

The Battle For Attorney's Fees: Reducing Plaintiff's Attorney's Fees Deducted From Your Lien

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The goal of recovering 100% of your workers' compensation lien is often beset by one significant hurdle – the plaintiff's attorney usually has the right to take a big chunk of your lien and call it an attorney's fee. States vary as to how much and when an attorney representing an injured worker can recover an attorney's fee out your lien in a third-party action against a negligent tortfeasor. Knowing how and when you can do something about it, can add up to a significant amount of additional money recovered each year. To do so, however, takes an aggressive mindset and a willingness to go the mat over your money.

Imagine the not-so-uncommon scenario where the plaintiff's attorney writes a two paragraph demand letter and settles a third-party case for policy limits. He attempts to argue you're not entitled to recover your full lien, and throws some inapplicable case law and legal obfuscation your way, all in an attempt to intimidate you into reducing or even waiving your lien. You don't, but when the attorney reimburses your lien he keeps a big chunk of it for himself and calls it an attorney's fee. State laws vary on the subject, but most states allow the plaintiff's attorney to claim a fee if his hard work has resulted in a significant recovery and you or your subrogation attorney have done very little to contribute to the litigation effort. We don't have to be this helpless.

A quick look at the law of several states shows that quite often, the carrier has the right to argue that the plaintiff's attorney is not entitled to a large attorney's fee out of your lien recovery. How and when you can challenge his attorney's fee varies from state to state:

ALASKA

In order to ensure that the employer's compensation carrier is not unjustly enriched at the employee's expense, the Supreme Court has required a prorationing between the carrier and the employee of litigation costs and attorneys' fees incurred by the employee in recovering from the third-party tortfeasor. *Cooper v. Argonaut Ins. Co.*, 556 P.2d 525 (Alaska 1976). Attorney's fees are charged to the carrier where they benefit from the employee's litigation effort. The intent is to prevent the carrier from enjoying a free ride and being unjustly enriched without having to pay an attorney for recovering its lien. However, the court can also award fees to the carrier where it contributed significantly to the litigation effort.

ARIZONA

Your lien is not subject to reduction by the plaintiff's attorney's fee. A.R.S. § 23-1023(C).

ARKANSAS

The judge is required to look at the facts of each case individually to determine whether the plaintiff's attorney has earned the right to take a fee out of the carrier's lien. *Continental Casualty Co. v. Sharp*, 849 S.W.2d 481 (Ark. 1991). In *Burt v. Hartford Acc. & Indem. Co.*, 483 S.W.2d 218, 222 (Ark. 1972), the employee, who received workmen's compensation benefits from a compensation insurer, which also insured the third-party tortfeasor, maintained that the compensation carrier, which intervened in the employee's suit against the tortfeasor, had no subrogation or reimbursement rights in the matter at all. The subrogated carrier's attorney argued that where the employee's position jeopardizes the insurer's right to subrogation and necessitates the hiring and presence of subrogation counsel, the employee's attorney should not benefit by being able to take a fee. The record showed that the employee's attorney prepared and handled most of the trial of the employee's claim against the tortfeasor and that the carrier's attorney participated very little. The Arkansas Supreme Court held that the trial court's refusal to deduct a reasonable attorney's fee from the insurer's subrogation recovery was not an error.

CALIFORNIA

The purpose of awarding plaintiff's attorney fees out of the carrier's lien is an implementation of the equitable practice of taxing attorney's fees to passive beneficiaries of a common fund created through the efforts of a successful litigation. *Kindt v. Otis Elevator*, 32 Cal.App.4th 452 (Cal. App. 1995). However, if a compensation carrier is not passive, the attorney's fees which should go to the plaintiff's attorney out of the lien should be apportioned between the carrier and the plaintiff's attorney. *Hartwig v. Zacky Farms*, 2 Cal.App.4th 1550 (Cal. App. 1992). Awarding attorney's fees to the plaintiff or his attorney where the carrier had to be active in the case is improper. *Hartwig*, supra. Where the carrier had to engage its own attorney, it is improper to award fees to the plaintiff's attorney. *Id.*

COLORADO

Section 8-41-203(1)(e) provides that: "If the [carrier] elects to intervene within 90 days...any recovery by [the carrier] shall not be reduced by any attorney's fees and costs incurred by the employee."

DELAWARE

Attorney's fees are to be apportioned between the plaintiff's attorney and carrier as their interests may appear in the case. 19 Del. C. § 2363(f).

GEORGIA

Attorney's fees are to be apportioned between the plaintiff's attorney and carrier's attorney in proportion to and in consideration of the case facts and the services each attorney provided. *Hammond v. Lee*, 536 S.E.2d 231 (Ga. App. 2000).

HAWAII

Attorney's fees should be apportioned between plaintiff and carrier based on the circumstances of the litigation and the roles that attorney played in the litigation. *Disher v. Kaniho*, 631 P.2d 1209 (Haw. App. 1981).

