



24th Annual Claims Handling Seminars

WINNING STRATEGIES FOR DIFFICULT TIMES

Thursday, May 21, 2009 – Bloomington, Illinois

WHAT YOU NEED TO KNOW ABOUT ILLINOIS LIENS AND THE COMMON FUND DOCTRINE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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WHAT YOU NEED TO KNOW ABOUT ILLINOIS LIENS AND THE COMMON FUND DOCTRINE

I. INTRODUCTION

In order to completely resolve a personal injury case, close attention must be paid to outstanding liens that may exist from health care providers, state and federal agencies, as well as other insurers that have already made payments. These materials provide an overview of the most frequently encountered liens dealing with medical bills including the health care services lien, workers' compensation lien, and the Illinois Public Aid lien. In addition, these materials update insurers on the "common fund doctrine" as well as provide a basic understanding of attorneys' liens.

As a preliminary matter, it is important to understand that the Illinois Supreme Court defines a lien as "a charge upon property, either real or personal, for the payment or discharge of a particular debt or duty in priority to the general debts or duties of the owner." *Eastman v. Messner*, 188 Ill. 2d 404, 721 N.E.2d 1154, 242 Ill. Dec. 623 (1999). In the context of personal injury cases, health care providers and other public and private entities who pay for medical services have statutory and/or contractual liens on the claimant for reimbursement for service or payment provided.

Black's Law Dictionary, 8th Edition 2004, defines subrogation as "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." Through the process of subrogation, the insurer becomes substituted to the claimant's right of recovery for medical bills from other sources as a way to reimburse the insurer. Providers and payors of health care services can recover from a claimant who receives payment from another source. A party who has provided health services or made payments is a lien holder or "subrogee" for purposes of subrogation.

II. IMPORTANT ISSUES WHEN HANDLING CLAIMS

A. Potential Exposure to Further Liability

The most important issue concerning liens a claims handler will face relates to the additional exposure that can arise from a failure to adequately protect a valid lien. A lien is a claim of entitlement to all or a portion of certain property or the proceeds from that property. If a lien is not adequately protected in a settlement, the lien holder may have its choice as to who it will pursue to satisfy the lien. As a result, a defendant and its insurer could be required to pay the value of the lien to the lien holder even though the settlement required the plaintiff to satisfy all liens.

Just because settlement release documents require the plaintiff and the plaintiff's attorney to satisfy all liens, this does not prohibit the lien holder from filing a claim directly against the defendant for the lien amount. While the defendant has the right to recover the amounts paid to the lien holder from the plaintiff pursuant to the release and settlement agreement, the ensuing litigation would be, at the very least, time consuming. Even if the settlement agreement provides that the plaintiff and plaintiff's attorney are to pay the costs of any such proceeding, there is always the possibility that they will have spent the money by the time you obtain a judgment on your claim for breach of the settlement agreement.

B. Validity of the Lien

A lien must be perfected and attached to the property to create a legal right. Each category of lien may have a different method for perfection and attachment. Statutory liens have specific enumerated procedures that must be satisfied before a valid lien will arise. These requirements will vary depending upon the type of statutory lien. Common law liens, such as mechanics' liens, some attorneys' liens, and liens which arise out of equitable principles, have other perfection and attachment requirements.

C. Effect of Liens on Plaintiff's Evaluation of Claim

A plaintiff's willingness to settle is largely dependent upon the liens he will have to pay back from his settlement proceeds. To better understand their "bottom line," a good understanding of the rules applying to the various liens will allow the claims handler to assess what the plaintiff will ultimately receive. The Common Fund Doctrine requires the lien holder who benefits from the plaintiff's attorney's work in pursuing the claim to pay a portion of the amount they are reimbursed on their lien to the attorney for the plaintiff for the attorney's fees and costs associated with the litigation.

With respect to statutory liens, the limits provided by statute are instructive, as they will also affect the plaintiff's "bottom line." As described more fully below, the lien holder may be required to establish a causal relationship between the injury and the services rendered which led to the establishment of the lien. A tenuous causal relationship may give the plaintiff leverage in negotiating a settlement with the lien holder for much less than the lien's value. Thus, many lien holders are willing to negotiate the value of their liens, especially in cases where the success of the lawsuit is uncertain. In many instances, the claims handler can negotiate the amount of the lien directly with the lien holder. This can be beneficial in cases where the claims handler has a large volume of claims involving liens from the same lien holder. By negotiating a favorable lien waiver from the lien holder, the insurer could obtain the benefit of negotiation rather than the plaintiff.

