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## Physical and Financial Injuries: The Common Fund Doctrine and Its Application Under the Illinois Health Care Services Lien Act

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# Physical and Financial Injuries: The Common Fund Doctrine and Its Application Under the Illinois Health Care Services Lien Act

AYLA ELLISON<sup>1</sup>

“By the law of nature it is fair that no one become richer by the loss and injury of another.”

- Shael Herman<sup>2</sup>

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## I. INTRODUCTION

A young man named Mark recently lost his job due to downsizing within his company. When he was terminated from his place of employment, not only did he lose his income, but he also lost his health insurance

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2. Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 258, 276 (1995) (stating that in 528 A.D., the Emperor Justinian ordered the compilation of Roman law now known as the *corpus juris civilis*. It contained the legal opinions of the Roman jurists).

benefits. Mark knew he had to find a new source of employment as soon as possible. He began the search, applied for many openings, and he received calls to come in for interviews from two of the companies he had applied to.

Mark scheduled his two interviews for the same day. On his way to his first interview, Mark's vehicle was struck by another vehicle that had failed to yield at a stop sign. The impact was on the front driver's side of the vehicle, and Mark was immediately rushed to the emergency room. Mark's injuries were not life threatening, and after two days in the hospital Mark was sent home in the care of his family.

A month after being discharged from the hospital, Mark received a bill in the mail for the treatment he had received in the emergency room at the hospital. The emergency room physician's fee was included on the bill. Mark had no way of paying the bill, due to his recent lack of income, and he felt he should be compensated for the injuries he was caused and the pain and suffering he had endured. Mark decided to hire a plaintiff's personal injury attorney and sue the other driver involved in the collision that caused the accident.

In the meantime, since the hospital had not received a payment from Mark, they attached a medical lien to his future settlements or monetary judgments. The physical therapist, who provided treatment to Mark while he was in the hospital, also imposed a separate medical lien.

Mark decided to hire a well-known personal injury attorney to represent him in his case against the other driver. Although the attorney charged more in fees than many of the other attorneys in the area, Mark thought the extra fee was worth a better chance for recovery from the driver. Litigation ensued, and Mark was right—the fee was worth it. His attorney was able to get a substantial judgment in Mark's favor.

All of Mark's medical bills were paid from the monetary judgment he received in his case. Even though the hospital, the treating physician, and the physical therapist benefitted from Mark's litigation, none had to contribute to his attorney's fees. No contribution was given because the Health Care Services Lien Act in Illinois does not require health care providers or health care professionals to contribute to plaintiffs' attorneys' fees in personal injury cases, even when they have attached a medical lien to the recovery from the cause of action. According to the Health Care Services Lien Act, an injured person's recovery, in the form of a judgment, award, compromise, or settlement, can be reduced as much as forty percent through the imposition of liens by health care providers and health care professionals, and there is no requirement for the lien holder to contribute to the plaintiff's attorneys' fees.<sup>3</sup> Accordingly, health care providers and

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3. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10 (West 2008).

professionals are being unjustly enriched by benefitting from a fund that they made no contribution to.

This Article will address the need for hospitals to contribute to plaintiff attorneys' fees, in cases in which the hospital will benefit from a judgment or settlement because they have attached a medical lien to a plaintiff's cause of action.

## II. HEALTH CARE SERVICES LIEN ACT

In Illinois, the Health Care Services Lien Act (the Act) allows a health care provider or health care professional to attach liens under specified circumstances.<sup>4</sup> According to the Act, the term "health care provider" includes the following categories: "licensed hospital, licensed home health agency, licensed ambulatory surgical treatment center, licensed long-term care facilities, or licensed emergency medical services personnel."<sup>5</sup> "Health care professional" includes the following categories: "licensed physician, licensed dentist, licensed optometrist, licensed naprapath, licensed clinical psychologist, or licensed physical therapist."<sup>6</sup> Hospitals will be the main focus of this discussion.

The liens imposed under the Health Care Services Lien Act are commonly referred to as medical liens.<sup>7</sup> The liens may be attached to causes of action brought by patients in order to recoup the amount of the hospital's charges for treatment.<sup>8</sup> In order to attach a medical lien, the patient's injury must be a result of the negligence of a third party.<sup>9</sup> If treatment is provided for such injuries and the patient fails to pay for the treatment, the Act allows a health care provider or professional to attach a lien.<sup>10</sup> Specifically,

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4. *Id.* at 23/1 (providing health care providers and health care professionals the option of attaching a lien in order to receive payment from a patient).

5. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/5 (West 2008) (providing definitions of "health care professional" and "health care provider" as used under the Act).

6. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/5 (West 2008) (providing definitions of "health care professional" and "health care provider" as used under the Act).

7. *See generally* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 21/1 (West 2008).

8. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/1 (West 2008) (giving health care providers and health care professionals the option of attaching a lien in order to receive payment from a patient).

9. *See* 42 C.F.R. § 447.15 (2014) (discussing when a medical lien may be attached).

10. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(a)-(b) (West 2008) (providing the process and formalities of attaching a medical lien and when it is appropriate to attach a lien).

the lien attaches to the debtor's future claims and causes of action.<sup>11</sup> The lien attaches to any verdict, award settlement, judgment, or compromise secured by the injured person.<sup>12</sup> In certain cases, the lien is a last option invoked by a health care provider in order to collect a payment owed.<sup>13</sup>

Although the sole purpose of medical liens is to ensure the provider receives payment for the services rendered, recovery is limited to certain actions.<sup>14</sup> A medical lienholder is not permitted to recover charges that do not stem from the injuries that the hospital provided treatment for and the patient is being compensated for.<sup>15</sup> In order to ensure that a lien is attached solely to recovery stemming from the accident for which the hospital provided treatment, the Act allows for an examination of health care records.<sup>16</sup>

The Health Care Services Lien Act is beneficial because the burden on hospitals is lessened by statutorily offering health care providers a method for securing payment.<sup>17</sup> From a policy viewpoint, the Act is beneficial because it induces hospitals "to receive . . . patient[s] injured in an accident, without first considering whether the patient will be able to pay the medical bills incurred."<sup>18</sup> The Act provides security in the sense that the hospital can

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11. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(a)-(b) (West 2008) (providing the process of attaching a medical lien).

12. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(a) (West 2008) (stating that a medical lien attached to any "verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his or her claim or right of action"). See Jeff Kaatz et al., *Illinois Law Update*, 98 ILL. B.J. 236, 237 (2010) (explaining how and when a medical lien attaches concerning the Health Care Services Lien Act).

13. See generally Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 21/1 (West 2008).

14. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 21/1 (West 2008) (providing the policy behind the legislatures action in enacting a statute in Illinois allowing health care or medical liens). See *Wise v. Soto*, 305 N.Y.S.2d 130 (1969); *In re Woods' Estate*, 144 N.Y.S.2d 880 (1955); *Republic Ins. Co. v. Shotwell*, 407 S.W.2d 864 (1966) (discussing the causes of action in which a medical lien may be attached).

15. See *Wise*, 305 N.Y.S.2d 130; *In re Woods' Estate*, 144 N.Y.S.2d 880; *Republic Ins. Co. v. Shotwell*, 407 S.W.2d 864 (Tex. Civ. App. 1966) (discussing the causes of action in which a medical lien may be attached).

16. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/25 (West 2008) (providing that health care records may be examined in order to determine the extent of injuries pertaining to a specific accident and a specific patient).

