SETTLEMENT OF THIRD PARTY ACTIONS FOR WORKERS COMPENSATION CASES

- 1. Workers Compensation Carrier Consent
 - a. Settlement of a third-party action affects subrogation rights of the employer or workers compensation insurance carrier. Therefore, Workers Compensation Law §29(5) requires written consent or a court order whenever a plaintiff voluntarily settles a third-party action.
 - The consequence of failure to obtain consent is loss of all plaintiff's future workers compensation benefits. Workers Compensation Law §29(5); Kleinsak v R.B. Samuels, Inc., 12 AD3d 738, 739–40 [3d Dept 2004]. This rule is strictly applied. When plaintiff settles a third-party action without the consent of the workers compensation carrier or fails to obtain judicial approval of the settlement, plaintiff's future benefits will be cut off regardless of any prejudice or lack thereof to the carrier. Stiffen v CNA Ins. Companies, 282 AD2d 991, 992 [3d Dept 2001].
 - Consent to settle is required for any <u>voluntary</u> compromise by the plaintiff. This includes voluntary dismissal of third-party action even where plaintiff is not awarded money. <u>Safi v New York City Dept. of Empl.</u>, 54 AD3d 1107, 1108 [3d Dept 2008]; <u>Kleinsak v R.B. Samuels, Inc.</u>, 12 AD3d 738, 739–40 [3d Dept 2004].
 - Consent is only required in actions against a tortfeasor. Therefore, consent is not required for awards via UIM arbitration. <u>Shutter v Philips Display Components Co.</u>, 90 NY2d 703, 707 [1997].
 - b. If prior consent to settle cannot be obtained, plaintiff must obtain an order approving the settlement from a judge in the court where the third-party action is or was pending within three months of the settlement. Workers Compensation Law §29(5); <u>In re Consolazio</u>, 272 AD2d 614, 615 [2d Dept 2000].
 - Plaintiff can also move for *nunc pro tunc* approval of the settlement after the three month period. Factors taken into account by the court when reviewing a petition for *nunc pro tunc* approval of a settlement are whether the "settlement is reasonable, [whether] the delay in applying for an order of approval was not caused by petitioner's neglect or fault, and [whether] the workers' compensation carrier was not prejudiced by the delay." <u>In re Consolazio</u>, 272 AD2d 614, 615 [2d Dept 2000].
 - Any petition for approval of a third-party settlement must be made to a judge within the court where the action is or was pending and must be made on notice to the carrier.
- 2. Reduction of the workers' compensation lien for the cost of litigation Kelly
 - a. Under Workers Compensation Law §29 the workers' compensation carrier is responsible for paying its equitable share of the costs of litigation (attorneys fees and disbursements). Determination of the WC carrier's equitable share of litigation costs requires calculating the "total benefit" derived by the carrier through the settlement of the third-party action.
 - The court of appeals in <u>Kelly v State Ins. Fund</u>, 60 NY2d 131, 136 [1983] recognized that WC carriers receive two potential benefits through the settlement of third-party actions.

- o (1) WC carrier receives satisfaction of its current lien for funds paid out for lost wages and medical treatment
- (2) where the WC carrier would have been responsible for future benefits payment, it instead is given a credit against payment of these benefits in the form of a "holiday" period in which the carrier will not pay out benefits until the plaintiff's net settlement from the third party award is exhausted at the previous rate. This number is determined by calculating the present value of the carrier's liability for future benefits.
- b. The <u>Kelly</u> formula still applies in all situations where plaintiff's future WC benefits are not "speculative" (i.e., instances involving death, scheduled loss of use or permanent total disability) or in instances where plaintiff is no longer receiving WC benefits at all.
- Determining the amount owed by and to the WC carrier under Kelly requires:
 - (1) determining the "total benefit" derived by the WC carrier by adding the gross WC lien to the present value of future liability for benefits (gross WC lien + present value of future liability for benefits = total benefit)
 - (2) determining the litigation costs expended in securing the settlement amount (attorneys' fees + disbursements = litigation costs)
 - (3) determining the percentage of the gross settlement amount spent on litigation costs (litigation costs / gross settlement = percentage spent on litigation costs)
 - (4) multiply the percentage spent on litigation costs by the carrier's lien to determine the lien reduction for the carrier's share of litigation costs
 (percentage spent on litigation costs * gross WC lien = net WC lien)
 - (5) using the net WC lien, determine the net amount of the settlement award to plaintiff (gross settlement attorneys' fees disbursements net WC lien = net settlement to plaintiff)
 - o (6) the WC carrier will have a credit, in the form of a "holiday" period against future benefits in the amount of the net settlement to plaintiff. The length of the holiday period can be determined by calculating the amount of time it would take the WC carrier to pay out the amount of the net settlement at the rate plaintiff was receiving benefits.

