Don't Let Your Credit Right Impede Settlement

By Nicole M. Kustermann, Yost & Baill, LLP

Settling a worker's compensation subrogation claim can be impeded by many factors, the most complicated of which is the carrier's right to claim a credit towards future worker's compensation exposure. A credit, sometimes referred to as a holiday, or a moratorium, or a vacation, or a set-off, depending upon the jurisdiction, attaches to an injured Plaintiff's net recovery, often purporting to diminish the recovery to such an extent that the Plaintiff believes that he or she has no incentive to settle the case. This type of situation can arise when an injured Plaintiff's case against a responsible third party settles for an amount in excess of the worker's compensation lien and the worker's compensation claim remains open with future exposure. Depending on the amount of the third party settlement and the anticipated future exposure, a strict application of a state's subrogation statute may result in a difficult settlement position for, most notably, the Plaintiff's attorney. It is the Plaintiff's attorney that must explain to his client how the subrogation statute affects the settlement. The issue of the credit can become a major impediment when this discussion occurs, for the first time with the Plaintiff, when an otherwise acceptable settlement is being considered. A Plaintiff who believes a $300K settlement will net him $200K after payment of attorney's fees will likely be disappointed when he hears how the lien and application of credit rights will impact 1) his cash in hand, 2) any future medical expenses for which he may now be responsible, and 3) the receipt of regular wage loss checks on which he has come to rely.

In many instances, a plaintiff's attorney is unfamiliar or inexperienced with the application of the worker's compensation statute and the corresponding credit rights. It is incumbent upon the subrogation professional to educate the attorney about the rights afforded the insurance carrier under the applicable statute, any distribution formula that may apply and the carrier's right to claim a credit. The earlier this education can occur in the case, the better. If a carrier is insistent upon exercising its full credit right to reduce future exposure (as it often should be), it makes no sense to withhold this fact until settlement. Disclosure of this posture early can aid the Plaintiff's attorney in negotiating a sufficient settlement.

It may often be necessary to inform Plaintiff's counsel about the underlying tenants of subrogation; that is, to prevent a double recovery and to make financially accountable the party responsible for the loss. The concept of a carrier having a right to a credit towards future benefits owed is rationally explained through those tenants. If a Plaintiff nets a recovery for medical expenses and wage losses from a responsible third party, why should the

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worker's compensation carrier continue to bear the responsibility of making such payments into the future? If the carrier continues to pay benefits, the Plaintiff will reap a double recovery and the carrier will be bearing the burden that should be borne by the responsible party.

As rational as the above explanation may seem to subrogation professionals, such arguments are often not enough to persuade the Plaintiff and his attorney to accept what the statute affords. Thus, a stalemate might ensue or a ripe settlement possibility may be at risk unless the parties can work together on a compromise. Many creative options exist to settle a case that involves a carrier's right to claim a credit.

Consider the catastrophic injury case, with questionable liability, which settles for insurance policy limits of One Million dollars. In such a case, the policy limits tender should be accepted by the parties to avoid the uncertain and potentially detrimental results of a trial. In such a case, however, it will be clear that there will not be enough money to satisfy the injured worker's claim and the worker's compensation lien claim, notwithstanding the carrier's right to a claim a credit towards future worker's compensation benefits owed. An injured party may not be willing to settle in a situation where the settlement dollars go to 1) pay attorney's fees and costs, 2) pay the worker's compensation subrogation lien and 3) will be subject to a carrier's credit right. Out of a One Million dollar settlement, the injured party could net no unencumbered money out of the litigation

Recognizing the situation presented above, a subrogated carrier may decide to waive its lien recovery in exchange for settling out or reducing the value of the future worker's compensation exposure. Alternatively, the carrier could propose waiving all or some of the credit, but taking more than its statutory share out of the settlement dollars. Another tactic is to suggest and negotiate a reduction of the Plaintiff's attorney's fee to get more money in the injured worker's pocket, money which could be excepted from the credit. This is the least likely of the proposals, but worth a try!

In many jurisdictions, the credit or off-set is not a dollar for dollar credit. That is, in most states recognizing a credit right, the insurance carrier must pay an attorney's fee towards the amount it is relieved of paying due to the credit. For example, if an injured plaintiff nets $100K in a third party settlement, the worker's compensation will be entitled to a credit or set-off for the next $100K in benefits owed to the injured party. The carrier must pay an attorney fee for the value it receives by having the future payments off-set. This attorney's fee is often commensurate with the contingent fee charged by the plaintiff's attorney in the third party case. As a simplified example, for each $100 payment the carrier is relieved of paying in the future, it will actually owe $33 (33%), until the $100K net recovery is exhausted. The effect of this calculation is a reduced payment to the injured party (or his attorney) and an accounting headache for the insurance carrier.

To avoid the headache and administrative hassle of issuing partial payments as described above, a creative solution in settling a case involving a future credit is for the carrier to calculate the present value of the future credit exposure, and to offer to reduce its lien recovery by that amount. That way, the carrier can claim a 100% credit for a certain period of time. This may be an attractive option for the plaintiff, as it will result in a greater cash recovery today; likewise, this solution may help entice a future lump sum settlement of the open worker's compensation claim, which would be attractive to the carrier.

It is important in any third-party settlement discussions involving an open worker's compensation claim to involve representatives from the subrogation side AND from the worker's compensation side of the claim. The subrogation professional can analyze the value of the lien recovery and future credit, along with the strength of the subrogation claim and the settlement offer; while the worker's compensation professional can properly analyze the future exposure of the worker's compensation claim. With knowledge of all, the best decision can be made about how to facilitate a settlement and how to avoid a future credit right becoming an impediment to settlement.

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