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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER

MAY 2012

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 Jamie Breen at jbreen@mwl-law.com. We appreciate your friendship and your business.

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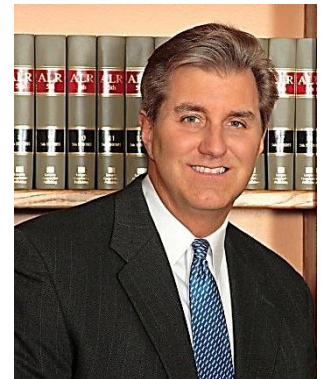
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AUTOMOBILE SUBROGATION

DOES AUTOMOBILE INSURANCE FOLLOW THE CAR OR THE DRIVER?

By Gary L. Wickert

As most of you know, one of the services we provide our clients is providing accurate and informative answers to subrogation questions and inquiries submitted to us either directly or via LinkedIn or the "Ask A Subrogation Question" feature on our website. The benefit of handling subrogation matters in all 50 states, Mexico and Canada, is the repeated exposure to a wide variety of subrogation issues spread across the jurisdictional spectrum. On any given day, one or more of our attorneys is devoting a significant portion of their day responding to the dozens of questions we receive daily. Accurate answers not only assist our clients, but pay dividends to us when we later see the same file for subrogation action, correctly handled and perfectly poised for litigation. An informed subrogation professional is a successful one.



It wouldn't be truthful if we said we have never seen a dumb question. Yet, dumb questions are almost always a product of bad information being spread throughout the industry. Whether or not insurance follows the car or driver in a particular jurisdiction is such a question we see somewhat regularly. It isn't a dumb question, but, it is the wrong question. The answer, too, depends on the kind of insurance coverage you are referring to. There are coverages that follow the car and coverages that follow the driver.

Liability Coverage

Liability car insurance coverage follows the driver no matter whose vehicle they are operating. All states but one (New Hampshire) require at least liability coverage. Liability coverage protects the insured (follows the driver) when he operates a vehicle owned by somebody else. They will still be covered under their own auto insurance policy.

Comprehensive And Collision

Comprehensive and collision auto insurance coverage, on the other hand, are tied to the insured vehicle (they follow the car). These coverages pay for damage that befalls the insured vehicle as a result of an accident or vandalism. With comprehensive insurance which covers almost everything, it is the car rather than the driver that is covered. This, however, requires many stipulations to be put in place, such as who is allowed to drive the car. If someone other than the insured is driving a vehicle covered by comprehensive coverage and is not listed as a covered driver - even if the other person has permission – the other person might not be covered in an accident. Family members (such as children or a spouse) are generally already included in the policy definition of “insured.” However, rarely will insurance cover a driver operating a vehicle without the owner’s permission.



Other Drivers Driving The Insured’s Vehicle

When an insured allows other drivers to drive his vehicle, then, and only then, does the question of whether insurance follows the car or the vehicle become even awkwardly relevant. The right question to be asking is not whether insurance follows the car or the driver, but whether or not other drivers will be covered by the insured’s automobile insurance. Unfortunately, there is no bright line answer to the question, and it depends greatly on the language of the policies involved, the jurisdiction you are concerned with, and the specific facts involved.



There are certainly insurance carriers and policies which will not cover any driver not specifically named in the policy. Other relevant facts include where the “other driver” resides and if they are related to the insured. In general, if someone is living in the insured’s household and regularly drives the insured’s vehicle, many insurance carriers expect you to have that person named on the policy. They will need to undergo the same underwriting and qualification process as any other policyholder.

In some cases, if a family member is visiting and has permission from the insured to drive the family vehicle, there will be coverage if there is an accident, but the coverage may be limited. All policies should be reviewed to determine if there are any excluded drivers and any limitations on coverage for anyone driving the car who are not specifically named on the policy.

The Insured Driving Someone Else’s Vehicle

In general, insurance coverage for an insured driving someone else’s vehicle is the coverage he carries for his own vehicle. The driver’s personal coverage will apply in most cases when driving a vehicle he does not own. This includes any uninsured motorist coverage he carries and the medical portions of his policy. The driver’s property damage coverage might carry over while driving another’s car as well, depending on policy language and the facts. If a person drives his own vehicle without insurance, he should not expect that he is covered when driving someone else’s vehicle.

