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Hey, where's my subrogation lien? It was here a minute ago!

By: Lawrence L. Pratt, Member

On March 28, 2005, the Illinois Fourth District Court of Appeals threw the business and insurance community in Illinois yet another curve ball. In a unanimous decision the court handed down Borrowman v. Prastein, 356 Ill.App.2d 546, 826 N.E.2d 600, 292 Ill. Dec. 459 (Ill. App. 4th Dist. March 28, 2005).

This case concerned circumstances under which employers or their insurers can inadvertently waive their workers' compensation subrogation liens in civil cases against third parties in the context of settling the workers' compensation case. This is important in Illinois because Illinois is one of only five states in the nation in which employers can be brought into civil cases concerning workplace injuries. Specifically, the workers' compensation subrogation lien acts to limit the employer's exposure in these civil cases. If the employer inadvertently waives the lien in the workers' compensation case it can cause the employer to be exposed to additional liabilities in the civil case.

In Borrowman, the Plaintiff, James Borrowman, while working for Watertower Paint & Repair Co., was painting the inside of a water tower when the scaffolding collapsed, causing him to fall into the tower, fracturing his heel. Borrowman sought treatment from Dr. Rebeccah Prastein. She performed surgery to repair the fracture. Soon thereafter, Borrowman contracted a bone infection at the fracture site. Dr. Prastein prescribed two strong antibiotics, as a result of the drugs' interaction Borrowman's inner ear was permanently damaged affecting his balance and frequently making him dizzy and nauseous.

Borrowman filed a claim for workers' compensation benefits shortly after the fall. Two years later he filed suit against Dr. Prastein for medical malpractice in connection with the injury to his inner ear. In January 2000, Borrowman settled his workers' compensation claim for $230,000. His claim against Dr. Prastein was still pending. A year and a half later Borrowman settled his malpractice claim with Dr. Prastein for $750,000.

Borrowman's employer, Watertower or rather its insurer, claimed its statutory subrogation lien pursuant to 820 ILCS 5/305-5(b) and demanded its share of the $750,000 settlement with Dr. Prastein. Borrowman filed a petition with the trial court to determine the existence of the lien and its amount. The court confirmed Watertower's lien, but not in the amount asked for by Watertower. Both appealed, Borrowman as to the existence, Watertower as to the amount.

The Fourth District ruled that because Watertower attached an addendum to the settlement agreement in the workers' compensation case that read:

> "the above constitutes a full, final[,] and complete settlement of any and all claims for temporary total disability, permanent partial and/or permanent total disability incurred or to be incurred by said [p]etitioner by reason of an industrial injury occurring on or about April 7, 1995, or by reason of any claim or cause of action by [p]etitioner against [r]espondent of any nature whatsoever. Rights under [s]ections 8(a) and 19(h) of the *** Act are hereby waived by both parties."

Watertower was aware that the malpractice case was pending, but still included the "full, final, and complete settlement" language in the settlement addendum. Therefore, the court held that Watertower must have intended to waive any claim to a subrogation interest in the civil case as well as everything else in the workers' compensation case.

The court went on to reason that by stating the workers' compensation settlement represented a "full, final and complete settlement" Watertower would have had to expressly reserve its statutory lien

in the workers' compensation settlement agreement to preserve its lien. This result ran expressly contrary to prior Illinois precedent regarding statutory and contract construction and took the legal community by surprise. Trial courts in Illinois have applied the Borrowman decision retroactively, suddenly leaving employers and insurers exposed.

As Borrowman was the only precedent on this specific issue, all circuit courts in Illinois were obliged to follow it. Then came the First District

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Employer's Right To Recovery In A Third-party Action

By: Mary Calzaretta, Member

The Workers' Compensation law requires an employer to provide benefits to any employee injured in the course and scope of his/her employment. Under certain circumstances, the employer may be entitled to recover a portion of the benefits paid to the injured employee.

Section 287.150 grants an employer subrogation rights whenever an employee's injuries are due to the negligence of a third-party. Simply stated, an employer is entitled to recover from the employee the benefits paid under the Workers' Compensation claim should the employee receive compensation from a negligent third-party. The most common examples are those cases involving auto accidents. An employee is injured in an auto accident in the course and scope of his employment. The employer pays Workers' Compensation benefits to the employee. The employee pursues a third-party action and recovers damages against the driver of the other vehicle involved in the collision. As the law discourages double recovery by the employee for the same incident, the employer is entitled to reimbursement for payments made in the Workers' Compensation case.

