MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER OCTOBER 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 Jamie Breen at **jbreen@mwl-law.com**. We appreciate your friendship and your business.*

IN THIS ISSUE....

INSURANCE SUBROGATION

DEDUCTIBLE REIMBURSEMENT CONFUSION PERSISTS

By Gary L. Wickert

In the world of subrogation, the issue of how much of an insured's deductible must be reimbursed to the insured after a carrier makes a successful subrogation recovery remains a perplexing and confusing issue for subrogation professionals. It rivals ERISA preemption in health insurance subrogation and the no-fault laws of certain states as one of the most confusing and least understood areas of subrogation. Even experienced subrogation professionals and lawyers get it wrong when it comes to understanding and employing the laws surrounding the subrogated carrier's obligation to reimburse an insured's deductible. This article strives to shed some light on this often misinterpreted area of subrogation law.

A good example of this confusion exists in **Texas**, where the Insurance Code provides as follows:

Tex. Ins. Code § 542.204. *"Action to Recover Deductible. (a) Notwithstanding any other provision of this code and except as provided by Subsection (b), if an insurer is liable to an insured for a claim that is subject to a deductible payable by the insured and a third-party may be liable to the insurer or the insured for the amount of the deductible, the insurer shall: (1) take action to*

recover the deductible against the third-party no later than the first anniversary of the date the insured's claim is paid; or (2) pay the amount of the deductible to the insured. (b) An insurer is not required to take action or pay the amount of the deductible as required by Subsection (a) if, no later than the earlier of the first anniversary of the date the insured's claim is paid or the 90th day before the date the statute of limitations for a negligence action expires, the insurer: (1) notifies the insured in writing that the insurer does not intend to take further collection actions against the third-party; and (2) authorizes the insured to take further collection actions. (c) This section applies regardless of whether the third-party who may be liable for the amount of the deductible is insured or uninsured."

What most lawyers and practitioners do not realize is that this is only a notice section; it does not require a subrogated carrier to pay the deductible first out of a subrogation recovery. You should first look at the applicable insurance policy to see how it deals with a deductible, if at all.

On May 24, 2010, the **Pennsylvania** Superior Court, one of two intermediate appellate courts in that state, rejected another baseless class action suit aimed at the insurance industry's practice of prorating deductible reimbursements in Pennsylvania. On December 10, 2005, Brenda Jones was involved in an auto accident with another driver. Jones held collision insurance, issued by Nationwide, with a $500 deductible. Nationwide paid the Appellant the amount of her loss, minus the $500 deductible. Nationwide then pursued a subrogation action against the other driver. Nationwide received an amount greater than $500, but less than the amount Nationwide had already paid to Jones.

Pursuant to Insurance Department Regulations, 31 Pa. Code § 146.8(c) (see *Deductible Reimbursement Laws Chart* on MWL's website at **www.mwl-law.com** or click **HERE**), Nationwide did not reimburse the Appellant the full amount of her deductible, but rather, only a *pro rata* share, which was $450. Amazingly, Jones filed a class action complaint, alleging that Nationwide's policy and practice of reimbursing only a *pro rata* share of the deductible constituted breach of contract, bad faith, conversion, and unjust enrichment and she sought an injunction to stop the practice.

Nationwide filed preliminary objections in the nature of a demurrer and argued that the complaint failed to state a claim because Nationwide's reimbursement scheme was consistent with the language of the Appellant's policy, and with Pennsylvania law; most specifically, § 146.8(c), which read as follows:

"Insurers shall, upon request of claimant, include first-party claimant's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with first-party claimant, unless deductible amount has been otherwise recovered. A deduction for expenses cannot be made from the deductible recovery unless outside attorney is retained to collect recovery. The deduction may then be for only pro rata share of allocated loss adjustment expense."