17. *Blankenbaker v. Jonovich*, 71 P.3d 910, 915 (2003) (discussing some of the strong policy arguments in favor of statutes allowing health care providers and professionals to attach medical liens). The opinion states "the underlying purpose of the health care provider lien statutes, which are designed to 'lessen the burden on hospitals and other medical providers imposed by non-paying accident cases.'" *Id.* at 914 (quoting *LaBomard v. Samaritan Health Sys.*, 991 P.2d 246, 251 (Ariz. Ct. App. 1998)).

18. *Univ. of S. Ala. v. Progressive Ins. Co.*, 904 So.2d 1242, 1246-47 (Ala. 2004) (discussing one of the strong policy arguments in favor of statutes which allow health care professionals and providers to attach medical liens to causes of actions invoked by patients who are indebted to them). The opinion states, "[w]e note that '[t]he purpose of Alabama's

receive the patient, and if the patient is unable to pay, a lien can be attached.<sup>19</sup> To help ensure that payment is provided, the Act requires notice to be given to the health care provider if the injured individual receives a judgment, settlement, award, or compromise.<sup>20</sup>

Although the Act lessens the burden on hospitals, the payment security provided is limited.<sup>21</sup> Many states, including Illinois, have placed restrictions on the amount a health care provider may recover from placing a lien on settlements or judgments.<sup>22</sup>

In Illinois, the Health Care Services Lien Act states that a hospital may not “receive more than one-third of the verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his or her claim or right of action.”<sup>23</sup> This does not mean the health care provider is entitled to one-third but that is the maximum that they may receive.<sup>24</sup> The Act further provides, if there are liens totaling forty percent or more of a settlement or judgment, liens imposed by a hospital shall not make up more than twenty percent.<sup>25</sup> Accordingly, courts do not have the authority to re-

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hospital-lien statute is, by giving a hospital an automatic lien for the reasonable value of its services, to induce it to receive a patient injured in an accident, without first considering whether the patient will be able to pay the medical bills incurred.” *Id.* (quoting *Ex parte Univ. of S. Ala.*, 761 So.2d 240, 244 (Ala. 1999)).

19. See Alaina Stout, *Statutory Liens for Health Care Providers: The Effectiveness of Laws Allowing Providers to Assert Liens on Settlements or Judgments from Third Party Tortfeasors*, 18 HEALTH L. 10 (2006) (discussing how allowing the attachment of medical liens provides health care providers with a sense of security).

20. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/15 (West 2008) (requiring notice to be given to a health care provider of any recovery by a patient which there is a medical lien attached).

21. See Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10 (West 2008) (providing the restrictions and limitation which are put on recovery by health care providers and health care professionals under the Act).

22. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10 (West 2008); IND. CODE ANN. § 32-33-4-3(c) (West 2013); KAN. STAT. ANN. § 65-406 (West 2008); MASS. GEN. LAWS ANN. ch. 111, § 70A (West 2003); MO. ANN. STAT. § 430.230 (West 2008); N.J. STAT. ANN. § 2A:44-38 (West 2008); TENN. CODE ANN. § 29-22-101(b) (West 2008).

23. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(c) (West 2008) (setting the maximum amount of recovery for health care professionals and providers who have attached a medical lien to a patient’s recovery in the same cause of action related to the same injury).

24. See Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(a) (West 2008) (setting the maximum amount of recovery for a health care provider who has attached a medical lien on a patient’s cause of action).

25. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(c)(2) (West 2008) (providing that when there are liens compromising forty percent of a specific judgment or settlement under the Act, hospital or health care liens can only make up twenty percent).

duce the amount a health care provider recovers through imposition of a lien as long as the recovery does not exceed the statutory limit.<sup>26</sup>

The above noted restrictive measures were put into place to help ensure the patient or victim still receives a certain amount of their recovery even when a medical lien has been attached.<sup>27</sup> One court stated the caps on hospital liens serve to ensure that a patient retains “sufficient funds to address other losses resulting from the tortious injury.”<sup>28</sup> The policy reasons for the introduction and implementation of caps on hospital liens appear beneficial to an injured party, but this commentary will later address how a plaintiff’s recovery is sometimes miniscule even with the caps in place. This is due to the out-of-pocket expense associated with paying attorneys’ fees, which health care providers currently do not have to contribute to.

If additional charges remain unpaid, even after the medical lien is satisfied, the health care provider can still recover the remaining charges.<sup>29</sup> The Health Care Services Lien Act does not limit “the right of a health care professional or health care provider, or attorney, to pursue collection, through all available means, of its reasonable charges for the services it furnishes to an injured person.”<sup>30</sup> Accordingly, a hospital may still seek payment after a lien has been fulfilled.<sup>31</sup>

#### A. THE PROCESS OF ATTACHING LIENS

In order to fully understand the Health Care Services Lien Act and its application, it is necessary to understand what a lien actually is. Liens can

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26. Dallas Cnty. Hosp. Dist. v. Perrin, 694 S.W.2d 257 (Tex. App. 1985). See Illini Hosp. v. Bates, 482 N.E.2d 235 (Ill. App. Ct. 1985). See also Baker v. Iowa Methodist Med. Ctr., 542 N.W.2d 847 (Iowa 1996) (providing that courts do not have the authority to lower the amount of a lien as long as the lien is not exceeding the statutory maximum).

27. Mercy Hosp. & Med. Ctr. v. Farmers Ins. Grp. of Cos., 932 P.2d 210, 212 (Cal. 1997) (discussing the authority of courts relating to the amount of recovery by a health care provider or health care profession who has attached a lien to a patient’s cause of action).

28. *Id.* (discussing the policy behind setting a statutory maximum for the amount of recovery from a medical lien by a hospital or physician).

29. See Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/45 (West 2008).

30. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/45 (West 2008) (providing that health care providers may use other means in order to receive full payment for their reasonable charges even after a medical lien has been satisfied. The Act states “the right of a health care professional or health care provider, or attorney, to pursue collection, through all available means, of its reasonable charges for the services it furnishes to an injured person”).

31. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/45 (West 2008) (providing that health care providers may use other means in order to receive full payment for their reasonable charges even after a lien has been satisfied).

arise in three ways.<sup>32</sup> They can arise by statute, contract law, or common law.<sup>33</sup> Typically, liens are imposed upon property, and the lien creates an interest for a creditor in the property.<sup>34</sup> When a lien is attached to property, the lien exists until the debt owed is paid in full.<sup>35</sup>

In Illinois, a lien is defined as:

A charge upon property, either real or personal, for the payment or discharge of a particular debt or duty in priority to the general debts or duties of the owner; an encumbrance upon property as security for the payment of a debt; or a hold or claim on another's property as security for the payment or performance of a debt, duty, or other obligation.<sup>36</sup>

Medical liens are created by statute, but rather than attaching to property, they attach to legal actions and settlements in which injured persons receive monetary compensation.<sup>37</sup>

In order for a medical lien to attach, there are certain formalities that must be satisfied. According to the Health Care Services Lien Act,

[t]he lien shall include a written notice containing the name and address of the injured person, the date of the injury, the name and address of the health care professional or health care provider, and the name of the party alleged to be liable to make compensation to the injured person for the injuries received.<sup>38</sup>

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32. 51 AM. JUR. 2D *Liens* § 7 (2011) (providing the three ways in which a lien may come into being).

33. See 51 AM. JUR. 2D *Liens* § 7 (2011) (providing the three ways in which a lien may come into being).

34. See Stout, *supra* note 19 (discussing the way liens attach traditionally).

35. See *id.* (discussing the process of attaching a lien and the process of satisfying a lien generally).

36. R.J. Robertson, *Attorney's Liens in Illinois: An Analysis and Critique*, 30 S. ILL. U. L.J. 1, 2 (2005) (quoting *Eastman v. Messner*, 721 N.E.2d 1154, 1156 (Ill. 1999)) (providing the definition of a lien in Illinois).

