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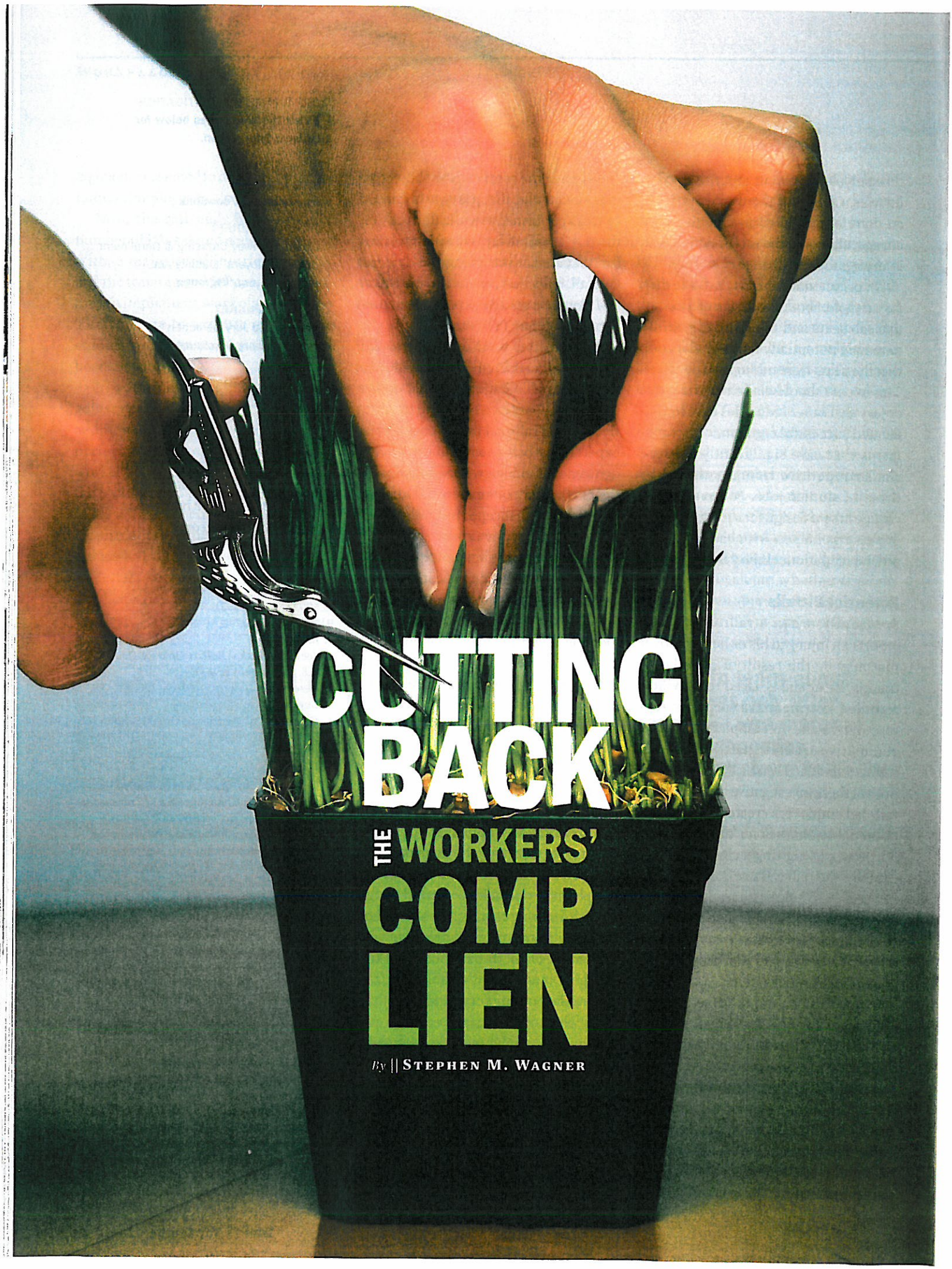

CUTTING BACK THE WORKERS' COMP LIEN

By || Stephen M. Wagner

You don't have to be a workers' compensation subrogation expert to ensure your client's third-party claim recovery isn't reduced by a huge lien. But you will want to know about these tried-and-true tips.

