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OUTSIDE COUNSEL

By Robert E. Grey

Court of Appeals Ruling In 'Shutter': Back to the Future

ON NOV. 20, 1997, the Court of Appeals held that a workers' compensation carrier does not have a lien or a credit against an injured worker's uninsured motorist recovery.[1]

In reversing decisions of the Third Department and the Workers' Compensation Board, the Court reaffirmed the validity of a 1957 First Department decision which had previously been widely accepted as controlling law.[2]

The Court also provided an enlightening review of the Legislative intent, history and express language of Workers' Compensation Law §§ 29, 29(1-a) and 30, ultimately returning to the four decades-old logic of the First Department decision in *Commissioners of the State Insurance Fund v. Miller*.[3] This article reviews the Court of Appeals decision and considers why it was required to rule on this issue despite the existence of long-standing law on the subject.

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The right of a workers' compensation carrier to assert a lien or credit against a compensation claimant's recovery from another source is defined and limited by Workers' Compensation Law §29(1), which states in pertinent part, that:

> If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee ... need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may [do both]. ... In such case, the ... insurance carrier liable for the payment of ... compensation ... shall have a lien on the proceeds of any recovery from such other.[4]

By the express language of the statute, therefore, the compensation carrier's lien attaches only where the claimant is injured by a third party to the employment relationship and sub-

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sequently obtains a recovery from that third party.

In *Shutter*, the claimant was injured when the driver of the taxi she had taken in the course of her employment lost control of the vehicle. The taxi owner and driver were third parties within the meaning of §29(1), but the driver was uninsured and the owner's insurance company disclaimed coverage.

The claimant, unable to meaningfully "pursue h[er] remedy against such other" in the absence of available insurance, applied for and received an uninsured motorist recovery from her own automobile insurance company. She had previously applied for and received workers' compensation benefits, and when she received her uninsured motorist recovery, the compensation carrier asserted a right to an offset under Workers' Compensation Law §29(4).[5]

The claimant in *Shutter* argued that unlike the third-party recovery contemplated by §29, her recovery was a first-party recovery from a policy of insurance for which she herself had paid a premium. She therefore contended that the party from which she recovered was therefore not "such other" whose "negligence or wrong" caused the accident within the meaning of §29 and that the compensation carrier should not be permitted to take credit for her uninsured motorist recovery.

The Court of Appeals noted that although the claimant's own automobile insurance carrier is a third party to the employment relationship, the statute clearly indicates that the compensation carrier is entitled to a lien and credit only against a recovery from a third-party tortfeasor.

Indeed, if the rule were otherwise, the compensation carrier's lien would attach to any recovery the claimant received as a result of an on-the-job injury, including recoveries from Social Security Disability, private policies of long-term disability benefits, employment-related disability retirement plans, and more.

Such was clearly not the result envisioned by the Legislature with the enactment of §29, which was intended only to give the compensation carrier lien rights against the claimant's recovery from a third-party tortfeasor.[6]

The Court's opinion was buttressed by the provisions of Workers' Compensation Law §30, which provides that "no benefits, savings or insurance of the injured employee independent of the provisions of this chapter shall be considered in determining the compensation or benefits to be paid under this chapter."[7]

'Miller' Decision

The Court also observed that the precise question of whether a compensation carrier's lien under §29(1) applies to a claimant's recovery from his own automobile insurance policy under an uninsured motorist endorsement was addressed by the First Department 40 years ago in *Commissioners of the State Insurance Fund v. Miller*.[8]

In *Miller*, as in *Shutter*, the claimant was injured while in the course of his employment by an uninsured motorist and made claims for workers' compensation benefits against the compensation carrier and uninsured motorist benefits against his own automobile liability insurer. The compensation carrier asserted a lien on the proceeds of the uninsured motorist recovery, and litigation ensued. The *Miller* court noted that

> It does not appear, however, that the law gives the compensation carrier a lien on all recoveries an injured worker obtains from others, regardless of the source. [§29(1)] provides that where an employee has been injured by the negligence or wrong of another, he may "pursue his remedies against such other," with the compensation carrier being accorded a lien "on the proceeds of any recovery from such other." Here, however, the injured employee did not pursue his remedy against the tortfeasor. Instead, he received payment from his own insurer.[9]

The compensation carrier's argument that the uninsured motorist carrier "stands in the shoes" of the third-party tortfeasor was rejected by the court, which noted that the compensation carrier "has no right to expect an employee to supplement his common-law remedies and the compensation carrier's statutory lien by purchasing his own insurance."[10]

A unanimous Appellate Division then held that "[a]bsent any recovery from the alleged wrongdoer, [the compensation carrier] can have no lien on the sums received by the" claimant from his uninsured motorist recovery.[11]

The Court of Appeals was forced to revisit this issue and reaffirm the validity of *Miller* because the Workers' Compensation Board, in a group of decisions which were validated by the Third Department opinion in *Shutter*, held that *Miller* had been rendered obsolete by the enactment of the No-Fault law and the amendment of Insurance Law §3420.

These rulings were predicated on the fallacious premise that because "the claimant's [uninsured motorist] recovery was not for first-party benefits for basic economic loss under the No-Fault Law," the carrier was entitled to a lien.[12]

The Court of Appeals held that the fact that a claimant's uninsured motorist recovery is not equivalent to "basic economic loss" is irrelevant to the question of whether the compensation carrier has a lien on such a recovery.

In reaching the opposite conclusion, the board and the Third Department presumed that a lien could exist in the first place, which the Court held was not the case based on the express language of §29.

The Court noted, however, that even if an uninsured motorist recovery could be characterized as a third-party recovery within the meaning of the statute, to permit a lien would contradict the legislative intent behind the enactment of Workers' Compensation Law §29(1-a).

