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Settlement of a Third-Party Action With a Related Workers' Compensation Claim

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SETTLEMENT OF A THIRD-PARTY ACTION WITH A RELATED WORKERS' COMPENSATION CLAIM

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It is often the case that a single accident results in the creation of two separate and distinct causes of action, one for workers' compensation benefits and one in the form of a third-party lawsuit for personal injuries. Section 29(1) of the Workers' Compensation Law provides that where "an employee entitled to compensation . . . be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect to take compensation . . . or to pursue his remedy against such other, but may" do both.[1] Concomitantly, the compensation carrier is afforded the right to protect its pecuniary interest in the third-party action, and this right usually takes the form of a lien on the proceeds thereof.[2]

This article will consider two common fact patterns. In the first, the employee is injured in a motor vehicle accident which gives rise to claims for workers' compensation and No-Fault benefits, and a negligence action against the parties responsible for the other vehicle. In the second, a lawsuit arises without the need to consider the special rules for vehicular accidents covered by the No-Fault Law.

I. Circumstances Creating a Lien in Favor of the Workers' Compensation Insurance Carrier.

In the non-No-Fault scenario, the compensation carrier will immediately have a lien (and possibly an offset as well) on the proceeds of any third-party recovery. This is due to the operation of § 29(1),

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1. N.Y. Work. Comp. Law §29(1) (McKinney 1984).
2. Clark v. Oates & Burger Co., 16 A.D.2d 490, 229 N.Y.S.2d 513 (3d Dep't 1962).

which provides that where a single accident results in a claim for compensation and a third-party action, the "insurance carrier liable for the payment of such compensation . . . shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees."[3] The formula for calculating the amount of the lien will be discussed below.

Conversely, in a No-Fault situation, the compensation carrier may have no lien at all, depending upon the circumstances. Prior to 1978, the rule in No-Fault situations was identical to that in other situations, and the compensation carrier had a lien on a claimant's third-party recovery to the extent of its payment of medical and disability benefits, including those cognizable under the No-Fault Law.[4] The result was that a compensation claimant became a self-insurer for at least part of his "basic economic loss," a result not intended when the No-Fault Law was enacted.[5]

In order to correct this inequity in the law, in 1978 the Legislature added §29(1-a) to the Worker's Compensation Law. Section 29(1-a) provides that the "insurance carrier . . . liable for the payment of such compensation and/or medical benefits shall not have a lien on the proceeds of any recovery received pursuant to" the No-Fault Law.[6] Once payment of compensation has exceeded basic economic loss, however, "the compensation carrier has a right to offset any further benefits due against a recovery from a tortfeasor, especially since that recovery would not include basic economic loss."[7] Other examples of automobile accident cases where lien provisions apply would be where payments extend beyond three years;[8] where the vehicular accident itself would not provide benefits to the injured worker;[9] and where the compensation award would not be equally payable under the No-Fault Law.[10]

It may thus be seen that not all vehicular actions will be subject

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3. N.Y. WORK. COMP. LAW §29(1) (McKinney 1984).

4. Matter of Granger v. Urda, 44 N.Y.2d 91, 98, 375 N.E.2d 380, 382, 404 N.Y.S.2d 319 (1978).

5. *Id.*

6. N.Y. WORK. COMP. LAW §29(1-a) (McKinney 1984).

7. Vinson v. Berkowitz, 83 A.D.2d 531, 533, 441 N.Y.S.2d 460, 462 (1st Dep't 1981).

8. Fellner v. Country Wide Ins., 95 A.D.2d 106, 466 N.Y.S.2d 766 (3d Dep't 1983).

9. Stedman v. City of New York, 107 A.D.2d 600, 602, 483 N.Y.S.2d 1013 (1st Dep't 1985).

10. Dietrick v. Kemper Ins. Co., 145 A.D.2d 8, 41, 537 N.Y.S.2d 372, 374 (4th Dep't 1989) *appeal dismissed*, 74 N.Y.2d 714, 541 N.E.2d 429, 543 N.Y.S.2d 400 (1989). Kupiec v. Christensen, 118 Misc.2d 716, 461 N.Y.S.2d 175 (1983).

ant's third-party settlement.[13] As noted above, it is essential that the practitioner obtain the consent of the compensation carrier irrespective of the present existence or non-existence of a lien, as the ongoing liability of the compensation carrier may create a right to an offset at a future date.[14]

