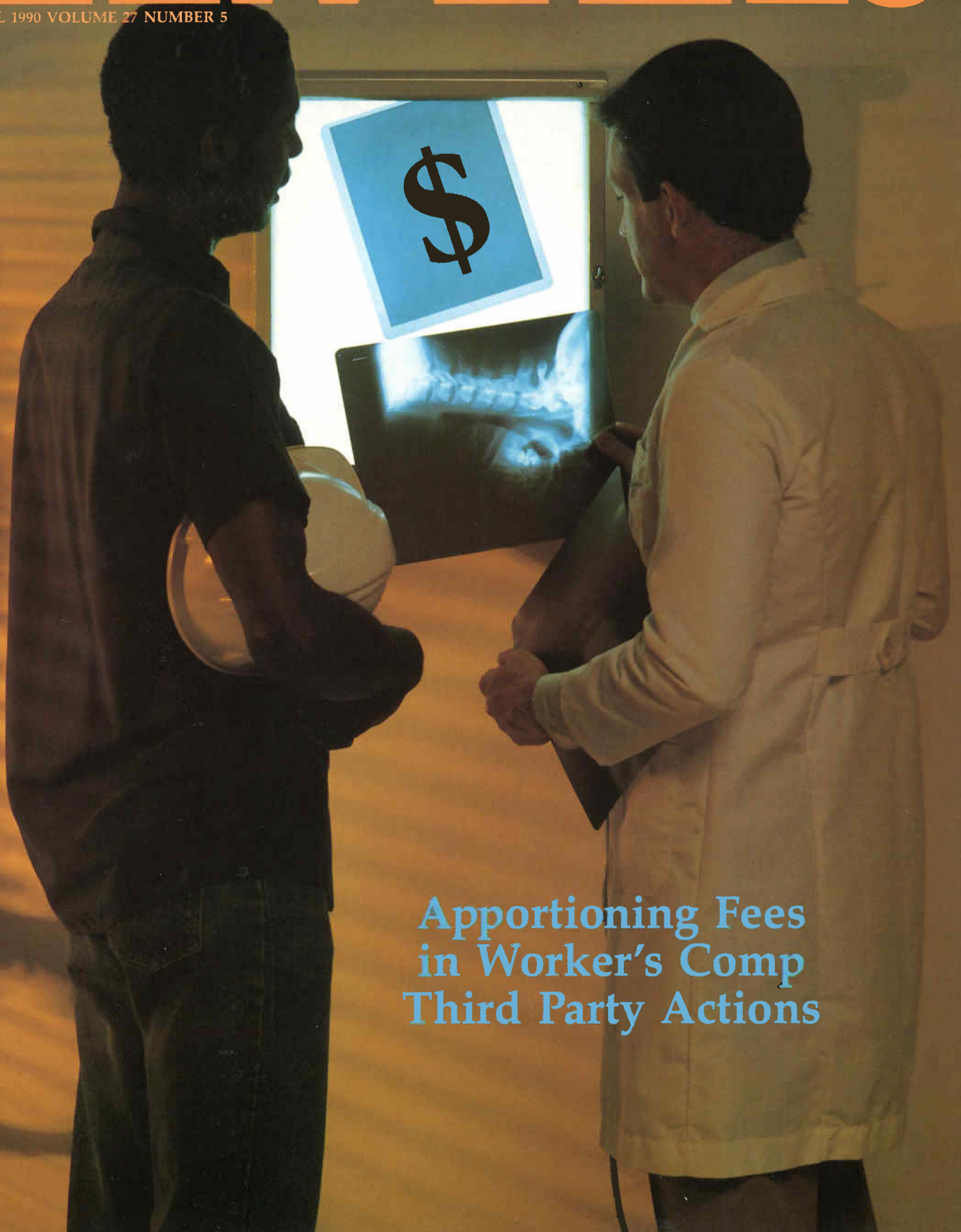


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Apportioning Fees
in Worker's Comp
Third Party Actions

Apportioning Attorney's Fees In Worker's Comp Third Party Actions

by Gary L. Wickert

For the past several years, the insurance industry has been waking up to the tremendous benefits of worker's compensation subrogation under Article 8307 §6(a) of the Texas Worker's Compensation Act. Article 8307 §6(a) is the statute creating a worker's compensation carrier's right of subrogation in third party lawsuits. Although having been around for over 70 years, the true benefits of this right of subrogation until now have been for the most part, ignored and underutilized. These carriers are now waging an expensive war to solidify their claim to subrogation monies supposedly guaranteed them by statute. Carriers across the state are recognizing the vital importance of subrogation and are hiring qualified litigators on an hourly basis to protect their subrogation recovery, which is ostensibly up for grabs under the terms of the statute. In this age of worker's compensation reform, carriers are discovering that one means of reducing the costs of worker's compensation premiums to the public is to obtain a full recovery of benefits paid out in situations where some third party is

There is a tremendous need for legislative reform giving trial courts guidelines and criteria on which to base apportionment decisions

legally responsible for the injuries sustained by the claimant.

Plaintiffs' attorneys who have traditionally been able to recover as attorney's

fees one-third of the carrier's total indemnity and compensation payments, and more, by filing a motion, are now confronted with carriers who insist on being active in the third party action in order to protect their lien. The notion of the carrier receiving a "free ride" on the backs of the plaintiffs' attorneys is becoming outdated.

