

EQUITY INVADES HOSPITAL LIEN LAW

Common Fund Doctrine Held Applicable To Hospital Liens

Howell v. Dunaway, 2010 WL 763918 (Ill. App. 2010)



Subrogation professionals are by now quite used to the tortured and twisted and application of equitable doctrine such as the “Made Whole Doctrine” or the “Common Fund Doctrine” to contractual and statutory subrogation and reimbursement rights. However, a new Illinois 5th District Court of Appeals decision completely rewrites the laws of equity by invading the province of a legislature to grant hospitals an absolute right to be reimbursed when a patient who hasn’t paid his hospital bill recovers from a third-party tortfeasor.



The Illinois Health Care Services Lien Act can be found at 770 I.L.C.S. 23/10 and creates a lien on behalf of every health care professional and health care provider that renders any service on behalf of an injured person upon all the claims and causes of action of that injured person. The lien is in the amount of the reasonable charges and attaches to any verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his claim or cause of action. 770 I.L.C.S. 23/20. On the petition of any interested party, the Circuit Court must

adjudicate the rights of all the interested parties and enforce the lien. 770 I.L.C.S. 23/30. The Act further provides that it shall not be construed as limiting the right of the health care professional or provider to pursue collection, through all the available means, of its reasonable charges or of the amount of its reasonable charges that remain not paid after the satisfaction of its lien under the Act. 770 I.L.C.S. 23/45.

In *Howell v. Dunaway*, consolidated with another case and decided on March 4, 2010, the plaintiffs were injured in car accidents and treated in Illinois’ Herrin Hospital and St. Joseph Hospital, respectively. They filed personal injury lawsuits against the drivers of the motor vehicles that injured them. The hospitals filed liens against any recovery in these personal injury actions pursuant to the Act. Both of the personal injury suits were settled, with the plaintiffs recovering damages. The plaintiffs then filed petitions under § 30 of the Act to adjudicate these liens, seeking to apply the Common Fund Doctrine to reduce the amount of the liens by one-third for attorneys’ fees incurred by the plaintiffs in their personal injury lawsuits. The Circuit Court granted the petitions, applying the Common Fund Doctrine for the first time to a lien filed pursuant to the Act and the hospitals appealed.

By way of background, as a general rule, the right of an attorney to recover for professional services must rest on the terms of a contract of employment with the person sought to be charged and cannot be based on a benefit derived by a third party from the services rendered by the attorney. *Maynard v. Parker*, 54 Ill. App.3d 141, 143 (1977), *aff’d*, 75 Ill.2d 73 (Ill. 1979). Further, the client who engaged the attorney and paid his fees is not entitled to recover a proportionate share of the attorneys’ fees from those who receive a benefit from the services. *Maynard*, 54 Ill. App.3d at 143. The Common Fund Doctrine is an exception to these general rules. *Maynard*, 54 Ill. App.3d at 143.



The Common Fund Doctrine is based on the equitable concept that an attorney who performs services in creating a fund should in equity and good conscience be allowed compensation out of the whole fund from all of those who seek to benefit from it. The doctrine rests upon the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched. *Bishop v. Burgard*, 198 Ill.2d 495, 509 (Ill. 2002). The policy behind the Common Fund Doctrine is to prevent those who benefit from a fund



without contributing to the cost of its creation from “freeloading.” However, there is no discussion about the fact that but for the third-party settlement, it would have been the injured plaintiffs who were freeloading on the backs of the hospitals which treated them. Accordingly, the Common Fund Doctrine permits a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees. *Scholtens v. Schneider*, 173 Ill.2d 375, 385 (Ill. 1996). Thus, it is now well established that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys’ fee from the fund as a whole.

To sustain a claim under the Common Fund Doctrine in Illinois, the attorney must show that (1) the fund was created as the result of legal services performed by the attorney, (2) the claimant did not participate in the creation of the fund, and (3) the claimant benefitted or will benefit from the fund that was created. For the first time ever, the *Howell* decision applies the Common Fund Doctrine to the statutory right of hospitals to be reimbursed from uninsured individuals. Practically, it works this way:

- (1) Hospital bills patient \$10,000.
- (2) Case settles for, say, \$100,000.
- (3) Client pays \$33,333.33 (or so) in attorney’s fees out of the settlement proceeds.
- (4) Hospital would normally be entitled to its entire \$10,000. Yet this case notes that the hospital is only getting repaid by virtue of the attorney’s work, and would reduce the Hospital’s recovery to \$6,666.66 (representing two-thirds of the total).

