

## PENNSYLVANIA SUPREME COURT TAKES STAND AGAINST GERRYMANDERING WORKERS' COMPENSATION THIRD-PARTY RECOVERIES

### Gillette v. Wurst, 2007 WL 4555287 (Pa. 2007)

On December 28, 2007, the Pennsylvania Supreme Court dealt a devastating blow to trial lawyers who routinely attempt to structure or gerrymander third-party tort settlements in such a way as to avoid repayment of legitimate workers' compensation subrogation liens.

In Pennsylvania, a carrier is entitled to be reimbursed "off the top" of any net recovery by the employee in a third-party tort action. The employee is required to reimburse a workers' compensation carrier the amount of workers' compensation benefits which the carrier has paid to the employee in the past. *Goldberg v. W.C.A.B. (Girard Provision Co.)*, 620 A.2d 550 (Pa. Commw. Ct. 1993). Where a widow of a deceased employee institutes a third-party action and an increased award to her is generated by the presence or existence of children, the compensation carrier is generally not subrogated to the recovery received by the children in a wrongful death action. *Anderson v. Greenville*, 273 A.2d 512, 515 (Pa. 1971). The attraction of this nuance of law is that if a trial lawyer can gerrymander a settlement so that the children recover the bulk of a third-party recovery, he or she can argue that the carrier should not be able to recover its workers' compensation lien from the settlement. Clearly, the potential for gerrymandering in death cases was high in Pennsylvania.

The danger of gerrymandering in death cases was brought into focus recently. *Gillette v. Wurst*, 869 A.2d 488 (Pa. Super. 2005). In *Gillette v. Wurst*, John Gillette, a middle school teacher, was shot while acting as a chaperone at an eighth grade graduation dinner dance. He was shot by one of the students attending the dance. John's wife, Debbie, filed a third-party action against the student and his parents, seeking damages. The case was settled for \$300,000, the limits of the student's parent's homeowner's insurance coverage. Under the settlement, Debbie Gillette was to receive \$288,000, with the remainder payable to another student who was shot at the same time. The Pennsylvania Wrongful Death Act provides that "damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy." 42 P.S. § 8301(d). After deduction of attorneys' fees, intestate succession would have provided Debbie Gillette a spousal share of \$109,493.77, with the remainder to be divided in equal portions among the three children. However, Debbie Gillette agreed to only retain \$12,000 for payment of funeral expenses, and disclaimed her spousal share in favor of her children. The workers' compensation carrier had paid death benefits in the amount of \$167,934 and intervened into the third-party action. The trial court ruled that because the mother had given away her recovery to her children, the workers' compensation carrier could not recover its lien. It amounted to subrogation larceny in broad daylight.

Obviously, the carrier appealed the decision to the Pennsylvania Superior Court (intermediate appellate court in Pennsylvania), and expected a quick reversal. The Superior Court noted that the carrier was only entitled to a subrogation lien against any recovery in tort made by the widow, not the children. *Greater Lancaster Disposal/SCA Services v. W.C.A.B. (Snook)*, 607 A.2d 334 (Pa. Commw. Ct. 1992). Surprisingly, in 2005 the Superior Court ruled that the widow did not have any interest in the third-party recovery because she disclaimed her intestate share of the damages, and therefore, she did not have an interest in a third-party recovery against which the carrier could assert its lien. *Gillette v. Wurst*, 869 A.2d 488 (Pa. Super. 2005). Therefore, the carrier could not subrogate against the monies the widow gave away to her children. The Superior

Court said that there was nothing in the law which precluded all of those entitled to recover under the Wrongful Death Statute from agreeing on a different manner of distribution, even though such gerrymandering nullified the carrier's subrogation lien.

The Superior Court ruling was appealed to the Pennsylvania Supreme Court, which granted allowance of the appeal to consider whether a widow claiming entitlement to payment under the Wrongful Death Statute may disclaim her share of those proceeds once offered, when her disclaimer effectively negates the valid entitlement to subrogation of an insurance carrier. *Gillette v. Wurst*, 2007 WL 4555287 (Pa. 2007). For two long years trial lawyers used the Superior Court's ruling as a license to steal subrogated compensation benefit payments. However, on December 28, 2007, the Supreme Court reversed the Superior Court, holding that the workers' compensation carrier, having paid Gillette, was not subrogated to the amount actually received by Gillette; rather, it was subrogated to the share that Gillette had the right to receive. *Id.* Therefore, any attempted waiver of a wrongful death beneficiary does not defeat the carrier's right of subrogation.

It is now clear that a carrier's subrogation rights are not affected by the way in which the claimant and third-party tortfeasor, or the jury, characterize the nature of the third-party recovery. *Cullen v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n*, 760 A.2d 1198 (Pa. Commw. Ct. 2000). However, this assumes that the worker against whom the subrogation interest is asserted holds a current, legally enforceable interest in the proceeds of the third-party recovery.

Other methods of gerrymandering settlements to avoid subrogation interests have also been ruled illegal in recent years in Pennsylvania. A workers' compensation claimant cannot avoid the statutory subrogation lien by apportioning his award to pain and suffering as opposed to lost wages. *Thompson v. W.C.A.B. (U.S.F. & G. Co.)*, 801 A.2d 635 (Pa. Commw. Ct. 2002). This is because the subrogation rights of the employer or the insurance carrier encompass amounts which are required to be paid under the law. The subrogation lien cannot be affected by an arbitrary agreement between the claimant and third-party, apportioning the elements of damages for his injuries. A worker may not apportion his interest in a third-party recovery so as to defeat a workers' compensation carrier's subrogation interest. Any attempt to do so will be deemed voidable to the extent that it operates to defeat a subrogation lien for benefits paid as compensation for the same underlying injury. *Bumbarger v. Bumbarger*, 155 A.2d 216 (Pa. Super. 1959). The final nail in the gerrymandering coffin was pounded in by the Pennsylvania Supreme Court in *Gillette v. Wurst*. *Gillette*, supra. Gerrymandering a third-party settlement by claiming the damages recovered are for pain and suffering only, rather than for economic damages such as medical expenses and lost wages, or by coaching a widow to "give away" her third-party recovery, in an effort to avoid repayment of a workers' compensation lien, is no longer allowed in Pennsylvania.