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QUARTERLY ELECTRONIC INSURANCE DEFENSE NEWSLETTER SPRING 2012

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

IN THIS ISSUE....

Understanding *Pierringer* and *Loy* Releases in Wisconsin 1
Sole Negligence Exclusion 2
Federal Case Law Regarding Reimbursement to Medicare 3
MWL Welcomes Several New Attorneys and Paralegals 5
Upcoming Events 6

INSURANCE LITIGATION

Understanding *Pierringer* and *Loy* Releases in Wisconsin

By Douglas W. Lehrer

As more and more cases result in settlements prior to trial, it is now more important then ever for insurance defense attorneys and insurance claims personnel to fully understand the effective use of *Pierringer* and *Loy* releases. Both releases allow plaintiffs to release some parties while preserving claims against others. This article will outline how *Pierringer* and *Loy* releases can be effective tools in reaching settlements in cases with multiple defendants.

In Wisconsin, contribution claims exist among multiple tortfeasors if there is joint liability between the parties and when one party pays more then their fair share. As a result, defendants in Wisconsin routinely file contribution claims against all other potential joint tortfeasors to avoid the possibility of paying more then one's fair share. However, contribution claims can also hinder a plaintiff's ability to settle claims with some but not all defendants.

The *Pierringer* release, first discussed in *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963), permits a plaintiff who has filed claims against multiple defendants to settle with one or more of the defendants and yet still continue to pursue claims against others. Of importance from the defense prospective is the fact that a *Pierringer* release eliminates the possibility of future litigation by and against multiple defendants who have filed cross-claims for contribution. With a properly executed *Pierringer* release in place, a plaintiff can settle with one defendant and still

proceed to trial against other non-settling defendants. Then, at the end of trial, the jury will apportion fault among all of the parties, including the settling party. The plaintiff will then be allowed to recover the percentage of damages the jury has awarded against the non-settling party. However, the plaintiff is not entitled to recover anything further from the settling party and the non-settling party has no right of contribution against the settling party. Since a *Pierringer* release makes certain that no party will ever pay more then their fair share, a claim of contribution can never exist. Defendants are thus free to settle cases without concern of future exposure from claims of contribution.

The *Loy* release, first discussed in *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982), is another way for plaintiffs to settle cases with some, but not all, defendants. The objective of the *Loy* release is to protect an insurer and insured from future liability while still allowing a plaintiff to pursue claims as against additional or excess insurance carriers. When entering into a *Loy* release, the plaintiff agrees to release in full all claims against the settling insurer. Furthermore, the plaintiff agrees to release from liability all claims against an insured up the policy limits of the settling insurance company as well as any personal exposure of that insured in excess of any and all additional insurance policy limits that may exist. With the protection of an insured in place, insurance carriers can pursue settlements even if other carriers may remain liable.

When used correctly, the *Pierringer* and *Loy* release are both effective tools in allowing settlement to go forward while still protecting settling parties from future liability. For more information on the effective use of these or other releases, please contact Doug Lehrer at **dlehrer@mwl-law.com**.

INSURANCE LITIGATION

SOLE NEGLIGENCE EXCLUSION

By Aaron D. Plamann

Many times in subcontracting work, general contractors specify via contract to be added to a subcontractor's insurance policy through an additional insured endorsement. Further, the general contractor often specifies to be indemnified for any claims that arise out of the subcontractor's work under the contract.

However, insurance companies may attempt to limit coverage for an additional insured through exclusions to the policy. One of these exclusions attempts to preclude coverage for bodily injury or property damage for an additional insured arising out of that additional insured's sole negligence or willful conduct (sole negligence exclusion).

In many scenarios that lead to litigation, one of the subcontractor's workers will be injured while on the job and look for other negligent parties to hold responsible (because his or her only recourse against the employer is often exclusively through workers' compensation laws, which allow for limited damages as opposed to a personal injury lawsuit). The injured worker will bring a third-party lawsuit against the general contractor. When the lawsuit is brought against the general contractor, the general contractor will demand that the subcontractor indemnify and cover its defense in the matter. The subcontractor's insurance company will then look to exclude coverage.

