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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **OCTOBER 2009**

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.

IN THIS ISSUE . . . .

PROPERTY SUBROGATION

WISCONSIN SUPREME COURT ISSUES MAJOR SPOLIATION OPINION AGREEING WITH MATTHIESEN, WICKERT & LEHRER'S AMICUS BRIEF

American Family Ins. Co. v. Golke Brothers Roofing and Siding, LLC, 2009 WI 81, 768 N.W.2d 729 (July 15, 2009)

By Ryan L. Woody

On February 12, 2000, a fire destroyed a home owned by David Ronaldson. As a result of the fire, his property insurer, American Family Mutual Insurance Company, incurred at least $165,000.00 in costs for rebuilding the home. However, prior to rebuilding, American Family retained two cause and origin experts to investigate the loss, who documented their inspection with photographs. The experts were able to determine that the fire was caused by faulty roofing work done by Golke Brothers Roofing and Siding, LLC.

American Family immediately notified Golke Brothers via regular mail of the loss through its principals, David Golke, Charles Golke and Joseph Golke. Golke Brothers and its insurer had actual notice of the loss and were afforded opportunity to inspect the fire site. Neither Golke Brothers nor its insurer inspected the site or requested it be preserved for any specific evidence. Approximately two months after the fire, American Family authorized Mr. Ronaldson to raze and rebuild his home.

At trial on the subrogation case, the defendants raised a spoliation defense, arguing that American Family had a duty to preserve significant amounts of physical evidence from the fire, and lacking this tangible evidence, the case should be dismissed. Although American Family's experts had documented the scene with photographs, the trial court found that American Family failed to adequately preserve the evidence and dismissed the action based on spoliation. The court determined that American Family owed a duty to preserve much of the physical debris from the fire despite giving defendants notice and opportunity to inspect the entire scene for two months. Specifically, the trial court held:

> *"American Family failed to preserve the scene in ways that were possible, taking adequate photographs, perhaps taking a videotape, I don't know; but clearly all, everyone agreed that it was possible to remove the dog house, the chase, and the appropriate chimney element; and since those weren't done, I'm satisfied that this is a clear case of spoliation every bit as bad, and I would argue the conduct of American Family is far worse than Sentry engaged in which led to the dismissal of the claim, of Sentry's claim…So at this point and time I am going to dismiss the action based on spoliation."*

American Family appealed the dismissal of its case and the Wisconsin Court of Appeals immediately certified the case to the Wisconsin Supreme Court. Specifically, the Court asked, "Under what circumstances may evidence crucial to a potential legal claim be destroyed and what notice must be given to a civil litigant before evidence is destroyed?"

Under pre-existing Wisconsin law, dismissal as a sanction for the destruction of evidence "requires the finding of egregious conduct, which, in this context, consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process." *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis.2d 707, 724, 599 N.W.2d 411 (Ct. App. 1999).

Matthiesen, Wickert & Lehrer ("MWL"), on behalf of the National Association of Subrogation Professionals, asked the Wisconsin Supreme Court to reverse the trial court arguing that a subrogated insurer should be able to rebut the allegation of egregious conduct in destroying evidence by demonstrating actual notice and a reasonable opportunity to inspect to the defendant. MWL sought to have the Court enunciate the procedure which is required by a subrogated carrier to avoid a "spoliation" defense at trial.

Leading subrogation practitioners and scholars agree that a subrogated plaintiff discharges its burden once notice and an opportunity to inspect are provided. The article, Touchstone for Insurers Pursuing Subrogation: Save the Evidence, 70 *Defense Counsel Journal,* 365 (July 2003), states in relevant part:

> *"If the responsible parties can be put on notice before the destruction of the fire scene, the subrogee will not be put in the position of defending whether destruction of the fire scene was within its control or contained relevant evidence. As long as potentially responsible parties are put on notice and given an opportunity to inspect, they cannot effectively pursue a claim that they were prejudiced. In analyzing whether to impose sanctions following the destruction of evidence, courts will look at the efforts taken by the defendant in attempting to investigate the claim. If it is determined that the defendant did not make a reasonable effort, sanctions will not be imposed against the plaintiff."*

As property subrogation professionals know all too well, residential or commercial fire losses pose unique concerns especially if you have to retain all possible relevant debris. Although the costs associated with photographing and/or videotaping the defective construction is minimal, the costs of retaining part or all of the structure can be prohibitive. While one party may want limited physical evidence near the

area of origin, another party may claim spoliation where every piece of physical evidence is not retained so that all possible alternative theories can be pursued.