The employer is not entitled to 100% reimbursement of the payments made. The law requires the employer to pay a proportionate share of the expenses and attorney's fees incurred by the employee in pursuing the third-party action. Calculating the amount of the recovery is governed by what is commonly known as the Ruediger formula. In Ruediger v. Kallmeyer Brothers Service, 501 S.W.2d 56 (Mo. 1973), the employee was awarded permanent total Workers' Compensation disability benefits as a result of injuries he sustained in an auto accident. Subsequently, the employee recovered $140,458.62 in a third-party action against the driver of the other vehicle involved in the collision. The attorney's fees and expenses incurred by the employee in pursuing the third-party totaled $46,819.54. At the time of the third-party recovery, the employer had paid $13,957.62 in Workers' Compensation benefits. In determining the amount to which the employer was entitled, the court deducted the amount of the attorney's fees and expenses ($46,819.54) from the amount of the total recovery ($140,458.62), leaving a balance of $93,639.08. The court divided the amount paid in Workers' Compensation benefits ($13,957.62) by the amount of the total recovery ($140,458.62) to determine the ratio of the amount paid by the employer to the overall third-party recovery. The balance of the third-party recovery after attorney's fees and expenses ($93,639.08) was then multiplied by the percentage in order to arrive at the final apportionment of the proceedings.

Under the court's calculation, the employer recovered $9,305.08 and the employee received the balance of $84,334.00. As the employee was awarded permanent total disability benefits under the Workers' Compensation case, he was receiving weekly benefits from the employer. The parties had reached an agreement so the court did not specifically address the issue of the future payments. The court did state, however, any recovery made by an employee should be treated as an advanced payment against any future Workers' Compensation benefits owed by the employer. The court indicated an employee is entitled to future compensation benefits once the amount paid as the advance is exhausted.

The Ruediger formula is an easy and convenient way of calculating an employer's subrogation interest when the third-party recovery exceeds the amount paid in Workers' Compensation benefits. In reality, however, the third-party recovery often is less than the benefits paid under the Workers' Compensation case. A strict construction of the law would allow the employer to claim the balance of any third-party recovery after the deduction of attorney's fees and expenses. Under these circumstances, the employee has little incentive to pursue a third-party case. As a result, the parties find it most beneficial to negotiate a compromise recovery amount.

An employer has a right to reimbursement of a portion of any Workers' Compensation benefits paid to an employee whenever there is a third-party recovery. An employer has the right to pursue the third-party action if an employee decides not to go forward with a case. In most instances where there is a viable third-party case, however, the employee is eager to pursue the action. Having the employee pursue the third-party action allows an employer to obtain recovery with minimal effort and expense. ■

Evans & Dixon Attorney Spotlight: Lawrence L. Pratt, Member

We would like to take this opportunity to introduce Larry Pratt, one of our top civil litigation attorneys. Larry joined Evans & Dixon in 2002 and has more than fifteen years of experience as a trial attorney. Larry is licensed to practice law in the state and federal courts of Missouri and Illinois and works out of our downtown St. Louis office.

He specializes in premises liability defense, personal injury defense, errors and omissions defense, contract law, and real estate in the State and Federal Trial and Appellate courts, as well as arbitration proceedings.

Larry earned his bachelor's degree from Brigham Young University in International Relations with an emphasis in German language and culture. He received his law degree from Washington University School of Law in St. Louis, MO.

Larry and his family reside in St. Louis, Missouri. His wife, Rhonda Coursey-Pratt works in the Kirkwood School District, where his fifteen year old daughter, Hilary, attends high school. ■

Cova Joins the Civil Litigation Practice Group at Evans & Dixon, L.L.C.

In August 2006, attorney Reno R. Cova III became the newest addition to our growing Civil Litigation practice group. Reno is licensed to practice in Missouri and Illinois. He brings a wealth of experience in neck and back injuries arising out of automobile and workplace incidents.

In 2000, Reno received his bachelor's degree from University of Missouri – Columbia in Human Environmental Studies. In 2004, he received his law degree, as well as an MBA in Management, from the University of Missouri - Columbia. ■

CASE VERDICTS

Compiled by Reno R. Cova and Katherine M. Cuneo

■ ***Brunner v. Brunner***

FACTS: The Plaintiff was a passenger in a vehicle being driven by his brother, the Defendant. Plaintiff and Defendant both claimed that a "phantom vehicle" was tailgating their car and as a result Defendant had to quickly change lanes to avoid a collision. This sudden lane change caused a chain reaction rear end collision involving two other vehicles behind Plaintiff and Defendant's car. Plaintiff sued his brother, the drivers of the other two vehicles, and his brothers' liability insurance provider under Defendant Brunner's uninsured motorist policy. Plaintiff's MRI indicated a bulging disk in the lumbar spine and Plaintiff claimed near constant lower back and leg pain.