Certain factors must be considered in determining if an insured is covered when driving someone else’s vehicle, including the reasons for driving the vehicle, if the insured had permission or not, or if it was a rental or dealership loaner. In each case, the individual circumstances and state law involved will factor into the outcome, but another policy might be considered primary over the insured’s.



Drivers From Other States

Automobile insurance will generally cover a driver from any state as long as he has the insured's permission to operate the vehicle. However, this isn't always the case. In all instances, when someone else operates the insured's vehicle, the auto coverage and policy terms may vary greatly depending on the carrier and insurance options selected by the insured.

Insurance Coverage When The Insured Is Not Present

In order for insurance to cover an accident when the insured is not present, there will need to be comprehensive auto coverage. The facts of each such case definitely matter. If the driver is a relative, then most likely the absent insured's insurance will cover the accident. The driver also needs to have had your permission, express or implied, or the insured's insurance may not cover the claim unless the vehicle was stolen. Individual insurance companies and policies may vary in regards to these rules.

So Does Insurance Follow The Car Or The Driver?



As we have seen, this is usually not the right question to ask. However, that won't prevent it from being asked – over and over. An answer to the question that isn't going to be universally correct, therefore, is that insurance that *follows the car* usually has the vehicle listed in the policy. If anyone who has your permission drives the car, that person is probably covered by virtue of the fact that the car is covered. However, as we've seen, this kind of insurance does not cover everybody. There are qualifications for the drivers covered. Other types of coverage, such as collision or comprehensive insurance, will usually follow the car. These coverages will usually not “follow the driver” to any vehicle which the “covered” driver operates.

Insurance that *follows the driver* will usually be limited to some form of liability coverage. When an insured drives someone else's vehicle, such as a rental car, a dealership loaner, or a friend's car, he is usually covered for liability insurance. However, other policies, which may be deemed “primary” over the insured's personal auto policy, may also come into play.

Therefore, a very general and often-incorrect answer to the wrong question is that generally, insurance coverage “follows the car.” However, more often than not you will be asking the wrong question. As long as a driver has the vehicle owner's permission to operate the vehicle, the owner's policy will provide coverage no matter who the driver is. The vehicle owner's policy should cover injuries and property damages. However, exceptions do exist. In most cases, therefore, the right question to ask is “Is there insurance coverage under these specific facts?”

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

PROPERTY SUBROGATION

SUBROGATING DOG BITE CASES JUST BECAME EASIER IN GEORGIA

By April K. Toy

Georgia Governor Nathan Deal last week signed into law House Bill 685, which, depending on the kind of day you are having, will either be viewed as an effective new subrogation tool in dog bite cases, or big government taking a swipe at liberty by implementing new controls and regulations involving the family pet. The Bill adds new §§ 4-8-1 and 4-8-20 to § 4-8-32 to the Georgia statutes and amends several other sections, providing definitions and hearing procedures for determining whether a dog is dangerous or vicious, and providing “dog control officers” with new investigative authority. Known as the “Responsible Dog Ownership Law”, the new law defines procedures for handling and keeping dogs, including muzzling and requiring a secure enclosure. If a dog has been defined as vicious, the owner



must carry \$50,000 in insurance and the dog must be microchipped. A dog owner could face at least one year in prison and at least a \$5,000 fine if the dog injures someone on a second occasion. An owner would be guilty of a high and aggravated misdemeanor on the first offense.

The new law establishes minimum standards for the control and regulation of dogs, provides for the identification of dangerous/vicious dogs, requires registration for the possession of such dogs, and requires the owner to maintain an enclosure, post warning signs, have a microchip implanted, and provide \$50,000 in liability insurance. It makes it unlawful to permit the dog to be off the owner's property without a leash.

Subrogating dog bite cases in Georgia got a little bit easier with the passage of this significant set of regulations and laws, but remains a challenge in many states.



Matthiesen, Wickert & Lehrer, S.C. has compiled the laws regarding subrogating dog bites from all 50 states and compiled them in a chart entitled “*Dog Bite Laws In All 50 States*”, which we have placed on our website and can be viewed [HERE](#). Dog bite law is a unique combination of city and county ordinances, state statutory law, state case law, and common law. The law varies from state to state. Generally, if the dog owner knows that the dog has exhibited a tendency or intention to some day bite a person, liability can attach.