How much activity on the part of the carrier is necessary to allow it to recover and keep 100 percent of its lien is a question whose answer has become lost in confusing legislation and conflicting opinions. One thing is clear. Article 8307 §6(a) and the opinions that interpret it provide very little direction and guidance. There is a desperate need for legislative reform. Nonetheless, a close look at the legislative purpose of the statute and some of the cases dealing with apportionment of attorney's fees can give us and our judiciary sorely needed guidance in an area having great import to and a tremendous effect upon the entire insurance industry as well as every business in Texas presently paying worker's compensation insurance premiums.

PURPOSE OF WORKER'S COMPENSATION SUBROGATION

Worker's compensation carriers did not always enjoy the benefits of subrogation. The original worker's compensation statute was passed in 1913. There were no subrogation provisions for the insurance carrier that paid compensation to the employee.¹ In 1917, the Worker's Compensation Act was amended and Article 8307 §6(a) was added.² It provided, in pertinent part, as follows:

[I]f compensation be claimed under this law by the injured employee or his legal beneficiaries, then the associations shall be subrogated to the rights of the injured employee insofar as may be necessary and may enforce in the name of the injured employee or his legal beneficiaries or in its own name and for the joint use and benefit of said employee or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employee or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said costs and the excess so recovered shall be paid to the injured employee or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employee or his beneficiaries and the approval of the board, upon a hearing thereof.³

The Texas Commission of Appeals approved and upheld the constitutionality of Article 8307 §6(a)⁴, acknowledging that the purpose of its enactment was to make insurance less burdensome to the insurer, and hence less expensive to the employer and ultimately to the public.⁵ Thus, the primary purpose of the legislature in enacting original Article 8307 §6(a) was to reduce the burden of insurance to the employer and to the public.⁶ The nature of the carrier's subrogation rights under the original version of §6(a) is the same as under its present version. In both versions, the legislators' main objective was to protect the worker's compensation carrier's subrogation rights.⁷

Article 8307 §6(a) which, in effect, created a lien on third part lawsuits in favor of the carrier, was amended effective September 1, 1973, to allow for plaintiffs' attorneys to recover a portion of that lien

as an attorney's fee, under certain circumstances.⁸ This amendment grew out of a practice that had become prevalent, in which a carrier would intervene in a third party action and do absolutely nothing else. It was to remedy this type of situation and to prevent the carrier from obtaining a "free ride" that the amendment was enacted.⁹ It is clear then, that in both the pre-amendment and post-amendment versions of §6(a), the protection of the worker's compensation carrier is paramount.

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MECHANICS OF WORKER'S COMPENSATION SUBROGATION

The carrier's right to recover all worker's compensation benefits from any third party settlement or judgment is not only statutory, it is automatic.¹⁰ An intervention is not required.¹¹ The first dollars received in any settlement or judgment by the plaintiff, and every dollar thereafter, until the carrier is paid in full, belongs to the carrier. Until the carrier is repaid in full, neither the plaintiff nor his attorney have any right to any of the funds.¹² This is true even where the plaintiff settles with one of several defendants.¹³ There is a myth among some lawyers that a carrier will only recover its lien if it proves up reasonable and necessary medical expenses and lost wages. To the contrary, the carrier's right to the "first dollar recovery" extends to *any* monies recovered from the third party, regardless

of which element of damage, injury, or loss it represents.¹⁴ It should be remembered that the carrier's right to recover "first dollar" is not merely a lien, it is a statutory cause of action. The Supreme Court provides that a carrier may even pursue an employee's third party cause of action on its own and in the employee's name.¹⁵ In fact, the employee doesn't even own a third party cause of action, except as to damages, if any, sustained in excess of the compensation lien.¹⁶

Where plaintiffs' attorneys have attempted to circumvent the carrier and avoid repaying its lien in a myriad of creative ways, retribution has been swift and severe.¹⁷ In fact, if a settlement is made behind the carrier's back, without repayment of their lien, the plaintiff, the plaintiff's attorney, the third party, and even the third party's carrier, can be held jointly and severally liable to the carrier.¹⁸

RECOVERY OF ATTORNEY'S FEES BY PLAINTIFF'S ATTORNEY

The 1917 act did not allow for recovery of attorney's fees. Problems with apportionment of fees first began with the 1973 amendment. Texas courts have consistently held that there are three situations in which Article 8307 §6(a) can apply:

1. Where the insurer has an attorney but he does not *actively* represent it;
2. Where the plaintiff's attorney represents both the worker and the carrier;
3. Where the carrier has an attorney who does *actively* represent it and participate in obtaining a recovery.¹⁹

This confusing piece of legislation has spawned confusing opinions. When dealing with potential apportionment of attorney's fees, the second scenario can be ignored. Here, the carrier will have an agreement with and will be represented by the plaintiff's attorney. The remaining two situations can be effectively merged, because, whether or not the carrier's attorney has "actively participated" is a distinction without a difference. This is ironic because "active participation" is the key jargon of the statute itself as well as in cases interpreting the statute.