Settlement negotiations with the responsible third party should be predicated upon an understanding that all offers are subject to the consent of the compensation carrier, since §29(5) provides that a "compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only . . . with the written approval of the . . . carrier liable to pay the same."[15]

It is immediately seen that the statute requires written consent, and the practitioner is admonished to accept nothing less. There are several cases[16] in which oral consent was held to estop the carrier from asserting its lien, but such cases are of dubious validity due to the subsequent enactment of provisions enabling the claimant to compel consent. Further, it is well-settled that a mere reduction of the carrier's lien does not constitute consent.[17] Consent has been implied where the compensation carrier: retained the plaintiff's attorney to represent its interests in the third-party action;[18] disclaimed liability and advised the claimant to settle;[19] actively participated in the third-party negotiations and misled the claimant;[20] is both the compensation and liability carrier;[21] or personally appeared in the

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13. N.Y. WORK. COMP. LAW §29(5) (McKinney 1984).

14. *See supra* note 11 and accompanying text.

15. N.Y. WORK. COMP. LAW §29(5) (McKinney 1984).

16. Godsman v. Grumman Aircraft Engineering Corp., 268 A.D. 945, 51 N.Y.S.2d 368 (3d Dep't 1944) *aff'd*, 295 N.Y. 708, 65 N.E.2d 339 (1946).; De Moranville v.Albany Seed Co., 268 A.D. 945, 51 N.Y.S.2d 355 (3d Dep't 1944).

17. Sandles v. Suffolk County Police Dept., 89 A.D.2d 682, 454 N.Y.S.2d (3d Dep't 1982). In *Sandles*, however, there was sufficient other evidence to support a finding that the carrier had impliedly consented to the settlement.

18. Warboys v. Kraft Foods Co., 286 A.D. 1043, 144 N.Y.S.2d 829 (3d Dep't 1955).

19. Beekman v. W.A. Brodie, Inc., 249 N.Y. 175, 163 N.E. 298 (1928); Dalton v. Journeymen Plumbers & Apprentices & Steamfitters, 22 A.D.2d 745, 253 N.Y.S.2d 455 (3d Dep't 1964).

20. Noyes v. First Nat'l City Bank, 39 A.2d 183, 333 N.Y.S.2d 117 (3d Dep't 1972), *aff'd*, 33 N.Y.2d 723, 304 N.E.2d 565, 349 N.Y.S.2d 996, (1973); Saponara v. Jill Bros., Inc., 270 A.D. 869, 60 N.Y.S.2d 364 (3d Dep't 1946).

21. Warboys v. Kraft Foods Co., 286 A.D.2d at 1043, 144 N.Y.S.2d 829; Gray v. Jeremiah Burns, Inc., 6 A.D.2d 955, 176 N.Y.S.2d 500 (3d Dep't 1958), *aff'd*, 5 N.Y.2d 975, 157 N.E.2d 719, 184 N.Y.S.2d 843 (1959).

proceedings via its own attorney.[22] Nevertheless, it is highly advisable to obtain express written consent to the settlement of the third-party action, rather than to assume that the carrier will be estopped from denying a claimant's rights to deficiency compensation.

It is possible that the claimant and the carrier may disagree as to the reasonableness of the settlement offer by the third party. Effective April 8, 1968, the Legislature amended §29(5) to provide a remedy in the event of a disagreement between the plaintiff and the compensation carrier as to the reasonableness of the offer.[23] A plaintiff may petition the court before which the third-party action is pending to compel the consent of the compensation carrier, and if the motion is successful he will retain his right to deficiency compensation.[24] The form and substance of the required petition are set forth in detail in §29(5) and need not be incorporated here. It is important to remember that the court has the power only to compel consent, not to compel a reduction of the carrier's lien.[25] A compromise order can be granted even before payment of compensation has begun (for example, in a controverted claim for compensation).[26]

In the event that the third-party attorney has settled the action without the consent of the compensation carrier, perhaps even believing that consent was unnecessary, as his settlement was below basic economic loss, and there was therefore no lien, all is not lost. Cases subsequent to the amendment of §29(5), permitting the plaintiff to petition for an order compelling consent, have interpreted the amendment as permitting the third-party attorney to make a motion to compel consent *nunc pro tunc*.[27] Such a motion, if successful, will procure an order of compromise that is entitled to the same legal effect as an order obtained at the time of settlement, preserving the

22. Illaqua v. Barr-Llewellyn Buick Co., 81 A.D.2d 708, 439 N.Y.S.2d 473 (3d Dep't 1981).

23. N.Y. WORK. COMP. LAW §29(5) (McKinney 1984) provides in pertinent part that "written approval of the . . . insurance carrier need not be obtained if the employee or his dependents obtain a compromise order from a justice of the court in which the third-party action was pending."