There has been no case law in Wisconsin construing sole negligence exclusions in an automatic insurance provision. However, Illinois has had a history of precluding coverage through the use of sole negligence exclusions. *L.J. Dodd Constr., Inc. v. Federated Mutual Ins. Co.*, 365 Ill. App.3d 260, 848 N.E.2d 656 (2006); *National Fire Ins. of Hartford v. Walsh Constr. Co.*, 392 Ill. App.3d 312, 909 N.E.2d 285 (2009).

Yet, recently the Illinois Court of Appeals has limited the use of this exclusion by holding that sole negligence exclusions in an insurance policy do not apply when the plaintiff alleges that multiple parties are negligent. *A-1 Roofing Co. v. Navigators Ins. Co., et al.*, 2011 Ill. App. LEXIS 656 (Ill. Ct. App. 2011). In examining insurance policy language, the Illinois Court of Appeals found that "the plain, unambiguous meaning of 'the sole negligence of any additional insured' implies 'exclusively or entirely' or 'single-handedly.'" *Id.* at p. 8, *citing L.J. Dodd Constr. Inc. v. Federated Mut. Ins. Co.*, 365 Ill App. 3d 260, 266, 848 N.E.2d 656 (Ill. Ct. App. 2006). If a plaintiff does not allege that a general contractor is *solely* responsible for his injuries (if he alleges that other parties are also negligent), the sole negligence exclusion is not triggered to negate insurance coverage as to the general contractor. *Id.* at p. 9.

Often times on construction sites, there are multiple subcontractors and other companies that are involved in the construction. This creates confusion as to the responsible party and the plaintiff may have to allege that multiple parties are negligent. If multiple parties are alleged to be negligent, then the sole negligence exclusion will not apply and the insurance company will have to defend the lawsuit.

It is difficult to predict how Wisconsin courts would interpret sole negligence exclusion language in an insurance policy. However, in arguing in favor of insurance coverage, there are a couple of concepts that may be used in an attempt to limit sole negligence exclusion language.

In Wisconsin, the words of an insurance policy are to be given their "common and ordinary meaning." *Mikula*, 2005 WI App. 92 at ¶ 15, *quoting Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶ 10, 245 Wis.2d 186, 629 N.W.2d 150. When the language of the policy is plain and unambiguous, it is enforced as written. *Mikula*, 2005 WI App. 92 at ¶ 15, citing *Hull v. State Farm Mut. Auto Ins. Co.*, 222 Wis.2d 627, 637, 586 N.W.2d 863. Therefore, one could argue that insurance policy language regarding "sole negligence" should only apply when the additional insured is exclusively or entirely responsible for the bodily injury.

Construction subcontracts often require that the general contractor be named as an additional insured under the subcontractor's insurance coverage, and such coverage is often required to be endorsed as primary over and above the general contractor's own insurance coverage. In that case, the general contractor often expects that the subcontractor's insurance policy will afford primary coverage to it for any claims arising out of the subcontractor's work or operations in carrying out the work of the subcontract, including any negligence that it may ultimately cause.

If you should have any questions regarding this article or insurance defense litigation in general, please contact Aaron Plamann at **aplamann@mwl-law.com**.

INSURANCE LITIGATION

FEDERAL CASE LAW REGARDING REIMBURSEMENT TO MEDICARE

Peter M. Silver

The Medicare Secondary Payer Statute does not have its own statute of limitations. In the Federal Court Decision, *United States v. Stricker*, 2010 U.S. Dist. LEXIS 106981 (E.D. N.D. Ala. Sept. 30, 2010), the Court determined that a three-year tort statute of limitations applies to the primary payer's obligations to Medicare and the six-year contract statute of limitations applies to plaintiffs' attorneys' obligations to Medicare.

This case arises out of *Abernathy v. Monsanto*, which was settled in 2003 for $3 million. In December 2009, the United States government filed suit against the insurance carriers for the defendants and the plaintiff attorneys that were party to the settlement, seeking reimbursement of conditional payments made on behalf of over 900 Medicare beneficiaries that were plaintiffs in the *Abernathy* lawsuit. The Department of Justice argued that the defendants, insurance carriers and plaintiff attorneys, failed to protect Medicare's interest under the Medicare Secondary Payer Statute. The Department of Justice argued that a six-year statute of limitations applied and that the statute should run from the date of the settlement's disbursement.

