MATTHIESEN | WICKERT | LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

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QUARTERLY ELECTRONIC INSURANCE DEFENSE NEWSLETTER **SPRING 2011**

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This quarterly electronic insurance defense newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of insurance defense and insurance coverage issues have, for many lawyers and insurance professionals, made keeping current with changing laws an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this quarterly insurance defense newsletter, to assist in the dissemination of new developments in insurance law and the continuing education of insurance 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.

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MWL NEWS

EXPERIENCED TRIAL LAWYER JOINS MATTHIESEN, WICKERT & LEHRER, S.C.

Matthiesen, Wickert & Lehrer, S.C. is proud to announce that Eric J. Goelz has joined the firm. Eric is an insurance litigation trial lawyer with 22 years of experience in complex insurance litigation, including large loss property, automobile, and workers' compensation subrogation, as well as complex construction and insurance defense litigation. Eric comes to us from the downtown Milwaukee law firm of O'Neill, Schimmel, Quirk & Carroll, S.C., and brings with him as a client, Integrity Mutual Insurance Company, who we welcome as a client to our firm.

Eric has participated in numerous trials, arbitrations and mediations over the years. Eric has also presented numerous seminars on various topics related to personal injury law. Eric will make an excellent addition to the firm and we look forward to introducing him to our many clients and friends, and vice-versa. Eric can be contacted at egoelz@mwl-law.com.

WISCONSIN CHANGES IN PRODUCTS LIABILITY LAW

By Douglas W. Lehrer

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

1. Products Liability.

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

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

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

2. Risk Contribution.

Prior to this Act, plaintiffs in Wisconsin were allowed to recover based on a "risk contribution" theory. Under that theory, the liability for an injury caused by a product was spread among all manufacturers marketing the product during the relevant time period. In 2005, the Wisconsin Supreme Court allowed the use of this theory to hold paint manufacturers collectively liable for the lead poisoning of a claimant after he ingested lead paint. Although the claimant could not prove what type of lead paint had been ingested, the Court apportioned liability to all manufacturers of lead paint during the relevant time periods in Wisconsin.

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

3. Caps on Punitive Damages.

Wisconsin law allows a plaintiff to recover punitive damages if it is shown that the defendant acted maliciously and with intentional disregard of the plaintiff's rights. This Act leaves the standard for allowing

punitive damages but sets a cap for the amount that can be awarded. This cap is now $200,000 or twice the amount of compensatory damages awarded, whichever is greater.

4. Health Care Matters.

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

It will be important to continue to keep an eye on Madison as additional tort reforms are proposed over the next few months. The law firm of Matthiesen, Wickert & Lehrer, S. C. will continue to keep clients updated on these important changes. If you should have any questions regarding this article or insurance defense or coverage issues in general, please do not hesitate to contact Doug Lehrer at dlehrer@mwl-law.com.

INSURANCE LITIGATION

DAUBERT BECOMES THE LAW IN WISCONSIN

With the passage of Senate Bill 1, which became effective on February 1, 2011, Wisconsin has now joined the federal courts and the majority of states in adopting the *Daubert* "reliability" rule for the admission of expert testimony. No longer will courts in Wisconsin rely on the *Walstad* "relevancy" rule, but rather judges in Wisconsin will now take a more active gatekeeper's role in determining whether expert witnesses will be allowed to testify at the time of trial. This article will outline how this change will affect the handling of expert witnesses in Wisconsin.

To fully understand the implications of this change, it is necessary to take a brief look at how Wisconsin Courts previously handled expert testimony. In *Watson v. State*, 64 Wis.2d 264 (1974), the Wisconsin Supreme Court established the "reliability" standard wherein a wide open rule of cross examination of experts at trial was utilized to test credibility. In 1984, the Court clarified the Wisconsin rule by stating that if a witness had scientific, technical or other specialized knowledge which would assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, would be able to testify regarding that knowledge in the form of an opinion or otherwise. *State v. Walstad*, 119 Wis.2d 483 (1984).