24. *Id. See also* Schnabel v. Grimes, 31 A.D.2d 375, 298 N.Y.S.2d 271 (2d Dep't 1969).

25. Volpe v. Fireman's Fund Ins. Co., 54 Misc.2d 212, 282 N.Y.S.2d 69 (Sup. Ct. N.Y. Co. 1967).

26. Nachison v. Phoenix of Hartford, 30 A.D.2d 499, 294 N.Y.S.2d 363 (3d Dep't 1969).

27. Norton v. Albany Appliance Dist., Inc., 79 A.D.2d 1053, 435 N.Y.S.2d 174 (3d Dep't 1981); Kusiak v. Commercial Union Assur. Cos., 49 A.D.2d 122, 373 N.Y.S.2d 714 (4th Dep't 1975). *See also* Spurling v. Beach, 93 A.D.2d 306, 463 N.Y.S.2d 293 (3d Dep't 1983).

claimant's right to receive deficiency compensation.[28]

III. Calculating the Extent of the Compensation Carrier's Lien

In all cases other than a settlement within the No-Fault limits, the next step following receipt of the carrier's consent to settlement will be to negotiate a reduction of the carrier's lien. In order to properly approach these negotiations, the practitioner needs to know the amount of the lien and its effect on both the carrier and his client.

Section 29(1) of the Worker's Compensation Law provides that the

> insurance carrier liable for the payment of such compensation . . . shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such . . . carrier.[29]

A cursory reading of the section reveals that the lienable portion of the third-party recovery is "deemed for the benefit of" the carrier, and the statute requires that the carrier pay its proportionate share of the expenses incurred in obtaining the recovery.[30] A closer inspection reveals that the section ensures that a claimant will always retain some benefit from successful third-party action.

In a deficiency compensation situation, it is immediately apparent that the entire third-party recovery innures to the benefit of the carrier and therefore the carrier will be responsible for the entire amount of the reasonable and necessary litigation expenses. The formula underlying this common-sense approach is to compute the ratio of the carrier's lien to the amount of the third-party settlement,

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28. *Norton*, 79 A.D.2d at 1053, 435 N.Y.S.2d at 174.

29. N.Y. Work. Comp. Law §29(1) (McKinney 1984).

30. *Id.* Section 29(1) goes on to provide that in the event of a recovery, the plaintiff may apply on notice to such lienor to the court in which the third party action was instituted, or to a court of competent jurisdiction if no action was instituted, for an order apportioning the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee or his dependents and the lienor.

See also Owens v. Town of Huntington, 125 Misc. 2d 574, 479 N.Y.S.2d 642 (Co. Ct. Suff. Co. 1984).

and multiply the litigation costs by that ratio.[31] In the deficiency situation, the ratio is 1:1, and the carrier pays 100% of the litigation costs.

In a non-deficiency situation, the amount of the third-party settlement exceeds the amount of the compensation lien, and, at first glance, the carrier will be responsible for something less than 100% of the litigation costs. In such a situation the carrier will recover its lien (with the appropriate deduction for its share of the litigation expenses) and will also obtain a concurrent right to offset.[32] To utilize a hypothetical, take a situation in which the total amount of compensation paid is $10,000, giving the compensation carrier a lien for that amount. Assume further that there is a continuing award of compensation at the rate of $100 per week. The third-party action is settled with consent for $50,000, with reasonable and necessary expenses of $20,000, $30,000 net to claimant. If the compensation carrier does not agree to reduce its lien, the applicable ratio will be 1:5, or 20%, and the $10,000 lien will be reduced by $4,000 ($20,000 x .20). The net lien will therefore be $6,000 and the distribution will be $20,000 to attorneys and expenses, $6,000 to carrier, and $24,000 to claimant ($20,000 from the settlement plus $4,000 reimbursement of expenses). In addition, pursuant to its right to offset, the carrier will be relieved of its liability to pay the claimant the $100 per week compensation award until such time as its right to offset has expired, in this case $20,000 in the future.