The Court applied the statute of limitations of the Federal Claims Collection Act (FCCA). Under the FCCA, the Court held that the insurance carrier defendants were subject to a three-year tort statute of limitations because they had no direct contractual relationship with the government. The Court also determined that the action filed by the Department of Justice accrued, at the latest, when the *Abernathy* settlement was approved by the lower court in September 2003. As a result, the Department of Justice's action was not timely and was therefore dismissed.

Regarding the defendant attorneys for the plaintiffs, the Court held that a six-year contract statute of limitations was applicable. The Court reasoned that the attorneys that had represented the plaintiffs in the *Abernathy* settlement were contractually obligated to assist Medicare in its attempt to recover conditional payments. However, the Court determined that the six-year contract statute of limitations began to run in October 2003 when the attorneys received the settlement money in escrow. Since the Department of Justice's action was not filed until December 2009, its claim against the attorneys was also dismissed as untimely.

In another Federal case, *Wilson v. State Farm Mutual Auto. Ins. Co.*, 2011 WL 2378190 (W.D. Ky., June 15, 2011), the Court determined that it is not bad faith to delay settlement pending resolution of Medicare's conditional payments. Steven Wilson was a passenger in a motor vehicle accident and sustained bodily injuries. Medicare paid some medical bills and Wilson filed an uninsured motorist claim against the defendant insurer, State Farm. State Farm agreed to settle the claim for its policy limits. Following the settlement, State Farm attempted to determine Medicare's conditional payment amount. The plaintiff refused to help State Farm determine the conditional payment amount and requested State Farm to pay the full policy limits in an escrow account from which Medicare's conditional payment amount would be payable. State Farm, however, suggested naming Medicare as a payee on the settlement check. The plaintiff rejected this provision and State Farm elected to delay settlement payments until after it obtained Medicare's reimbursable conditional payment amount. Wilson sued State Farm alleging that State Farm's payment delay violated Kentucky's bad faith law.

The Court explained that for an insurer to act in bad faith, it must have an obligation to pay the claim; not have a reasonable basis for failing to pay the claim; and have knowledge that it lacked a reasonable basis for failing to pay the claim, or act in reckless disregard to the existence of that basis. Focusing on the second factor, the Court stated that delay of payment alone is not enough to constitute bad faith, and it was not bad faith if the basis for delay was "fairly debatable." The Court looked to the Medicare Secondary Payer Statute and determined that an insurer could be deemed liable for repayment of Medicare's conditional payment amounts. Therefore, because State Farm was potentially liable, the Court determined that State Farm was acting responsibly and such actions did not constitute bad faith.

If you should have any questions regarding this article or Wisconsin insurance defense in general, please contact Peter Silver at **psilver@mwl-law.com**.

MATTHIESEN, WICKERT & LEHRER, S.C. WELCOMES SEVERAL NEW ATTORNEYS AND PARAGLEGALS

Matthiesen, Wickert & Lehrer, S.C. is proud to announce the addition of several new lawyers and paralegals. We appreciate the continued trust and confidence our clients have shown in our abilities to maximize their subrogation recoveries anywhere within North America, and the increased recovery business entrusted to us has necessitated the addition of several experienced new employees. Please help us in welcoming them.

ATTORNEYS

April K. Toy April joined our firm as an experienced litigator specializing in insurance litigation, products liability and subrogation. April obtained her Bachelor of Arts in English Literature from San Francisco State University and her law degree from Marquette University Law School. During law school, April served as a judicial intern to Justice Annette Ziegler of the Wisconsin Supreme Court and clerked for a large Wisconsin insurance company. A St. Thomas Moore Scholar all three years in law school and the recipient of the CALI Award of Excellence, April participated in Marquette Law School Moot Court Association and competed in the National Environmental Law Moot Court competition. April previously worked as an insurance litigator with the Hills Legal Group, where she worked on products liability, complex litigation, commercial subrogation, common carrier, automobile, premises, insurance coverage, and worker's compensation matters. April's practice within MWL focuses primarily on subrogation, worker's compensation and insurance litigation. She is admitted to practice before all Wisconsin State Courts as well as the United States Circuit Court for the Eastern District of Wisconsin. She is a member of the Hispanic National Bar Association, Wisconsin Bar Association, and the Wisconsin Defense Counsel. April is also an accomplished salsa dancer and thoroughly enjoys all forms of the arts and theater.

