

alert

VOLUME 16 ISSUE 6

September, 2006

WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

CONTENTS

1 **EMPLOYER DID NOT WAIVE OR FORFEIT HIS WORKERS' COMPENSATION LIEN BY FAILING TO SPECIFICALLY RESERVE IT IN ITS SETTLEMENT CONTRACT**

Gallagher v. Lenart

No. 01-06-0065, decided August 30, 2006

EMPLOYER DID NOT WAIVE OR FORFEIT HIS WORKERS' COMPENSATION LIEN BY FAILING TO SPECIFICALLY RESERVE IT IN ITS SETTLEMENT CONTRACT

Readers may recall that in our April, 2005 Newsletter, we reviewed the *Borrowman* case where the Fourth District Appellate Court, denied the employer's subrogation claim because the employer failed to specifically reserve the retention of its subrogation claim in the terms of the settlement contract. In the recent *Gallagher* case, the First District Appellate Court reached the opposite result.

The *Borrowman* case involved the employee pursuing a medical malpractice suit after having previously negotiating a settlement contract where the terms of the settlement contract made no reference to the subrogation claim. As noted by the court in the *Gallagher* case:

Thus, Borrowman holds that an employer forfeits or waives its workers' compensation lien by not specifically reserving it in a settlement of the employee's workers' compensation claim when the employer knew of the employee's pending claim

Wiedner & McAuliffe, Ltd
One North Franklin, #1900
Chicago, IL 60606
(312) 855-1105
wmlaw.com

against a third-party tortfeasor.

In the *Gallagher* case, the plaintiff, James Gallagher, an employee of Rail Terminal Services, was struck by a truck driven by an employee of Pacella Trucking Express. Rail Terminal paid TTD and medical expenses in the sum of \$78,295.72. Thereafter, Rail Terminal and Gallagher settled this claim for \$150,000, with the terms making no reference to the pending civil claim.

On September 16, 2005, Gallagher settled his civil case against Pacella, for a total of \$350,000, with \$125,000 to James Gallagher for his personal injury claim and \$225,000 to Michelle Gallagher for her loss of consortium claim. Understandably, Rail Terminal alleged that Gallagher had structured the settlement in an attempt to circumvent Rail Terminal's workers' compensation lien. During the trial court hearing, Rail Terminal produced testimony that Rail Terminal never agreed or intended to waive its workers' compensation lien and that it was not customary to waive an employer's right to recover its lien as part of negotiations for settlement of a workers' compensation claim and if such a waiver was contemplated, it would be clearly included in the terms of the contract. The trial court found for the plaintiff. The appellate court disagreed and, in its finding for the employer against Gallagher, conducted an excellent review of the law favoring the employer's right to recover.

This provision grants the employer a statutory lien on any recovery the employee receives from a liable third party equal to the amount of

the workers' compensation benefits paid or owed the employee. An employer's reimbursement of workers' compensation payments from an employer's third-party recovery is crucial to the workers' compensation scheme. The Act is primarily meant to provide prompt and equitable compensation for employees who are injured while working, regardless of fault. An employer may therefore be required to pay compensation even though the employer was without fault. However, section 5(b) allows the employer and employee to reach the true tortfeasor. Thus, the Act accords with "the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer."

Additionally, another purpose of section 5(b) is to prevent the employee from obtaining a double recovery. The purpose of compensatory tort damages is to compensate the plaintiff for his injuries, not to punish the defendant or confer a windfall upon plaintiffs. It is

"elementary that the claimant should not be allowed to keep the entire amount both of his or her compensation award and of the common-law damage recovery. The obvious disposition of the matter is to

*give the employer so much of the negligence recovery as is necessary to reimburse it for its compensation outlay, and to give the employee the excess. This is fair to everyone concerned: the employer, who, in a fault sense, is neutral, comes out even; the third person pays exactly the damages he or she would normally pay ***; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone.”*

With reference to the *Borrowman* court’s conclusion that the employer had waived or forfeited its rights by not specifically reserving same in a settlement when the employer knew of the pending claim, the *Gallagher* court stated:

A court cannot alter, change or modify the existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented, write into the contract something which the parties have omitted or take away something which the parties have included. A presumption exists against provisions that easily could have been included in the contract but were not. Further, where a contract purports on its face to be a complete expression of the entire agreement, courts will not add another term about

*which the agreement is silent.
...*

Further, waiver is the voluntary and intentional relinquishment of a known right by conduct inconsistent with an intent to enforce that right. The absence of any reference to an employer’s lien in a settlement agreement, without more, cannot constitute such a voluntary and intentional relinquishment of that right.

The court had knowledge that an employer may choose not to seek reimbursement of the compensation benefits paid and waive the lien. For example, under the *Kotecki* decision, an employer may limit liability to the extent of the workers’ compensation payments. An employer may also waive its lien in order to avoid paying its share of attorney’s fees and costs.

With reference to *Gallagher*’s selection to the apportionment of the settlement proceeds, the trial court had stated at the hearing that it did not need to address the issue of reallocation because it had denied that Rail Terminal had a valid lien. The matter has now been referred back to the trial court to decide the question involving the allocation of the plaintiff’s proceeds between James and Michelle *Gallagher*. Certainly, since the employer’s claim is limited to its employee’s share of the settlement, the allocation of nearly 65% of the proceeds to Michelle for her loss of consortium should be open to question. There appears to be case law that an improper allocation is subject to attack.

EDITOR'S NOTE: This *Gallagher* case makes a lot more sense than the *Borrowman* case. As a practical matter, the appellate court decisions in the two districts will determine what the trial courts will do in those respective districts. The First District is comprised of Cook County and the Fourth District is centrally located in Springfield. Hopefully, the supreme court will accept the *Gallagher* request to consider an appeal should the plaintiff decide to proceed further. The *Borrowman* case did not reach the Supreme Court..

Frank J. Wiedner
Editor