In response, Appellant argued that § 146.8(c) is void because the Insurance Department had no authority to promulgate it. On October 17, 2008, the trial court granted Nationwide's preliminary objections without issuing an opinion. The appeal followed. The Pennsylvania Superior Court made short work of the trial court's order, concluding that § 146.8(c) *"fits squarely within the scope of authority delegated [to the Insurance Department] by the General Assembly."* The Court concluded that *"the behavior complained of by the plaintiffs, which is specifically permitted by Pennsylvania's insurance regulations, cannot violate the common law 'Made Whole' Doctrine even assuming that the doctrine would in fact support a claim like that of these plaintiffs."* The Court reasoned that *"[b]ecause the behavior does not violate the 'Made Whole' Doctrine, the plaintiffs have failed to state a basis on which the Court could find a breach of the parties' contract."*

The Court rejected the plaintiff's remaining claims, declaring that Nationwide's behavior was not an act of bad faith because the defendant acted in reasonable reliance on a valid state insurance regulation. Under the terms of § 146.8(c), the plaintiffs were not legally entitled to a full recovery of their insurance deductible. The Court said Jones was entitled by law only to a prorated amount of the deductible. In short, the defendant's behavior as alleged was permissible under Pennsylvania law.

Subrogation professionals often assume that if a state employs or recognizes the "Made Whole Doctrine", then the insured must be totally reimbursed for its out-of-pocket deductible and any uninsured losses before a carrier can subrogate. Unfortunately, this over-simplistic view and application of the Made Whole Doctrine is not only erroneous, but results in reduced subrogation recoveries for carriers across the country. Surprisingly, the obligation of an insurer to reimburse some or all of its insured's deductible has little to do with the Made Whole Doctrine in most states. It is now clear that it has nothing to do with deductible reimbursement in Pennsylvania.

The Made Whole Doctrine generally provides that under the common law subrogation principle of equity, an insured is entitled to be "made whole" before a subrogated insurer can participate in a recovery from a tortfeasor. *Insurance Co. of North Am. v. Lexow*, 602 So.2d 528 (Fla. 1992). Insureds may argue that the Made Whole Doctrine prevents an insurer from subrogating or recovering anything on its subrogated interest whenever the insured has not been fully reimbursed for its deductible. Unfortunately, although observed and recognized by a large number of subrogation professionals throughout our industry, this view is incorrect. While the specific law involved may change from state to state, the general consensus is that the Made Whole Doctrine does not give an insured an affirmative right or cause of action against its insurer to be "made whole", beyond the payment of the insurance policy proceeds involved. *Schonau v. Geico General Ins. Co.,* 903 So.2d 285 (Fla. App. 2005). Rather, the Made Whole Doctrine may be used only as a defense by insureds to protect the insured's direct recovery from a tortfeasor where the insured also lays claim to a limited amount of third-party proceeds based on subrogation. *Florida Farm Bureau Ins. Co. v. Martin*, 377 So.2d 827 (Fla. 1979).

Decisions from across the country applying the Made Whole Doctrine essentially hold that where an insurer and insured simultaneously attempt to recover all of their damages from a tortfeasor who cannot (because of insolvency, limited insurance coverage, or other reasons) pay the full value of damages, the insured has priority of recovery over the insurer's subrogation interest. This is far different from an insured claiming it is entitled to 100% of its deductible before an insurer can subrogate on its own. Even the leading case in the country on the Made Whole Doctrine involved a dispute over limited third-party insurance proceeds between an insured and its insurer. *Garrity v. Rural Mutual Ins. Co.,* 253 N.W.2d 512 (Wis. 1977).

An insured always has the right to pursue a tortfeasor independently for its deductible, and that right alone is sufficient to allow the subrogee insurance company to keep its settlement, even if the insured is not made whole. *Paulson v. Allstate Ins. Co*., 665 N.W.2d 744 (Wis. 2003). Even one of the leading treatises on insurance, in its very first statement on the Made Whole Rule, raises the threshold issue of insufficient funds: *"In many instances, the insurer and insured both have rights of recovery against the third party primarily liable for the loss, if the amount recoverable from the third party is insufficient to completely satisfy the claims of both." Couch on Insurance*, § 223.133, at 223-145 (3d Ed. 2000).