There is a risk here for plaintiffs and their attorneys. Trial lawyers are jumping up and down at this landmark decision, and other states will undoubtedly now be faced with copycat claims and efforts at applying the Common Fund Doctrine to the hospital lien statutes of those states. However, trial lawyers should probably stop jumping long enough to read the last paragraph of the opinion. If the Common Fund Doctrine is applied to a hospital’s reimbursement right under the Illinois Health Care Services Lien Act, it creates a conflict of interest between the plaintiffs and their attorneys which will result in the plaintiffs owing more money to the lien holders. This is because any amounts paid to the attorneys out of the lien holders’ recovery will have to be paid at a later date by the plaintiffs, who still will not have paid their full hospital bill. So if lawyers try to apply this new, questionable decision to cases involving hospital liens, their selfish claim for a fee will expose their own clients to significant liability to the hospital which would otherwise have been extinguished if the lien had simply been paid off without reduction for the Common Fund Doctrine. The Illinois Court of Appeals expressed no opinion over whether the hospital is still entitled to the remaining one-third of its billed amount. Paying two-thirds of the lien to the hospital would reduce the lien but not reduce the amount of the bill. Expect trial lawyers to work hard to negotiate a final settlement of the hospital providers’ bills rather than simply taking their common fund attorneys’ fees out of the lien and closing their file. If they don’t, their clients could be billed for the remainder, sometimes weeks or months later after all of the settlement money has been spent.



However, more than hospitals are affected here. There are numerous Illinois statutes which grant liens to various health care providers:

- Hospital Lien Act, 770 I.L.C.S. 35/1, *et seq.*
- Physicians Lien Act, 770 I.L.C.S. 80/1, *et seq.*
- Clinical Psychologists Lien Act, 770 I.L.C.S. 10/1, *et seq.*
- Dentists Lien Act, 770 I.L.C.S. 20/1, *et seq.*
- Emergency Medical Services Personnel Lien Act, 770 I.L.C.S. 22/1, *et seq.*
- Home Health Agency Lien Act, 770 I.L.C.S. 25/1, *et seq.*

- Optometrists Lien Act, 770 I.L.C.S. 72/1, *et seq.*
- Physical Therapist Lien Act, 770 I.L.C.S. 75/1, *et seq.*



It is important to remember that recipients of personal injury settlements are entitled to an evidentiary hearing to determine the reasonableness of health care provider liens and the court can reduce the amount of health care provider liens based on the unreasonableness of the charges. *Phillips v. DeCarlo*, 301 Ill. App.3d 680 (Ill. 1998). Also, as in other states, the lien holder has the burden of proving that the treatment provided is causally connected to the tortfeasor's conduct. *Anderson v. Dept. of Mental Health and Developmental Disabilities*, 305 Ill. App.3d 262 (Ill. 1999). Subrogation vendors and purchasers of liens should be reminded that in Illinois at least, such liens are not assignable. *In re Petry*, 224 B.R. 899 (Bankr. C.D. Ill. 1998). In interpreting the Hospital Lien Act, the court held that rights under the Act are not assignable. Also to be remembered is that under the health care provider liens in Illinois the provider's lien is limited to one-third of the plaintiff's recovery. *Burrell v. Southern Truss*, 176 Ill.2d 171 (Ill. 1997). This means the aggregate liens of ALL providers is limited to one-third of the plaintiff's recovery.

The Common Fund Doctrine is not applicable to contractual medical lien holders in most states, nor should it be. See *Lovett v. Carrasco*, 63 Cal. App.4th 48, 73 Cal. Rptr.2d 496 (Cal. App. 4th Dist. 1998); *Trevino v. HHL Financial Services, Inc.*, 945 P.2d 1345 (Colo. 1997). However, this unusual and questionable Illinois decision is a reminder to hospitals and health care providers that subrogation counsel is advisable in larger health care lien cases.

Matthiesen, Wickert & Lehrer represents the subrogation and reimbursement rights of hospitals and health care professionals under the hospital lien laws of all 50 states. We recommend that Illinois hospitals simply do not negotiate away one-third of their lien so that the plaintiffs' attorneys can pocket it. You have the advantage at this point and gain nothing by giving up your one-third. The pressure will be on the attorney to negotiate something more advantageous to you.

The *Howell* decision illustrates the need for competent and aggressive subrogation counsel even with regard to something as seemingly "automatic" as hospital and health care liens. Most hospital lien laws provide that a hospital lien attaches when an injured person enters the hospital, but is only perfected by timely filing the lien and zealously advocating to protect your statutory rights. If you don't, they will be chipped away at just like they were in this decision. If you need help in collecting or enforcing hospital liens anywhere within the U.S., please contact Gary Wickert at gwickert@mwl-law.com.