Under the new *Daubert* rule, Wisconsin trial judges must now act as gatekeepers as to all expert testimony as to both relevancy and reliability. For example, absent a stipulation, Wisconsin trial judges must conduct a hearing outside the presence of the jury to determine whether expert testimony will or will not be allowed to be heard by the jury. In that hearing, the trial judge will be guided by several factors including the following:

1. Whether the expert's technique or theory has been tested.
2. Whether the technique or theory has been subjected to peer review and publication.
3. The known or potential rate of error.
4. The existence and maintenance of standards and controls.
5. Whether the technique or theory has been generally accepted in the scientific community.
6. Whether experts are proposing to testify about matters flowing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed it for purposes of testifying.

7. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
8. Whether the expert has adequately accounted for obvious alternative explanations.
9. Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.
10. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

After reviewing these factors, an expert will then only be allowed to testify if all the following are true:

1. The testimony is based upon sufficient facts or data.
2. The testimony is the product of reliable principles and methods.
3. The witness has applied the principles and methods reliably to the facts of the case.

With this change, it will be important for Wisconsin defense counsel to scrutinize the background, opinions and theories of all plaintiff's expert witnesses to consider whether a *Daubert* hearing can be used to prevent plaintiff's expert witnesses from testifying at trial. Likewise, defense counsel will want to make certain that the opinions of any expert retained will be sufficiently relevant and reliable to withstand any *Daubert* hearing.

If you should have any questions regarding this article or insurance defense or coverage issues in general, please do not hesitate to contact Doug Lehrer at dlehrer@mwl-law.com.

MEDICARE LITIGATION

MEDICARE SECONDARY PAYER STATUTE

By Peter M. Silver

The Medicare Secondary Payer Statute is found at 42 U.S.C. § 1395Y. It makes Medicare a secondary payer to not only workers compensation, but also to group health, auto, liability and no-fault insurance claims. Section 1395Y(b)(2) provides that in order to recover payments made under this subchapter for an item or service, the United States may bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service or any portion thereof under a primary plan.

It is clear under this Section that any payments made by Medicare are considered to be (conditional), with Medicare having an absolute right to seek recovery of those conditional payments. Medicare can also suspend or terminate a beneficiary's medical coverage, allocate 100% of a third party settlement to Medicare-eligible medical expenses and/or suspend a beneficiary's social security disability benefits on a dollar for dollar basis until the Medicare secondary payer claim, including interest, has been satisfied. Any payment Medicare makes isn't technically considered a lien. It is actually an inchoate right of reimbursement. If Medicare has to initiate any type of legal action in order to be reimbursed, they are entitled to double damages. Medicare has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer.

As indicated, the Medicare Secondary Payer Statute applies not only to workers compensation claims, but also to liability claims. CMS, a division of the Social Security Administration, has indicated that they will review workers compensation settlements that meet either of the following two (2) criteria:

1. Cases involving a current Medicare beneficiary where the total settlement amount is greater than $25,000; or
2. Cases where the claimant has a reasonable expectation of Medicare entitlement within 30 months where the total settlement amount is greater than $250,000.

CMS has indicated that the situations where an individual has a "reasonable expectation" of Medicare enrollment include, but are not limited to:

1. The individual has applied for social security disability benefits;
2. The individual has been denied social security disability benefits, but anticipates appealing that decision;
3. The individual is in the process of appealing and/or refiling for social security disability benefits;
4. The individual is 62½ years old; or
5. The individual has end stage renal disease, but does not yet qualify for Medicare.

These guidelines or policies by CMS apparently do not apply to liability claims. However, if you are settling a liability case that does specify future medical costs and the settlement is of significant value, you should consider addressing both past (conditional) and future interests of Medicare. Furthermore, keep in mind that some liability settlements involving critically injured plaintiffs are so large that CMS may presume the plaintiff is being compensated for future medical expenses.