Often, clients who are injured on the job have both workers' compensation and third-party personal injury claims. This scenario can arise in many contexts—the truck driver injured in a motor vehicle accident, the construction worker harmed through a contractor's negligence, or the factory worker injured by a defective product.

While you do not need to be a workers' comp expert to successfully handle such claims, careful coordination of workers' compensation and third-party claims will often result in an increased net recovery for the catastrophically injured client. Moreover, a working understanding of your state's workers' compensation subrogation law is essential to negotiating workers' comp liens. Although this area of law is primarily statutory and varies widely from state to state, the strategies for getting a workers' comp carrier to reduce its lien are the same in most jurisdictions.

In most states, workers can continue to receive workers' compensation benefits after settling a third-party claim, with a set-off of future compensation benefits in the amount of the third-party recovery.[1] However, in a growing number of states, settlement of the third-party claim will terminate all future benefits if the worker fails to obtain the employer's consent to the settlement.[2]

In these states, the quickest way to generate a legal malpractice claim in a case where your client will need lifetime medical treatment is to accept a policy limits settlement offer from the third party's insurer when the third party has state minimum insurance limits. This catastrophe can be avoided by obtaining the workers' comp carrier's consent and waiver of termination of future benefits before accepting the third-party settlement proceeds.

Even if you are not a "comp lawyer," it pays to not ignore the workers' compensation claim. By getting involved in the comp claim, you can ensure that its resolution will benefit the third-party claim.

Sometimes this involves "playing defense" by keeping aggressive workers' comp claims adjusters, nurse case managers, and even company doctors from creating bad records and evidence that could irreparably harm the third-party claim. Remind the claims adjuster at the outset that you are on the same team when it comes to recovering from the party at fault in the third-party claim.

Take the time to speak with the adjuster and nurse case manager and ask that they contact you if your client fails to show up for a scheduled doctor or therapy appointment. Even in states where the employer has the sole right to direct medical care, adjusters can be lobbied to send injured workers to objective physicians

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who will not attribute all complaints to preexisting conditions.

You should also take care when crafting the workers' comp settlement agreement—a document that will likely be subpoenaed in the third-party lawsuit and could end up in front of a jury. Form settlement agreements prepared by workers' comp defense attorneys often contain references to the "alleged injuries" and question the permanency of injuries, extent of disability, and need for future medical treatment. Insist that these phrases be removed, and substitute strong language stating that your client sustained permanent injuries, received reasonable and necessary medical care, was disabled from work, and will need future medical treatment as a result of the third party's negligence. This language will prevent defense attorneys in the third-party case from using this agreement to their advantage.

Most workers' compensation subrogation statutes require the lien holder to pay a proportionate share of the third-party litigation expenses.[3] Normally, the carrier's share of expenses will be deducted at the time the workers' comp lien is resolved, following a settlement or collected judgment in the third-party case. However, do not overlook the possibility of recovering litigation expenses from the carrier at the outset of the third-party litigation, or at least when the expenses are incurred.

For the sole or small firm practitioner, asking the workers' comp carrier to advance litigation expenses in an expensive products liability case makes a lot of sense. This strategy also works well if liability in the third-party case is questionable and the comp lien substantial, such as in a slip-and-fall accident resulting in serious injuries.

In a recent conversation with a workers' comp subrogation adjuster who called to check on the status of a six-figure lien, he asked me whether a lawsuit had been filed. I replied, "Well, my client is considering pursuing a third-party claim, and we're willing to put the necessary time in the case, but we don't want to front all the expenses, so we may not file the case." A few days later I received a check for advance case expenses.