37. See generally Carol A. Crocca, Annotation, *Construction, Operation, and Effect of Statute Giving Hospital Lien Against Recovery from Tortfeasor Causing Patient's Injuries*, 16 A.L.R. 5th 262 (1993). See also David L. Powell, *Florida's Hospital Lien Laws*, 21 FLA. ST. U. L. REV. 223 (1993) (providing that medical liens are created by statute).

38. Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(b) (West 2011) (providing the necessary requirements for creating and attaching a valid medical lien).



### III. LIENS IMPOSED BY HEALTH CARE PROVIDERS AND ATTORNEYS

It is the job of the individual states to create statutes that allow hospitals to impose a lien upon an injured individual's future settlement or monetary judgment, because in the absence of a statute, the hospital cannot impose the lien.<sup>39</sup> Since Illinois has a statutory provision covering hospital liens, settlements recovered by patients in the form of compensation for personal injuries are subject to hospital liens for outstanding charges. A hospital in Illinois is entitled to a lien for: (1) hospital care, (2) treatment, or (3) maintenance provided to the patient that is related to the injury.<sup>40</sup>

In order to have a valid lien, most states require notice be given to the injured party that a lien is being asserted.<sup>41</sup> In Illinois, the Health Care Services Lien Act provides that "lien notice shall be served on both the injured person and the party against whom the claim or right of action exists."<sup>42</sup> The Act further provides that, after notice has been provided and liability has been imposed, payment shall be made directly to the lienholder.<sup>43</sup>

Along with health care providers, attorneys are also permitted to attach liens in order to receive payment.<sup>44</sup> "Merely having a claim against a client

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39. *Thomas v. Okla. Orthopedic & Arthritis Found. Inc.*, 903 P.2d 279, 284 (Okla. 1995) (providing that it is necessary for a state to enact a statute which allows a health care professional or provider to attach a medical lien, because without a statute they have no right to attach a lien to a cause of action in order to receive payment from the patient they provided treatment for).

40. *See* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(a) (West 2011). *See Ex parte* Univ. of S. Ala., 761 So.2d 240 (Ala. 1999) (providing the services for which a hospital can recover by attaching a medical lien to a patient's cause of action).

41. *See* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/15 (West 2011) (providing the requirements of notice pursuant to the Act); Stout, *supra* note 19 (providing that notice must be given to a health care professional or provider if a patient, against whose recovery they have attached a lien, earns recovery in a lawsuit related to the treatment which they received at the hospital).

42. *See* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(b) (West 2011) (providing who is required to receive notice pursuant to the Act).

43. *See* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(e) (West 2008) (stating "[p]ayments under the liens shall be made directly to the health care professionals and health care providers. For services provided under an all-inclusive rate, payments under liens shall be made directly to the entity that bills the all-inclusive rate"); Steven Flower, Note, *Toward Correcting the Misapplication of Subrogation Doctrine in California Healthcare*, 77 S. CAL. L. REV. 1039, 1066 (2004) (providing that typically payments are made to the lien holder).

44. *See* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(c)(2) (West 2011) (providing that attorneys may attach liens to an individual's settlement or judgment). *See* Attorney Lien Act, 770 ILL. COMP. STAT. ANN. 5/0.01 (West 2011).

for the payment of fees is not sufficient to create a lien . . . .”<sup>45</sup> An attorney must attach the lien to property or, in some circumstances, to a cause of action.<sup>46</sup>

The liens attorneys impose are relevant under the Health Care Services Lien Act, because an attorney may attach a lien to the same cause of action that a health care provider has also attached a lien to.<sup>47</sup> In many jurisdictions, if an attorney is successful at attaching a lien, that attorney has first priority in payment.<sup>48</sup>

As with the liens imposed by health care providers, there are limitations imposed upon the recovery an attorney may receive under the Health Care Services Lien Act.<sup>49</sup> The Act provides: “If the total amount of all liens under this Act meets or exceeds 40% of the verdict, judgment, award, settlement, or compromise, the total amount of all the liens of attorneys under the Attorneys Lien Act shall not exceed 30% of the verdict, judgment, award, settlement, or compromise.”<sup>50</sup>

In order to fully understand the relationship between the Illinois Health Care Services Lien Act and the Common Fund Doctrine, it is necessary to examine the relationship between attorneys’ liens and health care liens. Some states give priority to attorneys’ liens over medical liens attached by health care providers.<sup>51</sup> These states will not allow medical liens to be paid until all attorneys’ liens have been taken care of.<sup>52</sup> This method is expressly noted in the law in many states, “presumably to encourage attor-

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45. Robertson, *supra* note 36, at 2 (providing the circumstances when an attorney may attach a lien on a client’s recovery in order to receive payment for the services they have provided).

46. *See id.* (providing the circumstances when an attorney may attach a lien on a client’s recovery in order to receive payment for the services they have provided). *See also* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/1 (West 2011).

47. *See* Attorney Lien Act, 770 ILL. COMP. STAT. ANN. 5/0.01 (West 2011). *See also* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/1 (West 2011) (providing that attorneys may attach liens to an individual’s settlement or judgment).

48. *See* Robertson, *supra* note 36, at 2 (providing the incentive for attorneys to attach a lien on a client’s recovery).

49. *See* Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(c) (West 2011).

50. *Id.* (providing if there are liens totaling forty percent or more imposed upon a patient’s recovery, the attorney’s liens shall not exceed thirty percent of the recovery).

51. *See* Daniel Saar, Note, *Blindsided (Again): Iowa Hospitals’ Abuse of the Hospital Lien Statute and What Has Been Done to Correct It*, 56 DRAKE L. REV. 463, 470 (2008) (noting that, in some jurisdictions, attorneys’ fees are given priority over medical liens).

52. *See, e.g.*, IND. CODE ANN. § 32-33-4-2 (West 2002) (“[The hospital’s lien] is junior and inferior to all claims for attorneys’ fees, court costs, and all other expenses contracted for or incurred in the recovery of claims or damages for personal injuries as described in this chapter.”).

neys to actually pursue their clients' cases zealously with the hope that they will be paid for the time they invest in the case."<sup>53</sup>

In Illinois, this is a nonissue. As noted above, the Health Care Services Lien Act restricts a health care provider's recovery to one-third of a settlement or judgment and the total amount of liens under the Act to forty percent.<sup>54</sup> The Act also restricts an attorney's recovery to thirty percent.<sup>55</sup> Accordingly, if a health care provider and an attorney both have liens on the same settlement, their combined recovery could never exceed seventy percent by collecting through the attachment of lien process.<sup>56</sup> If a lien is not completely satisfied by the amount recovered in a settlement or judgment, healthcare providers and attorneys may pursue other means of reimbursement.<sup>57</sup>

#### IV. THE COMMON FUND DOCTRINE

In the late 1800's, attorneys began using what has become known as a common fund in litigation.<sup>58</sup> Today, the Common Fund Doctrine provides for the law that applies to common fund litigation. The doctrine states 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 attorney's fee from the fund as a whole."<sup>59</sup> The policy behind the creation of this doctrine is to help prevent freeloading by those who benefit but do not contribute.<sup>60</sup>

The Common Fund Doctrine is based on equitable principles.<sup>61</sup> Underlying the doctrine is the "equitable concept" that the "beneficiaries of [the] fund . . . will be unjustly enriched by the attorney's efforts" unless they

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53. Saar, *supra* note 51, at 594. See, e.g., IND. CODE ANN. § 32-33-4-2 (West 2002).

54. See Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10(c) (West 2011) (providing the maximum percentage of recovery for medical liens in Illinois pertaining to a specific cause of action and a specific injury).