What is "active participation"? Nobody knows. The closest thing to a definition we can find was given to us by the Amarillo Court of Appeals.²⁰ They indirectly defined it as "anything harmonious with action or movement as opposed to inaction or

idleness.”²¹ What difference does “active participation” make? In practice, none. If the plaintiff is represented by an attorney and the carrier’s interest is *not* actively represented by an attorney, the court awards a reasonable attorney’s fee to the plaintiff’s attorney in an amount up to 33 1/3 percent of the carrier’s recovery. If the carrier *is* “actively represented,” the result is the same. The court may still award an attorney’s fee to the plaintiff’s attorney of up to 33 1/3 percent of the carrier’s recovery. In other words, for a carrier’s attorney to reach the magic threshold of “active participation,” gets him nowhere. The court still has to apportion a fee based upon the benefits of each attorney’s services to the carrier. There is no need for the court to award the carrier’s attorney anything, for his fee arrangement is between him and the carrier. Besides, in many cases, the carrier’s attorney is paid on an hourly basis. Therefore, the distinction must lie in the relative activity of each attorney, bearing in mind his client’s interests.

Article 8307 §6(a) appears to differentiate between a death claim and an injury claim, although many courts have not applied it this way. For death claims, where the plaintiffs are not represented by an attorney, the statute states:

[T]he amount of such recovery shall first pay costs and attorney’s fees and then reimburse the association, and if there be any excess, it shall be paid to the beneficiaries...

One possible interpretation of this portion of the statute is that under such circumstances the carrier is always 100 percent reimbursed, with any fees coming out of the gross recovery. Similarly, the act treats an injured claimant who is unrepresented in like fashion:

If compensation be claimed under this law by the injured employee or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employee, and may enforce in the name of the injured employee or of his legal beneficiaries the liability of said other person, and in case the recovery is for a sum greater than paid or assumed by the association to the employee or his legal beneficiaries, then out of the sum so recovered the association shall reimburse itself and pay said costs and the excess so recovered shall be paid to the injured employee or his beneficiaries.

It therefore appears that when the carrier files suit and the injured claimant is *not* represented by an attorney, the result is the

same as in death claims. Having brought an action in the plaintiff’s name, the carrier can first completely reimburse itself, then pay costs (defined to include attorney’s fees),²² and any excess recovered shall be paid by the carrier to the injured employee.

The statute next deals with situations where the claimant is represented by an attorney. The statute seems to establish only two situations that are applicable with reference to awarding attorney’s fees when the claimant is represented:

1. Where the claimant is represented and the carrier is not. The plaintiff’s attorney here should get all of the fees, because the carrier’s attorney does not exist. The amount of the fee can apparently range anywhere from one percent to 33 1/3 percent.

2. Where both the plaintiff and the carrier have attorneys. I submit that the active participation distinction is of no import. Where each party has an attorney, the court should look to the actions of each attorney and the benefits flowing from their services to the carrier.

It is important to note that the right to claim attorney’s fees under Article 8307 §6(a) is vested solely in the claimant’s attorney, not the claimant.²³ Such a claim must be brought in the attorney’s name. If the attorney does not join the claimant in his motion, it is subject to being dismissed.

The court is generally asked to apportion some amount, up to one-third, of the monies recovered by the carrier at the conclusion of a third party action. If the carrier compromises and reduces its lien, it is usually done with the understanding that the plaintiff’s attorney will make no claim for an attorney’s fee. Beginning in 1985, a series of courts of appeals’ decisions dramatically increased the need for direction and guidance in this very confusing area of law.²⁴ In *Chambers v. Texas Employers Insurance Association*, the Dallas Court of Appeals, in a no reversible error decision, held that for purposes of awarding attorney’s fees, the subrogation interest of the carrier was not limited to what had already been paid, but was to include the estimated future benefit payments from which the carrier was relieved by virtue of the advance against future benefits payments under the act.²⁵ *Chambers* and its progeny appear to grapple with where to fit this novel idea of com-

pensating the plaintiff’s attorney even further, within the confines and wording of the statute. *Chambers* refers to a “subrogation interest.”²⁶ *Ischy* and *Vanguard* refer to a “subrogation recovery.”²⁷ Later, *Tucker* again refers to a “subrogation interest.”²⁸ The reason for this difficulty is apparent. Nowhere in the statute is there any mention or allusion to future benefits in connection with awarding attorney’s fees. In fact, the future benefits is referred to in an entirely different subsection.²⁹ “Subrogated interest,” “subrogation recovery,” and “recovery” all refer to the same thing, the dollars received by the carrier in satisfaction of its worker’s compensation lien at the conclusion of a third party action. *Chambers* and its progeny encompass ideas that the legislature did not contemplate and they certainly do not advance the original purpose of Article 8307 §6(a), the protection of the carrier and the reduction of insurance burdens and premiums on the people of Texas. The Supreme Court has yet to address this issue, but the legislature has.

The Texas Legislature has recently recodified Article 8307 §6(a) in Section 4.05 of the new Texas Worker’s Compensation Act. Section 4.05 provides:

For purposes of determining attorney’s fees under this section, only the amount recovered for past benefits and medical expenses paid by the insurance carrier may be considered.³⁰

The effective date of this portion of the Act is January 1, 1991, meaning that any injuries sustained prior to this date will be handled under the old law.³¹ It is now obvious that the Legislature never intended attorney’s fees to be awarded based on benefits to be paid in the future. The only other change from Article 8307 §6(a) is the deletion of the section dealing with death claims.

