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# TORT AND INSURANCE NEWSLETTER

Summer 2009 Issue

## Don't Fall Into the Hospital Lien Trap - Court of Appeals Decision Requires Close Analysis

In February 2009, the Tennessee Court of Appeals released an important decision regarding the application and impairment of hospital liens. See Shelby County Healthcare Corporation v. Nationwide Mutual Insurance Company, No. W2008-01922-COA-R3-CV, 2009 WL 302261 (Tenn. Ct. App. Feb. 6, 2009). In that case, Kevin Holt ("Holt") was injured in an automobile accident and was transported by ambulance to Regional Medical Center ("the Med") in Memphis. Holt incurred medical expenses totaling approximately \$33,000, for which the Med filed a hospital lien. In accordance with its policy of insurance issued to Holt, Nationwide Mutual Insurance Company ("Nationwide") paid the maximum amount of its medical benefits coverage, which totaled \$5,000. Of this amount, \$1,290 was paid to the ambulance service, Medic One, while the remaining \$3,710 was paid to the Med.

The Med filed suit alleging that Nationwide's payment to Medic One impaired its hospital lien. For damages, the Med sought the full amount of its lien—approximately \$33,000. Nationwide asserted that the lien statutes did not apply to contractual obligations between an insurer and its insured. Nationwide also argued that payments made to Medic One on behalf of its insured—even if the lien was otherwise applicable—did not impair the Med's lien.

The court rejected Nationwide's arguments. Specifically, the court held that the lien statute extends to insurance contracts. In other words, even if the claimant or insured does not file a tort suit, his or her recovery under a contract of insurance can impair a hospital lien. Next, the court held that the Med's lien was impaired because payments were made on Holt's behalf to Medic One without Nationwide having first obtained a release or satisfaction of the Med's lien, in contravention of Tennessee Code Annotated section 29-22-104(b)(1). Lastly, the court determined that Nationwide was liable for the full amount of the Med's lien—not just the limits of the Nationwide policy. Although a hospital lien ordinarily cannot exceed one-third of the claimant's total recovery, the court held that such limitation does not apply when a hospital seeks damages for the impairment of the lien instead of merely seeking to enforce its lien.

Based on the court's recent analysis of the applicable lien statutes in this case, it is critical that insurers fully investigate the possible existence of hospital liens. If a lien exists, the insurer must either direct all payable sums to the holder of the lien or obtain a release of the lien from the holder. Failure to do so may result in the insurer being liable for the full amount of the hospital lien, even if such amount exceeds the insured's policy limits.

## Tennessee Supreme Court Reverses Favorable Ruling for Insurers and Holds That Initiation of Foreclosure Proceedings Does Not Constitute Increased Risk of Loss or Hazard

In our "Summer 2008" edition, we discussed how foreclosure initiation might affect a mortgagee's interest in an insurance policy. Recall that under Tennessee Code Annotated § 56-7-804, a mortgagee is required to provide notification to an insurer of "any change of ownership or occupancy or increase of hazard which shall come to the knowledge of the mortgagee..." Included in our newsletter was a discussion of the Tennessee Court of Appeals' well-reasoned holding in U.S. Bank, N.A. v. Tennessee Farmers Mutual Insurance Company, 2007 WL 4463959 (Tenn. Ct. App. 2007) that commencement of foreclosure proceedings constituted an increase of hazard.

Unfortunately for insurers, earlier this year that decision was reversed by the Tennessee Supreme Court in U.S. Bank, N.A., v. Tennessee Farmers Mutual Insurance Company, 277 S.W.3d 381 (Tenn. 2009). Tennessee's high court concluded the opposite and opined that commencement of foreclosure proceedings does not constitute an increase of hazard or increased risk of loss. The result is that mortgagees are not required to notify insurers when they initiate foreclosure proceedings, under either a standard mortgage clause or Tennessee Code Annotated § 56-7-804.

Thus, short of future legislative changes in Tennessee, unless there is very specific policy language requiring a mortgagee to give notice to an insurer of the initiation of foreclosure proceedings, the failure to do so by the mortgagee will not constitute a defense to the payment of a claimed loss in cases where a loss occurs after the initiation of foreclosure proceedings.



# TORT AND INSURANCE NEWSLETTER

Summer 2009 Issue

## Tennessee Supreme Court Holds Insurance Coverage Information Not Discoverable--At Least for Now

In the recent case of James G. Thomas, Jr., Brother and Next of Kin of Karen G. Thomas, Deceased v. Elizabeth Oldfield, M.D., 2009 WL 225260 (Tenn. Feb. 2, 2009), the Tennessee Supreme Court somewhat reluctantly held that in a civil matter, a defendant's liability insurance coverage information is not discoverable.

The trial court in Thomas ruled that the insurance information at issue was subject to discovery. The Court of Appeals reversed the trial court and the Tennessee Supreme Court affirmed. The Tennessee Supreme Court held that, (1) information regarding a defendant's liability insurance is not "relevant to the subject involved in the pending action," and, (2) discovery of such information is not "reasonably calculated to lead to the discovery of admissible evidence." Thus, because the requested insurance coverage information did not satisfy the criteria established by Tennessee Rule of Civil Procedure 26, it did not constitute discoverable information.

In its opinion, the Tennessee Supreme Court noted that a number of states, following the amendment to Federal Rule of Civil Procedure 26(b) which now specifically allows for discovery of insurance information, also amended their rules of procedure to achieve the same result. However, the Court pointed out that Tennessee, when amending its Rule 26 after the federal amendment, did not include the provision expressly allowing for discovery of insurance information. Thus, despite the fact that forty-eight (48) other states allow for the discovery of insurance coverage information, this ruling affirms that Tennessee will not, at the present time, join the majority.

As a final note, while the Tennessee Supreme Court refused to include insurance coverage information in the category of "discoverable information," the Court did express its belief that "the time has come to align Tennessee" with the majority and allow discovery of insurance information. Upon this suggestion from the State's highest court, action by our legislature to enact an amendment to Tennessee Rule of Civil Procedure 26 allowing for the discovery of insurance coverage information would not be unexpected.

*RKRB attorney Bradford D. Box prepared and filed the amicus curiae brief in this lawsuit on behalf of the Tennessee Defense Lawyers Association, advocating for the result reached by the Tennessee Supreme Court.*

### MEET THE NEWEST PARTNERS AT RAINEY • KIZER • REVIERE & BELL PLC



SELLERS

We are pleased to announce that **Michelle Greenway Sellers** and **Keely N. Wilson** have been named partners in the firm. Michelle represents physicians, nurses, hospitals, and clinics in medical malpractice litigation and also practices in the area of automobile accident litigation. Keely's practice focuses on general civil litigation defense, including insurance coverage, insurance fraud, automobile accident litigation, and premises liability actions.



WILSON

### RKRB ATTORNEYS BRAD BOX AND JONATHAN STEWART COMPLETE BOSTON MARATHON

Our attorneys excel both inside the courtroom and out. Join us in extending congratulations to Tort and Insurance Group Practice members Brad Box and Jonathan Stewart for completing the Boston Marathon on April 20, 2009. Brad finished in 3:36:07 and Jonathan finished in 3:36:08.



Photo taken the night of the race at the Union Oyster House, the oldest restaurant in Boston.

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