At the end of the summer after a long wait, the Wisconsin Supreme Court finally released its decision and sided with the subrogated insurer on all issues. The Court held that the duty to preserve evidence is discharged once the party in possession has given reasonable notice of a possible claim, the basis for that claim, the existence of evidence relevant to the claim, and a reasonable opportunity for inspection of the evidence. The Court said a trial court may use its discretion, guided by the totality of the circumstances, to judge the sufficiency of the content of the notice. Relevant factors include: (1) length of time evidence can be preserved; (2) ownership of the evidence; (3) prejudice posed to possible adversaries by destruction of the evidence; (4) form of the notice; (5) sophistication of the parties; and (6) ability of the party in possession to bear the burden and expense of preserving the evidence.

The Court also declared that notice to potential defendants via first class mail is appropriate. "The legislature has long recognized that first-class mail service is an efficient mechanism that is reasonably calculated to provide actual notice of possible or pending litigation," the Court remarked. "Notice of mail is usually considered complete upon mailing, not proof of receipt", the Court added. The Court said that evidence of mailing a letter raises a rebuttable presumption that the addressee received the letter. "This presumption cannot be overcome without a denial of receipt", the Court said. "Mere non-remembering of receipt is not enough," the Court stated.

The Court's decision clears up years of significant confusion over the duty to preserve evidence. As property subrogation practitioners this decision clearly establishes how we are to notify the defendant and what factors a court will consider to determine if our preservation efforts were ample. More importantly, the court reiterated its long-standing holding that there must be "egregious conduct" to justify dismissal for spoliation of evidence. "Egregious" conduct is "a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process," the Court explained. "Lesser sanctions for other behavior causing spoliation include pre-trial discovery sanctions and negative inference instructions", the Court said.

Should you have any questions regarding this decision, property subrogation, preservation of evidence, notice or spoliation, please feel free to contact Ryan Woody at **rwoody@mwl-law.com.**

HEALTH SUBROGATION

What's That Smell?
Have You Looked At Your Subrogation Provision Lately?

It's been almost eight years since the Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Hopefully that wasn't the last time you examined your ERISA plan's subrogation provision. Recent decisions have taken aim at subrogation provisions and federal judges routinely put the key language under a microscope. You don't have to look farther than the 11th Circuit's decision in *Popowski v. Parrott*, 461 F.3d 1367 (2006) for a better example. Does your provision properly specify both the fund out of which reimbursement is due to the plan and the portion due the plan? If you haven't revised your language lately, you should consider it.

Matthiesen, Wickert & Lehrer's attorneys specialize in plan consultation and drafting. We are happy to work with your plan to draft those airtight subrogation provisions. Take a look at your plan's subrogation provision and ask yourself when it was last revised. If you think it might be time to revamp your plan language, or if you would like your plan language reviewed to ensure it's effective, please contact Ryan Woody at rwoody@mwl-law.com.

PROPOSED OHIO ANTI-SUBROGATION LEGISLATION MARCHES ON: NARY A PEEP FROM THE INSURANCE INDUSTRY

The anti-subrogation bill being proposed by an Ohio State Bar Association ("OSBA") Committee which would have (1) eliminated all subrogation and reimbursement language found in any insurance policy providing hospital or medical benefits and/or (2) established a state-wide made whole doctrine and common fund doctrine, has been voted down by the special State Bar Committee considering it. This is good news and the direct result of an outpouring of concern and attendance at the committee hearing by insurance representatives, subrogation professionals and subrogation counsel. however, the battle is not over.

There are three other committees reviewing the same proposal, and the proposal will still be considered by the Council of Delegates for the Ohio State Bar Association ("OSBA"), who supposedly will take into consideration the votes and comments of the various committees which considered it. In other words, the delegates can still recommend the anti-subrogation proposal even if all the committees vote it down. If they do, they then shop for a legislator who will sponsor the suggested legislation and our fight in Ohio will start anew in the Ohio Legislature.

While the outcry from the insurance and subrogation community was loud - probably as a result of the global anti-subrogation effect the proposal will have - we can never let down our guard when it comes to advocating for and educating about the many societal and economic benefits of the not-so-well-understood legal concept of subrogation.

On Friday, October 23, 2009, the OSBA Screening Committee reviewed the legislative proposal drafted and endorsed by the majority of the Special Subrogation Committee. The Screening Committee then voted on whether the proposal should be recommended for consideration by the full Council of Delegates. Unfortunately, the Screening Committee passed through the proposal with only a couple of nay votes. This means the proposed legislation will be considered and endorsed by the full Council of Delegates on November 6, 2009. If it passes that hurdle, as it is expected to, the OSBA will then actively engage in lobbying for the codification of subrogation, the made whole rule, the common fund doctrine, and a list of other plaintiff-friendly changes. Subrogation in Ohio as we know it will be dead.

Once again, the industry defense of subrogation was sparse. NASP was present and spoke out against the legislation, but the main rebuttal in defense of subrogation as a cost-saving vehicle for the industry was an assistant general counsel from Nationwide who advocated with all of the zeal and passion of Don Knotts. The spokesman for the insurance industry basically fell on the sword, admitting that subrogation was a problem, and instead of advocating against the proposed legislation, suggested a kinder, gentler approach, such as approaching every case with a made whole issue (which will essentially be every case) on a pro rata distribution basis. The insurance spokesman on behalf of subrogation admitted there was a problem with subrogation that needed fixing. Go figure. There was little more than a peep from the rest of the industry.