55. See *id.* (providing the maximum percentage of recovery for attorneys' liens in Illinois pertaining to a specific cause of action and a specific injury).

56. See Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/10 (West 2011).

57. See Health Care Services Lien Act, 770 ILL. COMP. STAT. ANN. 23/45 (West 2011) (providing that health care providers may use other means, besides attaching a lien, to receive reimbursement for the services which have been rendered to the patient).

58. See Bruce R. Braun & W. Gordon Dobie, *Litigating the Yankee Tax: Application of the Lodestar to Attorneys' Fee Awards in Common Fund Litigation*, 23 FLA. ST. U. L. REV. 897, 900-01 (1996) (discussing the origination of the Common Fund Doctrine).

59. Scholtens v. Schneider, 671 N.E.2d 657, 662 (Ill. 1996) (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)) (describing how a common fund works in reference to who is responsible for paying into the fund).

60. See *id.* (discussing some of the policy arguments in favor of a common fund and the reasons behind the creation of the Common Fund Doctrine).

61. See Braun & Dobie, *supra* note 58, at 901.

contribute to the costs of the litigation.<sup>62</sup> Accordingly, in cases where a common fund is utilized, the costs associated with litigation, specifically attorneys' fees, are distributed equally among all members of the designated class.<sup>63</sup>

Today, common funds are frequently used in class action cases.<sup>64</sup> The doctrine typically only applies in class action suits in which there is a possibility of monetary recovery.<sup>65</sup> Utilization of a common fund in this type of litigation works well because a class action settlement must be approved by the court.<sup>66</sup> Before approving a proposed settlement, the court is required to evaluate the terms of the agreement to make sure it is fair and reasonable.<sup>67</sup> This evaluation includes a careful assessment of how attorneys' fees are handled.<sup>68</sup> This evaluation is vital because attorneys' fees are typically the largest charge to a common fund.<sup>69</sup> Although common funds are typically used in class action suits, the Common Fund Doctrine has also been applied in insurance subrogation claims and wrongful death cases involving an intervener.<sup>70</sup>

In Illinois, the Health Care Services Lien Act does not address whether a health care provider, such as a hospital, is responsible for attorneys' fees pursuant to the Common Fund Doctrine.<sup>71</sup> Even though the Act is silent on this issue, Illinois courts have held the Common Fund Doctrine does not apply to medical liens attached by health care providers.<sup>72</sup> Not only have Illinois courts held the doctrine does not apply to medical liens, but they are also yet to apply the Common Fund Doctrine to any debtor/creditor relationship, which is created when a hospital provides services in the form of

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62. Baier v. State Farm Ins. Co., 361 N.E.2d 1100, 1102 (Ill. 1977).

63. See Brooks Magratten et al., *How Do Courts Calculate Attorney Fee Awards?*, 39 BRIEF 52, 57 (2009) (discussing the Common Fund Doctrine's roots in equity).

64. *Id.*

65. Bennet A. McConaughy, *Back to the Future: Use of Percentage Fee Arrangements in Common Fund Litigation*, 12 U. PUGET SOUND L. REV. 43 (1988-1989) (discussing the types of cases the Common Fund Doctrine is typically utilized in, specifically, which types of class action cases).

66. FED. R. CIV. P. 23(e) (providing the procedure for class action lawsuits).

67. *Id.*

68. Strong v. Bellsouth Telecomms., 137 F.3d 844, 850 (5th Cir. 1998). See *In re AT&T*, 455 F.3d 160, 166 (3d Cir. 2006) (discussing the examination of attorneys' fees to make sure they are reasonable).

69. McConaughy, *supra* note 65 (providing that attorneys' fees are typically the largest charge against a common fund).

70. Kaatz et al., *supra* note 12, at 237.

71. Howell v. Dunway, 924 N.E.2d 1190 (Ill. App. Ct. 2010) (providing that the Health Care Services Lien Act in Illinois does not directly state whether the Common Fund Doctrine applies), *rev'd on other grounds*, Wendling v. S. Ill. Hosp. Servs., 242 Ill. 2d 261 (2011). See Kaatz et al., *supra* note 12, at 237.

72. See Kaatz et al., *supra* note 12, at 237 (outlining the current state of the law and the policy reasons used by courts in supporting their decisions in upholding that law).

treatment and a patient fails to repay the debt.<sup>73</sup> Courts have stated that hospitals do not directly benefit from the common fund; therefore, they are not unjustly enriched by the efforts of an attorney obtained by a plaintiff.<sup>74</sup>

## V. ATTORNEYS' FEES

Since this Article discusses hospitals paying their portion of attorneys' fees, before examining how medical liens, attorney liens, and the Common Fund Doctrine intertwine, it is important to understand how attorneys' fees are calculated. The American Rule states that, "absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorneys' fees and costs, and may not recover those fees and costs from an adversary."<sup>75</sup> This rule generally does not allow for attorneys' fees to be shifted from one party to the other, such as from a defeated party to a prevailing party.<sup>76</sup> Accordingly, attorneys' fees are typically not interfered with by the courts.<sup>77</sup> Clients and their counsel usually discuss and agree to what attorneys' fees will be in a case.<sup>78</sup> "However, there are occasions in which courts use their power to set fees for attorneys. One such occurrence is in common fund cases."<sup>79</sup>

The common fund exception to the general American Rule developed out of equitable principles.<sup>80</sup> The exception is based on the notion that a party who is involved in litigation that benefits others should be awarded attorneys' fees.<sup>81</sup> Since attorneys' fees in common fund cases are paid out of a "fund that has been created for the successful litigant due to the attor-

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73. *Trevino v. HHL Fin. Servs., Inc.* 945 P.2d 1345, 1349 (Colo. 1997) (discussing the concept of unjust enrichment and the part it plays common fund cases).

74. *See id.*

75. *Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 739 N.E.2d 1263, 1271 (Ill. 2000) (providing the general American Rule relating to attorneys' fees and the recovery of fees in litigation).

76. Brian R. Walding, *Common Fund Cases: How and When Should Attorneys Be Paid?*, 27 J. LEGAL PROF. 265 (2002-2003) (discussing the American Rule pertaining to attorneys' fees).

77. *Id.* (noting that courts typically do not interfere when a client and their counsel have agreed to attorneys' fees).

78. *Id.* (noting that a client and their attorney typically discuss and agree to attorneys' fees).

79. *Id.*

80. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939) (discussing the common fund exception to the general American Rule regarding allocation of attorneys' fees).

81. *Chambers*, 501 U.S. at 45 (1991). *See Sprague*, 307 U.S. at 164 (1939) (discussing the common fund exception to the general American Rule regarding allocation of attorneys' fees).

ney's efforts," the result is a "sharing or spreading of the fees among those benefiting from the litigation."<sup>82</sup>

Since the origination of common fund cases, courts have been conscious of the amount to be awarded in attorneys' fees.<sup>83</sup> "Attorneys' fees may be the highest priority in fund allocation, other than the award to clients."<sup>84</sup> This is largely because attorneys' fees are typically the largest charge against a common fund.<sup>85</sup> "[C]ourts have faced the issue of what method should be used in calculating attorneys' fees, as well as the priority attorneys' fees should be given."<sup>86</sup>

Today, a majority of courts use either the lodestar method or the percentage of recovery method in calculating attorneys' fees.<sup>87</sup> The Screen Extras Method is also utilized in some jurisdictions.<sup>88</sup> Regardless of the method used, courts generally do not compensate fee applicants for time spent on unsuccessful claims.<sup>89</sup>

#### A. LODESTAR METHOD

The Lodestar Method requires the court to multiply an attorney's hourly rate by the total number of hours worked.<sup>90</sup> An attorney's hourly rate may be based on any of the following: (1) the attorney's normal billing rate, (2) the attorney's status, (3) a reasonable rate, or (4) the prevailing rate in the community for similar legal services.<sup>91</sup> Although this method provides a mathematical equation for determining the proper amount of fees, there are downfalls associated with the Lodestar Method.