D. Personal Guarantee of Attorney to Pay Liens Found to Violate the Rules of Professional Conduct

In July of 2006, the Illinois State Bar Association submitted an advisory opinion on professional conduct finding that a lawyer may not provide a personal guarantee to pay the liens and subrogation claims chargeable against a client's settlement proceeds. It should be noted that, while the opinions such as the one addressed herein express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

In considering the question of whether the Illinois Rules of Professional Conduct prohibit a lawyer representing a party receiving money in a settlement from providing a personal guarantee that the settlement funds will be paid to all lienholders and indemnifying the defendant against all such claims, the ISBA found that such a guarantee (even if payments are to be made from the settlement funds) constituted financial assistance to his client and violated Rule 1.8 (d) of the Model Rules of Professional Conduct. ISBA opinion No. 06-01 (issued July, 2006). *See also* Steven G. Pietrick, *Settlement: A Plaintiff's Attorney's Personal Guarantee to Pay Liens Is Found to Violate the Rules of Professional Conduct*, 52 Trial Briefs 6 (Nov. 2006).

III. THE EVOLUTION OF HEALTH CARE SERVICES LIENS

A. *Burrell v. Southern Truss*, 176 Ill. 2d 171, 679 N.E.2d 1230, 223 Ill. Dec. 457 (1997)

At the time of the *Burrell* decision, there were a plethora of individual lien acts including: the Clinical Psychologists Lien Act, the Dentists Lien Act, the Emergency Medical Services Personnel Lien Act, the Home Health Agency Lien Act, the Hospital Lien Act, the Optometrists Lien Act, the Physical Therapist Lien Act and the Physicians Lien Act.

In *Burrell*, the Illinois Supreme Court considered whether each statutory lien category had a separate limit of one-third of the amount recovered by the injured party or whether they are to be considered together in determining the limit. The court held that the plain language of the statute recognized a lien for **each** category of health care provider up to one-third of the injured person's recovery based on the determination that each of the statutes was separate and independent of the others, and that a construction requiring that all lien claims be aggregated and capped by a one-third maximum would impose "an additional limitation that the legislature did not include."

Thus, a hypothetical plaintiff with a \$100,000 recovery could see each type of medical provider, hospital, physician, dentist, home health care etc., assert a lien for \$33,333.33 each, rather than group all providers' liens together for a total maximum lien of one-third. In such a case, a

plaintiff could be left with no recovery after the various liens were paid. See Kevin T. Veugeler, *The Health Care Services Lien Act*, 39 Tort Trends 3-4 (Dec. 2003).

B. The Legislature Responds with the Health Care Services Lien Act ("HCSA") – 770 ILCS 23/1

The Health Care Services Lien Act ("HCSA") became effective on July 1, 2003. It created two classes of liens, one for "health care professionals" and another for "health care providers." 770 ILCS 23/5. Furthermore, it significantly consolidated Illinois' statutory liens by repealing the acts listed above (the Clinical Psychologists Lien Act, the Dentists Lien Act, the Emergency Medical Services Personnel Lien Act, the Home Health Agency Lien Act, the Hospital Lien Act, the Optometrists Lien Act, the Physical Therapist Lien Act and the Physicians Lien Act).

The HCSA applies to the rendering of health services in the treatment, care, or maintenance of an injured person, except under the Workers' Compensation Act or the Workers' Occupational Disease Act. 770 ILCS 23/10(a). It attaches to any verdict, judgment, award, settlement, or compromise secured by or on behalf of an injured person. 770 ILCS 23/20. Further, it applies to the health care professional's or health care provider's reasonable charges up to the date of payment of damages. 770 ILCS 23/10(a). Finally, the injured person must give written notice to the health care professional or health care provider that holds a lien. 770 ILCS 23/15.

In addition, the HCSA **limits the total amount of all liens to 40 percent** of the damages paid to the injured person. 770 ILCS 23/10(a). The lien holder must provide notice to the injured person and to the party against whom the claim or right of action exists, 770 ILCS 23/10(b), and the recovery for multiple liens in same class (professionals or providers) must be proportionate and no one class can receive more than one-third of the total recovery. 770 ILCS 23/10(c). Special rules apply when the total amount of lien is equal to or greater than 40 percent of the recovery including: (1) All liens of professionals shall not exceed 20 percent; (2) All liens of providers shall not exceed 20 percent; (3) Attorney's liens are limited to 30 percent, but if the case is appealed, HSCA does not apply. 770 ILCS 23/10(c).

C. Selected Cases Subsequent to HCSA Enactment

Lopez v. Morley, 352 Ill. App. 3d 1174, 817 N.E.2d 592, 288 Ill. Dec. 234 (2d Dist. 2004) – A patient brought an action against a motorist for injuries sustained in an automobile accident, and the treating hospital took a lien for the full amount of its charges, even though it accepted less than its charges as full payment pursuant to a contract with patient's insurer. The circuit court granted patient's motion to extinguish the lien and the Appellate Court affirmed, holding that the hospital could not maintain the lien.

Progressive Universal Ins. Co. of Illinois v. Taylor, 375 Ill. App. 3d 495, 874 N.E.2d 910, 314 Ill. Dec. 545 (4th Dist. 2007) – Where a medical provider sought 100 percent of the medical payments benefits paid by insurer to two passengers injured in a single-car accident, the Appellate Court held that the medical provider's right to payment from medical payments checks from insurer

was limited to 40 percent of the amount paid; the medical provider's status as a joint payee on the checks did not limit its right to payment to one-third of the amount of the checks; and the attorneys had no lien rights in checks under the Attorneys Lien Act.