After the No-Fault Law was enacted in 1974, and continuing until the 1978 enactment of §29(1-a), all third-party recoveries of compensation claimants were subject to a compensation lien.[13] This resulted in the creation of two classes of motor vehicle accident victims.

Those injured outside the scope of their employment could receive no-fault benefits and pursue a third-party action upon which no lien existed, while those injured within the scope of their employment received compensation benefits which constituted a lien upon any third-party recovery. The unintended result of the law was, therefore, that the compensation claimant became a self-insurer for at least part of his "basic economic loss."[14]

In order to correct this situation, the Legislature enacted Workers' Compensation Law §29(1-a), which provided that the compensation carrier "shall not have a lien on the proceeds of any" third-party recovery to the extent that compensation payments were equivalent to basic economic loss under the No-Fault Law.[15] The Court of Appeals eventually held that §29(1-a) deprives the compensation carrier of its lien for any payments made by it within three years or $50,000 of the accident, as such were equivalent to no-fault benefits.[16]

Insurance Law §3420(f) mandates that no policy of automobile liabilit insurance may be issued without a uninsured motorist endorsement of least $10,000 per person and $20,0(per accident.[17] It further provides th an uninsured motorist recovery mu be for "serious injury" beyond th recoverable under the No-Fault Law. By definition, therefore, an uninsure motorist recovery cannot be equiv lent to basic economic loss.

A reading of Insurance Law §3420(apparently led the board and t Third Department to the erroneo conclusion that if a recovery of uni sured motorist benefits is not equiv lent to basic economic loss, then must be subject to a compensati lien.

If this reasoning were followed its logical conclusion, however, third-party recoveries arising out motor vehicle accidents would t subject to a compensation lien.

Under Insurance Law §5104(a), plaintiff in a personal injury actic arising out a motor vehicle accide cannot recover "first party benefit loss" from a third party tortfeaso just as in a claim for uninsured moto ist benefits under Insurance La §3420(f), the claimant cannot recove his "basic economic loss" from an u insured motorist carrier.[19]

Despite the fact that neither reco ery could be equivalent to basic ec nomic loss, however, the board an the Third Department held that an u insured motorist recovery is subje to a compensation lien, while a knowledging that a third-party reco ery is not.[20]

The Court of Appeals reversed th Third Department holding that b cause an uninsured motorist recove is not a third-party recovery withi the meaning of Workers' Compens tion Law § 29(1), no workers' compe sation lien or credit can exist.

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(1) *Shutter v. Phillips Display Components C* No. 220, 11-20-97.

(2) *Commissioners of the State Insurance Fu v. Miller*, 4 A.D.2d 481, 166 NYS2d 777 (1st De 1957).

(3) Id.

(4) Workers' Compensation Law §29(1)

(5) A workers' compensation carrier has a li under W.C.L. §29(1) for payments made prior the settlement of a third-party action and a co comitant credit under W.C.L. §29(4) for pa ments due subsequent to the settlement of third-party action to the extent of the claiman net third-party recovery. *Kelly v. State Insuran Fund*, 60 NY2d 131, 468 NYS2d 850, 456 N.E. 791 (1983)

(6) *Woodward v. E.W. Conklin & Son*, 171 A. 736, 157 NYS 948 (1916); *Caulfield v. Elmhu Contracting Co.*, 268 A.D. 661, 53 NYS2d 25, *re den.* 269 A.D. 671, 54 NYS2d 216, *aff'd* 294 N. 803, 62 N.E.2d 237 (1945); *Employers Mut. Lia Ins. Co. v. Refined Syrup Sales Corp.*, 184 Mis 941, 53 NYS2d 835, *aff'd* 269 A.D. 931, 58 NYS 216 (1945).

(7) Workers' Compensation Law §30.

(8) 4 A.D.2d 481, 166 NYS2d 777 (1st De 1957).

(9) *Miller*, 4 A.D.2d at 482.

(10) Id.

(11) *Miller* at 483.

(12) *Shutter v. Phillips Display Components C* 235 A.D.2d 904, 652 NYS2d 427 (3rd Dept. 199 Workers' Compensation Law §29(1-a) provid that a workers' compensation carrier has no li (or credit) against the proceeds of a third-par action to the extent that payments of worke compensation benefits are equivalent to bas economic loss under the No-Fault Law. W.C. §29(1-a); *Dietrick v. Kemper Ins. Co.*, 76 NY2d 24 557 NYS2d 301, 556 N.E.2d 1108 (1990); *Johns v. Buffalo & Erie County Private Industry Counc* 84 NY2d 13, 613 NYS2d 861, 636 N.E.2d 13 (1994).

(13) *Granger v. Urda*, 44 NY2d 91, 404 NYS 319 (1978).

(14) Id.

(15) W.C.L. § 29(1-a).

(16) *Dietrick v. Kemper Ins. Co.*, 76 NY2d 24 557 NYS2d 301, 556 N.E.2d 1108 (1990); *see al Johnson v. Buffalo & Erie County Private Indus Council*, 84 NY2d 13, 613 NYS2d 861, 636 N.E. 1394 (1994). It should be noted, however, th even if a compensation carrier has no lien at t time of the third-party settlement, the injur worker may have a claim for compensation ben fits which will eventually extend beyond thr years or $50,000. In such circumstance, if t compensation carrier's consent to the third-pa ty settlement is not obtained despite the absen of a lien, the claimant's right to payment of futu compensation benefits may be forfeited by su failure.

(17) Ins. Law § 3420(f).

(18) Id.

(19) Ins. Law §§ 5104, 3420(f)

(20) *Shutter.*