APPORTIONMENT OF ATTORNEY’S FEES

The usual step taken in order to obtain a judicial apportionment of attorney’s fees is to file a motion and request a hearing in front of the court in which the case is pending. The hearing can be formal or informal, but it is of the utmost importance to have a record of the entire hearing. Without such a record on appeal, the appellate court will be helpless to say that the judge abused his discretion in apportioning the fees the way he did.³² The hearing

should be handled just like a trial. Although the statute itself indicates that the court is to make the apportionment, an argument can be made, upon proper filing of a demand and fee, that a jury should decide the amount of attorney's fees to be apportioned.³³

The awarding of fees under Article 8307 §6(a) has traditionally been left to the sound discretion of the judge.³⁴ Hence, the appellate courts have usually been saddled with the rather arbitrary issue of whe-

The notion of the carrier receiving a 'free ride' on the backs of the plaintiff's attorneys is becoming outdated

ther the judge abused his discretion. It is hard to abuse one's discretion when there are no guidelines, parameters, or rules. With nothing to guide them, many judges have simply awarded the lion's share of fees to the plaintiff's attorney. One reason may be that, in years past, the carrier has taken a very passive role in the pursuit of third party actions. A judge abuses his discretion whenever the ruling he makes or the standard he applies is arbitrary and unreasonable.³⁵ Confronted with an apportionment situation, a judge then has two decisions to make: one, how much of the worker's compensation lien (up to one-third) should be set aside for apportionment as attorney's fees, and two, how to apportion that amount between attorneys. The first decision should be based solely on the nature of the third party case, including the amount of the lien involved and liability factors. Worker's compensation liens usually represent medical expenses and lost wages. These are two very tangi-

ble damage elements that are usually the first, if not the only, damages awarded by a jury. Therefore, it would seem reasonable that in proper cases, the court should apportion 20 percent, 15 percent, or even less of the lien as the attorney's fee to be apportioned between the two attorneys. Some courts have done this when liability is clear and there was a likelihood of recovering these most basic out-of-pocket losses had the suit been filed by the carrier's attorney.³⁶

The second decision to be made by the judge, the actual apportionment of the set aside fee, has traditionally been based on a review of the activity of each of the attorneys. Specific factors to be considered by the judge in apportioning fees are unclear, mainly due to the confusing nature of the statute itself. There appears to be no magic formula. The aggregate of the fees to be apportioned shall not exceed 33 1/3 percent. The courts of appeals that have been responsible for reviewing the random decisions by the trial courts with respect to apportionment of fees have confirmed that in their opinion there is a significant absence of statutory guidelines to assist the trial court in making divisions under Article 8307 §6(a).³⁷ The only guidance given us is the language "taking into account the benefit accruing to the association as a result of each attorney's service."³⁸

To what extent does the plaintiff's attorney benefit the plaintiff as opposed to the carrier? Traditionally, trial courts faced with this question have blindly followed the "lead horse theory." Who did the most work? Who deposed the most witnesses? Who filed the most motions? But this is certainly an illogical and dysfunctional approach to apportionment of fees, especially when you consider the interests of each party and the legislative intent behind the statute.

One of the first cases to review the apportionment of fees under the amended statute was *Insurance Company of North America v. Stuebing*.³⁹ In *Stuebing*, the court admitted that the amended statute grew out of the practice of the carrier filing an intervention and not doing any additional work, resulting in a "free ride" to the carrier. However, the court noted that the "benefit accruing to the association as a result of each attorney's service" is only one factor to be taken into account.

The court further stated:

"The instant case was one in which an amount considerably in excess of that subrogated was almost certain to be obtained from the third party tortfeasor."⁴⁰

The court in *Stuebing* reversed the trial court's award of fees to the plaintiff's attorney. Therefore, little or no attorney's fees ought to be awarded to the plaintiff's attorney in instances where the value of the plaintiff's case at its outset was in excess of the carrier's lien. Often, the defense counsel has settlement authority in excess of the lien long before suit is ever filed. In such circumstances, the plaintiff's attorney surely benefits only himself and his client by filing suit and artfully and impressively obtaining a massive settlement or judgment.

In *University of Texas System v. Melchor*,⁴¹ the court suggests factors that should govern those cases where apportionment is proper. *Melchor* cited many cases that had addressed the apportionment issue up to that date.⁴² The court submitted that the intention of Article 8307 §6(a) was for the intervenor to actively assist the plaintiff's attorney in the preparation of the case in a cooperative manner and not to fight over the leading role.

Justice Draughn draws a distinction between third party liability which is hotly contested and that which is reasonably clear. Where liability is clear, he feels an intervenor's duty consists of filing an intervention and offering proof of the carrier's lien. Nothing more needs to be done in order for it to recover its full lien. Where liability is hotly contested, however, the trial judge must assess the following factors in creating a fair apportionment of fees:

1. The degree of participation requested of the subrogation attorney by the claimant's attorney;
2. Whether such requests were reasonable; and
3. The degree to which the subrogation attorney responded to these requests.