Galvan v. Northwestern Memorial Hospital, 382 Ill. App. 3d 259, 888 N.E.2d 529, 321 Ill. Dec. 10 (1st Dist. 2008) – A patient brought a class action against the hospital and other similarly situated not-for-profit hospitals challenging, under the Consumer Fraud and Deceptive Business Practices Act, the hospital's practice of billing uninsured patients for gross hospital charges or list hospital charges that were higher than charges for services provided to insured patients, and asserting a claim for unjust enrichment. The Appellate Court held that the hospital, by filing a lien under HCSA, did not retain a benefit, which is a necessary element of the unjust enrichment claim.

IV. WORKERS' COMPENSATION LIENS

A. Introduction

A statutory lien is created under section 5(b) of the Illinois Workers' Compensation Act. 820 ILCS 305/5(b). Pursuant to the Act, if an employer pays related medical bills to an injured worker, the employer possesses a lien against the injured worker's third-party recovery. The employer may sue to enforce the lien if the worker does not. If the worker sues a third party, the worker must give notice to the employer and the employer may intervene in the lawsuit to protect its lien. When the employer holds a lien against the worker's attempt to recover from a third party, the worker cannot enter into a settlement and release without the employer's written consent. If the injured worker recovers from a third party, the employer is entitled to full reimbursement of its lien, even if the amount recovered from the third party is less than the lien. However, the employer has to pay 25 percent of the plaintiff's attorney's fees plus a *pro rata* share of expenses.

B. Workers' Compensation Liens Attach to Personal Injury Actions Only

The lien created by the Workers' Compensation Act is intended to prevent a double recovery by an injured employee or his personal representative. However, the lien attaches only to personal injury actions resulting from an injury incurred by a plaintiff which would be compensable pursuant to the Act. As a result, workers' compensation liens have been held to not attach to legal malpractice claims, even when the attorney's work related to an action for the work-related injury, *Woodward v. Pratt, Bradford & Tobin, P.C.*, 291 Ill. App. 3d 807, 684 N.E.2d 1028, 226 Ill. Dec. 32 (5th Dist. 1997); *Mosier v. Warren E. Danz, P.C.*, 302 Ill. App. 3d 731, 706 N.E.2d 83, 235 Ill. Dec. 823 (4th Dist. 1999); *Eastman v. Messner*, 188 Ill. 2d 404, 721 N.E.2d 1154, 242 Ill. Dec. 623 (1999); to underinsured motorist claims *Terry v. State Farm Mut. Auto. Ins. Co.*, 287 Ill. App. 3d 8, 677 N.E.2d 1019, 222 Ill. Dec. 485 (2d Dist. 1997); and to the portion of a wrongful death settlement allocated to a spouse's individual loss of consortium claim, *Borden v. Servicemaster Mgmt. Serv.*, 278 Ill. App. 3d 924, 663 N.E.2d 153, 215 Ill. Dec. 403 (1st Dist. 1996).

In *St. Pierre v. Koonmen*, 371 Ill. App. 3d 466, 863 N.E.2d 279, 309 Ill. Dec. 49 (2d Dist. 2007), an automobile insurer intervened in an insured's legal malpractice action to claim a lien against settlement proceeds. The circuit court denied the claim and the insurer appealed. The Appellate Court held that a policy provision (which required insured to reimburse insurer if the insured recovered damages from another) did not entitle the insurer to reimbursement from the settlement. The Court noted that the policy was ambiguous as to the insured's settlement of a legal malpractice action alleging failure to bring timely suit against an alleged tortfeasor and, thus, the injury for which the insured collected damages had to be the same injury for which the insurer had paid benefits; read literally, the reimbursement provision would require repayment if the insured recovers any damages from anyone for any reason.

C. Workers' Compensation Liens Can Attach to Medical Malpractice Claims

Employers have been allowed to assert liens in medical malpractice actions. In *Kozak v. Moiduddin*, 294 Ill. App. 3d 365, 689 N.E.2d 217, 228 Ill. Dec. 345 (1st Dist. 1997), an injured employee sustained a crush injury to his left foot and ankle during his course of employment at Yellow Freight. The employer settled the plaintiff's workers' compensation claim and made payment for medical expenses, temporary total disability, and permanent partial disability. The employer then attempted to intervene in the employee's medical malpractice action based on the argument that the treatment provided by the defendant doctor caused plaintiff to develop reflex sympathetic dystrophy and, therefore, even though Kozak was injured during the course of his employment, payment was made by Yellow Freight for damages resulting from malpractice. Specifically, Yellow Freight's payment for medical expenses, temporary total disability, and permanent partial disability correlated with plaintiff's claims for medical expenses, loss of mobility and disability, and loss of earnings and earnings capacity in the medical malpractice case. Given the purpose of section 5(b) to prevent an employee from obtaining a double recovery, the Court held that the workers' compensation lien should attach to the medical malpractice action.

