

## **FLORIDA COURT PROHIBITS SUBROGATION RECOVERY FROM LEGAL MALPRACTICE LAWSUIT**

### ***Columbia v. Brewer, 2008 WL 4643815 (Fla. App. 2008)***

Florida has finally cleared up an issue regarding workers' compensation subrogation which has remained undecided for decades. The issue of whether a workers' compensation lien attaches to the proceeds of a legal malpractice recovery pursuant to § 440.39 of the Florida Workers' Compensation Act is an issue that had not been addressed directly by the Florida courts, until now. They have now decided that such a right of subrogation does not exist.

In a 2001 Court of Appeals decision, the court had held that a workers' compensation carrier's lien would not attach to the proceeds of a legal malpractice recovery in that case, but only because an intervention was not timely filed. *Zurich, U.S. v. Weeden*, 805 So.2d 945 (Fla. App. 2001). The court noted that this issue was one of first impression in Florida, and held that the carrier was not entitled to a recovery because it did not timely file an intervention. However, the court did not address the issue of whether or not a carrier had a right to subrogate in a legal malpractice action. *Id.*

In 2008, the Court of Appeals decided a case in which Eddie Brewer, Jr. was injured by a paving machine within the course and scope of his employment with Anderson Columbia. Brewer engaged a lawyer to represent him in a negligence and product liability case against the paving machine manufacturer, but the lawyer's negligent handling of the file resulted in Brewer recovering nothing. Brewer filed a legal malpractice action against his lawyer, and the workers' compensation carrier, FCCI Insurance Company tried to assert its statutory right of recovery under § 440.39 of the Florida Workers' Compensation Act. The Florida Court of Appeals decided that the phrase "injured or killed in the course of his or her employment by the negligence or wrongful act of a third-party tortfeasor" contained in § 440.39 was not sufficiently broad to include defendants in a legal malpractice action within the definition of "third-party tortfeasors". *Columbia v. Brewer, 2008 WL 4643815 (Fla. App. 2008)*. Therefore, the court determined that FCCI was not subrogated to or entitled to reimbursement from recoveries by Brewer in his legal malpractice actions.

The decision is an unfortunate one because it leaves subrogated carriers with no recourse when, through no fault of its own, a negligent lawyer causes it to lose potentially hundreds of thousands or even millions of dollars of benefit payments which it would otherwise have a right to recover. The ruling is questionable because it presumes that the legislature specifically chose this language so as to exclude any right of subrogation in legal malpractice cases. It also leaves open the likelihood that when a lawyer makes a mistake and is sued for legal malpractice, the claimant has automatically won the lottery and is going to receive a double recovery - benefits from the workers' compensation carrier and a full recovery from the lawyer's malpractice carrier for the same elements of damages. It remains to be seen if Florida's collateral source rule, which reduces any damage award a plaintiff receives by the amount of collateral source benefits the plaintiff has received (such as workers' compensation benefits) will apply when the right of workers' compensation subrogation is abrogated as it now is in legal malpractice actions.