If the subrogation attorney makes known his readiness to participate and nothing is requested of him, that is all that can be expected of him.⁴³

Another factor to be considered in apportioning fees is who conceived of the cause of action.⁴⁴ Therefore, credit should always be given to the carrier for early investigation of the claim, inspection of defective products and premises liability

locations, statements taken, and the promptness with which the carrier forwarded its subrogation file to an attorney to represent its interest and pursue subrogation. The latter activity obviously indicates an intention on the carrier's part to vigorously pursue this cause of action in the absence of any third party claim by the claimant. Another factor to be considered is the negotiation of a settlement.⁴⁵ It is most difficult for an intervening carrier to settle a third party action, for without a release signed by the claimant himself, few defendants are willing to partially settle with the carrier. Therefore, settlement is within the province of the claimant's attorney alone. For this reason, little, if any weight should be given to a negotiated settlement by the claimant's attorney as a factor in apportionment.

If the plaintiff's attorney is going to make a claim for attorney's fees, it is appropriate that he be required to prove his fees in the normal manner, even if they are on a contingent basis. In *Fairmont Homes v. Upchurch*, a Deceptive Trade Practices Act case in which the plaintiff's attorney had a 40 percent contingent contract, the trial court awarded a 40 percent fee without other proof.⁴⁶ The appellate court reversed and remanded to determine the reasonableness and necessity for the fees, stating:

There is no other proof in the record to substantiate the sum of \$15,600.00 that was awarded to the attorney in this case. The attorney representing the appellees in this case neglected to present proof of his hours expended, the complexity of the case, etc. The award of attorney's fees is therefore unsupported by evidence and is reversed. The reasonableness of attorney's fees, in the absence of a contract therefor, is a question of fact and is an unliquidated demand to which the court should have heard evidence.⁴⁷

A ruling requiring the claimant's attorney to present proof of reasonable fees in the traditional manner was criticized in *Hartford Insurance Company v. Branton & Mendelsohn*.⁴⁸ That court stated:

[I]njecting an hour-rate basis disturbs the statute's contingent fee design. The statute does not provide for fees in the absence of a recovery, no matter how many hours the worker's attorneys labor nor how high their usual and "reasonable" hourly rate. ...Hence, to impose an hour-rate basis on fees recoverable up to one third (1/3) seems inconsistent.

There is no support for this position, and it appears that there is no inconsistency in requiring an hour-rate formula up to 33 1/3 percent of the lien amount. Article 8307 §6(a) does not excuse the plaintiff's attorney from proving the reasonableness and necessity of his fees.

The "lead horse theory" is patently unfair and prejudicial to the carrier. Furthermore, it does not advance the purpose of the statute or the intent of its drafters. Nonetheless, application of this theory by the courts has sent a message to all carriers telling them to hire an attorney and to attempt to beat the plaintiff's attorney to the punch in every aspect of discovery, including the filing of the original third party action, in order to protect what is rightfully theirs.

HOW ACTIVE CAN THE CARRIER BE?

At this point, it is clear that the carrier can be as active as it wants to be. It can notice depositions, conduct discovery, and take any other steps available to the claimant in order to protect its lien.⁴⁹ Today, it is not uncommon for the carrier to file suit first and require the plaintiff's attorney to intervene into its lawsuit. Although this may be confusing to the parties involved as well as the court, it is a prime example of the lengths the carrier has been forced to go to in order to protect its interests.

The interests of the plaintiffs and intervenors do not always coincide during the course of litigation. At some points, they can actually be adverse to one another.⁵⁰ In *Lindamood v. Link-Belt Corporation*,⁵¹ Lindamood filed a third party action and First Employees Insurance Company intervened. Lindamood settled his lawsuit and his attorney filed a motion for award of attorney's fees pursuant to Article 8307 §6(a). The court found that the intervenor's attorney had actively represented it to the full extent necessary to protect its subrogation interest and had actively participated in obtaining a recovery.⁵² Lindamood's attorney at one point proposed a settlement whereby the intervenor would cut its lien in half, and the intervenor refused. Upon reviewing the activity of the intervenor, the court noted the adversity of interests and found that the benefits accruing the insurance carrier resulted entirely from the services provided by its own attorney. The court had no

qualms about saying that the carrier did not receive a "free ride" from the plaintiff's efforts in preparation for trial. Certainly, a plaintiff's attorney who attempts to talk the carrier into accepting less than it is entitled to is not benefitting the carrier and should receive nothing by way of attorney's fees.

The carrier can, therefore, be as active as it wants to be. Yet, different standards need to be applied to the carrier's attorney and to the plaintiff's attorney. Otherwise, "lead horse" syndrome is created which has shown itself to be unfair and contrary to the legislative purpose of the statute. However, unbridled activity on the part of the carrier can lead to problems. As one court aptly states, "The scheme of the third party action known to Texas law violates the biblical command that the ass and the ox should not be yoked together."⁵³

HOW ACTIVE SHOULD THE CARRIER BE?

The answer to this question depends on who you ask. One plaintiff's attorney might tell you that the carrier is too active, while another plaintiff's attorney, under the same circumstances, would say that the carrier was not active enough. Different Texas courts have required varying degrees of activity from carriers. It is important not to lose sight of the very different roles played by each of these parties. It is recognized that the plaintiff's attorney should do most of the work.⁵⁴ The carrier's attorney's only job is to recover monies representing medical expenses and lost wages, the most basic elements of personal injury damages. It is unworkable to have each attorney racing to notice depositions simply for a stake in the attorney's fees. Some courts have recognized the ancillary role of the intervenor and the minimum requirements necessary for it to protect and recoup 100 percent of its lien.⁵⁵ One court awarded the lion's share of fees to the plaintiff's attorney because he was the "driving force" in the litigation.⁵⁶ This tells all carriers that they must strive to be the "driving force" in third party actions and compete with the plaintiff's attorney. Surely, this is not a message the Court of Appeals intended to impart. It is clear to see that there is much inconsistency in this area of growing importance. It has been held permissible for the carrier's attorney to merely review discovery authored by the

plaintiff's attorney if he deems the discovery sufficient.⁵⁷ On the other hand, carrier's are often criticized for not having performed enough discovery on their own, even though most of it would be duplicative.

