Dealing with the Unreasonable Workers' Compensation Lien Holder Where a Contribution Case Exists or Can Exist Against the Employer

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Introduction

The scenario: Your client is injured on a construction site. You file a workers' compensation claim against the employer, and a third-party civil lawsuit against the general contractor. The general contractor names the employer as a third-party contribution defendant in the civil action, alleging contributory negligence because the employer had a foreman supervising your client's work when they were injured.

The general contractor approaches you with a settlement offer before trial. However, the employer's workers' compensation insurer refuses to compromise its workers' compensation lien against the potential settlement. What to do? Accept the settlement offer from the general contractor, take an assignment of the general contractor's contribution action pending against the employer, and try the contribution case against the employer to a verdict. The jury determines what percentage of fault is attributable to the employer, forcing the employer to pay its *pro rata* share of the common liability settlement previously paid by the general contractor. The employer's payment of its *pro rata* share acts as a dollar-for-dollar reduction of its workers' compensation lien against the settlement, and can potentially "eliminate" the lien[1] altogether.

Assignment of Contribution Claim

The first district addressed and approved the assigning of a contribution action in the above context in *Block v. Pepper Const. Co.* In *Block*, a construction worker employed by a subcontractor brought suit against a general contractor, and various other sub-contractors ("first-party defendants"), after he was injured on the job site.[2] These defendants subsequently filed a contribution action against the plaintiff's employer ("third-party defendant/employer").[3]

The plaintiff in *Block* entered into a settlement agreement with the first-party defendants, wherein the plaintiff released his claim against all defendants in exchange for cash payment and an assignment of the contribution action against the third-party defendant/employer.[4] Upon motion of the third-party defendant/employer, the trial court held that the assignment to the plaintiff was invalid because the contribution claim could only belong to a joint tortfeasor per the trial judge's interpretation of the Joint Tort Feasor Contribution Act (the "Act").[5] As such, the third-party complaint was dismissed.[6]

On appeal, the first district disagreed with the trial court, and held that a contribution action can be assigned.[7] The court stated that, unlike a personal injury action which is non-assignable, "a right of contribution is distinct from the underlying tort and instead constitutes an action for the equitable division of damages."[8] The court specifically addressed the issue in the context of a plaintiff injured worker being assigned a contribution action against his employer holding a lien against the plaintiff/injured worker's settlement with first-party defendants, and found such assignments harmonious with the policy behind the Act, which is to encourage settlement.[9]

This mechanism, however, can apply to any settlement scenario, where a valid contribution action exists against the third-party defendant/employer, and is not limited to just construction actions.

What To Address In Settlement/ Assignment

First, make sure the third-party contribution action you are receiving as settlement consideration is properly pled and viable, as the contribution action filed by the settling general contractor (staying within the hypothetical scenario explained in the Introduction) governs the assignment to the plaintiff/injured worker, because "an assignment puts the assignee into the shoes of the assignor."[10] As such, when you agree to accept the assignment of the contribution claim as settlement consideration, you do so subject to all legal and equitable defenses existing at the time of the assignment.[11]

To be properly pled, in our hypothetical, confirm that the general contractor asserted the contribution claim against the employer by counterclaim or third-party claim in the civil action you originally filed against the general contractor on behalf of the injured worker, or else it will be barred.[12] Furthermore, you must ensure the counterclaim or third-party claim was brought by the general contractor within the statute of limitations that applies to contribution actions, which is two years after the

first-party defendant is served with process in the original cause of action.[13] So, in our hypothetical scenario, the two-year statute will begin to run once the general contractor is served with process in the civil action brought by the plaintiff/injured worker.

Second, and probably the most important sub-point in the "things to look out for" when you settle with a first-party defendant, and receive an assignment of the contribution claim as consideration, is the release language included in the settlement agreement.