This is known as “scienter” (knowledge or knowing) and is referred to as the “one bite rule”. Most states hold a dog owner responsible for negligence that results in any injury caused by a dog. This can take the form of general negligence or negligence per se (violation of a statute).

Sometimes, the liability depends on whether the dog bite occurred on or off the owner’s premises. Some states apply the Doctrine of Premises Liability when the victim is harmed on the dog owner’s property. Premises liability is a specific area of law that governs liability involving owners of property and landlords.

Other states base liability on statutes which create liability in the absence of “scienter”, negligence or intentional behavior. These are referred to as “statutory strict liability states” and vary from state to state. They sometimes hold the owner liable automatically if their dog bites somebody.

In “strict liability” states, the dog does not get “one free bite” as they do in states which adhere to the “one bite rule”. Still, other states complicate matters by mixing and matching their laws. Some of these complicated dog bite statutes impose strict liability under limited circumstances, or for limited types of losses, while relying more heavily on the “one bite rule”. The states having statutes which incorporate the “one bite rule” are referred to as “mixed dog bite law states” or simply “mixed states”. For example, New York imposes strict liability only for a bite victim’s medical bills. To recover other elements of damages, he has to meet one of the other burdens discussed above. States often provide certain exceptions to liability, including if the victim is a trespasser, veterinarian, was committing a felony, assumed the risk, or if the dog was provoked by physical abuse or was a police dog. The chart is an excellent starting point to determine dog bite liability in all 50 states. If you have any questions regarding subrogation of dog bite cases, please contact April Toy at apriltoy@mwl-law.com.



WORKERS COMPENSATION SUBROGATION

BILL INTRODUCED TO REMEDY DELAYS IN WORKERS' COMPENSATION MEDICARE SET-ASIDES

By Lisa M. Tanin



On April 27, 2012, Rep. Dave Reichert (R-WA) announced that he and co-sponsor, Rep. Mike Thompson (D-CA), introduced bipartisan legislation to be named, “The Medicare Secondary Payer and Workers’ Compensation Settlement Agreements Act of 2012.” The intent is to shorten delays and remove inconsistencies in Medicare’s approval process for set-aside funds for injured workers’ claims.



As we are all too aware of, Medicare requires that settlement funds be set aside in Medicare Set-Asides (MSAs) for future medical expenses for injured workers who will become eligible for Medicare during their claim period. The Centers for Medicare and Medicaid Services (CMS) must approve these set-asides for trusts exceeding \$25,000 before a claim can be closed. The idea behind MSAs is a noble one - to prevent the taxpayer from footing the bill for medical expenses which should be covered by the terms of a personal injury or workers' compensation settlement. However, the implementation of this idea has been anything but noble.

The CMS takes far too long to review and approve these MSAs. A claim can remain open and benefits continue to mount for months until the CMS finally gets around to approving it. In addition, there is no consistency from office to office in the standards CMS uses to determine the amounts to be set aside. Furthermore, there is no way to appeal oppressive and unreasonable decisions. The purpose of the new book is to resolve the delays and introduce consistent standards into the review of set-asides by CMS.

Previous efforts to fix the system - going back as far as 2006 - have all failed. The problem has gotten so bad that a coalition of interested parties has been formed, known as the Coalition for Medicare Secondary Payer (MSP) Reform, which includes representatives of injured workers, employers and insurance carriers. The Coalition has been working a number of years for reform and supports the bipartisan Reichert-Thompson legislation. Members of the Coalition include the American Insurance Association (AIA), National Council of Self-Insurers (NCSI), Property Casualty Insurers Association of America (PCI), Strategic Services on Unemployment & Workers' Compensation (UWC), Washington Self-Insurers Association (WSIA), American Association for Justice (AAJ), American Bar Association (ABA) and Workers Injury Law and Advocacy Group (WILG). In a strange instance of government over-reaching and making strange alliances and bedfellows, the trial lawyers are also on board with any efforts to fix a problem that has been around for a long time.



According to the Government Accountability Office (GAO), the average processing time for workers' compensation set-aside proposals increased from 22 days in April 2010 to 95 days in September 2011, resulting in delays in the resolution of cases. The goal is to be able to complete reviews within 45 days. The GAO also said that a number of factors, including increased workload, have contributed to the review process taking longer than desired. From 2008 to 2011, there was a 42% increase in MSA applications. Matthiesen, Wickert & Lehrer, S.C. has several MSA applications currently pending which were submitted more than nine months ago.