The **Utah** Court of Appeals recently decided a case in which an insurer reimbursed an insured their deductible, but not before reducing the deductible based on depreciation of property damage caused by a fire. *Birch v. Fire Ins. Exchange*, 2005 WL 2298130 (Utah App., Sept. 22, 2005). In that case, fire damaged the insured's property, and their insurance policy provided for full replacement costs, subject to a $500 deductible. The carrier subrogated against the tortfeasor, but was able to recover only the depreciated value of the property. It then reimbursed its insured its deductible, but first reduced it based on the depreciation of the property. The insured argued that the Made Whole Rule should focus not on what he might legally have recovered from the tortfeasor, but rather on the total damages or loss he sustained. The Court disagreed, and held that the reduction of the deductible was allowed because the maximum recoverable in the tort action was less than the replacement value insurance payment made by the insurer.

The **Florida** Court of Appeals astutely recognizes that a blanket application of the erroneous notion that an insured must recover its deductible first before a carrier will be allowed to recover dollar one of any

subrogation interest, will guarantee that insurance companies will simply readjust their premiums to pass on the added cost to consumers. *Monte de Oca v. State Farm*, 2004 WL 2955008 (Fla. App. 2004). It held that a 50% reimbursement of a deductible where the plaintiff was 50% at fault was perfectly equitable. What's more, a third-party tortfeasor lacks any standing to complain that an insurance company cannot subrogate until its insured has been totally reimbursed its deductible or otherwise "made whole". *Nationwide Property and Casualty Ins. Co. v. DPF Architects*, 792 So.2d 369 (Ala. 2000). Unless the insureds have intervened into the action to claim a right of recovery which would otherwise be prohibited due to lack of third-party proceeds or insurance coverage, a carrier is allowed to subrogate, notwithstanding the fact that the insured has not been made whole by complete reimbursement of its deductible. The only party withstanding to object to the insurer's lack of reimbursement of 100% of a deductible is the insured - and even then, it should only be able to complain when the insured is making an affirmative claim and third-party proceeds are insufficient to satisfy both the insured's uninsured loss and the carrier's subrogation interest. *Economy Fire & Casualty Co. v. Goar*, 564 So.2d 867 (Ala. 1990).

It should be clear then, that the so-called "dollar-one states" are a misnomer, and have little application as to whether and to what extent a deductible must be reimbursed to an insured. The term simply refers to whether or not a state recognizes and applies the Made Whole Doctrine as described above. But if the Made Whole Doctrine doesn't give the insurance industry guidance as to when and under what circumstances a deductible must be reimbursed, in whole or in part, what does? The answer, where it has been declared, is usually derived from the specific insurance regulations and administrative codes of each particular state.

Twenty-two states contain regulations or administrative codes which specifically and, in detail, govern when and under what circumstances an insured's deductible should be reimbursed by a subrogating insurer. For example, in **Texas**, the Texas Insurance Code § 542.204 specifically requires an insurer to "take action" to recover a deductible within one year from the date a claim is paid or 90 days before the statute of limitations runs - whichever is sooner. If it does not, the law requires an insurer to pay a deductible back to its insured. However, this burden does not apply if an insured is notified that no subrogation will be pursued and the insured is authorized to proceed on its own to recover any losses it deems it has suffered. However, this code section applies only to private passenger automobile policies. No other applicable statute, administrative code provision or case law gives us guidance for matters involving fire and casualty, property, or health insurance subrogation. However, the Texas Department of Insurance indicates that the reimbursement of the insurance deductible in a third-party claim is usually dictated by the level of recovery - usually a pro-rata reimbursement based on the percentage of recovery. However, the Department warns that a carrier must be consistent on its deductible reimbursement policy.

