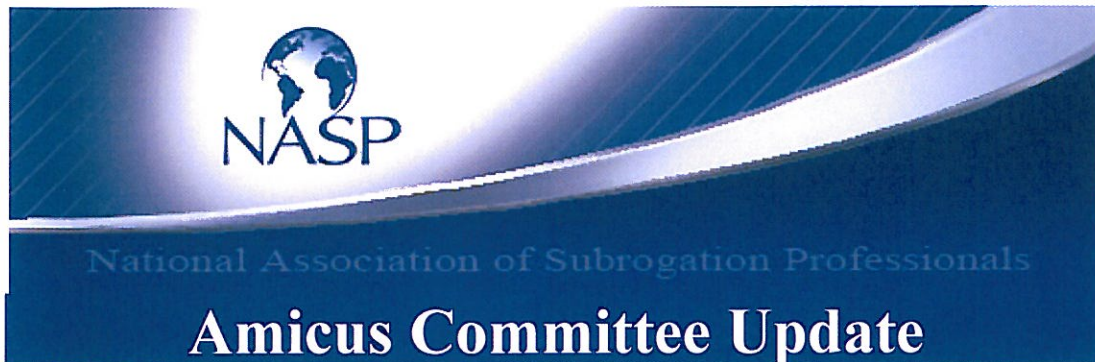


From: leslie.wiernik@subrogation.org [mailto:leslie.wiernik@subrogation.org]
Sent: Monday, November 28, 2011 5:20 PM
To: Leslie Wiernik
Subject: NASP Amicus Committee Update



Kansas Senate Bill 136: Kansas recently enacted a bill that would prohibit a driver from recovering noneconomic losses if they fail to maintain the mandatory personal injury protection coverage required in the state. The bill applies to personal injury lawsuits and wrongful death causes of action and bars recovery of noneconomic losses when someone is driving an automobile without the mandatory PIP benefits required by Kansas automobile injury reparations act, article 31 of chapter 40 of the Kansas Statutes Annotated. Two exceptions are noted: (1) if the court finds by clear and convincing evidence that the plaintiff was not knowingly driving without PIP coverage at the time of the loss; and (2) if the person's failure to maintain PIP coverage at the time of the loss is within 45 days or less of carrying a full year of continuous coverage. Otherwise, a driver must maintain the required PIP coverage to recoup noneconomic damages, such as pain and suffering, in a bodily injury or wrongful death cause of action.

Additionally, any person convicted or pleading guilty to a violation of driving under the influence of alcohol or drugs in Kansas or another state would be prohibited from seeking noneconomic damages in a bodily injury or wrongful death cause of action. The bill was signed into law by the Governor on May 12, 2011.

Thanks to Sheri McKee with Aetna for identifying and advising NASP of this bill.

Federal Employee Health Benefit Plans: As you may recall we recently sent out a blast regarding four putative class action lawsuits, challenging a Federal Employee Health Benefits plans' right to recover or subrogate and alleging that the Federal Employee Health Benefit Act (FEHBA) does not preempt state anti-subrogation laws. Recently, the case of *Morris v. Humana Health Plan, Inc.* in the U.S. District Court for the Western District

of Missouri, Western Division was remanded back to state court. The U.S. District Court held there was no federal jurisdiction.

Thanks to Joseph Willis III, Vice President, Client Solutions with Trover Solutions, Inc. and Chair of the Legislative Affairs Committee for updating NASP on this case.

House Bill 3000: We previously reported on House Bill 3000, which prohibited collateral source providers from seeking recovery or subrogating in a health care lawsuit. We wanted to clarify that the bill defined a health care lawsuit to mean a claim against a “health care provider, a health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product”.

We have learned that this bill has not been active in either House and, in fact, neither House has even held a hearing on the bill. The bill does not appear to be advancing and appears stagnant.

Thanks to Matt Falk with Falk Metz in Milwaukee, Wisconsin for updating us on this important bill.

Wisconsin Senate Bill 217: A bill which will affect the amount of time a driver’s license suspended for negligent operation of a motor vehicle has passed both the Wisconsin House and Senate and is currently on the Governor’s desk. SB 217 would limit the aforementioned suspension period to five years from the date of entry of a judgment against the negligent driver. This is a significant departure from current law, which allows the suspension to remain in place until the judgment is satisfied or discharged.

Thanks to Ken Wilber of Wilber & Associates in Bloomington, Illinois for bringing this bill to NASP’s attention.

THIRD CIRCUIT HOLDS THAT ERISA PLANS REIMBURSEMENT CLAIMS ARE SUBJECT TO EQUITABLE DEFENSES AND LIMITATIONS

On November 16, 2011, the Third Circuit held in *US Airways, Inc. v. McCutchen*, that an ERISA plan’s claims for reimbursement under ERISA §502(a)(3) are subject to equitable limitations and defenses. The matter involved a self-funded ERISA plan which had paid \$66,866 on behalf of a plan participant who was injured in an automobile accident. The participant settled claims against the responsible third party and his own

underinsured motorist carrier for a total of \$110,000. The plan participant received \$66,000 after paying a 40% contingency fee to his attorney. The district court found the plan unambiguous and awarded full reimbursement to the plan without reduction for attorney fees and costs. The Third Circuit reversed and remanded the matter to the district court for a factual determination as to which equitable doctrines and limitations may apply to limit the plan's claim for reimbursement.

The Third Circuit opinion is in conflict with opinions from the Eighth and Eleventh Circuits that have refused to apply equitable limitations on actions to enforce unambiguous employee benefits plans. Another case involving this question, CGI Technologies, Inc. v. Rose, is currently pending before the Ninth Circuit Court of Appeals. NASP filed an amicus brief supporting the ERISA plan in the Ninth Circuit case.

Thanks to John Kolb, with Gibson & Sharps, PSC in Louisville, Kentucky and Chair of the Amicus Brief section for researching and contributing this piece.

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