed at the time of the fall. Unfortunately, there are no shortcuts when it comes to subrogating slips and falls on snow and ice.

If you should have any questions regarding this article or subrogation in general, please contact Gary Wickert at [gwickert@mwl-law.com](mailto:gwickert@mwl-law.com).

## INSURANCE SUBROGATION

# SETTLING THE SMALL CASES

## Statutory Offers of Settlement

By Michael R. Sinnen



Let's be frank. They are the bane of all subrogation and claims professionals. I'm talking about the small-dollar claim. The vast majority of all civil actions are compromised and settled by agreement of the parties. However, even with good subrogation potential, small claims do not always lend themselves to quick resolutions because the mind set of some liability claims handlers is to deny a claim first, and ask questions later. Nine times out of ten, they figure, the file is too small to litigate and it will eventually go away. Most of the time, they're right.



Matthiesen, Wickert & Lehrer, S.C. ("MWL") has had great success in resolving smaller subrogation claims by improving the bargaining position of the small subrogation claim by utilizing state statutory offers of settlement in our demand letters and settlement packages. An offer of settlement statute, such as Wisconsin's § 807.01, are cost-shifting laws which allow the small claim plaintiff to recover double taxable courts costs if it makes an offer of settlement which is rejected, and ultimately recovers more than the offer of settlement in litigation. These statutes put a great deal of pressure on the part of the liability claims handler to resolve the small claim or face possible attorney's fees which could dwarf the size of the claims they routinely deny.

Currently, 24 states have offer of settlement statutes which provide some sort of liability on the part of the defendant if they reject a reasonable settlement offer. These statutes, if properly used, can be an extremely effective tool. Their use, however, is fraught with traps for the unwary. Improper use of the statute can arguably be the basis for a claim of attorney malpractice or bad faith.

For example, Wisconsin's § 807.01(1)-(3) contain various cost shifting provisions designed to encourage settlement at the risk of forfeiture of otherwise recoverable costs. These sections were not the subject of much litigation in the past, until the enactment of subsection (4), which has the most teeth. Prior versions did not provide for prejudgment interest. Section 807.01(4) allows prejudgment interest at the annual rate of 12% on the amount recovered from the date of an unaccepted offer until the amount is paid.



Pre-litigation interest in Wisconsin can be awarded in most liquidated damage claims, but only at the legal rate of 5%. Pre-litigation interest is not available in unliquidated damage claims such as ordinary personal injury tort litigation, despite frequent attempts by the plaintiffs' bar to change the common law. Therefore,

because of its universal applicability and relatively high interest rate, § 807.01 should be considered for use in small subrogation claims.

A total of 24 states have some sort of offer of settlement or cost-shifting statute which can be used by subrogating carriers. Oregon, for example, has § 20.080, which allows for a plaintiff to collect reasonable attorney's fees if a pre-suit, written offer was made and rejected by the defendant, and a more favorable amount was obtained at trial. The amount sought in the pleadings is limited to \$10,000.

Other states have similar statutes which MWL puts to use to your advantage in the smaller subrogation claims. In many situations, however, these offer of settlement statutes can be used as leverage in even much larger subrogation files. MWL continues to use to your advantage every possible technique or trick which will better help us recover on your subrogation claim – whether it be a multi-million dollar property loss, a catastrophic workers' compensation claim, an ERISA-covered or non-ERISA health claim, or even the small Med Pay, PIP, or auto property claim.

If you should have any questions regarding this article or subrogation in general, please contact Mike Sinnen at [msinnen@mw-law.com](mailto:msinnen@mw-law.com).

## INSURANCE SUBROGATION

### **SOUTH DAKOTA DEFEATS PROPOSED “MADE WHOLE” LEGISLATION**

By Melissa M. Stone



For a second consecutive year, South Dakota has defeated an attempt to introduce “Made Whole” legislation into the insurance subrogation arena. The “Made Whole” Doctrine is an equitable defense to the subrogation or reimbursement rights of a subrogated insurance carrier or other party, requiring that before subrogation and/or reimbursement will be allowed, the insured must be made whole for all of its damages. Precisely what being “made whole” means varies from state to state, but the concept is, nonetheless, fairly similar in each state. A well-respected legal treatise defines the Made Whole Doctrine as follows:

*It is widely held that in the absence of contrary statutory law or valid contractual obligation to the contrary, the general rule under the doctrine of equitable subrogation is that whether an insured is entitled to receive recovery for the same loss from more than one source, e.g., the insurer and the tortfeasor, it is only after the insured has been fully compensated for all the loss that the insurer acquires a right to subrogation.*

South Dakota HB 1184 proposed:

*FOR AN ACT ENTITLED, An Act to limit the subrogation of certain insurers unless and until the insured is fully compensated.*

*BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA: Section 1. That Chapter 58-11 be amended by adding thereto a NEW SECTION to read as follows:*

*“No insurer under this chapter is entitled to participate in any recovery from any tortfeasor on account of bodily injury or death or damage to property unless and until its insured has first been fully compensated as provided in § 21-3-1. The provisions of this Act do not apply to any workers’ compensation insurer.”*

While the Bill did pass the House Chamber, the Senate Committee defeated the proposed legislation 4-3. The bill was eventually proposed for debate on the Senate floor; however, the Senate refused to place HB 1184 on the Senate Calendar for debate by a vote of 24-11. Essentially, HB 1184 is defeated yet again.

In 2010, a similar “made whole” bill did pass the House Chamber and Senate; however, it was vetoed by the Governor of South Dakota. We fully anticipate that the Trial Lawyers of South Dakota will continue to pursue “made whole” legislation for a third consecutive year in 2012.

For a detailed analysis of the “*Made Whole Doctrine in All 50 States*”, please visit our website at [www.mwl-law.com](http://www.mwl-law.com) or click [here](#) to view.

PRODUCTS LIABILITY SUBROGATION

## WISCONSIN CHANGES IN PRODUCTS LIABILITY LAW

By Douglas W. Lehrer



In addition to other political news emanating from Wisconsin, on January 27, 2011, Wisconsin Governor Scott Walker signed into law a new tort reform bill (2011 Wisconsin Act 2) which will change how products liability claims are handled in a number of respects. This article will briefly summarize some of those changes which became effective on February 1, 2011.

### 1. Products Liability.

Prior to February 1, 2011, a broad “consumer expectations test” was used to determine the liability of manufacturer of products. This test determined whether an ordinary, reasonable consumer would find the product’s design, manufacture and instructions or warning defective.



With the passing of this Act, the State Legislature has now rewritten Wisconsin products liability law. First, the Act requires a plaintiff to show that a reasonable alternative design could have been adopted by the manufacturer to reduce or avoid the harm posed by the product. The Act also limits the liability of sellers or distributors to instances in which the seller or distributor has assumed responsibility for some portion of the manufacturing or labeling of the product or where the manufacturer is judgment proof. The Act disallows use of subsequent remedial measures as evidence of the product’s defect and limits liability for products manufactured 15 years or more before the claim.

In addition, a manufacturer must have manufactured a product within 25 years of the accrual of the plaintiff’s cause of action. Finally, the new law creates an irrebuttable presumption that a product which complies with standards approved by a federal or state agency is not defective.

### 2. Risk Contribution.

Prior to this Act, plaintiffs in Wisconsin were allowed to recover based on a “risk contribution” theory. Under that theory, the liability for an injury caused by a product was spread among all manufacturers marketing the product during the relevant time period. In 2005, the Wisconsin Supreme Court allowed the use of this theory to hold paint manufacturers collectively liable for the lead poisoning of a claimant after he ingested lead paint. Although the claimant



could not prove what type of lead paint had been ingested, the Court apportioned liability to all manufacturers of lead paint during the relevant time periods in Wisconsin.



With the passing of this Act, the standard of proof for claimants has been heightened. Specifically, a claimant must now prove that the manufacturer made the specific product responsible for the injury. If a claimant cannot identify the manufacturer of the specific product, and no other methods of recovery are available, the Court may apportion the liability to more than one manufacturer of the specific product liable for the injury. However, any manufacturer held liable must have manufactured a product that is “chemically and physically identical” to the product liable to the injury.

### 3. Caps on Punitive Damages.

Wisconsin law allows a plaintiff to recover punitive damages if it is shown that the defendant acted maliciously and with intentional disregard of the plaintiff’s rights. This Act leaves the standard for allowing punitive damages but sets a cap for the amount that can be awarded. This cap is now \$200,000 or twice the amount of compensatory damages awarded, whichever is greater.

### 4. Health Care Matters.

This Act also adopts a cap for non-economic damages for long term care providers. The damages awarded now cannot exceed \$750,000. In addition, the Act exempts health care providers from being charged with homicide by negligent handling of dangerous weapons, explosives or fire if the health care provider was acting within the scope of his practice or employment.



It will be important to continue to keep an eye on Madison as additional tort reforms are proposed over the next few months. The law firm of Matthiesen, Wickert & Lehrer, S. C. will continue to keep clients updated on these important changes. 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](mailto:dlehrer@mwl-law.com).

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## UPCOMING EVENTS.....

**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 6<sup>th</sup> 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](http://www.claimseducationconference.com).

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