California law requires that every insurer that makes a subrogation demand must include in every such demand the insured's deductible. 10 Cal. A.D.C. § 2695.7. Insurers must share subrogation recoveries on a pro-rata basis in order to reimburse a pro-rata share of their insured's deductibles. A pro-rata share of legal expenses and fees may be deducted on a pro-rata basis, if actually incurred. **Iowa** law requires that an insurer shall, upon the insured's request, include the insured's deductible in any subrogation demand. Iowa A.D.C. 191-15.43 (507B). Any subrogation recoveries will be shared on a pro-rata basis with the insured unless the deductible amount has otherwise been recovered. **New York** law requires an insurer which has made a physical damage third-party subrogation recovery to mail or hand deliver to the insured a pro-rata share of the insured's deductible, within 30 days after such recovery. N.Y. Ins. Reg. 64, § 216.7(g)(1). **Wyoming**, on the other hand, has enacted a specific statute which requires that an insurer reimburse its insured its deductible, in full, before any part of the recovery is applied to any other use. Wyo. Stat. § 26-13-113. If the deductible exceeds the recovery made by the insurer, the entire recovery must be paid to the insured.

And, so it goes, that 22 states have enacted insurance regulations or statutes specifically governing the duties of a subrogated carrier in subrogation settings. Of the other 28 states, 21 have no applicable

statute, provision, or case law. In light of the fact that most of the states which have enacted regulations appear to apply a pro-rata reimbursement philosophy, an advisable policy with regard to reimbursement of deductibles in states which have not made any pronouncement, is to follow the pro-rata reimbursement formula.

Seven states have specific case law which governs procedure in these situations. **North Carolina** requires an insurer to pay the deductible first out of any subrogation recovery absent some alternate agreement. *St. Paul Fire & Marine v. Rhodes*, 198 S.E.2d 482 (N.C. 1973). The **South Dakota** Supreme Court has held that an insured can collect even if its insured has not been made whole by reimbursement of a deductible. *Julson v. Federated Mutual Ins. Co*., 562 N.W.2d 117 (S.D. 1997). **Washington** follows the blanket rule that an insured must be made whole before an insurer can collect any excess, and the Department of Insurance advises that it relies on this case law to establish that a deductible must be reimbursed in full before a carrier can collect. *Theringer v. American Motors Ins*., 855 P.2d 191 (Wash. 1978). **Alabama** has left the entire issue to be governed by the terms of the insurance policy. *Ex parte State Farm & Casualty Co*, 764 So.2d 543 (Ala. 2000).

It is possible that the 21 undecided states may fall in line at some point on either side of the fence - either requiring a deductible to be reimbursed in full before any subrogation recovery can be had or allowing a carrier to subrogate either without regard to reimbursement of the deductible or after reimbursement of a pro-rata share of the deductible. A summary chart of the *Deductible Reimbursement Laws In All 50 States* can be found on the MWL website at **www.mwl-law.com** or by clicking **HERE**.

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

WORKERS' COMPENSATION SUBROGATION

THE OPPOSING TEAM'S GAME PLAN

Trial Lawyers' Strategy For Reducing Comp Liens

Sports fans will recall the New England Patriots' Cheating Scandal in 2007, when they were caught using electronic means to steal signals, giving them a significant advantage during football games. The Patriots videotaped defensive signals used by the New York Jets' coaches, according to league sources and later confirmed by film and cameras confiscated by NFL security officials. Clearly, you will have a significant advantage if you know what the other team is going to do. The same is true for subrogation. MWL has intercepted signals from trial lawyers which detail their strategy for reducing and eliminating workers' compensation subrogation liens. Knowing what the other side is going to do gives us a tremendous advantage in knowing how to defend against their anti-subrogation efforts.

We have always maintained that subrogation lawyers are really trial lawyers for the insurance industry. Gary Wickert has been a member of the American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), since 1983. As a long-time member, Gary receives the AAJ publication, *Trial.* The September 2011 issue of *Trial* contains a very telling article entitled "*Cutting Back The Workers' Comp Lien*." It details "tried and true tips" for reducing huge liens and workers' compensation subrogation interests. As Sun Tzu aptly advised in "*The Art of War*", it is important to "know your enemy."

