

## TEXAS SUPREME COURT SPANKS PARTIES FOR ATTEMPTING TO SETTLE AROUND COMPENSATION LIEN



*Texas Mutual Ins. Co. v. Ledbetter*, 2008 WL 918575 (Tex. 2008).

On April 4, 2008, the Texas Supreme Court issued a particularly strong, pro-workers' compensation subrogation opinion in a case in which the plaintiff's attorney attempted to gerrymander a third-party settlement by dismissing all claims in a death case, except for claims of the deceased's estate. The case should send a strong message to plaintiffs and defendants alike, that conspiring to avoid repayment of a workers' compensation lien in Texas can carry heavy consequences.

Charles Ledbetter was electrocuted while working on a job for his employer. The workers' compensation carrier, Texas Mutual Insurance Company, paid \$6,000 in funeral expenses and began paying \$1,258 monthly death benefits to his widow and minor son. The family settled the third-party case for \$4.5 million two weeks before trial, and the carrier quickly intervened. At the settlement hearing, the family dismissed all claims except those of the deceased's estate, and claimed that the carrier wasn't subrogated to the estate's recovery, but could pursue the defendant on its own. The recovery was allocated \$2,388,545.40 to Ledbetter's estate (for pain and suffering before his death); \$2,063,912.60 to their attorney; \$47,542.00 to the ad litem, and nothing to the widow, minor child, adult daughters, or compensation carrier. Ledbetter had died intestate, so his widow was entitled to one-third of the estate and his children to the remainder. But there was no evidence regarding expenses or expected distributions by Ledbetter's estate, or any testimony regarding how this settlement benefitted the minor. To the contrary, the ad litem stated that the only reasons for approving the settlement were (1) the minor would get nothing until he was 18 or older, and (2) his mother "understands her obligation to her child" in the meantime. The trial court noted that the carrier had done nothing to further the litigation and had only recently intervened, struck the late-filed intervention, and approved the settlement, even though the non-suit and dismissal purportedly meant it no longer involved a minor.



The court of appeals held the trial court erred in striking the carrier's intervention, and in allocating 100 percent of the settlement to the estate, citing the limited evidence that Charles suffered pain before his death and the undisputed evidence that his widow and son suffered the loss of their sole means of support. However, the court of appeals declined to set aside the trial court's non-suit and reinstate Ledbetter's wife and son as parties. The Supreme Court reversed, invalidating the gerrymandering attempt, and holding that the trial court did not give the carrier "first money". The court held that a carrier can even intervene AFTER a judgment if it is getting manipulated by the parties, and that a third-party is liable to the carrier for conversion of the lien if it is complicit in the scheme. Although the exact cause of action against the third-party was not made clear, it should be referred to as "reimbursement pursuant to Texas Labor Code Chapter 417." The court said:

*"When an injured worker settles a case without reimbursing a compensation carrier, everyone involved is liable to the carrier for conversion - the plaintiffs, plaintiffs' attorney, and defendants. As between those parties, we have held that generally those who received the funds unlawfully (the plaintiffs and their attorney) should disgorge them rather than making the tortfeasors pay twice."*

The court ordered the carrier's intervention reinstated, and remanded the case with instructions for the trial court to protect the carrier's subrogation interests.

The case reinforces the notion that the carrier's right to reimbursement is a "first money" right, and sends a stern warning to all parties not to infringe on the carrier's statutory right of reimbursement. However, the carrier came perilously close to losing its rights by not actively intervening and becoming involved in the third-party litigation in a timely fashion. Subrogating carriers, especially those with large subrogation interests, should get subrogation counsel involved promptly in order to properly prevent the needless expense of having to undo gerrymandered settlements such as the one in *Ledbetter*.