How active should a carrier be? Where liability is hotly contested, the court should review the carrier's attorney's activity in light of its limited interest in the case. The plaintiff's attorney should still bear the primary responsibility in the case,⁵⁸ and should not recover a fee where the majority of time, if not all time, was spent enhancing a recovery for his client. On the other hand, where liability is uncontested, or otherwise easily susceptible to establishment, the court can, and should, refuse to award attorney's fees to the plaintiff's attorney.⁵⁹

NEED FOR JUDICIAL GUIDELINES

Article 8307 §6(a) has been referred to by the courts as "a model of confusing legislation."⁶⁰ Even the pre-amendment version has been referred to as "an inept bit of draftsmanship."⁶¹ Attorneys on all sides of the docket as well as trial courts and the courts of appeals, are begging for direction, guidelines, and assistance in the interpretation and application of Article 8307 §6(a).

Until the statute is amended and clarified to reflect its original purpose and provide direction, attorneys and judges are left to flounder in the confusing array of decisions that have been handed down. Below are suggested factors to guide practitioners, judges, and appellate courts alike.

1. Size of verdict or settlement.
2. Complexity of the case (rear-end collision versus complex products liability or air disaster cases).
3. Whether liability is reasonably clear.
4. Size of worker's compensation lien in relation to the amount prayed for or ultimately recovered.
5. Insurance policy limits cases.
6. Whether the initial value of the case is in excess of the lien.
7. Indicia of carrier's intent to proceed on its own.
8. How soon carrier becomes involved in investigation or pursuit of the third-party claim.
9. Negotiation of settlements should not be a factor due to unequal bargaining positions.

10. Whether or not a lawsuit has been filed, and who filed it.

11. Hours spent on and work performed in case by carrier and its attorney.

12. Investigation performed by carrier and utilized by plaintiff's attorney.

NEED FOR LEGISLATIVE REFORM

The 14th District Court of Appeals recently made a plea for legislative intervention:

[W]e note a significant absence of statutory guidelines to assist the trial court in making such divisions under Article 8307 §6(a). More definitive standards are needed to assess both the degree of "active participation" by both attorneys and the relative benefit accruing to the subrogee from that participation.⁶²

It is clear that the legislature did not envision the waking of the insurance giant and the increasingly active participation by the carrier in order to protect its interests. Until the *Chambers* decision and its progeny are reversed, or the statute is amended, the stakes will continue to increase. No longer are attorneys dealing with small workers' compensation liens, but rather, at issue are cases involving hundreds of thousands of dollars to be apportioned by trial courts with little or no criteria on which to make their decisions. The legislature needs to amend and clarify Article 8307 §6(a), underscoring the primary right of the carrier and the original legislative intent behind granting the carrier its subrogation rights. The legislature also needs to remove some of the inequalities from the present interpretations of this statute and provide the trial and appellate courts with guidelines so that they can make informed decisions. The following are suggestions for amendments that might serve to provide equity for the parties involved, while still retaining the protection for the carrier.

1. Reduce or limit the amount of "attorney's fees" recoverable by the plaintiff's attorney where the plaintiff's attorney's effort obviously were of primary benefit to the plaintiff in increasing the plaintiff's recovery above and beyond that of the worker's compensation lien.

2. Grant attorney's fees for the carrier's attorney out of the entire recovery first (as in the pre-amended statute), and then apportion some amount between the attorneys for the carrier and the plaintiff, if the facts warrant it.

3. Limit the amount of fees to be apportioned to a maximum of 25 percent just as in compensation claims. The lien usually represents medical expenses and lost wages that are easy damage elements to recover in most personal injury scenarios. Look at the activity of the carrier's attorney first; if the attorney is active in the case, has made movement toward a settlement in the case, or otherwise indicates the carrier's intention to have prosecuted the third party action on their own but for the hiring of the plaintiff's attorney by the claimant, no fees should be awarded.

4. Make provisions in the statute that unless the plaintiff's attorney stipulates to the carrier's lien and agrees to claim no fees, the carrier is allowed to settle with the defendant independent of the plaintiff, and giving the third party carrier adequate assurances or otherwise precluding the plaintiff from recovering elements of damage represented by the lien.

5. Amend the statute to indicate that the court is not required to apportion the fee simply because the plaintiff hires an attorney. The present statute uses the words "shall apportion," yet case law indicates that this is not mandatory on the part of the court.⁶³

6. Provide for recovery of little or no attorney's fees where the carrier's attorney accedes to the reasonable requests for participation and assistance from the plaintiff's attorney, and the carrier's attorney makes known his readiness to participate fully with the plaintiff's attorney as in *Melchor*.⁶⁴

7. Redefine the main legislative intent and purpose of Article 8307 §6(a) so as to reflect the need to reduce the burden of insurance to the public and allow maximum recovery from third party actions by compensation carriers; the secondary purpose of the article shall be to make sure that the attorney who actually does the work is compensated and that the carrier does not receive a "free ride."

