NEW YORK WORKERS’ COMPENSATION
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Introduction

The subrogation landscape for New York is very favorable for workers’ compensation carriers with only one major snag - auto losses. New York is one of only two states that coordinate workers’ compensation benefits with no fault benefits (the other is Michigan). Aside from this obstacle, carriers’ subrogation rights are well-protected by statute and case law; in fact, the New York Workers’ Compensation Board strictly and consistently upholds a carrier’s subrogation rights. Combining favorable subrogation laws with a pure comparative negligence test should afford a carrier many recovery opportunities. The landscape is best analyzed and described by splitting it into non-auto and auto losses.

Three Rights of Recovery (Non-Auto Losses)

The first two rights are a right to reimbursement and a right to take credit. A carrier has a right to reimbursement from any non-auto third party claim and the right to take a dollar-for-dollar credit against both future medical and indemnity benefits. There are no filing requirements to protect a lien, such as an intervention action, unless the carrier feels a claimant’s attorney will attempt to circumvent a lien by labeling or apportioning settlement proceeds to those types of damages not subject to the lien (see section on Derivative Claims). Also, a carrier is assigned the claimant’s right to pursue a third party for reimbursement if a claimant fails to do so one year after the accident and a carrier notifies the claimant of its right to do by certified mail. The assignment occurs by operation of law if the claimant takes no action thirty days from receipt of the notice of assignment.

Last, but not least, a carrier has a right to consent to the third party settlement that involves a compromise. A “compromise” is any resolution that does not involve a jury verdict, not its traditional meaning-accepting less than your statutory recovery. Consent, which must be written, is very important to a carrier for two reasons: it provides notice that a third party claim is pending settlement and provides an opportunity to assess whether the case is being settled for a de minimis sum—a real issue when your future exposure is large. Failure of the claimant’s attorney to obtain consent affords the carrier a right to suspend benefits upon filing a Form C8.1 and obtaining permission of the NYWCB to do so. To cure such a defect, the claimant’s attorney must file a petition Nunc Pro Tunc with the Justice of the New York State Supreme Court. If Special Funds is involved (NYWCL Section 15-8), it must also provide consent. Failure of a carrier to obtain consent from Special Funds will jeopardize its future reimbursements. Lastly, a carrier’s consent is required even for third party auto claims in which the carrier does not currently have a lien (i.e., it may have one in the future and be able to take credit against future benefits), because its payout has not reached either one of the two following thresholds: $50,000 in total benefits or three years of indemnity benefits (the subject of my next topic).

Exception to Right of Recovery (Auto Losses)

There is one major exception to a carrier’s subrogation rights. Section 29(1a) states that a carrier has no lien on a third party auto bodily injury claim unless it pays $50,000 combined in medical and indemnity benefits or three years of indemnity benefitsthe statutory minimum no fault coverage in New York. Once a carrier’s payout exceeds either threshold, it can assert a lien against a third party bodily injury claim, but only for the portion of its payout that exceeds the threshold—not from dollar one. Of important note is that the threshold remains the same even if the claimant purchases additional no fault coverage.

Can a carrier ever recover the portion of its lien below $50,000 for an auto loss? Fortunately, the answer is yes. A carrier has a right to pursue an at fault carrier(s) in mandatory arbitration at AFI pursuant to the Loss Transfer Law if one of the vehicles in the accident (not necessarily the at fault vehicle or one in operation)
either weighs 6500 lbs. unloaded (as indicated by the automobile registration number) or is principally “for hire” to transport people or property. Of important note, carriers can now pursue Loss Transfer against the operator, owner, or employee of the owner or operator of a bus. Lastly, if the at fault carrier(s) is in liquidation, then the workers’ compensation carrier must pursue its claim for reimbursement with the Liquidation Bureau - good luck!

The best method for illustrating the subrogation law for auto claims for in-state auto losses is with a matrix shown at the end of this article. As you can see, there are four possible outcomes. At the one extreme (the lower right hand corner), a carrier may have no recovery despite 100% liability against the opposing driver(s) if none of the vehicles qualify for loss transfer (use or weight requirement) and the benefits paid are less than $50,000. At the other extreme (the upper left hand corner), a carrier has two sources of recovery, Loss Transfer and the bodily injury claim, when at least one of the vehicles qualifies for loss transfer and the benefits paid exceed $50,000.

The time frames for filing Loss Transfer claims are unique and distinct from bodily injury claims. First, there is no ninety-day notice of claim requirement for pursuing Loss Transfer against public entities, since your claim is for reimbursement of economic damages, not pain and suffering. Second, while the law has changed quite a bit, the statute of limitations for filing runs from the date of first payment, not the date of the accident.