Aaron D. Plamann Aaron comes to MWL with seven years of litigation experience and is a mechanical engineer with design experience. This unique combination of talents will help our firm tackle the growing number of product liability subrogation cases entrusted to us by our clients. Aaron was formerly with Stewart & Hafferman as in-house trial counsel for Zurich North America, as well as Turner & Flessas, S.C., where he oversaw millions in recoveries for his clients and developed an expertise in dealing with the intricacies of Medicare settlements. Aaron is a graduate of Marquette University Law School after having received his Mechanical Engineering degree at Milwaukee School of Engineering, where he still serves on their Institutional Review Board in reviewing research to protect human subjects. He is admitted to practice before all Wisconsin State Courts as well as the United States Circuit Court for the Eastern District of Wisconsin and the 7th Circuit Court of Appeals. Aaron's litigation experience, along with his mechanical engineering skills, will be a valuable resource for MWL as we assist our clients with product liability, technical subrogation, and insurance litigation matters. In his free time, Aaron enjoys cooking, traveling, listening to live music, and participating in athletic activities. Aaron is an avid slow-pitch softball pitcher, golfer, and he enjoys riding his road bicycle.

PARALEGALS

Erica Karch Erica Karch graduated from MATC in 2009 with an Associates Degree and Certificate in Paralegal Studies. Prior to MWL, she was employed at Pleas Williams, S.C. specializing in insurance defense and at WaterStone Bank in their legal department handling foreclosures. Erica's specialties at MWL include auto subrogation, as well as insurance defense, with a focus on medical record review and summarization. She is currently finishing up her Bachelors Degree in psychology at the University of

Milwaukee. In her free time, she enjoys going on hikes with her fiancée and two dogs, running website EatMKE, which is an insider's look at the Milwaukee area food scene, and playing rugby for the Oconomowoc Women's Rugby Football Club.

Lisa Tanin Lisa Tanin graduated from UW-Milwaukee in December 2010 with a Bachelor of Arts with a double major in communications and organizational administration. Prior to MWL, she was employed at Pitman, Kyle, Sicula & Dentice as their settlement specialist paralegal. This position helped to develop her specialty in medical subrogation, analysis of medical claims and liability in personal injury cases, the negotiation, mediation, litigation, and settlement process, along with the handling of Medicare claims. In her spare time, she enjoys taking her dog, Bungee, (Great Pyrenees/Irish Wolfhound mix) for walks to the park. She also studies ballet, plays guitar, and loves football. She hopes to go to her first Green Bay Packer game this year.

Lisa Bane Lisa Bane graduated in 1983 from Drake University, Des Moines, Iowa, with her Bachelor of Science Degree in Business Administration, with a major in marketing. In 2006, she graduated from Bryant & Stratton College, in Wauwatosa, Wisconsin, with her Paralegal Studies Associate Degree. Lisa was previously employed at Deutch & Weiss, LLC, where she was a paralegal responsible for insurance defense, subrogation and small and large claims litigation and at Duffey & Associates, S.C., where she was a paralegal responsible for personal injury and workers' compensation litigation. Lisa does a lot of volunteer work, including assisting the Family Law Self-Help Clinic Training, is a co-chair on the Hartford, Wisconsin Elementary Music Committee where she works with the School Board and Superintendent to expand their music program, is on the Hartford, Wisconsin Elementary Gifted and Talented Steering Committee where she reviews and assists with the development of the Student Curriculum Enrichment Programs, and is a teacher's assistant for the Hartford, Wisconsin Gifted and Talented Third Grade Research Project and Fifth Grade Computer Lab.

UPCOMING EVENTS

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**.

June 13, 2012 – Alejandro Bautista will be presenting a live webinar on *"Florida Automobile Subrogation"* from 10:00 - 11:00 a.m. (CST). This webinar is approved for 1.0 Texas CE credits and is free to clients and friends of MWL. A registration link will soon be on our website homepage, but you can click on the "Register Now" button to the right to register.

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

November 11-14, 2012 – MWL will be exhibiting at *NASP's 2012 Annual Conference, "Cirque du Subro",* in Las Vegas, Nevada. Jamie Breen will be at Exhibit Booth 103 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please go to **www.subrogation.org**.