D. Waiver of Workers' Compensation Liens

The Illinois Supreme Court has held that an employer who is a third-party defendant in a civil action may waive its workers' compensation lien post-trial. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 706 N.E.2d 441, 235 Ill. Dec. 886 (1998). The Supreme Court upheld the employer's post-trial waiver of its workers' compensation lien thereby allowing the employer to avoid liability to plaintiff's counsel for a *pro rata* share of costs and the 25 percent attorney's fee on the amount reimbursed to the employer on its lien. A determinative factor in the Supreme Court's analysis was that the employer did not request nor receive post-trial payment in satisfaction of its lien. In essence, the employer waived its lien, post-trial, prior to there being a satisfaction of its lien. The *LaFever* case provides third-party defendant employers considerable leverage in negotiating their lien amounts in conjunction with a settlement between plaintiff and defendant.

The First District Appellate Court discussed this issue at length in *Gallagher v. Lenart*, 367 Ill. App. 3d 293, 854 N.E.2d 800, 305 Ill. Dec. 208 (1st Dist. 2006). In *Gallagher*, after an injured truck driver settled his claim against a defendant truck driver's employer, the injured truck driver's employer was granted leave to intervene and sought to enforce its workers' compensation lien against the settlement proceeds allocated to the injured truck driver. The circuit court determined that the employer had waived its lien. On the appeal, the First District held that an employer's failure to specifically reserve its right to file a workers' compensation lien against any proceeds employee recovered in a personal injury action did not waive the employer's lien.

The Seventh Circuit has also addressed this topic recently. In *Baltzell v. R&R Trucking Co.*, 554 F.3d 1124 (7th Cir. 2009), a workers' compensation claimant critically injured when crushed by a tractor-trailer, sought workers' compensation benefits from the employer and brought strict liability claims (with his wife) against the owner of the tractor-trailer, the manufacturer of the tractor, and the manufacturer of the trailer, all of whom filed third-party claims against the employer for contribution. After the claimant prevailed against all defendants, the district court for the Southern District of Illinois denied the employer's motion to dismiss the contribution claims and the employer appealed. The court of appeals held that the employer was entitled to post-verdict waiver of workers' compensation lien in exchange for dismissal of contribution claims, and the owner and manufacturers were entitled to setoff for workers' compensation benefits that the employer had already paid to its employee. *See also* Steven P. Garmisa, *Employer Gets to Waive Comp Lien After Verdict on Contribution Claim*, 155 Chi. L. Bull. 1 (Apr. 7, 2009).

V. ILLINOIS PUBLIC AID LIENS

The Illinois Department of Healthcare and Family Services ("IDHFS") f/k/a the Illinois Department of Public Aid may also assert a lien on a personal injury case. *See Davis v. City of Chicago*, 59 Ill. 2d 439, 322 N.E.2d 29 (1974). Section 305 ILCS 5/11-22 provides that the IDHFS shall have a "charge" upon all claims, demands, and causes of action for injuries to an applicant or a recipient of financial aid for the total amount of medical assistance provided from the time of injury to the date of recovery upon such claim, demand, or cause of action. In order to perfect this lien, the IDHFS must serve notice by certified or registered mail upon the party or parties against whom the applicant or recipient has a claim, demand, or cause of action. The notice shall state the charge and describe the interest the Illinois department, local government unit, or county has in the claim, demand, or cause of action. The charge will then attach to any judgment or recovery made pursuant to any claim, demand, or cause of action pursued after service of the notice.

Additionally, 305 ILCS 5/11-22a provides the IDHFS with the right of subrogation. The IDHFS may subrogate a public aid recipient's recovery from any private or public health care coverage or casualty coverage, including coverage under the Workers' Compensation Act and the Workers' Occupational Diseases Act. 305 ILCS 11/22a. In order to enforce its subrogation right, the IDHFS can intervene in a pending lawsuit or bring its own against a liable party. 305 ILCS

11/22a. The IDHFS can also bring its own action against an insurance carrier that may be liable for medical benefits of the injured recipient, but must provide the recipient written notice of the suit advising him of his right to intervene. 305 ILCS 11/22b(b)(1), (d)(2).

When the IDHFS possesses an interest, no judgment, award, or settlement in any action or claim by a beneficiary to recover damages for injuries, can be satisfied without first giving IDHFS notice and a reasonable opportunity to perfect and satisfy its lien. 305 ILCS 11-22b(g). The entire amount of any settlement of the injured recipient's claim is subject to the IDHFS' claim for reimbursement of its lien. 305 ILCS 5/11-22b(i). It should be noted, however, that an IDHFS lien does not have priority over an attorney's lien.

VI. COMMON FUND DOCTRINE

A. Introduction

Illinois courts recognize the equitable principle of the common fund doctrine. In *Baier v. State Farm Ins. Co.*, 66 Ill. 2d 119, 361 N.E.2d 1100, 5 Ill. Dec. 572 (1977), the Illinois Supreme Court adopted this doctrine as a way to protect the recovery of attorney's fees in insurance subrogation cases. Most insurance policies include subrogation agreements for medical payments with its insured, which requires the insured to reimburse the insurer for monies recovered from the responsible party. In the process of recovering money for an injured client, whether by settlement or judgment, the plaintiff's attorney creates a fund for their client.