EXAMPLE OF KELLY FORMULA:

Plaintiff sustains physical injuries while working at a construction site. Assume for the first part of this example that plaintiff is no longer receiving WC benefits. In this example, the WC carrier is only receiving a benefit in the form of payment of its lien. ¹

The WC lien is \$50,000 in indemnity and \$40,000 in medical for a gross lien of **\$90,000**.

The third party action is being settled for \$400,000.

Disbursements in the third party action are \$10,000.

 $^{^{1}\} Example\ derived\ in\ part\ from\ http://lois-llc.com/new-york/third-party-recoveries-and-workers-compensation-in-new-york/.$

Attorneys fees are \$130,000.

Since plaintiff is not owed any future WC benefits the present value of future benefits is **\$0**.

The formula plays out like this:

(\$90,000 * .35) = \$31,500

(gross WC lien + present value of future benefits) = total benefit to WC (\$90,000 + \$0) = \$90,000

(attorneys fees + disbursements) = total litigation costs (\$130,000 + 10,000) = \$140,000

(total litigation costs / gross settlement amount) = percentage of settlement spent on litigation costs $(\$140,000 \,/\, \$400,000) = 35\%$

(total benefit to WC carrier * percentage of settlement spent on litigation costs) = WC carrier's equitable cost of recovery

(gross WC lien – WC carrier's equitable cost of recovery) = net WC lien (\$90,000 - \$31,500) = \$58,500

(gross settlement – total litigation costs – net WC lien) = net settlement to plaintiff (\$400,000 - \$140,000 - \$58,500) = \$201,500

In the above example, the WC carrier's lien is reduced by \$31,500 resulting in a net recovery to the carrier of \$58,500.² Plaintiff receives a net of \$201,500.

KELLY FORMULA – EXAMPLE 2

But what if the plaintiff was scheduled to continue receive "non-speculative" WC benefits (death, scheduled loss of use or permanent total disability) into the future? In this instance the WC carrier is receiving two forms of benefit: (1) payment of its lien and (2) relief from payment of future benefits in the amount of the net settlement to plaintiff. Accordingly, the WC carrier's proportionate share of litigation costs must rise as they are now receiving thE second added benefit.

Assume the same numbers as above except now plaintiff is receiving \$450 a week in permanent disability benefits. Plaintiff is 33 years old with a life expectancy of 40 years. Assume that the present value of 40 years of weekly payments at \$450 a week is \$354,573.00.

² The WC lien reduction will usually be around 33% (representing one third of the settlement for attorneys fees) plus a few percentage points for payment of disbursements.

Now, we must recalculate, using the formula above, the "total benefit" to the WC carrier taking into account the present value of future payments.

(gross WC lien + present value of future benefits) = total benefit to WC (\$90,000 + \$354,573.00) = \$444,573

(attorneys fees + disbursements) = total litigation costs (\$130,000 + 10,000) = \$140,000

(total litigation costs / gross settlement amount) = percentage of settlement spent on litigation costs

(\$140,000 / \$400,000) = 35%

(total benefit to WC carrier * percentage of settlement spent on litigation costs) = WC carrier's equitable cost of recovery (\$444,573 * .35) = \$155,600

(gross WC lien – WC carrier's equitable cost of recovery) = net WC lien (\$90,000 - \$155,600) = \$-65,600. NOTE – due to taking into account the present value of future payments and including this in the WC carrier's total benefit, not only has the WC lien been extinguished but the WC carrier is now ahead \$65,600. This sum of money must now be paid out by the WC carrier to plaintiff as "fresh money." This was the same scenario in Burns, discussed below, where the Supreme Court extinguished the WC lien and ordered Travelers to pay out \$18,960.92 to plaintiff under the Kelly formula.

(gross settlement – total litigation costs + net WC lien) = net settlement to plaintiff (\$400,000 - \$140,000 + \$65,600) = \$325,600.