The extent to which the compensation carrier is entitled to offset is unclear at the present time. The courts have consistently held that the right to offset is limited to the monies actually received by the claimant from the third-party settlement.[33] In the above hypo-

31. Kelly v. State Ins. Fund, 60 N.Y.2d 131, 456 N.E.2d 791, 468 N.Y.SD.2d 850 (1983); Van Deusen v. United States Fidelity & Guarany Co., 81 A.D.2d 1026, 440 N.Y.S.2d 130 (4th Dep't 1981); Martin v. Agway Petroleum Corp., 143 Misc. 2d 627, 451 N.Y.S.2d 309 (Sup. Ct. Monroe Co. 1989); Owens v. Town of Huntington, 125 Misc.2d 574, 479 N.Y.S.2d 642 (Co. Ct. Suff. Co. 1984); Wargo v.Longo, 85 Misc.2d 898, 380 N.Y.S.2d 1009 (Sup. Ct. N.Y. Co. 1976). O'Connor v. Lee Hy Paving Corp., 480 F.Supp. 716 (E.D.N.Y. 1979).

32. N.Y. WORK. COMP. LAW §29(4); Petterson v. Daystrom Corp., 17 N.Y.2d 32, 215 N.E.2d 329, 268 N.Y.S.2d 1 (1966). It is noteworthy that pursuant to *Robinette v. Arnold Meyer Sign Co.*, 43 A.D.2d 458, 352 N.Y.S.2d 533 (3d Dep't 1974), where the carrier fails, in compromising its lien, to expressly reserve its right to an offset, it is deemed to have waived such right. The Appellate Division, in reversing the Workers' Compensation Board, held that where a carrier compromises its lien there is an "inference flowing from such compromise of the lien that there was intent to waive offsets as to future awards." *Id. See also* Hilton v. Truss Systems, Inc., 82 A.D.2d 711, 444 N.Y.S.2d 229 (3d Dep't 1981).

33. *Robinette*, 43 A.D.2d at 458, 352 N.Y.S.2d at 533.

thetical, with a net to claimant of $24,000 and a continuing award of $100 per week, the carrier would be relieved of paying compensation for over four and a half years after the third-party settlement.[34] The problem inherent in this situation is that the carrier derives a greater benefit from an offset than it does from a lien. To illustrate: If, in our hypothetical, the carrier were to waive its entire lien (expressly reserving its right to an offset, so as not to run afoul of *Robinette*),[35] the net to claimant would be $30,000 instead of $20,000. In offsetting future payments, the compensation carrier would receive the benefit of the entire net recovery without paying any of the litigation expenses and leaving the claimant without any benefit from settling the action.[36] However, where this occurs in a deficiency compensation scenario and the money is taken as a lien, the carrier pays its share of the entire litigation expense.[37]

This gross inequity in the law was corrected to some extent by the Court of Appeals in *Matter of Kelly v. State Insurance Fund*.[38] In *Kelly*, the third-party action resulted in a gross recovery of $315,000, with litigation costs of $107,950.50 (34.27% of the total recovery) and a compensation lien of $54,127.56. Absent a third-party recovery, the compensation carrier would have had a continuing obligation to make payments of compensation.[39] In rejecting the carrier's contention that the maximum reduction of its lien under §29 was the ratio that its lien alone, without considering its offset, bore to the total recovery, multiplied by the reasonable and neces-

34. This assumes that the claimant does not need extensive medical care during this period. The carrier's offset applies both to payments of compensation and to medical expenses (N.Y. WORK. COMP. LAW §29(1) (McKinney 1984), *cf.* Clark v.Oakes & Burger Co., 16 A.D.2d 490, 229 N.Y.S.2d 513 (3d Dep't 1962)), so if the claimant has medical expenses, they are equally applicable to reduce the offset.

35. *See* discussion *supra* note 32.