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82. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (discussing the result of attorneys' fees being paid from a common fund).

83. Bruce Braun et al., *Litigating the Yankee Tax: Application of the Lodestar to Attorneys' Fee Awards in Common Fund Litigation*, 23 FLA. ST. U. L. REV. 897 (discussing the courts' consciousness of attorneys' fees).

84. Walding, *supra* note 76 (discussing the importance associated with courts thoroughly analyzing the calculation of attorneys' fees in common fund litigation).

85. McConaughy, *supra* note 65 (providing that attorneys' fees are typically the largest charge against a common fund).

86. Walding, *supra* note 76.

87. Magratten et al., *supra* note 63, at 52 (discussing the methods available for calculating attorneys' fees).

88. McConaughy, *supra* note 65, at 47 (discussing the Screen Extras Method for calculating attorneys' fees).

89. *See Certain v. Potter*, 330 F. Supp. 2d 576, 584-85 (M.D. N.C. 2004) (noting that fee applicants are typically not compensated for the time spent on unsuccessful claims).

90. Magratten et al., *supra* note 63 (describing the Lodestar Method for calculating attorneys' fees).

91. *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) (providing the method for setting or determining an attorney's hourly rate when utilizing the Lodestar Method for calculating attorneys' fees in a common fund case).

With this method there have been extensive reports of “excessive hours, duplicative or unjustifiable work, early settlement disincentive, lack of flexibility and predictability, and an increased burden on the judicial system.”<sup>92</sup> Judicial efficiency is also negatively impacted by the time it takes courts to review the hours reported by the attorneys involved in the case.<sup>93</sup> To help mitigate some of these issues, hourly based fee methodologies for calculating attorneys’ fees are often times adjusted through “multipliers.”<sup>94</sup> Multipliers can include such factors as risk of the case and exceptional results.<sup>95</sup>

## B. PERCENTAGE METHOD

Traditionally, courts “awarded a fee based upon a reasonable percentage of the common fund” as a whole.<sup>96</sup> This method for calculating attorneys’ fees is performed by taking a percentage of the prevailing party’s recovery and applying it to attorneys’ fees.<sup>97</sup> The following factors are utilized in determining the percentage to be awarded in attorneys’ fees: (1) “time and labor required,” (2) “novelty and difficulty of the questions” involved, (3) skills necessary to perform the legal tasks, (4) attorney’s preclusion from other employment, (5) “customary fee,” (6) nature of fee, (7) “time limitations imposed,” (8) “amount involved and the results obtained,” (9) “[t]he experience, reputation, and ability of the attorneys,” (10) “[t]he undesirability of the case,” (11) “[t]he nature and length of the professional relationship with the client,” and (12) “[a]wards in similar cases.”<sup>98</sup>

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92. McConaughy, *supra* note 65, at 45 (providing some of the disadvantages associated with the Lodestar Method of calculating attorneys’ fees).

93. Walding, *supra* note 76, at 270 (discussing some of the disadvantages associated with courts utilizing the Lodestar Method for calculating appropriate attorneys’ fees in common fund cases).

94. McConaughy, *supra* note 65, at 47 (discussing “multipliers” in the Lodestar Method and how they are utilized).

95. *Id.* (providing examples of multipliers that are used in some of the methods for calculating attorneys’ fees).

96. Braun & Dobie, *supra* note 58, at 901 (discussing the historic application and the origination attorneys’ fees and a common fund).

97. Camden I Condo. Ass’n, Inc. v. Dunkle, 946 F.2d 768, 774-75 (11th Cir. 1991) (discussing the percentage method for calculating attorneys’ fees in common fund cases).

98. Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated by* Blanchard v. Bergeron, 489 U.S. 87 (1989) (providing the “Johnson Factors” for determining what percentage should be awarded in attorneys’ fees in common fund litigation).

From the beginning, this method had some apparent problems.<sup>99</sup> The United States Court of Appeals for the Third Circuit held in the 1970's that "the percentage method did not produce rational and consistent results."<sup>100</sup>

There are also benefits to this method. Since class counsel receives a percentage of the class recovery, the plaintiffs' attorneys' fees rise proportionately with a rise in the class recovery when this method is used.<sup>101</sup> Hence, the attorneys will receive the best fee when they obtain the best recovery for the class.<sup>102</sup> Under the percentage approach, the class members and the class counsel have the same interest—maximizing the recovery of the class.<sup>103</sup>

### C. SCREEN EXTRAS METHOD

The Screen Extras Method focuses more on the factors, which were referred to as multipliers in the Lodestar method.<sup>104</sup> When using the Screen Extras Method, the court will consider the following:

- (1) Time and labor required;
- (2) novelty and difficulty of the questions involved;
- (3) skill requisite to perform the legal service properly;
- (4) preclusion of other employment by the attorney due to acceptance of the case;
- (5) customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) amount involved and the results obtained;
- (9) experience, reputation and ability of the attorneys;
- (10) undesirability of the case;

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99. See Braun & Dobie, *supra* note 58, at 901 (noting there were problems associated with the method courts traditionally used to calculate attorneys' fees).

100. *Id.* at 902 (discussing the initial drawbacks of the methods used in calculating attorneys' fees under the Common Fund Doctrine).

101. Reagan W. Silber & Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Call Counsel's Response*, 17 REV. LITIG. 525, 534 (1998) (discussing the percentage method, which is used by some courts in calculating attorneys' fees).

102. *Id.*

103. *Id.*

104. McConaughy, *supra* note 65, at 47 (discussing the Screen Extras Method used by courts in some jurisdictions for calculating attorneys' fees).



- (11) nature and the length of the professional relationship with the client; and  
 (12) awards in similar cases.<sup>105</sup>

The method lacks a mathematical equation, which can be applied to calculate attorneys' fees, and it entails a great deal of discretion by the courts given the numerous factors to be considered.

## VI. APPLICATION OF THE COMMON FUND DOCTRINE UNDER THE HEALTH CARE SERVICES LIEN ACT

Given the earlier discussion of the relationship between medical liens imposed by hospitals and attorney liens imposed to recoup fees, the question is whether a hospital that benefits from a common fund should be responsible for contributing to the attorneys' fees in that case.

Some jurisdictions require hospitals to contribute to attorneys' fees.<sup>106</sup> These courts allow the health care lien imposed by the hospital to be reduced, instead of requiring the hospital to make payment after fulfilling its lien.<sup>107</sup> The lien can only be reduced in an amount to account for their pro-rata share of the patients' attorneys' fees in their actions against the tortfeasors.<sup>108</sup> These courts use fairness as their justification for allowing the reduction.<sup>109</sup> They believe fairness is achieved by requiring health care providers to contribute to the fees for the attorney who ensured the recovery of the funds from the tortfeasor.<sup>110</sup>

Illinois has not adopted the above view,<sup>111</sup> holding the Common Fund Doctrine does not apply to the relationship created between a hospital and a patient.<sup>112</sup> In *Maynard v. Parker*, the Illinois Supreme Court stated that whether the Common Fund Doctrine applies is to be determined by the rela-

105. *Id.* at 47-48 (discussing the factors, also known as multipliers, considered in the Screen Extras Method, which is used in some jurisdictions for calculating attorneys' fees).