Finally, the WC carrier, under <u>Kelly</u> will receive relief from future benefits payments in the amount of the net settlement to plaintiff. This relief comes in the form of a "holiday" period. In the above example, to determine the holiday period we must be determine the amount of time it would take the carrier to pay out the amount of the net settlement under the current rate of payments.

(net settlement amount / amount of weekly payments) = amount of weeks in holiday period.

(\$325,600 / 450) = 723 weeks in holiday period.

In this example, the WC carrier would cease making benefits payments to plaintiff for a little under 14 years. At the end of this holiday period, plaintiff would begin receiving benefits (also known as "deficiency compensation") at the full rate of \$450 per week.

c. Notice above, that <u>Kelly</u> applies only in cases where plaintiff's benefits are "non-speculative", i.e. in instances of death, scheduled loss of use and/or permanent total disability. This is due to the Court of Appeals' holding in <u>Burns v Varriale</u>, 9 NY3d 207, 212 [2007].

- In <u>Burns</u>, the supreme court, using the <u>Kelly</u> formula, extinguished Travelers' lien and ordered the payment of "fresh money" to plaintiff. Travelers, the WC carrier, argued it was improper to charge the WC carrier as benefiting by the full amount of the present value of future payments where plaintiff was classified as permanently partially disabled. They argued that in the case of a plaintiff with a classification of permanent partial disability the plaintiff might return to the workforce in the future or "voluntarily withdraw" from the workforce for reasons other than the injuries sustained, thereby impacting the future benefits he would receive under WC.
- The Court of Appeals agreed with Travelers' argument and drew a distinction between "non-speculative" and "speculative" benefits. Non-speculative benefits would continue to be calculated at the time of settlement using present value and the Kelly formula. However, "speculative" benefits would be calculated on a "pay as you go" basis under a new formula promulgated in Burns.
- Under <u>Burns</u> plaintiff will continue to receive benefits albeit at a reduced rate. The WC carrier does not receive a holiday period as they would under <u>Kelly</u>.
- The <u>Burns</u> calculation generally results in WC carriers recouping more money in liens and will virtually eliminates instances in which the WC carrier would have to pay out "fresh money" to plaintiff
- The **Burns** calculation requires:
 - (1) determining the "total benefit" derived by the WC carrier. Under <u>Burns</u> the "total benefit" is simply recovery of the gross lien. (gross WC lien = total benefit)
 - o (2) determining the litigation costs expended in securing the settlement amount (attorneys' fees + disbursements = litigation costs)
 - (3) determining the percentage of the gross settlement amount spent on litigation costs (litigation costs / gross settlement = percentage of gross settlement spent on litigation costs)
 - (4) multiply the percentage spent on litigation costs by the carrier's lien to determine the lien reduction for the carrier's share of litigation costs (percentage spent on litigation costs * gross WC lien = net WC lien)
 - (5) using the net WC lien, determine the net amount of the settlement award to plaintiff (gross settlement attorneys' fees disbursements net WC lien = net settlement to plaintiff)
 - (6) determine the amount of weekly future <u>Burns</u> payments to be received by the plaintiff (normal weekly benefit payment * percentage of gross settlement spent on litigation costs) = amount of weekly <u>Burns</u> payments

The <u>Burns</u> payments will continue until the plaintiff's net settlement amount is exhausted by the differene between the full normal WC benefit received by plaintiff and the reduced payments issued by the WC carrier under <u>Burns</u>. In this way, the WC carrier is credited with plaintiff's net settlement amount as it was under <u>Kelly</u>. Essentially, the "savings" made by the WC carrier during the entire period of <u>Burns</u> payments must equal plaintiff's net settlement amount, just as the amount of savings during the holiday period under <u>Kelly</u> equaled plaintiff's net settlement amount. After exhaustion of the <u>Burns</u> payments plaintiff is eligible to continue receiving benefits at the normal WC rate ("deficiency compensation).

EXAMPLE OF BURNS FORMULA

Assume the same numbers as the second <u>Kelly</u> example above except that plaintiff has now been classified with a partial permanent disability, thereby placing this case under <u>Burns</u>. The formula would be applied as follows

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(gross WC lien) = total non-speculative benefit to WC
($90,000) = $90,000
(attorneys fees + disbursements) = total litigation costs
(\$130,000 + 10,000) = \$140,000
(total litigation costs / gross settlement amount) = percentage of settlement spent on
litigation costs
(\$140,000 / \$400,000) = 35\%
(total benefit to WC carrier * percentage of settlement spent on litigation costs) =
WC carrier's equitable cost of recovery
($90,000 * .35) = $31,500
(gross WC lien – WC carrier's equitable cost of recovery) = net WC lien
($90,000 - $31,500) = $58,500
(gross settlement – total litigation costs - net WC lien ) = net settlement to plaintiff
(\$400,000 - \$140,000 - \$58,500) = \$201,500
(weekly benefit payment amount * percentage of settlement spent on litigation costs)
= amount of weekly Burns payments
($450 * .35) = $157.50
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As under <u>Kelly</u>, the total money saved by the WC carrier during the period of <u>Burns</u> payments must equal the net settlement amount to plaintiff.

