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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **September 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. We appreciate your friendship and your business.

IN THIS ISSUE . . . .

WORKERS' COMPENSATION SUBROGATION

TEXAS SUPREME COURT KOs WORKERS' COMPENSATION BAD FAITH

Texas Mutual Ins. Co. v. Ruttiger, 2011 WL 3796353 (Tex., Aug. 26, 2011)

By Gary L. Wickert

In a ground-breaking decision with positive subrogation ramifications, the Texas Supreme Court has decided that workers' compensation insurers are no longer subject to "bad faith" claims for unfair claims settlement practices under the Texas Insurance Code.

"We conclude that (1) claims against workers' compensation insurers for unfair settlement practices may not be made under the Insurance Code, but (2) claims under the Insurance Code may be made against those insurers for misrepresenting provisions of their policies, although in this case there was no evidence the insurer did so," the Supreme Court announced in *Ruttiger*, decided on August 26, 2011.

With this decision, the Court overturned 20 years of established law which allowed claimants' attorneys to file bad faith claims at the drop of a hat – including when the carrier became aggressive in protecting its statutory subrogation rights and/or didn't reduce or eliminate a workers' compensation subrogation lien when plaintiffs' attorneys demanded it. Injured workers who have been subjected to "bad faith"

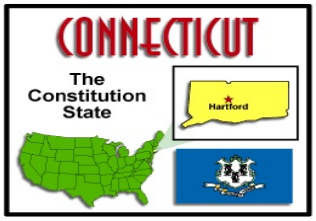
claims handling by their workers' compensation insurance carriers are no longer protected by the Texas Insurance Code's provisions against "unfair settlement practices." Justice Phil Johnson wrote in strong terms that a bad faith cause of action is inconsistent with the current workers' compensation system.

This means there can no longer be any insurance code violations in Texas (statutory bad faith) for workers' compensation claims settlement practices. As such, it can be safe to assume there is no insurance code violations for asserting subrogation or aggressively seeking to recover all of your subrogation lien. This decision knocks out the leverage plaintiff's counsel threatens in some cases we have seen where the plaintiff asserts insurance code violations in the claims handling to try to knock out the subrogation interests.

The case was remanded to determine if common law bad faith violations (breach of the duty of good faith and fair dealing) still remain in Texas, but four justices will likely answer this question "no", three will vote "yes", and two have not yet tipped their hand. So, when the case comes back up to the Supreme Court, it is possible that one of the two undecided justices will say "no." If that happens, even common law bad faith liability for workers' compensation will be a thing of the past. This is good news for workers' compensation carriers who have faced countless and baseless bad faith threats and lawsuits, and even better news for subrogation professionals, who all too often have seen minor problems in claims handling morph into threats of bad faith which all too often result in waiver of subrogation interests.

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



CHANGES TO CONNECTICUT'S WORKERS' COMPENSATION SUBROGATION

The Connecticut legislature has amended § 31-293, effective July 1, 2011, with a couple of changes which directly affect workers' compensation subrogation in the Constitution State.

Section 31-293 provides that where the worker and carrier join as plaintiffs and recover damages, the claim of the carrier takes precedence over the claim of the worker, after deduction of reasonable and necessary expenses, including attorneys' fees. Until recently, it was improper for the court to deduct a portion of the employee's attorneys' fees from the employer's reimbursement for benefits paid to the employee. However, effective July 1, 2011, § 31-293 was amended to provide as follows:

Connecticut State Capitol
Hartford, Connecticut

If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee, except that such reduction shall not apply if the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer, or the custodian of the Second Injury Fund.

In this way, Connecticut has gone from a state which prohibited a carrier's lien from being reduced for attorney's fees for the employee's attorney to a state in which the lien is reduced automatically by one-third, ostensibly as an attorney's fee for the plaintiff's attorney, without regard to how much work the carrier's attorney has done or whether plaintiff's counsel has fought to eliminate or destroy the carrier's lien.