IF YOUR THIRD-PARTY CASE INVOLVES COMPARATIVE FAULT ON THE PART OF YOUR CLIENT, MANY STATES WILL ALLOW A REDUCTION IN THE WORKERS' COMP LIEN.

Waiver and Reduction

Although a workers' comp lien is statutory, it can be waived. Why would a carrier waive its lien? Consider the case of a pizza delivery driver who suffers relatively minor injuries after falling on a customer's icy driveway. Assume the comp carrier paid a total of $10,000 in medical and disability benefits and that the worker is entitled to a workers' comp settlement that you would normally settle for $10,000.

Rather than negotiating a maximum settlement near the top end of your range, agree to accept a lesser amount ($5,000–$7,500), with a complete waiver of the comp lien on any third-party claim proceeds. Your client will not have to pay back the comp lien, which could have totaled $20,000, and the claims adjuster will celebrate closing the claim for a lower lump sum payment. With the advantage of no lien repayment, you now have the flexibility to settle the difficult slip-and-fall case for less than full value if the case does not pan out.

Workers' comp liens can also be reduced. Most states require the lien holder to pay a proportionate share of the injured worker's attorney fees and costs in pursuing the third-party claim.[4] This is normally accomplished by reducing the comp lien by attorney fees and costs at the time of repayment. The "reasonable attorney fee" chargeable to the workers' comp carrier is sometimes defined by statute at 33⅓ percent, although some states may apply a lesser rate if the third-party recovery is obtained without a lawsuit being filed.[5] If the carrier hires its own subrogation counsel to intervene and actively participate in the action, a court may be asked to divide attorney fees between the carrier's counsel and the worker's counsel.[6]

Reduction of a comp lien for attorney fees and costs is usually a given; further lien reductions require more argument on your part. Additional reductions may be based on comparative fault, application of the "made-whole doctrine," or even more equitable concepts such as the inability to collect full damages in the third-party case.

Many liability cases involve substantial fault on the injured worker's part—entering a restricted area in a construction site, not paying attention to a patch of ice on a sidewalk, or failing to follow proper procedures when cleaning dangerous machinery. If your third-party case involves comparative fault on the part of your client, many states will allow a reduction in the workers' comp lien.[7]

Likewise, the employer's or nonparties' comparative fault is often another basis for reducing the workers' comp lien. It is common for the injured worker's employer to bear some fault for occupational injuries—for example, not adequately marking off the restricted area on the construction site, not reporting to the landlord the gutter leak that resulted in the patch of ice, or failing to properly train employees.[8]

To bolster your argument for a significant lien reduction after settlement, do not hesitate to ask adjusters (in presuit negotiations) or defense attorneys to provide you with a letter outlining the extent of fault that should be apportioned to your client, your client's employer, and any nonparties. The letter should outline percentages of fault that figured in the defense's settlement offer. I often make such a letter a condition of settlement and then use the letter to make the case for a lien reduction with the workers' compensation carrier.

Many reasons aside from comparative fault can result in an injured worker obtaining less than a full recovery on a third-party claim: limited insurance policy proceeds or the tortfeasor's impending bankruptcy, a questionable legal claim subject to summary judgment, or even your client's extensive criminal history. If your client recovers only 50 percent of the value of his or her full claim and has thus not been made whole, the workers' comp carrier should recover only 50 percent of its lien, right? While justice would seem to call for an equitable application of the made-whole doctrine in such instances, most states do not recognize the doctrine in the context of workers' compensation subrogation law, mainly because subrogation is controlled by statutes that give the carrier a right of first recovery before the injured worker.[9]

However, some jurisdictions have included the made-whole doctrine in their workers' compensation or general subrogation statutes applicable to workers' comp liens.[10] Still others, while not explicitly including the doctrine in statutes, give the trial court or industrial commission the discretion to distribute the proceeds of third-party recovery in a "fair and equitable distribution," a broad standard that opens the door for lien reduction based on made-whole principles.[11] Regardless of whether the doctrine is strictly applicable, you should argue for a lien reduction if your client is not being made whole. Fairness requires it.