36. This assumes that the longevity of the claimant is such that he will exhaust the entire offset.

37. N.Y. WORK. COMP. LAW §29(1) (McKinney 1984).

38. Kelly 60 N.Y.2d 131, 456 N.E.2d 791, 468 N.Y.S.2d 850 (1983).

39. *Id.* at 135-136, 456 N.E.2d at 792, 468 N.Y.S.2d at 851. This continuing obligation to make payments seems to have engendered some confusion as to the formula for calculating the reduction of the carrier's lien. The *Kelly* Court seems to hold that, because the litigation costs were equal to 34.27% of the total recovery, the carrier's total benefit should be reduced by a like percentage. While this is in fact the end result, the formula (total benefit to the carrier divided by the gross settlement, multiplied by the litigation expenses) does not change. Implicit in the Court's holding is a finding that the total benefit to the carrier was in excess of the settlement amount. This, in effect, transmuted the case into a deficiency compensation case, resulting in the carrier's responsibility to pay the entire amount of the litigation costs. A proper interpretation of the *Kelly* case is found in Martin v. Agway Petroleum Corp., 143 Misc. 2d 627, 541 N.Y.S.2d 309 (Sup. Ct. Monroe Co. 1989).

sary litigation expenses, the Court of Appeals corrected the inequity of allowing the carrier to deprive a claimant of the benefit of his lawsuit by waiving a lien and taking an offset against which no litigation costs would be assessed.[40] Recognizing that "there is no question that the carrier benefits not only by the recovery of its lien but also by the value of estimated future compensation payments that, but for the employee's efforts, the carrier would have been obligated to make," the Court found it proper to assess litigation costs against the carrier in the proportion that both past and estimated future compensation payments of compensation bear to the gross recovery.[41] The Court further found that the estimation of future compensation benefits is "not so speculative that it would be improper to assess litigation costs against this benefit to the carrier," looking to the provisions of §29(2) for the method of calculation of future payments.[42]

The *Kelly* decision has the following effect on our earlier hypothetical in which the gross settlement was $50,000, the lien $10,000, the expenses $20,000, and the continuing award $100 per week. Assume that the claimant has a life expectancy of twenty years at the time of the settlement. Pre-*Kelly*, the carrier would pay 20% of the litigation costs and offset to $20,000 (the net to claimant from the settlement), resulting in a final benefit to the claimant of $4,000 (the amount of the reduction in the lien). Post-*Kelly*, the court must con-

40. *Kelly*, 60 N.Y.2d at 137-38, 456 N.E.2d at 793-94, 468 N.Y.S.2d at 852-53.

41. *Id.* at 138-139, 456 N.E.2d at 794, 468 N.Y.S.2d at 853.

42. N.Y. WORK. COMP. LAW §29(2) (McKinney 1984) provides in pertinent part that:

> When the compensation awarded requires periodical payments the number of which cannot be determined at the time of such award, the board shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the bases of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and such facts as it may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in such case, for the purpose of computing the amount of such excess recovery.

As a practical matter, if there is not a continuing award of compensation in place at the time of the third-party settlement it is virtually impossible to assess the value of future compensation payments. Briggs v. Kansas City Fire & Marine Ins. Co., 121 A.D.2d 810, 504 N.Y.S.2d 256 (3d Dep't 1986).

By way of illustration, if there is a continuing award of $100 per week in place, and the claimant has a life expectancy of twenty years at the time of the settlement, the value of the future compensation is easily calculable as the present value of $5,200 per year over twenty years. On the other hand, if there is no continuing award in place, and even if the compensation case is closed, there is still some likelihood that an individual claimant will reopen the case at some future date. The likelihood that a particular case will be reopened, and if it is, the extent of the future entitlement, is not possible to determine.

sider the carrier's future liability for compensation, which amounts to $104,000 ($100 per week for twenty years) reduced to present value, for a sum of $64,803.49 (assuming five percent interest, compounded yearly). The total amount of the third-party recovery that accrues to the benefit of the carrier is therefore $74,803.49 (the $10,000 lien plus the $64,803.49 estimated value of the future liability of which the carrier is being relieved by the settlement). The proportionate share of the expenses borne by the carrier increases from 20% (10,000:50,000) to 100% (74,803.49:50,000), and the case effectively becomes a deficiency compensation case in which the claimant's attorneys take their fees ($20,000) and the carrier's lien is reduced by a like amount. In the instant situation, a $10,000 lien must be reduced by $20,000, resulting in an immediate benefit to the claimant of $30,000, as the carrier's lien is altogether extinguished, giving the claimant the balance of the settlement. After the settlement, the carrier may offset the first $10,000 owing to the claimant (the claimant's net recovery above reimbursement for expenses) before it must resume payments.[43]