For years, the failure of a carrier to bring an action against the tortfeasor amounted to a waiver of their reimbursement rights to the same extent as if they had failed to intervene after notice of action brought by

the worker. If the carrier failed to intervene after receiving the 30-day notice required from the worker, it lost its right to intervene.

Notwithstanding the above, effective July 1, 2011, § 31-293 was amended to provide that the carrier will now not lose its subrogation rights for failing to intervene within 30 days after notice of an action brought by the employee, provided it "gives written notice of a lien in accordance with § 31-293."

These new changes do not eliminate the need for active subrogation representation in Connecticut, as the carrier must still be alert to and proactive against efforts to gerrymander settlements in such a way as to eliminate their subrogation interests. The carrier must be active to assert its right to future credits and combat the myriad of ways in which trial lawyers can and will strive to defeat the carrier's right to reimbursement of past benefits and a future vacation from paying prospective benefits.

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

HEALTH INSURANCE SUBROGATION

NOT BAD FAITH FOR UM CARRIER TO DELAY BENEFITS PENDING VERIFICATION OF MEDICARE LIEN

***Wilson v. State Farm Mutual Auto. Ins. Co.*, 2011 WL 2378190 (W.D. Ky. 2011)**

A Kentucky federal district court has ruled that it does not constitute bad faith for an uninsured motorist automobile carrier to delay payment of UM benefits while it attempts to determine the exact amount of a Medicare lien.

On August 29, 2009, Steven Wilson was the passenger of a Jeep Grand Cherokee insured by State Farm when it was involved in a collision with another vehicle. The driver of the other vehicle was at fault and uninsured. As a result of the accident, the plaintiff had significant medical bills, some of which were paid by Medicare. State Farm agreed that the plaintiff was due uninsured benefits up to the policy limits of $50,000. However, State Farm attempted to determine the value of Medicare's lien and asked for permission to discuss the lien with Medicare. The plaintiff refused the request and instead asked State Farm to deposit the full policy limits in an escrow account from which the Medicare lien would be paid. The plaintiff agreed "to hold State Farm ... harmless from any claim by Medicare."

Medicare was not involved in nor bound by this agreement. As an alternative, State Farm suggested including Medicare as a payee on the settlement check. The plaintiff rejected this request. Finally, State Farm decided to await Medicare's determination of the value of its lien and then issue separate checks to Medicare and the plaintiff.

While waiting for the information from Medicare, the plaintiff filed a lawsuit against State Farm, claiming it was bad faith to delay payment of the $50,000 more than 30 days merely to protect itself from later liability to Medicare. Two months later, State Farm learned the value of the Medicare lien.

The federal court ruled in favor of State Farm, holding that State Farm did not act in bad faith. In order to have acted in bad faith, an insurance company must (1) have an obligation to pay the claim at issue; (2) not have a reasonable basis for failing to pay the claim; and (3) know that it lacked a reasonable basis to delay payment. The court said that mere delay of payment alone does not constitute bad faith. While the plaintiff has the primary responsibility to repay Medicare, State Farm would be absolutely liable to Medicare should the plaintiff fail to make the repayments. State Farm may also have an obligation to protect Medicare's lien under the Medicare Secondary Payer Act and its corresponding regulations.

Therefore, while some Kentucky courts have held that it is reasonable for a UM carrier to include Medicare as a payee on a settlement check (which Steven Wilson refused to agree to), the delay in making the payment while State Farm determined Medicare's interests did not constitute bad faith.

HEALTH INSURANCE SUBROGATION

ARKANSAS PIP/MED PAY SUBROGATION:

Supreme Court Decision Adds Confusion

Riley v. State Farm Mutual Auto. Ins. Co., 2011 WL 2410521 (Ark. 2011)

Leave it to a few judicial activists on the Arkansas Supreme Court to destroy decades of subrogation tradition in Arkansas. In the 2011 decision of *Riley,* the Court bluntly announced that no subrogation rights arise until there is an affirmative determination by a court (or through an agreement – an event very few subrogation professionals will ever witness) that the injured party has been made whole. *Riley v. State Farm Mutual Auto. Ins. Co.,* 2011 WL 2410521 (Ark. 2011).

