

TAKING ON THE "COMMON FUND" DOCTRINE

By Gary Wickert

Regardless of which area of insurance you practice in – workers' compensation, property and casualty, auto, etc. – your subrogation efforts have no doubt been hampered and have come face to face with the common fund doctrine. You aggressively investigate subrogation, place potential third parties on notice, and negotiate with third party carriers regarding recovery of your subrogation lien, only to find a plaintiff's lawyer holding out his hand and demanding one-third or more of your subrogation lien as an attorney's fee. The authority he cites for his right to take a large portion of your subrogation dollar is known as the "common fund doctrine."

Understanding this doctrine can greatly assist you in combating its harsh effects. The common fund doctrine is an exception to the "American Rule," which obligates each party in a lawsuit to pay its own attorneys' fees. This doctrine is relevant in situations where one party's success in litigation benefits others in a recognizable group. A classic example is a situation where a plaintiff's lawyer files a personal injury suit from which your med pay recovery is made. Without the benefit of a lawyer in that case, the plaintiff's lawyer indicates that he has done all the work which created the "common fund," for which he should receive compensation from you.

This principle is based in equity, requiring each member of the group that is benefited from the "common fund" to bear a portion of the cost of obtaining that fund. The common fund doctrine has been recognized as a valid principle by the courts of most states. Most states do not have a statute which requires payment of attorneys' fees by someone who has not employed the attorney, but yet benefits from the attorneys' services. On the other hand, most states interpret their state's common law such that a party who has borne the expense of litigation is entitled to compensation. The idea is that the common fund doctrine prevents unjust enrichment at the expense of the litigating party, this supposedly means unjust enrichment of the insurance company. The common fund doctrine applies even though you have not retained the lawyer making the claim under that doctrine.

Yet, simply because the common fund doctrine may apply, doesn't mean that a plaintiff's lawyer is automatically entitled to one-third of your subrogation interest. The courts of most states indicate that they must examine the facts of the particular case in order to determine appropriate compensation for a lawyer responsible for creating the "common fund". Some courts, such as Nebraska and Wisconsin, require notification by the attorney to parties who may benefit from successful litigation (such as an insurer) before pursuing a claim on their behalf. The notice must be timely, and give the other party an opportunity to choose its own counsel to represent its interest. Whether an attorney is entitled to compensation under the common fund doctrine and exactly what constitutes a reasonable fee requires a subjective analysis. Most states have their own set of factors to be considered, but states such as Nebraska include factors such as the nature of the services performed, the results obtained, and the customary charge for similar work. These general considerations are weighed by Nebraska and other state courts when determining a reasonable fee under the common fund doctrine.

But the common fund doctrine may be defended against. Awarding fees under the common fund doctrine is not automatic. The burden of proving entitlement to compensation usually rests with the attorney who is claiming the fee. The attorney must prove that his services were a "substantial benefit" to the insurer. In many states, carriers defeat a claim for attorneys' fees by the plaintiff's attorney when the plaintiff's attorney fails to prove that the benefit to the carrier was "substantial". Nebraska is an example of a state which holds that merely showing that the time was spent litigating on the part of the party's behalf is insufficient proof of this. In addition, states such as Wisconsin hold that the common fund doctrine is inapplicable when it is disavowed by contract. Examples include ERISA health benefit plans, and other policies which may include specific proscriptions against application of the common fund doctrine. Where the claim for compensation under the common fund doctrine cannot be defeated entirely, the insurer may be able to reduce the fee claimed by the plaintiff's attorney. This is usually accomplished by claiming that the fee is unreasonable. The basis of this defense is that the insurer did not contract with the insured's attorney, and therefore is not bound by the insured's fee arrangement. Paying a plaintiff's attorney one-third for simply writing a few demand letters is unconscionable.

Additionally, in Illinois and other states, an insurer may attempt to prevent a claim for compensation by notifying the insured's attorney of its intention to pursue its own subrogation interest. However, written notice alone is often inadequate in avoiding a claim under the common fund doctrine, as it must be coupled with "meaningful participation" by the carrier's own lawyer in pursuing its own claim. "Meaningful participation" has been held to include:

1. Informing the tortfeasors' insurance company that the insurer intends to pursue its own subrogation claim and that medical payments should not be included in a settlement with the insured;
2. Sending written notification to the insured's attorney indicating an unwillingness to pay the attorneys' fees throughout the period of litigation; and
3. Communicating with the insured's attorney about every element of the litigation, so that the insurer can be proactive in pursuing its own claim independently.

By negotiating directly with the tortfeasors' insurance carrier, you are sending a clear message to the insured's attorney that you intend to pursue your own claim without outside assistance. South Dakota courts have held that such active participation in the settlement process may allow the carrier to avoid paying the plaintiff's attorney a portion of your recovery as fees.

Aggressive subrogation efforts, tactful and considered utilization of subrogation counsel, and aggressive subrogation action from the claims handler's desk, are all effective tools to be used in combating the wasting of subrogation recoveries as a result of the common fund doctrine.
