With a Roll of the Dice in Amtrust v. Vasquez, Nevada Workers' Compensation Insurers Hit the Jackpot!

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Doubling down on the often quoted phrase: "All is sunny in Workers' Compensation Subrogation," just last week, the Supreme Court of Nevada (Supreme Court) provided a huge win for workers' compensation subrogation professionals.

In *Amtrust N. Am., Inc. v. Vasquez*, No. 84974, 2024 Nev. Lexis 51, the Supreme Court overruled the much-maligned *Breen* [1] decision/formula and the *Poremba* [2] decision's limitation on economic damages. The Supreme Court held that workers' compensation insurers may now rely wholly upon NRS 616C.215(5), Nevada's lien reimbursement statute, to determine the amount an insurer can recover on its lien.

In *Breen* an injured employee died, and his estate filed a medical malpractice action. Prior to the employee's family reaching a settlement, the employer's insurer intervened to protect its lien. The *Breen* court held that a lienholder must bear a proportionate share of the plaintiff's fees and costs, devising a complicated formula to achieve this goal. Over time, the *Breen* formula proved unworkable and unfair to workers' compensation insurers. Accordingly, the *Vasquez* court held that NRS 616C.215 does not require insurers to bear any portion of the injured worker's third-party expenses. The court noted that using the *Breen* formula could result in situations where, contrary to the intended statutory language, the lien could be entirely wiped out, effectively resulting in a double recovery for the injured worker.

The *Vasquez* court held that, in addition to *Breen's* "mathematical defects," subsequent caselaw required an insurer not only intervene early, but also participate in the litigation in a "meaningful" manner, which was an amorphous obligation determined by the court. As such, the *Vasquez* court found that "reverting to the plain language of the statute will ***remove the ever evolving and inconsistent application of*** *Breen****, as it simply allows insurers to assert a lien upon the total proceeds of the injured worker's claim.***"

With respect to *Poremba*, a decision issued some three decades later, the court held that only economic damages were recoverable, and settlement proceeds designated as non-economic (i.e., pain and suffering) were not recoverable. The *Poremba* court did not reference *Breen* or NRS 616C.215 in coming to its decision, despite both sources stating that an insurer's lien applies to the total settlement proceeds. Thus, the *Vasquez* court found *Poremba* was in direct conflict with both precedent and the plain language of the controlling statute.

In sum, post *Vasquez*, in Nevada, when a workers' compensation insurer pays benefits to an insured's injured employee, NRS 616C.215 (5) provides that the insurer has a lien against the total proceeds of any recovery the insured may collect from a third party without resorting to any special calculations or limitations.

Because this opinion is extremely recent, we expect caselaw to develop regarding how attorneys' fees and costs are handled moving forward and we will continue to report any additional opinions that are generated because of this new law. For now, this is excellent news, and we look forward to helping you with any Nevada related questions, as well as any workers' compensation subrogation related questions for any other state.

[1] *Breen v. Caesars Palace,* 102 Nev. 79, 715 P.2d 1070 (1986).

[2] *Poremba v. Southern Nevada Paving,* 133 Nev. 12, 388 P.3d 232 (2017)