Folks, we are going to have to decide whether or not subrogation is something we value, whether or not it is something worthy of our time....worthy of protection. If subrogation truly is a source of revenue for the insurance industry, it will need to stand up and protect subrogation. If not, our subrogation rights will fall like dominoes, from state to state, until everyone reading this newsletter will be searching the want ads for something new to do with their lives. Matthiesen, Wickert & Lehrer has been litigating subrogation cases for 25 years, and our lawyers have yet to run across a plaintiff's attorney who openly admits that his client has been “made whole”. Like lambs to the slaughter, our industry is giving up one of its chief cost-containment weapons unilaterally, without any concessions from the other side. Things are not good in Subrogationville.

HEALTH SUBROGATION

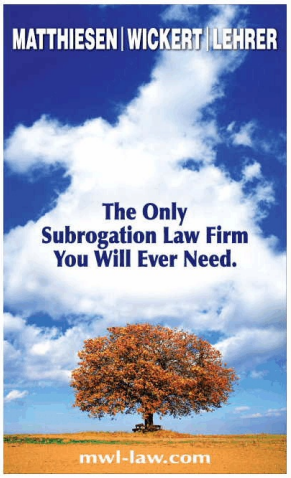
CONGRESS DROPS ANTI-SUBROGATION AMENDMENT TO HEALTH CARE BILL

The Trojan Horse amendment to H.R. 3200 sponsored by Rep. John Barrow (GA-D) and Rep. Bruce Braley (IA-D) being considered by the House of Representatives, which would have overlaid all subrogation (ERISA or otherwise) with the subrogation-destroying Made Whole Doctrine, has been dropped. The amendment, which we reported on in last month's newsletter, was strongly supported by the American Association for Justice (f/k/a the Trial Lawyers Association of America), especially during the last minute committee deliberations. Representatives Braley and Barrow strongly pushed their amendment, but were persuaded not to offer the amendment in committee. Rep. Henry Waxman (CA-D) dropped the amendment from the base bill. The issue wasn't even discussed in the committee mark-up sessions. In summary - we win...for now, but rest assured, the bill will be back. Even letter writing, calling your Congressmen, and attending hearings and committee meetings cannot substitute for the task of educating judges, legislators and society as a whole about the societal and economic benefits of subrogation. We must not ease up the pressure.

This victory was in no small part due to the lobbying efforts of several subrogation organizations and the expert lobbying services of Jon Breyfogle and others with the Groom Law Group in Washington, D.C. and communication and cooperation from Rep. Tim Murphy (PA-R), who fought valiantly against the proposal. Numerous influential organizations sent letters to Henry Waxman, chairman of the Energy and Commerce Committee in the 11th Congress, as well as to the other members of that committee. This includes letters voicing opposition to the bill from the Building and Construction Trades Department (AFL-CIO) (strange bedfellows with the insurance industry) and the National Construction Alliance II. A group letter signed by the Chamber of Commerce, UnitedHealth Group, Aetna, Humana, WellPoint, and the American Benefits Council was also sent. It was a classic example of democracy in action. It was perhaps the most visible the subrogation industry has been to Washington lawmakers in quite a while - perhaps ever.

This success should not be an occasion to put away our arsenal or let the momentum die down. The battle has been won, but there are many more battles to come and a long war to be waged. The interesting thing about this battle is that it truly transcends political parties and partisan politics - it's about what is best for America and its economy.

UPCOMING EVENTS.....



WE HOPE TO SEE YOU AT THE NASP CONFERENCE!

November 1-4, 2009 - Gary Wickert and Ryan Woody will be at the 2009 NASP Annual Conference being held in Colorado Springs, Colorado. On November 2, Gary Wickert will be presenting *The Complete Guide To Taking A Future Credit In All 50 States* and, on November 3, Ryan Woody will be presenting *ERISA and The Wrongful Death Lawsuit.* MWL will also be exhibiting at this conference so if you plan on attending, please stop by our booth and see Gary Wickert, Ryan Woody and Jamie Breen. For more information on this conference, please go to www.subrogation.org.

May 11-14, 2010 - MWL will be exhibiting at the 5th Annual Claims Education Conference being held in New Orleans, Louisiana. Jamie Breen will be at our exhibit booth so stop by our booth if you plan on attending this conference. For information on this conference, please go to http://www.claimseducationconference.com.

★★★ ***Matthiesen, Wickert & Lehrer, S.C. will be making online subrogation education/training webinars available in the very near future. Our November Newsletter will be dedicated to this subject and will provide you with all the information you need to know regarding scheduling webinars with Matthiesen, Wickert & Lehrer, S.C.***