The rule is a party that settles may seek contribution only from parties whose liability is extinguished by the same settlement.[14] This means that the employer **must be specifically named in the release**. While this may seem counter-intuitive given the fact that your ultimate goal is to try the contribution case, and get a jury verdict against the employer to reduce the workers' compensation lien, it makes perfect sense when you consider the language in *Block*, "a right of contribution is distinct from the underlying tort and instead constitutes an action for the equitable division of damages."[15] Thus, by specifically naming the employer in the settlement release, you discharge their liability in tort, which then enables you to proceed to trial on the contribution action, pending the court's approval of the settlement agreement with the general contractor.

Third, you must get the assignment from the settling first-party defendant(s) as well as their insurance companies. This is no different than having insurers named in a release. Problems may arise if the insurance companies refuse to assign their interest in the contribution claim, because the assignment may be deemed invalid under the argument that the claim really belongs to the insurance company whose subrogation interest was perfected when they paid the settlement on behalf of the individually name defendant.[16] If this is the case, refuse to settle the first-party case. Remember, it does not "cost" the first-party defendant anything to throw in the assignment as part of their settlement consideration. Insist that the insurers are included.

This issue was raised in *Mondschein v. Power Constr. Co.*, where the third-party defendant/employer argued that, because the insurer was not specifically named in the release as an assignor of the contribution claim, the first-party defendant's assignment of an inchoate right was not a valid assignment.[17] The argument ultimately failed, however, after the plaintiff/injured-worker obtained a signed and notarized "Confirmation of Assignment" from the insurance companies, which the court recognized obviated any defect in the release as to the validity of the assignment.[18]

Finally, you must get a good faith finding from court at time of settlement and assignment. This will also draw out any objections as to the assignment by the third-party defendant/employer at the time of the finding which, if they fail to make any, will haunt them later in post-trial motions if they claim

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assignment not valid.[19]

Try the Contribution Case

In an action for contribution, you try the issues in front of a jury just like an ordinary negligence trial, and then the jury determines the percentage of fault of the party from whom contribution is sought (i.e. that defendant's *pro rata* share of "common liability").[20] You are simply wearing a different hat at trial, i.e., you are now the "wronged defendant" that over paid to settle the first-party tort claim. When a joint-tortfeasor has settled before trial, the amount of settlement is considered the "common liability" to be allocated among the contribution parties.[21] Thus, at trial, the jury need only decide two issues: whether the contribution defendant is liable and, if so, by what percentage of the common liability.[22]

The jury instruction delineating your burden of proof is IPI 600.10. What differentiates an ordinary negligence trial from an action for contribution brought by a settling tortfeasor against a non-settling tortfeasor, is that in the latter the party seeking contribution must show that settlement was made in "reasonable anticipation of liability" to the injured party. There is no definition of "reasonable anticipation of liability" in the contribution instructions and it is vague at best in the case law. The only guidance in the context of a contribution action is found in *Sands v. J.I. Case Co.* and *Patel v. Trueblood, Inc.*[23] *Sands* articulates that the "reasonable anticipation of liability" standard merely requires a showing from which a trier of fact can infer that the settling third-party plaintiff reasonably anticipated its liability to the injured party in the tort action.[24]

In another case dealing with insurance coverage (not contribution), the court stated that to satisfy the "reasonable anticipation of liability standard" the settling party need not establish actual liability to the person with whom it has settled, rather, it's sufficient that "potential liability on the facts known" to the settling party is shown to exist, "culminating in an amount reasonable in view of the size of possible recovery and degree of probability" the person would succeed in an action against the settling party.[25]

Applying this in the context of an action for contribution, the trial evidence to prove this could come from a myriad of sources including the underlying tort plaintiff, one of the underlying insurance adjusters or defense attorneys, or even a liability expert from the underlying case that was adopted.

Finally, there is no reason for the jury to know you were counsel in the underlying first-party tort case, notwithstanding any noise made by opposing counsel as it is totally irrelevant to the trial of the contribution action. Any attorney can maintain the contribution action so there is no reason for the jury to know you created the underlying settlement amount.