The doctrine guarantees the plaintiff's attorney compensation for creating the fund from which the client receives settlements or judgments. Because the client may be required to reimburse his insurer for prior medical payments, the doctrine also insures that the plaintiff's attorney is paid his fees and costs in creating the fund and recovering monies in favor of the plaintiff's insurance company.

The common fund doctrine applies when an insurance company does not participate in the creation of the fund. The plaintiff's attorney who creates the common fund from which the plaintiff recovers and reimburses his insurer, is entitled to compensation from the monies recovered in favor of the passive insurance company. In other words, when an insurer receives reimbursement for medical payments it paid for the injured insured, that recovery is offset by the plaintiff's attorney's fees and costs in creating the common fund. The following three requirements must be present for the common fund doctrine to apply: (1) the fund must be created as the result of legal services performed by an attorney; (2) the subrogee or the insurance company must not participate in the creation of the fund; (3) the subrogee must benefit from the fund.

B. Avoiding the Common Fund Doctrine

1. Send a *Tenney* Letter

In *Tenney v. American Family Mut. Ins. Co.*, 128 Ill. App. 3d 121, 470 N.E.2d 6, 83 Ill. Dec. 251 (4th Dist. 1984), the Fourth District Appellate Court held that a plaintiff's attorney is not entitled to recovery of his attorney's fees under the common fund doctrine for services that have been knowingly rendered for unwilling recipients. Based on this case, an insurance company could become an "unwilling recipient" by sending what is commonly known as a "*Tenney* letter."

In *Tenney*, the plaintiff's insurer, American Family, promptly sent a letter to the plaintiff that informed the plaintiff of its subrogation lien on medical payments. The letter, most importantly, expressed the insurer's intention of dealing with the defendant's insurance company regarding this claim. The insurer promptly sent this letter to the plaintiff's attorney, who did not file suit on behalf of the plaintiff until nine months after receiving the *Tenney* letter. The Fourth District Appellate Court held that American Family had immediately and unequivocally informed the attorney of its intention to be an "unwilling participant" in the plaintiff's lawsuit. Because of this prompt notification, the plaintiff's attorney could not recover his fees and costs under the common fund doctrine.

Since the decision in *Tenney*, insurers have often thought that sending the letter to its insured or his attorney was enough to protect its subrogation interest. However, recent case law has clearly indicated that the letter might not be enough. Without overruling *Tenney*, Illinois Appellate Courts have held that in addition to sending the *Tenney* letter, insurers must follow-up and participate in creating the fund.

For example, in *Taylor v. American Family Ins. Group*, 311 Ill. App. 3d 1034, 725 N.E.2d 816, 244 Ill. Dec. 343 (5th Dist. 2000), American Family sent its insured's attorney a *Tenney* letter within a month of the underlying accident. The letter advised the insured's attorney of American Family's intent to represent its own subrogation interests as to the medical payments, indicated American Family's interest that the insured's attorney not represent its subrogation interest, and stated American Family would not recognize "any lien upon the subrogation amount under the 'Fund Doctrine' for services gratuitously given." A month later, American Family sent a follow-up letter to the insured's attorney, which was identical to the initial *Tenney* letter. American Family also sent a copy of this letter to the tortfeasor's insurer, State Farm, expressing its intent to represent its own subrogation interests. American Family also filed a petition for arbitration of its subrogation interest and notified the insured's attorney. American Family sent a third follow-up *Tenney* letter to the insured's attorney restating its position as an unwilling recipient of the attorney's services. Up to this point, it appeared that American Family had gone above and beyond the requirements of *Tenney*, but the Fifth District Appellate Court still held that the common fund doctrine applied.

After American Family sent its second *Tenney* letter, the insured settled her claim with State Farm. State Farm issued two checks – one for the amount of medical payments paid by

American Family, and the other for the amount of the underlying settlement. With respect to the medical payments, State Farm addressed the check to the insured, the insured's attorney, and American Family. When the insured's attorney notified American Family of the check and requested one-third for attorney's fees, American Family responded that it was in a pending arbitration with State Farm and that the attorney should return the check to State Farm. The insured's attorney responded by noting that she included American Family's subrogation interest in the settlement because American Family would not release its lien against the insured with State Farm.

The trial court awarded the insured's attorney her share of attorney's fees. The Fifth District Appellate Court affirmed, holding that merely writing to the insured's attorney and expressing a desire to represent one's own interest, without more, was not enough to overcome the common fund doctrine. The Fifth District Appellate Court noted that the insurer's conduct must reflect "meaningful participation" in creating the fund or reaching the settlement, which may involve filing a timely petition to intervene in the underlying personal injury action.

2. "Meaningful Participation:" Be Proactive in Creating the Common Fund to Protect Your Interests

The *Tenney* letter is the first step in avoiding the application of the common fund doctrine. However, subsequent decisions after *Tenney* have narrowed its application by requiring insurers to be more proactive in establishing their status as an "unwilling participant." Today, sending the *Tenney* letter is not enough to avoid the application of the common fund doctrine.