For generations, Arkansas has had a proud heritage of allowing PIP and Med Pay subrogation. Arkansas allows auto carriers to offer optional "medical expense benefits" (Med Pay) along with a standard automobile insurance policy. This Med Pay coverage is included in § 23-89-202(1), which provides for payment of 100% of any medical bills up to the coverage amount of $5,000 per person. Traditional Med Pay coverage is less common in Arkansas because § 23-89-202 requires PIP coverage which includes a Med Pay component. Arkansas blends the concept of Med Pay with PIP benefits, so subrogation of Med Pay benefits is allowed to the same extent as is the subrogation of PIP benefits. In Arkansas, an insurer which has paid Med Pay benefits to its insured under § 23-89-202 has an automatic lien upon, and a right of reimbursement from, any tort recovery or settlement obtained by its insured. *Daves v. Hartford Acc. & Indem. Co*., 788 S.W.2d 733, 736 (Ark. 1990); *Northwestern National Ins. Co. v. Am. States Ins. Co*., 585 S.W.2d 925 (Ark. 1979); *Carnathan v. Farm Bureau Ins. Co*., 705 S.W.2d 885 (Ark. 1986); *National Inv. Fire & Cas. Ins. Co. v. Edwards*, 633 S.W.2d 41 (Ark. App. 1982). This right of reimbursement is in the nature of subrogation. *Daves,* supra. The underlying principle of subrogation is to avoid a double recovery by the insured. *Id*.

Under Arkansas law, the Made Whole Doctrine is recognized and dictates whether an insurer has a subrogation right in settlement proceeds. In accordance with this doctrine, an insurer's subrogation right is secondary to the insured's right. *Green v. Ford Motor Co*., 2011 WL 2666198 (W.D. Ark., 2011). This doctrine is a descriptive term for assuring against unjust enrichment of the insured. *Farm Bureau Cas. Ins. Co. v. Tallant,* 207 S.W.3d 468 (Ark. 2005). An insured should not recover more than that which fully compensates him and an insurer should not recover any payments that should rightfully go to the insured so that he is fully compensated. *Id*. Arkansas' general rule is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss. *Franklin v. Healthsource of Ark.,* 942 S.W.2d 837 (Ark. 1997); *Shelter Mutual Ins. Co. v. Bough,* 834 S.W.2d 637 (Ark. 1992); *Riley*, supra. Arkansas courts are permitted to determine whether an insured has been made whole based upon the facts presented, and neither the insured nor insurer is entitled to a trial by jury on this issue. *Green*, supra. The relevant question is whether the insured's uncompensated (uninsured) loss is greater than the net recovery from the tortfeasor. *Id*.

Arkansas applies the Made Whole Doctrine rather broadly. It follows something called the "*Franklin Formula,*" which says the precise measure of an insurer's reimbursement is the amount by which the amount of the sum received by the insured from the third party, together with the insurance proceeds, exceeds the loss sustained and expense incurred by the insured in realizing his claim. *South Central Ark. Elec. Co-Op v. Buck*, 117 S.W.3d 591 (Ark. 2003); *Franklin,* supra. In short, Arkansas has begun sliding down the unsound legal slope of not differentiating between equitable/legal subrogation and contractual/conventional

subrogation. The insured must be wholly compensated before an insurer's right of subrogation arises – only where the recovery by the insured exceeds his total amount of damages incurred. *Bough*, supra. In *Franklin*, the Arkansas Supreme Court expanded the use of the Made Whole Doctrine and held that an insurer is not entitled to subrogation unless the insured has been fully made whole, regardless of whether the insurance contract between the insurer and insured expressly gave the insurer a right of subrogation for benefits paid. *Franklin,* supra. The Made Whole Doctrine applies even in cases of statutory reimbursement rights, such as PIP benefits under § 23-89-207. *Ryder v. State Farm Mutual Auto. Ins. Co.*, 268 S.W.2d 298 (Ark. 2007).