Final Issues

Three final issues to consider on this topic. First, the underlying injured plaintiff's own contributory negligence is not admissible evidence in a contribution action against an employer.[26] This is because contribution is limited by the Act to those subject to liability in tort, and an injured worker is not subject to liability to himself when injured on a job site.[27] So make sure to move *in limine* to keep any such evidence out of the contribution trial.

Second, in the contribution action following settlement it is "logically impossible" for the party against whom contribution is sought to be found 100 percent at fault.[28] Therefore, do not ask for 100 percent fault against the employer from the jury. Remember the old adage, "be careful what you wish for." You could nullify your claim.

Finally, be mindful of scenarios where the third-party/employer defendant has, pursuant to contract before construction begins, purchased indemnity insurance naming the settling first-party defendant as an insured. If the settling first-party defendant uses the insurance proceeds to settle with the injured worker in the civil tort case, then the "common liability" amount is reduced by the total insurance proceeds used.

For example, in *Mondschein v. Power Construction Co.*, an injured construction worker sued, among others, a general contractor, who then asserted a contribution claim against the subcontractor that employed the injured worker.[29] The plaintiff/injured worker settled the case with the first-party defendant/general contractor for $2,673,000, and received as additional consideration an assignment of the contribution claim against the third-party defendant/employer.[30] $1,000,000 of the $2,673,000 used to settle the first-party claim with the plaintiff came from an insurance policy purchased by the third-party defendant/employer, which covered the first-party defendant/general contractor as an additional insured to the extent that the general contractor's liability arose out of the employer's work.[31] The contribution action proceeded to trial, and the jury found the third-party defendant/employer liable for 35 percent ($935,550) of the settlement amount previously paid to the injured worker.[32]

On appeal, the third-party defendant/employer argued that its *pro rata* share of the "common liability" was satisfied by the $1,000,000 insurance policy it had purchased for the first-party defendant/general contractor ($1,000,000 > $935,550). The court did not agree that the third-party defendant/employer's *pro rata* share was extinguished, but did find that because the $1,000,000 insurance policy partly indemnified the general contractor for its liability to the plaintiff/injured worker, that amount could not be considered part of the

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"common liability," for purposes of determining the employer's *pro rata* share of liability.[33] The court then went on to distinguish indemnification from contribution, and stated that the general contractor still had to use $1,673,000 of its own money to extinguish the "common liability."[34] That figure, the court concluded, should have been used at trial to determine the third-party defendant/employer's *pro rata* share of liability, instead of the total settlement amount.[35]

Once you finally obtain a jury's determination of the third-party defendant/employer's *pro rata* share of the "common liability," the payment of that judgment acts as a dollar-for-dollar reduction of the workers' compensation lien against the original settlement, and you have achieved a greater overall settlement victory for your client. By way of example, assume the underlying first-party tort settlement was $3,000,000, and you have a $1,000,000 recoverable workers' compensation lien held by the third-party defendant/employer. If the jury finds that the third-party defendant/employer's *pro rata* share of the "common liability" is 50 percent, then your client now "owns" a $1,500,000 million dollar judgment on assignment against his employer, which exceeds the value of the $1,000,000 owed back on the workers' compensation lien, thus nullifying it.[36] Do not be afraid to use this very effective, and sorely underused tool to deal with the reluctant workers' compensation lien holder.

Endnotes

[1] It must be noted you are not "adjudicating" the workers' compensation lien, but rather obtaining a contribution judgment as a third-party plaintiff against the employer that exceeds what your client (first-party plaintiff in the underlying civil tort lawsuit) owes on the lien.

[2] *Block v. Pepper Const. Co.*, 304 Ill. App. 3d 809, 811 (1st Dist. 1999).

[3] *Block*, 304 Ill. App. 3d at 811.

[4] *Id.* at 811-12.

[5] *Id.* at 812.

[6] *Id.*

[7] *Id.* at 813. The *Block* appellate court nonetheless affirmed the trial court's dismissal of the action due to its finding the contribution claim being time-barred by the applicable statute of limitations. "We agree with plaintiff that a contribution action generally can be assigned. However, we hold that the contribution action in the present case is time-barred and, therefore, affirm the dismissal of the contribution action." *Block*, 304 Ill. App. 3d at 811.

