

Beware of the low-hanging fruit

Prelitigation settlement of the workers' comp/PI cross-over case, with special attention to indemnity provisions

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There are characteristics to personal injury/workers' compensation cross-over cases that almost invite early settlement. Since the workers' compensation system has its own mechanisms to prevent fraud and weed-out unmeritorious claims, there is often little dispute as to whether the applicant/plaintiff was in fact injured. The same is true for the treatment received as it is almost always recommended by licensed physicians and approved by the comp carrier as reasonable and necessary. Moreover, the evidence of this is often consolidated and coded into an accounting of the amounts paid for treatment and time spent off work due to disability. It is so clearly itemized that, with a few supporting medical records, a liability insurance adjuster can very easily obtain ample authority to settle the underlying third-party claim.

Recovery by WC carrier/employer of benefits paid

Unlike every other collateral source payor except for Medicare and perhaps Medi-Cal, the payor of workers' compensation benefits (usually an insurance company, but sometimes the employer) has independent standing under the Labor Code to recover its paid benefits from any responsible third-party. The liability carrier knows this and, usually, has little interest in settling the *employee's* personal-injury claim unless it also extinguishes the *employer's* independent claim. Beware settlement terms that make the employer's claim the responsibility of your client.

Indemnity agreements in claims settlement

Settlements are contracts and like most contracts, parties are free to negotiate terms so long as they do not achieve an unlawful objective. Regular readers of this magazine do not need to be told that indemnity obligations are all too frequently included as core terms in settlement agreements. Such terms typically obligate the settling plaintiff to protect the released party from competing claims to the settlement funds. From the liability carrier's perspective, it is understandable because they desire to "buy peace" and indemnity provisions can provide them a measure of protection against future claims arising out the same incident. While the financial protection that an ordinary person can offer is illusory compared to the assets of an insurance company, indemnity provisions do provide the released party some benefit as they function to motivate the settling plaintiff to resolve peripheral claims, like those held by lienholders, lest the indemnity provisions be triggered.

While conceptually daunting, an informed client can intelligently agree to

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indemnity provisions with a clear understanding of the obligation assumed. More often than not, in a personal injury case, it translates to an obligation to resolve or satisfy outstanding medical bills or payments on bills by insurance carriers or the government. These amounts offset by anticipated reductions can be easily calculated or estimated based on the records of what has already transpired, i.e., treatment received. Moreover, there is often little risk because the lien claimant is typically limited to the pool of funds created through the settlement, however small it might be. But tread cautiously when assuming indemnity obligations while your client pursues a parallel workers' compensation case. Such obligations could put at risk your client's right to future medical care and benefits.

A possible scenario

Consider the following scenario: You represent a driver who was rear-ended within the course and scope of their employment. The driver is entitled to claim comp benefits and also to pursue any responsible third-party. Let's say the responsible third-party readily tenders what turns out to be minimal $15,000/person policy limits; your client accepts and assumes all the typical "any and all," "hold harmless," etc. indemnity provisions that would make the client responsible for the costs of defending other claimants as well as the obligation to indemnify by satisfying any resulting judgments. Let's further assume that before the statute of limitations expired, the employer commenced an independent action against the responsible third party to recoup its benefits. It also turns out that the client now requires spinal surgery in their neck due to the whiplash of the collision.

Having been served the complaint from the employer, the third party invokes the indemnity provision of the settlement agreement and tenders the defense of the litigation to your client. Not only does the employer look to recover the benefits already provided, it also looks to exert leverage on the indemnity provision by making your client financially responsible for any future medical care, including the costly surgery that is required. Unlike the underlying liability carrier, your client has no "policy limits" under the indemnity agreement. That $15,000 settlement does not seem like such a good deal anymore.

Whether the employer could successfully press the client to bear personal liability for future care is not the aim of this article. Most would agree that it would be preferable to avoid altogether any dynamic in which terms of a settlement agreement were turned against your client in fashion. What could have been done differently to avoid this scenario?

How to limit the scope of indemnity

Efforts should be made to limit indemnity obligations whenever possible. The underlying liability carrier gets the benefit of policy limits, so why shouldn't the settling plaintiff have similar protection? Limit the scope of indemnity obligations to amounts paid under the settlement agreement or, better yet, the plaintiff's net recovery after payment of contingency fees and costs.

Under the Labor Code, the employer is entitled to notice of any settlement and an opportunity to recover its benefits. Rather than rushing into finalizing a settlement with a formal written release, give the employer notice of the settlement, but only after the liability carrier has tendered its settlement offer in response to your well-written demand letter, which will increase your ability to insist that "common fund" reductions be taken against any comp liens.

And sometimes, no settlement (right now) is better than a settlement with terms that do more harm than good. If you are unable to work out a deal prelitigation that protects your client's access to needed medical care through the workers' comp system, file suit and continue to work up the third-party case. There will be future opportunities to forge an agreement that is in your client's best interest.



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