IDAHO

If the plaintiff's attorney takes a position in the third-party case which is adverse to the carrier's right of statutory reimbursement, the Industrial Commission has jurisdiction to determine a reasonable fee for the efforts taken by the carrier's attorneys to protect the employer/carrier. *Cameron v. Minidoka County Hwy. Dist.*, 874 P.2d 1108 (Idaho 1994).

INDIANA

Plaintiff's attorney may still recover fees even where he attempted to thwart the statutory lien through a multitude of legal maneuvers and acted with unclean hands. *Dearing v. Perry*, 499 N.E.2d 268, 273 (Ind. Ct. App. 1986).

KANSAS

Where the plaintiff's attorney attempts to rig or gerrymander a settlement so as to avoid repayment of the workers' compensation lien, or otherwise tries to defeat the lien, no attorney's fees should be awarded to him. *Richard v. Liberty Mutual*, 160 P.3d 480 (Kan. App. 2007).

MARYLAND

A carrier may be entitled to a credit for the attorney's fees it had to pay its own attorney in order to protect its lien from attack. *Collins v. United Pacific Ins. Co.*, 553 A.2d 707 (Md. 1989).

MASSACHUSETTS

Where the plaintiff conspires and takes efforts whereby the defendant becomes responsible for paying the lien, no attorneys' fees are recoverable. *Carney v. Ramirez*, 490 N.E.2d 804 (Mass. App. 1986).

MISSISSIPPI

An intervening compensation carrier is entitled to recover attorney's fees that it incurs in protecting its subrogation interest. *Kidwell v. Gulf, Mobile & Ohio Railroad*, 168 So.2d 735 (Miss. 1964).

RHODE ISLAND

If the plaintiff's attorney follows a course of conduct adverse to the carrier or otherwise acts contrary to the carrier's interests, he waives the right to recover attorney's fees out of the lien reimbursed to the compensation carrier. *Commercial Union Co. v. Graham*, 893 A.2d 235 (R.I. 2006).

TEXAS

In awarding attorney's fees, the important issue is not who did the most to create the third-party recovery, but who did what to protect (or harm) the workers' compensation lien. *Brandon v. Am. Sterilizer*, 880 S.W.2d 488 (Tex. Civ. App. 1994). The court must apportion fees between the carrier and the plaintiff's attorney if the carrier was active in the third-party action.

VIRGINIA

When the carrier has to pay its own lawyer to defend its statutory reimbursement rights because the employee's attorney and the plaintiff have taken an adversarial position to the carrier, the court must allow a deduction from the attorney's fees what the carrier would otherwise owe and the amount the carrier expended to perfect and protect its right of subrogation. *Sheris v. Travelers Ins. Co.*, 491 F.2d 603 (4th Cir. 1974).

The laws from the states above should convince any aggressive subrogation professional that there are many occasions when striking first and being active in a third-party action can have its financial benefits – not to mention assisting in maximizing the third-party recovery.

Subrogation counsel should keep detailed records of all activity and efforts he or she undertakes in anticipation of arguing for no reduction of their subrogation recovery for plaintiff's attorney's fees. Active participation – more than simply intervening and calling occasionally for status updates – is required or subrogation counsel is not doing his client justice. Plaintiff's counsel should, but don't always, welcome a helping hand in developing a theory of liability, producing and serving discovery on the defendant, or even sharing in costs subject to a right of reimbursement of the costs off the top of any recovery. In short, subrogation counsel should be on the lookout for cases handled in the above states and work hard to take advantage of the favorable law regarding attorney's fees available to them.

About the Author



Gary Wickert is an insurance trial lawyer and is regarded as one of the world's leading experts on insurance subrogation. He is the author of several subrogation books and legal treatises and is a national and international speaker and lecturer on subrogation and motivational topics. Gary is also a published commercial fiction author and a politician in Wisconsin. After 15 years as the youngest managing partner in the history of the 30-lawyer Houston law firm of Hughes, Watters & Askanase, L.L.P., Gary returned to his native Wisconsin in 1998 and co-founded the subrogation firm of Matthiesen, Wickert & Lehrer, S.C. He oversees a National Recovery Program which includes a network of nearly 300 contracted subrogation law firms in all 50 states, Mexico, Canada and the United Kingdom and boasts more than \$500 million in recoveries and credits for more than 250 insurance companies since 1983.

Licensed in both Texas and Wisconsin, Gary is double board-certified in both personal injury law and civil trial law by the Texas Board of Legal Specialization. He is also certified as a Civil Trial Advocate by the National Board of Trial Advocacy, for whom he has both written and graded product liability questions contained on the NBTA national certification exam taken by trial lawyers around the country. For more than 25 years, Gary has served as an expert witness and insurance consultant on subrogation and insurance related issues and has been consulted by insurance carriers, lawyers, and legislative bodies from several states. He is a licensed arbitrator and has attended more than 750 mediations in more than 30 different states. He is one of only a few lawyers to have ever appeared before the United States Supreme Court on a subrogation issue, and was named as one of Law & Politics and Milwaukee Super Lawyers' magazine's Super Lawyers from 2005 to 2010.