8. Provide for recovery of no fees when the plaintiff's attorney settles the third party case or reasonably could have settled the third party case without filing suit because the carrier has no negotiating standing and cannot execute releases sufficient to satisfy the third party carrier.

9. Provide for recovery of reduced or no attorney's fees when it is evident that the carrier is ready, willing, and able to hire its own attorney to pursue the third party

action and there is some outward manifestation of its intent to do so.

10. Prohibit recovery of attorney's fees under all circumstances where the carrier is unable to participate or negotiate on its own behalf because of circumstances beyond its control (such as no suit being filed or the compensation claim not being filed until after the third party action is settled).

11. Require an injured worker who has received benefits to cooperate with the carrier in its subrogation efforts. Presently, there is no such duty. An employee who receives benefits and leaves his employment has no incentive to cooperate with the carrier, often hampering its efforts to recover.

12. Allow the carrier to recover pre-judgment interest on its compensation lien.

13. Put the financial burden on the wrongdoer/tortfeasor rather than on the insurance company. Require attorney's fees (for past and future benefits) to come out of the third party recovery after the carrier has been fully reimbursed.

The millions of dollars that would be saved by insurance carriers after implementation of some of these suggestions would translate into substantial dollars saved to the public on insurance premiums.

CONCLUSION

There is a tremendous need for legislative reform giving trial courts guidelines and criteria on which to base apportionment decisions. The original purpose of enacting Article 8307 §6(a) was to reduce the cost of insurance burdens to the insurer and, in turn, to the employer and the public. The original intent of the statute has been lost in a flurry of decisions with the intent of preventing the carrier from receiving a "free ride." Insurance companies are fighting tooth and nail for 100 percent recovery of their benefit dollars. This often results in the attorneys for the plaintiff and the carrier jockeying for position or racing to the courthouse in an effort to show that one has been more active than the other and is deserving of the lion's share of the attorney's fees. The results are confusion, conflicting decisions, and a total loss of judicial economy in third party actions.

ENDNOTES

1. *Fox v. Dallas Hotel Company*, 240 S.W. 517 (Tex. 1922), rev'd on other grounds, 616 S.W.2d 911 (Tex. 1981).
2. TEX. REV. CIV. STAT. ANN. art. 8307 §6(a) (Vernon 1917).

3. Article 8307 §6(a), *supra*; *Texas Employers Insurance Association v. Brandon*, 89 S.W.2d 982 (Tex. Comm'n App. 1936, opinion adopted).
4. *Consolidated Underwriters v. Kirby Lumber Company*, 267 S.W. 703 (Tex. Comm'n App. 1924, opinion adopted).
5. *Id.* at 706.
6. *Capital Aggregates, Inc. v. Great American Insurance Company*, 408 S.W.2d 922 (Tex. 1966).
7. *Watson v. Glens Falls Insurance Company*, 505 S.W.2d 793, 796 (Tex. 1974).
8. TEX. REV. CIV. STAT. ANN. art. 8307 §6(a) (Vernon 1973). The pertinent part of the amended article reads as follows:
 "However, when the claimant is represented by an attorney and the association's interest is not actively represented by an attorney, the association shall pay such fee to the claimant's attorney not to exceed one third (1/3) of said subrogation recovery or as may have been agreed upon between the claimant's attorney and the association or in absence of such agreement the court shall allow a reasonable attorney's fee to the claimant's attorney for recovery of the association's interest which in no case shall exceed 33 1/3 percent payable out of the association's part of the recovery... If the association obtains an attorney to actively represent its interest and if the attorney actively participates in obtaining a recovery, the court shall award and apportion an attorney's fee allowable out of the association's subrogation recovery between such attorneys taking into account the benefit accruing to the association as a result of each attorney's service, the aggregate of such fees not to exceed 33 1/3 percent of the subrogated interest."
9. *Insurance Company of North America v. Stuebing*, 594 S.W.2d 565, 567 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
10. 408 S.W.2d at 925.
11. *Travelers Insurance Company v. Seidel*, 705 S.W.2d 278 (Tex. App.—San Antonio 1986, writ dismissed).
12. *Prewitt & Sampson v. City of Dallas*, 713 S.W.2d 720 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
13. *Houston Lighting & Power Company v. Allen & Coon Construction Company*, 634 S.W.2d 875 (Tex. App.—Beaumont 1982, no writ).
14. *Ellis v. Kenworth Motor Truck Company*, 466 F. Supp. 441 (N.D. Tex. 1979).
15. *Fort Worth Lloyds v. Haygood*, 246 S.W.2d 865 (Tex. 1952).
16. *Id.* at 868; Article 8307 §6(a) clearly states that "the association shall be subrogated to the rights of the injured employee, and may enforce in the name of the injured employee or of his legal beneficiaries the liabilities of said other person...."
17. *Haygood*, 246 S.W.2d at 869. (Plaintiff can't settle independently with defendant and then simply state he will cooperate with the carrier in allowing the carrier to try to recoup its funds); *Traders & General Insurance Company v. West Texas Utilities Company*, 165 S.W.2d 713 (Tex. Comm'n App. 1942, opinion adopted), (Plaintiff cannot dismiss defendant even if dismissal is without prejudice to carrier's right to pursue subrogation).
18. *Seidel*, 705 S.W.2d at 281; *Prewitt & Sampson*, 713 S.W.2d at 722.
19. *International Insurance Company v. Burnett & Ahders, Associated*, 601 S.W.2d 199, 201 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).
20. *Lee v. Westchester Fire Insurance Company*, 534 S.W.2d 392 (Tex. Civ. App.—Amarillo 1976, no writ).
21. *Id.* at 396.
22. *Texas General Indemnity Company v. Jones*, 601 S.W.2d 194 (Tex. Civ. App.—El Paso 1980, no writ).
23. *Lee*, 534 S.W.2d at 395.
24. *Tucker v. Texas Employers Insurance Association*, 768 S.W.2d 742 (Tex. App.—Houston [1st Dist.] 1988, writ denied). *Vanguard Insurance Company v. Humphrey*, 729 S.W.2d 344 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Ischy v. Twin City Fire Insurance Company*, 718 S.W.2d 885 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *Chambers v. Texas Employers Insurance Association*, 693 S.W.2d 648 (Tex. App.—Dallas 1985, writ ref'd n.r.e.);
25. Article 8307 §6(a)(c) provides that any excess payments from a third party judgment or settlement, made to the claimant, are to be treated as an advance against future benefit payments of the carrier. The carrier may then cease making benefit payments until the advance is used up.