FINDINGS: Plaintiff's last demand before trial was $110,000. Plaintiff asked the jury for $180,000 at trial. The jury returned a verdict in Plaintiff's favor, finding Defendant Brunner liable in the amount of $22,500 but returned a Defendants verdict for Defendant Brunner's uninsured motorist carrier.

Lawrence L. Pratt represented Defendant, Brunner.

■ ***Vitale v. Ismet***

FACTS: Plaintiff was driving in the left-turn lane on a major St. Louis thoroughfare. Plaintiff claimed that Defendant, driving in the opposite direction, crossed the centerline, and struck his car. Defendant, a Bosnian immigrant with limited English, claimed Plaintiff began making a left turn and stopped in the middle of the roadway. Defendant swerved, but was unable to avoid the collision. Plaintiff claimed cervical soft tissue injury and associated pain.

FINDINGS: Plaintiff asked the jury for $12,000 in bodily injury and property damage. The jury found no bodily injury, property damage in the amount of $2,000 with 50% of the liability attributable to Plaintiff.

James E. Godfrey, Jr. represented Defendant Ismet.

■ ***Lucero v. Cornerstone National Insurance Company***

FACTS: In this class action suit, Plaintiffs sought class certification on behalf of all similarly situated customers of Cornerstone National Insurance Company who purchased $50,000/$100,000 underinsured motorist coverage (UIM). Plaintiffs claimed that the "set-off" provisions of Cornerstone's UIM policies served to reduce their value to no more than $25,000/$50,000 or as little as nothing. Defendant claimed that the class lacked common questions of law or fact, and that the damages claimed were too varied. For these reasons, there was an insufficient number of potential class members to qualify for class certification, a prerequisite for maintaining class action status in Plaintiffs' suit.

FINDINGS: The court ruled in favor of Defendant and refused to certify Plaintiff's purposed class, affectively terminating the class action suit.

James E. Godfrey, Jr. represented Defendant, Cornerstone National Insurance Company.

■ ***B.F.&B Enterprises, Inc. v. Keane Express Delivery, Inc.***

Plaintiff and Defendant each owned buildings on either side of an asphalt parking lot and both used the lot for parking and ingress/egress from their respective buildings. Both Plaintiff and Defendant purchased their respective buildings in March of 2003 from the same third party. This third party also owned the parking lot. The third party sold Plaintiff its building with the understanding that Plaintiff would be able to use the parking lot in perpetuity. Defendant purchased both its building and the lot. Between the time the sale contracts for the three properties were signed and closing Plaintiff's representative, Defendant's representative and the third party executed a document titled "License Agreement" purporting to give Plaintiff use of the parking lot and access to its building from the lot. Further, that this right was transferable from Plaintiff to successors and could only be terminated if Plaintiff or its successors failed after notice and thirty days to cure to pay half the cost of maintenance of the lot. The agreement also provided for mandatory arbitration by the American Arbitration Association for any disputes arising out of the agreements.

Three years later, Plaintiff learned of Defendant's intention to sell Plaintiff's building and the parking lot to a developer for conversion to loft apartments. Shortly thereafter Defendant contacted Plaintiff and informed Plaintiff that it considered the "License Agreement" to be only a license, thus terminable at will. Defendant indicated its intent to terminate the "License Agreement". Plaintiff invoked the arbitration clause and alleged that the agreement was not a license terminable at will of the property owner, Defendant, but was permanent and only terminable by agreement of the parties or by Plaintiff's default for failure to pay half the cost of maintenance of the parking lot.

The arbiter found for Plaintiff and held that the agreement was not a license. The agreement was a perpetual lease, transferable by Plaintiff to its successors and terminable only by agreement of Plaintiff (or its successors) and Defendant (or its successors) or by failure of Plaintiff to pay half of the maintenance costs.

Lawrence L. Pratt represented Plaintiff, B.F.&B Enterprises.