The *Kelly* doctrine has recently been expanded by Judge Patlow's decision in *Martin v. Agway Petroleum Corp.*.[44] *Martin* was a non-deficiency case in which the compensation carrier's lien was initially reduced by 47%, based on the ratio the total benefit to the carrier bore to the gross settlement. After this reduction, the compensation carrier's net lien amounted to $92,527.34.[45] The lien was then further reduced "*in its entirety*"[46] based on the legislative intent "to avoid 'rigid statutory formulas' "[47] and the express language of the statute, which requires that "expenditures shall be equitably apportioned."[48] The court, considered "certain equitable factors," including the difficulty in prosecuting the case, the defendant's verdict in a related third-party case, and the actions of the compensation carrier "to frustrate the interests of the plaintiff" during settlement negotiations.[49] It concluded that "a purely mathematical calculation will not ensure that the Workers' Compensation carrier

43. This is precisely the case in *Kelly*, 60 N.Y.2d 131, 456 N.E.2d 791, 468 N.Y.S.2d 850 (1983).

44. 143 Misc. 2d 627, 541 N.Y.S.2d 309 (Sup. Ct. Monroe County 1989).

45. *Id.* at 632, 541 N.Y.S.2d at 312-13.

46. *Id.* at 635, 541 N.Y.S.2d at 315 (emphasis added).

47. *Id.* at 633, 541 N.Y.S.2d at 313 (quoting Matter of Kelly v. State Insurance Fund, 60 N.Y.2d 131, 137-38, 456 N.E.2d 791, 468 N.Y.S.2d 850 (1983)).

48. *Id.* (quoting N.Y. WORK. COMP. L. §29(1) (McKinney1984)).

49. *Id.* at 635, 541 N.Y.S.2d at 314.

might otherwise become a self-insurer. Such application should be made to the court at the time of settlement or, at worst, by subsequent motion. Enforcement of *Kelly* rights does not appear to be within the jurisdiction of the Workers' Compensation Board,[52] although determinations as to estimated future liability are.[53]

CONCLUSION

In all third-party actions, with the sole exception of motor vehicle cases settled with the No-Fault limits, the compensation carrier will have a lien on the settlement for sums it has paid to the claimant as disability benefits and for those paid to the claimant's health providers for his medical expenses.[54] Even in the case of the motor vehicle action settled within the No-Fault limits, if payments of compensation subsequent to the settlement exceed basic economic loss, the compensation claimant's right to receive deficiency compensation will be effectively barred if the consent of the carrier to the settlement was not obtained.[55] It is therefore imperative in *all* third-party actions, irrespective of the existence or non-existence of a lien, that the consent of the compensation carrier be obtained prior to settlement.

When an action is settled with consent, if the compensation carrier has a lien, it is to be remembered that the value of the compensation case is not concurrent with that of the lien. There may be a continuing award of compensation or a likelihood of reopening the compensation claim that will render the carrier's proportionate share of the litigation expenses far greater than those attributable to the lien alone.[56] The proportionate share of litigation expenses paid by the carrier to reimburse the claimant for bringing the third-party action is often, as in the deficiency compensation situation, the only actual benefit accruing to the claimant once the lien and offset have been taken. Therefore, it is important to utilize *Kelly* and its progeny to their fullest effect in maximizing the benefit to the injured employee.

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52. United States Fidelity & Guaranty Co. v. 38 East 29 Street, Inc., 60 N.Y.2d 799, 457 N.E.2d 792, 469 N.Y.S.2d 686 (1983).

53. N.Y. WORK. COMP. LAW §29(2) (McKinney 1984).

54. N.Y. WORK. COMP. LAW §§29(1), 29(1-a) (McKinney 1984).

55. *See supra* note 12.

56. United States Fidelity and Guaranty Co. v. 38 East 29 Street, Inc., 60 N.Y.2d 799, 457 N.E.2d 792, 469 N.Y.S.2d 686 (1983); Kelly v. State Ins. Fund, 60 N.Y. 2d 131, 456 N.E.2d 791, 468 N.Y.S.2d 850 (1983); Owens v. Town of Huntington, 125 Misc.2d 574, 479 N.Y.S.2d 642. (Co. Ct. Suff. Co. 1984).