106. *E.g.*, *Alaska Native Tribal Health Consortium v. Settlement Funds ex rel. Ridley*, 84 P.3d 418, 431 (Alaska 2004); *Martinez v. St. Joseph Healthcare Sys.*, 871 P.2d 1363, 1366-67 (N.M. 1994) (providing that hospitals should contribute to attorneys' fees in cases where they benefit, the court stated, "it would be fundamentally unfair to allow the Hospital to collect on its lien without paying its prorated share of the legal expenses").

107. *E.g.*, *Alaska Native Tribal Health Consortium*, 84 P.3d at 422.

108. *E.g.*, *id.* at 421.

109. *Id.* ("[T]he situation is analogous to the [health care provider] filing suit itself, making a full recovery, and then paying its attorneys' their fees.").

110. *See id.* at 418.

111. *See Howell v. Dunway*, 924 N.E.2d 1190 (Ill. App. Ct. 2010), *rev'd sub nom. Wendling v. S. Ill. Hosp. Serv.*, 950 N.E.2d 646 (Ill. 2011).

112. *Maynard v. Parker*, 387 N.E.2d 298 (1979). *See Howell*, 924 N.E.2d 1190 (holding that the Common Fund Doctrine does not apply to medical liens imposed by a health care provider in Illinois).

relationship created between the parties.<sup>113</sup> The court further stated that while the Common Fund Doctrine applied to a traditional subrogor/subrogee relationship, it did not apply to a creditor/debtor relationship.<sup>114</sup> The court supported its holding by distinguishing between the two types of relationships. The court stated that in a creditor/debtor relationship, the debtor was obligated to pay even without the creation of the common fund (the benefit to the creditor from the creation of the fund is merely incidental), while in a subrogor/subrogee relationship, the subrogor was obligated to pay only if a common fund was created.<sup>115</sup>

Although the court in *Maynard* concentrated solely on the relationship between the parties, the relationship is not conclusive as to whether one of the parties will be unjustly enriched, which is what the Common Fund Doctrine was created to prevent. “A person is unjustly enriched if the retention of the benefit would be unjust.”<sup>116</sup> Although this definition is vague, Illinois courts have broken down the concept of unjust enrichment, and the elements needed for an unjust enrichment claim. The Illinois Supreme Court established the elements of unjust enrichment in *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*<sup>117</sup> The court held the necessary elements are: (1) the defendant receives a benefit (2) to the plaintiff’s detriment, and (3) the defendant’s retention of that benefit violates the principles of justice, equity, and good conscience.<sup>118</sup>

The term “benefit” needs to be examined, concerning the first element, in order to determine if unjust enrichment has occurred. Benefit has been given a broad definition when pertaining to the doctrine of unjust enrichment.<sup>119</sup> Some courts have held a benefit can be conferred in the form of a service or adding to another’s “security or advantage.”<sup>120</sup> Illinois courts have not provided a definition of benefit when dealing with unjust enrich-

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113. *Maynard*, 387 N.E.2d at 300. See *Howell*, 924 N.E.2d at 1193 (providing that the relationship between the parties needs to be examined and is extremely important in determining whether the Common Fund Doctrine should apply).

114. *Maynard*, 387 N.E.2d at 299 (holding that the Common Fund Doctrine did not apply to the debtor creditor relationship that was created between a healthcare provider, a hospital, and a patient).

115. *Id.* at 300 (making distinctions between the subrogor/subrogee relationship and the creditor/debtor relationship, which is created between a hospital and a patient).

116. RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. a (1937) (providing a definition of unjust enrichment).

117. See *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989) (providing the elements of an unjust enrichment claim in Illinois).

118. *Id.* at 678-79 (helping to establish the necessary elements of an unjust enrichment claim in Illinois).

119. RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. b (1937) (discussing the theory and forms of unjust enrichment under the law).

120. *Id.* (discussing the theory of unjust enrichment and providing the forms in which a “benefit” may be conferred).

ment claims, but they have provided examples of what form a benefit can take.<sup>121</sup>

In Illinois, there are three general categories that have been recognized as benefits.<sup>122</sup> The first category is “moneys had and received.”<sup>123</sup> This involves one individual, the defendant, receiving a sum of money that is owed to another individual, the plaintiff.<sup>124</sup> The second category involves services received.<sup>125</sup> An individual is unjustly enriched by receiving services that are not paid for.<sup>126</sup> The third category is “extinguishment of liability.”<sup>127</sup> This type of benefit typically occurs when a plaintiff pays a debt for the defendant or prevents a financial loss for the defendant.<sup>128</sup>

Given the three categories above, it appears two of them apply to the relationship created between a hospital and a patient. First, “moneys had and received” applies because the hospital is receiving money, which is owed to the plaintiff. Although the plaintiff has a debt to the hospital, the money recovered from a negligent tortfeasor is owed to the injured party, the plaintiff. The money is owed to the plaintiff because he or she is the one who has extended the funds to retain an attorney in order to sue the tortfeasor. Without the effort of the plaintiff or patient and the attorney, monetary recovery would not occur. Second, “extinguishment of liability” applies, because the monetary recovery from the attorney’s work prevents a financial loss for the hospital, and the plaintiff is the one who paid for and hired that attorney.

Regardless of whether a debt is owed to a hospital and a debtor/creditor relationship exists between a hospital and a patient, the hospital

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121. *Am. Credit Indem. Co. v. HCG Fin. Servs., Inc.*, No. 80 C 9583, 1991 WL 119129, at \*2 (N.D. Ill. June 24, 1991) (noting there has not been a definition of “benefit” provided in Illinois, but there have been examples given).

122. Ronald M. Lepinkas, *Unjust Enrichment Claims in Illinois: Applying a Venerable Doctrine to Modern Disputes*, 91 ILL. B.J. 514, 516 (2003) (discussing the three categories of benefits pertaining to unjust enrichment in Illinois).

123. *Id.* (quoting *Bd. of Highway Comm’rs v. City of Bloomington*, 97 N.E. 280 (Ill. 1911) (providing one category of benefit as recognized in Illinois pertaining to unjust enrichment)).

124. *Id.* at 516 (discussing the “moneys had and received” category of benefit pertaining to unjust enrichment in Illinois).

125. *Id.* (discussing the services received category of benefit pertaining to unjust enrichment in Illinois).

126. *Hoban v. Strata Mktg., Inc.*, No. 91 C 331, 1991 WL 206151, at \*3 (N.D. Ill. Oct. 8, 1991) (explaining the concept of unjust enrichment occurring through the means of services received but not paid for).

127. Lepinkas, *supra* note 122, at 516 (discussing the “extinguishment of liability” category of benefit pertaining to unjust enrichment under Illinois law).