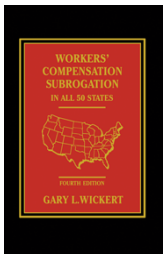
To its credit, the article reminds trial lawyers that they should contact and remind the comp adjuster that they are partners with the lawyer with regard to the third-party lawsuit and that both benefit by a nice third-party recovery. From there it is all downhill. The article tells trial lawyers to reduce liens by a proportionate share of attorney's fees and costs. But we should all keep in mind that many states, like **Arizona**, the **District of Columbia**, **Mississippi**, **Oregon**, **Wisconsin**, and **Wyoming**, do not require the

comp carrier to pay a percentage of attorney's fees and costs. Many more states which do provide for pro rata sharing of fees and costs do not require it where the subrogated carrier has intervened into the case and has been active in the litigation.

The *Trial* article argues that trial lawyers should further argue for lien reductions based on comparative fault, the Made Whole Doctrine, or the inability of the claimant to recover full damages for one reason or another. In truth, only a handful of states allow the Made Whole Doctrine to affect a carrier's subrogation interest, including **Arkansas**, **Georgia**, **Kentucky**, **Montana**, **New Mexico**, and **Washington**. The only state which explicitly allows a lien reduction for an employee's inability to recover full damages is **Indiana**, although equitable lien reduction provisions exist in **Nebraska**, **North Carolina**, **Oklahoma**, **Oregon**, and **South Carolina**.

The article also advises trial lawyers settling third-party cases to obtain a letter from liability adjusters and defense attorneys outlining how much at fault the claimant, employer, and non-parties were, and to make such a letter a condition of settlement. If large subrogation dollars are at stake, it is worth deposing the liability adjuster to get into the record that the trial lawyer made such a letter a condition of settlement. Trial lawyers are also advised that if the case settles for half of its value because of the criminal record of the claimant, the comp carrier should accept less than half of its lien, claiming that "justice" calls for such a corresponding reduction of the lien, even though it wasn't the comp carrier who committed the crimes.

Trial lawyers are urged to become familiar with the subrogation law of the state they are dealing with – a strategy MWL has been teaching its clients for over two decades. It warns lawyers about the possible conflict of law issues which exist where the accident occurs in one state but benefits are paid under the workers' compensation laws of a different state. For years, this has been a secret subrogation weapon, but trial lawyers are waking up to the fact that they, too, can take advantage of it.



The article recommends that trial lawyers become familiar with the subrogation law in the state they are working in and obtain a workers' compensation subrogation treatise. The only such treatise available is our own publication, "*Workers' Compensation Subrogation In All 50 States*", and a recent conversation with our publisher confirms that more and more trial lawyers are purchasing the book. Subrogation professionals must remain a step ahead of the bad guys if they hope to maximize their subrogation interests. The article concludes by saying:

> *"The overriding principle in workers' comp lien negotiations is, 'ask for the moon'. Regardless of the law in your jurisdiction, ask for a waiver of the lien, as a matter of course, even in clear liability cases where your client has made a full recovery. Busy subrogation claims adjusters will often be eager to recover something – anything – if payment can be made within 30 days."*

And it is here that the article strikes to the heart of one of the biggest subrogation problems we face: apathy and a willingness to do the work necessary to maximize subrogation recoveries. Trial lawyers and judges know from experience that the aggressive subrogated carrier zealously protecting its recovery rights is the exception rather than the rule. This lax approach to subrogation spawns an entire culture of trial lawyers and judiciary who believe carriers are supposed to waiver or significantly reduce their lien.

It should be the subrogated carrier who routinely "asks for the moon." Subrogation professionals should strongly and passionately remind trial lawyers, judges, and mediators that reimbursing an employer is not only part of the social contract entered into when this country waded into the arena of workers' compensation, it is necessary to keep premiums low for employers throughout the country. Subrogation is a major weapon in our national arsenal for fighting the rising cost of workers' compensation insurance premiums and the cost of being an employer in America. And that, in turn, helps with our struggling economy.

HEALTH INSURANCE SUBROGATION

Texas Supreme Court Clarifies Scope of Recoverable Amount in Personal Injury Lawsuits

During the tort reform flurry of 2003 in Texas, C.P.R.C. § 41.0105 was amended to limit a plaintiff's recovery of medical expenses to those that are actually paid or incurred, rather than the full medical bill charged to the patient. One of the lingering questions was whether the full, non-discounted bills could be presented to a jury. The Texas Supreme Court addressed this issue on July 1, 2011 holding only paid or incurred medical expenses can be presented to a jury.