In *Big R Towing, Inc. v. Benoit*, 2011 U.S. Dist. Lexis 1392 (W.D. La. Jan. 5, 2011), the District Court for the Western District of Louisiana assisted the parties in complying with obligations under the Medicare Secondary Payer Act. Benoit, a seaman pursuing an action under the Jones Act and general maritime law, entered into a settlement agreement with his employer, Big R Towing. The parties agreed to settle all outstanding claims for $150,000. Because Benoit was receiving social security disability benefits, he had a reasonable expectation of becoming a Medicare beneficiary within 30 months. As such, the parties recognized that Medicare's future interests should be protected and they agreed that Benoit would protect Medicare's interests as a part of the consideration for settlement.

Because the parties could not obtain Medicare's review by CMS to determine the appropriate amount to set aside for future care, the parties requested that the Court determine such. After holding an open hearing in which the medical evidence was considered, the Court declared that $52,500 should be set aside to pay future expenses. The Court further ordered Benoit to reimburse Medicare for all conditional payments even though there was evidence that Medicare did not yet pay any benefits because Benoit was not yet a Medicare beneficiary.

This case is just one (1) example of Medicare's role in liability claims. It is anticipated that more cases such as this are sure to emerge in the future. As cases develop, we will let you know the impact of Medicare's role in not only workers' compensation claims but also liability claims.

If you should have any questions regarding this article or workers' compensation defense or subrogation, please contact Peter Silver at psilver@mwl-law.com.

AUTOMOBILE LITIGATION

WISCONSIN LEGISLATURE EXPECTED TO ROLL BACK AUTOMOBILE INSURANCE MANDATES

Many of the increases in auto insurance coverage mandated by the Democratic-controlled legislature in 2009 will likely be repealed under a Bill to be taken up on March 8, 2011 by the State Assembly. Although Assembly Bill 4 will still require motorists to have insurance coverage, the proposal would lower most coverage minimums to their previous levels. Republicans, who now control the State Legislature in Wisconsin, have said that the higher coverage requirements that were put in place as part of former Governor Doyle's 2009-11 budget are raising insurance costs for consumers. Under the old law, drivers with insurance were required to carry minimum liability coverage of $25,000 for the injury or death of a person, $50,000 for the injury or death of more than one person and $10,000 for property damage. Republicans want to restore those limits from the current $50,000, $100,000 and $15,000 limits, respectively.

Among other provisions, Assembly Bill 4 also will reduce minimums for underinsured motorist coverage to $50,000 per person and $100,000 per accident from $100,000 and $300,000, respectively. The proposed Bill will also allow insurance companies to include "anti-stacking" language in their insurance policies as well as "reducing clause" language. Both of these provisions were held to be invalid by the Wisconsin Legislature in 2009.

The law firm of Matthiesen, Wickert & Lehrer, S.C. will continue to keep you updated as Assembly Bill 4 works its way through the Wisconsin Legislature. Feel free to contact Doug Lehrer at dlehrer@mwl-law.com if you have any questions regarding this Bill and how it would affect insurance coverage in Wisconsin.

UPCOMING EVENTS……

April 6, 2011 - Chris Miller will be presenting a live webinar entitled *"Investigation and Subrogation of Large Fire Losses*" from 10:00 a.m. - 12:00 p.m. (CST). This webinar is approved for 2.0 Texas CE credits and is free to clients and friends of MWL. A registration link will soon be on our website homepage but you can register now by clicking on the "Register Now" button to the right.

May 10-13, 2011 - MWL will be exhibiting at 6th Annual Claims Education Conference in Fort Lauderdale, Florida. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference and introduce yourself. For information on this conference, please go to www.claimseducationconference.com.

PLEASE NOTE…. We are now providing live webinars and, as we do so, we are putting the recorded versions of these webinars on our Seminars/Webinars page on our website at www.mwl-law.com.The recorded versions of these webinars can be viewed at a time most convenient for you and at no cost.