128. *Brown Leasing, Inc. v. Stone*, 284 Ill. App. 3d 1035, 1045 (1996) (providing an example of unjust enrichment occurring through the method of extinguishment of a liability).

is still receiving a benefit from the work done by the plaintiff's attorney and should contribute to the fees. *Bishop v. Burgard* helps to illustrate this point. In *Bishop*, an administrative committee, as Administrator of the Associates Health and Welfare Plan, contended that it would not benefit from the common fund. The committee argued that "the plan will not benefit from the fund because 100% reimbursement will merely return it to the position it enjoyed prior to Bishop's accident, before the plan paid out benefits."<sup>129</sup> The committee further argued that reimbursement does not qualify as unjust enrichment.<sup>130</sup> The court disagreed with the Committee and held that reimbursement was unjust enrichment, because if it were not for the plaintiff pursuing legal action and the efforts of the attorney, which the plaintiff hired, the plan would not have been reimbursed. The court noted:

For purposes of applying the common fund doctrine, it is irrelevant that the party who benefits from a lawyer's services has a right to compensation, be it an undifferentiated right of reimbursement or subrogation as is asserted here, or a right to compensation under some other theory. Obviously, everyone who brings a legal action is asserting some claim of right. However, a mere right may amount to nothing more than a possibility unless it is properly asserted.<sup>131</sup>

The holding in *Bishop* further supports the contention that the creditor/debtor relationship created between a hospital and a patient should not alleviate the hospital from contributing to attorneys' fees. Rather than concentrating on the relationship between the parties, as the court did in *Maynard*, it addresses the real question pertaining to common fund litigation, which is whether a benefit has been obtained by one of the parties as the result of a lawsuit without contributing to its costs.<sup>132</sup> If so, it was unjustly enriched for purposes of applying the Common Fund Doctrine.<sup>133</sup>

Continuing with this argument, even more to the point is *Taylor v. State Universities Retirement System*.<sup>134</sup> In *Taylor*, the appellate court upheld a judgment for attorneys' fees rendered pursuant to the common fund

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129. *Bishop v. Burgard*, 198 Ill. 2d 495, 508 (2002) (providing one of the arguments made in support of not applying the Common Fund Doctrine to litigation involving medical liens).

130. *Id.*

131. *Id.*

132. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

133. *Id.*

134. *Taylor v. State Univs. Ret. Sys.*, 203 Ill. App. 3d 513 (1990).

doctrine.<sup>135</sup> The plaintiff's attorney obtained an award of benefits under the Occupational Diseases Act from which the State Universities Retirement System (SURS) recouped disability benefits it had previously paid.<sup>136</sup> SURS did not, in any way, participate in the creation of the fund.<sup>137</sup> The appellate court held that SURS "definitely benefited from the creation of that fund by obtaining a recoupment of \$6,954.66, which it would not have received absent the fund's creation."<sup>138</sup>

Concerning the Health Care Services Lien Act, the trial court in *Wendling v. Southern Illinois Hospital Services* agreed with the above unjust enrichment argument and found the Common Fund Doctrine applied to a hospital and patient relationship for the following reasons:

- (1) [T]he funds were created as a result of the services performed by the plaintiff's attorney;
- (2) the lienholders did not participate in the creation of the funds; and
- (3) the lienholders would be unjustly enriched if they could recover from the fund without contributing to the costs of the creation.<sup>139</sup>

The cases above cover the first element of an unjust enrichment claim, but if a benefit is received, the second element needs to be further examined. The second element requires the benefit the defendant receives to be to the detriment of the plaintiff.<sup>140</sup> In order to satisfy this element it is necessary to determine damages. Unjust enrichment is unusual in that it calculates damages by "the amount [that the] defendant has been unjustly enriched or the value of the actual benefit received."<sup>141</sup>

Concerning medical liens, health care providers are being unjustly enriched in the amount they recover from the litigation they did not contribute to. Even though the plaintiff owes a debt to the hospital, the hospital would not have recovered the debt without the plaintiff's attorney. The plaintiff or patient that was treated is the one responsible for paying the attorney's fees,

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135. *Id.* at 525.

136. *Id.* at 516.

137. *Id.*

138. *Id.* at 520.

139. *Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261 (2011). Students of the University of Illinois College of Law, *Illinois Law Update*, 98 ILL. B.J. 236, 237 (Katy Dixon et al., eds. 2010) (providing that individuals or entities who benefit from a common fund without contributing to the fund are unjustly enriched).

140. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160 (1989) (providing the necessary elements for an unjust enrichment claim in Illinois).

141. *Champaign Cnty. v. Hanks*, 41 Ill. App. 3d 679, 684 (1976) (discussing the method utilized by courts in Illinois for calculating damages in an unjust enrichment case).

and the attorney asserted a claim in a way to receive a favorable judgment or award. Accordingly, the monetary recovery of a hospital is to the detriment of the plaintiff because the plaintiff is paying for the services of an attorney from which the hospital is benefitting, and the plaintiff's recovery is lessened in a greater amount because the hospital is not contributing to the attorney's fees. The Health Care Services Lien Act is not accurate in providing that a plaintiff's recovery may only be reduced by a set percentage for health care liens, because after those liens are satisfied, the plaintiff's recovery is being further reduced by being left with the burden of paying all of the fees that allowed the hospital to benefit and satisfy its lien.

The third element of an unjust enrichment claim is "that defendant's retention of the benefit violates the principles of justice, equity, and good conscience."<sup>142</sup> The case of *Baier v. State Farm Insurance Company* helps illustrate this element.<sup>143</sup> In *Baier*, a plaintiff was injured in an automobile accident, and an attorney hired by the plaintiff recovered a monetary settlement from the tortfeasor. The plaintiff used part of the settlement to reimburse State Farm Insurance Company for medical treatment the company had paid for pursuant to a subrogation agreement. Later, the plaintiff's attorney filed legal action against State Farm to recover a fee for the services he had provided the company by recovering its subrogation lien. The attorney's claim was "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 those who seek to benefit from it."<sup>144</sup>

The court applied the Common Fund Doctrine and allowed the attorney compensation from State Farm.<sup>145</sup> This case illustrates how hospitals benefit from the work performed by plaintiff's attorneys and that fairness and equity require them to contribute to the fund from which they benefit. A medical lien attached by a hospital is similar to the subrogation lien in *Baier* because enforcement of both of the liens is dependent on the creation of the fund by the plaintiff's attorney.<sup>146</sup> Furthermore, in seeking payment from the fund in reliance on the lien, hospitals receive direct benefits from the work done by the plaintiffs' attorneys.<sup>147</sup> Given the benefits received,

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142. *HPI Health Care Services*, 131 Ill. 2d at 160 (helping to establish the necessary elements of an unjust enrichment claim in Illinois).

143. *See Baier v. State Farm Ins. Co.*, 66 Ill. 2d 119 (1977).

144. *Id.* at 124.

145. *Id.* at 128.

146. *Bishop v. Burgard*, 198 Ill. 2d 495, 509 (2002) (comparing the subrogor/subrogee relationship, which exists between an insurance company and the insured individual, to the debtor/creditor relationship, which exists between a hospital and a patient).

147. *Id.* (providing one way in which a hospital could benefit from the work of a plaintiff's attorney without contributing to the fund that was responsible for paying the attorneys' fees).

equity and justice would promote hospitals contributing to the fund from which they benefit.

The policy behind the Common Fund Doctrine is to prevent freeloading.<sup>148</sup> If “costs of litigation are [not] spread to the beneficiaries of the fund, they will be unjustly enriched by the attorney’s efforts.”<sup>149</sup> These principles undoubtedly apply when a hospital benefits from an action to which they made no financial contribution.

## VII. PROPOSED SOLUTION

Medical liens serve a valid purpose: to allow health care providers and health care professionals to recoup payment for services they have rendered to an injured patient. Unfortunately, with the current scheme in place in Illinois, the Health Care Services Lien Act is allowing hospitals to be unjustly enriched by receiving benefits from litigation to which they did not contribute. Accordingly, in order to ensure fairness is achieved, it is necessary for hospitals to contribute to the attorneys’ fees that allow for the medical lien to be partially or fully satisfied.

Although some jurisdictions already require hospitals to pay a proportionate amount of attorneys’ fees in cases where they benefit from litigation brought by a patient on whose cause of action or claim of right they have imposed a medical lien, Illinois does not adhere to that view. Currently, the Illinois Health Care Services Lien Act is silent as to whether health care providers or health care professionals must contribute to attorneys’ fees in common fund cases. Since the statute is silent on the issue, health care providers and professionals do not contribute to the attorneys’ fees.