Because the successful negotiation of a workers' comp lien necessarily depends on the law of each state, learning the ins and outs of your state's subrogation law is a must to adequately represent your clients. If your practice includes representing clients injured in your state but who are subject to other states' workers' comp systems, you may have to wade into the murky waters of conflict-of-law analysis to see which state's subrogation law applies.[12] Consider consulting with an attorney familiar with the applicable state's subrogation law, or at least review a treatise on workers' compensation subrogation, before beginning negotiations with the lien holder.[13]

The overriding principle in workers' comp lien negotiations is, "ask for the moon." Regardless of the law in your jurisdiction, ask for a waiver or large reduction of the lien as a matter of course, even in clear liability cases where your client has made a full recovery. Busy subrogation claims adjusters will often be eager to recover something—anything—if payment can be made within 30 days. Your clients will appreciate your hard work in not only maximizing the settlement amount, but minimizing the amount to be repaid, thereby increasing the only number that really matters—the net recovery. T

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Notes

1. *See e.g. Overend v. Elan I Corp.*, 441 A.2d 311, 314 (Me. 1982).
2. *See e.g. Colbert v. D.C. Dept. of Empl. Servs.*, 933 A.2d 817, 820–21 (D.C. 2007); *Smith v. Champion Trucking Co.*, 925 N.E.2d 362, 367 (Ind. 2010); *Johnson v. Buffalo & Erie Co. Private Indus. Council*, 636 N.E.2d 1394, 1397 (N.Y. 1994); *Kimmer v. Murata of Am., Inc.*, 640 S.E.2d 507, 512–14 (S.C. App. 2006).
3. *See e.g.* Ind. Code §22-3-2-13 (2000); Tex. Labor Code Ann. §417.003 (2005).
4. *Id.*
5. Indiana provides for an attorney fee of only 25 percent if the lien recovery is made before suit is filed. Ind. Code §22-3-2-13 (2000).
6. *See e.g.* Neb. Rev. Stat. §48-118.01 (2005).
7. *See e.g.* Ind. Code §34-51-2-19 (2011); *see also* La. Stat. Ann. §23:1103 (1997) and §23:1104 (2010).
8. *See e.g.* Tex. Labor Code Ann. §417.001(b) (2005).
9. *See e.g. Vesta Ins. Co. v. Amoco Prod. Co.*, 986 F.2d 981, 988 (5th Cir. 1993).
10. *See e.g.* Georgia, which codifies the made-whole doctrine in its workers' comp statute, Ga. Code Ann. §34-9-11.1(b) (2011); and Indiana, which includes the doctrine in its general subrogation statute, arguably applicable to workers' comp liens, at Ind. Code §34-51-2-19 (2011).
11. *See* Neb. Rev. Stat. §48-118.04(2) (2005); *see also* S.C. Code Ann. §42-1-560(f) (2001).
12. In deciding which state's workers' compensation subrogation law to apply, courts generally take one of three approaches: apply the law of the forum state in which the accident occurred (*lex loci delicti* approach), e.g., *Johnson v. Comcar Indus., Inc.*, 556 S.E.2d 148, 149–50 (Ga. App. 2001); apply the law of the state where compensation benefits were paid (*Restatement (Second) of Conflicts of Law* §185, called the Larson Rule), e.g., *Malatesta v. Mitsubishi Aircraft Intl., Inc.*, 655 N.E.2d 1093, 1100–02 (Ill. App. 1995); or apply the subrogation law of the state with the "most significant relationship" to the incident, e.g., *Jemco, Inc. v. U.P.S., Inc.*, 400 So. 2d 499, 500–01 n. 5 (Fla. App. 1981).
13. For a comprehensive treatise on workers' compensation subrogation law, *see* Gary L. Wickert, *Workers' Compensation Subrogation Law in All 50 States* (4th ed., Juris Publg. 2009).

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