■ ***Totten v. Smith***

Defendant Smith struck the rear of Plaintiff Totten's car while Plaintiff was sitting at a stop light waiting for it to turn green. Plaintiff's car sustained moderate damage and she alleged soft tissue cervical and lumbar injuries with radiculopathy of the right leg. The Plaintiff claimed the pain was constant and continuous for the last two years and expected the pain to last the rest of her life. Plaintiff filed suit in rural Pemiscot County, Missouri, a liberal Plaintiff oriented venue. The Plaintiff claimed $16,000 in medical expenses consisting of an examination at the local hospital emergency room, X-rays, MRIs physical therapy and trigger point injections. Plaintiff testified that she missed two days of work, but was forced for financial reasons to return to work even though still in pain. Plaintiff made no lost wage claim. Plaintiff's last demand was $25,000. Plaintiff asked the jury at trial for a verdict of $45,000. The jury returned a verdict for Plaintiff in the amount of $1,000.

James E. Godfrey, Jr. represented Defendant, Smith.

Where's my subrogation lien? continued from page 1

Court of Appeals to the rescue in Gallagher v. Lenart, 367 Ill.App.3d 293, 854 N.E.2d 800, 305 Ill. Dec. 208 (Ill. App. 1st Dist. August 30, 2006). In Gallagher, Plaintiffs brought suit against Jaroslaw Lenart and his employer, Pacella Trucking Express, Inc., for injuries Plaintiff, James Gallagher, sustained from an automobile accident with Lenart. The Plaintiffs and Defendants entered into a settlement agreement. James Gallagher's employer, Rail Terminal Services, L.L.C., then sought and was granted leave to intervene to protect their workers' compensation subrogation lien, against the settlement proceeds allocated to James Gallagher.

Counsel for Plaintiff James Gallagher challenged Rail Terminal Services' lien and filed with the trial court a motion to adjudicate third party claims. The trial court held that Rail Terminal Services waived its workers' compensation lien pursuant to Borrowman when it settled the workers' compensation case without expressly reserving its subrogation lien.

The First District engaged in a thorough analysis of the Fourth District's opinion in Borrowman and held, "We find this holding unsupported by case law, contrary to several principles behind the [Workers' Compensation] Act, and at odds with general contract law. Accordingly, we reject it." And reject it they did. The First District held that "...such a waiver of a workers' compensation lien must be more explicitly and affirmatively stated in a settlement agreement and cannot simply be implied by a lack of any reference to that lien." The First District found that Rail Terminal Services L.L.C. did have a lien, did not waive it and reversed the trial court opinion.

Where does that leave us? Prior to Gallagher, when the Illinois Supreme Court refused to grant certiorari in the Borrowman case, Borrowman was the law of the land. Now with Gallagher we have a direct conflict between two of the district courts of appeal in Illinois. On November 29, 2006, the Illinois Supreme Court granted certiorari and agreed to hear the Gallagher case (Illinois Supreme Court No. 103522). No doubt, we will have to wait for the high court to sort out the issues and determine the law. In the mean time, the best practice for those representing employers in workers' compensation and civil suits coming out of workplace injuries is to specifically reserve the subrogation lien in any settlement agreement. It is no longer safe to assume that the employer's statutory rights will automatically be protected. ■

[1] RSMo 287.40 (3)

[2] Martin v. Mid American Farm Lines, Inc., 769 S.W. 2d at 112.

[3] Irma Esquivel v. Days Inn [need site], in fact once

[4] 8 CRS 50-2.030

[5] 8 CRS 50-2.030

[6] 8 CRS 50-2.030

[7] 8 CRS 50-2.030

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To Our Readers:

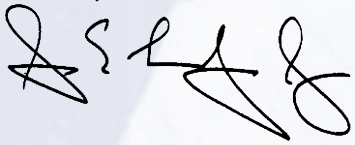
Thank you for reading this edition of the Evans & Dixon civil newsletter, we hope you found it informative. In 2007 we will continue to bring you information that affects you and your business.

Our mission is to support you through skilled legal representation in partnership with you to achieve your business goals. We will continue to deliver value and unparalleled service while adhering to the highest standards of ethics and integrity in our profession.

We recognize that our clients' needs change in this ever evolving legal climate and we feel it's important to offer innovative and effective solutions to meet those needs. We succeed only when our clients succeed.

Your feedback and suggestions are always welcome as part of our commitment to achieving your goals. Please tell us how we can improve our services by sharing your thoughts with Andrea Shomidie at ashomidie@evans-dixon.com.

Sincerely,



James E. Godfrey, Jr.