To achieve the ultimate goal of the Common Fund Doctrine, which is to prevent unjust enrichment, the Health Care Services Lien Act needs to be amended. The way the Act is written and applied allows for hospitals to reap the benefits of litigation without contributing to the individual, the plaintiff’s attorney, who made the monetary recovery possible. This illustrates a clear example of unjust enrichment because the hospital is receiving a benefit from the plaintiff, it is to the plaintiff’s detriment, and the hospital’s retention of the benefit violates the principles of justice, equity, and good conscience.<sup>150</sup> In order for fairness to be achieved and unjust enrich-

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148. *Principal Mut. Life Ins. Co. v. Baron*, 964 F. Supp. 1221, 1224 (1997) (providing policy behind the creation of the Common Fund Doctrine).

149. *Scholtens v. Schneider*, 173 Ill. 2d 375, 385 (1996) (providing that it is only equitable if attorneys’ fees are spread among all members of a class who are benefitting from the creation of a common fund).

150. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160 (1989) (helping to establish the necessary elements of an unjust enrichment claim in Illinois).

ment on the part of the hospital to be prevented, the amendment to the Health Care Services Lien Act needs to address when it is necessary for health care providers to contribute to attorneys' fees and how much they shall contribute.

When hospitals would be required to contribute to attorneys' fees will first be addressed. The amendment should include a provision that hospitals only have to contribute to attorneys' fees in cases where the plaintiff's attorney recovers a monetary award. The amendment should make this the only situation in which hospitals have to contribute to the fees, because if it were any other way there would still be unjust enrichment, except it would be on the part of the plaintiff or injured person.

Unjust enrichment requires a benefit to be incurred without compensation.<sup>151</sup> If the plaintiff's attorney does not recover a monetary award then the hospital is not benefiting by having their medical lien fully or partially satisfied; therefore, they are not being unjustly enriched. If a hospital were required to contribute to a fund, even when the plaintiff's attorney did not recover a monetary award, settlement, or judgment, the plaintiff would be unjustly enriched because the hospital would be paying for litigation that benefitted only the plaintiff. The benefit would be in the form of an extinguishment of liability because the hospital would be paying a debt for the plaintiff.<sup>152</sup>

When hospitals do benefit from a fund procured by a plaintiff's attorney, there needs to be a set equation for determining how much they are required to contribute. The amendment to the Health Care Services Lien Act should state that health care providers or health care professionals are only responsible for their pro-rata share of attorneys' fees. If a pro-rata share method were included in the Act through an amendment, it would require hospitals to contribute to attorneys' fees or litigation expenses for only its portion of the recovery.

The pro-rata share formula has already been adopted by many jurisdictions that require hospitals to contribute to attorneys' fees. This method helps to achieve fairness by requiring the hospital to only pay their proportionate amount and no more. If the amount the health care provider had to contribute to attorneys' fees was not based on the entity's pro-rata share, it once again could lead to the plaintiff being unjustly enriched by having a debt paid by the hospital.

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151. *Id.* (helping to establish the necessary elements of an unjust enrichment claim in Illinois).

152. Lepinkas, *supra* note 122, at 516 (discussing the "extinguishment of liability" category of benefit pertaining to unjust enrichment under Illinois law).



There is suggested language for an amendment to the Health Care Services Lien Act, entailing the above mentioned changes, included within this commentary as Appendix A.

#### VIII. CONCLUSION

The spreading of fees among all of those who benefit from a common fund helps to ensure no individual or entity is freeloading, and it helps to make certain everyone involved (including the patient, the plaintiff's attorney, and the hospital) gets what they are owed. Hence, the purpose of the creation of the Common Fund Doctrine was to prevent unjust enrichment. The current state of the law in Illinois allows hospitals and other health care providers to receive benefits from litigation that they are not required to contribute to. The hospitals are having a medical lien either fully or partially satisfied through the efforts of an attorney, whose fees have been completely paid by the plaintiff. In order to ensure the policy behind the Common Fund Doctrine is being upheld, the Illinois Health Care Services Lien Act must be amended.

## IX. APPENDIX A

The amended version of section 23/10 of the Illinois Health Care Services Lien Act, which pertains to percentages of compensation for healthcare providers, healthcare professional, and attorneys, should read:

§ 10, Lien created; limitation

(a) Every health care professional and health care provider that renders any service in the treatment, care, or maintenance of an injured person, except services rendered under the provisions of the Worker's Compensation Act or the Worker's Occupational Diseases Act, shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person. The total amount of all liens under the Act, however, shall not exceed 40% of the verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his or her claim or right of action.

(b) The lien shall include a written notice containing the name and address of the injured person, the date of the injury, the name and address of the health care professional or health care provider, and the name of the party alleged to be liable to make compensation to the injured person for the injuries received. The lien notice shall be served on both the injured person and the party against whom the claim or right of action exists. Notwithstanding any other provision of this Act, payment in good faith to any person other than the health care professional or health care provider claiming or asserting such lien prior to the service of such notice of lien shall, to the extent of the payment so made, bar or prevent the creation of an enforceable lien. Service shall be made by registered or certified mail or in person.

(c) All health care professional and health care providers holding liens under this Act with respect to a particular injured person shall share proportionate amounts within the statutory limitation set forth in subsection (a). The statutory limitations under this Section may be waived or otherwise reduced only by the lienholder. No individual licensed cat-

egory of health care professional (such as physicians) or health care provider (such as hospitals) as set forth in Section 5, however, may receive more than one-third of the verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his or her claim or right of action. If the total amount of all liens under this Act meets or exceeds 40% of the verdict, judgment, award, settlement, or compromise then:

- (1) all the liens of health care professionals shall not exceed 20% of the verdict, judgment, award, settlement, or compromise; and
- (2) all the liens of health care providers shall not exceed 20% of the verdict, judgment, award, settlement, or compromise;

provided, however, that health care services liens shall be satisfied to the extent possible for all health care professionals and health care providers by reallocating the amount unused within the aggregate total limitation of 40% for all health care services liens under this Act; and provided further that the amounts of liens under paragraphs (1) and (2) are subject to the one-third limitation under this subsection.

If the total amount of all liens under this Act meets or exceeds 40% of the verdict, judgment, award, settlement, or compromise, the total amount of all the liens of attorneys under the Attorneys Lien Act shall not exceed 30% of the verdict, judgment, award, settlement, or compromise. If an appeal is taken by any party to a suit based on the claim or cause of action, however, the attorney's lien shall not be affected or limited by the provisions of this Act.

(d) If the injured person obtains a licensed attorney for representation in litigation in which a health care provider or health care professional has attached a lien upon the injured person's claim or right of action, and that attorney attains a monetary judgment, settlement, compromise, or award for the benefit of the injured person, the health care provider or health care professional asserting the lien shall contribute a pro-rata share to the attorneys' fees.

(1) the pro-rata share contributed by the health care professional or health care provider shall be based on the percentage of recovery the lienholder received as a result of the litigation and the amount of total attorneys' fees in the case.

(e) If services furnished by health care professionals and health care providers are billed at one all-inclusive rate, the total reasonable charges for those services shall be reasonably allocated among the health care professionals and health care providers and treated as separate liens for purposes of this Act, including the filing of separate lien notices. For services provided under an all-inclusive rate, the liens of health care professionals and health care providers may be asserted by the entity that bills the all-inclusive rate.

(f) Payments under the liens shall be made directly to the health care professionals and health care providers. For services provided under an all-inclusive rate, payments under liens shall be made directly to the entity that bills the all-inclusive rate.