



## ***Are Legal Malpractice Recoveries Subject to Workers' Compensation Liens?*** **authors Brett Scher, Esq. and Jonathan Isaacson, Esq., New York Law Journal,** **Sept. 19, 2022**

*While some states have given legal malpractice attorneys the green light to disregard workers' compensation liens, New York is not one of them.*

*Attorneys who prosecute and defend bodily injury actions in New York are well aware of Workers' Compensation Law §29(1) and the ever-present impact of the liens that it creates on any potential settlement or recovery for plaintiffs who are injured while in the course of their employment. However, many attorneys who litigate legal malpractice claims arising from another attorney's mishandling of a work-related personal injury claim appear to be unaware of the impact that Workers' Compensation Law §29(1) has with regard to the settlement or verdict in those malpractice claims.*

*In the recent case of Continental Indemnity Co. v. Redzematovic, 206 A.D.3d 466 (1st Dept. 2022), the Appellate Division, First Department, confirmed that the resolution of a legal malpractice claim arising from an underlying personal injury claim must include satisfaction of the workers' compensation lien.*

*With some exceptions, an injured employee's exclusive remedy against his or her employer for injuries incurred while on the job is through workers' compensation, which generally helps to cover the injured employee's medical bills and a portion of his or her lost income due to the accident. However, the bar against injured workers suing their employers does not prevent them from asserting third-party claims against non-employee tortfeasors who are also potentially liable for the accident.*

*While the prosecution of such a third-party claim does not prevent the injured employee from recovering workers' compensation benefits, Workers' Compensation Law §29(1) creates a lien in favor of the workers' compensation carrier against the proceeds of any recovery from such third-party action, whether by judgment, settlement or otherwise, to the extent of the compensation provided. See Continental Indemnity, 206 A.D.3d at 467, citing Shutter v. Philips Display Components Co., 90 N.Y. 2d 703 (1997).*

*Every worker's compensation lien is different and unique to the specific injuries, medical care and occupational limitations of the recipient. However, in cases involving serious and catastrophic injuries, which are fairly common in construction accident cases, the liens can be substantial. Moreover, while workers' compensation carriers are often willing to compromise their liens as part of settlement efforts, high value liens often present a significant hurdle when it comes to settling the claims.*

*When errors are made in the handling of these workplace-related personal injury cases, legal malpractice claims often ensue. The million-dollar question is whether Workers' Compensation Law §29(1) also applied to any legal malpractice recovery.*

*The First Department's holding in Continental should put any debate to rest. In Continental Indemnity, a workers' compensation carrier sought to enforce a lien against its insured's settlement of a legal malpractice claim. The defendant, Redzematovic asserted a legal malpractice claim against the attorney who failed to timely commence an action against the tortfeasor responsible for her workplace accident. Redzematovic argued that the carrier was not entitled to a lien because Workers' Compensation Law §29(1) applies "only against recoveries from the third-party tort-feasors who are responsible for the claimant's injuries." In presenting this argument, Redzematovic argued for a strict construction of the statute, which does not explicitly provide for liens to attach to legal malpractice claims. Instead, she focused on the language concerning its applicability to third-parties claims arising from situations where the worker is "injured or killed by the negligence or wrong of another not in the same employ."*

*Rejecting this argument and holding that the carrier was entitled to a lien against the settlement of the legal malpractice action, the First Department held that "[a]lthough defendant did not recover directly from the tortfeasors, the legal malpractice settlement 'obtained as a result of the first attorney's failure to timely commence [an action] constitute[d] a third-party*

recovery within the meaning of Workers' Compensation Law 29(1)' because the legal malpractice 'settlement was a substitute for the usual third-party recovery against a negligent tortfeasor or wrongdoer.'" Id. at 467 (internal citations omitted).

In so holding, the First Department relied on precedent from the distant past. See, e.g., *In re Theresa M.C. v. Utilities Mutual Ins. Co.*, 207 A.D.2d 481 (2d Dep't 1994) and *McDowell v. LaVoy*, 63 A.D.2d 358 (3d Dep't 1978), affirmed, 47 N.Y.2d 747 (1979).

As such, it is now a relative certainty that any New York court will take an expansive view regarding the applicability of workers' compensation liens to subsequent legal malpractice claims. The First Department's decision appears to fall in line with not only other departments in New York, but several other Northeastern states' interpretation of their workers' compensation laws.

For example, in 1995, New Jersey's Supreme Court held that "workers' compensation lien pursuant to N.J.S.A. 34:15-40 attaches to the proceeds of a legal malpractice action brought to recover damages from an attorney who failed to institute an action against a third-party tortfeasor." *Frazier v. N.J. Mfrs. Inc. Co.*, 142 N.J. 590 (1995).

In 2002, the Pennsylvania Supreme Court followed suit holding that proceeds from a workers' compensation claimant's legal malpractice claim based on his former counsel's malfeasance in pursuing a claim against a third-party tortfeasor was subject to subrogation by his employer pursuant to Pennsylvania's Workers' Compensation Act. *Poole v. W.C.A.B.*, 570 Pa. 495 (2002).

In reaching its conclusion, the court in *Poole* noted that it is the "elemental requirement of proving the case within the case, that makes a legal malpractice action unique" and militates in favor of finding such a subrogation right for workers compensation carriers.

Inherent in the reasoning of each court decision that has allowed workers' compensation liens to attach to legal malpractice recoveries despite the lack of express statutory authority for same is the notion that the malpractice recovery is premised upon the same damages that would have been recoverable in the malpractice action. The purpose of a legal malpractice action is simply to make the plaintiff "whole" for any loss arising from the alleged malpractice and the purpose of a workers' compensation lien is to ensure that employers and workers' compensation insurers are compensated (at least in part) for benefits that they have paid on behalf of an injured worker, who may lack the resources at the time of the accident to cover such costs. Permitting the lien to attach to legal malpractice claims allows both of these objectives to be reached.

Courts outside of the Northeast have taken the opposite approach, arguing that to extend worker's compensation liens to malpractice claims is an improper overreach. For example, in *Anderson Columbia v. Brewer*, 994 So. 2d 419, (Fla. Dist. Ct. App. 2008), the court held that the right of a worker's compensation insurer to subrogate against an injured employee's third-party recovery is a creature of statute with no provision addressing a legal malpractice action. As such, the court was constrained to hold that injuries arising from legal malpractice do not occur in the course of the claimant's employment and the defendants in the legal malpractice action were not third-party tortfeasors within the meaning of Florida's Workers' Compensation Statute.

Likewise, Illinois courts have declined to allow workers' compensation insurers to assert a lien against a legal malpractice recovery. *Mosier v. Danz*, 302 Ill.App.3d 731 (Ap. Ct. 4th Dist. 1999) (holding that Illinois' Workers' Compensation Statute simply did not support the interpretation that the lien extends beyond bodily injury claims to legal malpractice actions arising from the negligent prosecution of such claims).

North Carolina has also taken this contrary approach. *Grant Constr. Co. v. McRae*, 146 N.C.App. 370 (COA 2001) provided another example of a strict statutory interpretation by noting that under a plain reading of the relevant law, the third party must be one who caused an injury to the employee in order for a lien or subrogation interest to apply.

While some states have given legal malpractice attorneys the green light to disregard workers' compensation liens, New York is not one of them. New York attorneys prosecuting and defending legal malpractice claims arising from underlying bodily injury actions must remain cognizant of whether the underlying claim involved a workplace accident and whether a Workers' Compensation Law 29(1) lien may be applicable.

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