In fact, the Arkansas Supreme Court has held that the Made Whole Doctrine applies not only to equitable and conventional rights as well as statutory rights, but also to statutory rights of subrogation provided under the workers' compensation statutes. *General Acc. Ins. Co. of Am. v. Jaynes*, 33 S.W.3d 161 (Ark. 2000). It's advisable for auto carriers subrogating for property damage to intervene into their insured's third-party action, because Arkansas does not approve of splitting of causes of action. *Home Ins. Co. v. Dearing*, 452 S.W.2d 852 (Ark. 1970).

In *Riley v. State Farm Mutual Auto. Ins. Co.*, State Farm had paid its insured $5,000 in medical benefits due to a car accident with a GEICO insured. Prior to making any benefit payments, State Farm sent GEICO a letter notifying them of their right to subrogation. Riley later settled her claim with GEICO for $11,500, which issued one check payable to Riley and her attorney for $6,500, and a second check payable to Riley, her attorney and State Farm for $5,000.

Riley sent a letter to State Farm asserting that she had not been "made whole" by the settlement. State Farm responded that the $11,500 settlement from GEICO was sufficient "to fully compensate Ms. Riley for her injuries" and agreed to reduce its recovery to $3,000 (so as to reimburse for recovery expenses and fees). Nonetheless, Riley filed a declaratory judgment action and complaint against State Farm, alleging that the notice letter to GEICO violated the rules and that the subrogation recovery was premature without a court's determination that Riley had been "made whole." The trial court dismissed this count, ruling that State Farm had a valid but unenforceable subrogation lien under Arkansas law. The Supreme Court reversed and held that unless an agreement has been reached between an insured and its carrier, the "subrogation lien cannot arise, or attach, until the insured has received the settlement proceeds or damage award and until there is a judicial determination that the insured has been made whole." The Court was clear in stating that the legal determination of made whole "must occur before the insurance company is entitled to recover in subrogation."

In Arkansas, an insurer cannot modify or contract around the Made Whole Doctrine within the terms of its insurance policy. *Franklin,* supra. So, the pronouncement in *Riley* has caused a great deal of consternation and confusion within the insurance profession. The right of subrogation does not accrue until there has been a legal determination by a court that the insured has been made whole. *Riley,* supra.

One thing is certain: there will be no legal determinations of whether an insured is made whole unless initiated by the subrogated carrier. Taking no action or instructing subrogation counsel not to take action on Med Pay or PIP subrogation in Arkansas is not necessary and will ensure no recoveries. Do not hamstring your subrogation counsel because the activist Supreme Court in Arkansas has issued a confusing and troublesome opinion. Instruct your subrogation counsel to actively seek a judicial determination as to whether the insured has been made whole. Anything short of that will ensure lost subrogation opportunities.

INSURANCE SUBROGATION

MSP LIABILITY: U.S. V. STRICKER UPDATE

Our January, 2010 newsletter featured an article entitled "Subrogation and the Great Medicare Set-Aside Debate". It can be found **HERE**. In that article we described in exhaustive detail how the Medicare Secondary Payer (MSP) Act at 42 U.S.C. § 1395y(b)(2) establishes that Medicare will not be responsible for medical payments when there is a primary payer (such as a health insurer or workers' compensation carrier), and, accordingly, Medicare's interests must be considered and adequately protected in any settlement which forecloses future medical expenses. If the claimant/plaintiff does not resolve any conditional payments within 60 days of a third-party tort settlement, the Center for Medicare & Medicaid Services (CMS) may seek recovery directly from us - the primary payer. If Medicare must take legal action to recover its conditional payments, it has the right to recover twice its actual expenses from the primary payer. We encouraged insurers and TPAs to utilize subrogation counsel who are knowledgeable and experienced in Medicare Set-Aside (MSA) issues, in order to avoid this potential liability in their subrogation files.