On July 1, 2011 the Texas Supreme Court in *Haygood v. Escabedo,* 2011 WL 2601363 (Tex. 2011) held that *"only evidence of recoverable medical expenses is admissible at trial."* Under Texas law the "*recovery of medical or health care expenses is limited to the amount actually paid or incurred by or on behalf of the claimant."* This ruling clarified that the amount of medical expenses that can be introduced into evidence is to be calculated based on what a medical provider is reimbursed for, not necessarily the amount the provider billed.

In *Haygood,* the plaintiff's health care providers billed the plaintiff $110,000. However, the plaintiff was covered by Medicare Part B, which only pays a "reasonable charge" for services. The plaintiff's health care providers adjusted their bills with credits of $82,000, leaving a total bill of $28,000. Under this new ruling, the plaintiff could only introduce evidence of medical bills totaling $28,000. The Court found that since no one would be paying the $82,000 credit, that evidence concerning it could not be used at trial.

The concern with the ruling, of course, is that limiting the evidence to amounts that have been or must be paid *"provides the jury an unfairly low benchmark with which to gauge the seriousness of the plaintiff's injuries…"* For subrogation professionals, this means several things. Conceivably smaller recoveries mean the plaintiff will fight that much harder to destroy your subrogation interest. However, because the amount the subrogated carrier pays for medical expenses is often the only amount the jury will hear, it provides you with an opportunity to work with plaintiff's counsel. In exchange for preparing detailed medical expense reports and summaries which can be presented directly to the jury, you save the plaintiff's attorney a great deal of time which might possibly be exchanged for stipulations on your subrogation interest.

WORKERS' COMPENSATION SUBROGATION

SUBROGATING CONTAMINATED AIRCRAFT CABIN AIR CASES

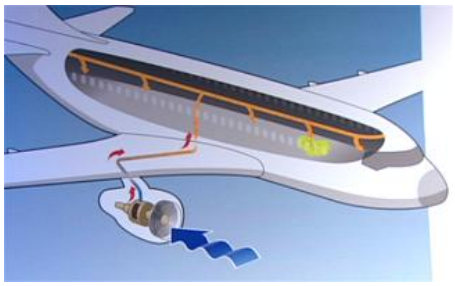
Terry Williams, a former flight attendant with American Airlines, recently announced a settlement with Boeing over injuries she claimed were caused by contaminated cabin air. The *Williams v. McDonell Douglas, et. al.* case was filed June 2009 in King County (Wash.) Superior Court. Terry successfully filed a workers' compensation claim for the exposure in California and received benefits for her work-related condition. As a result of the settlement, American Airlines has a subrogation right in this case to recover what it paid in workers' compensation benefits.

The news of the settlement has spawned inquiries to Matthiesen, Wickert & Lehrer, S.C. regarding whether similar comp claims might have subrogation potential. Usually, if there is one successful third-party action, more will follow. However, carriers must move cautiously before jumping into expensive litigation with Boeing because no two exposure cases are alike. Look at it as though the first case is the trailblazer, forging through the thousands of pages of documents, securing witnesses, hiring experts, etc.

The success of the *Terry Williams* case proves that there is subrogation potential in other cases, but in order to justify the time and cost needed to prosecute other exposure cases against Boeing the claims will have to be significantly large.

Nearly 250,000 pages of company documents turned over to Terry Williams' legal team by Boeing seem certain to fuel the long-running battle over the safety of cabin air in commercial jetliners. Judith Murawski, a Seattle-area based industrial hygienist for the Association of Flight Attendants-CWA, told msnbc.com, that she typically handles at least three new cases a week involving crew members exposed to fumes, and some of our clients have been seeking opinions from us on the viability of such subrogation actions. In evaluating the wisdom of pursuing Boeing for similar claims, one must look at the big picture.