The new bill should provide much-needed relief and consistency. It has been assigned to the House Ways and Means Committee and the House Energy and Commerce Committee, which will consider it before possibly sending it to the U.S. House or U.S. Senate as a whole. Matthiesen, Wickert & Lehrer, S.C. will keep you advised as we learn more.

INDUSTRY NEWS

NATIONWIDE MUTUAL COMPLETES HARLEYSVILLE MERGER



Nationwide

Nationwide Mutual Insurance Company has completed its \$834 million merger deal with Harleysville Mutual Insurance Company, which was previously announced in September 2011. Nationwide Mutual policyholders voted to approve the merger on April 9, 2012 and Harleysville Mutual policyholders and Harleysville Group stockholders approved it on April 24, 2012. The transaction has been reviewed and approved by the Pennsylvania Insurance Department, the Ohio Department of Insurance, and various other regulatory bodies. Now that the merger agreement has all the requisite approvals, Harleysville Mutual policyholders will become policyholders and members of Nationwide Mutual. Harleysville is now a part of Nationwide's property/casualty independent agency business unit under the Harleysville brand. Additionally, Harleysville's current headquarters in Harleysville, Pennsylvania, will serve as an integral part of the combined company's national,

independent agency-based platform. Michael Browne, the former president and chief executive officer of Harleysville, is now the president and chief operating officer of the Harleysville unit of Nationwide.

RYAN SPECIALTY GROUP TO ACQUIRE WKFC UNDERWRITING MANAGERS IN NEW YORK



Chicago-based Ryan Specialty Group said its subsidiary RSG Underwriting Managers is acquiring WKFC Underwriting Managers in New York. Terms of the transaction have not been disclosed. Ryan Specialty Group is a global-holding company which includes a group of highly-specialized underwriting companies, a Lloyd's insurer and other specialty services designed for agents, brokers and insurers. The chairman and CEO is Patrick G. Ryan, the founder and retired chairman and CEO of Aon Corporation. WKFC is a managing general agency in the excess and surplus lines arena. The business is comprised of property risks, general liability and specialty lines such as windstorm and earthquake deductible buybacks, equipment breakdown, inland marine, professional liability, weather, and special events programs.

UPCOMING EVENTS

May 9-12, 2012 – Jamie Breen, our Marketing Coordinator, enjoyed meeting everyone who attended the 7th Annual Claims Education Conference in Napa Valley, California, which was presented by the **International Insurance Institute, Inc.** Congratulations to Virginia Balogh, Century Insurance/Meadowbrook, and Barbara Borchardt, Church Mutual Insurance Company, who each won a copy of our new *Automobile Insurance Subrogation In All 50 States* book at the prize drawing held at our exhibit booth. If you are interested in learning more about MWL's National Subrogation Recovery Program, please contact Jamie Breen at jbreen@mw-law.com.

June 13, 2012 – Alejandro Bautista will be presenting a live webinar on “*Florida Automobile Subrogation*” from 10:00 - 11:00 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 click on the “Register Now” button to the right to register.



July 12, 2012 – Ryan Woody will be presenting on *2012 Health Subrogation Updates* at the National Association of Subrogation Professional's (NASP) Texas Chapter Meeting in Dallas, Texas. NASP is the world's largest subrogation association. For more information on NASP, please click **HERE**.

July 18-19, 2012 – MWL will be exhibiting at the 32nd *Annual National Workers' Compensation and Occupational Medicine Conference* in Hyannis, Cape Cod, Massachusetts. Jamie Breen will be at Exhibit Booth 10 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please click **HERE**.

November 11-14, 2012 – MWL will be exhibiting at *NASP's 2012 Annual Conference, "Cirque du Subro"*, in Las Vegas, Nevada. Jamie Breen will be at Exhibit Booth 103 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.subrogation.org**.

This electronic newsletter is intended for the clients and friends of Matthiesen, Wickert & Lehrer, S.C. It is designed to keep our clients generally informed about developments in the law relating to this firm's areas of practice and should not be construed as legal advice concerning any factual situation. Representation of insurance companies and/or individuals by Matthiesen, Wickert & Lehrer, S.C. is based only on specific facts disclosed within the attorney/client relationship. This electronic newsletter is not to be used in lieu thereof in any way.