[8] *Id.* at 813-14.

[9] "The inescapable conclusion is that an employer retains the identical posture of a contribution defendant, regardless of whether the contribution plaintiff is a settling defendant or a nontortfeasor plaintiff. On the other hand, without an assignment of a right of contribution, the injured employee may be far less likely to settle the matter and could be severely prejudiced by the employer's lien against any award from a settling defendant. For all of the foregoing reasons, we find that a right

of contribution under the Act can be assigned." *Id.* at 815.

[10] *Collins Co. v. Carboline Co.*, 125 Ill. 2d 498, 512 (Ill. 1988.)

[11] *Block*, 304 Ill. App. 3d at 816.

[12] *Laue v. Leifheit*, 105 Ill. 2d 191 (1984).

[13] 735 ILCS 5/13-204. The statute also provides that an action for contribution may be filed "2 years from the time the party, or his or her privy, knew or should reasonably have known of an act or omission giving rise to the action for contribution or indemnity, whichever period expires later."

[14] *Guerrero v. Sebastian Contr. Corp.*, 321 Ill. App. 3d 32, 39 (1st Dist. 2001).

[15] *Id.* at 813-14.

[16] 740 ILCS 100/2(f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any right of subrogation arising from any other relationship.

[17] *Mondschein v. Power Constr. Co.*, 404 Ill. App. 3d 601, 606 (1st Dist. 2010).

[18] *Mondschein*, 404 Ill. App. 3d at 606-07.

[19] See e.g. *Ewanic v. Pepper Construction Co.*, 305 Ill.App.3d 564 (1st Dist. 1999) The trial court specifically found injured worker's settlement with first-party defendant to have been made in good faith and employer did not object or challenge the good faith or reasonableness of the settlement.

[20] *Ziarko v. Soo Line R. Co.*, 161 Ill. 2d 267 (Ill. 1994); *Mallaney v. Dunaway*, 178 Ill.App.3d 827, 831 (3rd Dist. 1988).

[21] *Mallaney v. Dunaway*, 178 Ill.App.3d 827, 832 (3rd Dist. 1988).

[22] *Orejel*, 287 Ill. App. 3d at 602.

[23] *Sands v. J.I. Case Co.*, 239 Ill. App. 3d 19 (4th Dist. 1992), *Patel v. Trueblood*, Inc., 281 Ill. App. 3d 197 (1st Dist. 1996).

[24] *Sands*, 239 Ill. App. 3d at 24.

[25] *U.S. Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 625-26 (1st Dist. 1994). While *U.S. Gypsum Co.* discussed the issue in the context of insurance coverage, it lends some sensible guidance on what a party seeking contribution must show to prove it settled in "reasonable anticipation of liability."

[26] *Pempek v. Silliker Laboratories, Inc.*, 309 Ill. App. 3d 972, 983 (1st Dist. 1999) citing *Ewanic v. Pepper Construction Co.*, 305 Ill.App.3d 564 (1st Dist. 1999)

[27] *Ewanic*, 305 Ill.App.3d at 569.

[28] *Hackett v. Equip. Specialists, Inc.*, 201 Ill. App. 3d 186, 200 (1st Dist. 1990).

[29] *Mondschein v. Power Const. Co.*, 404 Ill. App. 3d 601, 602-03 (1st Dist. 2010).

[30] *Mondschein*, 404 Ill. App. 3d at 602-03.

[31] *Id.* at 609.

[32] *Id.* at 602.

[33] *Id.* at 610.

[34] *Id.*

[35] *Id.*

[36] This does not mean that the plaintiff/injured worker can collect the additional $500,000 after the workers' compensation lien is nullified. In Illinois, the employer's third-party liability is limited to the employer's liability under the Workers' Compensation Act. See *Palmer v. Freightliner, LLC*, 383 Ill. App. 3d 57, 66 (1st Dist. 2008) citing *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155 (Ill. 1991).

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