Nobody is falling on the sword as a result of the *Williams* settlement. Boeing and the airline industry have long maintained that cabin air (compressed air pumped or "bled" from the plane's engine) is safe, saying such breaches are extremely rare and that short-term exposure to the tiny amounts of toxic substances in the cabin air poses no health risk. Each case will involve facts specific to itself. Boeing still contends that cabin air is safe to breathe and studies by independent researchers have consistently shown that existing systems for providing cabin air to passengers and crew meet applicable health and safety standards.



Trial lawyers, to the contrary, maintain that faulty "bleed-air" systems have been causing health problems dating back to the takeoff of jet travel in the 1950s. In severe cases, they say, exposure to the toxic fumes has cost afflicted pilots their jobs when they lost medical clearances and kept flight attendants from working. Moreover, passengers are not informed what they may have breathed and can be endangered if pilots experience aerotoxicity symptoms such as drowsiness, disorientation and memory loss as a result of exposure, according to industry activists. If passengers are exposed to contaminated air, the cause is sometimes unknown or undetected, despite the fact that many passengers travel as part of their work-related functions. An increase in workers' compensation claims in this area in almost a certainty, so a commensurate increase in subrogation potential awareness in this area must be achieved.

Mechanical problems can occur with ventilation on rare occasions that can lead to exposure to airborne chemicals. Most will have temporary symptoms, but there is a chance of chronic health issues. A recent 105-minute documentary, "*Angel Without Wings*," is focusing additional attention on the issue. The film depicts former Australian pilot Susan Michaelis' 13-year effort to expose what she calls the aviation world's biggest cover-up — a workplace health issue that ended her career on July 23, 1997, at the age of 35.

TERRY WILLIAMS

Terry Williams claimed her life was changed by a single exposure when toxic smoke and oil fumes leaked into her MD-82 aircraft cabin on April 11, 2007, as American Airlines Flight 843 from Memphis, Tennessee to Dallas, Texas taxied to the gate. That is far from class action suit material. Such a single instance exposure resulting in severe disability will undoubtedly be quite rare. Each case will have to be recognized and pursued on its own facts and Boeing will justifiably fight each one based on its own merits.

It is unlikely that a large number of no lost time compensation claims will turn into subrogation cases against Boeing. It can be very expensive to litigate these cases and will require a good number of experts, etc. Subrogated comp carriers might be better advised in many instances to piggy-back any lawsuits filed by their injured employees, rather than taking up the litigation mantle on their own when it comes to this kind of case - unless they have huge subrogation liens.

For more information or to inquire about subrogation potential in cases such as these, please contact Gary Wickert at **gwickert@mwl-law.com.**

FIRM NEWS

MATTHIESEN, WICKERT & LEHRER, S.C. WELCOMES TWO NEW ATTORNEYS

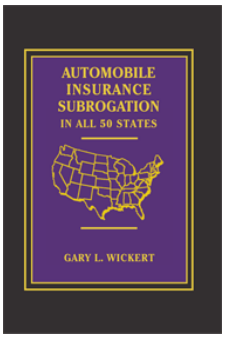
Matthiesen, Wickert & Lehrer, S.C. (MWL) is pleased to welcome two new attorneys to our insurance litigation staff. Tim Pagel recently joined our firm as a trial lawyer with experience in subrogation, insurance defense and insurance coverage. Tim is a 2007 graduate of Marquette University Law School, in Milwaukee, Wisconsin, where he earned recognition on the Dean's List and was the Managing Editor on the *Marquette Intellectual Property Law Review*. Prior to joining MWL, Tim was a Civil Division Law Clerk with the Milwaukee County Circuit Court (First Judicial District), and then joined the Law Offices of Jeffrey Leavell, S.C. in Racine, Wisconsin, where he represented insurance companies, individuals, businesses and municipalities in personal injury, contract, business tort, and employment-law cases.