Courts look for "meaningful participation" by the insurer in the creation of the common fund that reflects more than just the insurer's intention to protect its interests. While the courts have repeatedly used the phrase "meaningful participation," they have offered little guidance as to the level of participation necessary to avoid the common fund doctrine. Nevertheless, it has been held that the insurer "meaningfully participated" when it sent a *Tenney* letter to the plaintiff's attorney three weeks after the accident and attempted to intervene in the plaintiff's lawsuit over the insured's vigorous opposition. *Ritter v. Hachmeister*, 356 Ill. App. 3d 926, 827 N.E.2d 504, 292 Ill. Dec. 975 (2d Dist. 2005).

In order to avoid paying plaintiff's attorney's fees and costs under the common fund doctrine, the following steps should be considered:

Promptly send a *Tenney* letter to your insured: As soon as you learn of an insured's accident and claim, send a letter to the insured unequivocally informing them of your subrogation lien for medical payments and your intention to represent your own interests with the tortfeasor's insurance company.

Promptly send a *Tenney* letter to the tortfeasor's insurance company: This letter must clearly indicate that you plan on representing your own subrogation interests. The letter should also

request that the tortfeasor's insurance company not include any medical payments in any settlement offer to the injured insured.

If your insured retained his own attorney, promptly send a Tenney letter to the attorney:

The letter must state that you plan to represent your own subrogation interests and that you are unwilling to pay for his services under the common fund doctrine.

Arbitrate or intervene: If your company and the tortfeasor's insurance company participate in an arbitration program, file a petition for arbitration as soon as you can determine the amount of medical expenses paid to the insured.

If arbitration is not available, consider filing your own lawsuit to protect your subrogation lien on the medical payments. If the insured has already filed suit, then file a petition to intervene in that action. Your suit can ultimately be consolidated with the personal injury case.

Communicate: Instruct your retained attorney to communicate with the insured's attorney on issues related to the medical payments from settlement negotiations to trial preparation. If the insured's personal injury suit goes to trial and you have successfully intervened in the suit, be active in that portion of the trial related to medical expenses.

While this is not an exhaustive list, taking the aforementioned actions demonstrates the insurer's genuine interest to be an "unwilling participant," as well as "meaningful participation" in the creation of a common fund that should enable the insurer to avoid paying attorney's fees to the insured's attorney. The insurer should still send the *Tenney* letter promptly, but that alone is no longer enough to protect subrogation interest in medical expenses. Given the undefined requirements of "meaningful participation," the insurer should retain experienced defense counsel, where necessary, to protect its subrogation lien in order to recover medical payments and to avoid paying unnecessary attorney's fees.

C. Additional Selected Cases

Perez v. Kujawa, 234 Ill. App. 3d 957, 602 N.E.2d 38, 176 Ill. Dec. 731 (1st Dist. 1992) – The equitable "fund doctrine" did not justify an award of attorney fees to insured and other plaintiff represented by the same attorney, out of automobile insurer's medical payments subrogation lien. The insurer had promptly and unequivocally informed plaintiffs' previous attorney of its subrogation lien and disclaimed any intention to employ insured's attorney for that purpose, and that notice was chargeable to the attorney to whom the notified attorney referred the case.

Brase by Brase v. Loempker, 267 Ill. App. 3d 415, 642 N.E.2d 202, 204 Ill. Dec. 740 (5th Dist. 1994) – Plaintiff's attorney was entitled to one-third of total medical subrogation claim paid to plaintiff's insurer, as a result of an automobile accident, despite fact that plaintiff's insurer notified plaintiff's attorney prior to plaintiff's attorney filing suit that insurer did not want attorney's assistance but wanted to deal directly with defendant's insurer on its medical

subrogation claim, and where plaintiff's insurer asked defendant's carrier to keep subrogation rights of plaintiff's insurer in mind when settling claim with plaintiff's attorney.

Country Mutual Ins. Co. v. Birner, 293 Ill. App. 3d 452, 688 N.E.2d 859, 228 Ill. Dec. 161 (3d Dist. 1997) – Insured's attorney filed action against automobile insurer to recover payment from settlement with liability insurer. The Appellate Court held that: (1) attorney was entitled to payment under common fund doctrine, and (2) insurer was estopped from pursuing arbitration award noting that, under the "common fund doctrine," a lawyer who recovers common fund for benefit of persons other than client is entitled to reasonable attorney fees from fund as whole.

Blackburn v. Sundstrand Corp., 115 F.3d 493 (7th Cir. 1997) – Common Fund Doctrine not preempted by provisions of Employee Retirement Income Security Act (ERISA); *See also, Bishop v. Burgard*, 198 Ill. 2d 495, 764 N.E.2d 24, 261 Ill. Dec. 733 (2002).

Young v. Mory, 294 Ill. App. 3d 839, 690 N.E.2d 1040, 228 Ill. Dec. 965 (5th Dist. 1998) – State Employees Retirement System (SERS) does not preempt common fund doctrine.