26. *Chambers*, 693 S.W.2d at 850.
27. *Ischy*, 718 S.W.2d at 888; *Vanguard*, 729 S.W.2d at 346.
28. *Tucker*, 768 S.W.2d at 744.
29. TEX. REV. CIV. STAT. ANN. art. 8307 §6(a)(c).
30. Tex. S.B. 1, Sec. 4.05(g), 71st Leg. (1989).
31. *Id.*, Section 17.18(a).
32. *University of Texas System v. Melchor*, 696 S.W.2d 406 (Tex. App.—Houston [14th Dist.] 1985, no writ).
33. *Leal v. Leal*, 628 S.W.2d 168 (Tex. App.—San Antonio 1982, no writ).
34. *Hartford Insurance Company v. Branton & Mendelsohn*, 670 S.W.2d 699 (Tex. App.—San Antonio 1984 no writ); *Espinosa v. Victoria Bank & Trust Company*, 572 S.W.2d 816, 828 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).
35. *Landry v. Travelers Insurance Company*, 458 S.W.2d 649 (Tex. 1970).
36. *Twin City Fire Insurance Company v. Meave*, 743 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1988, no writ).
37. Art. 8307 §6(a), *supra* note 8.
38. *Melchor*, 696 S.W.2d at 408.
39. *Stuebing*, 894 S.W.2d 565.
40. *Id.* at 567.
41. *Melchor*, 696 S.W.2d 406.
42. *Id.* at 407, citing *Branton & Mendelsohn*, 670 S.W.2d *Houston General Insurance Company v. Metcalf*, 642 S.W.2d 79 (Tex. App.—Tyler 1982, writ ref'd n.r.e.); *Union Carbide Corporation v. Burton*, 618 S.W.2d 410 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Burnett & Adhers*, 601 S.W.2d 199. *Stuebing*, 594 S.W.2d 565. *Lee*, 534 S.W.2d at 395. (stating that all of these cases reveal that a proper apportionment turns upon the facts of the individual situation, requiring an assessment of the contribution of each attorney towards recovery of the subrogation amount).
43. *Melchor*, 696 S.W.2d at 409.
44. *Metcalf*, 642 S.W.2d at 80.
45. *Burnett & Adhers*, 601 S.W.2d at 202.
46. *Fairmont Homes, Inc. v. Upchurch*, 704 S.W.2d 521 (Tex. App.—Houston [14th Dist.] 1986, modified as to damages, 711 S.W.2d 618 (Tex. 1988)).
47. *Id.* at 526.
48. *Branton & Mendelsohn*, 670 S.W.2d n.32.
49. *Melchor*, 696 S.W.2d at 409.
50. *Lindamood v. Link-Belt Corporation*, 517 F. Supp. 426 (N.D. Tex. 1981).
51. *Id.*
52. The court noted that the intervenor's counsel at the bare minimum took the following action: 1. Filed intervention; 2. Filed answers to interrogatories directed by defendants; 3. Responded to defendant's Motion to Compel; 4. Arranged for inspection of a crane; 5. Prepared a summary of medical expenses; 6. Arranged for taking of depositions at intervenor's office and prepared witnesses for these depositions; 7. Reviewed or wrote many letters; 8. Incurred expenses of litigation; 9. Negotiated for an independent settlement with defendants. *Id.* at 428.
53. *Haygood*, 246 S.W.2d at 871.
54. *Melchor*, 696 S.W.2d at 408.
55. *Vanguard*, 729 S.W.2d 344.
56. *Meave*, 743 S.W.2d at 766.
57. *Lee*, 534 S.W.2d at 394.
58. *Melchor*, 696 S.W.2d at 409.
59. *Lee*, 534 S.W.2d at 394.
60. *Burnett and Adhers*, 601 S.W.2d at 200.
61. *Haygood*, 246 S.W.2d at 871.
62. *Melchor*, 696 S.W.2d at 408.
63. *Liquidation Division of Board of Insurance v. Kronzer*, 744 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1987, no writ).
64. *Melchor*, 696 S.W.2d at 409. ■

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