Alejandro Bautista has also joined MWL and is a recent graduate of Marquette University Law School in Milwaukee, Wisconsin, where he was a member of *Phi Alpha Delta*, earned recognition on the Dean's List, and was the Managing and Survey Editor for the *Marquette Sports Law Review*. Alejandro is licensed in Wisconsin and Florida and will be handling national subrogation, including a large number of workers' compensation claims in the State of Florida. Prior to joining MWL, Alejandro was a law clerk at Murn & Martin, S.C. in Waukesha, Wisconsin and an intern at the Wisconsin Department of Natural Resources in Madison, Wisconsin. Alejandro's multiple licenses and bilingual talent will be an important resource for our firm's national subrogation practice.

We are very excited to have Tim and Alejandro joining us at this exciting time in our firm's history.

UPCOMING EVENTS

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 110 so stop by our booth if you plan on attending this conference and introduce yourself. MWL makes every effort to keep in touch with its clients and we would like to meet up with any of our clients who will be in attendance at this conference. If you are a MWL client and will be at this conference, please let Jamie Breen know at **jbreen@mwl-law.com**. We would love to get together for dinner, lunch, coffee, or even just a quick "hello" and thank you for entrusting your national subrogation work to MWL. For more information on this conference, please go to **www.selffundingconference.com**.



November 2011 - MWL's *Automobile Insurance Subrogation: In All 50 States* will soon be released. It is the last and most anticipated of the subrogation trilogy, and a book which will serve as the "Bible" for any insurance company writing personal lines or commercial automobile insurance. There is no other book, resource, or authority like it - anywhere. It is a complete treatment - A to Z - of virtually every issue which the insurance claims or subrogation professional will face in the area of automobile insurance. It is like no legal treatise ever written and promises to be the most used reference in any insurance company. The myriad of subrogation topics addressed and receiving thorough treatment in this treatise were carefully selected by the author as the most frequently-asked-about areas of automobile insurance subrogation. MWL is very proud of the work which went into this book and looks forward to the feedback and symbiosis with the claims/recovery industry which has helped make its other subrogation resources the leaders in the

industry. You can pre-order the book or learn more about this book from our publisher, Juris Publishing, or by clicking **HERE**.

ATTENDING 2011 NASP CONFERENCE IN ORLANDO? The National Association of Subrogation Professionals (NASP) is having its 2011 Annual Conference dubbed "Subro Magic" at the Gaylord Palms in Orlando, Florida from November 6 to November 9, 2011. MWL makes every effort to keep in touch with its clients and we would like to take the opportunity to meet with any of our clients who may be in attendance at this conference. If you are a MWL client and will be at this conference next month, please let Jamie Breen know at **jbreen@mwl-law.com**. We would love to get together for dinner, lunch, coffee, or even just a quick "hello" and thank you for entrusting your national subrogation work to MWL.

December 7, 2011 – Timothy Pagel will be presenting a live webinar entitled *"Illinois Workers' Compensation and Employer Contribution*" from 10:00 a.m. - 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 register now by clicking on the "Register Now" button to the right.

May 9-12, 2012 - MWL will be exhibiting at the *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**.

INDUSTRY NEWS

ALLSTATE ACQUIRES ESURANCE

Allstate Corporation has completed its $1 billion acquisition of Esurance and Answer Financial from White Mountains Insurance Group, Ltd., according to **InsuranceNewsNet.com**. Allstate is seeking to become a bigger player in online insurance, more than doubling its book of business in that area. The Northbrook-based home and auto insurer said it will keep the current headquarters of online auto insurance provider Esurance in San Francisco and Answer Financial in Los Angeles. Geico remains the leader in direct auto coverage, commanding 38% of the market of vehicle policies sold online and by phone.

NATIONWIDE ACQUIRES HARLEYSVILLE

Nationwide Mutual Insurance Company will acquire Harleysville Mutual Insurance Company in a deal valued at around $800 million, the companies announced recently. Nationwide's wide geographical distribution will blend nicely with Harleysville's expertise in commercial lines, providing Nationwide an opportunity to increase market share while offering their customers and agents access to a broader portfolio of insurance, financial, and banking products. Under the deal, which is expected to close early next year, Harleysville will merge with Nationwide Mutual while Harleysville Group, the publicly traded company, will become a newly formed subsidiary of Nationwide Mutual. To read more, click **HERE**.