Share Health Plan of Illinois, Inc. v. Alderson, 285 Ill. App. 3d 489, 674 N.E.2d 69, 220 Ill. Dec. 798 (1st Dist. 1996) – Health Maintenance Organization subject to application of the common fund doctrine.

Kim v. Alvey, Inc., 322 Ill. App. 3d 657, 749 N.E.2d 368, 255 Ill. Dec. 267 (1st Dist. 2001) – Where parties agree to settlement figure and workers' compensation lien is not addressed, the payor is not entitled to a set-off for the amount of the workers' compensation lien.

Johnson v. State Farm Mut. Auto. Ins. Co., 323 Ill. App. 3d 376, 752 N.E.2d 449, 256 Ill. Dec. 569 (5th Dist. 2001) – Plaintiff's attorney was not entitled to fees under common fund doctrine for arbitration award in uninsured motorist action as no fund was created that benefitted the lien holder.

Eddy v. Sybert, 335 Ill. App. 3d 1136, 783 N.E.2d 106, 270 Ill. Dec. 531 (5th Dist. 2003) – An insured filed a motion in personal injury action to adjudicate a lien concerning insurer's subrogation claim regarding payment of insured's medical expenses under automobile insurance policy. The Appellate Court held that: (1) language of policy controlled in determining whether insurer had right to subrogation; (2) insurer's right to subrogation did not depend on whether insured was made whole by settlement with tortfeasor; and (3) insurer was obligated to pay medical bill, but insurer was entitled to subrogate that claim.

TM Ryan Co. v. 5350 South Shore, L.L.C., 361 Ill. App. 3d 352, 836 N.E.2d 803, 297 Ill. Dec. 72 (1st Dist. 2005) – A judgment creditor filed a petition for relief, alleging it was entitled to judgment debtor's insurance proceeds deposited in client funds account of judgment debtor's law firm. The law firm filed its own petition asserting an interest in the insurance proceeds. The Appellate Court held that the insurance proceeds were not a common fund out of which the law firm was

entitled to its fees and noted that the common fund doctrine does not apply where the debt paid from the fund existed independently of the creation of the fund.

VII. ATTORNEYS' LIENS

A. Common Law Liens

A common law lien arises as a result of an attorney's right to retain possession of property belonging to his client which comes into his hands within the scope of the attorney's employment until his charges are paid. *Needham v. Voliva*, 191 Ill. App. 256 (1st Dist. 1915). The most common "property" the attorney holds in regard to a common law lien is the client's file. Although generally the attorney will not be allowed to withhold the file, particularly where an action is still pending, the attorney does have the right to insist that the court determine the value of the attorney's services prior to the time the file is released so that an amount can be paid or otherwise adequately secured before the file is released to the former client. *Upgrade Corp. v. Michigan Carton Co.*, 87 Ill. App. 3d 662, 410 N.E.2d 159, 43 Ill. Dec. 159 (1st Dist. 1980).

This lien, commonly referred to as a "retaining lien," is waived when the client's file is turned over to her new counsel or to the plaintiff herself. This lien can only be asserted in a defensive capacity. The attorney cannot bring an action to obtain payment for his services in return for the file. Instead, it is a defense to a motion to compel production of the file, and the court is not allowed to determine the value of the attorney's services unless it is within this context. *Twin Sewer and Water, Inc. v. Midwest Bank and Trust Co.*, 308 Ill. App. 3d 662, 720 N.E.2d 636, 242 Ill. Dec. 15 (1st Dist. 1999).

In order to establish a common law lien, there must be an attorney/client relationship, the client's property to which the lien attaches must come into the possession of the attorney, and the client must owe the attorney compensation for services rendered in the course of the relationship. There are no other formal requirements to perfect the common law attorney's lien.

B. Statutory Attorney's Lien

Attorneys, like health care providers, have their own lien statute. The Attorneys Lien Act found at 770 ILCS 5/1 provides that attorneys shall possess a lien upon all claims, demands, and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients.

To enforce this lien, the attorney must serve written notice by registered or certified mail upon the party against whom their clients may have such claims, claiming a lien and stating the interest they have in the suit, claim, demand, or cause of action. The attorney's lien attaches to any verdict, judgment, or order entered and any money or property which may be recovered.

The notice of lien must be served during the existence of the attorney/client relationship. *Triskett Illinois, Inc. v. Dixon (In re T. C. Associates Ltd. Partnership)*, 163 B.R. 140 (N.D. Ill. 1994). An attorney's lien will not be perfected where it is served upon a former client after termination of the attorney/client relationship. *Muller v. Jones*, 243 Ill. App. 3d 711, 613 N.E.2d 271, 184 Ill. Dec. 244 (4th Dist. 1993). In addition to the attorney's lien statute, an attorney may also have a claim for recovery of attorney's fees based upon theories of breach of contract and *quantum meruit*. *Kannewurf v. Johns*, 260 Ill. App. 3d 66, 632 N.E.2d 711, 198 Ill. Dec. 381 (5th Dist. 1994); *Stefanich, McGarry, Wols & Okrei, Ltd. v. Hoeflich*, 260 Ill. App. 3d 758, 632 N.E.2d 1064, 198 Ill. Dec. 453 (3d Dist. 1994).