On the same note, a carrier has no right to assert a lien against uninsured motorist (UM) or underinsured motorist claims (UIM), regardless of who owns the policy.

**Exception to the Exception (Out Of State Auto Losses)**

There is one major exception to the onerous effects of Section 29(1a), which, from my experience, eliminates about half the subrogation opportunities for auto losses. The restrictions applicable to Section 29(1a) apply only to in-state auto accidents. In other words, a carrier has a lien from dollar one (like other non-auto losses) for out-of-state auto subrogation claims.

**Special Considerations**

There are two special considerations for New York subrogation - employers’ negligence and the Kelly decision. In short, the employer’s impunity from suit is alive and well. Employer’s negligence claims are pretty much a thing of the past, at least since November 1996. Unless a claimant’s injury is defined as “grave,” a direct action against the employer can not be maintained. This has important implications for a carrier’s lien when the claimants’ attorney is trying to effect a “global” settlement which includes the 1-B claim, workers’ compensation lien and third party liability claim.

The Kelly decision, which may impact a carrier’s reimbursement (not recovery), its theory and calculation (which has its own body of cases) will be discussed in a future article.

**Derivative Claims**

The three major types of derivative claims in the world of workers’ compensation subrogation are: medical malpractice, legal malpractice and loss of consortium. Actually, the medical malpractice claim is a derivative of the workers’ compensation claim; the legal malpractice claim is a derivative a third party claim gone bad; and the loss of consortium claim is also a derivative of the third party claim, but arises when a spouse is alleged damages that arise from the injured worker’s pain and suffering claim. It is more of an apportionment issue that must be looked at closely. A carrier can assert a lien on the first two claims, but not on the third. With respect to loss of consortium claims, it makes sense that the carrier would not have a lien, because the proceeds are going to the spouse, who did not receive workers’ compensation benefits. However, the
temptation for the claimant’s third party attorney to disproportionately allocate proceeds to the spouse to reduce the lien is a distinct possibility and requires subrogation counsel to scrutinize the transcripts to determine that the apportionment is appropriate.

Conclusion

The New York subrogation law and pure comparative statutory negligence test should yield favorable recovery results for non-auto claims. In practice, the laws are strictly enforced, the carrier has priority of distribution over the claimant and each settlement requires the carrier’s written consent on all third-party settlements, even auto claims in which the carrier does not currently have a lien. Finally, a credit can be taken, dollar-for-dollar, on both medical and indemnity benefits up to the claimant’s net recovery from the third party liability claim. Being well versed on the Loss Transfer law and recognizing which cases (or more correctly, which vehicles) qualify, will allow you to exploit those auto losses that do have subrogation opportunities - the bane of the New York workers’ compensation subrogation professional. Stay tuned for the sequel: the Kelly calculation article.

Subrogation Matrix for New York
In-State Auto Workers’ Compensation Claims

<table>
<thead>
<tr>
<th>Amount of Benefits Paid</th>
<th>Case Qualified for Loss Transfer</th>
<th>Case Does Not Qualify for Loss Transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greater than $50,000 or three years of indemnity benefits</td>
<td>1) Arbitration award up to $50,000 plus 2) Lien on claimant’s bodily injury claim for benefits paid over $50,000</td>
<td>Lien on claimant’s bodily injury claim for benefits paid over $50,000</td>
</tr>
<tr>
<td>Less than $50,000 or three years of indemnity benefits</td>
<td>Arbitration award up to $50,000</td>
<td>No recovery for carrier regardless of liability on third party</td>
</tr>
</tbody>
</table>

Endnotes

1 NYWCL Section 29(1); when asserting a lien against an existing claim, a carrier must pay its “equitable” share of the claimant’s attorney fee and expenses, which customarily means paying a pro rata share of the legal fee and expenses.
2 NYWCL Section 29(2).
3 NYWCL Section 29(5).
5 NYNFL Section 5102 defines the types of benefits that are lienable as well as covered persons and vehicles and Section 5102 and 5104(b) establish the threshold.
6 NYNFL Section 5105(a).
7 A.I Transport vs. New York State Insurance Fund (2003). This case is an important amendment to Section 5105(a) and 5103(a).
10 NYWCL Section 11, Chapter 67 of the Consolidate Laws.
12 For medical malpractice claims see Mary T. Berry vs. Metropolitan Life (1997); for legal malpractice claims see Theresa M.C. vs. Utilities Mutual Insurance (1994); for loss of consortium claims see Miszko vs. Gress.
(2002). For medical malpractice claims, like other jurisdictions, only the portion of the lien that represents additional costs to the carrier that resulted from the malpractice can be asserted as part of the lien.

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