While the above concept and risk to primary payers with regard to past benefit payments is fairly straightforward, there has been some uncertainty as to potential liability of plaintiffs' attorneys, insurers, and corporate defendants for conditional payments, including *future* (post-settlement) medical expenses in the settlement of liability claims. In the January, 2010 issue, we alerted you to a pending case known as the *Stricker* case, stemming from a $300 million settlement which took place on August 20, 2003, involving multiple toxic tort cases filed as a class action lawsuit against various corporate employers. *U.S. v. Stricker*, No. 09-2423 (N.D. Ala., Sept. 13, (2010).The settlement was highly-publicized and the U.S. government took notice. It filed a lawsuit under the MSP Act seeking reimbursement from the corporate tortfeasors who took part in the settlement, along with their insurance companies, subsidiaries, and certain plaintiffs' attorneys who received settlement funds in certain cases where Medicare had made payments. The government alleged that Medicare's interests were not adequately protected or addressed in the settlement.

The corporate defendants and insurers sought dismissal, arguing lack of privity with the government and that the three-year statute of limitations had expired. On September 20, 2010, the court dismissed the government's complaint against six defendants (Monsanto, Solutia, Pharmacia, AIG, Travelers, and various attorneys) based on statute of limitations arguments. The government filed a Motion for Reconsideration, which was denied by Judge Bowdre on August 12, 2011. However, the dismissal is truly a Pyrrhic victory for the insurance industry, because the dismissal was solely based on the statute of limitations arguments - not the merits of the incredible threat the U.S. government poses to innocent insurers and corporations settling tort claims brought against them.

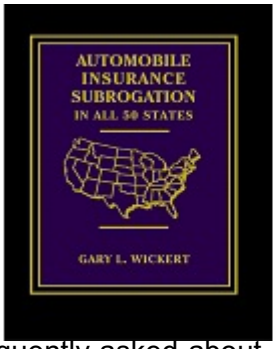
Despite the *Stricker* lawsuit, the official position of the Center for Medicare Advocacy continues to be that, in contrast to workers' compensation claims, Medicare does *not* look to the proceeds of liability cases for payment of medical expenses incurred after settlement of the liability claim. There is much speculation about the extension of MSP requirements to future medicals in liability cases and the need for MSAs in such situations. Gould & Lamb, L.L.C. - an MSA vendor with whom MWL has given numerous joint webinars and seminars on MSAs and MSP liability - has released an Industry News Bulletin sounding the clarion warning about the *Stricker* case. Despite the dismissal, the position of the government in the *Stricker* lawsuit gives clear indication of the aggressive position they will pursue and underscores the need for liability claims handling and settlement practices to be compliant with the MSP Act. By its actions, the government appears to seek to establish a right to proceed against the liability carriers for pre- and post-settlement Medicare expenses. Either way, it is a potential problem and a concern to any

insurance professional which should always be factored into and considered in any subrogation settlement involving qualifying future medical exposure to CMS.

For questions or referral of matters involving MSAs and MSP liability, contact Gary Wickert at gwickert@mwl-law.com.

UPCOMING EVENTS.....

September 20, 2011 - Ryan Woody will be presenting a live webinar entitled *"Avoiding The Made Whole And Common Fund Doctrines*" from 10:30 a.m. - 11:30 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.



October/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. This book has it all - accuracy, thoroughness, understandability, and reliability. 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 and affiliated local subrogation counsel in all 50 states over the past 28 years 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, by clicking **HERE**.

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. For more information on this conference, please go to www.selffundingconference.com.

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.