In order for the statutory attorney's lien to attach, there must be a valid attorney/client contract, the attorney must serve proper notice on the parties against whom the lien is sought to be enforced during the existence of the attorney/client relationship, and finally, there must be a recovery to which the lien can attach.

Where an attorney asserts an attorney's lien after he has been terminated, the courts will not enforce the lien under the Attorneys Lien Act. A court, however, may award against his former client on a *quantum meruit* basis in such a circumstance. This means that the court will determine the value of the services rendered by the attorney to the client. Although this recovery would most likely be enforced only as to the client, and not the adverse party, it is strongly recommended that any such claim of lien be adjudicated prior to issuance of drafts in satisfaction of settlement or judgment.

C. Equitable Liens

Most equitable liens arise from an express contract between an attorney and a client. Normally, the equitable lien arises from contract provisions providing for an assignment or security interest, held by the client, which is pledged to the attorney as payment for legal work. In order to establish an equitable lien, an attorney needs a valid contract with the client, and there has to be an equitable assignment to the attorney of a property in the contract. The equitable lien arises or is perfected merely through execution of a contingent fee agreement containing the appropriate language.

D. Additional Selected Cases

TM Ryan Co. v. 5350 South Shore, L.L.C., 361 Ill. App. 3d 352, 836 N.E.2d 803, 297 Ill. Dec. 72 (1st Dist. 2005) – A judgment creditor filed a petition for relief, alleging it was entitled to judgment debtor's insurance proceeds deposited in client funds account of judgment debtor's law firm. The law firm filed its own petition asserting an interest in the insurance proceeds. The Appellate Court held that a valid attorney's lien had not been created in the insurance proceeds, noting that attorneys who do not strictly comply with the Attorney's Lien Act have no lien rights.

Johnson v. Cherry, 422 F.3d 540 (7th Cir. 2005) – In a civil rights action, a motion for substitution of counsel was filed on behalf of the plaintiff. Plaintiff's counsel moved to strike the motion,

alleging that her signature had been forged. The district court imposed monetary sanctions on the attorney, finding that she had, in fact, signed the motion. The court of appeals held that the district court was required to balance the attorney's right to compensation against the client's interests before ordering the attorney to produce the client's file despite the attorney's assertion of retaining a lien.



Mark D. Hansen

- Partner

Mark concentrates his practice in the area of civil litigation. He has handled commercial litigation matters including contractual breaches, business torts, fraud and misrepresentation, commercial foreclosures, mechanics liens, replevin actions, trademark agreements, eminent domain (condemnation), real estate disputes, zoning issues, and business losses. He has also provided counsel on various litigation issues affecting corporate clients.

Mark has been involved in the defense of cases involving catastrophic injury, including the defense of complex cases in the areas of medical malpractice, products liability, and professional liability. He has defended doctors, nurses, hospitals, clinics, dentists, and nursing homes in healthcare malpractice cases. He has also been involved in the defense of numerous other insurance-related matters.

Mark is a graduate of the 33rd Annual International Association of Defense Counsel (IADC) Trial Academy which was held at Stanford Law School. The IADC Trial Academy is one of the oldest and most well respected programs for developing defense trial advocacy skills.

Significant Cases

- *Rosewood Care Center, Inc. v. Caterpillar Inc.*, 226 Ill.2d 559 (2007) Illinois follows the "leading object" test in determining application of the Statute of Frauds.
- *Romack v. R. Gingerich Co.*, 314 Ill. App. 3d 1065 (3d Dist. 2000) Determination of whether partial waiver of workers' compensation lien is good faith settlement under Illinois Contribution Act.

Selected Publications

- Co-Editor, Trial Briefs, the Civil Practice and Procedure Section newsletter published by the Illinois State Bar Association
- Co-Author, "The Statute of Frauds" in Contract Law Handbook, published by Illinois Institute of Continuing Legal Education (2006)

Public Speaking

- "Tort Law Update"
Illinois Association of Defense Trial Counsel's Fall Conference 2008
- "Settlement Values"
Greater Peoria Claims Association 2007
- "Chair"
Illinois Association of Defense Trial Counsel's Spring Defense Tactics Seminar 2006
- "Chair"
Illinois Association of Defense Trial Counsel's Rookie Seminar 2004

Professional Associations

- Illinois Association of Defense Trial Counsel (former *ex officio* member of the Board of Directors and co-chair of Young Lawyers Committee)
- Illinois Society of Healthcare Risk Management
- Abraham Lincoln American Inn of Court (Barrister)
- Defense Research Institute
- American Bar Association
- Illinois State Bar Association (past member of Civil Practice Section Council)
- Peoria County Bar Association (member of Courts and Procedures and Civil Practice Committees)

Court Admissions

- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Supreme Court

Education

- Juris Doctor (Cum Laude), University of Illinois College of Law, 1994
- Bachelor of Science - Finance (Cum Laude), Northern Illinois University, 1991