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(normal weekly WC benefit payment – amount of weekly <u>Burns</u> payment) = weekly savings to WC carrier ($450 - $157.50) = $292.50 (net settlement to plaintiff / weekly savings to WC carrier) = duration of <u>Burns</u> payments in weeks ($201,500 / $292.50) = 688.9 weeks
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Accordingly, plaintiff in the above example will receive reduced payments under <u>Burns</u> for a little over 13 years. After the <u>Burns</u> payments are concluded plaintiff will again be eligible to receive full benefits payments from WC. In the form of lessened payments over this timespan the carrier has gained the same "credit" against plaintiff's net settlement as it gains through the form of the holiday period under <u>Kelly</u>.

BURNS FORMULA EXAMPLE 23

Plaintiff is injured on the job. He is classified with permanent partial disability and receives \$550 per week from the WC carrier.

The third party action is settled for a gross amount of \$600,000.

The gross WC lien through State Insurance Fund is \$233,944.79.

Attorneys' fees are \$200,000. Disbursements are \$61,586.66

(gross WC lien) = total non-speculative benefit to WC (\$233,944.79) = \$233,944.79

(attorneys fees + disbursements) = total litigation costs (\$200,000 +\$61,586.66) = \$261,586.66

(total litigation costs / gross settlement amount) = percentage of settlement spent on litigation costs

(\$261,586.66 / \$600,000) = 43.6%

(total benefit to WC carrier * percentage of settlement spent on litigation costs) = WC carrier's equitable cost of recovery (\$233,944.79 * .43) = \$100,596.26

(gross WC lien – WC carrier's equitable cost of recovery) = net WC lien (\$233.944.79 - \$100.596.26) = \$133.348.53

(gross settlement – total litigation costs - net WC lien) = net settlement to plaintiff (\$600,000 - \$261,586.66 - \$133,348.53) = \$205,064.81

(weekly benefit payment amount * percentage of settlement spent on litigation costs) = amount of weekly \underline{Burns} payments (\$550 * .436) = \$239.80

As under <u>Kelly</u>, the total money saved by the WC carrier during the period of <u>Burns</u> payments must equal the net settlement amount to plaintiff.

(normal weekly WC benefit payment – amount of weekly <u>Burns</u> payment) = weekly savings to WC carrier (\$550 - \$239.80) = \$310.20

(net settlement to plaintiff / weekly savings to WC carrier) = duration of <u>Burns</u> payments in weeks

³ Numbers from Morris v. Missionary Sisters settlement.

3. Medicare set-asides

- Under federal law, Medicare is always a "secondary payer."
- The way Medicare ensures the primary payer (in this case, the plaintiff) has spent the necessary funds prior to picking up expenses is through the establishment of a Medicare Set-Aside Allocation. The Medicare Set-Aside allocation is a projection of future costs of treatment for plaintiff's injuries.
- The Medicare Set-aside Allocation amount must then be placed into a Medicare Set-aside Account. The funds in the account must then be exhausted before Medicare will resume coverage for medical expenses
- Plaintiffs receiving workers' compensation are required to set up a Medicare Setaside account if:
 - (1) Plaintiff is currently eligible for Medicare and the settlement amount is more than \$25,000 OR
 - (2) Plaintiff is not currently eligible for Medicare and the settlement amount is more than \$250,000 and there is chance plaintiff will be eligible for Medicare in the future. (Plaintiff is considered likely to be eligible for Medicare in the future if they are over 62 ½ years old at the time of receipt of the settlement, if they have filed for or plan to file Social Security Disability or if they have end stage renal disease.)
- While Medicare has established firm guidelines for when MSA's are necessary in workers' compensation cases, they have only outlined a series of "suggestions" for when MSA's should be established in third-party liability cases.⁴

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⁴ http://www.msameds.com/accounts